4 of 1977

IN THE PRIVY COUNCIL

29 OF 1976

ON APPEAL from the Supreme Court of New South Wales
Equity Division in Proceedings No. 707 of 1975

4

IN THE MATTER OF:-

CUMBERLAND HOLDINGS LIMITED

AND IN THE MATTER OF:-

THE COMPANIES ACT, 1961

CASE FOR THE APPELLANT

SOLICITORS FOR THE APPELLANT

Sinclairs,
5 Elizabeth Street,
SYDNEY

By their Agents:-

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Royex House,
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SOLICITORS FOR THE RESPONDENT

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Record

The order appealed from

1. This appeal is from a Judgment of the Supreme Court of New South Wales in its Equity Division whereby Cumberland Holdings Limited (hereinafter called "CHL") was, on 31st May 1976, ordered to be wound up under the Companies Act, 1961. The order was made on a petition presented by Washington H. Soul Pattinson & Co. Limited (hereinafter called "WHSP") on 2nd April, 1975 alleging:- Order Volume IV Page 1045

   (a) That two of the directors of CHL have acted in the affairs of the Company in the interests of themselves as directors, executives and shareholders of FAI Insurances Limited, (hereinafter called "FAI") and companies in the FAI Group rather than in the interests of members as a whole (Companies Act, 1961 New South Wales Section 222(1)(f)). Amended Petition paragraph 21 Volume I Page 5

		Record
(b)	That two of the directors of the company have acted in the affairs of the company in other ways which are unfair or unjust to other members. Companies Act, 1961, Section 222(1)(f).	Amended petition Volume I Page 5
(c)	That the affairs of the company are being conducted in a manner oppressive to one or more of the members. Companies Act, 1961, Section 186. cf. Companies Act, 1948 (U.K.) Section 210.	Amended petition paragraph 23 Volume I Page 6
(d)	That it is just and equitable that the company be wound up. Companies Act, 1961, Section 222(1)(h). cf. Companies Act, 1948 (U.K.) Section 222(f).	Amended petition paragraph 24 Volume I Page 6

Relevant background information

2. CHL was incorporated on 10th February, 1960 and during the first two years after its incorporation carried on the business of a finance company. Thereafter the company for several years carried on no business until it commenced to carry on the business of a geriatric nursing home proprietor in 1969. — Volume III Page 668

3. CHL acquired its first nursing home in 1969 and at the time of presentation of the petition was the proprietor of seven nursing homes and two private hospitals. The consolidated balance sheet of CHL and its subsidiary for the years ended 30.6.1974 and 30.6.1975 show the value of its fixed assets as being $2,653,695 and $3,203,631 respectively. — Volume III Page 670; Exhibit 77 Volume VI Page 1354

4. The issued capital of CHL at all material times was:-

Record

(a) 757,536 ordinary stock units of 50 cents each.

(b) 303,768 8% cumulative preference non-participating stock units of 50 cents each. Volume IV Page 976

(c) 300,000 8% cumulative redeemable preference non-participating stock units of 50 cents each.

5. WHSP is a listed public company which carries on the business of manufacturer wholesaler and retailer of pharmaceutical supplies with a turnover in excess of $20,000,000 per annum. Volume II Pages 298-9 It first became a shareholder of CHL during 1970-1971. Volume II Page 300 At the time of presentation of the petition it was the beneficial owner of 50,000 ordinary stock units in the capital of the company and was a substantial holder of each category of preference stock. Volume IV Page 976 WHSP's holding of ordinary stock represented approximately 6.6% of the issued ordinary stock units in the capital of CHL. Volume IV Page 977

6. The major holder of ordinary stock units in CHL was Fire & All Risks Insurance Company Limited (hereinafter called "FAR"), a wholly owned subsidiary of FAI a company whose shares are listed on Australian Stock Exchanges. Volume IV Page 977 At all times since CHL commenced to carry on its present business FAR has been the holder of not less than 50% of the ordinary stock units on issue from time to time. Volume III Page 673 Immediately prior to July 1974 it was the holder of 545,748 ordinary stock units which represented 72.042% of the ordinary stock units which had been issued. Volume IV Page 977

7. Prior to 22nd January, 1975 the directors of CHL were:-

		Record
	Lawrence James Adler (Chairman) - a director continuously since commencement of business in 1960	Volume III Page 668
	John Belfer	
	Glen Lawrence Albert Donohoo - between 19th April, 1972 and 4th March, 1975	Volume I Page 86
	Mr. Adler was also Chairman of directors of FAI and FAR: Mr. Belfer was a director of FAI and FAR and Mr. Donohoo was a director of WHSP.	Volume I Page 17
8.	The Sydney Stock Exchange maintains an official list of securities which have been admitted to quotation and for the time being not removed from quotation. The Committee of the Stock Exchange is empowered in its absolute discretion to admit securities of companies to quotation on the official list, and to suspend or withdraw the name of any company or any security thereof from the official list.	
9.	The Australian Associated Stock Exchanges of which the Sydney Stock Exchange is a member Exchange publishes a listing manual indicating the requirements which must be complied with in order to secure admission to the official list of a member exchange, including the Sydney Stock Exchange. The form of application for admission to the official list of the Australian Associated Stock Exchanges, which is appendix I to the manual, contains the following:-	Exhibit 42 (part only reproduced) Volume VI Page 1429
	"In making this application, the company acknowledges and agrees that if its securities are admitted to the aforesaid Official Lists and are granted official quotation, its securities will remain on the Official Lists and retention of official quotation for those	

securities will be during the absolute pleasure (without qualification whatsoever) of the aforesaid exchanges and that in particular (but without restricting the generality of the foregoing) removal from the Official Lists or withdrawal of official quotation may, at the absolute pleasure of the exchanges, take place if the company becomes unable or unwilling or in any respect fails to comply with the Official List Requirements of the Australian Associated Stock Exchanges for the time being in force, or if the Exchanges in their absolute discretion think fit."

10. Included amongst the listing requirements are the undermentioned provisions as to capital structure and distribution of securities:- Exhibit 42 Volume VI Page 1429

"1. A1. A Limited Liability Industrial Company seeking Quotation of shares may be considered for admission to the Official List of the Exchange if:-

(2) There are at least 300 holders of such shares of the one class and paid up value; and

(4) (a) in the case of a company having a paid up share capital of $200,000 but not exceeding $2,000,000 - at least $70,000 or 25 per cent of such capital of the one class and paid up value (whichever be the higher) is held by members of the public."

The Associated Stock Exchanges classify companies as "Industrial" or as "Mining".

		Record
	A Company which is not a mining company is classified as "Industrial".	
	There is an annual listing fee payable by a company to each Stock Exchange on which its securities are listed. At the time of the hearing of the petition the fee payable by an industrial company with a paid up capital such as that of CHL was between $700 and $800.	Exhibit 42 Volume I Page 277
11.	In determining whether or not a company's securities might remain listed on the Sydney Stock Exchange, the Committee considers and is substantially influenced by whether or not the company continues to meet the requirements mentioned in paragraph 10 above.	Volume I Pages 275-7
12.	Ordinary stock units in CHL had been listed on the Sydney Stock Exchange since it commenced to carry on its finance business.	Volume III Page 668
13.	There had been very little trading on the Stock Exchange in ordinary stock units in CHL at any time since listing commenced. The evidence established that from 1970-1971 onwards, transactions in CHL stock units on the exchange were slight in the extreme, and that with the exception of a very small number of purchasers of a very small number of shares, there had been no purchasers of the stock units other than companies associated with FAI.	Volume I Page 177 Exhibit 92 Volume VI Page 1323 Volume I Page 86 Volume I Page 89
14.	Because of the absence of other buyers for CHL stock units FAR had adopted a practice of acquiring parcels of units offered for sale from time to time "as a buyer of last resort", rather than allowing the quoted price for CHL stock units to fall to an unacceptable level and to maintain some market for those	Volume II Page 315 Volume III Page 669 Volume III Page 671 Volume III Page 753

Record

who may wish to dispose of their holdings. The acquisition of small parcels of stock units at different periods throughout the year presented problems for the auditors on consolidation of the FAI Group accounts, and at their suggestion, purchases of CHL stock units offered for sale from time to time ceased to be made by FAR. Instead, Mr. Adler, members of his family and companies associated with him commenced and continued to purchase small parcels offered for sale on the Stock Exchanges, with a view to their ultimate transfer to FAR as a single parcel.

Volume IV Page 984

15. Prior to July 1974, FAR and Mr. Adler, his family and companies associated with him had for a long period been virtually the only buyers of CHL stock units. The evidence established and his Honour found that the market for CHL ordinary stock units on the Stock Exchange had for some time been supported in the sense mentioned in paragraph 14 mainly by Mr. Adler and those associated with him. As a result of these policies FAR or subsequently Mr. Adler or persons associated with him acquired all or all but a small number of the parcels offered on the Sydney Stock Exchange between December, 1969 and June, 1974.

Volume III Page 596
Volume III Page 671
Volume III Page 819
Volume III Page 671

16. The number of holders of stock units in CHL had decreased significantly since its initial quotation on the stock exchange. The evidence established that at 28th August 1974 the number of holders of ordinary stock units of CHL was 138. Of these 110 shareholders held parcels of 1 - 1,000 units.

Volume III Page 671
Volume II Page 316
Exhibit 4 (Not reproduced)

17. By the beginning of July 1974 CHL did not satisfy the Stock Exchange Listing Requirements in that:-

Record

(a) There were considerably fewer than 300 holders of ordinary stock units.

(b) Less than 25 per cent of the ordinary stock units were held by members of the public. The Stock Exchange regarded a person as being a member of the public only if he were not connected with a major shareholder. Volume I Page 279 Volume I Page 280

By the beginning of July 1974 FAR and persons connected with it (Mr. Adler, members of his family and associated companies) had for some time collectively in fact held more than 79% of the issued ordinary stock units. This was a result of purchases on the Stock Exchange at one time by FAR and subsequently by Mr. Adler, his family and associated companies as described in paragraph 14 above.

A chronological summary of the events

18. A meeting of the Board of Directors of FAI was held on 11th July, 1974. The Directors of FAI then, and at all material times, were:-

Lawrence James Adler

Thomas Eric Atkinson - (Solicitor, England Advocate and Solicitor, Singapore and Malaysia) Volume II Pages 305-6

James Reuben Wilson - (Associate Professor of Economics, Sydney University) Volume II Page 550

Joseph Arthur James Barrington - (General Manager, CHL)

John Belfer - (Chartered Accountant)

Robert Lawrence Herman - (Company Secretary)

At that meeting the Board discussed and determined upon the investing of $400,000.00 for the purchase of securities listed on the Stock Exchange. Mr. Adler then raised the question whether it was a convenient opportunity for the FAI Group to acquire in addition the CHL stock units which Mr. Adler and his family and associated companies had acquired over a period of time.

Minutes Exhibit 67 Volume V Page 1072

Volume IV Page 985

19. Mr. Adler indicated that the ordinary stock units would be available at $1.25 each and the preference stock units at 50 cents each. This proposal was discussed by the FAI Directors present at the meeting, Mr. Adler having left the Board room whilst the discussion took place, and it was agreed to acquire the stock units at that price. In agreeing to purchase the stock at the price of $1.25 for the ordinary stock units, the Directors of FAI, as his Honour found, did so having regard to their opinion as to the future earnings, asset backing and prospects of CHL.

Volume IV Page 985

Volume IV Page 985

20. In consequence of the decision referred to in paragraph 19, FAR acquired an additional 55,850 ordinary, 9,428 8% cumulative preference and 128,700 8% cumulative redeemable preference stock units in the capital of CHL. When added to the ordinary stock units acquired by FAR on the stock exchange between 12th and 16th July, 1974, the effect of the share transactions during July was to increase FAR's holding to 603,298 ordinary stock units representing 79.639% of the ordinary stock units on issue.

Volume IV Page 977

21. On 23rd July, 1974 FAI wrote to the Stock Exchange as required by the Exchange's listing requirements advising it (inter alia) of the acquisition of the additional stock units in

Exhibit 46

Volume V Page 1088

Record

CHL. On 25th July, 1974 the Stock Exchange wrote to CHL requesting a copy of its substantial shareholders register (a register kept pursuant to the requirement of Section 69K of the Companies Act, 1961) and a list of the largest 20 shareholders. On 31st July, 1974 CHL replied to the Stock Exchange providing the information requested, but pointing out that the transactions which occurred with respect to stock units in CHL during July were not yet recorded in its registers. On 2nd August, 1974 the Stock Exchange requested FAI to provide a breakdown of the shares acquired during July into ordinary and preference holdings together with an indication of the percentage holdings of FAI in the various categories of CHL stock units. This information was provided on 12th August, 1974. It included a statement that FAR then held 79.64% of the issued ordinary stock units.

Volume V Page 1089

Volume V Page 1090

Volume V Page 1097

Volume V Page 1098

22. On 4th September, 1974 the Stock Exchange wrote to CHL referring to the information provided by FAI, drawing attention to the listing requirements of the Stock Exchange, and in effect threatening delisting of CHL unless within three months FAR reduced its holding of stock units to not more than 75% of the issued capital. It also required CHL to notify within 14 days its shareholders of the Exchange's requirements.

Exhibit 6 Volume V Page 1104

23. On 6th September 1974 the FAI Directors met and decided that the holding in CHL would not be reduced by FAR. Mr. Atkinson's evidence was that:-

Volume IV Page 988
Volume II Page 323

> We all took the view that there would be no way in which there would be any means of finding a home for the additional shares that were referred to through the mechanism of the Stock Market, and nobody else seemed to have any alternative suggestions; and

I think on all those grounds, it was just accepted immediately that there was no point in attempting to comply with the letter, or way in which it could be complied with.

Professor Wilson's evidence was to like effect:- Volume II Page 560

Q. Did you concur in the decision not to comply with the request of the Exchange?

A. Most certainly. I could see no useful purpose to be served by it, particularly as there had never been an active market in Cumberland shares. I could not see where we were going to find any buyers for our five per cent.

Mr. Adler also expressed the view that it would be impossible for FAR to dispose of the requisite number of shares on the exchange and indicated that any placement with a single shareholder would not, in his view, overcome the problem of the number of shareholders in CHL being considerably less than the specified minimum. Though his Honour made no express finding relating to this matter the appellant submits that the evidence referred to above is supported by the objective facts as to the previous lack of market interest in the acquisition of shares in CHL by members of the public. Volume IV Page 849 Volume IV Page 850 Volume IV Page 988

24. At the same meeting of Directors of FAI it was suggested that some form of takeover offer should be made to the remaining shareholders to give them the chance of quitting their holdings if they wanted to. Mr. Atkinson said that he was the one who suggested the making of a takeover offer. Professor Wilson said that the suggestion was his. Volume II Page 324

His Honour found that it was one or the other of them, and that the Board decision to make such an offer arose directly from the threat to delist referred to in paragraph 22. The offer in contemplation was a share exchange offer. Mr. Atkinson, Professor Wilson and Mr. Adler took the view that until the FAI Group accounts for the year ended 30th June, 1974 were available they could not fix the terms to be offered.

Volume II Page 559
Volume IV Pages 988-9
Volume II Page 540
Volume IV Page 1004
Volume II Page 540

25. A meeting of the directors of CHL was held on 10th September, 1974 at which it was decided to forward a letter to stockholders which was in fact sent on 13th September, 1974. The letter informed the stockholders of the Listing Requirements of the Australian Associated Stock Exchanges, of FAR's holding of approximately 80% of CHL's issued capital, of its unwillingness to divest itself of any part of that holding and of FAI's intention to make a formal announcement of its intention to make an offer for the outstanding shares as soon as practicable.

Exhibit 83 Volume V Page 1105
Exhibit 7 Volume V Page 1108

26. The accounts of the FAI Group became available to its directors during the latter part of September, 1974.

Volume IV Page 989

27. Part VIB of the Companies Act, 1961 prohibits, with immaterial exceptions, the making of takeover offers except in compliance with the provisions of that Part. The requirements are:-

(1) There must first, not more than 28 nor less than 14 days before the despatch of offers, be given to the Company whose shares are to be the subject of the offer (the offeree company) a statement in writing complying with the requirements of Part A to the Tenth Schedule to the Act (the Part A Statement). The information to be

Act. Section 180C(1)

set out in the Part A Statement includes full particulars of the takeover offer, of the shares in the offeree company to which the offeror and his associates are already entitled, and, where what is to be offered as the consideration for the takeover offer is or includes shares in some other corporation, then certain of the information which would be required to be included in a prospectus for a public issue of those shares, and also, if these shares are listed or dealt in on a stock exchange, the latest available sale price before the date on which the Part A Statement is given, and the highest and lowest market sale price during the immediately preceding three months.

A Copy of the Part A Statement is required to be lodged with the Commissioner for Corporate Affairs prior to the despatch of any takeover offer.

(2) An offeree company which has received a Part A Statement must itself,

(a) within the ensuing 14 days give to the offeror, or

(b) within 14 days after the first takeover offer is despatched give to each holder of shares to which the takeover offer relates

Act. Section 180G

a statement in writing complying with the requirements of Part B of the Tenth Schedule to the Act (the Part B Statement).

The Part B Statement is required to state whether there have been

any and if so what material changes in the financial position of the offeree company since the last balance sheet laid before the offeree company in general meeting, the extent of the interest, if any, of the Directors of the offeree company in the shares under offer and in any companies whose shares are offered as or as part consideration for the takeover offer, and whether the Board of the offeree company

(i) recommends the acceptance of the takeover offer

(ii) does not desire to make any recommendation

(iii) consider themselves not justified in making any recommendation.

(3) The takeover offer must be in writing and be accompanied by a copy of the Part A Statement and of the Part B Statement if one has been furnished to the offeror.

Act. Section 180C

28. Part VIB of the Act includes provisions under which an offeror who by a takeover scheme (two or more takeover offers proposing to acquire shares over the same period of time) has acquired not less than 90% of the class of shares the subject of the offer, may compulsorily acquire the remaining shares of that class (subject to any order to the contrary which the Court may make).

Act Section 180X

29. A draft of the takeover offer intended to be made by FAI was prepared by Mr. Atkinson and the Company's solicitors. The offer contemplated was 1 ordinary share in FAI for 1 ordinary share in CHL and 1 preference share in FAI for

Record

1 preference share in CHL. A copy of these documents was forwarded to Mr. Donohoo the Director of CHL representing WHSP for his consideration on 21st October, 1974. — Exhibit 8 Volume V Page 1131

A copy of the same drafts was also submitted to the Commissioner for Corporate Affairs and the Committee of the Sydney Stock Exchange for the approval in principle of those bodies. That approval was given prior to 28th October, 1974. — Volume II Page 331; Volume II Page 333; Volume I Page 22

30. At a meeting of its Board of Directors held on 1st November, 1974 FAI approved and its Directors signed the Part A Statement in respect of the proposed takeover offer in respect of all of the shares in CHL (ordinary and preference) not then owned by FAI. — Exhibit 68 Volume V Page 1163

The Part A Statement was given to CHL on the day on which it was signed.

31. On 4th November, 1974 a Board meeting of CHL was held at which the Part A Statement was tabled, and the form of the Part B Statement to be given to FAI discussed. At this meeting Mr. Donohoo:- — Exhibit 9 Volume V Page 1164

(a) Stated that he did not consider the offer a fair one in the light of the disparity between the net tangible asset backing of the two companies. — Volume I Page 24

(b) Requested, and was granted, the right to circularise the stockholders and give his opinion of the offer. — Volume I Page 23

(c) Asked that an independent firm of solicitors be engaged to advise the Board of CHL in relation to the proposed takeover offer and — Volume I Page 24

the necessary Part B Statement, which request was agreed to.

(d) Moved that an independent firm of chartered accountants or a leading merchant banker be appointed to assess the merits of the takeover offer, which motion was defeated. The purpose of this proposal was to obtain an independent assessment of the real worth of the FAI shares to be offered in exchange for the CHL shares.

Volume I Page 24

Volume I Pages 122-9

32. In accordance with the resolution of the Board the advice of Messrs. Norton Smith & Co. was sought in relation to the takeover documents on 4th November, 1974. The advice of Mr. Walker of that firm was received on 13th November, 1974.

Exhibit 95

Volume V Page 1166

Volume V Page 1167

33. On 14th November, 1974 Mr. Donohoo wrote to CHL setting out his views on the proposed takeover offer. He made it plain that he thought the offer inadequate.

Exhibit 10 Volume V Page 1175

34. A further Board meeting of CHL took place on 15th November 1974 at which (inter alia) the draft Part B Statement was considered. The matters discussed at this meeting are summarised in the judgment below.

Volume IV Page 991 to Volume IV Page 993

At that meeting the proposed Part B Statement was signed by all of the Directors of CHL. Mr. Donohoo first having sought and obtained an adjournment so as to enable him to consult the solicitors for WHSP for advice as to whether the proposed Statement was such as he might properly sign and being thereafter satisfied that it was a proper Part B Statement. He did not request the inclusion in this document of any additional material.

Volume I Page 43

Volume I Page 191

Volume I Page 191

Volume I Pages 192-3

The Part B Statement was given to FAI on that same day.

35. At a meeting of the FAI Board on 18th November, 1974, it was resolved to despatch the takeover documents on 20th November, 1974. The offers were despatched on 20th November, 1974 and on the same day, as required by Section 180H, FAI wrote to CHL advising it of the despatch of the offers.

Exhibit 102 Volume V Page 1193

Exhibit 96 Volume V Page 1194

36. By the time of the signing of the Part B Statement (15th November, 1974) Messrs. Adler and Belfer (the Directors of CHL who were also on the Board of the offeror) were in possession of the following information:-

(i) That Mr. Donohoo (the Director of CHL who was also the Director of WHSP which beneficially owned the largest parcel of shares the subject of the proposed offer, viz -

$\frac{50,000}{154,238}$ of the ordinary stock units; (32.417%)

$\frac{183,520}{294,340}$ of the preference stock units; (62.35%)

$\frac{118,000}{171,300}$ of the redeemable preference stock units; (68.89%)

was aware of the fact that in July, 1974 Mr. Adler, members of his family and companies associated with him had sold ordinary stock units in CHL to FAR for $1.25 in cash and preference stock units for 50 cents in cash;

Exhibit 12 Volume V Page 1212 Volume I Pages 20-2 Volume I Pages 30-1

(ii) That Mr. Donohoo proposed to circularise stockholders in CHL advising against acceptance of the takeover offer;

Volume I Page 23

		Record
	(iii) That WHSP did not propose to accept the offer so that the provisions of Section 180X relating to compulsory acquisition could not come into operation, WHSP holding more than 10% of each class of stockunits to be the subject of the takeover offer;	Volume I Page 183
	(iv) Stockholders in CHL had received its annual accounts for the year ending 30th June, 1974 at about the end of September, 1974.	Volume IV Page 872
	Nonetheless the takeover offer was made. The documents despatched to the stockholders in CHL are Exhibit 11.	Volume V Page 1195
37.	The documents which accompanied the takeover offer included a letter to the stockholders in CHL from the Chairman of the offeror company.	Exhibit 11 Volume V Page 1196
38.	On 21st November, 1974, the day after the takeover offers were despatched by FAI, Mr. Donohoo sent out circular letters, one to holders of ordinary stock units and one to holders of preference stock units. These circulars recommended strongly against acceptance of the offers and gave his reasons for that recommendation.	Exhibit 13 Volume V Page 1217 Exhibit 13 Volume V Page 1221
39.	A reply to those circulars was sent on by FAI on 22nd November, 1974. It was signed by Mr. Adler above the description "Chairman, FAI Insurances Limited, Cumberland Holdings Limited". This circular sought to answer arguments advanced by Mr. Donohoo and to provide further information.	Exhibit 15 Volume V Page 1241
40.	There followed, on 27th November, 1974 a circular from WHSP signed by its Chairman, Mr. J.S. Milner. It stated WHSP's vigorous opposition to the offer and recommended its rejection.	Exhibit 17 Volume V Page 1257

Record

It asserted that because ordinary stock units had been acquired at $1.25 cash and preference stock units at 50 cents cash from Mr. Adler, his family and associates in July, 1974 FAI should now make a similar cash offer to the remaining stockholders including WHSP. WHSP had acquired its holding in 1970-1971 at a placement price of 55 cents per ordinary stock unit and 50 cents per preference stock unit. Volume I Page 76

41. FAI sent out a circular letter on the same day in reply to that of WHSP. Exhibit 18 Volume V Page 1261

42. On the same day FAI received a letter from the "Manager - Companies" of the Sydney Stock Exchange. It raised the question whether the offer which had been made did in fact comply with the Exchange's listing requirements. This provoked an exchange of correspondence asserting differing views between FAI and the Exchange on matters raised by the Exchange. Exhibit 50 Volume V Page 1284 to Volume V Page 1291

43. As WHSP was asserting that FAI was seeking to force holders of stock units in CHL to sell them at what was asserted to be an inadequate price, and as the Sydney Stock Exchange was asserting that the offer made did not comply with its listing requirements, FAI determined to withdraw its offer. It did so on the advice of Counsel. That advice and the reasons for it were given in evidence Volume II Page 549
It did so by a letter dated 6th December, 1974. The letter stated that FAI was exploring the possibility of replacing its "offer" with an "invitation to sell". Exhibit 19 Volume V Page 1269

The letter also stated that any stockholder in CHL who had accepted the offer was free to withdraw his acceptance if he wished to do so. The

relevant difference between a takeover offer and an invitation for the purposes of Part VIB of the Companies Act, 1961 is that the compulsory acquisition power conferred by Section 180X does not apply where shares have been acquired pursuant to invitations.

44. Cyclone "Tracy" devastated Darwin on 24th and 25th December, 1974. FAI was heavily involved in insurance in Darwin. For a considerable time although it knew it had suffered considerable losses the extent of those losses was not known. The known extent of those losses and the uncertainty of the extent of further losses precluded any possibility at that stage of making any invitation to acquire the shares of the minority as was contemplated by the circular of 6th December, 1974. Volume II Pages 345-7

45. Notwithstanding the withdrawal of the takeover offer on 6th December, 1974 WHSP pursued a campaign designed to force FAI to make a cash offer of $1.25 for ordinary and 50 cents for preference stock units in CHL. In furtherance of that purpose:- Volume I Page 252

(a) WHSP -

(i) Wrote to the Corporate Affairs Commission on 9th December, 1974 relating to the history of the matter, suggesting various breaches of the Companies Act and Securities Industries Act, and enquiring whether the Commission proposed to take the action requested. Exhibit 49 Volume V Page 1277

(ii) Wrote to Mr. Adler on 13th December, 1974 threatening the presentation of a winding up petition unless an offer of $1.25 cash for ordinary stock units and 50 cents cash for preference stock units was made. Exhibit 22 Volume VI Page 1296

		Record
	(iii) Wrote to the Corporate Affairs Commission on 25th February, 1975 again requesting to know the Commission's intentions.	Exhibit 49 Volume V Page 1282 Volume IV Page 1027
	(b) Mr. Donohoo initiated a series of letters and decisions complaining about the minutes of the CHL Board meeting on 15th November, 1974.	Exhibit 21 Vol. V p.1293 Exhibit 23 Vol. VI p.1303 Exhibit 24 Vol. VI p.1305 Exhibit 95 Vol. V p.1171 Exhibit 24 Vol. VI p.1309 Exhibit 26 Vol. VI p.1324 Exhibit 24 Vol. VI p.1312
	(c) Mr. Donohoo circularised the stockholders on 10th December, 1974.	Exhibit 20 Volume V Page 1292
	(d) Mr. Donohoo took the steps which he did, as he conceded, to endeavour to force a cash offer of $1.25 for the ordinary stock units in CHL and thereby to put the holders of those stock units (other than FAR) into a better position than they would have been in had they remained shareholders in CHL with their ordinary stock remaining listed on the Stock Exchange.	Volume I Pages 177-8
46.	On 22nd January, 1975 FAI sought Mr. Donohoo's resignation as a Director of CHL because of:-	Exhibit 25 Volume VI Page 1335
	(a) The threat to present a winding up petition by WHSP.	
	(b) The lack of harmony which existed on the CHL Board because of the attitude adopted by Mr. Donohoo.	
47.	Mr. Donohoo indicated that he would not resign and at a CHL Board meeting on	

		Record
	22nd January, 1975 Mr. Atkinson and Professor Wilson were appointed as additional Directors of CHL.	Exhibit 29 Volume VI Page 1337
48.	On 29th January, 1975 FAR gave to CHL a notice pursuant to Section 137(1) of the Companies Act, 1961 requiring it to convene an extraordinary general meeting to consider and if thought fit pass a resolution removing Mr. Donohoo from the office as a Director of CHL.	Exhibit 30 Volume V Page 1365
	FAI on the same date despatched a circular to the stockholders in CHL informing them that WHSP was threatening to present a petition for the winding up of CHL, that no invitation to them to sell their shares in CHL would be made and that steps were being taken to remove Mr. Donohoo from the Board of CHL.	Exhibit 31 Volume VI Page 1366
	This led to a circular of the same date from Mr. Donohoo to the stockholders in CHL imputing inter alia an improper motive to Mr. Adler in seeking Mr. Donohoo's removal from the Board of CHL.	Exhibit 32 Volume VI Page 1368
	FAI replied to that circular from Mr. Donohoo on 4th February, 1975. It dealt for the most part with the imputation made against Mr. Adler.	Exhibit 35 Volume VI Page 1374
	Mr. Donohoo replied to that circular at length on 19th February, 1975. Attention is drawn particularly to the fourth last paragraph of that letter (Volume VI, page 1387).	Exhibit 37 Volume VI Page 1382
	On the day after the despatch of that circular Mr. Donohoo instituted and pursued a series of demands to inspect CHL accounting records and he spent many hours doing so.	Exhibit 48 Volume VI Pages 1400, 1402, 1404, 1410, 1411, 1412

		Record
49.	At an extraordinary general meeting of CHL held on 4th March, 1975 Mr. Donohoo was removed from his office of Director of CHL.	Exhibit 39 Volume VI Page 1425
50.	Throughout this period, and until the hearing, the business of CHL prospered. Its profit for the period of six months ending 31st December 1974 increased by 31% compared with the six months to 31st December, 1973. Its net tangible assets rose from approximately $1.22 per share in July 1974 to approximately $1.70 per share in November 1974. The net profit of CHL and its subsidiary, after providing for tax and minority shareholders interest in the subsidiary, increased from $122,920 for the year ended 30th June, 1974 to $179,183 for the year ended 30th June, 1975.	Volume IV Page 1008 Volume IV Page 1009 Exhibit 77 Volume VI Page 1356
	The shareholders funds, after deleting the interest of the minority shareholder in the subsidiary increased from $1,322,561 at 30th June, 1974 to $1,684,586 at 30th June, 1975.	Exhibit 77 Volume VI Page 1354
	On 14th August, 1974 the directors of CHL recommended an increase in the amount of the final dividend paid in the previous year of 5% to 6%. On 7th March, 1975 the interim dividend for the first six months of CHL's financial year was increased from the 5% of the previous year to 6%.	Exhibit 100 Volume V Page 1101 Exhibit 23 Volume VI Page 1304
	A new surgical hospital, acquired approximately 18 months prior to the hearing of the petition recommenced operations about one week before Mr. Adler gave evidence, after an extensive rebuilding programme had been carried out. Additional profits would thereafter emerge from this source.	Volume III Page 670

Record

The Petitioner's Case

51. The petitioner's primary case as presented at the hearing was that Mr. Adler had, in 1973, determined to set in train a series of events which would enable FAI to acquire the stock units in CHL not held by FAR, or by Mr. Adler, his family or companies associated with him and that pursuant to that plan he had contrived the threat from the Sydney Stock Exchange to delist CHL so as to "squeeze" the minority stockholders into disposing of their units at an inadequate price. His Honour rejected that case. Volume IV Page 1003

52. The petitioner's alternative case was that Mr. Adler or Messrs. Adler and Belfer had committed a series of acts or omissions justifying the relief sought in the petition. Those acts or omissions were particularised:-

(a) in the petition, paragraphs 26 - 35 inclusive. They may be summarised as follows:-

(i) paragraphs 26 and 27, alleging a failure on the part of Mr. Adler to inform those to whom FAI's takeover offer was directed of the price paid to himself, members of his family and associated companies for stock units sold by them to FAR in July, 1974. Volume I Page 7

(ii) paragraph 28, that Messrs. Adler and Belfer as Directors of CHL refused to agree to the evaluation of the takeover offer by a merchant banker or firm of chartered accountants. Volume I Page 7

(iii) paragraph 29, a matter rejected by his Honour and not now relied upon by the petitioner. Volume IV Pages 1018-9

(iv) paragraph 30, that Messrs. Adler and Belfer as Directors

		Record
	of CHL failed to resist the takeover offer and advise against acceptance of it.	Volume I Page 8
(v)	paragraph 31, that Messrs. Adler and Belfer as directors of FAI prejudiced the continued listing of stock units in CHL by causing FAR to increase its holding of ordinary stock units from 72.04% to 79.63%.	Volume I Page 8
(vi)	paragraph 32, that Messrs. Adler and Belfer, as Directors of CHL, failed, after the delisting threat, to take any steps to procure FAR to reduce its holding of stock units in CHL so as to comply with the requirements of the Sydney Stock Exchange.	Volume I Page 8
(vii)	paragraph 33, that Messrs. Adler and Belfer as directors of CHL caused Messrs. Atkinson and Wilson to be appointed to the Board of CHL.	Volume I Page 9
(viii)	paragraphs 34 and 35, that Messrs. Adler and Belfer as Directors of FAI caused FAR to convene an extraordinary general meeting of CHL to remove Mr. Donohoo from his office of Director of that company, and that it did so.	Volume I Page 9
(b)	by a letter dated 13th October, 1975 adding allegations:-	
(i)	that Mr. Adler in his letter to CHL stockholders of 22nd November, 1974 mistated certain of the conditions to which the offer was subject.	Exhibit 2 Volume VI Page 1464
(ii)	that FAR failed to reduce its holding of CHL ordinary stock units so that CHL might comply with the Exchange requirements.	Exhibit 2 Volume VI Page 1465

Record

(iii) that FAR and FAI failed to offer to acquire the minority stock units in CHL at $1.25 cash for ordinary and 50 cents cash for preference stock units. — Exhibit 2 Volume VI Page 1465

(c) by a letter dated 20th October, 1975 and tendered on 21st October, 1975 (the fifth day of the hearing) adding allegations:- — Exhibit 53 Volume VI Page 1451

(i) that in June-July, 1974 Messrs. Adler and Belfer caused FAI and Falkirk Properties Ltd. to create a false and misleading market price of $1.25 for ordinary stock units in CHL for the purpose of establishing a price at which Mr. Adler, his family and associated companies might sell those stock units to FAR. — Volume VI Page 1452

(ii) that in August 1974 Messrs. Adler and Belfer caused FAI and FAR to create a false and misleading market price for ordinary stock units in CHL of buyers 50 cents sellers 70 cents for the purpose of facilitating the acquisition of such units by FAI under its subsequent takeover offer. — Volume VI Page 1452

(iii) Mr. Adler misled CHL stockholders in his letters to them of 20th, 22nd and 27th November, and 6th December, 1974. — Volume VI Page 1452

Leave to rely on these matters but not on the matter in paragraph (d) of the letter Exhibit 53 was granted by his Honour on 21st October, 1975.

(d) by a letter dated 14th November, 1975 (after 11 hearing days), adding allegations:- — Exhibit 2 Volume VI Page 1466

(i) that Messrs. Adler and Belfer failed to disclose that on 21st November, 1974 Messrs. Adler, Belfer and Atkinson or persons associated with them had purchased 68,345 shares in FAI at 40 cents.

(ii) That on or about 21st November, 1974 Messrs. Adler and Belfer as Directors of CHL and of FAI had purchased or arranged for others to purchase 68,345 shares in FAI to facilitate the acquisition of CHL ordinary stock units under the takeover offer of 20th November, 1974. Exhibit 2 Volume VI Page 1467

Leave to rely on these matters was granted by his Honour.

His Honour's findings on these allegations and his reasons for rejecting the relevance of these findings to the case made by the Petitioner appear at Volume IV Pages 1005-7

The reasons for Judgment

53. Petition, paragraph 21

(A) His Honour found:-

"In my view Mr. Adler and Mr. Belfer acted in the relevant affairs of Cumberland in the interests of Fire & All Risks and FAI, and in their own interests, which were similar, rather than in the interests of the members as a whole, including the minority stockholders. I hold this ground has been established." Volume IV Page 1036

(B) Express reasons for this finding are not stated and must be educed

from findings of fact and opinions upon the law elsewhere stated.

(C) His Honour's statement of the law relevant to this ground is to be found at Volume IV Page 1028 to Page 1032 where four propositions are advanced (Nos. 1, 3, 4 and 5).

(D) The appellant submits that the law is erroneously stated by his Honour in that:-

(a) the section is not necessarily attracted if "one Director by some means or other, has caused his will to be carried into effect by the Board with the result that his personal interest has been preferred"; Volume IV Page 1029

(b) the section is not attracted by reason that "the Directors are shown to have preferred their own interests to the interests of one or more or perhaps some significant section of the members" rather than to the interests of the members as a whole; Volume IV Page 1030

(c) the expression in the section "the affairs of the company" does not embrace the shareholders reaction to a takeover offer nor the statutory duty of the Directors to furnish a Part B Statement.

(E) His Honour's findings of fact (apart from his recounting of the events which occurred) relevant to all of the grounds relied upon by the petition are to be found at Volume IV Pages 998 - 1028

They may be summarised thus:-

(a) The decision in September, 1974 to make a takeover offer arose Volume IV Page 1003

		Record
	directly from the threat of delisting in the Exchange's letter of 4th September, 1974 and was not a step in a pre-conceived and implemented plan.	Volume IV Page 1004
(b)	Mr. Adler realised the pressure to sell which would be placed, by the threat to delist on the minority stockholders, but he did not deliberately create the pressure for that purpose. The appellant accepts that the threat to delist would be an incentive to the minority stockholders to sell but submits that it imposed no "pressure" upon them.	Volume IV Page 1004
(c)	Mr. Adler took steps in August 1974 as a precautionary measure to depress the price of CHL ordinary stock units on the Exchange and that he did so with the knowledge that a threat of delisting was virtually inevitable. The appellant challenges this finding.	Volume IV Page 1005
(d)	That the offer of 1 FAI ordinary stock unit for 1 CHL ordinary stock unit was not a fair offer, in that it was at an undervalue. The appellant challenges this finding and its relevance to the relief sought. There is no finding that the offer in respect of CHL preference stock units was not a fair offer or that it was at an undervalue.	Volume IV Pages 1008 - 1010
(e)	That there was not a proper disclosure to the minority stockholders in CHL and that there were misleading statements in the takeover documents and circulars. Specifically his Honour found:-	Volume IV Pages 1010 - 1019

Record

(i) that the purchase by FAR on 11th July, 1974 of ordinary and preference stock units in CHL for $1.25 and 50 cents cash was material information which should have been disclosed to CHL stockholders to assist them in evaluating the worth of their ordinary stock units. The appellant challenges the finding that this information was material information and the assertion that there was a duty to disclose it. Both Mr. Atkinson and Mr. Adler gave evidence as to why no reference was made in the takeover documents to the July transactions. Volume IV Page 1012 Volume II Page 433 Volume III Page 716

If it be, contrary to the above submission, that disclosure ought to have been made, the question then is whether non-disclosure bears a sinister aspect, or was in error of business judgment, which, in the circumstances, prejudicially affected nobody. In answering that question, it is submitted that regard must be had to the circumstances:-

(a) That Mr. Donohoo was aware of the transactions, opposed to the offer, had, prior to 20th November, 1974, communicated both his opposition and his knowledge to the other Directors, and had obtained their assent to his circularising stockholders with his views on the offer. Volume I Pages 20-4 Volume I Page 183

(b) That at the meeting of 12th November, 1974,

Mr. Donohoo raised the question whether these July transactions should be referred to in the Part B Statement. The advice of both solicitors present at the meeting, the company's solicitor and Mr. Walker, the independent solicitor engaged at Mr. Donohoo's request, was that the Directors were free but not bound to disclose those transactions. Thereafter the Part B Statement, which did not refer to these transactions, was approved unanimously by the Board of CHL.

Volume I Pages 192-3

(c) That Mr. Donohoo asserted in evidence that Mr. Adler had consistently maintained "from start to finish" that he didn't "give a damn" about the success of the offer.

Volume I Page 36

Volume I Page 167

It is submitted that these circumstances render it improbable that non-disclosure was activated by improper motives, but rather for the reasons given in evidence. Whether those reasons, upon examination in a Court, are found to be logical and sufficient, is beside the point.

(ii) That there were certain material mistatements in the circular letter which accompanied the takeover offer and in the circulars subsequently sent out.

Volume IV Pages 1012-1018

The appellant challenges the finding that the circulars, read as such, were in fact misleading and asserts that if in fact there were any mistatements

in any of them, there was no intention to mislead and no misleading in fact.

The appellant also asserts that the finding that a circular was misleading in that it referred to ruling Stock Exchange prices was based on an erroneous finding of fact relating to a finding concerning dealings in CHL ordinary stock units by Falkirk Properties Limited. Volume IV Page 1017

(iii) That Messrs. Adler and Belfer, the Directors common to FAI and CHL when the takeover offer was made were in a position of conflict. Volume IV Page 1019

The appellant submits that while Messrs. Adler and Belfer may have had a duty to FAI not to cause it to make a takeover offer at a price exceeding the lowest price likely to be successful their duty to CHL or its minority stockholders was to provide information relating to CHL relevant to a stockholders' decision whether or not to accept the offer.

(iv) That on a matter such as the decision what recommendation Directors will make in a Part B Statement stockholders are in general entitled to have applied to the question the collective wisdom of an independent Board. Volume IV Page 1020

If this is a finding of fact the appellant submits it is not supported by any evidence. If it is an assertion of law the

appellant submits it is erroneous.

(f) That an independent Board of CHL ought to have explored "more realistically" the obtaining at reasonable cost of some form of independent assessment of the offer. This refers to the request for an independent assessment by a Merchant Banker or Chartered Accountant, of the worth of the FAI shares offered (see paragraph 31(d) above). Volume IV Page 1024

The appellant submits that there is no duty imposed on Directors of an offeree company who are also Directors of an offeror company to cause a majority of independent Directors to be appointed to the Board of the offeree company and no obligation on any offeror company to submit to any investigation of the worth of its own shares offered in exchange for shares in the offeree company.

(g) That an independent Board of CHL may have been able to advance reasons to the FAI Board or to the Exchange which would have affected the offer which was being made, or the threat of delisting. The appellant submits that this is speculation and is irrelevant to the relief claimed by the petitioner. Volume IV Page 1024

54. Petition, paragraph 22

(A) His Honour found:-

"In my view, Mr. Adler and Mr. Belfer acted in the relevant affairs of Cumberland in a manner which appears to be unfair or Volume IV Page 1036

Record

unjust to other members, in the sense that it was unfair or unjust to the minority stockholders."

(B) His Honour's statement of the law relevant to this ground is set out in the four propositions mentioned in paragraph 53(c) above and in two further propositions at — Volume IV Page 1029 and Volume IV Pages 1031-2

(C) The appellant submits that his Honour erred in asserting that it is sufficient if it is shown that the conduct is unfair or unjust at least to any significant body of other members and perhaps to any other member, rather than to the members as a whole (other than the Director or Directors concerned). — Volume IV Page 1032

The appellant further submits that, in asserting that the nature of the injustice or unfairness and the extent to which this operates to the detriment of any other member or members will be material for consideration by the Court in exercising its discretion whether or not to make a winding up order, his Honour has overlooked the requirements of Section 225(3) of the Act which requires a Court which has found this ground to have been made out to make a winding up order unless it be of opinion that the petitioners are entitled to relief by some other means than a winding up and the petitioners are acting unreasonably in seeking to have the Company wound up instead of pursuing that other remedy. — Volume IV Page 1032

It can hardly be, if there is no other remedy available to the petitioner because he has in fact suffered no detriment or loss, that the Court must make a winding up order. The appellant submits that detriment or loss to the petitioner

is inherent in the notion of unfair or unjust conduct.

(D) His Honour's findings of fact upon which he concluded that this ground had been made out were:-

(a) the way in which the takeover offer was dealt with and the misleading aspects of the circulars. This appears to be a compendious reference to the findings mentioned in paragraph 53(E)(e)(f) and (g). Volume IV Page 1036

(b) The appointment of Messrs. Atkinson and Wilson as additional Directors of CHL ensured the complete dominance of the point of view and interest of the majority stockholders and of Mr. Adler in the conduct of its affairs and that this was compounded by the removal of Mr. Donohoo from the Board of CHL at the extraordinary general meeting held on 4th March, 1975. Volume IV Page 1037

The appellant disputes this finding and asserts:-

(i) the Directors common to CHL and FAI had at all relevant times constituted a majority of the Board of CHL.

(ii) there was no evidence to suggest that either Mr. Atkinson or Professor Wilson was likely to act contrary to the interest of the minority shareholders in CHL.

(iii) there was no evidence to suggest that either Mr. Atkinson or Professor Wilson would be dominated by the views of Mr. Adler in their conduct of the affairs of CHL.

(iv) No suggestion was made during the hearing of the petition that either Mr. Atkinson or Professor Wilson had taken any steps as Directors of CHL otherwise than in the interests of its members as a whole.

(v) Notwithstanding anything which may be in the Articles of CHL its shareholders are empowered by Section 120(1) of the Companies Act 1961 by ordinary resolution to remove any Director from office and to appoint some other person in his place. FAR has had that power at all relevant times. Its exercise, it is submitted, cannot be a ground for nor can it support the making of a winding up order.

(c) That there is no assurance that this type of action may not occur again and that the likelihood is that the affairs of CHL will continue to be conducted in the same fashion. Volume IV Page 1038

The appellant submits that there was no evidence to suggest and no grounds upon which it could be inferred that any similar, or other, takeover offer in respect of the minority stockholding in CHL was likely to be made and no grounds upon which it could be inferred from what had occurred in respect of the offer made and withdrawn, or the changes to the Board of CHL, that there was any likelihood of any future unfairness or injustice. The appellant further submits that the likelihood of future unfairness or injustice is irrelevant to a petition for winding up on this ground.

Record

55. Petition, paragraph 23

(A) His Honour found:-

"The actions of Mr. Adler, and of Mr. Belfer so far as he combined with him, lead me to the conclusion that the affairs of Cumberland were, on the presentation of the petition in the present case, being conducted in a manner oppressive to the complaining stockholders in their capacity as members."

Volume IV Page 1040

(B) His Honour's statement of the law relevant to this ground is set out at

Volume IV Pages 1032 - 1034

Inter alia his Honour asserted that the expression "the affairs of the company" in Section 186(1) extend to "its response to a takeover offer".

Volume IV Page 1034

(C) The appellant submits that a takeover offer is an "affair" of the shareholders of an offeree company and not an "affair" of the offeree company itself.

(D) His Honour's findings of fact on which he concluded the ground had been made out were:-

(a) the minority stockholders of CHL were at the time of the hearing of the petition stockholders in a company:-

(i) which was under a threat of delisting. The appellant submits that this threat did not result from anything done in the conduct of the affairs of the Company and that it is incapable of amounting to oppression within the meaning of Section 186.

Volume IV Page 1039

Report

(ii) whose Board of Directors were so constituted that it is in a position to pay regard to the interests of the majority stockholder and to disregard the interests of the minority stockholders. — Volume IV Page 1039

The appellant submits that the presence on the Board of a company of a majority of Directors who are also Directors of that Company's parent company is incapable of amounting to oppression within the meaning of Section 186.

Being in a favourable position to oppress is not to be equated with oppressing in fact.

Re Broadcasting Station 2GB Pty. Ltd. (1964-5) N.S.W.R. 1648 at 1663.

(iii) whose Board has by the course of conduct which it has followed demonstrated that it will in fact act in the interests of the majority holder and without proper regard to the interests of the minority.

This would appear to be a reference to some one or more of the findings mentioned in paragraph 53(E)(e)(f) and (g) and 54 (D).

The appellant repeats its submissions as to these matters and in particular its submission in paragraph 54 (D) (c).

(iv) has as its Chairman and dominant member of the Board a person who has failed to observe the — Volume IV Page 1040

standards of fair and honest dealing with them which they are entitled to expect.

There are no specific findings of fact to this effect save those facts found to justify the conclusions reached in respect of grounds alleged in paragraphs 21 and 22 of the petition. Presumably then it is to those that his Honour refers.

The appellant repeats its submissions with respect to them and submits further that there is not to be found any grounds for inferring any likelihood of any repetition of any of them.

56. Petition, paragraph 24

(A) His Honour found:-

"In the circumstances it appears to me that the complaining stockholders are justified in their complaint and in having a lack of confidence in the future conduct of the affairs of the company of which they are members. It falls, I think, within the principles laid down in relation to winding up on just and equitable grounds. I hold that this ground has been established." Volume IV Page 1042

(B) His Honour's statement of the law relevant to this ground is set out at Volume IV Pages 1034 - 1036

(C) The appellant submits that his Honour erred:-

(i) in asserting that the principles enumerated in Loch v. John Blackwood Limited 1924 AC 783 were applicable to the steps taken by the Board in and about the making of a Part B Statement, or otherwise "in response to takeover offers".

(ii) in asserting that failure by the Board of an offeree company to take steps, consequent upon receipt of a Part A Statement, additional to those required by the Act, could afford grounds for a winding up.

(iii) in asserting that the reaction of the Board of an offeree company to a takeover offer which has been withdrawn provides grounds for concluding that it is just and equitable, after that withdrawal, to order that the company be wound up.

(D) His Honour's findings of fact upon which he concluded that this ground had been made out were:-

(a) that Mr. Adler had maintained control of the Board of CHL. Presumably his Honour by this expression was referring to the appointment of Messrs. Atkinson and Belfer as additional Directors and the subsequent removal of Mr. Donohoo at the extraordinary general meeting of 4th March, 1975. Volume IV Page 1041

The appellant submits:-

(i) the appointment of the two additional Directors was effected in accordance with the Articles of CHL (Article 89).

(ii) the removal of Mr. Donohoo

was effected in accordance with the statutory powers.

(iii) neither of the above justify, or support, a winding up on the just and equitable ground.

(b) That Mr. Adler conducted the affairs of CHL in such a way that stockholders were not provided with either the collective wisdom of an independent Board or at least independent guidance of some kind in relation to the takeover offer. Volume IV Page 1042

The appellant submits:-

(i) The holder of a majority of voting shares in a listed public company may exercise his voting power so as to secure the election to the office of Director of those persons he wishes to occupy that office.

(ii) There is no statutory or other obligation on the Board of an offeree company to do more than comply with the provisions of Section 180G of the Act. Failure to do more than the Statute requires does not justify or support a winding up on the just and equitable ground.

(c) That Mr. Adler's circulars in point of frankness and accuracy fell short of the standard which stockholders were entitled to expect. Volume IV Page 1042

The appellant submits:-

(i) that the circulars read in their context did not so fall short.

(ii) that there was no evidence that any stockholder had in fact been misled in any way by any of the circulars.

(iii) that the circulars were those of FAI or of Mr. Adler in his capacity as a Director of FAI and not in his capacity as a Director of CHL.

(iv) that the takeover offer having been withdrawn neither the making of it nor the sending out of any of the circulars prejudiced any person in his character of a stockholder of CHL or otherwise.

(d) That Mr. Adler persisted in furthering the interests of FAI and its subsidiary FAR and thereby his own interests without due regard to the interests of some of the stockholders of Cumberland in appointing Mr. Atkinson and Professor Wilson as additional Directors, and by the removal by FAR at Mr. Adler's instigation, of Mr. Donohoo without replacing him with any other independent Director. Volume IV Page 1042

This appears to be no more than a repetition of ground (a) above.

57. The appellant's submissions:-

The appellant submits that the following findings should have been made.

(A) The association between the shareholders of CHL was a purely commercial one, "of which it can safely

be said that the basis of association is adequately and exhaustively laid down in the Articles". Ebrahimi v. Westbourne Galleries Ltd. (1973) AC 360, 379 per Lord Wilberforce. In no relevant sense was CHL a quasi partnership, nor, in any relevant sense, were there considerations of a personal character operating between the shareholders which would make it unjust or inequitable for one shareholder to insist on his legal rights, or to exercise them in a particular way.

Because:-

(1) It has been a listed public company since 1960. Volume III Page 668

(2) Under its Articles of Association there are no restrictions on the free transferability of its stock units, whether ordinary or preference.

(3) There are no agreements among its shareholders as to its management and control or as to the manner in which its business is to be conducted.

(B) No holder of stock units in CHL had any greater right to insist upon the continued listing of those stock units on the Sydney Stock Exchange than had CHL itself, that is to say during the joint pleasure of the company and the Sydney Stock Exchange.

Because:-

(1) The listing of the stock units was no part of the contract between CHL and any of its members constituted by that membership. Companies Act, Section 33(1).

(2) CHL's entitlement to maintenance of the quotation of its

ordinary stock units on the Sydney Stock Exchange was governed by the terms of the contract between CHL and the Exchange, i.e. the quotation was determinable at the will of the Stock Exchange or by the company's failure to renew its listing.

(C) The holder of shares in a listed public company is free to increase his shareholding by acquisition on or off the Stock Exchange, notwithstanding that the magnitude of his shareholding or the paucity of other members may become such as to imperil the continuance of the listing of the company's shares. The directors of the company concerned have no duty or any power to prevent such an occurrence. No such duty is imposed upon them by reason of their also being Directors (if they are) of the company acquiring the majority interest.

Because:-

(1) No wrong is done to the company or to any shareholder by a transfer of shares in accordance with the Articles.

(2) Where under the Articles the Directors have no power to control any transfer of shares they can have no duty to endeavour either to prevent such a transfer, or to cause such a transfer to occur.

(D) Prior to 11th July 1974, CHL had become unable or failed to satisfy the official listing requirements with respect to its ordinary stock units, thus rendering those stock units liable to removal from the official list.

Because:-

(1) Mr. Adler, members of his

family and companies associated with him are counted by the Stock Exchange with FAR and not as members of the public in determining compliance with listing requirements.

(2) The number of members of the public holding shares and the percentage of capital held by the members of the public had fallen well below the Exchange's minimum requirements.

(E) A holder of a minority interest in a listed public company whose continued listing is under threat by reason of the magnitude of the holding by the major shareholder has no entitlement to receive an offer for the purchase of his shares from the majority shareholder.

Because his rights against that majority shareholder can only be such as are conferred upon him by the relevant legislation, the general law or the Company's Articles. The Articles of CHL confer no such rights. Nor does the Companies Act 1961. Nor in the appellant's submission does the general law.

(F) The takeover offer made by FAI was not in fact an inadequate or unfair offer and should be viewed as a genuine offer activated by the desire to afford minority stockholders the opportunity to quit holding in an unlisted security in favour of a holding in a listed security.

Because:-

(1) There was no obligation on FAI to make any offer at all.

(2) To value a minority shareholding in a continuing company on an asset backing basis is erroneous

in principle. Pearse v. Commissioner of Stamp Duties 1951 SR (N.S.W.) 52. Affirmed 84 C.L.R. 490 and 1954 AC 91.

(3) To compare the asset backing of the share offered in exchange in November 1974 with the cash price paid in July 1974 was to overlook or give insufficient weight to the considerable down turn in the share market generally in the second half of 1974.

(4) The evidence established that for a long time there had been virtually no buyers on the Stock Exchange except persons associated with CHL's parent company FAI.

(5) The evidence further established that prior to as well as after July 1974 the holder of a small parcel of stock units in CHL could not expect to sell it at all unless to FAR or one of its associates and then only for what that company or its associates were willing to pay.

(6) When it made the offer FAI was aware that WHSP did not intend to accept and that therefore the compulsory acquisition procedure set out in Section 180X could not operate.

(7) The making of the takeover offer was suggested either by Mr. Atkinson or Professor Wilson and the consideration was suggested by Mr. Atkinson. Both Mr. Atkinson and Professor Wilson in their commercial judgment considered the offer to be a fair and reasonable offer.

(G) The circulars sent out by FAI or by Mr. Adler were not intended to conceal or mislead and were not shown to have done so in fact.

Because:-

(1) They were despatched to CHL stockholders who had recently had that company's annual accounts and directors' report.

(2) They would not, in the hands of recipient stockholders, be subject to the type of textual criticism made in argument and dealt with in the judgment below.

(3) They were despatched with knowledge that Mr. Donohoo was aware of the details of the July purchase by FAR and that he intended to circularise stockholders arguing against acceptance.

(4) Except for that one which accompanied the takeover offer itself they were each despatched promptly in reply to a circular reflecting upon FAI or Mr. Adler. An intention to conceal or mislead should not be inferred from an argumentative circular despatched in the heat of a "paper warfare".

(H) No stockholder in CHL suffered any detriment from the making of the takeover offer or from anything done or ommitted during its currency.

Because:-

(1) It was withdrawn on 6th December, 1974.

(2) Those shareholders who had accepted were all given the opportunity to withdraw from the contract.

(J) The appointment of Mr. Atkinson and Professor Wilson to the Board of CHL and the subsequent removal of Mr. Donohoo were each proper and justifiable steps in the circumstances not permitting any inference of any intention to override minority stockholders.

Because:-

(1) WHSP whom Mr. Donohoo represented on the Board of CHL had threatened a winding up petition.

(2) WHSP and Mr. Donohoo had each embarked upon a campaign designed to improve the position of WHSP as a minority stockholder at the expense of the interest of the majority shareholder, FAR or its parent FAI.

(3) There had come to exist such disharmony between Messrs. Adler and Belfer on the one hand and Mr. Donohoo on the other that proper conduct of the business of meetings of Directors of CHL was being impeded.

(4) The ultimate step of removing Mr. Donohoo was taken on Senior Counsel's advice.

(K) Throughout the whole of the period during which occurred the events complained of, and afterwards, the business of CHL prospered and its assets and shareholders' funds increased.

58. The appellant submits that the petition should have been considered in accordance with the following principles:-

(A) Where a company is solvent and prosperous, the Court is reluctant to order a winding up, which is or ought to be a remedy of last resort, unless the petitioner establishes a case

which is convincing and clear. Galbraith v. Menito Shipping Co. (1947) SC 446, 459. The Court will not presume oppression, fraud, or abuse of power, but requires it to be established by satisfactory evidence. Peters American Delicacy Co. Ltd. v. Heath (61 C.L.R. 457, 482). A conclusion of breach of duty or abuse of power is not, it is submitted, to be spelled out from uncertain inferences equivocal considerations or "ambiguous" incidents.

(B) Section 222(1)(f) is directed at actions on the part of the Directors of CHL as such, and not at the manner in which they may exercise their prerogatives as shareholders in CHL. As shareholders they are entitled to act in their own interests, subject only to those restrictions to which all shareholders are subject.

Ngurli v. McCann 90 C.L.R. 425, 439

Burland v. Earl 1902 A.C. 83, 94

Re William Brooks & Co. Ltd. 79 WN (N.S.W.) 354, 366.

Further, the actions complained of must be "in the affairs of the company" as distinct from "in their own affairs" or in relation to some other matter. Whilst the phrase may be of uncertain content, it is submitted that it bears a meaning equivalent to either:-

(a) in the business of the company. C/f R. v. Board of Trade (1965) 1 QB 603, 613, 618, or

(b) in the performance of a power or duty which is delegated to the Directors by virtue of the Articles of Association of the company.

(C) The first limb of Section 222(1)(f) does not require or involve a dissection of the various competing

interests existing beneath the umbrella of a company structure from time to time, and a comparison as to whether a particular act on the part of the Directors is in the interests of one faction which they may be said to represent rather than in the interests of another or others.

The provision is directed not so much at the impact of actions of the Directors upon the actual individual interests of a member or members, but at the more general question as to whether the Directors have abused their position at the expense of the company which they represent. Where Directors act in a manner which accords with the interest of a majority shareholder or shareholders it cannot be said simply for that reason that they have acted "in their own interests". In a situation where the membership of a company was as to 80% in the hands of a majority, and as to 20% in the hands of a minority, and a situation arose where the interests of the majority and minority differed then:-

> "It can hardly be supposed that the only solution of such a difficulty which can be lawfully adopted is that which gives the minority an advantage at the expense of the majority."

C/f Peters American Delicacy Co. Ltd. v. Heath 61 C.L.R. 457 at 495.

(D) In determining whether to acquire further shares in CHL the Directors of FAR were both entitled and bound to act in what they regarded as the interests of FAR.

Parke v. Daily News Ltd. (1962) Ch. 927.

Walker v. Wimborne (50 A.L.J.R. 446, 449).

To the extent to which the Directors common to both companies determined that FAR should increase its holding in CHL, they were acting in the affairs of FAR and not those of CHL.

Similarly to the extent that Mr. Adler for his family and associated companies determined that they should sell their shares in CHL, he was acting in his own affairs, or theirs, and not in the affairs of CHL. The liberty of a shareholder to dispose of shares is essentially an individual decision and upon which neither the will of a majority, nor a minority, is entitled to prevail over the individual decision thus reached. Cf. Howard Smith Ltd. v. Ampol Ltd. (1974) AC 821, 837. That the acquisition or disposition of shares in a company is "clearly" not part of the conduct of the affairs of the company was recognised by Jacobs J. in Re Broadcasting Station 2GB Pty. Ltd. (1964-5) N.S.W.R. 1648, 1664.

(E) The second limb of Section 222(1)(f) (paragraph 22 of the petition) is directed towards actions of Directors in breach of their duties as such under the Act, the Articles or the general law which have an unfair or unjust impact upon or consequences to the members as a whole. Re William Brooks & Co. Limited 79 WN (N.S.W.) 354 at 367. What is relevant is what has occurred, not, as his Honour attempted, any predictions as to what may occur in the future.

(F) In relation to Section 186 that:-

(a) The oppression alleged must be shown to be a continuing state of affairs operative at the time of presentation of the petition.
In Re Jermyn St. Turkish Baths Ltd. (1971) 1 W.L.R. 1942, 1059.

In re Five Minute Car Wash Service Ltd. (1966) 1 W.L.R. 745, 751.

(b) The matters complained of must relate to the conduct of the affairs of the company of which the complainant is a member affecting complainant in his character as a member, and not in some other capacity.

In re Five Minute Car Wash Service Ltd. (1966) 1 W.L.R. 745, 751.

Scottish Co-Operative Wholesale Society Ltd. v. Meyer (1959) AC 324, 346.

Re Tivoli Freeholds Limited (1972) VR 445, 453.

(c) The conduct complained of must be "burdensome, harsh and wrongful".

Scottish Co-Operative Wholesale Society Ltd. v. Meyer (1959) AC 324, 342.

(d) The consequence of the conduct complained of must be that the rights of members, as members, had been affected. It must be shown that the members have suffered in a pecuniary sense in their capacity as members.

Re Broadcasting Station 2GB Pty. Ltd. (1964-5) N.S.W.R. 1648, 1662.

Re Tivoli Freeholds Ltd. (1972) VR 445, 453.

(e) The Section is directed towards a state of affairs existing as at the date of the petition, and neither authorises nor empowers the Court to anticipate damage in the future.

Re Broadcasting Station 2GB Pty. Ltd. (1964-5) N.S.W.R. 1648, 1663.

(G) To justify the making of a winding up order on the just and equitable ground:-

(a) An examination of the circumstances existing at and up to the presentation of the petition must render it just and equitable that a shareholder should be relieved of the contract constituted by the Memorandum and Articles; and permitted to withdraw his investment from the company, and put an end to the life of the company contrary to the wishes of the majority.

Cf. re Suburban Hotel Company (1827) 2 Ch. App. Cas. 737, 742-3.

(b) A serious condition affecting the proper conduct or management of the company's affairs must be established in order to justify the application of a drastic remedy.

Cf. Re J.J. Jowsey Mining Co. Ltd. 4 D.L.R. (3rd) 97, 100.

(c) The mere fact of misconduct on the part of the Directors of the company is insufficient.

Menard v. Horwood & Company Limited 31 C.L.R. 20.

Lock v. John Blackwood Limited (1924) AC 783, 791.

especially if it is an isolated occurrence which may not recur.

(d) There must be established a justifiable lack of confidence in the conduct and management of the company's affairs based on

the conduct of the directors as Directors of the Company rested on a lack of probity on the part of the Directors in the conduct of the company's affairs.

Lock v. John Blackwood Limited (1924) AC 783 at 791.

59. The appellant submits that the application of these principles to the matters established in evidence should have resulted in conclusions that:-

A. Petition, paragraph 21

(1) Messrs. Adler and Belfer did not as Directors of CHL act in the affairs of CHL in their own interests rather than in the interests of the members, as a whole, of CHL.

(2) That of the matters relied upon by the petitioner (see paragraph 52 above):-

(i) Those mentioned in (a)(v)(viii), (b)(ii) and (iii), and (c)(i) and (ii) are not alleged to have been acts of either Mr. Adler or Mr. Belfer in his capacity as a Director of CHL.

(ii) Those mentioned in (a)(vii) and (viii) were no more than an exercise of an authority conferred by the Articles and by the Act and not shown to have in any way prejudiced any stockholder or improperly advanced the interest of either Mr. Adler or Mr. Belfer.

(iii) Those mentioned in (a)(i)(ii)(iv)(vi) and (b)(i) were:-

(a) not actions or omissions "in the affairs" of CHL; or

(b) did not relate to the business of CHL; or

(c) were not acts or omissions in respect of any power or authority conferred by the Articles of CHL upon its Directors; and

(d) were not any of them such as to justify a finding that they were acts done or omissions made by either Mr. Adler or Mr. Belfer in their own interests.

B. Petition, paragraph 22

(1) Messrs. Adler and Belfer did not as Directors of CHL act in the affairs of CHL in any manner which appears to be unfair or unjust to other members.

(2) The same conclusions as are sought under A(2) above are sought in respect of this ground, and for the same reasons.

(3) In addition none of the matters particularised by the petitioner establishes that there had occurred any unjust or unfair impact upon or consequences to any minority shareholder in CHL.

C. Petition, paragraph 23

(1) The affairs of CHL had not been, and were not, at the presentation of the petition, being conducted in a manner oppressive to one or more of its members, including WHSP.

(2) That of the matters relied upon by the petitioner:-

(i) The information mentioned in (a)(i) was in fact known to the petitioner and became known to each other member of CHL before the takeover offer was withdrawn.

(ii) The matters complained of in (b)(i), if they were any of them mistatements, were corrected prior to the withdrawal of the takeover offer.

(iii) The matters mentioned in (a)(ii) and (v); (b)(ii) (iii), and (c)(i) and (ii) related to the affairs of FAI or FAR and not to the affairs of CHL.

(iv) The matters complained of in (a)(vii) and (viii) were no more than an exercise of an authority conferred by the Articles and by the Act and were not shown in any way to have prejudiced or oppressed any stockholder.

(v) The matters complained of in (a)(iv) and (vi) were not any of them capable of amounting to oppression and did not in fact oppress the petitioner or any other stockholder in CHL.

D. Petition, paragraph 24

(1) The Court is not of the opinion that it is just and equitable that the company be wound up.

(2) That the matters complained of did not any one or more of them, in so far as they related at all to the conduct and management of the affairs of CHL, establish a justifiable lack of confidence in any stockholder in the conduct or

management by its Directors rested on any lack of probity on their part therein.

60. The appellant accordingly submits that the appeal ought to be allowed, with costs and that in lieu of the order appealed from there should be an order that the petition be dismissed with costs. 10

RUSSELL BAINTON, Q.C.
P. G. HELY