

IN THE PRIVY COUNCIL

No. 29 of 1976

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

IN THE MATTER OF:-

CUMBERLAND HOLDINGS LIMITED

AND IN THE MATTER OF:-

THE COMPANIES ACT, 1961

CASE FOR THE RESPONDENT

SOLICITORS FOR THE APPELLANT

Sinclairs,
5 Elizabeth Street,
SYDNEY

By their Agents:-

Coward Chance,
Royex House,
Aldermanbury Square,
LONDON. EC2V 7LD

SOLICITORS FOR THE RESPONDENT

Allen Allen & Hemsley,
2 Castlereagh Street,
SYDNEY

By their Agents:-

Slaughter & May,
35 Basinghall Street,
LONDON. EC2V 5DB

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FROM THE SUPREME COURT OF NEW SOUTH WALES

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10

CASE FOR THE RESPONDENT

THE PROCEEDINGS GIVING RISE TO THIS APPEAL:

Record

1. This is an appeal against an order made on 31st May, 1976 by the Supreme Court of New South Wales, Equity Division (Bowen C.J. in Eq.) for the winding-up of Cumberland Holdings Limited ("Cumberland"). The order was made on the petition presented on 2nd April, 1975, of Washington H. Soul Pattinson & Company Limited ("Souls") a member of Cumberland at all relevant times. The hearing of the petition extended over seventeen days.

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2. At the time of the presentation of the petition Cumberland was solvent and trading profitably. The case made by Souls related mainly to the conduct of Cumberland's affairs by two of its three Directors, namely, Mr. Lawrence Adler and Mr. Belfer.

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3. The grounds of the petition, four in number were as follows:

1.

(a) that Mr. Adler and Mr. Belfer had acted in the affairs of Cumberland (1) in their own interests rather than in the interests of the members as a whole; and (2) in other ways which were unfair and unjust to members: The Companies Act, 1961 ("the Act") S. 222(1)(f);

(b) that the affairs of Cumberland "are being conducted in a manner oppressive to one or more of the members"; S. 186(1) of the Act; 10

(c) that it was just and equitable that Cumberland be wound-up: S. 222(1)(h) of the Act.

4. The petition was supported by fifty-nine (59) members holding 48,640 ordinary stock units and forty-four (44) persons holding 139,400 preference stock units in Cumberland. 20

5. The trial judge held that each of the grounds had been established.

THE FACTS:

6. Cumberland was incorporated in New South Wales on 10th February, 1960. Until 1962 it carried on business as a finance company; from 1962 until 1969 it was dormant. Volume III Pages 667-669

7. In 1969, Cumberland set about acquiring and conducting nursing homes, and at the time of the hearing of the petition conducted a number of nursing homes and two private surgical hospitals. Volume III Pages 669-670 30

8. Cumberland was listed on the Stock Exchange shortly after its incorporation and has remained listed since that date. Volume III Pages 668-670

Record

9. In December 1973, the issued capital of Cumberland was:

Exhibit 4

- (a) 757,536 ordinary fully-paid stock units of 50¢ each;
- (b) 303,768 8% cumulative preference non-participating fully-paid stock units of 50¢ each;
- (c) 300,000 8% cumulative redeemable preference non-participating fully-paid stock units of 50¢ each.

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10. During 1970-1971, Souls acquired the following interests in Cumberland:

Volume III
Page 672

- (a) 46,000 ordinary stock units;
- (b) 183,529 8% cumulative preference non-participating stock units;
- (c) 118,000 8% cumulative redeemable preference non-participating stock units;

In addition, Souls was at all relevant times the beneficial owner of 4,000 ordinary stock units held on its behalf by Mr. Donohoo, a director of Souls.

Volume I
Page 18

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Such was the extent of Souls interest in Cumberland at the date of presentation of the petition.

11. At all relevant times prior to 11th July, 1974, Fire & All Risks Insurance Company Limited ("Fire & All Risks"), a wholly-owned subsidiary of F.A.I. Insurances Limited ("F.A.I.") owned approximately 72% of the ordinary stock units in Cumberland.

Exhibit 3

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12. The principal actors and their respective roles in the events giving rise to the litigation were:-

Record

- (a) Mr. Lawrence Adler, chairman of directors of F.A.I., Fire & All Risks and Cumberland. The evidence revealed that he was the dominant figure on the boards of those three companies; Volume III Page 667
- (b) Mr. Thomas Eric Atkinson, a director of F.A.I. and Fire & All Risks since January 1974. He was appointed to the board of Cumberland on 22nd January, 1975; Volume II Page 309 Page 344 10
- (c) Associate Professor John Reuben Wilson, a director of F.A.I. since January 1972. He was appointed a director of Cumberland contemporaneously with Mr. Atkinson; Volume II Page 551 Page 564
- (d) Mr. James Sinclair Millner, at all material times chairman of directors of Souls. Between 1970 and 1972, he had served as a director of Cumberland; Volume III Page 672 20
- (e) Mr. Glenn Donohoo, a director of Souls, who was a director of Cumberland from April 1972 until 4th March, 1975, when he was removed from office by resolution of an extraordinary general meeting convened by Fire & All Risks for that purpose; Volume I Page 17 Exhibits 30, 31, 33 & 39 30
- (f) Mr. John Belfer, a director at all relevant times of F.A.I., Fire & All Risks and Cumberland. Although, like Mr. Adler, he participated, in conflicting capacities in events and decisions that led to this litigation he was not called as a witness to explain or justify his conduct as a director of Cumberland in relation to the matters charged against him. 40

13. In December 1973, Mr. Adler on behalf of F.A.I. decided to make an offer to acquire the holdings of the minority stockholders in Cumberland. The trial judge found that in December 1973 Volume III Pages 678-680, 689-692 Volume IV Pages 870,

Record

- Mr. Adler asked Mr. Millner whether Souls would exchange its holding of ordinary stock units in Cumberland for ordinary stock units in F.A.I. on the basis of one F.A.I. ordinary stock unit for two Cumberland stock units, and all of its preference stock units for an equal number of 8% preference shares in F.A.I. There was a conflict of evidence between Mr. Millner and Mr. Adler as to what was said in this discussion. The trial Judge rejected the latter's account, which was to the effect that he did not make any proposal with respect to the ordinary stock units.
- 10
14. A few weeks later, Mr. Millner informed Mr. Adler that Souls would not accept the offer.
- Volume IV
Page 881
- 20
15. On 3rd April, 1974, the directors of F.A.I. held a meeting, of which the following minute was made:
- "The takeover of Cumberland Holdings Limited was again discussed and it was resolved not to proceed."
- Volume II
Pages 484-486,
587.
Volume III
Pages 808-813
16. Prior to July 1974, Mr. Adler, members of his family, family companies controlled by him, and a company named Falkirk Properties Limited (a majority of the issued share capital of which was held by F.A.I., Mr. Adler, his family companies and Mr. Belfer's family companies) owned 57,550 ordinary stock units, 9,428 8% cumulative preference non-participating stock units and 128,700 8% cumulative redeemable preference non-participating stock units in the capital of Cumberland. All these stock units are hereinafter referred to as the "Adler Interests in Cumberland".
- Exhibit 67
Volume V,
Page 1072
- 30
- Volume II,
Pages 314-317
Volume III,
Pages 673, 674
- 40

Record

17. On 24th June, 1974, Mr. Adler on behalf of Fire & All Risks offered for sale on the Sydney Stock Exchange 1,000 Cumberland ordinary stock units at \$1.50. The last sale of Cumberland's ordinary stock units on the exchange prior to that date had taken place on 6th May, 1974 at a price of 75¢ per share.
- Exhibit 51
Volume III,
Pages 685-689
692-694
- Exhibit 45(1)
Volume VI,
Page 1440 10
18. It is important to bear in mind, in relation to this offer and subsequent offers placed by Mr. Adler in relation to Cumberland stock units on the Exchange, that there was at no relevant time any real market on the Exchange for Cumberland stock units. Mr. Atkinson aptly described the various buying and selling orders placed by Mr. Adler on the Exchange as "window dressing"; he was unable to name any reputable company which engaged in that practice. Details are set out below of activity engaged in by Mr. Adler to create the impression that there was a ruling market price for Cumberland stock units.
- Volume III,
Page 717
Volume IV,
Page 853-4
Volume II,
Pages 365-7,
383, 417, 432,
567
Volume III,
Pages 633-4 20
- Volume II
Pages 318,
365-7, 377,
417-28.
19. On 2nd July, 1974, Mr. Adler on behalf of F.A.I. and Falkirk Properties Limited (Mr. Adler being chairman of that company) placed with stockbrokers orders to buy Cumberland ordinary stock units on the Sydney Stock Exchange at \$1.25. Following those orders, the following purchases were made:
- Volume III,
Pages 688-9 30
- Purchases by Falkirk Properties Limited:
- | | | |
|-----------------|---|--------------|
| 2nd July, 1974 | - | 200 @ \$1.25 |
| 3rd July, 1974 | - | 400 @ \$1.25 |
| 11th July, 1974 | - | 500 @ \$1.25 |
- Exhibit 47
Volume V,
Page 1100
Volume II,
Pages 366, 377
- Purchases by F.A.I.:
- | | | |
|-----------------|---|--------------|
| 12th July, 1974 | - | 400 @ \$1.25 |
| 12th July, 1974 | - | 800 @ \$1.25 |
| 16th July, 1974 | - | 200 @ \$1.25 |
| 16th July, 1974 | - | 300 @ \$1.25 |
- 40

Record

20. On 11th July, 1974, Mr. Adler at a board meeting of F.A.I. offered to sell to F.A.I. the Adler Interests in Cumberland at a price of \$1.25 for each ordinary stock unit, and 50¢ for each preference stock unit. Mr. Atkinson considered that a purchase of the ordinary stock units at the price offered would be advantageous from the viewpoint of F.A.I.; Professor Wilson considered that price to be fair and reasonable, and the investment represented by the purchase to be a good investment. The offer was unanimously accepted by the directors of F.A.I. (other than Mr. Adler, who refrained from participation in the decision) without any attempt on their part to negotiate for a lower price. There was comment at the meeting on the fact that Mr. Adler's offer coincided in amount with the current Exchange price for the ordinary stock units; but this factor was placed on one side by Professor Wilson and Mr. Atkinson, who did not regard the market price as relevant in view of the circumstances that, to their knowledge, the price of \$1.25 had been placed "on the board" by Mr. Adler. The trial judge found that Messrs. Atkinson and Wilson when considering the value of the shares had regard to the earnings, asset backing and profits of Cumberland.
- Volume II
Pages 316,
359, 362
- Volume II,
Pages 362-4,
377, 378, 391 10
- Volume II,
Pages 566, 570
- Volume II,
Pages 391, 554
568-570
- Volume III,
Pages 695-6 20
- Volume II,
Pages 318, 556
- Volume IV,
Page 985 30
21. One of the vendors on whose behalf Mr. Adler on 11th July, 1974 offered to sell stock units was Falkirk Properties Limited.
- Volume III
Page 675
22. The transaction agreed to on 11th July, 1974 increased Fire & All Risks' holding of ordinary stock units in Cumberland from approximately 72% to approximately 80% of the total stock units on issue. This fact was well known to Mr. Adler at the time, as was the fact that such increase would put Cumberland in breach of one of the listing requirements of the Australian Associated Stock Exchanges.
- Exhibit 3 40
- Exhibit 46
Volume V,
Pages
1098-9

Record

23. On 23rd July, 1974 the Stock Exchange was notified of the acquisition by F.A.I. of those stock units. Exhibit 46
Volume V,
Page 1088
24. In August 1974, Mr. Adler on behalf of Fire & All Risks placed on the Exchange the following orders with respect to ordinary stock units in Cumberland:
- (a) on 7th August, 1974, a selling order for 10,000 @ 70¢ each; 10
- (b) on 19th August, 1974 a buying order for 25,000 @ 50¢ each.
- Neither of these orders attracted a bid.
25. The trial judge found that these orders were placed by Mr. Adler in the knowledge that a threat of de-listing (which subsequently materialised) was "virtually inevitable" and that majority stockholders in Cumberland would be "vulnerable thereafter to some approach to sell or exchange their holdings". Volume V,
Page 1005 20
26. A selling price of 70¢ represented a drop of 44% from the price of \$1.25 set on the board on 12th July, 1974; the buying price of 50¢ represented a drop of no less than 60% from that price. By contrast, the All Ordinaries Index on the Sydney Stock Exchange fell by only 14.2% between 12th July, 1974 and 7th August, 1974. Exhibit 81
Volume VI,
Pages 1454,
1455 30
27. Mr. Adler made no contemporaneous disclosure to his co-directors of the August selling and buying orders, which first came to the attention of Mr. Atkinson at the beginning of October, 1975 just prior to the commencement of the hearing of the petition. Professor Wilson first learnt about them when reading the transcript of evidence given by Mr. Atkinson during the course of the Volume II,
Page 371
Volumes II
& III,
Pages 574,
583 40

Record

hearing, just before he was called to give evidence on behalf of Cumberland.

28. On 4th September, 1974, what the trial judge described as "virtually inevitable" in fact happened: the Sydney Stock Exchange wrote to Cumberland advising that the effect of the acquisition of ordinary stock units in Cumberland by Fire & All Risks on 11th July, 1974 brought its holdings to a figure in excess of 75% of the total on issue, which was in breach of the Exchange's Listing Requirements. The letter called upon Cumberland to procure Fire & All Risks to reduce its holding to 75% if Cumberland wished to remain listed. Exhibit 6, Volume V, Page 1104 10
29. By letter dated 13th September, 1974, Cumberland advised its stockholders that Fire & All Risks was not prepared to divest itself of any part of its shareholding in Cumberland and that in view of the possibility that its refusal might be prejudicial to the interests of minority shareholders, Fire & All Risks intended to make an offer for the outstanding shares. Exhibit 7, Volume V, Page 1108 20
30. In about the third week of October, 1974, the directors of F.A.I. agreed upon the consideration to be offered for the proposed takeover. Their decision was the subject of a formal resolution at a board meeting of F.A.I. held on 1st November, 1974. The offer was: one ordinary stock unit in F.A.I. for each ordinary stock unit in Cumberland; one cumulative preference share of 50¢ in F.A.I. for each 8% cumulative preference non-participating stock unit in Cumberland and one 8% cumulative preference share of 50¢ in F.A.I. for each 8% cumulative redeemable preference non-participating stock unit in Cumberland. No cash alternative was proposed. The takeover documents were despatched to Cumberland shortly after this meeting. Volume II, Page 330 Exhibit 68 Volume V, Page 1163 30 40

Record

31. As stated in the reasons for judgment of the trial judge, the petition to wind-up Cumberland was occasioned by the acquisition of the Adler Interests by Fire & All Risks, by the subsequent letter from the Exchange, and by F.A.I.'s takeover offer. To those factors one would add:
- (a) the conduct of Mr. Adler and Mr. Belfer in relation to the offer while standing in conflicting positions as directors of the offeror and the offeree companies; 10
- (b) the conduct of the directors of F.A.I. in connection with various circulars issued to Cumberland stockholders in relation to the offer (in the evaluation of this conduct it is highly relevant to bear in mind that Messrs. Adler and Belfer had conflicting duties and interests); 20
- (c) the removal of Mr. Donohoo from the board of Cumberland, details of which will be given later.
32. On 4th November, 1974 the directors of Cumberland held a meeting to consider the takeover offer. Present were Mr. Adler, Mr. Belfer and Mr. Donohoo. One of the questions discussed was what recommendation, if any, the board should make in relation to the offer. Mr. Donohoo suggested that Cumberland appoint a firm of merchant bankers or accountants to evaluate it. This suggestion was formulated as a resolution, but it was defeated by the combined vote of Mr. Adler and Mr. Belfer. Exhibit 9
Volume V,
Page 1164
Volume I, 30
Pages 23-27
184, 185
Volume III
Pages 829-843
33. On 14th November, 1974, Mr. Donohoo wrote to Cumberland stating that in his view the offer was an unsatisfactory one. He drew attention to the fact that the Adler interests in Cumberland had received \$1.25 for their ordinary stock units in the preceding Exhibit 10 40
Volume V,
Page 1175
Volume I,
Pages 28,
37-42,
189

July. He again pressed the view that independent advice should be made available to the Cumberland minority stockholders.

34. On 15th November, 1974, the directors of Cumberland again met, Mr. Adler, Mr. Belfer and Mr. Donohoo being present. At that meeting, Mr. Donohoo again proposed a motion that an independent firm of merchant bankers or accountants be retained to evaluate the adequacy or otherwise of the takeover offer. Mr. Adler ruled that the motion lapsed for want of a seconder. Mr. Donohoo also proposed further resolutions, each of which were ruled by Mr. Adler to have lapsed for want of a seconder. Those resolutions were:
- Exhibit 25
Volume V,
Page 1244
- Exhibit 27 10
Volume V,
Page 1180
- Volume I,
Pages 28-42
189-198
- Volume III,
Pages 829-843
- (a) that F.A.I. be advised that the takeover offer appeared to be in breach of Regulation 5(10) (e) of the Australian Associated Stock Exchanges Listing Requirements by reason of the takeover consideration being less than that paid by F.A.I. for the Adler Interests in Cumberland in the transaction agreed to on 11th July, 1974; 20
- (b) that a request be made to the committee of the Sydney Stock Exchange Limited to advise whether the takeover offer contravened the official listing requirements of the Australian Associated Stock Exchanges; 30
- (c) that the opinion of the Commissioner for Corporate Affairs be sought as to whether a full and fair market had existed in regard to Cumberland's securities. 40

At that meeting, the Part B Statement was approved, that Statement being a document formulated by the Cumberland board. The Act required it to be forwarded to the offerees as part of the takeover documents.

Record

35. The Part B Statement stated that Mr. Adler and Mr. Belfer were in favour of the takeover scheme, and that Mr. Donohoo was not in favour, it being considered by him that the scheme was not in the best interests of the offerees. It also stated that because of the different views of members of the board, the board did not wish to make a recommendation to shareholders. It drew attention to the threatened de-listing and stated that if de-listing took place and the takeover offer was not accepted, stockholders could find considerable difficulty in disposing of their holdings. Exhibit 11
Volume V,
Page 1195
10
36. In November, 1974, the net tangible asset backing of each ordinary stock unit of Cumberland was approximately \$1.70 per unit, having risen from approximately \$1.22 per unit since July 1974. Between July and October 1974, the net profit of Cumberland had increased by 10%; between July 1974 and December 1974 the net profit had increased by 31%. Volume I
Page 25
20
Exhibit 87
Volume VI,
Page 1316
37. In November 1974, the net tangible asset backing of F.A.I. was 52¢ per share; the asset backing taking into account intangibles was \$1.00 per share. The asset backing of Cumberland was calculated solely on the basis of net tangible assets. There is no firm or acceptable evidence to suggest that F.A.I. increased its profitability between July and November 1974, and in the latter month, with the exception of 68,000 shares in F.A.I. purchased by Mr. Adler and Mr. Atkinson, the turnover on the Stock Exchange in F.A.I. shares was 11,367, the last sale price being 55¢. Volume I
Page 26
30
Exhibit 88
Volume VI,
Page 1321
40
38. On 21st November, 1974, in a crossing transaction on the Melbourne Stock Exchange, Mr. Adler purchased 64,000 ordinary stock units in F.A.I. at 40¢ each; and Mr. Atkinson for his family Volume II,
Pages 522-530
Volume III,
Pages 739-746,
752

Record

company purchased 4,000 of such ordinary stock units at the same price. These transactions were not revealed in the takeover documents or subsequently. The trial judge was mildly critical of this non-disclosure; it is submitted that more stringent criticism was called for.

39. On 21st November, 1974, the takeover offer was forwarded to minority shareholders of Cumberland together with a letter signed by Mr. Adler on behalf of F.A.I. and statements in accordance with Parts A and B of the Tenth Schedule of the Act. Exhibit 11
Volume V, 10
Page 1195
40. After 20th November, 1974, a number of circulars were forwarded by F.A.I. to minority stockholders of Cumberland regarding the takeover offer. Such circulars were invariably signed by Mr. Adler, and in one instance, signed by Mr. Adler as Chairman of Directors of both F.A.I. and Cumberland. The circulars were designed to persuade the recipients to accept the offer made by F.A.I. Reference will later be made to such circulars because, as found by the trial judge, they contained false and misleading statements. 20
Volume IV,
Pages 1012-1018
41. Should the offer have been accepted, minority shareholders would have disposed of their shares in Cumberland at what would have been a gross undervalue. 30
42. On 4th December, 1974 Mr. Adler in company with Mr. Atkinson attended a meeting with Mr. Charles Curran the vice-president of the Sydney Stock Exchange, such meeting having been initiated by Mr. Curran. When questioned by Mr. Curran as to how the price for the sale of the Adler Interests in Cumberland had been fixed, Mr. Adler sought to justify that price as being the market price at the time. Mr. Curran, obviously having knowledge of Mr. Adler's Volume I,
Pages 269-281
Volume II,
Pages 501-5,
507-518,
522-530. 40

Record

active participation in establishing the price of \$1.25 on the market in July, told Mr. Adler that his attempted justification did not hold good if the party interested in the transaction had made the market. It is submitted that Mr. Adler's disingenuousness in dealing with Mr. Curran was discreditable.

43. On 6th December, 1974, F.A.I. by letter to Cumberland stockholders withdrew its takeover offer. They were advised that F.A.I. was exploring the possibility of making an invitation to Cumberland stockholders to sell their stock units to F.A.I. Exhibit 19 Volume V, Page 1269 10
44. On 13th December, 1974, the solicitors acting for Souls wrote to F.A.I. threatening the issue of a petition to wind-up Cumberland unless within a specified time a cash offer were made to all Cumberland stockholders to acquire their ordinary stock units at \$1.25 each and their preference stock units for 50¢. This demand was refused. Exhibit 22 Volume VI, Page 1296 20
45. The possibility foreshadowed by F.A.I. in its letter to Cumberland dated 6th December, 1974 of issuing an invitation to sell never materialised.
46. At a meeting of directors of Cumberland on 22nd January, 1975, Mr. Adler, Mr. Belfer and Mr. Donohoo being present, Mr. Adler moved that Mr. Atkinson and Professor Wilson be appointed additional directors to the board. Mr. Donohoo opposed the appointment of those persons as they were already directors of F.A.I. Mr. Donohoo further stated at that meeting that if another director were needed, he would be quite happy for a person unconnected with F.A.I. to be appointed. Despite Mr. Donohoo's objection, Mr. Adler's motion was carried on his vote and that of Mr. Belfer. Exhibit 29 Volume VI, Page 1337 30
Volume I, Pages 53-55 40

Record

47. By letter from Mr. Adler dated 22nd January, 1975, Mr. Donohoo was asked to resign as a director of Cumberland. Mr. Donohoo refused to resign. In evidence, he stated that it was his intention to resign in the event of a petition being issued by Souls to wind-up Cumberland. His testimony on this point was accepted by the trial judge.
- Exhibit 28
Volume VI,
Page 1335
- Volume I,
Pages 60-63
Volume II,
Page 3423
- 10
48. On 4th March, 1975, an extraordinary meeting of Cumberland was held, having been requisitioned by Fire & All Risks for the purpose of removing Mr. Donohoo from the board of Cumberland. At that meeting, Mr. Donohoo was in fact so removed. The meeting was attended by a large number of minority stockholders all of whom voted against Mr. Donohoo's removal.
- Exhibit 30
Volume VI,
Page 1364
Exhibit 76
Volume VI,
Page 1347
Exhibit 39
Volume VI,
Page 1425
Volume I,
Pages 69-72
- 20
49. Subsequent to that date, the only directors of Cumberland were Messrs. Adler, Belfer, Atkinson and Professor Wilson, all of whom are directors of F.A.I.
50. In the course of his reasons for judgment, the trial judge considered the question whether F.A.I.'s takeover offer for the ordinary stock units in Cumberland was fair. His conclusion was that the offer of an exchange on a "one-for-one" basis represented an undervalue of Cumberland ordinary stock units, and that "the consideration on either side was unequal". This conclusion was based on findings that:
- Volume IV,
Pages 1007-1009
- 30
- (a) the Cumberland ordinary stock units held by the minority stockholders in November 1974 were worth "something near the figure of \$1.25"; and
- (b) the F.A.I. ordinary shares were at that time worth about 57¢.
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51. It is submitted that those findings are unassailable.

52. The trial judge next dealt with the question whether (a) "there was proper disclosure" (scil ... by the F.A.I. directors and by those of their number who were also directors of Cumberland) of matters relevant to the assessment by the minority shareholders of the takeover offer; and (b) whether "the documents put forth" in relation to the takeover offer were misleading.

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53. In dealing with these questions his Honour first of all examined and weighed some evidence given by Mr. Atkinson, who expressed the view that if an offeror in a takeover situation proposes to pay cash for the shares in the offeree company it would be appropriate to place a money value on those shares. He conceded that in such a case it would have been relevant to disclose, and quite improper not to disclose, in the offeror's takeover documents, the transaction effected on 11th July, 1974, for the sale (at \$1.25 for each ordinary stock unit) of the Adler Interests in Cumberland. But Mr. Atkinson asserted, to use the words of the trial judge, that "where the offer was for an exchange of shares, one did not go through this process, but somehow just compared the two shares". His Honour rejected this assertion, together with Mr. Atkinson's further assertion that, in the case of the offer actually made, it was not material to disclose and not improper to omit reference to the July transaction. His Honour expressly found, notwithstanding that such a transaction had taken place more than three months prior to the fixing of the takeover consideration, that "it constituted material information and should have been disclosed to Cumberland's stockholders to assist them in evaluating their ordinary stock units."

Volume IV,
Pages 1011,
1012

Volume II,
Pages 377-382,
391, 431, 20
448-457

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Record

54. The trial judge next turned to the various circulars published by Mr. Adler in collaboration with Mr. Atkinson, Mr. Belfer and Professor Wilson in the course of the takeover battle. The first to fall for examination was the letter dated 20th November, 1974 which accompanied the offer. The main, but not the only, criticism directed to this document, related to the following passage:
- "In terms of asset backing the latest published accounts of both Cumberland and F.A.I. reveal that the equity capital in each company had a value substantially above the par value of their issued ordinary stock and ordinary shares respectively."
55. His Honour criticised this statement as being "more remarkable for what it does not say than for what it does say", and although "not inaccurate as a broad statement", as giving "little assistance to a stockholder who would be interested to know the relative asset backing of the units and the shares". Of course the directors of F.A.I. must have been aware of what the relevant figures were: 72¢ or more above par values for Cumberland and 2¢ above par value for F.A.I., or, if one took net asset backing as including intangibles, 50¢ above par value for F.A.I. But they did not disclose those figures.
56. After Mr. Donohoo had issued a circular dated 21st November, 1974 recommending that stockholders should not accept the offer, Mr. Adler replied in a circular issued the next day. In this document Mr. Adler attributed to Mr. Donohoo an assertion that the private nursing home business (scil, Cumberlands) was "thriving, expanding, profitable and risk-free at this time". Mr. Adler denied these assertions.

Volume II,
Pages 380,
435-446, 453
Volume III,
Pages 651-659
715-724
725-732

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Volume IV,
Page 1013

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Volume II,
Pages 459-465
Volume III,
Pages 793-808 40

Record

It is submitted that he knew the denial to be false in material respects, certainly in relation to profitability. His Honour characterised the denial as one which would be grossly misleading to a stockholder who took it at face value.

Volume IV,
Page 1015

57. In a circular dated 27th November, 1974, Souls brought out into the light the transaction of 11th July and referred to the relative asset backing of the units and shares. Mr. Adler replied on the same day. Referring to the sale of the Adler Interests in Cumberland he said:

Exhibit 18,
Volume V, 10
Page 1216
Volume II,
Pages 339-341
409,415-428,
465-466

"When those sales took place the ruling Stock Exchange prices for Cumberland stock units were \$1.25 for the ordinary units and 50¢ for the preference units. There had, in fact, been unsatisfied ordinary stock buyers at \$1.25 on the Stock Exchange for several days, both before and after the date on which the sales referred to by Mr. Millner took place.

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Consequently, any stockholders of Cumberland who had wished to sell their holdings on the market at that time could have obtained similar prices to those effected in the sales referred to by Mr. Millner, and there was no question at all of any members of my family receiving any favoured terms.

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Unfortunately, as I am sure you will all very well know, the Australian Stock market has taken a terrible beating since July and the stock of Cumberland Holdings Limited has suffered just as badly as any others."

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Later he said:

"Naturally no company making a take-over offer can offer to pay more

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than the current market price just because at some previous time higher prices have prevailed."

58. From July 1974 to November 1974, the downward movement of the All Ordinaries Index on the Sydney Stock Exchange was approximately 16%. The difference between the price paid for ordinary stock units held by the Adler Interests in Cumberland (\$1.25) and the last sale price of F.A.I.'s shares on the exchange in November was 70¢ - a drop of 48%. Exhibit 81
Volume VI,
Pages 1455,
1456 10
59. His Honour was strongly critical of the passages set out in paragraph 57. The conclusions to be drawn from them, it is submitted, were:
- (a) that they were calculated to lead anyone receiving the circular to note the general fall in stock exchange prices for shares, to note the current price on the board for Cumberland, to compare it with the July board price of \$1.25 and to draw the conclusion that the drop in the board price of Cumberland shares was in line with the general drop in the market. (Of course such a belief would have been quite erroneous, as the board had dropped much lower than the All Ordinaries Index because of the buying and selling quotes put on the board by Mr. Adler in August 1974); 20
- (b) that they were calculated to induce recipients to believe that the price paid in July for the Cumberland ordinary stock units held by the Adler Interests and sold to F.A.I. was of no relevance to an evaluation of the takeover offer. (As against this must be put the fact that Mr. Adler, Mr. Atkinson, Professor Wilson and presumably Mr. Belfer knew that the Exchange prices on the board for Cumberland were of no real significance at any time. There being no real market in those Volume IV,
Page 1016 40

Record

securities, it was intentionally misleading, as his Honour found, to refer to a "ruling market price". Furthermore, they knew that the July price of \$1.25 was in line with the net tangible asset value of Cumberland ordinary stock);

Volume IV,
Page 1016

- (c) that they were calculated to engender a belief in the mind of a reader that any holder of Cumberland ordinary stock who had wished to sell his holding on the Exchange in July could have obtained \$1.25.

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60. His Honour demonstrated with forceful cogency why the lastmentioned belief would have been ill-founded. In so doing he relied upon several matters, viz:

Volume IV,
Pages 1015-
1018

- (a) virtually all buyers and sellers were acting on the directions of Mr. Adler;

Page 1017

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- (b) the smallness in volume of the dealings whereby Mr. Adler established a price on the board of \$1.25 on 11th July, 1974;

Page 1017

- (c) F.A.I. did not remain in the market as a buyer, as was illustrated by the fact that on 16th July, a holder of Cumberland ordinary stock placed a selling order for 600 units @ \$1.25, of which 300 were bought by F.A.I. on that day. But the remaining 300 remained unsold, despite a reduction of the selling quotation to \$1.20 until the order was cancelled on 18th September 1974.

page 1018

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61. The following is a summary of the several criticisms made by the trial judge of the conduct of the F.A.I. directors (two of whom were also directors of Cumberland) in relation to the takeover offer and the various documents put out in connection with it:

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	<u>Record</u>	
(a) Lack of complete candor in failing to disclose to offeree stockholders that purchases of F.A.I. shares at 40¢ made contemporaneously with the making of the offer;	Volume IV, Page 1007	
(b) The offer for the ordinary stock units in Cumberland was not a fair one, because the effect of a "one-for-one" exchange was to undervalue the Cumberland units. (All the directors of F.A.I. must have known that the offer was unfair, for they knew that:	Volume IV, Pages 1008-1010	10
(i) the net tangible asset backing of those units substantially exceeded that of the F.A.I. ordinary shares;	Page 1009	
(ii) the July price of \$1.25 was reasonable;	Page 1008	20
(iii) Cumberland's profitability had substantially improved between July and November);	Pages 1008-1009	
(c) Misleading, and in several instances consciously misleading, statements in the circulars.		
<u>62.</u> In a circular dated 22nd November, 1974 to stockholders of Cumberland written on the letterhead of F.A.I. and signed by Mr. Adler in his capacity as chairman of both F.A.I. and Cumberland, it was stated that no useful purpose would be served by engaging an independent merchant banker to advise stockholders regarding the takeover offer because of the close association of Cumberland and F.A.I. That statement was intentionally misleading and untrue, for such independent evaluation would clearly have revealed the inadequacy of the consideration offered.	Volume IV, Pages 1021-1023 Exhibit 15 Volume V, Page 1241	30
<u>63.</u> In the letter dated 20th November, 1974 which accompanied the offer, Mr. Adler said that he did not consider it would serve any useful purpose to comment on	Exhibit 11 Volume V, Page 1195	40

Record

such dealings as have taken place in the two securities during recent months. This was intentionally misleading, as a revelation of the price paid by F.A.I. for the Adler Interests compared to the Stock Exchange prices of F.A.I. during past months would have demonstrated the inadequacy of the offer.

64. In the circular dated 22nd November, 1974 Exhibit 15 10
Mr. Adler stated that F.A.I. had never Volume V,
attempted to obtain 100% control of Page 1241
Cumberland. That statement was inten- Volume IV,
tionally false, as demonstrated by the Pages 980-982
offer put by Mr. Adler to Mr. Millner
in December, 1973.
65. It was stated in circulars emanating Exhibit 11,
from F.A.I. and in particular the cir- Vol.V, p.1195
cular signed by Mr. Adler in his Exhibit 15,
capacity as chairman of both F.A.I. and Vol.V, p.1241 20
Cumberland that comments by Mr. Donohoo Exhibit 18,
were misleading. As the findings of Vol.V, p.1261
the trial judge demonstrate, such Exhibit 19
statements were entirely false. Vol.V, p.1269
Exhibit 31,
Vol.VI, p.1366
Exhibit 36
Vol.VI, p.1378
66. In the light of admissions made by both Volume II,
Mr. Atkinson and Mr. Adler that they Pages 365,367, 30
knew Cumberland's profits were increas- 380-383, 390,
ing, that they knew there was no real 417, 432-460,
market in Cumberland shares, that they 697-699,
knew the asset backing of Cumberland was 709-11,
greater than the asset backing of F.A.I. 717-718, 725,
having regard to either tangible or in- 778, 794, 818,
tangible assets, it is submitted that 819, 867-870.
the trial judge in his several criticisms
of the conduct referred to in paragraph
61 erred on the side of leniency. 40
67. The trial judge dealt extensively with Volume IV,
the implications of the obvious conflict Pages 1019-
of interest between the position of Mr. 1026
Adler and Mr. Belfer as directors and
shareholders of F.A.I. and directors of
Fire & All Risks, on the one hand, and
their position as directors of
Cumberland on the other.

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68. In this connection, his Honour examined the "Part B" Statement which, under the takeover provision in the Act, the directors of Cumberland were required to make to their shareholders. In its final form, paragraph 1(a) of that document said that two members of the Cumberland board, namely Messrs. Adler and Belfer, were also directors of the offeror corporation and were in favour of the takeover scheme; and Mr. Donohoo was not in favour of it because he considered that it was not in the best interests of stockholders to whom the offers were being made; and that accordingly the board as a whole did not desire to make a recommendation of acceptance. Paragraph 1(b) drew the attention of stockholders to the threat of de-listing Cumberland unless the F.A.I. group reduced its holding and went on to say that if Cumberland stockholders did not accept the offer and Cumberland was subsequently de-listed, they might find considerable difficulty in disposing of their holdings at a later date.
- Volume IV,
Pages 1020-1021
- 10
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69. His Honour pointedly observed that by signing his circular dated 22nd November, 1974 as chairman of both F.A.I. and Cumberland and of recommending in that circular the acceptance of the F.A.I. offer, Mr. Adler effectively rendered insignificant the formal abstinence from recommendation in paragraph 1(a) of the Part B Statement.
- Volume IV,
Page 1021
- 30
70. Mr. Adler's attempt, when wearing, as it were, two hats, to procure the acceptance by the Cumberland stockholders of the F.A.I. offer, is eloquent testimony of his lack of commercial probity. For in this circular he used the weight of his authority as chairman of each of the companies concerned to promulgate an assertion that he must have known to be untrue, namely, that Cumberland's business was neither thriving or expanding nor profitable.
- Volume III,
Pages 793-808
- 40

Record

71. In the circumstances, the existence of a division of opinion amongst the Cumberland directors as to the acceptability of the takeover offer made Mr. Donohoo's proposal for an independent evaluation compellingly persuasive; or so a fair-minded person would have thought. Mr. Donohoo lacked no determination in pushing his view; he did so twice - at Cumberland board meetings held on 4th and 15th November. But of course without success. 10
72. Various reasons were advanced as to why such a report should not have been obtained. The trial judge was unimpressed by any of them, and rightly so. The matter of expense was the main reason advanced when Mr. Donohoo raised his lone voice in the boardroom in favour of an independent report. But this ground, found by the trial judge to be without substance anyway, was not invoked by Mr. Adler when he wrote his circular dated 22nd November, 1974 in attempting to give reasons why no useful purpose would be served by an independent valuation. He went off on another tack: 20
- "Mr. Donohoo has further objected to the fact that independent merchant bankers were not engaged to advise stockholders regarding the bid. This seemed to be a pointless exercise in the circumstances which existed. As Cumberland and F.A.I. have been closely associated over a period of years, it was considered no useful purpose would be served particularly as the real issue boils down to the question whether shareholders are going to be better off in the long run by accepting the F.A.I. offer or by continuing to hold shares in what will probably be an unlisted company. That is not a question on which any merchant bank can really offer helpful advice. It is a matter which each stockholder must decide for himself. 30
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Speaking personally, I would never dream of allowing myself to be put in the position of a minority shareholder in an unlisted company, even if every merchant banker in the country should advise me to the contrary."

73. His Honour, perhaps charitably, described this passage in the circular as achieving "a high level of obfuscation". One asks: why does the "long standing close association between the two companies" dispense with the need for an independent assessment of the takeover offer, when the offer is made in a context of irreconcilable conflict of interest? Volume IV,
Page 1023 10
74. The message in this passage is clear. It is a threat to minority shareholders: Exhibit 15
Volume V, 20
Page 1241
- "Accept the F.A.I. offer or be 'locked in' as members of an unlisted company".
- And this threat Mr. Adler not only uttered for F.A.I. but also condoned for Cumberland (by virtue of his dual signature on the circular). This was an exercise in pressure tactics. The making of the threat underlined the necessity, in the circumstances, of what Mr. Donohoo sought and what Mr. Adler and Mr. Belfer, caught in the meshes of conflicting interests, refused: an independent assessment of the takeover offer for consideration by the minority stockholders. 30
75. On behalf of Cumberland an attempt, not convincing to the trial judge, was made to answer the criticism of the conduct of Mr. Adler and Mr. Belfer in their situation of conflicting interests. It was argued that a director of Cumberland, independent or otherwise, could do nothing in response to the Volume IV,
Page 1024 40

Record

threat of de-listing or the takeover offer that could advance the interest of minority stockholders. It is submitted his Honour's treatment of this proposition was wholly correct. A step of elementary simplicity that was open to Mr. Adler and Mr. Belfer was to resign for the time being from the Cumberland board for the purpose of enabling independent substitute directors to consider the takeover offer and take appropriate steps to protect the interests of the members of Cumberland as a whole.

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76. It must be remembered that in December 1973 Mr. Adler formed the idea of taking over the holdings of the minority stockholders in Cumberland. The subsequent steps taken by Mr. Adler indicate an objective of acquiring those holdings at a price advantageous to F.A.I. or Fire & All Risks and disadvantageous to the minority stockholders of Cumberland.

Volume IV,
Page 980

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77. With that aim in mind, Mr. Adler achieved a double advantage to himself and the interests (other than those of Cumberland stockholders), that he represented in causing the July transactions to take place. First, the Adler Interests obtained \$1.25 for their ordinary stock units in Cumberland, and the effect of those sales in July jeopardised the continued listing of Cumberland on the Sydney Stock Exchange. Secondly, the risk of de-listing gave Fire & All Risks an ostensibly reasonable cause for making a takeover offer apparently motivated by a desire to afford minority stockholders in Cumberland an opportunity to avoid being locked-in to a company that would in all probability be de-listed. It was only through the industry and resolution of Mr. Donohoo that the real object of the takeover offer was disclosed, namely, to obtain the minority shares at an undervalue.

Volume IV,
Page 985

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Volume IV,
Page 988

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78. Although the trial judge declined to draw inference that each move on the part of Mr. Adler through himself and companies controlled by him was in furtherance of a scheme designed to dispose of the Adler Interests in Cumberland at a realistic price, and to acquire the minority stockholders shares at an undervalue, his Honour conceded that to be a possible inference from the facts. It is submitted on behalf of the petitioner, as it was at the hearing, that such inference should be drawn. Volume IV,
Page 1003

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79. What his Honour did find was that Mr. Adler would have liked to acquire for Fire & All Risks or F.A.I. the minority shares in Cumberland, particularly if that could be achieved by exchanging shares in F.A.I. for shares in Cumberland, and that he was prepared to take every opportunity that presented itself to further that desire. Volume IV,
Page 1003

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80. It is implicit in the trial judge's findings, that Mr. Adler through himself and the majority of the board acted in an unfair, harsh and unconscionable manner when taking advantage of those opportunities, whether those opportunities arose by the action of Mr. Adler in furtherance of a preconceived plan to dispose of his shares at a proper value and acquire the minority stockholders shares at an undervalue, or whether those opportunities arose independently of any such preconceived plan. Whichever view is taken, those opportunities presented themselves primarily through positive action on the part of Mr. Adler and his co-directors. 30

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THE LAW:

81. As stated at the outset, The Act contains four separate and independent grounds which justified the order made

by the trial judge. The respondent adopts the manner in which his Honour applied and interpreted the relevant provisions of the Act to the facts.

82. The first ground (S. 222(1)(f)) requires a finding that directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole.

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83. It was decided in re National Discounts Limited (1952) S.R. (N.S.W.) 244 that directors may be held to have acted in their own interests when they have acted in the interests of another company of which they are also directors and shareholders.

84. His Honour construed "the interests of the members as a whole" as meaning the interests of one or more or perhaps some significant section of the members. It is submitted that this interpretation is correct.

Volume IV,
Pages 1029-30

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85. The second limb of that section requires a finding that directors have acted in the affairs of the company "in any manner whatsoever which appears to be unfair or unjust to other members".

86. The facts in this case clearly demonstrate that not only did the directors, namely Mr. Adler and Mr. Belfer, and later, Mr. Atkinson and Professor Wilson appear to have acted in the affairs of the company in a manner unfair and unjust, but that the conduct of those directors was in fact unfair and unjust to members of Cumberland.

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87. The third ground (S. 186(1)) requires a finding that the affairs of the company are being conducted in a manner

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oppressive to one or more of the members, and that the Court is of opinion that the company's affairs are being so conducted.

88. When the principles settled in cases such as: Scottish Co-Operative Wholesale Society Limited v. Meyer, 1959 A.C. 324: re H.R. Harmer, (1959) 1, W.L.R. 62: re Jermyn Street Turkish Baths Limited, (1971) 1, W.L.R. 1042: re Broadcasting Station 2GB Pty. Limited, 1964/5 N.S.W.R. 1648: re Tivoli Freeholds Limited, 1972 V.R. 45, are applied to the facts found by his Honour, it is clear that an order on this ground was justified. 10
89. Those authorities establish that a parent company has an obligation to deal fairly with its subsidiary, and in a case where directors of a parent company are also directors of a subsidiary, unfair or unjust action (whether such action be passive or active) taken in the interests of the parent against the interests of the subsidiary fall within that section. 20
90. The final ground (S. 222(1)(h)) justifies an order if the court is of opinion that it is just and equitable that the company be wound-up. 30
91. It was established in Loch v. John Blackwood Limited, 1924 A.C. 783 that an order on that ground will be made where there is a justifiable lack of confidence in the conduct and management of the company's affairs, such lack of confidence being grounded on the conduct of the directors in regard to the company's business. 40
92. That was a case dealing with the business of the company in the sense of its trade and business operations.

However the principle applies equally to questions affecting all the affairs of the company that come before its board of directors, and is not confined to its trade and business operations (Ebrahimi v. Westbourne Galleries Limited, 1973 A.C. 360).

93. Mr. Adler's continued control of the board of Cumberland, his assertion that he had no intention in the future of resigning from the board, the appointment of Professor Wilson and Mr. Atkinson to that board, and the absence following the removal of Mr. Donohoo of any independent director on the board justify such lack of confidence in the future conduct of the affairs of the company, particularly when regard is had to the refusal of the present members of the board, particularly Mr. Adler, when giving evidence, to recognise that any of that board's past actions, were unfair, unjust, unconscionable or as demonstrating a lack of probity. Adding to those factors the false and misleading statements in the takeover documents, one has, it is submitted, a strong case for a winding-up order. 10
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94. For these reasons, it is submitted the appeal should be dismissed with costs.

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T.E.F. Hughes

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B.C. Oslington