10, 1969

IN THE PRIVY COUNCIL No. 14 of 1968

ON APPEAL FROM

THE HIGH COURT OF AUSTRALIA

B E T W E E N :

BLUE METAL INDUSTRIES LIMITED AND
READY MIXED CONCRETE LIMITED

- and - Appellants

R.W. DILLEY AND THE COLONIAL
SUGAR REFINING COMPANY LIMITED
Respondents

AND B E T W E E N :

THE COLONIAL SUGAR REFINING
COMPANY LIMITED Appellant

- and -

R.W. DILLEY, BLUE METAL
INDUSTRIES LIMITED AND READY
MIXED CONCRETE LIMITED
Respondents

CASE FOR THE APPELLANTS

A 1. This is an appeal by special leave granted the 23rd day of January 1968 from a joint judgment of the High Court of Australia (Barwick C.J. and McTiernan and Taylor JJ.) dated the 17th October 1967 affirming a judgment and order of the Supreme B Court of New South Wales in Equity (McLelland Chief Judge in Equity) dated the 27th April 1967. Record p.120 p.55

2. The substantial question raised by the appeal is:

Does Section 185 of the Companies Act 1961 (as

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amended) of the State of New South Wales apply to one take-over offer made by two companies to the shareholders of a third.

3. S. 185 is substantially in the same terms as s. 209 of the Companies Act 1948 (U.K.).

4. S. 21(b) of the Interpretation Act 1899 (N.S.W.) is in the following terms:-

> "21. In all Acts the following words shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them:-
>
> (a) .....
>
> (b) Words in the singular shall include the plural and words in the plural shall include the singular."

5. The facts giving rise to the present appeal and the course of the judicial proceedings in the Courts

p.145 below may shortly be stated as follows: By an offer dated 16th July 1964 and purporting to have been made by the appellants, The Colonial Sugar Refining Company Limited and Blue Metal Industries Limited jointly those companies offered to acquire all the issued stock units of the appellant, Ready Mixed Concrete Limited. This offer was accepted by the holders of more than nine-tenths in nominal value of the stock units. The respondent R.W. Dilley (hereinafter called "the Respondent") was one of those who did not accept the offer.

p.8 6. The Respondent was notified by letter dated 15th January 1965 that his name had been removed by

the appellant Ready Mixed Concrete Limited from its Register of Members and that his former holding of 17,142 stock units had been transferred to the appellants The Colonial Sugar Refining Company Limited and Blue Metal Industries Limited jointly. The letter said that this had been done in accordance with the provisions of s. 185(5) of the Companies Act 1961 of the State of New South Wales. Record

7. The Supreme Court on the application of the Respondent made pursuant to the provisions of s. 155 of the Companies Act 1961 as amended of the State of New South Wales: p.1

(a) declared that the appellants The Colonial Sugar Refining Company Limited and Blue Metal Industries Limited never acquired 17,142 stock units held by the Respondent in the capital of the appellant Ready Mixed Concrete Limited; p.104.l.24.

(b) ordered that the Register of the appellant Ready Mixed Concrete Limited be rectified by restoring thereto the Respondent as the holder of 17,142 stock units, such restoration to be made by equal reduction in the shareholdings in the appellant Ready Mixed Concrete Limited held by the appellants The Colonial Sugar Refining Company Limited and Blue Metal Industries Limited; and p.104.l.31.

(c) made certain consequential declarations and

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orders.

p.1

8. The judgment of the Supreme Court was delivered upon a summons issued on behalf of the Respondent seeking the rectification of the register of the appellant Ready Mixed Concrete Limited. The respondents to such summons were the appellants.

p.127.1.24.

The High Court affirmed the Judgment and Orders of the Supreme Court.

9. The Supreme Court and the High Court granted the relief claimed in the said summons on the ground that the provisions of s. 185 of the Companies Act 1961-1966 of the State of New South Wales did not apply to one offer made by two companies and were applicable only to an offer made by one company.

10. The appellants submit firstly that s. 185 taken alone applies to one offer made by two companies and secondly that no other provision (in particular s. 184) operates to displace that application. Finally, should it become relevant, the appellants will submit that s. 184 itself is capable of being read in a plural sense.

11. The history of s. 185 is of the utmost importance for the proper determination of its meaning. The section is derived (as the side note suggests) from sections of a number of Acts of the State Parliaments (all having a substantially common

form) and from s. 209 of the Companies Act, 1948, of the United Kingdom. Those sections in turn owe their origin to s. 50 of the Companies Act, 1928, (U.K.). Prior thereto there was nothing in the Australian or English legislation corresponding to s. 185. S. 50 of the 1928 U.K. Act was as follows:

> "50. - (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to another company, whether a company within the meaning of the principal Act or not (in this section referred to as "the transferee company"), has within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine-tenths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company:
>
> Provided that, where any such scheme or contract has been so approved at any time before the commencement of this Act, the court may by order, on an application made to it by the transferee company within two months after the commencement of this Act, authorise notice to be given under this section at any time within fourteen days after the making of the order, and this section shall apply accordingly, except that the terms on which the shares of the dissenting shareholder are to be acquired shall be such terms as the court may by the order direct instead of the terms provided by the scheme or contract.

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(2) Where a notice has been given by the transferee company under this section and the court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or, if an application to the court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(3) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(4) In this section the expression "dissenting shareholder" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract."

12. Of s. 50 the appellants submit that its object was to aid a well-known commercial activity, viz. the acquisition of all of the shares in a company by empowering the offeror, should ninety per cent of the shareholders of the company agree, to acquire by compulsory purchase the shares of the dissident ten or less per cent. Prior to its enactment take-over offers were unregulated; there might, that is to say, be one or two or more offerors making one

offer. It is difficult to suppose in such a context that the legislature intended a single offeror to have a right of compulsory purchase but that two or more common offerors should not. Indeed, it always seems to have been assumed in the United Kingdom that a two company offer is permissible (see Rule 18 of the Licensed Dealers (Conduct of Business) Rules 1960).

13. The appellants further submit that there is nothing either in the language or substance of the section to suggest that the legislature intended to benefit only a single offeror. The imprecision of the phrase "a scheme or contract involving the transfer of shares" indicates the spread of the section: the language is commercial rather than juristic, looking generally to company take-over offers not kinds or types merely of those offers.

14. Nor does a consideration of the application of s. 50 to a joint offer reveal difficulties or impracticabilities. Consistently with the provisions of s. 1(1) of the English Interpretation Act 1889 the appellants suggest that the phrase in the section "another company" (i.e. the transferee company) should be read as if instead the words "another company or other companies" were written into the section. The requirement that the "scheme or contract" must involve the transfer of shares of

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the "transferor company" occasions no difficulty if such transfer is to be made to both of the "transferee companies". A joint offer does not necessarily involve a transfer of shares to the transferees jointly. The transfer is a matter of indifference to the disposing shareholder; it is a matter for agreement between the joint purchasers only. The requirement that ninety per cent of each class of shareholder (of the transferor company) must approve the offer is irrelevant to the consideration of whether the section applies to an offer made by one or more than one company. The requirement that the transferee companies acquire the shares of dissenters would, in the case of a joint offer, involve a joint purchase by the offerors. Any dissenter would not be concerned with the distribution as between the joint purchasers of the shares pursuant to such acquisition. The term "acquisition" is not equivalent to "transfer". The requirement that notice be given by the transferee companies would be complied with by a notice signed by both of them. No difficulty suggests itself in giving effect to the remaining provisions of s. 50 (in sub-s. (2) and (3) of the section) in the case of a joint offer. The appellants therefore contend that s. 50 applied to an offer made by more than one offeror.

A B C D E F

15. The subsequent history of s. 50 both in the United Kingdom and in New South Wales is as follows:

United Kingdom

(a) S. 155 of the Companies Act of 1929 re-enacted s. 50 of the Act of 1928. S. 155 was in the following form:-

"155. - (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to another company, whether a company within the meaning of this Act or not (in this section referred to as "the transferee company"), has within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine-tenths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company:

Provided that, where any such scheme or contract has been so approved at any time before the commencement of this Act, the court may by order, on an application made to it by the transferee company within two months after the commencement of this Act, authorise notice to be given under this section at any time within fourteen days after the making of the order, and this section shall apply accordingly, except that the terms on which the shares of the dissenting shareholder are to be acquired shall be such terms as the court may by the order direct instead of the terms provided by

the scheme or contract.

(2) Where a notice has been given by the transferee company under this section and the court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or, if an application to the court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(3) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(4) In this section the expression "dissenting shareholder" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract."

No changes relevant to the determination of the issue raised in this appeal appeared in s. 155 of the Companies Act, 1929, as compared to s. 50 of the Act of 1928.

(b) S. 209 of the Companies Act 1948, dealt with substantially the same subject matter as s. 155 of the Companies Act, 1929. The differences between s. 209 of the Act of 1948

A and s. 155 of the Act of 1929 that could be relevant to the present appeal are: Record

(i) The introduction of the words in parenthesis in the body of s. 209(1), the effect of which is to require the exclusion of the shares of a subsidiary together with those of the transferee or nominee of the transferee for the purpose of calculating whether the offer has been accepted within four months after its making by the holders of not less than nine-tenths in value of the shares.

(ii) The introduction of a new proviso to s. 209(1), and

(iii) The introduction of a new subsection by the enactment of s. 209(2).

New South Wales

The Companies Act, 1936 (N.S.W.) adopted in s. 135 the provisions of s. 155 of the Companies Act, 1929, (U.K.). That section remained unchanged in New South Wales until the enactment of the 1961 Act as part of the Australian Uniform Companies Legislation.

16. S. 195 of the Companies Act, 1961 (N.S.W.) is in the following terms:-

"185. (1) Where a scheme or contract involving

the transfer of shares or any class of shares in a company (in this section referred to as the "transferor company") to another company or corporation (in this section referred to as the "transferee company") has within four months after the making of the offer in that behalf by the transferee company been approved as to the shares or as to each class of shares whose transfer is involved by the holders of not less than nine-tenths in nominal value of those shares or of the shares of that class (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may at any time within two months after the offer has been so approved give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and when such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given or within seven days of a statement being supplied to a dissenting shareholder pursuant to subsection (3) of this section (whichever is the later) the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company.

(2) Notwithstanding anything in subsection (1) of this section where shares in the transferor company of the same class or classes as the shares whose transfer is involved are already held as aforesaid to a nominal value greater than one-tenth of the aggregate of their nominal value and that of the shares (other than those already held as aforesaid) whose transfer is involved the provisions of subsection (1) of this section shall not apply unless -

(a) the transferee company offers the same terms to all holders of the shares (other than those already held as aforesaid) whose transfer is involved or, where those shares include shares of different classes, of each class of them; and

(b) the holders who approve the scheme or contract, besides holding not less

than nine-tenths in nominal value of the shares (other than those already held as aforesaid) whose transfer is involved, are not less than three-fourths in number of the holders of those shares.

(3) Where a transferee company has given notice to any dissenting shareholder that it desires to acquire his shares the dissenting shareholder shall be entitled to require the company by a demand in writing served on that company within one month from the date on which the notice was given to be supplied with a statement in writing of the names and addresses of all other dissenting shareholders as shown in the register of members and the transferee company shall not be entitled and bound to acquire the shares of the dissenting shareholders until fourteen days after the posting of the statement of such names and addresses to the dissenting shareholder.

(4) Where in pursuance of any such scheme or contract shares in a company are transferred to another company or its nominee and those shares together with any other shares in the first-mentioned company held by, or by a nominee for, the transferee company or its subsidiary at the date of the transfer comprise or include nine-tenths in nominal value of the shares in the first-mentioned company or of any class of those shares, then -

(a) the transferee company shall within one month from the date of the transfer (unless on a previous transfer in pursuance of the scheme or contract it has already complied with this requirement) give notice of that fact in the prescribed manner to the holders of the remaining shares or of the remaining shares of that class who have not assented to the scheme or contract; and

(b) any such holder may within three months from the giving of the notice to him require the transferee company to acquire the shares in question,

and where a shareholder gives notice under

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paragraph (b) of this subsection with respect to any shares, the transferee company shall be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as are agreed or as the Court on the application of either the transferee company or the shareholder thinks fit to order.

(5) Where a notice has been given by the transferee company under subsection (1) of this section and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, after the expiration of one month after the date on which the notice has been given or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company together with an instrument of transfer executed, on behalf of the shareholder by any person appointed by the transferee company, and on its own behalf by the transferee company, and pay allot or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(6) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company in trust for the several persons entitled to the shares in respect of which they were respectively received.

(7) Where any consideration other than cash is held in trust by a company for any person under the provisions of this section it may, after the expiration of two years and shall before the expiration of ten years from the date on which such consideration was allotted or transferred to it, transfer such consideration to the Treasurer of the State.

(8) The Treasurer shall sell or dispose of any consideration so received in such

manner as he thinks fit and shall deal with the proceeds of such sale or disposal as if it were moneys paid to him pursuant to the provisions of the Unclaimed Moneys Act, 1917.

(9) In this section "dissenting shareholder" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

(10) In relation to an offer made by the transferee company to shareholders of the transferor company before the commencement of this Act, this section shall have effect as if -

(a) the words "the shares of that class (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary)" in subsection (1) of this section were omitted and the words "the shares affected" were inserted in lieu thereof;

(b) subsections (2) and (4) of this section were omitted; and

(c) the words "together with an instrument of transfer executed, on behalf of the shareholder by any person appointed by the transferee company, and on its own behalf by the transferee company" in subsection (5) of this section were omitted."

17. The differences between s. 135 of the Companies Act, 1936 (N.S.W.) and s. 185 of the Companies Act, 1961 (N.S.W.) are in the main due to the fact that s. 185 is based upon s. 209 of the 1948 Act of the United Kingdom. This appears by the reference to a subsidiary in s. 185 (1) taken from the similar reference in s. 209(1)(U.K.); the presence of s. 185(2) (N.S.W.) which substantially repeats the

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proviso to s. 209(1)(U.K.) and the fact that s. 185(4)(N.S.W.) substantially repeats s. 209(2)(U.K.). A

18. The difference between s. 185 of the New South Wales Act and s. 209 of the U.K. Act are to be found in the introduction of sub-s. (3), (7) and (8) of s. 185. The presence of s. 185(10) is to be accounted for by the fact that it was contemplated that s. 185 should apply to an offer made before the commencement of the Companies Act, 1961. B

19. The question, the appellants submit, is whether the subsequent statutory history is such that the phraseology common to s. 185 of the Companies Act of 1961 (N.S.W.) and s. 50 of the 1928 Act (U.K.) requires that s. 185 should be construed as applying only to an offer made by one company and not to offers made by two or more companies. The appellants submit that that history does not require nor permit a different interpretation to be given to s. 185 in the relevant sense from that which s. 50 in the relevant sense bore. The appellants submit that the changes disclosed by the subsequent provisions are not relevant to the question raised in this appeal; they do not, in other words, indicate that there has been such an alteration in the form of the provision as to require the conclusion that C D E F

s. 185 applies only to an offer made by one company whereas s. 50 applies to an offer made by one or two or more companies. Indeed, the changes made would tend to strengthen the view that s. 185 can be read in a plural sense; for otherwise minority shareholders could not insist on having their shares acquired if an offer were made by two or more companies, whereas they could do so if the offer were made by a single company.

20. Those features of s. 185 of the New South Wales Act which are derived from s. 209 of the U.K. Act are the words in brackets in s. 185(1) (appearing also in s. 209(1)), s. 185(2) which is a restatement of the proviso to s. 209(1) and s. 185(3) which is a restatement of s. 209(4). These have been referred to in paragraph 15(b) above. Of the bracketed words in s. 185(1) the appellants would observe that their purpose is to calculate whose shares are to be taken into consideration in determining whether an offer has been approved by ninety per cent of the shareholders of the transferor company. Where an offer is made by one offeror the words "nominee" and "subsidiary" must be treated as including the plural because the offeror may have more than one nominee and more than one subsidiary. The fact that there are common offerors therefore merely requires that those words be treated as

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extending to nominees and subsidiaries of each and of both such common offerors. Precisely the same observations apply to s. 185(2) which is derived from the proviso to s. 209(1). S. 185(3) which is a restatement of s. 209(4) raises no relevant problem.

21. As has also been set out above s. 185 of the N.S.W. Act contains provisions which do not appear in s. 209 of the U.K. Act. Those provisions are sub-s. (3), (7) and (8) of s. 185. Sub-s. (3) is satisfied in the case of an offer made by more than one company by requiring the notices referred to to be given by and to both companies. Sub-s. (7) and (8) raise no problem relevant to the present question. As indicated above sub-s. (10) is directed only to offers made before the operation of s. 185 and this in turn poses no problem.

22. The result, in the appellants' submission, is that the alterations made by s. 209 of the United Kingdom Act and s. 185 of the New South Wales Act do not require one to read either section as insusceptible of application to an offer made by more than one company. Those changes, in other words, do not require one to give to ss. 209 and 185 a construction in the relevant sense different from that which s. 50 of the 1928 Act bore. The appellants would further submit that it is as true

of ss. 209 and 185 as it is of s. 50 that they are benefit-conferring sections. S. 50 conferred a benefit upon accepting shareholders by removing the necessity for an offeror company wishing to obtain all shares in an offeree company to make its offer conditional on one hundred per cent acceptance. Furthermore it conferred a benefit upon the shareholders of the offeror company by enabling their company on obtaining ninety per cent acceptances to acquire the remaining ten per cent. The changes that have been made by subsequent statutes are to retain these benefits and to ameliorate the lot of the dissident minority in the offeree company by way of permitting them, should they so wish, to compel the offeror to acquire their shareholdings on the same terms as those on which the offeror acquires the shareholding of the approving ninety per cent. There is no reason to suppose that these benefits should exist only where an offer is made by one offeror.

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23. In relation to s. 185 of the Companies Act McLelland C.J. in Eq. said:

> "Reading s. 185 as a whole, it appears to contemplate singularity only and in particular the use of the words 'transferee company or its subsidiary' in s. 185(1) and in s. 185(4) and the terms of s. 185(4)

p.99.l.36.

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indicate that the Legislature did not intend that a 'transferee company' would or could for the purposes of s. 185 consist of more than one company or corporation." A

24. Their Honours in the High Court thought that the language of s. 185 made it clear that its provisions were inapplicable to the case of a joint offer. It will then be seen that neither McIelland C.J. in Eq. nor the High Court explained in their respective judgments why s. 21(b) of the Interpretation Act could not be availed of although each held it could not. The former merely said that the section as a whole contemplated singularity, giving as the only example of language which contemplated mere singularity the words "its subsidiary" in s. 185(1); whilst the latter gave a number of examples from which their Honours seemed to think that it was self evident that s. 21(b) of the Interpretation Act could not be employed. Those examples were the following:- B C D

p.126.1.12. (a) The provisions of s. 185(2)(a) which provide that sub-s. 185(1) is inapplicable unless the transferee company offers the same terms to all holders of the shares whose transfer is involved or, where those shares include shares of different classes, of each class of them other than those already held by or on behalf E F

of it or its subsidiaries (as described in s. 185(1)); Record

(b) The provisions of s. 185(3) which provide that where a transferee company has given notice to any dissenting shareholder that it desires to acquire his shares the dissenting shareholder shall be entitled to require the transferee company to provide him with certain information by serving a written demand on it; and p.126.l.25.

(c) Those provisions of s. 185(4) which provide that when a transferee company has received a ninety per cent (90%) acceptance from shareholders it shall give notice of that fact in the prescribed manner to non-accepting shareholders who may thereupon require the transferee company to acquire their shares. 126.l.32.

25. If one endeavours to reconstruct the reasoning behind the judgments of the Chief Judge and the High Court which led them to reject the applicability of s. 21(b) of the Interpretation Act, it is possible that their Honours found that section to be inapplicable by one or other of the following modes of reasoning:-

(a) S. 21(b) is authority for no more than rendering the language of a statute from the singular into the plural (and vice versa) as

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a matter of strict grammatical transliteration; but that if this process of transliteration produces a provision occasioning a difficulty of construction or verbal ambiguity, one must as a matter of law treat this resultant difficulty or ambiguity as necessarily displaying a "contrary intention" and therefore excluding the operation of the section. The examples given in the judgments below are then said to illustrate such resultant difficulties or ambiguities; or

(b) An application of s. 21(b) to a statutory provision expressed in the singular merely renders words into a "joint" plural, so that what is obtained is, as to nouns, a reference to those nouns jointly and not (as the context might suggest) to them jointly or severally or both jointly and severally, and as to verbs what is obtained is only a reference to joint action and not (as the context might suggest) to joint action, several action, or action which is both joint and several; and that if the provision read only in joint plurals leads to anomalies, the existence of such anomalies is in itself a manifestation of a "contrary intention" which is sufficient to exclude the operation of the section.

It is submitted that neither mode of reasoning is sound.

26. Each mode of reasoning is, it is submitted, vitiated by excessive literalism. The fundamental, albeit unexpressed, premise on which both modes of reasoning are based is that s. 21(b) of the Interpretation Act does not permit one to do more than literally transliterate the singular into the plural (and vice versa). On the authority of the decided cases, it is perfectly clear that this is not so. For example, in Connelly v. Steer (1881) L.R. 7 Q.B.D. 520 the Court of Appeal construed s. 12 of the (U.K.) Bills of Sale Act 1878, which read as follows:-

> "In case two or more Bills of Sale are given comprising in whole or in part any of the same chattels they shall have priority in the order of the date of their registration respectively as regards such chattels"

as requiring that a Bill of Sale attested and registered under the Bills of Sale Act 1878 receive priority over an earlier unregistered Bill of Sale as to chattels comprised in both Bills of Sale. In so doing their Lordships purported to do no more than read the expressed plural as including the singular in accordance with the then existing United Kingdom equivalent of s. 21(b) of the (New

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South Wales) Interpretation Act. In that case, only one Bill of Sale had been registered and the question was whether it had priority over an earlier but unregistered bill of sale. In Lyons v. Tucker L.R. 6 Q.B.D. 660 Grove J. had held that the section only applied where two or more bills of sale had been registered. The Court in Connelly v. Steer disagreed with this view and Lord Selborne, L.C. said at page 522:

"The material clause is the second. In Lyons v. Tucker it was the view of Grove, J., that the second clause applied only where two or more bills of sale have been registered: he thought that the grammatical construction required that more than one bill of sale should have been registered, in order to bring the second clause into operation; although he did not decide the case before him upon the ground of grammatical construction alone, yet it is plain from the language of his judgment that this was an argument carrying great weight with him. But, in construing a statute, plural is to read as singular whenever the nature of the subject-matter requires it; and here the manifest interpretation of the statute requires that the second clause of s. 10 shall be read in

the singular as well as in the plural: it would be an absurd result to hold that registered bills of sale shall have priority over one another according to the date of their registration, but that a registered bill of sale shall have no priority over one that is unregistered. The registration gives a priority which must prevail."

It is clear that this result was not achieved by any mere transliteration of plural into singular. Likewise, the decision of the Judicial Committee of the Privy Council in Sin Poh Amalgamated (H.K.) Ltd. v. Attorney-General of Hong Kong (1965) 1 W.L.R. 62 construed a Hong Kong Ordinance authorising the Governor in Council to nominate commissioners for the purpose of conducting an enquiry as empowering the appointment of a sole commissioner, notwithstanding that the Ordinance constantly used the expression "Commissioners" in the plural and included at least one section referring to "the Chairman or presiding member of such commission". In holding that the ordinance could be singularised in this way the Judicial Committee could not have been applying a mere process of transliteration. In Sin Poh's case the Judicial Committee at p. 66 said:

"If an ordinance refers to 'commissioners' in

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the plural it is undoubtedly an alteration of its expressed intention if one reads it as referring to 'commissioners or sole commissioner'. But the mere reference to the plural is not sufficient to show 'a contrary intention'. If it were, then the Interpretation Ordinance would never apply at all. And the President of the Full Court aptly observed (1963 H.K.L.R. 77, at p. 86) - 'But as the form of the subsidiary and ancillary provisions normally follows that of the main provisions, the mere fact that they do so conform and use plural words or words implying the plural, when the main clauses are so drafted, would not appear to carry any great implication. To discover whether a contrary intention is implied one must, I think, look, not at the form of particular expressions, but at the substance and tenor of the legislation as a whole. Whilst the mere use of the plural form without anything else may not be sufficient to exclude s. 3(5), if there is some substantive provision, essential to the functioning of the commission, which could not be satisfied without a plurality, that would be a very different matter, e.g. a provision that a commission should not sit to hear witnesses

unless at least two commissioners were present'."

27. It is also of significance that the method of statutory construction which has been approved (it is respectfully submitted, correctly) by the High Court in relation to the analogous question of applying statutory definitions (see Council of the Municipality of Randwick v. Rutledge (1959) 102 C.L.R. 54 per Windeyer J. at pp. 69, 71) is contrary to the literalistic attitude towards construction which was taken by the High Court in the present case.

28. Whichever mode of reasoning was adopted by the High Court (i.e. either that referred to in paragraph 25(a) or that referred to in paragraph 25(b)), that mode is contrary to the true principles of statutory interpretation which were laid down by the Judicial Committee in Sin Poh's case. In that case, the Judicial Committee said at page 67 "The Interpretation Ordinance was intended to avoid multiplicity of verbiage and to make the plural cover the singular except in such cases as one finds in the context of the legislation reason to suppose that the legislature if offered such amendment to the bill would have rejected it". That test is clearly inconsistent with whatever mode of reasoning the High Court adopted.

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29. Insofar as it has been found against the appellants that the expression "its subsidiary" is incapable of being pluralised so as to give one the expression "their subsidiaries" the judgments of the Chief Judge and of the High Court give rise to the astonishing result that Parliament cannot have intended such a plural to be used, although in fact Parliament has used that very expression (i.e."their subsidiaries") in other parts of the same Act (see the Fifth Schedule to the Act).

30. It is therefore submitted, in conformity with the decision of the Judicial Committee in Sin Poh's Case, that once the High Court discerned (as it clearly should have) a legislative intention in s. 185 to deal with all schemes or contracts, there would be no alternative but to hold that s. 185 was capable of pluralisation and the High Court should have so held. This is made quite clear when one considers the policy of s. 185. Insofar as s. 185 displays the policy that no dissenting shareholder should unnecessarily impede a company reorganisation, it is clear that this policy is equally valid in the case where the reorganisation involves a two-company scheme or contract as it is in a situation where the reorganisation merely involves a one-company scheme or contract. Insofar as the policy of s. 185 is to provide that when a "transferee" company

acquires the property of shareholders it does so only on condition that a dissenting shareholder can, if he likes, himself insist on his shares being acquired, such a policy is equally valid whether the "transferee" consists of one company or a consortium of two or more companies. Any other interpretation of s. 185 would lead to the intolerable result that, by reason of the accident that two companies made the offer instead of one company, no "landlocked" shareholder could force the "transferee" companies to acquire his shares on the same terms as those offered to other shareholders, or on any terms at all. The High Court decision, therefore, has the anomalous result that it would construe a section in such a way as to deprive it of the purpose for which it was intended in a large number of cases and in particular would construe such parts of it as were admittedly intended for the benefit of minority shareholders in a manner which would in fact deprive such shareholders of all intended protection.

31. It is further submitted that if the true explanation of their Honours' judgment is that suggested in paragraph 25(b) hereof, and even if it were correct that all expressions pluralised as a result of s. 21(b) of the Interpretation Act are joint plurals, and not either joint or several or

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both, as the context may suggest, their Honours are still in error in supposing that such an anomalous result would, of itself, constitute a "contrary intention" within the meaning of s. 21(b). The "joint plural" interpretation would give shareholders the protection of the Act in cases in which the High Court's interpretation would deny them that protection. Accordingly, even the "joint plural" interpretation would appear to be more consonant with the intention of the legislature than the interpretation adopted by the High Court.

32. The provisions of s. 185(1) relied upon by the Chief Judge (with the apparent approval of the High Court) as indicating a "contrary intention" and the appellant's submissions in relation thereto, are as follows:-

Section:

"Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as the "transferor company") to another company or corporation (in this section referred to as the "transferee company") has within four months after the making of the offer in that behalf by the transferee company been approved as to the shares or as to each class of shares whose transfer is involved by the holders of not less

A than nine-tenths in nominal value of those shares or of the shares of that class (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee B company may at any time within two months after the offer has been so approved give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and when such a notice is C given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given or within seven days of a statement being supplied to a dissenting D shareholder pursuant to subsection (3) of this section (whichever is the later) the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms which, under the scheme or contract, the shares E of the approving shareholders are to be transferred to the transferee company."

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Chief Judge and High Court p.99.1.36.

The Chief Judge stated that the expression 127 "its subsidiary" could not be pluralised, without stating reasons why this was so. The High Court F seems to have adopted his Honour's view in this

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regard.

Appellants' Submissions

The appellants submit that there is no reason why the expression in s. 185(1) of the Companies Act which the Chief Judge thought was incapable of pluralisation in the context of a joint two-company scheme or contract, viz. "its subsidiary", should not be read as "their subsidiaries", an expression already used by Parliament in the Fifth Schedule to the same Act. This expression, as so pluralised, would then refer to any company which was a subsidiary of both transferee companies, and would also refer to any company which was a subsidiary of either of the transferee companies. Alternatively, even if some more limited meaning would have to be attributed to the expression, your petitioners submit that pluralisation should still be permitted in order to give a limited protection to minority shareholders rather than no protection at all.

p.126

33. The provisions of s. 185 relied upon by the members of the High Court as indicating a contrary intention and the appellants' submissions in relation to them are as follows:

(1) Section

The provisions of s. 185(2)(a). This subsection provides as follows:-

"Notwithstanding anything in subsection (1) of

this section where shares in the transferor company of the same class or classes as the shares whose transfer is involved are already held as aforesaid (that is already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary) to a nominal value greater than one-tenth of the aggregate of their nominal value and that of the shares (other than those already held as aforesaid) whose transfer is involved the provisions of sub-section (1) of this section shall not apply unless -

(a) the transferee company offers the same terms to all holders of the shares (other than those already held as aforesaid) whose transfer is involved or, where those shares include shares of different classes, of each class of them."

High Court:

As to these words the High Court said:

"It is impossible to accommodate the language of these provisions to a case such as the present where, although the offer is called a joint offer, it contains an offer by each of the companies concerned to allot shares as part of the consideration." p.126.l.17.

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Appellants' Submissions: A

In the submission of the appellants it is difficult to understand why the High Court has used these words as indicating a contrary intention even taking into account the reasoning apparently underlying the approach of the High Court to the B problem. It would appear that the words have been mentioned to point up the fact that the offer although a joint offer, involved the issue by each of the offeror companies of shares in its capital. The High Court appears to be saying that because C the offer involves each offeror in making an issue of shares to furnish the consideration for the offer it is not possible to apply the provisions of s. 185 to a joint offer at least where the consideration involves partially the issue of shares D in the capital of each of the offerors. The appellants respectfully submit that the offer is a joint offer and that contractually the offerors together are obliged to ensure that the consideration they have offered passes to accepting E shareholders although this involves the procuring of an issue of shares by each of the offerors.

(2) Section:

The words "by a demand in writing served on that company" in s. 185(3). This subsection is in the following terms:- F

A "Where a transferee company has given notice to any dissenting shareholder that it desires to acquire his shares the dissenting shareholder shall be entitled to require the company by a demand in writing served on that B company within one month from the date on which the notice was given to be supplied with a statement in writing of the names and addresses of all other dissenting shareholders as shown in the register of members and the C transferee company shall not be entitled and bound to acquire the shares of the dissenting shareholders until fourteen days after the posting of the statement of such names and addresses to the dissenting shareholder".

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High Court:

D The reasoning of the High Court appears to be that there is a contrary intention expressed because the dissenting shareholder would not know upon which company he should serve the notice provided for in the Section.

p.126

Appellants' submissions:

E The appellants submit that the subsection can be pluralised so that it provides that, in the context of a joint two-company offer, it is a sufficient compliance with the section if a dissenting shareholder serves a notice on either of

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the transferee companies (by analogy with the rule that a notice to quit served by a landlord on one joint tenant is effective against two joint tenants). Alternatively, the appellants submit that even if the section as pluralised would require the giving of a notice to each transferee company, such a construction, effecting as it would some protection for dissenting shareholders, would be more consonant with Parliament's intention than holding the section incapable of pluralisation. On the High Court's interpretation, two joint transferee companies could withhold such information from dissenting shareholders who addressed an enquiry even to both of them and deny to such shareholders the right to compel the transferee companies to purchase their shares. In this connection, it is relevant to note that a plural reading of the subsection would create no more problems than those which already exist in s. 185(4)(a) in the context where even a sole transferee company gives the notice referred to therein to two or more persons who are jointly registered in the books of the transferor company as holders of shares.

A B C D E

(3) Section:

The words ".... shares .... held by or by a nominee for the transferee company or its subsidiary at the date of the transfer ...." in F

s. 185(4). This subsection is as follows: Record

"Where in pursuance of any such scheme or contract shares in a company are transferred to another company or its nominee and those shares together with any other shares in the first-mentioned company held by, or by a nominee for, the transferee company or its subsidiary at the date of the transfer comprise or include nine-tenths in nominal value of the shares in the first-mentioned company or of any class of those shares, then -

(a) the transferee company shall within one month from the date of the transfer (unless on a previous transfer in pursuance of the scheme or contract it has already complied with this requirement) give notice of that fact in the prescribed manner to the holders of the remaining shares or of the remaining shares of that class who have not assented to the scheme or contract; and

(b) any such holder may within three months from the giving of the notice to him require the transferee company to acquire the shares in question,

and where a shareholder gives notice under paragraph (b) of this subsection with respect

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to any shares, the transferee company shall be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as are agreed to as the Court on the application of either the transferee company or the shareholder thinks fit to order."

High Court

There is no disclosure as to which part of this subsection manifests a "contrary intention", but presumably their Honours are referring to the words "together with any other shares in the first mentioned company held by, or by a nominee for, the transferee company or its subsidiary at the date of the transfer". This presumably is thought to disclose a "contrary intention" because in the pluralised form of the subsection one would only count shares held jointly; or alternatively because it is ambiguous and one cannot determine whether those only held jointly are counted or whether one counts shares held jointly and also shares held by either of the transferee companies.

126.1.31

Appellants' Submissions:

The appellants respectfully submit that the ordinary meaning of the words "held by .... the transferee companies" is that if the shares are held

by either the one or the other or by both they are affected by the subsection as being shares held by the companies. Alternatively, even if the words are interpreted as referring to shares held jointly, they do not disclose a "contrary intention" so as to exclude pluralisation.

34. It is also to be remembered that even on the arguments of the Respondent Dilley a great number of expressions in s. 185 will have to be pluralised on any reading of the section, i.e. even where one applies the section to an offer made by a sole transferee, for example, the expressions "nominee" and "subsidiary" in s. 185(1) will on occasions need to be pluralised. Further, it is submitted that insofar as s. 185 permits a dissenting shareholder in a transferor company to have rights against the transferee company, that section confers such rights not only on persons who are sole owners of shares in the transferor company, but also on joint holders of its shares. It is also noteworthy that s. 185 itself actually employs plural expression in a sense other than a joint sense, for example in s. 185(4)(a) the phrase "the holders" must mean "the holders of each of them".

35. Finally, it is important to note that s. 185 is drawn in very rough and legally inartistic language. For example it employs the terminology

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of contract in its reliance on notions such as "offer" and "acceptance", whereas this concept is inapposite as between a transferee company and a transferor company, the relevant contracts in each case being contracts between the transferee company and each shareholder in the transferor company. Likewise, the expression "scheme" or "contract" is confusing and lacks precision. Of an earlier Tasmanian version of this section Dixon C.J. in Australian Consolidated Press Ltd. v. Australian Newsprint Mills (Holdings) Ltd. (1960) 105 C.L.R. 473 at 479 said that it

> "was transcribed from a badly drawn provision, untechnical and imprecise in its expression and exhibiting no very certain purpose or policy ...."
>
> "'Scheme' is a vague and elastic word. Doubtless it connotes a plan or purpose which is coherent and has some unity of conception. But the rest of the section shows that it is dealing with some plan, proposal or project which contemplates the acquisition of the whole of the shares in the 'transferor' company by the 'transferee' company or the whole of a specific class of such shares. That seems enough in itself to warrant the application of the word 'scheme' to the proposal. The

word 'involves' has of course a very wide and imprecise meaning and if the transfer of the shares is the object of the 'scheme' the transfer from each shareholder may surely be described as 'involved' in the scheme. We seem to be dealing with commercial rather than juristic English and if so it is the very word one would expect."

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Therefore, when applying the section and in considering whether it is capable of pluralisation it is submitted that the section should not be subjected to an analysis which will treat it as if it had been drawn with the accuracy of a skilled conveyancer.

36. The appellants submit that the policy which s. 185 is intended to effectuate requires that such section should be pluralised where necessary.

37. In their respective judgments both the Chief Judge and their Honours in the High Court stated as an additional reason why s. 185 was incapable of pluralisation that the provisions of s. 185 as a whole were merely intended to regulate the consequences of a "takeover scheme" under s. 184, which section they considered clearly incapable of pluralisation. The appellants secondly submit that, assuming that s. 185, standing on its own, is capable of being read in the plural sense, there is

p.100.l.1
p.125.l.4

Record

nothing in s. 184 which prevents such a reading. A

38. The judgments of the High Court and the Supreme Court proceed upon the basis that ss. 184 and 185 of the Companies Act are related. The appellants respectfully submit that the Sections do not bear any relationship to one another and that B s. 185 has an operation completely independent of s. 184. If the two sections which are in the same part of the Act and are consecutive sections were intended to work together it is to be expected that the Legislature would have described the subject C matter dealt with therein in identical terms. Moreover, despite the fact that some amendments were made in 1961 to the wording of the prototype of s. 185, it is significant that s. 185 was not redrafted so that it expressly applied only to D schemes or contracts effected pursuant to an offer complying with s. 184. Assuming that the English s. 209 permits of a plural offer, the corresponding N.S.W. s. 185 (which is in all material respects in the same terms) should not be confined to a single E offer. Yet, the Australian Courts would so confine it, partly because those Courts consider S. 184 should be so confined to a single offer and partly because they consider ss. 184 and 185 are complementary. The Board would not lightly give to F s. 185 a meaning different from that properly

attributable to s. 209; and it is submitted that there is no compelling provision in the N.S.W. Companies Act requiring the Board to do so.

39. S. 184 is a Section in which the Legislature has attempted to be precise in its definition of terms. Care has been taken with the definitions of "offeree corporation", "offeror corporation", "take-over offer" and "take-over scheme". None of these expressions is used in s. 185. The arrangement which is affected by s. 185 is "a scheme or contract involving the transfer of shares". This expression is not defined. The disposing company is not referred to as a corporation nor as a company to whom an offer is made but as "transferor company" whilst the acquiring company is again not referred to as a corporation and is described as the "transferee company". It is respectfully submitted that the very distinction that there is between the terms used in the two Sections is a strong indication that the Sections were not intended to be related or necessarily to work together.

40. Although the two Sections are to be found in Part VII which is entitled "Arrangements and Reconstructions" there are Sections in this Part of the Act dealing with a variety of subjects not all of them connected with arrangements and reconstructions. S. 181 deals with power to

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compromise with creditors and members. Ss. 182 and 183 are in their terms supplementary to s. 181. S. 184 deals with a distinct subject matter namely "take-over offers" as defined only for the purposes of that Section and the Tenth Schedule whilst s. 185 deals with the power to acquire shares of shareholders dissenting from a scheme or contract approved by a majority. S. 186 which is the last Section in Part VII is a section conferring upon a minority certain rights in the events of their being oppressed by a majority of shareholders. S. 186 is not appropriately found in a part entitled "Arrangements and Reconstructions".

41. S. 185 is a Section to be found in the United Kingdom Companies Act 1948 (S. 209). S. 209 was formerly s. 155 of the United Kingdom Act of 1929. It apparently had its origin in s. 50 of the United Kingdom Companies Act of 1928. The New South Wales Companies Act of 1936 incorporated such a provision in s. 135 and it was apparently from this section that s. 185 of the present New South Wales Act was taken. On the other hand s. 184 did not appear in any earlier New South Wales Statute nor has it a counterpart in the English Statute as such.

42. It is submitted that whatever meaning in the context should be given to the words "offeror corporation" and "take-over offer" the words

"scheme or contract" in s. 185 are extremely wide and would indicate unless there was a very clear intention to the contrary that they were to apply to all schemes or contracts whether involving offers by one company or by a plurality of companies. The words had prior to the introduction of the Uniform Companies Act been construed by the High Court of Australia in Australian Consolidated Press Ltd. v. Australian Newsprint Mills Holdings Ltd. 105 C.L.R. 473. Dixon C.J. at page 479 had, as earlier quoted, described the language as "imprecise and commercial".

43. It is respectfully submitted that the matters relied upon by the High Court and the Supreme Court as indicating a contrary intention in s. 185 itself do not disclose any changes in policy which there must be before there is an indication of a contrary intention so as to avoid the operation of the Interpretation Act. For these reasons the appellants respectfully submit that it is not necessary to consider whether the provisions of s. 184 apply to an offer made by two or more companies and that s. 185 should be looked at without reference to s. 184 in order to determine whether it applies to the offer made by The Colonial Sugar Refining Company Limited and Blue Metal Industries Limited in the present case.

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44. For the foregoing reasons the appellants submit that s. 185 is quite independent of s. 184 which was enacted for the first time in 1961. Even if it were true that s. 184 cannot be pluralised s. 185 clearly can be. There is nothing in s. 185 which expressly limits it to deal with the consequences of an offer made pursuant to s. 184, and the policy manifested by s. 185 is still valid whether s. 184 can be pluralised (as the appellants submit is the case) or whether it cannot be pluralised and merely leaves two-company offers unregulated. Historically and grammatically the two sections are quite distinct; nor from the policy point of view is there any reason to hold that s. 184 has the implied and extraordinary result of restricting the meaning of s. 185. The only circumstances in which it could even be conceivable to hold that s. 184 restricts the meaning of s. 185 would be if one held both that s. 184 was incapable of pluralisation and that the Act provides that all offers made otherwise than in conformity with s. 184 are illegal; a conclusion which the High Court (rightly, in the appellants' submission) itself recognises is untenable.

45. The appellants' third submission is that even if, contrary to their submissions, s. 185 merely regulates the consequences of an offer made

pursuant to s. 184, there is no reason why s. 184 cannot be pluralised. In neither Court were reasons given as to why s. 184 could not be pluralised; in the High Court their Honours merely gave examples of various provisions of s. 184 which seemed to them obviously incapable of pluralisation. The examples given were:- Record

(a) The definition of "takeover scheme" contained in s. 184(1); 123

(b) The provisions of s. 184(2) incorporating clauses 1(c) and 1(d) of Part B of the Tenth Schedule;

(c) The provisions of s. 184(2) incorporating into Part B of the Tenth Schedule the provisions of paragraphs 20 and 23 of Part II of the Fifth Schedule;

(d) The provisions of s. 184(2) incorporating clause 4(d) of Part B of the Tenth Schedule;and

(e) The provisions of s. 184(2) incorporating clause 8 of Part B of the Tenth Schedule; and

(f) The provisions of s. 184(7) incorporating mutatis mutandis the penal provisions of ss. 46 and 47 of the Act.

46. The appellants submit that, as in the case of s. 185, their Honours in reaching the conclusion that s. 184 was itself incapable of pluralisation could have adopted either of the fallacious modes of

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reasoning already referred to. If this be so, when their Honours said that the definition of "takeover scheme" contained in s. 184(1) was incapable of pluralisation (clearly meaning thereby that the expression "related to that corporation" contained in the definition was so incapable) their mode of reasoning was as follows:

Either

(a) That expression is incapable of pluralisation for the following reasons:

(i) Section 21(b) of the Interpretation Act would, if applicable, merely authorise the reading of the expression "related to that corporation" as "related to those corporations";

(ii) However, in the context of a joint two-company takeover scheme, the expression "related to those corporations" would be ambiguous - would it merely refer to companies which were related to either taking-over company? Would it merely refer to companies which were related to both taking-over companies or would it refer to companies which were related to either or both the taking-over companies?

(iii)Since pluralisation would lead to such ambiguities, as a matter of law there must be a "contrary intention";

(iv) Therefore s. 21(b) of the Interpretation Act is inapplicable to s. 184(1) of the Companies Act; or

(b) That expression is incapable of pluralisation because

(i) S. 21(b) of the Interpretation Act would, if applicable, authorise the reading of the expression "related to that corporation" as "related to those corporations";

(ii) In the context of a joint two-company takeover scheme, the expression "related to those corporations" would refer solely to companies which were related to both taking-over corporations, and not to companies which were related to either of the taking-over corporations solely;

(iii)Such an expression would give rise to practical anomalies;

(iv) The fact that such anomalies would exist is, as a matter of law, a legislative manifestation of a "contrary intention";

(v) Therefore s. 21(b) of the Interpretation Act is inapplicable to s. 184(1) of the Companies Act.

Similar reasons must explain each of the other examples given by their Honours.

The appellants submit that each mode of

Record

reasoning is likewise inapplicable to s. 184. A

47. As to the examples of the language contained in s. 184 of the Act which their Honours said was incapable of pluralisation, the appellants submit that,

(a) There is no difficulty in reading a pluralised B expression "related to those corporations" as comprehending companies which are related to either or both of two or more taking-over corporations;

(b) There is no difficulty in reading clauses 1(c) C and 1(d) of Part B of the Tenth Schedule to the Act as requiring the taking-over companies in a joint two-company takeover scheme to supply the information therein referred to insofar as it affects either or both of them; D

(c) There is likewise no difficulty in giving paragraphs 20 and 23 of the Fifth Schedule of the Act (as referentially incorporated into the Tenth Schedule) a similar meaning. It is submitted that the expression "profits and E losses and assets and liabilities of the companies" would be quite appropriate to deal with the profits, losses, assets and liabilities of each company and of their joint ventures, the joint profits, joint losses, joint assets F and joint liabilities of the company being in

any event necessarily disclosed in any report dealing with a single company. Likewise there is no difficulty in pluralising the word "report".

(d) There is no difficulty in reading clause 4(d) of Part B of the Tenth Schedule in a similar sense;

(e) There is no difficulty in reading clause 8 of Part B of the Tenth Schedule as requiring the offeror corporations to supply the information which they or either of them may have as to the number, amount or price at which the securities therein mentioned have been sold in the previous three months; and

(f) There is no difficulty in reading s. 184(7) in a plural sense, so that it subjects either or both of two taking-over corporations to penal sanctions if they give misleading information to the taken-over company as to the assets etc. of either of them. It is, the appellants submit, a construction of s. 184(7) consonant with the legislative intention that all take-over offers should be regulated that directors of one company concerting with directors of another to make one joint take-over offer by both of them, should all be liable for false statements relating to either company.

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48. Even on the arguments of the Respondent Dilley it is clear that some expressions at least in s. 184 would have to be pluralised even in the event of an offer being made by a single taking-over company. Thus, it seems clear that the words "by any other corporation" in paragraph (b) of the definition of "Takeover offer" in s. 184(1) are capable of being read in the plural i.e. by adding thereto the words "or corporations". When so read, the reference to "shares .... already held .... by any other corporation or corporations" (related to the offeror) would include shares in the offeree corporation held jointly by other corporations each of which is related to the offeror as well as shares in the offeree corporation held separately and individually by each of those other corporations. For example, if company A wishes to take over company B and companies X and Y are both subsidiaries of A and shareholders in B, it is clear that the shares in B held by companies X and Y must be counted together with those (if any) held by A in determining whether there is a take-over scheme within the meaning of s. 184(1). This would be true whether X and Y each held different shares in B or whether X and Y were joint shareholders of the same shares.

49. Clearly, the intention of s. 184 was the

protection of shareholders in a company subject to a take-over offer. What Parliament meant when it was enacting s. 184 was to insist that all shareholders in a taken-over company would, prior to the completion of the takeover, be supplied with full information as to the matters provided for in the Tenth Schedule. Record

50. It is particularly worthy of note that the Chief Judge did not hold that a two-company offer was illegal or in any way contravened the provisions of s. 184; and that the High Court held that, far from this being the case, such an offer was not rendered in any way illegal but was left entirely unregulated by the Act. It is also worthy of note that the High Court held that the legislature obviously intended to provide in s. 184 a complete code applicable to all company take-over offers but that it had failed to implement its intention in this regard. p.100.l.29 p.125.l.30/40

51. The High Court held, "It is clear enough, that s. 184 was introduced for the purpose of protecting the shareholders of a company to whom a takeover offer is made and there can be no doubt that it was the purpose of the legislature to require that "takeover" offers should be made only in conformity with its provisions (see subs. (6))". In conformity with Sin Poh's Case and the principles of legal p.122.l.7.

Record

interpretation contained therein, once the High Court had made such a finding as to Parliament's intention, their Honours were prevented from giving that section an interpretation which would defeat that intention; viz. that joint takeover offers can still lawfully be made but are left unregulated by any statutory provisions at all. The interpretation given by the High Court to s. 184 would mean that in the case of a joint takeover, no shareholder would have the right to insist that the taking-over companies provide him with the information required by the Tenth Schedule or with any information at all, a conclusion clearly at variance with the legislative intention which the High Court rightly found to be manifested in s. 184. Indeed, the High Court judgment involves the inconsistency that one can at the same time discern a "contrary intention" in an Act of Parliament within the meaning of s. 21(b) of the Interpretation Act and also make an express finding that Parliament had no such contrary intention. It would also have the anomalous practical result that a company wishing to make a takeover offer and evade the stringent provisions of s. 184 could always find a ready means of doing so merely by persuading a "dummy" company to join with it in making the offer, in which case it would be at perfect liberty to make

A B C D E F

A the offer but would not have any obligation to supply any information at all to the recipients of the offer.

52. In summary, therefore, the appellants submit -

(a) S. 185 can be read in the plural so as to make
B it applicable to two-company "schemes or contracts".

(b) The policy of s. 185 clearly requires it to be pluralised in a proper case.

(c) Even if as the High Court held s. 184 is
C incapable of pluralisation, that would be no reason for departing from the view of s. 185 submitted in (a) and (b) above.

(d) Alternatively to (c) s. 184 can and must be pluralised in order to give to that section the
D meaning which Parliament intended it to have.

Accordingly the appellants submit that the order of the High Court should be set aside and in lieu thereof it should be ordered that the summons by Dilley should be dismissed.

M.H. BYERS

FORBES OFFICER

No. 14 of 1968

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE HIGH COURT OF AUSTRALIA

B E T W E E N

BLUE METAL INDUSTRIES LIMITED AND READY MIXED CONCRETE LIMITED

- and -

Appellants

R.W. DILLEY AND THE COLONIAL SUGAR REFINING COMPANY LIMITED

Respondents

AND B E T W E E N

THE COLONIAL SUGAR REFINING COMPANY LIMITED

- and -

Appellant

R.W. DILLEY, BLUE METAL INDUSTRIES LIMITED AND READY MIXED CONCRETE LIMITED

Respondents

APPELLANTS CASE

LINKLATERS & PAINES,
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