INSTITUTE OF ADVANCED LEGAL STUDIES

Judgment No. 31/74

-9 - 1973

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES, EQUITY DIVISION

BETWEEN

HOWARD SMITH LIMITED	Appellant (13th Defendant)

-and-

AMPOL PETROLEUM LIMITED		Respondent Plaintiff
R.W.MILLER (HOLDINGS) LIMITED	(1st)	Defendant
ARCHIBALD N.TAYLOR	(2nd)	Defendant
SIR EMIL HERBERT PETER ABELES	(3rd)	Defendant
ELIZABETH MILLER	(4th)	Defendant
ROBERT I.NICHOLL	(5th)	Defendant
EVAN DUFF CAMERON	(6th)	Defendant
KENNETH B.ANDERSON	(7th)	Defendant
WILLIAM A CONWAY	(8th)	Defendant
PETER J.DUNCAN	(9th)	Defendant
ALAN V.BALHORN	(10th)	Defendant
F.M.MURPHY (a male)	(11th)	Defendant
C.J.WATT (a male)	(12th)	Defendant
SECURITY SHARE SERVICES PTY. LIMITED	(14th)	Defendant
		Respondents

UNIVERSITY OF LONDON INSTITUTE OF ADVANCED LEGAL STUDIES -4 JAN 1975 25 RUSSELL SQUARE LONDON W.C.1

CASE FOR THE RESPONDENT
AMPOL PETROLEUM LIMITED

Record

1. This is an appeal by HOWARD SMITH LIMITED (hereafter called "Howard Smith") from a decision given on 14 December, 1972 by the Chief Judge in Equity (Mr. Justice Street) sitting in the Equity Division of the Supreme Court of New South Wales. P.P.1198-9

2. The effect of the decision and the declarations and orders made consequent thereon was to declare invalid and set aside the allotment and issue to Howard Smith of 4,500,000 ordinary $1.00 shares in the capital of R.W.MILLER (HOLDINGS) LIMITED (hereafter called "Millers") made 6 July, 1972 and to rectify accordingly Millers' register of members.

3. The proceedings were brought by the Respondent AMPOL PETROLEUM LIMITED (hereafter called "Ampol") against Millers, its 7 directors and 4 alternate pp. 1-11

Record		
	directors, Howard Smith and Security Shares Services Pty. Limited (hereafter called "Share Services").	
p.1129 L.16	4. In the proceedings, Ampol challenged the validity of the said allotment to Howard Smith made at a meeting of Millers' directors on the morning of 6 July, 1972 (hereafter called "the Meeting") and attended by 6 of the 7 directors of Millers, Archibald Norman Taylor, Sir Emil Herbert Peter Abeles (hereafter called "Abeles"), Elizabeth Miller (hereafter called "Lady Miller"), Robert Ian Nicholl, Evan Duff Cameron, and Kenneth Barton Anderson and by Alan Vardy Balhorn as alternate director for the seventh director, Peter John Duncan. The allotment resolution was passed by 4 votes (Taylor, Nicholl, Anderson and Balhorn who are hereafter collectively referred to as "the majority directors") to 2 (Lady Miller and Cameron). Abeles did not vote, Taylor as Chairman having ruled earlier at the Meeting that he was disqualified from taking part in the discussion of and from voting upon the resolution.	10 20
P.1129 11.19-29 P1166 11.43-47	5. Ampol's principal ground of attach upon the allotment was that the majority directors were not acting bona fide in the interests of Millers as a whole in that their primary or dominant purpose in voting in favour of the allotment was to reduce the proportion of shares then held by Ampol and Bulkships Limited (hereafter called "Bulkships") in the capital of Millers from a combined holding of 54.9% to 36.6%	30
P.1129 11 30-33 Pp.1166-7 P.1167 11.2-7	6. Millers, the majority directors and Howard Smith denied that the allotment was made for that purpose and contended that the allotment was made primarily for the permissible purpose of meeting what was said to be Millers' "urgent need for capital". Alternatively, those defendants contended that, in the circumstances of the case, the primary or dominant purpose of the majority directors alleged by Ampol was a permissible purpose and within the ambit of the powers of Millers' directors.	40
P.14 11.6-24	7. Additionally Howard Smith argued that proof of a breach of duty by Millers' directors did not entitle Ampol to have the allotment set aside as against Howard Smith, for the reason that it was not shown that at the time of the allotment Howard Smith had notice of the breach	50

of duty by the majority directors or of any irregularity in the conduct of the Meeting. None of the persons who were involved on behalf of Howard Smith in the negotiations preceding the allotment were called to give evidence at the hearing.

CENTRAL ISSUES

8. The Chief Judge in Equity found that the primary or substantial purpose of the three directors and the alternate director who voted in favour of the allotment was to reduce the proportionate combined shareholdings of Ampol and Bulkships to something significantly less than a majority of the issued shares. His Honour further found that Howard Smith had notice of the fact that this was the primary or substantial purpose of the allotment. His Honour held, as a matter of law, that the purpose of so reducing the proportionate shareholding of the two main shareholders in a company is not a permissible purpose for which directors of the company may properly exercise the power to allot shares. His Honour therefore held that the allotment of the shares to Howard Smith was invalid. The central primary issues in this Appeal would appear to be:

P.1138 11.30-37

P.1191 11.45-
P.1192 line 2

P1190 L.1-10

P.1192 11.5-12

(a) Should His Honour's findings of fact as to the primary or substantial purpose of the three directors and the alternate director who voted in favour of the allotment of shares be set aside?

(b) Should His Honour's findings of fact that Howard Smith had notice of the primary or substantial purpose of the directors and the alternate director who voted in favour of the allotment be set aside?

(c) Was His Honour in error in concluding, as a matter of law, that the purpose of reducing the proportionate shareholding of the two main shareholders (who between them held a majority of the issued shares) in a company to something significantly less than a majority of the issued shares was not a permissible purpose for which directors of a company might properly exercise the power to allot shares?

The Respondent submits that each of these three questions should be answered in the negative. If any of these questions should be answered in the affirmative, it will be necessary for a number of subsidiary matters to be considered.

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CIRCUMSTANCES OF THE CASE

9. The principal companies involved in the events giving rise to these proceedings were as follows:-

P.1 ll.9-11
P.1128 L.30

(a) AMPOL (the Respondent) was a New South Wales based company which carried on the business, in Australia, of an oil company. At all relevant times Walter McEllister Leonard was Chairman of Directors of Ampol.

Exhibit A (Separate Document)

(b) MILLERS was incorporated on 11 June, 1962 in Australian Capital Territory (hereafter called "the A.C.T.") but had its head office in Sydney. 10

P.1127 ll.27-39

(i) The business of Millers and its subsidiary companies (all hereafter called the "Millers Group") fell broadly into 3 categories:-

they owned a number of hotels, they had coal mining interests and they owned a number of coastal ships and tankers including a completed 66,600 ton tanker, M.T. 20

"Amanda Miller" and another 66,000 ton tanker in the course of construction , M.T. "Robert Miller"

P.1128 ll.38-41

(ii) The nominal capital of Millers was $15,000,000 divided into 15,000,000 shares of $1.00 each.

P.1128 ll.38-41

(iii) Up to and including 5 July, 1972 the issued capital of Millers was 9,000,786 fully paid ordinary $1.00 shares. 30

P.2 line 30

(iv) Prior and up to 6 July, 1972, Millers' shares were, pursuant to its request, in the official list of The Sydney Stock Exchange Limited and all other member exchanges of the Australian Associated Stock Exchanges (hereafter called "the Exchanges") and accordingly Millers' shares were quoted on the Exchanges, and Millers was subject to the Official List Requirements of the Exchanges and in particular to Rules 11 (a) and 11 (b) thereof. 40

Exhibit C
Pages 12,13-4
P.1187 L.24 to
P.1188 line 37

P.2 lines 4-16

(v) The Directors of Millers consisted of Taylor; (appointed October, 1968),

Record

Anderson, (appointed 7 October, 1967) Nicholl (appointed August 1968), Duncan (Appointed 1969), **Lady Miller** (appointed **31 May, 1971**); Abeles (appointed 20 April, 1971) and Cameron (appointed 31 May, 1971) At all material times William Andrew Conway was alternate director for Anderson and Balhorn was alternate director for Duncan.

P.441 line 40
P.1003 L.15
P.789 line 27
Exhbts.M.H.13 M.H.14
P.1941 Line 31
P.1945 line 23
P.1945 11.3-10

(c) BULKSHIPS carried on the business of a shipowner operating, inter alia, on the Australian coast. At all material times Abeles was one of the 10 directors of Bulkships and Sir Ian Potter (hereafter called "Potter") was chairman of directors.

Exhibit MH 26

P.19 Line 3
P.1129 Line 6

(i) At all material times Bulkships held 2,257,100 shares in Millers (representing 25.1% of its issued capital) which it had acquired shortly prior to 26 April 1971.

P.1133 Line 29

(d) HOWARD SMITH owned, inter alia, a number of coastal tankers and was in this aspect of its business a competitor of Millers. The directors of Howard Smith were Messrs. W. Howard Smith (Chairman), Trotter, Thornthwaite and Harman. The latter 2 directors were at all material times on leave of absence. Other executive officers were Messrs. Griffin (general manager), Captain Evans (deputy general manager), Maxwell (secretary) and Mifflin (chief accountant).

1 Line 20

10. The principal Millers personalities and their backgrounds were:

A. DIRECTORS AND ALTERNATE DIRECTOR

(a) Sir Roderick Miller had been one of the foundation directors and was chairman and managing director of Millers from its incorporation in 1962 until his death on 26 April, 1971. As such he had played a dominant role in the affairs of the Millers Group and had held wide power in the daily conduct of their affairs. Sir Roderick Miller commanded the total confidence and co-operation of the directors of Millers. He was described

Exhibit A, Memorandum and Articles of Association of R.W.Miller (Holdings)Ltd. Separate Document

P.1128 11.2-12

Record

P.282 Line 28

in evidence as "a King" and the strength and competence of his control was recognised both inside and outside Millers.

P.1128 Line 18

Prior to his death the shareholding in Millers controlled by Sir Roderick Miller or subject to his direct influence amounted to 2,681,641 shares representing 29.8% of the then issued capital (hereafter called "the Miller shareholding"). Some 2,144,871 of such shares were held by Sir Roderick Miller's family company Romanda Pty. Limited (hereafter called "Romanda") and the balance was held by interests associated with him or subject to his direct influence.

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P.440 Lines 33- P.442 line 10

P.442 lines 15-22

(b) Taylor joined the Millers Group in 1954 primarily as a "coal salesman" and thereafter rose to the position of assistant to Sir Roderick Miller with the title "assistant general manager" (1968). In October 1968 Taylor was appointed a director of Millers and following Sir Roderick Miller's death he became chairman and (with Anderson) joint managing director. From 31 January 1972 Taylor was chairman and sole managing director.

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P.1000 line 28-

P.1001 line 11

P.1003 ll.5-19

P.1003 ll.33-36

P.1130 line 1

(c) Anderson joined the Millers Group on 14 April,1958 and rose to the position of personal assistant to Sir Roderick Miller (1966) and then general manager (1968).On 7 October 1967 Anderson was appointed a director of Millers. Following Sir Roderick Miller's death Anderson became joint managing director with Taylor and remained in that position until his retirement on 31 January 1972. Thereafter Anderson regularly attended board meetings, although from 6 to 29 or 30 June 1972 he was absent from Sydney during which time Conway was his alternate. Anderson had little commercial or board room experience.

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P.789 lines 15-34

(d) Nicholl was a solicitor and a member of a firm of solicitors Messrs. Nicholl & Nicholl. In August,1968

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Nicholl, at the personal request of Sir Rodereick Miller, accepted appointment as a director of Millers when a vacancy occurred. His appointment was confirmed at the annual general Meeting of Millers held in November, 1968. Nicholl had little commercial or board room experience.

P.1130 line 1

(e) Duncan was appointed a director og Millers in 1969. Between 1 July 1971 and 6 July 1972 (inclusive) Duncan personally attended only 3 out of the 14 Millers board meetings, namely those held on 29 July, 30 September and 19 November 1971. At all material times, Duncan was living in Tokyo.

Exhibit MH13
pp1796,1804, 1817,1823,1833, 1843,1852,1857, 1864,1873, 1886,1900,1906, 1917,1923,1929, 1933

(f) Lady Miller was the widow of Sir Roderick Miller and was appointed a director of Millers on 31 May 1971. At all material times Lady Miller was also a director of Romanda.

Lady Millers' shareholding in Millers as at 23 June 1972 was 52,360 shares.She was a director of Rellim Pty.Limited which held 35,000 shares in Millers and a trustee of the will of the late Sir Rodereick Miller whose estate held 1200 shares in Millers.

Exhibit P
P.1265
ll.17-24

(g) Cameron was a chartered accountant and a member of 10 years' standing of Messrs. Hungerford, Spooner & Kirkhope, a well known firm of chartered accountants. He was appointed a director of Millers on 31 May 1971. Following his appointment he assisted in initiating steps to provide information as to Millers' financial situation at each board meeting. A finance sub-committee was formed consisting of himself and a number of Millers executives.

P.44 line 16-27
Exhibit MH14
P.1945 line 23
Page 45

(h) Abeles was appointed as a director of Millers on 20 April 1971. He was a well-known and experienced businessman and a director of a number of public companies, including Tricontinental Corporation Limited, Bulkships (appointed 7 October 1970) and Thomas Nationwide Transport Limited (hereafter called "T.N.T.") which owned 3,537,669 shares in Bulkships. Abeles and companies controlled by him owned substantial shareholdings in and options over shares in T.N.T.

Exhibit MH 14
P.1941 line 31
Exhibit MH 11
Pp.1756-1759

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Exhibit MH 14 P.910 line 12 P.1945 P.1130 line 1	(i)	Balhorn was appointed as alternate director to Duncan on 31 May 1971. He lived in Melbourne and represented the personal and business interests of Duncan who paid him a retainer. Balhorn had little commercial or board room experience.	
	B.	EXECUTIVES AND CONSULTANT	
P.184 P.205 line 29 to P.206,line 16	(a)	Leonard Dean Koch joined the Millers Group in 1959 as assistant manager for South Australia. In January 1967 he became assistant to Sir Roderick Miller in Sydney. Following the death of Sir Roderick Miller, Koch was appointed general manager (June 1971) succeeding Anderson. He was a member of the finance sub-committee and thereafter he presented at Millers board meetings monthly management reports for the consideration of the directors.	10
P.205 lines 19-28	(b)	Henry Victor Ellis-Jones was secretary of Millers and a member of the finance sub-committee.	20
Exhibit MH 13 P.691 line14 P.1859 L.10 Exhibit MH 13 P.1932 L.36	(c)	Conway was appointed legal officer for Millers on 19 November 1971 and commenced his duties on 1 January 1972.He had been a solicitor and partner of a firm of solicitors, Messrs.W.P.McElhone & Co., which had acted as Millers' Solicitors. On 26 May 1972 Conway was appointed alternate director for Anderson for the period of his absence from Sydney.	30
P.205 Lines 20 and 27 P.694 Line 2	(d)	Mr.D.P.Walker was the manager of the hotel division of Millers Group and a member of the finance sub-committee.	
P.205 line 20	(e)	Mr F.M.Murphy was executive assistant to the managing director and alternate director for Taylor.He was also a member of the finance subcommittee.	
Exhibit MH13 Page 1931 line 20	(f)	Mr.John Aston was a solicitor and a member of the firm of solicitors,Messrs. Barkell & Peacock. At the meeting of directors of Millers held on 26 May 1972 that firm was appointed to advise the Board in relation to the Ampol take-over offer. Thereafter Aston advised Taylor and Millers executives in the capacity of what was described as a "take-over expert."	40

At Taylor's request, Aston attended and spoke at the Meeting.

SYNOPSIS OF EVENTS

11. The following is a summary of the circumstances of the case which are set out more fully in paras.12/22 hereof.

Ampol's interest in Millers

(a) The death of Sir Roderick Miller and the prospect of the large Miller shareholding of 2,681,641 Millers shares coming onto the market gave rise to considerable discussion and speculation in commercial circles concerning Millers' future. It was not long before there was talk of the possibility of a take-over offer being made for Millers' shares. Bulkships gave consideration to making such an offer but did not carry it through to fulfillment. (P.1128 L.13)

(b) Between April 1971 and May 1972 the remaining members of the "old team" on the Millers board, (Taylor,Nicholl, Duncan and Anderson) were joined by Abeles, Lady Miller and Cameron. (para.10A (f) (g) and (h) supra.)

(c) In May 1972 Ampol acquired the Miller shareholding at a price of $2.27 per share and thereby owned 29.8% of Millers' issued capital. At all material times Bulkships owned 25.1% of Millers' issued capital. (P.1134 L.42 to P 1135 L.3)

(d) On 22nd May 1972 Ampol publicly announced its intention to extend its $2.27 offer to all other Millers shareholders.Taylor strongly opposed the acquisition by Ampol of the Miller shareholding and his reaction to this announcement was to telex the Exchanges advising that the asset backing of Millers as certified by the Auditors was $3.71 (a figure not accepted as accurate by all the Millers directors and not intended by the Board of Millers to be made public) and recommending that Millers shareholders should not sell their shares until the board was in a position to tender further advice. (Pp.1135-1136)

Ampol's take-over offer and the reaction of the Directors of Millers.

(e) On 24 May 1972 Ampol gave Millers formal

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P.1136 L.28 — notice of its intention to make a take-over offer at a price of $2.27 per share.

P.1138 L.3 — (f) On 15th June 1972 Ampol made its formal take-over offer to Millers shareholders.

P.10 Line 9; P.10 Line 37. — (g) Millers wrote two letters to Ampol and commissioned a well-known firm of accountants Messrs.Cooper Brothers & Co., to examine the affairs of Millers and to provide information to asist the Millers board in considering the proposed Ampol take-over offer. 10

Appearance of Howard Smith and discussions with Millers.

pp.1138-1139 — (h) On 16, 19 and 20 June 1972 representatives of Millers had discussions with Howard Smith's representatives during the course of which the representatives of Millers disclosed full and confidential information concerning Millers' financial affairs. The object of these discussions (in which Taylor alone of the Millers directors was involved) was clearly to encourage Howard Smith to make an offer to acquire the issued shares in Millers. 20

Howard Smith's intended take-over offer.

pp.1139-1140 — (i) On 22nd June 1972 Howard Smith gave Millers notice of its intention to make a take-over offer to acquire Millers shares for $2.50 cash per share or a consideration consisting partly of shares in Howard Smith and partly of cash. On 23 June 1972 the Millers board unanimously recommended against accepting the Ampol take-over offer because Ampol's price was too low and because of the Howard Smith intended offer. 30

The Ampol and Bulkships joint announcement

P.1140 L.36 — (j) On the 27th June 1972, Ampol and Bulkships made a public joint announcement that they had reached agreement that day to act jointly in relation to the future operations of Millers, that they had decided to reject any offer for Millers shares and that they controlled between 40

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them in excess of 55% of Millers' shares.

The genesis of the allotment proposal.

(k) This announcement caused considerable dismay and concern at Millers. The unanswered question was whether Howard Smith would go ahead with its intended take-over offer. Millers' executives were preoccupied with devising ways to keep Howard Smith "in the race". It was suggested by Conway to Koch that Millers might buy Howard Smith's tankers for an issue of Millers shares. — Page 1141; Page 1142 1.10 (line 10)

(l) This suggestion was put to Howard Smiths' representatives at a meeting on 4 July 1972 attended by Taylor and Koch, but was firmly rejected by the Chairman of Howard Smith. This meeting consisted of discussions of ways and means of cutting down the proportionate share-holding of Ampol and Bulkships in Millers so that the Howard Smith offer might continue. Howard Smith proposed a share issue to it of 3,000,000 Millers shares at $2.00 with deferred payment terms. — Page 1142 1.10; Page 1142 1.24 (line 20)

(m) Throughout 4 and 5 July 1972 various discussions took place amongst Millers' executives and with Maxwell of Howard Smith. The proposal of 3,000,000 Millers shares at $2.00 with deferred payment terms was considered by Millers "unrealistic" and a breach of the Stock Exchange Regulations. Conway raised again with Maxwell the Millers proposal to buy Howard Smith's tankers in consideration of an allotment to it of Millers shares. Maxwell replied: — pp.1142 to 1144; Page 1144 1.33; Page 1144 1.40 (line 30)

"That's just no good because if we sell you the ships then we have to buy them back again if we did not succeed in our take-over bid." — Page 1144 1.47 (line 40)

Walker brought to Conway's attention Millers urgent need for cash from a short term liability point of view, provoking Conway to say:

"Well, surely in a situation like this, there is some justification for issuing shares." — Page 1145 1.15

Record

Crystallization of the negotiations between Millers and Howard Smith.

p.1145 l.39 to p.1146 l.21; p.1146 l.7; p.1146 l.16

(n) On 5 July 1972, there were discussions at Millers the tenor of which was the desirability for Millers to make an issue of shares to Howard Smith and the finding of a solution to the problem of justifying such allotment. Aston brought in as a "takeover expert", advised that an allotment could be justified if it was related to the amount needed to safeguard the company's financial position as it stood at the time. This was apparently understood by Koch as meaning that a share issue could be justified if the proceeds were sufficient to enable the company to discharge its short-term commitments. Koch worked out figures and said that at $2.30 per share Millers would need to issue 4,152,000 shares in order to produce $9½ million, being its short term commitments. Maxwell was then advised by Conway that if Howard Smith was minded to make an application it should be for "not less than 4,152,000 shares" at a price of "not less than $2.30 per share".

p.1147 l.29

(o) About 3 p.m. on 5 July 1972 Maxwell telephoned Conway and advised him of the "not unjoyous news" that Howard Smith proposed to apply for an allotment to it of 4,500,000 Millers shares at $2.30 per share.

Preparation for the Allotment

p.1147 l.34

(p) At approximately 4.45 p.m. on 5 July 1972 Maxwell came to Millers and produced to Taylor and Conway a draft letter setting out Howard Smith's proposal. Conway settled this letter by advising the deletion of certain words and it was planned that the same should be engrossed and presented to the Millers board the following morning. The letter itself put forward the need to destroy the majority bloc as a prerequisite to Howard Smith's take-over offer going forward, Millers' capital needs received but a passing mention.

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(q) Conway prepared a "script" for Taylor outlining the manner and conduct of the board meeting on 6 July 1972 and providing, inter alia for Taylor to rule Abeles ineligible to debate or vote upon the allotment by reason of his "conflict of interest", and for Koch to "fortify" the directors in their discussions with a summary of Millers' supposedly critical financial position.

p.1154 1.5
p.1283

(r) A deed of agreement relating to the proposal was prepared for execution by Millers and Howard Smith.

p.1148 1.45 to
p.1149
p.1277

(s) Arrangements were made in advance to have ready for sealing by Millers a share certificate for the 4,500,000 shares in favour of Howard Smith and to have completed and ready the necessary share register entry for effecting immediate registration of the allotment in Millers' share register kept by Share Services.

p.1154 1.32

6 July, 1972 and the Meeting.

(t) Maxwell arrived at Millers at about 9.40 a.m. and handed to Conway the engrossed letter of proposal and the counterpart deed to be executed by Millers. He remained in an upstairs office at Millers and kept with him there Howard Smith's formal letter applying for the shares, the deed already executed by Howard Smith and its cheque for the application moneys.

p.1148 1.42
Exhibit T
pp.1273-1282

(u) The Meeting commenced shortly after 10 a.m. and was attended by Taylor, Lady Miller, Abeles, Nicholl, Anderson, Cameron and Duncan. Taylor substantially followed his "script". The letter of proposal and the deed were read in full. In due course Abeles was ruled by Taylor ineligible to debate and vote upon the motion. Anderson moved the allotment motion (seconded by Nicholl). Koch "fortified" the directors as to Millers' supposedly critical financial position. Nicholl and Balhorn spoke shortly in favour of the allotment. Cameron and Lady Miller expressed concern at the proposal and the possible delisting of Millers. The motion was put to the vote and carried by 4 votes (Taylor, Nicholl, Balhorn and Anderson) to 2 (Lady Miller and Cameron). Abeles did not

pp.1154-1161
Exhibit V
pp.1290-1306

attempt to vote.

p.1160 1.32 (v) The deed of agreement and share certificate were forthwith sealed and handed by Conway to Maxwell in an upstairs office in exchange for the deed executed by Howard Smith, its letter applying for the shares and the cheque for the application moneys. Steps were then promptly taken to effect the registration of Howard Smith in Millers' branch register of members. 10

Post Meeting Activities

p.1161 1.16 (w) On 7 July 1972 the letter of proposal was reproduced in full in a full page advertisement inserted by Millers in the "Australian Financial Review". A copy of this advertisement was mailed to all Millers shareholders under cover of a letter of 7 July 1972 signed by Taylor as Chairman. 20

Exhibit X p.1309

Exhibit Y p.1312

DETAILED ACCOUNT OF FACTS

12. Ampol's interest in Millers:-

p.1128 1.13 (a) In the months that followed Sir Roderick Miller's death discussion and speculation upon Millers' future became rife in commercial circles. The prospect of the large Miller shareholding becoming available for purchase on the market, and the inevitable 30 change in the management consequent upon the removal of Sir Roderick Miller's hand from the helm, overshadowed the future with a cloud of uncertainty. It was not long before there was talk of the possibility of a take-over offer being made in respect of its shares. During this period Bulkships had given consideration to making such an offer, 40 but had not carried it through to fulfilment.

p.1133 1.33

p.1133 1.44 (b) Late in 1971 and through into 1972 there were discussions between Abeles in his capacity as a director of Bulkships and Leonard of Ampol, concerning the possibility of a joint

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approach being made to acquire Millers shares. There had existed between Abeles and Leonard over many years a background of commercial goodwill. Each of Bulkships and Ampol was interested in investigating and did investigate the prospect of a joint approach to take over Millers. The evidence did not establish however that at this period any agreement or under- 10 standing was reached between Ampol and Bulkships upon a joint course of action in connection with Millers.

(c) In the early part of 1972 and continuing until May 1972 Ampol negotiated with Lady Miller for the acquisition by it of the parcel of 2,144,871 Millers shares owned by Romanda. At all times Taylor opposed the sale by Romanda to Ampol of its shares in Millers. In his 20 judgment Street C.J.in Eq., said that contrary to submissions urged upon him on behalf of Millers, he was not satisfied on the evidence that there was collaboration between Ampol or Abeles or Bulkships in relation to the negotiations with Lady Miller. — p.1134 l.17; p.1134 l.24

(d) On the 12 and 22 May 1972 agreements were executed between Ampol and Romanda and between Ampol and another vendor 30 whereby Ampol purchased the total Miller shareholding of 2,681,641 shares representing 29.8% of Millers' issued capital. — p.1134 l.43 to p.1135 l.3

(e) After the execution of each of those agreements on 12 and 22 May 1972, Ampol made public announcement of the share purchases. In the second of the announcements Ampol announced its intention to make an offer of $2.27 per 40 share to all other holders of Millers shares. That price was higher than the price at which those shares were then being quoted on the Exchanges. — p.1135 l.6; Exhibits D& E pp.1215 to 1219; Exhibit MH 25 pp.2026 to 2028

13. Apprehension of Millers Directors regarding Ampol's interest:

(a) Ampol's first public announcement made on the 12 May 1972 was considered by the Millers directors at a board meeting held 50 on 15 May 1972. Abeles was absent overseas. — Exhibit D p.1217

Record

Exhibit MH 13
p.1925 l.37

The formal minutes of the meeting disclosed that the directors gave some consideration to the possibility of there being collusion between Ampol and Bulkships (who together now held 54.9% of the issued Millers shares) in connection with the future of Millers. The minutes further recorded that Taylor referred to the duty of the board to make "every endeavour to protect the interests of minority shareholders and staff". In his judgment Street, C.J.in Eq., said that the reference to " minority shareholders" was clearly enough a reference to shareholders other than Ampol and Bulkships.

p.1135 l.27

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Exhibit E
pp.1218 to 1219
p.1136 l.18
Exhibit MH 13
p.1923

(b) Following Ampol's second public announcement on 22 May 1972, Taylor sent a telex to the Exchanges announcing receipt of Ampol's indication of intention to make an offer of $2.27 to all Millers shareholders, and advising that the asset backing of the shares as certified by the auditors was $3.71 (a figure not accepted as accurate by all the Millers board and not intended by the board to be made public). The telex further stated that the assets of Millers were in the course of being revalued and it was recommended that shareholders should not sell their shares until the Millers board was in a position to tender further advice.

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14. The Ampol take-over offer and increased Millers apprehension.

Exhibit F.
p.1136 l.28
p.1220

(a) On 24 May 1972 Ampol, pursuant to Section 184 of the Companies Ordinance of the A.C.T., gave to Millers written notice of its intention to make a takeover offer to acquire the whole of the Millers shares then not already owned by it, for a consideration of $2.27 for each such share.

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p.1136 l.36
p.1137 l.7

(b) The notice of intention was considered by the Millers board on 26 May 1972. Abeles was still absent overseas. There was discussion regarding the employment of expert advisers upon the action to be taken by Millers. Balhorn, acting as alternate for Duncan, commented that the situation depended to a great extent on future action by Bulkships and that no decision should be made until the

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Record

attitude of Bulkships was known. The formal minutes of the meeting disclosed that Anderson recommended the employment of outside experts to advise management and Nicholl concurred, saying that experts should be retained "to protect the interests of minority shareholders". — p.1137; Exhibit MH 13 p.1930 1.30

(c) On 29 May and again on 6 June, 1972 Millers wrote to Ampol seeking certain information concerning Ampol's financial position and its intentions with regard to the future of Millers. — p.1137 1.9; Exhibits H & K p.1232 p.1239

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(d) Prior to 19 June 1972, Millers had instructed a well-known firm of chartered accountants, Messrs.Cooper Brothers & Co., to review the position of the company and its subsidiaries. This report (hereafter called "the Cooper Bros.report") was dated 21 June 1972, and was prepared as it stated, in order to provide information to assist in advising the Millers board regarding the Ampol take-over offer. — p.1137 1.37; Exhibit KK p.1372

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(e) On 15 June 1972, Ampol made a formal take-over offer to Millers shareholders to acquire their shares for $2.27 for each share. — Exhibit M p.1138 1.3 p.1243

15. The Appearance of Howard Smith and discussions with Millers.

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(a) On 16 June 1972, Messrs. W. Howard Smith, Griffin and Evans of Howard Smith called at the Millers offices and in the presence of Messrs.Taylor,Koch and Conway inquired whether Millers would be prepared to sell its tannkers to Howard Smith. Taylor gave a firm refusal to this proposal. The discussion regarding Howard Smith's wish to purchase the tankers included reference to the undesirability of the tankers passing to the ownership of Ampol. — p.1138 1.9

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After Taylor's refusal of Howard Smith's tanker proposal, there was a pause following which Conway said:

"Well, so far as we are concerned we would prefer you to offer for the — p.692,1.24 p.1138 1.40

Record

p.1138 l.40

shares of the Company".

In answer to a query made by the chairman of Howard Smith that Ampol and Bulkships held over 50% of Millers shares and therefore "How could we come in under those circumstances?" Conway expressed some doubt as to whether there was an existing understanding between Ampol and Bulkships. This meeting ended upon the basis that Howard Smith would think about the proposal. 10

p.1139 l.15

(b) On 19 June and again on 20 June 1972 there were meetings between Messrs. Maxwell and Mifflin of Howard Smith and Messrs.Ellis-Jones, Murphy, Walker, Conway and Koch of Millers. Neither Taylor nor W.Howard Smith were present at these meetings. The discussions consisted mainly of a series of questions by the representatives of Howard Smith as to Millers' financial position and the furnishing of information in response to those questions. During the course of the discussions on 20 June 1972 full information concerning Millers' financial affairs and a draft of the Cooper Bros. report on Millers were made available to the Howard Smith representatives on the authority of Taylor, notwithstanding that the Cooper Bros. report was confidential and had not yet been presented to the Millers board. 20 30

p.1139 l.23

Exhibit KK
p.1372

16. Howard Smith's intended take-over offer and its enthusiastic reception by the Millers Board.

Exhibit N
p.1139 l.45

p.1255

(a) On 22 June 1972 W.Howard Smith sent Taylor a letter of that date giving notice of an intention by Howard Smith to make a take-over offer to acquire all of the Millers issued shares on the basis of $2.50 per share in cash or two $1.00 Howard Smith shares plus $6.00 in cash for every 5 Millers shares. 40

p.1140 l.5

(b) On 23 June 1972 the Millers board (Taylor, Lady Miller, Abeles, Nicholl Cameron, Balhorn and Conway) considered

the contents of a draft statement pursuant to Part C of the A.C.T. Companies' Ordinance required to be prepared and issued by Millers to its shareholders following the receipt of the Ampol take-over offer. The Board (including Abeles) was unanimous in endorsing the amended Part C Statement which, inter alia, recommended the rejection of Ampol's offer on the grounds that the price offered was inadequate and further that Howard Smith had announced its intention to make a take-over offer at a higher price. Approval was also given by the Millers Board to the terms of a covering letter to accompany the Part C Statement. This letter, signed by Taylor, incorporated the full context of the Howard Smith letter of 22 June 1972, and recommended against acceptance of the Ampol offer.

Exhibit O.
Exhibit P.
p.1258 l.36
p.1259 l.24
p.1261

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Exhibit P
p.1262

(c) After the formal termination of the Millers Board meeting of 23 June 1972, Abeles had a private discussion with Taylor during which he reassured Taylor that Bulkships would not be selling its shares to anyone at any price, that Bulkships would now attempt to make a deal with Ampol and that failing that, with Howard Smith for the control of Millers.

p,1140 l.22

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17. The Joint Announcement of Ampol and Bulkships and its effects on Millers and Howard Smith

(a) On 27 June 1972, Koch received an intimation that Ampol and Bulkships had decided to act jointly in relation to Millers. He arranged an urgent meeting attended by himself, Ellis-Jones, Murphy, Walker and Conway of Millers and Maxwell of Howard Smith. At this meeting Maxwell declined to commit Howard Smith in any way or to forecast what might be the attitude of the Howard Smith board if the intimation which had reached Koch should prove to be true.

p.1141 l.9

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(b) On the evening of 27 June 1972 a joint press announcement was made by Leonard of Ampol and Potter of Bulkships in the following terms:-

p.1140 l.36

Record

Exhibit Q
p.1268

"Following discussions that took place today, agreement has been reached for the two companies to act jointly in relation to the future operation of R.W.Miller (Holdings) Limited. Accordingly, they have both decided to reject any offer for their shares whether from Howard Smith Limited or from any other source. Ampol Petroleum Limited and Bulkships Limited between them control in excess of 55% of the issued shares of R.W. Miller (Holdings) Limited." 10

p.1141 l.24

(c) Following the joint announcement there were several conversations between Conway and Maxwell, the continuing subject of which was the question of the effect of the joint announcement on the intended take-over offer to be made by Howard Smith and the further question of whether Howard Smith would go on with the offer or withdraw it. Maxwell remained non-committal throughout. 20

18. The genesis of the allotment proposal.

p.1141 l.34
p.698 l.20

(a) the first suggestion of an allotment was made by Conway in a conversation with Koch on either 3 or 4 July 1972. Conway raised the possibility of buying Howard Smith's tankers for an issue of Millers shares as being "one way of keeping Howard Smith in the race". 30

pp.1142 l.8 to p.1144 l.8
p.556 l.4

(b) Later in the morning of 4 July,1972 Taylor and Koch had a meeting at Howard Smith's office with W.Howard Smith, Trotter, Griffin and Evans. Taylor conceded in his evidence that what was discussed were "ways and means of cutting down the proportionate shareholding of Ampol and Bulkships so that the Howard Smith offer could succeed". At this Meeting:- 40

Exhibit UU
p.1572

(i) Maxwell proposed a share issue to Howard Smith of 3,000,000 Millers shares at $2.00 with deferred payment terms. Koch

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countered with a proposal (firmly rejected by W.Howard Smith) that Millers acquire the Howard Smith tankers (valued at $\$7\frac{1}{2}$ million) in consideration of the allotment to it of 3,000,000 Millers shares at \$2.50 and that Millers would make a further placement of 1,200,000 of its shares to Howard Smith for a total cost to that company of \$3,000,000. — p.1142 l.24

(ii) .... , The Howard Smith representatives said they would be in further communication with Millers. Taylor advised that there was a Millers board meeting fixed for 6 July 1972 and that if Howard Smith "were going to do anything they had better get it in before then". — p.1144 l.3; p.470 ll.28-37

(c) On return to Millers, Taylor and Koch informed Conway of Maxwell's proposal. Conway agreed that the offer was "Unrealistic" at that price and would — p.1144 l.9

(d) Later that day Conway telephoned Maxwell and re-affirmed that his proposal "just isn't on". In answer to Conway's question to Maxwell about the Koch proposal to buy the Howard Smith ships, Maxwell replied: — p.1144 l.38

> "No,that's just no good because if we sell you the ships then we we have to buy them back again if we did not succeed in our take-over bid."

(e) Details of the Maxwell proposal were advised by Taylor on the same day to Ellis-Jones, Murphy and Walker and later to Balhorn, Nicholl and Anderson. However, Taylor deliberately did not so advise Lady Miller Abeles and Cameron. — p.1145 l.18; p.471 l.6, p.558 l.7

(f) Later on 4 July 1972 Walker saw Conway and gave him some facts and figures as to Millers' financial position. Walker pointed out to Conway that from a short term liability — p.1145 l.4

Record

point of view Millers was urgently in need of cash. Conway's reply was:

p.700 l.10

"Well, surely, in a situation like this, there is some justification for issuing shares".

19. Crystallisation of the Negotiations between Millers and Howard Smith.

(a) On 5 July 1972, W.Howard Smith, Trotter, Griffin Evans met informally and discussed a memorandum prepared by Maxwell in which there was reference to the Maxwell proposal (varied however as to terms of payment) and to the fact that Taylor wanted a letter from Howard Smith applying for shares for presentation before the Millers board at its meeting the next day.

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pp.1434 to 1436
pp.1453 to 1455

(b) On the morning of 5 July 1972 Koch, Murphy, Walker, Ellis-Jones, Conway and Aston gathered in Koch's office. Taylor was "in and out" from time to time.

p.1145 l.44 to
p.1146 l.5

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p.700 l.33

(i) Aston advised the gathering that in view of the joint announcement of Ampol and Bulkships there appeared to be a clear "conflict of interest" with regard to Abeles' right to vote and that it would be legally permissible for Taylor to exclude Abeles from debating and voting upon a share allotment to Howard Smith if Abeles declined to disqualify himself.

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(ii) Aston further advised the gathering that so far as any allotment of shares was concerned, it should be related, if it were to be justified, to the amount which would be necessary to safeguard the Company's financial position as it stood at the time. Conway agreed with this statement.

p.1146 l.5

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(iii) There was some discussion of the price at which shares should be issued and figures of $2.50 and

Record

$2.30 per share were mentioned. Koch worked out some figures and said that at $2.30 per share Millers would need to issue 4,152,000 shares in order to produce nine and a half million dollars, being its current short term commitments.

(c) At approximately midday on 5 July 1972 Conway tekephoned Maxwell and advised him that Millers did not think that 3,000,000 shares were enough and that if Howard Smith was minded to make an application it should be for "not less than $2.30 per share." Maxwell replied:"We have already made up our minds that 3,000,000 shares are not enough and we are considering the matter". No conclusion was reached during this telephone conversation. — p.1146 1.22; p.702 11.2 to 33

(d) On 5 July 1972, Nicholl lunched in Millers' board room with Taylor, Conway, Koch and other Millers executives. Nicholl and Conway made reference to certain law books which Nicholl had brought with him and each of them expressed his summation of the law relating to share allotments. Nicholl's expressed view was that such an allotment was legal in a situation where the money was immediately required to meet the company's present and future financial requirements. Conway's summation was expressed by him as being "that the issue of shares could be justified if it were a proper amount bearing in mind the company's cash requirements." The tenor of this lunchtime discussion was that it was most desirable for Millers to make an allotment of shares to Howard Smith, and the question was how this could legally be done. — p.1146 1.31; p.703 11.15-19

(e) About 3 p.m. on 5 July 1972 Maxwell telephoned Conway and said that Howard Smith had decided to apply for 4,500,000 Millers shares at $2.30 and that he would be bringing round to Millers a form of letter setting this — p.1147 1.29; p.706 1.2

Record

out. Conway advised the remainder of the Millers luncheon gathering (Nicholl having already left) of this "not unjoyous" news.

p.758 1 25

(f) Later that afternoon, Conway telephoned Balhorn and told him that an offer from Howard Smith for the allotment to it of shares in Millers was expected before the Board Meeting the next morning. Balhorn was not told any details of the price offered or the number of shares sought or any other details.

p.1147 1.46 to p.1148 1.11

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(g) At approximately 4.45 p.m. on 5 July 1972 Maxwell arrived at Millers' office with a draft form of letter of proposal. Conway settled this letter by suggesting the deletion of certain lines and this was agreed to. The draft was thenread to Taylor who said that he wanted it signed by Howard Smith's Chairman before the Millers Board Meeting on the following day.

p.1147 1.34

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(h) On the night of 5 July, 1972:-

(i) Howard Smith's solicitors telephoned Conway at his home and there was discussion about the terms of the agreement referred to in the draft letter of proposal.

p.707 1.32

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(ii) A formal deed of agreement in relation to the proposed allotment was prepared by Howard Smith's solicitors for execution by Millers and Howard Smith.

p.1154 1.5

(iii) Conway prepared and partially completed a "script" for Taylor outlining the manner and conduct of the meeting of directors to be held on 6 July 1972. The "script" indicated, inter alia, plans to read out the letter of proposal, table the deed of agreement, advise the meeting of legal principles

Exhibit U p.1283

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Record

governing share allotments, exclude Abeles from debating or voting upon the allotment if he declined to disqualify himself and "fortify" the directors with a summary of Millers supposedly critical financial position.

20. Activities of Millers and Howard Smith on 6 July 1972 preceding the meeting.

10 (a) W.Howard Smith and Trotter attended a Howard Smith board meeting on 6 July 1972 and resolved to make application for the allotment of 4,500,000 Millers' shares at $2.30 and to execute both a form letter of application and the deed of agreement. — Exhibit NN, pp.1423 to 1425

(b) Conway completed and handed to Taylor his script — p.769 1.20

(c) Arrangements were made to have ready
20 for sealing at the Millers Board meeting, a share certificate in favour of Howard Smith for 4,500,000 shares, as well as to have completed the necessary share register entry for effecting immediate registration of the allotment in the Millers branch share register kept by Share Services. — Exhibit W p.1306; Exhibit CC p.1320; p.770 1.1 and 1.31

(d) At some time after 9 a.m. Anderson arrived at Taylor's office and was given
30 the board meeting papers. He then went to the Board room in anticipation of the commencement of the meeting scheduled for 10 a.m. — p.1005 1.30; p.1148 1.41

(e) At approximately 9.40 a.m. Maxwell arrived at Conway's office and handed to him the signed Howard Smith letter of proposal dated 6 July, 1972 as settled by Conway and Maxwell the preceding day and the unexecuted counterpart of the deed of
40 agreement. Conway read the letter through, and observed the agreed deletion. He then took the letter and counterpart deed into Taylor's office and advised Taylor of the deletion and that the deed was "all right". — p.24; Exhibit T p.1273; p.1153 1.2; p.710; pp.1149-1152

(f) The letter of proposal is reproduced in full in the judgment of Street,C.J.in Eq. — Exhibit T pp.24 to 27

Record

p.1273

In substance it sought the making of the allotment and put forward the need to destroy the majority bloc as a prerequisite to the Howard Smith offer going forward. The capital need of Millers received but a passing mention.

Exhibit T
p.1153 l.7
p.1273

(g) The deed of agreement contained a number of far reaching provisions. Inter alia, it bound Millers not to issue any shares for a period of 6 months. For an indefinite period, which could extend many months into the future, it tied up Millers in respect of a number of important aspects of its internal affairs. It prevented, without Howard Smith's consent, any mortgages or charges on properties, the borrowing of moneys otherwise than by bank overdraft, the disposal of assets otherwise than in the ordinary course of business, the making of various types of internal staff contracts and the entry into any long term or onerous contracts or commitments. Furthermore, it absolutely prohibited Millers from declaring or paying any dividend or bonus or making any other distribution of its profits or assets during the period stated in the Deed.

p.767 l.39 to
p.768 l.14

Exhibit W
p.1306

(h) After handing the letter of proposal and counterpart deed to Conway, Maxwell waited upstairs in another Millers office. He retained with him there Howard Smith's formal letter of application dated 6 July 1972 and its cheque for the application moneys of $1,035,000.

p.1153 l.36

(i) Shortly before 10 a.m. Balhorn came into Taylor's office and read the letter of proposal. He requested Conway to speak on the telephone to Duncan in Tokyo and explain the proposition to him. Balhorn handed Conway a piece of paper on which the words "yes" and "abstain" were written and left the office. Conway spoke to Duncan, ticked the word

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"yes" on the piece of paper and gave it to Balhorn in the board room. (See Conway's version p.711 and c.f. Balhorn's version pp.916/7, 928/30, 969/971).

21. The Meeting Itself.

(a) The meeting was attended by Taylor, Lady Miller, Abeles, Nicholl, Anderson Cameron and Balhorn as alternate director for Duncan. Koch, Conway and Aston were in attendance. — pp.1154 to 1161

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Contemporaneous shorthand notes were taken of parts of the meeting by a Miss Hill, Taylor's secretary. — Exhibits GG & HH pp.1338 and 1356

Formal minutes of the meeting were later prepared. — Exhibit V p.1290

(b) Street C.J. in Eq. sets out in detail the course of events at the meeting (See pp.30/35) Taylor substantially followed his "script". He made reference to " a dramatic development this morning", and stated that at about 9.30 a.m. he had received a letter signed by the chairman of Howard Smith which he proposed to read out to the board. The letter of proposal and deed were read out in full. Abeles predictably was ruled ineligible to take part in the debate and to vote on the allotment, having declined Taylor's request to disqualify himself. Taylor refused Abeles' request to adjourn the meeting so that he could obtain legal representation, whereupon Abeles temporarily left the board room to seek legal advice. Anderson and Nicholl moved and seconded respectively the allotment motion. Koch then "fortified" the directors with a resume of the company's supposedly critical financial position, reading out a list of short-term borrowings totalling $10,741,900 which were said to fall due on or before 30 June 1973. Nicholl and Balhorn spoke shortly in favour of the allotment. Cameron and Lady Miller expressed concern at the proposal and at the prospect of Millers shares being delisted. Both indicated that they would have liked more time to consider the allotment. The motion however was put to the vote and carried by Taylor, Nicholl, Balhorn and Anderson. Lady Miller and Cameron

pp.1155 to 1160

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p.715 l.10

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Exhibit TT p.1571

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Exhibit V p.1291

voted against it. Abeles who had by then returned to the board room, did not attempt to vote.

p.1160 l.32
Exhibits T & W
p.1273, p.1306

(c) Taylor and Anderson forthwith signed the counterpart deed of agreement and the share certificate. Those documents were sealed and taken from the board room by Conway, who went upstairs and handed them to Maxwell and received in exchange the deed of agreement and letter of application for the shares both executed by Howard Smith and the cheque for the application money. Conway returned to the board meeting with the deed executed by Howard Smith. The meeting was still in progress with discussion of other matters and concluded about 1 p.m.

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p.723 l.13

p.1160 l.44

(d) Steps were promptly taken to effect the necessary registration of Howard Smith as the owner of the 4,500,000 shares in the branch register kept by Share Services at its offices in a nearby Sydney suburb.

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22. Post Meeting Activities.

p.1161 l.7

(a) At the conclusion of the formal meeting arrangements were made by some of the directors (Nicholl, "probably Taylor and Balhorn were present") to publish the full Howard Smith letter of proposal in an advertisement in the Australian Financial Review. This suggestion was not dealt with at the board meeting itself.

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p.1161 l.16

Exhibit X
p.1309

(b) The letter of proposal was in fact published verbatim in a large advertisement measuring some 10" x 12" in the Australian Financial Review of 7 July 1972. The letter itself constituted the main substance of the advertisement. In the advertisement the words in the letter:-

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"thereby restoring to your minority shareholders, the right to sell their shares to the highest bidder and would give Ampol Petroleum Limited and Bulkships Limited a similar opportunity...."

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were printed in a heavier type.

(c) A copy of the advertisement was mailed to Millers' shareholders under cover of a letter dated 7 July 1972 signed by Taylor as chairman. — p.1163 l.16; Exhibit Y p.1309

(d) On the evening of 6 July 1972. quotation of Millers shares was suspended by the Exchanges. — Exhibit AA p.1315

(e) On 14 July 1972 the publication of the advertisement and the sending of the covering letter were mentioned at a meeting of the board of Millers at which Taylor, Lady Miller, Cameron, Nicholl, Anderson, Potter (as alternate director for Abeles) and Balhorn (as alternate director for Duncan) were present. Taylor sought ratification by the Board of his action in inserting the advertisement in the Australian Financial Review. A motion to this effect was moved by Anderson, seconded by Balhorn and passed without dissent. Potter abstained from voting on the ground that he was not present at the board meeting of 6 July 1972. During the course of the discussion of this motion, Balhorn commended Taylor on the advertisement as he considered it to be a " straightforward statement of fact." — p.1162 l.19; Exhibit DD p.1326 l.30

LEGAL PRINCIPLES APPLIED BY STREET C.J.IN EQ.,

23. Street C.J. in Eq. adopted as the principles of law relevant to the issues between the parties those principles enunciated by Dixon J., (as he then was) in Mills v.Mills 60 C.L.R. 150 at pp. 185/186:- — p.1132 l.2

(a) that directors of a company were fiduciary agents and a power conferred upon them could not be exercised in order to obtain some private advantage or for any purpose foreign to the power.

(b) that when the law makes the object, view or purpose of a man or of a body of men the test of the validity of their acts, it must take the substantial object the accomplishment of which formed the real ground of the board's action.

"If this is within the scope of the power, then the power has been validly exercised. But, if except for some ulterior and illegitimate object, the power would not have been exercised, that which has been attempted as an ostensible exercise of the power will be void, notwithstanding that the directors may incidentally bring about a result which is within the purpose of the power and which they consider desirable." (Mills v Mills supra at p.186) 10

The application of these legal principles was not challenged by any of the parties.

p.1167 l.8

24. Street C.J. in Eq., further held (and Ampol accepted) that Ampol bore the onus of proof in the proceedings.

PRINCIPAL FACTUAL CONTEST

25. In his judgment Street C.J. in Eq., said: 20

p.1133 l.12

(i) That his initial task was the ascertainment of the substantial object, the accomplishment of which formed the real ground of the action of the Millers' board in allotting the shares to Howard Smith, and
(ii) that this ascertainment involved essentially a question of fact.

26. The opposing contentions on this issue were:- 30

(a) the contention by Ampol that the dominant or substantial purpose of the allotment was the reduction of the proportionate shareholding in Millers of Ampol and Bulkships so as to make it possible for Howard Smith to acquire a majority of the issued shares in Millers. 40

(b) the contention by Millers, the majority directors and Howard Smith that such purpose was to meet an urgent financial need of Millers by obtaining a capital infusion into the company of over $10,000,000.

27. Howard Smith additionally argued that having regard to the width of the discretion given to the Millers directors in the exercise of all of their powers including the powers to raise capital and to the particular and unique circumstances of this case, there being a demonstrated shortage of capital, the allotment was not invalid notwithstanding that it was made with the exigencies of a take-over situation in mind.

Exhibit A (Articles of Association 4 & 110) (Separate Document)

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28. Millers and the majority directors sought to establish the substantial purpose contended for by them:

(a) first, by seeking to establish as an objective factual state that as at 6 July, 1972 Millers was in a financially straitened position; and

p.1167 l.22

(b) secondly, by the statement in the witness box of each of the majority directors that at the meeting he voted in favour of the allotment for the dominant purpose of meeting an urgent capital need of Millers.

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p.1172 l.22

29. Street, C.J. in Eq., resolved this principal factual contest by finding that the primary purpose of each of the majority directors in voting in favour of the allotment was to reduce the proportionate combined shareholding of Ampol and Bulkships in order to induce Howard Smith to proceed with its take-over offer.

p.1183 l.30

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30. His Honour's approach to the resolution of the principal factual contest was by:-

(a) <u>An Examination of Millers financial State</u>.

(i) His Honour examined the voluminous evidence adduced by Millers relating to its financial state.

pp.1167 to 1169

(ii) In particular His Honour referred to:-

a. The management reports of September and November 1971 and March and May 1972. Each of these reports had been presented to the board at its monthly meeting and had been accepted and relied on by the directors. The May 1972 management report was the last presented

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Exhibit MH 13 pp.1843,1864, 1917,and 1929.

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to the Millers board prior to the 6 July 1972 meeting. The tenor of those reports and particularly that of May 1972 was, so far as concerned finance in contrast with the tenor of Koch's statements at the Meeting.

p.1169 l.34

Exhibit KK
p.1372

b. The Cooper Bros.report which His Honour said:-

"provides further material which might be said to justify confidence in the policy of obtaining capital through loan finance. The report does not convey any note of impending doom still less of any need to revise the financial policies thus far followed by Millers." 10

p.1169 l.42
Judgment
Exhibit P
p.1261

c. The Part C Statement. Of paragraph 2 (g) of that document His Honour said that its tenor:- 20

"is confirmatory of what I regard as a developing optimism on the part of the directors of Millers for the future of the company in the light of its existing policies."

p.1171 l.20

d. The quality of some of the financial evidence adduced by Millers and the lack of certain other financial evidence. 30

p.1171 l.41 to 1172 l.10

(ii) In conclusion Street, C.J. in Eq. said that he could not accept as reliable the picture of gloom that Millers management team prepared for the board meeting on 6 July 1972 and that although there was a need for capital as at 6 July, 1972 he was not satisfied that the company's financial affairs were at crisis point due to unavailability of capital or that there was a pressing need to obtain cash funds by a share issue. 40

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(b) <u>An Assessment of the majority directors' evidence as to the purpose of the allotment.</u>

(i) Taylor, Nicholl, Balhorn and Anderson each gave evidence asserting that his primary purpose in voting for the allotment was to meet an urgent capital need for Millers. — pp.1172 to 1176

(ii) Street,.C.J. in Eq. found that he was unable to accept the assertions of any of the majority directors in the witness box that this was their primary purpose on 6 July,1972. He concluded that the majority directors issued the shares so as to reduce the interest of Ampol and Bulkships to something significantly less than that of a majority. — p.1176 l.35

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"This was the immediate purpose. The ultimate purpose was to procure the continuation by Howard Smith of the takeover-offer made by that company." — p.1183 l.47

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LEGAL CONSEQUENCES OF FACTUAL FINDING

31. Street C.J. in Eq., considered the legal consequences of his finding on the primary factual contest. — p.1184 l.5

(a) Ampol contended that such a primary purpose was foreign to the directors' powers to issue capital under Millers' articles of association and the general law. — Exhibit A Articles of Association 4 & 8 (Separate Document)

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(b) Millers, the majority directors and Howard Smith, in an alternative defence, denied that the pursuit of such a purpose lay outside the legitimate scope of the directors' powers. — p.1184 l.8

32. Street C.J. in Eq. held that the primary or substantial purpose of the allotment as found by him was not a permissible purpose and that consequently the allotment was not within the powers of the directors and was in valid. — p.1190 l.11

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(a) His Honour adopted as relevant principles of law on directors' powers to issue shares, — p.1184 l.12

the principles set forth in the joint judgment of Barwick C.J., McTiernan & Kitto, J.J., in the High Court case of Harlowe's Nominees Pty. Limited v. Woodside (Lake Entrance) Oil Company 121 C.L.R. 483 at p.493

p.1185 1.8

(b) His Honour accepted the statement of Menzies J., in Ashburton Oil N.L. v. Alpha Minerals N.L.45 A.L.J.R. 162 at p.169 that a majority shareholding or a controlling interest was not a right of property which ought to be preserved by intervention of the court to prevent the allotment of shares that would disturb it,but considered that directors could not validly negate the advantage of a majority by issuing shares for the purpose of destroying the effect of the majority bloc, no matter how greatly they might regret the existence of such bloc.

p.1189 1.27

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Exhibit C. p. 1213

pp.1187 to 1188

(c) His Honour referred to the specific rule in the Exchanges' Official List requirements governing the allotment of shares, and said that in allotting the shares the directors were in breach of Rule 11 (a) & (b).

p.1189 1.33

(d) Street C.J. in Eq., further concluded that contrary to the contentions urged on behalf of Millers and the majority directors there was no basis made out:-

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(i) of any actual or apprehended likelihood of abuse by Ampol and Bulkships of their majority powers in Millers, or;

(ii) of oppressive conduct by this majority towards the minority shareholders or towards Millers;

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or

(iii) of any actual or threatened infringement of the requirements of the law which fetter majority shareholders in the exercise of the power that is inherent in their majority.

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HOWARD SMITH'S KNOWLEDGE OF INVALID PURPOSE

33. The next issue which His Honourable determined was whether as against Howard Smith, Ampol was entitled to have the allotment set aside. — p.1190 1.20

34. The principal opposing contentions of Ampol and Howard Smith on this issue were as follows:-

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(a) Ampol's contention, inter alia, was that Howard Smith had both knowledge and notice that the allotment was being made for an improper purpose in that it had solicited or instigated the making of the allotment on the basis and in the belief that it would be made for such purpose. Consequently it was contended that neither the defence of bona fide purchaser for value without notice nor the benefit of the rule in Turquand's Case were available to Howard Smith and that the allotment should be avoided as against Ampol. — 5 E &B 24 (199 E.R. 474) 6 E&B 327(199 E.R.886)

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(b) The contention of Howard Smith, (on which no evidence was called) was that at all material times it was a bona fide purchaser for value without notice of the 4,500,000 Millers shares and that it did not at any of those times have notice of any irregularity, defect, excess or abuse of power, voidness or invalidity, affecting either the deed of agreement or the allotment of shares, It was further contended that the onus of proof of these matters lay upon Ampol. Consequently, it was contended that, having obtained the share certificate for the said shares, and having paid over the application moneys of $1,035,000 without knowledge or notice, Howard Smith was entitled to the benefit of the rule in Turquand's Case and to rely upon the defence of bona fide purchaser for value without notice. Accordingly, the allotment was valid as against Howard Smith. — p.14 1.6; Exhibit W p.1306

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35. Street C.J.in Eq., found on the evidence that Howard Smith was fixed with notice that the Millers board was predominantly influenced in the allotment of shares by the impermissible purpose contended for by Ampol. — p.1191 1.48 to p.1192 1.2.

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(a) His Honour supported this finding by reference to:-

p.1190 l.33

(i) the course of negotiations with Howard Smith, which he said established that those negotiating on behalf of Millers were concerned primarily if not solely to arrange for an issue of shares to Howard Smith so as to destroy the majority bloc and thus to preserve the Howard Smith take-over offer. 10

p.1191 l.6

p,749 l.21

(ii) The answer given by Maxwell on 4 July 1972 rejecting Conway's suggestions that Howard Smith should sell its ships to Millers in connection with a share issue. (See para. 18 (d) supra).

p.1191 l.27

Exhibit T ~~p.1273~~

(iii) The amendment by Conway in Taylor's presence of the draft of the draft of the Howard Smith letter of proposal and the acceptance of that amendment by Maxwell on 5 July 1972 which Street C.J., in Eq. , said indicated an approach on the part of the representatives of both companies that the reasons urged in the letter should be those which would commend the proposal to the directors of Millers. 20 30

p.1191 l.16.
Exhibit T.
p.1273

(iv) The terms of the Howard Smith letter of proposal which Street C.J. in Eq., said was the most compelling evidence of Howard Smith's anticipation of the purposes which the directors of Millers were seeking to achieve.

p.1191 l.39

"Howard Smith sought the allotment and supported its application by advocacy of a specific reason associated with the destruction of the majority bloc and the facilitation of its own takeover offer. 40

This reasoning advanced by Howard Smith having found favour with Millers' board, Howard Smith cannot be heard

to disclaim knowledge of the factors which rendered the decision of the Millers' directors invalid.

36. The aforesaid findings and conclusions of Street, C.J. in Eq., were held by him to entitle Ampol as against Howard Smith to have the allotment and the deed of agreement declared invalid and set aside and to have the appropriate consequential steps taken in order to correct Millers' share register.

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SUBSIDIARY CHARGES MADE BY AMPOL

37. Ampol made two subsidiary charges affecting the validity of the allotment. p.1192 l.13

38. The first subsidiary charge involved Balhorn's vote but in view of His Honour's finding of fact on this issue, this charge need not be further discussed at this stage. p.1153 l.35 to p.1154 l.4

39. The second subsidiary charge was that the exclusion of Abeles from participating in the discussion of and from voting on the allotment was wrong and that in consequence the proceedings had thereby lost their character as a meeting of directors thus invalidating the meeting and the allotment. p.1165 l.40 to p.1166 l.4

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(a) This charge raised for decision the factual issue of whether or not Abeles was excluded from full and free participation in discussion of the allotment resolution.

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(b) It was not contested that Abeles was excluded from voting on the motion. Millers, the majority directors and Howard Smith claimed to justify this exclusion of the basis of Abeles "conflict of interest" as a Millers director and a director of Bulkships a party with Ampol to the joint announcement of 27 June 1972. Such alleged justification formed part of a discretionary defence raised by Millers and was also the subject of a cross claim brought by Millers against Ampol, Abeles and Bulkships. p.18 l.42 p.20 l.36

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(c) Street C.J. in Eq., found as a fact that Abeles was prevented from taking part in the discussion and from p.1160 l.29

voting by reason of Taylor's ruling, and that otherwise he would have made a substantial contribution to the deliberations.

p.1192 l.13

40. Because of his findings and conclusions on the primary charge, Street C.J. in Eq. said that the challenge by Ampol to Taylor's disqualification of Abeles was not decisive upon the question of the validity of the allotment. His Honour concluded that Taylor's ruling was wrong in law, but found it unnecessary to discuss the effect of this error. 10

MILLERS' DISCRETIONARY DEFENCE

p.20 l.36

41. Street C.J. in Eq. dealt finally with the matters put forward by Millers as amounting to a discretionary defence against the granting of relief to Ampol.

p.1166 l.22

(a) In substance this defence amounted to a discretionary defence of "want of clean hands" and turned upon allegations made against Ampol and Abeles of wrongful complicity in actions inimical to the interests of Millers such as to compromise Abeles' position as a director of Millers. 20

p.1194 l.36

(b) Street, C.J., in Eq. concluded on the evidence that there was no basis upon which a finding could be made that Ampol, Bulkships and Abeles were embarked upon a conspiratorial course of conduct of such a nature as to induce the Court to withhold from Ampol relief to which it would otherwise be entitled to the effect of cancelling the allotted shares. Accordingly, His Honour found that the discretionary defence had not been made out and he discarded it. 30 40

CROSS CLAIM

p.20
p.1194 l.30

42. Street, C.J., in Eq. dismissed the cross claim brought by Millers against Ampol, Abeles and Bulkships seeking a discretionary dispensation preventing any error involved in the exclusion of Abeles, from invalidating the allotment. There is no appeal to this Board from that dismissal.

SUBMISSIONS

43. AMPOL respectfully submits to this Board:-

(a) that the findings of fact made by Street C.J. in Eq. were correct and should not be disturbed.

(b) that the allotment of shares made for the substantial purpose as found by Street C.J. in Eq. namely the purpose of cutting down Ampol's and Bulkships' proportionate shareholding in Millers so as to destroy what had been the majority bloc, was a purported exercise of the power to allot shares with a purpose that was ulterior and foreign and that such purpose was not a purpose for which the power was intended to be used. In such a case even a genuine belief in the propriety of the act could not cure the defect.

(c) that in any event the declarations and orders made by Street C.J. in Eq. can be supported by the alternative and additional submissions made or adopted by Ampol at the trial and hereafter set forth.

44. The ultimate facts found by Street C.J. in Eq., at the trial were:-

(a) That the dominant or substantial purpose motivating the majority directors in supporting the allotment was the purpose of cutting down the proportionate shareholdings of Ampol and Bulkships;

(b) That Howard Smith was affected with notice that the allotment was being made with this dominant or substantial purpose;

(c) That Abeles was excluded by Taylor's ruling from full participation in debate and from voting upon the allotment,

RE DOMINANT PURPOSE FINDING

45. The finding of fact in paragraph 44 (a) above depended largely upon an assessment of the credibility of each of the majority directors who gave evidence as to his primary

motivation in voting for the allotment.

46. It is submitted that the findings of fact by Street C.J. in Eq., were clearly correct and were justified by the evidence.

47. In any event it is submitted that an appellate court should not interfere with the trial judge's findings of fact unless it is satisfied:-

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(a) that any advantage enjoyed by the trial judge is not sufficient to explain or justify his conclusions;

(b) that the findings of the trial judge were clearly or demonstrably wrong.

("The Glannibanta (1876) 1.P.D.283; Khoo Sit Hoh v.Lim Thean Thong (1912) A.C. 232; Mersey Docks and Harbour Board v. Proctor (1923) A.C.253; "The Hontestroom (1927) A.C.37; Watt v.Thomas (1947) A.C.484; Benmax v.Austin Motor Co. Limited (1955) A.C. 370; Dearman v. Dearman 7 C.L.R. 549; Federal Commissioner of Taxation v. Clarke 40 C.L.R. 246; Paterson v.Paterson 89 C.L.R. 212; Whitely Muir & Zwanenberg Limited v. Kerr 39 A.L.J.R. 505; Da Costa v.Cockburn Salvage and Trading Pty. Limited 44 A.L.J.R. 455).

20

48. Each of the majority directors went into the witness box and deposed that his primary purpose was that which may shortly be described as the "financial purpose". He gave evidence as to his state of mind and his beliefs as to Millers' financial position. His statements in the witness box were sought to provide the "best" evidence of his primary motivation. It was important therefore that these statements should be tested most closely and received with the greatest caution.

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(Pascoe v. Federal Commissioner of Taxation 30 A.L.J.R. 402; Jacob v. Federal Commissioner of Taxation 71 A.T.C. 4192; Cox v. Smail (1912) V.L.R. 274; Mills v. Mills 60 C.L.R.150)

"Where the interests of individuals are

divergent and conflicting, where personal feeling is acute and where the parties immediately concerned give oral evidence, the trial judge is in a position which enables him to estimate the weight and value of evidence much more effectively than any court of appeal can possibly do. Where so much depends upon the character, personal motives and interests of individual
10 persons, the findings of a trial judge should not be disturbed unless there are strong and compelling reasons for taking a different view..." (Mills v. Mills supra per Latham C.J., at p.116)

49. It was essential for the trial judge to weigh and evaluate the evidence given by each of the majority directors. To perform this task His Honour said:-

"The demeanour of the witness, his involvement
20 in the matter under consideration and the extent of his reliability and understanding are all factors which must be weighed. These are amongst the considerations that I have taken into account in weighing and evaluating the evidence given by these four directors."

p.1177 l.15

50. The test by which these proceedings were to be determined was stated by Street C.J. in Eq., (and it is submitted correctly so stated) to be not the objective need
30 for capital, but whether the directors, in making the allotment, were acting in good faith for the benefit of the company as a whole. Even if the directors were wrong in their beliefs and assessments, if they allotted the shares primarily for the purpose of meeting what they honestly believed to be a pressing or critical financial need, then Ampol would fail in
40 its challenge.

p.1172 l.31

51. It was contended on behalf of Millers that ultimately the resolution of the contest came down to a straight forward question of credit - are the majority directors to be believed in their evidence when each asserted in terms that the allotment was made primarily to meet a capital need?

p.1172 l.43to
p.1173 l.5

52. It is submitted therefore that in these proceedings the assessment of the evidence and the credibility of the majority directors

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was critical and that in the performance of this task His Honour had a pronounced advantage over any appellate court.

53. Street C.J. in Eq. made close and penetrating assessments of each of the majority directors.

p.1177 l.37

(a) Taylor;

(b) Nicholl, Balhorn and Anderson.

p.1182 l.6 to p.1183 l.28

54. In the light of the history of events and contemporaneous statements actions, it is submitted that His Honour's inability to accept the assertions of the majority directors as to their primary purpose was amply justified and should not be disturbed. 10

RE NOTICE OF HOWARD SMITH FINDING

55. It is submitted that the factual finding in paragraph 44 (b) above was justified by the evidence.

56. On this issue there was evidence:- 20

Exhibit NN

pp.1423 to 1425

(a) that the Howard Smith representatives at the meeting with Taylor and Koch on 4 July 1972 included the two directors (W.Howard Smith and Trotter) who comprised the directors of Howard Smith at the meeting of directors held 6 July 1972 when it was resolved to apply for the allotment of Millers shares.

p. 379 l.32
p.556 l.4

Exhibit UU
p.1572

(b) that the meeting on 4 July 1972 consisted of a discussion of "ways and means of cutting down Ampol's and Bulkships' proportionate shareholding in Millers." The evidence, and in particular Exhibit UU, led to the clear inference that Howard Smith was attempting to bring about a situation in which the Millers directors would for an improper purpose allot shares to it upon terms which were from Millers point of view commercially indefensible. Howard Smith was attempting to persuade the Millers board to act with complete irresponsibility. In the absence of any evidence from Howard Smith this 30 40

inference it is submitted became compelling. Moreover, the inference from the general evidence is that Taylor did not reject the proposal of an allotment of 3,000,000 shares at $2.00 per share with deferred terms of payment. This would clearly appear to be Howard Smith's understanding of the situation as was evidenced by the Maxwell memorandum of 5 July, 1972.

pp.699-701

p.1572

10 (c) of the telephone conversation between Maxwell and Conway on the afternoon of 4 July 1972 which it is submitted highlights Howard Smith's understanding of the purpose of what was being discussed.

Exhibit NN

pp.1434 to 1435

pp.749 to 750

(d) of the midday conversation between Maxwell and Conway on 5 July 1972.

p.699
p.702
Exhibit NN
pp.1425 to 1427

(e) of the Howard Smith letter of proposal the draft of which was settled by Conway in the presence of Taylor, Conway's
20 suggested amendment being then complied with by Howard Smith.

Exhibit T.
p.1273

57. In the absence of any evidence from Howard Smith, it is submitted that the only inference open was that Howard Smith had notice of the fact that the purpose for which Millers would allot the shares was to cut down the proportionate shareholding of Ampol and Bulkships and that Howard Smith believed that the shares were to be and were in fact allotted by Millers for
30 that purpose.

p.759 1.36 to p.761

RE EXCLUSION OF ABELES FINDING

58. It is submitted that the factual finding in 44 (c) above was fully justified by the evidence.

See pp.609/611; 483/4
Exhibits V p. 1290 p.1232 and U. 1283

(a) The notice of motion for leave to appeal to this Board does not contain any specific challenge to this finding of fact.

(b) It is submitted that the evidence was all one way on this issue.

40 DOMINANT PURPOSE OF DIRECTORS WAS NOT A PERMISSIBLE ONE

59. It is respectfully submitted that the allotment of shares made for the substantial purpose of reducing the shareholding of Ampol and Bulkships in Millers to something significantly less than a

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majority of the issued shares was an impermissible purpose foreign to the directors' powers.

Exhibit A

60. The express general power to allot shares is contained in Clause 8 of Millers' articles of association. The ambit of that power is governed by the general law which lays down that directors of a company are fiduciary agents and that a power conferred upon them cannot be exercised in order to obtain some private advantage or for any purpose foreign to the power (Mills v. Mills (supra) at p.185).

61. It is submitted that it is important at the outset to distinguish between "purpose" and "motive" (See XCO PTY.LIMITED v. COMMISSIONER OF TAXATION 45 A.L.J.R.461 per Gibbs J p.464) In elliptical form it might be said that the allotment in this case was made to keep the Howard Smith takeover offer open and thereby enable Millers' shareholders to sell their shares to Howard Smith at a price of $2.50 per share. It is submitted however that any such desire would only be a motive or reason for making the allotment with the purpose of reducing the proportionate shareholding of Ampol and Bulkships. The "motivation" for having that "purpose" was that this would create a situation in which Howard Smith could obtain control of Millers notwithstanding the fact that Ampol and Bulkships did not want to sell their Millers shares to it. The further "motive" beyond that was that in those circumstances it was hoped and anticipated that Howard Smith would go ahead with its take-over offer and that the shareholders would have the opportunity of accepting it. It is submitted that the first motive and, a fortiori, the second motive lack a corporate purpose and are ulterior to the directors' powers to allot shares.

62. The purpose of "cutting down the proportionate shareholding of the majority bloc" may be expressed alternatively as the purpose of "altering the balance of voting power" so as to convert a majority into a minority. It is submitted that the

authorities support the proposition that the directors of a company cannot validly allot shares for the dominant purpose of altering the balance of voting power. It is not material whether the motive for such allotment is to buttress the position of the directors themselves or of their friends, or to entice an outsider into the company by means of an allotment cutting down an existing majority or to defeat a person seeking to obtain control of the company by purchasing shares from existing shareholders. Furthermore it is not material that the directors honestly believe that the achievement of their motives is for the good of the company. The critical matter is thatthe power to allot shares is not something that can be used for the dominant purpose of affecting the balance of the voting power.

(See Piercy v. S.Mills & Co.Limited (1920) 1.Ch. 77 at pp.82/85; Hogg v.Cramphorn (1967) 1 Ch 254 at pp.265/269; Harlowe's Nominees Pty Limited v. Woodside (Lakes Entrance) Oil Co.N.L.121 C.L.R. 483; pp. 492,494,497,499;) Television New England Limited v. Northern Rivers Television Limited and Anor. CCH Report of Company Cases 27, p.128, 133, et seq; Ashburton Oil N.L. v.Alpha Minerals N.L. 45 A.L.J.R. 162; at 162/3, 166, 167 and 168; Ngurli v. McCann 90 C.L.R. 425 at pp. 439/441; Gaiman v. National Association for Mental Health (1971) 1 Ch.317 @ p.330).

ALTERNATE AND ADDITIONAL SUBMISSIONS

63. By virtue of the findings of fact made by Street C.J. in Eq., it became unnecessary for His Honour to consider the alternative and/or additional submissions made or adopted by Ampol. It is submitted, however, that the declarations and orders made by Street C.J. in Eq., can be supported also by the acceptance of the following submissions made at the trial and hereafter set forth.

64. THAT even if the purpose of cutting down the proportionate shareholding of Ampol and Bulkships was not the dominant or substantial purpose of the allotment, or even if such purpose was a permissible purpose, the allotment was nevertheless void or voidable for the reason that the majority directors who supported the allotment acted on completely wrong bases in so far as the relevant considerations governing such

an allotment were concerned, and further that they paid no regard to almost all of the financial matters relevant to such an allotment. Expressed shortly the allotment was not made "bona fide".

pp.699-701

(a) Taylor, Nicholl and Balhorn acted on the wrong basis that for an allotment to be justified it must raise an amount of money approximately equal to the amount of short term borrowings. 10

(b) The majority directors acted on the wrong basis that the proposed allotment would be for the benefit of the company as a whole if the result was that all the existing shareholders had the opportunity of selling their shares at $2.50 and that even if Ampol and Bulkships did not want to sell, nevertheless 20 they still had the chance of selling. This approach was a consideration of the shareholders on the basis that they would cease to be shareholders and was opposed to the true obligation of the directors to look at the company as a continuing entity and at the interests of existing and future shareholders. (See Gower's Modern Company Law 3rd 30 Edition p.521 et seq.)

(c) It is immaterial whether the wrong approach resulted from an honest belief in wrong advice honestly given.

(See Ngurli v. McCann 90 C.L.R. 425 at pp. 441, 442, 444).

(d) None of the majority directors gave any consideration to most of the essential matters involved in 40 considering the desirability of an allotment from a financial point of view - for example, the Cooper Bros. Report; cash flows; future profits; "watering" of capital; an allotment to shareholders; an allotment to raise a lesser amount; the possibility of negotiating a higher price from Howard Smith. From Exhibits V, HH and T, it is clear that the only financial material 50

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put before the board was material in relation to short term borrowings. — Exh.V p.1290; Exh.HH p.1356; Ex.TT p.1571

(e) The majority directors approved the deed of agreement without any real knowledge or appreciation of its contents and of its effects upon the company's activities. — Exh.T. p.1293

(f) The evidence leads irresistibly to the conclusion that at the meeting the majority directors failed to give consideration to almost all of the matters relevant to the question of whether the proposed allotment was in the interests of the company as a whole because they were given and acted upon wrong and misleading advice with the consequence that the powers to allot exercised by those who voted in favour of the allotment was not exercised bonafide. (See Provident International Corporation v. International Leasing Corporation Limited 89 WN (N.S.W.)(pt 1) 370).

65. THAT Taylor's ruling excluding Abeles from discussion of and voting on the allotment resolution was wrong in law.

(a) The only basis for the ruling suggested at the Meeting was the joint announcement by Ampol and Bulkships of 27 June 1972 of which latter company Abeles was also a director. This was said by Millers to give rise to a "conflict of interest" justifying Taylor's ruling. — Exhibit V p.1290

(b) It is submitted that there was no authority for Taylor's ruling in Millers' articles of association or under the general law. — Exhibit A. Article 97

(c) It is further submitted that:

(i) if any conflict existed (and this is denied) it was a conflict of two duties and not a conflict of duty with personal interest. No attempt was made to prove that Abeles had any conflict or possible conflict of personal interest and duty.

(ii) in a situation such as that in which Abeles was placed, the rule that one whose interest conflicts with his duty must prefer his duty did not operate to disqualify him from participation in the relevant discussions, nor to permit the company to disqualify him.

(iii) in the relevant situation Abeles had a duty to Millers and also a duty to Bulkships. If those duties gave rise to a conflict (and this is denied) Abeles was not thereby absolved from performance of his duty to either company. The directors of Millers could not waive performance of that duty nor deny Abeles his right to perform his duty. 10

(See Furs Ltd. v. Tomkies 54 C.L.R. 583 at pp.590,592, 599) 20

(iv) in any event, the situation which gave rise to a potential conflict of different duties was one which had been created by Millers. It arose potentially, from the appointment of Abeles to Millers' board on 20 April 1971 at a point of time when he was, to the knowledge of Millers, a director of Bulkships itself a 25% shareholder in Millers. Thus Abeles had been placed by Millers in the position where a potential conflict of duties (but not on the evidence of personal interest and duty) might arise. In such circumstances if and when that possibility of conflict occurred, Abeles was not disqualified from decision making, voting, deliberation or other action, although he was required to perform his duty honestly and with scrupulous care. 30 40

(See Hordern v. Hordern (1910) A C 465 at p.475; Princess Ann of Hesse v. Field 80 WN (N.S.W.) 66 at pp.73/4; Re Broadcasting Station 2GB Pty. Limited (1964/65 N.S.W.R. 1648 at pp. 1662/3). 50

(v) the matter of the exclusion of a

director from discussion and voting is one which can be governed by the articles of association of the company. There is no rule of law relating to exclusion which will override the provisions of the articles.

(See Gower's Modern Company Law Supra p.526; Palmer's Company Law 21st Edition pp. 563/566).

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(vi) in any event, even if not entitled to vote Abeles was clearly entitled to participate in discussion. An indication of this is obtained from Clause 101 of Millers articles of association which permits interested directors to constitute part of a quorum.

Exhibit A Article 101

(See also Levin v. Clark & Ors. 80 W.N. (N.S.W.) 485)
The participation in discussion in a case such as this was far more important in terms of the way the vote turned out than the participation in voting.

20

66. THAT the consequence of the exclusion of Abeles from discussion and/or from voting was that the assemblage of persons (theretofore constituting the Millers Board and as such, the agents of Millers) ceased to constitute a meeting of the directors of Millers and became in legal consequence nothing more than an assemblage of persons. Their purported acts were void, not voidable.

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(a) While there does not appear to be any authority directly in point as to exclusion from voting, it is submitted that assistance can be obtained from a number of authorities (In re Norfolk Tramway Company (1887) 5 Ch D 963; In re Portuguese Consolidated Copper Mines Ltd. 42 Ch. D 160 at pp 167/8 168; Young v. Ladies Imperial Club (1920) 2 KB 523; John Shaw and Sons (Selford) Limited v. Shaw (1935) 2 KB 113 at pp.138/9,141; Re Homer District Consolidated Gold Mines 39 Ch D p.546 at pp.550/1; Levin v. Clark (supra.)).

40

(b) It is submitted that the purported acts are void not voidable for the reason

that they are acts done by a person without authority, by an assemblage whose act when done was not capable of ratification by the principal on whose behalf it purported to be done. This is so if only for the reason that the principal could not have authorised that assemblage to do that act in advance of its being done. Neither the Millers directors as a board, nor Millers itself could in advance have authorised or enforced the exclusion of Abeles from participation in debate and voting. 10

67. Alternatively to paragraph 66 above, THAT the exclusion of Abeles from voting had the effect of nullifying the allotment resolution if any of the votes of the other directors are to be discounted. 20

This is because the wrongful exclusion from voting combined with the exclusion of the votes of any of the other directors would have the consequence that the resolution would not have been carried. Taylor's casting vote as chairman does not come into consideration because it was not exercised and one can only speculate as to how it would have been exercised. 30

68. THAT the rule in Turquand's case has has no application to the circumstances of these proceedings.

(a) In substance these proceedings are proceedings brought by Ampol as a shareholder pursuant to S.155 of the New South Wales Companies Act 1961 as amended. (See U.K.Companies Act 1948 S.116) 40

(i) That section gives to each shareholder an individual legal (statutory) right to sue for rectification of the register of members if a name is entered on the register without sufficient cause (See Grants & Ors.v.John Grant & Sons Pty. Limited & Ors.32

C.L.R.1 at pp.31/2; Ngurli v. McCann 90 C.L.R. 425 at p. 447; Ansett v.Butler Air Transport Ltd. (No.1) 75 W.N. (N.S.W.) 299 at pp. 300, 303, 305).

(ii) The cause of action and the right to rectification is not the company's cause of action in respect of a wrong done to it. Thus the proceedings are not those maintained by a shareholder in a representative capacity under the exception to the rule in Foss v. Harbottle - as they would be if brought otherwise.

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(See Bonland v. Earl (1902) A.C.8 at p.93; Ngurli v. McCann (supra. at p.447).

(b) The rule in Turquand's case has no application to a shareholder's action brought under S.155. It applies only to actions by or against third parties brought by or against the company or by a shareholder under the exception to the rule in Foss v. Harbottle. It operates only to answer a claim or defence by the company made or raised against the third party arising out of some irregularity or defect in internal management.

20

(i) he Law had always been especially protective of shareholders in matters relating to the capital of the company. The statutory right has been conferred only in relation to such matters as the creation transfer and destruction (forfeiture) of the capital.

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(ii) Moreover the rule in Turquand's case arises in consequence of a representation made by or on behalf of the company by some person or body of persons as principal which has actual authority to make the relevant representation.

40

(See Freeman & Lockyer v. Buckhurst Park Properties (mangal) Ltd. (1964) 2 OB at pp.505/6)
In such a context it is natural that the rule should apply to and in respect of claims by and against

50

the company and to derivative claims on the company's behalf.

(iii) But where the claim is the shareholder's own, it is submitted that there is no reason in principle for preferring a third party's equitable or legal right arising from an unauthorised or irregular act of the company to the shareholder's equitable or legal right similarly arising. Neither innocent party in that situation has a higher equity than the other. 10

69. THAT the rule in Turquand's case and the defence of bona fide purchaser for value without notice are not available to Howard Smith because:-

(a) The purported act of allotment (after excluding Abeles) was void, not voidable. It was no more than the act of an assemblage of persons purporting to be Millers board. It was not the act of the board and so not the act of an agent of Millers. Thus no title at all was capable of being conferred upon Howard Smith, certainly no legal title could be created. The allotment was not the act of an agent within his apparent authority, breach of which would confer a voidable title. 20 30

(See Richard Brady Franks Ltd. v. Price 58 C.L.R. 112 at pp.142/3; Harlowe's Nominees Pty. Ltd. v. Woodside (Lakes Entrance) Oil Co.N.L. 121 C.L.R. 483 at pp.494,500)
It is submitted that the rule and the defence do not assist a defendant where the relevant act is void. It only relates to legal titles which would be voidable. 40

(See Re Robinson; (1911) 1 Ch 230; Clouette v. Storey (1911) 1 Ch 18); or

(b) The onus of establishing these defences was upon Howard Smith. (See Richard Brady Franks Ltd. v. Price (supra.) at pp.142/3).

Howard Smith called no evidence to establish lack of knowledge, notice,

reason for enquiry, nor to establish bona fides.

70. Alternatively to paragraphs 68 and 69 above, THAT the circumstances of and surrounding the allotment were suspicious so as to put Howard Smith on enquiry. (This is the qualification to the rule in Turquand's case). (See Gower (supra) p.154; Palmer (supra.)p.250

10 (a) The suspicious circumstances, it is submitted were:-

(i) The meetings of 4 July 1972 especially the "extraordinary approach" of Taylor and Koch.

(ii) Taylor made no real attempt to negotiate on price.

(iii) There was involved an obvious breach of the Stock Exchange Requirements.

20 (iv) The Maxwell- Conway conversation of "ships for shares".

(v) The letter from Howard Smith of 6 July 1972 was written at Taylor's request and was settled by Conway in his presence.

(vi) Howard Smith's proposal was for an impermissible purpose or if not, it was of such a character as to cause one to wonder whether 30 an allotment made in existing circumstances might be made for an improper purpose.

(vii) The haste with which the proposal and allotment were each made and the effect upon the take-over situation which existed were sufficient to require Howard Smith to make enquiry.

40 (viii) The immediate circumstances of the allotment, including the facts that before the meeting decided upon the allotment, Maxwell was invited along to Millers with the letters of

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application and proposal, the cheque and deed of agreement and was kept in an upstairs office during the meeting and that the allotment of the shares was made before the formal application was received from Howard Smith, that is before the Howard Smith's offer in point of law, was open for acceptance. 10
This was known to Maxwell when he delivered the letter of application and cheque in exchange for the share certificate. This circumstance of itself was sufficient to raise the question whether the allotment had been regularly and properly made.

(b) It is submitted that the above circumstances put Howard Smith on enquiry. 20 Once that occasion for enquiry arose, Howard Smith was to be taken to have notice of everything which it would have discovered in thecourse of proper enquiry. Such a course, it is submitted would have disclosed the intention to exclude Abeles from debate and from voting and the fact that he was so excluded and also the purpose for which the allotment was made. 30

71. The Respondent accordingly respectfully submits that the appeal should be dismissed with costs for the following (among other)

R E A S O N S

1. BECAUSE the findings of fact by Street C.J. in Eq. and set out in paragraph 44 above were correct; and

2. BECAUSE the substantial or dominant purpose of the allotment which His Honour so found was foreign to the powers of 40 the Millers directors to allot shares and was an impermissible purpose.

3. ALTERNATIVELY, because the purported allotment was not made bona fide for the benefit of Millers as a whole and Howard Smith had notice of this or was in the circumstances put on enquiry.

4. ALTERNATIVELY, because the exclusion of Abeles from debating and/or voting upon the allotment was wrongful and rendered the allotment void.

5. ALTERNATIVELY, that even if the allotment was only voidable by reason of the exclusion of Abeles from debating and/or voting, or by reason of the breach of duty of the majority directors, the rule in _Turquand's case_ does not apply in favour of Howard Smith in these proceedings.

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6. ALTERNATIVELY, because even if the allotment was only voidable, by reason of the exclusion of Abeles from debating and/or voting, the defence of bona fide purchaser for value without notice is not available to Howard Smith because it was put on enquiry by the suspicious circumstances of and surrounding the allotment.

W.P.DEANE, Q.C.

DAVID F. ROFE.

9 1970

IN THE PRIVY COUNCIL

O N   A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES, EQUITY DIVISION

B E T W E E N

HOWARD SMITH LIMITED — Appellant (13th Defendant)

-and-

AMPOL PETROLEUM LIMITED — Respondent Plaintiff

R.W.MILLER (HOLDINGS) LIMITED AND OTHERS — 1st Defendant

Respondent

CASE FOR THE RESPONDENT

AMPOL PETROLEUM LIMITED

CLIFFORD-TURNER & CO.,
11,Old Jewry,
London EC2R 8DS

Solicitors for the Respondents.