

On application by the company for approval of the scheme and confirmation of the associated reduction of capital:

Held, refusing the applications: (1) Although it is not possible to lay down specific rules dealing with communications between an expert engaged to prepare an independent report, on the one hand, and the company and those representing it, on the other, the guiding principle must be that care should be taken to avoid any communication which may undermine, or appear to undermine, the independence of the expert. What happened here did not accord with that principle. The report was produced under the supervision of the company and its advisers and owed much to their exertions. It did not represent the genuine independent opinion of its authors.

(2) The approach adopted in the report was not the result of an exercise of judgment by its authors uninfluenced by pressure brought to bear by or on behalf of the company. Pressure had been exerted by or on behalf of the company which significantly affected the contents of the report. Through this intervention, the company prevented its members from having the benefit of the independent exercise of the expert's judgment.

(3) The report had a tendency to mislead or deceive the shareholders by giving them the impression that the firm of accountants had, in the ordinary sense, valued either the existing ordinary, or the proposed redeemable preference, shares in the company.

(4) The report did not express an opinion genuinely held by its authors in discussing whether the scheme was in the best interests of members, but was the result of an exercise carried out for the purpose of arriving at a desired result. That fact alone was a sufficient reason for refusal to approve the scheme.

(5) To the extent to which, in their explanatory statement, the directors were trying to convey to shareholders that the advice received supported the scheme, or had been relied on by them in propounding the scheme, it was misleading. Further, the statement of reasons for the scheme was misleading: in propounding the scheme the directors were motivated by their fear of a takeover.

(6) The explanatory statement did not disclose information that was material to the making of a decision by a member whether to agree to the arrangement, and thereby failed to comply with s. 316(1)(a)(ii) of the *Companies (Victoria) Code*. The directors were concerned to avoid putting before members any information which would tend to suggest that the shares had a value much in excess of \$12.50.

The duties and responsibilities of persons engaged to prepare independent experts' reports and of those who engage them, discussed.

Summonses

Phosphate Co-operative Co. of Australia Pty. Ltd. applied for approval of a scheme of arrangement between it and its members and for confirmation of the associated reduction of capital. The facts are stated in the judgment.

A. C. Archibald Q.C. and *J. G. Santamaria* for the applicant.

A. J. Myers Q.C. and *G. R. Ritter* for the respondents.

Cur. adv. vult.

Brooking J.: I have before me two matters. One is an application by summons for the approval of a scheme of arrangement between the Phosphate Co-operative Co. of Australia Pty. Ltd. (which I shall call "Pivot") and its members, pursuant to s. 315 of the *Companies (Victoria)* Code. The second is an application under s. 123 of the Code for confirmation of the associated reduction of capital.

Both came on in the Practice Court and were subsequently admitted to the commercial list. Both were fixed for hearing in this list on 20 June on an estimate of three to five days. The hearing was broken off on 24 June, by which time it was apparent that the duration of the cases had been grossly underestimated by the parties' legal advisers. Pursuant to an order made by Ormiston J. on 26 May 1988, particulars of objection had been filed by the objectors to the scheme and proposed reduction of capital — Douglas Stephen Shears, City Farm Phosphates Pty. Ltd. and Peter MacPherson Robertson. City Farm (as I shall call that company) is a company controlled by Shears, he being the beneficial owner of all its issued shares. To the extent to which arguments put have travelled outside the particulars of objection, that has been done without protest. Further affidavits were filed on behalf of Pivot in consequence of an amendment which I permitted to be made to the particulars of objection and the cases did not come on for hearing again until 26 July. Later the hearing had to be broken off again because of the indisposition of a deponent, Alfredson, who was to be cross-examined.

Pivot's authorised capital is \$5 million, divided into 500,000 ordinary shares of \$10 each, of which 370,880 have been issued and are fully paid. The essence of the scheme is that all shareholders are to exchange each of their ordinary shares in Pivot for one redeemable preference share of \$10 credited as fully paid in the company. Five ordinary shares are not to be cancelled but, instead, converted into "non-participating shares" and held by the directors of Pivot on trust for the redeemable preference shareholders. The scheme involves the following steps:

- (1) Conversion of the five excepted shares into non-participating shares;
- (2) By way of reduction of capital cancellation of all shares on issue other than non-participating shares;
- (3) Allotment to existing shareholders of one redeemable preference share of \$10 credited as fully paid in substitution for each ordinary share previously held;
- (4) Crediting of capital cancelled to a special account and its application in paying up in full the redeemable preference shares so allotted.

I was told by counsel that the structure of the scheme had been influenced by *Re St. James' Court Estate Ltd.* [1944] Ch. 6.

Pivot was established to supply fertilisers to farmers and today is one of the largest fertiliser manufacturers and producers in Australia. Pivot now has more than 36,000 members. It does not pay and never has paid dividends: instead its profits are used to reduce the cost of fertiliser to farmers by means of rebate payments, although it has also built up very large reserves.

Pivot was not incorporated under the *Co-operation Act* 1958. It was incorporated almost 80 years ago, in 1919, under the *Companies Act* 1915. The first of its objects is to supply fertilisers and similar products to farmers

and others and the second is to carry on its trading objects on a co-operative basis by sharing profits with or giving rebates or special advantages to shareholders or purchasers or users of its goods. According to its annual report, the basic principles of its co-operative trading are that it sells at market rates and returns each year's surplus to members in proportion to purchases, that its rebates are paid only to members who co-operate by purchasing from it, that it pays no dividends, that each member's shareholding is strictly limited and that its shares are not listed on a Stock Exchange.

By its Articles (Article 5) the maximum number of shares to be held by any one person shall be 60 or such other number as the directors may from time to time fix. That number has, since 1964, been fixed at 500. In February 1987 the Articles of Pivot were amended to include a new Article (Article 5A), the effect of which was to deem, for the purposes of the Articles, a person to hold a share if he had a relevant interest in it for the purposes of s. 9 of the *Companies (Acquisition of Shares) (Victoria) Code*, the "Takeovers Code" as I shall call it.

Article 52 limits the number of votes to which any shareholder shall be entitled to five.

In fact the average shareholding is of only about 10 shares.

The directors of Pivot regard its members as falling into two categories — "wets" and "drys". These are those who respectively do and do not buy fertiliser from it. With the passing of the years, the tendency is for the number of "drys" to increase as farmers sell their farms or die.

The directors of Pivot have, for some years, been concerned with the possibility that control of the company would pass out of the hands of farmers who trade with it.

In January 1985 Pivot wrote to shareholders who had not bought any fertiliser from it during the preceding four years, offering to find a buyer for their shares at \$12.50 each. Before January 1974, shares were issued at par.

Since January 1974, Pivot has issued shares to new and existing shareholders at \$12.50 per share. In the three years ended 30 June 1974, 1975 and 1976 about 2000 shares were issued at \$12.50. About 10 years then passed without the issue of any shares. In all, about 19,000 shares have been issued at \$12.50. The total number of shares on issue is 370,880, as I have said. In the year ended 30 June 1986, 2015 shares were issued to 121 new members and 10,406 shares were issued to 336 existing members. In the following year 2785 shares were issued to 557 new members and 1602 shares were issued to 13 existing members. In each case, the issue price was \$12.50.

The substance of the scheme of arrangement is in effect to convert the existing ordinary shares into redeemable preference shares. The purpose of the five non-participating shares is to preserve an issued capital; generally speaking, these shares are to carry no rights. They are to be held in trust for the holders from time to time of redeemable preference shares.

By the scheme, the redeemable preference shares are liable to be redeemed by Pivot in three cases:—

- (a) Where the member has died or become insolvent;
- (b) Where the member is not an "active member", that is, has not bought any manufactured products from Pivot during the immediately preceding 36 months;

(c) Where directors believe on reasonable grounds that a person has a "relevant interest" within the meaning of the *Takeovers Code* in more than 500 shares of Pivot.

5 An order for meetings was made by Gray J. on 7 April 1988, convening for 13 May 1988 meetings of two classes of members of Pivot — the holders of the "excepted shares" (as defined in the scheme) and the holders of all issued shares other than the excepted shares. Pivot itself convened an extraordinary general meeting of members of the company to be held on
10 the same day, the purpose of this meeting being, *inter alia*, to make the necessary reduction of capital and to alter the Memorandum and Articles of Association for the purposes of the scheme of arrangement. The necessary resolutions were passed at the meetings. Voting at the meeting convened by order of the court of members other than holders of "excepted shares" was as follows:

15 83.8 per cent of members present in person or by proxy voted in favour of the scheme, representing 82.4 per cent of shares in respect of which votes were cast, and 16.2 per cent of members present in person or by proxy voted against the scheme, representing 17.6 per cent of shares in respect of which votes were cast.
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The votes cast accounted for 57.7 per cent of the issued shares.

The order of Master Evans shows that both meetings ordered to be held were duly convened and held, with the exception that the booklet containing the relevant documents was received late by the holders of the
25 "excepted shares". This irregularity obviously should not stand in the way of the approval of the scheme.

Since about November 1986, Shears and City Farm have been acquiring shares in Pivot. Shears is now the holder of 380 and the beneficial owner of 5627 shares and City Farm is now the beneficial owner of 27,185 shares.
30 These shares total 33,192 and represent 9.49 per cent of the issued capital. The general meeting of Pivot to introduce Article 5A into its Articles of Association was convened after City Farm had acquired about 22,000 shares.

A number of earlier legal proceedings should be briefly mentioned.
35 In the first half of 1987, Shears applied under s. 265B of the *Companies (Victoria) Code* for an order for the inspection of the books of Pivot. Pivot agreed to give him the access sought. In July 1987, Pivot took proceedings against City Farm, No. C.L. 265 of 1987, claiming declarations that the 27,185 shares in Pivot acquired by City Farm were deemed to be held by
40 Shears and that the Articles of Association of Pivot limited voting rights in relation to those shares to five votes. In August 1987, Shears and City Farm took proceedings against Pivot under s. 320 of the *Companies (Victoria) Code*, No. C.L. 285 of 1987, alleging oppression.

In the first half of 1987, Shears requisitioned a meeting of Pivot, in fact
45 held on 13 May 1987, to consider the removal of three members of the board and their replacement by himself and Messrs. Crow and McGauchie. This attempt failed.

In November 1987, Beach J. delivered judgment in the proceedings taken by Pivot seeking declarations and in the cross-proceedings by Shears
50 and City Farm in which it was alleged, *inter alia*, that the adoption by Pivot of Article 5A constituted oppression. Pivot succeeded in both proceedings and in particular it was declared that, by virtue of Article 5A and for the

purposes of the Articles, Shears was deemed to hold all of City Farm's shares in Pivot. An appeal is pending.

In April 1988, Shears sent to shareholders in Pivot a letter saying he was interested in buying a further 2500 shares in Pivot at \$50 per share. Later that month Pivot took proceedings against Shears, No. C.L. 114 of 1988, for an order restraining him from acting on any responses that he might receive to that letter. On 6 May 1988, Marks J. granted an injunction, which, subject to a proviso, prevented Shears from seeking to acquire further shares in Pivot.

In May 1988, Shears took proceedings, No. 1522 of 1988, against Pivot and its directors, alleging breaches of fiduciary duty owed by the directors to Pivot in relation to the scheme of arrangement.

According to Slattery, the general manager of Pivot, the board on 14 October 1986 sought advice from Potter Partners Ltd. (which I shall call "Potter Partners") concerning the possible amendment of its Articles. Slattery says that this was shortly before Pivot learned that the Shears interests had acquired shares in Pivot. A letter of 14 October 1986 from Pivot to Potter Partners suggests that Pivot regarded itself as vulnerable and I think this meant vulnerable to takeover. A memorandum of Slattery of 2 December 1986 (Exhibit 14) says that for some time the company has been aware that Pivot has been considered by several parties as a potential takeover target. It may well be that Potter Partners was consulted on 14 October 1986 because of this. Be that as it may, it is clear that Potter Partners was advising Pivot by late 1986 concerning defences against a possible takeover. Slattery's memorandum of 2 December 1986 deals at length with the position of possible "raiders", including Shears, and says that Pivot must now prepare a full response and defence plan.

The letter from Potter Partners of 8 December 1986 to Pivot (Exhibit 6) gives advice about possible takeover defences, suggests that the Articles of Association be amended so as to extend the limit on shareholding to embrace persons who are "associated", contrasts the issue price of shares (\$12.50) with net tangible assets per share, even at book value, of \$250 and says that the best takeover defence is a share price which fully reflects the value of the company.

The letter of Potter Partners of 19 December 1986 gives extensive advice about takeover defences and seems to me to approach the question what Pivot should do in relation to its shareholders in terms of what is expedient from the point of view of successful defence against a takeover. It recommends that Pivot find "friendly" buyers of the shares of "dry" shareholders and says that anything less than a price of \$50 per share could be regarded as wrong.

A Pivot board paper of March 1987, on the subject of City Farm, occasioned by the attempt to replace three members of the board, discusses a number of possible approaches. These include:—

"A white knight approach"

- Seek out parties interested in taking over Pivot and organise a high price option.
- Initiate a merger with other compatible parties.

"Expansion"

- Identify a major acquisition which will change the nature of the company and would reflect back on the composition of the board.

Such an acquisition could be funded by either share placements or debt financing. In any event, the deal might be so big as to overshadow and make irrelevant the dismissal resolution.

5 *“Restructure share base*

- Come up with a capital restructuring proposal which could have Shears move out with a capital gain.
- Amend the voting rights and restructure the share base.

10 *“Restructure size and composition of the board*

- Expand board members to seven, nine, 11 and thereby accommodate calls for greater shareholder representation whilst at the same time diluting the board vote of Shears or his nominees.
- Adopt a zone director structure.

15 *“Others*

- Seek direct government intervention to support the existing structure.
- Revamp rebate and tax structure of Pivot.

20 *“In identifying these categories we had in mind a number of models or projects which have been under consideration in past years such as a restructuring along the Wesfarmers line, a potential merger with C.S.B.P., a takeover of V.P.C., or an investment in a project such as Duchess.”*

25 The letter of 13 April 1987 from P.P. Corporate Advice Ltd. (another Potter company, which I shall call “P.P. Corporate Advice”) considers at length the value of Pivot shares, particularly having regard to the approaches suggested in a policy statement of the National Companies and Securities Commission, to which I shall refer again later. On the basis of capitalising earnings and allowing for a takeover premium, this letter discusses possible values of from \$309 to \$406. On the “alternative acquirer” basis, it discusses a possible value of \$358. On the basis of return to shareholders, it gives a range of possible values from \$84 to \$212. It says that, for takeover purposes, a value in excess of \$300 could be justified and that, even in the absence of a takeover offer, there can be no doubt that the “true value” is well in excess of \$12.50. It says that, on the basis of returns to shareholders from rebates, a price of \$100 to \$150 could be justified. In discussing how much a member who leaves the co-operative should receive for his shares, the letter raises the question whether, even if \$12.50 was appropriate 12 to 15 years ago, it is appropriate now and says that a 10 per cent growth per annum for 15 years would have increased the \$12.50 to \$52.21. The letter states that Pivot needs a mechanism which enables the value to be increased from time to time. It discusses a possible bonus issue of nine for one and says that this would result in a transfer price of \$125 effectively if the price was maintained at \$12.50 a share. It discusses a possible “two-tier” structure of dividends combined with rebates. The letter says that this is financially feasible and that the beneficial effect of it to Pivot members would be substantial. It should be noted that, in para. 68, it recommends that Pivot take action now to increase the transfer price to something between \$75 and \$125 and recommends \$125. It also recommends a nine for one bonus issue.

50 On 27 May 1987, the board of Pivot decided to terminate the engagement of P.P. Corporate Advice. After this had been communicated to it, that company wrote to Pivot on 10 June 1987, discussing the possibility of a takeover offer by Shears and how Pivot should “head off” this risk. The

letter discusses a possible scheme of arrangement and says that, if this involves redemption of "dry" shares at, say, \$50, it is very difficult to say how the court and shareholders would react to an argument that shares were worth much more, even at book values. The letter observed that an opponent of the scheme would need to go no further than point to Pivot's accounts to demonstrate a value per share of over \$200.

Slattery, the general manager of Pivot, says that it decided to terminate the engagement of P.P. Corporate Advice because that company did not have proper regard to the special position of co-operatives as such. It cannot be said, however, that the approach of P.P. Corporate Advice ignored co-operative theory. This is mentioned at p. 6 of its letter of 13 April 1987.

One should bear in mind the statement at p. 3 of the letter of P.P. Corporate Advice of 10 June 1987 that an opponent of the scheme need do no further than point to Pivot's published accounts to demonstrate a value of over \$200 when considering the failure of the board of Pivot to make any reference to net tangible assets when putting the scheme before the shareholders.

On 23 April 1987, the board resolved to appoint Partnership Pacific Ltd. (which I shall call "P.P.L.") to review the corporate structure of Pivot to ensure that its control remained in the hands of active farmers.

On 8 May 1987, P.P.L. wrote to Pivot recommending the conversion of ordinary shares to redeemable preference shares. This course, it said, would not entail a "fair and reasonable" report by an independent party; it said that many other options required such a report and added "You may well believe this to be an important consideration". The letter recommends an entry and exit price of \$25 to \$50 as necessary to oust City Farm, to avoid an "inequitable" label and to continue to attract new members. It observes that, under Sch. 9 of the Companies Regulations, the report of an independent expert on whether the scheme is in the best interests of members is not necessary but says that such a report should be obtained to avoid a charge of inequity, not to ensure that members are independently advised, the last being my observation. The letter states that such a report, that is, a report on whether the scheme is in the best interests of members, is totally different from a "fair and reasonable" report, which would be required under "several different scenarios that we have considered". The letter says that a "fair and reasonable" report almost certainly would value the shares at over \$250. It discusses the possibility of a bonus share issue being made before 1 July 1987 and leaves open the question whether such an issue is desirable.

On 27 May 1987, the board approved the appointment of P.P.L. On 6 July 1987, P.P.L. sent Pivot a financial analysis of the proposal that Pivot be restructured by the redemption of "drys". This considers the financial effect on "drys" and "wets" separately. It considers redemption prices of \$50, \$75 and \$100 and says that Pivot could sustain a price as high as \$125 and that a price of the order of \$50 is appropriate. The letter adds that an independent expert's report is necessary but that this need not be a matter of great concern — those words are to be marked — provided that the report is on the fairness of the proposal and that this need not entail a valuation of Pivot shares viewed as an investment.

On 20 July 1987, P.P.L. put forward a restructuring proposal and timetable (Exhibit 24). This discusses at length a proposal to replace ordinary shares by redeemable preference shares. At p. 24, it recommends a redemption price of \$50. It says (p. 12) that the redemption price is likely to be the most contentious aspect in the restructuring. It recommends the appointment of Arthur Andersen & Co. (which firm I shall call "Arthur Andersen") to assess whether the scheme is fair and reasonable to members. The letter states that an independent expert may well adopt a certain approach, called "the following scenario", which is set out at p. 13. At p. 14, it is said to be of fundamental importance to realise that, at any time after the company's restructure, a new bidder may emerge with an offer of, say, \$400. The letter notes that a potential conflict may arise if directors propose redemption at \$50 but a bidder offers \$400. It discusses (p. 9) the probable approach of the "wets", "very dries" and "drys". Under the heading, "Risks" (p. 21), it refers to a bid of \$400 as one-third of the net assets. Plainly, there is some error in relation to the fraction. Page 22 says that Adelaide and Wallaroo Fertilisers Ltd. is a likely candidate for a bid. This proposal (Exhibit 24) was considered by the board of Pivot on 23 July 1987. There purports to be a decision of the board recorded in handwritten notes made in conjunction with the affixing of a rubber stamp and signed by the chairman. One of these notes is, "Redemption and issue price tentatively \$50 per share subject to further review". The evidence is that these notes were made by the secretary. The original of this exhibit was not produced until after some time. The question has been raised whether the words "subject to further review" are a subsequent addition. I will assume that Pivot here has the benefit of the presumption of regularity. My view on the outcome of this litigation would be the same, whatever view I took on this point, but I should say that, despite the presumption of regularity, I am unable to make a finding one way or the other on whether these words were added subsequently.

In a letter to Pivot of 24 August 1987 (Exhibit 25) P.P.L. said that, if a separate meeting of the "drys" was necessary, it might be possible to increase that class so as to see City Farm outvoted.

On 30 August 1987, P.P.L. sent to Arthur Andersen its memorandum submitted to the Pivot board and said that the proposal, as approved in principle by the Pivot board, included a redemption price of not less than \$50. On 11 September 1987, P.P.L. sent an amended draft scheme to Pivot and asked to be supplied with all information concerning shares sold in the last six months, stating that P.P.L. and Clayton Utz considered that "sold" probably included the sales to City Farm.

On 23 September 1987, P.P.L. wrote to Pivot, discussing the relative merits of \$12.50 and \$50 as a redemption price and distinguishing between the "wets" and the "drys".

On 1 October 1987, P.P.L. wrote to Pivot, discussing the relative merits of \$12.50 and \$50 and stating that a price of at least \$50 might be necessary to obtain the necessary support from the "drys" and encourage the "wets" to vote and that, at \$12.50, the prospect of a hostile bid would be greater. Page 2 of the annexure to this letter gives \$400 as a possible bid price and as roughly equalling the revalued asset backing. This is the same figure as that on p. 14 of Exhibit 24.

From now on, it is convenient to consider the matter of draft schemes in conjunction with the preparation by Arthur Andersen of its report.

The person initially concerned with the writing of the independent expert's report was Williams. In June 1987, Trowbridge of P.P.L. met Williams at a conference on takeovers or something of that kind. They discussed the possibility of Arthur Andersen's being engaged by Pivot to write an independent expert's report in respect of a co-operative. There is no evidence that they discussed what approach would be appropriate in considering the redemption price where ordinary shares in a co-operative were to be replaced by redeemable preference shares but, putting the matter negatively, I am not satisfied that they did not. They did not speak again until several weeks later, when Trowbridge telephoned Williams in the first half of July and told him that the board of Pivot would like to meet him to discuss his doing an assignment; he told Williams that this concerned an independent expert's report and gave him some outline of the proposed scheme of arrangement. Again, although no affirmative finding is possible, I am, putting the matter negatively, not satisfied that there was no discussion of an expert's possible approach to the scheme. Very shortly after this telephone conversation, P.P.L. sent Williams a number of documents bearing, or thought to bear, on the proposed scheme. This was on 15 July. These documents included papers relating to the unsuccessful takeover bid made by the Shears interests in respect of the Tatura Co-operative, where P.P.L. had advised the co-operative.

On 16 July 1987, there was a meeting at the offices of Pivot between Williams, Alfredson, a partner in Arthur Andersen, Trowbridge and Nolan of P.P.L., Slattery accompanied by the secretary of Pivot and representatives of Deloitte Haskin & Sells, Pivot's auditors, and Arthur Robinson & Hedderwicks, the solicitors acting for Pivot. At this time, Arthur Andersen had not been engaged. At the meeting of 16 July, Williams got the impression that the purpose of the scheme was to dislodge a takeover suitor, Shears. He says that there was discussion in the context of a threat posed by Shears to Pivot. At the meeting, Williams explained in broad terms the approach Arthur Andersen would be likely to adopt in evaluating the scheme. Within a few days of this meeting, either Trowbridge or Nolan telephoned Williams and told him that the Pivot management or board had decided to instruct Arthur Andersen to prepare the expert's report and that he was passing on that decision and that the redemption price would be approximately \$50. Williams thought that this telephone conversation was on about 20 July but it may have been on 23 July, the date of the Pivot board meeting. At that board meeting, a P.P.L. letter of 20 July was considered, which at pp. 12-13 set out a "scenario" that P.P.L. said might well be possible as the finding of an independent expert. This included a valuation "totally unrelated" to value established by conventional valuations and unlikely to reflect net assets. It was a valuation based on returns and "dry" shareholders, said P.P.L., had no return.

On 23 July 1987, Williams wrote to Pivot, confirming the firm's engagement to prepare a report stating whether the implementation of the proposed restructuring was in the best interest of members. The letter showed that Williams contemplated preparing a valuation. Very shortly after, and as a result of, this letter, Slattery telephoned Williams and said that Arthur Robinson & Hedderwicks had told him in discussions that a valuation was not required and that all that was required was a "fair and reasonable" opinion. Williams told Slattery that a valuation was necessary

but added that whether details of the valuation were to be in the report was another matter. Williams says — and I have no doubt in accepting his evidence here — that it became clear to him very quickly that Pivot and P.P.L. were “worried like hell” that he intended to do a valuation in accordance with Policy Statement No. 102 of the National Companies and Securities Commission. In fact, in his letter of 23 July 1987, Williams had said that the firm believed that it would have to prepare a report consistent with that policy statement while “superimposing” its own “professional judgment to properly accommodate the valuation methodologies appropriate for co-operatives”.

Policy Statement No. 102 deals with experts’ reports for the purposes of ss. 23 and 43 of the *Takeovers Code*. In relation to the requirement that the expert state whether the takeover offer is, or the proposed terms of acquisition are, fair and reasonable, the statement says this:—

“14. Without limiting the expert’s application of skill and judgment in forming his opinion, the Commission considers that it may be appropriate for him to consider

(a) value at a specified capitalisation rate appropriate to the business or industry in which the target company is engaged, of the estimated future maintainable earnings of that company, and the estimated realisable value of any surplus or unrelated assets on the basis that a controlling shareholder would seek to maximise the value of its investment;

(b) the amount which an alternative acquirer might be willing to offer if all the securities in the target company were available for purchase; and

(c) the amount that would be distributed to shareholders assuming an orderly realisation of assets.

“In assessing (a), (b) and (c) above the expert would be expected to have regard to and quantify any material discrepancies that exist between the book values of assets and their market values. Such examination should extend to material intangible assets such as goodwill, licences, trademarks etc. where the existing accounting treatment (recognition and basis of valuation) might be inappropriate.”

The origin of some phrases in letters to which I have already referred will now be apparent.

Arthur Andersen’s letter to Pivot of 2 December 1987, justifying its interim account for \$48,000, states that the services rendered include “preliminary research designed to establish a valuation of Pivot”.

Williams says that, by early August, he had decided not to do a valuation.

By about August 1987, Williams had prepared five pages, numbered 12 to 16, as part of a draft report (Exhibit 30). These are headed “The Importance of the Nature of Co-operation in Assessing the Scheme of Arrangement”. This document says that a fair redemption price is \$10 and that it is “not practical to support a value of less than \$12.50 per share on the basis that this price has been used for share transfers since 1973”. It goes on to say that, in expropriations, shareholders should be paid a premium and that, on that basis, “We determine the redeemable preference share value of \$15 per share which is proposed is in the interests of shareholders”.

Williams sent this five page draft to Trowbridge of P.P.L. on about 25 August 1987. He wrote a note on it to Trowbridge, “Paul, this is the

essence of the argument". Almost immediately after receiving this five page draft, Trowbridge asked Williams for a draft report dealing with a redemption price of not less than \$50 to be put before a board meeting on 27 August 1987. An informal meeting between certain persons took place on 25 August. Indeed, it seems that all these events — the supply of the five page draft to Trowbridge, the request by Trowbridge for a draft report for the board meeting and the informal meeting with which I am about to deal — all took place within a day or so. This meeting was at Pivot's office and attended by Williams, Slattery and the secretary of Pivot, Trowbridge and Nolan and others. It discussed a redemption price of \$50. After this meeting was held on 25 August, that is, on 26 or 27 August, Williams sent Slattery a draft report dated 25 August (Exhibit 31). This was duly marked with a rubber stamp impression "Draft for discussion purposes only". In stating the terms of the proposed scheme, this says (p. 3) that the redemption price is not less than \$50. At the conclusion of the section headed, "The Importance of the Nature of Co-operation in Assessing the Scheme of Arrangement" (p. 11), it says that "our analysis" shows that a fair redemption price is \$10 but that, in view of the need to pay a premium in expropriations, a redemption price of \$12.50 would be fair and in the interests of shareholders. Under the "conclusion" (p. 12), the report says that the nature of the co-operative dictates redemption at par, that the scheme will redeem shares at \$50 (contrast the words "not less than \$50" used at p. 3) and that the "terminal dividend" of \$40 is not against the interests of shareholders who remain. Of course, there is a great difference between \$50 and "not less than \$50", indeed, an infinite difference. As Alfredson conceded, no report could sensibly discuss a proposed redemption price of not less than \$50 except by way of saying that a proposal without an upper limit had to be condemned. I refer to the whole of this paragraph in the draft report without setting it out and I refer to the whole of paras 16 and 17 of the affidavit of Williams without setting them out. They show, I think, the great difficulty experienced by Williams in accommodating the payment of \$50 to what he conceived to be co-operative principles. In the draft report, he said that any differential payment away from par value must of necessity be arbitrary and, in cross-examination, he made it clear that he could have written the report in the same terms, concluding that the scheme was in the interests of shareholders, whatever the redemption price was, provided that it was not less than the \$12.50 said to be required by the nature of the co-operative, together with the premium needed for expropriation, and provided it was not less than the net asset backing per share. He said that, once a price representing par value together with a small premium for expropriation was abandoned, there was no reason for selecting \$50 rather than, for example, \$35 or \$150, given only that the necessary asset backing per share was there, for one could not recommend a payment in excess of net asset backing.

Despite what Williams says about his ability to justify a price of \$50 only if Pivot "altered its general method of business operation" and despite what he says about discussions at the meeting of 25 August, the fact remains that he submitted a draft report in the terms of that of 25 August. On his evidence, I see no reason why he could not have submitted a report in the same terms, except as to redemption price, had he been told that a redemption price of \$150, or not less than \$150, was under consideration. Despite his attempted explanations, the incident must cast doubt on both the soundness and

genuineness of his views. Alfredson made a written comment to Williams that he did not see in this draft report any basis for the draft conclusion.

I should say in terms that, when Williams (at p. 331 of the transcript) answered my question whether he could equally well support the price of
5 \$15, \$100, \$150 or \$35, he was assenting.

The board of Pivot met on 27 August. Exhibit E comprises documents concerning the scheme then considered by it. These included a letter from P.P.L. of 24 August suggesting that a final decision on the scheme
10 should be deferred pending the outcome of litigation concerning the shares acquired by City Farm and the cross-proceedings, the five pages (Exhibit 30) which Williams had prepared by about 20 August, determining that a redemption price of \$15 was in the interests of shareholders, a draft explanatory statement, a draft scheme (the redemption price being not less than \$50) and the draft report of Arthur
15 Andersen dated 25 August and supporting a scheme with a redemption price both of not less than \$50 (p. 3) and of \$50 (p. 12). The five page draft, recommending the scheme with a redemption price of \$15, was preceded by a page, evidently prepared by P.P.L., saying "At the board meeting, we will table a developed draft of this report which will assume a redemption
20 value of \$50, in place of the \$15 referred to in this draft".

The letter of 2 December 1987 to Pivot, in which Arthur Andersen justified its interim account for \$48,000, mentioned, as part of the services rendered, "report writing and reviewing drafts with P.P.L. and Clayton
Utz", the latter being P.P.L.'s solicitors.

Williams left Arthur Andersen on about 4 January 1988. More recently,
25 he has demonstrated his personal independence rather strikingly by offering his services as a consultant to the opponents of the scheme, for he says there is an argument that the independent expert's report is wrong. For a fee, he was willing to expound that argument.

Alfredson, the partner in Arthur Andersen, says that he and his partner Hancy had a meeting, or meetings, in January or February with
30 representatives of Pivot and P.P.L. after Williams left Arthur Andersen. He says that, at a meeting, he went through page by page a further draft report prepared by Williams before leaving Andersen, dealing with a
35 redemption price of \$12.50, and listened to comments from Slattery on the draft which were "cosmetic", according to Alfredson.

After, and as a result of, this meeting a draft report dated 1 March 1988 (Exhibit 34) was prepared and sent by Arthur Andersen to P.P.L. for its
40 "review and comments", as Arthur Andersen put it. This differs in a number of respects from its immediate predecessor. It is impossible to say precisely what the differences are because Alfredson has destroyed all copies of the firm's draft reports concerning this scheme of arrangement which were in the firm's possession. At the same time he went so far as to
45 destroy the firm's copy of the report of 9 March, which I shall mention in a moment. How many drafts were prepared will never be known, at all events by persons outside Arthur Andersen and even they may have forgotten. It is clear that copies of them all are not in evidence, the only copy, or copies, of at least one draft having been destroyed by Arthur Andersen. Alfredson said that the draft reports were destroyed as a matter
50 of standard practice, so that they would not be available to be compared with the ultimate report. He said that he could not guarantee that, in this case, other documents had not been wrongly destroyed and it appears that

other documents were destroyed. The report of 9 March (Exhibit 8) was prepared and signed and delivered as a report, not a draft. It is in the same terms as the draft of 1 March (Exhibit 34), Alfredson not having received any complaints or suggestions from Pivot or P.P.L. in the meantime.

Alfredson, in para. 17 of his affidavit, says that this report of 9 March was "amended" as the result of comments made by Arthur Robinson & Hedderwicks on it dealing with the ability of shareholders to understand technical parts of the report. He says that he accepted some and rejected other comments and, in addition, added to the report some comments on why it was necessary to have a scheme. I shall return to how the report came to be "amended" shortly, the cross-examination being more illuminating than the affidavit.

It is unnecessary to mention all the many respects in which the signed report of 9 March (Exhibit 8) differs from the report of 31 March sent to shareholders. The references to expropriation at pp. 6 and 7 of the report of 9 March have gone. The mischievous or at all events dubious heading "The Appropriate Valuation Approach", has made its appearance. The earlier report gives the impression of being more "technical" and more defensive and less emphatic and less comfortable or comforting than the second. Yet the person assuming primary responsibility for both reports, Alfredson, is the same. Something has happened in the meantime to change his approach. And it is not just a matter of expressing technical concepts more simply. There is another change, which throws doubt on the genuineness of the views expressed in the final report or, at least, on the soundness of the expert's judgment, for it is a change in the basis for the conclusion. In the first report, the report of 9 March, at p. 7, the writer determines that a fair redemption price is \$10 but increases this to \$12.50 by way of a premium of \$2.50 for expropriation. The final report allows no premium for compulsory acquisition; it adopts the issue price that "has been current since 1973". I have much earlier summarised the evidence about issue price.

In the second place, the report of 9 March, in adopting \$10 as the fair redemption price before adding the expropriation premium, does so on the basis that par value (\$10) should be adopted and goes on to say that the adoption of par value is supported by the amount used for share transfers until 1973, when the board "arbitrarily" increased the transfer price to \$12.50. The final report supports \$12.50 as the appropriate redemption price, not as par value and as the price used for transfers until 1973, but as the issue price "current since 1973". These changes suggest that Alfredson was not clad in the armour of that "rigorous methodological base" which protected Williams against undesirable influences.

I should add that, in his affidavit, Alfredson said that, after his report of 9 March, it occurred to him that it contained "an error of fact", in that it referred to the transfer price, rather than the issue price, and that on reflection he decided that the transfer price was irrelevant. This is not an assertion that he used the word "transfer" or "transfers" in that report by a slip of the tongue. The word is used there three times. His affidavit, with its reference to reflection and relevancy, suggests that he changed his mind. Why Alfredson should describe the error as one of fact I do not know. On his account, the error was one of principle or approach. In the course of his oral evidence, Alfredson said that, at the time of the report of 9 March, he was not aware that some shares had been issued at a premium of \$2.50.

Having, on 9 March, boldly essayed a report as opposed to a mere draft, on 29 March Arthur Andersen cautiously reverted to the use of a draft by sending to Pivot a report dated 29 March, stamped "Draft for discussion purposes only".

5 Between the report of 9 March and the draft of 29 March, Alfredson had discussions by telephone with Slattery about the report of 9 March. In addition, during the same period, Alfredson attended a conference with counsel. Present were Alfredson himself, the solicitor for Pivot, and the
10 senior and junior counsel retained by Pivot for the purposes of the scheme of arrangement. Whether anyone else was present is not clear. The purpose of this conference seems to have been to improve the report of 9 March and counsel and the solicitor made suggestions to Alfredson about how that report might be improved. As a result of these suggestions, says Alfredson,
15 he substantially rewrote the report of 9 March with the object of making it more understandable. The result was the draft of 29 March. This differs from the report of 9 March in numerous respects, some of them important. I shall not summarise the many changes beyond mentioning that they included the introduction of matter which, in my view, tended to give the
20 impression that the report contained a valuation. Alfredson says that he was given written suggestions by the solicitors and counsel as to how parts of the report might be reworded and that he destroyed those written suggestions along with the draft reports and the report of 9 March itself.

The draft of 29 March differs from the final report of 31 March in
25 numerous respects, although I doubt whether any of them is important. That draft had been supplied to P.P.L. with a view to obtaining its comments. Comments were made by P.P.L. or otherwise on behalf of Pivot and these resulted in alterations to the draft of 29 March.

By its letter of 15 July 1987, P.P.L. had sent to Arthur Andersen
30 documents which included the financial statements of Pivot for the year ended 30 June 1986. When Alfredson came to concern himself with the preparation of the report after Williams left the firm, the file contained no financial statements of Pivot. Alfredson says that, before he signed the report of 9 March, he had read the annual reports of Pivot of recent years
35 but I am not satisfied that this is so.

On 29 March, Alfredson called for a number of documents and, on the same day, his firm obtained from Pivot its most recent annual reports and its prospectuses produced since 1973. This was, of course, about three weeks after the actual report of 9 March.

40 I now go back in time a little. Scheme documents were considered by the board on 25 February 1988. These included, as Annexure B, the draft report of 25 August 1987, prepared by Williams, which had been before the board on 27 August 1987 as part of what is now Exhibit E. But, by February, this draft report had been altered by Trowbridge and Nolan of
45 P.P.L. It forms part of Exhibit 32. The alterations include the substitution of \$12.50 for \$50 on pp. 3 and 12. When it was considered by the board, the alterations to the draft report had not been submitted to Williams.

Williams says that he received back a copy of this draft from P.P.L. with suggested alterations marked on it and that he discussed these alterations
50 with Trowbridge and accepted some and rejected others. Whether these alterations are the same as those made to the draft considered by the board on 25 February is not clear.

The circumstances surrounding the obtaining of the Arthur Andersen report are not in the least calculated to inspire confidence. Let me go through the history again. I do not want it to be thought that I question the desirability of each and every of the individual circumstances I am about to mention but, viewed as a whole, what took place was quite unacceptable. The expert appointed was recommended by P.P.L., a company employed by Pivot to advise it on tactics and strategy. Informal oral approaches were made by P.P.L. to the expert at an early stage and it was P.P.L. which engaged the expert on behalf of Pivot. Williams began preparing a draft report without any proper written proposal on which to comment.

Before the expert's engagement, its representatives attended the meeting of 16 July, attended by Pivot and Pivot's advisers from P.P.L. and Pivot's solicitors. Williams explained broadly the approach the firm would probably adopt. The meeting was such as to give Williams the impression that the object of the scheme was to dislodge Shears as a takeover suitor. The discussion of the scheme was in the context of the threat posed by Shears to Pivot. The consequences of the failure to register transfers of the shares acquired by the Shears interests was also discussed. Williams says that he and Alfredson did not participate in these discussions but, generally speaking, it is undesirable that discussions of this kind should take place in the presence of those who may be writing an independent expert's report. The danger is that, through his being privy to this kind of thing, he may come to be regarded and to regard himself as part of a "team". Moreover, it is undesirable that the prospective independent expert should disclose to its prospective employer its probable general approach in evaluating the scheme. When I put to Williams the danger that a company intending to commission a report might be regarded as shopping for a suitable expert by having exploratory discussions, he said, "There is always that possibility and I am certain, in many situations, that is the case". This is a disturbing piece of evidence so far as reports generally are concerned. Perhaps not every expert will have the "strong and rigorous methodological base that can be justified from the first principles" to which Williams laid claim as an amulet to ward off evil influences. Indeed, I doubt whether he would now assert that his draft report of 25 August 1987, which gave its blessing to redemption prices of not less than \$50 (p. 3) and \$50 (p. 12), was founded upon a strong and rigorous methodological base. He might, I think, if pressed, have admitted it to be an aberration. He said he was very uncomfortable with giving an opinion that \$50 was appropriate. This very case shows that even the sternest methodologist is safer if he prepares his report in his own way instead of doing so in consultation with his client and the client's advisers.

This case also shows the danger of the engagement of an expert before the proposal upon which he is to comment is properly formulated. Uncertainty as to the highly important matter of the proposed redemption price is a notable feature of this case. It is an exaggeration, but only a slight one, to say that at times one gets the impression that Pivot and its advisers are there to report on the independent expert's proposal, instead of the independent expert's being engaged to report on Pivot's proposal. After Williams had written to Pivot his letter of 23 July, referring to a valuation, it was quickly made clear to him that Pivot and P.P.L. were, as he said, "worried like hell" that he was preparing a valuation consistent with N.C.S.C. Policy Statement No. 102. Slattery telephoned him and, in

referring to advice from Pivot's solicitors, tried to persuade him that a valuation was not necessary. Williams says that, by early August, he had decided not to do a valuation. In these circumstances, suspicion will inevitably arise that Williams was influenced by Slattery on this question and, on the evidence, I draw the inference that he was.

I think it may be said to be notorious — certainly one's own experience in commercial litigation supports the view — that the writing of independent experts' reports in company cases may be remunerated at a very high rate. There will often be a danger that the client, who may well, in addition, be engaging experts who are to act in a partisan capacity, will come to regard the independent expert as another member of a team which is being paid very large sums of money to achieve a certain result. The client will often, as here, have at its disposal other advisers who are in a position, by reason of qualifications and experience, to influence, either directly, or indirectly through representations made by the client, the judgment or actions of the independent expert. The greatest circumspection is required in relation to this matter of making representations to an independent expert, not by way of correcting some error of fact, but by way of influencing his judgment on the established facts.

I do not for one moment believe that a shareholder in Pivot, reading the report of Arthur Andersen in the booklet, which begins, "You have asked us to provide an independent expert's report", would think that this positive and seemingly detached report had such a long and troubled history and had been produced under the supervision of Pivot and its advisers and owed so much to their exertions.

The calm, reflective air of the report in no way suggests its long period of gestation or the travail which accompanied its birth, to say nothing of the miscarriage or, perhaps I should say, infanticide — for the child, though sickly, was born alive — which led to the disappearance of the report of 9 March.

It was undesirable for Williams to send to Trowbridge the five pages of a draft report. It is significant that his note, written on this to Trowbridge, describes it as a "draft of the essence of the *argument*". It is one thing to submit to a client or third person acting on behalf of a client a draft of that part of a report which reviews the facts. This may well be perfectly proper and perfectly safe and, indeed, desirable, but to submit a draft of argumentative matter or of reasoning is, I think, asking for trouble.

Next, there is the meeting on 25 August between Williams, Slattery and the secretary of Pivot, Trowbridge and Nolan and others. At this, according to Williams, he canvassed at considerable length considerations to which regard should be had in forming a view on redemption price. Again, it seems to me to be dangerous for an expert to confer with the client and its advisers in this way. No doubt Williams would say his independence was in no way imperilled, but I cannot agree. Moreover, the discussions between Williams and those representing or acting for Pivot are not to be considered in isolation: one must also have regard to the course of events in relation to the draft and final reports, both in considering whether independence was imperilled and in considering whether Williams or other persons from Arthur Andersen were, in fact, influenced.

Then there is the matter of the draft report of 25 August 1987, with its prices of not less than \$50 and \$50 precisely, and the admission of Williams that he was not happy giving the draft blessing which he there gave and his

admission that he could equally well, or equally doubtfully and painfully, have supported a quite different price.

Then there is the reappearance before the board on 25 February 1988 of the draft report of 25 August 1987, the Shears interests having in the meantime been vanquished. This draft report was altered by Trowbridge and Nolan in ways not limited to the substitution of \$12.50 for \$50. It thus seems strange that the board should have been considering a draft report different from the draft prepared by Williams. The episode only goes to show the strange results which may ensue once draft reports are put into circulation. Late in 1987 Williams did receive from P.P.L. a copy of his draft report of 25 August, containing certain alterations. He discussed these suggested alterations with Trowbridge and says he accepted some and rejected others. Again, the process was a dangerous one. Williams left Arthur Andersen at the beginning of January. The partner, Alfredson, then began to participate in significant respects. He went through a further draft report at a meeting with representatives of Pivot and P.P.L. and, as a result, he produced yet another draft, dated 1 March, which went to P.P.L. for "review and comments".

Then the report dated 9 March 1988 (Exhibit 8) was prepared and signed, not a draft but a report. But even this apparent finality had not been reached without further contributions from Pivot. For, as I have mentioned, a meeting took place between Alfredson and representatives of Pivot and P.P.L., in which Alfredson went through a draft page by page and listened to and took into account comments made by Slattery, and this meeting had itself led to the further draft of 1 March. And so the report dated 9 March saw the light of day. But it was not long for this world. It did not suit Pivot and its solicitors and senior and junior counsel made a number of comments on it to Alfredson in the course of conferring with him. These comments included written suggestions. These comments resulted in alterations. Arthur Andersen then returned to the former, more tentative method of approach and so, on 29 March a "draft for discussion purposes only" was sent to Pivot. This draft itself was altered as a result of representations made by or on behalf of Pivot.

I suppose the process could have gone on a good deal longer but time was getting on or, perhaps, Pivot was at last satisfied and, on 31 March, a report was promulgated that was never withdrawn and that appeared in the scheme booklet. An intelligent shareholder, who not only had before him the final product from Arthur Andersen but also knew how many and which persons had helped to hammer it out, might have wondered whether the report could be relied on as independent. There is not much point in spending half a printed page, under the heading "Disclosure of interest", in assuring shareholders that you are independent, if you have, unbeknown to the shareholders, throughout behaved in a way which places your independence at risk and in question.

I do not know how often it happens, as took place in this case, that a report — not a draft, but a report — is signed and delivered and then replaced by another report, after discussions with the company which commissioned the report or its advisers. Alfredson said he could not recall any case, other than the present, where a report that had been delivered by his firm had been replaced by another. If the practice exists (and the disturbing facts of the present case give me no confidence for believing that it does not), it is to be deprecated. It is bad enough to do what was done

here by Arthur Andersen, when it accommodated its client by repeatedly settling draft reports in consultation with the client and its advisers. It makes matters worse to then tacitly agree to the suppression of a supposedly final report and its replacement by a different document and to go on to destroy the firm's copy of the supposedly final report, in order to prevent comparison with its successor. It is not as if the ultimate report differed from that of 9 March by correcting a typographical error or a slip made by the author himself in relation to some unimportant matter; there are significant differences between the two reports, which are not the result of slips. If these two signed reports had come into existence in consequence of the statutory requirements, disclosure of them both would have been necessary: see cl. 4 of Pt III of Sch. 9 to the Companies Regulations and ss. 23(2) and 43(5A) of the *Takeovers Code*, which are not to be read down as confined to reports from different experts.

Those who prepare experts' reports in company cases carry a heavy moral responsibility, whatever their legal duties may be. These reports are either required by the codes or provided by analogy with those requirements. In either case, they are supposed to be for the protection of individuals who are being invited to enter into some kind of transaction. Unless high standards are observed by those who prepare these reports, there is a danger that systems established for the protection of the investing public will, in fact, operate to their detriment through reliance placed on these reports and on the reputations of those who furnish them. In lending his name, the expert will often, as in this case, be lending a name to conjure with.

These reports will often be on questions about which an expert could prepare a tolerably plausible report either for or against. The expert will often have a great name, great experience and great ability (I do not say desire) to support either one conclusion or the other. The stakes, and the fees, are often high and the protagonists pressing. The expert's integrity and freedom from baneful influences are essential.

It is impossible to lay down specific rules dealing with communications between the expert, on the one hand, and the company and those representing it, on the other: everything depends on the circumstances. The guiding principle must be that care should be taken to avoid any communication which may undermine, or appear to undermine, the independence of the expert. What happened here was quite unsatisfactory. According to Alfredson, what took place in this case would have been completely representative of the commissioning, preparation and making of an expert's report, if only the signed report of 9 March had been issued as a draft. I do hope this is not so. I think the present case should serve as a model of what ought not to be done. The sooner experts and their clients realise this, the better. The interests of Pivot's shareholders would have been better served if, instead of their money being spent on the procuring of the Arthur Andersen report, that report had never been placed before them.

An expert's report was not required by law in this case, having regard to the terms of cl. 3 of Pt III of Sch. 9 to the Companies Regulations. But the directors chose to obtain one. P.P.L. had advised Pivot that, although an expert's report was not necessary, one should be obtained in order to avoid a charge of inequity. Much was made by the directors of the Arthur Andersen report. It is mentioned by them at least six times in the scheme

booklet and accompanying material. It was mentioned in a widely-publicised Pivot press release. It was mentioned more than once by the chairman at the court-convened meeting, who read aloud short extracts from it. The report obtained was from an extremely well-known and, it is common ground, well-respected firm.

I intend to deal, at this stage, with whether what is in the final Arthur Andersen report appears there as a result of an independent exercise of judgment on the part of those concerned in its preparation, those being principally Williams and Alfredson. Putting the matter negatively, I am not satisfied that the approach adopted in the report is the result of an exercise of judgment by those at Arthur Andersen uninfluenced by pressure brought to bear by or on behalf of Pivot. I will go further and say that I am affirmatively satisfied that pressure exerted by or on behalf of Pivot did affect what is in the report significantly. In particular — and this is not the only matter — I find that pressure caused Williams to abandon his intention of performing a valuation of Pivot shares and referring to it in his report. By “valuation”, I mean one which proceeded on some generally accepted basis, a conventional valuation, so to speak, even though the report might go on to say that, because the company was a co-operative, it was inappropriate simply to adopt a valuation made on a conventional basis. I think that, through intervention by or on behalf of Pivot, that company has prevented its members from having the benefit of the independent exercise of judgment of the expert engaged. If there were no other objection to the scheme, I should regard this as a sufficient reason for refusing to approve it.

I turn now to another question. Let me say first that, generally speaking, the outcome of an application for approval of a scheme of arrangement is not to be determined by whether the judge finds the expert's report persuasive: whether the report is persuasive is a question for the members. But if the judge takes the view that the report has a tendency to mislead or confuse, then that is another matter. What concerns me here is whether Arthur Andersen's report has a tendency to give the shareholders the impression that the firm has, in the ordinary sense, valued either the existing ordinary, or the proposed redeemable preference, shares in Pivot.

I think it does have this tendency. I need not essay a definition of “value” for present purposes. The distinction between “value” and “price” is clear enough. I accept that one may speak loosely of “redemption value” as meaning simply redemption price, that is, the amount at which, in consequence of the scheme of arrangement, preference shares are to be redeemed. So one can ask whether \$12.50 “is an appropriate redemption value for the proposed redeemable preference shares”, as the firm does at p. 20 of the scheme booklet. Here the expert is using the term “value” as meaning price as proposed to be fixed by the new Articles. And in the paragraph immediately preceding that from which the passage is taken, Arthur Andersen does refer to “the price paid for the redemption of a share”. But I think it is unfortunate that the expressions “value” and “redemption value” should have been used in the report. What Arthur Andersen is really saying, in its report, is that, having regard to the fact that the company is a co-operative and having regard to the fact that shares have for some years been issued at a price of \$12.50, it is appropriate to fix a redemption price of \$12.50 for the purposes of the scheme. Now, it is one thing to say that it is “appropriate” or “reasonable” to fix a particular

redemption price. It is entirely another to say or imply that what is so fixed is the value either of an existing ordinary, or of a proposed preference, share in any normal sense of that term. It is the value only in the sense of being the predetermined price. There is a danger, if the expression "value" is used, that shareholders will gain the impression that the expert is valuing the company, or their existing shares, or the proposed preference shares. The blue card accompanying the booklet asserts that "\$12.50 is the appropriate basis on which to value the termination of" the qualification for co-operative benefits and that this view is supported by the independent expert. At p. 15 of the booklet, the Arthur Andersen report says: "This report involves different considerations from those that are common in the valuation of shares in non-co-operative trading companies . . . As a result, we believe that the conventional notions of income and capital, as used in accounting and economics, are an inappropriate basis for valuing co-operative enterprises and the interests held in them."

At p. 16, the expert says that, in considering whether the scheme is in the best interests of shareholders, it has given particular attention to, among other things, "the principles upon which shares in a co-operative should, in our opinion, be valued". At p. 19, the expert says, "The question then arises as to the appropriateness of the value at which the redeemable preference shares are proposed to be redeemed". At p. 20, there are a number of references to "redemption value". Then there is the heading on p. 19, "The Appropriate Valuation Approach". This heading seems to me to be particularly important. I think that the report has a tendency to give the impression that the expert is, in the ordinary sense, making a valuation. It may be noted that the heading, "The Appropriate Valuation Approach", was not in any draft prepared by Williams and that it appears for the first time in Exhibit 9, the draft dated 29 March 1988, which was prepared after the actual report of 9 March 1988, which was not itself a draft. Williams disclaimed the heading as misleading.

There are moreover other passages in the Arthur Andersen report tending to support the view that it was performing a valuation. In describing its source of information at p. 16 of the booklet, it said that these included "published and unpublished financial information supplied to us by the management of Pivot" and "profit forecasts supplied by the management of Pivot". Whatever might be said of the former, it is difficult to see how profit forecasts are relevant on the approach adopted, as Williams conceded.

Then there is the emphatic statement, also at p. 16, that the firm is not the auditor of Pivot and that its examination and investigation of Pivot has not revealed any matter which an audit or more extensive review might disclose. This incantation may be usual but it tends to suggest that the company's financial position has been of importance to the expert in reaching its conclusions. Arthur Andersen goes on, at p. 21, to say that the authors of the report "have both had extensive experience in the preparation of valuations for companies and in advising corporations on takeovers generally and, in particular, on the valuation and financial aspects thereof, including the fairness and reasonableness of valuations". I draw attention in particular to the last seven words.

Finally, on the same page, it is said that the report has been prepared to assist directors and shareholders in assessing the scheme and not for any other purpose and that, accordingly, it has been prepared only for the

benefit of directors and shareholders “and does not provide a general expression of the Arthur Andersen and Co. opinion as to the value of Pivot”. Again, this may be a usual incantation but it does seem to me to imply that the report, in so far as it has been prepared for the benefit of directors and shareholders, does provide an expression for that purpose of the Arthur Andersen opinion as to the value of Pivot. At least it is capable of being so read.

On the whole of the material, I am not satisfied that the report of Arthur Andersen, dated 31 March, contained a genuine expression of opinion in discussing whether the scheme was in the best interests of members. Indeed, notwithstanding the gravity of the matter, I find affirmatively that the report did not express an opinion genuinely held in discussing that question but was the result of an exercise carried out for the purpose of arriving at a desired result.

If there were no other objection to the scheme, I should regard the fact that Arthur Andersen’s report was not a genuine expression of opinion as sufficient reason to refuse to approve it.

Alfredson accepts that the reports do not contain any valuation in any ordinary sense and that the burden of the reports is that it is, for reasons given, inappropriate to make a valuation in any ordinary sense. In view of this, I was surprised to learn that there is, in the mass of documents before me, a letter dated 9 March 1988, the same day as the first actual report, from Arthur Andersen to Pivot in the following terms, concerning the scheme of arrangement:

“We have provided an independent expert’s report stating whether, in our opinion, the reconstruction of Pivot is in the best interest of the members of Pivot. During the course of that investigation, we were required to consider the relative values of the new redeemable preference shares in Pivot and the existing ordinary shares in Pivot immediately before cancellation.

“This is to confirm that, in our opinion, the value of the new redeemable preference shares in Pivot after issue will not be less than the value of the existing ordinary shares in Pivot immediately before cancellation.

“This opinion has been provided solely for the purpose of providing information to you in accordance with s. 160ZZP(1)(e) of the *Income Tax Assessment Act 1936* (as amended).”

On 11 May 1988, Deloitte Haskin & Sells sought a ruling from the Deputy Commissioner of Taxation for capital gains tax purposes in reliance upon this letter and a favourable ruling was given. The section of the *Income Tax Assessment Act* is expressly concerned with market value and Arthur Andersen’s letter of 9 March must be taken to relate to market value. I find this letter impossible to square with Alfredson’s evidence. It was not put to him in cross-examination but I cannot see how he could have explained it. I should add that, while this letter reinforces my view of the unsatisfactory role of Arthur Andersen in this whole affair, my conclusion concerning that role and my conclusion concerning Alfredson in particular would be the same without it. I will also add that the abandonment of the independent expert’s report of the same date, which report is mentioned in this letter of 9 March, was evidently not regarded by Alfredson as requiring any action in relation to this letter and so the departed report lived on for the purposes of the capital gains tax representations to the extent to which it is referred to in the letter. This again does show how unsatisfactory it is

for one supposedly final report to be concealed, where this is thought to be convenient, and replaced by another.

In the explanatory statement, the directors said that the scheme of arrangement was put forward "after extensive research and advice".
5 Slattery says this was a reference to advice given by Potter Partners, Deloitte Haskin & Sells, Arthur Robinson & Hedderwicks and P.P.L.

The assertion of the directors in the explanatory statement that the proposal was put forward by them "after extensive research and advice" implies, in its full context, that the advice was taken for the purpose of
10 formulating a proposal which was in the best interests of the members and that the advice had been relied on by the directors in propounding the scheme. I have mentioned the sources of advice to which Slattery referred when questioned about this passage in the explanatory statement. A good deal of the advice which he there mentions could be regarded as advice as
15 to what was in the best interests of members only in the sense that the directors may perhaps have thought that it was in the best interests of members or, at all events, of "wet" members, to prevent the Shears interests, or some other person, from acquiring control of Pivot. According to Slattery, the advice from Deloitte Haskin & Sells was limited to taxation
20 and there is nothing in the material to suggest that that firm ever expressed, prior to the explanatory statement, any opinion which might be used to support the scheme of arrangement. In its letter of 22 July 1987 to Pivot, commenting on the P.P.L. report of 20 July 1987, the firm is discussing a proposed redemption price not of \$12.50 but of \$50. It suggests that an
25 entry price of \$50 is the logical consequence of an exit price of \$50. It also suggests that the possibility that "dry" shareholders are a separate class and so entitled to a separate meeting can be reduced if the P.P.L. proposal is varied by deferring redemption for six months. This suggestion has a partisan flavour about it but to say this is not to criticise the firm for it was
30 evidently not engaged on the basis that it was to give "independent" advice. The firm's letter of 11 May 1988 to the Deputy Commissioner of Taxation, which I earlier mentioned, was written after the explanatory statement.

As to Potter Partners, its advice of 19 December 1986 was concerned with defences against a possible takeover and seems to have been more
35 concerned with what was expedient in the interests of repelling a takeover than with what was in the interests of shareholders. It is noteworthy also that, in para. 4.35, the company says that, for the purposes of its suggestion that Pivot should seek out "friendly" buyers, a price of less than \$50 per share could be regarded as wrong. Similarly, in its earlier letter of
40 8 December 1986, Potter Partners had been concerned with defences against a possible takeover, some of which it said might be described by opponents as draconian, and had gone on to contrast the recent issue price of \$12.50 per share with a net tangible asset backing per share, at book value, of about \$250 as at 30 June 1986 and to say that the best takeover
45 defence was a share price which fully reflected the value of the company.

To the extent to which, in their explanatory statement, the directors were trying to convey to shareholders that this kind of advice could be said to support the scheme of arrangement, or had been relied on by them in
50 propounding the scheme of arrangement, it is quite misleading. The report of P.P. Corporate Advice of 13 April 1987 (which company I have no doubt Slattery intended to embrace among the advisers in his reference in evidence to "Potter Partners") mentions a range of values for Pivot shares

on a capitalised earnings basis, adding a takeover premium, of from \$309 to \$406, mentions on the "alternative acquirer" approach on one basis a possible value of \$358 on book values as opposed to values which may result from plant revaluation and says that, for the takeover offer price, a value in excess of \$300 could be justified, that, even ignoring the possibility of a takeover offer, the "true value" of Pivot shares is well in excess of \$12.50 and that, having regard to returns to shareholders from rebates, a price of \$100 to \$150 could be justified. The letter goes on to contrast the paid up capital of Pivot with its shareholders' funds and to raise the possibility of a nine for one bonus issue of shares, which would result in an effective increase in the share price to \$125 if the transfer price was maintained at \$12.50 per share. There is also a discussion of a "two-tier" dividend and rebate structure. In para. 68, the company recommends that Pivot take action now to increase the transfer price to a figure between \$75 and \$125 and expresses a preference of \$125. Again, it is thoroughly misleading to suggest that this kind of advice has been relied on by the directors in propounding the proposal.

The letter of P.P. Corporate Advice of 10 June 1987 was again concerned with defences to a takeover and with how Pivot should "head off" this risk. It recommended that there should be a subsidiary of Pivot, which would offer to buy shares from existing members. As to a scheme of arrangement designed to make shares redeemable, the writer said that, if shares were to be redeemed at \$50, it was very difficult to say how shareholders would react to the argument that, even at book value, shares were worth much more and that an opponent need go no further than point to Pivot's published accounts to demonstrate a value per share of over \$200. There is no reason to suppose that Messrs. Arthur Robinson & Hedderwicks, also mentioned by Slaterry as furnishing part of the advice mentioned in the explanatory statement, ever gave any advice which might be relied on in support of the view that the scheme was in the interests of shareholders. Those solicitors, after the report of 9 March had been signed and delivered, took part in the conference with counsel in which suggestions were made to Alfredson as to how that report might be improved.

The only other adviser mentioned by Slaterry was P.P.L. Its role may be illustrated by its preparation of the letter (Exhibit 12) which it proposed should be sent to a rural newspaper under a pseudonym. Its function was that of adviser only in the sense that it was advising Pivot on how the directors might best achieve the result which they wished to achieve.

Under the heading, "Purpose of the Scheme", the letter from the chairman at the beginning of the scheme booklet said this:

"Your directors believe that it is vital to the long term interests of members as a whole that the link between membership and active support of the Co-operative not be broken and, consistent with this, the proposed scheme will

- reinforce the ongoing ownership and control of Pivot by active farmer members;
- provide for the orderly equitable retirement of, and return of capital to, members who no longer actively trade with the Co-operative; and
- provide a flexible mechanism to ensure that shareholdings are limited to the maximum provided for in the Articles of Association and thereby protect the co-operative structure of Pivot."

The explanatory statement included a substantially identical passage in the section headed "Reasons for the Scheme". On the blue card which accompanied the scheme booklet the following appeared:

"1. Why is the Co-operative being restructured?"

- 5 "To reinforce the ongoing ownership and control of Pivot by active farmer members and to make provision for the orderly and equitable retirement of members who no longer trade with the Co-operative."

But what really motivated the directors in propounding the scheme was their fear of a takeover and I consider the chairman's letter and the
10 explanatory statement misleading in what they say as to the purpose of the scheme and the reasons for it. The statements made by the directors in the three documents I have mentioned, including the blue card, are consistent with there being no apprehension on their part of a danger of a takeover and no desire to guard against that danger by means of the scheme.

- 15 The law contemplates that, in considering whether to agree to the arrangement, a shareholder in Pivot will have regard to its effect on his interests. This is what one would expect the law's approach to be, and it is confirmed by the cases dealing with the role of the court on applications for approval and with the notion of a "class" of members. In addition, the Code
20 itself, in requiring the explanatory statement, expressly refers to the scheme's effect on the interests of persons (s. 316(1)(a)) and by the Companies Regulations, (Sch. 9, Pt III, cl. 3) the expert's report required in certain circumstances must concern itself with whether the implementation of the scheme is in the best interest of the members.

- 25 A member voting on a scheme is not required to act altruistically and sacrifice what he conceives to be his own interests to the interests of others or of the company as an institution, although of course he may do so if he chooses. The law proceeds on the basis that a member is entitled to consult his own interests and, in considering what is material for the purposes of the
30 explanatory statement or the conduct of the meeting or any purpose relating to the consideration of the arrangement by members, one must always bear this in mind. If the directors, or an expert engaged by them to report, mistakenly forms the view that a certain consideration is not material when in fact it is, that mistake cannot conclude the matter. If a fact
35 would tend to influence a sensible member's decision on whether the scheme is in his interests, then it is "material" for the purpose of s. 316(1)(a)(ii) of the Code. To say this is not to assert that information is "material" in this sense only if it would have that tendency for it may be argued in a given case that information is material to the making of a
40 decision whether or not to agree to the arrangement because it may make the scheme appeal to a member's sense of loyalty to a cause or to some similar sentiment. I say only that information which would tend to influence a sensible member's decision in relation to his own interests is material, whatever else may be.

- 45 Section 316(1)(a)(ii) of the *Companies (Victoria) Code* requires the explanatory statement to set out such information as is prescribed and any other information that is material to the making of a decision by a member whether to agree to the arrangement, being information that is within the knowledge of the directors and has not previously been disclosed to the
50 members. The Arthur Andersen report states the conclusion that the proposed redemption price of \$12.50 is appropriate in view of the nature of co-operation and the price at which shares in Pivot have, for the past

15 years, been issued. Nowhere in the report or in the other material sent by Pivot to members for the purposes of the scheme is there any information which would enable a view to be formed on the value of a share in Pivot on any conventional approach, nor is there any reference to the huge reserves that the company has accumulated, or to the revaluation by Rushtons, which added \$53 million to the assets, or to the proportion borne by shareholders' funds to paid up capital, even without the effect of that revaluation, or to the fact that Pivot directors have been advised by P.P.L., the company engaged by it for the purposes of the scheme, that, in its opinion, at any time before or after the scheme was agreed to, a bidder might emerge with an offer of, say, \$400 a share. Nor were the shareholders told that the net asset backing of the shares was, as at 30 June 1987, about \$256, ignoring the Rushtons' revaluation and about \$398, having regard to that revaluation. Nor were they told that P.P.L. had recommended to the board a redemption price of \$50 and that one of the Arthur Andersen draft reports had supported that price, or that P.P.L. had advised the board that Pivot could sustain a redemption price as high as \$125. No mention was made of the advice of Potter Partners to the board that anything less than a price of \$50 a share could be regarded as wrong if "dry" shareholders were selling their shares. They were not told of the recent sale of a substantial percentage of Pivot's issued capital to the Shears interests at a price, at all events generally speaking, of \$50 a share. No mention was made of the advice given to the board by P.P. Corporate Advice as to the value of Pivot shares, including the discussion of a possible value of \$309 to \$406 on a capitalised earnings basis allowing for a takeover premium, or of a possible value of \$358 on an "alternative acquirer" basis, or of a value of from \$84 to \$212 on the basis of return to shareholders. There was no mention of the advice of P.P. Corporate Advice that, for takeover purposes, a value in excess of \$300 could be justified and that, even in the absence of a takeover offer, there could be no doubt that the true value was well in excess of \$12.50 and that, on the basis of returns to shareholders from rebates, a price of \$100 to \$150 could be justified. Other aspects of the advice given to the board by one adviser or another could be mentioned in this regard.

Members were not told that the purpose of the board, in putting forward the scheme, was to reduce the prospect of a takeover of Pivot. For I am satisfied that this was the purpose. The purpose was misstated.

I have mentioned the passage in the explanatory statement referring to the announcement by the directors of the proposed scheme "after extensive research and advice" and to the evidence of Slaterry as to the sources of that advice. Whatever one might have said of the board's failure to disclose the advice it had received from Potter Partners, P.P. Corporate Advice and P.P.L., or any of that advice, had this reference not been made in the explanatory statement, it seems to me that the passage in question gives a quite false impression, having regard to the tenor of the advice that had been received and the purpose for which it had been sought.

In April 1987, Rushtons revalued the plant, machinery, land and buildings of Pivot at \$93,950,230. The existence of this valuation was never disclosed to shareholders, either in relation to the scheme of arrangement or otherwise. Before instructing Rushtons to make the valuation, Pivot sought and obtained advice as to whether it would have to disclose the valuation in the accounts.

The amount of the valuation, almost \$94 million, is to be contrasted with the amount in the accounts for the year ended 30 June 1987, about \$41 million. I shall mention later the effect of this valuation on net tangible assets per share.

5 The valuation cost about \$235,000. Although there has been no revaluation of assets by Pivot, it has accepted the Rushtons valuation as reliable, and Alfredson said in substance he saw no reason to challenge it.

10 The transcript of the meeting convened to consider the scheme of arrangement taken at the request of the Shears interests shows that the chairman of the meeting was asked by Bessemer whether Pivot had, in 1987, obtained a valuation of fixed assets and, if so, how much the valuation had cost and what the amount of the valuation was and that the chairman refused to answer the question as to the cost of the valuation and its amount on the ground that this was irrelevant. I am satisfied that this did take place

15 at the meeting and, indeed, Pivot accepts that I should so find.

On the whole of the evidence, I infer that the board of Pivot was concerned, when preparing to submit a scheme of arrangement to members and when actually doing so, to avoid if possible putting before members any information which would tend to suggest that the shares had a value much

20 in excess of \$12.50. It was for this reason that they omitted from the explanatory statement any reference to the relatively recent sales of a substantial percentage of Pivot's issued capital at a price or prices much in excess of \$12.50 and it was for this reason that, both before the scheme was put forward and at the time it was put forward, they omitted or refused to

25 inform shareholders that a valuation had been obtained which increased the value of plant and machinery and land and buildings from about \$41 million to about \$94 million. For the same reason they persuaded Arthur Andersen and Co. not to include in its report any valuation of the shares.

I have earlier, I think, said that one should bear in mind the statement

30 at p. 3 of the letter of P.P. Corporate Advice of 10 June 1987 that an opponent of the scheme need go no further than point to Pivot's published accounts to demonstrate a value of over \$200, when considering the failure of the board to make any reference to net tangible assets when putting the scheme before shareholders. I do not, of course, overlook that substantially

35 all shareholders have received published accounts, for I suppose there may be some new members who have not.

Clause 2(i) of Pt III of Sch. 9 to the Regulations requires disclosure of any other information material to the making of a decision in relation to the scheme which is within the knowledge of any director of the company

40 and which has not previously been disclosed to members; compare s. 316(1)(a)(ii), to which I earlier referred. The book value of the company's assets, the net asset backing per share, according to book value, the size of the reserves and the proportion borne by paid up capital to shareholders' funds were matters which could be ascertained by reference

45 to published accounts distributed to shareholders. But the amount of the Rushtons revaluation had not been disclosed to members. At the meeting, the chairman refused to reveal the amount. This revaluation, if acted upon, would increase shareholders' funds from about \$93 million to about \$146 million. It would add about \$142 to the net asset backing of each

50 share.

Mr. Archibald Q.C. has argued that the net asset backing on book values was so disproportionate to the redemption price that disclosure of the

revaluation would have been unlikely to affect the members' minds, but I think that the disclosure should have been made, both in the explanatory statement and in answer to the question at the meeting.

The explanatory statement contains the following item:

"Information as to share sales in the preceding six months.

"Save as is set out below, the company has no information as to the number of shares in Pivot which have been sold in the six months prior to the date upon which the explanatory statement, of which this annexure forms part, was lodged with the commission for registration:

	<i>No. of shares</i>	<i>Price at which sold (\$)</i>
	945	Nil
	40	5.00
	420	10.00
	10	12.00
	435	12.50
	15	14.00
	15	20.00
	10	25.00
	10	50.00
<i>Total number of shares sold</i>	1,900	"

Clause 2(g) of Pt III of Sch. 9 requires the explanatory statement to set out all the information the company has as to the number of its shares sold in the six months immediately preceding the lodging of the statement with the commission for registration and the amount of the shares and the prices at which they were sold.

The sales to City Farm do not fall within the six month period mentioned in cl. 2(g). But it seems to me that the sales should have been disclosed pursuant to cl. 2(i), which requires the statement to set out any other information material to the making of a decision in relation to the scheme. While in general compliance with cl. 2(g) is all that is required of an explanatory statement in relation to sales of shares, there may be cases in which sales outside the six month period are of such significance that reference to them is required by cl. 2(i). I do not think it can be said that cl. 2(g) is intended to be exhaustive in the sense that information as to sales of shares can never be "any other information material to the making of a decision" within the meaning of cl. 2(i). But if I were wrong in this view, it would not affect my conclusion on whether the scheme should be approved.

Slattery admits, and it is clear, that before the explanatory statement was lodged for registration Pivot knew that City Farm had acquired 27,185 shares. Indeed, in July 1987, Pivot had sued City Farm for declarations concerning those shares and knew that the price was \$50 in respect of most, if not all, of those shares. Slattery says that the reason for the omission was that the sales had not resulted in registered transfers and that he relied on shareholders getting that information otherwise. I reject this explanation. The number of shares bought by City Farm (27,185) was about 14 times the number of shares mentioned in the explanatory statement as having been sold and the price (\$50) was greater by amounts ranging from \$45 to \$25 in respect of all but 10 of the 1900 shares mentioned in the explanatory statement as having been sold.

The directors should have disclosed these additional sales. There is no reason why they could not, in addition, had they thought it appropriate, have told the shareholders in the explanatory statement that, in their view, the sales were extraordinary and referred to the litigation and the provisions of the Articles.

5 Despite Slattery's explanation, I think the reason for the omission was the fear that the disclosure of the large volume of sales at \$50 might induce some shareholders not to vote for the scheme. In other words, I think the information was omitted because it was regarded as having a tendency to
10 affect the outcome of the vote.

I have referred to a considerable number of matters which were not mentioned in the explanatory statement. I am certainly not to be taken as expressing the view that each of them should have been mentioned and I refer again to the fact that published accounts were, of course, distributed
15 to shareholders. But I am satisfied that the statement was significantly defective by reason of its failure to disclose matters bearing on the value of shares in Pivot. So far as the possibility of a takeover bid is concerned, I am not saying that it was necessarily incumbent on the directors to state, as a material fact, for example, that they had been advised by P.P.L., the
20 company engaged by Pivot for the purposes of the scheme, that a bidder might emerge at any time with an offer of, say, \$400 a share. If the directors doubted the soundness of that advice — and I have no reason for supposing that they did — or if they were concerned about causing speculation or giving unwarranted emphasis or credence, they could, if they mentioned
25 the advice, have done so in cautious and cautionary terms. The importance of this advice and other similar advice is the light which it threw on the value of Pivot shares and Pivot's undertaking and the vice of the explanatory statement in this regard is its failure to assist in any way a shareholder who wished to form a view upon the value of his shares.

30 I have made a number of criticisms of the way in which the scheme has been presented to shareholders. Some of these concern failures to comply with the *Companies Code* (including the prescription by cl. 62 of the Regulations of information for the purposes of s. 316(1)). Others of them are not of this character. It is unnecessary for me to consider whether
35 non-compliance with s. 316(1) goes only to discretion. I am willing to assume, without expressing an opinion on the question, that I have a discretion, despite non-compliance, to approve the scheme. I am satisfied that that discretion should not be exercised in favour of approval so far as this matter is concerned.

40 It is, of course, accepted that the proposed reduction of capital stands or falls with the scheme of arrangement.

The present inclination of my mind is that, in addition, it was necessary for the scheme to be considered by more than the two classes selected by Pivot, or, alternatively, that if the scheme has been formulated in a way which, because of the definition of "calculation date", prevents the
45 identification of classes so that only the two classes selected by Pivot exist, this would itself be a valid objection to the scheme — I mean "valid" having regard to the existence of the discretion. This would be an additional reason for refusing to approve the scheme but, since it is unnecessary for my decision, I do not determine the classes question.

50 A number of other submissions were made on behalf of the objectors by way of objecting to the approval of the scheme but I find it unnecessary to say anything about them.

The application for approval of the scheme of arrangement and the application for confirmation of the reduction of capital are dismissed, with costs, including transcript and any reserved costs.

Application dismissed.

Solicitors for the applicant: *Arthur Robinson & Hedderwicks.*

Solicitors for the respondents: *Baker & McKenzie.*

D. M. MACLEAN
BARRISTER-AT-LAW