THE PERNAS/HAW PAR SAGA: LEGAL ISSUES AND DOCUMENTATION

The Takeover

The current controversy relating to Haw Par Brothers International [1] of Singapore in its proposed arrangement with Pernas Securities Sdn. Bhd.[2] of Malaysia raises several vital legal and political issues. This episode is remarkable for its galvanising effects on the Singapore Stock Exchange and the Securities Industry Council and the consequences thereto. It is intended in this article to survey the salient facts that are now publicly available, and to consider the legal issues and implications raised. Since only the takeover bid has come full circle, this aspect can be analyzed in full. Aspects relating to the investigation, insider trading and any possible extradition proceedings are here dealt with on the scant facts now available and any definitive study must await the Inspector's Report and the conclusion of legal proceedings that are inevitable. Since this is a continuing saga the full legal implications of which are not quite discernible at this stage, the documentation provided in this paper will be useful for further and future study.

The Facts

In April 1975, Haw Par was heavily traded on the Singapore Stock Exchange up to a turnover of 16.79 million shares. This meant 10.03 million shares changing hands or about 17.3% of the total monthly turnover of 58 million shares.[3] This active trading in Haw Par was against the background of a generally depressed market. In reply to queries by the Stock Exchange, Haw Par replied: "No contracts or arrangements have been entered into which would give any substance to these rumours".[4]

On 29th May 1975 the following transaction was reported in the newspapers: Haw Par was to issue 70.4 million of its own shares to Pernas Securities, which would amount to 39.7% of its enlarged equity. The new shares would not rank for dividends to be declared by Haw Par for the year ending 31st December. In return, Haw Par would acquire from Pernas Securities the whole of the share capital of Tradewinds (Malaysia) Sdn. Bhd. The principal assets of Tradewinds, are 20% or 4.4 million shares in London Tin (U.K.); 19% or 5.7 millions shares in Island and Peninsular, 10% or 16.2 million shares in Sime Darby Holdings; and other quoted securities to the value of M$12 million. Consequent to this arrangement, Pernas Securities, having gained control of Haw Par, would gain control of Haw Par subsidiaries

1 Hereafter referred to as Haw Par.
2 Hereafter referred to as Pernas.
3 See New Nation 31st May, 1975 page 37.
4 See Far Eastern Economic Review 13th June, 1975 page 56.

by controlling directly or indirectly 61% of Island and Peninsular, 51% of London Tin and 10% of Sime Darby Holdings. The dispersed general public holding of Haw Par would be trimmed from 74% to 44% while Pernas with a block of almost 40% would therefore have control.

Other terms of the arrangement divulged indicated that Tunku Razaleigh would become chairman of Haw Par while Mr. Watson would remain managing director of the Haw Par group. Pernas would prefer the existing management in the enlarged group to continue without change.

The background in these two companies would serve to explain to some extent the reasons for later events. Pernas Securities is a wholly owned subsidiary of Perbadanan Nasional Sdn. Berhad, a Malaysian Government-owned company set up to achieve 'Bumiputra' or Malaysian Malay control of the economy. Under the Second Malaysian Development Plan 1971 it is envisaged that by 1980, 30% of the Malaysian economy would be in the hands of the Malaysian Malays. The following quotation from Tunku Tan Sri Razaleigh Hamzah, Chairman of Pernas Securities, indicates the manner in which this acquisition fits in with the Malaysian Second Development Plan:

> "Our objective is not to take over Singapore companies. We want to have a share of companies which benefit from our national resources. Companies like London Tin have been here for ages and have enjoyed returns on capital many times over. It was alright during the colonial days. Now the people of this country to whom the resources belong want to have a share of the cake and a say in the way their resources are used. We are not nationalising but, first, we want to try a partnership to do things in a commercial way. We bought London Tin in the market. We paid market prices."[5]

Haw Par Brothers International is the fifth largest company on the Stock Exchange of Singapore and Malaysia with assets totalling more than S$550,000,000. Its activities range from investment holdings, management and dealing in properties, insurance, financial services and commercial and industrial activities. By its 1975 Annual Report, Haw Par owns 78 subsidiaries, of which 35 are incorporated in Hong Kong, 28 in Singapore, and 5 in Malaysia. The Slater Walker Securities' interest in Haw Par has diminished, at least in terms of direct investment, by the sale of Slater Walker Securities' 26.6% holdings in Haw Par earlier in 1974 to two companies, Ivory and Sime, and Charter Consolidated. However, the management of Haw Par Brothers International, i.e. Messrs. Watson and Tamblyn remained the same except for new membership on the Board from the two new shareholders.[6]

The Singapore Government policy on foreign investment and Haw Par in particular, is best exemplified by the following statements by the Finance Minister, Mr. Hon Sui Sen, to Parliament:

> "... to encourage the further development of Singapore as a major regional and international financial centre. The success we have achieved has been due in large measure to our policy of welcoming the free inflow of all capital, whether regional or international, and whether for use directly in trade, industry or construction or merely for portfolio investments. Few, if any restrictions, are imposed on such investments which

[5] Far Eastern Economic Review 4th July 1975 page 51.
[6] See "The Haw Par Story" Decision 14th October, 1974.

> would when so desired may be and often are in wholly owned, locally incorporated companies, as well as in branches of foreign and multi-national companies. The presence of many old and new trading houses, manufacturing industries and banks, insurance companies, merchant banks, discount houses, as well as holding companies and conglomerates, is sufficient evidence of the effective operation of our policy. However, to ensure orderly conditions and fair terms of competition — and where many investors are concerned, fair treatment of minority interests — it has been necessary here as elsewhere, to provide by law for the regulation of company operations."[7]

However, had the necessary steps been taken to obtain prior consultation and approval with the Securities Industry Council of Singapore, the Singapore authorities would have been forced to handle the problem privately without the fanfare of traditional Singapore/Malaysian hostility. Failure of Haw Par Brothers International and Pernas to comply with or to seek prior consultation with the Securities Industry Council provided the legal basis upon which the proposed takeover could have been, and inevitably was, objected to as being in breach of the Code on Takeovers and Mergers.

The U.K. interest in the Haw Par deal, in particular London Tin, is evidenced by the fact that although London Tin is a United Kingdom registered company domiciled therein, it operates primarily in Malaysia and is one of the largest tin-mining companies in the world. Some of the leases to mine tin in Malaysia, which leases are granted by the State Governments, are due to expire in the next few years and London Tin's ability to acquire and renew these leases is very much in doubt because it is a foreign company. With the new Pernas interest in London Tin the ability of London Tin to obtain the renewal of leases and the bringing of new mines into operation, would theoretically be enhanced.[8]

The Share Options

In June 1975 it was reported that six executive directors Messrs. Watson, Tamblyn, Ong, Brand, Johnson Hill and Rendall of Haw Par were granted an option by major shareholders to buy from them 2.135 million Haw Par shares (0.2 per cent of the existing paid up capital). The option was given by Charter Consolidated, Atlantic Assets Trust, British Assets Trust and Second Assets Trust, which together were the largest single shareholders, holding 26% of the share capital of Haw Par. The last three trusts were managed by Ivory and Sime. Were the Pernas bid to materialize, this controlling holding would be reduced to 16% while Pernas would be substituted as a controlling shareholder with 39.7% of Haw Par's equity.

The terms of the option were as follows:

Daisingrove Co. (beneficially owned by Mr. Watson) obtained the option from the grantors for $4 and in turn sold it to the six Haw Par directors for $1,000. It enables Mr. Watson to purchase 425,000 shares; Mr. Tamblyn 380,000 shares and the others 330,000 each up till 8 August 1979. The price is computed thus: any exercise on or before 8 August 1975 is to be at $2.332 per share with a 10% compounded annual increase for each calendar month. If any of the

[7] Singapore Parliamentary Debates Vol. 34 No. 15, 29th July, 1975 page 1151.
[8] Straits Times 4th July, 1975 page 22.

directors leave Haw Par before 9 August 1977 for reasons which in the opinion of Daisingrove directors are not beyond their control, their shares will be sold and they will receive only what they paid for them or less depending on the market. Any surplus achieved by the resale will be forfeited. On leaving Haw Par before 9 August 1979, any unexercised option is to lapse. In 1979, the whole of Daisingrove's capital is to be sold to the grantor's of the option at par.[9]

Insider Trading

In July 1975 [10] the Stock Exchange set up a Committee headed by its general manager to inquire into the possible insider trading in Haw Par shares. This Committee was appointed via. s.132A(6) of the Companies Act which reads:

> "A Committee of a stock exchange which has been approved by the Minister pursuant to the provisions of any written law relating to the securities industry or any body, panel or council set up to advise the Minister on the securities may, and shall if so directed by the Minister, investigate any dealing in securities under this section and may in any such investigation summon any person to give evidence on oath or affirmation or produce any document or material necessary for the purpose of the investigation."

This Committee was appointed at the behest of the Stock Exchange itself, rather than on direction of the Minister. It is interesting to note that the Securities Industry Council itself could have, under s.132A(6) been ordered to conduct the investigation, although under these circumstances its role as arbiter of takeovers and an investigating agency on insider trading in the same Haw Par/Pernas situation, would have been totally indelicate.

The subjects of the second investigation were the stockbroking companies who allegedly had large parcel dealings in Haw Par shares prior to its dealing suspension on the Singapore Stock Exchange at the end of May. Arising from its letter of inquiry [11] sent by the Exchange to past and present directors of Haw Par the following areas appear to be focussed on

> "shareholding activities in Haw Par and its related corporations in relation to the activities of Spydar Securities; and in relation to the creation and operation of unit trusts; offer of shares and options to specific directors and agents of Haw Par and its related corporations; share dealings activities in Haw Par in relation to the Beaver companies"[12]

The trading volumes of Haw Par shares during April and May 1975 totalled 20 million units (15.6% of the overal market volume).[13] The Haw Par counter was suspended on Thursday 30 May 1975 at a price of $2.40. The London, Kuala Lumpur and Hongkong Stock

[9] Reported in Straits Times 4th June, 1975 at page 17.
[10] See Straits Times 22nd July, 1975 pages 1 and 8.
[11] See Stock Exchange of Singapore Financial News July 1975.
[12] At the time of going to press, the Exchange has released the results of its investigations in 3 Reports: The Investigation of Haw Par Bros. International and its Related Corporations; Report on Spydar Securities Ltd.; and Report on Grey Securities Ltd.
[13] See Straits Times 29th May, 1975 page 1.

Exchanges on which its securities were listed were not suspended, except for the Kuala Lumpur Exchange which suspended the security but lifted it shortly thereafter.[14] The 'black market' price for each Haw Par share off the stock market in Singapore after its suspension was to a maximum of $2.60.

The Stock Exchange's Interchange with Haw Par

On receipt of news of the reverse bid, on May 29, 1975 trading on Haw Par shares on the Singapore Stock Market was suspended. Haw Par has three share registers and is listed on the Stock Exchanges of London, Singapore and Kuala Lumpur. The interchange of correspondence between the Exchange and Haw Par on possible breaches of the Stock Exchange Rules relating to takeovers focussed on three areas:

(i) The windfall Pernas would acquire.

(ii) The geographical distribution of Haw Par's operations in Malaysia and Singapore.

(iii) The diminution of Haw Par's assets between 1974 and 1975.

(i) *The windfall Pernas would acquire*

According to the press release, Pernas would transfer the whole of the share capital of Tradewinds (M) to Haw Par. The market value of Tradewind's assets are currently estimated to be S$l14,335,632 which is the total of its holdings in London Tin $43,236,697; Island & Peninsular $12,316,251; Sime Darby $47,491,290 and other quoted securities at $11,311,394. Pernas was to purchase 70.41 million Haw Par shares at the cost of S$1.62 per share and this totalled S$168.99 million on the basis of the last closing price of the security in Singapore which was S$2.40 per share. On this basis Pernas secures a net capital gain of S$54,835,568 in addition to gaining control of Haw Par, which is therefore inconsistent with Haw Par's statements that the whole transaction was to the benefit of all shareholders,[15]

(ii) *Geographical distribution of Haw Par's assets*

By Haw Par's press release, it stated that 57% of the Group's assets are based in Malaysia, with 17% based in Singapore and 26% in Hong Kong. On being challenged, Haw Par clarified the statement by saying that this percentage geographical distribution was made on the basis of book net assets employed in each country after deducting the holding company's liabilities. The Stock Exchange in reply[16] rejected both claims as being inaccurate. Firstly, it denied that the assets as disclosed in the consolidated balance sheet can only represent group assets. Secondly, even on the basis of net assets, the figures disclosed were inaccurate. The Stock Exchange painted the following

[14] From 29th May, 1975-1st June, 1975.

[15] See Financial News, Singapore Stock Exchange Thursday, 20th May, 1975 page 1.

[16] Financial News, *op. cit.,* Wednesday, 25th June, 1975 page 1.

picture on the basis of the Group's consolidated balance sheet ending 31 December 1974:[17]

(a) Consolidated Accounts basis:

	Amount	%
Malaysia approximately	$100,000,000	24
Singapore, Hong Kong and elsewhere approx.	$312,126,000	76
	$412,126,000	100

(b) Book net assets basis:

Malaysia		
Book net assets of Haw Par (London) attributable to Haw Par	$ 4,133,592	2.5
Book value of investments in Island & Peninsular [18]	21,600,000	13.0
	$ 25,733,592	15.5
Singapore, H.K. and others	$139,976,408	84.5
As per audited Haw Par Company's balance sheet without consolidation	$165,710,000	100.0

On both accounts the geographical location of assets in Malaysia, on the Stock Exchange's calculations did not establish the 57% claimed by Haw Par but only 24% on the consolidated accounts or 15.5% on the book net assets basis. Haw Par's reply was to announce that its calculations were based on group net assets rather than net book assets or group assets generally[19] and that they were made on the consolidated balance sheet as of 31 March 1975.

The Exchange charged that even on the latest figures used, Haw Par had used different measures in calculating the assets in Malaysia from those used for calculating the assets used in Singapore and Hongkong. Thus in the case of Malaysian assets all liabilities were treated as long term liabilities or deferred capital and no deductions were made. In the case of Hongkong assets long term liabilities totalling S$230,000,000 had been deducted. This selective use of figures enabled Haw Par to justify its claims of 57% of its assets being situated in Malaysia. The Exchange has thus demanded from Haw Par on independent accountant's report on the following:

> "(a) A schedule showing the distribution of group assets totalling $417,126,000 as per audited Consolidated Balance Sheet as at 31 December 1974 giving the amount and percentage for each territory.
>
> (b) A schedule showing the distribution of the net book assets employed in each country after deduction of outside and minority interests and holding companies' liabilities based on audited accounts to 31 December 1974, giving the amount and percentage of each territory.
>
> (c) A distribution of the group net assets on the basis of your latest letter, the basis adopted to be consistent for all territories.
>
> (d) Confirmation by the Accountant that the accounting basis used for all three territories is similar, indicating which of the above three

[17] *Ibid.*

[18] The basis of this calculation is to be found in the Stock Exchange's letter to Haw Par, *ibid.*

[19] Financial News, *op. cit.*, Friday, 4th July, 1975 page 1.

bases of distribution presents a true and correct view of the distribution of assets by territories".[20]

(iii) *Diminution of Assets between 1974 and 1975*

The shareholders' assets were represented to be S$234,363,000 in Haw Par's offer document for the takeover of Motor & General Underwriter's Investment Holdings Ltd. in January 1974; and these assets were mentioned in the Pernas deal as totalling S$121,584,000. Haw Par's explanation for the diminution of the asset values was the following financial procedures:[21]

Goodwill on consolidation	$ 18,363,000
Excess of book value over market value of investments	83,243,000
Recovery of shortfall in market value of investments as at 30.4.75	52,095,000
Profits after taxation, minority interest and extraordinary items	4,951,000
Drop in market value between balance sheet dates of M. & G. offer document and 31 December 1973	68,219,000
	$112,779,000

The Exchange discovering discrepancies and requiring further information concluded that correct information had not been furnished to it. By its public release[22] the Exchange announced that it would not consider lifting the suspension of trading until the following were received: the independent accountant's report; chartered merchant bankers independent assessment of the transaction; compliance with the Securities Industry Council, the London Panel for Takeovers and Mergers and section 179 of the Companies Act. Currently,[23] Haw Par shares are being sold on the black market at S$1.20 per share, or half its presuspension price.

Two related matters were raised by the Exchange. The letter by Haw Par in reply to queries by the Exchange about the rumours on the market in May 1975 that 'no contracts or arrangements have been entered into which would give any substance to these rumours or give use to the necessity under the Stock Exchange's listing requirements and the policy of Corporate Disclosure to make a public announcement' was deemed to have been misleading. Haw Par was reprimanded for not having made a more positive statement and for not requesting a temporary suspension of the shares pending the finalising of the scheme.

[20] *Ibid.*

[21] Contained in the Minister of Finance's Statement to Parliament, Parliamentary Debates Vol. 34 No. 15, 29th July, 1975, Annex. page 1163.

[22] Financial News, Tuesday, 8th July, 1975 page 1.

[23] Late November 1975.

[24] Clause 4(8) Stock Exchange of Singapore Listing Manual reads "Where a listed company proposes to acquire another business, company or companies, all or some of which are not listed, and the transaction would be one where the relative figures on the basis set out in paragraph 3 would be 100% or more or which would result in a change in control through the introduction of a majority holder or group of holders, that transaction will be deemed to be a reverse take-over. For the purpose of determining a reverse take-over separate acquisitions in any period of 12 months may be aggregated.

In failing to furnish the Exchange with information required by clauses 4(8);[24] 4(11)[25] and 5A(4),[26] of the Listing Manual, Haw Par had breached the Exchange's rules on reverse takeovers.

Legal Issues raised by the Takeover Codes: (i) London

The Haw Par/Pernas bid relating to the entire share capital of the Tradewinds Malaysia Sdn. Bhd. was one by which Haw Par would acquire indirectly 20.36% of the issued ordinary share capital of London Tin. Together with its already existing shareholding of 29.98% Haw Par would therefore, own 50.34% of the issued share capital of London Tin. Since London Tin is a U.K. registered company listed on the London Stock Exchange, the London Code on Takeovers and Mergers became operative. By its decision of the 6th June 1975, the Panel held the following:

> "It was explained to the Panel that Pernas and Haw Par were seeking a partnership on fair commercial terms with the minority shareholders of London Tin. The concept that there should be a partnership between British industrial and commercial interests and those of Malaysia is to be welcomed, and the Panel both appreciates and recognises that Malaysia should seek to control its own natural resources. However, the Panel considers that for such a partnership to be successful, it should arise as a result of an association entered into willingly by all shareholders in accordance with normal commercial practice. Accordingly, the minority shareholders should be given the opportunity of deciding whether or not to retain their investment in London Tin.
>
> The Panel has ruled that Pernas and Haw Par were acting in concert when shares in London Tin were purchased by Tradewinds. Accordingly, both companies have a joint and several obligation under Rule 34 of the City Code to make or procure a bid for the ordinary shares in London Tin not already owned by them at 197 3/16p per share; this is the highest price paid for shares acquired by them during the past year."[27]

The Committee will normally require that the transaction be subject to the approval of shareholders and that listing of the company's securities be suspended. The suspension will usually last at least from the time when the acquisition or acquisitions are announced until shareholders' approval has been obtained and all relevant information made available. This must include an accountants' report on the business or unlisted company or companies to be acquired and a pro forma balance sheet of the group as reorganised which must also be included in an advertised statement. The Committee may, in certain circumstances, require the accountants' report to cover the accounts of the purchasing or listed company as well as the companies to be acquired."

[25] Clause 4(11) reads "Any transaction which might reasonably be expected to result in either the diversion of 20% or more of the net assets of the company to an operation which differs widely from those operations previously carried on by the company, or the contribution from such an operation of 20% or more to the pre-tax trading result of the company, should be made conditional on approval by the company in general meeting. In assessing the extent of diversification or the amount of contribution to the pre-tax trading results account should be taken of any associated transactions or loands effected or intended and of contingent liabilities or commitments. References herein to the company are to the consolidated figures of the company and its subsidiaries attributable to its equity capital."

[26] Clause 5A(4) reads "If, in the opinion of the Exchange, a company which is on its Official List has merged, amalgamated or formed and association with an unlisted company, person or group, and as a result the unlisted company, person or group has thereby acquired control of the listed company, the listed company shall immediately lodge with the Exchange all information and documents which are then currently required from any company seeking admission to the Exchange Official List."

[27] For full text of decision see Appendix 1, *infra.*

Rule 34 of the London Code on Takeovers[28] reads: "Except in a case specifically approved by the Panel, the purchaser from a limited number of shares of a significant holding or holdings which confer effective control must extend an offer to the remaining shareholders on the basis set out in Rule 10." Rule 10 of the London Code reads: "Directors whose shareholdings, together with those of their families and trusts, effectively control a company, who contemplate transferring effective control, should not, other than in special circumstances, do so unless the buyer undertakes to extend unconditionally within a reasonable period of time the same class and a comparable offer to the holders of any other class of equity share capital, whether such capital carries all the rights or not. In such special circumstances, the Panel must be consulted in advance and its consent obtained." Effectively therefore, the London Panel required Pernas and Haw Par to make a complete bid with the outstanding shares of London Tin, which would cost Pernas an additional Stg. £20 million.

The tenor of the London Panel's decision reflect to a large extent the geopolitics inherent in British investment in Malaysia. The United Kingdom domiciled but Malaysian operating companies, at least in tin mining have arrived at a watershed. The Malaysian economic nationalism particularly Malay nationalism has created, consonant with international developments, the move towards indigenous control of natural resources. The promise of partnership between existing British management and Malaysian co-ownership from the Malaysian viewpoint meant that a sudden shortage of management skills would not precipitate and from the British viewpoint that there would be a gradual dislodgement of their investments without precipitous nationalisation. Hence the mild response of the Panel, though coupled with the decision that a general bid to the remaining shareholders of London Tin at 197 3/16 p. was to be made.

Legal Issues raised by the Takeover Codes: (ii) Singapore

(i) *Does the Code apply?*

The key thrust of the defence of Haw Par/Pernas directors was that the whole Takeover Code was inapplicable. In essence, under legal and financial advice, they felt that the Code only applies to where a purchaser acquires 1/5 or more of the shares of a company and is thus obliged to make a general offer to the remaining shareholder on equivalent terms. Their view of the transaction in question was that Haw Par was buying the assets of a third party (i.e. Pernas holding of Tradewinds) and in the process the vendor of those assets gains majority control of Haw Par, whose shares were issued to pay for the assets acquired.

Pernas were not acquiring an existing bloc of shares from a controlling shareholder nor were they making a partial bid in the sense that they wished to purchase 39.7% from certain shareholders. The objection to the application of the Code was that here Haw Par was acquiring a new asset i.e. Tradewinds, and was paying for it via the issue of new Haw Par shares.

[28] Rule 34 of the Singapore Code is identical, except that instead of "effective control" it uses the terms "20% of the voting rights". The London Panel apparently considers "effective control" to exist anywhere 30% of the voting rights or more are transferred.

Section 179 of the Companies Act defines a takeover scheme as one "involving the making of offers for the acquisition of shares which carry the right to exercise or control the exercise of not less than 20% of the voting power". There is good reason for the narrowness of the definition, for the Act merely seeks to regulate the disclosure of information through the formal offer documents via the 10th Schedule. Its restricted scope was reviewed by the Australian Eggleston Committee [29] which resulted in the new Australian legislative framework of section 180A - 184.[30]

The Code however while retaining the 20% margin in Rule 34, defines an offer in under terms: via "offer includes, whenever appropriate, takeover and merger transactions howsoever effected, including reverse bids...." The functional concept of a takeover is that a transaction or series of transactions whereby a person (individual, group of individuals or company) acquires control over the assets of a company, either directly or by becoming the owner of those assets or indirectly by obtaining control of the management of the company."[31]

Since the Code is geared towards the enforcement of good business standards and is intended to be all pervasive, it is quite obvious that the functional concept will be utilised. Thus any arrangement, the end result of which is to pass control to another party, would prima facie be considered a takeover transaction falling within the Code.

(ii) *Partial Offers*

By section 179(1) of the Companies Act[32] a takeover scheme is defined as one that involves control of at least twenty per cent of the voting power. As envisaged by the parties, Pernas would own 39.7% of the enlarged equity of Haw Par which would clearly constitute such a scheme. By Rule 34 of the Code, a purchaser of holdings above 20% of the voting rights is obliged to extend the offer to the remaining shareholders on the basis set out in Rule 10. Rule 10 precludes controlling directors from selling out unless comparable offers are extended to the remaining shareholders. Specific consultation of the Council for its consent or exemption are mandated in both Rules.

The underlying philosophy of the Code, relating to partial offers, as such was the case here, is expressed in Rule 27 i.e. they are undesirable and only permissible on the advance approval of the Council. Partial bids are deemed undesirable because if they succeed, the remaining shareholders may be frozen in without any recourse or option to sell out. Further, they enable the purchaser for a smaller investment to gain control over greater assets of the whole company, at a price lower than what he would have had to pay were he to acquire the total assets. Finally, they are undesirable because controlling shareholders would be able to sell their shares at a premium

[29] Second Interim Report (1969). Note that there is no equivalent in Singapore.
[30] Uniform Companies Act 1961, Amendment 1969. See generally Patterson and Ednie "Australian Company Law" page 2329, *et seq,*
[31] Weinberg "Takeovers and Mergers" (1971) 3rd Edition, para. 103.
[32] Cap. 185. As amended by Amendment Act No. 49 of 1973 to reduce the percentage from "one third". See generally the writer's "Corporate Takeovers in Singapore" (1973) 15 Mal. L.R. 170 and "Current Developments in Corporate and Securities Law in Singapore and Malaysia" (1974) 16 Mal. L.R. 107.

(to compensate for the control element which other shareholders individually do not possess) and the legal rules in Singapore as in the United Kingdom do not regulate the sale of control premium as do the American courts.[33]

(iii) *Exemption from Rule 27*

Under what circumstances will the Council grant exemption from the need to make a general bid? It is submitted that conceptually, the exemption should be linked to the necessity for the rule itself. Thus if all the abuses sought to be prevented by the Rule are non-existent, exemption should be granted. Fair treatment of the minority inevitably requites them to have the option to accept identical terms for their holdings. Another example of the conditions under which a partial bid is justifiable is pointed out by the Secretary to the Securities Industry Council:[34]

> "As to what circumstances constitute justification for a partial bid is a question that Council will judge from case to case. As in the United Kingdom, one of the circumstances which appear to be acceptable to Council as justification is the instance of a genuine trade investment by the offeror. This may be illustrated by the case of the partial takeover of LAC (Holdings) Ltd. by Carrier Corporation of the United States. As disclosed in its offer document, Carrier Corporation which is one of the world's largest producer of air-conditioning equipment, had for a long time been associated with IAC (Holdings) Ltd. Almost the whole of IAC (Holdings) Ltd.' business had been the distribution of Carrier's products. Apart from two private purchases in 1973, Carrier had not bought or sold any shares in IAC since its listing in 1971. The partial offer when successfully completed would convert IAC (Holdings) Ltd. into a subsidiary of Carrier. IAC, as a subsidiary of Carrier would be further backed up by the technical and other resources of Carrier. The offer document further stated that Carrier would regard its enlarged share holding as a long term investment. Council approved the partial bid under Rule 27 of the Code.
>
> It is also the practice of Council when granting an approval to a partial bid to impose certain conditions. In implementation of General Principle 8 calling for equal treatment of shareholders, the offer if not so stipulated already by the offeror, will be required by Council to be made on a pro rata basis to each shareholder. Carrier's offer of $4 cash for each IAC share was, inter alia, made to 'all shareholders (other than Carrier) equally for 50% of each shareholding.' Council would also require disclosure in the offer document assurances made to the offeree company regarding such matters as future dividend policy, management plans, offeror's shareholding, offeror's conduct or the business of offeree company in a manner fair to all shareholders, etc.".

A further example of exceptional circumstances is to be found in the 1969 Annual Report of the London Panel or Takeovers and Merger, viz. the situation where a company wishes to purchase a large block of shares in another company as a trade investment, without a general offer being made to shareholders. The Panel would be reluctant to prohibit this in all cases for it might "frustrate what may appear to be a perfectly sensible trade association between two companies to the mutual advantage of those companies and their shareholders.

[33] See A. Boyle "The Sale of Controlling Shares: American Law and the Jenkins Committee (1964) 13 I.C.L.Q. 185 and the writer's "Corporate Takeovers in Singapore" *op. cit.* at page 191.

[34] Dr. Tan Pheng Theng, "The Singapore Code on Takeovers and Mergers: An Introduction" (1975) 3 Singapore Stock Exchange Journal 5.

Other provisions of the Code relating to partial offers, have the twin objectives of limiting partial bids by prescribing minimum levels of acceptance and in requiring that all shareholders be treated alike.[35]

Thus Rule 21 prevents an offer being made unless it is envisaged ultimately that at least 'shares carrying over 50% of the voting rights attributable to equity share capital' are to be acquired. This is designed to compel the offeror to acquire a substantial financial stake in the offeree company and therefore act in its interests where the Council permits a bid for less than 50% via Rule 27 the offeror is compelled to state the precise number of share offered for and the offer may not be declared unconditional unless acceptances are received for not less than that number.

Equality of treatment is mandated via General Principle 8. Rule 27, requires, when Council approval is given, that a partial offer is extended to all shareholders who wish to do so to accept in full for the relevant percentage of their holdings. Thus if an offeror wishes to acquire 20% of the equity, all shareholders have a right to a pro rata opportunity to sell their shares. This rule is designed to combat the premium for control problem, whereby only the block holder sells all his shares at a higher price than available to ordinary shareholders. Finally, Rule 31, reiterates this equality value, where there is a partial offer, by prohibiting the offeror or his associates[36] from dealing in the shares of the offeree Company during the offer period for this own account,[37] nor where they succeed, unless the Council approves, to purchase such shares during the 12 month period from the last day of the offer period.

(iv) *Status of the Code as a Flexible Body of Rules*

Assuming that some doubt exists on the application of the Code on a construction of its terms, the question arises, whether the 'spirit' of the Code would prevail. It raises the initial question of the status of the Code as a body of clear cut rules and the ability of companies

[35] These objects and the comparable London Code on Takeovers and Mergers provisions are delineated by M.A. Weinberg "Weinberg on Takeovers and Mergers" (1971) Sweet and Maxwell para. 904-908.

[36] The Definition to the Code refrains from defining "associate" except to give examples of those clearly caught within its ambit — i.e. all persons who deal in shares of the offence company in a takeover transaction and who have an interest on potential interest in its outcome viz. subsidiaries and parents of the offeror/offeree company; bankers, stockbrokers, financial advisers to the offeror/offeree and their related companies; directors (close relatives or related trusts) pension funds of all companies mentioned; any pension fund, investment company, unit trust or fund accustomed to act on the instructions of an associate; holders of 10% or more of the equity of the offeror/offeree company and companies having material trading arrangements with the offeror/offeree company.

[37] The Rules draw an undesirable distinction in preventing associates from trading on their own account, but allowing trading on their investment accounts for their clients provided their clients themselves are not associates. This pre-supposes a clear distinction in operations of merchant banks between financial advice and investment advice departments. For a criticism of this distinction in the context of the Pergamon/Leasco Bid. See B.J. Davies "An Affair of the City: A Case Study in the Regulation of Takeovers and Mergers" (1973) 36 M.L.R. 457.

and their directors to anticipate legal consequences from their breach of the Code.

The status of the Singapore Code is quite different from the London Code, as it finds some statutory basis for its existence. Section 179(11) of the Companies Act envisages the existence of a Code to regulate takeovers and by section 179(12)[38] the Minister has specified the non-statutory Code 'The Singapore Code on Takeovers and Mergers' to have effect in relation to takeovers and mergers. The Code may be varied, amended or added to by the Minister on the advice of the Securities Industry Council. Section 179(12)(c) provides that the Council may issue rulings on the interpretation of the general principle and rules of the Code and practice directions, which rulings and directions are to be final and not capable of being challenged in Court.[39] The status in Singapore of the London Panel's rulings and practice directions, is unclear though there is a tendency of the Singapore Council to utilise, with slight modifications the London Panel rulings and directions.

Section 179(12)(d) reemphasises the non-statutory nature of the Code in that while a mere breach of the Code ipso facto does not constitute a criminal offence, non-observance may be used in civil or criminal proceedings as tending to establish or negative any liability in question. In relation to sanctions, section 179(12)(e) presumes the power of the Council to invoke sanctions including public censure in relation to breaches of the Code.

The Code itself, expresses its own force and sanction thus:

> "The Code has not, and does not seek to have, the force of law. It represents the collective opinion of those professionally concerned in the field of takeovers and mergers. Those who wish to have the facilities of the securities markets available to them should conduct themselves in matters relating to takeovers and mergers according to the Code; those who do not so conduct themselves cannot expect to enjoy those facilities and will find that they are withheld....
>
> The duty of the Council is the enforcement of good business standards and not the enforcement of law."

To say that the Code is non-statutory, is of limited significance. It is non-statutory in the sense that firstly it can be revised easily by the Minister on the advice of the Council rather than through Parliament. Secondly, and more significantly, in an Act of Parliament, what is not clearly within the statute as construed by the Courts with the aid of reasonable construction, is clearly lawful and no penal or civil consequence attaches. In the case of the Code, however, General Principle 1 emphasises: "... persons engaged in such transactions should be aware that the spirit as well as the precise wording of these general principles and of the ensuing Rules must be observed. Moreover, it must be accepted that the general principles and the spirit of the Code will apply in areas or circumstances not explicitly covered by any Rule,"[40]

[38] As amended by Amendment No. 11 of 1974.

[39] It is of course trite law that such private clauses do not totally excluded judicial review. See *R.* v. *Medical Appeal Tribunal ex p. Gilmore* [1957] 1 Q.B. 574.

[40] See Introduction to the Singapore Code on Takeovers and Mergers.

Thus, the Code envisages that where there is doubt as to the applicability of the Code, its 'spirit' might cover the situation and therefore the common lawyer's instinct that what is not prohibited in clear terms is lawful has been displaced. The underlying philosophy of the Code and the Council is clearly expressed by the London Panel Annual Report 1970,[41] "When in doubt, ask." The nature of the Code as seen by the Council's current secretary is that:

> "… the Code, especially the Rules, must not be taken to be an exhaustive and comprehensive statement of all the situations intended to be covered. The Securities Industry Council which is the administering authority of the Code has power to interpret the Code in such a way as to cover a situation where human ingenuity has managed to avoid offending the latter of the Code but which, in the opinion of the Council is nevertheless in violation of the spirit of the Code. In this manner loopholes and drafting oversights will be covered by Council through the exercise of its administrative function. For these reasons it will be easily seen that the Code is deliberately designed to be of a flexible and adaptable character".[42]

The sanctions behind the Code are non-statutory in the sense that no fines and imprisonment are levied. They include public censure or reprimand as in the Sim Lim Holdings (Pte) Ltd. decision of the Council;[43] temporary or permanent withdrawal of the use of the facilities of the market; and where there are breaches of the Companies Act or Securities Industry Act, prosecution by the Attorney-General would be recommended. It is obvious that the suspension of listings and internal fines of members of the Singapore Stock Exchange or companies listed on the Exchange could also be recommended by the Council.

Its greatest sanction however lies in the fact that the Council acts as a Government agency, in close cooperation with the Monetary Authority of Singapore, the Attorney General and the Registrar of Companies. A failure to comply with its rulings is unthinkable. Thus in the Sim Lim Holdings (Pte) Ltd. decision, the Council merely reprimanded the Company and its board, because of the Company's undertaking to rescind the offending share purchase contracts and to liquidate the company formed to acquire the shares that were the subject of the offending takeover. In the Haw Par/Pernas ruling, the decision that a general offer had to be made to the remaining shareholders, meant effectively that the bid would not proceed to fruition. With such sanctions, to call the Code non-statutory, in the sense that no penal or civil consequences follow ipso facto from a breach, is too subtle a distinction to make.

The Code is non-statutory, in the sense that it is exempt from the ordinary rules of judicial construction of statutes which seek to effectuate the intention of Parliament through the words actually used and no further. Thus an underlying value in statutory interpretation is that "the law should be readily ascertainable and reasonably clear"[44] has been displaced in favour of a flexible case to case determination

[41] Report of Panel on Takeovers and Mergers on the Year Ended March 31, 1970. Reproduced in Palmer's Company Law, Sixth Cumulative Supplement to the 21st Edition App. 3.14.

[42] Dr. Tan Pheng Theng, *op. cit.* at page 7.

[43] See Appendix 4, *infra.*

[44] The Renton Committee "The Preparation of Legislation" 1975 H.M.S.O. Cmnd. 6053 Chap. 7 para. 7.4.

on the basis of guidelines provided in the Code. Further the spirit may be much wider than can be deduced from the Rules.[45]

By section 179(12) (c) the Council may issue rulings and interpretations on the Code and practice points which are to be final and not subject to challenge in the Courts. Thus it is intended that even erroneous rulings be immune from Court challenges. This, coupled with the power to amend the Rules easily renders judicial consideration of the Code to be exceptional, rather than the rule.

(v) *The Issue of New Shares*

The issue of 70,413,000 new shares in Haw Par to Pernas Securities, raises a peripheral issue, as to the ability of boards of directors to issue new shares during a bid. While the regulation of new issues during takeover bids are primarily intended to curb issues by the target company to friendly third parties rather than the offerer;[46] it may be extended to prohibit all new issues during a bid. Rule 38 of the Code controls issues by the offeree company without shareholder approval of any unissued shares, options therein, or convertible securities or enter into agreements to acquire or dispose assets of a material amount or enter into contracts otherwise than in the ordinary course of business; without the Council's consent. This clearly applies to defensive tactics by an offeree company to thwart a takeover bid. In the Haw Par issue, the shares (if Haw Par were the target company, as the Council took it to be) were issued by Haw Par not to a third party to thwart the bid but rather to the offeror company itself — Pernas. Both Rule 38 and Section 132D[47] are wide enough to control issues without shareholder approval of shares to the offeror company itself. One of the evils, these provisions are designed to expunge is the directors' deciding to fight a bid because their tenure of service is to be ended. The Code and the Act emphasise that even in the case that the directors' wish to issue shares to the offeror company, the decision is to be entirely made by the shareholders. By Section 132D, the directors may not exercise the power to issue shares without the prior approval of the company in general meeting. The approval may be general or particular, conditional or unconditional only operates for the period between general meetings. By Section 132D(4) any offer, agreement or option made during the lifespan of such approval is valid even if the actual issue of shares by the directors takes place after its expiry. Any issue of shares contravening this section is void and the consideration is recoverable and any director who knowlingly contravenes, or permits or authorises the issue is liable to compensate the company or any person who suffers loss thereby.

In the Pernas bid for Haw Par, the proposed issue would have to be approved by the shareholders of Haw Par in general meeting. In view of the fact that 74% of Haw Par was held by widely dispersed public investors, the actual Pernas and Ivory and Sime holdings in

[45] See the London Panel decision of *Mount Charlotte Investment & Gale Lister,* 26 March, 1974.
[46] For an example of which see *Howard Smith Ltd.* v. *Ampol Petroleum Ltd.* [1974] 1 All E.R. 1126 which principle is no longer tenable in Singapore because of section 132D of the Singapore Companies Act.
[47] Amendment No. 11 of 1974.

Haw Par together with the management control through proxies conceivably would not have produced any difficulties in obtaining the necessary approval.

(vi) *The Decision*

The Singapore Council delivered its decision on the Haw Par/Pernas deal in June 1975.[48] It held:

> "An exchange or additional issue of shares, the end result of which is the transfer of effective control, is therefore a transaction that comes within the Code .... A basic concept in the Code is that if a company as a result of a transaction acquired, or is to acquire effective control of another company (i.e. by acquiring 20% or more of its voting rights) an obligation arises under the Code to extend a general offer to the remaining shareholders (Rules 10, 34 and 35 refer). In this respect, the Council emphasizes that the gaining of effective control for the purposes of the Code is not restricted to a case where shares are acquired from existing shareholders. The Code is applicable where an interest results from the issue by a company of new shares in consideration for the sale of a business or other assets, whereby effective control is transferred to the subscriber of these new shares .... Parties to a transaction cannot, therefore, avoid their obligations under the Code by selecting, for example, certain rules in the Code relating to disclosure of information and disregarding other equally vital rules and general principles. Neither can the parties to a transaction override the obligations attaching to them under the Code by seeking the consent of the shareholders at an Extraordinary General Meeting. If this were the case, the dissenting shareholders who have been outvoted at the meeting would be deprived of the rights conferred upon them by the Code. General Principles 7 and 8 are relevant in this connection. Council in such a situation, would not be able to ensure that all shareholders were treated equally and fairly under the Code. The Code would, as a result, become a dead letter.... In the resulting situation, it is incumbent upon the offeror (Pernas) to make a general offer to the remaining shareholders of Haw Par under Rule 35 of the Code and the Council so rules. Although there may well be situations under Rule 35 whereby Council could waive the requirement of a general offer, no reasons have been advanced to Council to justify such a waiver, Council ruling that the price of the general offer that is to be made to the remaining shareholders and the price of the offer in respect of the additional 70,413,000 shares to be issued shall be governed by the principle enunciated under Rule 32 of the Code. For the purposes of this Rule, the day on which the transaction was effected shall be 28th May 1975 and the price shall be $2.42."

Rule 27 of the Singapore Code on Takeovers reads:

> "Generally speaking, offers for less than 100% of the equity share capital of an offeree company not already owned by the offeror or any of its subsidiaries are undesirable. If there are circumstances in which a general offer for less than 100% is, in the opinion of the offeror, justified, the Council's approval must be obtained in advance. Such an offer must be made to all shareholders of the class and arrangements must be made for those shareholders who wish to do so to accept in full for the relevant percentage of their holdings. Other than in special circumstances, a partial offer not conferring voting control may not be made: but where such an offer is made the precise number of shares offered for should be stated and the offer may not be declared unconditional unless acceptances are received for not less than that number".

Rule 32 of the Singapore Code reads:

> "If the offeror or any person acting in concert with the offeror purchases shares in the market or otherwise during the offer period at above the offer price (being the then current value of the offer) then he shall

[48] For full text of the Decision and Reprimand see Appendices 2 and 3, *infra.*

> increase his offer to not less than the highest price (including stamp duty and commission) paid for the shares so acquired. If the offer involves a further issue of already quoted securities, the value of such securities shall normally be calculated for the purpose of ascertaining what minimum increase price shall be paid by reference to the mean of the quotation (as stated in the Stock Exchange Official List) of the securities on the day on which the transaction at the highest price was effected. If the offer involved the issue of securities which are not already quoted the value shall be based on a reasonable estimate of what the price would have been had they been quoted. If there is a restricted market in the securities of the offeror, or if the amount of already quoted securities to be issued is large in relation to the amount already quoted, the Council may require justification of prices used to determine the value of the offers. Shareholders of the offeree company must be notified in writing of the increased price payable under this Rule at least 14 days before the offer closes."

The Haw Par/Pernas understanding, under legal advice that the Code was not applicable received therefore a rude shock from the Singapore Securities Industry Council. In effect almost consistent with the London Panel the SIC had required Pernas to make a general bid to the remaining shareholders of Haw Par if the intended takeover was to proceed. Having intimated that a waiver from the provisions of the Code ought to have been sought, it indicated that Pernas' stand hitherto that the Code was not applicable was erroneous. Following the SIC's decision. Haw Par proceeded to obtain approval from the SIC by providing detailed information relating to the company as well as the reasoning behind the director's recommendation that the whole transaction was in the interest of the shareholders. Nothing to date has transpired on this application for waiver and the key thrust of activity has been the exchange of letters between the Stock Exchange of Singapore and Haw Par.

On July 23rd 1975 the SIC publicly reprimanded the directors of Haw Par Brothers International for breaching the Code on Take-overs and Mergers.

> The breaches "warrant a public reprobation in the strongest possible terms, and the Council has no hesitation in administering it.... The provisions of the Code that were breached included Rule 5, i.e., in not making an announcement with up to date information regarding the state of negotiations of the deal in the wake of the rumours circulating in the market in the first week of May. Secondly, Rule 20 of the Code was breached by the failure to lodge with the Council the most vital document of the transaction, i.e., the document signed between Pernas and Haw Par on May the 28th until June the 11th... .Failure to comply with Rule 20 combined as it is in this case with a regrettable lack of prior consultation, is considered to be an inexcusable disregard of the provisions of the Code and of the Council. It is impossible for Council to accept the excuse that breach of this Rule was a mere oversight caused by the pressure of events existing at that time. Having regard to all the circumstances of this case and in particular the individual background of each of the directors, Council cannot stress too strongly that it views such failure to consult to be most reprehensible. This is especially so in the light of the financial magnitude of the transaction. Ordinary prudence would have called for prior consultation... who wish to have the facilities of the Securities market available to them, should conduct themselves in matters relating to takeovers and mergers according to the rules and principles of accepted business practice that are enshrined in the Code. Those who have been found by Council to have not so conducted themselves, put their fitness to enjoy these facilities in doubt, and find that the facilities are withheld from them. This applies particularly to directors who have been entrusted with stewardship of a publicly quoted company, and upon whom rests the primary responsibility to observe the Code."

The SIC also determined that Rule 10 of the Code had not been breached that the directors having effective control of a company should not contemplate transferring effective control unless the buyer undertakes to extend unconditionally this same reasonable period of time the same offer to minority shareholders. It also decided that Rule 30 (which prohibited dealings of any kind including options in the shares of the offeree company by any person who is privy to the preliminary takeover and merger discussions) was not breached even in relation to the share options of 2.125 million Haw Par shares granted to 6 executive directors of Haw Par. This impressive speed of activity by the SIC in administering the Code meant that Haw Par minority shareholders would have had made to them a deal by Pernas towards the acquisitions of their shares as well. This cost of this additional takeover is estimated by the following report:

> "Under this ruling, if Pernas wishes to acquire control of Haw Par it will need to raise $316 million to meet the price set on the total Haw Par shares. Pernas had originally planned to swop assets with the market worth of $114.35 million for the new Haw Par shares (valuing them at $1.62 each). These shares would have given Pernas a 39.7% controlling interest in the enlarged Haw Par. To reduce the cash burden Pernas can lower the number of new Haw Par shares it will take for Tradewinds to 47½ million, giving it just over 30% in the enlarged capital. Nevertheless, it still has to find $259 million for the 107 million existing Haw Par shares".[49]

Some interesting principles emerge from the decision, and are noteworthy in view of the developing Council caselaw.

Rule 10 and Effective Control

By Rule 10 directors who, with shareholdings together with those of their families and trusts, effectively control a company may not transfer their control without all undertaking from the buyer to extend the same offer to remaining shareholders. Two directors, Messrs. Gammell and Clarke, were partners and directors respectively of Ivory & Sime and Charter Consolidated Ltd. which in turn managed trusts or held directly about 13% each of Haw Par shares. By virtue of the definition of 'director' to include persons with whose instructions the directors are accustomed to act it was held that Ivory & Sime and Charter Consolidated Ltd. were such directors of Haw Par, who, having effective control sought to transfer such control. The Council however held that no effective transfer was made and therefore Rule 10 was not breached.

Rule 30 and the Options

The Haw Par directors' arguments were based on the fact that while Rule 30 prohibited any dealings in the shares (including options) of the offeree company by persons privy to the preliminary takeover discussions, these unexercised options were worthless and therefore no breach of the rule existed. This defence was peremptorily rejected by observing that options by their very nature normally confer valuable rights of potential for gain. However, being with reasonable doubt as to whether the options were in fact connected with the Pernas offer, they granted the benefit of the doubt to the defendants in holding that no breach of Rule 30 was established.

[49] Straits Times June 20, 1975 page 1.

Rule 5 and the Firm Intention to make an Offer[50]

The need to notify shareholders only exists when both companies are agreed on the basic terms of the offer and are reasonably confident of a successful outcome of the negotiations. A factual determination as to when this firm intention crystallises has to be made. Haw Par's defence was that negotiations with Pernas had broken down on 7th May 1975 having been commenced in the summer of 1974 and new negotiations with Haw Par alone proceeded on 12th May 1975 and the basic terms of the agreement did not crystallise until 28th May 1975. With the following facts in mind the Council rejected this submission: Pernas acquired 10% of London Tin shares in the first two weeks of May, another 10% of London Tin shares in the first two weeks of May, and another 10% in the third week of May. The London Panel had found that Pernas and Haw Par were working in concert in the purchase by Tradewinds of London Tin shares. Finally Pernas through its subsidiary Tradewinds bought some London Tin shares from a Haw Par subsidiary, Harimau Investments. The Council concluded that the firm intention existed in the first week of May and therefore the shareholders ought to have been notified of the facts shortly thereafter. Again the misleading reply to the Stock Exchange query, when viewed with the background of Stock Market activity and rumours was held to be in breach of Rule 5.

Rule 20 and Lodgment of Documents with the Council

By Rule 20 all documents bearing on the takeover have to be lodged with the Council at the time they are made or despatched. The agreement between Haw Par and Pernas of 28th May 1975 was not lodged with the Council until 11th June 1975 and this together with the total lack of prior consultation received unsympathetic disapproval and reprobation from the Council.

It is interesting to note that no other sanctions were invoked. The withdrawal of the bid by Pernas, the investigation into the affairs of Haw Par and the Stock Exchange investigations into insider trading followed.

As a result of the adverse rulings by both the London and Singapore Panels, Haw Par appointed two merchant banks in London,

[50] Principle 5 reads "It must be the object of all parties to a take-over or merger transaction to use every endeavour to prevent the creation of a false market in the shares of an offeror or offeree company."
Rule 5 reads "When any firm intention to make an offer is notified to a Board from a serious source (irrespective of whether the Board views the offer favourably or otherwise), shareholders must be informed without delay by Press notice. A copy of the Press notice, or a circular informing shareholders of the offer, should, on the occasion of the first such Press notice, normally be sent to shareholders promptly after the announcement.
Where there have been approaches which may or may not lead to an offer, the duty of a Board in relation to shareholders is less clearly defined. There are obvious dangers in announcing prematurely an approach which may not lead to an offer. By way of guidance it can be said that an announcement of the facts should be made forthwith as soon as two companies are agreed on the basic terms of an offer and are reasonably confident of a successful outcome of the negotiations.
In any situation which might lead to an offer being made, whether welcome or not, a close watch should be kept on the share market; in the event of any untoward movement in share prices an immediate announcement, accompanied by such comment as may be appropriate, should be made."

Baring Brothers and J. Henry Schroeder Wagg, to advise it on alternative proposals for the acquisition of London Tin. In July 1975,[51] Pernas' Chairman Tunku Razaleigh announced that Pernas was not going to make a general bid for Haw Par since its primary interest was the acquisition of Tin. The formal announcement of the withdrawal of the bid for Haw Par on the ground that Pernas was unable to make a general offer to Haw Par, also meant that it was not proceeding with an attempt to obtain a waiver of the code in this instance.

A tentative new scheme to enable Pernas to acquire London Tin has reportedly[52] emerged. It envisages Pernas and Charter Consolidated forming X Co. to acquire control of the assets of London Tin. X Co. would in turn acquire 30% of Sime Darby, which holding, together with Pernas' existing 10% holding would give it control of Sime Darby. Charter Consolidated would transfer its Malaysian Tin mining assets and management to Tradewinds which would sell off its equity to the Malaysian public on being listed on the Kuala Lumpur Stock Exchange. London Tin would hive off its Malaysian assets to a new A Co. and existing London Tin shareholders would be compensated in shares of A Co. Finally, Tradewinds would make a bid for A Co.

The key merit of this reconstituted scheme, is that Pernas would no longer have to make a general offer to all the shareholders of London Tin as it would have purchased the entire equity of the new A Co. thereby getting control over the Malaysian tin operations, which was its prime target in the first instance. The full implications of United Kingdom capital gains tax and the implications of a change of domicil present problems.

Thus concludes the scheme of events leading up to the abandonment of the takeover scheme of Haw Par by Pernas. The Appendix, provides documentation of the following: The London Panel of Takeovers and Mergers Decision on the London Tin Acquisition; The Singapore Securities Industry Council decisions on Haw Par and Sim Lim Holdings (Pte) Ltd.

[51] Straits Times 2nd July, 1975 page 24.
[52] Far Eastern Economic Review, 14th November, 1975 page 54.

APPENDIX 1:

LONDON PANEL ON TAKE-OVERS AND MERGERS

STATEMENT

LONDON TIN CORPORATION LIMITED ("LONDON TIN")

On 29th May, 1975 it was announced by the boards of directors of Pernas Sendirian Berhad ("Pernas") and Haw Par Brothers International Limited ("Haw Par") that arrangements had been finalised under which Haw Par would purchase from Pernas the entire issued share capital of its wholly-owned subsidiary, Tradewinds (Malaysia) Sendirian Berhad ("Tradewinds"). The directors of Haw Par had agreed to issue new shares in Haw Par in exchange for the share capital of Tradewinds representing approximately 39.7% of the enlarged capital of Haw Par.

The principal assets of Tradewinds included some 20.36% of the issued ordinary share capital of London Tin. Haw Par already held some 29.98% of London Tin.

On 3rd June, 1975 the full Panel met to consider an application from Haw Par and Pernas in relation to the obligations arising under the Code as a consequence of the above transactions. The Panel was informed that the 20% of London Tin had been purchased by Tradewinds during the latter part of May, at a time when the proposed arrangements between Haw Par and Pernas were under discussion.

It was explained to the Panel that Pernas and Haw Par were seeking a partnership on fair commercial terms with the minority shareholders of London Tin. The concept that there should be a partnership between British industrial and commercial interests and those of Malaysia is to be welcomed, and the Panel both appreciates and recognises that Malaysia should seek to control its own natural resources. However, the Panel considers that for such a partnership to be successful, it should arise as a result of an association entered into willingly by all shareholders in accordance with normal commercial practice. Accordingly, the minority shareholders should be given the opportunity of deciding whether or not to retain their investment in London Tin.

The Panel has ruled that Pernas and Haw Par were acting in concert when shares in London Tin were purchased by Tradewinds. Accordingly, both companies have a joint and several obligation under Rule 34 of the City Code to make or procure a bid for the ordinary shares in London Tin not already owned by them at 197 3/16p per share; this is the highest price paid for shares acquired by them during the past year.

6th June, 1975.

APPENDIX 2:

SINGAPORE SECURITIES INDUSTRY COUNCIL

STATEMENT

PERNAS SECURITIES SDN. BHD. AND HAW PAR BROTHERS INTERNATIONAL LTD.

On the 29th May 1975 it was announced by Pernas Securities Sdn. Bhd. (Pernas) and Haw Par Brothers International Ltd. ("Haw Par") that arrangements had been finalised under which Haw Par would purchase from Pernas the entire issued share capital of its wholly owned subsidiary Tradewinds (M) Sdn. Bhd. ("Tradewinds"). The Board of Haw Par has agreed to issue 70,413,000 new shares in Haw Par in exchange for the whole of the share capital of Tradewinds. As a result of the transaction Pernas will own approximately 39.7% of the enlarged capital of Haw Par.

On the 30th May 1975, the Securities Industry Council (Council) met to consider the transaction and, in particular, to decide the nature of the obligations attaching to the transaction under the Singapore Code on Takeovers and Mergers (the Code).

In so deciding, Council had regard to certain fundamental concepts inherent in the Code. The Code applies to takeover and merger transactions howsoever effected, including reverse bids (see definition of "Offer" in the Code and General Principle 1). An exchange or additional issue of shares, the end result of which is the transfer of effective control, is therefore a transaction that comes within the Code. Merely to describe the transaction as a reconstruction, amalgamation, merger, offer to sell (rather than an offer to buy), or a commercial partnership with another party or parties, cannot have the effect of taking the transaction outside the Code. If it did so, then not only the precise wording of the General Principles and the Rules, but also the spirit of the Code, would be breached. A basic concept in the Code is that if a company as a result of a transaction acquired, or is to acquire effective control of another company (i.e. by acquiring 20% or more of its voting rights) an obligation arises under the Code to extend a general offer to the remaining shareholders (Rules 10, 34 and 35 refer). In this respect, Council emphasises that the gaining of effective control for the purpose of the Code is not restricted to a case where shares are acquired from existing shareholders. The Code is applicable where an interest results from the issue by a company of new shares in consideration for the sale of a business or other assets, whereby effective control is transferred to the subscriber of those new shares.

The Code, however, does contemplate an offer for less than 100% of the equity share capital of an offeree company being made if the offeror can justify the circumstances under which the offer (called a partial offer) is being made. It is however, careful to point out that partial offers are, generally speaking, undesirable.

It was with these main concepts in mind that Council approached this transaction. Council accordingly ruled on the 4th June 1975 that the Code applied to the transaction. Haw Par concedes that the Code does so apply. It is implicit in this ruling that all the General Principles and Rules, as well as the spirit of the Code, have actual or potential application to this transaction. Parties to a transaction cannot therefore avoid their obligations under the Code by selecting, for example, certain Rules in the Code relating to disclosure of information and disregarding other equally vital Rules and General Principles. Neither can the parties to a transaction override the obligations attaching to them under the Code by seeking the consent of the shareholders at an Extraordinary General Meeting. If this were the case, the dissenting shareholders who have been out-voted at the meeting would be deprived of the rights conferred upon them by the Code. General Principles 7 and 8 are relevant in this connection. Council, in such a situation, would not be able to ensure that all shareholders were treated equally and fairly under the Code. The Code would, as a result, become a dead letter.

Council having ruled that the Code applied to the transaction directed the attention of the offeror (Pernas) to the provisions of the Code, and in particular to Rule 27. Pursuant to that Rule, Council called upon the offeror to justify the circumstances under which the partial offer was being made. Pernas, in response to Council's ruling, failed to give any circumstances in justification but maintained, in effect, that the transaction was an offer for sale and that the Code did not apply, except in relation to the general requirement in the Code to give the fullest information to the Haw Par shareholders.

In the absence, therefore, of any circumstances of an exceptional nature being advanced, Council has no alternative but to rule that the offeror is not justified in making an offer for 39.7% of the equity share capital of Haw Par on the basis proposed, thereby obtaining effective control.

In the resulting situation, it is incumbent upon the offeror (Pernas) to make a general offer to the remaining shareholders of Haw Par under Rule 35 of the Code and the Council so rules. Although there may well be situations under Rule 35 whereby Council could waive the requirement of a general offer, no reasons have been advanced to Council to justify such a waiver.

Council would emphasise that those who wish to have the facilities of the securities market available to them should conduct themselves in matters relating to takeovers and mergers according to the Code. Council, in this regard, observes that if a takeover transaction is to be successful it has to be properly conducted in accordance with the Code.

The offeree (Haw Par) has submitted a considerable amount of information on the commercial benefits that it expects to flow from the transaction. But under the Code, Council cannot concern itself with the evaluation of the financial or commercial advantages or disadvantages of the takeover or merger proposition. Were it otherwise, Council would be substituting its views for those of the shareholders, the company and its advisers.

Council, in pursuance of its ruling that a general offer must be made, makes the following consequential ruling, namely:

> That the price of the general offer that is to be made to the remaining shareholders and the price of the offer in respect of the additional 70,413,000 shares to be issued, shall be governed by the principle enunciated under Rule 32 of the Code. This Rule, inter alia, states:
>
> > "If the offer involves a further issue of already quoted securities, the value of such securities shall normally be calculated for the purpose of ascertaining what minimum increased price shall be paid by reference to the mean of the quotation (as stated in the Stock Exchange Official List) of the securities on the day on which the transaction at the 'highest price' was effected."

For the purposes of this Rule, the day on which the transaction was effected shall be 28th May 1975 and the price shall be $2.42.

Council is considering the conduct of the parties in this transaction in relation to the Code and will issue a statement in that regard if the circumstances so require.

SECURITIES INDUSTRY COUNCIL

19 June 1975

APPENDIX 3:

SINGAPORE SECURITIES INDUSTRY COUNCIL

STATEMENT

HAW PAR BROTHERS INTERNATIONAL LTD.

In Council's statement dated 19th June 1975, it was mentioned that Council was considering the conduct of the parties in relation to the Singapore Code on Take-overs and Mergers ("Code") and that Council would issue a statement in that regard if the circumstances so required.

In the course of Council's consideration of the proposed takeover of Haw Par Brothers International Ltd. ("Haw Par") by Pernas Securities Sdn. Bhd. ("Pernas"), certain facts were brought to the attention of Council. These facts established a *prima facie* case of breaches of the Rules of the Code by the Board of Directors of Haw Par. On 26th June 1975, the Directors of Haw Par, namely, Messrs. J.G.S. Gammell (Chairman), D.E. Ogilvy Watson (Managing Director), I.K. Tamblyn (Deputy Managing Director), J.H.T. Scothorne, R.A.H. Brand, K.A. Johnson-Hill, Ong Beng Seng, J.N. Clarke and T.M. Rendall were informed by Council that sufficient facts had been disclosed to establish a *prima facie* case of breaches of Rules 5, 10 and 32, 20 and 30 of the Code. Particulars of the breaches were also furnished to the directors to enable them to answer the alleged breaches. A hearing was fixed for 2nd July 1975 but was postponed to 8th July 1975 at the request of Mr. Gammell. On 4th July 1975 Haw Par made written submissions to Council in answer to the alleged breaches. Further oral submissions were made by the directors at the hearing on 8th July 1975. At this hearing all the directors were present with the exception of Mr. J.N. Clarke who was represented by his alternate, Mr. Anthony J. Owston.

After considering both the written and oral submissions by the directors, Council has arrived at the following decisions.

Rule 10 of the Code provides that directors whose shareholdings, together with those of their families and trusts, effectively control a company, who contemplate transferring effective control should not, other than in special circumstances, do so unless the buyer undertakes to extend unconditionally within a reasonable period of time the same offer to the holders of the remaining capital. In such special circumstances, Council must be consulted in advance and its consent obtained. For the purposes of this Rule, the term "directors" include persons in accordance with whose instructions the directors are accustomed to act. The directors of Haw Par have argued before Council that the directors were not in effective control of the company. Mr. Gammell in his written submission contended that he was invited by the Haw Par Board to be the company's independent Chairman, and that as Chairman he acted independently in his personal capacity and not on instructions from any of the Trust companies managed by Ivory and Sime. Council does not accept this contention and considers Mr. Gammell's appointment to the Board of Haw Par was by virtue of his being the Senior Partner of Ivory and Sime which manages the three trusts — Atlantic Assets Trust Limited, British Assets Trust Limited and Second British Assets Trust Limited. These three trusts together hold approximately 13% of the existing capital of Haw Par. There was no dispute that Mr. J.N. Clarke is a Director appointed by Charter Consolidated Limited (of which he is a full time executive director) to represent its interest in the Company amounting to 14,125,000 shares or approximately 13.21% Council is therefore in no doubt that the directors of Haw Par, together with the share interests that they represent, are in effective control of the company.

In oral submissions to Council Mr. Gammell contended that although the directors have contemplated transferring effective control they have not done so as the agreement between Pernas and Haw Par was made expressly subject *inter alia* to the approval of Council. After due consideration of this argument Council came to the conclusion that on a restrictive construction of Rule 10 it could be held in favour of the directors that there was as yet no effective transfer of control and hence no actual breach of the Rule has occurred.

Rule 30 of the Code prohibits dealings of any kind (Including option business) in the shares of the offeree company by any person who is privy to the preliminary take-over or merger discussions, etc. On 2nd June 1975, Haw Par disclosed to the Stock Exchange that six of its executive directors have for some months been negotiating with Charter Consolidated Ltd., Atlantic Assets Trust Ltd., British Assets Trust Ltd. and Second British Assets Trust Ltd. for the possible sale to them (the executive directors) by way of options of a parcel of shares in the company from the shareholdings held by the four abovenamed companies. The arrangement was a grant of options for 2,125,000 Haw Par shares to Daisingrove Ltd., (a company wholly and beneficially owned by Mr. D.E. Ogilvy Watson), which, in turn, would grant matching options to the six executive directors in the following proportions: —

Name of Executive Director	No. of shares to be the subject of options
Mr. D.E. Ogilvy Watson	425,000
Mr. I.K. Tamblyn	380,000
Mr. R.A.H. Brand	330,000
Mr. T.M. Rendall	330,000
Mr. Ong Beng Seng	330,000
Mr. K.A. Johnson-Hill	330,000

The grant of options are contained in a letter dated 27th May 1975 from Charter Consolidated and the three Trust Companies managed by Ivory and Sime. The options are exercisable by the grantees at a price of $2.332 until 8th August 1975 and thereafter at an increased rate of 10% compounded annually. The options are exercisable at any time until 8th August 1979. Any profits realised from the difference between the price at which the options are exercised by the grantees and the price at which the shares are disposed of in the market cannot be utilised by any of the grantees until 8th August 1977.

The directors had in oral arguments submitted that as the options have not been exercised as yet, they were therefore worthless paper and no breach of Rule 30 had occurred. Council rejects this argument as it is well recognised that options by their nature normally confer valuable rights upon the grantees. The value of options lies in the potential for gain that they might have for the grantees when a rise in the market price of the shares occurs above the price at which the options are to be exercised.

The directors further submitted to Council that the option agreement, though concluded almost contemporaneously with the takeover offer by Pernas has nothing to do with the latter. Evidence was tabled to show that the option agreement was settled between the parties by about 17th or 18th April 1975 and thereafter it was simply a matter of getting the necessary signatures which came about on 27th May 1975. The execution of the agreement on this date was, they said, purely fortuitious. Mr. Gammell also claimed that the granting of options to the directors named was to ensure equality of treatment with the middle management who had some months previously been granted options on very much more favourable terms since they were related to a lower market price of Haw Par shares prevailing at that time.

After consideration of all the circumstances attaching to these option arrangements Council held that a reasonable doubt exists as to whether the options were in fact connected with the offer by Pernas, and Council is bound to give the benefit of that doubt to the directors of Haw Par. Council, however, bearing in mind the fact that the executive directors had full control both of the negotiations in regard to the transaction with Pernas, and the arrangement in regard to the options considers that it was within the powers of the executive directors when the negotiations with Pernas were coming to fruition to terminate any negotiations with regard to the option agreements in order to avoid a possible breach of Rule 30 and common prudence should have suggested such a course of action even as late as the 12th May 1975. Had this option arrangement been entered into after this date in Council's opinion there would have been a clear breach of Rule 30. This would have been a most serious situation for Rule 30 is very much tied up with the evil of insider trading by officers of a company. After long deliberations on this

matter Council found that, though the circumstances gave rise to well-founded suspicion, there was insufficient circumstantial evidence of a conclusive nature to show that a breach of this Rule had been established.

Rule 5 of the Code requires that when a firm intention to make an offer is notified to a board from a serious source, the shareholders must be informed without delay by press notice. Rule 5 is an implementation of General Principle 5 which states that every endeavour must be made to prevent the creation of a false market in the shares of the offeree company. In answer to Council's charge of a breach of Rule 5 the directors submitted as follows:

> "Ever since Charter Consolidated Limited became a substantial shareholder in Haw Par in Summer 1974, discussions between Charter Consolidated, Haw Par and Pernas Securities have been carried on with a view to trying to agree upon terms for the joint development of their interests in the tin mining industry in Malaysia. Numerous proposals had been considered and rejected but at the end of April 1975, it did at last look as though progress was being made on a transaction involving all three companies. However, following upon more detailed discussions in Kuala Lumpur on 7th May 1975, when all the parties were represented, negotiations broke down and it became clear that Pernas Securities might then be prepared to enter into a transaction with Haw Par alone. Negotiations for this new transaction commenced when Mr. D.E. Ogilvy Watson was authorised by the Executive Committee of the Board on the 12th May 1975. Because of this history of protracted and inconclusive discussions, Haw Par was not reasonably confident of a successful outcome of these new negotiations nor indeed were the basic terms fully fixed until the Agreement itself was signed on 28th May 1975 on which day my Board considered and approved the Agreement. While it is appreciated that in many cases commercial arrangements are finalised a little while before they become formally documented, this was not the position on the present transaction".

Council finds the submission unacceptable for the following reasons. At the Council meeting held on 13th June 1975 where Messrs. Watson and Ong Beng Seng were present, Mr. Watson, in reply to questions put to him, informed Council that Haw Par was aware of the acquisition by Pernas of London Tin shares at the time when the acquisition was made and that the acquisition was made and that the acquisition of London Tin shares by Pernas was an essential part of the deal and, further, that the transaction between Haw Par and Pernas would go through only if Pernas possessed the London Tin shares. Again, in reply to another question, Mr. Watson informed Council that the first 10% of London Tin shares was acquired by Pernas in the first and second weeks of May and the remaining 10% was acquired in the third week of May. Council also took due notice of the Ruling on 6th June 1975 by the London Panel on Takeovers and Mergers that "Pernas and Haw Par were acting in concert when shares in London Tin were purchased by Tradewinds".

At the hearing on 8th July 1975 a question was put to the directors of Haw Par as to whether Pernas through its subsidiary Tradewinds Sdn. Bhd. ("Tradewinds") purchased any London Tin shares from any of the subsidiaries or associates of Haw Par. In reply Mr. Watson informed Council that some London Tin shares were in fact bought by Tradewinds from Harimau Investments Ltd., a subsidiary of Haw Par.

Taking these undisputed facts into consideration, Council came to the conclusion that by about the first week of May a firm intention to make an offer by Pernas must have been notified to the directors of Haw Par. It is clear to Council that the necessary arrangements that must be required for the purchase of a large block of London Tin shares in the London market could not have been entered into overnight for obvious reasons. That the offer by Pernas was "serious" is also clear to Council in view of the financial outlay made by Pernas through its subsidiary Tradewinds to purchase the requisite percentage of London Tin shares. When these events took place, it became incumbent upon the directors of Haw Par to notify its own shares without delay of the firm intention by Pernas to make an offer.

In oral submissions the directors of Haw Par had argued that the question of when an announcement of a transaction of this nature should be made was

a difficult one of judgment, and that they in avoiding a premature announcement, had made an announcement on a day which with hindsight was judged unduly late. Council recognises that the question of the exact timing of an announcement can be a difficult one of judgment. Rule 5 itself states that there are obvious dangers in announcing prematurely an approach which may not lead to an offer. Rule 5, however, continues —

> "By way of guidance it can be said that an announcement of the facts should be made forthwith as soon as two companies are agreed on the basic terms of an offer and are reasonably confident of a successful outcome of the negotiations."

In all the circumstances of this case, there is no doubt in Council's mind that by about the first week of May, the two companies, namely, Pernas and Haw Par, were already agreed on the basic terms of the offer by Pernas and were reasonably confident of a successful outcome of their negotiations. In the circumstances, an appropriate announcement should have then been made in accordance with Rule 5.

Neither can Council entirely ignore the rumours that existed in the market during the first week of May. The "rumours" were prevalent enough to cause the Straits Times, on 3rd May 1975, to publish an article entitled "Another Change of Stripes at Haw Par". The Stock Exchange by a letter dated 5th May 1975 requested the directors of Haw Par to confirm immediately whether there was any truth in the rumours as stated in the article in the Straits Times of 3rd May 1975. In a reply dated 5th May 1975 the directors of Haw Par stated as follows: —

> "Thank you for your letter of the 5th May 1975.
>
> We confirm that it is our intention to make a preliminary announcement of our results for the year ended 31st December 1974 following a Board meeting this afternoon.
>
> The Board are aware that a number of rumours have been circulating relating to the possible development of Haw Par. However, it is confirmed that no contracts or arrangements have been entered into which would give any substance to these rumours or give rise to the necessity under the Stock Exchange listing requirements and the policy of corporate disclosure to make a public announcement".

In the light of the facts and other evidence enumerated earlier, Council is of the opinion that the reply by Haw Par although correct as to the fact that no contracts or arrangements had been entered into on that date, was, nevertheless, misleading in the overall impression it sought to convey. Rule 7 stresses the vital importance of absolute secrecy before an announcement is made. In circumstances, therefore, when it has become obvious to the directors that absolute secrecy had not been preserved and that market rumours were rife, the burden fell squarely upon the directors to make an appropriate announcement giving up-to-date information regarding the state of the negotiations and whatever basic terms that may have been agreed upon in principle — although not yet reduced into a signed contract. Failure to do so, especially after the Stock Exchange's query, must be viewed as a flagrant breach of Rule 5.

With regard to a second breach of Rule 5 alleged against the directors, the directors have in written submissions satisfied Council that there was generally no untoward movement in the prices of Haw Par shares in April and May, 1975, and in this regard Council wishes to state that at the beginning of the hearing on 8th July 1975 Council informed the directors that Council had withdrawn the second charge of breach of Rule 5. Council wishes to observe that although there is insufficient evidence of an untoward movement in the share prices of Haw Par, the volume of trading activity for the relevant period had been more than ordinary, being generally against the then current trends, and that speculative interest, in the midst of the "rumours" in circulation, was evidently high.

Rule 20 of the Code states that in order to facilitate the work of Council copies of all documents bearing on the takeover must be lodged with Council at the time they are made or despatched. The directors of Haw Par failed

to lodge with Council the most vital document to the transaction, namely, the agreement signed between Pernas and Haw Par on 28th May 1975, until 11th June 1975 despite a request made by the Secretary to Messrs. Watson and Ong Beng Seng at an interview on 29th May 1975. The directors of Haw Par have admitted during the hearing on 8th July 1975 that they are in breach of Rule 20. They however claimed that the breach was of a technical nature. Council however does not view the breach of Rule 20 as technical. Council cannot be expected to perform its duty, indeed, even to commence consideration of the take-over transaction under the Code until a copy of the agreement is lodged with it. Failure to comply with Rule 20 combined as it is in this case with a regrettable lack of prior consultation is considered to be an inexcusable disregard of the provisions of the Code and of Council. It is impossible for Council to accept the excuse that breach of this Rule was a mere oversight caused by the pressure of events existing at the time.

Finally, Council considers that the directors have failed to consult it in all matters affecting the takeover transaction not only up to the time of their press notice dated 28th May 1975 but also up to 30th May 1975, at which time Mr. Watson was invited to appear before Council to make some explanations in regard to the takeover transaction. The Haw Par Board has expressed regret for its failure to consult Council at the appropriate time.

The directors, in mitigation, asserted that they relied on professional advice both before and after the transaction, and that being pressed for time it was difficult to consult council. Although a situation may conceivably be difficult, the directors, in a proper discharge of their duties to their company and shareholders had much to lose and little to gain by not consulting Council in advance particularly as Council's approval was a necessary condition of the agreement between the parties. Council has little sympathy with the directors' submission in this regard. Directors have a primary responsibility to observe the Code and this responsibility cannot be shifted to their legal and other advisers.

Having regard to all the circumstances of this case and in particular the individual background of each of the directors, Council cannot stress too strongly that it views such failure to consult to be most reprehensible. This is especially so in the light of the financial magnitude of the transaction. Ordinary prudence would have called for prior consultations. Failure to seek prior consultation and to lodge with Council a copy of the agreement until 11th June 1975 becomes inexplicable when the record shows that this particular board of directors has had more than average experience in dealing with Council in regard to other take-over transactions.

In conclusion, Council views with grave concern the breaches of the Rules of the Code by the directors. Council considers that the directors of Haw Par have failed to observe the standards of conduct which the Code assumes directors of a board must maintain in the conduct of a take-over transaction. The failure of these directors of Haw Par thus to observe these standards of conduct warrants a public reprobation in the strongest possible terms and Council has no hesitation in administering it. Council stresses that those who wish to have the facilities of the securities market available to them, should conduct themselves in matters relating to takeovers and mergers according to the rules and principles of accepted business practice that are enshrined in the Code. Those who have been found by Council to have not so conducted themselves, put their fitness to enjoy those facilities in doubt, and will find that the facilities are withheld from them. This applies particularly to directors who have been entrusted with the stewardship of a publicly quoted company, and upon whom rests the primary responsibility to observe the Code,

23rd July, 1975.

APPENDIX 4:

SINGAPORE SECURITIES INDUSTRY COUNCIL

STATEMENT

SIM LIM HOLDINGS (PTE.) LTD.
SIM LIM INVESTMENTS LTD.

Sim Lim Holdings (Pte) Ltd. has made a take-over bid of Sim Lim Investments Ltd. by acquiring the shares of Soon Peng Yam (Pte) Ltd., Federal Investment Co. (Pte) Ltd. and Hong Kong Credit & Enterprise (Pte) Ltd., representing 59.18% of the share capital of Sim Lim Investments Ltd. Council has ruled that the Code on Takeovers and Mergers applied to this take-over transaction and that the bid should be extended to the minority shareholders of Sim Lim Investments Ltd.

The Board of Sim Lim Holdings (Pte) Ltd. in response to Council's ruling has advised that it is incapable of complying with Council's ruling. Council is satisfied that this is so. The Board of Sim Lim Holdings (Pte) Ltd. has conceded that it has committed numerous breaches of the Code in this as in other respects and which Council does not propose to refer to in this statement.

The Board of Sim Lim Investments Ltd. is also in breach of the Listing Requirements of the Stock Exchange of Singapore, particularly the provisions therein dealing with take-overs. The breaches of the Code and the Listing Requirements have been continuing ones since July 1974 when this take-over first came to the notice of Council. The failure of Sim Lim Investments Ltd. to comply with the Listing Requirements has resulted in the recent suspension by the Stock Exchange of Singapore of its listing on the Stock Exchange.

In the course of a long drawn out investigation by Council into this take-over transaction the Board of Sim Lim Holdings (Pte) Ltd. has failed on numerous occasions to supply Council with reliable and accurate information as to the events that had taken place during this take-over transaction, particularly in regard to the circumstances attaching to the acquisition of shares in Sim Lim Investments Ltd. They have, in fact, been less than candid and have fallen far short of the standard required of offeror Boards under the Code. Indeed, it may be said that they have conducted this taxe-over transaction with little or no regard for the Code.

The only thing that can be said in their favour is that the acquisition of the shares by private arrangement from the majority shareholders occured before the introduction of the Code though they were not registered as substantial shareholders of Sim Lim Investments Ltd. until March 1974 which was after the Code was introduced. They might well have had grounds for believing up to this date that the Code did not apply, particularly as they had not sought competent advice in this matter before July 1974. They were, nevertheless, bound to adhere to the Listing Requirements of the Stock Exchange to give the necessary information which they omitted to do.

Be this as it may, no justification can exist for their conduct from the time they were advised that the Code applied to the transaction and it is this conduct from this date which Council feels obliged to censure.

In a recent Ruling concerning the case of National Industries of Singapore Ltd. and Veneer Products Ltd. and the purported withdrawal of a bid during the offer period, Council stressed the obligation under the Code placed upon an offeror company to proceed with a bid once it had been made. Again, in this case Council has directed the attention of Sim Lim Holdings (Pte) Ltd. to Rule 18 of the Code and Clause 3, Part B of the 10th Schedule of the Companies Act (Cap 185) which in effect lay down that an offeror company making a bid for cash must ensure that it has adequate funds to satisfy full acceptance of the offer.

The circumstances, whether of a procedural or financial nature, that will permit an offeror company not to proceed with a bid once it has been made must be of a wholly exceptional nature if the offeror wishes to avoid the imposition of sanctions by Council — the most severe of which are public reprimand, restraining of the offeror company from voting its shares in the offeree company and the denial of the facilities of the market to a company.

Sim Lim Holdings (Pte) Ltd. is a private company and the only sanction that is appropriate, in all the circumstances of this case, is a public reprimand which the Council has no hesitation in giving. Council has refrained from imposing any further sanction on Sim Lim Holdings (Pte) Ltd. in view of its undertaking—

(a) to rescind the contracts of sale and purchase of the shares from Soon Peng Yam (Pte) Ltd., Federal Investment Co. (Pte) Ltd. and Hong Kong Credit & Enterprises (Pte) Ltd.;

(b) to place into liquidation at an early date the private holding company which was formed for the purpose of acquiring the shares the subject of this take-over.

The circumstances of this case demonstrate once again the urgent need that exists for company boards and their advisers to familiarise themselves with the provisions of the Code. The Code has now been in force for at least 12 months—ignorance of its provisions will no longer be regarded as an excuse or reason for not imposing severe sanctions.

SECURITIES INDUSTRY COUNCIL

Date: 5 June 1975

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