

MINISTER OF STATE FOR INDUSTRY AND INFORMATION TECHNOLOGY

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I refer to your minute of 12 March to the Prime Minister in which you ask, on page 6, for advice on the provision of finance by Government to ICL, especially in the context of section 332 of the Companies Act 1948. This subject is to be discussed by Ministers tomorrow.

2. The position as I understand it (not having seen the Touche Roche report which is being prepared this weekend) is that, without further assistance, ICL will cease in a few weeks to be able to pay its debts as they fall due.

3. I also understand that a statement has been passed on to the Board of ICL as a result of which they agreed to defer till tomorrow their decision on whether to apply for a voluntary winding-up. The statement read as follows:

"The Government as clients intend to provide some measure of help for the Company in its present situation. This is complicated. Will you therefore adjourn the Board meeting on this particular issue until 16 March, by which time Ministers will have reached a decision".

Reasonably in my view, the Board of ICL has interpreted this statement as committing Government to some help - the nature and amount of which, however, has yet to be determined.

4. Against this background, you properly refer to section 332 of the 1948 Act. In essence, this provision means that if a company is wound up and prior to this the business of the insolvent company has been carried on fraudulently (for example by the company incurring debts which it has no prospect of meeting, or for any other dishonest purpose), any person who was party to the fraud can be made liable for all the debts of the company, whenever they were incurred.

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5. In the case of anyone who gives financial help to an insolvent company, section 332 will found liability but only if

- (a) those carrying on its business have done so fraudulently;
- (b) there is a subsequent winding up; and
- (c) the person giving assistance knows of the fraud so that, by virtue of the assistance, he becomes a party to the fraud.

6. As a matter of law Government cannot be made liable under section 332 because that section does not bind the Crown. However, successive Governments have regarded themselves as morally bound to act as if section 332 did apply to them, and the Law Officers have been advising on these lines at least since 1973.

7. Applying the doctrine to present circumstances and subject to the Touche Roche report, it appears that no-one has yet incurred liability by reference to section 332. But we are now advised that if further help is not given within a few weeks, ICL will be forced to cease trading. In my view, liability can be avoided if the following conditions are satisfied in relation to any assistance by Government to deal with the crisis.

(i) At the time the facility is given, Government has not formed and has no reason to form a positive view that the company cannot achieve viability in a reasonable period (say 12 months or such other fixed term as may be agreed for the facility) taking into account its terms and all the relevant circumstances including the prospects of a partnership deal. The Board of ICL would be obliged to keep Government informed of progress, so that its position could be monitored.

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(ii) The facility itself/limited both as to time and amount; is expressed to be a "once and for all" arrangement; and does not state or imply either that the Government guarantees the long term future of the company or will provide further assistance if the facility proves insufficient. The same applies in relation to any public statements made about the facility, since creditors are likely to rely on such statements.



8. I recognise that a facility as "tight" as this may not create enough confidence in ICL to achieve all the objectives, but that is a matter for colleagues' judgement. However, the more open-ended the facility is, the greater the liability of Government by reference to section 332, until the stage is eventually reached where the Government may feel obliged to meet all the debts of the company in which case section 332 will cease to be relevant because the Government is then in effect guaranteeing that the company will remain solvent.

9. If the latter is the true position, the best course in my view is to recognise it now and to act accordingly by agreeing to commit such funds as may prove necessary to avoid liquidation. Otherwise a limited facility on the lines suggested in paragraph 7 above would, I am satisfied, avoid any criticism of the Government's conduct based on section 332. This would allow it to provide facilities on a limited scale for the stated purpose of facilitating a partnership deal, and not entailing any further commitment.

10. This minute is copied to the recipients of yours.

*JR Mallinson*

H. M. Attorney General

(text approved by him  
and signed in his absence)

15 March 1981



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Communications on this subject should  
be addressed to  
THE LEGAL SECRETARY  
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,  
LAW OFFICERS' DEPARTMENT,

ROYAL COURTS OF JUSTICE,

LONDON, W.C.2.

Our Ref : 400/81/79

13 March 1981

Mrs E A Riley  
Office of Kenneth Baker MP  
Department of Industry  
Ashdown House  
123 Victoria Street  
LONDON S W 1

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Dear Mrs. Riley

ICL

We discussed earlier today the request for the Attorney General's advice on page 6 of Mr Baker's minute of yesterday to the Prime Minister. This is to record what I said.

2. On the present state of knowledge in this Department about the Government's plans, I do not think there is much the Attorney General could safely add to the general principles (relating to s. 332 of the Companies Act 1948) which are set out in paragraph 3 of the draft conditions of guarantee circulated by Jonathan Hudson on 10 March.

3. But I have prepared a submission to the Attorney General in the light of Mr Baker's minute and I shall take his (The Attorney General's) views on this over the weekend. It has been agreed that I will attend Mr Baker's meeting on Monday at 9.15 a.m. so that I can report these views and obtain such details as the Attorney General may need in connection with further advice.

4. This is copied to Geoffrey Preston (DOI), Tim Lankester (No 10) and David Wright (Cabinet Office).

Yours sincerely

John R Mallinson

J R MALLINSON

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13 MAR 1981

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