EXHIBITS

Description of Document	Date	Page
"C" Form of Acceptance and Transfer (not duplicated because same as exhibit on page 167)	1977	
"D" Form of Proxy (not duplicated because same as exhibit on page 169)	1977	
"3" Letter and Invitation from Industrial Equity Limited to Blue Moon Fruit Co-operative Limited	14th May, 1976	138
"5" Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-operative Limited	21st April, 1977	145
"6" Notice of Resolution	12th December, 1952	171

LIST OF DOCUMENTS NOT TRANSMITTED TO THE PRIVY COUNCIL

Description of Document	Date
Summons in the Supreme Court of Victoria	18th November, 1977
Subpoena Duces Tecum on behalf of Plaintiff addressed to the Victorian Commissioner for Corporate Affairs	21st November, 1977
Order of the Honourable Mr. Justice O'Bryan	24th November, 1977
Affidavit of Documents of the Appellant (Plaintiff)	14th December, 1977

Description of Document	Date
Affidavit of Documents of the firstnamed Respondent (Defendant)	January, 1978
Amended Notice to Admit given to secondnamed Respondent This has been omitted as it is in the same form as that given to the firstnamed Respondent, being Document 7	25th January, 1978
Notice of Motion to the Full Court of the Supreme Court of Victoria seeking leave to appeal to Her Majesty in Council	11th December, 1978
Affidavit of Ronald Alfred Brierley. This Affidavit has been omitted as it only corrected paragraph 5 of Document 14 in the Record of Proceedings and the corrected paragraph 5 has been inserted in the said Document 14	12th December, 1978
Affidavit of Ronald George Pitcher, Chartered, Accountant, confirming the statements made in paragraph 10 of Document 14 in the Record of Proceedings	11th December, 1978
Affidavit of Thomas Henry Leggatt regarding security for costs to be given by the Appellant to the firstnamed Respondent	15th December, 1978
Affidavit of Charles Edward Rosedale and exhibits thereto, in regard to the fulfilment by the Appellant of the conditions set out in paragraph 2 and 4 of the Order of the Full Court of the Supreme Court of Victoria being Document 15 in the Record of Proceedings	9th February, 1979
Notice of Motion seeking final leave to appeal to Her Majesty in Council	9th February, 1979

1/80

IN THE PRIVY COUNCIL No. 16 of 1979

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

B e t w e e n :

COACHCRAFT LTD. — Appellant (Plaintiff)

- and -

S.V.P. FRUIT CO. LTD. and MAXWELL GEOFFREY CHAPMAN — Respondents (Defendants)

RECORD OF PROCEEDINGS

INCE & CO.,
11 Byward Street,
LONDON. EC3R 5 EN
Solicitors for the Appellant (Plaintiff)

RICHARDS BUTLER & CO.,
5 Clifton Street,
LONDON. EC2.
Solicitors for the Respondents (Defendants)

IN THE PRIVY COUNCIL No. of 1979

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

B e t w e e n :

COACHCRAFT LTD. Appellant (Plaintiff)

- and -

S.V.P. FRUIT CO. LTD. and MAXWELL GEOFFREY CHAPMAN Respondents (Defendants)

RECORD OF PROCEEDINGS

NO. 1.

AMENDED STATEMENT OF CLAIM

In the Supreme Court of Victoria

No. 1. Amended Statement of Claim of Appellant 18th November 1977

1. The Plaintiff is and was at all times material a company duly incorporated pursuant to the provisions of the laws of the State of Queensland.

2. The firstnamed Defendant is and was at all times material a company duly incorporated pursuant to the provisions of the laws of the State of Victoria.

3. On or about the 7th day of October, 1977 the firstnamed Defendant changed its name from Blue Moon Fruit Co. Co-Operative Limited to S.V.P. Fruit Co. Ltd.

4. The Plaintiff is and was at all times material a shareholder in the capital of the firstnamed Defendant.

5. By notice dated the 13th day of September 1977 addressed to its members the firstnamed Defendant gave notice to its members that an extraordinary general meeting of its members would be held on the 5th day of October 1977 to consider and if thought fit pass the resolutions referred to in the said notice.

6. The said extraordinary general meeting of the members of the firstnamed Defendant was held on the 5th day of October 1977.

7. At the said extraordinary general meeting of the members of the firstnamed Defendant a resolution was put to the meeting that the firstnamed Defendant be wound up voluntarily and that the secondnamed Defendant be appointed liquidator for the purposes of the winding up of the firstnamed Defendant.

8. On the 5th day of October 1977 the Plaintiff :-

(a) Was registered as the holder of 10,000 shares in the capital of the firstnamed Defendant;

(b) Had purchased 110,312 shares in the capital of the company from persons who were registered as the holders of such shares in the register of members of the firstnamed Defendant.

9. In the premises the Plaintiff was entitled to the beneficial ownership in the said 110,312 shares referred to in paragraph 8(b) hereof.

10. The members of the firstnamed Defendant who had sold the said 110,~~194~~ 311 shares to the Plaintiff had appointed David Harold Allen Craig or failing him Barry Broughton Holmes or failing either of them such other person as might from time to time be nominated in writing for that purpose by the Plaintiff as their proxy to vote at meetings of members of the firstnamed Defendant and had appointed both of the said persons as their attorneys.

11. At the said extraordinary general meeting of the firstnamed Defendant held on the 5th day of October 1977 the said resolution referred to in paragraph 7 hereof was put to the meeting to be voted on by a show of hands and before or alternatively on the declaration of the result of the voting by a show of hands a poll was demanded by at least three persons present at the said meeting and entitled to vote thereat and holding or representing by proxy or attorney or entitled to vote in respect of at least one-tenth part of the capital represented at the said meeting.

12. Thereupon a poll was held at the said meeting in respect of the said resolution.

13. The said David Harold Allen Craig as proxy and attorney for the holders of the said 110,312 shares and the persons he had appointed as proxies pursuant to the said powers of attorney exercised their said proxies and voted against the said resolution.

14. The chairman of the said meeting wrongfully disallowed the said votes cast by the said David Harold Allen Craig and the persons he had appointed as proxies and refused to accept such votes as votes as validly cast in relation to the said resolution.

15. The result of the poll was that the resolution was passed and by virtue of the provisions of Article 65 of the Articles of Association of the firstnamed Defendant the result of the poll was deemed to be the resolution of the said meeting.

16. If the chairman of the said meeting had not disallowed the said votes cast by David Harold Allen Craig and the persons he had appointed as proxies and had not refused to accept them as aforesaid the said resolution would not have been passed and would have failed.

17. By reason of the matters aforesaid the resolution passed by the said meeting of the members of the firstnamed Defendant on the 5th day of October 1977 to wind up the firstnamed Defendant voluntarily and to appoint the secondnamed Defendant liquidator for the purposes of the winding up was void, of no effect, invalid and not effective to result in the firstnamed Defendant being wound up voluntarily or the secondnamed Defendant being appointed liquidator of the firstnamed Defendant.

18. The Plaintiff as a member of the firstnamed Defendant is aggrieved by the matters hereinbefore referred to and does not want the firstnamed Defendant to be wound up voluntarily or at all, having voted against the said resolution.

19. The secondnamed Defendant threatens and intends unless restrained from so doing to act as liquidator of the firstnamed Defendant and to wind up the affairs of the firstnamed Defendant.

20. By reason of the matters aforesaid the Plaintiff has suffered loss and damage.

In the Supreme Court of Victoria

No. 1. Amended Statement of Claim of Appellant 18th November 1977

AND THE PLAINTIFF CLAIMS :

1. A Declaration that the resolution passed at the extraordinary general meeting of members of the firstnamed Defendant on the 5th day of October 1977 that the firstnamed Defendant be wound up and that the secondnamed Defendant be appointed liquidator for the purposes of the winding up was void, of no effect, invalid and ineffective to wind up the first-named Defendant or appoint the secondnamed Defendant as liquidator of the firstnamed Defendant.

2. A Declaration that the firstnamed Defendant has not been wound up voluntarily or at all.

3. A Declaration that the secondnamed Defendant has not been validly or effectively appointed liquidator of the firstnamed Defendant.

4. An Injunction restraining the secondnamed Defendant, whether by himself, his servants or agents or any of them or otherwise howsoever from taking any steps to wind up the secondnamed Defendant or otherwise disposing of its assets.

5. Damages.

6. Costs.

7. Such further or other relief as to the Court may seem fit.

(Signed) Alan Goldberg

ALAN H. GOLDBERG

DELIVERED with the Writ

TAKE NOTICE that the Plaintiff requires Pleadings and desires the above endorsement to stand as its Statement of Claim.

NO. 2.

AFFIDAVIT OF DAVID HAROLD ALLEN CRAIG

In the Supreme Court of Victoria

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No. 2 Affidavit of David Harold Allen Craig

18th November 1977

I, DAVID HAROLD ALLEN CRAIG of 115 The Boulevard, East Ivanhoe in the State of Victoria, MAKE OATH AND SAY as follows :-

1. I am the Melbourne Manager of the abovenamed Plaintiff company and am duly authorised by it to make this affidavit on its behalf. I depose to the matters hereinafter set forth from my own knowledge save where otherwise indicated.

2. Now produced and shown to me and marked with the letter "A" is the Certificate of Incorporation of the Plaintiff.

3. Now produced and shown to me and marked with the letter "B" is the Certificate of Incorporation of the firstnamed Defendant.

4. On the 14th day of May 1976 the Plaintiff issued an invitation to certain shareholders in the firstnamed Defendant, then known as Blue Moon Fruit Co-Operative Limited to sell their shares to the Plaintiff. The

THE RECORD

IN THE PRIVY COUNCIL No. of 1979.

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

B e t w e e n :

COACHCRAFT LTD. Appellant (Plaintiff)

- and -

S.V.P. FRUIT CO. LTD. and MAXWELL GEOFFREY CHAPMAN Respondents (Defendants)

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

invitation was made for only 60,000 shares on a "first come first served" basis which was approximately 15% of the issued capital of the firstnamed Defendant. Approximately 30,000 shares were sold to the Plaintiff in response to this invitation. Subsequently on or about the 12th day of August 1976 the Plaintiff increased the price which it was prepared to pay in respect of its invitation and a further 28,000 shares or thereabouts were sold to the Plaintiff in response to the invitation. The invitation terminated on the 2nd day of September 1976 at which time the Plaintiff held 58,886 shares in the capital of the firstnamed Defendant, being just under 15% of its issued capital.

5. On the 22nd day of April 1977 the Plaintiff made a take over offer for the remaining 356,169 shares in the capital of the firstnamed Defendant and it was a term of such offer that it be accepted by, inter alia, executing a form of acceptance and transfer and two copies of a power of attorney. Now produced and shown to me and marked with the letter "C" and "D" respectively are true copies of the said form of acceptance and transfer and the power of attorney.

6. The directors of the firstnamed Defendant, in the "Part B" statement issued in accordance with the provisions of the 10th Schedule to the Companies Act and dated the 22nd day of April 1977 did not recommend to shareholders in the firstnamed Defendant that the offer by the Plaintiff be accepted.

7. On the 26th day of April 1977 the firstnamed Defendant called an extra-ordinary general meeting of its members for the 12th day of May 1977 to consider and if thought fit pass a resolution that the whole of the business of the firstnamed Defendant be sold for $790,000. That meeting was held on the 12th day of May 1977 at which representatives of the Plaintiff attended. The resolution passed with approximately 250,000 votes being cast for the resolution and approximately 59,000 being cast against the resolution. The votes which were cast against the resolution were cast in respect of shares held by members who had prior to the date of the meeting sold

their shares to the Plaintiff and given powers of attorney to myself or failing me, Barry Broughton Holmes in the form of the power of attorney which is exhibit "D" above. I cast those votes against the resolution on the instructions of the Plaintiff. The votes which I so cast were not challenged at the meeting.

8. Subsequent to the date of the meeting, as a result of the offer which it had made to the shareholders in the firstnamed Defendant, the Plaintiff purchased a further 60,000 shares or thereabouts in the capital of the firstnamed Defendant.

9. By the beginning of August 1977 the Plaintiff was registered as the holder of 10,000 shares in the capital of the firstnamed Defendant and the remainder of the shares which it had purchased pursuant to the said invitation and offer were still registered in the names of the selling shareholders, although the voting rights in relation to them were controlled by Mr. Holmes and myself pursuant to the proxies and powers of attorney which had been received from the selling shareholders in the form of exhibit "D" above.

10. On the 3rd day of August 1977 the Plaintiff and I wrote a letter to the firstnamed Defendant requisiting a meeting of the firstnamed Defendant to consider certain resolutions. We were entitled to do this on the basis that the 10,000 shares in respect of which the Plaintiff was registered as a member of the firstnamed Defendant and the shares in respect of which I was a donee of the powers of attorney in the form of power of attorney which is exhibit "D" above totalled more than 10% of the issued capital of the firstnamed Defendant. The 10,000 shares in respect of which the Plaintiff was registered as a member represented less than 10% of the issued capital in the firstnamed Defendant.

11. In accordance with our requisition the directors of the firstnamed Defendant convened an extraordinary general meeting of members of the firstnamed Defendant for the 5th day of October 1977 and in addition to the resolutions proposed by the Plaintiff and I included further resolutions to the effect that the name of the firstnamed

Defendant be changed to S.V.P. Fruit Co. Limited and that the firstnamed Defendant be wound up voluntarily and that the secondnamed Defendant be appointed liquidator for the purposes of the winding up.

In the Supreme Court of Victoria

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12. Now produced and shown to me and marked with the letter "E" is a copy of the circular letter dated the 13th day of September 1977 and the enclosed notice of the extraordinary general meeting whereby the directors of the first-named Defendant convened the said extraordinary general meeting for the 5th day of October 1977.

No. 2. Affidavit of David Harold Allen Craig

18th November 1977

13. I attended that extraordinary general meeting with other representatives of the Plaintiff. Prior to the meeting, in accordance with article 16 of the Articles of Association of the firstnamed Defendant the Plaintiff and I had forwarded to the firstnamed Defendant the powers of attorney which had been received from the shareholders in the firstnamed Defendant who had sold their shares to the Plaintiff in response to the said invitation and offer.

14. Now produced and shown to me and marked with the letter "F" is a letter dated the 9th day of May 1977 from the firstnamed Defendant in which it acknowledges having sighted and recorded powers of attorney in favour of the nominees of the Plaintiff over 49,086 shares in the firstnamed Defendant. These shares and the additional 10,000 shares registered in the Plaintiff's name, represented almost all the shares which had been acquired by the Plaintiff pursuant to the said invitation.

15. Now produced and shown to me and marked with the letter "G" is a letter dated the 25th day of August 1977 from the firstnamed Defendant in which it acknowledges having received "61 documents purporting to be powers of attorney". These were the powers of attorney which had been received from shareholders in the firstnamed Defendant who had accepted the Plaintiff's said offer.

16. Prior to the date of the meeting in accordance with the powers of attorney I had received from shareholders in the firstnamed Defendant who had

sold their shares to the Plaintiff in response to the said offer and invitation I was entitled to act as a proxy and attorney in respect of those shares at any meeting of members of the first-named Defendant or appoint proxies to vote at any such meeting.

In the Supreme Court of Victoria

17. Prior to the date of the meeting pursuant to the powers of attorney I appointed Ms. M. Moloney as proxy for three shareholders holding 4016 shares and Mr. R. Brierley as proxy for two shareholders holding 9290 shares. Seven other shareholders in the first-named Defendant who had not accepted the Plaintiff's said invitation or offer and who held between them approximately 15,739 shares appointed Ms. M. Moloney, Mr. Brierley and myself as their proxies and these proxies and the ones which I appointed were delivered to the firstnamed Defendant on the day prior to the holding of the meeting. As stated in paragraphs 14 and 15 above prior to the date of the meeting I had in accordance with the Articles of Association of the firstnamed Defendant deposited at the office of the firstnamed Defendant the powers of attorney.

No. 2. Affidavit of David Harold Allen Craig 18th November 1977

18. The meeting commenced at approximately 1.25 p.m. and it was chaired by the Chairman of Directors of the firstnamed Defendant, Mr. Muir. He referred to the sale of the firstnamed Defendant's business to a company in which his son had an interest and he disclaimed any impropriety in his son's involvement in the sale. The first resolution in the notice relating to a report by the directors was then put to the meeting and passed unamimously on a show of hands. There was then a discussion about the firstnamed Defendant's losses and a shareholder, Mr. Noonan, then moved that the second resolution submitted by the Board of Directors relating to the winding up of the firstnamed Defendant be put to the meeting. There was discussion about the resolution and it was unanimously agreed that the resolution be put and it was passed on a show of hands. Mr. Brierley then called for a poll and the Chairman asked if there were three people calling for a poll. Ms. M. Moloney and I indicated that we also called for a poll and a poll was then held.

19. The firstnamed Defendant's secretary, Mr. Homer, another person whom I am unable to identify and myself acted as scrutineers. Poll slips were handed out to members and the persons present at the meeting recorded their votes on the slips and they were counted. I exercised the proxies I held by voting against the resolution and I am informed by Ms. Moloney and Mr. Brierley and verily believe that they proposed to do the same. The votes held by the Plaintiff and those I exercised under power of attorney were cast by the use of one poll slip upon which the name of the Plaintiff was written. The votes held by Mr. Brierley and Ms. Moloney were cast by the use of a separate poll slip upon which the name of the Plaintiff was also written. The total votes cast by us were approximately 136,000.

20. All the poll slips were collected and I signed as scrutineer the result of the poll. I do not recall the precise number of votes cast but it was approximately 180,000 votes "for" the resolution and 136,000 "against" the resolution. The result of the poll was given to the Chairman and he announced the results of the poll and then said that 110,000 of the votes cast "against" the resolution which were cast pursuant to the powers of attorney given to me were disallowed on the basis of a legal opinion which had been given by Counsel.

21. The firstnamed Defendant's solicitor was present and he then explained the basis of the legal opinion and referred to Article 6 of the Articles of Association of the firstnamed Defendant. He held up a sheet of hand written paper and conveyed the impression that it contained the legal opinion and read from it briefly. There was then some discussion about the fact that these votes had been disallowed and then the meeting proceeded to the remaining resolutions which had been proposed in the notice, pursuant to the requisition. These were all defeated on a show of hands. The resolution for the change of name for the firstnamed Defendant was passed on a show of hands.

22. I am informed by the Plaintiff's legal advisers

and verily believe that searches made at the office of the Commissioner for Corporate Affairs in relation to the firstnamed Defendant disclose that its authorised capital is $1,000,000.00 divided into five hundred thousand ordinary shares of $2.00 each. The issued capital is $830,110.00 comprising 415,055 shares. The resolution changing the name of the firstnamed Defendant to S.V.P. Fruit Co. Limited has been lodged as has the resolution for the appointment of the secondnamed Defendant as liquidator of the firstnamed Defendant.

23. As a result of the purported appointment of the secondnamed Defendant as liquidator of the firstnamed Defendant I verily believe that he will be taking steps to wind up the firstnamed Defendant and dispose of and distribute its assets. The Plaintiff does not want the firstnamed Defendant to be wound up but wishes it to continue in existence. I verily believe that the resolutions passed at the said extraordinary general meeting of the firstnamed Defendant that it be wound up voluntarily and that the secondnamed Defendant be appointed liquidator were not validly passed and are ineffective as the Chairman refused to recognise the votes which were validly cast against the resolution. The nature of the resolutions were such that they were special resolutions and they therefore required a 75% affirmative vote in order for the resolutions to be passed. Had the votes cast pursuant to the proxies held by Ms. Moloney, Mr. Brierley and I been taken into account the votes cast in favour of the resolution would have represented much less than 75% of the votes which could have been cast by the persons present at the meeting or voting by proxy thereat.

24. I therefore respectfully request this Honourable Court to grant the Plaintiff the relief sought in the Summons herein. In the event that the Court is disposed to grant the Plaintiff such relief I am authorised by the Plaintiff to undertake to the Court on its behalf to abide by any order as to damages which the Court may consider it proper to make if the Defendants shall suffer any damage by reason of any interlocutory injunction granted by the Court which the Court

shall consider the Plaintiff ought to bear.

In the Supreme Court of Victoria

—

No. 2. Affidavit of David Harold Allen Craig

18th November 1977

SWORN at MELBOURNE)
)
in the State of) (Signed)
)
Victoria this 18th) D.H.A. Craig
)
day of November, 1977.)

Before me :

(Signed) A. Zaitman

A Commissioner of the Supreme Court of Victoria for taking Affidavits.

This Affidavit is filed on behalf of the Plaintiff.

NO. 3.

DEFENCE OF FIRSTNAMED RESPONDENT

In the Supreme Court of Victoria

—

No. 3 Defence of First-Named Respondent

30th November 1977

To the Indorsement on the Writ of Summons which stands as the Plaintiff's Statement of Claim the firstnamed Defendant says :-

1. It admits the allegations contained in paragraph 1.

2. It admits the allegations contained in paragraph 2.

3. It admits the allegations contained in paragraph 3.

4. It admits the allegations contained in paragraph 4.

5. Save that it will refer to the full and precise terms of the notice dated the 13th September 1977 it admits the allegations contained in paragraph 5.

6. It admits the allegations contained in paragraph 6.

7. It admits the allegations contained in paragraph 7.

8. (a) It admits the allegations contained in paragraph 8(a).

(b) It does not admit the allegations contained in paragraph 8(b).

9. It does not admit the allegations contained in paragraph 9.

10. It does not admit the allegations contained in paragraph 10.

11. Save that it admits that at the said extraordinary general meeting the said resolution referred to in paragraph 7 thereof was put to the meeting and was carried on a show of hands after which a poll was demanded by three persons present at the meeting it otherwise does not admit the allegations contained in paragraph 11.

12. Save that it admits that a poll was held at the said meeting in respect of the said resolution it otherwise does not admit the allegations contained in paragraph 12.

13. It does not admit the allegations contained in paragraph 13.

14. At all times material the Articles of Association of the firstnamed Defendant provided -

> "5. No applicant for shares shall be allotted less than One share or more than Ten thousand shares in the Company.
>
> 6. The shares held or capable of being held by or by and on behalf of any one member shall not exceed in number Ten thousand nor in value Ten thousand pounds".

15. Save that it admits that the chairman of the said meeting disallowed the said votes cast by the said Craig and the persons he had appointed as proxies and refused to accept such votes as votes validly cast in relation to the said resolution it otherwise denies the allegations contained in paragraph 14.

16. If on the 5th day of October 1977 the Plaintiff had purchased 110,194 shares in the capital of the firstnamed Defendant from persons who were registered as the holders of such shares in the register of members of the firstnamed Defendant and if the Plaintiff was entitled to the beneficial ownership of such shares and if the members of the firstnamed Defendant who had sold the said shares to the Plaintiff had appointed David Harold Allen Craig or failing him Barry Broughton Jones or failing either of them such other person as might from time to time be nominated in writing for that purpose by the Plaintiff as their proxy to vote at meetings of the firstnamed Defendant and had appointed both of the said persons as their attorneys and if the said David Harold Allen Craig as proxy and attorney for the holders of the said shares and the persons he had appointed as proxies pursuant to the said powers of attorneys exercised their said proxies and voted against the said resolution (all of which allegations are not admitted) then the exercise or attempted exercise by or on behalf of the Plaintiff and by or on behalf of the said proxies or attorneys of any voting rights in respect thereof was wrongful and in breach of and contrary to the provisions of the said Article 6.

17. By reason of the matters aforesaid the disallowance by the chairman of the said votes was lawful and in conformity with and required by the provisions of the said Article 6.

18. It admits the allegations contained in paragraph 15.

19. It admits the allegations contained in paragraph 16.

20. It denies each allegation contained in paragraph 17.

21. It does not admit the allegations contained in paragraph 18.

22. It admits the allegations contained in paragraph 19.

23. It does not admit the allegations contained in paragraph 20.

24. Further to paragraphs 14, 15, 16 and 17 hereof the provisions of the said Articles 5 and 6 were approved by the Governor in Council along with the other Articles of Association of the firstnamed Defendant pursuant to the provisions of section 356 of the Companies Act, 1938 (Act. no. 4602) and in particular section 356 (12) (c)(i).

25. By reason of the matters referred to in paragraph 24 it will be contended at the trial of the action that the provisions of the said Articles not only had contractual force between the Plaintiff and the firstnamed Defendant and the other members of the company but were also in a form contemplated by and provided for in a public Act in force at all material times in the State of Victoria and approved under the provisions thereof by the Governor in Council for the purpose of achieving the policies embodied in sections 356(11) and (12) of the said Act.

(Signed) Clifford Pannam

CLIFFORD PANNAM

(Signed) H.R. Hansen

H.R. HANSEN

DELIVERED the 30th day of November 1977.

NO. 4.

DEFENCE AND COUNTERCLAIM OF SECONDNAMED RESPONDENT

In the Supreme Court of Victoria

No. 4 Defence and Counter-claim of Second-Named Respondent

2nd December 1977

To the endorsement on the Writ of Summons herein standing as the Statement of Claim the second abovenamed Defendant saith :

1. He admits the allegations contained in paragraph thereof.

2. He admits the allegations contained in paragraph 2 thereof.

3. He admits that by resolution of the members of the firstnamed Defendant (hereinafter referred to as "the company") duly passed at an Extraordinary General Meeting held on the 5th October 1977 the name of the company was changed from Blue Moon Fruit Co-Cperative Limited to S.V.P. Fruit Co. Ltd. Save as aforesaid he denies each and every allegation contained in paragraph 3 thereof.

4. He admits that the Plaintiff is the holder of 10,000 shares in the issued capital of the company. He does not admit that the Plaintiff was a holder of those shares at all times material. Save as aforesaid he denies each and every allegation contained in paragraph 4 thereof.

5. He admits the allegations contained in paragraph 5 thereof.

6. He admits the allegations contained in paragraph 6 thereof.

7. He admits the allegations contained in paragraph 7 thereof.

8. As to paragraph 8 thereof -

(a) he admits that on the 5th October 1977 the Plaintiff was registered as the holder of 10,000 shares in the issued capital of the company;

(b) he admits that by the 5th October 1977 the Plaintiff had purported to purchase from members of the company shares in the issued capital of the company in addition to the said 10,000 shares (which purported purchases are hereinafter referred to "the impugned purchases");

(c) save as aforesaid he denies each and every allegation contained therein.

9. He admits that the members of the company who were registered as the holders of shares which were the subject of the impugned purchases purported to hold the same for and on behalf of the Plaintiff but otherwise denies each and every allegation contained in paragraph 9 thereof.

10. At all material times the Articles of Association of the company, as approved by the Governor in Council pursuant to the Companies Act 1938 provided inter alia :

"5. No applicant for shares shall be allotted less than 1 share or more than 10,000 shares in the Company.

6. The shares held or capable of being held by or by and on behalf of any one member shall not exceed in number ten thousand nor in value ten thousand pounds."

11. Each of the impugned purchases was and is in breach of the Articles of Association of the company, unlawful, illegal, and contrary to the provisions of the Companies Act 1938 and is invalid void and of no effect whatsoever.

12. He admits that members of the company who were vendors in respect of the impugned purchases purported to appoint David Harold Allen Craig or failing him Barry Broughton Holmes or failing either of them such other person as might from time to time be nominated in writing for that purpose by the Plaintiff as their proxy to vote at meetings of members of the company (which appointments are hereinafter referrred to as "the impugned appointments"). Save as aforesaid he denies each and every allegation contained in paragraph 10 hereof.

13. The impugned appointments were made pursuant to obligations imposed by the terms of and in implementation of the impugned purchases.

14. Each of the impugned appointments was and is in breach of the Articles of Association of the company, unlawful, illegal, and contrary to the provisions of the Companies Act 1938 and is invalid void and of no effect whatsoever.

15. He admits that at the said Extraordinary General Meeting of the company held on the 5th October 1977 the resolution referred to in paragraph 7 thereof was put to the meeting to be voted on by a show of hands and that before or alternatively on the declaration of the result of the voting by a show of hands a poll was demanded by at least three persons present at the said meeting. Save as aforesaid he denies each and every allegation contained in paragraph 11 thereof. Further, insofar as the said three persons purported to represent by proxy or attorney any member or members who was or were a vendor or vendors in respect of any of the

impugned purchases pursuant to any of the impugned appointments, such persons were not entitled to vote at the meeting in respect of at least one tenth part or any part of the capital represented at the said meeting.

In the Supreme Court of Victoria

16. He admits that a poll was thereupon held at the said meeting in respect of the said resolution but otherwise does not admit any of the allegations contained in paragraph 12 thereof.

No. 4. Defence and Counterclaim of Second-Named Respondent

17. He admits that the said David Harold Allen Craig and the persons he had purported to appoint as proxies in reliance upon the impugned appointments purported to exercise their proxies and to vote against the said resolution. Save as aforesaid he denies each and every allegation contained in paragraph 13 thereof.

2nd December 1977

18. He admits that the Chairman of the meeting disallowed the votes purportedly cast by the said David Harold Allen Craig and the persons he had purportedly appointed as proxies and refused to accept such purported votes as votes validly cast in relation to the said resolution. Save as aforesaid he denies each and every allegation contained in paragraph 14 thereof. The Chairman acted correctly and in accordance with the Articles of Association and the general law in disallowing such purported votes.

19. He admits the allegations contained in paragraph 15 thereof.

20. He does not admit any of the allegations contained in paragraph 16 thereof.

21. He denies each and every allegation contained in paragraph 17 thereof.

22. He admits that the Plaintiff as a member of the company claims to be aggrieved by the matters thereinbefore referred to. He admits that the Plaintiff as to the 10,000 shares in respect of which it was registered as holder voted against the said resolution. Save as aforesaid he denies each and every allegation contained in paragraph 18 thereof. He further says that the allegation that the Plaintiff does not want the company to be wound up voluntarily or at all is otiose and vexatious and ought to be struck out.

23. He admits the allegations contained in paragraph 19 thereof. He says that he is obliged to act as liquidator of the company and to wind up its affairs.

24. He denies each and every allegation contained in paragraph 20 thereof.

In the Supreme Court of Victoria

No. 4. Defence and Counterclaim of Second-Named Respondent

2nd December 1977

COUNTERCLAIM

By way of Counterclaim the second above-named Defendant saith :

25. He refers to and repeats by way of positive averment the admissions and the allegations contained in paragraphs 1, 2, 3, 5, 6, 7, 8(a), 8(b), 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 22 and 23 hereof as if each of the same was set forth fully seriatim hereunder.

26. The said resolution that the company be wound up voluntarily and that he be appointed liquidator for the purposes of the winding up of the company was duly passed and was and is valid.

27. In the premises he was and is duly appointed the liquidator of the company for the purposes of the winding up of the same.

28. If by reason of the matters alleged by the Plaintiff in the said endorsement standing as a Statement of Claim, there be any defect or defects or irregularity or irregularities affecting the validity of the winding up or his appointment as liquidator -

(a) his acts as liquidator are nonetheless valid;

(b) all conveyances assignments transfers mortgages charges or other dispositions of the company's property made by him are valid in favour of persons taking such property bona fide and for value and without notice of such defect or irregularity.

AND THE SECONDNAMED DEFENDANT COUNTERCLAIMS AGAINST THE PLAINTIFF :

In the Supreme Court of Victoria

A. A declaration that the said resolution was validly passed.

B. A declaration that the secondnamed Defendant was validly appointed liquidator of the firstnamed Defendant for the purposes of the winding up of the firstnamed Defendant.

No. 4.
Defence and Counterclaim of Second-Named Respondent

2nd December 1977

C. A declaration that notwithstanding any defect or defects or irregularity or irregularities affecting the validity of the winding up of the firstnamed Defendant or the appointment of the secondnamed Defendant as the liquidator -

(a) his acts as liquidator are nonetheless valid;

(b) all conveyances assignments transfers mortgages charges or other dispositions of the company's property made by him are valid in favour of persons taking such property bona fide and for value and without notice of such defect or irregularity.

D. Further and other relief as to the Court shall seem meet.

E. Costs.

(Signed) A.C. Archibald

A.C. ARCHIBALD

DELIVERED the 2nd day of December 1977.

NO. 5.

AMENDED REPLY TO DEFENCE OF FIRSTNAMED RESPONDENT

In the Supreme Court of Victoria

No. 5 Amended Reply to Defence of First-Named Respondent

16th December 1977

The Plaintiff as to the Defence of the firstnamed Defendant delivered herein on the 30th day of November 1977 says :-

1. It admits the allegations contained in paragraph 14 thereof.

2. It denies each and every allegation contained in paragraph 16 thereof.

3. It denies each and every allegation contained in paragraph 17 thereof.

4. It denies each and every allegation contained in paragraph 24 thereof.

5. Insofar as paragraph 25 contains allegations of fact, it denies each and every allegation therein contained. Save as aforesaid it does not plead to the allegations contained in paragraph 25 thereof as the same contains no allegations of fact but pleads matters of law.

6. Article 6 of the Articles of Association of the firstnamed Defendant, upon its proper construction, alternatively by reason of Section 141 of the Companies Act 1961, did not preclude or disentitle :-

(a) The members of the first-named Defendant who had sold the said 110,312 shares to the Plaintiff from appointing David Harold Allen Craig or failing him Barry Broughton Jones or failing either of them, such other person as might from time to time be nominated in writing for that purpose by the Plaintiff as their proxy to vote at meetings of the firstnamed Defendant.

In the Supreme Court of Victoria

—

No. 5 Amended Reply to Defence of First-Named Respondent

16th December 1977

(b) The said members of the firstnamed Defendant from appointing the said David Harold Allen Craig and Barry Broughton Jones as their attorneys;

(c) The said David Harold Allen Craig and Barry Broughton Jones from exercising their said proxies and voting against the said resolution;

(d) The said David Harold Allen Craig and Barry Broughton Jones as attorneys of the said members from appointing other persons as proxies of the said members to vote at the said extraordinary general meeting of the firstnamed Defendant;

(e) The persons who had been appointed as proxies of the said members by their said attorneys from exercising their said proxies and voting against the said resolution.

7. Article 6 of the Articles of Association of the firstnamed Defendant, upon its proper construction, alternatively by reason of Section 141 of the Companies Act 1961, did not preclude or disentitle the members of the firstnemed Defendant who were registered as the holders of the said 110,312 shares in the share register of the firstnamed Defendant and who had sold the said 110,312 shares to the Plaintiff from voting at the said extra-

ordinary general meeting of the firstnamed Defendant and against the said resolution either personally, or by proxy or by their attorney or attorneys.

In the Supreme Court of Victoria

—

No. 5 Amended Reply to Defence of First-Named Respondent

16th December 1977

8. The chairman of the said extra-ordinary general meeting of the firstnamed Defendant was not entitled whether by virtue of Article 6 of the Articles of Association of the firstnamed Defendant or otherwise to disallow votes cast by the proxies or attorneys of the holders of the said 110,312 shares which holders were registered as the holders of the said shares in the share register of the company.

10. Save as aforesaid and as to the admissions therein contained, it joins issue with the firstnamed Defendant on its Defence.

ALAN H. GOLDBERG

DELIVERED the 16th day of December 1977

AMENDED the 1st day of February 1978.

NO. 6.

AMENDED REPLY AND DEFENCE TO DEFENCE AND COUNTERCLAIM OF SECONDNAMED RESPONDENT

In the Supreme Court of Victoria

No. 6 Amended Reply and Defence to Defence and Counter-claim of Secondnamed Respondent

16th December 1977

The Plaintiff as to the Defence and Counter-claim of the secondnamed Defendant delivered herein on the 2nd day of December 1977 says :-

1. It admits the allegations contained in paragraph 10 thereof.

2. It denies each and every allegation contained in paragraph 11 thereof.

3. It denies each and every allegation contained in paragraph 13 thereof.

4. It denies each and every allegation contained in paragraph 14 thereof.

5. Save for the admissions contained in paragraph 15 thereof, it denies each and every allegation contained in paragraph 15 thereof.

6. Save for the admissions contained in paragraph 18 thereof it denies each and every allegation contained in paragraph 18.

7. Save for the admissions contained in paragraph 23 thereof it denies each and every allegation contained in paragraph 23.

8. Article 6 of the Articles of Association of the firstnamed Defendant, upon its proper construction, alternatively by

reason of Section 141 of the Companies Act 1961, did not preclude or disentitle :-

(a) The members of the firstnamed Defendant who had sold the said 110,312 shares to the Plaintiff from appointing David Harold Allen Craig or failing him Barry Broughton Jones or failing either of them, such other person as might from time to time be nominated in writing for that purpose by the Plaintiff as their proxy to vote at meetings of the firstnamed Defendant.

(b) The said members of the firstnamed Defendant from appointing the said David Harold Allen Craig and Barry Broughton Jones as their attorneys;

(c) The said David Harold Allen Craig and Barry Broughton Jones from exercising their said proxies and voting against the said resolution;

(d) The said David Harold Allen Craig and Barry Broughton Jones as attorneys of the said members from appointing other persons as proxies of the said members to vote at the said extraordinary general meeting of the firstnamed Defendant;

(e) The persons who had been appointed as proxies of the said members by their said attorneys from exercising their said proxies and voting against the said resolution.

9. Article 6 of the Articles of Association of the firstnamed Defendant, upon its proper construction, alternatively by reason of Section 141 of the Companies Act 1961, did not preclude or disentitle the members of the firstnamed Defendant who were registered as the holders of the said 110,312 shares in the share register

In the Supreme Court of Victoria

—

No. 6 Amended Reply and Defence to Defence and Counterclaim of Secondnamed Respondent

16th December 1977

of the firstnamed Defendant and who had sold the said 110,312 shares to the Plaintiff from voting at the said extraordinary general meeting of the firstnamed Defendant and against the said resolution either personally, or by proxy or by their attorney or attorneys.

10. The Chairman of the said extraordinary general meeting of the firstnamed Defendant was not entitled whether by virtue of Article 6 of the Articles of Association of the firstnamed Defendant or otherwise to disallow votes cast by the proxies or attorneys of the holders of the said 110,312 shares which holders were registered as the holders of the said share register of the company.

12. Save as aforesaid and as to the admissions therein contained, it joins issue with the secondnamed Defendant on its Defence.

DEFENCE TO COUNTERCLAIM

13. As to paragraph 25 thereof :-

(a) It refers to and repeats paragraphs 1, 2, 3, 5, 6, 7, 8, 9, 12, 16, 17 and 22 of the Statement of Claim;

(b) It refers to and repeats paragraphs 1 to 11 hereof.

14. It denies each and every allegation contained in paragraph 26 thereof.

15. It denies each and every allegation contained in paragraph 27 thereof.

16. It denies each and every allegation contained in paragraph 28 thereof.

ALAN H. GOLDBERG

DELIVERED the 16th day of December 1977

AMENDED on the 1st day of February 1978.

NO. 7.

AMENDED NOTICE TO ADMIT GIVEN TO FIRSTNAMED RESPONDENT

In the Supreme Court of Victoria

No. 7 Amended Notice to Admit given to Firstnamed Respondent

25th January 1978

TAKE NOTICE that the Plaintiff in this cause requires the firstnamed Defendant to admit, for the purposes of this cause only, the several facts respectively hereunder specified; and the firstnamed Defendant is hereby required, within four days from the service of this Notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this cause.

The facts, the admission of which is required, are :

1. Prior to the meeting of shareholders of the Defendant S.V.P. Fruit Co. Ltd. on 5th October 1977 :

   (a) the registered holders of not less than 49,086 shares in the first-named Defendant had completed, signed and delivered to the Plaintiff documents in the form of the annexure attached to this Notice marked "A" in respect of those shares and had completed, signed, sealed and delivered to the Plaintiff documents in the form of the annexure attached to this Notice marked "B";

(b) the registered holders of not less than 61,226 shares in the firstnamed Defendant had completed, signed and delivered to the Plaintiff documents in the form of the annexure attached to this Notice marked "C" in respect of those shares and had completed, signed and delivered to the Plaintiff documents in the form of the annexure attached to this Notice marked "D".

In the Supreme Court of Victoria

—

No. 7 Amended Notice to Admit given to Firstnamed Respondent

25th January 1978

2. Prior to the said meeting and acting in accordance with the terms of the documents referred to in paragraph 1 above David Harold Allen Craig purported to appoint Mr. Brierley as proxy for two shareholders holding a total of 9,290 shares and purported to appoint M/s. Moloney as proxy for three shareholders holding a total of 4,016 shares.

3. Prior to the said meeting the registered holders of a further 15,000 shares or more appointed Messrs. Brierley and Craig and M/s M. Moloney as their proxies, being in the form enclosed with the Notice convening the meeting.

4. All documents in the form of the annexures marked "B" and "D" referred to in paragraph 1 above, the purported appointments referred to in paragraph 2 above - also being in the form enclosed with the notice convening the said meeting - and the appointments referred to in paragraph 3 above were deposited at the office of the firstnamed Defendant not less than twenty-four (24) hours before the time for holding the said meeting. If any of the appointments referred to in paragraph 3 above were signed under a Power of Attorney or other authority, that Power of Attorney or other authority or a notarially certified copy thereof was also deposited at that office not less than twenty-four (24) hours before the time for holding the meeting.

5. The duly appointed representative of the Plaintiff at the said meeting was Ronald Alfred Brierley.

6. At the said meeting a poll was demanded in respect of the resolution referred to in paragraph 7 of the Statement of Claim by Messrs. Brierley, Craig and Mann and M/s M. Moloney. On the poll 186,511 votes were cast in favour of the resolution, the Plaintiff cast 10,000 votes against the resolution, Mr. Brierley purported to cast the 9,290 votes attached to the shares first referred to in paragraph 2 above against the resolution, M/s. M. Moloney purported to cast the 4,016 votes attached to the shares secondly referred to in paragraph 2 above against the resolution, Mr. Craig purported to cast the remainder of the 110,312 votes attached to the remainder of the 110,312 shares referred to in paragraph 1 above against the resolution and a further 17,047 votes (including the votes attached to the shares referred to in paragraph 3 above) were cast against the resolution. No-one present at the said meeting failed to cast a vote that he was entitled to cast. The Chairman disallowed only the 110,312 votes attached to the shares referred to in paragraph 1 above and allowed all the other votes that were cast or purportedly cast.

In the Supreme Court of Victoria

—

No. 7 Amended Notice to Admit given to Firstnamed Respondent

25th January 1978

DATED this 25th day of January, 1978.

PHILLIPS, FOX & MASEL

Solicitors for the Plaintiff

To: H.L. Yuncken & Yuncken, Solicitors for the Defendant, S.V.P. Fruit Co. Ltd.

and

To: Philip E. Fox, Solicitor for the Defendant, Maxwell Geoffrey Chapman.

- - -

NO. 8.

TRANSCRIPT OF DISCUSSIONS BEFORE HIS HONOUR MR. JUSTICE MENHENNITT

In the Supreme Court of Victoria

MR. CALLAWAY, instructed by Messrs. Phillips, Fox & Masel, appeared on behalf of the Plaintiff.

MR. S. CHARLES, Q.C. with MR. HANSEN, instructed by Messrs. Yuncken & Yuncken appeared on behalf of the First Defendant.

MR. UREN, instructed by Phillip E. Fox, Esq., appeared on behalf of the Second Defendant.

No. 8
Transcript of Discussions before His Honour Mr. Justice Menhennitt

1st/2nd February 1978

(After discussion):

HIS HONOUR: By consent leave is granted to amend paragraphs 8, 9, 10 and 13 by substituting for the figure 110,194, the figure 110,312.

(After further discussion):

HIS HONOUR: Leave is granted to the Plaintiff to amend the reply to the defence of the First-named Defendant and the reply and defence to the counter claim of the second-named Defendant in the manner shown in red in the two documents reading : "Amended Reply to defence of First-named Defendant, and amended reply and defence

HIS HONOUR (Contd): to the counter claim of the Second-named Defendant.

(Mr. Callaway proceeded to open the case to His Honour.)

In the Supreme Court of Victoria

EXHIBIT "A"	...	Notice of Extra-ordinary General Meeting of Blue Moon Co-Operative Limited dated 13.9.1977, with the attached form of proxy.	No. 8 Transcript of Discussions before His Honour Mr. Justice Menhennitt
EXHIBIT "B1"	...	Notice to admit to the first-named defendant.	1st/2nd February 1978
EXHIBIT "B2"	...	Notice to admit to the second-named Defendant.	

HIS HONOUR: It will be recorded in association with those notices to admit that Counsel for the defendants admit the facts stated in the notices to admit subject to the substitution of the words "purporting to act" for the word "acting" in paragraph 2 of each of the notices.

MR. CALLAWAY: Your Honour, that completes the evidentiary material the plaintiff wishes to put before Your Honour and the opening as far as factual matters are concerned. The rest of the - - - : it is entirely an argument as to whether the Chairman was right in disallowing the votes cast by Mr. Craig on the figures in the notice to admit.

HIS HONOUR: There are two courses open. One if for the defendants now to argue that point. The other is for them to intimate -- another course is for them to intimate the grounds in general terms -- the grounds upon which they contend that the Chairman acted appropriately.

MR. CALLAWAY: I think my learned friend, Mr. Charles, wishes to mention at least one factual matter which is also the subject of an admission between

MR. CALLAWAY (Contd): the parties. It may be that Your Honour may wish to hear him at least on that.

HIS HONOUR: I think we might as well have all the facts clarified before we proceed further. Is there a fact you want to refer to:

MR. CHARLES: As far as we are concerned, we are entirely in Your Honour's hands as to the course later to be taken in relation to argument. We are happy either to address Your Honour first or to indicate what the grounds are on which we rely. As far as the facts are concerned we have obtained from the Companies Office the company bag which is now in Your Honour's Associate's possession -- the red bag -- and I seek to tender that. Secondly, - -

HIS HONOUR: The whole of it?

MR. CHARLES: The whole of the bag, yes.

HIS HONOUR: That may be a slightly inconvenient course. I only mention that once that happens and if there should be anything in the nature of further proceedings by way of appeal or otherwise that the whole bag remains there. Now if you want that course you are perfectly entitled to tender the whole of it. Sometimes that is overcome by tendering parts of it or copies of parts of it. Is it a very substantial bag?

MR. CHARLES: It is quite large, yes.

HIS HONOUR: I merely mention to you the fact, should this matter proceed further beyond any decision I give, that bag will remain in the custody of the court indefinitely until the matter is disposed of.

MR. CHARLES: It might be convenient -- I only saw the bag for the first time when we arrived at court at 10 past 2. It might be convenient if, at the end of the day, my instructing solicitor and my junior and myself were permitted to look at the bag and extract from it the most relevant documents.

HIS HONOUR: I think that would be a more convenient course, and also if they are not very voluminous if they were actually photographed and tendered in that form. I think it is an inconvenient course for a bag to remain in the court possibly indefinitely when someone else might want to have access to it at the Companies Office. You will certainly have that liberty. At this stage you won't tender the bag.

MR. CHARLES: If Your Honour pleases. The second matter -- I have indicated to my learned friend that we wish one matter to be admitted -- and he had indicated to me that that matter would be admitted by the plaintiff. That is this fact.

HIS HONOUR: This is the precise form of the admission. I would be glad if you would take it slowly so that I can take it down as well as the shorthand writer.

MR. CHARLES: By way of preliminary to it -- it is necessary to explain the fact to state this first. The company was incorporated on the 27th November, 1930 under the Companies Act, 1928, with the name "Southern Victoria Pear Packing Company Limited." Secondly, the company changed its name to "Blue Moon Fruit Co-operative Limited" with the approval of the Governor-in-Council on the 27th March, 1946, under the Companies Act, 1938.

"Thirdly, it was a requirement of the obtaining of such approval at the time of such name change that requirements 5 and 6 be included in the Articles of Association. Fourthly, the Articles were amended on 8th December, 1952, into their present form with the approval of the Victorian Crown Solicitor to increase the number of shares permitted to be held by any one member to 10,000."

(Mr. Charles continued to submit to His Honour.)

EXHIBIT NO. 1. ... Affidavit of David Harold Allen Craig, sworn 18th day of November, 1977, and the exhibits thereto.

EXHIBIT NO. 2. ... Memorandum and Articles of Association of First-named Defendant

In the Supreme Court of Victoria

No. 8
Transcript of Discussions before His Honour Mr. Justice Menhennitt

1st/2nd February 1978

(Mr. Charles read Exhibit No. 1 to the court.)

(Discussion ensued.)

AT THIS STAGE THE COURT ADJOURNED UNTIL 10.30 A.M. THE FOLLOWING DAY, THURSDAY, 2ND FEBRUARY, 1978.

THURSDAY, 2ND FEBRUARY, 1978.

(Second day of hearing)

HIS HONOUR: Yes Mr. Charles.

MR. CHARLES: There are two documents I desire to tender out of the Company's Bag. I have got them with me at the present time, I suspect that my instructing solicitor is now over in the Practice Court consenting to the adjournment of the winding-up petition, whatever the status of that petition may be but if I can delay that until his arrival - the other document that I have sought and which I will tender if it is possible is the invitation which came from Coachcraft to shareholders of Blue Moon being the first invitation pursuant to which nearly 60,000 shares were bought on the first occasion.

HIS HONOUR: Any objection?

MR. CALLAWAY: No.

HIS HONOUR: Very well, have you a copy of that Mr. Charles?

MR. CHARLES: Your Honour, my instructing solicitor I imagine is in the Practice Court but the secretary of the company has produced the documents which I had hoped to tender, so I am now in a position to put them before the court. If I may do it chronologically, the first document

MR. CHARLES (Contd): that I have here is the invitation, it may assist if I show it to my learned friend first, as I have not discussed the matter with him before court, Your Honour. If I may now hand that up to Your Honour.

EXHIBIT NO. 3. .... Letter dated 14th May, 1976, from Industrial Equity Limited to the Chairman of the First-named Defendant, and the invitation dated 14th May, 1976, to selected shareholders of the First-named Defendant, with the standard form of transfer and other attached documents.

EXHIBIT NO. 4. ... Photograph copy of document headed Coachcraft Limited, incorporated in Queensland, a wholly owned subsidiary of Industrial Equity Limited. Statement by Coachcraft Limited pursuant to the provisions of Section 180 C and in accordance with Part A of the Tenth Schedule to the Companies Act of the State of Victoria.

EXHIBIT NO. 5. ... Photograph copy of document headed Companies Act 1961, Section 180 H, to Blue Moon Fruit Co-Operative Limited, signed for and on behalf of the plaintiff and dated 22nd April 1977.

EXHIBIT NO. 6. ... Notice dated 12th December 1952 by the first-named Defendant.

(Mr. Charles concluded addressing His Honour.)

(Mr. Uren addressed His Honour.)

(LUNCHEON ADJOURNMENT)

UPON RESUMING AT 2.15 P.M. :

During Mr. Callaway's address to His Honour :

HIS HONOUR: The word "requirements" in the third line of page 4 of the transcript will be amended to read "articles".

Mr. Callaway continued addressing His Honour.

(AT 4.15 P.M. THE COURT ADJOURNED UNTIL 10.30 A.M. THE FOLLOWING DAY, THURSDAY, 3RD FEBRUARY, 1978.)

NO. 9.

REASONS FOR JUDGMENT OF HIS HONOUR MR. JUSTICE MENHENNITT

(Delivered 8th June, 1978)

In the Supreme Court of Victoria

No. 9
Reasons for Judgment of His Honour Mr. Justice Menhennitt

8th June 1978

HIS HONOUR: The plaintiff in this action (Coachcraft Ltd.) seeks a declaration that the following resolution (passed at an extraordinary general meeting of the members of the S.V.P. Fruit Co. Ltd. (the first-named defendant) held on the 5th day of October 1977, namely that the first-named defendant be wound up and that Maxwell Geoffrey Chapman (the second-named defendant) be appointed liquidator for the purposes of the winding-up, was void, of no effect, invalid and ineffective to wind up the first-named defendant or to appoint the second-named defendant as liquidator of the first-named defendant. The plaintiff also seeks associated declarations and a consequential injunction. References hereafter to "the company" are references to the first-named defendant.

The facts admitted or not in dispute include the following.

HIS HONOUR: The first-named defendant was incorporated under the name Southern Victoria Pear Packing Company Limited. It changed its name to Blue Moon Fruit Co-Operative Limited on 27 March 1946. That changed name included the word "Co-operative". It was a condition of that change of name that the articles of association of the company be amended, as they were in fact amended on 7 March 1946, to include, inter alia, articles 5, 6 and 159 in the following terms :

> 5. No applicant for shares shall be allotted less than One share or more than Four thousand shares in the Company.
>
> 6. The shares held or capable of being held by or by and on behalf of any one member shall not exceed in number Four thousand nor in value Four thousand pounds.
>
> 159. Articles numbered 3, 5, 6, 7, 8, 41, 109, 127, 134, shall not be altered varied or rescinded without the consent of the Governor-in-Council first obtained.

On 8 December 1952 articles of association 5 and 6 were amended to substitute "Ten" for "Four" wherever "Four" appeared. The consent of the Governor in Council was not obtained for this amendment, although the consent of the Crown Solicitor was. However, on the hearing before me, all parties accepted that articles 5 and 6 were operative in their amended form. There would be no significant difference in relation to the issue before me if articles 5 and 6 were in their original form. I shall hereafter refer to the articles of association of the first-named defendant in their amended form as "the articles".

The plaintiff is a wholly owned subsidiary of Industrial Equity Limited.

HIS HONOUR: On 14 May 1976 the plaintiff sent to selected shareholders of the first-named defendant (then still named Blue Moon Fruit Co-operative Limited) a letter in the following terms :

In the Supreme Court of Victoria

No. 9
Reasons for Judgment of His Honour Mr. Justice Menhennitt

8th June 1978

COACHCRAFT LTD.
C/- Industrial Equity Limited
44 Market St., Melbourne, 3000.

14th May, 1976

To selected shareholders of

BLUE MOON FRUIT CO-OPERATIVE LIMITED.

This letter is an invitation to you to sell to us all your shares in Blue Moon Fruit Co-Operative Limited.

The price we offer is 85 CENTS PER SHARE WHICH IS CONSIDERABLY MORE THAN THE PRICE AT WHICH WE UNDERSTAND SHARES HAVE RECENTLY CHANGED HANDS WHEN A BUYER COULD BE FOUND.

Our offer is limited to a maximum of only 60,000 shares and is therefore on a strictly "first come first served" basis. This letter is being sent simultaneously to selected shareholders so that each will have an equal opportunity to participate in this offer of 85c. per share but you are urged to act quickly if you wish to sell. Acceptances received by us at the same time shall be treated as being received in such order as Coachcraft Ltd. in its absolute discretion shall determine.

Because of transfer restrictions in the Blue Moon Articles of Association it is a condition of our offer that you sign a Power of Attorney in respect of the shares you sell. This document is enclosed and it should be noted that its effect is confined strictly to the exercise of powers in connection with any shares transferred.

You may if you wish call at our office and exchange your shares for a cheque on the spot.

HIS HONOUR (Contd):

In the Supreme Court of Victoria

No. 9
Reasons for Judgment of His Honour Mr. Justice Menhennitt

8th June 1978

Alternatively you may prefer to send your documents to the Commonwealth Trading Bank of Australia, who is acting as agent for Coachcraft Ltd. in the matter, together with the enclosed instruction letter. The Bank will ensure that payment is sent to you before your share certificate and transfer is handed to us.

If you wish to accept this offer to buy your shares the procedure is as follows :

1. Sign the enclosed transfer (white form)

2. Sign both copies of the enclosed power of Attorney form before a witness who should also sign (buff forms)

3. Attach your share certificate(s)

4. Deliver the above documents to 44 Market Street (3rd floor) and receive a cheque in exchange

OR

Sign the attached instruction letter to our agent (blue form) and send all documents to Coachcraft Ltd. c/- Stock and Share Department, Commonwealth Trading Bank of Australia, 367 Collins Street, Melbourne, 3000.

Yours faithfully,
COACHCRAFT LTD.

R.A. BRIERLEY
Director.

The document numbered 1 enclosed was a standard form of transfer to the plaintiff of shares in the first-named defendant. The document numbered 2 enclosed was in the following terms :

Insert name & address ..... of

.....

HIS HONOUR (Contd):

In the Supreme Court of Victoria

No. 9
Reasons for Judgment of His Honour Mr. Justice Menhennitt

8th June 1978

give notice as follows :

1. I have sold to COACHCRAFT LTD., C/- INDUSTRIAL EQUITY LIMITED of 44 Market Street, Melbourne all my interest in shares in the capital of BLUE MOON FRUIT CO-OPERATIVE LIMITED and I enter into this Deed as one of the terms of such sale. BLUE MOON FRUIT CO-OPERATIVE LIMITED is hereafter referred to as "the Company".

2. I hereby irrevocably appoint David Harold Allen CRAIG or failing him Barry Broughton HOLMES or failing either of them such other person as may from time to time be nominated in writing for that purpose by Coachcraft Ltd., as my proxy to vote at meetings of members of the Company and I also irrevocably appoint each of such persons and also the said Coachcraft Ltd. severally as my attorney with power but only in relation to shares of the Company to do all matters or things of every kind and nature which I myself could do if personally present and acting including without limitation of such power the power to transfer assign mortgage or otherwise deal with such shares.

3. I hereby request the Company to register my address in the register of members as care of Industrial Equity Limited, 44 Market Street, Melbourne and direct that all scrip receipts, notices, proxies, circulars and other communications and all payments whether dividends or other sums payable by the Company to me be sent to such address and declare that the receipt of the Secretary of Industrial Equity Limited shall be full and sufficient discharge therefor.

4. I covenant that no person has any claim to the shares in the Company which I have sold which prevents me from selling the whole

HIS HONOUR (Contd):

interest in such shares to Coachcraft Ltd. and that I will execute or have executed if so requested by Coachcraft Ltd. but at its expense all such further documents in relation to such sale as may be thought necessary or desirable more effectively to assure the benefit of such sale to Coachcraft Ltd. or to such other person as it may from time to time wish to have the benefit of such sale.

5. I covenant for myself my executors administrators and assigns to allow ratify and confirm all and whatever my attorney or proxy or Coachcraft Ltd. shall do or cause to be done by virtue of this Deed.

Insert date: IN WITNESS WHEREOF I have hereunto set my hand and seal this day of , 1976.

Insert Name & sign Witness to sign: SIGNED SEALED AND DELIVERED by the said .... in the presence of ....

(Seal)

The offer so made did not fall within the take-over provisions of the Victorian Companies Act 1961. The purchase price in that offer was increased on or about 12 August 1976. By 2 September 1976 the plaintiff had purchased 58,886 shares in the company.

The plaintiff lodged with the Commissioner for Corporate Affairs a statement dated 31 March 1977 the headings and first three paragraphs whereof were as follows :

COACHCRAFT LTD.

(inc. in Queensland)

A wholly owned subsidiary of Industrial Equity Limited

HIS HONOUR (Contd):

STATEMENT BY COACHCRAFT LTD. PURSUANT TO THE PROVISIONS OF SECTION 180C AND IN ACCORDANCE WITH PART A OF THE TENTH SCHEDULE TO THE COMPANIES ACT 1961 OF THE STATE OF VICTORIA

1. PRELIMINARY

References in this Statement to "the Act" are to the Companies Act 1961 of the State of Victoria. The takeover offers hereinafter referred to are hereinafter collectively referred to as "the Takeover Scheme".

2. Full particulars of the takeover offers proposed to be made pursuant to the Takeover Scheme for the acquisition by Coachcraft Ltd. ("Coachcraft") of shares in the capital of Blue Moon Fruit Co-operative Limited ("Blue Moon") are set out in the proposed form of takeover offer which is set forth in paragraph 3 below.

3. PROPOSED FORM OF OFFER

The following is the proposed form of offer which will be dispatched to shareholders in Blue Moon pursuant to the Takeover Scheme :-

There then was set out an offer in the terms of the offer to which I next refer and also additional information required to be stated which included a statement that the plaintiff was entitled within the meaning given to that term by section 180A of the Companies Act 1961 to 58,886 ordinary shares in the capital of the first-named defendant.

On 21 April 1977 the plaintiff made a takeover offer for all the issued shares in the first-named defendant which had not already been sold to it and it gave notice thereof to the first-named defendant on 22 April 1977. That takeover offer was made by letter dated 21 April 1977 to all the shareholders of the first-named defendant who had not executed transfers of their shares to the plaintiff. The first two

HIS HONOUR (Contd):

In the Supreme Court of Victoria

paragraphs and the first sentence of the third paragraph of that letter were in the following terms :

> We have pleasure in enclosing a takeover offer for your shares in Blue Moon Fruit Co-operative Limited.
>
> The price which we offer is $1.20 per share which is payable in cash to you (within 14 days of receiving your documents) and which is unconditional as to number of acceptances received.
>
> It will be recalled that last year we made an offer of $1.00 per share for 15% only, of the total capital.

No. 9 Reasons for Judgment of His Honour Mr. Justice Menhennitt

8th June 1978

The enclosed takeover offer was headed :

COACHCRAFT LTD.

(inc. in Queensland)

A wholly owned subsidiary of INDUSTRIAL EQUITY LIMITED OFFER

To acquire all your shares in

BLUE MOON FRUIT CO-OPERATIVE LIMITED

The first sentence of paragraph (b) of the offer was in the following terms :

> (b) Shares proposed to be acquired under Takeover Scheme
>
> Coachcraft proposes to acquire during the period during which offers made pursuant to the Takeover Scheme remain open for acceptance as hereinafter provided 356,169 shares of $2 each in Blue Moon being all the shares in Blue Moon on issue on the date of this offer other than the shares in Blue Moon to which Coachcraft is entitled (within the meaning of Section 180A of the Act) at the date hereof.

HIS HONOUR (Contd):

Paragraph (d) of the offer was in the following terms :

(d) Consideration.

The consideration offered is One dollar twenty cents ($1.20) cash for each offer share in respect of which you accept this offer by executing the form of acceptance and transfer and the two copies of the Power of Attorney and otherwise complying with paragraph (o) below. The Power of Attorney is required because payment will not be delayed pending registration of shares in the name of Coachcraft - see paragraph (i) below. Blue Moon's Article six at present provides "The shares held or capable of being held by or by and on behalf of any one member shall not exceed in number ten thousand nor in value ten thousand pounds".

Sub-paragraphs (A) and (B) of paragraph (o) of the offer were in the following terms :

(o) Acceptance of Offer

(A) To accept this offer :

(i) Sign in the presence of a witness so as to be binding on you the Form of Acceptance and Transfer (Blue form) and the two copies of the Power of Attorney (Buff forms).

(ii) Forward the Form of Acceptance and Transfer and the Power of Attorney documents together with your Share Certificates to be received by Coachcraft Ltd., c/- Industrial Equity Limited,

HIS HONOUR (Contd):

151 Macquarie Street, Sydney, New South Wales, prior to the expiration of the period during which this offer remains open.

(B) By signing in the presence of a witness the Form of Acceptance and Transfer you will be deemed to have :

(i) authorised Coachcraft to complete on your behalf on the form correct details of your holding of offer shares;

(ii) acknowledged that insofar as any blanks remain in that form Coachcraft is thereby authorised to complete such blanks in such manner as is necessary to make such Acceptance and Transfer effective in relation to all the shares held by you in the capital of Blue Moon.

There was attached to that offer a copy of the statement dated 31 March 1977 which the plaintiff had lodged in the office of the Commissioner for Corporate Affairs. There were also attached two documents termed "Form of Acceptance & Transfer by Shareholders of Blue Moon Fruit Co-operative Limited," and what was termed in paragraph (o) (A) "Power of Attorney". The front of the first of those two documents was in the following terms :

ACCEPTANCE DOCUMENTS

THIS AND THE POWER OF ATTORNEY

ARE IMPORTANT DOCUMENTS

HIS HONOUR (Contd):

In the Supreme Court of Victoria

If you do not understand them please consult your financial or legal adviser immediately

For instructions on how to accept the offer see overleaf

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FORM OF ACCEPTANCE & TRANSFER

BY SHAREHOLDERS OF

BLUE MOON FRUIT CO-OPERATIVE LIMITED

8th June 1978

Please insert full name and address

I/We Mr. Mrs. Miss .....

Full name in block letters

of .....

Full address in block letters

Insert number

being a registered holder of shares of $2.00 each in Blue Moon Fruit Co-Operative Limited

(1) HEREBY ACCEPT the Takeover Offer by Coachcraft Ltd.

(2) Have duly executed (in the case of a person signed in the presence of a witness) or will duly execute the two copies of the Power of Attorney required with this document for acceptance of the Takeover Offer.

(3) Transfer the shares shown above held by me/us to Coachcraft Ltd. for the consideration set out in the said offer subject to the several conditions on which I/we held the same immediately before the execution hereof and Coachcraft Ltd. does hereby agree to take the said shares subject to the conditions aforesaid.

(4) Authorise Coachcraft Ltd. to complete on my behalf in the space provided above correct details of my holding of shares in Blue Moon Fruit Co-Operative Limited.

HIS HONOUR (Contd):

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Where this document is signed under Power of Attorney the donee of the Power of Attorney declares he has no notice of revocation.

SIGNED by the Transferor)
this day of)
1977, in)
the presence of :)Transferor

.....
Witness

The second of those two documents was in the following terms :

Insert name & address

TO ALL TO WHOM THESE PRESENTS SHALL COME

I .....

of .....

give notice as follows :

1. I have accepted the offer dated of COACHCRAFT LTD., c/o INDUSTRIAL EQUITY LIMITED of 151 Macquarie Street, Sydney to acquire all my shares in the capital of BLUE MOON FRUIT CO-OPERATIVE LIMITED and have sold such shares to Coachcraft Ltd. I enter into this Deed as one of the terms of such sale. BLUE MOON FRUIT CO-OPERATIVE LIMITED is hereafter referred to as "the Company". I hold the shares I have sold and all dividends accretions and other benefits accrued or to accrue in respect thereof but not paid or made for Coachcraft absolutely.

2. I hereby irrevocably appoint David Harold Allen CRAIG or failing him Barry Broughton HOLMES or failing either of them such other person as may from time to time be nominated in writing for that purpose by Coachcraft Ltd. as my proxy to vote at meetings of members of the Company and I also irrevocably appoint

HIS HONOUR (Contd):

each of such persons and also the said Coachcraft Ltd. severally as my attorney with power but only in relation to shares of the Company to execute all notices proxies and other documents and to do all matters or things of every kind and nature which I myself could do if personally present and acting including without limitation of such power the power to transfer assign mortgage or otherwise deal with such shares.

3. I hereby request the Company to register my address in the register of members as care of Industrial Equity Limited, 151 Macquarie Street, Sydney and direct that all scrip receipts, notices, proxies, circulars and other communications and all payments whether dividends or other sums payable by the Company to me be sent to such address and declare that the receipt of the Secretary of Industrial Equity Limited shall be full and sufficient discharge therefor.

4. I covenant that no person has any claim to the shares in the Company which I have sold which prevents me from transferring the whole beneficial interest in such shares to Coachcraft Ltd. and that I will execute or have executed if so requested by Coachcraft Ltd. but at its expense all such further documents in relation thereto as may be thought necessary or desirable more effectively to assure the benefit of the acquisition of such shares to Coachcraft Ltd. or to such other person as it may from time to time wish to have the benefit thereof.

5. I covenant for myself my executors administrators and assigns to allow ratify and confirm all and whatever

HIS HONOUR (Contd):

In the Supreme Court of Victoria

my attorney or proxy or Coachcraft Ltd. shall do or cause to be done by virtue of this Deed.

6. Coachcraft Ltd. is empowered to transfer the benefit of this Deed.

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Insert Date — IN WITNESS WHEREOF I have hereunto set my hand and seal this day of 1977.

Insert Name & sign — SIGNED SEALED AND DELIVERED) by the said .....) in the presence of) .....)

Witness to sign

It is to be noted that, whilst this document termed Power of Attorney was not identical in terms with the document termed power of Attorney enclosed with the 1976 offer, the two documents were very similar in their operative effect and no distinction between them was drawn in argument before me nor does there appear to me to be any significant difference for the purpose of deciding the issues in this case.

By the beginning of August 1977 the plaintiff was registered as the holder of 10,000 shares in the first-named defendant.

By notice dated 13 September 1977 the first-named defendant called an extraordinary general meeting of its members for 5 October 1977. Paragraph 2 of that notice was in the following terms :

> The said extraordinary general meeting is commenced in pursuance of a requisition deposited at the registered office of the company on the 5th day of August 1977 by Coachcraft Ltd.

The third paragraph commenced as follows :

> The objects of the meeting as stated in the requisition are to consider and if

HIS HONOUR (Contd):

thought fit pass the following resolutions :-

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There followed six resolutions headed "As ordinary resolutions". There next appeared the following :

As special resolutions

7. That the Articles numbered 159, 3, 6 and 80 of the company's Articles of Association be and are hereby deleted.

8. That the Article numbered 58 of the company's Articles of Association be and is hereby amended by deleting the figure "12" and substituting therefor the figure "2".

The notice then continued :

AND NOTICE IS HEREBY FURTHER GIVEN that the Board of Directors will submit the following resolutions to the meeting as special resolutions :

1. That the name of the company be changed to -
S.V.P. Fruit Co. Ltd.

2. That the company be wound up voluntarily and that Maxwell Geoffrey Chapman of 351 Collins Street, Melbourne, Chartered Accountant, be appointed liquidator for the purposes of the winding up and that the remuneration of the said Maxwell Geoffrey Chapman be the liquidator's normal professional fees based on time spent by the liquidator, his partners and staff and that the liquidator be authorised at his discretion to destroy the books and records of the company within a period of five years after dissolution of the company.

I shall refer to the last mentioned resolution of which notice was given as the winding up resolution.

HIS HONOUR: Prior to the meeting of shareholders of the first-named defendant on 5 October 1977, the registered holders of not less than 49,086 shares in the first-named defendant had completed, signed, and delivered to the plaintiff documents in the form of the transfers annexed to the offer of 14 May 1976 in respect of those shares, and had completed, signed, sealed, and delivered to the plaintiff documents in the form of what was termed the Power of Attorney in the offer dated 14 May 1976, and the registered holders of not less than 61,226 shares in the first-named defendant had completed, signed, and delivered to the plaintiff documents in the form of the transfers attached to the offer made 21 April 1977 in respect of those shares, and had completed, signed, and delivered to the plaintiff documents in the form of what were termed the Power of Attorney attached to that offer. Prior to that meeting, and purporting to act in accordance with the terms of those documents, David Harold Allen Craig purported to appoint Mr. Brierley as proxy for two shareholders holding a total of 9,290 shares and purported to appoint M/s M. Moloney as proxy for three shareholders holding a total of 4,016 shares. Prior to that meeting the registered holders of a further 15,000 shares or more appointed Messrs. Brierley and Craig and M/s M. Moloney as their proxies, such proxies being in the form enclosed with the notice convening the meeting. All documents in the form of the aforesaid documents terms Powers of Attorney accompanying the offers dated 14 May 1976 and 21 April 1977, the purported appointments in respect of the 9,290 and 4,016 shares above referred to - also being in the form enclosed with the notice convening the said meeting - and the appointments in respect of the above-mentioned 15,000 shares above referred to were deposited at the office of the first-named defendant not less than twenty-four (24) hours before the time for holding the said meeting. If any of the appointments in respect of the 15,000 shares were signed under a power of attorney or other authority, that power of attorney or other authority or a notarially certified copy thereof was also deposited at that office not less than twenty-four (24) hours before the time for holding the meeting.

HIS HONOUR (Contd): The duly appointed representative of the plaintiff at the said meeting was Ronald Alfred Brierley.

At the meeting, after a resolution relating to a report by the directors was unanimously passed on a show of hands and certain other discussion, it was unanimously agreed that the second resolution submitted by the Board of Directors in the notice of meeting, that is the winding-up resolution, be put. This resolution was carried on a show of hands. Messrs. Brierley, Craig and Mann and M/s M. Moloney demanded a poll thereon. On the poll 186,511 votes were cast in favour of the resolution, the plaintiff cast 10,000 votes against the resolution, Mr. Brierley purported to cast the 9,290 votes attached to the above-mentioned 9,290 shares against the resolution, M/s M. Moloney purported to cast the 4,016 votes attached to the 4,016 shares above referred to against the resolution, Mr. Craig purported to cast the remainder of the 110,312 votes attached to the remainder of the 110,312 shares above referred to (that is, the 49,086 and the 61,226 shares in respect of which powers of attorney, in the forms accompanying the plaintiff's above-mentioned offers, had been executed) against the resolution, and a further 17,047 votes (including the votes attached to the above-mentioned 15,000 shares) were cast against the resolution. No one present at the meeting failed to cast a vote that he was entitled to cast. The Chairman disallowed all the votes attached to the above-mentioned 110,312 shares and allowed all the other votes that were cast or purportedly cast.

The result was that, having regard to the Chairman's disallowance of the votes cast in respect of the above-mentioned 110,312 shares, the winding-up resolution was carried, but if the votes which the Chairman disallowed had been allowed and included, that resolution would have been defeated. It is the passing of that resolution which is the subject of challenge in the present action.

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HIS HONOUR: The first resolution of which the Board of Directors had given notice as a special resolution, namely, that the name of the first-named defendant be changed to S.V.P. Fruit Co. Ltd., was carried.

The submission for the plaintiff is that the documents termed powers of attorney (accompanying the plaintiff's offers) which were executed by shareholders in the first-named defendant and appointed proxies and authorised the appointment of proxies to vote at meetings of the first-named defendant are valid and were, with the proxies given pursuant thereto, properly lodged with the first-named defendant before the meeting on 5 October 1977 and that the chairman of the meeting erroneously excluded votes cast in accordance with such proxies. As part of such submission it was submitted that section 141 of the Companies Act 1961 gave the shareholders who had given such proxies a statutory right to appoint proxies which could not be taken away by any article of association of the first-named defendant or any implication to be drawn from those articles.

The submission for the defendants is that the chairman of the meeting correctly disallowed the 110,312 votes which he did in fact disallow. In so submitting no reliance was placed upon the concluding sentence of article 69 of the articles of association, which reads :

> "The decision of the Chairman as to the admission or rejection of a vote shall be final and conclusive."

The essence of the submission for the defendants was that the proxies disallowed were invalid. It was submitted that the reason for this invalidity was that sales of shares to the plaintiff in excess of 10,000 constituted a breach of article 6 of the first-named defendant's articles, that for shareholders to hold shares in trust for the plaintiff in excess of 10,000 was also a breach of that article by reason of the words "or by and on behalf of" in that article and that there was an implication that the proxies given in pursuance of sales of shares in breach of article 6 were also invalid. It was submitted that this applied

HIS HONOUR (Contd): to all the votes which the chairman disallowed and hence that the chairman correctly disallowed those votes.

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Part of the submission for the defendants was that articles 5 and 6 have special statutory or other significance in that their adoption was a condition of the Governor in Council giving consent to the first-named defendant changing its name to include the word "Co-operative" and they were in a form contemplated by section 356(11) and (12) of the Companies Act 1938. Indeed, in paragraph 24 of the defence of the first-named defendant it is pleaded that articles 5 and 6 were approved by the Governor in Council pursuant to section 356 and in particular section 356(12)(c)(i). Section 17(2)(a)(iii) of the Companies Act 1938 provided that except with the consent of the Governor in Council no company shall be registered by a name which contains the word "Co-operative". Section 356 of the Companies Act 1938 contained restrictions on offering shares for subscription or purchase to the public. Sub-section (11) of that section enacted that the provisions of section 356 should not apply to offers of shares in a co-operative company. Sub-section (12) of the section provided, inter alia, that in sub-section (11) "Co-operative Company" meant a company formed and registered under Part 1 of the Act (which deals with trading companies) the name of which lawfully contained the word "Co-operative" and the rules of which in the opinion of the Governor in Council made adequate provision that the number and total value of shares capable of being held by, or by and on behalf of, any one member is limited to a number and to a total value approved by the Governor in Council. These provisions all point to the conclusion that the inclusion of articles 5 and 6 in the articles was a condition of the approval of the Governor in Council to the giving of consent to the inclusion of the word "Co-operative" in the name of the first-named defendant.

Counsel for the plaintiff replied to all this by referring to article 8 of the Articles which is in the following terms :

HIS HONOUR (Contd):

"The shares of the Company shall not be offered in any manner in contravention of Section 356 sub-section (1) to (10) inclusive of the Companies Act 1938 and the provisions of Section 356 sub-sections (11) and (12) shall not apply to the Company."

This article clearly purports to negate subsection (11) of section 356 by providing that, although it is a Co-operative company, nonetheless its shares shall not be offered in any manner in contravention of sub-sections (1) to (10) inclusive of the Companies Act 1938 (a restriction which would otherwise not have applied to the first-named defendant) and also purports expressly to exclude the application of subsection (12) of the Companies Act 1938. Article 8 is one of the articles which, by article 159, cannot be altered, varied or rescinded without the consent of the Governor in Council. The reason for the presence of article 8 is far from clear but it does appear to me to negate any conclusion that articles 5 and 6 were adopted pursuant to section 356 (12)(e)(i) of the Companies Act 1938 because the articles purport to provide expressly that subsection (12) shall not apply to the Company. It seems to me to follow that articles 5 and 6 have no statutory or other special significance than that by reason of article 159 they cannot be altered, varied or rescinded without the consent of the Governor in Council. However, I can see no reason why article 159 could not be deleted by a special resolution of the first-named defendant, as was proposed in the special resolution numbered 7 in the notice for the meeting of 5 October 1977, it being proposed in the same resolution that article 6, among others, be deleted.

This conclusion makes it unnecessary to consider the other arguments advanced on behalf of the plaintiff in reply to the defendants' contention as to the special nature of articles 5 and 6. I deal with the matter on the basis that those articles have no more significance than articles have in any other company.

HIS HONOUR: I deal next with the issue whether the articles of association of the first-named defendant, and, in particular, article 6, and the implications thereof invalidate the proxies which the chairman excluded. I shall deal subsequently with the plaintiff's reliance on section 141 of the Companies Act 1961.

As an aspect of this first argument it was submitted for the defendants that the articles of association of the first-named defendant constitute a contract between the first-named defendant and its members. Reliance was placed upon the statements and authorities referred to in Halsbury's Laws of England (4th Edn.) Vol. 7, pages 71 to 73, paragraphs 117 to 121, Gower, The Principles of Modern Company Law (3rd Edn.) pages 261 et seq including Rayfield v. Hands (1960) Ch. 1 and Thor Industries v. O'Donnell C.C.H. Australian Corporate Affairs Reporter Vol. 2, 29,411 at 29,415 (a decision of the Full Court of this Court which was affirmed by the High Court in O'Donnell v. Thor Industries Ltd. 51 A.L.J.R. 569, Aicken, J. expressly agreeing with the reasons of the Full Court and the other members of the High Court not saying anything inconsistent with the passage in the Full Court judgment relied upon by the defendants). Reliance was also placed on section 33(1) of the Companies Act 1961. It was further submitted that members of a company are deemed to be aware of the contents of the company's articles (Halsbury's Laws of England (4th Edn.) Vol. 7, page 73, paragraph 121 and the authorities there cited).

It was also submitted for the defendants in reliance upon Hickman v. Kent or Romsey Marsh Sheepbreeders Association (1915) 1 Ch. 881 at 897 to 898 and In Re H.R. Harmer Ltd. (1959) 1 W.L.R. 62 at 84 and 87, that a company is entitled as against its members to enforce and restrain breaches of its articles and that the members of a company are entitled to have its affairs conducted in accordance with the articles of association.

For the plaintiff it was conceded that the articles constitute only a kind of a contract and reliance was placed upon the statements of Cussen, J. in The Land Mortgage Bank of Victoria v. Reid (1909) V.L.R. 284 at 288 to 289. In that passage

HIS HONOUR (Contd): Cussen, J. said, after referring to the then equivalent of section 33(1) of the Companies Act 1961, that a reference to the provisions of the then Act as to the contents of the memorandum "supports the view that by these words alone the intention was not to constitute a contract such as would enable an action to be brought, say, for the payment of moneys, but was to establish what might be called a law by which the company and its members, while they are members are to be bound." For the plaintiff it was submitted, inter alia, that, if the articles of the first-named defendant did create any rights, the only appropriate remedies were an injunction to ensure that the articles were observed and possibly a declaration but that the chairman of the meeting had no power to disallow the proxies and the votes purported to be cast upon the basis thereof.

I find it more convenient to deal first with the substantive issue as to whether or not the proxies were valid and effective proxies. I shall return to the question of rights and remedies after dealing with that issue.

The argument for the defendants as to the meaning and effect of the articles was ultimately put in the alternative and I therefore deal with those two alternatives. It was submitted that article 6, limiting the number of shares which could be held beneficially by a shareholder and the implications thereof, totally invalidated anything done in contravention of that article and such implications, or, alternatively, that it invalidated as against the company anything done in contravention of that article and such implications.

The authorities appear to me to establish that the contravention of an article of association of a company such as article 6 and the implications thereof does not invalidate totally what is done but does no more than invalidate what is done as against the company and, it may be, its directors and members; it does not produce total invalidity as between a shareholder and a purchaser.

HIS HONOUR: In support of both of the alternative propositions the defendants placed reliance upon the statement in Halsbury's Laws of England (4th Edn.) Vol. 7 at page 221, paragraph 401 in the following terms :

> "Where a limited number of shares only can be held by a shareholder, a transfer to a person already holding the prescribed number by a transferor with notice of the fact is invalid."

It is to be noted that this proposition in its terms deals only with an actual transfer. What I am concerned with in this case is not a transfer but a sale without transfer and a power of attorney, giving proxies and authorising the giving of proxies, associated with such sale.

Further, the authorities appear to me to establish that, if the sale itself is in contravention of such an article and its implications, the most that is produced is invalidity, as against the company, of the sale and its effects, but not invalidity as between the shareholder and the purchaser.

The case cited as authority for the proposition in paragraph 401 of Halsbury set out above itself recognises, I think, that it is only as against the company that invalidity results. That case is In re Newcastle-Upon-Tyne Marine Insurance Company; Ex parte Henderson 19 Beav. 107; 52 E.R. 289. There, a transfer of shares in excess of a permissible number had been registered. The opening paragraph of the judgment of Romilly, M.R. reaffirms his decision in Shortridge v. Bosanquet 16 Beav. 84; 51 E.R. 708 that even a registered transfer of shares in contravention of the company's deed of settlement (because it took place without the consent of the directors) may be valid in equity as against the company if the transferring shareholder acted bona fide. The Master of the Rolls distinguished that case from the case before him where he doubted the bona fides of the transfer and found that the transferor had not taken all possible means of ascertaining that every due formality had been complied with and he

HIS HONOUR (Contd): concluded his judgment by expressly not determining any question as between the transferor and the transferee.

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Hawks v. McArthur (1951) 1 A.E.R. 22 is direct authority for the proposition that, despite the fact that executed transfers of shares were in direct contravention of a pre-emption provision in a company's articles, nonetheless, the transfers gave to the transferees who had given full consideration for the shares beneficial rights to the shares as against third persons.

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For the defendants reliance was placed upon the decision of the House of Lords in Hunter v. Hunter (1936) A.C. 223. That case was concerned with a pre-emption clause (article 17 of that company's articles). The Law Lords, with the possible exception of Lords Blanesburgh and Atkin, appear to have taken the view that a transaction of mortgage in contravention of the articles was not totally invalid as between the shareholder and the mortgagee. What the House of Lords decided was that a registration of shares, in contravention of the pre-emption clause, to a transferee with notice of the pre-emption clause should be set aside. However, Viscount Hailsham, L.C. in whose opinion Lord Macmillan concurred said at page 248 that he did not think that disregard of the article rendered the transaction ultra vires the company or that it could not have been regularised by the assent of all the shareholders. Lord Blanesburgh said at page 249 that he was in accord with the conclusions reached by the Lord Chancellor on each of the two broad questions raised by the appeal and at pages 254 to 255 he appears to have regarded the case as determined by the Court of Appeal decision not appealed from and by the estoppel issue raised in the case. Lord Russell of Killowen said at page 264 :

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> "As at present advised I do not feel convinced that the entry on the register of persons who are transferees under a transfer not authorised by article 17 is necessarily a nullity."

HIS HONOUR (Contd): Whilst Lord Atkin did say at page 261 that in his opinion no rights arose between the mortgagee and the shareholder under any contract of sale either equitable or legal, he went on to say immediately that in any case the power of sale over the deposited shares did not in his judgment include a power to sell or agree to sell the whole equitable interest in the shares.

For the defendants strong reliance was also placed on the decision of the House of Lords in Lyle & Scott Ltd. v. Scott's Trustees (1959) A.C. 763. That was another case concerned with a pre-emption provision in an article of association of a company. The House of Lords decided that, within the meaning of the relevant pre-emption article, shareholders, by entering into an agreement with a third party whereby for a consideration they agreed to put him as fully in control of the company as they could without registering transfers of the shares, could be inferred to be desirous of transferring, within the meaning of that article, and could accordingly be ordered to comply with the article, which meant they were required to offer the shares to other shareholders willing to purchase at a price to be determined in the manner specified in the article. This decision was, however, essentially one between the company and its shareholders and did not deal with the question as to what rights, if any, arose between the shareholders and purchasers of their shares.

In Gold v. Penney (1960) N.Z.L.R. 1032 at 1058 to 1061 it was decided expressly by two members of the Court of Appeal that an agreement to sell in breach of a pre-emptive provision was not a nullity and could, as between vendor and purchaser, be regularised by the directors.

In any event, it appears to me that pre-emption clauses in articles are sui generis and the enforcement of them by a company or its shareholders really involves the equivalent of granting specific performance of the pre-emptive rights. (See, for example, (1959) A.C. at 786.) But where, as in the present case, the issue is as to the effect of a limitation on the quantum of shareholding, decisions on pre-emption clauses

HIS HONOUR (Contd): appear to me not to determine the position as between a shareholder and a purchaser where both the shareholder and the purchaser know or ought to know that the sale is in breach of the articles.

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A much closer analogy is, I think, to be found in the situation where a purchaser splits his shareholding between himself and nominees in order to avoid a prohibition on holding more than a specified number of shares. As counsel for the plaintiff pointed out, it has been held in Re Stranton Iron and Steel Company (1873) 16 Eq. 559 and Pender v. Lushington (1877) 6 Ch.D. 70 at 76 to 78 that such transfers are valid (see also Palmer's Company Law (22nd Edn.) page 575).

However, the use of nominees was not employed in the present case and the transfers executed were all to the plaintiff itself or such as entitled the plaintiff to transfer to itself and the shares the subject of such transfers far exceeded the limit of 10,000.

Having reviewed the authorities relied upon, my conclusion is that, with an article such as article 6 of the first-named defendant, a sale in breach of that article and the implications of that article is not totally invalid as between the vendor and purchaser. Whilst it would be wrong for me to pronounce finally on the point in the absence of a case between a vendor and the plaintiff, my inclination is to think that the vendors of such shares would, for example, be bound to account to the plaintiff for any payments received in respect of such shares such as dividends or a return of capital pursuant to a reduction of capital or a distribution of a company's property among members upon a winding up (see section 264 of the Companies Act 1961).

The present case, however, is concerned not with the rights of a purchaser of shares as against vendors but directly with relationships between the company and its shareholders. It concerns the validity of proxies pursuant to which votes were attempted to be cast at a meeting of the company with respect to a resolution

HIS HONOUR (Contd): put to that meeting. The issue before me is whether the giving of those proxies was invalid as against the company.

In its terms, article 6 of the first-named defendant's articles does not prohibit the giving of the proxies relied upon by the plaintiff. For the defendants, however, it was submitted that article 6 raised an implication which made invalid the granting of the proxies. In substance the submission was that what could not be achieved directly could not be achieved indirectly. It was said that the beneficial holding by the plaintiff of shares in excess of 10,000 was invalid as against the company, because article 6 prohibited shares in excess of 10,000 being held by or on behalf of the plaintiff, and that the attempt to achieve the same result by executing transfers and giving to the transferee, the plaintiff, or its nominees the right to vote at meetings through proxies granted by the vendors of the shares was equally invalid.

For the defendants reliance was placed upon the following statement by Isaacs, J. in O'Keefe v. Williams (1907) 5 C.L.R. 217 at 230 :

> "In every contract there is an obligation, implied where not expressed, that neither party shall do anything to destroy the efficacy of the bargain he has entered into."

As I understood the argument for the defendants in answer to the plaintiff's reliance upon the provisions of section 141 of the Companies Act, reliance was placed upon the principles stated by the High Court in the case to which I shall next refer in support of the proposition that the vendors of shares to the plaintiff, in excess of 10,000 shares, thereby deprived themselves of the right to vote at meetings of the company, either in person or by proxy. For reasons I shall give, I do not accept that contention. The principles so stated so, however, in my view, support the contention for the defendants that there is an implication

HIS HONOUR (Contd): from article 6 that it is not permissible to achieve by the granting of proxies what would be invalid as against the company, namely to have shares in excess of 10,000 held beneficially for the plaintiff. Those principles were stated by Barwick, C.J. and Aickin, J. in Ansett Transport Industries (Operations) Proprietary Limited v. The Commonwealth of Australia in the following passages in the judgments of Barwick, C.J. and Aickin, J. Barwick, C.J. said (at page 3 of the printed judgment) :

> "I agree with the reasons advanced by my brother Aickin for concluding that it would be a breach of the agreement between the plaintiff and the Commonwealth for the Commonwealth by any means within its lawful power to enable a third airline operator to carry for reward on a trunk route. I would prefer, I think, to put the obligation not to do so upon the general rule that a party to a contract made on the footing of the continuance of a state of things may not by any act within its power or control do anything to destroy or relevantly to diminish that situation. But I would accept that the same result may be reached by the implication of a term with both positive and negative obligations to maintain and not to destroy or relevantly alter the basis on which the parties have contracted."

Aickin, J. said (at pages 39 to 40 of the printed judgment) :

> "I would prefer to express the position by saying that the circumstances mentioned in the paragraphs referred to above, including the particular clauses of the Agreements in the context of the Agreements as a whole, demonstrate that the parties were contracting, at least from 1961 onwards, on the common understanding that the position then prevailing would continue during the term of the Agreements and that the common objective of the parties would continue to be as

HIS HONOUR (Contd):

stated. For one party to bring that situation to an end otherwise than in accordance with the Agreement is a breach of such a contract. This is a position analogous to that described in the speech of Lord Atkin in Southern Foundries (1926), Ltd. v. Shirlaw (1940) A.C. 701. He said, at p.717 :

> 'The arrangement between the parties appears to me to be exactly described by the words of Cockburn, C.J. in Stirling v. Maitland 5 B. & S. 840, 852: "If a party enters into an arrangement which can only take effect by the continuance of an existing state of circumstances"; and in such a state of things the Lord Chief Justice said: "I look on the law to be that ... there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative." That proposition in my opinion is well established law. Personally I should not so much base the law on an implied term, as on a positive rule of the law of contract that conduct of either promiser or promisee which can be said to amount to himself "of his own motion" bringing about the impossibility of performance is in itself a breach.'

The general proposition stated by Lord Blackburn in Mackay v. Dick (1881) 6 A.C. 251, at p.263 appears to me helpful in the present situation. He there said :

> 'I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that

HIS HONOUR (Contd):

In the Supreme Court of Victoria

No. 9 Reasons for Judgment of His Honour Mr. Justice Menhennitt

8th June 1978

> something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.'"

It was submitted on behalf of the defendants, and in my view correctly, that whilst Barwick, C.J. and Aickin, J. dissented in the result in that case, the majority of the High Court did not disagree with the principles stated by Barwick, C.J. and Aickin, J. What the majority decided, it appears to me, was not to draw the implication from the agreements in question which Barwick, C.J. and Aickin, J. in fact drew.

In my view the articles, and in particular article 6, do contain an implication that a shareholder cannot by the granting of a proxy or proxies indirectly achieve as against the company a result he could not achieve by selling to anyone, including the plaintiff, shares which would give the purchaser beneficial ownership of shares in excess of 10,000. This conclusion is I think supported by the consideration that the plaintiff, as beneficial owner, was entitled to direct both the vendors and the proxies as to the manner in which they should vote at the meeting (Kirby v. Wilkins (1929) 2 Ch. 444 at 454, Butt v. Kelson (1952) Ch. 197 at 207 and Walker v. Willis (1969) V.R. 778). That the shareholders who granted the powers of attorney had purported to sell to the plaintiff shares in excess of 10,000 was manifested to the first-named defendant by the time of the meeting on 5 October 1977 because, before that date, the plaintiff had become registered as the holder of 10,000 shares and the givers of the proxies informed the first-named defendant in the first paragraph of the documents termed powers of attorney that they had sold their shares to the plaintiff. That those powers of attorney did not relate to the 10,000 shares transferred to

HIS HONOUR (Contd): the plaintiff was manifest at the meeting, because votes in respect of those 10,000 shares were independently cast at the meeting.

Insofar as it was necessary for it to be shown that the shareholders who gave the proxies in the powers of attorney knew or ought to have known that what they were doing was in breach of the implications of article 6, the documents passing between the plaintiff and the shareholders established, I think, this element. In the case of the sales resulting from the takeover offer, the vendors had their attention drawn to article 6 of the first-named defendant's articles because its terms were set out in paragraph (d) of the offer. In that offer it was also stated that the plaintiff was already beneficially entitled to more than 10,000 shares, namely 58,886 shares. In the 1976 offer, the statement that the offer was limited to a maximum of 60,000 shares alerted the vendors to the real possibility that their shares might be among the shares up to 50,000 which exceeded 10,000. Every shareholder who executed a power of attorney did so knowing that the purpose of the plaintiff seeking the power of attorney and the vendor granting the power was to circumvent article 6 by reason of the sentence reading: "Because of transfer restrictions in the Blue Moon Articles of Association it is a condition of our offer that you sign a Power of Attorney in respect of the shares you sell." Added to this is the presumption, above referred to, that shareholders are presumed to be aware of the contents of a company's articles of association.

In addition to disputing the implication relied upon by the defendants counsel for the plaintiff submitted that, in any event, the grants of the proxies in paragraph numbered 2 of the documents termed powers of attorney stood on their own feet and were valid grants of proxies even if the sales were invalid as against the company. This submission appears to me to involve a determination as to the real effect of the documents termed powers of attorney including the question whether paragraph 2 of those documents was severable. I disregard as of no significance the need to refer back in paragraph 2 to paragraph

HIS HONOUR (Contd): 1, by reason of the use of the expression "the company", because this reference could be achieved by severing out of the whole document, paragraph 2 and the sentence in paragraph 1 defining the expression "the company".

For the plaintiff it was submitted that paragraph 1 of the documents termed powers of attorney was no more than a recital or statement of fact and that paragraph 2 stood as an independent grant of a proxy in no way dependent on paragraph 1 or any other paragraph of the power of attorney. For the defendants the submission was that the powers of attorney were integral documents which stood or fell as a whole and that it was not permissible to sever paragraph 2 and disregard paragraph 1.

Looking solely at the documents termed powers of attorney, it seems to me that they are integral documents which stand or fall in toto and that paragraph 2 cannot be severed so as to stand and have effect on its own. In the case of each form of the powers of attorney, paragraph 1 contains an unequivocal statement that the grantor of the power has sold his shares in the company to the plaintiff This is supported by the covenant as to title in paragraph 4. Each form of power of attorney contains in paragraph 1 the words "I enter into this Deed as one of the terms of such sale". To disregard all this when considering the effect of paragraph 2 appears to me to disregard the reality of the documents. If the shares could have been transferred to the plaintiff there would have been no need for the granting of the proxies. It appears to me to be manifest from the documents themselves that the granting of the proxies was the means selected for giving to the plaintiff the vital voting right which shareholding would give but which could not be given by a transfer. There was no occasion for giving proxies to the plaintiff or its nominees unless for the obvious reason that sales could not result in transfers to the plaintiff by reason of the provisions of article 6. Although the principles applicable to contracts are not, I think, directly applicable to proxies, those principles (see Chitty on Contracts, General

HIS HONOUR (Contd): Principles (23rd Edn.) pages 495 to 496, paras. 1051 to 1053 and the authorities there referred to including Attwood v. Lamont (1920) 3 K.B. 571 at 593 and Kenyon v. Darwen Cotton Manufacturing Co. (1936) 3 K.B. 193 at 207 and the statement by Taylor, J. in Brooks v. Burns Philp Trustee Co. Ltd. (1969) 121 C.L.R. 432 at 442) are, I think, analogous to the principles applicable to documents which contain withim them proxies.

All I have said was I think true of the powers of attorney given in response to the first offer but it was underlined in paragraph 1 of the powers of attorney given in response to the takeover offer. That paragraph contained an explicit reference to the takeover offer, to which the company was entitled to look because notice thereof had been given to it. Paragraph (d) of that offer spelt out the reason for requiring the power of attorney, namely, to permit voting whilst the restriction on shareholding in article 6 continued. Paragraph 1 of the powers of attorney given in response to the takeover offer also stated that the vendor of the sales held "the shares I have sold and all dividends, accretions and other benefits accrued or to accrue in respect thereof but not paid or made for Coachcraft absolutely". As against the company this was invalid as in direct contradiction of article 6. This assertion, however, made the reason for the giving of the proxies even more clearly manifest.

Accordingly, it appears to me that the proxies given by paragraph 2 of the powers of attorney are inseverable from the whole documents and, as against the company, fell with the sales referred to in paragraph 1 of the documents, which were invalid as against the company but which were the raisons d'etre for the giving of the proxies.

The remaining substantive question concerns the reliance placed by counsel for the plaintiff upon section 141(1) of the Companies Act 1961 which is in the following terms :

HIS HONOUR (Contd):

141. (1) Subject to sub-section (2) of this section, a member of a company entitled to attend and vote at a meeting of the company, or at a meeting of any class of members of the company, shall be entitled to appoint -

(a) in the case of a company not having a share capital - another member or, where the articles so provide, another person (whether a member or not); or

(b) in any other case - not more than two other persons (whether members of not) -

as his proxy or proxies to attend and vote instead of the member at the meeting and a proxy appointed to attend and vote instead of a member shall also have the same right as the member to speak at the meeting, but unless the articles otherwise provide a proxy shall not be entitled to vote except on a poll.

In association with this section he relied upon the decision of Street, J. in Industrial Equity Ltd. v. New Redhead Estate & Coal Co. Ltd. (1969) 1 N.S.W.R. 565 and in particular the passage at p.569 where His Honour said :

"I turn then to the other main aspect of the case, namely the challenge made by the plaintiffs to the rejection of the 160 persons listed on Mr. Dixon's list. The terms of Art. 67 relevant to this point are as follows : 'In the case of any dispute as to the admission or rejection of a vote the chairman shall determine the same and such determination made in good faith shall be final and conclusive.' This provision is to be considered in the background that s.141 of the Companies Act 1961, as amended, confers a statutory right upon every member of a company to attend and vote by proxy. This statutory right is, of course, subject to regulation by the terms

HIS HONOUR (Contd):

of the company's articles. But the regulatory effect of the articles cannot be permitted to frustrate the statutory right of a shareholder. A right to lodge a vote by a proxy is no longer (as it was before the 1961 Act) purely a creature of contract as set forth in a company's articles."

He also relied upon the decision of Nagel, J. in Shepherd & Anor. v. The Farmers & Graziers Co-operative Grain Insurance and Agency Co. Ltd. C.C.H. Corporate Affairs Reporter, 8,505.

I agree, with respect, with the conclusions of Street, J. that section 141(1) of the Companies Act 1961 confers a statutory right upon every member of a company to attend and vote by proxy which may be regulated but not frustrated by a company's articles. It is to be noted, however, that section 141(1) entitles a member to appoint a proxy. This leaves open the question whether a member has validly done so.

I am unable to accept the submission for the defendants that, by reason of the provisions of article 6 and the implications thereof and the shareholders' knowledge, actual or presumed, of the breach of the articles involved in the sales, the shareholders once they had entered into sales which were invalid as against the company had thereby deprived themselves of the right to vote at company meetings either in person or by proxy. The principles stated by the High Court in the Ansett Transport Industries (Operations) case which I have set out above do not in my view lead to so far reaching a result. The vendors of shares, despite such sales, still retained, I think, the right to vote in person or to give valid and effective proxies.

What I do conclude in the present case is that, by reason of article 6 and the implications thereof and having regard to the fact that the appointment of proxies in the documents termed powers of attorney is inseverably associated with sales which are invalid as against a company,

HIS HONOUR (Contd): the whole of the documents termed powers of attorney, including the powers to appoint proxies contained therein, are ineffectual documents as against the first-named defendant, to exercise the entitlement of the shareholders to appoint proxies. As the sales of the shares were invalid as against the company and as the purported grant of power to appoint proxies is inseverably linked to the sales, the whole documents are I think ineffectual as against the company. This means, in my view, that the shareholders concerned have failed to exercise their entitlement to appoint proxies. If the shareholders had attended the meeting in person they would I think have been entitled to vote and they were still entitled to give effective proxies. However, neither of these things happened. All that happened was that the shareholders executed documents which were ineffectual to exercise their entitlement to appoint proxies. Accordingly, the provisions of section 141 of the Companies Act 1961 did not, in my view, validate votes exercised pursuant to the documents called powers of attorney.

I am disposed to think also that this conclusion is supported by another line of reasoning. Insofar as shareholders were parties to sales of shares which were invalid as against the company and insofar as they appointed proxies in an attempt to achieve indirectly what they could not do directly, the purported proxies were not, within the meaning and effect of section 141, real exercises of the shareholders' right to appoint proxies, because the proxies were in reality dictated by the plaintiff as beneficial owner of the shares, whereas, as against the company, this beneficial ownership was invalid.

I turn finally to the question of remedy. It was submitted on behalf of the defendants and, as I understood it, not disputed on behalf of the plaintiff, that the members of a company are entitled to have its affairs conducted in accordance with the articles of association (see the authorities, above referred to, relied upon by the defendants). This principle leads, in my view, to the conclusion that, as it was

HIS HONOUR (Contd): manifest to the company that the proxies in issue were not valid proxies by reason of matters appearing on the face of the proxies and matters known to the company, it was open to the chairman of the meeting to disallow them. Having regard to the time element, it was not realistic to expect the company to seek an injunction, because proxies could be lodged with the company as late as twenty-four hours before the meeting. The remedy of declaration would have been available to the plaintiff if it had succeeded in this action but, for the chairman to have allowed the proxy votes he disallowed, would have meant that the winding up resolution would not have been carried, whereas the effect of my decision is that it should have been carried and that the company was properly wound up.

For the reasons I have given the claims by the plaintiff in the action fail. This being so, there is no occasion to deal with the second-named defendant's counterclaim which is confined essentially to claims in the event of the plaintiff succeeding.

The judgment of the Court is: The claims by the plaintiff are dismissed; there will be judgment in the action for the defendants with costs, including the costs of the counterclaim, and reserved costs, to be taxed and paid by the plaintiff.

NO. 10.

J U D G M E N T

BEFORE HIS HONOUR MR. JUSTICE MENHENNITT
THE 8TH DAY OF FEBRUARY, 1978.

In the Supreme Court of Victoria

No. 10 Judgment of His Honour Mr. Justice Menhennitt

17th July 1978

THIS ACTION coming on to be heard before this Court on the 1st, 2nd, 3rd and 6th days of February, 1978 in the presence of Counsel learned for the Plaintiff and the Defendants

AND UPON READING the pleadings herein

AND UPON READING the exhibits put in evidence and set out in the Schedule hereto

AND UPON HEARING what was alleged by Mr. F.H. Callaway of Counsel for the Plaintiff and Mr. S. Charles one of Her Majesty's Counsel and Mr. H. Hansen of Counsel for the firstnamed Defendant and Mr. G. Uren of Counsel for the secondnamed Defendant.

THIS COURT DID ORDER that this action should stand for Judgment and this action standing for Judgment this day in the presence of Counsel for the Plaintiff and the Defendants THIS COURT DOTH DECLARE that :-

The claims by the Plaintiff are dismissed

AND THAT there will be judgment in the action for the Defendants.

AND THIS COURT DOTH ORDER that the Defendants' costs of this action, including the costs of the counterclaim and reserved costs, be taxed and when taxed be paid by the Plaintiff to the Defendants.

In the Supreme Court of Victoria

No. 10
Judgment of His Honour Mr. Justice Menhennitt.

17th July 1978

BY THE COURT

(Signed)

MASTER

Entered the 17th day of July 1978.

(Signed) P.S. Malbon

Prothonotary

S C H E D U L E

EXHIBITS

The Affidavit of D.H.A. Craig sworn 8th November, 1977 and the exhibits referred to therein.

Notice of Extraordinary General Meeting of Blue Moon Fruit Co-operative Limited dated 13th September, 1977, with attached form of proxy.

Notice to Admit to the firstnamed Defendant.

Notice to Admit to the secondnamed Defendant.

Memorandum and Articles of Association of S.V.P. Fruit Co. Ltd.

Letter dated 14th May, 1976 from Industrial Equity Limited to the Chairman of S.V.P. Fruit Co. Ltd. and the invitation dated 14th May, 1976 to selected shareholders of S.V.P. Fruit Co. Ltd., with the standard form of transfer and other attached documents.

Photograph copy of document headed Coachcraft Limited, incorporated in Queensland, a wholly owned subsidiary of Industrial Equity Limited. Statement by Coachcraft Limited pursuant to the provisions of Section 180C and in accordance with Part A of the Tenth Schedule to the Companies Act of the State of Victoria.

Photograph copy of document headed Companies Act 1961, Section 180H, to Blue Moon Fruit Co-operative Limited, signed for and on behalf of the plaintiff and dated 22nd April, 1977.

Notice dated 12th December, 1952 by the firstnamed Defendant.

In the Supreme Court of Victoria

No. 10
Judgment of His Honour Mr. Justice Menhennitt

17th July 1978

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NO. 11.

NOTICE OF APPEAL

In the Full Court of the Supreme Court of Victoria

No. 11 Notice of Appeal

20th June 1978

TAKE NOTICE that the Full Court of the Supreme Court of the State of Victoria will be moved by way of appeal on the first available day within the meaning of the Rules of the Supreme Court by Counsel on behalf of the abovenamed Appellant for an order that the judgment or order of the Supreme Court made and pronounced by the Honourable Mr. Justice Menhennitt on 8th June, 1978 in action no. 6951 of 1977 wherein the abovenamed Appellant was Plaintiff and the abovenamed Respondents were Defendants WHEREBY the Court adjudged or ordered that the claims by the Appellant be dismissed and that there be judgment in the action for the Respondents with costs, including the costs of the counterclaim, and reserved costs, to be taxed and paid by the Appellant, be set aside and that in lieu thereof orders may be made as set out in paragraph 9 hereunder. The whole of the judgment or order of the Supreme Court is complained of or appealed against on the following grounds (inter alia) :

1. That the judgment was erroneous and wrong in law.

2. That the Court was in error in adjudging or ordering that the claims by the Appellant be dismissed and that there be

judgment in the action for the Respondents with costs, including the costs of the counterclaim, and reserved costs, to be taxed and paid by the Appellant.

3. That the Court was wrong in holding that the firstnamed Respondent's Articles of Association and in particular Article 6 impliedly prohibited or precluded -

(a) the registered holders of shares in the firstnamed Respondent referred to in paragraph 1(a) of the Appellant's notices to admit dated 25th January, 1978 from appointing David Harold Allen Craig as their proxy in the form of the annexure attached to those notices and marked "B";

(b) the registered holders of shares in the firstnamed Respondent referred to in paragraph 1(b) of those notices from appointing David Harold Allen Craig as their proxy in the form of the annexure attached to those notices and marked "D".

4. That the Court was wrong in holding that -

(a) the documents in the form of the annexure attached to the Appellant's notices to admit and marked "B";

(b) the documents in the form of the annexure attached to those notices and marked "D",

were not valid and effectual appointments of David Harold Allen Craig as the proxy of the members of the firstnamed Respondent who executed those documents.

5. That the Court should have held that neither Article 6 nor any other provision of the firstnamed Respondent's Articles of Association prohibited or precluded -

(a) the registered holders of shares in the firstnamed Respondent referred to in paragraph 1(a) of the Appellant's notices to admit from appointing David Harold Allen Craig as their proxy in the form of the annexure attached to those notices and marked "B";

(b) the registered holders of shares in the firstnamed Respondent referred to in paragraph 1(b) of those notices from appointing David Harold Allen Craig as their proxy in the form of the annexure attached to those notices and marked "D".

6. That the Court should have held that -

(a) the documents in the form of the annexure attached to the Appellant's notices to admit and marked "B";

(b) the documents in the form of the annexure attached to those notices and marked "D",

were valid and effectual appointments of David Harold Allen Craig as the proxy of the members of the firstnamed Respondent who executed those documents either because -

(c) the documents were authorized by and in accordance with the firstnamed Respondent's Articles of Association; or

(d) alternatively, the documents were authorized by and in accordance with Section 141 of the Companies Act 1961 and the firstnamed Respondent's Articles of Association to the extent (if any) that those Articles validly regulated the right conferred on members of the firstnamed Respondent by that section.

7. That the Court was wrong in holding that the chairman of the extraordinary general meeting of the firstnamed Respondent held on 5th October, 1977 properly rejected the votes cast by David Harold Allen Craig pursuant to -

(a) the documents in the form of the annexure attached to the Appellant's notices to admit and marked "B";

(b) the documents in the form of the annexure attached to those notices and marked "D",

and that the winding up resolution purportedly passed at the meeting was valid.

8. The Court should have held that the chairman of that meeting improperly rejected those votes and that the winding up resolution purportedly passed at the meeting was invalid.

9. The Court should have made declarations and granted an injunction in the form, or substantially in the form, prayed for in paragraphs 1, 2, 3 and 4 of the prayer for relief in the Appellant's statement of claim and ordered that the costs of the action, including reserved costs, be taxed and paid by the Respondents and that the costs of the secondnamed Respondent's counterclaim be taxed and paid by the secondnamed Respondent.

The Appellant asks that in lieu of the judgment or order appealed from orders be made as set out in paragraph 9 above.

DATED the 20th day of June, 1978.

(Signed) Phillips, Fox & Masel

Solicitors for the abovenamed Appellant.

TO: The Respondent S.V.P. Fruit Co. Ltd. and to its Solicitors, Messrs. H.L. Yuncken & Yuncken.

AND TO: The Respondent Maxwell Geoffrey Chapman and to his Solicitor, Philip E. Fox, Esq.

NO. 12.

REASONS FOR JUDGMENT OF THEIR HONOURS MR. JUSTICE STARKE, MR. JUSTICE McINERNEY, AND MR. JUSTICE MURPHY

In the Full Court of the Supreme Court of Victoria

STARKE, J.:
McINERNEY, J.:
MURPHY, J.:

No. 12 Reasons for Judgment of Their Honours Mr. Justice Starke, Mr. Justice McInerney and Mr. Justice Murphy

22nd November 1978

This is an appeal by Notice of Appeal dated 20th June, 1978, from a judgment of Menhennitt, J., pronounced 8th June, 1978, whereby he dismissed an action brought by the appellant Coachcraft Ltd. against the respondents S.V.P. Fruit Co. Ltd. and Maxwell Geoffrey Chapman. The appellant is and has at all material times been a company duly incorporated in Queensland pursuant to the laws of that State and a wholly owned subsidiary of Industrial Equity Ltd. The first-named respondent is a company duly incorporated in Victoria and the secondnamed respondent is the liquidator appointed by a special resolution declared carried at an extraordinary general meeting of the firstnamed respondent held on 5th October, 1977.

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: The first-named respondent was incorporated under the name Southern Victorian Pear Packing Co. Ltd. On 27th March, 1946, it changed its name to Blue Moon Fruit Co-operative Ltd. It was a condition of that change of name, which included the word "Co-operative" that the Articles of Association of the company be amended, and they were in fact amended on 7th March, 1946 to include, inter alia, Articles 5, 6, and 159 of the present Articles.

These Articles in their form as so amended were in the following terms :

"5. No applicant for shares shall be allotted less than one share or more than Four Thousand shares in the company.

6. The shares held or capable of being held by or on behalf of any one member shall not exceed in number Four Thousand nor in value Four Thousand Pounds."

"159. Articles numbered 3, 5, 6, 7, 8, 41, 109, 127, 134 shall not be altered varied or rescinded without the consent of the Governor-in-Council first obtained."

On 8th December, 1952, Articles of Association 5 and 6 were amended to substitute "Ten" for "Four" wherever "Four" appeared. The consent of the Governor-in-Council was not obtained for this amendment though the consent of the Crown Solicitor for the State of Victoria was. At the hearing before Menhennitt, J., all parties accepted that Articles 5 and 6 were operative in their amended form, but the issue which requires resolution in this case would still arise even if Articles 5 and 6 were in the form they assumed upon the 1946 amendment.

In the Full Court of the Supreme Court of Victoria

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No. 12
Reasons For Judgment of Their Honours Mr. Justice Starke, Mr. Justice McInerney and Mr. Justice Murphy

22nd November 1978

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: (Contd): On or about 7th October, 1977, the first-named respondent changed its name from Blue Moon Fruit Co. Co-operative Ltd. to S.V.P. Fruit Co. Ltd. It will hereafter be referred to as "the company".

At all relevant times the nominal capital of the company has been $1,000,000 divided into 500,000 shares of $2 each and its issued capital $830,110 made up of 415,055 shares of $2 each.

At all material times the appellant has been a shareholder in the capital of the company.

On 14th May, 1976, the appellant sent to selected shareholders of the company what has been called a "First Come First Served" offer to purchase from each of the selected shareholders all his shares in the company at a price of 85 cents per share. The purchase price offered was later increased. As a result of this invitation, by 2nd September, 1976, the appellant had purchased 58,888 shares in the company.

The "First Come First Served" invitation or offer just referred to did not fall within the takeover provisions of the Victorian Companies Act 1961. On 21st April, 1977, the appellant made a formal "Take Over" offer for all the remaining issued shares in the company which had not already been acquired by it. It gave notice of that Take Over offer to the company on 22nd April, 1977. As a result of that formal "Take Over Offer" the appellant acquired another 60,000 shares (approximately) in the company.

It was, by the beginning of August, 1977, registered as the holder of 10,000 shares in the company.

By a notice dated 13th September, 1977, the company called an extraordinary general meeting of its members for 5th October, 1977.

In the Full Court of the Supreme Court of Victoria

No. 12
Reasons for Judgment of Their Honours Mr. Justice Starke, Mr. Justice McInerney, and Mr. Justice Murphy

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STARKE, J.:
McINERNEY, J.:
MURPHY, J.: (Contd): The meeting was called, in pursuance of a requisition deposited by the appellant at the registered office of the company on 5th August, 1977, to consider and if thought fit to pass a number of resolutions as ordinary resolutions as well as the following resolutions submitted as special resolutions :

"7. That Articles numbered 159, 3, 6 and 80 of the company's Articles of Association be and are hereby deleted.

8. That the Article number 58 of the company's Articles of Association be and is hereby amended by deleting the figure '12' and substituting therefor the figure '2'."

By the same document notice was given that the Board of Directors would submit to that meeting two special resolutions :

"1. That the name of the company be changed to S.V.P. Fruit Co. Ltd.

2. That the company be wound up voluntarily and that Maxwell Geoffrey Chapman of 351 Collins Street Melbourne, Chartered Accountant, be appointed liquidator for the purposes of the winding up and that the remuneration of the said Maxwell Geoffrey Chapman be the liquidator's normal professional fees based on time spent by the liquidator, his partners and staff and that the liquidator be authorised at his discretion to destroy the books and records of the company within a period of five years after dissolution of the company."

The last mentioned resolution may conveniently be referred to as the winding up resolution.

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Reasons for Judgment of Their Honours Mr. Justice Starke, Mr. Justice McInerney, and Mr. Justice Murphy

22nd November 1978

STARKE, J.:

McINERNEY, J.:

MURPHY, J.: Prior to the meeting of shareholders on 5th October, 1977, the registered holders of not less than 49,086 shares in the company had completed, signed and delivered to the appellant documents in the form of the transfers annexed to the "First Come, First Served" offer of 14th May, 1976, in respect of their shares, and had completed, signed, sealed and delivered to the appellant documents in the form of what was termed the Power of Attorney in the offer dated 14th May, 1976. Furthermore, the registered holders of not less than 61,226 shares in the company had completed, signed and delivered to the appellant documents in the form of the transfers attached to the "Take Over Offer" made on 21st April, 1977, in respect of those shares and had completed, signed and delivered to the appellant documents in the form of what was termed the "Power of Attorney" attached to that offer. Prior to the meeting on 5th October, 1977, and purporting to act in accordance with the terms of the documents referred to above, David Harold Allen Craig purported to appoint one Brierley as proxy for two shareholders holding a total of 9,290 shares and one M/S M. Moloney as proxy for three shareholders holding a total of 4,016 shares. Furthermore, prior to that meeting, the registered holders of a further 15,000 or more shares appointed Messrs. Brierley and Craig and M/S M. Moloney as their proxies, such proxies being in the form enclosed with the notice convening the meeting. All these documents were deposited at the office of the company not less than twenty-four hours before the time for holding the meeting.

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At the meeting, after a resolution relating to a report by the directors had been passed unanimously on a show of hands and after certain other discussion, it was unanimously agreed that the winding up resolution submitted by the Board of Directors be put. This resolution was declared carried on a show of hands. Messrs. Brierley and Craig, one Mann and M/S M. Moloney demanded a poll thereon.

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: (Contd): On the poll, 186,511 votes were cast in favour of the resolution. It followed that at least 62,171 votes had to be cast against the resolution if it were to be defeated. In fact 137,359 votes were cast against the resolution. Of these votes, 10,000 were cast by the appellant as the registered holder of 10,000 shares in the company. These votes were allowed. A further 17,047 votes were cast by various shareholders in the company: these also were allowed. These two sets of votes against the resolution, totalling 27,047, were the only ones allowed. The chairman disallowed a total of 110,312 votes, comprising 97,006 votes cast by Craig, 9,290 votes cast by Brierley, and 4,116 votes cast by M/S M. Moloney. Of the 17,047 votes cast by various shareholders, and allowed, some 15,000 were cast in respect of shares the holders of which had appointed Messrs. Brierley, Craig and M/S M. Moloney as their proxies, such proxies having been in the form enclosed with the notice convening the meeting.

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No one present at the meeting failed to cast a vote which he was entitled to cast.

In the result, having regard to the chairman's disallowance of the votes cast in respect of the abovementioned 110,312 shares, the winding up resolution was declared carried. If the votes which the chairman disallowed had been allowed, that resolution would have been defeated. It is the passing of that resolution which was the subject of the challenge at the trial of the action and in the present appeal before us.

It should be added that the first resolution of which the Board of Directors had given notice as a special resolution, namely, that the name of the company be changed to S.V.P. Fruit Co. Ltd., was declared carried. No question arises as to the validity of that resolution.

STARKE, J.:

McINERNEY, J.:

MURPHY, J.: The submission for the appellant before the learned trial Judge, repeated before us, was (1) that the documents termed powers of attorney (accompanying the appellant's offers) which were executed by shareholders in the company which purported to appoint proxies or authorise the appointment of proxies to vote at meetings of the company are valid, (2) that they were, with the proxies given pursuant thereto, properly lodged with the company before the meeting on 5th October, 1977, and (3) that the chairman of the meeting erroneously excluded votes cast in accordance with such proxies. It was further submitted that s.141 of the Companies Act 1961 gave the shareholders who had given such proxies a statutory right to appoint proxies, and that such right could not be taken away by any Article of Association or any implication to be drawn from those Articles.

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The submission for the respondents before the trial Judge and before us was that the chairman of the meeting acted correctly in disallowing the 110,312 votes, because the proxies disallowed were invalid. It was submitted that the reason for this invalidity was that sales of shares to the appellant in excess of 10,000 constituted a breach of Article 6 of the company's Articles, that for any shareholder to hold shares in trust for the appellant in excess of 10,000 was also a breach of that Article by reason of the words "or by or on behalf of" in Article 6, and that it followed that the proxies given in pursuance of sales of shares in breach of Article 6 were also invalid. It was submitted that this applied to all the votes which the chairman disallowed, and that therefore the chairman had correctly disallowed those votes.

It is convenient at this stage to set out the terms of the respective offers and so-called proxies.

The "First Come First Served" offer, dated 14th May, 1976, was in these terms :

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"To selected shareholder of
Blue Moon Fruit Co-operative Ltd.

This letter is an invitation to you to sell to us all your shares in Blue Moon Fruit Co-Operative Ltd. The price we offer is 85 cents per share which is considerably more than the price at which we understand shares have recently changed hands when a buyer could be found.

Our offer is limited to a maximum of only 60,000 shares and is therefore on a strictly 'first come first served' basis. This letter is being sent simultaneously to selected shareholders so that each will have an equal opportunity to participate in this offer of 85 cents per share but you are urged to act quickly if you wish to sell. Acceptances received by us at the same time shall be treated as being received in such order as Coachcraft Ltd. in its absolute discretion shall determine.

Because of transfer restrictions in the Blue Moon Articles of Association it is a condition of our offer that you sign a power of attorney in respect of the shares you sell. This document is enclosed and it should be noted that its effect is confined strictly to the exercise of powers in connection with any shares transferred. You may if you wish call at our office and exchange your shares for a cheque on the spot. Alternatively you may prefer to send your documents to the Commonwealth Trading Bank of Australia - who is acting as agent for Coachcraft Ltd. in the matter, together with the enclosed instruction letter. The bank will ensure that payment is sent to you before your share certificate and transfer is handed to us. If you wish to accept this offer to buy your shares the procedure

STARKE, J.:
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MURPHY, J.:

(Contd):

is as follows :

1. Sign the enclosed transfer (white form);

2. Sign both copies of the enclosed power of attorney form before a witness who should also sign (buff forms);

3. Attached your share certificate(s);

4. Deliver the above documents to 44 Market Street (3rd floor) and receive a cheque in exchange; or sign the attached instruction letter to our agent (blue form) and send all documents to Coachcraft Ltd. C/-: Stock and Share Department, Commonwealth Trading Bank of Australia, 367 Collins Street, Melbourne. 3000.

Yours faithfully,

Coachcraft Ltd.

A.R. Brierley,
Director."

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The document numbered 1 enclosed with that letter was a standard form of transfer to the appellant of shares in the company. The document numbered 2 enclosed was in the following terms :

"Insert name and address .....
of .....
give notice as follows :

1. I have sold to Coachcraft Ltd. C/o Industrial Equity Ltd. of 44 Market Street Melbourne all my interest in shares in the capital of Blue Moon Fruit Co-operative Ltd. and

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(Contd):

I enter into this deed as one of the terms of such sale. Blue Moon Fruit Co-operative Ltd. is hereafter referred to as 'the company'.

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2. I hereby irrevocably appoint David Harold Allen Craig or failing him Barry Broughton Holmes or failing either of them such other person as may from time to time be nominated in writing for that purpose by Coachcraft Ltd. as my proxy to vote at meetings of the members of the company and I also irrevocably appoint each of such persons and also the said Coachcraft Ltd. severally as my attorney with power but only in relation to shares of the company to do all matters or things of every kind and nature which I myself could do if personally present and acting including without limitation of such power the power to transfer, assign, mortgage or otherwise deal with such shares.

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3. I hereby request the company to register my address in the register of members as C/o: Industrial Equity Ltd., 44 Market Street, Melbourne and directthat all scrip receipts, notices, proxies, circulars and other communications and all payments whether dividends or other sums payable by the company to me be sent to such address and declare that the receipt of the Secretary of Industrial Equity Ltd. shall be full and sufficient discharge therefor.

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4. I covenant that no person has any claim to the shares in the company which I have sold which prevents me from selling the whole interest in such shares to Coachcraft Ltd. and that I will execute or have executed if so requested by Coachcraft Ltd. but at its expense all such further documents in relation to such sale as may be thought necessary or desirable more effectively to assure the benefit of such sale to Coachcraft Ltd. or to such other person as it may from time to time wish to have the benefit of such sale.

5. I covenant for myself, my executors, administrators and assigns to allow, ratify and confirm all and whatever my attorney or proxy or Coachcraft Ltd. shall do or cause to be done by virtue of this deed.

In Witness whereof I have set my hand and sealed this day of 1976.

Signed, sealed and)
delivered by the)
said)
in the presence of)

(Seal)"

The terms of the takeover offer made on 21st April, 1977, are set out in full in the Appeal Book.

Certain paragraphs only of the offer need to be stated :

STARKE, J.:
McINERNEY, J.:
MURPHY, J.:

(Contd):

"(d) Consideration

The consideration offered is one dollar twenty cents ($1.20) cash for each offer share in respect of which you accept this offer by executing the form of acceptance and transfer and the two copies of the power of attorney and otherwise complying with paragraph (o) below. The power of attorney is required because payment will not be delayed pending registration of shares in the name of Coachcraft - see paragraph (i) below. Blue Moon's article 6 at present provides 'the shares held or capable of being held by or on behalf of any one member shall not exceed in number 10,000 nor in value £ 10,000'".

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Paragraph (o) of the offer was as follows :

"(o) Acceptance of Offer.

(A) To accept this offer :

(i) sign in the presence of witness so as to be binding on you the form of acceptance and transfer (blue form) and two copies of the power of attorney (buff forms);

(ii) forward the form of acceptance and transfer and the power of attorney documents together with your share certificates to be received by Coachcraft Ltd., C/o: Industrial Equity Ltd., 151 Macquarie Street, Sydney, N.S.W., prior to the expiration of the period during which this offer remains open.

STARKE, J.:
McINERNEY, J.:
MURPHY, J.:

(Contd):

(B) By signing in the presence of a witness the form of acceptance and transfer you will be deemed to have:

(i) authorised Coachcraft to complete on your behalf on the form correct details of your holding of offer shares;

(ii) acknowledged that insofar as any blanks remain in that form Coachcraft is thereby authorised to complete such blanks in such manner as is necessary to make such acceptance and transfer effective in relation to all the shares held by you in the capital of Blue Moon."

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Annexed to the takeover offer were two documents, termed respectively, "Form of Acceptance and Transfer by shareholders of Blue Moon Fruit Co-operative Ltd." and "Power of Attorney". It is unnecessary to set out the terms of the "Form of Acceptance and Transfer" - it is sufficient to say that it refers in its terms to the execution of the power of attorney required with that document for acceptance of the takeover offer.

The power of attorney was in the following terms :

"TO ALL TO WHOM THESE PRESENTS SHALL COME

I .....

of .....

give notice as follows :

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1. I have accepted the offer dated of Coachcraft Ltd. C/o: Industrial Equity Ltd. of 151 Macquarie Street, Sydney to acquire all my shares in the capital of Blue Moon Fruit Co-operative Ltd. and have sold such shares to Coachcraft Ltd. I enter into this deed as one of the terms of such sale. Blue Moon Fruit Co-operative Ltd. is hereafter referred to as 'the company'. I hold the shares I have sold and all dividends, accretions and other benefits accrued or to accrue in respect thereof but not paid or made for Coachcraft absolutely.

2. I hereby irrevocably appoint David Harold Allen Craig or failing him Barry Broughton Holmes or failing either of them such other person as may from time to time be nominated in writing for that purpose by Coachcraft Ltd. as my proxy to vote at meetings of members of the company and I also irrevocably appoint each of such persons and also the said Coachcraft Ltd. severally as my attorney with power but only in relation to shares of the company to execute all notices, proxies and other documents and to do all matters or things of every kind and nature which I myself could do if personally present and acting including without limitation of such power the power to transfer, assign, mortgage or otherwise deal with such shares.

3. I hereby request the company to register my address in the register of members as C/o Industrial Equity Ltd., 151 Macquarie Street, Sydney

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and direct that all scrip receipts, notices, proxies, circulars and other communications and all payments whether dividends or other sums payable by the company to me be sent to such address and declare that the receipt of the Secretary of Industrial Equity Ltd. shall be full and sufficient discharge therefor.

4. I covenant that no person has any claim to the shares in the company which I have sold which prevents me from transferring the whole beneficial interest in such shares to Coachcraft Ltd. and that I will execute or have executed if so requested by Coachcraft Ltd. but at its request all such further documents in relation thereto as may be thought necessary or desirable more effectively to assure the benefit of the acquisition of such shares to Coachcraft Ltd. or to such other person as it may from time to time wish to have the benefit thereof.

5. I covenant for myself, my executors, administrators and assigns to allow, ratify and confirm all and whatever my attorney or proxy or Cocahcraft Ltd. shall do or cause to be done by virtue of this Deed.

6. Coachcraft Ltd. is empowered to transfer the benefit of this Deed.

In Witness whereof I have hereunto set my hand and seal this day of 1977.

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Signed, Sealed and Delivered)
by the said .....)
in the presence of .....)
.....)

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The learned trial Judge in his reasons for judgment observed that whilst the document termed "Power of Attorney" annexed to the takeover offer was not identical in terms with the document termed "Power of Attorney" enclosed with the 1976 offer, the two documents were very similar in operative effect, that no distinction between them was drawn in argument before him and that there did not appear to him to be any significant difference for the purpose of deciding the issues in this case. With the views which His Honour there expressed we are in full agreement.

In the case of a company having a share capital (as this company has) s.140(1)(d) of the Companies Act 1961 confers on every member one vote in respect of each share held by him. But this is, as the introductory words of the section state, "so far as the articles do not make other provision in that behalf". The right given by the section and subject to the qualification mentioned is given only to a member of the company, and only those persons whose names are entered in the register of members of the company are "members". See s.16(5) and s.151(1) of the Act.

It does not appear to us that the Articles contain any provision inconsistent with the terms of s.140(1), having regard to the fact that Article 70 provides (again, subject to the Articles and to any special terms as to voting upon which any shares may have been issued) that on a show of hands every member present (in person or by attorney) and entitled to vote shall have one vote, and upon a poll every member present in person or by proxy or by attorney and entitled to

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: (Contd): vote shall have one vote for every share held by him.

Article 6 merely imposes a restriction on the number of shares which may be held by a member of the company. It does not deny to any such member the right to vote in respect of each of the shares held by him. As Palmer points out (Company Law 22nd Ed. Vol. 1 p.332), "A share in a company is the expression of a proprietary relationship: the shareholder is the proportionate owner of the company" but not in the sense, either at law or in equity, of owning the company's assets - see Short v. Treasury Commissioners (1948) 1 K.B. at p.122 per Evershed, L.J. Those assets belong to the company as a separate distinct legal entity. What the shareholder owns is a bundle of rights in respect of the management and control of the company and its assets, in the distribution of its profits, and in the ultimate distribution of those assets.

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It may be surmised that Article 6 was designed to ensure an equal and equitable spread of ownership and control among shareholders (in accordance with principles propounded by the Co-operative Movement) and to prevent the ownership and control of the company from being concentrated into a very small group of members. Clause 2(q) of the Memorandum of association reflects this "Co-operative Movement" background, as also does Article 3. See also s.356(12) of the Companies Act 1938 (Act 4602).

Included in the rights of the shareholder is the right to vote at meetings of the members of the company. That right might now be regarded as of statutory origin, deriving from the provisions of s.140 of the Companies Act 1961, if or insofar as Article 70 is not a sufficient source. The right conferred by Article 70 includes the right to vote by proxy - but in any event, in the case of this company, the right to attend and vote by proxy is conferred by s.141(1)(b) to which section we return later in this judgment.

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: It is settled law that unless the Articles otherwise provide a shareholder has a free right to transfer to whom he will: Palmer, op cit. p.386, citing Weston's Case, (1868) L.R.4 Ch. 20 and see s.90 of the Companies Act 1961, Delavenne v. Broadhurst (1931) 1 Ch. 234, Greenhalgh v. Mallard (1943) 2 All E.R. 234. But a transfer is incomplete until registered: the transferee does not become the legal owner of shares transferred to him until his name is entered in the register in respect of those shares - Palmer op cit. p.389. Pending registration, the transferor owns the legal estate in the shares on trust for the transferee. The transferee, because his name has not been registered in the share register of the company, is not entitled, as against the company, in his own right as transferee to attend or vote (whether in person or by proxy) at meetings of members of the company. By the same token, and precisely because he is still registered as the holder of the shares transferred to the transferee, the transferor remains entitled to attend and vote and whether in person or by proxy, and as a general rule it is open to him to appoint his transferee as his proxy to attend and vote, in right of the transferor, at such meetings. It was accepted before us that in general circumstances if the transferor attended and voted, he was bound to exercise his voting rights with due regard to his transferee's equitable interest in the shares, in respect of which the right to vote was being exercised. It was also accepted before us that unless prohibited by the Articles the transferee could require the transferor to appoint him (the transferee) as proxy to attend and vote at the meeting.

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The validity of this last proposition was evidently accepted by the chairman of the meeting on 5th October, 1977, when he allowed the 15,000 votes cast in respect of shares the holders of which had appointed Messrs. Brierley, Craig and M/s Moloney as proxies.

STARKE, J.:
McINERNEY, J.:
MURPHY,J.: It was argued for the appellant that although Article 6 prohibits the number of shares held by or on behalf of any one member from exceeding 10,000, nevertheless where a shareholder had sold shares to the appellant which in conjunction with other shares held by the appellant exceeded 10,000 in number, there was nothing in Article 6 which expressly or by implication precluded that shareholder from appointing the appellant or an officer of the appellant as his proxy. It was accepted for the purposes of this argument that if or insofar as the Articles may be regarded as constituting a contract between the company and that shareholder, the sale of those shares to the appellant would have been a breach by that shareholder of that contract. It was contended, however, that Article 6 was concerned only with the legal ownership, as evidenced by the Register of the company, and in addition the equitable ownership of shares in the company and that it was in no way concerned with the appointment of proxies. In the alternative, it was said that if on its proper construction Article 6 operated to preclude the appointment of the appellant (or of an officer of the appellant) as a proxy, it was inconsistent with and overridden by the provisions of s.141 of the Companies Act 1961.

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It was said that s.141 gave to a member a statutory right, as distinct from the original common law or contractual right, to appoint a proxy, and reliance was placed on the dictum by Street, J. (as he then was) that though this statutory right was subject to regulation by the terms of the Company's Articles, the regulatory effect on the Articles could not be permitted to frustrate the statutory right of the shareholder - see Industrial Equity Limited v. New Readhead Estate and Coal Co. Ltd. (1969) 1 N.S.W.R. 565 at p.569.

It was said that so long as a shareholder who had sold his shares remained registered as the owner of those shares the company could not go behind the face of the register but was bound to recognise and give effect to the rights which

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: (Contd): belonged to him as the registered shareholder so long as he remained shareholder in respect of shares not exceeding 10,000 in number. The company was bound therefore to recognise his right to vote, and his right to appoint a proxy. To hold otherwise (it was said) would be to give to Article 6 an effect which went far beyond regulation (in the sense used by Street, J. in the Industrial Equity Ltd. Case (supra)) and which was inconsistent with the fundamental policy to be collected from the terms of s.141(1) of the Act. If it were otherwise, it was said, there would be no logical basis for distinguishing this case from the prohibition of a negro or married woman, etc. It was not open to the company, Mr. Callaway argued, to exclude a proxy merely because the company considered that the transferor shareholder appointing the proxy and the transferee to whom the proxy had been given had acted in violation of Article 6.

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Mr. Callaway sought to rely on the decisions in Re Stranton Iron and Steel Co. (1873) L.R. 16 Eq. 558 and in Pender v. Lushington (1877) 6 Ch. D. 70 and especially on the observations of Jessel, M.R. in the latter case at pp.77-8. However, the Articles in question in those cases were in very different form from those in the present case. There was not in either of those cases any restriction on the number of shares which a shareholder could hold, there was merely a provision limiting the number of votes which a shareholder could have. The legislation (Companies Act 1862 s.30) provided that the company should not be affected with notice of any trust. There was nothing in the Articles in either of those cases to prevent a member from transferring some of his shares to another person as trustee for him so as to enable him, through his control of that trustee, to exercise a greater voting power than he could exercise if the shares remained in his own name. Here, on the other hand, the Articles go behind the legal title and restrict to 10,000 the number of shares which may be held by or on behalf of any one member. In the circumstances, we do not consider that either of

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: (Contd): the cases mentioned above assist the appellant's case.

Mr. Callaway did not contest the conclusion of the learned trial Judge that, as against the company, the sale to the appellant of shares which brought its holding of shares above 10,000 in number was invalid. We think it clear that the appellant could not require the company to register transfers of shares whereby the appellant would become registered as the holder of shares in excess of 10,000, that the appellant could not require the company to allow the appellant, in respect of those shares, to attend or vote by its proper officer or by proxy at meetings of the company, and that it could not require the company to pay to it dividends in respect of those shares. For the company to have done so would have constituted a breach of its contract (constituted by the Articles) with the shareholders not involved in the dealings with the appellants.

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It is another thing to say - and the respondent did not contend - that the appellant could not require its transferor to pay over to it any dividends from time to time received in respect of those shares.

It was argued for the appellant that the chairman's disallowance of the proxy votes in respect of the 110,312 shares was a denial of the statutory right, conferred by s.141 (1) of the Companies Act 1961 on the transferor shareholders to appoint proxies to attend and vote in their stead at the meeting of 5th October, 1977. In our view, the argument thus put fails to give proper effect to the words "entitled to attend and vote at a meeting of the company" appearing in s.141(1). It is only to members "entitled to attend and vote" that the right of appointing proxies is given.

The right of a member of a company to attend and vote at a meeting of the company is a right which in the first instance stems from the fact of membership of the company and it is,

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: (Contd): in general, a right of property which the member may use as he pleases - see Palmer, Company Law (22nd Edn) Vol. 1 p.575 ss.53-67. It has now a statutory basis in s.140 1)(c) of the Companies Act 1961 which so far as relevant) provides :

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> "So far as the articles do not make other provision in that behalf -
>
> (a) ...
>
> (b) ...
>
> (c) in the case of a company having a share capital every member shall have one vote in respect of each share or each $20 of stock held by him."

The statutory right is therefore a right "so far as the articles do not make other provision in that behalf."

Article 70 provides :

> "Subject to these Articles and to any special terms as to voting upon which any shares may have been issued on a show of hands every member present in person or by attorney and entitled to vote shall have one vote and upon a poll every member present in person or by proxy or attorney and entitled to vote shall have one vote for every share held by him."

This Article must be read in the light of the terms of Article 6 whereby :

> "The shares held or capable of being held by or by and on behalf of any one member shall not exceed in number Ten Thousand ... "

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: It follows then that no shareholder is entitled to hold or to be registered in respect of or to have held by any other person any number of shares which total in excess of ten thousand, and it follows that he is not entitled to attend and vote at a meeting of the company in respect of any shares held by him or by him and on his behalf in excess of ten thousand. The provisions of Article 6 are in line with and based on the provisions of s.356(12)(c)(i) of the Companies Act 1938 (Act 4602). It is to be observed that the company was incorporated under the provisions of the Companies Act 1946 under the name Southern Victorian Pear Packing Company Limited on 27th November, 1930, and that it changed its name to Blue Moon Fruit Co-operative Limited on 27th March, 1946. That change of name was effected with the approval of the Governor-in-Council and it was a condition of that approval that the Articles of Association be amended to include Articles 5, 6 and 159, and that those Articles were adopted by Special Resolution at a meeting of shareholders held in Blackburn on 7th March, 1946.

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It follows therefore on a combined reading of ss.140 and 141 and the Articles that the appellant was entitled to attend and vote at any meeting of the company in respect of shares in respect of which it was registered or which were held on its behalf to the total number of ten thousand only and that it was only in respect of that total number of shares that it was entitled to appoint proxies to vote. It was not entitled to procure and exercise voting rights in respect of shares over and above the permitted number of ten thousand by the device of procuring vendors of those shares to exercise in its favour their power of appointing proxies to vote purportedly on their own behalf but in reality on behalf of the appellant.

It does not appear to us that Article 6 would operate so as to prevent a person, e.g. a director who was bona fide appointed proxy by

(Contd): members holding shares totalling in excess of 10,000, from voting on a poll to the full extent of the shares represented by that proxy appointment. In such a case, the disallowance of the proxy votes would be improper.

This being so, any restriction to be placed on the entitlement of the appellant or the members whose proxies he held to vote in a similar manner must, it would seem, be based on or stem from the breach of contract infecting the circumstances in which the appellant became seised of the proxies in question.

If the appointment of the appellant as proxy can be seen to be inextricably bound up with, so as to be a part of, a scheme which in itself depended upon a breach of contract by the members appointing the proxy, would the company be entitled, through the chairman of the meeting of members, to declare such proxies invalid?

The appointment of a proxy in the circumstances of this case is not illegal by statute, nor at common law. Here, the terms of the contracts between the members of the company inter se and the company itself were evidenced by the Articles of Association. The terms of Article 6 prohibited members from holding shares "on behalf of any one member" in excess of 10,000. Members may be presumed to have been aware of the terms of the Articles of Association of their company. In any event, the restriction on share ownership was brought to the attention of members to whom offers or invitations were made by the appellant, and it was pointed out that a power of attorney was required "because of transfer restrictions." See the "First Come First Served Offer" of 14th May, 1976.

Thus, although shareholder members accepting the appellant's offer remained as members on the company's register, they contracted with the appellant to hold their shares "on behalf of" the

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STARKE, J.:
McINERNEY, J.:
MURPHY, J.: (Contd): appellant, who was at all material times a member of the company. These contracts were in fact in breach of the terms of the Articles of Association and, in giving proxies to the appellant pursuant to them, the members in breach and the appellant were attempting to effect the very result which the Article 6 was designed to avoid.

The question is whether the chairman at the meeting of members was entitled in the circumstances to refuse to recognise these proxies, or, expressed in another way, whether he was entitled to declare them invalid.

The mere fact that the granting of proxies is ex facie lawful does not prevent the Court from looking at all the circumstances and if necessary going behind the transaction itself.

Here the Court is being asked to declare that the company, a party to a contract in writing with its members constituted by the Articles, is bound to accept that some of its members were entitled to appoint the appellant as their proxy to vote at the meeting. The Court is asked to ignore the circumstances in which (it appears to be common ground) the appellant came to be appointed proxy.

> "A plaintiff who asks the Court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of inter-dependent undertakings between the plaintiff and the defendant cannot succeed in obtaining such relief is he is at the time in breach of his own obligations. The case of Measures Bros. Limited v. Measures (1910) 1 Ch. 336; (1910) 2 Ch. 248 if a familiar instance of this principle."

In the Full Court of the Supreme Court of Victoria

No. 12
Reasons for Judgment of Their Honours Mr. Justice Starke, Mr. Justice McInerney, and Mr. Justice Murphy

22nd November 1978

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: This statement of the law, contained in the advice tendered to Her Majesty by the Privy Council in Australian Hardwoods Pty. Limited v. Commissioner for Railways (1961) A.L.R. 757 at 761-2; (1961) 1 A.E.R. at 742, bears directly upon the circumstances of the present case.

In the Full Court of the Supreme Court of Victoria

No. 12 Reasons for Judgment of Their Honours Mr. Justice Starke, Mr. Justice McInerney, and Mr. Justice Murphy

22nd November 1978

Both the members who purport to appoint the appellant as their proxy and the appellant itself are in breach of their contract with the other members of the company and the company itself as constituted by the Articles.

The appellant seeks to have the Court declare that, notwithstanding that the transferor shareholders and appellant are in breach of contract with the company and their fellow members, the proxy appointments remain valid because the terms of s.141 of the Companies Act cannot be negated by an Article of Association.

In our view, the members of the company who, in the circumstances set out, agreed to transfer their shares to the appellant, and who appointed it their proxy in consideration of the payment to them of the purchase money were in breach of their contract with the company and with their fellow shareholders.

Although they remain on the register as members, they were not "entitled to vote" within the meaning of those words in s.141. They could not, so long as they remained in breach, obtain relief from the Court if the chairman of a meeting of members of the company refused to accept their vote.

It was argued that the appellant (the transferee) could require the company to recognise a proxy given by the transferors appointing the appellant to attend and vote on the transferee's behalf at a meeting.

It is not necessary for us to express any concluded view on whether the transferor

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: (Contd): could resist a suit by the appellant (the transferee) to compel the transferor to execute such a proxy on the score that the transferor could not be compelled to exercise as against the company rights which are inconsistent with the terms of Article 6. Those points do not arise in this case for we are concerned not with what the transferors can be compelled to do but with what they have done and with the question whether the company can be compelled to give recognition and effect to what the transferors and transferee have done.

In the Full Court of the Supreme Court of Victoria

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Reasons for Judgment of Their Honours Mr. Justice Starke, Mr. Justice McInerney and Mr. Justice Murphy

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It was contended for the appellant that Article 6 was silent on the point, and that the result reached by the learned trial Judge involved implying a term into the Articles which could not consistently with the express terms of the Articles be done.

It was pointed out that the Courts have of recent years become very reluctant to imply terms into a contract and have been prepared to do so only when such an implication was necessary: it was no longer sufficient to say that it was reasonable to imply a term - see Liverpool City Council v. Irwin (1977) A.C. 239 at pp.253-4 per Lord Wilberforce (esp. at 253G and 254F); at pp.257-9 per Lord Cross of Chelsea (esp. at p.258B); at pp.261-3 per Lord Salmon (esp. at p.262A-C); and at pp.265-6 per Lord Edmund Davies (esp. at p.266C).

On the footing that the transferors had, by virtue of their shareholding, become contractually bound to the company to regulate their relationships with the company on the footing of the Articles, including Article 6, then any transfer of shares executed by the transferor having the effect of giving the transferee an equitable interest in respect of shares in excess of the permitted number of 10,000 would as between the company and the transferor shareholder be a breach of contract, and to that breach the company could deny legal efficacy.

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: (Contd): And since the purported transfer of shares carries with it the power in the transferee to exercise or control the exercise of the voting rights in respect of those shares, it appears to us that any act done by the shareholder transferor purporting to confer on the transferee (the appellant) the power to vote in the transferee's own right must equally be a breach of that Article, to which breach the company can deny legal validity. By parity of reasoning, any act done by the shareholder transferor purporting to confer on the transferee power to vote in the name of and on behalf of the transferor but in reality for the benefit of and in the interests solely of the transferee is equally a breach of Article 6 and one to which legal validity can equally be denied by the company.

In the Full Court of the Supreme Court of Victoria

No. 12
Reasons for Judgment of Their Honours Mr. Justice Starke, Mr. Justice McInerney and Mr. Justice Murphy

22nd November 1978

On the facts this is exactly what the chairman of the meeting of 5th October, 1977, did: he denied legal validity to the proxies in respect of the 110,312 shares.

In Ansett Transport Industries (Operations) Pty. Ltd. v. Commonwealth of Australia (1977) 52 A.L.J.R. 254, differing opinions were expressed as to the basis of the doctrines there applied. Barwick, C.J. (at p.257 Col. 1) preferred to base his conclusion on "the general rule that a party to a contract made on the footing of the continuance of a state of things may not by any act within its power or control do anything to destroy or relevantly to diminish that situation." Aickin, J. (at p.273) appears to have adopted the same approach. Having expressed the view that "the parties were contracting, at least from 1961 onwards, on the common understanding that the position then prevailing would continue during the term of the Agreements and that the common objective of the parties would continue to be as stated," he added: "For one party to bring that situation to an end otherwise than in accordance with the agreement is a breach of such a contract," and he went on to refer to the observation of

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: (Contd): Cockburn, C.J. in Stirling v. Maitland 5 B. & S. 840 at p.852 and to the preference expressed by Lord Atkin in Southern Foundries (1926) Ltd. v. Shirlaw (1940) A.C. 701 at 717 for "a positive rule of the law of contract that conduct of either promisor or promisee which can be said to amount to himself 'of his own motion' bringing about the impossibility of performance is in itself a breach."

Although the views of Barwick, C.J. and Aickin, J. cited above were expressed in dissenting judgments, we do not understand that these views were in any way called in question in the majority judgments in the Ansett Transport Industries (Operations) Pty. Ltd. Case. And in our view, the solution in the present case is to be found in the application of the principle stated above with the result that the chairman of the meeting of 5th October, 1977, was right in denying legal validity to the proxies in respect of the 110,312 shares previously referred to.

It follows, in our view, that since the giving of the proxies was an essential part of and inextricably bound up with the appellant's scheme to obtain ownership of and control of the voting rights exercisable in respect of shares in excess of the permitted number of 10,000, it is not possible, consistently with accepted principles, to apply the doctrine of severance to the proxies given by the transferor shareholders in respect of the 110,312 shares the subject of the decision appealed against.

It follows that, subject to one qualification, the appeal must be dismissed, with the usual consequence as to the costs of the appeal. The qualification concerns the question of the costs of the respondents' counter-claim in the Court below. The counterclaim was not proceeded with at the trial, and it appears to us that in those circumstances the learned trial Judge erred in directing that the appellant

In the Full Court of the Supreme Court of Victoria

No. 12
Reasons for Judgment of Their Honours Mr. Justice Starke, Mr. Justice McInerney and Mr. Justice Murphy

22nd November 1978

STARKE, J.:
McINERNEY, J.:
MURPHY, J.: (Contd): pay the respondents' costs of the counterclaim. The judgment appealed from should therefore be varied by deleting the order that the respondents' costs of the counterclaim be taxed and when taxed be paid by the appellant to the respondents. In our view there should be no order as to the costs of the counterclaim. Subject to those variations, the judgment appealed from should be affirmed.

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In the Full Court of the Supreme Court of Victoria

No. 12
Reasons for Judgment of Their Honours Mr. Justice Starke, Mr. Justice McInerney and Mr. Justice Murphy

22nd November 1978

NO. 13.

JUDGMENT OF THE FULL COURT BEFORE THEIR HONOURS MR. JUSTICE STARKE, MR. JUSTICE McINERNEY AND MR. JUSTICE MURPHY

In the Full Court of the Supreme Court of Victoria

—

No. 13 Judgment of the Full Court

22nd November 1978

THIS APPEAL coming on to be heard before this Court on the 22nd, 26th and 27th days of September, 1978, UPON READING the Appeal Book herein and UPON HEARING what was alleged by Mr. F.H. Callaway of Counsel for the Appellant (Plaintiff) and Mr. S. Charles one of Her Majesty's Counsel and Mr. H. Hansen of for the firstnamed Respondent (Defendant) and Mr. P. Hayes of Counsel for the secondnamed Respondent (Defendant) THIS COURT DID ORDER that this Appeal should stand for Judgment AND this Appeal standing for Judgment this day in the presence of Counsel for the Appellant (Plaintiff) and the Respondents (Defendants) THIS COURT DOTH ORDER that the Judgment appealed from be varied by deleting the order that the Respondents' (Defendants') costs of the counterclaim be taxed and when taxed be paid by the Appellant (Plaintiff) to the Respondents (Defendants) AND THAT otherwise the appeal herein be dismissed AND THAT the Respondents' (Defendants') costs of this Appeal be taxed and when taxed be paid to the Respondents (Defendants) by the Appellant (Plaintiff).

BY THE COURT

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NO. 14.

AFFIDAVIT OF RONALD ALFRED BRIERLEY

In the Full Court of the Supreme Court of Victoria

No. 14
Affidavit of Ronald Alfred Brierley

7th December 1978

I, RONALD ALFRED BRIERLEY of 151 Macquarie Street, Sydney in the State of New South Wales, Company Director, make oath and say as follows :

1. I am a Director of the abovenamed Applicant and am duly authorized to make this Affidavit on its behalf. Except where otherwise indicated I do so from my own knowledge.

2. At all material times the nominal capital of the firstnamed Respondent has been $1,000,000 divided into 500,000 shares of $2.00 each and its issued capital has been $830,110 made up of 415,055 shares of $2.00 each. Now produced and shown to me marked "A", "B" and "C" respectively are true copies of the last Annual Return, the last Balance Sheet and the Liquidator's Account of Receipts and Payments and Statement of the Position in the Winding Up as at 4th October, 1978 of the firstnamed Respondent lodged at the office of the Commissioner for Corporate Affairs.

3. On 14th May, 1976 the Applicent sent to certain shareholders in the firstnamed Respondent an offer to purchase from each of those shareholders all his shares in the firstnamed Respondent at 85 cents per share. The purchase price offered was later increased to $1.00 per share. As a result of the offer the Applicant purchased at least 49,086 shares, some at 85 cents per share and some at $1.00 per share.

4. On 21st April, 1977 the Applicant made a formal takeover offer for all the remaining issued shares in the firstnamed Respondent to which it was not already entitled within the meaning of Section 180A of the Companies Act 1961. As a result of that formal takeover offer the Applicant purchased at least a further 61,226 shares at $1.20 per share.

In the Full Court of the Supreme Court of Victoria

No. 14 Affidavit of Ronald Alfred Brierley

7th December 1978

5. In August 1977 the Applicant became registered as the holder of 10,000 shares in the firstnamed Respondent (8,500 being other shares purchased pursuant to the offers referred to in paragraphs 3 and 4 and 1,500 being shares purchased separately from those offers through a stockbroker), but it remained and still remains unregistered in respect of the 110,312 shares referred to in paragraphs 3 and 4.

6. The Applicant has paid the respective vendors of all the shares it has purchased in the firstnamed Respondent in full, and had done so on or before 31st August, 1977. The Applicant is and has at all times since that date been the beneficial owner of all those shares including the shares sold to it but not registered in its name.

7. The Applicant obtained irrevocable appointments of proxy from the vendors of all the shares not registered in its name appointing David Harold Allen Craig as their proxy to vote at meetings of members of the firstnamed Respondent. The terms of those appointments of proxy are set out in the Judgment of the Full Court of this Honourable Court pronounced on 22nd November, 1978, to which I ask leave to refer.

8. I am advised by the Solicitors for the Applicant and verily believe that the effect of that judgment and the Order of the Full Court of this Honourable Court made on 22nd November, 1978 is, among other things -

(a) that the firstnamed Respondent is and has been since 5th October, 1977 in members' voluntary liquidation and that all its assets are lawfully under the control of the secondnamed Respondent;

(b) that the vendors referred to in paragraph 7 were not entitled to vote in person or by proxy at the extraordinary general meeting of the firstnamed Respondent held on that date and that the appointments of proxy were invalid;

(c) that the said vendors are still not entitled to vote, and will continue not to be entitled to vote, in person or by proxy at any general meeting of the firstnamed Respondent in accordance with the Applicant's instructions or at all.

In the Full Court of the Supreme Court of Victoria

No. 14
Affidavit of Ronald Alfred Brierley

7th December 1978

9. Both the assets of the firstnamed Respondent and the Applicant's indirect interest therein, i.e. what it would receive as a dividend on liquidation, greatly exceed £ 1,000 sterling and $2,000 and would do so even if the Applicant were confined to the 10,000 shares registered in its name. Now produced and shown to me marked "D" is a true copy of the Declaration of Solvency made by the Directors of the firstnamed Respondent dated 9th September, 1977 and lodged at the office of the Commissioner for Corporate Affairs. If such a dividend were paid by the liquidator directly to the vendors referred to in paragraph 7 at their various individual addresses the Applicant would also be likely to suffer loss and damage exceeding £1,000 sterling and $2,000.

10. If the advice of the Applicant's Solicitors referred to in paragraph 8 is correct, the value of the shares purchased by the Applicant but not registered in its name has also been diminished by a sum greatly in excess of £1,000 sterling and $2,000. That would be so even if the entitlement of the vendors to vote were restricted only in respect of their voting by proxy or only in respect of their voting in accordance with the Applicant's instructions or only in respect of their voting by proxy and in accordance with the Applicant's instructions.

11. The grounds on which the Applicant desires to appeal to Her Majesty in Council are as follows :

(1) That the Full Court was wrong in holding that the firstnamed Respondent's Articles of Association and in particular Article 6

or breach thereof by the Applicant or the registered holders hereinafter referred to prohibited or precluded -

(a) the registered holders of shares in the firstnamed Respondent referred to in paragraph 1(a) of the Applicant's notices to admit dated 25th January, 1978 from voting personally, alternatively from appointing David Harold Allen Craig as their proxy in the form of the annexure attached to those notices and marked "B";

(b) the registered holders of shares in the firstnamed Respondent referred to in paragraph 1(b) of those notices from voting personally, alternatively from appointing David Harold Allen Craig as their proxy in the form of the annexure attached to those notices and marked "D".

(2) That the Full Court was wrong in holding that -

(a) the documents in the form of the annexure attached to the Applicant's notices to admit and marked "B";

(b) the documents in the form of the annexure attached to those notices and marked "D",

were not valid and effectual appointments of David Harold Allen Craig as the proxy of the members of the firstnamed Respondent who executed those documents entitling him to vote on their behalf at the extraordinary general meeting of the firstnamed Respondent held on 5th October, 1977 and, to the extent that it did hold as hereinafter mentioned, that they were -

(c) not authorized by and in accordance with the first-named Respondent's Articles of Association; or

(d) not authorized by and in accordance with Section 141 of the Companies Act 1961 and the firstnamed Respondent's Articles of Association to the extent (if any) that those Articles validly regulated the right conferred on members of the firstnamed Respondent by that section.

(3) That the Full Court should have held that neither Article 6 nor any other provision of the firstnamed Respondent's Articles of Association nor breach thereof by the Applicant or the registered holders hereinafter referred to prohibited or precluded -

(a) the registered holders of shares in the firstnamed Respondent referred to in paragraph 1(a) of the Applicant's notices to admit from voting personally or from appointing David Harold Allen Craig as their proxy in the form of the annexure attached to those notices and marked "B";

(b) the registered holders of shares in the firstnamed Respondent referred to in paragraph 1(b) of those notices from voting personally or from appointing David Harold Allen Craig as their proxy in the form of the annexure attached to those notices and marked "D".

(4) That the Full Court should have held that -

(a) the documents in the form of the annexure attached to the Applicant's notices to admit and marked "B";

(b) the documents in the form of the annexure attached to those notices and marked "D",

were valid and effectual appointments of David Harold Allen Craig as the proxy of the members of the firstnamed Respondent who executed those documents entitling him to vote on their behalf at the extraordinary general meeting of the firstnamed Respondent held on 5th October, 1977 and that they were -

(c) authorized by and in accordance with the firstnamed Respondent's Articles of Association;

(d) further or alternatively, authorized by and in accordance with Section 141 of the Companies Act 1961 and the firstnamed Respondent's Articles of Association to the extent (if any) that those Articles validly regulated the right conferred on members of the firstnamed Respondent by that section.

(5) That the Full Court was wrong in holding that the chairman of that meeting properly rejected the votes cast by David Harold Allen Craig pursuant to -

(a) the documents in the form of the annexure attached to the Applicant's notice to admit and marked "B";

(b) the documents in the form of the annexure attached to those notices and marked "D",

and that the winding up resolution purportedly passed at the meeting was valid.

(6) That the Full Court should have held that the chairman of that meeting improperly rejected those votes and that the winding up resolution purportedly passed at the meeting was invalid.

(7) That the judgment was erroneous and wrong in law.

(8) That the Full Court was in error in affirming the judgment and order of the Supreme Court pronounced and made by the Honourable Mr. Justice Menhennitt on 8th June, 1978 to the extent it did affirm that judgment and order.

(9) That the Full Court was wrong in disallowing the grounds of appeal set out in the Applicant's Notice of Appeal dated 20th June, 1978 to the extent it did disallow those grounds.

(10) That the Full Court should have allowed each of those grounds and made declarations and granted an injunction in the form, or substantially in the form, prayed for in paragraphs 1, 2, 3 and 4 of the prayer for relief in the Applicant's statement of claim and ordered that the costs of the action, including reserved costs, be taxed and paid by the Respondents and that the costs of the secondnamed Respondent's counterclaim be taxed and paid by the secondnamed Respondent.

12. The questions involved in the appeal for which leave is sought are of importance extending far beyond the Applicant's own interests. First, there are other co-operative companies with restrictions in their articles similar to the restriction in Article 6 of the Articles of Association of the firstnamed Respondent and cases like the present have occurred in the past and are likely to occur again. One such example was the takeover of Kyabram Preserving Company Limited by Henry Jones (IXL) Limited in 1977. Now produced and shown to me marked "E" is a true copy of the form of takeover offer in that case. Secondly, if shareholders may be deprived of their entitlement to vote otherwise than by express provisions of articles of association it will be difficult for investors, company administrators or their respective advisers to proceed with confidence. Thirdly, the appeal bears on the true construction of Section 140 and 141 of the Companies Act 1961.

13. The Applicant respectfully submits -

(a) that the matter in dispute on the appeal for which leave is sought amounts to or is of the value of £500 sterling or upwards or the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £ 500 sterling or upwards;

(b) the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council for decision; and

(c) the matter in issue in this action amounts to £1,000 sterling in value and the decision of the Full Court is one by which the merits of the case may be concluded;

and asks that the Orders sought in the Notice of Motion may be granted. Counsel on behalf of the Applicant is authorized to give the undertaking referred to in the Notice of Motion.

SWORN by the said)
RONALD ALFRED BRIERLEY)
at Sydney in the State)
of New South Wales) (Signed)
this 7th day of December)
1978.)

Before me :

(Signed)

A Commissioner of the Supreme Court of Victoria for taking Affidavits in New South Wales.

This Affidavit is filed on behalf of the Applicant.

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NO. 15.

ORDER OF THE FULL COURT GRANTING (INTER ALIA) CONDITIONAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

THEIR HONOURS THE CHIEF JUSTICE SIR JOHN YOUNG, MR. JUSTICE STARKE AND MR. JUSTICE MARKS

In the Full Court of the Supreme Court of Victoria

No. 15 Order of the Full Court of the Supreme Court of Victoria 19th December 1978

UPON MOTION made unto this Honourable Court on the 18th day of December, 1978 and this day in pursuance of the Notice of Motion dated the 11th day of December, 1978 and filed herein for leave to appeal to Her Majesty her heirs and successors in her or their Privy Council from the judgment of this Honourable Court delivered on the 22nd day of November, 1978 UPON READING the said Notice of Motion, the Affidavits of Ronald Alfred Brierley sworn the 7th and 12th days of December, 1978 and of Ronald George Pitcher sworn the 11th day of December, 1978 and of Maxwell Geoffrey Chapman sworn the 15th day of December, 1978 and of Thomas Henry Leggatt sworn the 18th day of December, 1978 all filed herein and the respective exhibits in the said Affidavits referred to and UPON HEARING what was alleged by Mr. F.H. Callaway of Counsel for the Applicant (Appellant) (Plaintiff) and Mr. H. Hansen of Counsel for the firstnamed Respondent (Respondent) (Defendant) and Mr. P. Hayes of Counsel for the secondnamed Respondent (Respondent) (Defendant) THIS COURT DOTH ORDER :

1. That the Applicant have leave pursuant to Rule 2(a) of the Order in Council made by His Majesty King George V on 23rd January, 1911 to appeal from the judgment and Order of the Full Court in this action pronounced and made by the Honourable Mr. Justice Starke, the Honourable Mr. Justice McInerney and the Honourable Mr. Justice Murphy on 22nd November, 1978 to Her Majesty her heirs and successors in her or their Privy Council.

2. That, upon the Applicant by its Counsel undertaking to the Full Court -

(a) not to ask for any order as to the costs of the second-named Respondent's counter-claim; and

(b) to ask that the declarations sought be subject to the application (if any) of Section 268 of the Companies Act 1961,

that leave be upon condition of the Applicant, within three months from the date of the hearing of this application, entering into good and sufficient security, to the satisfaction of the Full Court, by means of a bond in the sum of $1,000 in favour of the Respondents lodged with the Prothonotary, for the due prosecution of the appeal, and the payment of all such costs as may become payable to the Respondents in the event of the Applicant's not obtaining an Order granting it final leave to appeal, or of the appeal being dismissed for non-prosecution, or of Her Majesty her heirs or successors in her or their Privy Council ordering the Applicant to pay the Respondents' costs of the appeal (as the case may be).

In the Full Court of the Supreme Court of Victoria

No. 15 Order of the Full Court of the Supreme Court of Victoria

19th December 1978

3. That, upon the Applicant by its Counsel undertaking to the Full Court to abide by any Order as to damages which the Court may hereafter consider it proper to make if the Respondents or either of them suffer any damage by reason of the injunction hereinafter set forth which the Court considers the Applicant ought to bear, pending the appeal the Respondents be restrained from -

(a) making any distribution or payments to any shareholders in or contributories of the firstnamed Respondent; and

(b) making any payments to any other persons otherwise than in discharge of debts due by the firstnamed Respondent or the secondnamed Respondent in his capacity

as liquidator of the firstnamed Respondent whether incurred on, prior to or subsequent to 5th October, 1977.

4. By consent that, upon condition of the Applicant, within three months from the date of the hearing of this application, entering into good and sufficient security, to the satisfaction of the Full Court, by means of a bond in the sum of $16,060 in favour of the firstnamed Respondent and a bond in the sum of $9,618 in favour of the secondnamed Respondent both lodged with the Prothonotary, for the payment of the costs hereinafter referred to in the event of the Applicant's not obtaining an Order granting it final leave to appeal, or of the appeal being dismissed for non-prosecution, or of Her Majesty her heirs or successors in her or their Privy Council affirming the Order for costs hereinafter referred to (as the case may be), execution of the Order of the Full Court made on 22nd November, 1978, insofar as it affirms the Order of the Supreme Court made by the Honourable Mr. Justice Menhennitt on 8th June, 1978 that the Respondents' costs of this action, including reserved costs, be taxed and when taxed be paid by the Applicant to the Respondents be suspended pending the appeal.

5. That the costs of this application and the Orders hereon be costs of the appeal and that all parties have liberty to apply.

By the Court

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In the Full Court of the Supreme Court of Victoria

No. 15
Order of the Full Court of the Supreme Court of Victoria

19th December 1978

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NO. 16.

ORDER OF THE FULL COURT GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

THEIR HONOURS MR. JUSTICE LUSH, MR. JUSTICE CROCKETT AND MR. JUSTICE McGARVIE

In the Full Court of the Supreme Court of Victoria

No. 16 Order of the Full Court of the Supreme Court of Victoria

22nd February 1979

UPON MOTION made unto this Honourable Court this day in pursuance of the Notice of Motion dated the 9th day of February, 1979 and filed herein for final leave to appeal to Her Majesty her heirs and successors in her or their Privy Council from the Judgment of this Honourable Court delivered on the 22nd day of November, 1978, UPON READING the said Notice of Motion, the Affidavit of Charles Edward Rosedale sworn the 9th day of February, 1979 both filed herein and the exhibits in the said Affidavit referred to and UPON HEARING what was alleged by Mr. F.H. Callaway of Counsel for the Applicant (Appellant) (Plaintiff) and Mr. P. Hayes of Counsel for the firstnamed and secondnamed Respondents (Respondents) (Defendants) by consent THIS COURT DOTH ORDER :

1. That final leave be granted to the Applicant to appeal from the judgment and Order of the Full Court in this action pronounced and made on 22nd November, 1978 to Her Majesty her heirs and successors in her or their Privy Council.

2. That execution of the Order of the Full Court made on 22nd November, 1978, insofar as it affirms the Order of the Supreme Court made by the Honourable Mr. Justice Menhennitt on 8th June, 1978 that the Respondents' costs of this action, including reserved costs, be taxed and when taxed be paid by the Applicant to the Respondents and orders that the Respondents' costs of the appeal to the Full Court be taxed and

when taxed be paid by the Respondents by the Applicant be suspended pending the appeal.

3. That the costs of this application and the Orders hereon be costs of the appeal and that all parties have liberty to apply.

In the Full Court of the Supreme Court of Victoria

No. 16
Order of the Full Court of the Supreme Court of Victoria

22nd February 1979

By the Court

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EXHIBITS

PLAINTIFF'S EXHIBIT

"A"

Exhibit "A"

Certificate of Incorporation of Coachcraft Ltd.

25th June 1951

CERTIFICATE OF INCORPORATION OF COACHCRAFT LTD.

"THE COMPANIES ACTS, 1931 TO 1942"

No. 189 of 1946

CERTIFICATE OF INCOPRORATION

ON CHANGE FROM A PRIVATE TO A PUBLIC COMPANY

THIS IS TO CERTIFY that

COACHCRAFT LTD.

formerly called Coachcraft Pty. Ltd. was incorporated on the Twentysecond day of November, 1946 under the provisions of "The Companies Acts, 1931 to 1942" and that the said Company is limited by shares and is a Public Company.

GIVEN under my hand and Seal at Brisbane this Twentyfifth day of June One thousand nine hundred and fiftyone.

(Signed) R.R. Templeton

Deputy Registrar of Companies for the State of Queensland

Neil O'Sullivan & Whitehouse,
Solicitors for the Company
Colonial Mutual Building,
289 Queen Street,
BRISBANE.

PLAINTIFF'S EXHIBIT

"B"

Exhibit "B"

CERTIFICATE OF INCORPORATION ON CHANGE OF NAME OF S.V.P. FRUIT CO. LTD.

Certificate of Incorporation on Change of Name of S.V.P. Fruit Co. Ltd.

CERTIFICATE OF INCORPORATION

ON CHANGE OF NAME OF COMPANY

9th November 1977

Victoria
Companies Act 1961
Section 12(2)

No. of Company
C 15943-F

This is to certify that

BLUE MOON FRUIT CO-OPERATIVE LIMITED
(ORIGINALLY CALLED SOUTHERN VICTORIA PEAR PACKING COMPANY LIMITED)

which was, on the 27th November 1930 incorporated under the Companies Act 1928, did on the 7th October 1977 change its name to S.V.P. FRUIT CO. LTD.

and that the company is a company limited by shares

Given under my hand and seal at Melbourne this 9th November 1977

(Signed)

Assistant Commissioner for Corporate Affairs.

PLAINTIFF'S EXHIBIT

"E"

Exhibit "E"

LETTER AND NOTICE OF EXTRAORDINARY GENERAL MEETING OF S.V.P. FRUIT CO. LTD.

Letter and Notice of Extra-ordinary General Meeting of S.V.P. Fruit Co. Ltd.

BLUE MOON FRUIT CO-OPERATIVE LIMITED

60-64 Railway Road,
BLACKBURN. 3130.

Telephone 878-1922

13th September 1977

13th September 1977

Dear Shareholder,

Enclosed is notice of an extraordinary general meeting of shareholders to be held on 5th October 1977.

Your Board has called the meeting to consider, and if thought fit, to approve a special resolution to place the company in voluntary liquidation. The proposed liquidator is Mr. Maxwell G. Chapman, chartered accountant of 351 Collins Street, Melbourne.

The move to return the company's substantial cash holdings to shareholders by liquidating the company follows the passing by shareholders at the extra-ordinary general meeting held on the 12th May 1977 of the resolution to sell the net assets of the Blue Moon group. The passing of that resolution was a necessary pre-requisite for the company to return capital to shareholders at an early date under a voluntary winding up process.

In accordance with the resolution passed at that meeting, the sale of the group's net assets has now been effected. The sum of $430,000 has been received to date from the purchasers and the moneys have been deposited on short-term with the A.N.Z. Banking Group Ltd. at an attractive rate of interest.

The liquidator will, as soon as practicable, make a full and final payment to shareholders in proportion to their shareholdings. We expect the liquidator to be able to distribute between $1.10 and $1.20 a share. Your Board regrets that this figure is below that indicated in our earlier advices which were based on the view that adverse trading results would be arrested in the current year. Unfortunately, as already advised, this has not been the case and a substantial

trading loss has been incurred in the current year. The main areas where this loss has arisen are :-

Exhibit "E"

Letter and Notice of Extraordinary General Meeting of S.V.P. Fruit Co. Ltd.

13th September 1977

1. Trading loss in Victorian merchandising division and substantial provision for doubtful debts mainly in the Goulburn Valley.

2. Tasmania, where normal costs were incurred until March 1977 when we were unexpectedly forced to cease operations following the appointment of a Statutory Marketing Authority to export apples and pears from that State in the 1977 season, and a large provision for doubtful debts has become necessary.

3. Reduction in estimated storage income from our Blackburn and Shepparton cool stores.

Details of the loss will be given to shareholders at the meeting.

We anticipate that, subject to the passing of the special resolution to voluntarily wind up the company, liquidation will be a relatively simple and inexpensive process, and to have no material effect on the return to shareholders.

The proposal to liquidate is the subject of a special resolution which requires approval of holders of 75% of shares held by shareholders voting personally at the meeting or by proxy. To enable an early return of capital to shareholders it is imperative that you support the resolution. Accordingly, the Board urges your co-operation and asks you to attend the meeting. We also urge you, regardless of the size of your shareholding, and irrespective of whether you are able to attend the meeting, to sign the enclosed proxy and return it to the company by return mail.

The meeting will also consider a series of resolutions following receipt of a requisition from Coachcraft Ltd. Your Board is opposed to the adoption of any of these resolutions in view of the proposal to liquidate the company.

Unless you have sold your shares under earlier offers, and have received a cash payment for those shares (and thus are no longer a shareholder), the

PLAINTIFF'S EXHIBIT

Exhibit "E"

Letter and Notice of Extraordinary General Meeting of S.V.P. Fruit Co. Ltd.

13th September 1977

enclosed proxy form, duly signed and witnessed, will replace any proxy which you may have signed previously.

If you are in any doubt about the validity of any earlier proxy which you have signed, please contact the company secretary, Mr. J.N. Homer.

IN RECENT YEARS GENERAL MEETINGS OF THE COMPANY HAVE BEEN HELD AT NIGHT AT THE REGISTERED OFFICE. PLEASE NOTE THE CHANGE OF TIME AND VENUE FOR THE ABOVEMENTIONED MEETING WHICH WILL BE HELD DURING THE DAY AT 1 P.M. AT THE MASONIC HALL, CLARKE STREET, BLACKBURN, ON 5TH OCTOBER 1977.

For and on behalf of the Board

W. MUIR

Chairman.

PLAINTIFF'S EXHIBIT

BLUE MOON FRUIT CO-OPERATIVE LIMITED

(Incorporated in Victoria)

Exhibit "E"

Letter and Notice of Extra-ordinary General Meeting of S.V.P. Fruit Co. Ltd.

13th September 1977

60-64 Railway Road,
BLACKBURN. 3130.

Telephone 878-1922

NOTICE OF EXTRAORDINARY GENERAL MEETING

NOTICE IS HEREBY GIVEN that an extra-ordinary general meeting of members of the above company will be held at the Masonic Hall, Clarke Street, Blackburn, on Wednesday the 5th day of October 1977 at one o'clock in the afternoon.

The said extraordinary general meeting is commenced in pursuance of a requisition deposited at the registered office of the company on the 5th day of August 1977 by Coachcraft Ltd.

The objects of the meeting as stated in the requisition are to consider and if thought fit pass the following resolutions :-

As ordinary resolutions

1. That the Board of Directors is instructed by this Meeting to provide a full report to shareholders as to the cause of the disastrous loss for the 10 month period to 30th June 1977 and the reasons why this loss was not disclosed to shareholders at the meeting held to approve the sale of the business on 12th May 1977.

2. In accordance with the provisions of Article 79 it is hereby determined that until otherwise resolved in General Meeting the number of Directors shall be not more than eight.

3. In accordance with the provisions of Article 93 it is hereby determined that until otherwise resolved in General Meeting and that notwithstanding the provisions of Article 80 a Director shall not require any share qualification.

4. That Ronald Alfred Brierley be and he is hereby elected a Director of the Company.

PLAINTIFF'S EXHIBIT

Exhibit "E"

Letter and Notice of Extra-ordinary General Meeting of S.V.P. Fruit Co. Ltd.

13th September 1977

5. That william Marcus Loewenthal be and he is hereby elected a Director of the company.

6. That David Harold Allen Craig be and he is hereby elected a Director of the company.

As special resolutions

7. That the Articles numbered 159, 3, 6, and 80 of the company's Articles of Association be and are hereby deleted.

8. That the Article numbered 58 of the company's Articles of Association be and is hereby amended by deleting the figure "12" and substituting therefor the figure "2".

AND NOTICE IS HEREBY FURTHER GIVEN that the Board of Directors will submit the following resolutions to the meeting as special resolutions :

1. That the name of the company be changed to -

S.V.P. Fruit Co. Ltd.

2. That the company be wound up voluntarily and that Maxwell Geoffrey Chapman of 351 Collins Street, Melbourne, Chartered Accountant, be appointed liquidator for the purposes of the winding up and that the remuneration of the said Maxwell Geoffrey Chapman be the liquidator's normal professional fees based on time spent by the liquidator, his partners and staff and that the liquidator be authorised at his discretion to destroy the books and records of the company within a period of five years after dissolution of the company.

Dated this 13th day of September, 1977.

By order of the Board

J.N. Homer

Secretary.

PLAINTIFF'S EXHIBIT

PROXIES

Exhibit "E"

A shareholder entitled to attend and vote is entitled to appoint not more than two proxies to attend and vote at the meeting instead of the shareholder. A proxy need not be a shareholder of the company. Where more than one proxy is appointed, each proxy must be appointed to represent a specified proportion of the shareholder's voting rights. A proxy form is enclosed. To be effective, properly signed proxy forms must be received by the company at its registered office, 60-64 Railway Road, Blackburn, Victoria, 3130, not less than 24 hours before the time appointed for the holding of the meeting.

Letter and Notice of Extra-ordinary General Meeting of S.V.P. Fruit Co. Ltd.

13th September 1977

IN THE MATTER of Blue Moon Fruit Co-operative Limited a company duly incorporated under the law of Victoria the registered office of which is situate at 60-64 Railway Road, Blackburn in the State of Victoria.

PROXY FORM

I/We (please print) .....

of .....

being a member of Blue Moon Fruit Co-operative Limited hereby appoint William Muir of 25 Back Beach Road, Portsea, or failing him Douglas Giles Livermore of Phillip Road, Avonsleigh, as my/our proxy to vote for me/us and on my/our behalf at the extraordinary general meeting of the company to be held on Wednesday, 5th October 1977 at Masonic Hall, Clarke Street, Blackburn at one o'clock in the afternoon and at any adjournment thereof in respect of the whole of my/our shares.

PLAINTIFF'S EXHIBIT

Exhibit "E"

Letter and Notice of Extra-ordinary General Meeting of S.V.P. Fruit Co. Ltd.

13th September 1977

As witness my hand this ..... day of

..... 1977.

Signed by the said .....
(please print name of shareholder/s)

in the presence of .....
(please print name of witness)

Signatures ....
(Witness) (Shareholder/s)

PROXY NOTES

1. A member entitled to attend and vote is entitled to appoint not more than two proxies to attend and vote instead of the shareholder. A proxy need not be a member of the Company. Where more than one proxy is appointed each proxy must be appointed to represent a specified proportion of the shareholders voting rights. (Section 141, Companies Act, 1961).

2. To be effective, proxy forms together with any power of attorney or other authority (if any) under which they are signed (or a notarially certified copy of such power of attorney or other authority) must be received by the Company at its registered office at 60-64 Railway Road, Blackburn, Victoria, Australia not less than 24 hours before the time appointed for holding the meeting or adjourned meeting at which the person named in such forms proposes to vote. (Article 75).

3. The proxy form must be signed by the member or by his attorney duly authorised in writing, or if the shareholder is a corporation either under its common seal or the hand of its attorney and in any of these events shall be duly attested by at least one witness. (Article 74).

4. In the case of joint holders, the proxy form may be signed by any one holder. (Article 73).

PLAINTIFF'S EXHIBIT

"F"

Exhibit "F"

LETTER FROM S.V.P. FRUIT CO. LTD. TO COACHCRAFT LTD.

Letter from S.V.P. Fruit Co. Ltd. to Coachcraft Ltd.

BLUE MOON FRUIT CO-OPERATIVE LIMITED

60-64 Railway Road, Blackburn, Victoria 3130.

9th May 1977.

9th May 1977

Coachcraft Ltd.,
C/- Industrial Equity Ltd.,
44 Market Street
MELBOURNE 3000.

Dear Sirs,

We hereby acknowledge that we have sighted, and have recorded, Powers of Attorney in favour of your nominees over 49,086 shares in our company.

The original Powers of Attorney were returned to you and we have retained photostats.

Yours faithfully,

(Signed)

J.N. Homer,
Secretary

PLAINTIFF'S EXHIBIT

"G"

Exhibit "G"

LETTER FROM S.V.P. FRUIT CO. LTD. TO COACHCRAFT LTD.

Letter from S.V.P. Fruit Co. Ltd. to Coachcraft Ltd.

BLUE MOON FRUIT CO-OPERATIVE LIMITED

P.O. Box 21,
Blackburn, 3130,
Australia

25th August 1977

25th August 1977

Coachcraft Ltd.
C/- Industrial Equity Ltd.
44 Market Street
MELBOURNE 3000.

Dear Sirs,

We acknowledge having received from you today 61 documents purporting to be powers of attorney.

Yours faithfully,

(Signed) J.N. Homer

J.N. Homer,
Secretary.

DEFENDANT'S EXHIBIT

"3"

Exhibit "3"

LETTER AND ATTACHED DOCUMENTS FROM INDUSTRIAL EQUITY LIMITED TO BLUE MOON FRUIT CO-OPERATIVE LIMITED

Letter and attached documents from Industrial Equity Limited to Blue Moon Fruit Co-operative Limited

INDUSTRIAL EQUITY LIMITED

14th May 1976

The Chairman of Directors,
Blue Moon Fruit Co-operative Ltd.,
60 Railway Road,
BLACKBURN. Vic. 3130.

14th May 1976

Dear Sir,

As you are no doubt aware, we have made an offer to acquire up to 15% of the capital of Blue Moon Fruit Co-operative Ltd. We enclose herewith copies of the relevant documents for your information.

In the event that we are successful in obtaining a substantial shareholding in the company we would welcome an early opportunity of meeting you to discuss various aspects of the company's affairs.

We wish to assure you that it would not be our desire to propose any changes in the management or business of the company. In fact, we believe that there are areas in which the traditional operations of Blue Moon could be extended with the support and assistance of our group but which are not possible in terms of your existing capital structure.

You may be interested to know that we are already involved in the orchard industry through a wholly owned subsidiary of our group in New Zealand, called Asparagus Ltd. Enclosed for your information is a recent newspaper cutting on this company together with an Annual Report of Industrial Equity Ltd.

Yours faithfully,
INDUSTRIAL EQUITY LIMITED

(Signed)

R.A. Brierley
CHAIRMAN OF DIRECTORS

jf
enclosures

DEFENDANT'S EXHIBIT

Exhibit "3"

Letter and attached documents from Industrial Equity Limited to Blue Moon Fruit Co-operative Limited

14th May 1976

COACHCRAFT LTD.

C/- Industrial Equity Limited
44 Market St., Melbourne, 3000.

14th May 1976

To selected shareholders of

BLUE MOON FRUIT CO-OPERATIVE LIMITED.

This letter is an invitation to you to sell to us all your shares in Blue Moon Fruit Co-Operative Limited.

The price we offer is 85 CENTS PER SHARE WHICH IS CONSIDERABLY MORE THAN THE PRICE AT WHICH WE UNDERSTAND SHARES HAVE RECENTLY CHANGED HANDS WHEN A BUYER COULD BE FOUND.

Our offer is limited to a maximum of only 60,000 shares and is therefore on a strictly "first come first served" basis. This letter is being sent simultaneously to selected shareholders so that each will have an equal opportunity to participate in this offer of 85¢ per share but you are urged to act quickly if you wish to sell. Acceptances received by us at the same time shall be treated as being received in such order as Coachcraft Ltd. in its absolute discretion shall determine.

Because of transfer restrictions in the Blue Moon Articles of Association it is a condition of our offer that you sign a Power of Attorney in respect of the shares you sell. This document is enclosed and it should be noted that its effect is confined strictly to the exercise of powers in connection with any shares transferred.

You may if you wish call at our office and exchange your shares for a cheque on the spot.

Alternatively you may prefer to send your documents to the Commonwealth Trading Bank of Australia, who is acting as agent for Coachcraft Ltd. in the matter,

DEFENDANT'S EXHIBIT

Exhibit "3"

Letter and attached documents from Industrial Equity Limited to Blue Moon Fruit Co-operative Limited

14th May 1976

together with the enclosed instruction letter. The Bank will ensure that payment is sent to you before your share certificate and transfer is handed to us.

If you wish to accept this offer to buy your shares the procedure is as follows :

1. Sign the enclosed transfer (white form)

2. Sign both copies of the enclosed power of Attorney form before a witness who should also sign (buff forms)

3. Attach your share certificate(s)

4. Deliver the above documents to 44 market Street (3rd floor) and receive a cheque in exchange

OR

Sign the attached instruction letter to our agent (blue form) and send all documents to Coachcraft Ltd. c/- Stock and Share Department, Commonwealth Trading Bank of Australia, 367 Collins Street, Melbourne, 3000.

Yours faithfully,
COACHCRAFT LTD.

(Signed)

R.A. BRIERLEY
Director.

DEFENDANT'S EXHIBIT

EXHIBIT "3"

Letter and attached documents from Industrial Equity Limited to Blue Moon Fruit Co-operative Limited

STANDARD TRANSFER FORM

For Non-Market Transactions

Affix Stamp Duty Here

Marking Stamp

FULL NAME OF COMPANY OR CORPORATION	BLUE MOON FRUIT CO-OPERATIVE LIMITED		
DESCRIPTION OF SECURITIES	Class: ORDINARY	If not fully paid, paid to	Register: MELBOURNE
QUANTITY	Words	Figures	
FULL NAME(S) OF TRANSFEROR(S) (SELLER[S])	Surname(s) Given Name(s) (PLEASE USE BLOCK LETTERS)		Broker's Transfer Identification Number
CONSIDERATION	85 cents per share. Total: $		Date of Purchase / /19
FULL NAME(S) OF TRANSFEREE(S) (BUYER[S])	Surname(s) Mr. / Mrs. / Miss } COACHCRAFT LTD. Given Name(s) (PLEASE USE BLOCK LETTERS)		
FULL POSTAL ADDRESS OF TRANSFEREE(S) (BUYER[S])	c/- INDUSTRIAL EQUITY LIMITED, 44 MARKET STREET, MELBOURNE. 3000. VICTORIA State/Country ..... Postcode		
REMOVAL REQUEST	Please enter these securities on the		REGISTER

I/We the registered holder(s) and undersigned seller(s) for the above consideration do hereby transfer to the above name(s) hereinafter called the Buyer(s) the securities as specified above standing in my/our name(s) in the books of the above-named Company, subject to the several conditions on which I/We held the same at the time of signing hereof and I/We the Buyer(s) do hereby agree to accept the said securities subject to the same conditions.
I/We have not received any notice of revocation of the Power of Attorney by death of the grantor or otherwise, under which this transfer is signed.

TRANSFEROR(S) SELLER[S] SIGN HERE	x x	(FOR COMPANY USE)
DATE SIGNED	/ /19	
TRANSFEREE(S) BUYER[S] SIGN HERE	The Common seal of Coachcraft Ltd. was hereunto affixed in the presence of:	
DATE SIGNED	/ /19	Secretary Director

DEFENDANT'S EXHIBIT

Exhibit "3"

Letter and attached documents from Industrial Equity Limited to Blue Moon Fruit Co-operative Limited

14th May 1976

TO ALL TO WHOM THESE PRESENTS SHALL COME

I .....
(insert name & address)

of .....

..... give notice as follows :

1. I have sold to COACHCRAFT LTD., c/- INDUSTRIAL EQUITY LIMITED of 44 Market Street, Melbourne all my interest in shares in the capital of BLUE MOON FRUIT CO-OPERATIVE LIMITED and I enter into this Deed as one of the terms of such sale. BLUE MOON FRUIT CO-OPERATIVE LIMITED is hereafter referred to as "the Company".

2. I hereby irrevocably appoint David Harold Allen CRAIG or failing him Barry Broughton HOLMES or failing either of them such other person as may from time to time be nominated in writing for that purpose by Coachcraft Ltd. as my proxy to vote at meetings of members of the Company and I also irrevocably appoint each of such persons and also the said Coachcraft Ltd. severally as my attorney with power but only in relation to shares of the Company to do all matters or things of every kind and nature which I myself could do if personally present and acting including without limitation of such power the power to transfer assign mortgage or otherwise deal with such shares.

3. I hereby request the Company to register my address in the register of members as care of Industrial Equity Limited, 44 Market Street, Melbourne and direct that all scrip receipts, notices, proxies, circulars and other communications and all payments whether dividends or other

DEFENDANT'S EXHIBIT

Exhibit "3"

Letter and attached documents from Industrial Equity Limited to Blue Moon Fruit Co-operative Limited

14th May 1976

sums payable by the Company to me be sent to such address and declare that the receipt of the Secretary of Industrial Equity Limited shall be full and sufficient discharge therefor.

4. I covenant that no person has any claim to the shares in the Company which I have sold which prevents me from selling the whole interest in such shares to Coachcraft Ltd. and that I will execute or have executed if so requested by Coachcraft Ltd. but at its expense all such further documents in relation to such sale as may be thought necessary or desirable more effectively to assure the benefit of such sale to Coachcraft Ltd. or to such other person as it may from time to time wish to have the benefit of such sale.

5. I covenant for myself my executors administrators and assigns to allow ratify and confirm all and whatever my attorney or proxy or Coachcraft Ltd. shall do or cause to be done by virtue of this Deed.

IN WITNESS WHEREOF I have hereunto set my hand and seal this day of , 1976.
(insert date)

SIGNED SEALED AND DELIVERED)
)
by the said .....)
(insert name & sign))
)
.....)
)
in the presence of .....)
)
.....)
(Witness to sign)

Seal

DEFENDANT'S EXHIBIT

Exhibit "3"

Letter and attached documents from Industrial Equity Limited to Blue Moon Fruit Co-operative Limited

..... 1976

The Registrar,
Stock and Share Department,
Commonwealth Trading Bank of Australia,
367 Collins Street,
MELBOURNE. 3000.

as agent for Coachcraft Ltd.

14th May 1976

Dear Sir,

I wish to accept the offer by Coachcraft Ltd. to buy my shares in Blue Moon Fruit Co-Operative Limited.

Enclosed are :

Signed Transfer covering ..... shares
Share Certificate(s) No.(s) .....
Signed Power of Attorney (in duplicate)

Please hand these documents to Coachcraft Ltd. only after you have received from that company on my behalf the sum of 85 cents per share for all shares offered. The proceeds of the sale should be remitted forthwith to the address shown below.

I understand that Coachcraft Ltd. will accept only 60,000 shares on a "first-come-first-served" basis and if my shares are not bought all documents are to be returned to the address shown below.

.....
(Signature)

Remittance Instructions :

Name .....
Address .....
.....

BLOCK LETTERS PLEASE

DEFENDANT'S EXHIBIT

"5"

Exhibit "5"

DOCUMENTS CONTAINING OFFER OF TAKEOVER BY COACHCRAFT LIMITED TO BLUE MOON FRUIT CO-OPERATIVE LIMITED

Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-Operative Limited

21st April 1977

COMPANIES ACT 1961

SECTION 180H

To Blue Moon Fruit Co-Operative Ltd.

Pursuant to Section 180H (1) (a) of the Companies Act Coachcraft Ltd. hereby gives to your Company as Offeree Company Notice that takeover offers in terms of the form of takeover offer annexed hereto are dated 22nd April 1977 and have this date been despatched to the persons to whom such offers are addressed.

DATED this 22nd day of April, 1977.

For and on behalf of
COACHCRAFT LTD.

(Signed)

Director

DEFENDANT'S EXHIBIT

Exhibit "5"

Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-Operative Limited

21st April 1977

I, William Marcus Loewenthal, Director of Coachcraft Ltd. hereby certify that this is a true copy of the notice given on 22nd April, 1977 pursuant to Section 180H (1) (a) by Coachcraft Ltd. to Blue Moon Fruit Co-Operative Limited.

(Signed) W. Loewenthal

(Signed)

Assistant Commissioner for Corporate Affairs

I, Ross Daniels, Secretary of Coachcraft Ltd. certify that the annexed takeover offer documents are a true copy of the documents sent this day to shareholders in Blue Moon Fruit Co-Operative Limited.

(Signed) R. Daniel

22nd April, 1977

DEFENDANT'S EXHIBIT

Exhibit "5"

Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-Operative Limited

21st April 1977

10 OFFER BY

C O A C H C R A F T L T D.

(a wholly owned subsidiary of Industrial Equity Limited)

for

All the issued Ordinary Capital of

BLUE MOON FRUIT CO-OPERATIVE LIMITED

DEFENDANT'S EXHIBIT

Exhibit "5"

Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-Operative Limited

21st April 1977

COACHCRAFT LTD.

151 Macquarie Street,
SYDNEY. 2000.

21st April, 1977

To the Shareholders of

BLUE MOON FRUIT CO-OPERATIVE LIMITED

Dear Shareholder,

We have pleasure in enclosing a takeover offer for your shares in Blue Moon Fruit Co-operative Limited.

The price which we offer is $1.20 per share which is payable in cash to you (within 14 days of receiving your documents) and which is unconditional as to number of acceptances received.

It will be recalled that last year we made an offer of $1.00 per share for 15% only, of the total capital. Although the Board was very critical of this offer we nevertheless obtained the required number of acceptances and so we are now by far the largest shareholder in the company. Since that time we have partly reconciled our differences with the Board, at least to the extent of several personal discussions at which there has been a free and cordial exchange of views regarding the future of the company.

Although we do not by any means entirely agree with the policies of the Directors we respect the integrity of their opinions and in the event of the success of the offer we certainly do not propose any dramatic changes at Board or management levels.

It is a fact however, that since our first offer there has been no good news for shareholders, notwithstanding the statements by the Board at that time.

DEFENDANT'S EXHIBIT

Exhibit "5"

Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-Operative Limited

21st April 1977

A further loss of $98,428 has been incurred and, of course, there have been no dividends paid. Some assets have been disposed of, but this merely reduces the scope for future recovery and overall the situation can hardly be described as a very happy one.

No doubt those shareholders who accepted our original offer of $1.00 in 1976 were pleased to have taken the cash and reinvested the proceeds far more profitably. You now have the opportunity to take $1.20 on the same basis. The higher price compensates not only for the longer wait but takes into account every favourable factor which can possibly be attributed to the results of the past year.

We believe that this is a very fair offer to you, which, if successful, will also enable us to preserve what is left of a viable operation at Blue Moon and hopefully return to profit in due course.

TIME IS RUNNING OUT, HOWEVER. PLEASE CONSULT YOUR FINANCIAL ADVISER AS SOON AS POSSIBLE.

To accept the offer, sign and return the enclosed documents together with your share certificate. A cheque will be sent to you within 14 days thereafter.

Yours faithfully,

COACHCRAFT LTD.

R.A. Brierley

DIRECTOR

DEFENDANT'S EXHIBIT

Exhibit "5"

Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-Operative Limited

21st April 1977

COACHCRAFT LTD.

(inc. in Queensland)

A wholly owned subsidiary of INDUSTRIAL EQUITY LIMITED

O F F E R

To acquire all your shares in

BLUE MOON FRUIT CO-OPERATIVE LIMITED

(a) Definitions

In this offer "Coachcraft" means Coachcraft Ltd. "Blue Moon" means Blue Moon Fruit Co-operative Limited, and "the Act" means The Companies Act, 1961 of the State of Victoria.

(b) Shares proposed to be acquired under Takeover Scheme

Coachcraft proposes to acquire during the period during which offers made pursuant to the Takeover Scheme remain open for acceptance as hereinafter provided 356,169 shares of $2 each in Blue Moon being all the shares in Blue Moon on issue on the date of this offer other than the shares in Blue Moon to which Coachcraft is entitled (within the meaning of Section 180A of the Act) at the date hereof.

The terms of all other takeover offers dispatched or to be dispatched in respect of the shares in Blue Moon proposed to be acquired by Coachcraft as aforesaid (which other takeover offers together with this takeover offer are hereinafter collectively referred to as "the Takeover Scheme") are the same terms as are contained in this offer. The shares in Blue Moon which Coachcraft proposes to acquire pursuant to the Takeover Scheme are hereinafter referred to as "offer shares".

DEFENDANT'S EXHIBIT

Exhibit "5"

Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-Operative Limited 21st April 1977

(c) Offer and entitlement to Offer

Coachcraft hereby offers to acquire on the terms and conditions set out in this offer the whole of your offer shares. This offer is made to you as the holder of offer shares registered in the Register of Members of Blue Moon at 5.00 p.m. (Eastern Standard Time) on the date hereof. In accordance with Section 180K of the Act, where at the time when this offer was made or at any time during the period during which this offer remains open for acceptance, another person is or is entitled to be registered as the holder of shares to which this offer relates then -

(i) a corresponding takeover offer shall be deemed to have been made to that other person in respect of those shares; and

(ii) a corresponding takeover offer shall be deemed to have been made to you in respect of any other shares to which the offer relates.

(d) Consideration

The consideration offered is One dollar twenty cents ($1.20) cash for each offer share in respect of which you accept this offer by executing the form of acceptance and transfer and the two copies of the Power of Attorney and otherwise complying with paragraph (o) below. The Power of Attorney is required because payment will not be delayed pending registration of shares in the name of Coachcraft - see paragraph (i) below. Blue Moon's Article six at present provides "The shares held or capable of being held by or by and on behalf of any one member shall not exceed in number ten thousand nor in value ten thousand pounds".

(e) Currency of Offer

It is a term of this offer that it and all other offers made by Coachcraft under the Takeover Scheme will unless withdrawn remain open during the period ending at 5.00 p.m. (Eastern Standard Time) on 17th June 1977 PROVIDED HOWEVER THAT Coachcraft may in accordance with the provisions of Section 180L at any time and from time to time vary this offer by extending the period during which this Offer remains open.

DEFENDANT'S EXHIBIT

Exhibit "5"

Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-Operative Limited

21st April 1977

(f) Conditions of Offer

This Offer and any contract or agreement arising from the acceptance of it are subject to the following conditions :-

(i) Between the 28th March 1977 and the end of the period during which this offer and all other offers under the Takeover Scheme remain open for acceptance, Blue Moon and each of its subsidiaries has carried on and will carry on its business in the existing and ordinary and usual manner and in particular has not and shall not have -

A. declared paid or distributed any dividend bonus or other share of its profits or assets to members;

B. issued allotted or granted options over or otherwise made any commitments with respect to any of its capital or effected any alteration in its capital structure or issued or agreed to issue any convertible notes;

C. appointed any additional Directors to its Board;

D. conducted business except in the normal and usual course or made any change which has a materially adverse effect on its business or prospects.

E. had threatened or commenced by it or against it any claim or proceedings in any Court;

F. made any changes in the provisions of its Memorandum or Articles of Association;

G. entered into any contract or commitment other than in the normal and usual course of business;

H. passed any resolution for liquidation or had or otherwise been liable to have appointed an Official Manager, Receiver or Liquidator or become subject to investigation under Part VIA of the Act nor will there have

DEFENDANT'S EXHIBIT

Exhibit "5"

Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-Operative Limited

21st April 1977

been any petition for winding up nor any threat of proceedings for winding up against it.

(ii) That any breach or non-fulfilment of the conditions in (i) above or any one of them may be relied upon only by Coachcraft which may at its option waive any such condition or the breach or non-fulfilment thereof. No action shall lie on any such condition after payment.

(g) Coachcraft alone shall be entitled to the benefit of the foregoing conditions and may at any time and from time to time declare this and all other offers made by Coachcraft under the Takeover Scheme and any contract or agreement arising from the acceptance thereof free from any one of or all the conditions set out in paragraph (f) above by notice in writing to Blue Moon PROVIDED THAT such declaration or declarations be made not less than seven days before the end of the period during which this offer remains open.

(h) Immediately before this offer was dispatched Coachcraft was entitled (within the meaning of Section 180A of the Act) to 58,886 fully paid ordinary shares of $2.00 each in the capital of Blue Moon.

(i) Satisfaction of Consideration

Subject to satisfaction of all the conditions of this offer (except to the extent that the Offeror may pursuant to paragraph (g) above declare this and all other offers under the Takeover Scheme free from any one or all of such conditions or may pursuant to paragraph (f) (ii) above waive any such condition or the breach or non-fulfilment thereof) payment of the cash consideration will be made to the holder of shares accepting the offer prior to the date being fourteen days after Coachcraft receives the acceptance and other (if any) documents required by paragraph (o) or 31st August 1977 whichever shall be the earlier. A cheque drawn in favour of each offeree accepting this offer for the cash consideration payable for the offer shares in respect of which the offer is accepted will be posted prior to the date hereinbefore referred to by prepaid mail to the offeree concerned at his address appearing in the Register of Members of Blue Moon or where no such address appears in the Register of Members of

DEFENDANT'S EXHIBIT

Exhibit "5"

Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-Operative Limited

21st April 1977

Blue Moon or a different address is shown on the Form of Acceptance and Transfer, then to the address shown on the Form of Acceptance and Transfer.

PROVIDED ALWAYS THAT notwithstanding the provisions of this offer nothing herein contained shall create or transfer to any offeree who is resident out of Australia any right (actual or contingent) to the payment of moneys by Coachcraft hereunder where the authority of the Reserve Bank of Australia to such payment is required, unless and until such authority has been obtained.

(j) Warranty

It is a term of this offer that by signing the acceptance documents the offeree represents and warrants (with the intent that such warranty shall persist notwithstanding payment) to Coachcraft that all of the shares in Blue Moon the subject thereof are and shall remain free from all mortgages, charges, liens and encumbrances of every kind arising from the act or default of the offeree whether to Blue Moon or any other company, firm or person whatsoever.

(k) Withdrawal of Offer

Coachcraft shall be at liberty by written notice to Blue Moon at any time during which this offer remains open to withdraw this and all other offers made by Coachcraft under the Takeover Scheme in which case any contract arising from acceptance of any such offer which has not been completed by payment shall be voidable at the option of Coachcraft by notice in writing to the Offeree not later than one month after such withdrawal. Pursuant to Section 180E (4) of the Act, if an offer arising under the Takeover Scheme is withdrawn, a contract arising from the acceptance of any other offer under the Takeover Scheme is voidable at the option of the offeree by notice in writing given to Coachcraft not later than one month after the firstmentioned offer is withdrawn.

(l) General

This offer is not conditional upon the Offeree approving or consenting to a payment or other benefit being made or given to a director of Blue Moon or of a corporation

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that is deemed by virtue of Section 6 (5) of the Act to be related to Blue Moon as compensation for loss of office or as consideration for or in connection with his retirement from office.

(m) In accordance with Section 180E (5) of the Act Coachcraft specifies 9th June 1977 as the date for the publication of the notice referred to in Section 180N (3) of the Act PROVIDED THAT Coachcraft hereby expressly reserves its right to vary such date under and subject to Section 180L of the Act.

(n) All costs and expenses of the preparation and circulation of this and all other offers made by Coachcraft under the Takeover Scheme and stamp duty on Acceptance documents will be payable by Coachcraft.

(o) Acceptance of Offer

(A) To accept this offer :

(i) Sign in the presence of a witness so as to be binding on you the Form of Acceptance and Transfer (Blue form) and the two copies of the Power of Attorney (Buff forms).

(ii) Forward the Form of Acceptance and Transfer and the Power of Attorney documents together with your Share Certificates to be received by Coachcraft Ltd., c/- Industrial Equity Limited, 151 Macquarie Street, Sydney, New South Wales, prior to the expiration of the period during which this offer remains open.

(B) By signing in the presence of a witness the Form of Acceptance and Transfer you will be deemed to have :

(i) authorised Coachcraft to complete on your behalf on the form correct details of your holding of offer shares;

(ii) acknowledged that insofar as any blanks remain in that form Coachcraft

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is thereby authorised to complete such blanks in such manner as is necessary to make such Acceptance and Transfer effective in relation to all the shares held by you in the capital of Blue Moon.

(C) If the Form of Acceptance and Transfer or Power of Attorney is signed under Power of Attorney the Power of Attorney must be produced to Blue Moon for noting unless it has already been noted by that Company;

(D) If the Offeree or one of the Offerees is a corporation it must execute the Form of Acceptance and Transfer and Power of Attorney under its seal or by attorney;

(E) If the shares are registered in the names of joint holders, all must sign the forms;

(F) If the shares stand in the books of Blue Moon in the name of a person now deceased this Offer shall be deemed to be made to his Executors or Administrators. Probate, Letters of Administration or a Certificate of Grant and a Certificate under Section 14 of the Probate Duty Act of Victoria must be produced to Blue Moon for noting unless they have already been noted by that company.

Failing strict compliance with the foregoing provisions of this paragraph Coachcraft may (but shall not be obliged to) grant time in which to effect such compliance and validate acceptance, or may waive such compliance.

DATED this 22nd day of April, 1977.

For and on behalf of

COACHCRAFT LTD.

R.A. Brierley

DIRECTOR.

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COACHCRAFT LTD.

(inc. in Queensland)

A wholly owned subsidiary of INDUSTRIAL EQUITY LIMITED

STATEMENT BY COACHCRAFT LTD. PURSUANT TO THE PROVISIONS OF SECTION 180C AND IN ACCORDANCE WITH PART A OF THE TENTH SCHEDULE TO THE COMPANIES ACT 1961 OF THE STATE OF VICTORIA

1. PRELIMINARY

References in this Statement to "the Act" are to the Companies Act 1961 of the State of Victoria. The takeover offers hereinafter referred to are hereinafter collectively referred to as "the Takeover Scheme".

2. Full particulars of the takeover offers proposed to be made pursuant to the Takeover Scheme for the acquisition by Coachcraft Ltd. ("Coachcraft") of shares in the capital of Blue Moon Fruit Co-operative Limited ("Blue Moon") are set out in the proposed form of takeover offer which is set forth in paragraph 3 below.

3. PROPOSED FORM OF OFFER

The following is the proposed form of offer which will be dispatched to shareholders in Blue Moon pursuant to the Takeover Scheme :-

COACHCRAFT LTD.

(inc. in Queensland)

A wholly owned subsidiary of INDUSTRIAL EQUITY LIMITED

O F F E R

To acquire all your shares in

BLUE MOON FRUIT CO-OPERATIVE LIMITED

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Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-Operative Limited 21st April 1977

(a) DEFINITIONS

In this offer "Coachcraft" means Coachcraft Ltd., "Blue Moon" means Blue Moon Fruit Co-operative Limited, and "the Act" means The Companies Act, 1961 of the State of Victoria.

(b) SHARES PROPOSED TO BE ACQUIRED UNDER TAKEOVER SCHEME

Coachcraft proposes to acquire during the period during which offers made pursuant to the Takeover Scheme remain open for acceptance as hereinafter provided (number will be inserted) shares of $2.00 each in Blue Moon being all the shares in Blue Moon on issue on the date of this offer other than the shares in Blue Moon to which Coachcraft is entitled (within the meaning of Section 180A of the Act) at the date hereof.

The terms of all other takeover offers dispatched or to be dispatched in respect of the shares in Blue Moon proposed to be acquired by Coachcraft as aforesaid (which other takeover offers together with this takeover offer are hereinafter collectively referred to as "the Takeover Scheme") are the same terms as are contained in this offer. The shares in Blue Moon which Coachcraft proposes to acquire pursuant to the Takeover Scheme are hereinafter referred to as "offer shares".

(c) OFFER AND ENTITLEMENT TO OFFER

Coachcraft hereby offers to acquire on the terms and conditions set out in this offer the whole of your offer shares. This offer is made to you as the holder of offer shares registered in the Register of Members of Blue Moon at 5.00 p.m. (Eastern Standard Time) on the date hereof. In accordance with Section 180K of the Act, where at the time when this offer was made or at any time during the period during which this offer remains open for acceptance, another person is or is entitled to be registered as the holder of shares to which this offer relates then -

(i) a corresponding takeover offer shall be deemed to have been made to that other person in respect of those shares; and

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Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-Operative Limited

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(ii) a corresponding takeover offer shall be deemed to have been made to you in respect of any other shares to which the offer relates.

(d) CONSIDERATION

The consideration offered is One dollar twenty cents ($1.20) cash for each offer share in respect of which you accept this offer by executing the Form of Acceptance and Transfer and the two copies of the Power of Attorney and otherwise complying with paragraph (o) below. The Power of Attorney is required because payment will not be delayed pending registration of shares in the name of Coachcraft - see paragraph (i) below. Blue Moon's Article six at present provides "The shares held or capable of being held by or by and on behalf of any one member shall not exceed in number ten thousand nor in value ten thousand pounds".

(e) CURRENCY OF OFFER

It is a term of this offer that it and all other offers made by Coachcraft under the Takeover Scheme will unless withdrawn remain open during the period ending at 5.00 p.m. (Eastern Standard Time) on 17th June 1977 PROVIDED HOWEVER THAT Coachcraft may in accordance with the provisions of Section 180L at any time and from time to time vary this offer by extending the period during which this Offer remains open.

(f) CONDITIONS OF OFFER

This Offer and any contract or agreement arising from the acceptance of it are subject to the following conditions :-

(i) Between the 28th March 1977 and the end of the period during which this offer and all other offers under the Takeover Scheme remain open for acceptance. Blue Moon and each of its subsidiaries has carried on and will carry on its business in the existing and ordinary and usual manner and in particular has not and shall not have -

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A. declared paid or distributed any dividend bonus or other share of its profits or assets to members

B. issued allotted or granted options over or otherwise made any commitments with respect to any of its capital or effected any alteration in its capital structure or issued or agreed to issue any convertible notes;

C. appointed any additional Directors to its Board;

D. conducted business except in the normal and usual course or made any change which has a materially adverse effect on its business or prospects;

E. had threatened or commenced by it or against it any claim or proceedings in any Court;

F. made any changes in the provisions of its Memorandum or Articles of Association;

G. entered into any contract or commitment other than in the normal and usual course of business;

H. passed any resolution for liquidation or had or otherwise been liable to have appointed an Official Manager, Receiver or Liquidator or become subject to investigation under Part VIA of the Act nor will there have been any petition for winding up nor any threat of proceedings for winding up against it.

(ii) That any breach or non-fulfilment of the conditions in (i) above or any one of them may be relied upon only by Coachcraft which may at its option waive any such condition or the breach or non-fulfilment thereof. No action shall lie on any such condition after payment.

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Documents containing offer of Takeover by Coachcraft Limited to Blue Moon Fruit Co-Operative Limited 21st April 1977

(g) Coachcraft alone shall be entitled to the benefit of the foregoing conditions and may at any time and from time to time declare this and all other offers made by Coachcraft under the Takeover Scheme and any contract or agreement arising from the acceptance thereof free from any one of or all the conditions set out in paragraph (f) above by notice in writing to Blue Moon PROVIDED THAT such declaration or declarations be made not less than seven days before the end of the period during which this offer remains open.

(h) Immediately before this offer was dispatched Coachcraft was entitled (within the meaning of Section 180A of the Act) to (number will be inserted) fully paid ordinary shares of $2.00 each in the capital of Blue Moon.

(i) SATISFACTION OF CONSIDERATION

Subject to satisfaction of all the conditions of this offer (except to the extent that the Offeror may pursuant to paragraph (g) above declare this and all other offers under the Takeover Scheme free from any one or all of such conditions or may pursuant to paragraph (f)(ii) above waive any such condition or the breach or non-fulfilment thereof) payment of the cash consideration will be made to the holder of shares accepting the offer prior to the date being fourteen days after Coachcraft receives the acceptance and other (if any) documents required by paragraph (o) or 31st August 1977 whichever shall be the earlier. A cheque drawn in favour of each offeree accepting this offer for the cash consideration payable for the offer shares in respect of which the offer is accepted will be posted prior to the date hereinbefore referred to by prepaid mail to the offeree concerned at his address appearing in the Register of Members of Blue Moon or where no such address appears in the Register of Members of Blue Moon or a different address is shown on the Form of Acceptance and Transfer, then to the address shown on the Form of Acceptance and Transfer.

PROVIDED ALWAYS THAT notwithstanding the provisions of this offer nothing herein contained

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shall create or transfer to any offeree who is resident out of Australia any right (actual or contingent) to the payment of moneys by Coachcraft hereunder where the authority of the Reserve Bank of Australia to such payment is required, unless and until such authority has been obtained.

(j) WARRANTY

It is a term of this offer that by signing the acceptance documents the offeree represents and warrants (with the intent that such warranty shall persist notwithstanding payment) to Coachcraft that all of the shares in Blue Moon the subject thereof are and shall remain free from all mortgages, charges, liens and encumbrances of every kind arising from the act or default of the Offeree whether to Blue Moon or any other company, firm or person whatsoever.

(k) WITHDRAWAL OF OFFER

Coachcraft shall be at liberty by written notice to Blue Moon at any time during which this offer remains open to withdraw this and all other offers made by Coachcraft under the Takeover Scheme in which case any contract arising from acceptance of any such offer which has not been completed by payment shall be voidable at the option of Coachcraft by notice in writing to the Offeree not later than one month after such withdrawal. Pursuant to Section 180E (4) of the Act, if an offer arising under the Takeover Scheme is withdrawn, a contract arising from the acceptance of any other offer under the Takeover Scheme is voidable at the option of the Offeree by notice in writing given to Coachcraft not later than one month after the firstmentioned offer is withdrawn.

(l) GENERAL

This offer is not conditional upon the Offeree approving or consenting to a payment or other benefit being made or given to a director of Blue Moon or of a corporation that is deemed by virtue of Section 6 (5) of the Act to be related to Blue Moon as compensation for loss of office or as consideration for or in connection with his retirement from office.

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(m) In accordance with Section 180E (5) of the Act Coachcraft specifies 9th June 1977 as the date for the publication of the notice referred to in Section 180N (3) of the Act PROVIDED THAT Coachcraft hereby expressly reserves its right to vary such date under and subject to Section 180L of the Act.

(n) All costs and expenses of the preparation and circulation of this and all other offers made by Coachcraft under the Takeover Scheme and stamp duty on Acceptance documents will be payable by Coachcraft.

(o) ACCEPTANCE OF OFFER

(A) To accept this offer :

(i) Sign in the presence of a witness so as to be binding on you the Form of Acceptance and Transfer (Blue form) and the two copies of the Power of Attorney (Buff forms).

(ii) Forward the Form of Acceptance and Transfer and the Power of Attorney documents together with your Share Certificates to be received by Coachcraft Ltd. c/- Industrial Equity Limited, 151 Macquarie Street, Sydney, New South Wales, prior to the expiration of the period during which this offer remains open.

(B) By signing in the presence of a witness the Form of Acceptance and Transfer you will be deemed to have :

(i) authorised Coachcraft to complete on your behalf on the form correct details of your holding of offer shares;

(ii) acknowledged that insofar as any blanks remain in that form Coachcraft is thereby authorised to complete such blanks in such manner as is necessary to make such Acceptance and Transfer effective in relation to all the shares held by you in the capital of Blue Moon.

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(C) If the Form of Acceptance and Transfer or Power of Attorney is signed under Power of Attorney the Power of Attorney must be produced to Blue Moon for noting unless it has already been noted by that Company;

(D) If the Offeree or one of the Offerees is a corporation it must execute the Form of Acceptance and Transfer and Power of Attorney under its seal or by attorney;

(E) If the shares are registered in the names of joint holders, all must sign the forms;

(F) If the shares stand in the books of Blue Moon in the name of a person now deceased this Offer shall be deemed to be made to his Executors or Administrators. Probate, Letters of Administration or a Certificate of Grant and a Certificate under Section 14 of the Probate Duty Act of Victoria must be produced to Blue Moon for noting unless they have already been noted by that Company.

Failing strict compliance with the foregoing provisions of this paragraph Coachcraft may (but shall not be obliged to) grant time in which to effect such complience and validate acceptance, or may waive such compliance.

N.B. The following information which will not be available until the date upon which offers are made pursuant to the Takeover Scheme will be included in each offer namely :-

(a) In sub-paragraph (b) the number of shares in Blue Moon which Coachcraft proposes to acquire pursuant to the Takeover Scheme.

(b) In sub-paragraph (h) the numbers of ordinary shares of $2.00 each in Blue Moon to which Coachcraft is entitled immediately before the offers are dispatched pursuant to the Takeover Scheme.

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In addition the offer will be dated such date will be inserted in the Power of Attorney form and a facsimile of the signature of a Director of Coachcraft will appear at the foot thereof.

4. ADDITIONAL INFORMATION REQUIRED TO BE INCLUDED IN THIS STATEMENT

(a) The names, occupations and addresses of all the directors of Coachcraft are as follows :

Ronald Alfred Brierley, 151 Macquarie Street, SYDNEY. N.S.W. 2000. Company Director

Barry Broughton Holmes, 8 David Close, ST. IVES, N.S.W. 2075 Company Director

William Marcus Loewenthal, 10 Alvona Avenue, ST. IVES, N.S.W. 2075 Company Director

(b) The principal activity of Coachcraft is investing in shares in Blue Moon.

(c) At the date of this Statement Coachcraft is entitled, within the meaning given to that term by Section 180A of the Act, to 58,886 ordinary shares of $2.00 each in the capital of Blue Moon.

(d) Other than as set out in (c) above Coachcraft is not entitled at the date of this Statement to any marketable securities in Blue Moon.

5. There is no restriction on the right to transfer the shares to which offers made under the Takeover Scheme relate contained in the Memorandum or Articles of Association of Blue Moon which has the effect of requiring the holders of the shares before transferring them, to offer them for purchase to members of Blue Moon or to any other person.

6. The consideration payable for the acquisition of shares i Blue Moon under the Takeover Scheme will be made by Coachcraft from loans made

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available to it by its parent company, Industrial Equity Limited.

7. It is not proposed in connection with the Takeover Scheme that any payment or other benefit shall be made or given to any Director of Blue Moon or of any corporation that is, by virtue of sub-section (5) of Section 6 of the Act, deemed to be related to Blue Moon as compensation for loss of office or as consideration for or in connection with his retirement from office nor is there any agreement or arrangement made between Coachcraft and any of the Directors of Blue Moon in connection with or conditional upon the outcome of the Takeover Scheme.

8. Within the knowledge of Coachcraft the financial position of Blue Moon has not materially changed since the 31st August, 1976, being the date of the last balance sheet laid before Blue Moon in general meeting on 30th March, 1977.

9. There is no agreement or arrangement whereby any shares in Blue Moon acquired by Coachcraft will or may be transferred to any other person.

DATED this 31st day of March, 1977.

SIGNED by WILLIAM MARCUS LOEWENTHAL and RONALD ALFRED BRIERLEY being two of the Directors of Coachcraft Ltd. authorised so to sign pursuant to a resolution passed at a Meeting of Directors of Coachcraft Ltd. held on the 31st day of March, 1977.

WILLIAM MARCUS LOEWENTHAL — Director

RONALD ALFRED BRIERLEY — Director

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ACCEPTANCE DOCUMENTS

THIS AND THE POWER OF ATTORNEY

ARE IMPORTANT DOCUMENTS

If you do not understand them please consult your financial or legal adviser immediately

For instructions on how to accept the offer see overleaf

FORM OF ACCEPTANCE & TRANSFER

BY SHAREHOLDERS OF

BLUE MOON FRUIT CO-OPERATIVE LIMITED

Please insert full name & address

I/We Mr. / Mrs. / Miss .....
Full name in block letters

of .....
Full address in block letters

Insert number

being a registered holder of shares of $2.00 each in Blue Moon Fruit Co-operative Limited.

(1) HEREBY ACCEPT the Takeover Offer by Coachcraft Ltd.

(2) Have duly executed (in the case of a person signed in the presence of a witness) or will duly execute the two copies of the Power of Attorney required with this document for acceptance of the Takeover Offer.

(3) Transfer the shares shown above held by me/us to Coachcraft Ltd. for the consideration set out in the said offer subject to the several conditions on which I/we held the same immediately before the execution

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hereof and Coachcraft Ltd. does hereby agree to take the said shares subject to the conditions aforesaid.

(4) Authorise Coachcraft Ltd. to complete on my behalf in the space provided above correct details of my holding of shares in Blue Moon Fruit Co-operative Limited.

Where this document is signed under Power of Attorney the donee of the Power of Attorney declares he has no notice of revocation.

SIGNED by the Transferor)
)
this day of) .....
) Transferor
1977 in the)
)
presence of :)

.....
Witness

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TO ALL TO WHOM THESE PRESENTS SHALL COME

I .....
(Insert name and address)

of .....

give notice as follows :

1. I have accepted the offer dated 21st April 1977 of COACHCRAFT LTD., c/o INDUSTRIAL EQUITY LIMITED of 151 Macquarie Street, Sydney to acquire all my shares in the capital of BLUE MOON FRUIT CO-OPERATIVE LIMITED and have sold such shares to Coachcraft Ltd. I enter into this Deed as one of the terms of such sale. BLUE MOON FRUIT CO-OPERATIVE LIMITED is hereafter referred to as "the Company". I hold the shares I have sold and all dividends accretions and other benefits accrued or to accrue in respect thereof but not paid or made for Coachcraft absolutely.

2. I hereby irrevocably appoint David Harold Allen CRAIG or failing him Barry Broughton HOLMES or failing either of them such other person as may from time to time be nominated in writing for that purpose by Coachcraft Ltd. as my proxy to vote at meetings of members of the Company and I also irrevocably appoint each of such persons and also the said Coachcraft Ltd. severally as my attorney with power but only in relation to shares of the Company to execute all notices proxies and other documents and to do all matters or things of every kind and nature which I myself could do if personally present and acting including without limitation of such power the power to transfer assign mortgage or otherwise deal with such shares.

3. I hereby request the Company to register my address in the register of members as care of Industrial Equity Limited, 151 Macquarie Street, Sydney, and direct that all scrip receipts, notices, proxies, circulars and other communications and all payments whether dividends or

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other sums payable by the Company to me be sent to such address and declare that the receipt of the Secretary of Industrial Equity Limited shall be full and sufficient discharge therefor.

4. I covenant that no person has any claim to the shares in the Company which I have sold which prevents me from transferring the whole beneficial interest in such shares to Coachcraft Ltd. and that I will execute or have executed if so requested by Coachcraft Ltd. but at its expense all such further documents in relation thereto as may be thought necessary or desirable more effectively to assure the benefit of the acquisition of such shares to Coachcraft Ltd. or to such other person as it may from time to time wish to have the benefit thereof.

5. I covenant for myself my executors administrators and assigns to allow ratify and confirm all and whatever my attorney or proxy or Coachcraft Ltd. shall do or cause to be done by virtue of this Deed.

6. Coachcraft Ltd. is empowered to transfer the benefit of this Deed.

IN WITNESS WHEREOF I have hereunto set my hand and seal this day of , 1977.
(Insert date)

SIGNED SEALED AND DELIVERED)
)
by the said .....)
(Insert name & sign))
)
in the presence of : .....)
)
.....)
(Witness to sign))

DEFENDANT'S EXHIBIT

"6"

Exhibit "6"

NOTICE OF RESOLUTION

Notice of Resolution

No. of Company -

Form No.40

12th December 1952

COMPANIES ACT 1938

COPY RESOLUTION OR AGREEMENT
Pursuant to Section 118.

BLUE MOON FRUIT CO-OPERATIVE LIMITED.

At a General Meeting of the Members of Blue Moon Fruit Co-operative Limited duly convened and held at Blackburn on the Eighth day of December, 1952, the following Special Resolution was duly passed :-

That the Articles of Association of the Company be altered as follows :-

1. In Article 5 for the expression "FOUR THOUSAND" substitute the expression "TEN THOUSAND".

2. In Article 6 omit the words "FOUR THOUSAND NOR IN VALUE FOUR THOUSAND POUNDS" and substitute therefor the words "TEN THOUSAND NOR IN VALUE TEN THOUSAND POUNDS".

DATED THIS TWELFTH day of DECEMBER, 1952.

(Signed)

E.W. IRWIN.
Secretary.

IN THE PRIVY COUNCIL No. 16 of 1979

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

B e t w e e n :

COACHCRAFT LTD. — Appellant (Plaintiff)

- and -

S.V.P. FRUIT CO. LTD. and MAXWELL GEOFFREY CHAPMAN — Respondents (Defendants)