GOLD FIELDS v HARMONY: A LOST OPPORTUNITY TO CLARIFY SECTION 145 OF THE COMPANIES ACT

MALEKA FEMIDA CASSIM
Candidate attorney

INTRODUCTION

Two fiercely debated issues arose in the recent and as yet unreported decisions in the case of *Gold Fields Limited v Harmony Gold Mining Company Limited* (WLD Case 04/27304 judgment of Goldblatt J handed down on 11 November 2004 (hereafter *Goldfields* (HC)) and SCA case 559/04 judgment of Nugent JA handed down on 26 November 2004 (hereafter *Goldfields* (SCA)). The two courts involved in the case — the Witwatersrand Local Division of the High Court and the Supreme Court of Appeal — were faced with two issues: (i) whether the taking up of shares in exchange for other shares fell within the meaning of the term 'subscription' in s 145 of the Companies Act 61 of 1973 ('the Act'), or whether this term is confined to the taking up of shares for cash only; and (ii) whether an offer by company A made to the shareholders of company B to acquire their shares in company B in exchange for shares in company A (in order to achieve a merger) would constitute an 'offer to the public' as defined in s 142 of the Act. Section 142 states that an 'offer to the public' means 'any offer to the public and include[s] an offer of shares to any section of the public, whether selected as members or debenture-holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.' If the offer constitutes an 'offer to the public for the subscription of shares', as contemplated by s 145 of the Act, a prospectus is required. (Section 145 states that 'no person shall make any offer to the public for the subscription for shares unless it is accompanied by a prospectus'.)

Regarding the first issue of the meaning of 'subscription', there have been two divergent lines of thought: in English law it was laid down in *Governments Stock and Other Securities Investment Co Ltd v Christopher* [1956] 1 All ER 490 (Ch) that a 'subscription' means to take up shares for cash and does not include the taking up of shares in exchange for other shares. This came to be accepted as settled law in England, and was so regarded by numerous leading English (and South African) textbook writers. When it was later found in English law that investor protection in the form of a prospectus is also necessary and desirable where shares are issued for a non-cash consideration, the English Companies Act, 1985 was amended to incorporate this need (see further below). In striking contrast, a single judge in the Australian case of *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* (1984) 8 ACLR 609 held, in disagreement with the approach adopted in English law, that a 'subscription' would encompass an offer to take up shares in exchange for other shares.

In the *Gold Fields* case, the High Court correctly followed the English approach to the meaning of 'subscription'. Regrettably, however, the Supreme Court of Appeal overturned this decision and followed the Australian approach, holding that a 'subscription' includes an exchange of shares.

As to the second issue — the interpretation of the rather problematic phrase 'offer to the public' — both the High Court and the Supreme Court of Appeal found that Harmony's offer to the shareholders of Gold Fields to acquire one Gold Fields share in exchange for 1.275 Harmony shares, as the initial stage of a possible merger of the two mining companies, was not an 'offer to the public', and that accordingly there was no need for a prospectus. It will be submitted respectfully that this decision is debatable, and stems from a loose application of the factors that determine when an offer is *not* one to the 'public'. There appears to be no indication in the judgment of either court as to why the court favoured a narrow or restrictive interpretation of the word 'public' over a perhaps more prudent, broad interpretation.

THE SCOPE OF 'SUBSCRIPTION'

Critical evaluation of the case law: two divergent approaches

As stated above, the two opposing lines of thought on the meaning of 'subscription' are laid down by the English case of *Christopher* and the Australian case of *Broken Hill*. The court in *Christopher* justified its ratio decidendi that 'subscription' means taking or agreeing to take shares *for cash*, somewhat briefly, giving three reasons: the dictionary meaning of the term 'subscription', which means 'taking or agreeing to take shares for cash'; a reference to previous authorities, to which the court merely referred without any explanation as to why these authorities supported its decision (see further below); and a bare statement (again without explanation) that paras 4–7 of Schedule 4 to the English Companies Act, 1948 pointed to such a finding. (It is noteworthy that the High Court in *Gold Fields*, in justifying its decision to follow *Christopher's* line of thought, similarly used as support for its decision para 21 of Schedule 3 of the South African Act, which is the equivalent of para 4 of Schedule 4 of the English Companies Act, 1948; see further below.)

The Supreme Court of Appeal in *Gold Fields*, however, found that the dictionary meaning of the word 'subscribe' is 'to promise over one's signature to pay (a sum of money) for shares in an undertaking'. The court continued by stating that the words in parenthesis indicated that that part of the definition of subscribe is not universally applicable (*Goldfields* (SCA) para 8)) and that the dictionary meaning 'does not require the consideration to be in cash (although that is usual)' (para 9). The court used this reasoning in support of its finding that a 'subscription' includes an exchange of shares. The dictionary meaning of 'subscribe' can, however, not be determinative of the issue since there is no universally applicable or usual meaning of the word 'subscribe'.

Turning to the authorities relied on in *Christopher*, both the court in *Broken Hill* as well as the Supreme Court of Appeal in *Gold Fields* baldly asserted, in dismissing *Christopher's* case, that the authorities referred to in *Christopher* did not support its construction of the word 'subscription' as meaning the taking of, or agreement to take, shares for cash. Regrettably, neither the judgment in *Broken Hill* nor the judgment of the Supreme Court of Appeal gives any insight into the courts' reasons for this dismissal, which was made 'shortly and sharply' (as so aptly put by the High Court in *Gold Fields* (HC) para 8)). The 'relevant authorities' relied on in *Christopher* were *Chicago Railway Terminal Elevator Co v Inland Revenue Commissioners* (1896) 75 LT 157, *Brown v Inland Revenue Commissioners; Gordan v Inland Revenue Commissioners* (1900) 84 LT 71 (CA) and the judgments of both Kekewich J in the court a quo and the Court of Appeal in *Arnison v Smith* (1889) 41 ChD 348. On turning to these authorities, one is, however, inclined to agree with Hampel J in *Broken Hill* and Nugent JA in *Gold Fields* (SCA) that the extension of these authorities to the facts of *Christopher* was somewhat debatable. Although these authorities undoubtedly provide support for *Christopher's* decision, it is submitted that it is questionable whether the decision 'necessarily follows' from these judgments as stated by Wynn-Parry LJ in *Christopher* (supra) at 492); some justification and reasons on why these decisions could correctly be extended to the facts of *Christopher* is sorely lacking.

The issue in both *Chicago Railway* and *Brown* was whether an exchange of debentures and bonds, respectively, in one company for bonds in another company amounted to a 'subscription' for the purposes of the Stamp Act, 1891. In *Brown* (supra) at 79 Smith MR held that the giving up of old bonds in exchange for new ones did not amount to 'subscribing' for the new bonds, and Sterling LJ was of the same view (at 84). In *Chicago Railway* (supra) 161, the court stated that the words 'offered for subscription' were not apt to describe a transaction of exchange). These cases thus lend support to the proposition that an exchange is not the equivalent of a 'subscription'. But they were decided in the context of the Stamp Act, in relation to debentures and bonds, and the meaning of a 'subscription' in the context of that Act may not necessarily be the same in the Companies Act, particularly in respect of shares rather than debentures and bonds. Indeed, in *Chicago Railway* (supra) at 160 the court expressed the same sentiment by stating that the law with respect to the issue of shares in a company bore little analogy to the transfer or the exchange of bonds Some indication in the judgment of *Christopher* as to why the court saw fit to extend the law relating to bonds and marketable securities (as defined in the Stamp Act) to shares would have been most welcome. In *Arnison*'s case (supra), which dealt with a misrepresentation in a prospectus, both the lower court and the appeal court found that the meaning of a 'subscription' of shares did not extend to the allotment of fully paid-up shares as part consideration for a construction contract. Kekewich J (at 357) commented that to 'subscribe' means to acquire shares *for cash* from the company by way of the issue and allotment of unissued shares by the company (see also T E Cain *Charlesworth & Cain Company Law* 11ed (1977) 132). The Court of Appeal in *Arnison* likewise stated that to say that a person has 'subscribed' for shares means that the person has undertaken to pay for shares in cash (see further S Mayson, D French & C Ryan *Mayson, French & Ryan on Company Law* 20ed (2003) 201). Accordingly, the reference in *Christopher* to *Arnison* as authority was, it is submitted, clearly an apposite one. However, *Christopher* ought arguably to have taken some account of and reconciled the distinguishing factors in *Arnison*'s case, namely that *Arnison* had not been based solely on the ordinary construction of the word 'subscription', but had also examined and relied on the context in which the word was used in the prospectus as well as the surrounding circumstances in order to arrive at its finding. More importantly, while in *Arnison* the shares had been used as consideration for services rendered, in *Christopher* the shares were used as 'consideration' to acquire other shares. Furthermore, while services rendered may easily be valued in monetary terms, the same does not necessarily apply to an exchange of shares.

Despite these criticisms, it is nevertheless respectfully submitted that the failure of the court in *Christopher*'s case to give reasons for its reliance on the authorities to which it had referred was not by itself a strong enough justification for either the court in *Broken Hill* or the Supreme Court of Appeal in *Gold Fields* to reject the decision. The Report of the Company Law Committee ('Jenkins Committee') ((1962) Cmnd 1749 para 236–7 at 87) certainly approved of the ruling that a 'subscription' must involve a payment of money. Moreover, in rejecting *Christopher*'s case, the court in *Broken Hill* did not rely on any authority for its decision that a 'subscription' included a transaction where the consideration was in the form of shares. The court simply stated (at 617) that there was 'no basis in law or principle . . . for limiting the definition in the way his Lordship [Wynn-Parry LJ in *Christopher*] did'. But no previous decisions were cited as authority to support such a conclusion. Hampel J, in *Broken Hill*, in delivering his decision that an exchange of shares constituted a 'subscription', continued to say that:

> '[t]here is no reason, in my view, why the provisions of the Code should be interpreted so as to deprive people who subscribe in shares in consideration for other shares of the protection of s 96. It is arguable that even greater protection is necessary in those circumstances.'

Broken Hill chose to follow a more vigorous interpretation of the term 'subscription', perhaps to conform with the object of investor protection. Inevitably, the question must arise whether in South African law such an approach, as adopted by the Supreme Court of Appeal in *Gold Fields*, is the better approach.

The term 'subscription' in the Companies Act

Both the High Court and the Supreme Court of Appeal in *Gold Fields* looked to other sections of the Companies Act for enlightenment on the meaning of 'subscription'. A 'subscription' is not defined in the Act. The Supreme Court of Appeal was of the view that the sections of the Act dealing with the issue of shares for a consideration other than cash (i e ss 76(1) and (2), 77(2), 92 and 165(3)) provided a 'clear indication' that the intention of the drafter was that a 'subscription' should not be restricted to the taking of shares for cash only, because it would otherwise be 'difficult to see how the subscription and the allotment would then coincide' (para 9). With respect, the court's reasoning appears to be flawed. These sections refer only to the 'issue' and 'allotment' of such shares — they do not necessarily envisage that one 'subscribes' for such shares. It does not follow that the issue and allotment of shares in a company must of necessity always arise from a 'subscription' for the shares. The term 'acquisition', it is submitted, may be used to describe the situation where one obtains shares from a company for a consideration other than cash; such shares would, notwithstanding the absence of a 'subscription' for them, be allotted and issued by the company.

It is submitted that the reliance by Goldblatt J in the court a quo on s 165 of the Act is more logically appealing. Section 165 provides that, before a company allots shares which have been offered in terms of a prospectus for subscription, the 'minimum subscription' mentioned in the prospectus must have been raised; and s 165(3) provides that the determination of the 'minimum subscription' takes account only of amounts payable in cash. Goldblatt J (para 9) was firmly of the view that the logical conclusion arising from s 165 is that the 'minimum *subscription*' (emphasis added) must be a *cash* amount. This strongly suggests that the word 'subscription' is restricted to the situation where cash is paid as consideration (or perhaps part consideration) for shares. Thus, in a share exchange, the value of shares exchanged in consideration for the company issuing its shares is not taken into account in determining the 'minimum subscription', with the implication that no 'subscription' of the newly issued shares takes place at all.

The term 'subscription' also appears in s 38 of the Act, which prohibits a company from giving financial assistance for the purchase of or 'subscription' for its shares. While a *purchase* of shares involves acquiring the (issued) shares from an existing shareholder with a subsequent transfer of the shares into the name of the purchaser, a *subscription* involves an acquisition of (unissued) shares directly from the company, by way of an application to the company, which then allots and issues the shares to the subscriber. There is authority in English and Australian law that an offer does not amount to one of purchase where securities are offered in exchange for other securities (see *Re Westminster Property Group* (1983–5) 1 BCC 99, 355 CA; *Ex parte Lovell* (1938) 38 SR (NSW) at 153; see also Eilis Ferran *Company Law and Corporate Finance* (1999) 442). As far as South African law is concerned, in *Mountbatten Investments (Pty) Ltd v Mahomed* 1989 (1) SA 172 (D) it was held that, if no part of the consideration for the delivery of a res is in cash, the contract cannot be classified as one of purchase, but must instead be regarded as one of barter (see also R C Beuthin & S M Luiz *Beuthin's Basic Company Law* 3ed (2000) 91). It is submitted that the same principles must apply to a 'subscription'. (See A N Oelofse 'Artikel 38 van die Maatskappywet' 1980 *TSAR* 47 at 52, asserting that a barter or exchange of shares would amount to neither a 'purchase' nor, more significantly, a 'subscription'.)

Further support for the contention that a share exchange is not a 'subscription' is to be found when s 85 of the Act is contrasted with s 38. Section 85, which regulates the acquisition by a company of its own shares, refers to an 'acquisition', in contrast to s 38, which refers to a 'purchase or subscription'. According to F H I Cassim, an 'acquisition' is wider than both a purchase and a subscription, and, unlike s 38, an 'acquisition' for the purposes of s 85 would probably include an exchange of shares for a consideration other than cash (F H I Cassim 'The new statutory provisions on company share repurchases: A critical analysis' (1999) 116 *SALJ* 760 at 763).

Indeed, it was accepted in English law that the definition of a 'subscription' could not be stretched to include an exchange of shares. This is significant because the South African companies legislation is based on, and strongly influenced by, interpretations of the English legislation. When it was found in English law that investors required protection even when shares are acquired by means of a share exchange (see L C B Gower *The Review of Investor Protection* (1984) Cmnd 9125), the approach that was followed was to amend the legislation instead of artificially stretching the meaning of a 'subscription' — as was done in *Broken Hill* and now sadly also by the Supreme Court of Appeal in *Gold Fields*. In *Broken Hill*, the court pointed out that there was a need to protect shareholders to whom a share exchange offer had been made, and it proceeded to extend the definition of a 'subscription'.

Policy considerations and conclusion on the issue of 'subscription'

Investor protection is fundamental to company law. As stated by Hampel J in *Broken Hill*, investors require even greater protection by means of a prospectus in a share exchange transaction. Indeed, the recent Department of Trade and Industry guidelines on corporate law reform ('South African Company Law for the 21st Century: Guidelines for Corporate Law Reform' (GN 1183 in *GG* 26493 of 23 June 2004)) also emphasize the underlying policy that investors should be provided with adequate protection (para 4.3 at 34). This does not mean, however, that the term 'subscription' in s 145 of the Act should be artificially extended to bear a meaning which the drafter may never have intended. It is respectfully submitted that the Supreme Court of Appeal in *Gold Fields* should perhaps have left the extension of investor protection to a share exchange transaction to the legislature, which is the more appropriate organ.

A somewhat disturbing implication of the decision of the Supreme Court of Appeal in *Gold Fields* is that there is no reason why its definition of a 'subscription' should not apply to s 38, or for that matter to any other section of the Act in which the word appears. Should the prohibition against a company giving financial assistance for the subscription of its shares be extended to apply to a share exchange transaction, this would have a severe impact on some of the Black Economic Empowerment transactions which have recently taken place, and which have been justified as being in the public interest. The problem of access to capital in empowerment transactions has of late been addressed by way of elaborate financing structures. These structures are multi-layered and complex, with the result that the parties frequently run the risk of contravening s 38. Depending on its particular financing structures, it is quite conceivable that an empowerment transaction may be seen to have effected a share exchange. Extending the meaning of a 'subscription' to include a share exchange would thus heighten the risk of such a transaction being declared void as a contravention of s 38. This result was surely not intended by the legislature.

'OFFER TO THE PUBLIC'

At the outset, it may be useful to repeat that the definition of an 'offer to the public' includes an offer which is made to only a *section* of the public, however selected (s 142 of the Act). The fact, therefore, that only a particular group is capable of accepting an offer does not mean that the offer is not one to the 'public'. When an offer is made only to a group of persons the question must arise whether or not that group constitutes a 'section of the public' (M S Blackman, R D Jooste & G K Everingham *Commentary on the Companies Act* vol 1 (2002) 6–3; *Hurst v Vestcorp* (1987) 13 ACLR 17 CA (NSW) 25–6). For some purposes, any group constitutes a 'section of the public', but for other purposes, and in other circumstances, the same group could be regarded as distinct from the 'public' (*Corporate Affairs Commission (SA) v Australian Control Credit Union* (1985) 157 CLR 201 (HC) at 208 (hereafter the *CAC* case)). The concept of an offer to a 'section of the public' means that the offer, although not universal, is general (Blackman et al op cit 6–4). The question in the *Gold Fields* case, therefore, was whether the group, consisting of all the persons who held shares in Gold Fields, constituted a 'section of the public' in the particular circumstances of the case.

Both the High Court and the Supreme Court of Appeal in *Gold Fields* ruled that the offer in question was not an offer to the public or an offer to a 'section of the public', and that it did not therefore require a prospectus under s 145 of the Act. (Even though the decision of the High Court that a share exchange is not a 'subscription' meant that a prospectus was not required in any event, the High Court nevertheless considered the question of whether the offer was one to the 'public'.) The decision of the courts effectively was that an offer by company A made to the shareholders of company B to acquire their shares in company B in exchange for shares in company A (in order to achieve a merger) (hereafter referred to as a '*Gold Fields*-type offer') would not constitute an 'offer to the public' within the meaning of s 142 of the Act (quoted above).

There have been three other previous cases in which the same issue was considered: the *Broken Hill* case (supra), the *Christopher* case (supra) and *TNT Australia (Pty) Ltd v Normandy Resources NL* (1989) 15 ACLR 99 (SC). The courts in *Gold Fields* opted to follow the *Normandy Resources*' approach that a *Gold Fields*-type offer is not an offer to the 'public'. The ruling in *Broken Hill* that a *Gold Fields*-type offer was indeed an offer to the public was surprisingly neither considered nor cited in either of the *Gold Fields* judgments. It seems odd that the Supreme Court of Appeal chose to follow *Broken Hill* on the issue of the definition of a 'subscription', but not to follow or to even refer to

Broken Hill on the issue of whether the offer was one to the 'public'. In *Broken Hill* it was found that a *Gold Fields*-type offer was 'clearly' one to the public (at 617) but the court appeared to have found it unnecessary to delve further into the issue. (While *Christopher*'s case found that the offer was not an offer to the public, there are two reasons why this may be disregarded. First, the legislative definition of an offer to the public that was considered in *Christopher* (see s 55(2) of the English Companies Act, 1948) had arguably precluded the offer from being an offer to the public. Secondly, the test of an offer to the public that was propounded in *Christopher* was that the determinative criterion was not who had received the offer but who could accept it (at 493). The law has in the meantime developed, and it is now accepted that even where only the members of a particular group may accept the offer, this does not necessarily make the offer a 'non-public' offer. (See Bollen J in the court a quo in *Australian Central Credit Union v Corporate Affairs Commission (SA)* (1985) 9 ACLR 718.))

The approach of the Supreme Court of Appeal in *Gold Fields* was that the word 'public' in s 145 of the Act is not used in any 'special sense' (para 11) and that an offer to the 'public' as the term is 'ordinarily understood' (para 13) would 'necessarily be in terms that would enable it to be made to and accepted by the public at large, and it could thus be made with indifference to any random section of the public' (para 13). The crux of the decision of the High Court as well as the Supreme Court of Appeal in *Gold Fields* was that, in offering to exchange shares, the offeror's aim was to acquire specific, private assets (that is, the Gold Fields shares) from the owners of the private property, and the offer was consequently addressed to the offerees in their private or non-public capacity (para 12 of the judgment of the High Court and paras 14 and 16 of the judgment of the Supreme Court of Appeal). The Supreme Court of Appeal (para 14) further applied (what will be referred to herein as) the 'rational connection criterion' that was laid down in the *CAC* case, and found briefly, following *TNT Australia (Pty) Ltd v Normandy Resources NL* (supra), that there was a 'rational connection' between the offer and the characteristic that set the offeree group apart, with the result that the offer was not one to the 'public', and did not therefore require a prospectus. This reasoning will be critically analyzed below.

The concept of a 'section of the public'

What has loosely been referred to above as the 'rational connection criterion' may be expounded as follows: in the *CAC* case (at 208), and with regard to similar legislative wording, it was held that, when an offer is made to a group, the question whether the group constitutes a 'section of the public' cannot be answered in the abstract but depends always on the circumstances of each case. For the group not to constitute a 'section of the public' there must generally exist, as a *pre-condition*, either: (i) some subsisting relationship between the offeror and the members of the offeree group; or (ii) some rational connection between the common or identifying characteristic of the members of the group and the offer made to them. If this pre-condition (or 'rational connection criterion') is satisfied, the question of whether the offeree group makes up a 'section of the public' will fall to be determined by a *variety of factors*, the most important being the number of persons in the group; the subsisting relationship between the offeror and the members of the group; the nature and content of the offer; the significance of any particular characteristic which identifies the members of the group; and any connection between that characteristic and the offer. These principles were laid down in the *CAC* case (at 208) and have been accepted by the leading textbook writers in South African law (on the basis of similar wording in s 142 of the Act). The court in *CAC* emphasized that the question of whether an offer is one to the 'public' is a matter of fact and depends on the purpose and circumstances of the offer. It is determined by weighing up all the above factors, once the pre-condition has been satisfied. Of these various factors, none is usually determinative on its own.

The *CAC* principles were applied, albeit briefly, by the Supreme Court of Appeal in *Gold Fields*, where the court stated simply: 'That there is a 'rational connection' between the offer and the characteristic that sets the group apart . . . hardly needs saying for the characteristic is inherent in the offer itself' (para 14). The court thus applied the 'rational connection criterion' or precondition, and alluded to the nature of the offer and the significance of the identifying characteristic of the group. But as explained above, the 'rational connection' criterion is merely a first step in the test of an offer to a 'section of the public'. Once this necessary but not sufficient condition is satisfied, the second leg of the test is the analysis of the variety of factors listed in the *CAC* case which determine whether an offer is a 'non-public' one (namely, the number of persons in the group; the subsisting relationship between the offeror and the members of the group; the nature and content of the offer; the significance of any particular characteristic which identifies the members of the group; and any connection between that characteristic and the offer). Disappointingly, there is only a very terse analysis in the judgment of the Supreme Court of Appeal on the second leg of the test.

Moreover, the *CAC* case laid down that the essential criterion (see M S Blackman 'Companies' *LAWSA* Part I vol 4 para 147) of whether an offer is not one to a 'section of the public' is whether the *offerees* — by reason of their common characteristic or their antecedent relationship with the offeror — have an interest in the subject matter of the offer which is substantially greater than or substantially different from the interest which others who do not have that characteristic or relationship would have in the offer (the *CAC* case at 210 and 213; *Hurst v Vestcorp* (1987) 13 ACLR 17 CA (NSW) at 45–6). It is worthy of emphasis that the 'essential criterion' relates to the special interest of the *offerees* — and not the offerors — in the subject matter of the offer. But in the *Gold Fields* case both the respective judgments placed the emphasis on the special interest of the *offeror* in the acceptance of the offer. This is evidenced by the statements of the courts that the offer was not one to the public because the object or goal of the offeror, Harmony, was ultimately to achieve a merger with Gold Fields by acquiring the Gold Fields shares which belonged to the offerees (para 12 of the judgment of the High Court; paras 14 and 16 of the judgment of the Supreme Court of Appeal). But there is no authority for the view that an offer is not one to a 'section of the public' if the offeror (as opposed to the *offerees*) has a special interest in the acceptance of the offer (Blackman op cit para 147). This question was in fact specifically left open by Brennan J in the *CAC* case (at 213). Perhaps the Supreme Court of Appeal in *Gold Fields* intended to lay down a new test for an offer to a section of the public — although this is unlikely in the light of its statement that it 'can add nothing useful to what has been said in earlier cases on the meaning of "public"' (para 11).

It makes perfect sense to view the need for a prospectus from the perspective of the *offerees*' special interest when one examines the wording of s 145 of the Act. Section 145 requires a prospectus for 'an offer to the public for the *subscription* of shares' (my emphasis). The crucial issue is therefore whether the subscription component of Harmony's proposal (that is, the offer to *subscribe* for shares in Harmony) constituted an offer to the public; and *not* whether the *taking up* of Gold Fields shares by Harmony constituted an offer to the public. The court's focus should therefore have been placed on the special interest of the persons to whom the offer to *subscribe* for Harmony shares was made, and not on the special interest of Harmony.

On a proper application of what Blackman refers to as the 'essential criterion' (set out above) to the facts of *Gold Fields*, it is submitted that the test is not satisfied. The *offerees*, by reason of their shareholding in Gold Fields, did not have a special interest in acquiring shares in Harmony that was substantially greater than or different from the interest of those who did not hold shares in Gold Fields. The fact that both Gold Fields and Harmony were mining companies does not alter the position (see *re South of England Natural Gas and Petroleum Company Limited* [1911] 1 ChD 573, where it was held that an offer by a gas company of its shares to shareholders of several other gas companies was nevertheless an offer to the public). It is submitted that the non-fulfillment of the 'essential criterion' is a strong factor in favour of the view that the offer in *Gold Fields* was one to a 'section of the public'.

The loose application of CAC *in* Normandy Resources *and* Gold Fields

Turning to the application of the 'variety of factors' laid down by the *CAC* case as being determinative of whether an offer is one to the public, it becomes relevant to make mention of *Normandy Resources* (supra). *Normandy Resources* was cited with approval by both the High Court and the Supreme Court of Appeal. The facts in *Normandy Resources* were substantially similar to those of *Gold Fields* in that *Normandy Resources* also involved a *Gold Fields*-type offer (but see further below). In contrast with the other Australian case on a *Gold Fields*-type offer, namely *Broken Hill*, the *Normandy Resources* case held that such an offer was not one to the public. It is submitted that the decision in *Normandy Resources* resulted from a rather liberal interpretation of the principles which determine when an offer is not one to the 'public' as laid down in the key case of *CAC*, or to express it differently, the decision resulted from a restrictive interpretation of the term 'public' (see H A J Ford & R P Austin *Ford's Principles of Corporations Law* 6ed (1992) 410). The facts in *Normandy Resources*, and the *Gold Fields* case by extension, were not as convincingly suggestive as the facts of the *CAC* case that the offer was a 'non-public' one. It is questionable whether the respective courts in *Gold Fields* should have followed a similar approach as that adopted in *Normandy.*

Apart from what Blackman refers to as the 'essential criterion' discussed above, it is submitted that there are four further factors derived from the leading *CAC* case which support the view that the offer in the *Gold Fields* case was indeed an offer to a 'section of the public'. It is submitted that these additional considerations should have been taken account of by the respective courts in *Gold Fields* in weighing up whether the offer was one to the 'public'. The four factors are as follows:

First, according to the *CAC* case (at 209) the common or identifying characteristic held by the members of a group of offerees must be one which is both restrictive as well as well defined in order to be a significant indication that an offer is not one to the 'public'. It is submitted that in *Gold Fields* the common characteristic of the group of Gold Fields shareholders was neither restrictive nor well defined. It was not a well-defined group because at the time the offer was made, it was not certain exactly who the offerees were; any member of the public could qualify for the offer and become an offeree simply by purchasing a Gold Fields share which is listed on the JSE Securities Exchange. (The Supreme Court of Appeal in *Gold Fields* and the court in *Normandy Resources*, however, rejected this argument, which rejection could well have been what led Ford op cit 410 to describe the decision as 'liberal'). Neither was the common characteristic of the group of offerees a restrictive one, that is to say 'restrictive' in the sense that eligibility for membership of the group must be restricted by clear criteria that can easily be applied (see Ford op cit 409; *CAC* case at 209). An example of a restrictive group is provided by the facts of the *CAC* case itself, where the offerees were all members of a corporate credit union, which had rules restricting eligibility for membership by reference to employment and/or residence, as well as clear procedures for the rejection or acceptance of applications for membership (at 209–10). By contrast, the common characteristic of holding one or more Gold Fields shares is not in any way restrictive; any member of the public who pays the consideration for the shares is eligible to subscribe for or purchase shares and there are no procedures for rejecting the applications of certain well-defined applicants for shares.

The second factor favouring a view of the offer in the *Gold Fields* case being one to 'a section of the public' relates to the 'rational connection criterion'. It is submitted that there was a relatively weak connection in *Gold Fields* between the common characteristic of the offeree group on the one hand, and the nature of the offer on the other hand. Again, the *CAC* case provides a useful illustration. In that case the offer was confined to a group consisting of the members of a credit union, and the nature of the offer was to acquire units in a unit trust which was to be formed to acquire the premises owned by the corporate credit union. The 'rational connection' was that the members of the credit union were being afforded the opportunity to share in the beneficial ownership of the premises which were to serve as the headquarters of their own credit union. The offer effectively was an offer of a direct interest in immovable property in which the *offerees already had an indirect interest* as members of the credit union (at 209–10). By contrast, the members of the *offeree* group of Gold Fields shareholders had no previous interest in Harmony.

Instead, the only reason in the *Gold Fields* case for the offer having been made to the Gold Fields shareholders was that the *offeror*, Harmony, had an interest in the offerees accepting the offer and thereafter handing over their Gold Fields shares as the first stage of achieving a merger with Gold Fields. The Supreme Court of Appeal considered this to be a clear and obvious 'rational connection' (between the selection of the offerees and the nature of the offer) (para 14). But it is submitted with respect that the court overlooked the vital principle that the 'rationality' of the connection must be judged in the light of the particular context of investor protection (Ford op cit 410). This means, for example, that if an offer of shares in a gardening undertaking is made to a group of gardeners, although the common element of gardening is a 'connection' between the selection of the group and the nature of the offer made to them, it is not a 'rational connection' in the sense that there is any less need for investor protection in the form of a prospectus (ibid). In the same vein, although the object of Harmony in selecting the Gold Fields shareholders as the group of offerees bore a 'connection' to Harmony's goal of eventually achieving a merger with Gold Fields, the connection was not a 'rational connection' in the context of investor protection. As stated by Kirby J in the *Hurst* case (supra), the criterion of the 'public' quality of an offer was laid down in order to exempt from the requirement of a prospectus those offers that were made in circumstances where the relationship between the parties is of such a nature that it can be deemed to be a sufficient explanation for the investment (for example a friendship, partnership or family relationship with the promoter); to impose a requirement of a prospectus in such circumstances would be artificial, burdensome and unnecessary for the purposes of protecting the investor. In the *Gold Fields* case though, there was no 'rational connection' in the light of investor protection — notwithstanding Harmony's object, the Gold Fields shareholders may have had a real need for the information disclosure in a prospectus.

The third factor in the *Gold Fields* case which supports the view that the offer was one to a 'section of the public' was that the number of persons in the offeree group consisting of all the Gold Fields shareholders was without doubt quite large. Fourthly, there was no subsisting relationship between the offeror and the offerees.

As explained above, the issue of whether an offer is one to a 'section of the public' depends on and involves a judgment of and a weighing-up of all the relevant evidence. In most cases there is evidence pointing towards different conclusions and there is no one conclusion that is objectively correct (*Hurst* (supra) at 26). It is submitted with respect that in the *Gold Fields* case the court did not consider fully all the factors in favour of the view that the offer was one to a 'section of the public'. The court ought to have given the issue fuller consideration. It is further submitted that on a weighing-up of the factors both favouring and militating against a view that the offer was one to a 'section of the public', the better conclusion is that the offer was one to a 'section of the public'.

Grounds for distinguishing between Normandy Resources and *Gold Fields*

It is furthermore submitted that the *Gold Fields*-type offer in *Normandy Resources* may be distinguished from the offer in *Gold Fields* in a respect that renders the offer in *Gold Fields* even more likely to be a public offer than that in *Normandy Resources*. In *Normandy*'s case Company N (the equivalent of Harmony) wished to merge with Company P and made an offer to the shareholders of Company P (being the equivalent of the Gold Fields shareholders) to acquire their shares in P in exchange for cash and a redeemable preference share in N. The redeemable preference share in N carried with it an option to re-acquire a share in P after six months but before three and a half years, by surrendering the preference share (which the court referred to as the 'exchange right' component of the offer). The issue before the court was whether the *exchange-right* component of the offer constituted an offer to the public. This may be distinguished from the *Gold Fields* case where there was no exchange-right component in issue. A shareholder in *Normandy Resources* who chose to exercise her exchange right would already have been, at the time of exercising the exchange right, a shareholder *in N*; in other words, as regards the exchange-right component of the *Normandy* offer, it is implicit in *Normandy*'s decision (though not expressly stated by the court) that there would have been an antecedent or subsisting relationship between the offeror and the offeree which, as held in the *CAC* case, is a weighty factor in favour of an offer being a 'non-public' one. In striking contrast in the *Gold Fields* case, the offer in question was simply an offer to initially exchange shares; there was no exchange right in issue before the court and therefore no subsisting or antecedent relationship between the offeror and offeree parties. But the court in *Gold Fields*, with respect, failed to take the absence of an antecedent relationship into account.

Besides its loose application of the *CAC* criteria, further doubt is cast on the reasoning of the court in *Normandy Resources* by its reliance on outdated dicta. *Normandy* relied on and applied the dictum of Kitto J in *Lee v Evans* (1964) 112 CLR 276 (HC) at 286 as well as that of Barwick CJ in *Lee v Evans* (supra) at 285 that an invitation is not an invitation to the public unless it is 'an invitation made to the public generally and capable therefore of being acted upon by any member of the public'. But this dictum was made in the context of previous legislative provisions which were overridden and superseded by the legislative amendments to the Companies (South Australia) Code (s 5(4)) which provided for a more expansive definition of an 'offer to the public'. Later judgments found that this expansive definition was 'plainly intended to exclude the direct applicability of *Lee v Evans*' (*CAC* case at 207–8; see also *Hurst* (supra) at 25–6). *Normandy*, nevertheless, appeared to have applied *Lee v Evans*, in flawed reasoning, to arrive at its conclusion that the offer to all the shareholders of P was not one to the public. Surprisingly, the Supreme Court of Appeal in *Gold Fields* seems to have engaged in similar flawed reasoning, in stating (para 13) that 'an offer that is made to the public would necessarily be in terms that would enable it to be made to and accepted by the public at large'. The example may be used again of an offer of shares in a gardening undertaking, which the offeror wishes to restrict to gardeners. The fact that the offer is not made to and capable of acceptance by the public at large, does not necessarily mean that it is not an offer to a 'section of the public' (as explained above).

Also worth mentioning is *S v National Board of Executors Ltd* 1971 (3) SA 817 (D). In that case, although the court was really concerned with the application of s 84bis(2) of the Companies Act 46 of 1926, it did state quite emphatically that the word 'public' in the context of s 84bis(1) of the Companies Act, 1926, had 'great width' and that the wording of s 84bis(1) extended the meaning of an offer to the 'public' beyond its popular meaning (at 824). The court went on to quote with approval Gower's remark that the definition of 'offer to the public' is so wide that it would be impossible for a company to ever issue shares without making a public issue (unless some carve-outs were legislated) (at 824). Section 84bis(1) is the predecessor to the current definition of 'offer to the public' in s 142 of the Act, and the two provisions are quite similar in wording. The interpretation of s 84bis(1) in *S v National Board of Executors Ltd* (supra) supports the view advocated in this note that 'public' should be widely interpreted, and not narrowly as was done in *Gold Fields*.

Conclusion on the issue of 'offer to the public'

The decision in *Gold Fields* is more complex than at first blush it appears to be. The High Court as well as the Supreme Court of Appeal took a rather narrow view of what would constitute an offer to the 'public' (or 'section of the public'). Both courts failed to take account of important factors which favoured a finding that the offer was a 'public' offer which required a prospectus. It is respectfully submitted that on considering the two opposing views in *Broken Hill* and *Normandy Resources* and on weighing up all the relevant factors in the *Gold Fields* case, as discussed above, the offer was an offer to a 'section of the public'.

Furthermore, as stated by Hampel J in *Broken Hill*, in a share exchange transaction investors may require even greater protection by means of a prospectus (see above) and certainly require no less protection. The need for investor protection stems from the nature of shares and the vulnerability of the purchaser of shares. In many cases, purchasers of shares depend heavily on the information provided in the prospectus when assessing the value of the shares and the prospects of the vendor company (see further Roman Tomasic & Stephen Bottomley *Corporations Law in Australia* (1995) 556–8; Blackman et al op cit 6–15).

It is quite conceivable that many investors who hold shares in a large listed company (such as Gold Fields) may be ordinary unsophisticated members of society, with no particular knowledge of, or expertise relating to, investments in equity and no prior knowledge about a company (such as Harmony) in which they had previously held no shares; upon being made an offer to exchange their shares in the one company for shares in the other, it is likely that such investors would be poorly equipped to make an informed decision on whether or not to accept the offer, and would therefore be in dire need of guidance in the form of a prospectus. Notwithstanding the conclusion reached above on the construction of the term 'subscription', one wonders whether, in the still developing economy in South Africa, the court should not have followed a less restrictive, *Broken Hill*-type approach to the interpretation of the phrase 'offer to the public'.