CITIBANK LTD v LINPUT PTY LTD (IN LIQUIDATION)

In the Supreme Court of the Northern Territory of Australia

Martin J.

4 & 5 March & 12 June 1991

COMPANIES - Charge - application for order extending time for registration - charge not registered within time - failure to notify of stamping - inadvertence - whether Court should exercise discretion - exceptional circumstances - Companies Code ss. 100, 201(1), 203(5), 204(1), 205(1)(a), (b), (c) & (d), 205(3), 365(1) Corporations Law ss. 263(1), 266(4)

PRACTICE & PROCEDURE - Procedural irregularity - application under ordinary rules of Court instead of company rules - whether has or may cause substantial injustice - Companies Code s. 539(2) - Corporations Law s. 1322 - Supreme Court (Companies) Rules r. 139

PRACTICE & PROCEDURE - Proceedings initiated prior to winding up order - liquidator joined as a party

Cases followed:

Douglas-Brown v Standard Chartered Finance Ltd (1990) 2 ACSR 737
Vector Capital Ltd v SNS Software Network Systems Pty Ltd (1988) 12 NSWLR 1

Cases distinguished:

re Ashpurton Estates Ltd (1983) 1 Ch 110
re Flinders Trading Co Pty Ltd (1978) 3 ACLR 218

Cases referred to:

re Anglo-Oriental Carpet Manufacturing Co (1903) 1 Ch 914
Sanwa Australia Finance Ltd v Groundbreakers Pty Ltd (1990) 2 ACSR 692
Standard Chartered Finance Ltd v De Barros Nominees (1989) 7 ACLC 15
The Commercial Banking Co of Sydney Ltd v George Hudson Pty Ltd (1973) 131 CLR 605
Wilde & Anr v Australian Trade Equipment Co Pty Ltd (1981) 145 CLR 590

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Solicitors for the defendant : Philip & Mitaros

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 71 of 1990
No. 24 of 1991

BETWEEN:

CITIBANK LIMITED
Plaintiff

AND:

LINPUT PTY LTD
(In Liquidation)
Defendant

CORAM: MARTIN J.

REASONS FOR JUDGMENT

(Delivered 12 June 1991)

Procedural Matters

Application for an order extending the period for lodgment of a notice in respect of a charge held by the plaintiff ("Citibank) on property of the defendant ("Linput") (Companies Code s. 205(3) / Corporations Law s. 266(4)). I have not been directed to any material differences between the legislation as in force at the time Citibank first sought to institute proceedings in this Court for that relief, and the time when the matter was heard.

I need not now dwell upon various objections taken

by counsel for the liquidator of Linput as to procedural matters, they having been largely dealt with during the course of the hearing, by order. They principally related to the application having been first made under the Ordinary Rules of the Court, not the Companies Rules. The company entered an unconditional appearance in those proceedings and the liquidator filed an affidavit going to the merits. Proceedings under the Code are not invalidated by reason of any procedural irregularity unless the Court is of the opinion that the irregularity has caused, or may cause, substantial injustice that cannot be remedied by any order of the Court, and by order declares the proceedings to be invalid (s. 539(2)/s. 1322 see also r. 139 Supreme Court (Companies) Rules). I am not of the opinion that the irregularities caused or may cause substantial injustice and decline to make an order declaring the proceedings or any part of the proceedings to be or have been invalid.

Citibank filed a summons under the Companies Rules, in January 1991 and it was agreed that all the affidavits filed in the earlier proceedings could be used in those.

The original proceedings were initiated prior to an order being made for the winding up of Linput and the appointment of Mr Harkness as its liquidator.

Upon the hearing, senior counsel appeared on behalf of the liquidator, but the liquidator had never been

made a party. Any order extending the time for lodgement of the Notice of Charge would adversely effect the liquidator in relation to the assets of the company. He appeared to vigorously oppose the application. It has been held that a liquidator not appointed at the date of the making of an order extending the time for lodgement of a Notice of Charge was a person aggrieved by the order for the purposes of according to him locus standi to appeal (re Hewitt Nominees 4 ACLR 348). It is accepted that he should be added as a defendant.

Legislation

The relevant legislation at the date of the creation of the charge provided that:

". Where a company creates a charge it shall ensure that notice is lodged with the Commission within 45 days (s. 201(1))

. Where -

(a) an order is made, or a resolution is passed, for the winding up of a company; or

(b) an official manager is appointed in respect of a company,

a registrable charge on any property of the company is void as a security on that property as against the liquidator or official manager, as the case may be, unless -

(c) a notice in respect of the charge was lodged with the Commission under section 201 or 202, as the case requires -

(i) within the relevant period; or

(ii) not later than 6 months before the

commencement of the winding up or the appointment of the official manager, as the case may be;

(d) in relation to a charge other than a charge to which sub-section 201(3) or (4) applies - the period within which a notice in respect of the charge (other than a notice under section 206) is required to be lodged with the Commission, being the period specified in the relevant section or that period as extended by the Court under sub-section (3), has not expired at the commencement of the winding up or at the time of the appointment referred to in paragraph (b) and the notice is lodged before the expiration of that period (s. 205(1)).

. The relevant period means the period of 45 days or that period as extended by the Court (s. 205(3)).

. The Court, if satisfied that the failure to lodge a notice in respect of a charge was accidental or due to inadvertence or some other sufficient cause or is not of a nature to prejudice the position of creditors or shareholders, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seems to the Court just and expedient, by order, extend the period for such further period as is specified in the order (s. 205(3)/s. 266(4))."

The Charge

The charge arose in this way. On 9 May 1989 Citibank entered into a "Bill Acceptance Agreement" with Spersea Pty Ltd, ("Spersea") a company incorporated in Victoria. On the same date Linput, incorporated in the Northern Territory, entered into a "Deed of Assignment" with Citibank wherein it was recited that Citibank had provided or may provide loans, advances or other financial accommodation to Spersea or to Linput, Linput had agreed to

enter into the deed to secure any loans, advances or other financial accommodation provided or to be provided by Citibank to Spersea and Linput, and that only a part of the amount of the total amount secured or to be ultimately recoverable by or under the Deed was secured on property in the Northern Territory. By that Deed, Linput, as beneficial owner, assigned to Citibank all of its rights and benefits accruing under all agreements entered into from time to time between it and Harbour Bridge Holdings Ltd ("Harbourbridge"), a company incorporated in the British Virgin Islands, in respect of loans or other financial accommodation provided by Linput to that company on or prior to the date of the Deed. The Deed went on to provide that upon payment to Citibank in full of, inter alia, all monies which were then or thereafter owing and payable to Citibank by Spersea or by Linput or either of them, the Bank would, at the request and expense of Linput, reassign the property assigned to it. The property assigned also included all the books and records of Linput in the Northern Territory, and it was provided that of the total amount secured or to be ultimately recoverable by or under the Deed of Assignment, only A$15,000 should be secured by those books and records. It was that assignment to Citibank of the debt owing by Harbourbridge to Linput which created the charge giving rise to the obligation to lodge notice of it with the then Corporate Affairs Commission.

By a Deed of Covenant of the same date it was

warranted by Linput and another company, Linter Group Ltd ("LGL"), incorporated in New South Wales, that LGL had lent an amount of not less than 125 million pounds sterling to Linput, which sum had in turn been lent by Linput to Harbourbridge and that as at that date Harbourbridge owed Linput an amount of not less than that sum. On the same day, 9 May 1989, Citibank provided financial accommodation in the sum of $112m to Spersea. As at the end of February this year Citibank says the amount remaining due to it under the financial accommodation granted to Spersea and secured by the Deed of Assignment given by Linput, was "approximately $65m, together with interest".

Lodgment of Notice of Charge - Inadvertence

On 12 May 1989 Darwin solicitors received instructions from solicitors for Citibank in Melbourne to lodge notice of the charge with the Office of the Corporate Affairs Commission in Darwin (the Northern Territory being the place of incorporation of Linput). The period of 45 days for lodgment was to expire on 23 June.

On 16 May the Darwin solicitors lodged the appropriate notice with the Commission, but the accompanying Deed bore no stamp duty. The Commission caused there to be entered in the Register the time and date when the notice was lodged with the required particulars, and caused the words "provisional" to be entered on the Register. The

provisions of the Code (s. 203(5)) then allowed 30 days, or such further period as the Commission allowed, for evidence satisfactory to the Commission to be produced that the document had been duly stamped, whereupon the Commission was required to delete the word "provisional" from the entry in the Register. If the evidence was not produced within that period then the Commission was also obliged to delete from the Register all the particulars that were entered in relation to the charge. The document was lodged for stamping with the Commissioner of Taxes for the Northern Territory who raised a query on 23 May 1989. On 13 June the solicitors responded to the Commissioner's enquiry and on the same date requested of the Commission an extension of time within which to fulfil the stamping requirements and provide evidence that they had done so. The Commission responded on 15 June granting the extension of time until 16 July. On 5 July the Deed of Assignment was stamped.

In an affidavit sworn on 28 February 1991, a clerk in the employ of the Darwin solicitors deposed that on 5 July she attended at the offices of the Corporate Affairs Commission and informed an employee known to her as 'Rohan' that the stamp duty had been paid. She deposed to her normal practice in attending to such matters, including the making of a note of her attendance for her employer's files. However, she was unable to affirmatively depose to precisely what she did on that occasion, she could find no note, and there is no other evidence bearing on that question. She

swore that she recalled that Rohan had not made a note of what she had told him whilst he was in her sight and alleged that he had little experience on the counter at the Commission. She was cross-examined on her affidavit material and I am satisfied that, although she was probably doing her best to help the Court, what she was swearing to was her normal practice in relation to matters such as this. I am not satisfied that she had any specific recollection of this particular transaction at all. According to the solicitor to whom she was responsible, the clerk informed him on or about 5 July that the stamp duty had been paid and that the Commission had been informed. On about 25 July (about 9 days outside the extended period allowed by the Commission), he made enquires as to the whereabouts of the Certificate of Registration of the charge and ascertained that it had not been registered, whereupon he immediately informed the Commission of the payment of stamp duty. On 22 August 1989 he requested a further extension of time for registration of the charge, but the Commission refused that application on 25 August. In the meantime, on 17 July, all of the particulars relating to the charge had been deleted from the Register as required by the legislation. On 1 September the Darwin solicitors informed those instructing them of what had transpired and received instructions from their principals to relodge the required notice which they did three days later, that is, approximately seven weeks after the extension of time granted by the Commission had expired. There is no satisfactory explanation as to why it

took from 16 July to 5 September to lodge the notice the second time. There is a chronology but that is all. The application is for an order extending the time of lodgement until 5 September.

As has been pointed out in a number of cases (for instance re Flinders Trading Co Pty Ltd (1978) 3 ACLR 218 at 220), the Court is empowered to act on proof of any one of the alternatives set out in the section. The extension of time may be granted on the ground of inadvertence notwithstanding that the omission to register within the prescribed period may have prejudiced creditors. If one of the conditions is satisfied the Court has a discretion to order that the time for registration be extended. Although I cannot be satisfied as to just what it was that the clerk did or failed to do in relation to the proper notification of the payment of stamp duty to the Commission within the extended time allowed, the failure arose through inadvertence. She may have been "not properly attentive" by failing to notify the Commission or, if she did so, in failing to do so in a way which would ensure that the information was received and acted upon. However, it is not enough to simply have a finding which satisfies a prerequisite to the exercise of the discretion. There is a discretion to be exercised and that must be done taking into account relevant matters only, the comparative weight or importance to be accorded to each of them and bearing in mind the object of the exercise of the power.

What Happened in the Meantime

It is now necessary to go back to what was happening between the parties and others associated with them during the period between 9 May, when the documents were executed, and 4 September when the required notice was lodged the second time.

According to the General Manager of the Victorian branch of Citibank, who had responsibility for the relationship between Citibank and what is termed the "Goldberg group of companies" including Spersea, LGL and Linput, the loan made by Linput to Harbourbridge was to enable that company to attempt a takeover of a British company, Tootal Group Plc ("Tootal"); that takeover bid was not successful and the shares which had been acquired as part of that attempt were sold by Harbourbridge; according to Mr Goldberg, a Director of all the companies, the proceeds of sale of the Tootal shares were to be applied to build up an equity in Brick and Pipe Industries Ltd ("Brick and Pipe"). By the last week in May the manager believed that Harbourbridge had repaid the loan made to it by Linput, Linput in turn had repaid that money to LGL and that "accordingly the subject matter of the Deed of Assignment was no longer in existence". If that were so, then the charge created by the Deed of Assignment in respect of the funds which it had made available to Spersea was valueless but, according to its manager, it agreed to suspend the

exercise of its rights against Spersea until 17 September provided the amount owing was repaid by that date.

Blowing with the Wind?

The manager was aware by 4 September that the charge over the debt due by Harbourbridge to Linput had not been registered, but because it was believed that the subject matter of the charge had ceased to exist and an undertaking to repay the debt due by Spersea to Citibank by 17 September had been received, instructions were given to have the charge registered, but to refrain, for the time being, "from taking remedial steps in relation to the late lodgement for registration". On 18 September 1989 Citibank received $50m in respect of the debt due by Spersea, leaving a balance of $62m. Between that date and 17 January 1990, according to the manager, there were intense discussions (as might well be imagined) involving Citibank officers and representatives of the Goldberg Group in relation to repayment of the balance of the debt or the provision of further security, and, upon the basis of assurances then given, Citibank believed, up to the middle of January 1990, that the balance of the debt due by Spersea would be shortly repaid in full. However, information was received on 15 January 1990 which caused the manager to become concerned that Spersea would not be able to pay. Furthermore, towards the end of January 1990 Citibank received information that there was a possibility that the whole of the money owing by

Harbourbridge to Linput may not have been repaid, that is, part of the subject matter of the charge might still exist, and instructions were given shortly thereafter for this application to be made which, as already noted, was initiated on 14 February 1990. A question arises as to what effect, if any, a deliberate decision on the part of Citibank not to proceed to make an application to the Court when it thought that there would be nothing to be gained, and a change of heart after a lapse of about five months when it appeared that perhaps there might be something to be gained, should have upon the exercise of discretion. During January Citibank took further security in relation to the debt due by Spersea, as appears later, but that was not revealed to the Court by Citibank.

The Appointment of the Liquidator and its Effect

Confusion was confounded. The Directors of Linput resolved to appoint a liquidator on 16 February 1990, that is, two days after these proceedings were initiated, and the petition to wind up the company was filed 10 days later. Mr Harkness was appointed provisional liquidator on 14 March and liquidator on 18 June. If there is no order extending the period for lodgement of a notice in respect of the charge then it is void as a security in respect of the property charged as against the liquidator. The question now is whether an extension of time will be refused because of the winding up of Linput and, if not, will the extension

of time only be granted if exceptional circumstances are shown?

Some of the cases to which reference was made during the course of argument were decided upon legislation prior to the coming into operation of what was commonly called the Companies Code. (Strictly speaking there was no such Code in the Northern Territory, but the legislation in force at the time the charge in this matter was created was that common to other Australian jurisdictions). Under that earlier legislation it was provided, in s. 100 or its equivalent, that if the requirements as to registration of a charge were not complied with, the charge "is, so far as any security on the Company's property or undertaking is thereby conferred, void against the liquidator and any creditor of the company". The provision as to extension of time was similar to that now under consideration.

Upon a winding up order "the undertaking and assets of the company passed under the control of the liquidator whose duty it was to convert them into money and out of the proceeds to pay the creditors existing at that date. The assets have been said to have been impressed in the hands of the liquidator with a statutory trust in favour of the creditors. Upon the commencement of the winding up, an immediate duty was cast upon the liquidator to collect the assets and distribute them among the creditors then existing" re Anglo-Oriental Carpet Manufacturing Co (1903) 1

Ch 914 at 918. To the same effect Brightman LJ. in re Ashpurton Estates Ltd (1983) 1 Ch 110 at 123, "Once the company has gone into liquidation, the existing unsecured creditors are interested in all the assets of the company, since the liquidator is bound by statute to distribute the net proceeds pari passu among the unsecured creditors, subject to preferential debts. The assets of the company are at that stage vested in the company for the benefit of its creditors. The unsecured creditors are in the nature of cestui que trust with beneficial interest extending to all the company's property". Lord Justice Brightman went on to say "It follows from this approach that the court must invariably refuse to extend the time for registration once the company has gone into liquidation". The position was seen to be different where an extension of time was sought to register a charge in respect of assets of a company which was a going concern; "The reason for this was that such unsecured creditor could not have intervened to prevent payment being made to the lender whose charge was not registered. Nor could such unsecured creditor have prevented the creation of a new charge, duly registered, to take the place of the unregistered charge. The proviso ("that this order be without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered") was intended to protect only rights acquired against, or affecting, the property comprised in the unregistered charge, in the intervening period between the date of the creation of the unregistered charge and the

registration of such charge." The ordinary unsecured creditor was left in no better position if an application was being made to extend the time for registration of a charge than when the charge was created or the statutory period for registration of it expired. A company can give security over all or any of its assets to the potential detriment of its then unsecured creditors. Under current legislation such a charge could exist for a period of 45 days without notice being given on any public register. Nevertheless, it would secure such of the assets of the company as were covered by the charge and take effect notwithstanding the claims of unsecured creditors whose debts may have been incurred before or after the date of the creation of the charge. However, once the company goes into liquidation the position of unsecured creditors may be prejudiced if an extension of time is granted for the lodgment of notice of a charge because otherwise they all rank equally, (including a creditor whose charge is made void as a security against the liquidator). If the chargor is insolvent or a winding up order is imminent like considerations apply in anticipation of the appointment of a liquidator.

The position in England, as recorded in re Ashpurton Estates at p. 124, was that it had become firmly established by 1983 that the Court would not make an order once liquidation had supervened, anything in the nature of the proviso to the order, making it without prejudice to the

rights of parties acquired prior to the time when the charge should have been actually registered, being futile. Their Lordships also examined the cases which showed a division of judicial views as to the relevance of solvency where there was no actual liquidation at the date of the proposed order. They went on to dismiss an appeal against a decision refusing to extend the time to register a charge upon the basis that, as a matter of discretion, the Court will not make an order extending that time once a winding up has supervened "save in very exceptional circumstances" (at p. 129). Further, the mortgagee having deliberately elected not to seek registration out of time when the mistake was discovered, believing that course to be in its interests, the Court ought not to exercise its discretion when subsequently the mortgagee decided that the opposite course was for its benefit. In the course of their reasons their Lordships rejected an argument that the mortgagor had only one known unsecured creditor of substance and that that creditor had knowledge of the charge at all material times. They said that knowledge was irrelevant and that it was not the creditor which had to be considered, but its outside creditors who were the only persons ultimately interested in the creditor. That creditor was part of a group of companies known as the I.L.I. group, most of the constituent companies of which were in liquidation. All inter-group credits would be wiped out in the course of the liquidation of the constituent members of the group and thus the ultimate beneficiaries, if the mortgagee could not register

its charge and had to rank as an unsecured creditor, would be the outside creditors, one of which had a claim in excess of 1m pounds sterling (p. 122). It was also held to be irrelevant to the circumstances of that case that no unsecured creditor of the mortgagee was prejudiced by the non-registration of the charge. In summing up, the Court held that the Judge from whom the appeal was brought was entitled in the exercise of his discretion, (i) to take into account as decisive against the mortgagee the then fact of liquidation, (ii) to reject the submission that exceptional circumstances existed which entitled to give the mortgagee priority notwithstanding the liquidation, and (iii) to take into account, as equally decisive against the mortgagee, the fact that it had deliberately chosen not to apply for an extension of time when the mistake of non-registration was first discovered; "On this last point, we think that, when an unregistered chargee discovers his mistake, he should apply without delay for an extension of time if he desires to register; and the Court, when asked to exercise its discretion, should look askance at a chargee who deliberately defers his application in order to see which way the wind is going to blow" (at p. 132). There is no relevant distinction between the failure of a chargee to have the charge registered due to inadvertence than by mistake. However, under the legislation there being considered, it was not open to lodge notice of the charge out of time unless an order had been obtained. Under the legislation applicable to this case notice can be lodged at

any time. Their Lordships approved the majority decision in re Flinders Trading Co Pty Ltd that an application could properly be refused if a winding up was imminent.

Moving to Australian cases reference has been made to the following, amongst others, The Commercial Banking Co of Sydney Ltd v George Hudson Pty Ltd (1973) 131 CLR 605. That was a decision under s. 106 of the earlier Companies Act (similar to that under consideration in re Ashpurton Estates). There the company was in the course of being wound up when the Registrar of the Court made an order extending time for registration of a charge which would give the secured creditor the opportunity to strengthen his hand against a liquidator who had already been provisionally appointed. At p. 613 Menzies J. said "It is a deeply rooted principle of company law that, when liquidation has commenced, one creditor should not be assisted by the court to improve its position vis a vis other creditors".

In Vector Capital Ltd v SNS Software Network Systems Pty Ltd (1988) 12 NSWLR 1 Needham J. had occasion to examine the New South Wales legislation which was in the same terms as that operating in the Territory when the assignment of the debt in this case was executed. When the charge was given in that case the plaintiff had instructed its solicitor to affect registration and the clerk first lodged the deed with the Stamp Duties Office, (rather than obtain provisional registration), but, when advised that the

stamped document was ready for collection, she did not do so, but went on holiday. The period of 45 days expired about 3 weeks before the solicitor discovered the state of affairs on the 18 May 1987. The charge was lodged for registration on 29 May and on 31 July the summons to extend the time for registration was filed. On 11 September a summons was filed seeking the winding up of the company and the summons for extension of time came before his Honour on 28 September when the matter was further adjourned. A winding up order was made on 6 October and the summons to extend time came on for hearing on 9 November. The company was one of a group all in liquidation, whose assets amounted in all to $388,000. The liquidator had not been able to apportion the assets amongst the three companies in the group, but the debts of the defendant, not including that of the plaintiff or of any overseas creditors, as at the date of the hearing of the summons to extend the time, amounted to over $250,000. Apart from those details there was no evidence from any creditor as to the circumstances of the contracting of his debt, although it appears that all creditors had the opportunity to place any information they wished before the court. There was no evidence that any creditor became such after search of the Register or because he was unaware of the plaintiff's claim to be a secured creditor. His Honour observed, from the figures set out in his reasons, that if an order was made extending the time for registration of the charge until 29 May 1987, the claim of the plaintiff would have priority over all unsecured

creditors who would get nothing. In the course of his reasons, his Honour pointed to what he regarded as being differences between the legislation he was there considering and the previous legislation upon the likes of which In re Ashpurton was decided. At p. 6 of the report he says that the fact that a winding up commences before the expiration of the time for lodgement is not effective to invalidate the charge (see s. 205(1)(d)). His Honour went on to say "The strong argument, under the previous legislation, that an order extending time for registration of a charge should not, except in the most extraordinary circumstances, be made when the winding up commences because the effect of the winding up is to give the unsecured creditors a beneficial interest in the assets of the company, must be considerably weakened in the case of the provisions of the Code because of the existence of s. 205(1)(d)." That subsection envisages registration after the commencement of a winding up provided it is within 45 days of the creation of a charge or within the period for registration as extended by the court under s. 205(3). The legislation treats the rights of unsecured creditors to an interest in the assets of the company as being expressly subject to the court's power to extend time. Having considered various cases including re Flinders Trading Co, In re Ashpurton and earlier New South Wales cases, his Honour concluded, commencing at the bottom of p. 7, that there was no case binding on him which required him to hold that insolvency or the commencement of winding up before an application under s. 205(3) was heard

or made was a factor fatal to such an application. He considered that the fact of winding up is relevant to the exercise of a discretion, but does not require that the discretion be exercised in one way.

In Standard Chartered Finance Ltd v De Barros Nominees (1989) 7 ACLC 15 Pidgeon J. in the Supreme Court of Western Australian drew attention to the reference by Gibbs J. in Wilde & Anr v Australian Trade Equipment Co Pty Ltd (1981) 145 CLR 590 at 596 that the provisions as to registration of charges are intended to protect persons who may become unsecured creditors of the company. Pidgeon J. went on to say that the applicant in the case before him, the chargee, had not attempted to prove there was no prejudice to unsecured creditors, but observed that it would be very difficult for that to be affirmatively established. At p. 19 he expressed his agreement with the observations of Needham J. that winding up is relevant to the exercise of discretion but does not require the discretion to be exercised in one way. That case was taken on appeal and is reported as Douglas-Brown v Standard Chartered Finance Ltd (1990) 2 ACSR 737 (Mr Douglas-Brown was the Liquidator of De Barros Nominees). The chargee lent money upon security of a Bill of Sale, notice of which was registered on the Bill of Sale Register, but not lodged for registration in accordance with s. 201 of the Code. The period for lodging notice of the Bill of Sale with the Corporate Affairs Commission expired on 27 June 1985. In July of that year the chargee

was informed by the appellant, in his then capacity of administrator of the company, that the company was likely to go into liquidation. On 15 August 1985 a petition was presented to wind up the company. The respondent lodged notice of the Bill of Sale for registration on 23 August 1985 and a winding up order was made on 6 November 1985. At p. 740 Malcolm CJ. and Roland J. (with whom Wallwork J. agreed) pointed out that the scheme of the Code differed from the earlier Companies Acts in that it allowed the lodging of notice and registration of a charge, after the time for the filing of the statutory notice had expired, without any order. That was done in this case. Further, pursuant to and subject to s. 204(1), which incorporates the provisions of schedule 5, in so far as other secured creditors without notice of the previous charge are concerned, priority is given to the security from the date of that registration. As their Honours pointed out, under s. 100 of the Companies Act, failure to lodge notice for registration within the required time made the security void "against the liquidator and any creditor of the company". No provision was made for the charge to be accepted for registration out of time unless an order was made under s. 106 of that Act. At p. 741 their Honours noted that the policy of the Code was that an unregistered charge is no longer void as against unsecured creditors. In that case the questions requiring consideration were:

1. Did any creditor suffer prejudice between the date

when the notice should have been lodged and the date when it was in fact lodged?;

and

2. Did any creditor suffer prejudice between the date when the notice should have been lodged and the date on which the order (extending time, the subject of the appeal) was made some 2 1/2 years later or at least between the earlier date and the date when the application for that order was made, 14 January 1988?

The notice in that case was lodged before a winding up order was made, but after presentation of the petition for winding up and liquidation was at that time imminent. The application for an extension of time was made much later, but their Honours were of the view, expressed at p. 745, that s. 205(1)(d) when read with s. 205(3) made it clear that the possibility remained open under the Code that an order extending time for lodgement of notice may be made after the commencement of the winding up. Their Honours agreed with the observations of Needham J., to which reference has already been made, but drew attention to persuasive authorities that suggested to them that an extension of time would almost invariably be refused after the commencement of a winding up and would only be granted in exceptional circumstances. Reference was made to

Ashpurton and Flinders Trading. They noted the difference between the Vector Capital case and that with which they were then dealing, in that in the former the provisions of s. 205(1)(d) could apply, but that that was not the case before them because the notice was lodged after the "commencement of the winding up". Their Honours then proceeded to examine the facts to see whether all of the circumstances were sufficiently exceptional so as to overcome what they described as "the normal rule". A similar view was adopted by the Full Court of the Supreme Court of Queensland in Sanwa Australia Finance Ltd v Groundbreakers Pty Ltd (1990) 2 ACSR 692. At p. 695 Kelly SPJ., with whom Macrossan CJ. and Connolly J. agreed, having reviewed many cases considered that the following principles emerged:

(a) The fact of winding up is relevant to the exercise of the discretion but does not require the discretion to be exercised one way.

(b) The probable detrimental effect of the making of the order on unsecured creditors is a relevant but not overriding consideration.

(c) The discretion is sparingly exercised and if a company is obviously insolvent or already in liquidation it will be exercised only in circumstances which may properly be regarded as

exceptional.

In that case a series of Bills of Sale had been given and notice was lodged out of time for varying periods, but up to 51 days late. The last was lodged on 15 May 1989, a winding up application was made on 5 July 1989, a provisional liquidator was appointed on 7 July and the winding up order on 1 August. The application for extension of time was filed on 17 October 1989. At p. 699 the Court observed that the absence of evidence of a creditor acting in reliance upon the Register is a relevant consideration in the exercise of the discretion given by s. 205(3). In that case the question also arose as to whether unsecured creditors should have been given the opportunity to bring any possible prejudice to the notice of the Court. Whilst there may well be situations in which that should be done, in the case then before the Court, the unsecured creditors were sufficiently represented by the liquidator for that purpose.

I accept the submissions made on behalf of the liquidator here that the assets of Linput are now vested in the hands of the liquidator. The parties agree that the winding up commenced on 26 February 1990. (I would have thought it was on 16 Febraury 1990 when, according to the affidavit of Mr Furst in the winding up application, the directors of the company resolved that it was insolvent and that application should be made for the appointment of a

liquidator s. 365(1) of the Code. Either way it does not matter to the outcome). As the notice was lodged on the second occasion without an order extending time, but prior to commencement of the winding up, regard can be had to the provisions of s. 205(1)(d). An order to extend time may be made notwithstanding that a Liquidator has been appointed, but bearing in mind, with respect, the weight of persuasive authority to which I have referred the order extending time for lodgement of the notice will only be granted if exceptional circumstances can be found, but that fact is not fatal to the application.

What about the Unsecured Creditors?

Any prejudice that might be sustained by unsecured creditors has consistently been a matter taken into account by the courts upon an application to extend time for lodgement of a charge against an asset or all of the assets of a debtor company. In an affidavit sworn in March 1990, in support of the application, the general manager of Citibank deposed that at all times during the dealings between Citibank and Linput resulting in the signing of the Deed of Assignment on 9 May 1989, Citibank held the belief that Linput was solvent; that belief was the result of information obtained from Linput by Citibank and from assurances made by Linput to Citibank as to its solvency; the Deed of Assignment contains representations by Linput to Citibank that Linput had borrowed at least 125m pounds

sterling from LGL and had lent that money to Harbourbridge, that 50% of the shares in Linput were legally and beneficially held by LGL, and the other 50% were legally and beneficially held by Istacat Pty Ltd; both LGL and Istacat Pty Ltd are corporations in what may be broadly described as the "Goldberg Group" of companies; although they are not related companies, the ultimate beneficial owners of Linput, LGL and Istacat Pty Ltd are a Mr Abraham Goldberg and persons associated with him. The general manager further deposed that at the time Linput entered into the Deed of Assignment it was believed that Mr Abraham Goldberg was effectively in control of all three companies and consented to the giving of the security by Linput to Citibank; for example, on the same date as the Deed of Assignment was executed, Mr Goldberg entered into a guarantee of the obligations of Spersea Pty Ltd, which guarantee contained various representations, warranties and covenants in relation to the loan from LGL to Linput and the loan from Linput to Harbourbridge. Under clause 9.7 of the Deed of Assignment, Linput covenanted with Citibank that until Citibank had been paid all the money secured by the Deed of Assignment, Linput would have no liabilities other than the loan from LGL of not less than 125m pounds sterling. The manager goes on to say that no facts were known that suggested to the manager that Linput had since 9 May 1989 incurred debts other than those referred to above. In the manager's belief LGL, as the sole creditor of Linput, was aware of the arrangements between Citibank and Linput with

respect to the granting of security over the loan to Harbourbridge, and consented to Citibank becoming a secured creditor of Linput ranking in priority to the unsecured rights of LGL; for example, on the same date as the Deed of Assignment Citibank, Linput and LGL entered into a Deed of Covenant containing various representations, warranties and covenants in relation to the loan from Linter Group Limited to Linput and the loan from Linput to Harbourbridge. There was no evidence to dispute that of the manager.

As already related, on 14 March 1990 John Beresford Harkness was appointed provisional liquidator of Linput, and as liquidator on 18 June 1990. In his affidavit sworn 18 December 1990, Mr Harkness disclosed that by letter dated 17 October 1990 he had written to the Darwin solicitors for Citibank advising he was not as of then aware of any reason why an extension of time for the lodgement of the notice of the charge should be contested, and that he was unaware if the proposed registration of charge would cause prejudice to other creditors. There was exhibited to the affidavit a true copy of the report as to the affairs of Linput as at 14 March 1990 showing that it had two creditors, being LGL owed approximately $205m, and Broadcast and Communication Holdings Limited owed approximately $800,000. Mr Harkness said that upon receiving notice of this application he made enquires of the creditors of Linput in relation to the application generally and the circumstances surrounding the creation of the charge, and

was then instructed to oppose the application. Furthermore, he deposed that he had been directed on behalf of LGL, the major creditor of Linput, to oppose the application. (It appears that Mr Harkness had previously held an appointment as a joint receiver and manager of LGL, together with Lindsey Philip Maxsted, although he had retired from that position as at 14 November 1990). He makes the point that on the information available to him Citibank had not advanced any monies to Linput. Counsel for the liquidator points out that on the evidence it does not appear that Linput obtained any benefit from the transaction involving Citibank. The statement of affairs shows sundry debtors of Linput; Foxlow Pty Limited approximately $45m, Istacat Pty Ltd $125m and Harbourbridge $12.5m approximately, but all of those amounts were regarded as not being realisable. Foxlow Pty Limited and Istacat Pty Ltd were said to be in liquidation at the date of the report as to affairs of Linput. The report does not disclose any other assets of the company nor any claims by employees, preferential creditors or partly secured creditors, and the only unsecured creditors referred to in that report are those already mentioned, LGL and Broadcast and Communication Holdings Limited. There was no mention of the charge in favour of Citibank.

There is no evidence as to the creditors of LGL or Broadcast and Communication Holdings Limited.

In his affidavit of 18 December 1990 Mr Maxsted, the remaining receiver and manager of LGL, confirmed that that company was the major creditor of Linput in the sum of approximately $205m "which arose out of inter company transactions involving an attempted takeover of Tootal." In a further affidavit, sworn 30 January 1991, Mr Maxsted provided considerable detail and supporting documents which he asserted established that debt. A closer examination of those records, particularly the account of Linput in the annual general ledger of LGL, shows that there were substantial financial transactions prior to 9 May 1989 and thereafter, including a debit to the account of Linput of $125m a few days after the creation of the charge and a credit of approximately $217m related to Harbourbridge on 19 May 1989.

The solicitor for Citibank, Mark Anthony Troiani, in his affidavit sworn 27 February 1991, in reliance upon documents annexed to the affidavit and discussions with the directors of Harbourbridge deposed that:

(i) As at 9 May 1989, when the Deed of Assignment was executed, the amount of the loan from Linput to Harbourbridge was approximately 129m pounds sterling.

(ii) Notice of assignment of the loan was duly given to Harbourbridge.

(iii) On or about 19 May 1989 approximately 100m pounds sterling of the loan was repaid to Linput leaving a balance of approximately 28m pounds sterling due to Linput.

(iv) On or about 1 June 1989 interest of approximately 800,000 pounds sterling was capitalised to the Linput/Harbourbridge loan account leaving a balance of approximately 29m pounds sterling.

(v) On or about 16 June 1989 approximately 2.5m pounds sterling of the loan was repaid to Linput, leaving a balance of approximately 26m pounds sterling.

(vi) Later in June 1989 the loan account was converted to Australian dollars (approximately $53.5m) and transferred to another account which also existed between Linput and Harbourbridge.

(vii) A number of other transactions have occurred on the Australian dollar account between Harbourbridge and Linput, with the result that as at that time it appeared to Mr Troiani that Harbourbridge owed Linput an amount of approximately $205m.

Having performed that analysis the solicitor deposed that in his belief part of the loan which was the subject of the Deed of Assignment in favour of Citibank, being approximately $50m, remained owing by Harbourbridge to Linput.

In a late affidavit, sworn 1 March 1991, the solicitor for Linput provided further information as to the financial transactions involving Harbourbridge and other companies in the Goldberg Group (all now in liquidation) to demonstrate that Harbourbridge has no realisable assets and therefore will not be able to pay to Citibank the debt due by it to Linput.

The evidence on both sides relating to these financial affairs was admitted without objection. There are discrepancies between the evidence produced by each side, no doubt due to the extent to which the affairs of the various companies have been fully investigated and the information available to each. Neither criticises the other, and the broad picture as outlined above has been regarded as sufficient and accurate enough for the purposes of the application now being dealt with.

At all relevant times Messrs Dean, Boskovitz and Gale are shown in the records as having been the directors of LGL, Broadcast and Communication Holdings Limited and Linput. Mr Goldberg and Mr Furst were also directors of LGL

and Broadcast and Communication Holdings but were not shown as directors of Linput. Whether it is right to impute to one company the knowledge which one or more of its directors happened to have by reason of his or their dealings with or position on the Board of another company when considering the issues in this case, is not a question which needs to be determined. The documentary evidence in the Deed of Covenant to which Citibank, Linput and LGL were all parties shows that LGL was well aware of what was happening between Linput and Citibank, including the mortgage by Linput of the loan from Linput to Harbourbridge. LGL was aware that that asset of Linput had been encumbered and as at that date Linput owed it an amount of not less than 125m pounds sterling. LGL was prepared to remain as an unsecured creditor and to assist in securing the arrangements between Linput and Citibank whereby Citibank took security over a substantial asset of Linput. It was during the period of 45 days after the creation of charge that the debit was raised in the account of Linput in the books of LGL for $125m on 18 May 1989, followed on the next day by the credit of $217m. The background to those two substantial adjustments to the Linput account has not been fully explained in the course of these proceedings, and on the evidence available I can do no more than simply note them. Had LGL examined the Register prior to the transaction on 18 May it would have not found any reference to the registration of the charge given by Linput to Citibank, but that would have provided it with no great comfort since the statutory period for

registration of the charge had not expired.

The circumstances surrounding the debt of approximately $800,000 by Linput to Broadcast and Communication Holdings Limited is not disclosed. Mr Harkness says that he has made enquires of the creditors of Linput in relation to this application and it is to be inferred that that company had nothing to put before the Court beyond the fact that it was an unsecured creditor. There is no evidence that it relied upon the absence in the Register of notification of the charge in entering into whatever the arrangements were which led to it being owed money by Linput. In the Deed of Assignment Linput covenanted that as from the date of the security it would have no liability other than the loan from LGL, but that does not prove when the liability to Broadcast Communication Holdings Limited was incurred, and there is just no information as to when it was. Though substantial in itself the amount owed by Linput to that company is insignificant in the overall scheme of things. In a letter addressed to the Darwin solicitors for Citibank of 13 July 1990, Mr Harkness said that Broadcast Communication Holdings Limited was a member of "the Linter Group" and that he was then unable to advise when the debt was incurred.

There is evidence that a copy of a summons indicating the nature of the relief sought in this matter and of the affidavit material in support of it then

available had been sent by ordinary post to the company at its registered office in Sydney, on 23 November 1990 by the Darwin solicitors for Citibank. I am satisfied that that company has had notice of these proceedings.

Additional Securities Held by Citibank

The charge over the debt owed by Harbourbridge to Linput was but one of numerous securities taken or to be taken by Citibank under the terms of the Bill Acceptance Agreement between it and Spersea. The securities were all detailed in the first schedule to that Agreement. That Agreement, and in particular its provision in relation to securities, was not disclosed to the Court by Citibank. The proceedings were originated on 14 February 1990 and affidavits were filed in support of the applicant's case including one exhibiting the Deed of Assignment, but it was not until Mr Harkness' affidavit of 20 December 1990 was filed that the terms of the Bill Acceptance Agreement or the securities were disclosed. In that affidavit Mr Harkness also deposed that the terms of that Agreement were further amended on 8 and 19 January 1990, the effect of which was to provide further security to Citibank pursuant to the terms of the Agreement, including a guarantee made 19 January 1990 executed by Arnsberg Pty Ltd in favour of Citibank, and an equitable mortgage of shares dated 19 January 1990 executed by Arnsberg in favour of Citibank in respect of all shares held by Arnsberg in Brick and Pipe. What form the

amendments referred to is not disclosed, but no objection was made to the evidence being brought forward. As earlier mentioned that was not disclosed to the Court either. Counsel for the liquidator argued that the non-disclosure of the other securities was a matter to be taken into consideration in the exercise of discretion, the submission being, as I understand it, that there is an obligation on an applicant for an extension of time to disclose material which might show that it will not be prejudiced if the application is refused because it has other means of recovering or seeking to recover the debt which was secured by the charge then void as a security against a liquidator.

I need not examine all of those other securities in detail. Suffice it to say that the companies which gave or were to have given guarantees are either in liquidation or receivership and regarded as insolvent. As to a guarantee by Citibank in favour of Citicorp Australia Limited, listed amongst the securities in the schedule, I am satisfied that it was included in error in that it secured the obligations of Spersea Pty Ltd to Citicorp Australia Limited and did not secure the obligations of Spersea Pty Ltd to Citibank under the Bill Acceptance Agreement. Another security required the deposit with Citibank of share certificates for shares in the capital of Battery Group Limited together with blank share transfers duly executed by the holders of such shares. Citibank has disclosed that the

share certificates were deposited as required, but the share certificates were returned to the "Goldberg Group of Companies". The circumstances giving rise to the return of those share certificates and their value is not disclosed. It might be assumed that the security over the shares was discharged, but I am not prepared to so hold in the absence of further evidence. There is one security being termed "a guarantee and indemnity by the subsidiaries of Linter Textiles Corporations Ltd" in the schedule, the value of which cannot yet be ascertained according to the general manager of Citibank. There may be something in it, but that remains to be seen. The value of the personal guarantee of Mr Goldberg is in question since he is bankrupt. If it turns out that there is amongst all of these securities, not all of which have been described, something of value which can be used to discharge or partly discharge the debts owing to Citibank by Spersea, then, to that extent a benefit accrues to Linput.

The Proceedings in Victoria

On 24 April 1990, that is a little over two months after Citibank initiated these proceedings, LGL (by then in receivership) commenced proceedings in the Supreme Court of Victoria against a number of defendants including Citibank Limited and Arnsberg Pty Ltd (provisional liquidator appointed). The Statement of Claim sets out the plaintiff's case -

- As to how it says it was induced to advance approximately $206m to Arnsberg to enable it to purchase fully paid shares in the capital of Brick and Pipe.

- It alleges the money was provided in late May and early June 1989, and during about that same period of time Arnsberg purchased over 51 million shares in Brick and Pipe. The repayment of the monies which LGL provided or advanced to Arnsberg for the purchase of those shares was not secured in any way, and the plaintiff derived no benefit or advantage from the provision or advance of those monies.

- On 9 June 1990 Arnsberg and other defendants entered into agreements relating to the advance of further substantial amounts of monies to Arnsberg to purchase up to 100% of the share capital of Brick and Pipe and securities were given by way of equitable mortgages over all the shares in Brick and Pipe.

- It is then alleged that by a share mortgage of 19 January 1990 Arnsberg mortgaged in favour of Citibank by way of equitable mortgage, all its rights, title and interest in the Brick and Pipe shares held by it to secure the repayment of

monies advanced to Spersea Pty Ltd by Citibank.

. It is then claimed that some of the defendants caused and procured Arnsberg to grant various share mortgages including that to Citibank, knowing full well that the grant of those mortgages would or may prevent the plaintiff recovering any of the funds it provided or advanced to Arnsberg for the purchase of the shares.

. The plaintiff claims that in all of the circumstances set out in the Statement of Claim (I have only referred to those which seemed to be important for the purposes of this case) the 51 million shares in Brick and Pipe which Arnsberg purchased with the monies provided by LGL were from the time of purchase held upon a constructive trust for that company, and that the plaintiff had an equitable interest in those shares or the proceeds of their sale, which has priority over the interest claimed by the other mortgagees including Citibank.

. Receivers appointed by one of the share mortgagees sold or agreed to sell all of the shares in Brick and Pipe held by Arnsberg in about April 1990 and LGL says that the monies are held upon

constructive trust for it, and that it is entitled to the sum derived from the sale in priority to the claims of the holders of the share mortgages.

No relief is sought by Linter Group Limited against Citibank other than a declaration that the proceeds of sale of the shares in Brick and Pipe are held on constructive trust for the plaintiff, and that it is entitled to those proceeds in priority to any of the claims of the mortgagees including Citibank.

In its defence and counter claim, Citibank refers to the Deed of Assignment and pleads that Linput, in breach of the Deed and in breach of its duties as a trustee arising from the Deed, paid monies received by it from Harbourbridge to LGL rather than to Citibank, which monies it says were paid by LGL to Arnsberg and Arnsberg applied it to the purchase of the 51 million shares in Brick and Pipe. It therefore claims that Arnsberg held upon constructive trust for Citibank so many of the shares in that company as it purchased with the money which Citibank says was paid by Linput to LGL in breach of the trust established by the Deed.

There are other pleadings in defence to the claim of LGL and by its counterclaim Citibank asserts that the share mortgage held by it ranks in point of priority ahead of any entitlement of LGL and other mortgagees. It seeks a

declaration that the proceeds of sale of so many of the Brick and Pipe shares as Arnsberg purchased with the monies Citibank alleges were held in trust for it, are held upon constructive trust for it and that it is entitled to the proceeds of sale in priority to any of the other claims.

The effect of all that is that Citibank is party to litigation in the Supreme Court of Victoria in which it is seeking to establish and pursue a claim to monies which were derived from the sale of shares in Brick and Pipe, which shares, Citibank says, were acquired in breach of trusts established by the Deed of Assignment. The pleadings show that the litigation will give rise to disputes of fact and difficult questions of law. What the outcome will be as far as Citibank is concerned is impossible to predict. Linput, however, says that regardless of what may be the outcome or potential outcome of those proceedings in Victoria the fact that they were on foot should have been disclosed by Citibank in these proceedings, and further, that these proceedings were designed to procure what was called a "collateral advantage" in respect of Citibank's position in the proceedings in Victoria. The proceedings in this jurisdiction were commenced before the proceedings in Victoria. In those latter proceedings Citibank is a defendant and it has raised issues there against LGL which it was obliged to raise given the relief against it sought by that plaintiff. Furthermore, if the time for lodging of the notice of the charge given by Linput to Citibank is not

granted then it is void only as against the liquidator of Linput. It has not been demonstrated to me by those representing Linput that the outcome of this application will have any bearing upon the issues raised in the litigation in Victoria. Neither Spersea Pty Ltd nor Linput are parties to that litigation.

Conclusion

In the circumstances of this case the object of the grant of the discretion to extend time for lodgement of the notice of charge, the company being in the course of being wound up, is to enable the Court to balance the prejudice to the creditor whose security is void against the liquidator, against that of the other creditors and anyone else concerned whose position may be prejudiced if the avoidance is displaced.

The following are the principal considerations:

1. The charge was created in favour of Citibank at a time when Linput was believed to be solvent.

2. Although Linput derived no discernible benefit from the financial accommodation provided by Citibank to Spersea, the two companies were of the same group and subject to common control.

3. As soon as practicable after the creation of the charge notice was lodged with the Commission and provisional registration achieved.

4. In accordance with what the legislation permits, steps were taken to attend to the duty requirements of the Territory within the extended period allowed by the Commission.

5. All of the requirements to enable the "provisional" notification on the Register to be deleted were achieved, except that, by inadvertence, the Commission was not properly informed of the payment of the duty.

6. During the period up to 16 July there was public notice of the creation of the charge by virtue of the provisional registration. (Unfortunately, there is no evidence as to whether public notice of the charge was still available notwithstanding the deletion of its provisional registration status).

7. There is no satisfactory explanation for the delay from the time of the loss of the provisional registration to date of second lodgment, a period of the order of 7 weeks.

8. The delay in bringing the application and the change of mind which caused it is not so important as it may have been under the previous legislation, given that notice could be and in fact had been lodged for the second time much earlier.

9. The application was brought, though in an irregular manner, prior to the commencement of the winding up, whether that was the date of the resolution of the directors or the date of the filing of the application for the winding up.

10. The other major creditor of Linput, LGL, was a party to the legal arrangements entered into to secure the Citibank loan at the time when it was owed a substantial sum by Linput for which it was unsecured and it was also a party to subsequent events whereby the value of the charge to Citibank was at least diminished.

11. Broadcast Communication Holdings Limited, the only other creditor, has not placed any information before the Court. I bear in mind, however, the detriment it may suffer if the order applied for is made.

12. There is no evidence as to the creditors of either

LGL or Broadcast Communication Holdings Limited.

13. Citibank failed to disclose anything about the other securities it had available to it at the time it entered into the arrangements with Spersea and the securities taken in relation to the Brick and Pipe transaction in January 1990. I accept that there is an obligation upon a chargee to make full disclosure to the Court of facts bearing upon the question of whether it will be no better off than as an ordinary unsecured creditor of the company in liquidation. That is so even if the liquidator of the company ought to be able to discover whether any additional securities have been given. It is not certain that a liquidator will always be able to ascertain all securities which might have been obtained in relation to a loan to the company in liquidation. The securities taken or to be taken might not always be recorded in such detail as in this case and may well be supplied by parties far removed from those directly involved in the loan. The fact that the chargee may be of the opinion that the other securities are or are likely to be of little or no value is immaterial. But the reason for nondisclosure may range from being entirely innocent to a deliberate attempt to withhold information from the Court with a view to

misleading it. In this case it was suggested that some sinister connotation should be drawn from the failure to make disclosure of the other securities including those given in January 1990, but I decline to make such a finding in the absence of such a suggestion having been clearly put to the responsible officer of Citibank in the witness box.

14. The value of any of the additional securities is unknown.

15. I am not satisfied that this application is in any way an abuse of the process of this Court as being an attempt to derive some collateral advantage in relation to the proceedings in Victoria.

I am satisfied that on balancing these matters those favouring the applicant outweigh those favouring the liquidator, and that those favouring the applicant amount together to such exceptional circumstances as to justify the exercise of discretion in favour of the applicant.

Orders

(1) The plaintiff is granted leave to continue these proceedings against Linput Pty Ltd (In Liquidation) as from the date of the order for the

winding up of the company.

(2) John Beresford Harkness be added as a defendant as liquidator of Linput Pty Ltd.

(3) The period of 45 days specified in s. 263(1) of the Corporations Law is extended from 16 July 1989 to 5 September 1989 with respect to the charge called "Deed of Assignment" created 9 May 1989 in which Citibank Limited is the bank and Linput Pty Ltd is the mortgagor at which charge was allocated no. 7005 in a Register of Company Charges kept by the Commissioner for Corporate Affairs.

I will hear counsel as to any other orders and as to costs.