



01-405 7641 Extn

✓ NB PM  
TPL, 26/3

cc: Mr. Ingham  
26/3

ROYAL COURTS OF JUSTICE  
LONDON, WC2A 2LL

26 March 1981

PRIME MINISTER

ccan Pd

ICL - s.332 COMPANIES ACT 1948

At Cabinet on 19 March you said that my legal advice on ICL (attached) should be circulated to all members of Cabinet. It has been agreed that I should do this.

2. I think the advice is self-contained and self-explanatory. But it should now be read in the light of the decision that was taken, namely, to give ICL strictly limited assistance (both as to time and amount) and without any express or implied commitment to give any further help. Inevitably the need to restore confidence in ICL increases the risks under section 332 so that Ministers should be sure to say nothing that would call into question the strictly limited nature of the assistance, or imply that any more will be forthcoming in any circumstances.

3. This minute and the attachment go to all members of Cabinet and Sir Robert Armstrong.

M.H.



MINISTER OF STATE FOR INDUSTRY AND INFORMATION TECHNOLOGY

ICL

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.

/ In the case



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.

is

(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.

/ I recognise



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.

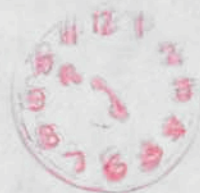
*J.R. Mallinson*

H. M. Attorney General

(text approved by him  
and signed in his absence)

15 March 1981

26 MAR 1987







Secretary of State for Industry

*Econ 18*

DEPARTMENT OF INDUSTRY  
ASHDOWN HOUSE  
123 VICTORIA STREET  
LONDON SW1E 6RB

TELEPHONE DIRECT LINE 01-212 3301  
SWITCHBOARD 01-212 7676

2 April 1981

Tim Lankester Esq  
Private Secretary to the  
Prime Minister  
10 Downing Street  
London SW1

*Dear Tim*

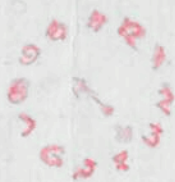
Thank you for your letter of 25 March.  
In view of concern about Section 332 of the  
Companies Act, it would probably be best not  
to say anything about hopes for the future.

*Yours ever*

*Richard*

RICHARD RILEY  
Private Secretary

APR 3 1981



DRAFT REPLY TO

David Scholey Esq  
SG Warburg & Co Ltd  
30 Gresham Street  
London EC2P 2EB

|| Thank you very much for your letter of 23 March.  
May I, in turn, thank you for the significant  
role which you and your colleagues have played  
in ~~recent events~~ *helping us*  
*reach the decision which*  
*we made.*

~~am sorry not to have~~  
~~applied earlier.~~

about ICL.



3 APR 1981



THE UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

DEPARTMENT OF CHEMISTRY

606 S. MATHISON DRIVE

Urbana, Illinois 61801

Telephone (312) 244-2100

file

ds

B/F

25 March 1981

I enclose a letter the Prime Minister  
has received from Mr. David Scholey. I would  
be grateful for a draft reply for the Prime  
Minister to send.

T P LANKESTER

No ack. necessary

Richard Riley, Esq.,  
Department of Industry.

TPL