
TAKEOVER FINANCING**QUESTIONS AND ANSWERS****Question - John Chandler (Chairman):**

One area that I have always found very difficult is the s.129 question - the difference in view between the sort of asset diminution test and the sort of Williams test. The step in the transaction question as to whether the financial assistance is assisting in the purchase. I wonder Phillip whether I could ask you to make any comment on that.

Response - Phillip Cornwell:

Yes, well that is the debate that is covered in the written paper under the topic "Limitations of the Impoverishment Theory". I certainly am one who has never subscribed to the impoverishment theory. I think s.129 is so densely drafted, I don't think that there is any room in it for the imposition of overriding requirements. Obviously my feeling on that has to contend with a case like Burton and Palmer which is the judicial source of the theory in New South Wales. But in that case itself the undertakings were really without any content, they did not involve any diminution at all so that it was not a hard case. And the theory cannot be reconciled with Belmont Finance where the purchase of an asset at what the parties at the time regarded to be fair value was held to contravene the English section which is in materially similar terms. It was irrelevant whether or not there was a diminution of assets. The fact that the funds had facilitated or enabled the acquisition was enough. And I note that in the Myer Retail case more recently Sheppard J. was prepared to accept that someone had made out a prima facie case which relied on the enablement approach, that is that notwithstanding the question of diminution of assets, the fact was that there was an enablement, there was a placing in funds which facilitated the acquisition. A more recent decision, Charter House Investment Trust really put it very well. Hoffman J. said that it does not matter that the company's balance sheet is undisturbed in the sense that the cash paid out is replaced by an asset of equivalent value, in the case of a loan by a company to a creditworthy purchaser of its shares the balance sheet is equally undisturbed but the loan plainly constitutes giving financial assistance. So, yes, I think that the impoverishment theory if it is right at all has very severe limitations.

Question - From the floor:

I just wondered if I could ask John Edwards a question about his comment in relation to litigation. Do you regard the use of litigation as serious? It seems to me that that is a comment that has been made on two or three occasions by the practitioners and I just wondered whether you see a change appearing?

Response - John Edwards:

I am afraid that I do. Ten years ago, I would have said that the practice in America of using litigation to either thwart or interfere with hostile takeover bids was common whereas in the UK it was unknown. In the recent 18 month or so period we have seen a number of attempts to get actions started in the English courts which quite clearly are a delaying or a spoiling tactic.

Comment - John Chandler:

In a second our Chairman Mr John Cadell will close the Conference. I think we owe a debt of gratitude to both our speakers for two excellent presentation and I would be grateful if you would join with me in thanking them in the normal way.