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98 Pages

CHARIAH RESOURCES NL v TRICONTINENTAL CORP LTD - BC9102925

SUPREME COURT OF VICTORIA CAUSES
VINCENT J

2081 of 1990

20 May-24 September 1991, 12 December 1991

Vincent J

Before the Court are three companies (hereinafter referred to as Chariah, MEH, and MEI, respectively), which seek to recover damages and to obtain certain other forms of relief that they claim have been incurred or the grant of which have become necessitated by reason of the acquisition by Chariah of a controlling interest in a number of connected companies known as the Falcon/Minefields Group.

Very generally stated, contentions have been advanced that each of the plaintiffs has undertaken contractual obligations and has incurred a number of expenses as a consequence of the acquisition and the wrongdoing of the defendants, and that each has sustained substantial losses.

They argue that the situation has been brought about as a result of their reliance upon a number of representations both express and implied which were made by the secondnamed defendant who was, at all relevant times, the Group Managing Director of the firstnamed defendant (Tricontinental). Essentially, they claim, first, that the secondnamed defendant upon whose knowledge, skill and judgment reliance was placed, advised two persons, Messrs Chapman and Gargaro who were directors of each of the plaintiffs, that the acquisition in question was in the best interests of MEH (the initially proposed acquirer) and Chariah, and represented that Tricontinental would provide a gold loan of sufficient size to enable it to be effected.

Second, they allege that the representation was made that the amount outstanding under an existing cash advance facility which Tricontinental had made available to one of the companies (Dundas Gold Corp) of the

Falcon/Minefields Group, would be restructured by the provision of a gold loan of approximately $18 million. However, they argue, the firstnamed defendant did not intend to provide, nor did it have the means of obtaining for the companies in the group, restructuring finance of the amount required in this form.

Third, a claim is made with respect to an amount of $500,000 that was advanced by Tricontinental to MEH during March 1989. It is alleged that in consequence of the conduct engaged in and representations made by Tricontinental and Johns this plaintiff was placed in a position of serious disadvantage which necessitated the incurring of additional obligations. Accordingly, the argument proceeded the grant of the securities, over its assets, being a mortgage debenture over the assets and undertakings of MEH and a guarantee and mortgage debenture over the assets and undertakings of Michael Edgley International Ltd (MEI) are void as having been procured by unconscionable and inequitable conduct. Alternatively, it is claimed that this agreement was entered into by MEH on the basis of representations made by the defendants that the amount could, along with the other funds advanced during 1988, be converted into a gold bullion loan.

More specifically, the plaintiffs' claims against the first defendant have been formulated pursuant to the terms of s52 of the Trade Practices Act 1974 (Cth) which applies to corporations, and against each defendant on the basis of s11 of the Fair Trading Act 1985 (Vic), the operation of which is not so restricted. As these provisions

are in the same form it is necessary to set out only one of them. S11 of the Fair Trading Act reads:

"S11 A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

It is further claimed that Johns was a person involved in these alleged contraventions by Tricontinental within the meaning of s75B of the Trades Practices Act and s32 of the Fair Trading Act, and is therefore liable for damages. S32 of the Fair Trading Act defines such a person as one who:

> "(a) contravenes; or
> (b) aids, abets, counsels or procures a person to contravene; or
> (c) induces, or attempts to induce, a person whether by threats or promises or otherwise, to contravene; or
> (d) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of; or
> (e) conspires with others to contravene -
> a provision of this Act..."

The plaintiffs contend that oral representations were made by Johns and other servants or agents of Tricontinental, to Chapman and to Gargaro on various occasions from 9 February 1988 to 17 June 1988 (the acquisition period) and thereafter until about the middle of 1989. It is also alleged that related representations were made in writing by the defendants who engaged in deceptive and misleading conduct throughout the entire period. Through these statements and conduct, the plaintiffs argue,

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Tricontinental impliedly represented, agreed, and warranted that:

"(a) it had the intention of providing to, or obtaining for, Chariah a gold bullion loan in the amount required for the purchase of the Falcon and Minefields shares;

(b) it had the intention of providing to, or obtaining for, Chariah, Falcon, and Dundas gold bullion loans in amounts sufficient to repay their then indebtedness to Tricontinental and provide them with additional working capital; and

(c) it had the means of ensuring the provision of the gold bullion loans."

It is alleged that the plaintiffs, acting in reliance on the representations borrowed $5.7m from Tricontinental to purchase the Falcon and Minefields shares. Not only, the plaintiffs claim, were the representations false and incapable of substantiation on any reasonable grounds, but in any event the defendants neither intended nor attempted to honour them.

With respect to the claim made in connection with the possible restructure of the $18m Dundas facility, the plaintiffs allege that the relevant representations were made in March and April 1988, that they were, in the terms of the legislation "misleading and deceptive", and that the plaintiffs placed reliance on them. It was argued that they amounted to a material inducement which misled and deceived both MEH and Chariah and caused them to act to their detriment.

Next, the plaintiffs also allege that the first named defendant committed a breach of a contract into which

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it entered with the firstnamed plaintiff. It was argued that it had been agreed between these parties that in consideration of Chariah borrowing $5.7m, Tricontinental would provide to or obtain for them a gold loan within 30 days of 17 June 1988. This contract, according to the submission, was constituted by oral and written agreements and can also be implied from negotiations relating to the acquisition which were being conducted between them at the time. In addition, or alternatively, the plaintiffs' claim that in consideration of Chariah entering into an agreement on 3 May 1988 with Mullins Investments, Stylewest Investments, and Mullins himself, Tricontinental undertook to Chariah to provide to or obtain for that company a gold bullion loan of $5.7m to enable settlement of the transaction. Again, it was argued, this agreement was constituted by oral and written undertakings and also can be implied from the contemporaneous negotiations. This agreement, it was submitted, was varied on 17 June 1988 to extend the period for performance by 30 days. These allegations were broadly pleaded in the Further Amended Statement of Claim (pursuant to leave granted on 3 June 1991), although not specifically raised until the closing address of counsel for the plaintiffs. They are, in practical terms, based upon the same material as that relied upon to support the claims of the plaintiffs to which reference has already been made.

The significance of the alleged representations and contractual arrangements concerning the financing of both the acquisition and the debt owed by Dundas to Tricontinental

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through the provision of sufficient gold loans arises from the undisputed fact that Chariah at no relevant stage had the funds available to assume either of these responsibilities, nor did there appear to be any realistic possibility that Dundas would be able to meet its obligations without some form of restructuring of its debts and without the injection of additional working capital. The plaintiffs claim, however, that both Chariah and Dundas were engaged in the exploitation of gold mining tenements and possessed the potential to produce sufficient quantities to enable repayment in kind of substantial loans of gold together with attendant interest. By this means it would have been possible, they argue, for the acquisition to have been effected and the debt structure of the group to be so organised that substantial benefits could have been obtained from the transaction.

A useful description of a number of features of one form of gold loan arrangements relevant to these contentions and to other issues arising for consideration in this matter, is contained in a discussion paper prepared on behalf of Tricontinental which has been tendered as an exhibit in this proceeding. Although it is relatively lengthy, I consider that there is value in setting out a substantial portion of it.

"GOLD LOANS

CONCEPT

The gold loan is a relatively new technique of fund raising, which enables gold producers to borrow now against future production. As such it is a suitable vehicle for prospect development. The lender is usually a

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financial institution with an active bullion trading division.

Effectively, value is given at a point of time by the lender to the borrower, which is equated to a certain number of ounces of gold. Repayments are made in ounces of gold, rather than dollars, where the total amount of ounces to be repaid equates to the amount originally drawn.

Gold is defined as the pure gold content of a bar of gold which is deliverable to the London Gold Market, or Sydney Futures Exchange....

MECHANICS

The amount of the loan will not exceed the lesser of either:

o the aggregate of the original dollar value of the gold, or

o the quantum of gold specified.

These are specified on an either/or basis from the outset.

The original dollar value of the gold drawndown will be calculated in reference to the spot gold price at the time.

Drawdown

At drawdown the lender will provide to the borrower the relevant quantity of gold, which is debited to the borrowers gold account.

The borrower then immediately sells the gold back to the lender, at the spot price used in determining the original quantity of the gold, previously drawn.

There is no actual physical delivery of gold.

This effectively provides the borrower with funds, and has locked in the producer's return on that portion of production over the repayment term.

Repayment and Redelivery

The borrower has received funds, but owes gold.

Repayment is physically made in gold. Terms are pre-determined with set quantities due at pre-set dates. Delivery is set in line with production capacity of the borrower.

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The borrower would deliver the gold to an approved refiner who in turn would deliver to the lender. The lender in turn would credit the borrowers gold account.

Ability to meet the repayment schedule is important for the lender as it allows certainty of physical stock for its bullion trading division.

The gold loan will usually allow for early repayment from the borrowers own production, but not from other sources.

Term

Set at discretion of parties involved, but more likely to be short/medium term.

Costs

One of the major attractions to the borrower of a gold loan is the cost.

As there are no actual funds borrowed, no interest is payable. Rather, the lender charges the borrower a number of fees.

These may include:

1) Gold Fee (Approx 1.2%)

2) Early Delivery Fee (Approx 0.5-1.0%), if applicable.

3) Establishment Fee

Other costs involved include security and documentation costs.

The all-up cost to the borrower would normally approximate 4% of the face value of the facility.

Payment of costs may be converted to ounces of gold and repaid from production.

Risks

The two main risks run by the lender are repayment and security.

Repayments

There are 2 repayment risks, being the physical recovery of gold and the physical value of gold.

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(1) Physical Recovery

The major repayment risk is the inability of the gold producer to produce sufficient gold to meet commitments. This is particularly relevant where it is a project finance deal for a new mine or prospect development.

General factors to be looked for in assessing a gold loan to minimise risk:

o look towards experienced producers of gold.

o ensure that reserves are sufficient to meet production targets (confirmed by a consulting geologist).

o ensure that the reserves can be recovered.

o ensure that plant is adequate and efficient enough to process the ore and recover the gold.

Rule of thumb is that no more than 30% of gold production is committed to repaying the loan and that a further 10% could be called upon if needed. Naturally, repayment schedule has to be set in line with other commitments that have to be met such as wages, plant hire, operating costs, etc

The gold loan agreement may enable repayment to be made in cash where production is inadequate.

Allowance may also be made for rescheduling of repayments due to inability to produce because of external influences eg strikes, government action, civil war, etc. Situation known as Force Majeure.

(2) Physical Value

The other risk to the lender is that the value of gold received during the repayment period may not be worth the value initially given to it.

This can be effectively counter-acted by the lender forward covering the value of gold to be received through the futures market at the time of entering into the loan.

At the time of drawdown the lender gives value to the borrower at the then spot price and sells a contract forward for the expected delivery date at a price no less than the

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current spot price, hence locking in the future repayments.

With futures trading, on entering into a forward contract the lender will be required to lodge a deposit, or margin, usually representing 10% of the contract value. Should the price move in excess of the margin then a further margin is to be paid or the contract is automatically closed out.

Due to this the gold loan agreement will usually allow the lender to call from the borrower additional funds to cover margin calls on futures contracts.

SECURITY

Security analysis is similar to any other deal. The lender has the option to lend:

o unsecured if the borrower is strong.

o with physical security over gold producing assets.

o with other security if available.

Where the lender is a bullion trader, and risk adverse then security apart from the gold producing assets may be sought.

This has allowed the security risk to be split between the bullion trading and credit. In this case the credit risk may be passed on by the lender taking a guarantee from another financial institution.

This is the role that TCL usually plays in a gold loan arrangement, such that there becomes another party to the agreement.

o the lender (bullion trader)
o the borrower (gold producer)
o the guarantor (financial institution that is prepared to take the credit risk)

By introducing a guarantor further cost is added to the gold loan.

TCL is suited to this role, rather than as lender in a gold loan agreement as TCL does not have an active bullion trading division.

Assets typically available in this style of deal are:

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(1) Charge over mining tenements and/or leases. To be valued and reserves proven by independent consulting geologist.

(2) Charge over plant and equipment used in the gold mining process.

(3) Guarantees of principals and/or corporate owners.

ADVANTAGES OF A GOLD LOAN

(1) To the Borrower:

o enables the producer to match loan repayments with physical production.

o provides a relatively low cost method of funding.

o suited to project development finance.

o effectively "forward-sells" a portion of production over the repayment period.

(2) To the Lender:

o provides a constant source of physical supply for bullion trading division.

o entire credit risk may be off-loaded."

The advantages which could be derived by a borrower engaged in project development or desirous of increasing production from existing operations through entering into arrangements of this kind are obvious. Activities that may not be commercially viable if financed on the basis of cash advances with a relatively high rate of interest could well return a significant profit if funded by this means.

Finally, the plaintiffs submit that Tricontinental, which acted to enforce securities held by it under facility agreements entered into with Chariah, wrongly appointed agents in possession of Chariah's assets on 24 August 1989, as the appointment was made pursuant to a mortgage debenture which they contend was void in its entirety or,

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alternatively, could not operate over any encumbrance on a number of specific gold mining leases in Queensland purportedly affected by it. The argument is based on non-compliance with s37 of Mining Act 1968-1983 (Qld) which for relevant purposes reads:

"37. *Transfer, etc, of mining lease or application therefore*. (1) Subject to this Act, and with the approval of the Minister -

(a) a mining lease or any share or interest therein may be transferred, assigned, sub-let or encumbered; and

...

in the prescribed manner and upon payment of the prescribed fee.

(2) A person desirous of exercising a power referred to in subs(1) may make application to the Minister for his approval to that exercise and shall furnish to the Minister such information with respect thereto as the Minister requires.

...

(4) Subject to subs(5), any purported transfer, assignment, sub-letting, encumbrance of a mining lease or an application therefore or of any share or interest therein that is not made in accordance with this section is void."

Or its successor:

"*7.55 Assignment, etc of mining lease or application therefor*. (1) With the approval of the Minister -

(a) a mining lease or an interest therein may be assigned or mortgaged;

(b) a mining lease may be subleased; and

(c) an application for a mining lease or an interest therein may be assigned,

in the prescribed manner and upon payment of the prescribed fee.

...

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(7) A purported assignment, sublease or mortgage of a mining lease or an assignment of an application therefor or of any interest therein shall not be effective unless it is made and approved in accordance with this section and shall take effect on the day next following its approval by the Minister under subs(4)."

The plaintiffs submit that the onus of establishing the validity of the debenture or compliance with s37, rests upon the defendants who are required to establish a legal justification for the taking of possession of the property. They contend that the agents are, in law, to be regarded as trespassers and that as a consequence of their wrongful acts, the plaintiffs have suffered loss and damage.

Each of the defendants has rejected a number of the central factual contentions upon which the plaintiffs' claims have been based. They deny any wrongdoing and have argued that the decision of Chariah to proceed with the acquisition was in no way contributed to or dependent upon any misrepresentations made by either of them or influenced by any conduct of a misleading or deceptive character. The actual situation, they contend, was that for reasons of their own, Chapman and Gargaro, who were the real decision makers involved, were determined to secure control of the Falcon/Minefields Group. Throughout the history of the matter they pursued their own independently developed strategic

objectives. A variety of reasons could be advanced for the ultimate lack of success of these endeavours. However, neither of the defendants, who acted properly at all times could be regarded as responsible for this failure, the argument proceeded.

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In response to the plaintiff's claim relating to the $5.7m acquisition facility, the defendants state that Tricontinental did enter into a $5.7m credit cash advance facility with Chariah, which had the option of converting the arrangement into a $6.6m performance bond guarantee; however, it was submitted, Chariah never satisfied the pre-conditions for this to occur, either by the provision of a suitable gold bullion lender or the production of the required securities. They deny that at any stage there was any misrepresentation by them concerning this facility.

With respect to the alleged representation concerning the $18m Dundas facility, the defendants maintain that no representations or promises were ever made other than those contained in a letter of 20 April 1988 from Johns to Gargaro and none were relied upon by the plaintiffs. The defendants further submit that the plaintiffs who at the relevant time were negotiating with other financiers for this purpose, did not rely upon any conduct of or representations made by Tricontinental or Johns in relation to the restructuring of all or part of the debt obligations of the Falcon and Minefields group when deciding to proceed with the acquisition.

With regard to that part of the claim for damages which is based upon the alleged wrongful taking of possession of Chariah's Queensland tenements the defendants maintain that it has not been demonstrated that there was a failure to comply with the requirements of either s37 of the Mining Act or its successor.

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Alternatively, they argue that even if the mortgage debenture, to the extent that it relates to the mining tenements, may be void, Tricontinental nevertheless had power to take possession of at least some of the property pursuant to a mortgage, executed at the same time as the debenture, both being collateral security for a facility provided in 1986 by Rothschild Australia Ltd which was guaranteed by Tricontinental. The defendant submits that although the notice given to the plaintiffs of the agent's appointment referred to its powers under the mortgage debenture, Tricontinental had authority to appoint agents without notice, upon the happening of an event of default under the mortgage, the validity of which has not been challenged. The defendant also argues that the plaintiffs have suffered no loss by reason of the appointment as during the period of their administration there was no change to the management or the conduct of Chariah's operations. It claims that although the agents controlled the "purse strings" and made some decisions about the conduct of the business operations, they exercised a very limited form of control, and indeed, through the injection of additional funds by Tricontinental enabled the company to continue operations when it would otherwise have been unable to do so.

The first defendant, by counterclaim, seeks judgment for the amounts outstanding under arrangements entered into by both MEH and Chariah with Tricontinental between June 1988 and 2 June 1989. It also seeks orders for injunctive relief, declarations as to the validity of the

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appointment of agents over the mining tenements in Queensland and other security documents.

Whilst a number of the questions to which attention must be given in this matter are not without some complexity, as the extensive cross-examination and the character of many of the submissions advanced by counsel for each party indicate this case at heart is based upon a factual dispute. To aid in its resolution, there has been a substantial amount of oral and documentary evidence adduced and I have had the benefit of considering the extremely helpful oral and written submissions prepared by counsel for the respective parties. A large number of areas and issues have received attention and arguments advanced with respect to the many threads which constituted the complex tapestry of the relationships between the parties. Although, in spite of those endeavours, it is apparent that there are a number of threads missing and that the complete tapestry cannot be reconstructed, there are sufficient to enable its form and much of its detail to be ascertained.

The history of the interactions between the participants in the various alleged activities and conversations encompassed by the evidence in this matter is relatively long. Some of it does not possess significance in the determination of the issues which have arisen before the Court and other portions, although relevant either to the establishment of facts in dispute or to the credit of witnesses called in the proceeding, need not be specifically mentioned in this judgment. Accordingly, for ease of presentation, I have confined my statement of findings as far

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as possible, although not exclusively, to those to which reference must be made if an understanding of the issues and the central pieces of evidence relevant to them is conveyed.

A substantial amount of documentary material has been tendered by each of the parties, and objection has been taken by respective opposing parties to the admissibility of a number of items or with regard to the evidentiary use to which particular documents or passages in them could be put. As I indicated in the course of discussion, it was not a realistic possibility to identify all relevant documents and to give rulings as to the admissibility and evidentiary status of each disputed passage, seriatim, during the course of the hearing. The documents were noted to be subject to objection and I have remained mindful of the need to subject them to proper scrutiny and to apply the appropriate principles of evidence when considering what, if any, significance could be ascribed to them.

Turning then to the various threads to which I have referred, the first of these connects the subject of the acquisition itself (the Falcon/Minefields Group), its Managing Director (Mullins), to Tricontinental and to Johns.

Falcon/Minefields Group

For relevant purposes, the history of this group can be traced from November 1982 when Johns and a person named M D Mullins were both directors of a company known as Narm Corp Ltd, which subsequently changed its name to Falcon Australia Ltd. On 21 November 1986, a large number of

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shares in Falcon were acquired by Mullins Investments Pty Ltd. At that time Falcon had, it would appear, at least two subsidiaries, Ladd Pacific Petroleum Ltd, and Quartz Reef Mining Pty Ltd. Shortly afterwards, Mullins Investments obtained a substantial shareholding in a publicly listed company, Minefields Exploration NL.

In March 1987, Mullins Investments sold the share capital, which it had earlier acquired from Falcon, of Dundas Gold Corp NL to Falcon and Minefields in which each then held a 50% interest.

By May 1987, Dundas had acquired a number of alluvial and "hard rock" gold tenements in the Georgetown mining district of northern Queensland which appeared to possess considerable potential for exploitation.

During 1987, as a result of a series of transactions the precise details of which may be put to one side, Falcon also obtained control of Ocelot International Pty Ltd, Peregrine Oil NL, and Sovereign Oil (Australia) Ltd.

It was against this general background that, on 1 May 1987, Mullins who was the Managing Director of Falcon wrote to the secondnamed defendant seeking the provision of a gold loan of $18 million for Dundas to be repaid over a period of two years from that company's gold production, which, it should be noted, had not yet commenced. The purpose of the facility was stated to be to

o Finalise the acquisition of Ocelot International Pty Ltd.

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o Take over debts owing to Tricontinental Corp Ltd by Abrolhos Oil & Investments Ltd.

o Provide working capital for additional acquisitions.

What lay behind the decision by Falcon to assume responsibility for the Abrolhos debts has not been satisfactorily explained in the evidence before the Court. There are some curious features about that transaction and unresolved questions concerning the relationship between Johns and Mullins during the relevant period. For reasons which will emerge later, however, many of these must have occurred to Chapman and Gargaro as they pursued their enquiries into the financial position of the group prior to the making by Chariah of the decision to secure control of it. The matter was raised in a report prepared by accountants at the request of Chapman in April 1988.

Although Mullins stated in this letter that a further assessment of the entire revaluation of the reserves of the company was being conducted, with the expectation, subsequently demonstrated to be justified, that there would be a substantial increase in the quantities accepted as proven, according to Mr Johns the firstnamed defendant decided to proceed on the basis of the reserves which were so designated at the time. In his witness statement he stated with respect to this request

"We decided that, at least initially, Dundas really only required a $12 million guarantee facility and a credit submission was therefore prepared on that basis. The amount of $12M was fixed by reference to the then proven reserves of approximately 31,000 oz. That submission was approved by the Board of TCL and a letter of offer was forwarded by me to Mullins on 4 June 1987."

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Following the failure to locate a gold bullion dealer prepared to enter into such a transaction, further financing arrangements were put in place under which Tricontinental provided a cash advance facility of $9.5 million and a guarantee for $2.5 million in respect of forward gold contracts to be entered into by Dundas with Rothschild Australia Ltd (a gold bullion dealer). It was further agreed that the amounts due under the cash facility would be amortized at the rate of $400,000 per month commencing in July 1987. However, this schedule was maintained for only two months before difficulties were encountered so that by October arrears had started to accrue. There would appear to have been a number of reasons for the development of this situation, including the fact that a drought in Queensland created a water shortage which had delayed the attainment of the necessary level of production from the Georgetown mine. Also significant, in this context, was the failure, by reason of the stock market crash which occurred later in the same month, of an attempt to obtain funds by means of a public float of oil assets in which Falcon had an interest through Peregrine.

By the end of 1987 the debts of the Falcon/Minefields group were mounting quickly and insufficient income was being generated to permit financial obligations and time-tables for repayment to be met. In consequence, further arrangements were entered into in December of that year under which the cash advance facility to Dundas was increased to $14.4 million and the performance bond/guarantee facility to $3.6 million. The potential

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problems inherent in this situation were clearly apparent to the second-named defendant who claimed, however, in his witness statement that:

"At that stage I was not concerned by the failure of the Peregrine float as I had faith in Mullins' ability to recover from tight financial situations, which I had seen him do many times over the years."

Whether or not either of the defendants were appreciative of all of the factors which contributed to the fragility of the Falcon/Minefields group in the period leading up to February 1988, I am unable to determine on the basis of the evidence adduced in this matter. I am satisfied, nevertheless, that the possibility of the collapse of the group was well to the forefront of the mind of Johns who was sufficiently acquainted with the position to be able to develop an appreciation of this situation, and who, it must be remembered, possessed considerable experience as a banker. The passage earlier cited indicated that he was aware that the position was "tight" and would require skilful handling.

By reason of the practical and legal constraints within which the present proceeding has been conducted, an adequate analysis of the relationship between Johns and Mullins has not been possible. A number of unanswered questions have emerged. In spite of these limitations, I do not think that it would be unreasonable to state that their association appears to have been close, co-operative and continuing.

Accepting at face value his statement that he had confidence in the capacity of Mullins to extricate the

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companies from their difficulties and was therefore not particularly concerned about their continued viability, the communication to Johns by Mullins that he (Mullins) was suffering from leukaemia would have required him to re-assess the situation. I consider that it is highly likely that from that time and in particular, on 9 February 1988 when he raised the possibility of the acquisition of control of the group with Chapman and Gargaro, he regarded its future as being substantially more uncertain. There was a real possibility that it would "fall over" and that Tricontinental could incur substantial losses. I have little doubt that he was anxious to find a satisfactory solution to the problem. Fortuitously, from the perspective of the secondnamed defendant, Chapman and Gargaro who were seeking to expand their operations at that very time, attended at his office with a proposal of their own for the expansion of the activities of MEH and Chariah.

The next thread to which attention must therefore be given connects those persons, the acquiring company Chariah, MEH, Tricontinental, and Johns.

Chariah Resources NL and MEH Ltd

Chariah Resources NL was incorporated as a no liability shelf company on 12 June 1986. It was initially a wholly owned subsidiary of MDR Mutual and General Group Resources Pty Ltd ("MDR"), which also owned gold mining

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leases in the Charters Towers area, some of which were later acquired by Chariah in exchange for shares. Messrs Chapman and Gargaro at all relevant times had a controlling interest in MDR and they have been for some time Managing Directors of Chariah which is now a wholly owned subsidiary of MEH Ltd (a publicly listed company). Since 1986, they have controlled approximately 30% of the issued shares in MEH and they are both directors of that company.

In April 1985, Gargaro and Chapman acquired control of a private company, Michael Edgley International Pty Ltd ("MEI") which, it was shortly afterwards resolved should be publicly floated. It would appear that the two men first had dealings with Johns at the time of this transaction.

Tricontinental acted as underwriter to this float in the following year. However, because there was a shortfall in the number of subscribers, Tricontinental itself took up 10% of the shares.

In May 1986, Chapman approached the firstnamed defendant and spoke with Johns and a man named Warren Atlas, who at that time was a Group Manager in the Project Finance Division at Tricontinental, requesting a gold bullion loan to enable MDR to fund the construction of a plant utilizing CIP leaching technology at Chariah's Millchester Gold Project in Charters Towers. This approach was made prior to the acquisition by MEH of Chariah, although negotiations for the acquisition were being conducted at the time. Chariah was provided with a $2.3m guarantee from Tricontinental to support a loan by Rothschild in July 1986.

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In mid-1986, Chapman and Gargaro approached Johns for advice on whether Chariah should be converted into a subsidiary of MEH. Johns arranged for Douglas Green, the general manager of the firstnamed defendant's Corporate Services Division to assist them with respect to this matter. Tricontinental also prepared the report required under Stock Exchange r3J(3) to be presented for the approval of MEH shareholders. In November 1986, a resolution was passed by the members of MEH that it acquire all of the shares in Chariah.

In November 1986 another resolution was passed by MEH to enable it to purchase 50% of the issued shares in a company known as Edgley Mutual and General (Commodities) Pty Ltd ("Commodities"), the remaining 50% to be taken up by Tricontinental. This second resolution is relevant to events which took place after the stock market crash in October 1987.

During 1987, Johns became aware of delays in the operations at Charters Towers. In January 1987, he approved an increase in the 1986 guarantee facility to $3m to adjust for cost overruns. In August 1987, he was again approached by Chariah, which had obvious liquidity problems, for a further $500,000 but this request was declined. In September 1987, Johns adopted a recommendation made by Atlas that the company be placed on a watch list, and instructed the latter to provide no further funding to it.

At the time of the stock market crash, Commodities had an exposure of $11m consequent upon the making of a margin call which it was obliged to satisfy. Under the

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Sydney Futures Exchange rules, a failure to meet such a call could result in the company concerned being suspended from trading. Chapman and Gargaro met with Johns on 19 October 1987 to discuss this matter which clearly had serious implications. Originally Johns requested that MEH provide its $5m share of the call, but when it was realised that this was simply not possible, he proposed that Tricontinental provide all of the funds and that MEH's exposure would be limited by the amount of the company's shareholding interest in Commodities, which was at that time $2m. Chapman and Gargaro who conferred with the other MEH directors, agreed to this proposal and Tricontinental subsequently satisfied the whole of the margin call within the required time.

As a result of an audit performed by the Sydney Futures Exchange, in late 1987, of transactions affecting Commodities, a Notice was issued by the Exchange directed to the Company and which required it to show cause why it should not be suspended from trading. Chapman, at the request of Tricontinental, acted as spokesman for Commodities. At a hearing on 25 January 1988 concerning the matter, it was found that there were certain irregularities, which were admitted by the company, and a fine of $25,000 was imposed.

Chapman has given evidence, which I accept, that Johns on behalf of the firstnamed defendant expressed relief at this outcome and indicated that in appreciation of the endeavours made by him, Tricontinental owed him a favour.

During the period between 1985-1988 Tricontinental offered or provided loan funds to the following companies

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which Chapman, or Gargaro, or members of their respective families were associated:

MDR Mutual and General Group Pty Ltd
MDR Mutual and General Group Resources Pty Ltd ("MDR")
Goscor Pty Ltd
The Michael Edgley Corp Pty Ltd ($1.5m)
Michael Edgley International Pty Ltd
MEH Ltd ($3m)
Centrepoise Pty Ltd
Chariah Resources Pty Ltd
Chenin Blanc Pty Ltd

In each of these cases the loans were handled, although not exclusively, by Johns.

On or about 4 January 1988, Tricontinental issued formal demands in respect of loans of $500,000 to MDR and $2m to Goscor Pty Ltd. Demands were also made on Gargaro and Chapman personally as guarantors. Chapman, Gargaro, and Johns met on 11 January 1988, and it was agreed that the facilities would be extended for 12 months based upon a $100,000 reduction of each of the loans. On 29 January, MDR satisfied this requirement but no funds were forwarded by Goscor.

What emerges from this brief description of the history of their association is that it is apparent that by the beginning of February 1988, Johns knew a great deal about Chapman, Gargaro, and, at least, some of the companies with which they were involved. He must be taken to have been aware of the financial strictures within which they were

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operating and I also have little doubt that he assessed them as ambitious individuals who were prepared to undertake some risks to achieve their objectives. Importantly, they had taken a development project to the stage of production and there was a reasonable basis for anticipating the gold loan secured in 1986 would be repaid in full, albeit somewhat belatedly.

The intertwining of the threads commenced on 9 February 1988 when a meeting which was attended by Chapman, Gargaro, and Johns, took place at the offices of Tricontinental.

Acquisition Process

All present agree that the possibility of the acquisition of the Falcon and Minefields group of companies was first mentioned at this time.

The meeting had been sought by Gargaro and Chapman who were interested in the possible acquisition by Chariah of a company known as North Queensland Resources Ltd, which was the holder of a number of mining leases and had been given the code name "Circus". They proposed that funding for this transaction be made available through a gold bullion loan for a sum of about $16m. Clearly, they were eager to expand their companies' holdings and interests, and, in particular, their gold mining operations.

Johns advised them that he thought that the "Circus" project involved the assumption of an excessively

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high risk for the "MEH" companies, and that they should not proceed with it. He told them that he considered that it would be better to endeavour to pursue activities directed to securing an increase in gold production by obtaining control of an existing producer rather than to attempt to develop a new operation. The rationale underlying this suggestion presents no difficulties when regard is had to the general financial position of Chariah at that time.

In response to their enquiry as to whether he was aware of anything suitable, Johns told the two men that he knew of a person who was intending to sell his petroleum and gold mining interests in North Queensland and the Northern Territory. One of the gold exploration leases that it held (identified at a later time as being at Yam Creek in the Northern Territory) was described by him as being "the jewel in the crown". Although the parties do not agree as to the detail of the conversation that followed, the differences between their respective versions are, for present purposes, inconsequential.

Johns informed Chapman and Gargaro that the person who effectively controlled the companies concerned, had advised him that he was dying of leukemia and that that was the reason why he was disposing of his interest in them. Discussion during the remainder of the meeting centred around the value of the assets of the companies, the productivity of their gold mining tenements, and the anticipated price for their acquisition which was estimated by Johns to be between $10m - $12m. Messrs Chapman and Gargaro expressed interest in

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the suggestion and requested him to obtain more information for them.

Each of the participants agrees that a gold loan was discussed, similar to that suggested in relation to the "Circus" proposal, as a means of funding the purchase of the necessary shares. All of them accept that Chapman told Johns that Chariah could only proceed with such an acquisition if an arrangement of this kind could be put in place. Evidence has been presented that when the possibility of this method of financing was raised with Johns, he responded with words to the effect that it would be "no problem" or that he "could not see any problem with that" and this evidence is not challenged. Further it is common ground that Rothschild Australia Ltd was also mentioned in this context. Although there was no specific reference to the form or detail of the proposed arrangements, it would seem that all of the participants contemplated that a gold loan would be secured and structured in a similar fashion to that which had earlier been arranged in 1986, with Rothschild probably acting as the bullion dealer.

In the course of his submissions, Mr Robson of Her Majesty's counsel, who appears on behalf of the plaintiffs, advanced a number of substantial arguments with respect to the use of such terms by Johns.

He submitted that Chapman and Gargaro could reasonably have anticipated and Johns would have appreciated, as they claim, that Johns who held a very senior position in Tricontinental was able to decide in the exercise of a personal discretion whether or not approval would be given to

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a specific financing proposal. In other words, they were justified in accepting and understanding that if he so stated he meant to convey that there would be "no problems". They would have been strongly fortified in that expectation Mr Robson argued, as a consequence of their experiences in relation to earlier dealings. Obviously there is much force in this argument. Johns, on any view, of the situation possessed considerable influence in Tricontinental.

However, I am confident that as experienced business men and in consequence of their previous involvement in a similar transaction, Chapman and Gargaro understood that there were several matters to which attention would have to be given before any gold loan arrangements of any kind could be put in place and that they appreciated that there were a number of unexpressed provisos to Johns' utterances concerning the absence of problems whether he employed either of the expression "no problems" or the more tentative "could not see any problems", which were given in evidence.

The situation was not one in which Johns' utterances could be taken as representing more than a preliminary indication of his and Tricontinental's preparedness to become involved in the financing of the acquisition.

Whilst all participants to the conversation contemplated the probability that if it were effected the acquisition would be financed through a gold loan arrangement, it is apparent that none of them considered that any commitments had been entered into or that any

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undertakings given or representations made beyond those which I have just set out.

The further submission advanced by Mr Robson that Johns had no intention of honouring even limited representation of this kind and certainly did not intend to provide the level of financial support which the plaintiffs claim that the conversation implied is not, in my opinion, supported by the evidence. Apart from the fact that it is relatively unlikely that he would have consciously embarked upon a course which he must have appreciated would have led inevitably to disaster for all concerned including himself, the conduct of Johns as disclosed by the evidence is inconsistent with the existence of such an approach by him.

Johns alleges in his witness statement, when referring to this meeting that there was also some conversation concerning the Goscor and MDR facilities. He claims that he informed Chapman and Gargaro that there would be no extension of time for payment of the amounts due from these companies and that he could not advance any more money to companies associated with the two men as his lending limit in that regard had been reached. However, he states that he indi-

cated that a loan could be effected through a company controlled by their respective wives (Centrepoise Pty Ltd). There is support for this evidence in the fact that a formal application was made by Mrs Gargaro for a loan on the next day.

This otherwise irrelevant transaction possesses significance as it tends to cast some doubt upon the assertion made by both Chapman and Gargaro that they believed

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that Johns possessed an unfettered discretion with respect to the granting of loan approval and that, accordingly, if he said "no problems" then he was undertaking, as they understood he was empowered to do, that there would be none.

They knew that, whilst his authority within Tricontinental was substantial that there were procedural and other constraints within which Johns was required to operate. On this occasion he was able to provide an alternative avenue of assistance for them employing the procedures and discretions available to him, but they, in turn, had to arrange for the attendance of their wives and the making of the application.

Following that meeting, Johns arranged on 11 February for an information package to be forwarded to Chapman and Gargaro. The accompanying letter which reads:

"Many thanks for your letter of 8th February, 1988 and as confirmation of our discussions, I consider it to be in the best interest of MEH Ltd to enter into an arrangement for further production and not to actively seek an acquisition of "Circus". Any acquisition undertaken by MEH should be effected towards the end of June which would not adversely affect the bottom line through holding costs.

As discussed, I enclose a confidential document which has been prepared by a major shareholder of Falcon ie Minefields Exploration NL.

As verbally advised, it is my understanding that the major shareholder is intending to dispose of his total interest in both companies for consideration of $10 million cash.

If at all you are interested, I will be able to provide full details of permit areas and geological reports etc"

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is consistent in its terms with the assertion made by Johns in his witness proof and which was not the subject of challenge that

"I told Chapman and Gargaro that, if they were interested, I would introduce them to the principal direct and they would need to obtain all relevant information from him. I said they would have to do their own work to determine whether or not they wish to proceed with the purchase."

The letter also places the "best interest" statement of Johns into what I accept was understood by Chapman and Gargaro to be its proper context. The broad proposition that the interests of MEH would be best served by entering into arrangements for further gold production and that the company should not at that time incur the substantial expenditure involved in the development of a new project which might not produce income for some time if at all, was a straight forward one. It did not carry with it any implication that it would be in the best interests of MEH to acquire the Falcon/Minefields Group, although it certainly involved the suggestion that Johns was of the view that it could be so. I have no doubt that all understood that.

Mr Robson argued that Johns who had a great deal of knowledge about the financial situation of both the proposed acquirer and the subject companies was aware at all stages that it was contrary to the interests of MEH to embark upon this course. He submitted that Johns and Tricontinental owed a duty to the plaintiffs who were clients of the bank to so inform them. I do not accept that Johns had formed the view that it was contrary to the interests of

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MEH to effect the acquisition. The proposed enterprise carried a number of risks as I have no doubt he appreciated. Equally I have no doubt that Chapman and Gargaro who were not novices in the gold mining industry understood that a careful evaluation of the situation was required. They had been told by Johns that they had to make their own enquiries and to determine for themselves whether or not they wished to proceed with the transaction. It defies reason to suggest that they did not appreciate the necessity to give independent consideration to the proposal after conducting their own feasibility study. The evidence later set out indicates that they proceeded on precisely this basis.

Johns pursued the matter on 17 February by sending a telex to Gargaro in the following terms:

"In relation to information recently provided and potential purchase of controlling interest in two public companies, could you please advise firstly if you are interested in pursuing the matter, and secondly, what further details are required."

Gargaro responded on the next day, indicating that MEH Ltd was:

"Certainly interested in going further but need to have closer look at: project detail, full profile, financing arrangements and most importantly need our people to see and assess mining projects first hand.

Suggest meeting next week (Thursday or Friday) with John Chapman to discuss matter further."

It is apparent from these communications that enquiries were at a preliminary and tentative stage. As mentioned the necessity to conduct an independent investigation and to make their own assessment of the wisdom or otherwise in proceeding with the matter was, as this

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response indicates, appreciated by Gargaro and, almost certainly, also by Chapman who said in evidence that he had read these messages by the end of February.

The next step in the process was taken by Chapman who spoke with Mullins in Brisbane on 21 February. A further meeting between Chapman, Gargaro and Johns was held shortly thereafter at which a number of matters related to the prospective acquisition were discussed. Whilst there is some dispute as to when this occurred, all agree that it was held in late February and, I think, probably on 24 February.

The accounts of the conversation that then took place also differ. All participants agree that the assets of the company were further discussed and that Chapman indicated that investigations were being carried out, including some to be conducted by a firm of accountants, Arthur Anderson & Co. They differ in their accounts in the following significant respects:

1. Gargaro initially maintained in his evidence that the matter of funding was again raised by either Chapman or himself, and that it was repeated that the only way in which the acquisition could proceed was through the provision of a gold loan to be repaid over 3-5 years. He stated that Johns responded, as he had previously done, that there would be "no problem". However it is to be noted that in cross-examination he modified his position and agreed that no mention of any term for the proposed loan was made. Johns denies that the subject of acquisition funding was raised at all in this conversation. Chapman did not specifically refer to the

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matter in his evidence. I reject Gargaro's evidence on this aspect.

2. Chapman says that Johns referred to the anticipated payment to Dundas of $5m by a company called Golconda upon the taking up by the latter of an option to purchase a 50% interest in the Yam Creek Project. Johns and Gargaro maintain, and I accept, that Dundas' arrangements with Golconda were not discussed at this time.

3. Chapman and Gargaro maintain that Gargaro queried Tricontinental's $18m exposure to the group of companies. They state that he enquired as to the purpose for which those funds were advanced and that Johns responded that it was intended that they would be used to acquire gold producing and petroleum assets and investments. Johns says that he told Chapman that Dundas had a gold loan arrangement involving Rothschild, but that the other matters about funding were not raised. I reject the evidence of Chapman and Gargaro on this aspect. The allegation first appears in supplementary witness statements made by them on 28 May 1991. I find it difficult to accept that the making of such a significant utterance would have been overlooked for a period of three years and not brought to mind until after some questions were asked by me concerning the bases upon which the claim was being made during the opening of the plaintiffs' cases.

Although, as earlier indicated, I accept Johns' denial that the method of financing the purchase by means of the provision of a gold loan was mentioned at that time, as

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claimed by Gargaro; on any version of the evidence there is no suggestion that the subject was taken much further than on the previous occasion, concerning which there has been no substantial dispute. Johns had clearly indicated, both prior to and during the meeting, that he regarded the acquisition as being worthy of consideration. His approach carried the implication that Tricontinental, on whose behalf he was acting, and he would consider favourably an appropriate fund-

ing proposal based upon a gold loan arrangement, and it is apparent that he possessed some enthusiasm for the idea of the transfer of the Falcon/Minefields group to these prospective purchasers. Again, as I indicated earlier, he almost certainly was of the view that such a transaction could resolve more than one problem.

However, I do not consider that any of those present formed the impression or gained the understanding that any commitments or undertakings were being entered into by any of them at that stage. The wisdom and practicality of the acquisition of the group on any basis had still to be determined. The purchase price and terms of payment had not yet been negotiated. In that circumstance, of course, no consideration could realistically be given save in a very general fashion to the amount, or terms of the proposed loan, or the security which would be required to support it.

An indication of the way in which the situation was perceived by Johns at the time can be found in correspondence forwarded by him to Mullins. In a letter dated 24 February 1988 he provided:

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"Just a gentle reminder that repayment $6 million is due 29th February, 1988. As per our recent discussions, you confirmed that Goldconda $4 million will be payable by that date as part repayment. Please confirm immediately.

I have today discussed Falcon/Minefields with Mr John Chapman who has expressed interest and will contact you for further detailed information.

Des, we have a fish on the hook - do not over-play it or appear too keen to sell or else the price will drop."

This letter is informative in a number of respects. Johns demonstrates an awareness of the financial difficulties being encountered by the Group. He appears to have been anticipating that the prospective purchasers were going to examine the proposal carefully, and some suggestion is conveyed of the closeness of the relationship between Mullins and himself.

As far as Chapman is concerned, to be described in this fashion would, I suspect, be likely to produce more than a mild sense of apprehension in the mind of almost any person contemplating entering into a business or contractual relationship with either the sender or recipient of such a letter. However, both Gargaro and he state that whilst they became aware of its contents during the month of April 1988, the letter did not give rise to any uncertainty in their minds as to the reliability of the advice which they claim to have received from Johns or the wisdom of acting on his alleged assurances or undertakings. In order to justify this somewhat curiously naive reaction to the letter, each, by the adoption of a convoluted reasoning process, contended that the letter was interpreted by them as Johns' technique for forcing down the price. It was claimed that by pointing out

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that obligations were not being satisfied, Johns was subtly indicating to Mullins that a sale had to be made; in other words, that he was exerting pressure on one client of the bank for the benefit of another. If the two men actually interpreted the letter in that way rather than upon an equally disturbing straightforward reading of its contents, and if they had placed reliance upon Johns, they could hardly have derived anything other than a measure of disquiet from such behaviour on the part of a person in whom they and presumably Mullins had placed trust.

In my view Chapman and Gargaro were not acting under any illusions or misconceptions concerning either the activity upon which they were embarking or as to the role of Johns in relation to it. They were experienced business men who I am satisfied had no intention of committing either their companies or themselves to what could be a very costly venture without independently satisfying themselves that the potential profits justified the incurring of substantial financial risks. I have no doubt that they appreciated that Johns saw advantages to Tricontinental (the interests of which were not necessarily the same as their own), to Mullins, and perhaps even possibly to himself, if the transaction was brought to fruition.

On 25 February, Chapman consistent with this view forwarded a facsimile transmission to Mullins stating:

"Further to our telephone conversation of even date and our discussions in Brisbane on the 22nd February, 1988, we confirm our interest in the possible acquisition from your Company and related entities of their controlling shareholding interests in Falcon Australia Ltd and Minefields Exploration NL.

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Subject to our conducting a confirmatory evaluation of the financial state of Falcon Australia Ltd, Minefields Exploration NL and their relevant subsidiary companies by our Auditors, Messrs Arthur Anderson & Co, and subject to a technical evaluation of the existing goldmining operations of Minefields Exploration NL, Dundas Gold Corp NL and Quartz

Reef Mining Pty Ltd by technical consultants to be appointed by our Company, and provided that such evaluation does not disclose any significant matters which adversely affect the operations of those companies, their financial condition and self sufficiency, our Company would be interested to make the acquisition of the relevant controlling shareholdings for a total price in the range of $8,000,000 to $9,500,000 in the manner outlined by you.

Our Auditors, Messrs Arthur Anderson & Co would need to have access to the books of accounts and receivables of the various companies in your Group and we would need to be able to also access the technical records and reports pertaining to the gold mining operations of the various companies in your Group. Kindly advise us if those arrangements could be put into place at your convenience.

Naturally, we and our Consultants are prepared to provide your companies with appropriate undertakings of confidentiality in relation to such an evaluation."

The state of Dundas was giving rise to concern within Tricontinental at about this time to the extent that Atlas, who was then Assistant General Manager of its Project Finance Division, noted on a memorandum that he had had a number of cheque requisitions read to him so as to assure himself that they appeared to be in order and legitimate. I think that it is reasonable to infer in view of the level of involvement of Johns with the matter generally, as disclosed by the evidence, that he was well aware of the situation.

On 3 March 1988 Chapman wrote to Arthur Anderson & Co, interestingly as Joint Managing Director of Chariah and not as a director of MEH, in which he confirmed verbal

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instructions previously given to them to conduct a purchase evaluation of the Falcon/Minefields Group, the precise purpose of which was stated to be:

"... to assist the Directors of Chariah to determine whether it would be in the best interests of our Company to acquire a controlling share interest in the two listed companies, as part of the longer term development of Chariah's gold interest."

It was said in the same letter that Mr Mullins and his staff would provide such assistance as might be required

"...to enable your firm to conduct a proper evaluation of the financial state of the various companies."

This assignment was accepted. However, the accountants pointed out that it would not be possible to perform all of the work required to provide an audit opinion. They undertook to conduct a limited review of the position of the companies as at 31 December 1987 with certain other investigations to be carried out, and adjustments to be made by reason of (inter alia) subsequent receipts and "ageing of debtors".

The next meeting between Chapman, Gargaro, and Johns, took place on 21 March at the offices of Tricontinental and the possibility of funding the acquisition through a gold loan was pursued. Chapman and Gargaro proposed that security to support such an arrangement could be provided through Chariah's share in Sunburst. This proposal referred to a joint venture with Orion Resources NL to vat leach tailings, known as "Sunburst Gold", in which Chariah held a 63% interest and which had been announced in January 1987. Johns requested that further information be

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supplied about the project. Again, the comment can be made that it is apparent from this discussion that all present understood that appropriate securities would be required before a gold loan could be obtained.

The parties also agree that Gargaro asked Johns whether Tricontinental would continue to support the group if the acquisition by Chariah went ahead, to which Johns responded affirmatively. Precisely what was understood by the participants to be the effect of this portion of the conversation has been the subject of dispute. Gargaro in his evidence indicated that he regarded it as representing an open-ended commitment by Johns to provide whatever funding was required to keep the group viable.

It was submitted on behalf of the plaintiffs with respect to this comment that the offering of an indefinite measure of support which in normal business practice would not amount to very much, gained significance when assessed against the background provided by the history and character of the relationships between the parties. From the perspective of Chapman and Gargaro, their relationship with Johns, it was contended, was based on faith and trust and their assessment of the manner in which he conducted his business. There was, as they claim to have interpreted the situation, a great degree of innuendo in what was said by Johns, who they believed had the capacity to do what was insinuated by him as

being within the powers he possessed as Managing Director of Tricontinental. Johns, however, stated that he was expressing no more than an attitude of goodwill towards both the acquisition and the prospective purchaser.

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I am satisfied that the evidence of the latter should be accepted. It is highly unlikely that he would have intended to commit either Tricontinental or himself to obligations of such indeterminate magnitude as those suggested by Mr Gargaro by the employment of the vague term "support", and even taking into account the background to which I have referred, that Mr Gargaro understood that he had done so. The possibility of consolidating the existing Chariah facility (1986 gold loan) with the acquisition funding was also discussed, and the idea was not rejected by Johns.

However, the accounts of the meeting vary in the following manner:

1. Both Chapman and Gargaro maintain that the request to Johns was for a $10m gold loan repayable over a period of not less than 3 years and not more than 5 years. Johns contends that there was no mention of price or term of the loan.

Again, I prefer the evidence of Johns as to the matter. At the time at which the conversation took place, it was still not known what the actual cost of the acquisition would be nor upon what terms it would be effected. Neither the amount required nor term of a gold loan to finance it could have been determined at that stage. Further, in a letter dated only two days later, a portion of which is set out a little further on in this judgment, sent by Chapman to Johns, a proposal for a gold loan for a substantially smaller sum was advanced.

2. Another point of dispute relates to whether it was accepted by Johns that the funding required to

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restructure the group debts of Falcon/Minefields would be made available. Johns denies that there was any discussion about additional loan funds, the refinancing of Dundas' debts to Tricontinental under a gold loan, or that any commitment was given as to future funding. Chapman says that there was a discussion about the whole group of companies and that Johns was informed that a "turnaround" was needed. The refinancing of all the companies' debts to Tricontinental was required as was additional funding to enable Dundas to improve its plant. According to Chapman, Johns undertook to provide a suitable gold loan to achieve this. This would have involved a very substantial increase in the exposure of Tricontinental and, if given, would almost definitely have been reflected in later events, correspondence, or conversations. Significantly, Gargaro does not make any reference to any such discussion in his evidence about this meeting. I do not accept this portion of the evidence of Chapman.

Considered in retrospect the activities of the respective parties in March 1988 are surrounded by an aura of unreality. Chapman and Gargaro had great expectations for a golden future but Chariah was not able to meet its obligations with respect to the earlier gold loan which it had obtained, and, although Gargaro could provide glowing cash flow projections, the Sunburst joint venture project had not yet produced one ounce of gold. Dundas was heavily in debt and unable to satisfy its obligations and its situation was obviously deteriorating. The position of Falcon was no

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better. Johns enquired from Mullins as to whether the company was able to meet its wages bill and indicated that Tricontinental was becoming desperate to obtain an amount of $4m anticipated from the taking up of certain options by Golconda. Against this unpromising background a multi-million dollar transaction involving these companies was being discussed.

Nevertheless, the negotiations proceeded and on 23 March 1988 Chapman wrote to Johns concerning what was described as "a first Gold Loan proposal to assist with the acquisitions". Information concerning the Sunburst project was provided which presented an optimistic view of its prospects of success. The letter continued:

"As the Joint Venturer's will be receiving their respective share of the gold produced from the Joint Venture each month and contributing proportionately to operating costs and working capital, we believe the project has the capability of servicing a gold loan commitment on the part of Chariah Resources of $4,000,000 to $4,500,000 over a two year period. In any case, as Chariah's existing gold loan of $3,000,000 in relation to the Millchester Gold Project should have been repaid by the end of December 1988, any shortfall in production from the Joint Venture could be offset by surplus production from Chariah's existing CIP operations from 1989 onwards."

Johns responded in a letter dated 25 March 1988 indicating that:

"I see no reason why Tricontinental cannot proceed to provide a gold loan of approximately $4.5 million over a two year period in relation to the Sunburst Gold Project.

Provision of such loan would naturally be subject and conditional to your proposed acquisition of the major shareholding of Minefields Exploration NL and Falcon Australia Ltd.

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I look forward to our further discussions upon your return from Perth later next week."

Johns and Chapman had a telephone conversation on the same day about this letter.

Chapman's account of the conversation is that he told Johns that the Sunburst project could support $4.5m liability, but that the amount required depended upon the outcome of negotiations with Mullins. He says that he made it clear that Tricontinental was required to fund the entire acquisition and that Johns agreed.

However, Chapman swore an affidavit dated 18 May 1988, in legal proceedings issued by Intercapital Holdings Ltd, a portion of which has been exhibited in this matter and reads:

"On 25 March, 1988 Johns wrote to me confirming that Trico would fund Chariah's acquisition of the Falcon and Minefields shares by providing or arranging an initial gold bullion loan of $4.5 million, as the Vendor of the shares was prepared to accept deferred payment on part of the purchase consideration on an interest free basis."

This does not appear to support his contention that a sum greater than $4.5 million was discussed with Johns.

Johns maintains that the conversation concerned a misinterpretation of the security to be provided to support the loan and to make it clear that Chariah had only a 63% interest in Sunburst to utilise for this purpose, and not 100%. In this context reference should also be made to a Board Paper presented to the MEH Board on 21 April 1988 to which I will return later and which includes the following passage:

"If Directors are agreeable to the foregoing acquisitions, it is proposed to finance the same

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under a gold loan to be provided by Tricontinental Corp against the future production of Chariah Resources NL from its 63% interest in the Sunburst Gold Project."

Johns also contacted Mullins on 29 March and requested him to:

"..please advise current position with John Chapman and his Group.

For your confidential information, funding is no problem for them."

This letter is consistent with the evidence of Johns as to his state of knowledge concerning, and participation in, the negotiations which had been conducted to that time and also with the contents of his letter to Chapman of 25 March.

The first black cloud appeared over the golden horizon with the delivery by Arthur Anderson & Co of a draft report on 6 April. That document, which purported to set out the findings of a review undertaken on behalf of the directors of Chariah to assist them in their determination as to whether that company should acquire a substantial interest in the Falcon/Minefields Group contained a number of findings which, objectively considered, ought to have been extremely worrisome to prospective purchasers with current liquidity problems. The report revealed that the group had external liabilities of $38,401,000 as at 31 December 1987, and recommended that a restructuring of the debts should take place, as it was currently having difficulties servicing its loans. The key findings of the review were summarised as follows:

"1. The companies within the group are faced with a shortage of liquidity. Operations will not be able to continue for long

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unless there is a large cash injection from external sources.

2. The companies have relied extensively on external debt for financing of operations and this requires immediate rationalisation in order for the companies to continue operating.

3. Several of the tenements in Dundas Gold Corp NL have not been registered in the name of the company, and are still in the name of the original holders. One of these original holders is Mullins Investments Pty Ltd.

4. Minesite operations have resulted in poor production results. This indicates either that the tenements do not contain economically recoverable resources, or minesite management is not operating effectively. The assessment of production

performance is not within the scope of this report, and we understand that Chariah has employed engineering and geologist consultants to review minesite operations and geological aspects of the tenements.

5. The return on investment from the oil operations has been less than expected.

6. Overheads of the companies have been very high, indicating that there is a need to rationalise operations at head office level and to introduce cost cutting measures."

Among other matters raised by the report, was a statement that the circumstances surrounding the assumption by Falcon of responsibility for a $5 m loan made by Tricontinental to Abrolhos Oil and Investments Ltd were not known and a reference was made to the uncertainty of obtaining payment of the debt. The authors of the report state:

"We were not able to ascertain the specific reasons for this transaction other than Mr Mullins had some involvement with both Falcon and Abrolhos at that time."

Chapman says in his supplementary witness statement that he spoke to Mullins and his associate (Palmer) about

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this matter and he sought legal advice as to the prospects of success of an action in the Supreme Court to secure the money. He states that:

"As a result of their advice, I believed there was a prospect of success in the action. Further, I was comforted by the fact that both Mullins and Palmer had told me that in their view the assets of Abrolhos on a worst case scenario were worth $6-$7 million. I was also comforted by the fact that I believed that Tricontinental would not have loaned in excess of $5 million to Abrolhos in the first place unless the assets being acquired were of commensurate value, and that our banker Mr Johns considered the petroleum assets of Falcon could be sold for at least $10 million. I was not aware at this stage that the transaction of 20 July, 1987 referred to in s3.1 of the Arthur Andersen report of March/April 1988 was financed entirely by borrowings by Dundas from Tricontinental."

Not surprisingly, Chapman does not appear to have been particularly concerned with what may have been the genesis of the Abrolhos debt at that time. He was clearly interested in ascertaining whether or not it was recoverable, and, I consider, approached the matter on the basis that the real questions for the proposed acquirer related to the assessment of the true value and prospects for the Falcon/Minefields Group.

In the report, it was further pointed out that Dundas had entered into contracts for forward sales of gold and that it had found it necessary to defer delivery by reason of a shortfall in production. With respect to the Tricontinental facility the following observations were made:

"Under the $18m facility, Dundas is obliged to make repayments of $500,000 per month to Tricontinental. The funds should be derived from the forward gold sales to Rothschild. The forward gold sales contract was entered into at the insistence of Tricontinental, to ensure a

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minimum cash flow would be derived by Dundas which would then allow it to repay Tricontinental

...

Under the Tricontinental facility, Dundas is committed to making repayments of $500,000 per month commencing January 1988, which do not appear to have been made."

Chapman and Gargaro each maintain in their respective witness statements and evidence before the Court that they had been led to believe the advances to Dundas had been made for proper purposes, and were of good standing,

"... and that interests commitments on these loans were being serviced by them as and when the same fell due."

On being taxed about these statements each of them encountered difficulty in explaining what they meant. Both the draft and final report of Arthur Anderson and Co adverted to an apparent failure by Dundas to honour its obligations. In the face of this evidence the two witnesses adopted untenable positions in an endeavour to justify the contents of their statements.

It was suggested, for example, by Gargaro who it should be mentioned is an accountant, that a loan was being serviced, although no payment of principal or interest was made, if appropriate entries to indicate the factual situation were made in the books of the respective parties.

Chapman said that he regarded a loan as being of good standing, even though default had occurred and no arrangements made with these creditors with respect to the position, if no formal demand for payment had yet been made.

The unreality of their stances on this matter does not require explanation. Put very basically they were

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informed that Dundas was not paying its bills. The various reasoning processes upon which they have relied in the present proceeding to suggest that they were somehow deceived into believing a different situation existed demonstrates, in my opinion, the unreliability of their evidence on this aspect.

Johns to whom a copy of the draft was provided stated somewhat laconically in a memorandum to Atlas that it made "interesting reading" and further that:

"From my brief reading, Mullins has made a fortune out of the companies which are now in trouble.

As TSL underwrote the rights issue last year, we should be prepared for some flak in the event Falcon falls over, which is a possibility."

Chapman, Gargaro, and Johns agree that a meeting took place on 7 April at which Chapman reported on the state of negotiations with Mullins. Johns has stated that the 6 April Arthur Anderson report was given to him on this occasion and this is not denied by the other parties.

The point of contention arising from this meeting is Chapman's claim that he sought an assurance from Johns that Tricontinental would provide take-out finance for the amount of any deferred purchase price through the provision of a gold bullion loan. Johns maintains that such finance was never mentioned. Johns also contends that Chapman as a result of his negotiations with Mullins, had already determined that Mullins was prepared to accept a portion of the purchase price in cash and the balance on deferred terms. Chapman states that it was Johns who told him that Mullins would accept such an arrangement. Whoever raised this

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matter, it would appear, if the relatively contemporaneous affidavit of Chapman (sworn on 18 May) to which reference has earlier been made accurately presents the situation, that the information had been secured at least by 25 March and not on this occasion.

Johns also denies that he indicated that Mullins would provide vendor finance of an amount in the order of $3m - $4m. Chapman and Gargaro state that vendor finance was discussed but the amount referred to in their respective versions varies. It appears to be common ground, however, that Johns advised them that they should not offer security for deferred terms and should not offer any interest for such finance.

Johns and Chapman agree that at some time during this month Johns was informed that Chariah would be proceeding with the acquisition and not MEH. However Johns denies this followed an expression of concern by him to Chapman that the two directors of MEH who opposed the acquisition might block the transaction. Chapman claims that when Johns expressed this fear, he (Chapman) suggested that Chariah could proceed as an alternative. Again, I do not accept the evidence of Chapman. As mentioned earlier, the initial instructions given to Arthur Anderson & Co were stated to be those of Chariah and it seems likely that either the possibility that the acquisition would be made through this company was considered at a quite early stage or that Chapman and Gargaro were desirous of concealing their activities from the other directors of MEH.

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Chapman also maintains that he spoke with Johns about this time and indicated that a total restructure of its debts was required if a "turnaround" in the financial situation of Dundas was to be achieved.

He said that he accordingly asked Johns if he was prepared to provide to Chariah, and also Falcon and Dundas, gold bullion loans in order to reduce interest costs on their borrowings with Tricontinental and to provide the working capital support required for Dundas' mining operations. He claims that Johns replied that he would do so and would continue to ensure Tricontinental's financial support of all of the companies involved in the acquisition until their gold production was increased sufficiently to enable them to service their commitments to Tricontinental. Chapman also claims to have informed Johns that he would seek a similar commitment from Rural and Industries Bank of Western Australia (R & I) and Natwest Australia Ltd (Natwest).

Johns denies that any such conversation occurred and that the matters raised in it were ever discussed. In my view the evidence of Chapman constitutes another example of a sweeping assertion, in relation to which there is not only no supporting evidence but cannot be reconciled with the conduct of Chapman himself.

The draft Arthur Anderson & Co report appears to have provided little discouragement to Chapman and Gargaro who went to Perth where the Head Office of the Falcon/Minefields Group was situated in order (inter alia) to conduct their own examination of the files and books. The evidence indicates that some examination of this kind of

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material was carried out and that discussions took place with Mullins and the representative of Arthur Anderson & Co who was also present.

The evidence of both Johns and Gargaro is that they had at least two telephone conversations during this month. Johns dates the conversations on the 13 and 20 April. Gargaro also refers to at least two conversations held in mid-April.

Gargaro's accounts of them having taken place in mid-April vary from those of Johns' in that he includes more subjects of discussion in his recollection of events. He says that each of the conversations was conducted in order to determine precisely the amount of the Falcon and Minefields group debt to Tricontinental and to discuss the group's external liabilities. He says:

1. That they discussed the external liabilities as being $40m, with $20m owing to Tricontinental, and that the group would need to restructure through a gold loan mechanism otherwise with the $40m exposure, it could not survive without its banker's support.

2. That Johns urged him to "put an offer on the table"

3. That they talked about work on alluvial plants and the necessity for the addition of at least one more plant at Georgetown.

4. That they also discussed a $1.5m cash advance as Falcon and Minefields could not afford capital expenditure of that magnitude with its then cash flow.

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5. That Johns said "I cannot speak for the other Banks but as far as I am concerned, I cannot see a problem with restructuring Tricontinental's cash advance facility of $18m into a gold loan, that should see you through until you increase production at Western Creek. Put an offer on the table and don't worry about it."

Johns maintains that the first conversation which he states took place on 13 April involved a request from Gargaro to clarify Dundas' direct and contingent liabilities to Tricontinental. He also says that he urged Gargaro to put Mullins "out of his misery" and to "put an offer on the table". Gargaro in reply, according to Johns' account, said that they were still trying to reduce the price. Johns also says that Gargaro told him that they were having discussions with Natwest regarding a gold loan. He says that Gargaro asked whether Tricontinental would be prepared to be involved if Natwest provided a portion of the finance for a total restructure by this means, and that he replied that Tricontinental would prefer that its facilities be completely paid out.

That evidence which was not the subject of challenge in the witness statement of Chapman or Gargaro, or in the cross examination of Johns is consistent with a letter from Johns to Mullins dated 14 April 1988 which contains the following passage:

"Following our discussion yesterday morning, I made contact with Nick Gargaro who confirmed what you have stated. He also confirmed that they were having discussions with Natwest to refinance total borrowings on a gold loan structure."

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During cross examination Gargaro stated initially that he had difficulty in interpreting this passage as he was confused by the use of the word "they". At a later stage he indicated that he may have used the expression to refer to members of Chariah or to Mullins.

Notwithstanding the matters raised in the draft Anthony Anderson Report, Chapman and Gargaro as directors of MEH entered into non-binding heads of agreement with Mullins Investments Pty Ltd on 14 April 1988. They were encouraged to do so by Johns who informed Mullins that he had "endeavoured to push Gargaro to place an offer on the table". He has contended that he did so in order to relieve the stress under which Mullins was operating. I do not accept that

explanation and consider as earlier-mentioned, that Johns was eager to resolve a rapidly developing problem. The motivation for much of his conduct can, I think, be found in that desire.

The terms set out in that document included a provision that:

"(e) Mullins will diligently and fervently assist and co-operate (both in Australia and in the United Kingdom) as required by MEH in the preparation of the loan submission documentation and the negotiation and establishment of, and supporting the submission for, the refinancing of all external debt of Falcon, Minefields and Dundas under a gold loan bearing an interest rate of not more than 4% per annum in respect of not less than 54,000 ounces of gold to be repaid over a period of not less than 3 years, and otherwise being to the satisfaction of MEH. The parties hereto will use their best respective endeavours to cause the provision of a facility reasonably acceptable to all of the parties hereto from Natwest Australia Bank Ltd and/or Country Securities Ltd."

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A similar term was later included in the purchase deed of 3 May 1988. No satisfactory explanation for its presence on either occasion was advanced by Chapman or Gargaro in my opinion. Each of them when giving evidence endeavoured to minimize its significance in a proceeding in which both claim to have relied upon representations attributed to the defendants to provide gold loan restructuring finance to enable the acquisition to be commercially feasible.

In this context reference should be made to a statement in the Arthur Anderson & Co report dated 18th April:

"*7.2 Proposed Natwest Australia Bank Ltd (Natwest) Gold Loan*

We understand that Natwest may be interested in providing the Falcon/Minefields Group with a gold loan of between 54,000 and 74,000 ounces equivalent to approximately $35,000,000 to $48,000,000 on current gold prices.

We have assumed that Dundas will be the borrower of the gold loan. It is possible that Minefields and Falcon would guarantee the loan. The security for the proposed gold loan would be over the Georgetown and Yam Creek gold properties.

From discussions with Messrs Chapman and Gargaro the proceeds of the gold loan would be used as follows:

. Repay Tricontinental (Dundas)	$12,000,000
. Tricontinental (Falcon)	6,000,000
. Natwest (Falcon)	4,000,000
. Natwest (Minefields)	6,000,000
. R & I Bank (Falcon)	4,000,000
. R & I Bank (Minefields)	3,000,000
. Mullins Investments Pty Ltd	1,500,000
. Creditors and Accruals	1,800,000(estimate)
	$38,300,000
. Possible deal with Climax Minerals Ltd and Petroleum Securities Ltd	9,000,000
. Working Capital	700,000
	$48,000,000"

The stated purposes which include the payment out of the Tricontinental facilities are also difficult to reconcile with the plaintiff's claims in this Court.

Chapman maintains that he spoke to Richard Lee at Rothschild Australia Ltd in about mid to late April to discuss the possibility of Chariah extending its gold bullion loan to enable it to finance the acquisition. He states that Lee informed him that Rothschild was not prepared to transact a further gold loan in relation to Chariah, as Tricontinental had reached the limit of exposure that Rothschild was prepared to accept. He also alleges that Lee told him that Rothschild would not be prepared to provide a gold loan to Dundas so as to refinance its $18m debt, but confirmed that the company had been delivering gold since January 1988 in satisfaction of its obligations under the forward sales arrangements previously mentioned.

The happening of this conversation was not recalled by Lee who did not exclude the possibility, however, that it may have taken place. There is, in my opinion, more than one curious feature in the evidence of Mr Chapman on this aspect. First it suggests, contrary to other evidence given by him, that he accepted that the obligation to secure a suitable bullion dealer rested upon Chariah. Second, I regard it as extraordinary that, if he considered that Tricontinental was under a

duty to do so he did not then contact Johns and discuss the emergence of a possible problem in that regard with him. It should not be forgotten in this

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context that Rothschild was the only bullion dealer of which any mention had been made to that stage. Of course, the communication of such an unpromising attitude may well not have been likely to assume great significance if Chapman was not placing reliance upon Johns or Tricontinental but rather upon the prospect of entering into refinancing arrangements through the Natwest Bank as the defendants allege.

Johns has stated that during a conversation which he alleges took place on 20 April, Gargaro asked whether Tricontinental would be prepared to provide a gold loan facility of $18m to Dundas to refinance existing borrowings, and that he also requested a letter for the MEH board about the availability of such finance. Johns' response to this request according to his evidence was that Tricontinental would consider the application on its merits and would forward a letter to that effect. The contents of the letter which he forwarded are consistent with his version and do not represent any substantial change of position on this matter as Tricontinental had earlier provided less satisfactory facilities involving an exposure of approximately $18m when a bullion dealer who was prepared to enter into gold loan arrangement was not found. The letter reads:

"RE: *DUNDAS GOLD NL*

I refer to our discussion earlier today and advise that Tricontinental Corp Ltd would consider providing a suitable guarantee in favour of a bullion dealer in order for Dundas Gold NL, a joint venture company between Falcon Australia Ltd and Minefields Exploration NL, to secure a suitable gold loan in the order of A$18 million.

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You will appreciate that the provision of such guarantee would be subject to the normal lending criteria of Tricontinental.

Please do not construe this letter as a form of approval, however indicative of our intention to consider a proposal."

Gargaro's account of the request for a letter to the MEH Board also differs from that of Johns'. He maintains that they again discussed the $40m liability of Dundas and the promised restructure finance by Johns. He claims that he told Johns that although an oral arrangement was acceptable to Chapman and himself, they needed something in writing to show to the other board members.

A meeting of that Board was held on 21 April, at which Chapman and Gargaro presented a paper outlining the proposed acquisition of the Falcon and Minefield shares. The results of the various searches and studies that had been conducted prior to entering into the non-binding heads of Agreement were set out in this document, as were details of the purchase price of the Falcon shares ($5.7m), and the Minefields shares ($1.638m). Referring to what was described as a key feature of the acquisition, it was stated that the Minefield shares were to be subject to a put option exercisable by MEH within 12 months, for a sum of $1.875m. The advantage of the option was that it limited the exposure of MEH whilst still allowing the company to maintain control of the Falcon and Minefields group. The total consideration for the acquisition was reported to be $6.725m.

Another "key feature" of the transaction to which reference was made in the Paper related to a gold loan re-financing package that, it was anticipated, would be

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"sourced" through Tricontinental, County Natwest and/or Standard Chartered Bank. This was to be:

"... aimed at re-financing the total liabilities of the combined group under a gold loan for a minimum of 54,000 ounces and a maximum of 74,000 ounces against the proven and probable reserves of the Western Creek Alluvial Gold Project operated by Dundas Gold Corp. At this stage Tricontinental Corp Ltd has indicated that it would be agreeable in principal (sic) to a gold loan re-financing in the order of $18,000,000 to $20,000,000. Discussions with the Australian General Manager of County Natwest Australia Ltd have indicated that County Natwest would be prepared to consider a re-financing package under a gold loan of the order sought and a detailed submission is currently being prepared on behalf of Dundas Gold Corp for that purpose.

...

The reference to the "in principle" preparedness of Tricontinental to enter into a gold loan arrangement reflects the contents of the 20 April letter earlier mentioned, and is difficult to reconcile with the evidence of Gargaro as to his understanding of the situation.

In spite of this approach to Tricontinental there can be little doubt that as far as Chapman and Gargaro were concerned, a primary objective in the acquisition process was to secure a total restructuring of the group's debts through a single gold loan which, it was anticipated could be organized through Natwest. Less satisfactory alternatives were, however, not excluded from consideration and a partial restructuring of the debts through Tricontinental was considered as a possible option.

Chapman and Gargaro have both given evidence that they were negotiating with Natwest from April to effect a refinancing of the total borrowing of the Group through a

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gold loan agreement, although each claims that this was neither a primary objective nor was the decision to proceed with the acquisition in any way dependent upon or influenced by this possibility. Although the witness Grix who was the General Manager of Natwest denied the occurrence of any substantial discussions about entering into any such arrangements with Gargaro during the period between April and June, I found his evidence to be quite unsatisfactory. Chapman told the Court that he appreciated (as indeed it seems to me would any reasonably intelligent observer) that Natwest was significantly under secured and may have been amenable to an approach which improved its situation in this regard. Certainly the preparedness of Chapman and Gargaro to approve the grant of a mortgage over the Yam Creek tenements on 21 June as apparently volunteered collateral security for pre-existing advances is explicable on this basis. Obviously if a refinancing arrangement with Tricontinental had been a central objective at that time, it is inconceivable that the most valuable asset of the group would have been so encumbered, particularly an asset which Johns had personally referred to as "the jewel in the Crown".

Other matters dealt with in the paper included a method of reducing overheads, details of the security to be offered for the loan and the broad objectives for MEH in proceeding with the acquisition. These were optimistically stated to be:

"1. Acquiring a group of companies with strong roots in the gold mining and oil production areas.

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2. Consolidating all the external liabilities of the combined Group under a single gold loan which would be repaid over a period of three years from production out of the Western Creek Alluvial Gold Project.

3. A reduction in overheads and interest in the order of $4.2 million to $5.2 million would be achieved almost immediately without adversely affecting the operations of the Group.

4. The potential of being able to float Peregrine Oil NL in the next six to twelve months and dispose of 50% interest for approximately $15,000,00 to $20,000,000.

5. The potential for consolidating the gold mining interests of Chariah Resources NL and Dundas Gold Corp NL and disposing of 45% of the combined gold interests via a public float and thus raising between $20,000,000 and $30,000,000 for the Group.

6. The overall result within twelve months would be that MEH would have a controlling interest in four publicly listed Mining Companies with a strong earnings base in gold production and oil production as well as having realised an extraordinary cash profit of between $35,000,000 and $52,000,000 from the float of Peregrine Oil NL and Dundas Gold Corp NL."

If Directors are agreeable to the foregoing acquisitions, it is proposed to finance the same under a gold loan to be provided by Tricontinental Corp against the future production of Chariah Resources NL from its 63% interest in the Sunburst Gold Project."

The Paper concluded with a firm expression of view by Chapman and Gargaro that the acquisition would be in the best interests of MEH and was highly recommended by them. Their enthusiasm for it is illustrated by the following comment included in the paper:

"Furthermore, we wish to put on record that if the Board of Directors of MEH declines to proceed with this acquisition, Tricontinental Corp Ltd has already indicated that it is prepared to provide finance to interests associated with Messrs J Chapman and N J Gargaro for the

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purpose of acquiring the controlling shareholding in Falcon Australia Ltd and Minefields Exploration NL independently of MEH."

There is no support in the evidence before the Court for the making of any such claim which also reflects, in my opinion, a degree of unsatisfactory behaviour on the part of the two men when dealing with their own Board.

A decision regarding the acquisition was required from the Board by the following day, Friday 22 April. Why the time frame to which Mullins, Chapman and Gargaro had agreed was so short never became clear but probably was intentionally chosen to confine the opportunity for any serious analysis by anticipated objectors.

However, objections were expressed and Chapman and Gargaro received a letter dated 22 April from the other two directors of MEH (Messrs Edgley and Peterson), who advised them that they were of the opinion that the acquisition process should not proceed.

"We are of the opinion that the proposal does have a downside that could be as high as $5 million, but this aside, we are not of the opinion that it is an encouraging investment for MEH in view of the liability the Company now has and the additional liabilities this venture would place upon it.

Russell also expressed concern as to the legalities of the Company entering into this venture at a time when it is under threat of takeover. Furthermore, Russell believes that you should give very careful consideration before proceeding with this acquisition in your own right, as it will be difficult for you to maintain your full supervision of Chariah if you have the above project to worry about as well.

...

In summary, in view of the need for a response from us within the specific time given, we believe that we cannot responsibly recommend

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proceeding with this acquisition at this point in time."

On 26 April, these directors sent a further letter confirming the above advice and also recommending that if Chariah were to undertake responsibility for the acquisition, an investment of such magnitude should be presented to the shareholders of MEH, which it must be remembered was not only a publicly listed company but also held all of the shares in Chariah.

At the time of this meeting, MEH was itself subject to a takeover bid by Intercapital Holdings Pty Ltd ("IHL"), which attempted to thwart the acquisition through the initiation of legal proceedings. Although these were not commenced until 10 May, they are relevant in that it was obvious before this time that the company, a significant shareholder in MEH, did not support the purchase. In an affidavit in those proceedings Chapman swore that:

"19. On Tuesday 26 April, 1988 at a meeting at Chariah's offices, convened at the request of and attended by Maxwell Di Russo, the Chairman of Intercapital and its controlling shareholder, Gargaro and myself, Di Russo said:-

'I know about Falcon and Minefields. I will tell you now that you'll never get it through your board.'

I replied:-

'How do you know that?'

Di Russo responded:-

'I have my sources: why don't you take it yourself - look, it will give you two publicly listed vehicles.'

(the reference by Di Russo to Gargaro and me taking it ourselves was a matter that had been raised only at the board meeting of 21 April, 1988, and I refer to Exhibit 'JC-13' of this my affidavit). All details of the existence of the

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transaction had been kept confidential until announced publicly on 4th May 1988.

I responded with words to the effect that it would create a conflict for Gargaro and me to divide our time between a personal commitment of that level and our obligations as directors of both MEH and Chariah. Di Russo also said that he saw the proposed acquisition as a deliberate attempt to frustrate 'his' offer in respect of MEH saying that 'its a dog of a

company' (referring to Falcon and Minefields) 'if you can convince me otherwise, I wouldn't object to the deal.' I told him that the suggestion that this was an attempt to frustrate his offer for MEH was nonsense; that we had been evaluating the proposed acquisition for the last two months and our interest, pre-dated any knowledge of his offer; that the material that we had obtained indicated that it was a good purchase and that we intended to proceed with it."

Chapman, still determined to proceed and, if possible, to secure the acquiescence of the reluctant directors of MEH to these transactions, commissioned Arthur Anderson & Co to prepare a further report setting out the net tangible assets and liabilities of the Falcon/Minefields group on the basis of what he maintained thereafter was a "worst case scenario" for Chariah. This reference is included in a memorandum to the directors of MEH dated 4 May and in the affidavit sworn by Chapman in the IHL legal proceedings earlier mentioned. However the correspondence from Arthur Anderson does not reflect any such instructions:

"As requested by you, we have prepared a summary of the net tangible assets of the Falcon and Minefields groups as at 31 December 1987. This information is summarised from the unaudited accounts of these groups which were prepared by their management as at 31 December 1987. These accounts are included as an Appendix to this report."

Shortly put, neither the instructions given nor the contents of the report itself, a draft of which was altered

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at the direction of Chapman with the effect of presenting a more favourable position, justifies the making of any such claim.

Chapman and Gargaro, despite the urgings of fellow directors of MEH, decided that Chariah should proceed with the acquisition. On 3 May, Chapman spoke with Hutchinson, another director of Chariah, and forwarded to him the final draft of the Arthur Anderson report dated 4 May by facsimile transmission. Chapman, Gargaro and Hutchinson agreed that Chariah should purchase a controlling interest in the Falcon and Minefields Group. On 4 May, Chapman acting alone passed a resolution on behalf of MEH as the sole shareholder of Chariah ratifying the company's execution of the contract.

When the shareholders meeting of Chariah was held on the same day, Chapman again attended alone, and purported to act on behalf of MEH which was not otherwise notified of its occurrence, as he ritually passed a motion for abridgment of notice.

Edgley and Peterson, the directors of MEH, who had opposed proceeding with the acquisition, were informed of it only after the deed of purchase was executed, by a memorandum which was forwarded to them, with an attached press release.

I am satisfied that Chapman and Gargaro regarded the acquisition of the Falcon/Minefields group as highly desirable. Their determination to secure their objectives is evident in this and other conduct in which they engaged during the process of acquisition. They were prepared to

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utilize whatever procedural devices were available to them, to limit the extent of any opportunity which the other directors of MEH might have to interfere in the achievement of their design, and if necessary, to mislead them. Significantly there is no reliable evidence before the Court that either Johns or Tricontinental was implicated in this behaviour. Whilst their extraordinary conduct is explicable on no other bases, other than a strongly held belief in the correctness of their own judgment and their view of the likely success of the venture, I suspect but I do not find that the desire to thwart the Intercapital bid may have been a contributing factor. In a letter which they both signed dated 14 June 1988 and addressed to shareholders of MEH the following passages which demonstrate their approach appear.

"Intercapital has sought recourse to the Courts in order to have the acquisitions set aside and has alleged that the transactions if not invalid, were at the very least entered into by the Directors of Chariah Resources in breach of their fiduciary duty. In response thereto, it has been established by Chariah that the transactions were approved by the unanimous resolution of the Chariah board following an investigation lasting three months, conducted at a cost of approximately $100,000 and utilising three independent firms of specialist consultants."

"The interests of Messrs Chapman and Gargaro and their respective families currently are entitled to 33.66% of the shares in MEH Ltd. Given such a substantial level of shareholding by them, is it likely that as Directors and Executives of MEH and Chariah, Messrs Chapman and Gargaro would commit $6.725 million to acquisitions which had no commercial merit or potential benefit for MEH and its subsidiary Chariah? After all it would be like 'shooting yourself in the

foot', for them to enter into an acquisition of that nature, as Messrs Chapman and Gargaro have almost as much to lose in that event as

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Intercapital, with its 37% holding of the shares in MEH."

It is to be noted that once again they claim to have conducted an extensive independent investigation before committing Chariah to the transaction.

As far as Tricontinental was concerned the evidence indicates that there was relatively little contact in the period between the signing of the purchase deed and the settlement of the transaction on 17 June. Johns contends that he spoke to Chapman in early June and requested him to contact Clark of Tricontinental with regard to the preparation of a credit submission for the amount required for settlement. Clark gave evidence that he spoke to Chapman about this matter and enquired as to the amount which would be needed and as to when the necessary documentation relating to the Sunburst project would be forwarded. In response to the latter request, Chapman stated that he told Clark that he anticipated that this matter would be attended to within a few days. In the event no such material was produced.

The only reliable evidence before the Court with respect to the matter suggests that no attempt was made by Chariah to secure the approval of its joint venture partner for the creation of a charge over its interest in Sunburst until after settlement had taken place. In a letter, a copy of which was sent by Gargaro to Tricontinental on 6 July the Managing Director of Orion states:

"I respond to your verbal request to us on June 24th in relation to a charge over the Chariah portion of the joint venture between Chariah Resources NL and Orion Resources NL known as the Sunburst Gold joint venture.

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Under Article 11 of the Agreement creating the joint venture Orion has no objection to Chariah charging their portion of the joint venture to facilitate a gold loan, provided that the Chargee agrees to be bound by the provisions of cl11.5(a) of the Agreement and provided further that Orion receives from you the material referred to in cl11.5(c) of the Agreement."

There was no evidence adduced that either of the conditions set out in that letter were ever satisfied or that any attempts were made to do so.

A meeting attended by Chapman, Gargaro, and Johns took place on 6 June. Chapman has said that he told Johns that an amount of approximately $6m would be required at settlement, that payment of the balance of the purchase price (approximately $2,85m) was to be deferred for a year and would be interest free. He claims also to have told Johns that Chariah would require a further gold bullion loan to re-finance this latter amount. I do not accept his evidence on this matter. If any such comment had been made, it would almost certainly have been mentioned in a conversation which Chapman had with Clark on the following day and which was concerned with the question of repayment of the proposed $5.7m gold loan. The undisputed substance of that conversation was set out by Clark in a memorandum shortly afterwards, and is far more consistent with the evidence of Johns than it is with that of Chapman.

The relevant portion of it reads:

"John Chapman rang this morning re information required on proposed $5.7 million gold loan.

I outlined the cash flow shortfall over 2 years on the $5.7 million loan, relying on the Sunburst project solely. He indicated that any repayment shortfall would be made up from their existing CIP plant and reserves which are the subject of our present $3 million guarantee.

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Our existing guarantee still stands at $3 million, however Mr Chapman believes Chariah has delivered about 400oz of gold to date or some 10% of the total under the Gold loan.

His main positive point was that improvements/modifications to the CIP plant have been completed and production has built up to a level of 400/500oz per month (May 1988 production was almost 500oz).

Mr Chapman has undertaken to provide 2 year cash flow projections on the existing CIP operation which hopefully will demonstrate the ability to meet the Sunburst shortfall after repaying the existing gold loan obligation. These should be available later this week.

Mr Chapman also made two suggestions:

i) that the existing $3 million Chariah facility be extended from its current expiry date of 31.12.88 to 30.6.89;

ii) that the existing and proposed gold loans be restructured as one.

I expressed my doubts that ii) could be accomplished easily and in fact even without formal documentation to link them, our security position should be that once the existing gold loan is retired we have access to the surplus cash flow of Chariah from the CIP project."

There can be little doubt that Chapman understood that the preparedness of Tricontinental to enter into a gold loan arrangement was provisional upon (inter alia) the production of adequate security.

Whether or not the parties accepted that Tricontinental was under an obligation to secure a bullion dealer for the proposed gold loan or even anticipated that it would do so, all would have realized that no action would have been likely until appropriate security was known to be available to support such an arrangement.

Specifically, I reject the assertion by Chapman that he expected that a gold loan arrangement would suddenly

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materialize on or about settlement day without any further step having been taken by or the involvement of Chariah.

There is no reason to suppose that Tricontinental did not accept the assertions of Chapman and Gargaro that the Sunburst project was viable and could be used to supply part of what was seen to be required. However, little save optimistic projections were provided by 14 June when the making of an interim arrangement was seen to be necessary.

I accept that there was discussion about the problem on 15 June in consequence of which a letter of offer was prepared for a bridging cash facility for $5.7m which it was indicated would be converted into a gold loan guarantee by Tricontinental for $6.6m

The conduct of Johns, in authorizing the advancing of funds to enable settlement to proceed arguably without complying with the formalities normally required by the bank, is open to criticism. He endeavoured to justify his failure to obtain the approval of Tricontinental's internal credit committee for this facility on the basis of an argument that neither the credit exposure nor the security to be held by the bank was changed by the conversion from the acquisition gold loan facility which the committee had earlier approved. However, the interest differential between the two types of arrangements was substantial and the very features which made one more advantageous to both a borrower and lender indicate that simplistic answers cannot be accepted. However, I do not think that his departure from proper procedures carries the implications for which the plaintiffs contend. As I have remarked on more than one occasion Johns obviously

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perceived advantages in the successful completion of the transaction. There is no evidence before the Court that suggests that he anticipated that, although Chariah had not yet done so, the necessary securities to support the advance would not be produced. However, I am conscious of the extent to which Johns was able to determine the attitude adopted by Tricontinental in this matter and I have taken that into account when assessing the evidence of Chapman and Gargaro with respect to their belief and experience as to his ability to control loan approvals and the disposition of funds.

When the letter of offer was forwarded to Chariah for consideration Chapman amended the document in some important respects. In particular, the security to be provided was restricted to Chariah's interest in the Sunburst project and the operation of a precondition relating to the provision of an independent geological report was confined to the gold loan guarantee facility. Importantly, the provision concerning the conversion to a gold loan guarantee facility was varied so that any such transition was to be at Chariah's option. That choice was never taken up and, as mentioned, no security over the Sunburst project was provided by settlement date.

The term of the facility was fixed at thirty days and was clearly intended to operate as a bridging arrangement which would be replaced by a gold loan if Chariah exercised the option which it had chosen to reserve for itself in the letter of offer. I do accept the contention of that plaintiff that Tricontinental had contractually undertaken to

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provide a gold loan within the period designated in any event.

Johns gave instructions that Tricontinental would proceed with the settlement on the basis of blank executed transfers. Lien documents over scrip in Falcon and Minefield were prepared by Tricontinental. There were some negotiations involving Clark and Gargaro with respect to the interest to be paid on the bridging facility and agreement was reached that interest for 10 days only needed to be paid.

One of the first acts performed by the new controllers of the Falcon/Minefields Group was to encumber the Yam Creek tenements in favour of Natwest. Chapman and Gargaro then approached that bank with an ambitious and complex scheme for restructuring the group which was to be sold into a company known as Climax Mining Ltd. Chapman in a letter dated 6 July to the Manager of the Resources, Minerals and Resources Division of Natwest indicated that he had been engaged in discussions with Climax for "some two months". If that statement was correct then he had been involved in these activities from about the time that the Deed of Purchase was signed. He apparently had much grander plans than he had been prepared to indicate to Johns throughout that period as the letter indicates.

"Assuming that the September 1988 options are fully exercised, the capital of Climax would be expanded to approximately 89 million shares (20 cents each) and the subsequent Vendor share issues to MEH Ltd (approximately 13.5 million shares) and Minefields Exploration NL (approximately 39.5 million shares) would expand the total issued capital in Climax to 141,599,000 shares. Minefields Exploration NL would then be entitled to approximately 83.918 million shares (59.26%) and MEH Ltd would be entitled to approximately

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13.5 million shares in Climax (approximately 9.53%). In turn, MEH Ltd through Chariah Resources NL would be entitled to a controlling interest in Minefields Exploration NL."

He proposed that a restructure of the group's current debt could be made upon one of alternative bases:

"1. A syndicated loan involving Tricontinental, Natwest and R & I in the proportions of the current debt structure or alternatively as the Bank's may otherwise agree, partly under a gold loan of up to $25 million and the balance on a cash advance facility pending the group restructure and rationalization of its total gold production as set out above;

2. Natwest Australia becoming the sole lender to the group for the total amount of the outstanding group debt under a gold loan as to $25 million and the balance under cash advance facilities pending the group restructure and rationalization of its gold production operations as set out above."

and that:

"As soon as Natwest Australia is able to indicate its preferred direction as to the gold loan re-financing, a full submission could be provided backed up with geological reports, cash flow projections and other relevant material within 10 to 14 days.

A copy of this letter was sent to Johns with the comment that he should:

"..note this is not our submission for a Gold Loan, but a strategy paper relating to the structure and financing of the group's operations.

We anticipate making our submission for the Gold Loan within the next 10 to 14 days."

If the various assertions with respect to the restructuring of the Dundas debts and the making of an open-ended commitment to financially support the Group made by Chapman and Gargaro in the present proceeding were correct, it is to say the least somewhat surprising that Natwest was approached and that a copy of the letter containing the

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proposition was only subsequently sent to Tricontinental. The fact that this course was followed provides support for the evidence of Johns that he had earlier indicated to Gargaro that if a restructuring arrangement was entered into with Natwest, he would prefer that the Tricontinental facilities be retired.

It became apparent fairly quickly that Natwest had no real interest in taking up this proposal, although negotiations were not terminated and further cash advances were made. Grix gave evidence that he was concerned only with the possibility that the group would collapse within six months of the acquisition by Natwest of a number of securities, on the basis that in such an eventuality they may have been regarded as the grant of an assailable preference to the bank. The evidence discloses that the security position of Natwest had improved substantially in the period between April and the end of June 1988. In common with a number of other persons who gave evidence in this proceeding, the cynicism of this witness was profound and his commercial morality extremely dubious.

The bridging cash facility with Tricontinental was extended in September 1988, but no conversion to a gold loan arrangement was requested, secured or, it would seem in retrospect, realistically likely in view of the increasing uncertainty about the viability of the Sunburst project.

At about this time, July 1988, some adverse publicity was given to the Falcon/Minefields Group. In an article in Australian Business dated 20 July 1988, it was reported that Johns held a financial interest in Falcon

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through a company known as Xantron. As the circumstances related to the acquisition of this interest are the subject of criminal charges against both Johns and Mullins, this aspect was not canvassed in the course of the hearing. It represents one of those threads missing from the tapestry of relationships. What is remarkable in the context of the present case is the absence of any adverse reaction from either Chapman or Gargaro. If their assertion of reliance upon and confidence in the integrity of Johns possessed any substance, their lack of any complaint and their inaction generally when faced with what they claim to have been a total disregard of contractural undertakings and representations is extraordinary.

Previously the attempt by Intercapital to thwart the acquisition had received publicity both in an article in the Financial Review on 27 May and by reason of the appearance of Chapman and Di Russo on a television programme when they were interviewed about the legal proceedings. The attention given to both the acquisition and the connection of Johns with the Falcon/Minefields Group could hardly have assisted Chapman and Gargaro in their attempts to secure funding from any financier.

As Gargaro stated in evidence, from the time at which Natwest expressed a lack of interest in the Climax proposal the situation was one of fairly rapid deterioration. The Sunburst project was abandoned; interest bills mounted rapidly; and the possibility of a restructure became increasingly remote.

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Chapman and Gargaro claim that various conversations were held with Johns requesting both the conversion of the cash advance facility and restructure finance but that these requests were met with the response that they were "not the flavour of the month" with Tricontinental. It is stated by Chapman and Gargaro that Johns' attitude was explicable by the recent adverse publicity surrounding Tricontinental, which was regarded as having resulted from attention given in the media to MEH's problems with Intercapital and the associated legal proceedings. Chapman and Gargaro also claim that Johns threatened to sell Tricontinental's shares in MEH and employed this as a tactic for the purpose of avoiding commitments previously made to them.

Johns denies these allegations, most particularly, his use of the phrase "flavour of the month" in the context in which these witnesses have placed it. He claims that the expression was employed by him to illustrate Tricontinental's reluctance to become involved in the IHL legal proceedings, rather than as an expression of annoyance at the media exposure received by Tricontinental through its association with MEH.

Again it would appear that Johns version is the more acceptable having regard to the correspondence and contemporaneous events. Only two months after settlement, Tricontinental sought payment of interest on the $5.7m facility in a letter dated 23 August 1988 which reads:

"It is again necessary for me to remind you that July interest payments have not been made.

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Could these payments be made immediately in order to avoid embarrassment at the forthcoming Tricontinental Board meeting.

Kind regards."

Rather than expressing any sense of irritation or complaint about an alleged failure on the part of Tricontinental or Johns to honour undertakings given, reliance upon which may have contributed to a rapidly worsening position, Gargaro forwarded the amount due with an apology. Indeed, it was not for many months that a complaint of any kind was made about alleged statements or conduct of either of the defendants and not until some weeks after the commencement of the trial itself, almost three years later, that these complaints took their final form.

An application by letter dated 1 September 1988 for a further interim funding facility of $1.6m was made to Johns. Significantly, no reference was made in the supporting correspondence to the conversion or restructuring of the existing facilities, as might have been expected if Gargaro's assertions were true. The refusal was also accepted without complaint.

Clearly difficulties were being encountered within the Falcon/Minefields Group and attempts were being made to ensure its survival. Consistent with the view that Chapman and Gargaro undertook to secure the gold bullion dealer on 9 September, Chapman wrote to Deak International Pty Ltd requesting a gold loan facility of $10m, the proceeds to be used in part to repay the balance of the Rothschild facility and to replace the Tricontinental acquisition cash advance. This overture in common with a number of other attempts, the

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detail of which need not be set out, to stave off the virtually inevitable collapse of the group was unsuccessful.

On 26 September Johns wrote again to Chapman stating:

"I find it necessary to again chase up monthly interest payments for:-

Chariah Resources NL
Falcon Australia Ltd
Dundas Gold NL

John, this matter is now becoming very embarrassing and must be rectified now.

What is happening to your refinance proposal? We need to talk.

Kind regards."

Chapman did not accept this invitation.

Johns maintains that he was not ever presented with any specific oral or written submissions by either Chapman or Gargaro regarding restructure finance. He was aware that arrangements of that kind were desired and almost absolutely necessary if the Group was to survive, but understood from the two men that they were endeavouring to effect this through other sources. This evidence is consistent with his invitation to Chapman at the end of the letter of 26 September (set out above) and is clearly at odds with the version of events offered by Chapman and Gargaro.

One point which perhaps should be made in reference to that letter is that its terms suggest that Johns knew little about what was happening and was awaiting contact from them. If the evidence given by them concerning approaches to Tricontinental was correct, the tone and contents of the letter must have produced considerable alarm. From at least

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that point they would have appreciated that Johns was in the course of betraying them and have taken some action.

It does not appear to be disputed that Johns instructed Atlas in November 1988 to work with the two men in arranging a syndicate of lenders who would provide a guarantee to a gold bullion dealer, who was prepared to grant a gold loan to refinance the total indebtedness of the group. It would appear that at this time Tricontinental became actively involved in Chariah's endeavours to secure syndicated restructure finance. Negotiations were held during the period November 1988 to June 1989 with a number of financial institutions including Arab Australia Ltd in October 1988, who agreed to be a participant in the syndicate until late November when they withdrew. Also approached were Mace Westpac Ltd, Kleinwort Benson Australia Ltd, State Bank of New South Wales, Standard Chartered Bank, Rural and Industries Bank and Deak International Pty Ltd, none of which were ultimately prepared to participate.

Negotiations also continued with Natwest which had a substantial exposure to the group, and a number of meetings were attended by Grix. As I have earlier remarked I consider that it is relatively unlikely that Grix ever intended to commit Natwest to any substantial further exposure to the Falcon/Minefields Group and that his primary concern was that bank's security position. However, it was not until 5 June 1989, at a meeting with the representatives of MEH, Tricontinental, State Bank of Victoria (who by that stage had taken over the operations of Tricontinental) Natwest and

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Mullins, that he indicated that no further financial support would be given.

The involvement of Atlas from November 1988 onwards in the attempts to raise restructure finance was the subject of evidence and argument in the course of the hearing. Although as I have earlier indicated, I do not accept that Tricontinental was obliged to arrange the restructure finance as a consequence of any representations made by its agents or upon any contractual basis, or that the evidence supports a finding that Johns had failed to honour assurances given or undertakings made, it is common ground that from this time assistance was offered and a number of possibilities were investigated. Chapman and Gargaro contend that Johns called Atlas to his office on one occasion during this period on which

they were present and ordered him in what might be euphemistically described as direct terms to pursue the matter with utmost vigour. They claim that this occurred as a response to their complaint about his (Johns) failure to honour his undertakings.

At the encouragement and authorisation of Johns, Atlas actively pursued financiers in an attempt to gain their commitment to a syndicate of lenders. Prior to this, Chapman, the evidence indicates, was the person who had primarily performed this role. The involvement of Tricontinental at this late stage is consistent with the defendants' account of events and the activities of the various parties during the period

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as disclosed by the evidence, particularly when regard is had to contemporaneous correspondence.

It would be reasonable to infer that by late November 1988, Johns must have become increasingly concerned about the viability of the Falcon/Minefields Group and its ability to service the loans due to Tricontinental. As previously stated, he had motives of his own for keeping the group afloat, if possible, at least until arrangements were made to retire the Tricontinental facilities. I suspect, but of course do not find, that he was very disappointed when it began to appear that Natwest was really not interested in proceeding with any of the proposals made by Chapman and Gargaro. It was clearly in the interests of both Tricontinental and himself that some arrangement of this kind should be put in place. The offering of the services of Atlas was as much directed to the protection of the interests of the defendants as it was to those of the plaintiffs.

There is no doubt that during this period, when the syndicate lenders were being sought, the situation was deteriorating for the plaintiffs and that Tricontinental was fully aware of their worsening financial position, particularly with respect to demands being made upon them by trade creditors. Rothschild had, pursuant to the guarantee of the 1986 facility, requested an amount of $1,838,446.41 from Tricontinental on 31 March 1989, this was in turn debited to Chariah on Tricontinental's normal borrowing terms and conditions.

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In addition, Chapman requested a $500,000 facility from each of Grix and Johns in March 1989. Chapman has stated that this was intended to be a temporary facility from Tricontinental, as gold production had been inhibited by a lack of working capital. It was claimed that a connection existed between the necessity to secure this facility and the alleged failure by Tricontinental to provide a gold loan, in that it was said adequate working capital would have been available if Tricontinental had honoured its undertakings. Chapman told Johns that Chariah needed the funds to maintain the cyanide supply necessary for the continuation of production by Chariah.

The accounts given by the participants with respect to the negotiations regarding this facility differ in that Chapman and Gargaro maintain that it was agreed that the funds were to be advanced under existing security arrangements whilst Johns and Atlas state that additional security was to be provided by MEH and MEI. It is not surprising that Chapman, considering the difficulties he had earlier encountered with the directors of the MEH board was reluctant to request their approval of the granting of these securities. Nevertheless, regardless of which account is accepted, the securities were provided and the facilities were drawndown on 14 April 1989. A further $100,000 was granted by Mr McAnany of the State Bank of Victoria, on the same terms on 25 May 1989.

Further funds were advanced to MEH at the request of Chapman to pay some of Chariah's suppliers on 2 June 1989, with an amount of $142,707.48 being granted

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against the security of a lien over 4,200,005 shares in Chariah owned by MEH.

A payment of $50,000 was also made to Mintrade Pty Ltd, a long standing creditor of Chariah which was demanding immediate payment of outstanding trade accounts. Gargaro informed Atlas that Chariah required supplies from this company if the operations at Charters Towers were to continue. Authority to advance these funds to Chariah was given by Mr Keating of the State Bank of Victoria on 23 June 1989.

Clearly by this stage there was an awareness that the Falcon/Minefields group was experiencing terminal difficulty. Whilst the assistance given by Atlas at the direction of Johns to Chapman and Gargaro in their endeavours to secure a gold loan may perhaps have enhanced the prospects of success, these would never have been more than slight. Creditors were demanding payment for supplies, and Rothschild were calling on Tricontinental to fulfil its obligations under the guarantee granted in 1986. Debt was continuing to mount and for a variety of reasons, production was not meeting the confident projections that had been made during the period 1986 - 1988. The whole operation faced extinction with

creditors threatening to cut essential supplies. Also significant in this context is the fact that on 21 May 1989, Johns ceased to be Managing Director of Tricontinental and its operations were subsumed into the State Bank of Victoria. Although Chapman and Gargaro were able to receive some further support from that body, principally through Mr P Keating, a more cautious approach seems to have been adopted

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in granting them funds. It is not surprising, considering the precarious financial situation of the Falcon and Minefields group that on 24 August 1989, Tricontinental, through the State Bank of Victoria advised that agents in possession of its assets and undertakings had been appointed.

At this stage it is therefore necessary to deal with a contention by Chariah that this appointment was wrongful and that in consequence it has sustained loss and damage.

The facts that give rise to this claim can be briefly outlined as follows:

On 19 August 1986, a mortgage and a debenture charge deed were executed as security for the guarantee facility provided by Tricontinental to support the Rothschild gold loan to which reference has earlier been made. The mortgage which encumbered only some of the tenements later held by Chariah in Queensland was registered in accordance with the law of that State on 6 January 1987 and there is no dispute as to its validity. However, no step was taken to secure the approval of the Minister to the encumbering of any of the Queensland holdings in the manner set out in the debenture charge deed. Consequent upon the default of Chariah under the facility agreement, a notice dated 18 August 1989 was served on the company by Tricontinental demanding the payment of all moneys owing to it. As the deed purported to create a fixed and floating charge over all of the assets of the company, the notice had the effect, if validly created, of crystallizing the situation, so that the

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charge encompassed the entirety of the assets and undertakings of Chariah as at the date of service.

On 24 August 1989, Tricontinental appointed two members of the accounting firm Coopers & Lybrand as its agents in possession of all of the properties subject to the charge and bestowed upon them the powers which it possessed under that instrument.

Their administration was described by David McEvoy in a witness statement dated 16 May 1991 as follows:

"5. During the period of administration, Mr Kirk, I and other employees of Coopers & Lybrand controlled the accounts of Chariah, taking in the cash received by Chariah and making appropriate payments. All transactions were recorded in books maintained by Coopers and Lybrand.

9. During the entire period of administration, the management of the Charters Towers operations who were employed by Chariah (Mr G Durack, Mr H Zeissink and others) continued in their employment and continued to manage the operations in the usual manner. At all times, I and Mr Kirk sought their advice as to the operations and followed their advice in the areas of their expertise.

11.(c) ... I deny that the costs of the mining operations of Chariah were increased in any way by reason of the agents' appointment. During the period of administration of the assets of Chariah, expenditure of both an operational and capital nature was required to facilitate the ongoing processing of the company's tailing reserves. The expenditure was incurred based upon the recommendations of the company's management and I consider that the amounts expended were commensurate with the level of production achieved and the capital expenditure requirements at the time. The expenditure was in excess of $2,000,000, absorbing all the proceeds received from the company's gold and silver sales. If this expenditure had not been incurred the tailings would not

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have been processed and the operations would have been closed down."

It would appear that, save for the appropriation of certain amounts in respect of the costs of the administration itself, all of the proceeds derived from the operations of the company were employed to facilitate the ongoing processing of the company's tailing reserves. As the income so obtained was not sufficient to meet operational costs Tricontinental found it necessary to make up the deficit.

The administration continued until 21 December 1989, when an injunction was obtained by Chariah. This was, in turn, discharged on 5 January 1990 and re-imposed on 11 January 1990. It is still in force.

As I have indicated, Chariah has argued in this proceeding that as Tricontinental purported to enter and take possession of its tenements on the authority provided by the mortgage debenture, that the defendant bore the onus of establishing that it was entitled to act upon the instrument. In other words, in the circumstances of the present matter Tricontinental needed to demonstrate that necessary approval of the Minister for Mines, which was required under Queensland law before recognition would be given to the creation of an encumbrance over a mining property, had been secured. This, it was submitted, has not been done. Reliance was placed, for this argument, upon the provisions of the Mines Act which have been earlier set out in this judgment. Presumably, Mr Robson argued, if the Minister had given such consent, the procedure set out in the Statute would have been followed and this would have been recorded on the appropriate register.

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Mr Young, QC, who appeared as counsel for the first-named defendant, argued in response that, because the plaintiff's claim encompasses not only an allegation of trespass but also the contention that there has been wrongful interference with its business, what is considered to be the normal onus is displaced and the obligation to prove its case is cast upon the plaintiff. I do not accept this proposition. On whatever basis the matter is approached the legitimacy of the conduct of the defendant during the period it controlled Chariah's operations is dependent, at least in part, upon the lawful taking of possession of Chariah's mining properties. Those properties and the activities performed in connection with them provided the major source of income for the company. Denied access to them, Chariah was effectively brought to a standstill. There is no evidence before the Court that the necessary Ministerial approval was ever given to the creation of a charge by the debenture deed. The mortgage which operated over some of the tenements only which were taken into the possession of the defendant cannot provide a sufficient warrant for the assumption of total control. I do not consider that it is possible in the circumstances of the present case to read down the terms of the debenture deed in some fashion or other as suggested by Mr Young so as to exclude the tenements in respect of which Ministerial approval for the creation of an encumbrance had not been secured. As has been pointed out, Tricontinental purported to act on the basis of the debenture charge deed and central to the activities of its agents was the taking of possession of the Queensland tenements.

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Neither is it realistically possible on the basis of the evidence before the Court to effect a division between those activities which could arguably have been justified by reference to the mortgage, those which might have been justified if the deed were to be interpreted in some restricted fashion, and those which were, on any view, not unauthorized.

It follows also that the exercise of a power of attorney contained in the debenture to execute a mortgage over other Queensland leases cannot be effective in these circumstances.

In relation to a contention that the Chariah is unable to determine precisely what losses have been incurred by reason of a failure on the part of the agents in possession to account for all moneys received and expended by them during the period of their administration, the first-named defendant submitted that any deficiency has been rectified and that Chariah has now been provided with all of the necessary information. In my opinion this answer to the plaintiff's complaint is not satisfactory and the making of an order for a full accounting is appropriate in the circumstances. This will necessitate the granting of leave to Chariah to present further submissions to the Court with respect to the question of damages if additional matters are subsequently disclosed.

Chariah claimed to have sustained loss and damage as a result of this wrongful action by Tricontinental under a number of heads. The arguments presented with respect to each of which have been set out in a written submission and

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therefore need only to be set out in a brief form here. First, it was argued that having appropriated and sold gold and silver from Chariah's mining leases, Tricontinental was required to recompense the company for the entire value of the materials extracted. The costs of production, the contention was advanced, could not be deducted from this sum as they were incurred by the defendant on its own behalf. The agents in possession did not act for Chariah but on behalf of those who engaged them who were consequently responsible for all debts and costs incurred by them. In my view, this argument misconceives the position. The real question for determination is what, if any, loss was sustained by Chariah. On the basis of any realistic assessment of the situation presented in this case, the answer, with certain specific exceptions to which attention will be directed, appears to be that none has been shown.

The relevant principles to be applied to a claim of the present type were the subject of consideration by the High Court in Gates v City Mutual Life Assurance Society Ltd (1985-6) 160 CLR 1 where it was said that the object of damages in

tort "is to place the Plaintiff in the position in which he would have been but for the commission of the tort" per Mason, Wilson, Dawson JJ at p13.

The operations of the company continued, as they had to that stage, without variation, or interruption. No policy was adopted or implemented which was different in any respect. No suggestion has ever been made that Chariah may have ceased operations or perhaps may have made any different decision concerning the incurring or payment of production

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costs during that period. What Chariah in fact lost was the opportunity to conduct its own affairs. Translated into economic terms, as I earlier mentioned, this loss has little, if any, value. However, as I also mentioned, there are exceptions to this general proposition and certain expenditure and loss can be related to the assumption of control by Tricontinental's agents. Obviously this would include such amounts as the fees of the agents themselves, and the costs of administration. It would appear reasonable to include amounts totalling $390,019.99 paid on behalf of Dundas which may have been dealt with in a different fashion in this category.

The next heading relates to a claim made for legal costs and disbursements incurred in connection with proceedings taken by Chariah in Queensland to remove the agents in possession. I consider that it would be inappropriate to deal with that matter in the present case. The costs of proceedings instituted before a tribunal is a matter to be determined by the judge before whom it arises, in the exercise of that person's discretion according to the ordinary principles. No loss could be said to have been incurred at this stage, in any event.

The next component relates to costs and disbursements incurred in opposing applications to wind up the company which were made by unpaid creditors and which it is alleged were precipitated by the appointment of agents by the first-named defendant. This situation, it is claimed, was brought about by the undertakings which Chariah gave in the District Court in Queensland the effects of which were to

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prevent the company from paying debts incurred by it prior to the appointment of Tricontinental's agents. The fundamental difficulty with this contention is that Chariah was simply not producing sufficient income to meet even its production costs. Tricontinental found it necessary in fact to make up the deficit during this period. The company was simply non-viable. At the very worst, in my view, the actions of Tricontinental brought forward by some small period of time, the inevitable taking of action by those to whom money was owed. This claim must be rejected.

Finally, I also reject the claim made for the estimated loss to Chariah of the benefit of trade credit facilities, attributed to the taking of possession of the company's business by Tricontinental. For obvious reasons, the availability of such credit was reducing during 1989 as the fortunes of Chariah declined and greater difficulties were experienced by the company in paying its bills.

I do not think that it is necessary to highlight the various deficiencies in the evidence of Mr Lester. It is given to support this claim and it is sufficient, I think, to state that in my view, this evidence was unsatisfactory in that it was based upon very limited material and that which was produced did not, on careful analysis, support the contentions made.

As I remarked at an earlier point in this judgment, I have not attempted to recount each piece of evidence adduced during a lengthy trial nor to address specifically each inference or argument which might be conceivably considered to arise from the evidence or the submissions of

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counsel who have appeared on behalf of the respective parties. Neither, in a case in which I have formed the opinion that the evidence given by the two principal witnesses called on behalf of the plaintiffs is severely flawed and unreliable, do I consider that it is necessary to attempt to set out an exposition of the relevant law. That, for relevant purposes, is reasonably clear and substantially undisputed. This case, as I earlier stated, has largely been concerned with what at heart is a factual dispute.

The conduct of both Chapman and Gargaro, as my brief narration of the events with which this matter is concerned demonstrates, was at a number of stages quite inconsistent with the claims that they now make. At almost every point at which it has been possible to test their versions against objective evidence or their own contemporaneous statements they have been shown to be unreliable. On occasions I consider that each has been untruthful.

In short, I am of the view the evidence before the Court does not provide an adequate foundation for a grant of any of the forms of relief sought by the plaintiffs arising from the acquisition of the Falcon/Minefields Group save for the loss and damage as a result of the wrongful appointment of agents.

Finally, I turn to deal with the counterclaim made by the first-named defendant, the details of the transactions are included in the defendant's further amended counterclaim, dated 22 February 1991.

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Basically, these claims relate to moneys drawn down by the respective plaintiffs pursuant to the terms of cash advance and commercial bill facilities provided to them by Tricontinental and repayment of which although demanded, have not been made. A further claim is made for an amount due under the guarantee facility granted to support the 1986 Rothschild gold loan which was later converted into a commercial bill facility when the guarantee was called upon.

Although I am not going to attempt to make the precise calculations of the amounts claimed, the relevant transactions should be set out. Briefly summarised, Tricontinental advanced to Chariah $5.7m under a cash advance facility in June 1988, $1,838,446.41 under a commercial bill facility on 4 April 1989 and $50,000 cash advance on 26 June 1989. Demand for these amounts with the attendant interest was made on 18 August 1989 and has yet to be satisfied by this plaintiff.

The defendants also claim that Chariah wrongfully refuses to deliver up the property the subject of security being the Debenture Charge, and Mortgage dated 19 August 1986 and a second mortgage dated 10 January 1990. It is claimed that Chariah has defaulted under each of the securities and that Tricontinental is entitled to claim the property they encumber. In addition the defendants claim that they are entitled to enforce the lien, granted as security for the $5.7m cash advance facility to Chariah. The argument relevant to the validity of the debenture charge has been canvassed above and it is unnecessary to address this matter further other than to say that because of the failure to

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comply with the provisions of the Mining Act, it is either void or, if the distinction matters, of no effect.

Tricontinental also claim the amounts that were borrowed by MEH Ltd, which included, on 14 April 1989, $500,000 pursuant to a commercial bill facility dated 30 March 1989; a cash advance of $100,000 dated 25 May 1989; and $142,707.48 paid by Tricontinental to MEH pursuant to a commercial bill facility of 2 June 1989.

As security for these advances, MEH granted to Tricontinental a charge over the whole of its undertaking and assets by mortgage debenture dated 5 April 1989. In addition, a guarantee was provided by Michael Edgley International Ltd, and that company also granted to Tricontinental a charge over the whole of its undertaking and assets by a mortgage debenture. Both of these securities were executed on or about 10 April 1989. Demand was made pursuant to the securities for the MEH facilities on 24 May 1990 and it was submitted MEH has wrongfully denied Tricontinental's right to enforce the mortgage debentures. Michael Edgley International Ltd has failed to pay the moneys due under both the guarantee and the mortgage debenture.

On 14 December 1987, Tricontinental agreed to grant financial accommodation to Dundas pursuant to a commercial bill facility. On or about 28 March 1988, $3.9m was drawn down by Dundas pursuant to that facility, with a further $500,000 drawn down on or about 15 April 1988. Demand for repayment of these funds including interest was made on 21 August 1989.

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A further facility was granted to Dundas on 21 July 1989 whereby Tricontinental provided a $65,000 cash advance, and a demand for repayment of this amount was made on 24 May 1990.

As security for the advances given to Dundas, that company granted to Tricontinental a charge over its present and future right, title and interest of Dundas in, to, under or derived from certain mining tenements and project assets dated 10 July 1987. Pursuant to this charge on or about 24 August 1989, agents on behalf of Tricontinental took possession of the mining tenements and project assets the subject of the charge. Tricontinental claims a declaration that this Dundas charge is valid and enforceable. As further security both Minefields and Falcon jointly and severally guaranteed the repayment of funds by Dundas and neither of the companies have fulfilled their obligations under the guarantee.

In relation to all of the claims outlined above, Tricontinental claim the principal amounts owing plus interest, and also various injunctions and declarations relevant to the validity of the security and other related documents.

In response to the claims of the first-named defendant, the plaintiffs, save that they admit that the funds were advanced either to MEH, Dundas, Chariah or at the direction of Chariah, and that demands were made on respective dates, denies all the other allegations. The plaintiffs concede the fact that the funds advanced have not been repaid, but submit that it was entitled to withhold the

funds and challenges the validity of the securities that Tricontinental are attempting to enforce. The plaintiffs also claim that the amounts outstanding under the securities granted by both Chariah and Dundas can be set-off against the amounts claimed by them from the defendants.

It will be necessary to make appropriate orders with respect to the undertaking of accounting and to reserve liberty to Chariah to apply in relation to any additional claim for damages which may emerge once a full accounting is made.

Order

In substance the Orders to be made are as follows:

1. The plaintiffs claim fails save for its claim in relation to the validity of the appointment of the agents in possession.

2. The defendant succeeds in its counterclaim save for the declarations with regard to the mortgage debenture dated 19 August 1986, the mortgage dated 10 January 1990 and Deed of Appointment dated 24 August 1989.

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Solicitors for the first-named defendant: Mallesons, Stephen Jacques

Counsel for the second-named defendant: Mr S Wilson

Solicitors for the second-named defendant: Arnold Bloch Liebler