

Cumberland Holdings Limited - - - - - Appellant

v.

Washington H. Soul Pattinson and Company Limited - - Respondent

FROM

THE SUPREME COURT OF NEW SOUTH WALES
EQUITY DIVISION

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 31ST MARCH 1977

Present at the Hearing :

LORD WILBERFORCE
LORD CROSS OF CHELSEA
LORD EDMUND-DAVIES
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL

Delivered by LORD WILBERFORCE

This is an appeal from the Supreme Court of New South Wales Equity Division. On 31 May 1976 the Court (Bowen C.J. in Eq.) made an order for the winding up of Cumberland Holdings Ltd. ("C.H.L.") on the Petition of a shareholder, Washington H. Soul Pattinson & Company Ltd. ("Souls").

The solvency of C.H.L. was not in question: it was a company trading successfully and profitably in the conduct of nursing homes and private surgical hospitals. The grounds on which the order for winding up was sought were:

1. That two directors of C.H.L. (Mr. Adler and Mr. Belfer) had acted in the affairs of the company in their own interests rather than in the interests of the members as a whole: The Companies Act, 1961 ("The Act"), s.222(1)(f).
2. That the same two directors had acted in the affairs of the company in other ways which were unfair and unjust to members: *ibid.*
3. That the affairs of C.H.L. were being conducted in a manner oppressive to one or more of the members: s.186(1) of the Act.
4. That it was just and equitable that C.H.L. be wound up: s.222(1)(h) of the Act.

The learned trial judge held that each of these grounds had been established.

The facts and history are fully and clearly set out in his Honour's judgment. But since this appeal comes direct to the Board, and their Lordships are asked, within the limits properly open to an Appellate Court, and particularly to this Board, to review the trial judge's findings, it is necessary to state them in some detail.

In December 1973, when the first material events took place, the issued capital of C.H.L. was as follows:

- 757,536 ordinary stock units of 50 cents each;
- 303,768 8% cumulative preference non-participating stock units of 50 cents each;
- 300,000 8% cumulative redeemable preference non-participating stock units of 50 cents each.

Of these Souls held:

- 50,000 ordinary stock units (4,000 of these were registered in the name of Mr. Donohoo a director)—this was about $6\frac{1}{2}\%$ of the issued ordinary stock;
- 183,520 preference stock units;
- 118,000 redeemable preference stock units.

Souls held these shares at the date of the Petition. At 11 July 1974 72% of the ordinary stock units were held by Fire and All Risks Insurance Co. Ltd. ("F.A.R."), a wholly-owned subsidiary of F.A.I. Insurances Ltd. ("F.A.I."), a public company. The Chairman of the directors of F.A.I., F.A.R. and C.H.L. was Mr. Lawrence Adler. He was the dominant figure on all these boards. Other directors of F.A.I. were Mr. T. E. Atkinson, Professor J. R. Wilson, and Mr. John Belfer. Mr. Atkinson had been a solicitor in England and an advocate and solicitor in Singapore and Malaysia. Professor Wilson was Associate Professor of Economics, Sydney University and served as a director part-time. Mr. Belfer was a chartered accountant and was also a director of C.H.L.

At the same date, the directors of C.H.L. were Mr. Adler (Chairman), Mr. Belfer and Mr. Donohoo; the last-named was a director of Souls, and represented their interest. The shares and stock of F.A.I. and of C.H.L. were listed on the Sydney Stock Exchange. However from 1970 onward transactions in C.H.L. stock units were very slight: with few small exceptions the only purchasers of ordinary stock were Mr. Adler and those associated with him including F.A.R. It had been the policy for F.A.R. to acquire small parcels of offered shares as a buyer of last resort in order to maintain a market. These acquisitions in the course of a financial year created difficulties for the auditors in the preparation of group accounts, and so at their suggestion such parcels of shares as were offered for sale were, instead, acquired by Mr. Adler, members of his family, and companies associated with him with a view to later transfer to F.A.R. It was found by the judge that the market in ordinary stock of C.H.L. had for some time been supported in this way. Although the stock continued to be listed on the Stock Exchange, the requirements for listing were in July 1974 not satisfied in that there were less than 300 holders of ordinary stock units, and less than 25% of these units were held by the public—*i.e.* by persons other than F.A.R. and holders connected with F.A.R. (*viz.* Mr. Adler and his associates).

On 11 July 1974 a Board meeting of F.A.I. was held to discuss investment policy. It was decided to invest \$400,000 in listed securities. Mr.

Adler then raised the question of transferring to the group the stock in C.H.L. which he and his family and associated companies had acquired. These amounted to 55,850 ordinary, 9,428 preference and 128,700 redeemable preference. Mr. Adler indicated that the ordinary would be available at \$1.25 and the preference stock units at 50 cents each. At this time there were some listings on the Stock Exchange Board of \$1.25 for the ordinary. These related to some small parcels acquired by a company associated with Mr. Adler at that price.

Mr. Adler left the board room and the other directors discussed the offer. Mr. Atkinson and Professor Wilson said that they discarded the Stock Exchange quotations which they knew had been placed on the Board by Mr. Adler, but after consideration they concluded that the offer was fair. The judge found that "they appear[ed] to have done so having regard to the earnings, asset-backing and prospects of [C.H.L.]". The Board then agreed to the purchase and it was carried out. The result was to bring F.A.R.'s holding of ordinary stock in C.H.L. up from 72% to nearly 80%, which would enable F.A.R. to carry a special resolution. It will be necessary to comment further on this transaction.

The purchase of 11 July 1974 was duly notified to the Stock Exchange on 23 July and there followed some correspondence on the subject of listing. On 4 September the Exchange wrote to C.H.L., in effect, giving notice that the stock would be delisted unless F.A.R.'s holding was reduced to at most 75%. On 6 September the directors of F.A.I. (who at all times seemed to have made decisions for F.A.R.) decided that divestiture of the necessary number of stock units was impracticable, as indeed it was. The suggestion then emerged that an offer should be made for the outstanding minority interest in C.H.L. It seems clear (though his Honour does not explicitly so find) that this suggestion was made either by Mr. Atkinson or by Professor Wilson. The terms of the offer were not fixed at this time, because it was thought necessary to have the accounts of F.A.I., due to be presented later in the month. On 13 September the Board of C.H.L. informed the stockholders of the possibility that the stock might be delisted and, in view of the possibility that this might be prejudicial to the interests of the minority shareholders, of F.A.R.'s intention to make an offer for the shares which it did not own. Soon after, a draft of the offer was prepared by Mr. Atkinson with the help of F.A.I.'s solicitors. It was for a one for one exchange: *i.e.* one F.A.I. share for each ordinary stock unit of C.H.L., and one preference share in F.A.I. for each preference share unit of C.H.L.; the preference shares of F.A.I. were all to be redeemable.

Mr. Donohoo was informed of this intended offer on 21 October. On 1 November the statement required to be given to the "offeree" company by Part A of the 10th Schedule to the Act was signed and given to C.H.L.: it was tabled at a meeting of that company's Board on 4 November. Mr. Donohoo made four points; first that the offer was inadequate in view of the asset value supporting the C.H.L. stock; second that he proposed to circularise the C.H.L. stockholders stating his opposition to the offer; third that he desired the appointment of independent solicitors to advise C.H.L.; fourth that he desired the appointment of a merchant bank or similar body to advise on the adequacy of the offer. As regards point 1, Mr. Adler said: "That is the offer. Full stop." The majority of the C.H.L. Board agreed to point three but not to point four. It was further agreed that the Board would not make a recommendation regarding acceptance of the offer.

On 15 November the Board of C.H.L. met to consider the statement required to be sent to stockholders in C.H.L. by Part B of the 10th Schedule to the Act. Mr. Donohoo asked for inclusion in it of information

regarding the July transactions—*i.e.* the sale of ordinary stock to F.A.I. at \$1.25 a unit. The majority did not agree. Thereupon Mr. Donohoo, having consulted his solicitors, signed the Part B statement, as did the other two directors Mr. Adler and Mr. Belfer.

There followed what has been described as a war of paper of some intensity. On 21 November Mr. Donohoo circularised stockholders urging them to reject the offer: amongst other points he referred to the asset backing of the shares in C.H.L. and F.A.I. respectively and to the absence of a cash alternative but he did not—it appears on advice—refer in his circular to the July transactions. F.A.I. replied to this on 22 November. On 27 November Mr. J. S. Millner as Chairman of Souls sent out a circular in which Souls' opposition to the offer was stated. It referred to the July purchases, mentioning the amounts paid by F.A.I., and that they were in cash, and asserted that F.A.I. should make a similar offer in cash to the remaining stockholders including Souls. On the same day F.A.I. sent out over Mr. Adler's signature a circular in reply. This set out to answer Mr. Millner's contentions about the July purchases. It contained a passage which, as it has been much criticised, must be quoted verbatim:

“When those sales took place the ruling Stock Exchange prices for Cumberland stock units were \$1.25 for the ordinary units, and 50c. 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.

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.

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

Later it was said:—

“Naturally no company making a takeover offer can offer to pay more than the current market price just because at some previous time higher prices have prevailed.”

There followed some correspondence between F.A.I. and the Sydney Stock Exchange on the question whether the offer complied with the Exchange's requirements. On 4 December 1974 Mr. Adler and Mr. Atkinson had an interview with Mr. Curran, a stockbroker and vice-president of the Stock Exchange, who asked about the price of \$1.25 paid in July. Mr. Adler sought to justify the July transactions as having been made at the market price at the time. Mr. Curran was not disposed to accept this in view of the way in which the market had been made—in effect by Mr. Adler's interests—and expressed himself critically of those events.

On 6 December, acting on the advice of Counsel, F.A.I. withdrew the offer. In its letter to stockholders it stated that anyone who had accepted the offer was free to withdraw if he wished. It was indicated that F.A.I. was exploring the possibility of replacing the offer with an invitation to sell. (This would not have attracted the compulsory acquisition power conferred by s.180X of the Act.)

Shortly afterwards (24/5 December 1974) Cyclone "Tracy" struck, involving probable heavy insurance claims on F.A.I., and it was not found possible to make an invitation. The war of paper nevertheless continued, with the object of persuading, or forcing, F.A.I. to make a cash offer of \$1.25 for the ordinary and 50 cents for the preference stock units in C.H.L. It is only necessary to refer to two events. On 22 January 1975, by majority decision of the directors of C.H.L., Mr. Donohoo objecting, Mr. Atkinson and Professor Wilson were appointed additional directors of C.H.L. On the same day, by letter, Mr. Adler asked for Mr. Donohoo's resignation, which was refused. On 4 March 1975 an extraordinary general meeting of C.H.L. was held, on the requisition of F.A.R., at which Mr. Donohoo was removed from the Board of C.H.L. This removal was opposed by minority stockholders present at the meeting. This meant that from that date all the directors of C.H.L. were also directors of F.A.I.

The Petition for the winding up of C.H.L. was presented on 2 April 1975 by Souls and was supported by a substantial number of holders of ordinary and preference stock units.

The financial situation of C.H.L. as at this date is clear. C.H.L. was a prosperous and successful company. Its profits for the half year ending 31 December 1974 had increased by 31% compared with those for the same period of the preceding year. On 14 August 1974 the directors had recommended an increase in the final dividend for the past year from 5% to 6%. On 7 March 1975 the interim dividend was increased from 5% to 6%. The net tangible assets rose from \$1.22 per ordinary stock unit in July 1974 to \$1.70 in November 1974. A new surgical hospital was in course of re-building and was expected to add to the company's profits. No complaint has been made that the company's affairs were being mismanaged, or that the minority shareholders were being denied a fair share of the company's profits. Their Lordships accept that these are not the only grounds on which the Court will intervene in order to protect minority shareholders in a company. Indeed the statutory provisions are widely expressed and effect should be given to them in accordance with their terms whenever the Court comes to the conclusion that there has been a lack of fairness, or oppression, or lack of probity on the part of the majority, or of the directors representing the majority. But to wind up a successful and prosperous company and one which is properly managed must clearly be an extreme step and must require a strong case to be made. An example where this was done under s. 222(1)(f) and (h) of the Act is *Re Weedmans Ltd.* [1974] Qd.R. 377.

The grounds put forward by the Petitioners may be summarised as follows. They have been subject to considerable modifications as the case has proceeded.

I. In the original Petition.

The primary case, so presented at the hearing, was that Mr. Adler had, from December 1973, a deliberate intention and plan to take over the minority holdings in C.H.L.—*i.e.* those not held by F.A.R. or by Mr. Adler and his interests—that he had contrived, or encouraged, the threat from the Sydney Stock Exchange to delist the shares in C.H.L., so as to put pressure upon the minority holders to part with their stock at an inadequate price. Mr. Adler has firmly denied that he had any such intention or made any such plan.

There were also introduced into these charges allegations concerning the "off-loading" by Mr. Adler (and his family and associates) of their holdings in July 1974 to F.A.I. at a false price. It is difficult to understand

their relation to the main case, since much of the contention that the offer to the minority was inadequate was based on the contention that the July price was not a false price. Further reliance was placed upon some figures placed on the Stock Exchange Board by Mr. Adler in August 1974 for ordinary stock in C.H.L.—in fact of a selling price of 70 cents and a buying price of 50 cents—in order, supposedly, to lower the market price and so facilitate a take-over offer.

These were undoubtedly charges of a serious character, which if made good might well have justified a winding-up order (cf. *Scottish Co-operative Wholesale Society Ltd. v. Meyer and Another* [1959] A.C. 324). The judge did not accept them. He said:

“Each of the incidents, taken by itself, has an ambiguous aspect. If they are taken together they do not in my opinion, make out any firm case against Mr. Adler in the sense that they do not establish he maintained and carried out a plan throughout. The suggestion that he did, and that each move was in furtherance of having his own units acquired for a good price and then endeavouring to squeeze the minority stockholders with the threat of delisting and acquire their units at an inadequate price, is a serious allegation. It is a possible inference from the facts but I am not satisfied on the evidence before me to draw that inference.”

He continued with a finding that Mr. Adler for various reasons, at times not specified, would like to have acquired for F.A.R. the [minority] stockholding in C.H.L.: that he took advantage of turns of the wheel without deliberately causing the wheel to turn.

These findings are not as clear cut as perhaps they might have been. It was for the Petitioner to make out its case, and the consequence of its failure to make good a serious allegation of a deliberate contrivance, planned and executed over a period, can only be that this allegation is rejected. Their Lordships are unable to approach this case except upon the basis that the Petitioner's main case failed without any residue of suspicion conveyed by a metaphorical phrase. As to the component elements in it: first, their Lordships are unable to understand how the transactions of July 1974, even assuming that there was some impropriety about them, support a case that Mr. Adler was endeavouring, or desiring, to squeeze out the minority stockholders, or how these transactions in themselves affected the minority stockholders in any way: disclosure or non-disclosure of them is a different matter with which their Lordships will deal later.

Secondly, their Lordships would agree that the listings of August 1974 might have some relevance—if for example it could be said that they were part of a plan to depress the value of the stock which F.A.R. was soon to offer to buy. But, whatever Mr. Adler's reasons may have been for establishing these figures—and certainly his motives were neither clear nor logical—there is really no basis for relating them to the subsequent offer at all. He did not tell Mr. Atkinson or Professor Wilson about them: Mr. Atkinson first knew of them in October 1975, Professor Wilson even later, during the trial. Nor did Mr. Adler rely upon these figures, or mention them at any stage in the war of paper in support of the offer prices. If these listings were part of a plot, it was singularly inept in execution.

The judge's finding in this matter is contained in this passage:

“It is fair to say that if Mr. Adler had not placed prices on the board during August, he would have been departing from his normal practice. What troubles me about these transactions is that he had

by his own actions at that time virtually made delisting inevitable, the large and unprecedented size of the parcels offered, and the extent of the drop in his quoted prices from the 'real' price of 11th July 1974. I think Mr. Adler took the steps he did in August as a firm action to depress the price of Cumberland ordinary stock units on the board, not in furtherance of a specific plan to make a subsequent take-over offer, but at least as a precautionary measure which later he no doubt thought had turned out to be a wise one."

With all respect, their Lordships cannot regard this as satisfactory. If these transactions were part of a design to prepare the way for an inadequate offer, (as to which no direct suggestion was made in the cross-examination of Mr. Adler) an explicit finding was called for. If it was not, a characterisation of the listings as a precautionary measure, and an inference that Mr. Adler (who, in fact, never relied on these listings) thought it had turned out a wise one, is hard to understand. There is no support here for the Petitioner's case.

Thirdly, as an essential ingredient in this part of the Petitioner's contentions, there is the question of the fairness, or adequacy, of the offer. Their Lordships would have thought that this admitted of a simple approach. By September 1974 F.A.R. held nearly 80% of the ordinary stock. The stock was—indeed had been for some time—threatened with delisting. For a long time there had been, for practical purposes, no buyers of the stock other than Mr. Adler or his associates. In these circumstances the only value of the stock was what Mr. Adler and his associates were willing to pay. Such a price might, in the opinion of the stockholders, be adequate or inadequate: their choice, in those circumstances, was to accept or reject the offer. In view of Souls' announced intention to reject the offer there could be no question of the power of compulsory acquisition (s.180X of the Act) being used. In this situation, calculations based upon the value of C.H.L.'s assets, though they might influence the decision of stockholders, do not enable the offer to be described as adequate or inadequate. In the first place F.A.I. was not offering cash, so what could have been relevant (if at all) was a comparison between the value of C.H.L.'s assets and those of F.A.I., if one could usefully be made having regard to the difference in the nature of the two companies' businesses. And in any case F.A.I. was not prepared to offer more than a one for one exchange.

Their Lordships therefore cannot agree with the approach of the learned judge by which he found himself able on consideration of asset values and profits, to establish a "value" in November 1974 for the C.H.L. stock at \$1.25 and of F.A.I. at 57 cents. It is to be noted that the Petitioner called no merchant bank or other expert to establish the "real value" of the shares in either C.H.L. or F.A.I., an omission which additionally undermines the contention that the Board of C.H.L. should themselves have engaged such an expert. Finally, on this point, it is relevant to consider whether those who prepared the offer, in fact Mr. Atkinson and Professor Wilson, *bona fide* considered the offer to be fair. The judge makes no finding that they did not. In the absence of such a finding, and in view of the fact that both gentlemen gave evidence that they did so consider the offer, their Lordships must deal with the case on the basis that the terms, whether objectively adequate or not, were *bona fide* thought to be so by those who prepared it.

II. The next main set of allegations in support of the Petition related to the circular letters above referred to which, or some of which, were said to be misleading. These allegations were formulated in a letter dated 20 October 1975—which was the fifth day of the hearing. The circulars and the person who signed them are as follows:

<i>Date</i>	<i>Signed</i>
20 November 1974	Mr. Adler as Chairman of F.A.I
22 November 1974	Mr. Adler as Chairman of F.A.I and C.H.L.
27 November 1974	Mr. Adler as Chairman of F.A.I
6 December 1974	Mr. Adler as Chairman of F.A.I

Although these circulars related to other subjects (with which their Lordships will deal) the principal matter, indeed the only one of real significance, related to the transactions of 11 July 1974. The complaint with regard to this was twofold: first that the transactions, involving as they did sales of ordinary stock units at \$1.25, ought to have been disclosed with the offer; second that the explanation regarding these transactions was misleading and disingenuous.

Before coming to the transactions themselves it is necessary to be clear as to the duty of disclosure, how it arose and on whom it fell.

The offer was one made by F.A.I. to the stockholders of C.H.L. Legally, in their Lordships' opinion, there was no obligation on F.A.I. under the Act to disclose the July transactions, and F.A.I. was so advised by their solicitor. If there was any obligation to disclose, this arose out of the normal obligation at common law not to make misrepresentations inducive of a contract. A misrepresentation of this kind (whether by non-disclosure or by misleading statement) by F.A.I. would have become very material if the offer had been accepted and if any stockholder had thereafter wished to dissolve the bargain (cf. *Bulfin v. Bebarfald's Ltd. and Others* (1938) S.R. (N.S.W.) 423; *Re Castlereagh Securities Ltd.* (1973) 1 S.R. (N.S.W.) 624). This however did not happen.

A failure to disclose by Mr. Adler as director of F.A.I. might be relevant in another context, *i.e.* in so far as it might reflect upon his fitness to remain a director of C.H.L. The argument might be that so long as C.H.L. remained in existence, it would continue to be directed by Mr. Adler; Mr. Adler, by his failure to disclose material information, had shown himself unfit to remain at the head of C.H.L.; there was no certainty that he would not in the future commit similar acts of misconduct.

Then as regards C.H.L., or Mr. Adler as Chairman of C.H.L., C.H.L. was neither the offeror nor the offeree. But it had duties imposed on it by the Act to provide its stockholders with information material to enable them to decide whether to accept or reject the offer. Among such information might be the July transactions. It could be said that the directors of C.H.L., in particular Mr. Adler and Mr. Belfer, failed in their duty by not including information about the July transactions in or with the Part B statement.

There is no doubt, in their Lordships' minds, with hindsight, that it would have been far wiser to have disclosed the July dealings in full. To have done so would no doubt have involved also the making of explanations why the price of \$1.25 at that time, for a key holding which would enable F.A.R. to get special resolutions passed, was no true guide to the price offered in November 1974 for smaller parcels, under different market conditions. Both Mr. Atkinson and Professor Wilson seem in fact to have been of the opinion that the wiser course

was to disclose. Mr. Atkinson took the view that as the offer was one for a share exchange, not for cash, the July cash payment was not material. The judge found that the information was material and should have been disclosed: their Lordships agree. But, although a strong attack was made upon the honesty of Mr. Atkinson in the witness box, his Honour did not find that there was any intention to mislead by non-disclosure either by Mr. Atkinson or by Professor Wilson or indeed by Mr. Adler. The finding was put no higher than error of judgment and lack of frankness and accuracy.

Turning to the positive content of the circulars, their Lordships do not consider that there is much weight in the criticisms brought against the circulars of 20 November or 22 November. The reference to asset backing for the shares in F.A.I. and C.H.L. in the former were merely that each, in such terms, had a value substantially above par value. His Honour said and their Lordships agree that this was not inaccurate as a broad statement but that it gave little assistance to stockholders interested to know the relative asset backing of the units and shares. This falls well short of any impropriety.

In the circular of 22 November Mr. Adler was criticised for an apparent denial of the fact that C.H.L. was an expanding and thriving business, as had been stated by Mr. Donohoo in his circular of the previous day. More care could perhaps have been used in drafting the reply, as his Honour held, but in the climate of the time, which apparently required that a circular should be sent out by each side almost before the ink was dry on that of the adversary there is inevitably, if regrettably, some failure of accuracy. Their Lordships do not consider that this passed over into dishonesty.

The circular of 27 November however can justly be criticised, even though it was rushed out on the same day as that to which it was a reply. It appears that Mr. Atkinson played a considerable, if not the main, part in drafting this document, so that the main attack on it was directed against him. The material passage has been cited. It seems to contain two points. The first was that \$1.25 was the ruling Stock Exchange price for C.H.L. stock ordinary units on 11 July, that there were unsatisfied buyers at \$1.25 for several days before and after 11 July 1974, that any stockholders of C.H.L. could have obtained this price and that members of Mr. Adler's family did not receive favoured terms.

Much of this was technically correct. There were listings on the Board at \$1.25, buyers, from 1 July to 15 July both inclusive. Of the 2,800 shares acquired by Adler interests, 200 were bought on 2 July, 400 on 3 July. The next parcel was not bought until 11 July, so that between 3 and 11 July the Adler interests could be described as unsatisfied buyers, and if other sellers had come in, they could, up to a limit, have got \$1.25 for some units. It is true that a seller—through a stockbroker called Bunn—tried to sell 600 shares, and was able only to sell 300 at \$1.25, but at that point (16 July) the buying price of \$1.25 was withdrawn. But though the information was probably technically correct their Lordships would agree with Mr. Atkinson who in the witness box was constrained to agree that it was capable of being misleading: he took the same line in the meeting with Mr. Curran on 4 December. In truth the July transaction went through, not because \$1.25 was the "ruling price"—for Mr. Adler had, in effect, made the ruling price—but because Mr. Atkinson and Professor Wilson had concluded, on grounds of trading prospects, that \$1.25 was a proper price.

However this may be, the whole argument, in this part of the circular, was an irrelevance and misdirected. If Mr. Adler was concerned, as

presumably he was, to persuade C.H.L. stockholders to accept something like 57 cents (the value of F.A.I. shares) for their units, to show that \$1.25 was the "ruling" or the real price in July 1974 so far from helping the argument would undermine it. The less real the July price was, the better was his case—though of course it would then be difficult to defend the July sales themselves. This seems to have been lost sight of in the heat of argument.

The second part of the circular is more relevant. It refers to the fall in stock markets since July, suggests that the stock of C.H.L. had suffered as much as any other and says that a take-over offer cannot be at more than the current market price. Of this the learned judge said:

"These statements were, I think, calculated to lead anyone receiving the letter to look to the Exchange prices, to note the fall in those prices generally and note the prices on the board for Cumberland, and to draw the conclusion that the price paid for Mr. Adler's stock units was of little or no relevance."

Their Lordships consider that his Honour was justified in his criticism of this part of the circular's argument, although, as they have said, they do not wholly agree with his approach to the July transactions themselves. The learned judge continues with a passage, referring to the July dealings, in which he says that all buyers and sellers were acting on the directions of Mr. Adler: this was not so. The buyers were "Adler interests" but the sellers were third parties selling on the market as to whom there was no evidence that they were acting on Mr. Adler's directions. This serves indeed to illustrate the confused character of the circular.

Their Lordships, after full consideration, reach the conclusion that the document was open to criticism: that it was more likely to confuse and indeed to mislead stockholders than to help them: that Mr. Adler brought this criticism on himself by (a) the nature and, their Lordships must say, dubious character of the July transactions and (b) his—or F.A.I.'s—failure to disclose these transactions when the offer was made. Some allowance may perhaps, here too, be made for the heat engendered by the battle of circulars and for haste in preparation, but this having been made their Lordships think that Mr. Atkinson was justified when, on reflection and under determined questioning, he agreed that the document was unsatisfactory and at least potentially misleading. In spite of the strong attack on Mr. Atkinson, his Honour was not prepared to go further than to find that Mr. Adler, Professor Wilson and Mr. Atkinson were of opinion that the Stock Exchange prices on the Board for C.H.L. were of no significance and that they were aware that it was misleading to speak of ruling stock exchange prices for C.H.L. stock units. Their Lordships do not find it possible to regard this as a finding of dishonesty: nor can they regard the finding as one reflecting upon the unfitness for office of the directors of C.H.L. It must be remembered that Mr. Atkinson and Professor Wilson did not become directors until January 1975.

There are three other matters of which mention is required:

1. On 14 November 1975, during the trial, after 11 hearing days, a fresh allegation was introduced that on 21 November 1974 Messrs. Adler, Atkinson and Belfer or persons associated with them had purchased 68,345 shares in F.A.I. at 40 cents (the "offer" value was 57 cents) and that this purchase was in order to support the market price and to facilitate the acquisition of C.H.L. ordinary stock units under the take-over offer. There appears here to be a radical *non-sequitur* of the same kind as that relating to the July transactions at \$1.25—it could no more help the take-over offer to go through to acquire F.A.I. shares at an undervalue than would the purchase of C.H.L. shares at an overvalue. But in any case the whole allegation was refuted: the purchase was shown to be on a

distress sale which the seller was willing to make at the price because he, being a U.K. resident, would get the benefit of the investment dollar premium. From the buyer's point of view it was thought to be the "bargain of the century". His Honour made no finding as to the propriety of this transaction but thought that it might have been more candid to have disclosed it. He concluded with the words:

"I cannot feel that any severe criticism ought to be levelled against the directors [*i.e.* of F.A.I.] for the omission to do so."

Their Lordships agree.

2. The appointment of Mr. Atkinson and Professor Wilson as directors of C.H.L. (January 1975) and the removal of Mr. Donohoo (March 1975). Both of these events occurred after the withdrawal of the offer, and when Mr. Donohoo had plainly put himself in a posture of confrontation. A minority is naturally aggrieved if their representative on the Board is removed, and if all the directors represent the majority. Moreover, in some circumstances the deprivation of the minority of the right to participate in management may be a ground for winding up under the "just and equitable" clause (see *Ebrahimi v. Westbourne Galleries Ltd. and Others* [1973] A.C. 360 and *In re A. & B.C. Chewing Gum Ltd.* [1975] 1 W.L.R. 579). But in this case no sufficient circumstances were shown. The appointment of Mr. Atkinson and Professor Wilson—two gentlemen of experience, whose probity has not been successfully challenged—cannot be regarded as unfair or oppressive; as was pointed out in *Re Broadcasting Station 2GB Pty. Ltd.* (1964-5) N.S.W.R. 1648, to put directors in a position where they might be able to act oppressively is not itself oppression.

As regards Mr. Donohoo, once he had threatened a winding up petition it was at least reasonable to take the view that the Board was better without him. Mr. Donohoo's removal from management participation was, in fact, the consequence of the presentation of the winding up petition or at least of the threat of it, not an action which provoked or justified the threat.

3. Refusal to appoint a merchant banker or a firm of chartered accountants to evaluate the offer. Their Lordships have already commented on this. This is a matter on which legitimate differences of views might exist: Mr. Adler's view was that the expense was not justified, and also that such an evaluation would not help. Their Lordships do not regard the majority decision not to accept Mr. Donohoo's proposal as oppressive or unfair. As already pointed out, no expert advice as to value was called at the trial.

In summary, their Lordships are of opinion that the Petitioners, who undertook the heavy task of justifying the extreme step of winding up this company, failed to make good either their main case, of a long-term plan to squeeze out the minority stockholders, or their subsidiary case based upon the circulars.

They failed to make good a case of oppression or of unfair and unjust conduct in the company's affairs. They did not succeed in showing that Mr. Adler or Mr. Belfer had acted in the affairs of C.H.L. (even giving those words a wide construction) in their own interests rather than in the interests of the members as a whole. They did not succeed in establishing lack of probity of the directors of C.H.L. in the conduct of the company's affairs. They did not succeed in showing that F.A.R. or F.A.I. intended either to squeeze out the minority of C.H.I. or to freeze it in. At the end of the day the case is one of an offer by the majority shareholder, which had, without the use of improper methods, acquired a predominant position, making voluntarily an offer to the minority for their

shares, which they were free to accept or reject, an offer which if not generous, was not found not to be a *bona fide* offer and which, in the event, did not lead to any deterioration in the position of the minority, or in the value of their shareholdings. The Petition, which was understandably and admittedly launched to obtain better terms, failed in its objective and in their Lordships' view ought to have been dismissed.

Their Lordships will humbly advise Her Majesty that the appeal be allowed and the order for winding up set aside. The respondents must pay the appellants' costs of the trial and before the Board.



In the Privy Council

CUMBERLAND HOLDINGS LIMITED

v.

**WASHINGTON H. SOUL PATINSON
AND COMPANY LIMITED**

DELIVERED BY
LORD WILBERFORCE