

*Privy Council Appeal No. 9 of 1973*

**Howard Smith Limited**     -   -   -   -   -   -     *Appellant*

v.

**Ampol Petroleum Limited and Others**     -   -   -     *Respondents*

FROM

**THE SUPREME COURT OF NEW SOUTH WALES**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY 1974

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*Present at the Hearing:*

LORD WILBERFORCE

LORD DIPLOCK

LORD SIMON OF GLAISDALE

LORD CROSS OF CHELSEA

LORD KILBRANDON

[*Delivered by* LORD WILBERFORCE]

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This is an appeal from a decision of Street J., Chief Judge in Equity, in the Equity Division of the Supreme Court of New South Wales. On 14th December 1972 the learned judge made certain declarations and orders, the effect of which was to set aside the issue to the appellant ("Howard Smith") of 4,500,000 ordinary shares of \$1.00 each in the capital of R. W. Miller (Holdings) Limited ("Millers"). The proceedings, for the setting aside of this issue, were brought by the respondent to the appeal ("Ampol") as plaintiff against fourteen defendants, which included Howard Smith, Millers, eleven directors or alternative directors of Millers, and a company which acted as registrar for Millers in New South Wales. Only Howard Smith, as appellant, and Ampol, as respondent, appeared on the present appeal to the Board.

The litigation arose out of a struggle for the takeover and control of Millers, the rival parties to which were Ampol on one side and Howard Smith on the other. Associated with Ampol was Bulkships Limited, a substantial shareholder in Millers. Ampol had acquired, in May 1972, a large shareholding in Millers; this holding was 29.8 per cent of Millers' issued share capital; Ampol bought it for a price of \$2.27 per share. Bulkships owned 25.1 per cent of Millers' issued share capital so that Ampol and Bulkships together had about 55 per cent, the remaining 45 per cent being held by outside shareholders. By the allotment, made on 6th July 1972, Howard Smith obtained 4,500,000 shares at \$2.30 a share. The effect of this, if valid, would be that Ampol and Bulkships would no longer be the majority shareholders in the Company.

The rival takeover propositions, to which reference has been made, were as follows. On 15th June 1972 Ampol formally made an offer for all issued shares in Millers at \$2.27 per share. On 23rd June 1972 the directors of Millers met and considered the offer. They unanimously decided to recommend that it be rejected as too low. Before this date there had been discussions between Howard Smith and persons concerned in the management of Millers who included Mr. A. N. Taylor, the Managing Director; these persons have been referred to in the proceedings as "the management team". No other Millers' director than Mr. Taylor was involved at this stage. These discussions first focussed upon the possible acquisition by Howard Smith of two tankers which were under construction for Millers, the concern of Howard Smith, and to some extent of the management team of Millers, being to prevent these tankers passing under the control of Ampol. Objections were found to exist to this proposal and then there emerged an alternative, namely that Howard Smith should make an offer to take over Millers *in toto*. On 22nd June 1972 Howard Smith announced its intention to make a takeover offer at \$2.50 cash per share (there was an alternative offer of cash and shares worth at that date \$2.76). On 27th June 1972 a press statement was issued by Ampol and Bulkships stating that the two companies intended to "act jointly in relation to the future operation" of Millers: that they had decided to reject any offer for their shares "whether from Howard Smith Limited or from any other source": that Ampol and Bulkships, between them, controlled in excess of 55 per cent of the issued shares of Millers. This statement conveyed the message, unmistakably, that, with the shareholding as it was, it would be useless for the outside shareholders to accept the Howard Smith offer or to decline the Ampol offer and that it would be useless for Howard Smith to proceed.

The position was then considered afresh by Howard Smith and the Millers management team and a plan was evolved to make an issue of shares to Howard Smith of sufficient size to convert Ampol and Bulkships together into minority shareholders, so that Howard Smith could proceed with its offer. Since this was higher than the Ampol offer, there was every prospect of it succeeding, and Howard Smith would then control Millers. The exact number of shares to be issued was worked out upon the basis of Millers' known or assumed capital requirements and upon the footing of legal advice that an issue could be justified if, and only if, it were *bona fide* related to these requirements. Millers in fact did require some \$10,000,000 to finance the tankers under construction and generally to secure its financial position, so it was calculated that, at an issue price of \$2.30 per share, 4,500,000 shares needed to be issued: the figures were fixed accordingly.

On 6th July 1972 Howard Smith addressed a letter to Millers applying for an allotment of 4,500,000 \$1.00 ordinary shares at a premium of \$1.30 per share. It contained the following passages:

"This combination by the two largest shareholders of your Company [viz. Ampol and Bulkships] would in the present circumstances effectively deprive the very large number of minority shareholders of R. W. Miller (Holdings) Limited of the opportunity of securing a substantially higher price for their shares. My Board would be most reluctant to proceed with a bid which, even if every shareholder other than Ampol or Bulkships accepted, could only result in Howard Smith Limited being the largest individual shareholder in a company the future operations of which would be controlled by a combination of two smaller shareholders. We believe that your Board is conscious of the injustice being suffered by your smaller shareholders and we submit for your consideration a proposal which, if it meets with the approval of your Board, would enable

Howard Smith Limited to proceed with its intended offer thereby restoring to your minority shareholders the right to sell their shares to the highest bidder, and would give Ampol Petroleum Limited and Bulkships Limited a similar opportunity. . .

. . . . .

“Notwithstanding the current circumstances I believe that the opportunity of placing such a large parcel of shares at a substantial premium is likely to be of considerable benefit to your Company. The infusion of \$10,350,000 cash is likely to ease the financing problems your Company has faced in recent years, and enable you to rearrange your borrowings with the prospect of interest savings.”

This letter was considered by the directors of Millers at a Board Meeting held on the same day with Mr. Taylor in the Chair, and after discussion the proposal was accepted by a majority of 4-2. One of the directors, Sir Peter Abeles, did not vote because the Chairman ruled that he was disqualified by reason of his interest as a director of Bulkships. This ruling was challenged in the proceedings and reference will subsequently be made to the matter. The allotment and issue to Howard Smith was made immediately after the meeting. These proceedings followed on 7th July 1972.

The above is a brief summary of the many sided events which preceded the issue in dispute. These were investigated in all possible detail at the trial which took 28 days. The Millers' directors who voted for the issue all gave evidence, as did other persons involved in the framing of the arrangement with Howard Smith. On this evidence and upon a considerable volume of documentary material, full and lucid findings were made by Street C.J. in Equity and set out at length in his judgment. No purpose would be served by repeating the effect of this and their Lordships have confined their own narrative to the minimum necessary for understanding. The central findings of the learned judge, directed as they are to a determination of the purpose of the Millers' Board of Directors in making the disputed issue, and based as they are upon his estimate of the individual directors as seen in the witness box, are such as an appellate tribunal would necessarily respect. Their Lordships in fact are of opinion that upon the evidence given at the trial these findings are not only supportable, but inevitable. They will first endeavour to summarise them and will then consider to what conclusion they should lead in law.

#### **Findings of Fact**

1. The learned judge found, as their Lordships think it right to make clear at once, that the Millers' directors were not motivated by any purpose of personal gain or advantage, or by any desire to retain their position on the Board. His Honour said:

“I discard the suggestion that the directors of Millers allotted these shares to Howard Smiths in order to gain some private advantage for themselves by way of retention of their seats on the Board or by obtaining a higher price for their personal shareholding. Personal considerations of this nature were not to the forefront so far as any of these directors was concerned, and in this respect their integrity emerges unscathed from this contest.”

2. He then proceeded to consider the main issue which he formulated in accordance with the principle stated in the High Court of Australia by Dixon J. in the case of *Mills v. Mills* (1938) 60 C.L.R. 150, 185/6. This was to ascertain the substantial object the accomplishment of which formed the real ground of the Board's action. The issue before him he considered to be whether the primary purpose of the majority of directors was to satisfy Millers' need for capital or whether their primary purpose was to destroy the majority holding of Ampol and Bulkships.

It was suggested on behalf of the appellants that in stating the issue in these terms the learned judge did not give adequate recognition to the concern felt by the management team, and by Mr. Taylor in particular, that the future of Millers under the control of Ampol and Bulkships might be uncertain and that he should have considered whether the purpose of the majority directors in deciding to make the allotment to Howard Smith might not have been, at least in part, to secure the Company's future as a going concern and to prevent its possible dismemberment. But their Lordships do not consider this criticism to be justified. The learned judge indeed accepted that during the period antecedent to the issue the Millers' directors felt a growing concern, even apprehension, as to what the intentions of Ampol, or of Ampol and Bulkships together, might be, but what he had to decide was what was the primary purpose of the directors in making the disputed allotment. This decision he had to make on the case as presented by the majority directors and on the evidence. It is important to appreciate that the case put forward by the majority directors was in the terms of the first of the alternatives mentioned above, *i.e.*, that their primary purpose was to raise necessary capital. And as regards evidence, it was clear from what each of them said at the trial, that they did not themselves contend that they were motivated by any other considerations bearing upon the interest of Millers than concern to satisfy Millers' capital needs. It is equally clear that the minutes and partial verbatim account of the critical meeting of 6th July 1972 did not suggest that any other consideration was at that time acting upon their minds. The issue was therefore, in their Lordships' opinion, correctly stated.

In order to assist him in deciding upon the alternative motivations contended for, His Honour considered first, at some length, the objective question whether Millers was in fact in need of capital. This approach was criticised before their Lordships: it was argued that what mattered was not the actual financial condition of Millers, but what the majority directors *bona fide* considered that condition to be. Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the Court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision, on such a question, if *bona fide* arrived at. There is no appeal on merits from management decisions to Courts of law: nor will Courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

But accepting all of this, when a dispute arises whether directors of a Company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the Court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, *per contra*, insubstantial an alleged requirement may have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme.

This was, in their Lordships' view, the course taken by the learned Chief Judge. His conclusion as to the objective situation was expressed in these words:

"It is clear on the evidence that Millers was, as at 6th July 1972, in a position of tight liquidity. It did not have within its own funds sufficient money to cover its present and foreseeable financial commitments. It had, however, been in a position of tight liquidity

for many months before 6th July 1972. There is a history of a series of financial crises; but at the same time there is a trend of improvement during the months preceding the meeting of 6th July.

. . . . .

"In short, I am satisfied that as at 6th July 1972 there was a need for capital. I am satisfied that this need had been recognised for many months past and that a policy had been followed of meeting it by loan capital rather than by share capital. I am satisfied that progress was being made in meeting this need by this policy. I am not satisfied that the company's financial affairs were at crisis point due to unavailability of capital, or that there was a pressing need to obtain cash funds by a share issue."

Their Lordships accept that the general financial picture as drawn by His Honour was correct. On this view of the situation in July 1972 the learned judge made his findings as to the purpose of the majority directors in voting for the issue.

After hearing and considering the evidence of Messrs. Taylor, Nicholl, Balhorn and Anderson, each asserting that his primary purpose in voting for the allotment on 6th July 1972 was to meet an urgent capital need of Millers, His Honour found that he was unable to accept these assertions. He found that the primary purpose so far as the management team was concerned (this is *not* the directors, but the team headed by Mr. Taylor which negotiated with Howard Smith) was to issue shares to Howard Smith so as to enable the Howard Smith takeover to proceed. As to the Millers' majority directors he said this:

"They had found themselves enmeshed in a takeover struggle. The greater part, if not the whole, of their thinking in the critical days up to and including 6th July was directed to this takeover situation. It is unreal and unconvincing to hear them assert in the witness-box that their dominant purpose was to obtain capital rather than to promote the Howard Smith's takeover offer, and I do not believe these assertions.

"The conclusion that I have reached is that the primary purpose of the four directors in voting in favour of this allotment was to reduce the proportionate combined shareholding of Ampol and Bulkships in order to induce Howard Smiths to proceed with its takeover offer. There was a majority *bloc* in the share register. Their intention was to destroy its character as a majority. The directors were, and had for some weeks been, concerned at the position of strength occupied by Ampol and Bulkships together. They were aware that in the light of the attitude of these two shareholders Howard Smiths could not be expected to proceed with its takeover offer that these directors regarded as attractive. They issued the shares so as to reduce the interest of these two shareholders to something significantly less than that of a majority. This was the immediate purpose. The ultimate purpose was to procure the continuation by Howard Smith's of the takeover offer made by that company."

Their Lordships accept these findings.

#### **The Law**

The directors, in deciding to issue shares, forming part of Millers' unissued capital, to Howard Smith, acted under Clause 8 of the Company's Articles of Association. This provides, subject to certain qualifications which have not been invoked, that the shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons on such terms and conditions and either at a premium or otherwise

and at such time as the directors may think fit. Thus, and this is not disputed, the issue was clearly *intra vires* the directors. But, *intra vires* though the issue may have been, the directors' power under this Article is a fiduciary power: and it remains the case that an exercise of such a power though formally valid, may be attacked on the ground that it was not exercised for the purpose for which it was granted. It is at this point that the contentions of the parties diverge. The extreme argument on one side is that, for validity, what is required is *bona fide* exercise of the power in the interests of the company: that once it is found that the directors were not motivated by self interest—*i.e.* by a desire to retain their control of the Company or their positions on the Board—the matter is concluded in their favour and that the Court will not enquire into the validity of their reasons for making the issue. All decided cases, it was submitted, where an exercise of such a power as this has been found invalid, are cases where directors are found to have acted through self interest of this kind.

On the other side, the main argument is that the purpose for which the power is conferred is to enable capital to be raised for the company, and that once it is found that the issue was not made for that purpose, invalidity follows.

It is fair to say that under the pressure of argument intermediate positions were taken by both sides, but in the main the arguments followed the polarisation which has been stated.

In their Lordships' opinion neither of the extreme positions can be maintained. It can be accepted, as one would only expect, that the majority of cases in which issues of shares are challenged in the courts are cases in which the vitiating element is the self interest of the directors, or at least the purpose of the directors to preserve their own control of the management (see *Fraser v. Whalley* (1864) 2 H.&M.10, *Punt v. Symons* [1903] 2 Ch.506, *Piercy v. S. Mills & Company Limited* [1920] 1 Ch. 77, *Ngurli Limited v. McCann* (1953) 90 C.L.R.425, *Hogg v. Cramphorn Ltd.* [1967] 1 Ch.254, 267).

Further it is correct to say that where the self interest of the directors is involved, they will not be permitted to assert that their action was *bona fide* thought to be, or was, in the interest of the Company; pleas to this effect have invariably been rejected (*e.g.* *Fraser v. Whalley u.s.* *Hogg v. Cramphorn u.s.*)—just as trustees who buy trust property are not permitted to assert that they paid a good price.

But it does not follow from this, as the appellants assert, that the absence of any element of self interest is enough to make an issue valid. Self interest is only one, though no doubt the commonest, instance of improper motive: and, before one can say that a fiduciary power has been exercised for the purpose for which it was conferred, a wider investigation may have to be made. This is recognised in several well known statements of the law. Their Lordships quote the clearest which has so often been cited:

“Where the question is one of absence of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interest of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason.” *Hindle v. John Cotton Ltd.* (1919) 56 Sc.L.R. 625 at 630–1 *per* Viscount Finlay.

On the other hand, taking the respondents' contention, it is, in their Lordships' opinion, too narrow an approach to say that the only valid purpose for which shares may be issued is to raise capital for the Company. The discretion is not in terms limited in this way: the law should not impose such a limitation on directors' powers. To define in advance exact limits beyond which directors must not pass is, in their Lordships' view, impossible. This clearly cannot be done by enumeration, since the variety of situations facing directors of different types of company in different situations cannot be anticipated. No more, in their Lordships' view, can this be done by the use of a phrase—such as “*bona fide* in the interest of the Company as a whole,” or “for some corporate purpose.” Such phrases, if they do anything more than restate the general principle applicable to fiduciary powers, at best serve, negatively, to exclude from the area of validity cases where the directors are acting sectionally, or partially: i.e. improperly favouring one section of the shareholders against another. Of such cases it has been said:

“The question which arises is sometimes not a question of the interest of the Company at all, but a question of what is fair between different classes of shareholders. Where such a case arises some other test than that of the ‘interests of the company’ must be applied.” (*Mills v. Mills* 60 C.L.R.150, 164, *per* Latham C.J.)

In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the *bona fide* opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls.

“The application of the general equitable principle to the acts of directors managing the affairs of a company cannot be as nice as it is in the case of a trustee exercising a special power of appointment.” (*Mills v. Mills* p.185-6 *per* Dixon J.)

The main stream of authority, in their Lordships' opinion, supports this approach. In *Punt v. Symons (u.s.)* Byrne J. expressly accepts that there may be reasons other than to raise capital for which shares may be issued. In the High Court case of *Harlowe's Nominees Pty. Ltd. v. Woodside (Lake Entrance) Oil Company No Liability* (1968-9) 121 C.L.R.483, an issue of shares was made to a large oil company in order, as was found, to secure the financial stability of the Company. This was upheld as being within the power although it had the effect of defeating the attempt of the plaintiff to secure control by buying up the Company's shares.

The judgment contains this passage:

“The principle is that although primarily the power is given to enable capital to be raised when required for the purposes of the company, there may be occasions when the directors may fairly and properly issue shares for other reasons, so long as those reasons relate to a purpose of benefiting the company as a whole, as distinguished from a purpose, for example, of maintaining control of the company in the hands of the directors themselves or their friends. An inquiry as to whether additional capital was presently required is often most relevant to the ultimate question upon which the validity or invalidity

of the issue depends; but that ultimate question must always be whether in truth the issue was made honestly in the interests of the company. Directors in whom are vested the right and the duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts. Thus in the present case it is not a matter for judicial concern, if it be the fact, that the allotment to Burmah would frustrate the ambitions of someone who was buying up shares as opportunity offered with a view to obtaining increased influence in the control of the company, or even that the directors realised that the allotment would have that result and found it agreeable to their personal wishes." (Joint judgment of Barwick C.J., McTiernan J. and Kitto J., p.493.)

Their Lordships were referred to the recent judgment of Berger J. in the Supreme Court of British Columbia, in *Teck Corporation Ltd. v. Millar et al.* (1973) 33 D.L.R.3rd 288. This was concerned with the affairs of Afton Mines Ltd. in which *Teck Corporation Ltd.*, a resource conglomerate, had acquired a majority shareholding. Teck was indicating an intention to replace the Board of Directors of Afton with its own nominees with a view to causing Afton to enter into an agreement (called an "ultimate deal") with itself for the exploitation by Teck of valuable mineral rights owned by Afton. Before this could be done, and in order to prevent it, the Directors of Afton concluded an exploitation agreement with another company "Canex". One of its provisions, as is apparently common in this type of agreement in Canada, provided for the issue to Canex of a large number of shares in Afton, thus displacing Teck's majority. Berger J. found that:

"Their [sc. the directors'] purpose was to obtain the best agreement they could while still in control. Their purpose was in that sense to defeat Teck. But, not to defeat Teck's attempt to obtain control, rather it was to foreclose Teck's opportunity of obtaining for itself the ultimate deal. That was . . . no improper purpose" (p.328).

His decision upholding the agreement with Canex on this basis appears to be in line with the English and Australian authorities to which reference has been made.

In relation to a different but analogous power, to refuse registration of a transfer, the wide range of considerations open to directors, and to the Court upon challenge to an exercise of the power, is set out in the judgment of the High Court of Australia in *Australian Metropolitan Life Assurance Company v. Ure* (1923) 33 C.L.R.199.

By contrast to the cases of *Harlowe* and *Teck*, the present case, on the evidence, does not, on the findings of the trial judge, involve any considerations of management, within the proper sphere of the directors. The purpose found by the judge is simply and solely to dilute the majority voting power held by Ampol and Bulkships so as to enable a then minority of shareholders to sell their shares more advantageously. So far as authority goes, an issue of shares purely for the purpose of creating voting power has repeatedly been condemned: *Fraser v. Whalley*, *Punt v. Symons*, *Piercy v. S. Mills & Co. Ltd.* ("merely for the purpose of defeating the wishes of the existing majority of shareholders"), *Hogg v. Cramphorn Ltd.* [1967] 1 Ch.254. In the leading Australian case of *Mills v. Mills* (1937-8) 60 C.L.R.150, it was accepted in the High Court that if the purpose of issuing shares was solely to alter the voting power the issue would be invalid. And, though the reported decisions, naturally enough, are expressed in terms of their own facts, there are clear considerations of principle which support the trend they establish. The constitution



of a limited company normally provides for directors, with powers of management, and shareholders, with defined voting powers having power to appoint the directors, and to take, in general meeting, by majority vote, decisions on matters not reserved for management. Just as it is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office (*Automatic Self Cleansing Filter Syndicate Co. Ltd. v. Cunningham* [1906] 2 Ch. 34), so it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist. To do so is to interfere with that element of the Company's constitution which is separate from and set against their powers. If there is added, moreover, to this immediate purpose, an ulterior purpose to enable an offer for shares to proceed which the existing majority was in a position to block, the departure from the legitimate use of the fiduciary power becomes not less, but all the greater. The right to dispose of shares at a given price is essentially an individual right to be exercised on individual decision and on which a majority, in the absence of oppression or similar impropriety, is entitled to prevail. Directors are of course entitled to offer advice, and bound to supply information, relevant to the making of such a decision, but to use their fiduciary power solely for the purpose of shifting the power to decide to whom and at what price shares are to be sold can not be related to any purpose for which the power over the share capital was conferred upon them. That this is the position in law was in effect recognised by the majority directors themselves when they attempted to justify the issue as made primarily in order to obtain much needed capital for the company. And once this primary purpose was rejected as it was by the Chief Judge in Equity, there is nothing legitimate left as a basis for their action, except honest behaviour. That is not, in itself, enough.

Their Lordships therefore agree entirely with the conclusion of the Chief Judge in Equity that the power to issue and allot shares was improperly exercised by the issue of shares to Howard Smith. It was not disputed that an action to set aside the allotment and for rectification of the register was properly brought by Ampol as plaintiff.

There remain a few points for brief comment.

1. Reference was made in the judgment of Street J. and in argument to the regulations of the Australian Stock Exchanges as to the listing of shares. It seems quite clear that the issue to Howard Smith was in contravention of these regulations, which moreover have contractual force. The respondent did not rely on this contravention as in itself a ground for setting aside the allotment. But their Lordships are in agreement with the learned Chief Judge both in his criticism of the directors in this respect and in his opinion that the disregard by the directors of this important matter was evidence that their intentions were directed primarily toward takeover strategies.

2. It was an issue at the trial whether, assuming that the issue to Howard Smith was an improper act on the part of the Millers' directors, Howard Smith had notice of this impropriety. The Chief Judge in Equity held that they had such notice, mainly, but not exclusively, because of the terms of their own letter of 6th July 1972 addressed to Millers. Their Lordships need do no more than express their complete concurrence on this point.

3. As has been indicated, an issue was raised at the trial whether the Chairman of Millers' directors had acted within his powers in excluding one of the directors, Sir Peter Abeles, from discussion and voting on the proposal to allot the shares to Howard Smith, and if not, what the

consequences of his having so acted might be. The learned Chief Judge did not decide this point, it being unnecessary to do so since he held the allotment invalid on other grounds. Their Lordships take the same course.

4. Various minor issues were raised at the trial other than those dealt with in this judgment, but these were not pursued in the appeal and their Lordships need not refer to them.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.



In the Privy Council

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