and are key provisions for regulating the relationship of the relevant Gorton schemes since 1965 have made dispositions of property, for less than full consideration; and each should have lodged a gift duty return within one month after making the gift.[27] Failure to lodge returns has made the companies liable to maximum penalties of amounts equal to the gift duty assessable in each case.[28] As the distinguishing feature of the Gorton scheme is the allotment of shares at a large premium, no doubt the Commonwealth Taxation Department has been able to locate many of the companies concerned, by searching returns of allotment lodged at the various Companies Registration Offices. The question is—to what extent will the Commissioner of Taxation go back into the past and issue default assessments? At the time of writing, no announcement has been made, a fact which must cause concern to a considerable number of company controllers and their legal advisers.

6 *Summary*

The decision in the *Ord Forrest* case is most welcome. It has made it clear that an apparent loophole which should never have been allowed to appear to exist does not exist. Whilst there are many who would argue that those who indulge in tax avoidance are anti-social and no penalty is too severe for them, it is submitted that the better view is vividly expressed in the following extract from a letter to the "Australian Financial Review" on 26th March 1974:

> "Whether one approves of such devices to avoid duties or not, no reasonable man could possibly approve of the attitude of the department and the Government to the matter—an attitude which let six years go by while they sat on the sidelines and permitted hundreds of people to put their necks in the trap before moving to spring it."

GARRY J. SEBO*

INDUSTRIAL EQUITY LTD. v. TOCPAR PTY. LTD.[1]

The question of the rights and obligations attaching to parties involved in a company takeover has been the subject of important legislation in recent years. In *Industrial Equity Ltd.* v. *Tocpar Pty. Ltd.*,[2] Helsham J. was concerned with the problem of the extent to which the offeror and the offeree company may co-operate in propounding the takeover offer. The specific provisions involved in the case were s. 67(1) and s. 180C(1)(b) of the Companies Act. Both sections are uniform throughout Australia,

[27] See section 19 of the Commonwealth *Gift Duty Assessment Act 1941-1972*—I am here referring only to gifts made in Australia.

[28] Although, it is arguable that if the companies concerned did not know they had made gifts, they should not have been required to lodge returns. The alternative argument is that they should have lodged returns and obtained rulings from the Commonwealth Taxation Department.

* B.Juris. LL.B. (Hons), Monash University.

[1] [1972] 2 N.S.W.L.R. 505.

[2] Id.

parties in a takeover. It is my contention that the decision of Helsham J. unnecessarily restricts the scope of those sections, and as such permits an undesirable degree of liaison between the offeror and the company which it is seeking to take over.

The case concerned the battle between Tocpar and Industrial Equity for the takeover of Country Producers Selling Co. Ltd., which is described in the judgment as a "plum ripe for picking". The facts are necessarily involved, and may be summarized as follows:

(1) Country Producers had an issued capital of 200,000 shares at $2.00 each called up to $1.50. It possessed interests in real estate which were not necessary for the conduct of its business.

(2) On 15th May 1972 the plaintiff company, Industrial Equity, through its subsidiary, Jeperion Pty. Ltd., made a bid for the shares of Country Producers, as a result of which it acquired 14.7 per cent of those shares.

(3) On 24th May 1972 the directors of Country Producers distributed a letter to its shareholders, advising them to reject Jeperion's offer. The letter also contained a scheme to distribute tax free the cash available from the sale of its surplus realty. This scheme comprised the payment of capital on the shares, the formation of a new company to acquire the remainder of Country Producers, and the liquidation of Country Producers with a distribution of the sale of the surplus real estate.

(4) In early July, Tocpar made a takeover offer to Country Producers' shareholders. It sent to Country Producers a Part A statement, in which it offered to acquire Country Producers' shares for $6 each. By paragraph 13 of the statement, Country Producers could not do various matters while the offer was capable of acceptance; those matters included the paying of a dividend, and the making of any change in the conduct of its business which would have a materially adverse effect on the business.

(5) On 7th July 1972 Jeperion sent Country Producers a Part A statement, offering $6.15 cash for its shares.

(6) The secretary of Tocpar sent Country Producers a letter dated 13th July 1972 which contained certain proposals.

(7) On the next day, Tocpar's secretary attended a meeting of Country Producers' directors to discuss the proposals in the letter. The proposals were twofold:

(a) The payment of a dividend by Country Producers of 15 cents per share;
(b) The formation of a new company with a capital of 400,000 shares of 50 cents each. The shareholders of Country Producers would be entitled to take up at par 200,000 of those shares pro rata according to the shares which they held in Country Producers. Country Producers would take the remaining shares at a premium, so that the net asset backing of the shares would be 75 cents.

(8) The effect of this scheme would be that Country Producers' shares would be worth $6.40, consisting of $6 takeover price, 15 cents dividend, and a further 25 cent "profit" made on the shares taken up in the new company.

(9) On 14th July 1972 the Chairman of directors of Country Producers sent its shareholders a letter containing these proposals.

(10) On 20th July 1972 Tocpar dispatched its formal takeover offer to Country Producers' shareholders. Among the documents sent was the letter of 14th July 1972.

Industrial Equity commenced the suit for interlocutary relief against the second defendant, Country Producers, claiming that it was in breach of s. 67(1), and against the first defendant, Tocpar, on the ground that it had contravened s. 180C(1)(b).

1 *Section 67(1)*

The plaintiff first alleged that the scheme set out in the letter of 14th July 1972 constituted a breach of s. 67(1). It contended that Country Producers would be required to provide $100,000 to the new company, in order that it have a net asset backing of 75 cents per share. Hence, it was argued, Country Producers was giving financial assistance in connection with the purchase of its share by Tocpar.

Although Helsham J. acknowledged that the scheme was intended to be an inducement to Country Producers' shareholders to accept Tocpar's offer, he held that Country Producers had not breached s. 67(1). His Honour held that there was not sufficient connection between the provision of the $100,000 to the new company and the purchase by Tocpar, arguing that "the purchase will be long since completed before Country Producers makes any advance to the new company".[3] The fact that the offer of Country Producers to provide the asset backing for the new company was an inducement to the shareholders to accept Tocpar's offer was not a sufficient connection to constitute it a breach of s. 67(1).

It is my contention that the provision of the funds by Country Producers to the new company was closely related to the takeover attempt by Tocpar. The whole course of events evinces an intimate connection between the two transactions. The scheme was initially proposed by the secretary of Tocpar in his letter of 13th July 1972 and was propounded by him at the meeting of the director of Country Producers on the following day. In the letter of 13th July 1972 the secretary of Tocpar described the scheme in terms of its effect on its takeover offer.

Furthermore, the letter of 14th July 1972 by the Chairman of Directors of Country Producers to the shareholders confirms the relationship between the scheme and the takeover. The title on the letter was "Re: Takeover Offer by Tocpar Ltd.". The letter noted the offer by Tocpar and stated that "consent has been given for this Company to provide the following further benefits". Those benefits were the declaration of the dividend and the formation of the new company. The grant of consent mentioned in the letter refers to the consent of Tocpar under paragraph 13 of the Part A statement. Moreover the letter was sent "by and on behalf of Tocpar".[4]

[3] [1972] 2 N.S.W.L.R. 505, 514.
[4] Ibid. 511.

In spite of this close relationship between the formation of the new company and the takeover of Country Producers by Tocpar, Helsham J. held that the two transactions were not sufficiently connected to constitute a breach of s. 67(1). The basis of his honour's decision was that the purchase of shares by Tocpar would be completed well before Country Producers would be required to provide the asset backing for the new company. That is, the fact that the two transactions occur at two distinct points of time is sufficient to prevent the provision of the $100,000 to the new company from being financial assistance in connection with the purchase of shares by Tocpar.

In *Dey* v. *Dey*[5] McInerney J. held that the description in s. 67(1) of financial assistance as "assistance by means of loan guarantee or the provision of security" does not constitute a genus. Hence, the succeeding phrase after that description "or otherwise" is not to be interpreted ejusdem generis. Thus, s. 67(1) contemplates a wide, amorphous range of financial assistance. The decision of Helsham J. in *Tocpar's* case unnecessarily and undesirably restricts the scope of assistance covered by the section.

The words of the section are clearly applicable to financial assistance given before or after the purchase of the shares. The phrase "in connection with a purchase . . . made or to be made" indicates that s. 67(1) covers financial assistance in respect of a past or future purchase of shares.

Furthermore, the authorities show that s. 67(1) may be breached although the giving of the financial assistance occurs at a distinct point of time which is later than the purchase of the shares. In *Curtis's Furnishing Stores Ltd. (In Liquidation)* v. *Freeman*,[6] the defendant, who owned a large proportion of the shares in the plaintiff company, was in debt to the company for £22,548. The defendant sold his shares for a nominal consideration of £1 to M and J, who were to pay off the defendant's creditors at an agreed rate. By clause 6 of the agreement for sale, M and J were to "procure that the company will forthwith without payment release" the defendant from his indebtedness to the company. At a date later than the sale, the debt was written off the company's books, although a formal deed of release was not executed. Cross J. held that the release of the debt constituted financial assistance in connection with the purchase of the shares in breach of the equivalent to s. 67(1), although the assistance occurred, not at the time of the agreement, but at the later date when the company released the debt. Thus, Cross J. held that the fact that the share purchase occurred at a time distinctly before the financial assistance was given does not remove the transaction from the ambit of s. 67(1).

Similarly, in *Cooper (Inspector of Taxes)* v. *Sandiford Investments Ltd.*,[7] Buckley J. stated by way of obiter dictum that when company A had borrowed money from its bankers to purchase shares in company B, and after completion of the purchase had borrowed a like sum from

[5] [1966] V.R. 464, 469.
[6] [1966] 1 W.L.R. 1219.
[7] [1967] 1 W.L.R. 1351, 1356.

company B with which it had discharged its debt to its bankers, company B had given financial assistance in connection with a purchase of its own share contrary to s. 67(1).

It may also be stated that s. 67(1) was clearly intended to cover the type of situation which arose in *Tocpar's* case. One of the purposes of the provision is to protect creditors, so that the capital of the company is not diminished other than by expenditure in carrying on the authorized business operations of the company.[8] Clearly the decision in *Tocpar's* case would frustrate this aim by allowing a company to provide moneys to a new company simply in order to encourage the purchase of its shares. Another function of s. 67(1) is to prevent the practice whereby financiers bought up and assumed control of companies with money advanced to the purchasers from the company.[9] In *Tocpar's* case, Country Producers provided $100,000 so that in effect Tocpar could raise its takeover offer to $6.40 per share. Hence, part of the overall purchase price for the shares was to be provided from the funds of the company being taken over.

Thus, the decision of Helsham J. in respect of s. 67(1) is not only unnecessarily narrow, but it also allows an unfair degree of collusion between the offeror and the offeree company which frustrates the purposes of s. 67(1).

2 *Section 180C(1)(b)*

The plaintiff's other ground of attack on the scheme was that it failed to comply with s. 180(C)(1)(b). The provision was inserted in the Companies Act in 1971.[10] It provides that, in a takeover, the offeror must give to the offeree company, at least 14 days before the offer is dispatched, a Part A statement in accordance with the requirements of the Tenth Schedule Part A. That statement must include full particulars of the takeover offer (Tenth Schedule, Part A, clause 1).

The plaintiff claimed that the scheme to promote the new company formed part of the takeover offer, and that it was not included in the Part A statement. Helsham J. rejected the plaintiff's contention, holding that the scheme set out in the letter of 14th July 1972 did not constitute part of Tocpar's offer. His Honour based his decision on six factors:

(1) There were a number of documents sent by Tocpar to Country Producers' shareholders on 20th July 1972 which did not constitute part of the offer.

(2) "The letter of 14th July 1972 is not couched in the terms of 'offer'."[11]

(3) The letter was not intended by Tocpar as being part of its offer, as Tocpar could not have intended it to be "a document which would destroy the scheme by being intended to form part of the offer".[12]

[8] *Trevor* v. *Whitworth* (1887) App. Cas. 409, 415 per L. Herschell.
[9] *In re V.G. Holdings Ltd.* [1942] Ch. 235, 239 per. L. Greene M.R.
[10] Act No. 8185.
[11] [1972] 2 N.S.W.L.R. 505, 519.
[12] Id.

(4) It was not sent by Tocpar, but by Country Producers.

(5) The letter contained no suggestion as to how or when the proposals were to be implemented.

(6) In the documents sent out by Tocpar, there was an offer document with instructions as to how the offer was to be accepted.

With respect, none of these factors are convincing grounds for holding that the scheme in the letter of 14th July 1972 was not part of the takeover offer. The first ground does not indicate whether the letter was one of the offer documents or not. The fact that non-offer documents were sent does not establish the inference that the letter was such a document. Indeed, the other non-offer documents sent by Tocpar were either: (a) acceptence documents or (b) documents required to be sent by statute. The only relevant purpose for including the letters of 24th May 1972 and 14th July 1972 among them would be to furnish further information about the offer.

The same objection may be raised to the sixth reason propounded by Helsham J. The fact that another offer document was sent does not prevent the letter of 14th July 1972 from also forming part of the offer.

The second ground is equally unconvincing. The parties need not use the term "offer" in order that an offer be made. Similarly, it is not necessary for a document to employ that word before it forms part of the offer. A document may be held to be an offer from the surrounding circumstances. In *Tocpar's* case, the inclusion of the letter with the offer militates in favour of the conclusion that it was part of the offer, as it would otherwise be of no real relevance.

With respect, the reasoning of Helsham J. in relation to the third ground is circular. Simply because Tocpar would not have wished to breach s. 180C by including the letter as part of the offer does not establish the conclusion that Tocpar did not send it for that purpose.

Furthermore, the fact that the letter was not initially sent by Tocpar does not mean that it was not part of Tocpar's offer. By dispatching it with the offer documents, Tocpar may well have incorporated it as part of its offer. In any event, to argue that Country Producers, and not Tocpar, initially sent the letter does not fully reflect the realities of the situation. Tocpar suggested the scheme to Country Producers in its letter of 13th July 1972. The meeting of Country Producers' directors was attended by Tocpar's secretary. Helsham J. acknowledges that "The proposals were undoubtedly *put forward by Tocpar* with the view of making its takeover offer more attractive".[13] The letter of 14th July 1972 by Country Producers to its shareholders was sent "by or on behalf of Tocpar".[14] Thus, from its very inception Tocpar was a participant in and a proponent of the scheme. To hold that nevertheless the letter of 14th July 1972 does not constitute a part of the takeover offer is, with respect, to put a much too narrow interpretation on the term "offer" in s. 180C(1)(b).

[13] Ibid. 510.
[14] Ibid. 511.

Finally, the fifth ground advanced by Helsham J.—that the letter contains no suggestion as to how and when the proposals are to be implemented—does not prevent it being an offer. If it is an offer, then its acceptance by the shareholders would make it binding and enforceable. The scheme would form part of a binding contract between Tocpar (and, probably, also Country Producers) and the shareholders.

Thus, there are good grounds for arguing that the letter of 14th July 1972 was part of Tocpar's takeover offer, and as such should have been included in the Part A statement. The decision of Helsham J. unnecessarily confines the ambit of the term "offer", and thereby restricts the effects of s. 180C. The purpose of that section is to properly provide shareholders with detailed and orderly information of the takeover offer. The Eggleston Committee Second Interim Report on Disclosure of Substantial Shareholding and Takeover Bid states:[15]

> "[I]f a natural person or corporation wishes to acquire control of a company by making a general offer to acquire all the shares or a proportion sufficient to enable him to exercise voting control, limitations should be placed on his freedom of action so far as is necessary to ensure—
>
> (i) that his identity is known to the shareholders and directors;
> (ii) that the shareholders and directors have a reasonable time in which to consider the proposal;
> (iii) that the offeror is required to give such information as is necessary to enable the shareholders to form a judgment on the merits of the proposal;
> (iv) that so far as practicable, each shareholder should have an equal opportunity to participate in the benefits offered."

The decision in *Tocpar's* case would clearly frustrate the second and third purposes of the provision. It would enable the offeror and the offeree company to jointly devise a scheme to make the offeror's takeover offer more attractive, and yet not include it in its Part A statement. As a result, shareholders would be deprived of the opportunity of properly assessing that offer. Indeed, they would be in some state of confusion concerning what does in fact form part of the offer. *Tocpar's* case would thus undermine the express aims of the new takeover code introduced in 1971.

It may also be stated that there is another purpose behind the new takeover provisions. That purpose is to regulate the relations between competing parties in a takeover, and to ensure that there does not occur undue outbidding of each party by the other. In *Tocpar's* case, Tocpar used the scheme involving the new company to lever its bid above that of Industrial Equity. The decision of Helsham J. thus permits such unfair counterbidding in a takeover battle, and thereby substantially diminishes the protection afforded by the new provisions to parties competing to take over a company.

STEPHEN KAYE*

[15] P.P. No. 144 (N.S.W.) (1970) at p. 13.

* B.A., LL.B. (Hons), Monash University.