

Judgment 20 1973

In The Privy Council

4 OF 1973

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES
EQUITY DIVISION
IN SUIT 1232 of 1972

BETWEEN

STENHOUSE AUSTRALIA LIMITED (Plaintiff) Appellant

AND

MARSHALL WILLIAM DAVIDSON PHILLIPS (Defendant) Respondent

TRANSCRIPT RECORD OF PROCEEDINGS

WILKINSON, KIMBERS & STANNAN
Hale Court,
Lincolns Inn,
London

LINKLATERS and PAINES
Barrington House,
59 Gresham Street,
London, E.C.2

Solicitors for the Appellant

UNIVERSITY OF LONDON Solicitors for the Respondent

INSTITUTE OF ADVANCED
LEGAL STUDIES
28 MAY 1974
25 RUSSELL SQUARE
LONDON W.C.1

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O N A P P E A L

From the Supreme Court of New South Wales
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BETWEEN

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AND

MARSHALL WILLIAM DAVIDSON PHILLIPS (Defendant) Respondent

TRANSCRIPT RECORD OF PROCEEDINGS
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Letter C.E. Heath Underwriting Agency (Australia) Pty. Limited to J.R.M. McGriskin C.E. Heath Insurance Broking (Australia) Pty. Limited		Undated " " 30th June, 1972

"D"

Number	Description of Document	Date
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"E"

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	13.	Exhibit L - Letter M.W.D. Phillips to S. Short Royal Insurance Group	25th November, 1969
		Memorandum M.W.D. Phillips to K. Bulgin, <u>Defendant's Exhibits</u>	16th March, 1970
	14.	Exhibit No. 1 - Letter Stenhouse Australia Limited to Mr. F.C. Hargreaves Boral Insurance and Fund Management Limited	26th June, 1972
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15.	Exhibit No. 2 - Letter C.E. Heath Insurance Broking (Australia) Pty. Limited to F.C. Hargreaves Boral Insurance and Fund Management Limited	27th March, 1972	
16.	Exhibit No. 5 - First page of the Memorandum of Association, Boral Insurance and Fund Management Limited	Undated	
	Letter The Fire & Accident Underwriters Association of New South Wales to Boral Insurance and Fund Management Limited	1st March, 1971	

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	Certificate of Deposit and Receipt by The Treasury relating to Boral Insurance and Fund Management Limited	30th January, 1970
	Certificate of Incorporation of Boral Insurance and Fund Management Limited	27th November, 1969
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18.	Affidavit of John Henry Herron	16th November, 1972
19.	Certificate of Registrar in Equity of due compliance with conditions of order	14th December, 1972
20.	Notice of motion for final leave to appeal to Privy Council	15th December, 1972

"G"

PART III

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No. 1

AMENDED SUMMONS
3rd October, 1972

The Plaintiff Claims:

In the Supreme
Court of N.S.W.

No. 1

Amended Summons

1. An injunction restraining the defendant from directly or indirectly soliciting as principal servant or agent prior to the 9th July, 1976, whether by written or oral communication or otherwise unless with the prior consent of the plaintiff insurance business from any person firm or corporation being a client of the plaintiff as defined in the Deed made the 23rd day of March, 1972, between the plaintiff of the first part and the defendant of the second part. 10
2. As injunction restraining the defendant from acting directly or indirectly as principal, servant or agent prior to the 9th July 1974 as Insurance Broker for any client as defined in the Deed made the 23rd day of March, 1972 between the plaintiff of the first part and the defendant of the second part unless with the prior consent in writing of the plaintiff or except in the circumstances provided for in clause 5 of the Deed. 20
3. A declaration that the defendant has since the 9th July, 1971 without the prior consent in writing of the plaintiff acted directly or indirectly as principal, servant or agent for a client of the plaintiff as the word "client" is defined in the said Deed and in breach of clause 6 thereof.
4. A declaration that the defendant has since the 9th July, 1971 without the prior consent of the plaintiff directly or indirectly solicited as principal, servant or agent insurance business from a client of the plaintiff as the word "client" is defined in the said Deed and in breach of clause 4 thereof. 30

5. That it may be referred to the Master to enquire into the damages which the plaintiff has suffered by reason of the breaches by the defendant of the said Deed and that the defendant may be ordered to pay the amount of such damages to the plaintiff.
6. In the alternative that it may be declared that the defendant is bound to pay or procure that the same be paid to the plaintiff a one-half share of the commission received in respect of the insurance policies placed by the Boral Group in or about June 1972 in the manner provided by clause 5 of the said Deed.
7. That it may be referred to the Master to enquire into the amount of such commission and that the defendant be ordered to pay the amount of the same to the plaintiff.
8. That it may be declared that the provisions of clauses 4, 5 and 6 of the Deed made between the plaintiff of the first part and the defendant of the second part and dated the 23rd March 1972 are valid and enforceable.
9. Such further or other order of relief as this Honourable Court may deem fit.
10. An order that the defendant pay the plaintiff's costs of this Summons.

In the Supreme
Court of N.S.W.

No. 1

Amended Summons

To the Defendant:-

If there is no attendance before the Court by you or by your Counsel or Solicitor at the time and place specified below, the proceedings may be heard and you will be liable to suffer judgment or an order against you in your absence. Before any attendance at that time you must enter an appearance in the Registry.

Time: 2 p.m. on the 4th July, 1972 at

Place: Before the Honourable Jack Austell Lee a Judge of the Supreme Court sitting in Equity in vacation at No. 5 Court, Supreme Court, Elizabeth Street, Sydney.

In the Supreme
Court of N.S.W.

No. 1

Amended Summons

The time before which this Summons is to be served has been abridged by the Court to 10 a.m. on 4th July, 1972.

Plaintiff: Stenhouse Australia Limited,
a Company duly incorporated
and having its registered
office situated at 8/12
Market Street, Melbourne, in
the State of Victoria.

Solicitor: John Dudley Westgarth, 10
C/- Messrs. Dudley Westgarth
& Co.,
39 Martin Place,
Sydney. (25-6741)

Plaintiff's
address for
service: Messrs. Dudley Westgarth &
Co.,
39 Martin Place,
Sydney. 20

Address of
Registry: The Supreme Court,
King Street,
Sydney.

Plaintiff's Solicitor

Filed in the
Supreme Court,
King Street,
SYDNEY.

Registrar in Equity

No. 2

POINTS OF DEFENCE
27th September, 1972.

- 1 The provisions of the agreement sued on are void and unenforceable.
- 2 The defendant did not solicit in breach of the said agreement.
- 3 The defendant did not act as a broker in breach of the said agreement.
- 4 No injunction should be granted in the exercise of the Court's discretion:
 - (i) on the ground that the enforcement of the provisions sued on would be harsh or oppressive to the defendant:
 - (ii) on the further ground that if clause 5 of the said agreement is valid, it was intended by the parties to be the fixed price for which the defendant might lawfully do the acts prohibited by clauses 4 and 6 of the said agreement:
 - (iii) on the further ground that, in these proceedings, the plaintiff has claimed to recover, in effect, liquidated damages or a share of the profits specified in clause 5 of the said agreement and by reason of that election, the Court should, in the exercise of its discretion, refuse to grant an injunction.
- 5 Further, clause 5 of the said agreement (if otherwise not invalid) constitutes a penalty and is therefore unenforceable.

In the Supreme
Court of N.S.W.

No. 2

Points of Defence

10

20

ISSUES
27th September, 1972.

In the Supreme
Court of N.S.W.

No. 3

Issues

1. Did the defendant directly or indirectly in breach of clause 4 of the Deed made between the plaintiff and the defendant dated the 23rd March 1972 as servant or agent of C.E. Heath Insurance Broking (Australia) Pty. Limited solicit insurance business from a person or corporation.
2. If so, was such person or corporation a client within the meaning of the said Deed.
3. Did the defendant as servant or agent in breach of clause 6 of the Deed made by the plaintiff and the defendant dated 23rd March 1972 directly or indirectly as servant or agent of C.E. Heath Insurance Broking (Australia) Pty. Limited act as Insurance Broker for a person or corporation. 10
4. If so, was such person or corporation a client within the meaning of the said Deed.
5. Did a client within the meaning of the said Deed place insurance business so that the defendant or C.E. Heath Insurance Broking (Australia) Limited received or became entitled to receive directly or indirectly any financial benefit from the placing of such business. 20
6. Whether the provisions of the Deed sued upon are void and unenforceable.
7. On the exercise of the Court's discretion:
 - (i) Would the enforcement of the provisions sued on be harsh or oppressive to the defendant. 30
 - (ii) Was it intended by the parties that Clause 5 of the Deed be the fixed price for which the defendant might lawfully do the acts prohibited by clause 4 and 6 of the said Deed.

6.

(iii) Whether the plaintiff by claiming to recover, in the alternative, under Clause 5 of the Deed, has elected to accept payment under that clause, and if so, whether the Court should refuse to grant an injunction.

In the Supreme
Court of N.S.W.

No. 3

Issues

8. Whether Clause 5 of the said Deed (if otherwise not invalid) constitutes a penalty and is therefore unenforceable.

TRANSCRIPT OF ORAL EVIDENCE BEFORE
HIS HONOUR MR. JUSTICE MAHONEY
27TH AND 28TH SEPTEMBER,
1972 AND 3RD OCTOBER, 1972

Wednesday, 27th September, 1972.

STENHOUSE AUSTRALIA LIMITED v. PHILIPS

In the Supreme
Court of N.S.W.
No. 4

MR. LUSHER, Q.C. with MR. WOOD appeared for the
plaintiff.
MR. BYERS, Q.C. with MR. BEAUMONT appeared for
the defendant.

Transcript of
oral evidence

(At the commencement of the proceedings Mr.
Lusher made an application to his Honour
that the matter be adjourned for one day.)

HIS HONOUR: On the matter being called on for
hearing Mr. Lusher, on behalf of the plaintiff,
made an application for an adjournment; he ask- 10
ing that the matter be stood over until tomorrow.
The substantial basis of the adjournment put to
me was that the matter is one of important fact,
it is said, not merely the present defendant but
other persons as well and that is a matter of
such importance that the matter ought to be dealt
with upon formal pleadings.

It was then asked that an adjournment be
granted in order that consideration be given to 20
that matter. As I understand the application,
it will mean a statement of claim will be filed
and the defendant will be asked to file a state-
ment of defence of pleadings. The plaintiff
asked for an adjournment until tomorrow that
this be done and presumably it is anticipated
the defendant would provide some co-operation
in having the pleadings prepared by that time.

Mr. Byers opposes the application for an
adjournment. He indicates in fact no steps were 30
taken by the plaintiff to formulate the issues
involved until certain particulars were lodged
or provided by letter dated 25th September 1972.
He says on receipt of that letter then certain
so-called points of defence were prepared on be-
half of the defendant based on the particulars
of claim in the letter of 25th September 1972.

The substance of these points of defence were indicated to the plaintiff by telephone on 26th September and a copy was formally delivered this morning. He indicates the matter is one concerning the business activities of the defendant and one in which it is sought to restrain the defendant's activities by reason of two agreements made by him in relation to soliciting employees and matters of that kind.

In the Supreme
Court of N.S.W.

No. 4

Transcript of
oral evidence

10 The matter is one of urgency, as it was represented to me, and the matter was listed for today on the basis that it was urgent, that substantially it was an issue of law and the issues of fact in the matter would not be substantial and would enable the matter, in any event, to be dealt with today and tomorrow.

20 On this basis it would appear to me not an appropriate matter to be adjourned and I see no particular pressing reason why, having regard to the position of the defendant, it would be essential that the matter proceed on a statement of claim. It appears to me by no means certain if an adjournment were granted until tomorrow that pleadings could be drawn and the defendant might not be able to or want to prepare pleadings by that particular time.

30 Normally an adjournment would be granted if the prejudice to the defendant could be dealt with by way of an order for costs. At the moment, having regard to the kind of prejudice and the possibility of the matter being delayed, I cannot see or I am not convinced the prejudice to the defendant in a case like this could be dealt with essentially by an order for costs particularly in a case where, on the basis of the information that has been put before me by counsel, the issues likely to arise must have been reasonably apparent from the commencement of the proceedings.

40 In reply, Mr. Lusher then indicated to me one of the executive officers of the plaintiff had come from Melbourne and he, Mr. Lusher, had seen him this morning and had not been able fully to confer with him. I do not understand why this may have been so but it may be there were good and adequate reasons for this. If in the course of matters, difficulties arise by

In the Supreme
Court of N.S.W.

No. 4

Transcript of
oral evidence

reason of counsel's inability properly to have full instructions then applications may be made and I will deal with them on their merits. However, on what is before me I do not think it a proper matter to adjourn.

It may be noted Mr. Byers has suggested in my statement of reasons for refusing the adjournment it is suggested the letter of 25th September 1972 was in fact a letter from the defendant to the plaintiff. It is, of course, in fact a letter from the plaintiff to the defendant giving some indication of the nature of the case to be made by the plaintiff upon the basis of certain amendments which were to be asked for. Mr. Byers indicates, and for the purpose of the transcript I will record that the defendant sought additional particulars of the matter referred to in the letter of 25th September 1972 and some particulars of this nature were furnished orally by the plaintiff to the defendant. Mr. Byers indicates the points of defence formulated by the defendant were formulated by reference to the matter in the letter of 25th September 1972 as so particularised.

10

20

(Mr. Lusher called for the manager of Heath Insurance Broking (Australia) Pty. Limited on subpoena duces tecum. Mr. Byers produced certain documents in answer to the subpoena together with a copy of the subpoena.)

30

(In answer to a subpoena duces tecum served on the defendant, Mr. Byers produced further documents together with a copy of the subpoena.)

(Frank Cecil Hargreaves, general manager of Boral Ins. Fund Limited and an executive of Boral Limited produced certain documents to the Court together with copies of the subpoenas.)

40

(Mr. Lusher called for inspection of the documents on subpoena from Heath Insurance Broking Pty. Limited. Mr. Byers objected to this course. Inspection allowed subject to any application that might subsequently be made.)

(In respect of the request by Mr. Lusher for inspection of the documents produced on subpoena duces tecum from the defendant it was agreed between counsel that the documents may be inspected without objection subject to any application that might subsequently be made by either party.)

In the Supreme
Court of N.S.W.

No. 4

Transcript of
oral evidence

10

(Unstamped agreement of 11th September 1964 between Stenhouse Scott-North Australia Limited and the defendant tendered and marked Ex.A).

(Agreement dated 6th September 1966 between Stenhouse Australia Limited and the defendant tendered and marked Ex.B).

20

(Stamped copy of agreement of 23rd March 1972 between Stenhouse Australia Limited and the defendant tendered and marked Ex.C on the undertaking of the plaintiff's solicitors to pay the stamp duty in the normal manner.)

(Further noted that it is admitted the defendant's employment was terminated on 9th July 1971.)

(Frank Cecil Hargreaves representing Boral Insurance Fund Management Limited produced further documents on subpoena duces tecum.)

30

(Kenneth James Bulgin, secretary, Stenhouse Australia, produced certain documents on subpoena duces tecum together with a copy of the subpoena.)

(Counsel were granted access to the documents produced on subpoena).

(Letter of 25th September 1972 from the plaintiff's solicitors to the solicitors for the defendant tendered and marked Ex.D).

(Short adjournment)

40

(Upon resuming Mr. Lusher sought a further adjournment until 2 p.m. to enable him to

In the Supreme
Court of N.S.W.

No. 4

Transcript of
oral evidence

F.H. Laird x

further inspect the documents produced on subpoena duces tecum. The application was opposed by Mr. Byers. His Honour granted an adjournment until 2 p.m.)

FRANCIS HENRY LAIRD
Sworn, Examined as under:

MR. LUSHER: Q. What is your full name?
A. Francis Henry Laird.

Q. Your address? A. 5 Rothwood Place,
Turramurra.

10

Q. Your occupation? A. Insurance Broker.

Q. With what firm or group. A. With the
Stenhouse Group.

Q. What is comprised within the Stenhouse
group of companies? A. First of all there
is Stenhouse Australia Limited, then there is
the operating companies which are Stenhouse
Queensland Limited, Stenhouse New South Wales
Limited, Stenhouse Newcastle Limited, Sten-
house Victoria Limited, Stenhouse Wallace
Bruce & Company Limited, Stenhouse Northern
Territory Limited, Stenhouse Scott-North
Australia Limited, Stenhouse Re-Insurance Pty.
Limited, Stenhouse Insurance Services Limited.

20

Q. The relationships between those various
companies and Stenhouse Australia? A. Sten-
house Australia is basically a holding com-
pany. Stenhouse Scott-North Australia Limited
is the vehicle through which insurance is
placed on the London market only for the other
members of the group. Stenhouse Re-Insurance
Pty. Limited is a re-insurance broking company
that places re-insurance between one insurance
company and another. Stenhouse Insurance Ser-
vices Limited is the technical centre of the
Stenhouse group in Australia and the other
companies I mention are operating insurance
broking companies.

30

Q. Stenhouse Australia is the overall holding
company; does it play any part at all in brok-
ing? A. No.

40

Q. With which particular company are you?
 A. I am with Stenhouse New South Wales Limited.

In the Supreme
 Court of N.S.W.

Q. In what capacity? A. Managing Director.

No. 4

Q. Of any of the others? A. I am also a director of Stenhouse Northern Territory Limited.

Transcript of
 oral evidence

Q. Are you familiar with the activities of the other companies? A. Yes.

F.H. Laird x

10 Q. You mention the various activities of the broking companies. What types of insurance are they concerned with? A. Those companies undertake all classes of insurance without exception.

Q. In broad terms are they taken from all places or limited to some areas? A. There are no geographical limits on any of the operations.

Q. In relation to risks which they take, are they all held locally or some dealt with in London? A. There is a mixture. Predominantly they are dealt with locally. Some smaller percentage is placed on the London market.

20 Q. Is that done by all the different companies?
 A. Yes.

Q. That placement is done through Stenhouse Re-Insurance? A. Through Stenhouse Scott-North.

Q. Are you familiar with the firm of Heath's?
 A. Reasonably so.

Q. Do you know its name accurately, C.E. Heath Insurance Broking Pty. Limited? A. Yes.

Q. Does that operate in Sydney? A. Yes.

30 Q. Anywhere else? A. I understand it also operates in Queensland.

Q. Are you familiar with the broking market?
 A. Yes.

Q. Can you tell us what sort of activities that particular firm is engaged in? A. I would imagine they are engaged in the same activities as Stenhouse and the other (Objected to).

In the Supreme
Court of N.S.W.

No. 4

Transcript of
oral evidence

F.H. Laird X

Q. First of all, have you had dealing with Heath's? A. No.

Q. From your own experience what type of activity do they engage in as a general position?

A. My understanding is that the Heath operation in Australia would be no different to the operation (Objected to).

HIS HONOUR: It is agreed between the parties that C.E. Heath Insurance Broking (Australia) Pty. Limited is engaged in the business of insurance broking in Australia. 10

MR. LUSHER: It might be noted that latter company is associated with the company of C.E. Heath & Co. Limited insurance brokers.

Q. The question of broking involves a relationship between you and your client? A. Very much so.

Q. One of the factors involved in the relationship between you and the client is one of the most important aspects of it, in so far as making business and recommendations of that sort? 20

A. In order to function successfully as an insurance broker it is essential to know the operations of the client, the insurance risks inherent to that client's operation. Therefore, in order to become their insurance broker or adviser it is important that you get a lot of information from them from observation and discussion that is not information generally known. Over a period this creates a very close relationship between the particular person who is handling that particular account with the insurance broker and the client. That personal relationship is of paramount importance in being an insurance broker. 30

Q. Is that information a matter of general broad knowledge or is it in detail? A. That needs to be obtained in quite detail. You need to know what they are doing and what they are proposing to do in the future; the opening of branches, the closing of branches, changes in personnel, finance structure. 40

Q. In the case of companies does it involve an awareness of the company structure; subsidiaries? A. Yes.

Q. In other words, the maximum of control --
A. This varies according to the structure of the particular prospective client with which you are dealing but in setting up any insurance program it is vitally important to establish the program you set up, if it is the client's requirement, and it invariably is, that it covers the assets and liabilities of not only the holding company but also the subsidiary companies.

10

Q. Are there any requirements as between broker and client which you regard as essential by the client as regards the knowledge which the broker holds and information which he gets? A. Yes. The prime requirement from the client's point of view is to have confidence in the broker's ability to adequately perform the functions that he is carrying out for the client. It is equally vital for the client to have complete and utter faith and trust in the insurance broker, particularly in view of the confidential information which is within the broker's knowledge, and must be, to carry out his job.

20

Q. In relation to a particular client for his needs, what do you say as to the skill required on the part of the broker. I am speaking in relation to handling his problems of insurance and as a broker? A. I am probably very biased because I have been an insurance broker for a long while but I become more convinced the older I get that the knowledge required of an insurance broker in order to undertake his job satisfactorily and to fulfil his client's requirements, the demand for knowledge is increasing daily in the knowledge that the broker must have must be substantial.

30

Q. What type of knowledge or skill? A. First of all he has to understand something about processes, understand something about types of building, their construction; he has to understand something about fire protection - fire protection of all phases. He has got to be able to understand the risks that the client has that can be insured whether they be liability, fire, marine, automobile. Secondly, but no less important, he has to know the insurance

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market within which he has to work and he has to know where he can obtain for the client the covers that he thinks the client needs and which the client has agreed to accept on the best possible terms for the client which might mean placing one account partly on the Australian market and partly on the London market and sharing it in both those markets in different fields.

Q. All this being designed to get the best service that can be obtained for the client? 10
A. Yes.

Q. In relation to the material in the overseas market, what does that involve? You get a risk which has to be assessed? A. The basic principle of placing business on the London market from Australia is that the Australian broker sends through to London all the relevant information and invariably the broker at the other end of the line then takes that information from his corresponding broker in Australia and uses his knowledge of the London market to place that to the best advantage of the client whether it be in the Lloyds market or the open market. 20

Q. With various underwriters? A. Yes.

Q. The Australian market is the same thing; local underwriters? A. Yes.

Q. What do you say as to the necessity of bargaining on behalf of the client in relation to extensions of policies and modifying of policies? A. I would agree with you but I would rather call it negotiating than bargaining. 30

Q. That is an essential requirement of a broker? A. Very much so.

Q. I take it it is also a question of him giving advice to the client and whether it is suitable or not? A. Yes.

Q. Are you familiar with Boral Limited and its subsidiary and associated companies? 40
A. In general terms.

Q. Was that group of companies a client of the Stenhouse group of companies? A. Yes.

Q. Before July 1971? A. Yes.

Q. And during that period? A. Yes.

Q. And at that time? A. Yes.

Q. Have you ever had dealings or negotiations with any of that group? A. No.

Q. Did you know Mr. Philips, the defendant?
A. Yes.

10 Q. What was his position in the Stenhouse group? A. He was managing director of Stenhouse Scott-North Australia Limited and Stenhouse Re-Insurance Pty. Limited.

Q. Did you see him from time to time in connection with the general affairs of the group?
A. Yes.

Q. To your knowledge did he have negotiations with the Boral group from time to time up to the end of July 1971? A. Yes.

20 CROSS-EXAMINATION:

MR. BYERS: Q. You have referred to the Boral group of companies? A. Yes.

Q. As at March 1972 that group of companies constituted a trading company and an insurance company at the time? A. I understand it did.

Q. You have mentioned the Boral group. By that you intended to refer to a group of companies included in which was Boral Insurance & Fund Management Pty. Limited? A. Yes.

30 Q. As at March 1972 Boral Insurance & Fund Management Pty. Limited was an insurance company? A. Yes.

Q. And had been for a number of years prior to March 1972? A. It had been prior to then but I do not know how long.

Q. When you refer to the Boral group of companies having been a client of the Stenhouse

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group, it would be right to say you meant the Stenhouse group re-insured on occasions policies for Boral Insurance & Fund Management?

A. I would not know that. That was re-insurance.

Q. You do not know -- A. What I mean is I think you are putting the wrong interpretation on the answer I gave.

Q. The situation as at March 1972; the Boral group, excluding the insurance company, was not a client of any particular company in the Stenhouse group? A. It was a client.

10

Q. Which company? A. Stenhouse N.S.W.

Q. Which Boral company? A. Boral Limited and subsidiary and associated companies.

Q. Which subsidiary and associated companies?

A. The whole of the associated companies as listed on the policy in force at that time.

Q. Have you the policy with you in force at that time? A. No.

20

Q. Would it be correct to say the Boral Insurance & Management Fund Pty. Limited did much of the insurance for the Boral group and did so as at March 1972? A. I would not know.

Q. When you refer to Boral being a client of the Stenhouse group can you tell his Honour with a little more precision what Boral company you are referring to? A. I am referring to the insurance that was in force on the books of Stenhouse N.S.W. Limited in the name of Boral Limited and subsidiary companies.

30

Q. Was that re-insurance or not? A. That was direct insurance placed on the local market.

Q. What type? A. Of public liability.

Q. You do not know when that insurance was placed with the Stenhouse group. A. Not off hand.

Q. You do not know whether it was 1970 or 1969? A. No.

Q. Or before? A. Or before. Except that I do know that it was before 1st. July 1971.

Q. You do not know how long before? A. No.

Q. So far as your memory goes were the companies you named all the companies which were subsidiaries of the Stenhouse holding company?

A. I do not think there would have been. There are probably other companies I cannot recall.

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10 Q. (Shown document) You would agree those companies were subsidiaries of the Stenhouse holding company as at June 1970? A. I would not know. It is not my job to know this. All these names are familiar to me. They had been subsidiary companies of Stenhouse Australia Limited; whether they still are or were in 1970, I do not know. The company secretary or finance director could answer that better than I could.

20 (Document containing list of names m.f.i. 1.)

Q. Stenhouse N.S.W. Pty. Limited was a company you mentioned. That is a company in which all the shares at 23rd March 1972 were owned by the holding company? A. Yes.

Q. The holding company is the plaintiff company? A. Yes.

30 Q. Stenhouse Queensland was a company, all the shares of which as at 23rd March 1972, were owned by the holding company, the plaintiff? A. I would not know.

Q. You know it is in the group? A. I am managing director of Stenhouse N.S.W. I do not know the shareholders of Queensland Limited.

Q. When you use the expression "group of companies" were you referring to companies, the shares of which were controlled by Stenhouse, the holding company, directly or indirectly? A. Yes.

40 Q. The companies which you mentioned would have been controlled in that sense by the plaintiff as at 23rd March 1972? A. Yes.

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Q. For some time prior to that? A. Yes.

Q. The New South Wales company no doubt has its head office in New South Wales? A. Yes.

Q. It would carry on its business in the main in New South Wales? A. Yes.

Q. Its clients would be constituted in New South Wales and other States and abroad?
A. Yes.

Q. This was during or in March 1972? A. Yes.

Q. Stenhouse Queensland would have its head office in Queensland? A. Yes. 10

Q. Its clients were clients either in Queensland or throughout Australia in March 1972, and abroad? A. Yes.

Q. The same would be true of the Victorian company in March 1972? A. Yes.

Q. The Newcastle company had an office in Newcastle in March 1972? A. Yes.

Q. Its clients were throughout New South Wales and Australia? A. Yes. 20

Q. Stenhouse Wallace Bruce & Company has its office where? A. Adelaide.

Q. It had its head office there in March 1972?
A. Yes.

Q. It carries on that business, in the main, in South Australia? A. Yes.

Q. With South Australian clients and New South Wales clients? A. Yes.

Q. And clients constituted throughout Australia?
A. Yes. 30

Q. And overseas? A. Yes.

Q. Stenhouse Northern Territory Limited, I take it has its office in the Northern Territory?
A. Yes, Darwin.

Q. It had its office there in March, 1972?

A. Yes.

Q. Its clients were Northern Territory clients and Australian clients as well? A. Yes.

Q. And overseas clients additionally? A. Yes. Not yet, but we hope.

Q. Scott-North Australia, where did it have its head office? A. Sydney.

Q. In March 1972? A. Yes.

10 Q. And for some years before that? A. In Sydney.

Q. Its clients were scattered throughout Australia? A. Its clients were the operating companies of Stenhouse within Australia.

Q. Stenhouse Re-Insurance Pty. Limited was situated in New South Wales, Sydney? A. Yes.

Q. In March 1972 and for many years before that? A. Yes.

20 Q. Its clients were constituted throughout the Commonwealth as at March 1972? A. Yes.

Q. Do you know a company called Stenhouse Western Australia Limited? A. Yes.

Q. In March 1972 it was controlled by the Stenhouse holding company directly or indirectly?

A. So I understand.

Q. Its office was presumably in Perth? A. Yes.

Q. Its clients were in Perth and throughout Australia and overseas clients as well? A. Yes.

30 Q. John C. Lloyd & Co. Pty. Limited; that was a company in March 1972 which was controlled by the plaintiff company? A. Yes.

Q. Where was its office constituted in March 1972? A. Melbourne.

Q. It engaged in insurance business? A. Insurance broking.

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Q. Its clients were no doubt situated throughout Australia, and overseas as well? A. Yes.

Q. A company Danby Gibby & Outhwaite Pty. Limited, do you remember that? A. Yes.

Q. That company in March 1972 was controlled directly or indirectly by the plaintiff company? A. Yes.

Q. Where was the office of Danby, Gibby & Outhwaite in March 1972? A. Melbourne.

Q. I suppose its clients were scattered throughout Australia? A. Yes. 10

Q. I suppose the companies of which I asked you had more than one office? A. Some of them.

Q. As at March 1972? A. Yes.

Q. Do you know a company called Wynn Roberts? A. I have heard of it.

Q. That is a company controlled by the plaintiff company? A. Yes.

Q. It was so controlled in March 1972? A. Yes.

Q. It carries on insurance business also? A. Insurance broking business. 20

Q. It did so in March, 1972? A. Yes.

Q. Whereabouts was its office? A. Sydney.

Q. Noble Hall & Co. Pty. Limited, is that familiar? A. Yes.

Q. In March 1972 was it a company controlled by the plaintiff company? A. Yes.

Q. Was it an insurance broker? A. As far as I am aware it was an insurance broking company.

Q. Whereabouts was its head office? A. Brisbane. 30

Q. Its clients would have been situated in Queensland and throughout Australia? A. Yes.

Q. No doubts overseas as well? A. Yes. May I ask a question? The thing I cannot follow is you keep on saying "and overseas". To my knowledge as far as Stenhouse N.S.W. is concerned we have no clients who are domiciled outside Australia. We have clients who are the Australian subsidiaries of overseas companies but we do not operate insurance broking business for clients operating outside Australia.

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10 HIS HONOUR: Q. Does that apply to all of the cases when "overseas" was mentioned in the questions to you? A. Yes. The only overseas contact we have with any of the companies mentioned in Australia is in respect of the Australian branches of overseas clients.

MR. BYERS: Q. An approach might come from the overseas branch but usually came from the company situated in Australia? A. Yes.

Q. Was that so in March 1972? A. Yes.

20 Q. Stenhouse Re-Insurance in March 1972 would insure with London insurers? A. If they found it necessary.

Q. I suppose from time to time prior to March 1972 they had re-insured with London insurers?
A. I would not have any evidence of this.

Q. In March 1972 there would have been a large number of insurance brokers carrying on that business in New South Wales? A. Quite a number.

30 Q. Would you agree in March 1972 there were about 470 listed insurance brokers in New South Wales? A. I did not quite realise there were that many but I would not disagree with your figure as you probably counted them.

Q. In March 1972 there was a number of insurance agents carrying on business in Sydney?
A. Yes.

40 Q. Also a number of people carrying on business in Sydney as insurance consultants?
A. Yes.

Q. Would you agree it would be of the order of 300-odd, comprising both? A. Possibly.

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Q. An insurance agent is a person who places insurance for a client? A. Yes.

Q. Either with an insurance company or with a broker? A. That is not quite right. The difference between an insurance broker and an insurance agent is that invariably the insurance agent is an agent of the insurance company. The insurance broker is an agent of the insured of the client.

Q. I take it consultants advise on matters of insurance? A. I have never really understood the difference and I do not know why the Pink Pages of the telephone book separated them two years ago. 10

Q. In March 1972 there were a number of people calling themselves insurance consultants who would advise clients in the same way as a broker advises his client? A. Yes.

Q. In addition to those carrying on business in Sydney, insurance brokers, in March 1972, there were large numbers carrying on such business in Melbourne? A. Yes. 20

Q. And the other capital cities? A. Yes.

Q. In March 1972 there existed a very large number of public companies interested in taking up insurance against risk? A. Yes.

Q. That would run into thousands? A. Yes.

Q. There were large numbers of such companies situated in the various other capital cities of the Commonwealth at that time? A. Yes. 30

Q. In addition, there was a large number of companies, other than public companies, interested in getting insurance cover for themselves? A. Yes.

Q. Both in Sydney and the other capital cities? A. Yes.

Q. No doubt throughout the Commonwealth generally? A. Yes.

Q. Sydney in March 1972, would it have been the largest centre of insurance broking in Australia? A. Yes.

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Q. Would it be correct to say that most of the large insurance brokers carried on their business activities within the city of Sydney proper? A. Yes.

10 Q. If one took a 25-mile radius from the post office you would cover the centre in which insurance broking was carried on in New South Wales? A. Yes. That also covers the centre that insurance is carried on in New South Wales.

Q. In March 1972 there would be something of the order of 470 insurance brokers in Sydney? A. There are approximately that number in the Pink Pages, yes.

Q. Many of those insurance brokers employ staff? A. Many of them.

20 Q. There would be a number of companies such as the Stenhouse group who carry on insurance broking? A. Yes.

Q. And did in March 1972? A. Yes.

Q. The staffs of those companies would be quite large? A. Yes.

Q. And would embrace men whose skill lies in insurance broking? A. Yes.

Q. You remember Mr. Philips employment terminating in July 1971? A. Yes.

30 Q. You had known him for a number of years before then. Over what period of time? A. About six years.

Q. Your knowledge of him was throughout his working life he had been associated with insurance business? A. Yes.

Q. And with nothing else? A. I would not know.

40 Q. In the six years during which you were acquainted with him he was associated with the insurance business and nothing else? A. Yes.

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Q. That is where he earned his crust, as it were? A. Yes.

Q. You first became associated with Mr. Philips when the Stenhouse group took over a company called Robert Paxton Insurance?

A. Yes.

Q. At the time that happened Mr. Philips was then an employee of Robert Paxton Insurance?

A. Yes.

Q. I suppose he had been so for some years? 10

A. I don't know.

Q. Did you and Mr. Philips ever discuss your respective ages? A. No.

Q. Did you have anything to do with the payment of Mr. Philips wages? A. No.

Q. In July 1971 you did not know from whom Mr. Philips would have received his wages?

A. I would not know.

Q. Would it be correct to say as at March 1972 each of the companies which the plaintiff controlled carried on a different sort of business, one broking in one field and so on? A. A different type of business, but the type of business that goes together to make up an insurance broking company. 20

Q. It would be right to say the Stenhouse Re-Insurance Company carried on re-insurance business? A. Yes.

Q. That consisted of its entire business activity? A. I understand it did. 30

Q. What is the company you are associated with?

A. Stenhouse New South Wales.

Q. That carries on business as an insurance broker? A. Yes.

Q. And did so in March 1972? A. Yes.

Q. The brokerage which that company did covered the whole spectrum of risks? A. Yes.

Q. The same would be true of each of the insurance companies that carried on broking business in the Stenhouse group? A. Yes.

Q. Each, of course, carried on its own business? A. Yes.

RE-EXAMINATION:

MR. LUSHER: Q. This Boral client, how do you express that in size without giving figures?

10

A. I would say the Boral account generally within the insurance market in Australia would be considered quite a large account.

Q. Dealing with re-insurers, you said they did it in London. Do they do it locally here?

A. Stenhouse Re-Insurance, yes, locally and in London.

Q. Were you in any contact with Mr. Philips during the period he was with the Stenhouse group? A. Yes.

20

Q. In what period did you see him? A. Over the period Mr. Philips joined us when Paxtons became part of the Stenhouse group, up to the time of his leaving, which was about six years.

Q. Would you see him daily or what? A. Two or three times a week on an average.

30

Q. Did he have any activity at all in relation to the New South Wales company? A. In certain areas Stenhouse Scott-North Australia, which was the vehicle the Stenhouse group used for placing work on the London market, Stenhouse New South Wales would go to Stenhouse Scott-North, which would create a relationship between those two companies.

Q. Were there any other relationships between yourself and Mr. Philips? A. No, only the relationship of both being part of the one group, both running individual companies, which, because of the structure, were run separately.

40

Q. What about direct insurance, any part played by Philips at all in relation to the New South Wales company? A. Only the Boral instance which I did not have any personal knowledge of. (Objected to).

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MR. LUSHER: Q. In relation to direct insurance, did Mr. Philips have any duties in relation to New South Wales or take any part in relation to them? A. There were certain accounts Mr. Philips handled on a direct basis, but from the point of view of debiting, record keeping, it came to what was the New South Wales company account.

Q. In what way would he deal with those accounts, deal with them from whom? A. He would deal with them direct on the basis of dealing with clients, placing insurance with certain insurance companies and then --- 10

Q. Where? A. Either locally or overseas, and then Stenhouse (N.S.W.) is the direct broking company, established the records and created the debit for those transactions.

Q. He would handle those personally himself? A. Yes.

Q. In relation to what type of client was this activity engaged in, what types of clients in terms of size? A. Quite large types of clients. 20

Q. Were there many of them? A. Probably half a dozen or more of that type of client.

Q. Who were they? A. The BORAL account was one of those accounts and NABALCO would be another one.

Q. When you say NABALCO, does that include subsidiaries and associates? A. Yes.

Q. Any others? A. There are certain instances or there were certain instances where Mr. Philips had dealings, as I understand, but I won't say that because this is not firsthand knowledge. I would not know. 30

Q. Is there any other company or group, of which you were personally aware, with which he had personal dealings with clients? A. Yes, there was a professional indemnity policy for a small firm in the country. I cannot recall the name now. A professional indemnity policy for a firm of solicitors, handled on that basis, where the ultimate recording of the documents 40

and debiting was finally done through the broking company but the negotiations were done by Mr. Philips.

Q. Are there any others you can recall? A. It was within my knowledge that Mr. Philips had on many occasions --- (Objected to).

Q. With whom, to your knowledge he was in communication, dealt with in New South Wales?
A. Yes.

10 Q. What other groups of companies? A. As I mentioned, in the professional indemnity market, there were two or three clients involved in this, but I cannot now recall their names.

Q. How do you describe their accounts? A. For that particular business, quite large, with that type of business.

20 Q. Are there any others? A. There were. Mr. Philips, through his activities, had many discussions with the insurance officer, group insurance officer, of the BHP group.

Q. Are they a client company of yours?
A. They are clients of many of the companies in the Stenhouse Group, some of them in New South Wales, some in Victoria.

Q. Was his activity in that regard dealt with through New South Wales or not? A. No, it was dealt with through Victoria.

Q. Any others? A. I cannot recall any others offhand.

30 Q. Are you familiar with the Ord-Minnett group?
A. Yes, they are clients of Stenhouse (N.S.W.)

Q. Did he have anything to do in connection with them? A. Mr. Philips had dealings with that client and some with Ord-BT.

Q. Were they direct? A. Yes.

Q. Were they through New South Wales? A. Yes.

Q. What do you say as to those? A. Again, for their size, quite good accounts. Ord-BT is

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quite small, because the company is quite young.

Q. Brambles, do you recall? A. Yes, Mr. Philips had dealings with Brambles, for many years. This is an account of Stenhouse.

Q. This is New South Wales? A. We handled Brambles business on a consulting fee. In fact, we do not have any records of the insurance in the same way as we do as a broker. We work there and get a handling fee. 10

Q. Who handles that? A. Various people.

Q. Which of your companies? A. Certain people in New South Wales companies and certain people in Stenhouse (Australia) Limited.

Q. He has access and dealings with them in relation to direct insurance? A. Yes, in relation to business they place.

Q. Do you recall anything about the --- (Objected to; admitted).

Q. I was asking you about the Atomic Energy Commission? A. Yes, the Atomic Energy Commission account was one with which Mr. Philips in conjunction with other senior employees of Stenhouse (Australia) Limited had quite substantial dealings. At this stage the insurance through our organisation has not come to fruition, but there has been substantial dealings both by Mr. Philips at the time and other senior members of Stenhouse (Australia) with the Atomic Energy Commission. 20 30

Q. That was with Stenhouse (Australia) and not with Stenhouse, (N.S.W.)? A. No.

Q. You mentioned Swiss Aluminium. Do you remember that group. A. Yes, they are part of the NABALCO group, as such. Swiss Aluminium is basically the parent company, from Switzerland.

Q. Is that Swiss Aluminium Australia Limited? A. Yes.

Q. They have other subsidiaries here as well? A. Yes, they have Swiss Aluminium Mining Limited as a subsidiary. 40

Q. What do you say as to the relationship with Mr. Philips and that group? A. There were dealings by Mr. Philips with those particular companies on a direct basis, yes.

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Q. Was that a matter relating to Stenhouse (N.S.W.) or Stenhouse (Australia)? A. New South Wales.

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Q. When this sort of situation emerged, was that done as a result of discussion with you or anybody else, or was it done by his own choice, or what situation led to him seeing such people? A. It depended on the particular circumstances. In most cases Mr. Philips, as a senior member of the organisation, would make his own arrangements regarding the discussion and have them when necessary with the client.

20

Q. Were there any occasions when this was subject to objection by yourself, as managing director of New South Wales, in relation to his activities in relation to your company? A. No.

30

Q. How was the relationship conducted in the sense of whether he would see somebody, or somebody else? A. Mr. Philips was operating in a particular field, within the Stenhouse organisation, which had been created through his dealings with London, through Stenhouse North, the vehicle through which we placed our London business. There were many areas in which he negotiated sometimes on his own, and sometimes with other senior executives of the New South Wales company, or of Stenhouse (Australia) Limited.

Q. Those cases I have mentioned, with the exception of Swiss Aluminium, are they clients of the Stenhouse group of companies? A. Yes.

Q. As at the time Mr. Philips left? A. Yes.

40

Q. What is the situation so far as concerns the funds of New South Wales and Australia, in relation to Stenhouse (NSW) in relation to the Australia company? A. Stenhouse (N.S.W.) does not have a bank account. The bank account is in the name of Stenhouse (Australia) Limited. Funds generated by the collection of premiums by Stenhouse (N.S.W.) Limited are banked into the account of Stenhouse (Australia) Limited and invested with money.

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MR. BYERS: Q. In relation to the bank account, I take it the company which has the bank account uses the money of the company that does not have the bank account? A. Would you repeat that?

Q. You have mentioned that one of the companies did not have a bank account and there was paid into the bank account of another company that first company's money? A. Yes.

Q. Entries are raised in the books of the various companies relating to those payments in? A. No. Stenhouse (Australia) controls the money for the whole group in Australia. There is only one bank account, Stenhouse (Australia) Limited.

10

Q. Do you mean that all the funds that come into the whole of the companies are banked to the one account? A. Yes.

Q. The name of the account happens to be Stenhouse (Australia)? A. Yes.

20

Q. As between the various companies there are kept records of the entitlement of each company? A. Yes, we have our debtors and creditors ledgers.

Q. The respective income tax returns and so on? A. Yes.

Q. You have mentioned from time to time the fact that the Stenhouse group of companies had clients. I suppose some of its clients were people who would come to the group on one occasion and on one occasion alone, for a particular job, as it were? A. This would happen, but very very infrequently.

30

Q. Suppose you had a particular executive of a company going abroad? A. Yes.

Q. And his employer wished to insure him against his death by accident whilst he was away? A. Yes.

Q. No doubt the employer would approach you or approach the Stenhouse group, to get such insurance? A. He could yes.

40

Q. That no doubt happened, from time to time?

A. Except for the fact if it was not already a client of ours, we would not take the insurance on.

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Q. When you say who was not already a client of yours, do you mean to say you only acted for people for whom you had already acted?

A. As regards small individual bits like that, yes.

10 Q. Suppose you had a big new person coming to you, a large firm and this is in 1972, and asking you to insure a particular factory against a particular risk? A. Yes.

Q. I take it that business would be accepted?

A. Very much so, yes.

Q. That firm might never approach you again?

A. Highly unlikely, but possible.

Q. I suppose you have lost clients, from time to time? A. Yes.

20 Q. Apart from occasions when there would be a specific insurance for a period of less than a year, there were also cases where the policies you were asked to place were annual policies? A. Yes.

Q. And in the latter category would be, I suppose, fire policies, and matters of that sort. A. Yes.

Q. Part of the business was done for people who sought policies for a year? A. Yes.

30 Q. Part of the business of the group was for people who sought specific insurance against specific risks? A. Yes.

Q. Sometimes in the case of annual policies, sometimes you would renew for your client and sometimes your client would go elsewhere.

A. Yes.

40 Q. Your client paid you the fees that were required when you obtained the insurance which it required? A. Yes, except the client does not pay us the fee.

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ret'd

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x

Q. It pays you a premium? A. Premium, yes.

HIS HONOUR: You get a commission out of the insurance company? A. Yes.

MR. LUSHER: Q. What do you say as to the continuity or otherwise of the BORAL account?

A. I do not understand the question -

Q. Would you think of them as an isolated person, who came in with an isolated matter or has some continuity with their business?

A. No, we had their account for a few years. 10

HIS HONOUR: Q. When did Stenhouse, (N.S.W.) start to place insurance for BORAL Limited, or any of the operating companies of the BORAL group? A. I would not be sure, but I think it was June, 1969.

Q. When did they last place insurance for them. A. June, 1971.

Q. Were these annual insurances? A. Yes, annual renewals.

Q. June to June? A. Yes. 20

Q. The last one was June, 1971? A. Yes, to 1972.

(Witness retired).

FRANK CECIL HARGREAVES
Sworn, examined as under:

MR. LUSHER: Q. What is your full name?

A. Frank Cecil Hargreaves.

Q. What is your occupation? A. General Manager, BORAL Insurance & Fund Management Limited.

Q. And your address? A. My home address, 82 Wahroonga Avenue, Wahroonga. 30

Q. That company which you mentioned, BORAL Insurance Fund Management Pty. Limited; is that a subsidiary company in the BORAL Limited group of companies? A. It is a wholly owned subsidiary of BORAL LIMITED.

Q. Do you hold any other office with the BORAL group? A. I am an executive of BORAL Limited.

Q. And executive? A. Yes, of BORAL Limited, head office executive.

Q. What is your actual position? A. As an executive of BORAL I am interested in safety and fund management, and other items of that nature.

10 Q. Do you have any title office that you are called by? A. I am generally referred to as the General Manager of BORAL Insurance & Fund Management Limited. My duties are to control and organise insurances for the whole of the group.

Q. For how long have you held that position? A. Since September, 1969.

Q. When did the company begin to operate? A. We formed the company in November, 1969, and we commenced operations on 1st January, 1970.

20 Q. Prior to that, were you engaged with similar activities? A. I was General Manager of Commercial & General Insurance Limited.

Q. Had you known Mr. Philips? A. Yes, I have known Mr. Philips in the insurance industry for possibly 10 years.

Q. You know the Stenhouse Group of companies? A. I have known them also.

Q. Stenhouse (Australia) and Stenhouse (N.S.W.) and their other companies.

30 Q. The particular company with which you are concerned, what are its activities? A. We act as a captive insurance company. We are a licensed insurer registered in Canberra. We are a member of the Fire, Accident & Underwriters Association, which is a tariff organisation, and we engage in the insurance of the various assets of the group, through our own company or place them on the direct market, whichever way I think is best for the company or group of companies of BORAL Limited.

40 Q. On some occasions you actually take the risk yourselves? A. Yes, some occasions we take portion of the risk, but not all.

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Q. You do not take the entire risk under any circumstances? A. We would always have some re-insurance content in all we take.

Q. Do you issue policies? A. We issue certificates.

Q. Dealing with the outside world, do you deal direct, or through brokers? A. Depending on the circumstances. Sometimes, we deal direct with brokers, and sometimes we place business through what we consider reputable brokers. 10

Q. In the period between June, 1969 and June, 1971, those two years, were you dealing with any particular broker? A. The 1st January, 1970, the day we started operating as an insurance company, we placed business through Stenhouse (Australia) through motor vehicle insurance, on a direct basis. We had also placed workers compensation through another firm of brokers. We placed public and products liability insurance through Stenhouse (Australia). Fire insurance and certain classes of accident insurance, and so on, on a treaty basis, of which Stenhouse placed one-third of the first surplus treaty. Then we also gave them certain faculties re-insurance to place on our behalf. They were one of a number of brokers, who assisted us at that time. 20

Q. That position continued up until July, 1971? A. Until July, 1971, and up until 30th June, 1972. 30

Q. When you mentioned placing it direct, what did you mean by that? A. To take as an example: We placed motor vehicle insurance on the direct market, on the best possible terms and conditions we could for the group as a whole. We did not as an insurance company really enter into it, but we placed it directly and the company then looked after the claims and so forth, as in a normal transaction. 40

Q. Which company was that placed with?
A. The company I placed the motor vehicles with,

Q. You placed it in the instance you have given, direct through Stenhouse? A. No, through Stenhouse at all. Not that particular time.

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Q. You said you placed insurance direct through Stenhouse, did you not? A. Yes. Motor vehicle originally, for the six months period 1st January, 1970, to 30th June, 1970, and public liability, always been on a direct basis.

Q. In those situations I speak of - with direct insurance? A. Yes.

Q. Who is the insured? A. BORAL Limited or subsidiary and/or associated companies.

Q. It is expressed in that particular form?
A. Yes.

20

Q. Any commissions paid to you in relation to any of that business? A. In some cases we do get commission. In the case of public liability, we did not get commission.

Q. What about motor vehicle, with Stenhouse?
A. In the early stages of motor vehicle, we shared commission, some commission.

Q. Was that a matter of arrangement? A. A matter of arrangement. Where it is done as re-insurance, there is normally a re-insurance exchange commission, that goes to the insurance company.

Q. Direct? A. No.

30

Q. Are there rebates-back in that situation always? A. No, not always.

Q. It is a matter of negotiation? A. Yes.

Q. With whom did you deal when you dealt with Stenhouse (Australia) with regard to this insurance? A. Mainly Mr. Philips.

Q. You had known him beforehand? A. I had known him, with my other company, yes.

Q. At the time you were in touch with him about that, was there any insurance at all,

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with Stenhouse, or the Stenhouse group - or some, or none, or what was the position?

A. We started the BORAL group on 1st January, 1970. That is when Stenhouse (Australia) came into the picture.

Q. When you started the BORAL group, as you said, what do you mean? A. We started insuring for BORAL Limited.

Q. Do you mean up till that time any insurance had been only through Stenhouse? A. By any of the BORAL subsidiary companies, yes.

10

Q. Prior to that date, there were some?
A. Yes.

Q. Were there many, or how many? A. BORAL Services handled through the Newcastle organisation of Stenhouse ---

Q. Stenhouse (Newcastle). A. Yes, that is one that readily comes to mind. A company we recently took over in Brisbane was handled by Stenhouse (Queensland).

20

Q. That was some company dealing with gas?
A. Yes.

Q. Brisbane Gas? A. Yes.

Q. Consequent upon that, you began to deal with and place BORAL and subsidiaries, with Stenhouse? A. If they had the best contract, yes.

Q. In relation to those did you always deal with Mr. Philips? A. No, I have been with Mr. Newton and Mr. Kidd, I have known them for many years, but my main dealings were with Mr. Philips.

30

Q. You have had other experience outside your present position in the insurance world?
A. Yes.

Q. Is it fair to say the type of insurance of which you have spoken was very substantial accounts? A. Yes.

Q. Very big sums involved? A. Yes.

Q. Big premiums? A. Yes.

Q. By any standards in Australian insurance?
A. We are a fairly large group of companies.

Q. They are substantial? A. Quite substantial, yes.

Q. In relation to these insurances, and I refer to direct insurance, were they placed here locally, or on the overseas market?

10 A. The public liability in the first period, 1st January, 1970, to 30th June, 1971, the major portion of that would have been placed overseas and the balance in Australia. In 1971 and 1972 it would have been on the Australian market. Principally on the Australian market.

Q. In relation to the first of those, did that involve you in negotiations with Mr. Philips? A. Yes.

20 Q. Were they short, or protracted negotiations in their nature? A. I had discussions with Mr. Philips, shortly after checking with the company in September, until I went to London in November/December, on this particular contract, and assisted ---

30 Q. What do you say of the nature of the discussions and negotiations, as to their length, and their complexity? A. We had to discuss the terms of the policy, the terms we wanted, the areas we had to cover, to protect, various types of industry, and operations, that we have, and the amount of liability that we wanted, which was available.

Q. Did that involve discussions as to the turnover of your group of companies? A. Yes.

Q. The financial arrangements of it? A. The premiums are related to turnover.

40 Q. And the inter-relationship of the companies and their production, would be all matter discussed? A. We had to supply, and always supplied, certain information in this regard, otherwise we could not get cover.

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Q. How do you describe the information that you were required to supply? A. We would have to supply a list of the operating companies, the various activities through the industry, shipping or other type of operations we were engaged in. We would discuss the various requirements of those companies and produce turnover figures, to get the minimum premium, and the rate would be arrived at on the basis of turnover for the forthcoming year.

10

Q. Is this a matter of negotiation and discussion? A. It is mainly a matter of negotiation.

Q. Mr. Philips is the man you dealt with in relation to these matters. A. Yes.

Q. Did he in turn, to your knowledge, deal with London in relation to that matter?

A. Yes.

Q. What do you say, as to him keeping you advised as to what was done in London? A. I was over in London while the negotiations took place.

20

Q. Prior to going to London, was he in negotiation with London before you went over. A. He made arrangements for me to see certain brokers, when I was in London.

Q. In other words, you were briefed on the matter, as a result of discussions with Mr. Philips here? A. Yes.

Q. He having previously been in communication with the London people? A. Yes.

30

Q. With a view to placing what was required on the London market? A. Yes.

Q. Did this require much contact between you and Mr. Philips over that period? A. We were in very close contact.

Q. In what terms of contact? A. Pardon?

Q. In what terms of time was the contact? A. Possibly the first six months, three months prior to placing the policy, and three or four months after that; completing details of the policy, we would be in close contact.

40

Q. Would it be every day? What time would you put on it? A. Certainly we would have discussions, two or three times a week, possibly; not always personally, but on the telephone. This would go on for some time, until the policy was completed, and if claims arose we would have discussed that claim.

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10 Q. That would bring him into contact with you on occasions when there were other executive on your group, in that conference with him? A. Yes, on occasions my assistant would be at the conference.

Q. What about the executives of other companies within the group itself? A. No, it is my responsibility to arrange and control insurance.

Q. Was he in London with you at that time?
A. Not at that time.

20 Q. Whilst you were there engaged on that business, were you in communication with him?
A. I believe I had some telephone calls. It is three years ago. I would imagine I would have spoken to him in telephone calls.

Q. Matters you referred to him for his advice?
A. There were Telex communications passing frequently, letting him know how we were getting on, in London.

30 Q. This is the products liability policy?
A. Yes.

Q. What about the motor vehicle? A. The motor vehicle, Stenhouse only had it for six months and we then transferred to another firm of brokers.

Q. Was there any other policy, or any other policies they had during this period of two years? A. They helped us arrange the treaty policies, the first surplus treaty ---

40 Q. Would you explain that to us? A. An insurance company takes a risk, and the management decides on what proportion it will keep within the company itself. It then arranges treaties, obligatory treaties. These treaties

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will accept up to a certain number of times the amount we retain. We arranged a first surplus fire treaty and a first surplus accident treaty and Stenhouse arranged the placement of one-third of that treaty.

Q. What were they requested to do, in relation to that? A. Five times our retention, they place for us - with another insurance company.

Q. Was that locally, or overseas? A. That was locally. 10

Q. With whom did you deal in relation to that? A. Mainly Mr. Philips.

Q. In relation to that transaction your company, BORAL Insurance & Fund Management Limited, retained some of the risk itself? A. Yes.

Q. Was that a continuing policy, in the sense that it was re-newed? A. There was an arrangement to continue for one year, and then subject to renewal. They continued from the first January, 1970, until 30th June, 1972, by which date we terminated it. 20

Q. In relation to your own activities, as to the person in charge of this, is your salary met by BORAL Insurance & Fund Management Limited, or by another member of the group. A. No, my salary is paid by BORAL Insurance & Fund Management, as an operating company.

Q. They pay it direct? A. Yes.

Q. You knew Mr. Philips had been with the Stenhouse group for some time up to July, 1971? 30

A. I would not know the actual date he left.

Q. You became aware he resigned at about that time? A. Yes, Mr. Philips advised me he was starting up a broking company, C.E. Heath.

Q. When was it that he so advised you of that? A. I would not even hazard a guess as to when it was. We had a number of discussions on the policies and policy conditions, which eventually culminated in the letter that Mr. Philips sent to me on 27th March, 1972. 40

Q. When were you first aware that he was leaving, or had left the Stenhouse Group?
A. Probably ---

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Q. Was it before, or after he left? A. I think it was after he left.

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Q. So that you were not aware of his intention to leave, prior to that? A. No.

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Q. When was it after he left, that you first saw him in relation to matters of this sort?

10 A. I have seen him on and off, over the years so often, I would only be guessing.

Q. In July, 1971, - how often would you see him? Would you see him weekly? A. No, would not be weekly but certainly on the basis of perhaps once a month, we would see one another once a month.

Q. When you would see him, in what circumstances were they? A. We would discuss the new types of policies, how it could be arranged
20 ---

Q. By appointment? A. Yes.

Q. Would you have records of diary entries?
A. Not necessarily.

Q. Have you been able to check any diary as to the occasions when you saw him? A. No.

Q. Do you know if you have such an entry available? A. I may have had a short note in my diary, but what I talked about on that occasion I could not tell you. To me at that
30 time there was no importance in the matter.

Q. Are you able to give us any indication of when you first knew he was no longer with Stenhouse? A. It would probably be late 1971, or early 1972.

Q. Where was it, and under what circumstances?
A. If my memory serves me, Mr. Philips rang me and said he had left Stenhouse.

Q. As best you can recollect, can you give us the conversation you had with him? A. No,

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just he had left Stenhouse and was going to London. I think that was the extent of the conversation, and he would contact me when he came back, which he did.

Q. Was there any other conversation that you can recall concerning the matter as to the reason for going for the purpose of going to London? A. I gathered he was going over to perhaps negotiate with somebody but I could not say for sure. That was my impression. 10

Q. Do you mean in relation to some employment?

A. That is the impression I got.

Q. Any mention of any names? A. No.

Q. Or the period of time he would be away?

A. No. When I say there was no mention of a period I think a month or thereabouts was mentioned, but I am not sure.

Q. What was the reason for him phoning you on that occasion? A. I think out of courtesy to let me know he had left Stenhouse and was no longer there. 20

Q. Can you recall any other matters that were discussed, any other business matters which were discussed? A. Not at that time, no.

Q. Following that, when did you next have any communication with or from him? A. When he returned from London.

Q. We can assume you had no communication with him whilst he was abroad? A. No. 30

Q. When he came home what were the circumstances under which you were in communication? A. I think Mr. Philips rang me, and said he was back, and we should have lunch, or something like that, and we possibly did, and then we followed on with various other conversations regarding ---

Q. He telephoned you? A. On the occasion of him coming back from London, yes.

Q. Can you recall in what period after he returned it was? A. No. 40

Q. Was it within a day, or a week after he came back? A. I think he had been back a week, or two weeks. I am not too sure. It could not be too long after because I think Mr. Philips mentioned to me he was waiting for his car. I take it that it would not have been too long after he came back.

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Q. How does the car assist you in time?

10

A. It assists me in the time he got back to the time he picked up the phone.

Q. Following that phone call, did you meet him for lunch? A. Yes, I am sure I did.

Q. How was that arranged? A. I think by telephone.

Q. Who phoned whom? A. I think Mr. Philips phoned me on that occasion.

Q. Did you arrange to meet somewhere for lunch?

A. At a time suitable to both of us, we would meet.

20

Q. Do you recall now where it was? A. No.

Q. You had lunch together. What was the subject matter of discussion on that occasion?

A. Generally people we knew overseas, whom we both knew overseas.

Q. You knew people whom he knew, by virtue of the fact that you had been to London in connection with some insurance business earlier?

A. Yes.

30

Q. What other topics were discussed apart from personalities? A. On that particular occasion just more of a general conversation I think. I probably said, "Getting yourself organised," or something of that nature.

Q. What is the best of your recollection as to whether you did or did not say that on that occasion? A. I am sure I would have asked how he got himself organised.

40

Q. Was there any answer forthcoming from him as to his intentions? A. Not at that stage, I do not think.

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Q. Or anything as to the purpose of his trip?
A. I gathered what the purpose was, but we did not discuss that.

Q. What did you gather concerning that? A. I gathered he had been there to interview people he knew in London, with certain objects in view.

Q. What objects? A. Maybe starting a company out here.

Q. What sort of a company? A. I assumed it would be in the broking field.

10

Q. Following the lunch what is the next occasion? A. I have not really the faintest idea.

Q. Can you recall the next occasion on which you saw him and he told you his intentions, or you had some indication of what he was doing?
A. It would probably be maybe a month or so after.

Q. How were you communicated with on this occasion? A. I think by telephone from him.

Q. What is your recollection of that? A. I think it was broadly discussed he would be starting up in the broking business, but certain details had to be ironed out and until they were completed, he could not tell me much more.

20

Q. What was said as to the broking business, who the brokers were? A. I do not think I did know at that time, only he would let me know.

Q. No discussion of the group? A. I am sure at that time no detailed discussion.

30

Q. The next occasion? A. Then, after that we got to talking of new policy conditions, different type of policies.

Q. In effect, he got down to some tintacks?
A. Yes.

Q. How did this arise, to be a matter to be discussed? Then the stage is reached where he talks about being associated with some group?

A. I would say by this time his company had been formed, established, and we talked about a new type of policy condition.

Q. How did you learn of his company having been formed? A. Mr. Philips would have told me he formed the company.

Q. How did he tell you that; on the telephone? A. I think so. Probably followed by a visit.

10 Q. What is your recollection of what he told you about that? A. I see something like 50 brokers a month. I do not remember all the brokers. I am not trying to evade anything but I do not want to be dishonest.

Q. At that stage you were talking to him about what his intentions were and what he is going to do? A. Yes.

20 Q. What was the subject he told you? A. That he formed a company which would be an Australian offshoot of a very well known and reputable English company, C.E. Heath, and we then discussed - I probably said "Anything new on the market?". Talked of terms and conditions, and we followed that with a further conversation, by telephone or personally, and discussed as to how we as BORAL Insurance and BORAL Limited could cut down a lot of the internal paper work that we did. This subsequently brought about the quotation from Mr. Philips on the 27th
30 March, together with quotations from other brokers, working along the same lines, as Mr. Philips.

(Further hearing adjourned to 10 a.m. Thursday, 28th September, 1972).

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Second Day, Thursday,
28th September 1972

STENHOUSE AUSTRALIA LIMITED v. PHILIPS

FRANK CECIL HARGREAVES
Recalled on former oath:

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MR. LUSHER: Q. Mr. Hargreaves, at the time we adjourned yesterday I was taking you through a series of conversations and discussions you had with Mr. Philips subsequent to his return from England and we had reached the point where a number of phone calls had been taken and you had lunch with him. We reached the point where there was a phone call followed by a visit. I asked you "What was the subject he told you?" and the answer was "he formed a company which would be an Australian offshoot of a very well known and reputable English company, C.E. Heath, and we then discussed - I probably said 'Anything new on the market?'. Talked of terms and conditions, and we followed that with a further conversation, by telephone or personally, and discussed as to how we as BORAL Insurance and BORAL Limited could cut down a lot of the internal paper work that we did. This subsequently brought about the quotation from Mr. Philips on the 27th March, together with quotations from other brokers, working along the same lines, as Mr. Philips."? A. Yes.

10

20

Q. What I would like you to direct your attention to is this. In that answer you telescoped apparently a number of different interviews or discussions in a summary form? A. Yes.

Q. Could you detail the interviews you had with him? A. I had a list taken out from my diary that may be of some assistance.

30

Q. That contains the dates? A. Just the dates on which we had appointments, no telephone conversations.

Q. Are you able to give us from reference to your diary the dates that you saw him? A. Starting back from 10th August 1971; which was a Tuesday; Monday, 27th September 1971, Thursday 30th September 1971, Friday 22nd October 1971;

Tuesday 14th March 1972; Wednesday 22nd March 1972; Thursday 20th April 1972; Thursday 11th May 1972; Thursday 25th May 1972; Monday 5th June 1972; Tuesday 13th June 1972; Friday 16th June 1972; Monday 3rd July 1972; Wednesday 12th July 1972; Thursday 24th August 1972 and Friday 8th September 1972.

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Q. Bearing in mind those dates are you able to tell us when it was - not the exact meeting, but when approximately it was that he told you he had formed a company to be an Australian offshoot of this English equivalent? A. I am not sure when Mr. Philips came back from London; perhaps if I could have that date I could then refer to it.

Q. I am afraid I have not got that date, but you are unable to tell us from your notes there?
A. No.

20

Q. Are you able to tell us whether it was before - apparently you did not see much of him between October and March? A. There is nothing in my diary to that effect.

Q. What is your recollection - before March or round about October? A. It would probably be before March in this year, I think; I am not sure of that.

30

Q. You told us the subject matter of that matter. Can you tell us the nature of the discussions you had with him on that occasion?
A. That he had formed or he was proposing to form an Australian offshoot of a very large English company and that they would be operating as insurance brokers in Australia.

Q. That was some information he passed on to you? A. Yes.

Q. Were any other matters discussed? A. At that time, no.

40

Q. What was the purpose of his visit? A. I would imagine to let me know what he was doing, what he intended to do.

Q. You say you talked of terms and conditions?
A. That was from the March period on where we

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discussed insurance terms, conditions, rates and so forth generally from that point on.

Q. After the meeting in which he advised you about his relationship and forming this new company what is your recollection as to when you next saw him? A. If it was on this meeting around about September or October I don't recall seeing him between then and this next diary date in March.

Q. What were the circumstances under which you met him in March? A. I would imagine Mr. Philips telephoned me to see if he could make an appointment, which was made. 10

Q. When you saw him can you recall any further discussion on the phone? A. From that time, we discussed this new type of concept.

Q. How did that come to be mentioned? A. Mr. Philips said he had some ideas I may be interested in, and I was most interested in. 20

Q. Was this a phone call or a meeting? A. At that meeting.

Q. Preceded by a phone call? A. Preceded by a phone call.

Q. At that meeting to the best of your recollection what was the matter he raised with you? You said he had some ideas? A. He discussed the industrial all risks type of policy, how it would help us in cutting down detailed work by effecting one policy instead of a series of policies we had at the present time, and we discussed the pros and cons of having one policy for a group as a whole as against individual policies. We then had a look at suggested wording. 30

Q. Was there any discussion of terms? A. Not at that stage, no. When one is negotiating a contract of this type there is so much information to be given, plans, reports of the various sites and so forth, inspections have to be made, all before terms and conditions can be discussed, and this took place I would say between the period 14th March and 27th May - 25th May rather. 40

Q. You apparently indicated that you were interested in his proposals? A. Most interested.

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Q. It is fair to say from then on there were discussions between you and him as to the nature of his proposals and their content and things relating to them? A. That is quite true.

Q. You discussed terms and conditions?

10

A. Yes.

Q. Rates, general paraphernalia of that sort of business? A. Yes. You will notice from the period 20th April to 25th May we had four meetings and I probably had quite a number of telephone calls in that time.

Q. At that stage had anything been said as to his company, what company he was - A. Yes, I knew at that stage it was a subsidiary company of C.E. Heath in London.

20

Q. What was the source of your knowledge on that? A. Mr. Philips informed me. I would need to know that before I commenced negotiations with him.

Q. In short terms what did he do for you in relation to that consequent upon those discussions? A. He then prepared a submission which was forwarded to me in his letter of 27th May enclosing copies of the suggested wording, which was already agreed or looked at and I agreed in principle, and the letter came together with the rates suggested and the method that would be used in the issuing policy.

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Q. A letter of 27th May? A. 27th May.

Q. Where was that letter addressed to? Have you got that letter? A. I submitted it to the court. I beg your pardon, it is 27th March. It was a letter setting out the proposition in detail. (Witness looks through documents). This (referring to document) was attached to it as the specimen proposal.

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Q. You say the blue document was the attachment to it? A. Yes.

Q. Those three documents you have just produced were part of the attachment? A. They would be part of our discussions and then the final proposals.

MR. LUSHER: I tender those three documents, they being a Specimen Insurance Manual Boral Limited, Suggested Public Liability and Products Wording, and a Suggested Industrial All Risks Wording. 10

MR. BYERS: I would not object to the two documents which bear on their face the authorship; I ask my friend to ascertain the authorship of the other document.

MR. LUSHER: Q. What was the source from which you obtained that, the Specimen Insurance Manual Boral Limited? A. From Mr. Philips or Mr. McGriskin in Mr. Philips' office, one or the other. 20

Q. Did it come to you with this letter of which you speak? A. I thought so, yes. I am quite sure I submitted that letter together with those documents.

(Document entitled Specimen Insurance Manual Boral Limited admitted and marked Ex.E.)

(Document entitled Suggested Industrial All Risks Wording admitted and marked Ex.F.) 30

(Document entitled Public Liability and Products Wording admitted and marked Ex.G.).

Q. Subsequent to these discussions - you had these discussions and ultimately was insurance taken out? A. It was.

Q. In relation to what policies? A. As far as the - (Objected to).

Q. What policies were subsequently issued?
A. By C.E. Heath? 40

Q. Yes. A. The industrial all risk and what we call the crime policy.

Q. In broad terms what does crime relate to?
A. Theft, burglary, larceny.

Q. On what company were those policies issued?
A. They have not yet been issued. There have been cover notes obtained and the copies of the slip are in your possession.

Q. Have you those documents? A. No.

10 Q. You have got no copies of those documents?
A. No, I submitted them all to the court. It is an insurance slip with a number of companies and percentages on it.

(Witness looks through documents)

20 Q. While you are looking through those documents can you tell us who the insurers were in respect of those policies? A. The slip was made out in the name of Boral Insurance & Fund Management and the company was Boral Limited and subsidiary or associated companies. They are not in this bundle of documents. There is a slip for the crime policy, a slip for the industrial all risks and the letter from C.E. Heath.

Q. (Correspondence handed to witness) Is that the document you received? A. This is the document we received and this is for the crime policy, attached to that is the letter that I refer to.

30 Q. The letter you are referring to, the letter of 30th June? A. No, the letter that I refer to was with those documents. It is not there now but it was with them.

HIS HONOUR: Q. The letter of 23rd May?
A. March.

MR. LUSHER: Q. Are you able to tell us where the originals of these documents are? A. They are held by C.E. Heath.

MR. LUSHER: I tender those documents.

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Q. Do you suggest the letter of 27th March was with them or the letter of 6th July?

A. No, that refers to those covers, the letter of 6th July.

Q. So that I am clear, you are not suggesting the letter of 27th March is part of these documents, it is the letter of 6th July?

A. Yes.

MR. BYERS: I object to this.

MR. LUSHER: I tender the letter of 6th July together with the attachments. That document refers to the matters which were particularised and also refers to some further policies which are not the subject of the particulars; and, of course, not only does it refer to the policy which has been particularised so far as the particulars are concerned to the letter but also in relation to the others, and I am tendering it as a complete document. (Objected to on relevance).

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(Letter dated 6th July 1972 from C.E. Heath Insurance Broking (Australia) Pty. Limited to Boral Insurance & Fund Management Limited together with the attachments referred to therein admitted and marked Ex.H.)

HIS HONOUR: I note that objection has been taken by Mr. Byers to the tendering of some of the attachments as going beyond the particulars furnished by the plaintiff. I accept the tender of the whole document as being the document constituting the letter of 6th July 1972 and the attachments; whether any use can be made of any particular attachment will have to be the subject of argument and submissions at some stage.

30

MR. LUSHER: We would formally ask for an amendment of the particulars to include the additional policies referred to in that letter and the slips referred to accompanying that letter.

40

MR. BYERS: I would wish to see the documents again.

HIS HONOUR: You may renew the application subsequently after Mr. Byers has looked at these documents, Mr. Lusher.

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MR. LUSHER: Q. In round terms without being specific could you give the amount of the value of the premiums? A. Of the industrial all risks policy - Mr. Marshall Philips' letter to me dated 28th July set out the rates.

10 Q. In relation to all of them? A. In relation to three policies - the fire and industrial all risks, the crime and the lost profits. In round figures the industrial all risks would cost Boral \$100,000 to \$110,000. The crime as shown in that letter would be a minimum of \$10,000, and the loss of profits or consequential loss could be in the vicinity of another \$15,000. These figures will not be known until all the details are supplied.

20 Q. The amount of the policies themselves are shown on the actual slips? A. Yes, we are covered for \$3,000,000, any one subsidiary company, any one situation.

Q. That is in relation to which policy? A. Industrial All Risks.

Q. And the loss of profits overall? A. The loss of profits are all covered on their existing terms and conditions but until such time as balance sheets are prepared we won't be able to give the sums insured.

30 Q. As at the time it was taken out what figure was that? A. In sums insured I would not know. I could give you premium but I would not know on sums insured.

Q. You have not got a total figure? A. No.

Q. The amount of cover in relation to crime? A. \$20,000 in the case of specified situations, \$10,000 for unspecified situations, that is in each situation.

40 Q. In relation to your own group, the Boral Limited group, what is the means whereby you yourself know or are advised as to the requirements, such as they may be, of the head company and the various subsidiary groups (objected to as irrelevant; allowed).

Q. Are you familiar with the question I put to you? A. Yes.

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Q. In short it is the means by which you were receiving information as to their requirements?

A. I have access to the company's plant registers and asset registers, I do personal inspections of the site and together with the chief executive officer of the particular group the matter is discussed in detail as to what I recommend as to the requirements of that particular group.

Q. You say the executive of the particular group, you mean the particular subsidiary?

10

A. We have four operating divisions and each of those operating divisions has a chief general manager.

Q. And various subsidiaries are attached to various groups, as I understand it? A. Yes.

Q. Is there any provision whereby you are kept up to-date? A. Yes.

Q. How are you kept up to date with a new risk which is developing or new projects? A. Any capital approvals are submitted, they are submitted to the board who approve, or the managing director who approves, and I get copies so that I know what is happening within the group.

20

Q. From what source do you get it? Do you get it from the managers and the board? A. I report directly to the managing director.

Q. Of Boral Limited? A. Yes.

Q. From what source did you get it - that came from the board itself? A. If it is over a certain amount it comes from the board, if it is in the managing director's authority he would pass it.

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Q. Of Boral? A. Yes, he would pass it on, or within the authority of the general manager he would pass it on; it depends on the amount.

Q. It is all channelled through Boral Limited board or manager in the sense in which you mean? A. That section is channelled through Boral Limited.

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Q. So any executive of a particular subsidiary who may wish to add or be involved in further

risk, the procedure is he channels that through the board? A. He would discuss it with me.

Q. You would deal also with any - A. Any particular matter that a chief general manager wanted to discuss regarding insurance would be mine.

Q. By chief general manager you mean of a subsidiary? A. Yes, of a group.

10 Q. Do you advise him then or do you advise the board? A. No, I advise him. If there were any disagreement we would have access to the managing director.

Q. Is the company, Boral Insurance & Fund Management, itself insured in relation to public liability? A. We are included in the Boral Limited and/or subsidiary and/or associated companies.

Q. You are on that list? A. Public liability.

CROSS-EXAMINATION

20 MR. BYERS: Q. I think you told his Honour in your evidence in chief that in about September or November 1969 you became general manager of Boral Insurance & Fund Management? A. That is correct.

Q. And you have been with that company from the commencement of its activities? A. That is correct.

30 Q. And, of course, that company has obtained a licence, has it not, under the provisions of the Commonwealth Insurance Act? A. That is correct.

(Mr. Byers was granted access to documents produced on subpoena by Boral Insurance & Fund Management)

Q. And I think that company Boral Insurance & Fund Management, in accordance with the provisions of the Insurance Act of the Commonwealth has lodged with the Treasury the securities that that Act requires? A. Yes.

40 Q. And it has done so from the commencement of its business operations? A. Immediately we

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were granted, before we were granted the licence we had to lodge the necessary securities.

Q. You got your licence from the Treasurer?

A. Yes.

Q. And you have continued to maintain the securities at the level which the Act requires?

A. Yes.

Q. The business which that company undertakes is entirely insurance business, is it not?

10

A. Insurance and superannuation funds, and that type of activity.

Q. I think in addition to being the holder of a licence under the Insurance Act the company has been a member of the Fire & Accident Underwriters Association of N.S.W. for some time?

A. That is so.

Q. Is that also from the commencement of its business operations? A. No, that was a little after, a little time after.

20

Q. I think the company is represented in the Association, that Association? A. Yes.

Q. If we might set aside the superannuation side of the company's activities the only remaining part as you have indicated to his Honour is the insurance business? A. We lend money to other companies within the group but that is purely an internal matter.

Q. Then you look after, do you, the superannuation funds covering the whole of the staff? A. The whole of the staff of the group.

30

Q. And the other aspect of your business is the carrying on of insurance business?

A. That is so.

Q. You have done that, of course, certainly from January 1970? A. Yes.

Q. I think that company, Boral Insurance & Fund Management approached Stenhouse, did it not, in 1970? A. We were in communication

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with Stenhouse, whether Stenhouse approached us or I approached Stenhouse I am not sure but we certainly talked about getting together on this.

Q. The company, the Boral Insurance company, had a number of business transactions with Stenhouse prior to 30th June 1972? A. Oh yes.

10 Q. It would be correct to say, of course, that there are in the insurance world at the present time many companies such as Boral Insurance & Fund Management? A. Not a great number, no.

Q. There are a number of companies which carry on business of insuring the group? A. Not very many.

Q. A number? A. There are a number yes.

20 Q. And the other companies carry on insurance business in the same way, the other such companies, as your company has since 1970? A. I would believe so, yes.

Q. Some of the activities that your company has conducted from time to time would be to obtain reinsurance of risks which it accepts? A. Yes.

Q. To issue direct policies? A. Yes.

Q. And on some occasions no doubt to negotiate through brokers the placement directly of insurance for someone else? A. Yes.

30 Q. That is its main business activity? A. Yes.

Q. This insurance side. I think you mentioned to his Honour in answer to a question my learned friend put to you that you would see a large number of insurance brokers? A. Yes.

Q. That would be in connection with the company's insurance business? A. When you say the company's -?

40 Q. I mean Boral Insurance & Fund Management, its insurance business? A. It could be in connection with Boral Limited as well.

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Q. But you are the general manager of the fund company, are you not? A. That is right.

Q. In connection with the policies that were obtained through Heath Insurance Broking in 1972 it would be right to say that the industrial and all risks policy was a policy or a cover note on account of Boral Insurance & Fund Management? A. Yes.

Q. And it was that policy that related to the Boral Limited and its subsidiary companies? 10
A. Yes.

Q. And so were all the other policies that you obtained? A. Yes.

Q. Then the procedures involved related to the reinsuring of Boral Insurance in relation to the obligations which it undertook to its subsidiaries? A. Yes.

Q. Before you joined B.I.F.M., if I may use that expression, you had been a manager of another insurance company, had you? A. Yes. 20

Q. That was Commercial & General Insurance? A. Yes.

Q. And prior to 1970 as the manager of that company you had had contact with Stenhouse? A. Yes.

Q. The first contact you had with Stenhouse on the Boral side, if I may use that expression, was as general manager of B.I.F.M.? A. Yes.

Q. And that is the only contact you had with Stenhouse? A. Yes. 30

Q. After Mr. Philips left Stenhouse you and he had some discussions, did you not, in relation to Commercial & General? A. Commercial & General - yes, we have had discussions regarding Commercial & General.

Q. And in relation to City Mutual, do you remember that? A. Yes, I remember that.

Q. There was a particular problem involved there that had no relation to B.I.F.M. at all? 40
A. That is correct.

Q. And that involved you and he speaking about a number of matters over a period of time?

A. Yes.

Q. At some stage or other there was mention either by you or by him about the question of the insurance which B.I.F.M. had to obtain for the Boral Group? A. Yes.

Q. When I say for the Boral Group, in the sense that it was concerned to cover their risks? A. Yes.

Q. I suppose it is difficult for you to remember this, but no doubt you could have been the person who first raised that topic with Mr. Philips? A. I don't remember, I would only be guessing if I said Yes.

Q. In other words, you have no memory of who raised it first? A. I have not, no.

Q. You may remember, of course, that Mr. Philips went away to England, as you have indicated to his Honour? A. Yes.

Q. After he left Stenhouse? A. Yes.

Q. And he was away for some little time? A. Yes.

Q. Is that your recollection? A. That is so.

Q. Thereafter he came back but for awhile he had no office, there was no office set up at all? A. That is right.

Q. That meant, I suppose, that he would ring you as a rule because you had no telephone number to ring? A. That would be correct.

Q. In your capacity as the general manager of C. & G. I. you had seen Mr. Philips from time to time prior to 1970, had you not? A. Yes.

Q. How long back did your knowledge of him go prior to 1970, can you recollect? A. I think I first met Mr. Philips when Stenhouse acquired the Paxton Insurance Company; that would possibly be 1964 or 1963, I would think.

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Q. During the time you knew him prior to 1970 he had been solely engaged in the insurance business? A. Yes.

Q. In fact, his specialty from your experience of him was reinsurance? A. Yes.

Q. And it was in that context that from time to time you saw him on behalf of C. & G.I.?

A. Yes.

Q. And spoke to him about insurance problems?

A. Yes.

10

Q. I suppose it would be right to say, would it, that you let it be known in 1971 that B.I.F.M. was interested in securing the renewal of its policies for the group? A. In 1971?

Q. The latter half of 1971? A. Yes, we would be renegotiating for - in the latter half, no. All our policies fall due on 30th June and we would have completed our contracts up to 1971 and we would have renewed them from 30th June 1971 to 30th June 1972.

20

Q. In relation to the policies you obtained from Heath I suppose you had been in touch, first of all, with other brokers? A. Yes.

Q. You made enquiries generally throughout the market? A. Yes.

Q. Including Stenhouse? A. Yes.

Q. And they submitted a quote to you, did they not? A. Yes.

(Mr. Byers was granted access to the documents produced on subpoena by Boral Insurance & Fund Management).

30

Q. In fact, B.I.F.M. received a letter from Stenhouse (Australia) Limited dated 26th June 1972 in connection with some insurances?

A. Yes.

Q. (Document shown to witness). Could you indicate to his Honour whether or not that letter and the accompanying material is the letter and the material which you received from

Stenhouse (Australia) in connection with B.I.F.M. Insurances? A. Yes.

Q. In fact, the letter contained a quote, did it not? A. Yes.

Q. And you took the view, did you, that the quote made to you by Heath was a better business proposition - (Objected to; allowed).

(Previous question read back by court reporter).

10 Q. - than the quote made to you by Stenhouse?
A. It was a better proposition than the quote made by anyone else.

MR. BYERS: I propose to tender the letter from Stenhouse (Australia) Limited to Mr. Hargreaves, Boral Insurance & Fund Management, dated 26th June, 1972 with the accompanying documents. (Objected to).

20 Q. In addition to Stenhouse and Heath you received, I suppose, quotations from other brokers as well in relation to this business the subject of these proceedings? A. Yes.

(Letter dated 26th June 1972 from Stenhouse (Australia) Limited to Boral Insurance & Fund Management and accompanying documents admitted and marked Ex.1).

30 Q. Can you recollect at the moment how many other brokers did send you quotes in relation to this business? (Objected to). A. There were a number of submissions put to us by brokers. I finally decided there would be four brokers who could give us a final quotation, and two of those brokers were Stenhouse and C.E. Heath.

Q. Can you remember how many brokers put submissions to you? A. I allowed four brokers to put submissions to me.

40 Q. Would it be right to say that you discussed this question of insuring, the B.I.F.M. Insurance for the group, around the insurance broking market? A. Well, I possibly discussed it with ten of the leading brokers.

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Q. And no doubt in relation to any insurance contract that you were concerned with reinsuring or obtaining for B.I.F.M. that would be a normal procedure? A. As I mentioned yesterday, brokers are continually approaching us, it is not always a question of us approaching brokers.

Q. And I suppose it is fairly common knowledge in the insurance broking world what your requirements were? A. Only amongst the top brokers, they would be the only people.

10

Q. But that would be fairly wide spread amongst the top brokers? A. Yes.

Q. From time to time you would insure with one broker and on another occasion you would insure with yet another broker? A. Yes.

Q. That happened, I think, in relation to your motor vehicle insurance, you insured originally with Stenhouse and thereafter with another broker? A. That is right.

20

Q. I suppose your interest was in seeing the best quote you could get? A. This is not only my interest, it is my job.

Q. And to insure that you had got the best quote you let it be known, import as you think appropriate, that the company was interested in obtaining submissions and quotes? A. Yes.

Q. And you did so in relation to the particular insurances for the group for the period following the expiry of the previous insurances in June 1971? A. Yes.

30

Q. I suppose some of the policies that B.I.F.M. had obtained were annual policies, bi-annually? A. Yes.

Q. Did it have policies that were not renewal bi-annually? A. Yes, we had a number of marine type policies which are for a particular period of time or for a voyage.

Q. Those policies would either be negotiated by way of reinsurance through a broker, an

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insurance broker, by B.I.F.M., would that be correct? A. Not always, I have to decide firstly whether we want to accept any part of the risk at all; if we do we arrange insurance, not necessarily through a broker but we do use brokers for insurance. On the other hand, I may place it direct with a company.

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10 Q. I suppose it would be correct to say, would it not, that large business organisations in this State constantly require, for example, marine insurance and matters of that sort? A. Yes.

Q. And that is done in relation to specific insurances taken out? A. Yes.

Q. And there are, of course, other matters in relation to which specific insurance cover is taken? A. Yes.

20 Q. And any such one company could place its various types of policy through a number of brokers? A. Yes, the brokers and/or insurance companies.

Q. It would be right to say, would it not, that B.I.F.M. alone was the company which paid the premiums in relation to the group insurance? A. In the question of policies written by us, yes; not necessarily where it is written on a direct basis, it could be paid by Boral.

30 Q. May I get back to Stenhouse. You have mentioned to his Honour that it was you who saw or were in contact with Stenhouse group from time to time as general manager of B.I.F.M.? A. Yes.

Q. And in relation to the brokerage fees paid to Stenhouse they were paid, were they not, by B.I.F.M.? A. No, we do not pay any brokerage, the insurance broker gets the brokerage from the insurance company.

40 Q. It would be right, would it not, that the main topic that you discussed with Mr. Philips immediately after his leaving Stenhouse was this matter of the City Mutual

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problem? A. It was one of the subjects discussed, yes.

Q. I suggest to you it would be the main problem that was discussed initially? A. Yes.

Q. Would you agree with that? A. It was one of the things we discussed.

Q. I know these things are difficult to remember, but I suppose it would be right to say, would it, that before 27th March 1972 you and Mr. Philips had had discussions in relation to the B.I.F.M. policies? A. Yes. 10

Q. And would it be right to say that before 23rd March 1972 you had had a considerable discussion with him? A. Concerning?

Q. Concerning the Boral proposals? A. Yes.

Q. Would it be right to say that before 23rd March 1972 the detail of the proposal had been mentioned between you? A. Certainly discussed between us, yes.

Q. You did mention in your evidence in chief yesterday a quotation of 27th March that you received from him? A. Yes. 20

Q. That quotation put into written form, did it, proposals that he had discussed with you before 23rd March 1972? A. That was the letter that I am quite sure I submitted. I have a note here that I received the letter from Mr. Philips dated 27th March culminating the discussion I previously had.

Q. The time sequence would have been discussions between yourself and Mr. Philips prior to 27th March and certainly prior to 23rd March 1972? A. I would think so, yes. 30

Q. The proposals that were set out in detail, I suppose, in the letter of 27th March 1972 - would that be right? A. Yes.

Q. But that letter was but a written statement of proposals and discussions taking place before 23rd March 1972? A. Yes, it was setting out what we had discussed. 40

Q. I think there were discussions between yourself and Philips in relation to whether or not the Public Liability proposal could be done otherwise than by way of reinsurance? A. Yes, it had never been done by reinsurance.

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Q. And Philips would draw the quote for any direct insurance they made, do you remember that?
A. No, I don't remember that. I think the proposition put to me was as stated in the letter.

10 (Short adjournment)

Q. I think you did mention to his Honour a letter of 27th March 1972 from Heath Insurance Broking (Australia) Limited to yourself as general manager of B.I.F.M.? A. Yes.

Q. (Approaching) That would be a photocopy of the letter which you received would it (document shown to witness)? A. Yes, that is the one.

20 (Letter dated 27th March 1972 from C.E. Heath Insurance Broking (Australia) Limited to Boral Insurance & Fund Management Limited admitted and marked Ex.2.)

(Mr. Byers was granted access to the Memorandum and Articles of B.I.F.M.)

30 MR. BYERS: Q. You may remember, Mr. Hargreaves that the suggestion made in that letter in relation to public liability insurance was that, and I will quote it if I may, "It would be our intention to convert this to a reinsurance B.I.F.M. and improve the wording slightly in the area of contractual liability where problems have arisen". Do you remember that?
A. Yes, I remember.

Q. And you may remember that in fact difficulties arose in relation to reinsurance and relation to public liability? A. Yes.

40 Q. And in fact no proposal was presented by Heaths in connection with public liability.
A. There was a proposal. It is in a letter there, that they submitted a quotation for public liability.

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Q. The letter is 27th March, is it not?
A. Well, I don't know. I would like to have
a look. (Mr. Byers approached the witness).
But there is also a letter -

MR. LUSHER: I can hardly hear Mr. Hargreaves.

WITNESS: I thought there was another letter
which referred to public liability.

MR. BYERS: What I suggest to you, and I know
it is difficult for you to remember these
things, that Heaths didn't, because they were
unable to reinsure public liability, proceed
with any proposal with B.I.F.M. about public
liability? A. They quoted me for public
liability.

10

Q. When you say they quoted you, you are re-
ferring to the letter? A. No, I am referring
to a letter that has already been submitted to
his Honour.

Q. (Calls for Ex.G, approaches witness). This
is the document you have in mind, is it, Mr.
Hargreaves? A. Yes, there is also a letter
too.

20

Q. And there was a letter in addition to the
letter of 27th March? A. Yes.

Q. Tell me, Mr. Hargreaves, if you cannot
remember this but what I was suggesting to you
was on 27th March the suggestion that was made
by Heaths was, in connection with Public
Liability, that it was their intention to con-
vert the Public Liability to a reinsurance of
B.I.F.M.? A. That is quite correct at that
date, yes.

30

Q. At that date? A. Yes.

Q. What my next suggestion to you is is that
that was not considered or not found to be
practicable? A. That is correct.

Q. And thereupon from that area Heaths with-
drew? A. That is not correct.

MR. LUSHER: That is -?

HIS HONOUR: Not correct.

MR. LUSHER: Not correct?

WITNESS: No.

MR. BYERS: Q. (Calls for the cover notes and approaches the witness). Mr. Hargreaves, is the letter which you have in mind when you answered the last question that dated 6th July, 1972? A. No.

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Q. Is it an earlier letter? A. I think there is an earlier one.

Q. The letter to which I have referred you as 6th July, 1972 is part of Ex. H? A. That does not mention anything about public liability.

HIS HONOUR: Would you keep your voice up, Mr. Hargreaves.

WITNESS: Yes, that does not mention anything about public liability.

20

MR. BYERS: Q. May I take you to another letter included within Ex. H which is a letter apparently to Mr. McGriskin of C.E. Heath Insurance? A. Yes.

Q. Which is a confirmation of the agency's acceptance for 15% participation in the buildings, contents and stock, right? A. Yes.

30

Q. And I think there was then another letter again from C.E. Heath Underwriting Agencies Australia to Mr. McGriskin dated 30th June, 1972 which relates to that part of the cover, the cover relating to profits? A. Yes, that is correct.

Q. Now you had in front of you I think, Mr. Hargreaves, some letters. Is the letter that you have in mine -? A. No, it is not here. To the best of my recollection I was quoted a premium of \$50 to 55,000 and I did not accept it because I was able to obtain an additional \$1,000,000 cover from another broker.

Q. In relation to public liability? A. In relation to public liability.

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Q. And the quotation was from Heaths but directed to reinsurance? A. It wasn't discussed how it would be but I took it to be reinsurance.

Q. And then that proposal was not proceeded with because you took the cover elsewhere?
A. I took the cover elsewhere.

Q. That is right? A. That is correct.

Q. But the proposal that was made to you at any rate initially was in relation to public liability? A. Yes. 10

Q. As contained in the letter of 27th March, part of the paragraph on p.3, a sentence of which I read to you? A. Yes.

Q. And it would be correct to say of course that all of the cover that you did obtain through Heaths related to reinsurance cover?
A. The policies as I understand it will be worded "Boral Insurance and Fund Management Limited re Boral Limited". 20

Q. So it is a reinsurance cover? A. Yes.

Q. Mr. Philips had I think been known to you from your previous proposals, previous experience from time to time as a man whose main task, almost his entire task, was reinsurance?
A. Yes.

Q. And he had been doing reinsurance work throughout the period of your association with him when he was with Stenhouse? A. That is correct. 30

Q. And he had in that particular field developed a particular expertise, skill?
A. Yes, I would agree with that.

Q. And of course reinsurance is underwritten, reinsurance contracts are entered into in relation to a very wide area of insurance cover?
A. Yes.

Q. Practically all of it? A. Yes.

Q. (Approaches witness) Mr. Hargreaves, I think the memorandum of association which I 40

now show you is that of Boral Insurance and Fund Management Limited? A. Yes.

Q. The Company you are associated with? (No answer).

(Memorandum of association to be tendered when copied by Mr. Byers' instructing solicitor.)

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RE-EXAMINATION:

10 MR. LUSHER: Q. On this question of reinsurance, is that as a result of the suggestion put by Mr. Philips? A. I don't quite understand.

Q. Was the scheme for reinsurance of these insurances that part of the matter which was suggested to you by Philips. (Objection taken to the form of the question; question rephrased).

20 Q. From what source did the suggestion of reinsurance come? A. Well, it is the function of my company to reinsure and the possibilities of reinsurance were discussed with the public liability, even though in the past we have had difficulty because of the small amount we could retain as to whether it would be a proposition.

Q. In relation to the actual reinsurance which you speak of in this particular case, the scheme had been submitted by Mr. -? A. Mr. Philips.

Q. Philips? A. Yes.

Q. In that scheme he had suggested, had he not, reinsurance? A. That is quite correct.

30 Q. Previously you had dealt with him directly in relation to those risks, had you? A. Yes.

Q. In relation to seeing the other brokers, when was it that you saw the other brokers in relation to these matters? A. Extended over a period of three to four months.

Q. From when to when? A. Possibly early February on until June.

HIS HONOUR: Q. Just a couple of matters if you could help me. The B.I.F.M. Company, does

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that do any, call it compendiously for the moment outside insurance work? A. No, sir, we are a pure captive insurance company.

Q. You do not effect insurance whether as brokers, agent, or any other way, other than for companies of the Boral group? A. That is right.

Q. How does it then come about that you are a member of the Fire and Accident Underwriters' Association? A. We have the necessary financial qualifications and, shall we say, expertise to allow us to become a member.

10

Q. How long have you been in the insurance industry? A. Forty years.

Q. Before you were manager of Commercial and General Insurance, what kind of position did you occupy? A. I was assistant manager of the Queensland Insurance Company in Sydney.

Q. And did you have contact in your various activities with the activities of insurance brokers? A. Oh, yes, yes.

20

Q. To what extent would you be connected with their activities? A. As far as my - when I was with the Queensland Insurance Co., insurance brokers were one of the sources of our income. They provided us with business and we had to foster them and encourage them to place business with the Queensland Insurance Company. That company had its own reinsurance organisation in London. Therefore we did not use reinsurance brokers as such to any great extent.

30

Q. Was it part of your knowledge or expertise to know how insurance brokers worked, how they conducted their business? A. Yes, it was.

Q. Then perhaps you could assist me on this. I am interested if you can tell me, and if you cannot please say so, in this question of the relationship which would exist between a broker and of a broker's own client; that is not the insurance company but the insured or prospective insured? A. Yes.

40

Q. Is it possible firstly to express any view in your opinion as to this kind of problem.

If a particular company has been a client of an insurance broker in the sense that the broker has from time to time arranged insurance for that company? A. Yes.

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10 Q. How long does it take for the relationship to be broken so that, as it were, that broker is in no better position than any other broker in the industry so far as obtaining business from that client. Do you follow the question I have asked you? A. I think I do, sir.

Q. Can you tell me first is it possible to express an opinion upon that? A. I can express a personal opinion on that, yes, I think so.

MR. LUSHER: Can he speak up?

HIS HONOUR: I propose to ask the witness then his opinion. If counsel have any objection to my doing so, I invite them to indicate it.

20 MR. BYERS: I would object. I do not wish to argue only because he rather suggested - I would not raise any question about qualification but he rather suggested he is talking about his own personal opinion. I am not quite sure what he has in mind.

HIS HONOUR: You can see the point that I am seeking to get some assistance on?

MR. BYERS: Yes.

30 HIS HONOUR: And I think it is a matter on which assistance will be necessary.

MR. BYERS: The only basis of the objection is the suggested form of the answer really.

HIS HONOUR: Mr. Hargreaves, counsel has pointed out that you said you could give a personal opinion? A. Yes.

40 Q. Do you mean by that that this is purely a guess or a speculation or is this something that you can derive as a matter of expertise from your experience? A. This is something from my experience.

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HIS HONOUR: Then I propose to ask the witness.

MR. BYERS: I would not have any objection.

HIS HONOUR: Mr. Hargreaves, can you tell us, with whatever qualifications you think appropriate, how long it would take between a person having been a broker of a client in the sense to which I have referred, then ceasing to do so? A. Yes.

Q. How long it would take for that person to cease to have some particular effect or relationship with that client which would put him in a better position than any other broker in the industry? A. It would take a broker a number of years to become very conversant with the problems of his client. Having reached that point he would be of considerable value to the client because he could anticipate the needs of the client and what insurance requirements would be necessary. If for some reason the broker severed a relationship with the company, the company itself would appoint another broker which would take time and it would then take the new broker quite a considerable amount of time to become familiar with the company's affairs.

10

20

MR. LUSHER: I cannot hear.

HIS HONOUR: Mr. Hargreaves, could you keep your voice up?

WITNESS: It would take the broker a considerable amount of time to become familiar with the company's affairs. Regarding putting him or putting a person in a worse position or better position, the brokers that I would use would have to have first-class knowledge and ability. I don't think they would be put in any better or worse position, your Honour.

30

HIS HONOUR: Q. Does that mean this - correct me if I am wrong because I am not sure that I understand you; that if there had been a broker or a particular employee of a broker? A. Yes.

40

Q. Who had been acting for you, you being the client? A. Yes.

Q. In the sense that I have referred to, and then that relationship was broken or, as it were, terminated? A. Yes.

Q. Would there be a period of time for which, within which, that broker or the employee would have some advantage, some edge over any other broker competing for your business?

A. Yes.

Q. Because of his relationship? A. Yes.

10 Q. The expertise he built up? A. Yes.

Q. Is it possible to express an opinion as to how long that would be likely to last, and take it in the case of the Boral group of companies? A. The changes are very frequent in Boral because of its activities. I would think a period of possibly two to 2½-years absence from Boral would mean that the broker had completely lost touch with the activities of the company and therefore he would be at a disadvantage.

20

Q. I directed that obviously to Boral?
A. Yes.

Q. Are you in a position to express a similar opinion in relation to companies generally or in relation to particular classes of companies generally who would be such clients? A. I think so. I think if one takes an ordinary manufacturing company who keeps to one particular industry it would - possibly three or four years may not make any difference, but with a conglomerate or a company that has many changes and take-overs of activities or many activities, well, the period obviously is less as I suggested.

30

Q. In the insurance broking industry itself, in your experience is competition active?
A. Very active, yes.

Q. Are there a large number or a small number of how would you describe it, of good, competent, reliable brokers available? A. The number of brokers that I would use in regard to my company's operations would be limited to no more than twelve. That is for my company's operations.

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Q. What about employees in the industry?

A. Yes.

Q. Is the supply in your experience of men of the competence for example of a person who could be a senior executive of an insurance broking company, is the supply of those people small or large or is there enough of them or how would you describe it? A. Very small, your Honour. A very small supply and they are in very great demand.

10

HIS HONOUR: Are there any matters arising out of those questions?

MR. LUSHER: No, I have nothing.

MR. BYERS: I think, Mr. Hargreaves, the Boral group had an association with Total? A. That is correct.

Q. That was in relation to a refinery venture, was it not? A. Yes.

Q. That association was severed, was it not? A. On 31st December, 1971.

20

Q. That severance left the activities of the Boral group less sophisticated than they had been before? A. We got out of a very difficult interest.

Q. But also one which no doubt would require some form of, from the point of view of insurance, some form of knowledge of the processes involved and matters of that sort of thing? A. Yes.

Q. Once you got rid of the refinery, that very largely diminished -? A. It diminished that area, yes.

30

Q. Now you have said in relation to yourself and concerning the Boral group that you would confine yourself to twelve or so brokers? A. That is so.

Q. Is that because some brokers specialise in some particular areas of insurance? A. Yes, there are certain brokers that specialise but my assessment of the broking company would be

40

its ability to do the work that I want doing and that of course means that they would have the trained personnel to be able to carry out those duties.

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Q. You could have for example some brokers who specialise in placing machine -?

A. Marine.

Q. Marine insurance, I am sorry? A. Yes, or refinery insurance or that sort of thing.

10 Q. And they would have a particular expertise? A. Yes.

Q. And there would be varying numbers of these people in Sydney and in Australia?

A. That is right.

Q. And sometimes you get large firms presumably who specialise in a whole series of areas? A. Yes.

20 Q. And therefore if you had, or if such a firm had, a man cognizant with your area, you would go to that firm? A. Yes.

30 Q. Now you have mentioned a period of two to 2½-years. I suppose once your refinery activities were removed, that period would be diminished, would it not? A. As far as that section of the business, but as I indicated earlier, in getting out of the refinery business we have gone into other complex types of businesses, so where we have got rid of one problem we have taken on other problems. I am speaking now just as Boral Limited or for Boral Limited.

Q. The actual acquisition by a broker of the knowledge necessary to place insurance for a particular company could be of course quite small, for example, a couple of weeks or a couple of months? A. Could be, yes.

40 Q. And the rest that happens thereafter is that, once having acquired the knowledge, the broker as it were just happens to know the people involved, is that right? A. It is more than knowing the people. It is knowing the operations of the company itself.

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Q. That is involved in, as it were, studying the company's needs? A. Yes.

Q. And in some companies that may be a very very brief period of time? A. Yes.

Q. For the broker to learn that; in other companies it may take longer? A. True.

Q. Of course one could not say over the insurance field at large what would be the length of time necessary to acquire the knowledge?
A. No.

10

Q. It varies? A. It would vary, it would vary considerably.

Q. And I presume therefore the less sophisticated the manufacturer's operation of the company, the more transient is its attachment to the broker? A. Yes.

Q. And one particular company may of course place with different brokers different types of insurance? A. Yes.

Q. That would be quite usual? A. Oh, yes. We do it ourselves and it is quite common.

20

Q. For some types of insurance a knowledge of the company's undertaking and mode of operation is substantially unnecessary? A. Yes.

Q. For example motor vehicles? A. Yes.

FURTHER RE-EXAMINATION:

MR. LUSHER: Q. Does knowledge of the group enable a broker who is familiar with the company's structure to be in a position to quote adequately in relation to any new insurance that may be required? A. Well, I think anyone that has a knowledge of the business and its activities is in a much stronger position to go to an underwriter and negotiate rates because he does know what he is talking about, whereas a new person coming into an operation may not know all the background and facets.

30

Q. Not only a question of his knowledge so

far as his relations with his clients are concerned? A. No.

Q. It is also his knowledge of the rates used on behalf of his clients with his underwriters whom he seeks to place? A. Yes.

Q. In his negotiations with him? A. Yes.

Q. Does this involve such information as to claims? A. Yes.

Q. And things of that nature? A. Yes.

10 Q. General comparative activity of the group compared with questions which may be put to him by the underwriters? A. That is so.

Q. Just in short terms how many subsidiaries have you got apart from your main company? A. Forty odd.

20 Q. And again in short terms over what industries do they range? A. We are in liquified gas, town gas, brickworks, pipeworks, concrete masonry, concrete blocks, quarrying, sand extraction, crushing, road surfacing and ready or pre-mixed concrete. They are the main activities.

Q. And what about exploration? A. That is only - it is not operating.

Q. It is a very ramified activity? A. It is.

HIS HONOUR: Q. Perhaps I should have asked one question, Mr. Hargreaves. I'm not sure whether it is an appropriate question. You gave an answer in general terms to the question? A. Yes.

30 Q. Might I ask you particularly to what extent is the personal relationship between a broker and a client of substantial significance; I mean the fact that they happen to know one another personally and things of that kind? A. I think it helps the individual tremendously, but in my own case not only would I have to know the person well and trust him but he would have to perform, and my personal feelings for the individual would not count if I got better terms and conditions from somebody else.

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In the Supreme Court of N.S.W. Q. You personally or -? Q. I think this would be general in the insurance field or the manufacturing.

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(Witness retired, excused).

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JOHN LOCK KIDD
Sworn, examined as under:

F.C. Hargreaves
fur re-x ret'd
J.L. Kidd x

MR. LUSHER: Q. Your full name, Mr. Kidd?
A. John Lock Kidd.

Q. What is your address? A. 55 Bundarra Avenue, North Wahroonga.

10

Q. You are the managing director I understand of Stenhouse Australia? A. I am.

Q. You are also the chief executive of that company? A. Yes.

Q. And are you the chairman of directors of some of the subsidiary companies in the Stenhouse group here in Australia? A. All of these subsidiary companies.

Q. You naturally play an active role in the affairs of that group? A. I am responsible in Australia for the overall control for all the activities of the company.

20

Q. You have been with the Stenhouse group since 1949, is not that so? A. Correct.

Q. Having had earlier training in an insurance company; and would you answer Yes or No because it has to go down on the notes?
A. Yes.

Q. Rather than just nodding your head. You originally were a fire surveyor? A. I joined Stenhouse as a fire surveyor.

30

Q. And were you subsequently made a branch manager? A. Yes.

Q. Where was that - Aberdeen, Scotland?
A. 1950.

Q. And was that in the field of what type?

A. I was responsible for the overall operations of Aberdeen Branch as an insurance broker.

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Q. That was an insurance broking branch?

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A. Yes.

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Q. Then I think in 1951 did you complete the fellowship of the Chartered Insurance Institute?

A. Yes.

J.L. Kidd x

Q. And is that that Institute's highest - that is their degree as they call it? A. Yes.

10 Q. How is that regarded in the insurance world?
A. It is looked upon as the ultimate in examination success in the insurance world.

Q. Then were you manager also in Glasgow?

A. Yes, 1957.

Q. What was your position there? A. Again the same responsibility as Aberdeen branch but for a very much larger branch.

20 Q. And in terms of employees for instance, how many would that carry? A. Glasgow branch carried approximately 120.

Q. Compared to? A. Aberdeen branch had 10 on the staff.

Q. And compared to any of the Australian branches, would it be smaller than that? A. It would be comparable with Sydney and Melbourne.

Q. And in 1958 you became a director of Stenhouse Scotland, did you? A. Yes.

30 Q. What is that; that is the head body, is it? A. That is the company responsible for the affairs of the Stenhouse group in Scotland.

Q. And then in 1963 you were a director of Stenhouse International; what is that?

A. Stenhouse International administers and controls all the overseas activities of the Stenhouse group in the world.

Q. And do those activities extend, apart from the United Kingdom and Australia, elsewhere?

A. They extend to New Zealand, to South Africa, Rhodesia and France.

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Q. And that is a broking house in all of these areas, is it? A. Yes.

Q. And then in 1965 I think it was you came to Australia? A. Yes.

Q. And in what capacity? A. I came in the initial capacity as resident director of Stenhouse International until the then managing director resigned, and I then was appointed managing director in June of that year.

Q. Of Stenhouse Australia? A. Of Stenhouse Australia. 10

Q. And you have subsequently taken these other positions, the other directors? A. Yes.

Q. That you speak of? A. Yes.

Q. Now, in the course of your activities have you acted of course yourself - you would be familiar of course with insurance broking? A. Yes.

Q. Were you yourself active and participated in insurance broking over these years? A. I have on occasions, yes. 20

Q. And you still do; you nod your head? A. I do.

Q. You hold office in some of the underwriting associations here? A. I do not.

Q. Are you members of them in effect? A. Underwriting Associations?

Q. Not the Underwriting, the Broking Association? A. I am Federal President of the Corporation of Insurance Brokers in Australia. 30

Q. How long have you held that office? A. This is my second year of office.

Q. You might tell us what are the activities of a broker? A. The activities of a broker are to advise his client, to consult with him, to negotiate in the market place on his behalf and having received the client's instructions, to place that business in the market place.

Q. What is meant by "place"? A. "Place" is conclude the order giving instructions to the insurance company to effect certain insurances on behalf of his client.

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Q. And having done that does he have any further duties? A. He has further responsibility through client contact and through regular servicing of that to keep the existing insurances on an up-to-date basis.

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10 Q. Does that involve further advice from time to time as it may become necessary? A. It involves advice at regular intervals, some more regular than others depending on the nature of the client's business. Could I give you an example of that?

20 Q. Yes? A. A departmental store is a fairly standard static type of risk which does not vary very much on a year to year basis. They may vary from the point of view of change of departments and locations but it is what we would call a standard static type of risk. A firm of contractors is not a standard static type of risk because they are working in one particular type of contract one month, six months later they may be doing something entirely different; so the contact with a firm of contractors is probably more regular than the departmental store contact.

30 Q. What is the purpose of the contact with your client? A. The purpose is to ensure that when the contingency, the event, happens, that we as brokers have advised our client to take the proper necessary insurance cover available against that contingency.

Q. Against the various types of risk that he may be subject to? A. To discuss all of these things with him and to accept his instructions.

40 Q. What do you say as to the need for knowledge of an industry and of the particular business of the client concerned? A. I think one will never become as expert as the client in the running of his own business but, as an experienced broker, one must have an understanding of and knowledge of trades and processes to understand technical terms within these trades, to understand what is meant for instance by a pot-cher house in a paper mill, to have seen a

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potcher house, to have been in one so you can talk to your client about some of the problems which might arise from that trade.

Q. And also I suppose to be able to appreciate the risks involved in a particular type of activity that may or may not be involved?

A. Yes.

Q. What do you say as to the personal element, that is to say the personal element of the broker himself qua his client? A. It is highly personal between broker and client. The broker must establish compatibility with his client so that his client in effect almost looks upon the broker as an extension of his own business, of him but not on his staff. 10

Q. Does confidence and trust play a part in this?

A. Absolutely.

Q. And I suppose there are instances of course when the broker advises his client to reduce insurance or drop it? A. These instances do arise where the broker may say to the client, "Well, you have a multitude of small plate glass windows and the premium on this is so much. Now the replacement cost of one of these plateglass windows is so much. Now this is in our opinion perhaps a commercial risk that over the year so few windows will be broken. That is not worth your while wasting this premium and seeking plateglass insurance". 20

Q. Knowledge of the affairs of the company and its financial structure; what do you say on that question? A. One must understand as a broker just how your client company operates. Is it a conglomerate company, has it branches? You must understand that structure. You must understand the relationship between the one part of the conglomerate and the other, particularly in the field of loss of profit insurance where one particular part of the conglomerate may make the bodies for motor cars, and if that plant is destroyed then all the other areas which have been left undamaged may grind to a standstill because of the non-availability of the motor body. So in all these fields the broker must be an expert and must have a deep understanding of how his client company operates. 30 40

Q. What about the level at which the broker deals with personnel insofar as his client is concerned? A. Normal broker/company relationship is in respect of client representative through either the accountant or the company secretary or the financial director. Some managing directors do take an interest but the background work is done by the second man.

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10 Q. What is your opinion as to the desirable person you should be dealing with on the client's side? A. The person on the other side who has authority to speak for his company.

Q. Authority can easily be given, of course?
A. Yes.

Q. But what as to his capacity to understand his client's, his own companies' affairs?
A. He must have a deep understanding of what is required so he can appreciate the suggestions put forward by the insurance broker. He must know for instance what the company's forward planning is when he is discussing with the broker the loss of profits insurance.

20

Q. Now so far as your own group is concerned, Stenhouse Australia, that particular company, does it engage in broker? A. It does.

Q. By yourself? A. By myself but more directly by my deputy who is designated on the Board of Stenhouse Australia.

30

Q. What is your deputy designated as? A. He is designated as development director, the production of new business. This is his prime responsibility.

Q. And do you have other persons engaged in that activity as well? A. We have other persons engaged in various branches in that activity.

Q. And then from time to time are members of the branches brought in so far as Stenhouse Australia is concerned in relation to broking on a particular matter? A. They are brought in at certain times when the development director of Stenhouse Australia has been successful

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in the particular area in producing a potential new client. Now he may see this one through himself or he may bring in a senior from a particular branch in whose territory this potential new client operates.

Q. Now taking in the first instance - you yourself do engage at different periods in broking? A. I have done so in my capacity, yes.

Q. At what level, if I may ask you, do you operate in your field of broking? A. I operate at the level of the managing director or the chairman either of the potential client or of the existing client of Stenhouse. 10

Q. That is with the client? A. Yes.

Q. What about on the other side, that is to say with the insurance company or persons with whom the business is being placed? A. With the insurance companies I am on firstname terms with practically all the chief general managers of insurance companies in Australia. These are the people whom I deal with. I don't necessarily regularly deal with their branch managers in the various capital cities. 20

Q. Now in relation to your own activities, does this involve new business too? A. It does involve new business at times if an approach is made to me personally.

Q. And this comes I suppose locally, from Australia? A. It comes locally here from Australia and also from overseas. 30

Q. It can come from the United States?
A. Yes.

Q. You act for people in the United States?
A. We act for a firm of insurance brokers here in Australia who are not represented but are American brokers.

Q. They consult with you direct? A. They write to me direct.

Q. Do you as Stenhouse Australia handle that broking business? A. I handle it with the 40

assistance of the branch. It may be Melbourne or it may be Sydney or it may be Adelaide.

Q. In the event that problems arise with clients either of Stenhouse Australia or of Stenhouse New South Wales or any of the other companies, do you have any association with that situation so far as broking is concerned?

10

A. I do. If there is a problem in any of the branches and they feel that they have taken it as far as they can, or if the client himself is not satisfied with the servicing or the service director of that branch is not pushing it hard enough, he may well contact me direct. This has happend before, through the chairman and managing director.

Q. In most cases is this on the level of which you speak? A. Yes, chairman and managing director ringing and seeking an appointment to come and discuss a particular problem.

20

Q. And you then enter the field and put your weight as it were into that situation if you think it necessary? A. If it is a problem of a claim which is doubtful, the client naturally feels that he seeks to recover it and the insurance company takes the opposite view that there is an exclusion on the policy which they found on, I then liaise with the chief general manager of that insurance company to seek a way where the client can be satisfied if at all possible.

30

Q. Does the same thing apply in relation to the obtaining of rates or terms on behalf of a client either of Stenhouse Australia or someone who is being dealt with at the branches? A. If we have a problem at one of the branches and then the approach comes from my branch to me because they have taken the matter in negotiations at branch insurance company level as far as they can, well, I then intervene and deal with the chief general manager of our company at that level.

40

Q. With a view to obtaining better terms or some such thing? A. Of obtaining what our local people are discussing; obtain an improvement on what has been offered.

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Q. Does this apply both locally and overseas? A. Not so much overseas but locally here.

Q. What about new business; are you often contacted in relation to new business and if so what size? A. Size of accounts, we are talking of half-million, million dollar accounts; yes, they would come to Stenhouse Australia. This has happened.

Q. What does this involve then so far as you are concerned? A. It involves initially the preliminary discussions but since I have a majority of other responsibilities within the company and I have a specialist development director, he very quickly is introduced into this area, if he has not already been introduced. 10

Q. Your associate is Mr. Newton? A. Newton.

Q. You bring Mr. Newton in and he takes it on? A. Yes. 20

Q. Attends to this and ultimately it may go to a branch, or what is the procedure? A. The position is that Newton would continue his negotiations with the potential client depending on the size of it. He might well continue these negotiations and discussions with insurance companies to obtain terms, conditions and rates and submit it in writing to the client who, after considering it, then would either reject it or would give a letter of authority, a letter of appointment as it is called in the business, to Stenhouse Australia. Then he would sit down and say, "Well, this is a Melbourne address. Now from the point of view of operational control it is much better than we now bring in the Melbourne branch to handle the servicing of this account." 30

Q. Now the State branches, what is the position so far as supervision and control is concerned in relation to Stenhouse Australia? A. On the day to day affairs of running their companies? 40

Q. Yes? A. The managing directors of these branches run the branches within the framework of the policy which is laid down by the Board of Stenhouse of Australia.

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Q. What about their broking activities?
A. They are responsible for the servicing of these clients resident in their area.

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Q. Is that subject to any control so far as Stenhouse Australia is concerned?

10 A. Subject to the control that if I see, or it is brought to my attention, that this client's servicing is not being done properly, then I take the appropriate action as managing director of Stenhouse Australia, and correct it.

Q. Now if I may ask you something in relation to Mr. Philips. How long have you known Mr. Philips? A. I first met Mr. Philips fleetingly on a visit to Australia in 1964, and then when we acquired the Robert Paxton business.

20

Q. He has been with you for some period of years? A. Yes.

Q. Did he have any particular field in which he worked or what was the nature of his duties? A. He was responsible for the placing of direct business to the London market and also the placing of reinsurance business, not necessarily on the London market.

30

Q. Just the distinction between those two, direct business and reinsurance? A. I'm sorry?

Q. The distinction between the two, direct business and reinsurance? A. That distinction exists, that distinction exists.

Q. But what is the distinction between direct and reinsurance? A. Reinsurance is the acceptance of the business from insurance companies and placing the business with our insurance companies.

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Q. For the insurance company on the London market? A. Yes. Direct business is merely writing business for a client with the company.

MR. BYERS: Direct business is what?

WITNESS: The writing of and placing of business on behalf of a client with an insurance company or with a Lloyds underwriter.

MR. LUSHER: Q. And he was engaged in both fields, was he? A. He was.

10

Q. And in any other fields? A. Latterly - he was engaged in that field for some years but latterly his responsibilities were widened slightly and his activities widened slightly because he found, and we found, that his time, his energies, and his talents were not fully deployed in that limited area of London reinsurance, and he then worked in a supporting role to Mr. Newton, the development director, on the technical side of some of the potential client and client contact that Mr. Newton was establishing as development director.

20

Q. This involved relationships with clients? A. It did, yes.

Q. As well as prospective clients? A. Yes.

Q. And what were his activities of a general nature related to in that field? (Objected to; rejected.)

(Luncheon adjournment).

30

ON RESUMPTION:

MR. LUSHER: Q. Mr. Kidd, we were speaking about Mr. Philips and his duties. Had he ever acted other than in matters of insurance by way of reinsurance? A. Yes.

Q. And in relation to what size or what types of accounts and clients? A. All sizes ranging from small through to large.

Q. What was your regard for him as a man in the office, as an employee? A. In my opinion Mr. Philips first was a highly intelligent young man.

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Q. I am not talking about his personality. I am talking about him as an insurance man to do his work? A. He had considerable talent and I emphasise a young man because he carried a high degree of responsibility in his position at a fairly young age. This created I felt possibly through lack of maturity a certain degree of - (Objected to; question rephrased.)

Q. All I am concerned about is how did you regard him as an employee? A. First class.

Q. In his capacity to carry out his work? A. First class.

Q. Had he been to London whilst he was with you? A. Yes, several times.

20

Q. On what sort of business? A. On certain occasions he was there renegotiating extensions of cover in respect of a particularly large account in the contracting field.

Q. Was that direct or reinsurance? A. That was direct.

Q. Direct? A. Direct insurance.

Q. And did you regard him as capable and able to do that sort of work? A. Absolutely.

30

Q. Had confidence in him? A. I had confidence, otherwise I wouldn't have sent him.

Q. And in relation to clients, what do you say as to his capacity to deal with clients and fulfil their needs or requirements from what you observed? A. Technically he was excellent. Possibly because of his age he showed a certain amount of impatience at times.

40

Q. Was there any limit placed upon the types of clients that he was to approach or was to see or handle? A. Working with Mr.

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Newton in Stenhouse Australia the limitation was when his services were called upon by Mr. Newton.

Q. What does that show? A. It shows some degree of control at a more mature level.

Q. Then in relation to direct, had he handled any big accounts in relation to direct insurance? A. The one which he travelled to London, he was very deeply involved in it, in the handling of it. 10

Q. What is involved in the time factor; I don't mean the London trip but what is involved in handling that particular client in terms of time? A. A considerable portion of a week's work fairly regularly.

Q. What about Australian Atomic Energy; had he had any dealings with them? A. He was involved in the earlier dealings with the Atomic Energy account with Mr. Newton and was part of Mr. Newton's team. 20

Q. And what type of insurance was that, direct or reinsurance? A. That was direct insurance.

Q. In relation to a broker dealing with a client such as he was, down at the level at which he was, and the capacity which he had reached, what do you say as to the availability or otherwise in the market of employees of that nature and calibre. (Objected to as being irrelevant; allowed.) 30

Q. What do you say? A. The availability of people of this calibre in the market, in the insurance market, is very restricted and very limited. To lose a man of this calibre is a very hard blow to a company because he is very difficult to replace.

Q. What do you say as to the period that is involved in the replacement, in the obtaining of skills and expertise and the capacity such as he exhibited, in terms of time involved? (Objected to; allowed.) 40

Q. Over what period in your opinion does

it take a man to reach a point where he has the talents, qualities, expertise and skills in the insurance field and market in its ramifications, such as Mr. Philips had?

A. Many years; years four, five, six. It is a business in which one is always learning.

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Q. What do you say as to this question; namely given a man of his qualifications and skills and capacities who has this contact with and is advising a client, as to the period of advantage such a man would have with a client over a man who was not in that category. (Objected to; allowed.) A. The new man coming in would be at a considerable advantage (sic) in the early period and possibly would not be matching the former employee for three or four years.

CROSS-EXAMINATION:

20

MR. BYERS: Q. Mr. Kidd, I think in answer to my friend from time to time in relation to the Stenhouse companies you were referring to branches? A. Yes.

Q. Do you mean a branch of Stenhouse Australia, do you? A. I look upon all of our addresses as branches of Stenhouse Australia.

30

Q. That is not what I asked you. When you used the word "branches" were you referring to your subsidiary companies or office branches of Stenhouse Australia? A. We have two kinds because we have branches which are branches of the subsidiary companies.

Q. When you used the word "branches" were you referring to companies which were subsidiaries of Stenhouse Australia? A. Yes.

Q. And to that alone? A. Perhaps I could enlarge on my answer?

40

Q. Yes? A. The origin of Stenhouse in Australia in 1961 was through A.R. Stenhouse and Partners Australia Limited which was a Commonwealth-wide operation with every address in Australia in those days being a

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branch of A.R. Stenhouse and Partners. This became unwieldy after a number of years and from a point of view of ease of operation, book-keeping and accountancy, separate companies were created to replace these branches; and that is why, your Honour, I still address and still think of these locations as branches of the parent company.

Q. Now I am mainly interested in ascertaining what you meant when you used the word "branches", Mr. Kidd. Is it right to say that you were referring to subsidiary companies of Stenhouse only? A. Yes.

10

Q. Is it right to say that Stenhouse Australia, the plaintiff company, has an office in Sydney? A. Yes.

Q. Does it have offices in other States of the Commonwealth? A. No.

Q. Is it correct to say that Stenhouse Australia, that is the plaintiff company, has a number of subsidiary companies? A. Yes.

20

Q. And those subsidiary companies have been in existence of course for quite a large, quite a long period of time? A. Depends what you mean by "long".

Q. They were in existence when you came to Australia? A. Yes.

Q. And you came to Australia, did you, in - I'm sorry, I think it is 1965? A. 1965.

30

Q. At that stage there was in existence in Australia a number of subsidiary companies of Stenhouse Australia? A. Yes.

Q. And each of those companies was carrying on its business in Australia? A. Yes.

Q. And that was the situation as at March, 1972? A. Yes.

Q. Now Stenhouse Australia carried on its own business as an underwriter, did it not, in addition? A. Underwriting?

40

Q. Yes? A. No.

Q. Did it quote for underwriting activity?
A. Didn't carry on business as underwriters or underwriting.

Q. I am so sorry, you are perfectly correct. Insurance broker? A. Yes.

Q. And a number of the subsidiary companies of Stenhouse Australia in March 1972 also carried on the business of insurance brokers?
A. Yes.

Q. And had been doing so for a period of time that antedated your arrival in Australia?
A. Yes.

Q. And those subsidiary companies were scattered throughout Australia, were they not? A. Yes.

Q. I think for example one was in Western Australia? A. Yes.

Q. One in Melbourne? A. Yes.

Q. One in Sydney? A. Yes.

Q. One in Brisbane? A. Yes.

Q. And one in the Northern Territory?
A. No, not one in the Northern Territory, not in 1965.

Q. That one in the Northern Territory was in existence and carrying on its business there in March of 1972? A. Yes.

Q. And of course in addition to those companies there were companies which carried on underwriting business in various States, various towns of various States? A. Not underwriting.

Q. Not underwriting? A. Not underwriting.

Q. Other types of insurance business?
A. Broking.

Q. They carried on broking business?
A. Yes.

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Q. I am sorry, I keep on saying that. I am indebted for your correction. And there were a large number of such companies in March 1972 in addition to what I call the main companies? A. Not separate companies; branches of these State companies or these local -

Q. Branches of the State companies?
A. Yes.

Q. There is a company called Danby, for example, Danby, Giddy and Outhwaite? 10
A. Yes.

Q. And that in March 1972 was a subsidiary of Stenhouse Australia? A. Yes.

Q. And it carried on business in Melbourne?
A. It was a non-trading company in Melbourne a non-trading company.

Q. A non-trading company? A. Yes.

Q. Was it carrying on a business of underwriting? A. No. 20

Q. I am so sorry; broking? A. Perhaps if I explain the background of the Stenhouse group, your Honour, in Australia. It will answer this question.

HIS HONOUR: Would you answer counsel's question, Mr. Kidd.

WITNESS: I anticipate some future questions.

HIS HONOUR: He may have a point you do not see.

MR. BYERS: Q. Is it right to say that Danby, Giddy and Outhwaite had an office in Melbourne in March 1972? A. It had a registered office in Melbourne. 30

Q. Did it carry on any business in Melbourne in March 1972? A. It was a company which was acquired by Stenhouse in 1962 and merged with John C. Lloyd shortly after that and trading as Stenhouse Victoria.

Q. And John C. Lloyd was another subsidiary of Stenhouse Australia, was it not? A. Yes.

Q. And it was carrying on business in March 1972 in Melbourne? A. Yes.

Q. Now as I understand you, Mr. Kidd, you became in 1965 managing director of Stenhouse Australia? A. Yes.

Q. And from time to time you yourself did broking transactions? A. Yes.

10 Q. And still do? A. And still do.

Q. Now I suppose as managing director of Stenhouse Australia from time to time you would speak to the directors of that company's subsidiary company? A. Yes.

Q. And of course in connection with those companies business activities? A. Yes.

20 Q. And from time to time the directors of those companies would speak to you in connection with those companies' business activities? A. Yes.

Q. Either a specific transaction or generally? A. Yes.

Q. And from time to time no doubt you would give advice or directions to the managing directors of the subsidiary companies? A. Yes.

30 Q. Of course I assume you would have become a director of companies other than Stenhouse Australia in 1965? A. Not in every case.

Q. But a large number? A. A large number, the majority of the companies.

Q. Now one of the subsidiaries of the plaintiff company, that is Stenhouse Australia, was a company Stenhouse Reinsurance? A. Yes.

Q. And had it been incorporated from 1965? A. I think it was incorporated after 1965.

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Q. Can you remember how long after it was after it was incorporated? A. Some twelve months.

Q. That is 1966? A. Yes.

Q. And then Stenhouse Reinsurances did a lot of reinsurance work? A. Yes.

Q. And Mr. Philips was I think the main person concerned in the reinsurance work in that company? A. Yes.

Q. Now you were aware, were you not, that in May 1971 Mr. Philips tendered his resignation as an employee of Stenhouse Australia? A. Yes, I was made aware of that. 10

Q. I think you were told of that resignation by Mr. Newton, were you? A. I was.

Q. I think the resignation was given in the first half of May, 1971? A. Yes.

Q. I will show you this photocopy of a letter dated 12th May, 1971. You have seen that letter before, have you not? A. I have, yes.

Q. That was the written letter from Mr. Philips concerning his oral resignation? A. Yes. 20

(Copy letter of 12th May, 1971 from the defendant to J.A. Newton, Esq., admitted and marked Ex. 3.)

Q. I suppose, Mr. Kidd, you had discussions in May 1971 with Mr. Newton in connection with Mr. Philips' resignation? A. Discussions on the telephone.

Q. But you had them? A. I had, yes. I was overseas at the time. 30

(Letter dated 13th May, 1971 from Stenhouse Australia Limited to Mr. Philips tendered. Objected to on the basis of relevance.)

HIS HONOUR: I propose to admit the letter for what it is worth. I suppose it can be argued that one of the factors in determining what is reasonable as between master and servant is the availability of other staff, if

other staff is readily available; or if there was an admission made that other staff were readily available, this may arguably go to the reasonableness of the restraint. I have some doubts about whether it does. I will indicate to counsel that I do not propose to place much weight on it unless it were connected up and counsel do lead evidence to show that it is relevant in the light of all the evidence.

10

(Letter dated 13th May, 1971 from Stenhouse Australia to Mr. Philips admitted and marked Ex. 4.)

MR. BYERS: Q. Mr. Kidd, you were aware in May of 1971, were you not, that Mr. Newton had suggested a period of three months' notice should be given by Mr. Philips?
A. Yes.

20

Q. And did you discuss with Mr. Newton that period? A. I discussed that with Mr. Newton, yes.

30

Q. And you had in mind I suppose in relation to the period the question of replacing Mr. Philips? A. No, I had in mind that I was in Scotland at that time, as was the chairman of Stenhouse Australia, and I wished to return to Australia to discuss with Mr. Philips the action he had taken in my absence of his tendering of his resignation. I was not due back in Australia until the end of July.

Q. End of -? A. July.

Q. Then it was for that reason I take it then that you made the suggestion to Mr. Newton, was it? A. Yes.

40

Q. Of course it would be right to say, wouldn't it, that you did discuss this matter with Mr. Philips on your return to Australia? A. Yes.

Q. And eventually Mr. Phillips left the employ of Stenhouse on 9th July, 1971?
A. Yes.

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Q. Now do I understand you to say, Mr. Kidd that there would be very few people of the calibre of Mr. Philips in the underwriting market - I am sorry, I keep on saying that - in the broking market in New South Wales in March 1972? A. In his age group, yes.

Q. What about in his class, if I may use that expression? A. I wouldn't limit it to very few.

Q. A large number? A. There would be thirty or forty people in New South Wales of an age group, and I emphasise the senior part of it because when one is a senior these people are not prepared to move. That is why I came back to the particular age group which Mr. Philips is in. There are very few people of that calibre in that age group. 10

Q. It would be thirty or so? A. He was just over thirty. 20

Q. No, thirty -? A. No, I would say probably a dozen.

Q. A dozen? A. Yes.

Q. And that would cover in effect the field of Mr. Philips' expertise; he would have a dozen equal to him? A. It would not exceed a dozen.

Q. It would not exceed a dozen? A. No.

Q. And of course a very large total of persons who were engaged in insurance broking at March, 1972 in New South Wales? A. Yes. 30

Q. Now would it be right to say that in March, 1972 there would be, apart from what I might call the Stenhouse group of companies other large insurance brokers of comparable standing? A. A few.

Q. Those insurance brokers would have offices? A. Yes.

Q. Throughout Australia, would they? A. In most cases, yes. 40

Q. When you say "a few" could you indicate to his Honour the number? A. Three.

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Q. Three? A. Three others.

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Q. Would it be correct to say that the employers, the potential employers of a person like Mr. Philips, would be about three brokers? A. To which date are you referring?

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10 Q. I beg your pardon? A. To which date and in which area of the world?

Q. March, 1972? A. In Australia, in Sydney?

Q. Yes? A. Yes.

Q. I suppose it would be right to say that those three firms have clients in common? A. I am sorry I don't understand your question.

20 Q. It would be right to say that in March 1972 the Stenhouse group would have been acting for clients who also were clients of one or two of the other three? A. That can have happened within the Commonwealth of Australia with different branches of the two organisations.

Q. So I understand - A. That Stenhouse could be capable, can be for a particular client in one state and in another state that some clients were looked after by another insurance firm, does that answer your question?

30 Q. For example, if you take the Boral group as an illustration, it would be right to say that the Stenhouse group did some of their broking? A. Yes.

Q. And it would be right to say also that one or more of the other brokers acted for that group in other capacities? A. Yes.

Q. And of course that situation was not in March 1972 an isolated one, was it? A. No.

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Q. It would be true to say that the larger the client's account is to the broker the more varied are the types of insurance that client seeks? A. Not in every occasion.

Q. Generally? A. Depending on the activities and the trade of the client.

Q. For example, let me make an illustration, it would be not unusual for large manufacturing companies to have fleets of trucks, motor trucks? A. Not unusual.

10

Q. In fact it would be usual, wouldn't it? A. Yes.

Q. And in relation to those trucks they would seek motor vehicle insurance? A. Yes.

Q. And they would obtain that motor vehicle insurance often from, or through, a broker different from the one who handled their public risk cover for them? A. I can't answer that question, it is presupposing I have knowledge of the decisions which individual firms make as to the location of their insurance, it is not normal.

20

HIS HONOUR: Rephrase the question.

MR. BYERS: Q. You were aware that Boral of course had motor vehicle insurance placed through brokers other than Stenhouse? A. Yes.

Q. And that Stenhouse acted for it, for the group, as brokers in relation to insurance other than motor vehicle? A. Yes.

30

Q. What I am suggesting to you is that split occurred quite frequently where the client was a large client? A. It does occur, I would not say it occurs frequently?

Q. It does not? A. It does not, frequently.

Q. I suppose another illustration would be where the client seeks to take out marine insurance to cover, for example, goods being transported overseas? A. Yes.

Q. In cases of that type it did occur in March 1972 that there was such a client, would have a broker for its marine policies and another broker for its fire and public risk policy? A. This can happen.

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Q. And it would be correct to say that the larger the company was the more frequently that happened? A. I would not say that.

10 Q. I would ask you some questions now in relation to Stenhouse Australia and the group, it would be right to say that each of the subsidiaries of Stenhouse had their own clients? A. No, it would not be right.

Q. You mean for example Stenhouse Australia had no clients? A. Stenhouse Australia has all the clients.

Q. Had its own clients? A. Has all the clients.

20 Q. What do you mean by that, Mr. Kidd?
A. When Stenhouse Australia formed in 1961 it started to acquire a number of local Australian businesses, Melbourne, Sydney, Brisbane and Adelaide, and during the period the name was changed to Stenhouse Australia, during the acquisition of this business which we paid for in cash, paid for in cash by Stenhouse and Partners Australia Limited, the only saleable product of this Australian clients was their clients, portfolio of business, and I maintain I am correct in saying
30 the clients in Australia are the clients of Stenhouse Australia Limited.

Q. I understand your contention, but in point of fact Stenhouse Victoria had its own clients?
A. For the purposes of management. May I continue?

40 Q. It would be right to say that Stenhouse Victoria had clients in respect of which that company was remunerated by the insurance company? A. Yes.

Q. And that is true, isn't it, of each of the subsidiaries? A. The clients were looked after by these state companies on behalf of Stenhouse Australia because the

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local state companies did not pass monies nor
are they remunerated directly by the insurance
company.

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Q. I suppose each of the subsidiary company
kept a list of its clients did it not?

A. Yes.

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Q. And it had done that for at least seven
years prior to March 1972? A. Yes.

Q. And it would be right to say that an
employee of, for example, Stenhouse re-insur-
ances, would not necessarily know the identity
of a client of Stenhouse Victoria? A. Not
necessarily.

10

Q. You agree with that? A. Not necessarily.

MR. LUSHER: I do not quite follow what the
answer is (Discussion).

MR. BYERS: Q. Sometimes the employee might
know and sometimes he might not know? A. De-
pending on the seniority of the employee.

Q. If you take Stenhouse re-insurances that
would be right to say that there were clients
of Stenhouse Victoria the identity of which
was not known to any of the employees of Sten-
house re-insurances? A. It would be highly
unlikely in respect of a major occurrence, it
might happen in respect of a modest occurrence
where there was nothing in call for the services
of Stenhouse re-insurances.

20

Q. An employee of Stenhouse re-insurances
would not be conversant by Stenhouse Victoria
of a list of its clients? A. No, but employees
of Stenhouse re-insurances visit Victoria regu-
larly and discuss reports by way of re-insurances
in respect of their clients.

30

Q. By way of re-insurance? A. Yes.

Q. Take Stenhouse Victoria and Stenhouse Aust-
ralia, would it be right to say that an employee
of Stenhouse Victoria would not know who were
the clients of Stenhouse Australia? A. Again
it would depend on the seniority.

40

Q. Nor would he know who was the clients of Stenhouse Western Australia? A. He would, because Stenhouse Australia run a clients list, major clients list of major clients in Australia, they produce a list of major clients in Australia.

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Q. For whom? A. For whom, the use of our capital state companies.

10 Q. Take the company Lloyd, as a Melbourne company, isn't it, a subsidiary of Stenhouse Australia? A. It is part of Stenhouse Victoria.

Q. Does Lloyd keep its own list of clients?
A. As I said before J.C. Lloyd as such is not a trading company within the Stenhouse organisation.

Q. What about North(?) A. Neither is it, it is not a trading company.

20 Q. I suppose it would be correct to say that Stenhouse Victoria has a large underwriting business? A. Not underwriting, brokering business.

Q. A large brokering business? A. Yes.

Q. But it has a large number of clients?
A. Yes.

Q. That was so in March 1972? A. Yes.

Q. Stenhouse New South Wales had a large brokering business and a large number of clients?
A. Yes.

Q. And Stenhouse Australia also? A. Yes.

30 Q. And the same would be true of the remainder of the Stenhouse companies subsidiaries in the various States? A. Relative to the size of the various states and its capital cities.

Q. Would it also be right to say that the affairs of Stenhouse in Victoria were run in Victoria by its managing director on its own?
A. On a day to day basis, yes.

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re-x

Q. And the same would be true of each of the other subsidiary companies? A. Again on a day to day basis.

Q. Did Stenhouse re-insurances, I am asking you again in relation to March 1972, conduct direct insurance as well as re-insurance?

A. Did Stenhouse?

Q. Yes. In March 1972, did Stenhouse re-insurances effect re-insurances for outside brokers, that is brokers not in the Stenhouse group? A. To the best of my knowledge there was some effected.

10

Q. I take it then that Stenhouse Australia re-insurances would keep, as it were, its own clients concealed, outside clients concealed from the other brokers in the Stenhouse group?

A. You go back to the previous question.

Q. March 1972? A. The answer is no, I misunderstood the question at the time you presented it to me, the year is wrong.

20

Q. Up to 1971, say July 1971? A. This could have happened on occasions.

Q. Would it be correct to say that Stenhouse re-insurances kept its list of outside clients secret? A. Yes.

RE-EXAMINATION:

MR. LUSHER: Q. When you say Stenhouse re-insurances kept its list secret, secret from whom? A. Secret from the operating, contract part of Stenhouse Australia.

30

Q. Being which company? A. Stenhouse N.S.W., Stenhouse, Victoria, have it separate, the office separate, the managing director separate, the staff separate, files.

Q. Then you were asked when Stenhouse Australia re-insures did it act for brokers in relation to some of these transactions? A. I said it could have happened that a broker, there was no access to the London market, and have to go to Stenhouse Australia and sort assistance in the business.

40

Q. And Stenhouse would accept such an assignment? A. Not a thing to be encouraged.

Q. How often does it happen? A. I am saying it could have happened, a sort of thing which is so infrequent.

Q. With what frequency? A. Once or twice perhaps in the course of a year's accommodation.

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Transcript of
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J.L. Kidd re-x

10 Q. You were asked about the knowledge of employees of clients of other companies within the Stenhouse group of companies to which your answer was depending on the seniority of the employee? A. Yes.

Q. In relation to a man like Mr. Philips, in a position such as he occupied, what would you say? A. I would say he would have considerable access to the names of clients, in other words, of Stenhouse.

20 Q. In the ordinary course of his activities? A. Because he would be seeking reinsurance business from his full contracts of the State companies and seeking support for his company.

Q. To the extent an employee does not know, is it easy to find out from another client, from another of the companies in the group or is it restricted? A. If he wants information, information would be made available very easily if he tried, if you handle xyz in Melbourne, depending on the position in relation to xyz, the answer would be yes or no.

30 Q. You have mentioned that there were a few other brokers like Stenhouse, and then you were asked the potential of employers of Philips. I understood you to say it would be limited to three? A. I did not say that.

40 Q. You were asked a question in relation to the number of potential employers of Philips, would that be limited in any way by the size of the organisation? A. Not necessary, one can have a small broking house which is not the size of the Stenhouse Australia, out of anyone of these other three where the senior position could be adequately filled by someone like Mr. Philips.

Q. How many of such firms? A. There is probably twenty of them.

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oral evidence

J.L. Kidd re-x

Q. In insurance companies themselves, separate independently of broking group, what do you say as to the availability for a man of Mr. Phillip's account? A. The availability there is extremely limited, it is upon our experience without going into the market, to buy a replacement of the group, speaking of each group, thirty to thirty-five, from an insurance company like that, we reckon for the first two years possibly training an insurance broker would be an insurance broker in his outlook, apart from his experience, because he has a background and acts with insurance companies, tends to discipline his thinking along a narrow front and what his company could do.

10

Q. I am putting to you, take Mr. Phillips himself? A. Sorry, the availability of a position in an insurance company?

Q. In any insurance world, what do you say to his fitness? A. He has capacity to move into that area with success, not over night, because his background is broking.

20

Q. What do you say as to the availability of positions as he would be competent to fill in that area? A. There is a great scarcity of people in the ranks of insurance companies of Mr. Phillips calibre.

Q. In the past two years, Heaths, you used the name, came to Australia? A. That is so.

Q. Any other groups coming to Australia other than Heaths in the past few years? A. Very many, the Insurance Broking Association.

30

Q. From where? A. London and America.

Q. Can you give any indication? A. Six to eight.

Q. Are these staffed to your knowledge by some members in the Australian area? A. In most cases, yes.

Q. What size firms are these, what types of firm? A. Some of them have small beginnings, others have come because over the years they had built up an international framework of clients with an Australia content which was formerly looked after

40

by an Australian broker on a correspondent basis and now they have come over on their own rights, they are quite large.

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oral evidence

J.L. Kidd re-x

Q. Is there any consent given by you or sought from you or Stenhouse Australia by Phillips to approach the Boral group? A. I missed the first word.

10 HIS HONOUR: It can be noted Counsel agreed in so far as the defendant wrongly approached a former client he did not do so with the consent.

MR. LUSHER: I tender some documents. A batch of correspondence between Stenhouse Australia and the general manager of Boral Services and Stenhouse Australia to whom it may concern, being a certificate. Also correspondence between Mr. Phillips on behalf of Stenhouse Australia and Mr. Hargreaves of Boral Limited.

20 (Bundle of 15 copy and original letters between Stenhouse Australia Limited and companies of the Boral group of companies admitted and marked Exh. "J".)

(Two copy letters dated 1969 from Boral, one to Stenhouse Australia and the other to an insurance company, both purporting to be signed by Mr. Hargreaves tendered; objected to; rejected.)

30 (Memorandum dated 28th April 1972 and three telexes taken from papers produced on subpoena by C.E. Heath Insurance Broking Australia Pty. Limited tendered; objected to subject to relevance; admitted and marked Ex. "K".)

(It was agreed that the telex documents in Ex. "K" relate to a Mr. Juggins in the C.E. Heath organisation in London.)

40 (Two documents dated 25th November 1969 and 16th March 1970 from papers produced on subpoena by Stenhouse Australia Ltd. tendered; objected to subject to relevance; admitted and marked Ex. "L".)

(It was agreed that since 24th November 1971, Mr. Phillips, the defendant, has been employed as a director of the Heath company and is described as an insurance broker.)

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x

(It was noted by agreement that the Memorandum of Association of Stenhouse Australia, the name having been changed from the earlier name, contains in par. 2K the object "(a) to acquire by purchase or otherwise and to carry on in Victoria or elsewhere business of insurance brokers and insurance and commission agents and transact all kinds of trust and agency business and to hold in trust for insurance and other companies insurance premiums taken on their behalf").

10

(It was noted that on 23rd March, 1972, Stenhouse Australia ratified the termination agreement between it and Phillips)

(CASE FOR THE PLAINTIFF CLOSED subject to the two letters dated 1969 mentioned).

CASE FOR THE DEFENDANT

(Photocopy of the first page of the Memorandum of Association, Boral Insurance & Fund Management, admitted and marked Ex. 5.)

20

DEFENDANT

Sworn, examined as under:

MR. BYERS: Q. Is your full name Marshall William Davidson Phillips? A. Yes.

Q. I think you live at 34 Perth Avenue, East Lindfield? A. Yes.

Q. You are the defendant in this action? A. Yes.

Q. I think you are a director of - what is the name of the company? A. C.E. Heath Insurance Broking Australia Pty. Limited.

30

Q. When was is that you first were connected with insurance? A. In 1956.

Q. How old were you then? A. 17 or 18.

Q. Have you been connected with that activity, insurance activity, ever since? A. Fully.

Q. Have you any other field of experience or knowledge apart from that? A. No.

Q. I think for a considerable period of that time you have been an insurance broker, have you not? A. Since 1960.

Q. I think in that year you were employed by Robert Paxton Insurance? A. That is correct.

Q. And you remained with them until 1964?
A. Yes.

Q. That was an insurance broking company?
A. Yes.

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10 Q. In that year the company was taken over by Stenhouse Australia? A. It was taken over by Stenhouse Scott-North Australia Limited which was a subsidiary of Stenhouse Scott-North Limited of London.

Q. I think after that happened you were asked, were you not, to sign an agreement which is dated 11th December, 1964 to which you and Stenhouse Scott-North Australia Limited were the parties?
A. Yes.

20 Q. You, in fact, signed the agreement, did you?
A. Yes, it was a condition of the deal.
(Objected to).

Q. What was said to you about signing the agreement of December, 1964? A. It was a standard form. (Objected to; not pressed)

Q. You signed that agreement, did you not?
A. Yes.

30 Q. Thereafter you remained in the employment of Stenhouse Scott-North Australia. Would that be right? A. Yes.

Q. Or commenced that employment? A. Yes.

Q. I think between December 1964 and September 1966 you remained in the employ of that company did you? A. Yes.

Q. And in September, 1966 I think you signed an agreement dated 6th September, 1966?
A. Yes.

Q. In May 1971 I think you delivered a written notice of your resignation from the employment

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of Stenhouse Australia Limited? A. Yes.

Q. And previous to delivering that notice had you spoken to Mr. Newton about it? A. I spoke to Mr. Newton.

Q. And did you tell him that you were resigning? A. Yes.

Q. Did he say anything to you? (Objected to; withdrawn).

Q. I think on 9th July, 1971 you left the employ of Stenhouse Australia? A. Yes. 10

Q. Where did you go thereafter? What did you next do? A. Physically I went to London for about a fortnight and then I came back. Then on 1st August I started to work for the Heath Company, I don't know which Heath Company it was at that time, it was in general agreement with the director of Heath & Company Limited of London.

Q. Thereafter the company of which you are a director was incorporated and you were appointed a director? A. Yes. 20

Q. And you have been in the employ of that company and a director of that company since November 1971? A. Yes.

Q. I take you back to your employment with Stenhouse. Whilst you were so employed did you meet Mr. Hargreaves? A. Yes.

Q. Was Mr. Hargreaves then with any Boral company? A. No.

Q. What position did Mr. Hargreaves then hold? A. He was the general manager of the Commercial & General Insurance Company Limited. 30

Q. Did you have discussions with him in his capacity as general manager of that company from time to time? A. Yes.

Q. Did you ever speak to Mr. Hargreaves after he left that company? A. Yes.

Q. After he left Commercial & General? A. Yes.

Q. You were aware, were you, that B.I.F.M. was incorporated? A. Yes.

Q. Did Mr. Hargreaves tell you that? A. I don't know who told me but I became aware of it.

Q. And that Mr. Hargreaves was the general manager of that company? A. That is right.

Q. Were you aware whether or not he held any position in any of the Boral companies?

10 A. Only that of general manager of Boral Insurance & Fund Management.

Q. Did you speak to him from time to time when you were with Stenhouse in relation to insurances for the Boral group? A. Yes.

Q. To be arranged by what company? (Objected to; allowed).

Q. Did you speak to Mr. Hargreaves after the incorporation of B.I.F.M. in connection with any Boral insurances? A. Yes.

20 Q. You told His Honour that at this stage you only knew him as general manager of B.I.F.M.? A. Yes.

Q. Whilst you were employed by the Stenhouse company did you have any dealing yourself with any executive member of the Boral company? A. No.

Q. Other than Mr. Hargreaves? A. That is right.

30 Q. And Mr. Hargreaves alone? A. That is right.

Q. When you were with the plaintiff company I think you did have dealings with Brambles, did you not? A. Yes.

Q. Since you left them you have done no insurance business with or for them in any way? A. No.

Q. You did have dealings with the Atomic Energy people? A. Yes.

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Q. But again you have undertaken no business for them in any capacity since you left?

A. That is right.

Q. Again you did have dealings with Nabalco when you were employed by the plaintiff but since you left you have had no dealings with that company? A. Yes, no dealings.

Q. Or any of the group? A. No dealings.

Q. When you were with Stenhouse did you have any dealings with Ord-Minnett? A. No.

10

Q. Did you have any dealings with Ord-BT?
A. Yes.

Q. Since you left the plaintiff have you had any dealings at all with Ord-BT? A. I have had a discussion with Ord-BT.

Q. But anything else? A. No, no business with them.

Q. Who approached whom? A. Ord-BT rang me up.

Q. When you left the employ of the plaintiff did you see Mr. Hargreaves from time to time?
A. Yes.

20

Q. Did you discuss from time to time certain affairs with him immediately after your resignation from the plaintiff company? A. After my return from England.

Q. Can you remember when that was? A. Well, in August, it would have been in August sometime.

Q. That is when you came back from England?
A. Yes, I was back from England by 1st August, probably late July.

30

Q. At this stage did you have an office to yourself? A. No.

Q. And, I take it, no business telephone number? A. No.

Q. What was it that you were discussing with Mr. Hargreaves? A. Well, one of the other Heath

companies in Australia is an underwriting Company, and insurance, an acceptor of risk. It had some, it specialises in workers compensation business and it is used by all the major broking houses in Australia. It applied on a number of occasions for a workers compensation licence in N.S.W. which was not granted. During these applications it became so important to have this that we had even agreed with the New South Wales Workers Compensation Commission, or the company had agreed, that it would put up a paid up capital of \$6,000,000 which would be invested in Government stock and therefore fairly low yielding return because it was found that not having a facility for writing the business in N.S.W., which is the major workers compensation State in terms of premium, more premium is spent in N.S.W. than anywhere else, it was likely to affect its business and certainly its growth. In order to get around this the business that was in N.S.W. that it had to look after was by agreement looked after by the City Mutual General which is a subsidiary of the City Mutual Life Society, and they were having troubles, their general manager was ultimately disposed of and the Workers Compensation Commission was starting to look at them fairly carefully and ask for extra returns and so forth, and they gave notice or an indication, I am not sure what it was, but from 30th June, the next year's renewal you cannot lapse a workers compensation policy, that they were going to conclude the deal. Now, we thought that as it was having management troubles and that we had everything to lose by it, that we should try and buy them out, so we had a discussion with the chairman of Heath Australia and approval was obtained from Heath London -

Q. How did Mr. Hargreaves fit into this? A. I am sorry, I just wanted you to know this was important. It was decided I would approach Mr. Hargreaves because Mr. Hargreaves was closely associated with Sir John O'Neill and in the Boral camp and Boral have a close directorial association with the City Mutual, and therefore I would find out by discussion over a period what the chances were.

Q. You discussed that matter with Mr. Hargreaves, did you, when you came back from England? A. Yes.

Q. Was there ever mentioned anything in connection with the B.I.F.M. Insurances or reinsurances?

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A. At that stage in the, shortly after my return there was no mention of their insurances.

Q. Can you remember when that was first raised between yourself and Mr. Hargreaves? A. I think that it would have been raised fairly early in the new year, I am not certain about this. At some of the discussions, let me say, the sort of problems he was having and his worries, you know we discussed them because they are common to the industry, and on occasions Boral Insurance & Fund Management employees would ring me up and ask me to help, possibly on something I had done when I was with Stenhouse, and I would refer them back to Stenhouse and say it was not my business. 10

Q. When you say early in the New Year you mean early this year, do you? A. Yes.

Q. At this stage you had not signed the agreement which is presently sued on? A. True.

Q. The agreement of March 1972. Was the matter of insurance in relation to the Boral group raised on one occasion or more than one occasion? 20

A. During our discussion?

Q. Yes. A. On certainly more than one occasion.

Q. Can you remember who first mentioned it?
A. No.

Q. Did you and Mr. Hargreaves from some time in the beginning of this year have discussions periodically in connection with this insurance that was later given to B.I.F.M. by your company? A. Yes. 30

Q. Did those discussions culminate in a letter that you wrote to Mr. Hargreaves on 27th March of this year? A. That is right.

Q. Had there been mentioned between yourself and Mr. Hargreaves the question of public liability policy? A. Yes.

Q. What was said about that?

MR. LUSHER: When was the occasion?

HIS HONOUR: Can you fix the date of the conversation. 40

MR. BYERS: Q. Can you remember how long before 27th March the question of public liability was mentioned between the two of you?

A. It was shortly after the beginning of the year because I remember the comment quite distinctly that - (Objected to; disallowed)

Q. It was shortly after the beginning of the year. Have you a particular reason for remembering that? A. Well, they had disposed of their - (Objected to)

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Q. You have a reason for remembering; just answer that yes or no. Have you a reason for remembering the particular occasion? A. Yes.

(Witness stood down)

(Further hearing adjourned Tuesday,
3rd October, 1972)

THIRD DAY: TUESDAY, 3RD OCTOBER, 1972

DEFENDANT

On former oath:

Further examination in chief:

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HIS HONOUR: You took an oath on Thursday and you realise you are still bound by that oath.

WITNESS: Yes.

MR. BYERS: Q. In relation to the public liability policy that you discussed with Mr. Hargreaves after your employment with Stenhouse was terminated, was that written by Heath? A. No.

Q. Was that because you were unable to reinsure that risk? (Objected to; question allowed).

A. It would have been possible to reinsure Boral insurance and fund management on a simple word but when it became apparent that Hargreaves wanted an umbrella type, a wider wording to include this surplus cover on motor vehicles and worker's compensation and a charterer's liability for vessels, to my knowledge it would not be possible and was not possible for us to do any reinsurance with Boral Insurance and Fund Management in those terms. 10

Q. So the business was not done? A. Not done.

Q. May I take you now back to the time during which you were employed by the plaintiff company. You told his Honour from 1970 onwards you became aware that Mr. Hargreaves was employed by Boral Insurance & Fund Management? A. Yes. 20

Q. Were there any discussions between yourself and Mr. Hargreaves in relation to the motor vehicle policy? A. Yes.

Q. Do you remember when that took place? A. Towards the end of 1969.

Q. What was done in relation to that? A. The policy was placed for six months, a policy covering the vehicles owned by Boral Limited, its associated and subsidiary companies, in very wide terms -- all the vehicles for which it was responsible. 30

Q. In that policy so far as you remember what was the - (Objected to; question withdrawn)

Q. In relation to the obtaining of that policy did you have some arrangement with Mr. Hargreaves for Stenhouse about payment of commission? A. Yes, we split the commission with him, rebated commission.

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Q. To whom? A. To Boral Insurance & Fund Management.

10 Q. Did you yourself during any time of your employment with Stenhouse have any dealings with Boral Road Services? A. No, except as a party to the cover, the motor vehicle cover and the public liability. Their name - they were in it, although not specifically mentioned.

Q. From time to time I think you had some correspondence with Mr. Hargreaves in relation to the work with which you were connected on the Stenhouse side for the B.I.F.M. Insurance. Do you understand me? A. I am afraid I don't.

20 Q. I suppose during the course of your employment with the plaintiff company you remember you wrote some letters to Mr. Hargreaves? A. Yes.

Q. Do you remember to what company you wrote those letters? (Objected to; disallowed)

Q. Did you write letters to Mr. Hargreaves at any address other than Boral Limited? A. Yes, to Boral Insurance & Fund Management Limited as general manager.

30 Q. Were the Boral companies at different addresses so far as your communication with them was concerned? A. No, they were at North Sydney, the same building.

Q. Have you any recollection yourself as to why it was that some letters were addressed to Boral Limited and some to Hargreaves, B.I.F.M.?

40 A. My memory is that when we placed the motor vehicle business because of the amount of premium involved, \$50,000, Mr. Hargreaves asked and I agreed under the circumstances to rebate commission to him on that particular case, the cover to go to Boral Insurance & Fund Management Limited. The public liability, we were talking about a very large cover, all of which did not eventuate, but it was for some \$15-million cover on risks including the oil refinery, it was going to involve a

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vast amount of work and there could be no possibility of us rebating any commission to Mr. Hargreaves' company on that, so that my recollection is that I wrote - I tried to split the parties up in correspondence although my main problem and my main activity was directed to getting a cover. I was not terribly conscious of trying to do anything that would get us out of or involve us in an agreement so I wrote to him as Boral Limited for a while until the situation resolved itself and it became quite clear that he was not after and was not expecting commission on the public liability.

10

Q. I think you during your employment with Stenhouse spent most of your time in the reinsurance side of the business? A. Yes.

Q. What proportion of your time would be spent in that field? A. Seventy per cent.

Q. Over what period of time had you been concerned with reinsurance business during your association with the insurance business?

20

A. From 1963.

Q. Was it from 1963 onward your main activity in the insurance field? A. Yes.

Q. When you were employed by the plaintiff company was it any part of your duties to obtain new business? A. Only to the extent that all the executives were expected to keep their eyes open for prospects.

30

Q. What position did you hold with Stenhouse Reinsurance? A. Managing Director.

Q. Were there any other members on the staff of the company? A. Yes.

Q. Who were they? A. We have a small staff, it fluctuated a bit but generally there were two or three other males and two typists, secretaries.

Q. Were the other men under your control or above you? A. Under my control.

Q. You have mentioned to His Honour that 70 per cent. of your time was concerned with reinsurance.

40

What was the rest of your time, what type of policies were you concerned with? A. Probably about 15 per cent. - it is a bit difficult to say - about 15 per cent. was involved with Stenhouse Scott-North Australia placing direct business into London.

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10 Q. And the balance? A. And the balance would have been involved on direct accounts of the Boral type for the various State companies, Stenhouse N.S.W. Limited. Stenhouse Victoria Limited.

Q. In relation to that type of business was it you who selected the client or someone else in the Stenhouse group? A. Someone else.

Q. You would then as it were perform the job?
A. Yes.

20 Q. Taking the period from say January 1971 to July 1971 did you know during that period how many employees there were in the Stenhouse group of companies in Australia? A. Not precisely.

Q. Approximately? A. I think there were about 300.

Q. About approximately how many of those were executives, broking executives in Australia so far as you knew? A. I would say about 50.

Q. About how many of them in Sydney?
A. Fifteen.

Q. I think that group of companies is a very large broking group? A. Yes.

30 Q. Was there from time to time a turnover in the executive staff? A. Yes.

Q. Was that fairly constant or not? A. Yes, very common throughout the industry.

Q. Constant throughout the industry, is that correct? A. Yes.

40 Q. From your experience with the managerial side of the group, were provisions made from time to time to build up replacements for men who were leaving or contemplated leaving? A. I did not have a great deal to do, in fact I had very

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little to do with the day-to-day operations in the various subsidiary companies. (Objected to)

Q. You heard it said that a period of two or three years would be necessary to replace an executive such as yourself? A. Yes.

Q. Do you agree with that or not? A. Well, I would have to give you a general answer to that because it is a general sort of question.

Q. With His Honour's permission you may do so? (Objected to; question withdrawn)

10

Q. What is your view on that? (Objected to)

Q. I think you were present in Court whilst Mr. Kidd and Mr. Laird gave evidence in relation to the time necessary to replace a competent broking executive. Do you agree with the views they related to the effect that it would take from two to three years? (Objected to; question allowed)

Q. Would you now answer the question? A. I wonder if I could have it again? (Question read) No. I don't agree.

20

Q. What do you say? A. From the experience that I have had of building up a brand new broking company, to employ from the market an executive capable of handling large accounts from \$300,000 premium on, I would say six months.

Q. Is it necessary for a broker to obtain some knowledge of the business activities of the client? A. Yes.

Q. Does that take in your experience, from personal experience whilst at Stenhouse, a long period of time? A. No. It of course depends upon the case. It does not take a long time.

30

Q. Take the case of Boral with which you were concerned. How long did it take you to acquire knowledge of the business activities of Boral sufficient to discharge your duties as a broker? A. The public liability was the only complex one that I became associated with and from start to finish with the assistance of the client and with the assistance of the other resources in Stenhouse I feel that within three or four months we knew all

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we had to know to give a client good insurance advice, reliably covering all aspects of it, all his wording, all his installations, all his agreements. It was hard work but it was done.

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Q. Were you during the period of your duties in Stenhouse fully employed in what you were doing for the plaintiff or any of the other insurance companies within the group? A. Was I fully employed? Does that mean was my time fully taken up?

Q. Yes, that is right? A. I worked a full day, yes.

Q. During the period of time you were with Stenhouse did you extend yourself to the full? Were you able to extend yourself to the full so far as your skill was concerned? A. I don't think so.

20

Q. Is there anything particularly complicated in relation to reinsurance business? A. Yes. It requires a profound knowledge of the market, it is sophisticated in its own way. It is a very big business. Some parts of it facultive such as the one we have at the moment; that is fairly straight forward until it comes to placing it; it is a complicated business.

Q. From your experience as a broker were there in March 1972 a number of what is called captive insurance companies in Australia? A. Yes.

30

Q. Many? A. Well, there were some six to seven I know operating except with a captive you quite often don't know. Quite a lot they place off shore so they are not mentioned. People don't go around saying "We have got a captive on shore."

Q. Captive insurance companies have certain commercial advantages, don't they? A. Very much so.

Q. As at March 1972 was the number of them increasing? A. Yes.

40

Q. What were the commercial advantages captive insurance companies possessed? (Objected to; question allowed). A. Depending upon the nature

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of the client's business a captive give a tax deferral advantage, a cash flow, retained cash flow, it gives you greater flexibility on the cover you can get and it enables you to buy your protection wholesale. That means that you buy, could get by reinsurance, and the reinsurance providers, reinsurers as they are called, are a lower cost insurance market than the general companies you see around.

Q. From your knowledge of the insurance market as at March 1972, there were six or so captive insurance companies were they doing a large volume of business or a small volume of business? A. It is comparatively small compared with the thousands of millions of dollars spent on insurance in Australia. I don't know what their volume would be, they are very secret, they do not have to give anybody any information at all. 10

Q. Do they cover the conventional range of insurance business such as ordinary insurance companies? A. Yes, with the exception of the statutory ones where they probably have difficulty getting a licence, worker's compensation that is, compulsory third party. 20

CROSS-EXAMINATION:

MR. LUSHER: Q. You said when at Stenhouse you were not able to extend yourself to the full. Do you mean by that you were not able to extend yourself fully in your broking business or do you mean something extraneous to that business? A. In relation to the broking business? 30

Q. In relation to the broking business. A. In this broad sense.

Q. Do you mean by that that there were other avenues of broking open to you which you could not get in to? A. Yes.

Q. Within the Stenhouse organisation?
A. Precisely.

Q. Activities which were being carried out by other people? A. Yes. 40

Q. Who? A. The major broking houses in the world.

Q. You had ideas of developing different activities in the Stenhouse group? A. Yes.

Q. In order that from your point of view you would be able to extend yourself more fully within that group? A. Yes.

Q. This was raised by you as a matter of policy was it? A. There were -

Q. Was it? A. Yes.

Q. And rejected by the management? A. Yes.

10 Q. Consequent upon that you tendered your resignation, is not that so? A. No.

Q. It was shortly after that that you tendered your resignation? A. My -

Q. Would you answer the question? A. No - the answer is no.

Q. What was the delay factor between the rejection of your suggestion and your resignation?
A. The suggestions were made over a long period of time.

20 Q. When was it last made? When was it last made prior to your resignation? A. I could not give you a date.

Q. It was made within days and weeks was it not? A. No, during my resignation -

Q. Were not the suggestions you are referring to made within a short period of your resignation being tendered? A. Within -

30 Q. A short period of your resignation being tendered. A. I am afraid I have lost the first part of your question.

Q. Were you not engaged with discussions concerning your ideas for extension in Stenhouse shortly prior to your resignation being tendered?
A. No.

Q. Were you not engaged in such discussions within a few weeks or a month or so at least beforehand? A. There were some discussions.

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Q. This was your suggestion about involving merchant banks was it not? A. No.

Q. Was it a suggestion involving people like Darlings? A. That -

Q. Was it? A. Not prior to my resignation.

Q. Were you discussing Freehill Holingdale group that may have an interest in some of your suggestions? A. Not prior to my resignation.

Q. No discussion about that at all prior to your resignation being tendered? A. Not that I recall. 10

Q. Were there not discussions in those fields in which you said you would be able to interest Darlings, Freehill Hollingdale, C.S.R. etc. in such projects? A. Not prior to my resignation.

Q. Not at all? A. Not prior to my resignation, not prior to my letter of resignation but prior to my resignation.

Q. At that stage your letter of resignation came after you said you wanted to resign, didn't it? A. The next couple of days. 20

Q. There was a question of policy involved as to whether brokers would or should or could be involved in these sort of schemes of yours, was there not? A. Yes, that would be something to consider in any sphere.

Q. And there would be room for more than one point of view in that situation, would there not? A. Yes. 30

Q. Because one of your schemes that you regarded as extending yourself involved as you say forming these captive insurance companies, big groups, did it not? A. I don't remember discussing that specifically. I could have well done.

Q. Would it have involved the formation of these sort of captive insurance companies? A. Yes, it would have involved it.

Q. You mentioned a tax deferral advantage, a cash flow, greater flexibility, that you could buy your protection wholesale and you could buy reinsurance, and these other factors, did you not? A. In answer to the previous question?

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Q. In answer to Mr. Byers. A. Yes.

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Q. This involves of course a cash flow coming from the premium payment in the initial instance, does it not? A. Yes.

10

Q. And that is in reinsuring the whole load?
A. Reinsuring the whole load?

Q. The great bulk of it at a lower rate?
A. That is one way it could be done.

Q. With the result if you can keep the premium within your own area and at the same time reinsure the full cover at a less rate, this gives a corresponding benefit, cash flow in addition? A. Yes, there are other ways of getting cash flows.

20

Q. There are different ways of handling the same scheme? A. Reinsuring.

Q. Yes. A. There are.

Q. This was one of the ways in which you felt you could extend yourself more profitably, is that so? A. When at Stenhouse?

Q. When at Stenhouse? A. That was an area.

Q. If you could move out and form a separate group that would handle this sort of field you could employ yourself a lot more profitably, couldn't you? A. I don't think that follows.

30

Q. You are now with which firm? A. C.E. Heath Insurance Broking Australia Pty. Ltd.

Q. You have been with them since which month last year? A. Since 1st August.

Q. Of 1971. Have you got a contract with them? A. Do I have to answer that?

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HIS HONOUR: Yes.

WITNESS: No.

MR. LUSHER: Q. No written contract?

A. No.

Q. Have you any documentation, any letters you have exchanged about it? A. No, not with C.E. Heath Insurance Broking Australia Pty. Limited.

Q. You mean by that you have got it with somebody else? A. Yes.

10

Q. With whom? A. C.E. Heath & Co. Limited of London.

Q. What have you got, documents, some letters? A. Yes.

Q. Have you got those with you? A. No.

Q. What salary do they provide for you in this country? A. Do I have to answer that? (Objected to)

Q. How long were you actually with the Stenhouse group? A. Approximately six years.

20

Q. You did have a very substantial increase in the small while that you were there, did you not? A. It depends on what you mean by substantial.

Q. What did you start there on? A. \$2750.

Q. What did you finish on? A. I think it was about twelve or thirteen thousand, I am not sure.

Q. It was over 13,000, was it not? A. Well, it might have been \$13,500. I am not too clear. It is not something -

30

Q. You received a motor car? A. Yes.

Q. Owned by Stenhouse Australia? A. Yes. I didn't know who owned it.

Q. You received did you not a loan from

Stenhouse Australia to assist you in the purchase of your home? A. Yes.

Q. A long term loan? (Objected to; question allowed). A. Yes, a long term loan, 20 years.

Q. And you reached a position of seniority did you not in the Stenhouse group?

A. Yes, I would say so in the Stenhouse Australia group.

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10 Q. You say you were so? A. Yes, I thought I was.

Q. The reinsurance company, the Stenhouse reinsurance company, was that your own idea?
A. Yes.

Q. Basically? A. Yes.

Q. That was a matter you raised for management to consider and which they adopted, is not that so? A. Yes, at the beginning.

20 Q. You were made managing director? A. That is right.

Q. That company in status is equal to a State group of Stenhouse is it not? (Objected to).
A. I would not say so.

Q. In the hierarchy of the order of executives your position as managing director of the reinsurance company was equal to that of a State manager approximately, was it not?
A. Some.

30 Q. Which ones do you say it was not equal to?
A. The ones that were on the Board of Stenhouse Australia.

Q. How many of those were there? A. One.

Q. Who was that? A. Victoria.

Q. In point of fact your position actively was that you worked down at 19 Pitt Street, did you not? A. Yes.

Q. Down there were yourself, Mr. Kidd, correct?
A. Yes.

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Q. Mr. Newton? A. Yes.

Q. Mr. Bodinnar? A. Yes.

Q. That was all apart from their staffs?
A. Yes, there was a lot of staff down there.

Q. Those other gentlemen, that is to say
Mr. Kidd, Mr. Newton and Mr. Bodinnar, are
all associated with Stenhouse Australia group
are they not? A. Yes.

Q. That is to say they are the headquarters
group, the head Australia company group are
they not? A. Yes. 10

Q. You were the only one of the rest of the
whole organisation who was down there with
them? A. That is true.

Q. I will now put the question of salaries
with the background of the other material?
(Objected to).

HIS HONOUR: I will allow the question. I
direct his present salary be written down and
made available at this stage to counsel and
to instructing solicitors. If any application
desired further in relation to the matter
it can be made later. 20

MR. LUSHER: Q. What is your salary with
Heaths and other emoluments?

MR. BYERS: Do you mean his employer?

HIS HONOUR: Retirement benefits?

MR. LUSHER: If he has any right to commiss-
ions.

HIS HONOUR: I direct the witness to note his
actual salary plus any commissions or remuner-
ations of that kind. 30

MR. LUSHER: Q. I am not asking for the
figure but what the arrangement is? A. There
is a share option scheme which takes about
eight pages to describe and which is fairly
irrelevant. Should I just write down "plus
share option scheme"?

HIS HONOUR: Yes.

(Sheet of paper containing details as outlined above completed by defendant and marked for identification 2)

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MR. LUSHER: The share option scheme of which you are speaking, has that been finalised?

A. Yes.

10

Q. In short terms it gives a right to take up some part of - (Objected to; question allowed).

Q. Is that so? A. Yes. There are two share option schemes, one is the parent company, the one in Britain of which I am entitled to become a member, and the other is the one applying to my own company.

20

Q. When you say "my own company" you mean the Australian company or is it some other company?

A. C.E. Heath Insurance Broking, Australia branch.

Q. This is the company by whom you are employed? A. C.E. Heath Insurance Broking.

Q. The options are with both of them?

A. There are two separate schemes.

Q. You say both of them have been brought to fruition? A. The schemes are available in the parent public company.

30

Q. You had some discussions did you not with Mr. Kidd as to the likelihood of you becoming - in effect taking his position over in future?

A. I have never had any discussions with Mr. Kidd about that.

Q. Was it mentioned? A. Mr. Kidd mentioned it I think in round about terms, describing it as his chair, not as his position - sitting in his chair.

40

Q. What he gave you to understand was you had the opportunity of sitting in his chair in effect as head of the Australian company?

A. He gave it to me, yes.

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Q. Your indication to him was you wanted more than that, was it not, you wanted an equity in the business. That is the fact is it not? A. It was well known, if I could answer it -

Q. That was your reply, was it not? A. No, I would not reply - I would not think I would reply to that sort of comment from a managing director by saying, "I want some more."

Q. Did you say to him that you wanted an equity in the business? A. I have said to all sorts of people including the late Hugh Stenhouse himself that I felt that the executive generally, not only me, obviously they are not going to give me an equity and nobody else, that they should get an equity. 10

Q. You did say to Mr. Kidd when he mentioned the chair you wanted an equity in the business? A. I don't recall saying it then.

Q. Would you deny you said it to him? A. I would not deny I said that to him. 20

Q. The probabilities are you would have said that? A. At that meeting perhaps rather strictly the other way.

Q. In effect what you were seeking was an equity in the Stenhouse business? A. Yes.

Q. The position that you had in terms of your physical location with Mr. Kidd and Mr. Newton, they were the two senior men here in Australia were they not? A. No. 30

Q. Kidd was was he not? A. Mr. Kidd is managing director, Mr. Rundle is the chairman.

Q. He is a solicitor is he not? A. Yes.

Q. And in Melbourne? A. Yes.

Q. He is also on the board of the parent company in Australia is he not? A. Yes, the chairman of it.

Q. Mr. Newton was also very active in the Stenhouse Australia group was he not? A. Yes. 40

Q. Would you agree your position down there was highly central in the affairs of the overall group? A. Geographically?

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Q. Yes. A. Certainly.

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Q. Because a lot of the activities of the various States came back to that particular office, did they not, and went forward to the States from it? A. Yes.

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10 Q. Of course you were engaged there in reinsurance were you not? A. Yes.

Q. And you were also engaged in placing in London through Scott North? A. Yes.

Q. And you had something to do with direct insurance? A. Yes.

20 Q. It is not unusual is it not for one of the State companies seeking direct insurance and having explored the Australian market to ask you to test the London market through Scott North or through reinsurance, that is so is it not? -

Q. It is not unusual? A. Can you give me the date because it changes.

Q. During the period you were with Stenhouse? A. No.

Q. In the period you were with Stenhouse? A. No, if I could just - the answer is yes and no.

30 Q. There were occasions were there not when State managers having explored the market here would ask you to test the London market as against the Australian market? A. Yes.

Q. And you might do as well or better or worse? A. Yes.

Q. And in order to know or in order to place or to acquire quotes in London on the market you would need to know something about the nature of the business of the client from the State branch concerned, would you not? A. Yes, we would want the underwriting information.

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Q. And with reinsurance you would need to know something of the nature of the business and the nature of the client's activities before you could place reinsurance? A. Yes.

Q. So you would agree would you not you were placed in a position where you could get and know a considerable amount of information of reinsurance and placing overseas and being asked to obtain competitive quotes, get to know a considerable amount concerning the overall activities of the Australian group? A. Yes.

10

Q. Far more so than if you were just in a State branch? A. I don't think so.

Q. You don't think so; would you not agree with that? A. No.

Q. Was it not a fact that you were there with Kidd and Newton, an area within which you were able to discuss with them their problems as well as your own? A. No, I would not have been there to discuss their problems.

20

Q. Do you say that did not ever happen? A. It would have happened, yes.

Q. And it was quite common for them to discuss with you matters which had been raised in other States apart from N.S.W. was it not? A. Relating to insurance?

Q. Relating to insurance? A. With Mr. Newton certainly, not so I would think with Mr. Kidd.

30

Q. There was a list of clients kept down there were there not, major clients kept by Mr. Newton? A. Yes.

Q. These were major clients who had amounts upwards of certain figures in terms of premium? A. Yes.

Q. They were available to you? A. Yes.

Q. And you had used it had you not in the

40

course of your business, in the course of your work, if you needed? A. Yes, not often but I referred to it from time to time.

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Q. You mention turnover, there being no turnover in the past few years of any of the top executives in the Stenhouse group?

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A. Only the ones retiring.

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Q. At what age? Do you mean because of age? A. One was sickness and the others because of age.

10

Q. In March of 1972 you were actually in communication with Mr. Hargreaves in that period were you not? A. Yes.

Q. You had been in touch with him before that had you not? A. That is true.

Q. And it was during that period you were then negotiating the final agreement, contract, between yourself and Stenhouse Australia?

A. Yes.

20

Q. Which was signed on the 23rd March?

A. Yes.

Q. And at that point of time you knew of course that there were soliciting clauses relating to that contract? (Objected to; admitted on ground of credit).

Q. I think at that time you were aware of the presence of soliciting clauses were you not? A. Yes.

30

Q. In point of fact you had taken some legal advice some time before? A. Yes.

Q. Round about the time you tendered your resignation? A. Yes.

Q. With a view to ascertaining whether or not the restrictive clauses which were then operating would be likely to bind you or not?

A. Regarding the contract generally, I did not specify what - -

40

Q. You were interested in the restrictive clauses? A. I was interested in the whole contract.

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Q. Were you not interested in the restrictive clauses? A. Yes, I was interested in everything else in the contract.

Q. Amongst other things you were interested to know whether or not you could approach former clients, were you not?
A. Yes.

Q. That could be substantial accounts if you could get them? A. Yes.

Q. There were files that you had access to at Stenhouse, were there not? A. Yes. 10

Q. And which you took with you? (Objected to; question allowed).

Q. Some files were taken by you were they not from Stenhouse? A. Yes.

Q. You were subpoenaed in this present action to produce those documents were you not? A. Yes.

Q. And you did produce some? A. I produced them all. 20

Q. How many files were there? A. Three.

Q. What did they relate to in broad terms?
A. One is a file of balance sheets of the companies I was a director of. The other two relate to my activities with the firm called P.L.A. which I took with Mr. Newton's approval.

Q. You say you took them with Newton's approval? A. Yes.

Q. What was the other? A. Two relating to P.L.A. and one relating to balance sheets - three. 30

Q. When you took your advice you told us that you were interested in whether or not you could approach clients, that was part of your interest, was it not? A. Part of my interest.

Q. And it was whilst you were in the course

of discussions with Mr. Hargreaves that this agreement was signed? A. Yes.

Q. That had been the result of discussions between yourself and Stenhouse through your respective solicitors? A. Yes.

Q. So at that time you were fully aware that soliciting was being involved in terms of this new contract? (Objected to).

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Q. You were aware that soliciting was the subject of one of the clauses in the contract? A. Yes.

Q. And it was at your suggestion that the question of insurance companies was deleted? (Objected to).

Q. Or excluded. Was it your suggestion or your solicitor's suggestion that "insurance companies" was excluded? A. Yes.

Q. From the definition of "clients"?
A. Yes. (Objected to; question allowed).

20

Q. So as I understand it it was your belief that it was permissible for you to negotiate with insurance companies without infringing any clause relating to soliciting? A. Yes.

Q. To have dealt with Mr. Hargreaves on a direct basis would have put it into a different category would it not, placing of direct insurances from the Boral group? (Objected to; question disallowed).

30

Q. To have dealt with anybody from the Boral group regarding placement of the Boral insurance directly would have been an infringement of your understanding of the restrictions? A. Other than Boral Insurance & Fund Management.

Q. I am speaking on the basis of approach from yourself. A. Yes.

40

Q. It was your understanding because you were dealing with an insurance company you were outside that problem? A. Yes.

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Q. At the time when you were engaged in these negotiations with Stenhouse you made no reference to the circumstance you were dealing at that point of time with the Boral group in any form, did you? At the time you were engaged in these negotiations relating to this contract no mention was made by you to the Stenhouse group that you were engaged in any negotiations with Boral?

A. No, I didn't think I had to in this case.

10

Q. Because your belief was you were outside the area by dealing with an insurance company? A. I had not told them about the other insurance companies I was dealing with either.

Q. I am speaking only of Boral at the moment. Actually you had been in negotiation before the exclusion of the insurance company question had been accepted, had you not?

A. Yes.

20

Q. So I suppose it was in your mind was it not that they, the Stenhouse group, may or may not accept your suggestion that insurance companies be excluded? A. It was in my mind they could accept or reject it, yes.

Q. And if they had rejected the exclusion of the insurance company and you had approached an insurance company you may well have been in breach of such a covenant? A. I certainly would.

30

Q. Did that cross your mind? A. Yes.

Q. But you did not inform them of it, or that possibility? A. I don't know if they were informed.

Q. You did not inform them you were dealing with Boral? A. No.

Q. You did not seek their consent to deal with Boral? A. No.

Q. But you were concerned about the ethics I take it of your position in that situation? A. No.

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Q. Not at all? A. No, as I was allowed to deal with any insurance company, no problems at all.

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Q. It was not until the 23rd March that agreement excluding insurance companies was reached, was it not? A. When the agreement was signed.

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Q. Were you not concerned about the ethics of your own position prior to that? A. No.

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Q. Did it occur to you it would have been fair to have indicated to them what your intentions were in order that they may or may not have considered it as to whether they would agree to exclude insurance companies?
A. Under the circumstances, no.

20

Q. As a reinsurance man you had to operate considerably within insurance companies, within the general sense of that word, excluding captive insurance companies?
A. Yes.

Q. As a reinsurance man a great deal of your work would be with the ordinary insurance companies properly so called?
A. Yes.

Q. And of course it was part of your design not to have any of your position affected so far as concerning your right to approach insurance companies for reinsurance? A. Any insurance company, yes.

30

Q. Particularly you wanted to preserve the right so far as it related to reinsurance?
A. Yes.

Q. Because as you told us 70 per cent. of your activities with Stenhouse were in that field? A. Yes.

Q. I suppose you expected to be engaged in the field of reinsurance in the Heath organisation too? A. Yes.

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Q. You wanted to have as it were freedom to negotiate in that field? A. Yes.

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Q. After you resigned you went over to London? A. Yes.

Q. Within what period? A. The next day.

Q. For the purpose of seeing the Heaths?

A. Yes.

Q. With a view to employment? A. Yes.

Q. Then you apparently reached some decisions there with Heaths? A. Yes.

Q. Then you came back? A. Yes.

Q. When did you get back? A. Towards the end of August - towards the end of July; I was away about a fortnight. 10

Q. You were then in touch with Mr. Hargreaves? A. Yes.

Q. You were in communication with him on a number of occasions? A. Yes.

Q. It was you who made the initial move towards him? A. Yes.

Q. And it was you who phoned him on each occasion, was it not? A. As far as I can recall. 20

Q. You made arrangements to see him for lunch? A. Yes.

Q. He was regarded by you as a prospective client? A. Yes.

Q. And his companies were regarded as a prospective client? A. Boral Insurance and Fund Management.

Q. You were also looking at the Boral account then were you not? A. Well, the relationship was over a long period of time. 30

Q. When you came back and when you were seeing Mr. Hargreaves in these initial periods you were interested in getting the Boral account itself were you not? A. Not at that stage, no.

Q. You certainly were in March were you not? A. Yes.

Q. Did you suggest to him various schemes for his insurance? A. Only one.

Q. Did you discuss that generally with him? A. Yes.

Q. Did you discuss matters of insurance with him generally? A. Yes.

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Q. At your initiative? A. At the initial discussion.

Q. At your initiative? A. The meetings were at my initiative generally.

Q. And you brought up these matters about the insurance with him? A. And he brought them up too.

Q. But you brought them up with him did you not? A. Yes.

20

Q. Because you were anxious to obtain as much of the Boral work as you could were you not? A. Later on, not initially.

Q. But you were in March? A. Yes, as much as I have set out in that letter.

Q. You were prepared were you not to go past Hargreaves if necessary? A. No.

Q. You had been prepared to go past Hargreaves earlier, had you not, if it had been necessary, when you were with Stenhouse? A. No.

Q. What? A. No.

30

Q. In the early stages in relation to the Boral work whilst you were with Stenhouse were you not prepared to go beyond Mr. Hargreaves higher up in the Boral executives with a view to obtaining the Boral business, if it became necessary? A. Depending upon what you mean by "necessary". In the event of Hargreaves being sick or something like that, an unsatisfactory situation which never arose, certainly.

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Q. Not in the event of him being sick, in order to achieve and obtain the Boral business? A. It never occurred to me but I suppose so. It might have occurred to me but I did not ever consider going above Hargreaves seriously - no point.

Q. Was there not some doubt in your mind as to whether or not Hargreaves might be able to control as much of that Boral work as you thought? A. Initially? 10

Q. Yes. A. There was.

Q. And even later was not that still the same position? A. I think that he is fully competent to handle it.

Q. You thought he was fully competent to handle it? A. I think he is.

Q. Did you not prepare a memo in Stenhouse indicating that if necessary you could go past or you would go past Hargreaves?

A. I don't remember doing it. One has to look at all the aspects. 20

Q. That would be a means of obtaining the Boral account? A. Today or then?

Q. Then? A. It would be a means, one of the means.

Q. And there is no doubt while you were with Stenhouse what you were interested in was the Boral account itself, not just reinsurance?

A. True.

Q. That is true is it not? A. Yes. 30

Q. And it is true is it not that afterwards, after you left Stenhouse and in March of 1972 it was the Boral account that you were interested in, such of it as you could get, was it not? A. As reinsurance of Boral Insurance and Fund Management.

Q. Or even direct if you could get it?

A. If I was going to get it direct I would have to start correspondence with Stenhouse and get their permission. 40

Q. If you could have got it direct you would have liked to have got it? A. There would have been advantages and disadvantages.

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Q. And you discussed with Mr. Hargreaves the question of direct insurance? A. It was discussed.

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Q. In March of 1971? A. 1972.

M.D.W. Phillips

Q. March of this year? A. Yes.

xx

10 Q. That is the fact is it not? A. There were some discussions on direct insurance.

Q. In any event when it comes to the question of reinsurance, before any reinsurance could be placed by the Boral Insurance Company it was necessary of course you would have some insurance to place? A. Yes.

Q. Was it not? A. They had a lot.

20 Q. At the time you were negotiating with Mr. Hargreaves, when you say they had a lot, you mean there was a lot available to place with different people? A. I mean Boral Insurance & Fund Management in say March 1972 underwrote for all practical purposes all the fire business of the Boral group, all the loss and profits, all the cash in transit and the fidelity guarantee.

Q. You say it did it? A. It wrote it, issued policies to the other members of the Boral group and had been doing so for 18 months.

30 Q. You say they had been doing so for 18 months? A. Yes, nearly 18 months.

Q. Was it not part of your discussions with him that policies should be placed from the Boral group with the Boral industrial group? Was it part of your suggestion that the Boral insurance should be placed direct with their insurance company so to make them reinsure it? A. It was being done already.

40 Q. You say it was being done already?
A. Yes.

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Q. Prior to that? A. Yes from inception.

Q. What do you mean by from inception?

A. In January 1970 my recollection is that Boral Insurance & Fund Management Limited began to insure the various Boral Limited subsidiaries and issue policies to them and in turn reinsure them. What I suggested was instead of issuing policies to these little subsidiaries, issue just one policy which was as far as I could see all that was necessary and then it would reduce the number of policies.

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Q. What you suggested was that all these policies should be consolidated and put through the Boral Insurance Company?

A. They were already there.

Q. But you suggested they should be consolidated? A. To use "consolidated" in that way certainly.

20

Q. Brought into one policy? A. Into as few a number of policies as possible.

Q. Into as few a number of policies as possible? A. Yes.

MR. LUSHER: Q. So your suggestion involved the writing of fresh policies in relation to those risks into different and smaller policies in terms of numbers of subsidiaries? A. Yes.

Q. And then, having got that, your scheme was that the insurance company would then reinsure that particular risk or risks? A. It was only tips. It was not an important aspect of it.

30

Q. It was only what? A. A tip. Our scheme would still apply if it wrote it any other way.

Q. Whether it would or would not, that was your suggestion? A. Yes.

Q. And that was what was adopted? A. Yes.

40

Q. The public liability was originally directed to Stenhouse, was it not? A. Yes.

Q. So you wanted to change that, did you not, as part of this arrangement? A. If it was of any benefit to him. There were changed circumstances.

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Q. But you suggested to Hargreaves -
A. That he wrote it himself.

Transcript of oral evidence

Q. That he write that himself? A. Yes.

M.D.W. Phillips
xx

Q. And then reinsure in the same way?
A. No, in a different way.

10

Q. In a similar fashion? A. Yes.

Q. With your company? A. Yes.

Q. And in the reinsurance? A. Yes.

Q. The crime and loss of profits. Let us take the loss of profits. Where had that been placed before? A. I don't know.

Q. But your suggestion to him was that he should run the loss of profits also for the Boral group into the Boral insurance company?
A. Yes. I didn't know that he was underwriting much loss of profits at all.

20

Q. But it was your suggestion to him in March of 1972 that he run that insurance for the Boral group into the Boral Insurance & Fund Management Company? A. Boral Insurance & Fund Management would not write it.

Q. That was your suggestion? A. Yes.

Q. And that he would then, as part of your overall scheme, reinsure that with you?
A. Yes.

30

Q. And the same with the crime? A. Well, he had the crime already, yes.

Q. You say that you can't remember, I think you said, who first raised this matter of insurance - you or Mr. Hargreaves? A. Insurance generally?

Q. Yes. A. No, I can't remember.

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xx

Q. By that do you mean that you have forgotten? A. Well, you are talking about the Boral -

Q. Do you mean that you have forgotten who raised it first? A. Insurance generally? Yes - I don't remember.

Q. It would have been an important matter to you from a point of view from business first of all, wouldn't it, the Boral insurance work? A. We are talking about the Boral insurance work now, not insurance generally. 10

Q. Yes. A. Yes.

Q. And generally it would have been important for you from the point of view of the covenants as to whether or not you were in breach or not in breach? A. Whether I mentioned it to him first, or he mentioned it to me?

Q. Yes. A. I would think that I didn't look at it that way. 20

Q. You just can't remember at all one way or the other? A. No, I can't. I certainly know that I didn't go there with the intention of making him say it first.

Q. But it is more likely than not, is it not, that you would have raised it first? A. Yes.

Q. As to Mr. Newton, do you say that he gave you permission to take these files? A. Yes. 30

Q. I put it to you that that is not so at all; he gave you no such permission. Do you deny that? A. I deny it most emphatically. Those files meant a lot to me. I said that "I am taking them". It was the Thursday night before I left. He asked "What are you doing?" I said to him, "I am taking all this rubbish out of my office, including paintings. I am taking these P.L.A. files. Is that all right?" He had a look through them - a quick look - and said O.K. 40

Q. There is no dispute that they were Stenhouse documents? A. I don't know that they were Stenhouse documents at all. It didn't occur to me whether they were Stenhouse documents or not. There were a lot of personal letters in them.

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Q. You mentioned some of the other ones and you said you had no dealings with Ord B.T.? A. No, it was not Ord B.T.

M.D.W. Phillips
xx

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Q. I asked you did you have any dealings with Ord B.T. Limited and you said that you had discussion with them - is that so?

A. Yes.

Q. When was that? A. A few months ago. I don't remember precisely.

Q. Relating to insurance? A. One was relating to insurance. We do have some money placed with that firm.

20

Q. But you raised it with them, did you not, the question of insurance? A. No.

Q. Was it not raised by you at all?

A. No. They rang up.

Q. They approached you did they? A. They rang me up on the telephone, yes.

Q. Why do you say approached you?

A. Vaughan Chapman, their secretary.

Q. In short terms, for what purpose?

A. To see if we could arrange professional indemnity insurance for them, which we could not do.

30

Q. Then you mentioned others. Atomic Energy - did you have dealings with them? A. When at Stenhouse, yes.

Q. Have you been in communication with any of their officers at all? A. No.

Q. Have they been in communication with you?

A. No.

Q. You have had no dealings with them whatsoever? A. No.

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oral evidence

M.D.W. Phillips

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Q. Brambles - have you been in communication with any of the Brambles people?

A. I have spoken with the Brambles people of Brambles insurance.

Q. To whom did you speak? A. Drew, their insurance officer.

Q. Did you approach him? A. No.

Q. You say he approached you did he?

A. One of my employees.

Q. Who is that? A. A fellow called Hanning - Mr. L. Hanning had an association, a pretty vague one, with Drew, and it was in connection with not a subsidiary of Brambles but a joint venture they have with Brinks concerning the carriage of money around.

10

Q. Cash in transit? A. Cash in transit. Hanning wished to follow this up. I allowed him to do it. He spoke to Drew. Drew came on one occasion to the office. They went to lunch. I went along to the lunch and that is the long and short of the association.

20

Q. That was with a view to obtaining that business so far as it related to Brambles and Brinks? A. Yes.

Q. Were you successful in obtaining that?

A. No, not in it.

Q. But the approach was made by one of your men, to your knowledge? A. Yes.

Q. What about the other one you have mentioned Nabalco; have you had any relations with Nabalco? A. Well -

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Q. Well have you? A. Yes.

Q. When? A. Well I -- (Question objected to).

HIS HONOUR: If this evidence is directed to indicating that some kind of business has been done or sought to be done with these particular companies and that in some way this

10 goes to an issue relevant in the present matter, then upon the basis of the particulars which have been given in the particular matter informally between the parties it does not seem to me that it goes to any such issue. I limit my views in relation to it in that particular way because, as I understand it, it has been put upon a basis relating to relevance to the particular issues before me. The issues before me seem to be issues in relation, so far as is here relevant, to an approach in relation to the Boral group of companies - using that compendiously to include the B.I.F.M. company, if that be the terms of the particular clause; on that basis then I would not think the question of any relevance for the purpose for which it is contended. I reject that question.

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xx re-x

RE-EXAMINATION

20 MR. BYERS: Q. I think Brambles-Brinks is a new company, a corporation distinct from Brambles? A. I understand so.

Q. You did raise, did you not, with the plaintiff the question of the validity of the pre-existing restrictive covenants in correspondence between the two solicitors? A. Yes.

Q. That was done I think first in January 1972. A. Yes.

30 Q. And agreement was struck as to the form of the definition of the word "client" in the plaintiff's solicitors Herbert Geer and Rundle letter of 24th February, 1972? A. Yes.

Q. Was there any communication between yourself and the plaintiff as to the identity of any of his clients between 9th July 1971 and 23rd March 1972? A. No.

Q. You have mentioned, I think, that you first saw Mr. Hargreaves at your suggestion? A. Yes.

40 Q. In relation to the Boral insurance business can you remember who it was who first mentioned that topic? A. I can't remember.

Q. Or when it was mentioned? A. I can't

remember that either.

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Court of N.S.W.

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Transcript of
oral evidence

M.D.W. Phillips
re-x fur xx

Q. I think you, during the time you were with Stenhouse, wrote a number of letters - and I will read these out, by agreement - to Mr. Hargreaves as general manager of Boral Insurance & Fund Management Limited. With His Honour's permission I will read the dates; 25th March 1970, 23rd April 1970 and 5th May 1970 in relation to public liability; on 22nd May 1970, 3rd June 1970, 26th November 1970 and on the 16th February 1971 on which two letters were sent; in relation to other topics on 18th March 1970, 3rd February 1971, 1st October 1970, 5th November 1970, 19th March 1970, 25th March 1970, 14th January 1971, 11th November 1970, 3rd June 1971, 21st May 1970, 2nd June 1970, 14th July 1970, 28th July 1970, 17th September 1970, 18th March 1970, 20th April 1970 and 15th May 1970.

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20

Just one other question; You have mentioned P.L.A. what does P.L.A. stand for?

A. P.L.A. stands for M.W. Payne Liability Agencies Pty. Limited, which was a company that I thought the idea up and together with a friend of mine in London, Michael Payne, after whom it is named, with the support of Stenhouse, was formed some time ago in Melbourne. It was the first company that was formed outside Lloyds to underwrite, with the blessing of the committee of Lloyds, and for that reason I regarded the papers as of some historic value, certainly to me.

Q. These are the ones you mentioned to Newton? A. Yes.

FURTHER CROSS-EXAMINATION

MR. LUSHER: Q. After you returned from London were you not using Payne's offices yourself, personally? A. Yes. Paynes is a subsidiary of Heaths.

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HIS HONOUR: Q. You say you went to London the day after you resigned from Stenhouse. May I take it that would be then some time in July 1971? A. Yes, the Saturday. It was the Saturday I left.

Q. When did you come back? A. About the following Sunday fortnight, because I told Mr. Kidd that I would return to work for them for a month if they wanted me to. He said that my office would be open and I could use it and he would even pay me while I went through anything they had any queries on. When I got back they didn't want to take it up.

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M.D.W. Phillips
fur xx

10 Q. You came back from London in July 1971 - would that be right? A. Yes.

Q. You were in Australia then constantly from that time? A. No. I have been to Hong Kong on business and I have also been to Britain again recently.

Q. You were then in contact with Mr. Hargreaves shortly after your return? A. Yes.

20 Q. And you remained in contact with him until, amongst other things, you gave a quotation to him on the 27th March 1972 - is that right? A. Yes, that is right.

HIS HONOUR: I was looking through the evidence Mr. Hargreaves gave. I am looking at p.18 and following. I will be corrected if I am wrong, but as I understand that evidence it indicates that as far as insurance of Boral companies is concerned, sometimes that insurance was done by B.I.F.M. acting as an insurance company and actually directly insuring it?

30 A. Yes.

Q. Sometimes by B.I.F.M. acting as an insurance broker and arranging for an outside company to insure? A. Yes.

Q. And sometimes by B.I.F.M. going to an outside broker who, in turn, would arrange for an outside company to insure the Boral companies - is that right? A. Yes.

40 Q. And sometimes by insurance being placed direct by the Boral companies with outside companies? A. I don't know whether any Boral subsidiary or for that matter the holding company would - I have no part of this information but it could happen that it would go without the offices of Boral Insurance and

Fund Management.

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Transcript of oral evidence

M.D.W. Phillips
fur xx ret'd

Q. In any event, apart from that qualification, you were aware that that was the way the Boral group of companies were operating the most of their insurances?

A. Yes.

Q. When you were discussing whatever you were discussing with Mr. Hargreaves after your return from London did it occur to you that if your then existing agreements were valid you were acting in breach of them?

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A. Well, up until we had general agreement at least - I could say general agreement on the new agreement, I had no conversations with Hargreaves the essence of which would have been to do business for Boral. They were all related to this City Mutual matter which loomed very large in our lives in those days and still does; I am still talking to him about it.

20

Q. I am not quite sure that that clarifies the particular point. When did you first discuss with Mr. Hargreaves anything that would relate to insurance of Boral companies?

A. It would certainly have been mentioned in the discussions prior to say December 1971.

Q. Did it occur to you that in discussing those matters you would be in breach of your then existing agreement? A. Not in the manner in which they were being discussed. I had no organisation at all. All we had was a 47½ interest in a company, which interest I sold - I negotiated the sale of because it was completely unsatisfactory. There was no reason for me discussing business other than, you know, as a general subject between Insurance men.

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Q. Did you ever tell Mr. Hargreaves that the only way you would do business with him was on the basis of reinsurance of B.I.F.M. risks? A. No.

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(WITNESS RETIRED)

(List of Associated companies tendered and marked Ex. 6)

HIS HONOUR: Perhaps it can be noted that the document Ex. 6. is agreed to be the list of associated companies, subsidiary or related companies, referred to in cl. 9 of Exhibit "A".

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Transcript of oral evidence

(CASE FOR THE DEFENDANT CLOSED)

(NO CASE IN REPLY)

(Two copy letters dated 21st November, 1969 from Boral Limited respectively to the Manager Stenhouse (Australia) Limited and the General Manager of City Mutual General Insurance Limited tendered and marked part of Exhibit "J")

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HIS HONOUR: By consent I order that the summons be amended to be in the form of summons initialled by me and filed with the papers.

(Counsel addressed)

(Further hearing adjourned to 10 a.m. Wednesday 4th October, 1972.)

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No. 5

JUDGE'S NOTES

11TH, 25TH AUGUST, 1972
1ST, 27TH & 28TH SEPTEMBER, 1972.

STENHOUSE AUSTRALIA LIMITED V. PHILLIPS

FRIDAY 11TH AUGUST, 1972.

In the Supreme
Court of N.S.W.

LUSHER Q.C. & WOOD for plaintiff

No. 5

DEAN Q.C. & BEAUMONT for defendant

Judge's Notes

B/C S/O 25.8.72

FRIDAY 25TH AUGUST, 1972

WOOD for plaintiff

BEAUMONT for defendant

B/C S/O 1.9.72

FRIDAY 1ST SEPTEMBER, 1972

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NICHOLAS mentions by consent of all parties -

by consent existing undertakings to continue
up to and including the hearing.

B/C S/O 27.9.72

WEDNESDAY 27TH SEPTEMBER, 1972

LUSHER Q.C. & WOOD for plaintiff

BYERS Q.C. & BEAUMONT for defendants

EXHIBITS (P) (a) Agreement 23.3.72
(b) Agreement 6.9.66
(c) Copy of Agreement 11.12.64 20
(d) letter dated 25.9.72
(e) specimen Insurance Manual Boral Limited
(f) Industrial all Risks wording

- (g) Public Liability and Products
wording
(h) letter dated 6.7.72 together
with attachments.
(j) bundle of letters from Stenhouse
to Boral from 1969 to 1970
(k) documents from the Heath file
dated 28.4.72
(l) 2 documents dated 25.11.69 &
16.3.70 respectively.
(2 letters copy 27.11.67 from Boral to
Stenhouse - part of Ex (j)).

In the Supreme
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Judge's Notes

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- EXHIBITS (D) (1) letter from Stenhouse to Hargreaves
dated 26.6.72
(2) letter from C.E. Heath Insurance
to Mr. Hargreaves dated 27.3.72
(3) letter to Mr. Wentworth dated
12.5.71
(4) letter from Stenhouse to Mr. Phillips
dated 13.5.71
(5) photo copy Boral 116130 Memorandum of
Association
(6) document agreed to be listed of Subs.
Coys. Cl.9 in Ex (a)

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THURSDAY 28TH SEPTEMBER, 1972

APPEARANCES AS ABOVE

TUESDAY 3RD OCTOBER, 1972

APPEARANCES AS ABOVE.

HIS HONOUR: I ORDER, by consent, that the Summons be
amended to be in the form of Summons in-
itiated by me and filed in papers.

30

WEDNESDAY 4TH OCTOBER, 1972

WOOD for plaintiff

BEAUMONT for defendant

B/C S/O 26.10.72

155.

THURSDAY 26TH OCTOBER, 1972

In the Supreme
Court of N.S.W.

WOOD for plaintiff

No. 5

RAFFELL for defendant

Judge's Notes

JUDGMENT DELIVERED

SUIT DISMISSED WITH COSTS.

(Stamp)
SUPREME COURT N.S.W.
EQUITY DIVISION

(Sgd.) D. Thollar

(ASSOCIATE)

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No. 6

REASONS FOR JUDGMENT OF HIS HONOUR MR. JUSTICE MAHONEY
3RD 4TH & 26TH OCTOBER 1972

HIS HONOUR: This proceeding comes before me on summons dated 3rd July, 1972. An ex-parte injunction was granted against the defendant during vacation; the matter was first mentioned, after vacation, before me on 11th August, 1972; the matter was fixed for hearing on 27th September, 1972, and the hearing, occupying four days, concluded on 4th October, 1972.

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No. 6

Reasons for
Judgment

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The plaintiff claims declarations and injunctions based upon the allegation of a breach by the defendant of the terms of an agreement under seal dated 23rd March, 1972, made between the plaintiff and the defendant. (I shall refer to that agreement as "the present agreement").

(a) General outline of circumstances giving rise to the dispute: The defendant was employed as an executive by a company of the Paxton group of companies, companies engaged in the business of insurance brokers.

20

There are throughout the world a number of companies bearing the name "Stenhouse", these being companies controlled by or associated with interests

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Reasons for
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in the United Kingdom engaged in the business of insurance broking.

Some time prior to the end of 1964, control of the Paxton group of companies was acquired by or on behalf of what I shall call compendiously the Stenhouse interests.

Subsequently, the Stenhouse interests set up a group of companies in Australia.

The plaintiff, Stenhouse Australia Limited, is the holding company of this group of

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companies in Australia. The "operating companies" include Stenhouse Queensland Limited, Stenhouse New South Wales Limited, Stenhouse Newcastle Limited, Stenhouse Victoria Limited and Stenhouse Northern Territory Limited, (each of these carrying on what, in substance, is the insurance broking activities of the Stenhouse interests in the relevant areas in Australia).

Stenhouse Scott North Australia Limited,

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(a company by which insurance is placed on the London market for other members of the Stenhouse group); Stenhouse Re-insurance Pty. Limited, (a re-insurance broking company that places re-insurance between one insurance company and another); and Stenhouse

Insurance Services Limited, (described as "technical centre of the Stenhouse Group in Australia"), (I shall use the term "Stenhouse Group" to include these companies generally).

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When the Stenhouse Group acquired control of the Paxton Group, the defendant accepted employment with the Stenhouse Group. By an agreement dated 11th December, 1964, he accepted employment with Stenhouse Scott North Australia Limited. This agreement provided for long-term employment and contained provisions restrictive of the defendant's operations in the insurance broking field during and after the termination of that agreement.

10

On 6th September, 1966, an agreement was made between Stenhouse Scott North Australia Limited, Stenhouse Australia Limited, and the defendant, which in general, recognized that the defendant became the employee of Stenhouse Australia Limited, and the agreement sought to novate the rights and obligations of the parties under the former agreement by substituting Stenhouse Australia Limited for Stenhouse Scott North Australia Limited.

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The defendant, until the termination of his employment, continued to be governed, in his

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relationships with the Stenhouse group by
the agreement of 6th September, 1966.

During his employment, the defendant was,
as to the main part of his activities,

concerned with re-insurance work for the
Stenhouse group, in Australia and with

United Kingdom companies. In this work,

he made arrangements whereby companies

which had accepted, to the insured, the

liability primarily for insuring the in-

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sured, became indemnified, as to part or

all of the risk involved, by other compan-

ies in Australia or the United Kingdom.

However, in addition, his activities in-

cluded direct contact with persons seeking

insurance or who obtained insurance with

or through the Stenhouse Group. This part

of his activities was not negligible, but

the general conclusion which I draw is,

that it was substantially less than half

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of his total activities during such employ-

ment. Towards the middle of 1971, the de-

fendant discussed with the executives of the

Stenhouse Group his resignation from his

employment and, ultimately, he resigned from

such employment, it being agreed that the

date of such resignation was 9th July,
1971.

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The defendant then, immediately, set about
the constitution in Australia of a busin-
ess in competition with the Stenhouse
Group. The day after his resignation, he
left Australia for London and there negot-
iated with an insurance broking group
bearing the name of C.E. Heath. Ultimately,
as the result of these arrangements there
was formed in Australia a company, C.E. Heath
Insurance Broking (Australia) Pty. Limited,
and that company commenced its operations as
an insurance broker in a significant form,
by the first half of 1972.

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At some time after his resignation from the
Stenhouse Group and before January 1972 neg-
otiations commenced between the defendant
and the Stenhouse Group as to the terms of
the restrictive covenants binding the def-
endant. The defendant had had some legal
advice concerning the agreement of 6th
September, 1966, prior to his resignation,
although the advice received by him does not
clearly appear from the evidence.

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However, by January 1972, the negotiations

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had proceeded to agreement at least upon the definition of "client" (as set forth in Cl.8 of the present agreement), i.e., the parties had arrived at a measure of agreement as to what were to be the restrictions to operate upon the defendant in respect of insurance broking.

Ultimately, an agreement was made between solicitors on behalf of the defendant and the Stenhouse Group respectively, and the present Agreement was executed on 23rd March, 1972. It was not suggested that the terms of the present Agreement were agreed between the parties prior to the defendant's resignation; they are something which arose (in a manner which is not precisely clear) after such resignation. In the present Agreement, it is recited that the defendant "has tendered his resignation as an employee of Stenhouse and has requested Stenhouse to release him from his obligations under "the previous agreements", and it is further recited that "Stenhouse has agreed so to release Mr. Phillips but only on the condition that he undertakes to be bound by the obligations hereinafter stated".

It was claimed in argument, on behalf of the defendant that these recitals were clearly false and, certainly, the inference which I would draw from the evidence, is that, the present Agreement was first discussed after the resignation had taken effect; it does not appear to have been suggested that the contrary was the position. However, this aspect of the matter was not placed in the forefront of the argument of either counsel and no submissions were addressed to me as to the extent of which it would be proper for me to form any conclusion of fact contrary to these recitals.

The plaintiff alleges that the defendant has acted in breach of the present agreement. The breaches alleged were particularized in a letter dated 29th September, 1972, from the solicitors for the plaintiff to the solicitors for the defendant, and (as far as here relevant) were as follows:

"The defendant is alleged to have acted as an Insurance Broker for Boral Limited and/or its Subsidiaries and Associated Companies and alternatively Boral Insurance and Fund Management Pty. Limited between July, 1971 and October, 1972. It is alleged that Boral Limited and/or

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its Subsidiaries and Associated Companies and alternatively, Boral & Fund Management Pty. Limited were clients within the meaning of the Deed between the parties dated 23rd March, 1972.

It is alleged that the defendant solicited, as servant or agent of C.E. Heath Insurance Broking (Australia) Pty. Limited, business of Boral Limited and/or its Subsidiaries and Associated Companies and alternatively, that of Boral & Fund Management Pty. Limited between July, 1971 and October, 1972. The insurances placed were the Industrial All Risk Insurance; the Crime Policy and the Loss of Profits Policy." 10

Boral Limited (to which, in association with its subsidiary and associated companies I shall refer to "the Boral Group") is a company which, by itself or its subsidiary or associated companies, carries on business in several diverse fields of industrial activity. 20

The Boral Group, in these activities, would prudently be expected to effect substantial insurance cover, for example, in respect of Motor Vehicles Insurance, Public Risk Insurance, Workers' Compensation Insurance, Products Liability Insurance, and the Loss of Profits Insurance. 30

Prior to 1970, the Boral Group had effected insurance in various ways in respect of various of the companies in the group. However, in 1969, there was carried forward a

proposal that what was described as a "captive insurance company" should be formed. This was to be a company which itself carried on insurance business and it was contemplated that this company would arrange (to use the term in its neutral sense) all insurance needed by the Boral Group. Ultimately, Boral Insurance & Fund Management Pty. Limited (to which I shall refer as "BIFM) was formed as such a company and it undertook the arranging of the insurance for the Boral Group.

In general terms, BIFM, for this purpose, acted both as an insurance company, in the strict sense, and as an insurance broker. It procured the necessary statutory recognition of itself under relevant legislation. In respect of some insurance risks of the Boral Group, it became the insurer; in respect of such risks, it then arranged or relied upon already arranged, re-insurance treaties, so that, in economic terms, the proportion of the loss for which BIFM would be liable ultimately in respect of any claim would only be a relatively small

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percentage of the total.

In other instances, BIFM acted as insurance broker and, procured insurance companies to insure the Boral Group (or relevant companies therein), with or without the payment of a commission or rebate to BIFM. In other cases, acting as an insurance broker, BIFM arranged with other insurance brokers, such as the Stenhouse Group, to cause the Boral Group (or relevant Companies therein) to be insured. 10

In general, as explained by Mr. Hargreaves, the general manager of BIFM, the forms of the arrangements qua insurance made by BIFM were those which were in the particular case the best that could be obtained in the interests of the Boral Group.

BIFM commenced this form of operation at the beginning of 1970 and thereafter Mr. Hargreaves was, for practical purposes, the channel through which the insurance of the Boral Group were placed. 20

Mr. Hargreaves, as a person, highly skilled in the insurance market, did not, at any relevant time, place the insurance business of the Boral Group with any one insurance

company or through any one insurance broker exclusively. I infer that he made it clear upon the market generally, that the extensive insurance business of the Boral Group could be obtained, as to part, by any company or broker which presented a proposal to him sufficiently attractive for the purpose. In fact, the Stenhouse Group acted as insurance broker of some classes of insurance but by no means all of the insurance arrangements affecting the Boral Group between 1st January, 1970 and 30th June, 1972, (the later date being the normal date of expiry of insurance contracts made by the Boral Group). Other insurance companies and insurance brokers were also utilized by Mr. Hargreaves for similar purposes. Shortly after he ceased to be employed by the Stenhouse Group, the defendant was in communication with Mr. Hargreaves. The defendant knew of Mr. Hargreave's position with BIFM and I infer that he was of the view at all relevant times that normally the insurance business of the Boral Group would be placed in accordance with recommendations made by Mr. Hargreaves. The

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matters discussed by the defendant with Mr. Hargreaves during the second half of 1971, no doubt, included matters other than the actual placing of the insurance business of the Boral Group; I am prepared to accept that some of the matters discussed "related to this City Mutual matter" as the defendant described it, a matter relating to the manner in which the Heath Company could transact workers' compensation insurance business generally. However, I infer that discussions took place between the defendant and Mr. Hargreaves as to the placing of the insurance business of the Boral Group during discussions prior to December 1971, and prior to the making of the present Agreement on 23rd March, 1972.

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On or about 27th March, 1972, C.E. Heath Insurance Broking (Australia) Pty. Limited submitted detailed proposals to Mr. Hargreaves in relation to substantial insurance business sought in respect of the insuring of the Boral Group, (I state the matter in this general form and without distinguishing between an insurance arrangement which

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would properly be described as a re-insurance of insurance risks of the Boral Group already undertaken by BIFM, and direct insurance of the Boral Group). Ultimately, later in 1972, insurance policies were effected relating to insurance risks of the Boral Group.

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The plaintiff complains that in these circumstances the defendant has committed a breach of the present agreement and seeks relief in respect of such breach.

(b) The form of the proceedings:

The present proceedings was commenced on 3rd July, 1972, by a summons supported by an affidavit. The matter in dispute was one which required speedy determination, and the parties, in default of formal pleadings, have during the hearing agreed upon the formulation of the matters in issue between them.

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During the course of the hearing, it became expedient to amend the form of the summons as originally filed and on 3rd October, 1972, without objection, I allowed the summons to be amended to comprehend the issues which the parties

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desired to be determined.

(c) The form of the agreements between the parties:

The original agreement of 11th December, 1964, between the defendant and Stenhouse Scott North Australia Limited, provided for the employment of the defendant until he should obtain the age of sixty years, subject to termination as provided in the agreement.

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The defendant agreed that he would not, for five years, after the determination of the agreement for any cause,

"within 25 miles radius of the G.P.O. Sydney, directly or indirectly engage or be concerned whether as principal servant or agent in the business of Insurance Broking or the business of an Insurance Agent or solicit the custom of any person, firm or corporation, who during the continuance of this agreement shall have been a customer of the Company and/or Stenhouse Holdings Limited and/or any Company associated therewith or a subsidiary thereof in competition with any such Company". (Clause 9)

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As a separate and independant covenant, the defendant agreed that he would not for five years after the determination of the agreement for any cause,

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"directly or indirectly engage or be concerned in the business of insurance broking or the business of an insurance agent in any town in Australia in which the Company

and/or any of its associated insurance broking companies shall have at the date of termination of this agreement a recognised place of business or in any place within Australia solicit the custom of any person, firm or corporation who during the continuance of this agreement shall have been a customer of the Company and/or Stenhouse Holdings Limited and/or any company associated therewith or a subsidiary thereof in competition with any such Company": (Clause 11)

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The agreement of 6th September, 1966, provided that the original agreement should operate as though it had been entered into with Stenhouse Australia Limited as "The Company": (Clause 3), but it provided that the defendant should continue to be bound to Stenhouse Scott North Australia Limited to observe inter alia clauses 10 and 11 of the original agreement.

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By the present Agreement it is provided that "with effect from the 9th day of July, 1971" the earlier agreements and the defendants employment and obligations thereunder should cease and determine: (Clause 1)

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The present agreement then purports to impose restrictions upon the defendant (as far as are here relevant) as follows:

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"4. Mr. Phillip covenants that he will not for a period of five years from the said 9th day of July, 1971, unless with the prior written consent of Stenhouse directly or indirectly as principal servant or agent solicit whether by written or oral communication or otherwise Insurance business from any client as hereinafter defined.

5. In the event that any client of Stenhouse shall, within a period of five years from the said 9th day of July, 1971, (and that whether or not such client is a client of one or more of the Stenhouse Companies at the time) place Insurance business (whether or not business of a type at presently transacted by Stenhouse for such client through the agency of Mr. Phillips or through any agency other than that of one of the Stenhouse Companies referred in clause 2 of this Agreement so that Mr. Phillips or any person firm or corporation for whom Mr. Phillips is a Principal or Agent or by whom Mr. Phillips is employed and with whom he is associated or connected in any way receives or becomes entitled to receive directly or indirectly any financial benefit from the placing of such business than Mr. Phillips agree to pay or procure that there shall be paid to Stenhouse a one half share of the commission received in respect of such transaction and such commission shall be the gross commission (including any allowance) paid by the Insurance Company in respect of such transaction without allowance for any rebate made to the client and after deduction of any procurement fee properly paid in respect of prospective clients as hereinafter defined to any third party for the introduction of such business such procurement fee not to exceed one third of the total initial commission. The sums payable to Stenhouse pursuant to this Clause shall continue to be paid for a period of five years (but only if there is a financial benefit as aforesaid for each year) upon the date on which such insurance business is so first placed and

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shall be paid to Stenhouse concurrently with the settlement of the nett premium due to the Insurance Company concerned.

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10 6. Mr. Phillips covenants that except in the circumstances provided for in clause 5 hereof, he shall for a period of three years from the said 9th day of July, 1971, unless with the prior consent in writing of Stenhouse directly or indirectly as principal servant or agent, act as Insurance Broker for any client has hereinafter defined.

20 8. For the purposes of clause 4, 5 and 6 of this Agreement the word "client" shall mean any person, firm or corporation who at the said 9th day of July, 1971 or in the preceding month was a client of Stenhouse or any of its associated companies with whom in the course of his employment with Stenhouse Mr. Phillips has had dealings or negotiations and further, shall mean a prospective client of Stenhouse or of its associated companies whose insurance business was the subject of negotiation with Stenhouse through the services or agency of Mr. Phillip either at the said 9th day of July 1971 or within the period of 12 months preceding that date but shall be construed as excluding any person, firm or corporation who was a client or prospective client of Stenhouse as aforesaid and whose business is acquired by or becomes thereafter a subsidiary of any other person, firm or corporation which is at the said 9th day of July, 1971, or may become during the term of this agreement a client of Mr. Phillips or any person, firm or corporation by whom he is employed or for whom he is acting as agent, and further shall be construed as excluding any Insurance Company.

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50 9. For the purposes of this Agreement 'associated company' or 'associated company of Stenhouse' shall mean and include any company which is a subsidiary or related corporation of Stenhouse within the meaning of section 6 of the Companies Act 1961".

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(d) The enforceability of the present Agreement:

I shall consider whether the present Agreement, or at least the relevant portions of it, are unenforceable as being unreasonable restraints of trade. For this purpose, I shall at this stage assume, without deciding, that the enforceability of the present Agreement is to be determined by reference to the principles normally applicable to restraints imposed in the ordinary master and servant context.

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(i) Clause 4:

This clause contains a five year restraint upon soliciting insurance business from a client of the Stenhouse Group (as defined). The restraint will be unenforceable unless it appears that, having regard inter alia to time of operation, area of operation and activities restricted, it is no more than is reasonably necessary to protect the legitimate interest of the plaintiff. I shall consider, first, the reasonableness of the restraint having regard to its time of operation. In considering the period for which a restraint may be validly imposed, it is

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relevant to consider what interest of the employer may be properly protected by the restraint and against what activities of the employee. It is clear that it is not legitimate for an employer to protect himself against mere competition from a former employee, even in respect of persons who are or have been his customers. However, it is legitimate to protect himself against something which goes to the relevant extent beyond "mere" competition. The interest which may be protected by a restraint is, no doubt, complex in nature and it is not possible to comprehend all aspects of it by a simple verbal formula, but it appears to be accepted that an employer has, for this purpose, a legitimate interest in his relation with his customers, and that he may properly protect that relationship against interference by the use by the former employee of what may in general be called the influence of that employee in respect of such customers, gained during the employment. The nature of the relationship between the employer and the customer, and of the relevant influence of the employee was considered by the High Court of Australia in Lindner v.

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Murdock's Garage (83 C.L.R. 628). Latham, C.J. referred to the fact that an employee who is "in a position which brings him into close and personal contact with the customers of a business in such a way that he may establish personal relations of such a character that if he leaves an employment he may be able to take away" those customers may substantially affect the employer's goodwill of the business and, therefore, a restraint preventing the use of "the knowledge of and intimacy with the customers that he has obtained in the course of his employment" may be valid: at 636. His Honour referred to the servant learning details of the customer's likes and dislikes and something of their financial credit": at 637; and to the fact that "such knowledge can be used with effect ... to induce such customers to transfer their custom to a new employer": at 637. These observations, though contained in a dissenting judgment, do not appear to differ in principle from those stated by the majority of the Court.

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McTiernan, J. referred to the employee obtaining "such personal knowledge or influence over the customers of his employer" as to affect the trade connection and held that this would

justify a restraint; but his Honour pointed out that such a restraint "would not be permissible if the Court were unable to conclude that, by employing a defendant, the plaintiff had reasonable grounds for apprehending the plaintiff exposed its business to such danger": at 645.

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Fullagar, J. accepted that an employer "is also entitled not to have his old customers by solicitation or such other means enticed away from him", and that "what he is entitled to protection against is the use by the employee against him in his business of knowledge obtained by him of his employer's affairs and the influence acquired by him over his customers in the course of an ordinary trade and in the case of a professional man over what is more commonly called his clients": at 649.

Kitto, J. said:

"... they needed protection for their business connection against the possibility of its being affected by the personal knowledge of and influence over the customers which the appellant might acquire in their employment ..."

His Honour said that the employee

"should not be in a position to use the intimacies and the knowledge which he has acquired in the course of his employment in order to create or assist a competing business in the same area and by doing so undermine the business connection of

of the respondents"; at 654.

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His Honour cited with approval the following
passage:

"There are many methods of enticing away customers beside the method of direct solicitation impossible of detection and only known by result. But apart altogether from any conscious exercise by the former employee of such knowledge and influence as he may have acquired in his former employment the employer is entitled to protect himself against loss which might otherwise arise from the mere existence of a personal relation between his customers and his former servant. That relation, when resulting from the employment, is an advantage accruing to the employer and properly exercisable for his benefit as long as the service continues. The same relation would become a source of injury to the employer if the former servant were permitted to accept the custom which might voluntarily flow to him upon his opening an opposition business in the old locality. This danger is quite reasonably met, in our opinion, by a provision against serving the old customers for a limited period. The same reasoning is, we think, fully recognised by the common acceptance of a covenant carrying on a rival business at all in a given locality. Such a covenant has been repeatedly held to be reasonable, though it obviously has nothing to do with solicitation": at 655.

In the present case, evidence was add-
uced by the plaintiff directed to showing that
an ex-employee, in the position of the defendant,

would have acquired a particular influence of relationship with customers of the plaintiff with whom he came in contact. The evidence generally suggested this influence or relationship would have two aspects: there would be a personal relationship of friendliness or business access; and there would be peculiar knowledge of the client's business affairs and his insurance needs.

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(No particular reliance was made upon "matters of confidentiality" in the relationship and no reliance on this aspect of the relationship was made in the present case.)

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No particular stress was placed upon the first aspect of the influence or relationship, i.e., the personal one. No doubt, this aspect cannot be put aside entirely, but I draw the inference from what was said by Mr. Hargreaves and from the fact that no particular stress was placed upon this aspect either in evidence or in address that the personal relationship would be of little account if another person were able to offer insurance upon better terms and

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conditions. There was no particular evidence directed to the period of time over which this personal relationship might continue to be effective and I would not be satisfied, as a matter of fact, that it would continue to have any relevant effect for a period of five years.

As to the second aspect of the influence or relationship, that relating to knowledge of the client's affairs and insurance needs, it was towards this that the main emphasis in the case was directed. That there was knowledge to be gained and actually gained by the defendant in this regard was proved and not contested. However, little attempt was made to define the period during which it might be expected that this aspect of the influence or relationship would continue. Questions were therefore put to Mr. F.C. Hargreaves upon this point. He was accepted as a person with considerable experience in the insurance industry. He had, before taking his position with the Boral Group, been associated with the Queensland Insurance

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Company Limited, and had been the senior executive of Commercial & General Insurance Limited and had had substantial experience of a direct nature in relation to insurance brokers.

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As to part, Mr. Hargreaves' evidence was as follows:

10 "Q. Then perhaps you can assist me on this I am interested if you can tell me, and if you cannot be say so, in this question of the relationship which would exist between a broker and broker's own client; that is, not the insurance company but the insured or prospective insured? A. Yes.

20 Q. Is it possible firstly to express any view in your opinion as to this kind of problem. If a particular company has been a client of an insurance broker in the sense that the broker has from time to time arranged insurance for that company? A. Yes.

30 Q. How long does it take for the relationship to be broken so that as it were that Broker is in no better position than any other Broker in the industry so far as obtaining business from that client. Do you follow the question I have asked you? A. I think I do, sir.

Q. Can you tell me first, is it possible to express an opinion on that? A. I can express a personal opinion on that. Yes, I think so. ...

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Q. Do you mean by that that is purely a guess or a speculation or is it something you can derive as a matter of expertise from your experience?

A. This is something from my experience.

...

Q. Mr. Hargreaves can you tell us with whatever qualifications you think appropriate how long it would take between a person having been a broker of a client in the sense to which I have referred then ceasing to do so?

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A. Yes.

Q. How long would it take for that person to cease to have some particular effect or relationship with that client which would put him in a better position than any other broker in the industry?

A. It would take a broker a number of years to become very conversant with the problems of his client. Having reached that point, he would be of considerable value to the client because he could anticipate the needs of the client and what insurance requirements would be necessary. If for some reason the broker severed a relationship with the company, the company itself would appoint another broker which would take time and it would then take the new broker quite a considerable amount of time to become familiar with the company's affairs.

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...

It would take the broker considerable amount of time to become familiar with the company's affairs. Regarding putting him or putting a person in a worse position or a better position, the brokers that I would use would have to have first class knowledge and ability. I don't think they would be put in any better or worse position, Your Honour.

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Q. Does that mean - correct me if I am wrong because I am not sure I understand

you, but if there had been a broker or a particular employee of a broker?

A. Yes.

Q. Who had been acting for you, you being the client? A. Yes.

Q. In the sense that I have referred to, and then that relationship was broken or as it were terminated?

A. Yes.

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Q. Would there be a period of time for which, within which, that broker employee would have some advantage, some edge over any other broker competing with your business? A. Yes.

Q. Because of his relationship? A. Yes.

Q. The expertise he built up? A. Yes.

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Q. Is it possible to express an opinion as to how long that would be likely to last, and take it in the case of the Boral Group of Companies? A. The changes are very frequent in Boral because of its activities. I would think a period of possibly two to three and a half years' absence from Boral would mean that the broker had completely lost touch with the activities of the company and therefore he would be at a disadvantage.

Q. I direct that obviously to Boral?

A. Yes.

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Q. Are you in a position to express a similar opinion in relation to companies generally, or in relation to particular classes of companies generally who would be such clients? A. I think so. I think that if one takes an ordinary manufacturing company who keeps to one particular industry, it would - possibly three or four years may not make any difference, but with a conglomerate or a company that has many changes and take-over activities or many activities, well, the period obviously is less than I suggested."

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Subsequently, Mr. Hargreaves in answer to
counsel for the defendant, gave evidence as
follows:

"Q. Now you have mentioned a period of
two to two and one half years. I
suppose once your refinery activities
were removed, that period would be dim-
inished, would it not? A. As far as
that section of the business, but as I
indicated earlier, in getting out of the 10
refinery business we have gone into
other complex types of business so,
where we have got rid of one problem,
we have taken on other problems. I am
speaking now just as Boral Limited or
for Boral Limited.

Q. The actual acquisition by a broker
of the knowledge necessary to place insur-
ance through a particular company could
be, of course, quite small, for example, 20
a couple of weeks or a couple of months?
A. Could be, yes.

Q. And the rest that happens thereafter
is that, once having acquired the know-
ledge, the broker as it were just happens
to know the people involved, is that
right? A. It is more than knowing the
people it is knowing the operations of
the company itself.

Q. That it involved in as it were study- 30
ing the company's needs? A. Yes.

Q. And in some companies that may be a
very brief period of time? A. Yes.

Q. For the broker to learn that; in
other companies it may take longer?
A. True.

Q. Of course, one could not say
over the insurance field at large what
would be the length of time necessary to
acquire that knowledge? A. No. 40

Q. It varies? A. It would vary it
would very very considerably.

Q. And I presume therefore the less sophisticated the manufacturer's operation of the company, the more transient is its attachment to the broker?
A. Yes.

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Q. And one particular company may, of course, place with different brokers different types of insurance? A. Yes.

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Q. That would be quite usual? A. Oh yes. We do it ourselves and it is quite common.

Q. For some types of insurance the knowledge of the company's undertaking and mode of operation is substantially unnecessary? A. Yes.

Q. For example, motor vehicles? A. Yes. "

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No other evidence of an extensive kind was lead directly relating to this aspect, although witnesses called subsequently, including Mr. Kidd (senior executive of the Stenhouse Group in Australia) and the defendant might have been expected to be able to deal in detail with the matter if there were any significant disagreement with the effect of Mr. Hargreaves' evidence. The defendant gave some evidence which could relate to the question, but which appeared more directly to be concerned with the replacement of insurance executives by the plaintiff, and such evidence would suggest that the period of operation of the broker's influence or relationship in respect of a client would be no more

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than and might well be significantly less than that referred to by Mr. Hargreaves. In the light of the evidence generally, I concluded that in respect of a company having complex activities (such as the Boral Group) the particular influence or relationship here in question would cease after some two and two and one half years; in a case of a company having less complex activities (such as an ordinary manufacturing 10 company), such influence or relationship would cease after about three to four years; and the period of time over which such influence or relationship would continue, would vary significantly according to the particular client, the nature of his business, the nature of the insurance cover dealt with through the particular broker, and, no doubt, by virtue of other factors.

I shall now consider the reasonableness of 20 the restraint imposed by cl. 4.

The fact that a group of clients, in respect of whom an influence or a relationship would exist, might be such that such influence or relationship would last longer qua some than qua others, does not mean that, in my view,

that it is not possible to impose a restraint by reference to a single period of time, which does not coincide with the precise time period of the existence of that influence or relationship in respect of any one client. Conversely, it does not mean, in my view, that it is sufficient to take the longest of such time periods and impose a restraint for that period.

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10 The law, in matters of commercial restraints, will, I believe, take a practical view, bearing in mind the difficulties of proof of, e.g., solicitation or other improper use of the influence or relationship: see the observations of Latham, C.J. loc. cit. at 637; and of Kitto, J. at 655; and the practical desirability of fixing a general period applying to all activities included in the restraint.

20 However, a restraint which extends beyond the actual period during which the influence or relationship may be unfairly used "will be jealously scanned"; at 650 per Fullager, J.: and the period of restraint must, I believe, "fairly approximate" the estimated time within which the employee's influence may

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operate: see at 655-6 per Kitto, J.

In all these circumstances, I am of the view, that the period of five years fixed by Cl. 4 is longer than is reasonable in the interests of both parties. This period is not supported in terms by any witness as a period over which the influence or relationship in question would extend in respect of any client of the Stenhouse Group. In relation to large and complex companies (such as the Boral Group), the period suggested is considerably less than five years. It is relevant to note that a significant number of the clients with whom the defendant was alleged by the plaintiff to have come in contact were of a substantial kind, e.g., the Nabalco Group, the B.H.P. Group, and the Brambles Industries Group. In respect of less complex companies, the period of three or four years or perhaps more, was referred to, but I note that, although the period of time in effect runs from 9th July, 1971, the definition of the term "client" in cl.8 is such that the restriction could operate in respect of a company whose only association with the defendant was that, within the period of twelve months preceding 9th July, 1971, he had had unsuccessful negotiations in respect of insurance business.

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The difficulty of fixing with precision the period within which the kind of influence or relationship herein question may continue must, I believe, be borne in mind, and, no doubt, some flexibility in fixing a period of time by reference to or affected by the continuance of the influence or relationship must be allowed. It may be that a restraint which cannot be shown to be measured precisely by the limits of the influence or relationship in question can yet be held valid, even at this stage of the development of this branch of the law: see generally the discussion, in Mr. J.D. Heydon's book "The Restraint of Trade Doctrine", of the significance of what he described as "Customer connexion" (esp. at 154-155.) However, in the present case, the evidence which is before me satisfies me affirmatively, that in relation to the client particularly in question, viz., the Boral Group, and a significant number of other clients of the same general kind, the influence or relationship would have ceased substantially before the end of the five-year period, even if the period be calculated from 9th July, 1971, simpliciter; and the absence of any substantial evidence which I would accept upon this issue, from the plaintiff,

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strengthens the inference which I draw that, positively, the relevant influence or relationship in respect of a substantial number of clients of the plaintiff would have ceased before the expiration of such period. Where the evidence positively establishes the point beyond which that influence or relationship will not operate, then a restraint intended to operate beyond that point should not, in my view, be upheld.

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Apart from the question of time of operation of the restraint in Clause 4, it is to be noted that the restraint imposed upon the defendant operates to prevent solicitation of clients (as defined) anywhere in the world and whether or not, e.g., the risk to be insured exists at a place far removed from Australia. In terms, if the defendant migrated to Canada, he would be restrained by clause 4 from soliciting business from a client in respect of the client's activities in Canada.

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The significance of the width of the restraint qua area of operation must be assessed in the light of the particular circumstances of the present case. In this regard, I note, that whereas, the normal master-servant restraint is to be assessed in respect of reasonableness at

the date when the restraint is contracted for, normally at the commencement of the employment, in the present case, the restraint was imposed at the time when it was known or could be ascertained who were, in fact, the "clients" in respect of whom the restraint is imposed. If the fact were that such clients had no present activities outside Australia, and that the possibility of the restraint operating in fact upon ex-Australian activity of the defendant was remote, this would require to be taken into account. There was, in the present case, no detailed analysis of the clients or their actual prospective operations although a general reference was made to them in the course of the evidence of, e.g., Mr. Laird, the managing director of Stenhouse N.S.W. Limited.

In the circumstances, I am not satisfied, whether or not the fact that the restraint, in terms, would operate outside Australia would in any practical sense impose a significant burden upon the defendant. Reference was made in the evidence to the fact that insurance brokers and insurance business generally are related to companies operating in the United Kingdom and elsewhere in the world and that American influence operates in the

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insurance field in Australia. Mr. Kidd, the senior executive in Australia of the Stenhouse Group, appears to have come to Australia from the United Kingdom and the defendant was said to have visited the United Kingdom on several occasions in relation to insurance business.

In so far as the onus may be upon the plaintiff in this regard, I am not satisfied that the restraint, in so far as it would operate outside Australia, in the sense to which I have referred, 10 would not impose an unreasonable restraint upon the defendant having regard to the legitimate interests of both parties.

It is relevant to consider also, the particular activities of the defendant upon which the restraint is imposed. The restraint is imposed upon soliciting "insurance business from any client". No attempt is made to distinguish between aspects of the insurance business of a client with which the defendant in fact had 20 "dealings or negotiations": Cl.8; and aspects of the client's insurance business with which the Stenhouse Group and the defendant had no particular relationship. In addition, no attempt is made to distinguish between the aspects of the insurance business with which the defendant

was relevantly concerned and those with which he had no contact. It is conceivable that the defendant, whose activities were mainly concerned with re-insurance, might in respect of the insurance business of a particular client have been concerned only with that aspect relating to re-insurance; and the extent to which activity in respect to that aspect would have required the establishment of the particular influence of relationship in question does not directly appear from the evidence.

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10 Were this the only aspect of the restraint, the reasonableness of which was in question, it might be argued that the restraint was not unreasonable. However this be, when the effect of the operation of the restraint is considered generally, in the light of all of the matters to which I have referred, I hold that the restraint imposed by Cl. 4 is greater than is
20 reasonably necessary for the protection of the legitimate interests of the employer and as between the employer and the employee, is, on balance unreasonable.

(b) Clause 5:

This Clause, in effect, requires that the defendant pay (or procure to be paid) sums

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of money, if, within the same five year period, a client of the Stenhouse Group places insurance business in such a fashion that the defendant or a person for whom he is acting or by whom he is employed or with whom he is connected or associated in any way, receives a direct or indirect financial benefit.

Clause 5 is not in its terms a restraint of trade; it is a covenant for payment of sums of money in stated circumstances. 10

However, the clause, in my view, is directed to ensuring that trade with "clients" will be restricted, and this result is sought to be achieved by imposing pecuniary obligations or imposts if the trade, in fact, takes place. In my opinion, such a provision falls to be considered as to its enforceability, by reference to the normal restraint of trade principles:

see Buckley v. Tutty (1971) 46 A.L.J.R. 20
23; Howard F. Hudson v. Ronayne (1972)
46 A.L.J.R. 173.

The exemption contained in Cl. 6 of the present Agreement confirms my view that at least one of the major functions of

Cl. 5 is to deter or persuade the defendant not to do insurance business with clients of the Stenhouse Group during the five year period.

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In considering the enforceability of this restraint, it is relevant that it is not imposed upon solicitation or other activities which in terms relate to the exercise by the defendant of the influence or relationship to which I have referred; the restraint is imposed by reference merely to the placing of insurance business.

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A restraint of this kind may be justifiable, for the reasons referred to by Kitto, J. in the Lindner case (at 655), but the generality of the restraint is accordingly to be subject to careful scrutiny.

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The circumstances in which the obligation to pay arises are very wide. The clause comprehends any class of insurance business; it applies if the insurance business is "placed" even though such placing results from the activities of a person with whom Mr. Phillips has no connection; and it operates because, inter alia, a corporation by whom Mr. Phillips is employed and with whom he is associated or connected in any other way, directly or indirectly, receives a financial

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benefit from the placing of the business. The relevant events may occur without any knowledge of or participation by the defendant in the transaction.

If the rationale of Cl. 5 be ultimately that the ex-employee shall not improperly affect the proprietary interests of the ex-employer, it is in principle difficult to justify the present restraint in so far as it may operate without the knowledge of or indeed against the will of the defendant.

Even if the restraint can be justified in cases in which there is not or cannot be any proved or inferred relationship between the fact upon which the restraint operates and the use by the employee of his influence or relationship as to the customer, the restraint should not be upheld where a significant number of the occasions on which the restraint may operate to require payment of the sum in question may be occasions as to which the defendant has no such knowledge or control as would enable him to prevent the employer being detrimentally affected. Also, the five-year period of the restraint is, for the reasons to which I have referred in relation to Cl. 4, longer than can be justified.

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I therefore hold that Cl. 5 operates to restrain the defendant in his trade, beyond what is reasonable, upon the principles which I have referred.

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(c) Clause 6:

Prima facie, this clause is an absolute restraint upon the defendant acting as an insurance broker for any client of the Stenhouse Group for three years from 9th July, 1971.

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The covenant contains the exception, "except in the circumstances provided for in clause 5 hereof". It is not clear precisely what is the operation of this exception.

20

The acts proscribed by Clause 6 (apart from the exception) appear within the boundaries of the circumstances giving rise to the operation of cl.5, i.e., if a client of Stenhouse placed insurance business "through the agency of Mr. Phillips", Mr. Phillips would be "acting as insurance broker" for that client. Therefore the exception in cl. 6 cannot be referring to a mere set of circumstances falling within cl.5; it would appear to be attempting to indicate that if payment is made in accordance with cl.5, then cl.6 has no application. (I assume for this purpose

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that when the defendant acted as insurance broker of the client, the relevant financial benefit would be derived for purposes of cl.5.) If this be the correct effect of the exception, then cl.6 in substance, provides that unless a payment is made in accordance with cl.5, the defendant will not act as insurance broker as set forth in cl.6. In terms there is no covenant to pay (as there is in cl.6); cl.6 operates to proscribe unless payment is made.

10

Upon this basis, is cl.6 enforceable?

There is undoubtedly a strong case to be made out for the enforceability of cl.6 viewed as an isolated restraint. The time period for which the restraint is to operate is arguably a reasonable compromise between clients in respect of whom influence would cease after about two or two and a half years, (such as the Boral Group) and clients in respect of whom the influence would be longer lasting. The law would permit, I believe, a practical compromise of this kind to be validly made.

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In addition, the apparent limitation of the restraint to persons of "client" status would normally be a strong factor supporting the

enforceability of the restraint: see generally J.D. Heydon, "The Restraint of Trade Doctrine", at 152.

But, notwithstanding such factors, I am of the view that on balance the restraint ought to be held wider than is reasonable, within the established principles.

It is not open to me, as a judge of first instance, to do more than apply the decisions of appellate courts, but in the many decisions of appellate courts dealing with the validity of restraints upon trade, it is difficult to discern any single principle which may be stated in such terms as to provide an immediately obvious answer to such cases as the present. However, I take as the foundation of the application of the principles of restraint of trade to the employer-employee relationship, the decision of The House of Lords in Herbert Morris Limited v. Saxelby (1916) A.C.

688; from that decision I take the formulation of the principle as being that a restraint will be held to be enforceable if it "affords ... nothing more than reasonable protection against something which he is entitled to be protected against": See 700 per Lord Atkinson; or that " ... for a restraint to be reasonable in the interests of the

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parties it must afford no more than adequate protection to the party in whose favour it is imposed": see 707, per Lord Parker of Waddington and, at 712, Lord Sumner (the italics are those of Lord Parker); and I take the interest of the employer, legitimately to be protected as being that stated by Lord Atkinson (at 701-2):

"he is also entitled not to have his old customers by solicitation or such other means enticed away from him. But freedom from all competition per se apart from both those things, however lucrative it may be to him, he is not entitled to be protected against. He must be prepared to encounter that even at the hands of a former employee";

10

and by Lord Parker of Waddington (at 709):

"Whenever such covenants have been upheld it has been on the ground ... that he (the employee) might obtain such personal knowledge of or influence over customers of his employer, or such an acquaintance with his employer's trade secrets, as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilise information confidentially obtained".

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(The relevant matter here is not confidential information but what is comprehended by "trade connection").

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But the contraposition of "competition per se" and "enticement away of customers" is, in a sense, more apparent than real. That in which the employer is ultimately interested (and in respect of which he seeks protection) is: will my existing

customer buy from me or from the ex-employer?
It is for the purpose of obtaining the answer,
"from the former", that the employer seeks to
apply the restraint to the employee's activities.

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When it is said that the employer cannot seek
protection from "mere competition" from the
employee, it is being recognised that the em-
ployee may not be restrained completely from
10 obtaining the answer, "from the latter"; it is
being recognised that the purpose of the re-
straint cannot be to ensure that no customers
of the employer will buy from the ex-employee.
What is being pointed out is that a restraint
will be allowed if it is one which ensures that
the way in which the customer comes to buy from
the ex-employee is not a way which, on this
branch of the law, is objectionable. The def-
inition of the "ways" which are "objectionable"
20 has not perhaps been exhaustively stated, and
it may be accepted that Lord Atkinson's form-
ula ("by solicitation or such other means en-
ticed away from him", at 700); and that of Lord
Parker of Waddington ("obtain such personal
knowledge of or influence over customers of his
employer ... as would enable him to take

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advantage of his employer's trade connection," at 709); are descriptions of the objectionable trade methods or circumstances rather than exhaustive definitions of them.

But, even if it be accepted that it is only the objectionable "way in which" which can be properly the thing to be proscribed, the Courts have recognised that it may be difficult or impossible for an employer to show that the relevant fact (viz., that the customer has brought from the ex-employee) has resulted from the objectionable "way in which", and this is particularly so if it be accepted that the existence of the influence or relationship between the customer and the ex-employee may cause that fact, and may therefore be properly the subject of a restraint, even without the ex-employee subsequently seeking to use the influence or relationship to produce that fact: compare Woodmason's Melrose Dairy Pty. Ltd. v. Kingston (1924), V.L.R. 475 at 480- 1; S.W. Strange Ltd. v. Mann (1965) 1 W.L.R. 629 at 640.

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20

It has therefore been recognised in the cases that a restraint, not in the terms of its verbal mechanism proscribing a sale which results from an objectionable "way in which" as such, may yet be

valid; for example, it has been held that a general proscription of the serving of the employer's customers for a stated period or of carrying on business in competition for a stated period, may be valid.

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10 But it would appear to remain the rationale of those restraints also that they are directed ultimately to preventing, not the fact alone of the customer buying from the ex-employee, but the objectionable "way in which" the sale comes about. It is respectfully suggested that this is the basis of the decision of the High Court of Australia in Lindner v. Murdock's Garage (83 C.L.R. 628); in so far as the members of the Court expressed views which would suggest the validity of an absolute covenant against competition or dealings with employer's customers, as distinct from taking advantage of objectionable access to the customers, such val-

20 idity appears to have been based upon the practical difficulty of proof or enforcement in relation to restraints upon soliciting per se and the improper use of the employee's influence over customers: (see per Latham, C.J. at 637; per McTiernan, J. at 645; per Fullager, J. at 650 and per Kitto, J. at 655-6).

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It would appear difficult to reconcile the basic assumptions of the Court in Lindner's case with the views expressed by the English Court of Appeal in certain more recent cases. In G.W. Plowman and Son Limited v. Ash (1964) 1 W.L.R. 568, the Court upheld the validity of a covenant by a salesman against soliciting any person who, during the employment of the salesman, had been a customer of the employer. It rejected the argument that the restraint was too wide because it would restrain the salesman soliciting customers of the employer with whom the salesman had no contact: At 572-3, per Harman, L.J.; at 57304 per Davies, L.J.: and at 574-5 per Russell, L.J. 10

In Home Counties Dairies Limited v. Skelton (1970) 1 W.L.R. 526, a restraint upon serving a person who during the last six months of the employment had been a customer of the employer and served by the employee, was held valid. The members of the Court referred with approval to the Plowman case, and Cross, L.J. (as he then was), after referring to the Plowman case, said (at 538): 20

"A restraint on an ex-employee which is directed only to the prevention of competition is, of course, void; but this restraint is plainly intended to protect the employer's trade connection. It is in practice extremely difficult to frame restrictions

which will adequately protect a trade connection and may not at the same time cover some cases where a breach will not injure the trade connection. If the court can see that the restriction has been carefully framed for a legitimate purpose, I do not think it should hold it void as contrary to public policy in favour of an ex-employee who is in flagrant breach of it on such narrow grounds as those relied on in this case."

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If the Plowman case were to be understood as deciding that, as such, a restraint could validly be imposed in relation to customers with whom the employee had and would have no contact and with whom he had not and would not have any relevant influence or relationship, it would appear to be inconsistent with the principle upon which, for example, Kitto, J. approved the decision of Harvey, C.J. in *Eq. in Stephens v. Kuhnelle* (1926) 26 S.R. N.S.W. 327); see *Lindner v. Murdocks Garage* (83 C.L.R. 628 at 657-8.)

20

It may be that the Plowman decision is to be reconciled with the basic principles as laid down in *Herbert Morris Limited v. Saxelby* (1916) 1 A.C. 688; and as explained in the *Lindner* case, as being merely an illustration of the recognition by the Courts of the practical difficulties involved in the drafting of restraints. Thus it might be said:

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- (1) That the basic principles (protection against the objectionable "way in which" competition is carried on, rather than against "mere competition") are accepted;
- (2) that, however, in the case of a covenant which is entered into at the commencement of the employment, it is not possible to say with any certainty who will be the employer's customers in respect of whom the employee will acquire the relevant influence or relationship; 10
- (3) that, therefore, the best that can be done, in a practical sense, is to attempt to map out in advance those customers as to whom it is to be anticipated that influence or relationship will come to exist;
- (4) that this, in some cases, can be done only by mapping out the geographical area within which the employee will operate (as in *Brightson v. Sampson Paragon Limited* (18 C.L.R. 331 at 335)); as it is to be assumed that he will have the relevant access to all the employer's customers in the area; 20
- (5) that, in other cases, the facts make it possible to conclude that the relevant

influence or relationship can be anticipated to arise only in relation to persons who will actually have been customers of the employer, as contrasted with others who had less than a "customer" relationship with the employee (as explained in *Gilford Motors Ltd. v. Horne* (1933) Ch. 935); but that he will have had such access to all such customers that it is not practicable to anticipate that the relevant influence or relationship will come to exist in relation only to those customers with whom he has had direct contact; cf. the emphasis placed upon the defendant's position as managing director in the *Gilford* case, at 959, 960, 964 and 966).

- (6) that, in other cases, the facts make it possible to conclude that the relevant influence and relationship can be anticipated to arise only in relation to those customers of the employer with whom the employee has had personal contact (as in *Stephens v. Kuhnelle* (above) and *Lindner v. Murdock's Garage* (above); and

- (7) that, provided the restraint is framed according to what may, in the practical

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sense, be fairly so anticipated, as at the date of the agreement, the restraint will be regarded as the best approximation that can be achieved to a restraint only of the objectionable "way in which" and as therefore reasonable as between the parties, even though it be recognised that inevitably the restraint may operate, at the end of the employment, in respect of persons as to whom the relevant influence or relationship will not have been acquired by the employee.

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Whether the decisions can be rationalised, or can all be rationalised, upon such a basis, an examination of the facts by reference to these principles is of assistance in determining whether the restraint imposed by clause 6 in the present case is unenforceable.

The present restraint was formulated after the employment had come to an end, therefore, a judgment could be formed as to the customers as to whom the relevant influence or relationship had come to exist and the nature of the customer's business, and the consequent period for which the influence or relationship might continue to be operative, with much more precision than could

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have been done if that judgment had had to be made immediately after the commencement of the employment.

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During discussion, in the course of the present case, a list of clients of the Stenhouse Group was referred to as being, in substance, the clients or at least the main clients, with whom the defendant had had relevant connection. It would, in my opinion, have been practical in the present case, in the state of my knowledge which the plaintiff had in the first half of 1972, for the plaintiff to have made a determination, with a reasonable degree of certainty, as to the clients with whom the defendant had had any contact; as to the nature of such contact and in particular whether the contact related only to such matters, e.g. pure re-insurance, as would not have resulted in there being created between the defendant and the client the relevant influence or relationship; as to the period during which, in respect of that particular client, the influence or relationship would have been likely to continue so as to give the defendant an objectionable "edge" in respect of, or access to, the client; and as to the geographical area in respect of which that influence or

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relationship might be relevant in respect of the business connection of the Stenhouse Group.

There were, in the present case, several factors which would suggest that the restraint could have been formulated with greater precision so as to protect the precise interest which the plaintiff was entitled to protect, and so as (in the words of Lord Parker of Waddington) to "afford no more than adequate protection" to the plaintiff.

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The persons for whom the defendant may not act include not merely clients but "prospective clients". (As to the term "prospective", compare Patterson's Trustees v. Motion (1941) S.C. 290; Lindsay v. Miller (1949) V.L.R. 154; and Drewery and Drewery v. Ware-Lane (1960) 1 W.L.R. 1204). Such persons would, at least, include all persons as to whom there was no more than a real possibility, in the period 10th July, 1970, to 9th July, 1971, that they might become clients of the Stenhouse Group; and the relevant relationship with the defendant need be only that it was "the subject of negotiations ... through the services or agency of the defendant". Whether the negotiations had reached the stage at which the defendant would have

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acquired any particular degree of knowledge of the prospective client's affairs, such as would have effected the necessary relationship with such person is not referred to. No attempt is made to differentiate between the different classes of insurance business, although I accept that in respect of some classes of business, e.g. motor vehicle insurance or some shipping insurance, the knowledge of the business of the prospective client to be acquired in such negotiations would be very different from that to be acquired in relation to other classes of insurance business which might be discussed, and that a prospective client might have negotiated with the defendant only in respect of a particular and limited class of insurance business. At least by the date on which the present agreement was signed, viz. 23rd March, 1972, it is by no means clear that there could not have been a better dissection of such prospective clients (as at 9th July, 1971) into those in respect of whom some influence or relationship might be thought to exist and those in respect of whom there was no such relationship.

The restraint imposed by cl. 6 in unlimited in geographical area. It would forbid the

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defendant to act as an insurance broker, as an employee or on his own account, for a client or prospective client (as defined) anywhere in the world and in respect of insurance risks wherever arising. Were he employed in the United Kingdom by a broker, he would be restrained from insuring the London risks of an international company which, as to its insurance risks in Sydney, or some of them, had negotiated the possibility of cover through the services of the defendant.

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In some context, the testing of the reasonableness of a restraint by reference to possible international movements of the parties, has been referred to in terms such as "fantastication", see *G.W. Plowman & Son Ltd. v. Ash* (1964) 1 W.L.R. 568 at 572; in the present context, I would not so regard the matter. I am satisfied that insurance broking is a business which has international connections and that persons engaged in insurance broking in Australia are, as to a substantial number of them, persons who are subsidiary or associated companies of the United Kingdom or American companies.

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The defendant had had significant acquaintance with insurance in London and had visited

that city in relation to insurance broking. I would not be satisfied that, were the defendant seeking employment in the business of insurance broking in London, a prospective employer might not be significantly influenced if he were advised that the defendant could not act as an insurance broker for a client of the Stenhouse Group (or of the parent company or companies in London of Stenhouse Australia Limited; see the
10 definition of "associated company" in cl. 9); if, in Australia he had negotiated concerning the possibility of an insurance or some portion of its insurance risks in Australia.

It is to be borne in mind that the defendant has been engaged in the business of insurance as his only occupation since he was seventeen or eighteen years of age and that he has been an insurance broker since 1960. To prevent him acting as such broker for any person whom he had in
20 any relevant way dealt with or negotiated with, successfully or unsuccessfully, between 10th July, 1970 and 9th July, 1971, would be seriously to interfere with his occupation, having regard, inter alia, to the fact that his senior status in the business would be likely to limit the field of activity in which he might legitimately hope to

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engage to persons of substantial business size,
and that the Stenhouse Group in general acted
mainly for such class of persons.

One other matter may be noted, that which
the defendant obtains from the plaintiff under
the present agreement is, in substance, the
release of his obligations under the present
agreements; cl. (1). Notwithstanding the terms
of cl. (1), his employment had already, on the
evidence before me, ceased and the only effective 10
operation of cl.(1) was in relation to such re-
straints as the previous agreements may have
validly placed upon him; see cl.(9) and (10) of
the agreement of 11th December, 1964. The
reasonableness of a restraint is not to be as-
certained by merely weighing up the advantages
and disadvantages of the restraint qua the employee:
see *Herbert Morris Ltd., v. Saxelby* (1916) 1 A.C.
688 at 707, per Lord Parker of Waddington; but
the processing of weighing up may not be completely 20
irrelevant to the question of reasonableness. For
example, the period of the employment to which the
restraint is collateral has been taken into account.
It must be doubtful whether the earlier agreements
imposed any enforceable restraints upon the defend-
ant, and in my opinion the balance of advantages

and disadvantages qua the defendant under the present agreement would be substantially against the defendant.

I therefore hold that the restraint imposed by cl. 6 is not enforceable.

(e) Severability:

10 Upon the view which I have formed to the unenforceability of cll. 4, 5 and 6, of the present deed, it is not strictly necessary for me to consider the question of severability. However, as the matter has been argued at some length I shall state the views which I have formed. The question in the present case is whether, if one or more but not all of the restraints in cll. 4, 5 and 6 are unenforceable, those restraints which are not unenforceable are capable of being enforced at the suit of the plaintiff.

20 The question of severability has been considered primarily by reference to the English decisions, in Mr. J.D. Heydon's recent (1971) book "The Restraint of Trade Doctrine", see at p.279 et seq. See also T. Lucas & Co. Ltd. v. Mitchell (1972) 1 W.L.R. 938, the references to the question in the Law Quarterly Review, vol.64, p.230, 347; vol.69, p.111, vol.79, p.410, 425.

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Cases in which the question has been referred in Australia include: *McFarlane v. Daniell* (38 S.R. 337 at 345); *Thomas Brown & Sons Limited v. Fazal Deen* (108 C.L.R. 391 at 411); *Brooks v. Burns Philp Trustee Co. Ltd.* (1969) 43 A.L.J.R. 131; and *Howard F. Hudson Pty. Ltd. v. Ronayne* (71 S.R. N.S.W. 269 at 286); (1972) 46 A.L.J.R. 173 at 178-9, 181.

In considering a question of severability it appears relevant to distinguish between, inter alia, the following classes of cases:

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1. Where the question of severability arises because part of a particular promise is held unenforceable but the remainder of the same promise (if standing alone) would be enforceable: cf. *Marquett v. Walsh* (29 S.R. N.S.W. 298);
2. Where the fact that the whole of a particular promise is unenforceable results in there being no consideration to support the (otherwise enforceable) promise which is sought to be enforced; see *Howard F. Hudson Limited v. Ronayne* (1972) 46 A.L.J. 173 at 178-9, per Walsh, J.;
3. Where the agreement, properly construed,

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discloses that the enforceability or performance of the unenforceable covenant is a condition precedent to the enforcement of the covenant which is sought to be enforced;

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4. Where (no problem arising in relation to consideration or the specialty form of the Agreement) the promisor has given to the promisee several promises and some but not
10 all of such promises are wholly unenforceable.

The question of severability, in the present case, is of the fourth class. The plaintiff has (by cl.1 of the present Agreement) given certain releases of restraints which, for present purposes may be assumed to be valid. In return for the plaintiff's promise (or act in the law; Selmond and Williams on Contract, (2nd ed.) 4-14) the defendant has (as far as is here relevant) entered
into three covenants, those in cll. 4, 5 and 6.

20 If it be assumed for example, cll.4 and 5 are unenforceable, but cl.6 is enforceable, it is necessary to determine whether cl.6 may be severed from the other restraints in the present Agreement and, standing alone, enforced. It is therefore necessary to determine what is the test, in cases of the fourth kind (above), by reference to which

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it is determined whether a promise or covenant
may be severed.

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If the actual intention of the parties,
as to severance, is stated in terms or can be
inferred, as a matter of construction, from the
document, then effect will be given to that in-
tention. If, however, no such actual intention
can be determined, the matter has been said to
fall for determination according to the intent-
ion to the "imputed" to the parties; See 10
Brooks v. Burns Philp Trustee Co. Ltd. (1969) 43
A.L.J.R. 131 and 134. But, if it be acknowledged
that no actual intention can be discerned, and
the test of severability is an intention which is
imputed to the parties, it is then relevant to
ask the question: when is the intention to sever
to be so imputed?

In Stewart v. Williams (18 C.L.R. 381 at
409-410), Isaacs, J. stated the matter as follows:

"It is said, however, the illegality of the 20
withdrawal clause, is an exceptional cir-
cumstance and the Court will simply excise
the clause and leave the rest standing.
That would, in this case, be forcing on the
opposite party a bargain he never entered
into. The doctrine of severing illegal
promises was referred to, but there is no
analogy. If a man for valuable consider-
ation promises another two distinct and sep-
arate things, one lawful and the other un- 30
lawful, the promisee may content himself
with the lawful thing and have it, though
he cannot compel compliance as to the

unlawful promise. The case of *Bank of Australasia v. Breillat* (6 Moore P.C.C. 152 at 201; 13 E.R. 642 at 660), is the highest authority for that. But, on the other hand, as Willes, J. said in *Pickering v. Ilfracombe Railway* (L.R. 3 C.P. 250): 'Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void'. And see *Karney v. Whitehaven Colliery Co.* (1893) 1 Q.B. 700 particularly at 713."

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However, it would appear to some extent perhaps that the general principle so stated is subject to certain qualifications. Thus, in *McFarlane v. Daniell* (38 S.R. N.S.W. 337 at 345) Jordan, C.J. said:

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"When valid promises supported by legal consideration are associated with, but separate in form from, invalid promises, the test as to whether they are severable is whether they are in substance so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature. If the elimination of the invalid promises changes the extent only but not the kind of the contract, the valid promises are severable. If the substantial promises are all illegal or void merely, ancillary promises would be inseverable".

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The principles in *McFarlane's* were applied by Walsh, J. in *Bonda v. Wagenmaker* (77 W.N. N.S.W. 363 at 36506); and were subsequently applied in *Thomas Brown & Sons Ltd. v. Fazal Deen* (108 C.L.R. 391 at 411).

In my opinion, the principle of severability could be applied to permit enforcement of cl.4,

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if standing alone, or cl.5 and 6, if these clauses were valid. If cl.4 and 5 were unenforceable the exception made to cl.6 by reference to cl.5 would not, in my opinion, prevent cl.6 being severed and alone enforced. If, as I have held, cl.6 merely provides alternatives to the defendant, viz., the observance of the restraint or the payment of the sum of money calculated by reference to cl.5, then, in my opinion, even if cl.5 were, itself, unenforceable, the nature of the practical situation sought to be achieved by cl.6, viz., that the defendant should not act as an insurance broker as therein set forth, would be achieved by the enforcement of cl.6 without that alternative.

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I note that the defendant argued that cl.6 was not to be regarded as essentially a restraint but in reality a clause providing for the payment by the defendant of a price for acting as an insurance broker as stated in the clause. Reliance was placed by the defendant in this regard upon the principles stated in Halsbury's Laws of England (Third Edition) vol.21, p.381-1, and reference was made in particular to *Hamilton v. Leathbridge* (14 C.L.R. 236); *Leagh v. Lillie* (6 C. & N. 165; 158 E.R. 69); and *General Accident*

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Co. Limited v. Noel (1902) 1 K.B. 377 at 380. In my view, cl.6 does seek to impose a restraint and not primarily to establish a price in this sense. Whether, were cl.6 enforceable in injunction would, as a matter of discretion be granted, would require consideration. In the present case, no offer of payment was made by the defendant and, ultimately, no claim for account or damages was asked for qua cl.6 by the plaintiff.

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(f) The restraints as "Restraints in Gross";
The defendant argued that that a restraint of trade, even if otherwise not unreasonable, would not be enforced unless it was ancillary to another and legitimate principal transaction. The defendant referred to Esso Petroleum Co. Limited v. Harper's Garage (Stourport) Limited (1968) A.C. 269 at 341; Butt v. Long (88 C.L.R. 476 at 486); Howard F. Hudson Pty. Limited v. Ronayne (71 S.R. N.S.W. 269 at 286); Lido v. Panedes (1972) V.R. 297; and Mobil Limited v. McKenzie (1972) V.R. 315. The plaintiff referred to Spink (Bournemouth) Limited v. Spink (1936) Ch. 544 at 548; and Stewart v. Stewart (1898) (1 Frazer 1158).

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It was argued for the defendant that in the present case the restraints were not ancillary to a main and legitimate transaction and that they were given in gross within the meaning of that term in the authorities.

In the Agreements of 11th December, 1964, and 6th September, 1966, there were "main transactions" to which the restraints in those agreements could be said to be ancillary; the basic transaction of employment was the principal matter dealt with by those agreements. These two agreements (assuming them to be valid and enforceable) continued according to their terms to be enforced after resignation by the defendant from his employment on 9th July, 1971. If the present agreement were directed to a compromise of the dispute as to the relationships arising under the earlier two Agreements and if the present restraints were entered into by way of compromise of disputes as to, inter alia, the validity of the restraints granted by the earlier two agreements, in my opinion, they should be held enforceable for present purposes. On principle a variation of existing (assumably enforceable) restraints in the course of a bona fide compromise, should not be held unenforceable if,

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had they been embodied in the original agreements, they would have been held enforceable.

It would, however, be arguable that in the present case, this was not the nature of the present agreement. The defendant has argued that the last two recitals in the present Agreement are false or misleading and that the present Agreement is not the result of compromise as to whether the defendant ought to have accepted the resignation which he tendered.

In addition, no doubt, it might be argued, that the restraints imposed, by the two earlier agreements were themselves invalid as being unreasonable.

Were it necessary to decide the matter, I would be of the opinion that, the present Agreement was the result of a compromise variation of the obligations to which the defendant might (if valid) have been held liable under the two earlier agreements and that as such the restraints imposed by the present Agreement could have been enforced.

(g) Did the plaintiff have "sufficient interest" to support the present restraints?:
The defendant also argued that the restraints were directed either totally or in substance, to the protection of the

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business interests not of the plaintiff but of its subsidiary companies, and that a promise to the plaintiff for this purpose could not be valid. The defendant referred to the recent decision of *McGuigan Investments Pty. Ltd. v. Dalwood Vinyards Pty. Ltd.* (1970) 1 N.S.W.R..686 at 69304; *Leetham v. Johnston White* (1970) 1 Ch. 189; *Stephens v. Kuhnelle* (26 S.R. N.S.W. 327); *Wood Masons v. Kinstone* (1924) V.L.R. 475; and *Aloha Shangri-la Atlas Cruises Pty. Ltd. v. Pender-Brookes* (1970), Q.R. 438 at 445, 448. The plaintiff relied upon *Harold Holdsworth & Co. (Wakefield) Limited v. Caddies* (1955) 1 W.L.R. 352; *Gilford Motor Co. Limited v. Horne* (1933) Ch. 935; and *Connor Bros. Limited v. Connor* (194) 4 All E.R. 179).

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In the present case, the subsidiary companies through whom principally the insurance business of the Stenhouse Group is conducted are wholly owned subsidiaries of the plaintiff. The senior executives of the Group are associated directly with the plaintiff but, in fact, from time to time, are directly concerned in the business

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activities of the subsidiaries and in particular by way of dealing with difficult problems arising in the course of the business of those subsidiaries. In addition, there does not appear to be any complete and exclusive division of business between the plaintiff and its subsidiaries; in a practical commercial way, the plaintiff appears from time to time to be concerned directly with insurance broking business which it may in particular cases direct to be carried out by an appropriate subsidiary company. In the factual sense therefore, the plaintiff does have a distinct interest as a separate entity in the businesses carried on, even though the bulk of the physical operations is conducted by the subsidiaries: cf. the McGuigan case (supra) at 696; and the position of the plaintiff is not in relation to its subsidiaries the same as the position of one sister subsidiary to another sister subsidiary of a holding company.

The question remains, however, whether even if such a different interest is sufficient to support a restraint in favour of the plaintiff.

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The plaintiff relied upon the general statements as to "group enterprise" referred to in Caddies' case and also upon the decision of the Privy Council in Connor's case. In Connor's case, a shareholder of an operating company covenanted on sale of his shares, that he would not compete with the company's business. It was held that such restraint could be enforced. Whether, in the case of an employee, the relationship of a shareholder-holding company to an operating company which alone conducted a business would be sufficient to support such a restraint would appear questionable. In the present case, where the holding company is itself involved in the business activities, and it is in practice difficult to separate the practical or group goodwill of the Stenhouse Group into exclusive sections relating merely to the holding company or to an operating subsidiary, the question is more difficult. The effect of the employment of the defendant is to give him a form of access to and power over such goodwill and where, as in the present case, the restraint is limited to clients with whom he has dealt, I am inclined to the view that the restraints would not in the present case be bad upon this ground alone.

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(h) Was the defendant in breach of the present Agreement?:

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I accept the submission of the defendant that any breach of the present Agreement must be shown to have occurred after the date on which the Agreement came into force. I do not accept that any inconsistency with the restraints imposed by it which arose as such prior to the 23rd March, 1972, would constitute a breach.

10 However, I accept that the significance of events which occurred after the signing of the Agreement may be assessed by reference, inter alia, to events which took place prior to 23rd March, 1972. I am satisfied that, at the latest, the defendant commenced to discuss matters relating to the insurance of Boral Companies by December, 1971. At this time, the defendant was aware that the insurance risks of

20 the companies in the Boral Group had been the subject of insurance sometimes as a result of a direct insurance of the particular Boral Company by B.I.F.M. acting as an insurance company, sometimes by B.I.F.M. acting as an insurance broker and arranging

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for an outside company directly to insure the Boral Company and sometimes by B.I.F.M. arranging through another insurance broker for an outside insurance company directly to insure the relevant Boral Company.

I am satisfied that prior to 23rd March, 1972, the defendant had been seeking (to put the matter in a neutral form) to persuade Mr. Hargreaves that the insurance risks of Companies in the Boral Group should be made the subject of insurance in a manner different from the manner in which they were then "covered".

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During these discussions, as the defendant admits, he did not ever tell Mr. Hargreaves that the only way in which he would do business with Mr. Hargreaves was on the basis that B.I.F.M. should, itself, directly insure the companies of the Boral Group, and that the Heath Company should operate only to arrange a re-insurance of the obligations of B.I.F.M. In fact, discussions had taken place over a period which I infer was at least from December 1971, until a formal submission was made to Mr. Hargreaves by the Heath Company by its letter of 27th March, 1972. I do not accept that, prior to the 27th March, 1972, the defendant discussed with Mr. Hargreaves

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only proposals which would have involved the Heath Company in re-insurance of risks undertaken by B.I.F.M.; I am of the view that the defendant was seeking to evolve a procedure in relation to insurance which would commend itself to Mr. Hargreaves, but in the course of the discussions he discussed proposals for "direct insurance", i.e. proposals in which the relevant insurance risks of the relevant Boral Company were not insured by B.I.F.M. and then re-insured, and I am satisfied that the substantial part of the proposals which the defendant believed would be attractive to Mr. Hargreaves was, that the number of separate policies, then in existence, in respect of companies of the Boral Group should be consolidated into a smaller number of policies in different terms covering all or all relevant group companies. I accept that this proposal would have been attractive whether it had involved the initial writing of all insurance by B.I.F.M. and a re-insurance by B.I.F.M., or a direct placement of the insurance risks with an outside insurance company.

It was not until the execution of the present Agreement on 23rd March, 1972, that, in terms there was excepted from the restraint which might

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then be binding upon the defendant, activities in relation to "any insurance company"; see the concluding words of cl.8, which exclude from the term "client" "any insurance company".

Following the execution of the present Agreement on 23rd March, 1972, the letter of 27th March, 1972 was written and there were, after such execution, forwarded to Mr. Hargreaves, three folders (Exs. E, F and G) setting forth details of the defendant's proposals as to insurance.

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The precise wording of the insurance ultimately effected, does not appear to have been reduced to any policy or policies, or at least, the terms of these are not before me and it may well be that, as suggested during the hearing, there was only as between the parties a "slip" prepared. However, in cross-examination, Mr. Hargreaves assented to the view that the only insurance cover which was obtained from the Heath company was a re-insurance cover and I shall assume that, in fact, as far as concerns the insurance policies actually effected as the result of the defendant's activities, these were policies by the relevant Boral Company with B.I.F.M. and, in respect of those, re-insurance was arranged by the Heath company.

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However, as at 27th March, 1972, and thereafter, the defendant was, in my view, aware that at that time the position as to insurance of the risks of the Boral Companies was, as I have above set forth, and in particular, that in respect of some insurance risks, the risks were insured by a company or companies other than B.I.F.M.; see, for example, the letter of 27th March, 1972, page 1, par.3 and page 3, par.5

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10 The proposals put forward in the document entitled "Specimen Insurance Manual Boral Limited" (Ex.E) outlined what was called "Insurance Procedure", in respect of companies of the Boral Group, and further outlined what were described as "the services offered by our insurance brokers, C.E. Heath Insurance Broking (Australia) Pty. Limited", see p.1, par.5; compare also the form of the schedule for the "All Risks Insurance" included in the document Ex.F.

20 The manual provided for annual insurance declarations and suggested that the particular Boral Company (not B.I.F.M.) should "contact your local broker or write to head office. In addition a covering certificate to our brokers signed by your general manager is also required and a sample is attached to this procedure": see p.4.

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Page 7 of the manual contemplates that the Heath Company will act in relation to claims made for insured loss: see also p.17. The manual also contemplates that each individual Boral Company will forward detailed statistics and Declarations each year not to B.I.F.M. but direct to the Heath company: see p.22 et seq..

As to Mr. Hargreaves' position, I am satisfied that the defendant believing that in so far as the insurance arrangements of any Boral Company were concerned, if that company were insured direct by an outside insurance company, Mr. Hargreaves (or B.I.F.M., acting through its servant, Mr. Hargreaves) would act as the servant or agent of that Boral Company to effect that insurance. I am satisfied further that the defendant contemplated that if an arrangement resulted from his negotiations with Mr. Hargreaves, under which some insurance business of a Boral Company was placed direct with an outside insurance company, this would be done as the result of the discussions of the defendant with Mr. Hargreaves and the actions of Mr. Hargreaves as such servant or agent of the Boral Company.

I do not accept that, whether before or after the 23rd March, 1972, the defendant would have

refused to act in relation to insurance business resulting from his discussions with Mr. Hargreaves, unless that insurance business was limited exclusively to re-insurance of B.I.F.M.; I accept that, for example, as at 27th March, 1972, it was "the writing of fresh policies in relation to those risks into different and smaller policies in terms of the number of subsidiaries" which, essentially the defendant was seeking to achieve and that, the scheme for B.I.F.M. to write such insurance and then re-insure was not an important aspect of his proposals. I accept, however, that, having achieved with the plaintiff the exclusion of "any insurance company" from the definition of "client" in the Agreement of 23rd March, 1972, he would, thereafter, have preferred that the matter be done upon such re-insurance basis.

In my view, the facts disclosed that the defendant, as servant or agent for the Heath company, solicited insurance business from a client of the plaintiff within cl.4 of the present Agreement.

The term "insurance business" is not defined in the present Agreement, nor is the term "solicit". I am satisfied that, from December 1971, the defendant solicited business from Mr. Hargreaves. He let it be known that he was

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interested in obtaining advantage from the placing of insurance in respect of the Boral Group, and, he does not substantially contest that the approaches to Mr. Hargreaves were made by him and the initiative was taken by him. The fact that while he was seeking to persuade Mr. Hargreaves to accept his views or proposals, the signing of the present Agreement intervened, would not, in my opinion, mean that his activities thereafter and until the time when insurance was finally effected fell outside the term "solicit". He was, in my opinion, on 27th March, 1972, and thereafter, seeking to persuade Mr. Hargreaves that insurance business be effected as he, the defendant suggested; the fact his attempts after 23rd March, 1972, were merely a continuation of attempts made prior thereto would not, in my view, take them outside the category of "soliciting".

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It is assumed for the present purposes that the term "client" includes companies of the Boral Group but not B.I.F.M., then it is necessary to consider whether what the defendant did related to insurance business from "one of the Boral Companies". I am of the view, that if what the defendant did was merely to ask a Boral Company (through its

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servant or agent, Mr. Hargreaves), to insure all its insurance risks with B.I.F.M. as part of a proposal that B.I.F.M. employ the Heath Company to effect re-insurance of B.I.F.M's liability, then the defendant was seeking "insurance business from" the Boral Group. If the defendant had sought to persuade the relevant Boral Company to effect a policy with a particular outside insurance company, with the assistance of the Heath Company as broker, this clearly, in my view, would fall within clause 4, the fact that the defendant, on this construction, was seeking to procure that the Boral Company effect its insurance policy with B.I.F.M., with the view to the Heath company securing the benefit from re-insurance of B.I.F.M., could appear not to be relevantly different.

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In general, in my opinion, to solicit a Boral Company to effect particular kinds of insurance policies with particular persons in order that the Heath company may obtain commission on re-insurance would, in my opinion, fall within clause 4.

In addition, in my opinion, the defendant "acted as insurance broker for" a client of the plaintiff within clause 6.

It is accepted that companies of the Boral

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Group were "clients". If it be assumed for this purpose that the term "client" does not include B.I.F.M., it is necessary to consider whether the Heath Company was, through the defendant, acting as insurance broker for any particular Boral Company.

In my view the action of an insurance broker for this purpose is not limited to the mere effecting of a policy. It extends to the counselling, advising and servicing of an existing insurance arrangement and, at least, the negotiations and advising as to the form of insurance to be sought and otherwise which lead up to the actual effecting, through the means of the broker, of an insurance policy. On this basis, the defendant was counselling and advising the Boral Group of Companies (through their servant or agent, Mr. Hargreaves) as to the form of the insurance policy or policies which they should effect and his actions led to their ultimately effecting a policy or policies of the kind in contemplation. This was done upon the basis that those policies would then be serviced in the manner contemplated by the insurance manual (Ex. E); the evidence suggested the inference that this was the basis upon which the Heath company would act in

relation to those insurances ultimately effected by the Boral Group as the result of its efforts.

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Court of N.S.W.

No. 6

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I have been informed by the parties that the present matter is one of importance to the plaintiff in that its effects may not be limited to matters relating solely to this defendant. Upon this basis, I have expressed my views as to some of the main matters which were argued before me and which may be relevant if the view which I have formed as to the unenforceability of the present Agreement be wrong in any particular. I note, in addition, that, were the restraints imposed by cl.4 or cl.6 of the Agreement valid and enforceable, and were the granting of relief by way of injunction a matter in respect of which I would be required to exercise a discretion, I would exercise my discretion so as to restrain the defendant from acting in breach of the relevant provision.

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However, in view of the conclusions to which I have arrived as to the unenforceability of the restraints contained in the present Agreement, it is my view that the proceeding should be dismissed with costs.

237.

NO. 7

ORDER OF HIS HONOUR MR. JUSTICE MAHONEY
26TH OCTOBER, 1972

The Court Orders that -

In the Supreme
Court of N.S.W.

No. 7

Order of His
Honour Mr.
Justice
Mahoney

1. This suit be dismissed with costs.

ORDERED 26 October 1972

(Sgd.) D.L. Mahoney
JUDGE

and entered 14 December 1972

(Stamp)

SUPREME COURT N.S.W.
EQUITY DIVISION

NO. 8

ORDER GRANTING CONDITIONAL LEAVE
TO APPEAL TO PRIVY COUNCIL.

THE COURT ORDERS that -

In the Supreme
Court of N.S.W.

No. 8

Order Granting
Conditional
Leave to Appeal
to Privy
Council

1. Leave to appeal to Her Majesty in Her Majesty's Privy Council from the judgment of this Court be granted to Stenhouse Australia Limited hereinafter called the Appellant UPON CONDITION that the appellant do, within 14 days give security to the satisfaction of the Registrar in Equity in the amount of \$1,000.00 for the due prosecution of the said appeal and the payment of such costs as may become payable to the Respondent in the event of the Appellant not obtaining an order granting it final leave to appeal from the said judgment or of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the appellant to pay the Respondent's costs of the said appeal AND UPON FURTHER CONDITION that the Appellant do within 14 days from the date hereof deposit with the Registrar in Equity the sum of \$50.00 as security for and towards the costs of the preparation of the transcript record for the purposes of the said appeal AND UPON FURTHER CONDITION that the Appellant do within 28 days take out and proceed upon all such appointments and take all other steps as may be necessary for the purpose of settling the index to the said transcript record and enabling the Registrar in Equity to certify the said index has been settled and that the conditions hereinbefore referred to have been duly performed AND UPON FURTHER CONDITION finally that the Appellant do obtain a final order of this Court granting it leave to appeal as aforesaid.

2. The costs of all parties of this application and of the preparation of the said transcript record and of all other proceedings hereunder and of the said final order do follow the decision of Her Majesty's Privy Council with respect to the costs of the said appeal in case the same shall stand or be dismissed for non-prosecution or be deemed so to be subject however to any orders that may be made by this Court up to and including the said final order or under any of the rules next hereinafter mentioned that is to say rules, 16, 17, 20 and 21 of the Rules of 2 April 1909 regulating appeals from this Court to Her Majesty in Council.

In the Supreme
Court of N.S.W.

No. 8

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3. The costs incurred in New South Wales payable under the terms hereof or under any order of Her Majesty's Privy Council by any party to this appeal be taxed and paid to the Party to whom the same shall be payable.

4. So much of the said costs as become payable by the Appellant under this Order or any subsequent order of the Court or any order made by Her Majesty in Council in relation to the said appeal may be paid out of any moneys paid into Court as such security as aforesaid so far as the same shall extend and that after such payment out (if any) the balance (if any) of the said moneys be paid out of Court to the Appellant.

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5. Each party be at liberty to restore this matter to the list upon giving two days notice thereof to the other for the purpose of obtaining any necessary rectification of this order.

ORDERED 17 November 1972.

(Sgd.) D.L. Mahoney
Judge

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and entered 14 December 1972.

(STAMP)

SUPREME COURT N.S.W.
EQUITY DIVISION

240.

No. 9

ORDER GRANTING FINAL LEAVE TO APPEAL TO PRIVY COUNCIL
15TH DECEMBER, 1972

THE COURT ORDERS that -

1. Final leave to appeal to Her Majesty in Her Majesty's Privy Council from the judgment of this Court of 26 October 1972 be granted to the Plaintiff.

2. The sum of \$50 deposited in Court by the Plaintiff pursuant to the Order of this Court of 17 November 1972 as security for the costs of preparation of the Transcript Record on appeal together with accrued interest if any be paid out of Court to the Plaintiff.

3. Both parties be at liberty to apply.

ORDERED 15 December 1972.

(Sgd.) D.L. Mahoney

ENTERED 7 February 1973

JUDGE.

In the Supreme
Court of N.S.W.

No. 9

Order granting
final leave to
appeal to
Privy Council

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No. 10

CERTIFICATE OF REGISTRAR IN EQUITY
VERIFYING TRANSCRIPT RECORD.

In the Supreme
Court of N.S.W.

No. 10

Certificate of
Registrar in
Equity Verify-
ing Transcript
Record.

I, ALAN VICKERY RITCHIE of the City of Sydney in
the State of New South Wales Commonwealth of
Australia Registrar in Equity of the Supreme Court
of the said State DO HEREBY CERTIFY that the
sheets hereunto annexed and contained in the pages
numbered 1 to 262 inclusive contain a true copy
of all the documents relevant to the appeal by the
Appellant, Stenhouse Australia Limited to Her
Majesty in Her Majesty's Privy Council from the
Order made in the above mentioned suit by the
Honourable Dennis Leslie Mahoney, a judge of the
Supreme Court sitting in Equity on the twenty
sixth day of October One thousand nine hundred and
seventy two so far as the same have relation to
the matters of the said appeal together with the
reasons for the said Order given by the said
judge and an index of all the papers documents and
exhibits in the said suit included in the annex-
ed Transcript Record which true copy is remitted
to the Privy Council pursuant to the Order of
His Majesty in Council of the Second day of May
in the Year of Our Lord one thousand nine hundred
and twenty five.

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IN FAITH AND TESTIMONY
whereof I have hereunto
set my hands and caused
the seal of the said
Supreme Court in its
Equitable Division to be
affixed this day
of in the
Year of Our Lord One
thousand nine hundred and
seventy three.

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Registrar in Equity
Supreme Court of New
South Wales

242.

No. 11

CERTIFICATE OF CHIEF JUSTICE

I, THE HONOURABLE JOHN ROBERT KERR, C.M.G. Chief Justice of the Supreme Court of New South Wales DO HEREBY CERTIFY that Alan Vickery Ritchie who has signed the Certificates above written is the Registrar in Equity of the said Supreme Court and that he had custody of the records of the said Supreme Court in its Equitable Division.

In the Supreme Court of N.S.W.

No. 11

Certificate of Chief Justice

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IN FAITH AND TESTIMONY whereof I have hereunto set my hand and caused the Seal of the said Supreme Court to be affixed this day of in the Year of Our Lord One thousand nine hundred and seventy three.

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Chief Justice of the Supreme Court of New South Wales

PART III

PLAINTIFF'S EXHIBITS

EXHIBIT A.

AGREEMENT MADE BETWEEN STENHOUSE SCOTT
NORTH AUSTRALIA LIMITED AND MARSHALL
WILLIAM DAVIDSON PHILLIPS
11TH DECEMBER, 1964

In the Supreme
Court of N.S.W.
Exhibit A.

AN AGREEMENT made the 11th day of December 1964
BETWEEN STENHOUSE SCOTT NORTH AUSTRALIA LIMITED
the registered office of which is at 107 Pitt
Street Sydney in the State of New South Wales
(hereinafter called "the Company") of the one
part and MARSHALL WILLIAM DAVIDSON PHILLIPS of
5 Oswald Street Cremorne of the said State
Insurance Broker (hereinafter called "the Dir-
ector") of the other part WHEREAS it has been
agreed that the Director shall serve the Company
as Director upon the terms and conditions here-
inafter contained NOW IT IS HEREBY AGREED AND
DECLARED as follows:

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1. The Company shall employ the Director who shall serve the Company as Director and in particular shall perform such duties and exercise such powers in the conduct and management of the business of the Company and/or any company a subsidiary of or associated with the Company as may from time to time be assigned to or vested in him by the Directors of the Company. 20
2. The Director shall devote his whole time and attention to the Company's business and do his utmost to promote the interests of the Company and to make the business a financial success and he shall not knowingly do or suffer to be done any act or thing which may in any way be prejudicial to the Company. 30
3. The Director's employment hereunder shall be deemed to have commenced on the 7th day of December 1964 notwithstanding the date hereof and as from that date this agreement supersedes all or any existing agreements which subsist or may subsist between the Company and the Director and subject to the provisions herein contained this agreement shall

10 contine from the said 7th day of December
1964 until the Director shall attain the
age of 60 years but shall not then terminate
unless six months' notice in writing of
termination shall have been given by one
party to the other terminating the same
and unless so terminated as aforesaid this
agreement shall continue from year to
year thereafter until terminated by at least
20 six months' notice in writing given by one
part to the other or until the Director
shall attain the age of 65 years whichever
shall first occur. If the service of the
Director hereunder shall continue after he
attains the age of 60 years he shall during
the month preceding 15th January in each
year thereafter submit himself for examinat-
ion by a medical practitioner nominated by
the Company and his continued employment
shall be dependent upon such medical
practitioner certifying that he is fit to
carry out his duties hereunder, failing
which this agreement shall terminate without
notice on the 15th January following such
examination.

- 30 4. There shall be paid to the Director in re-
spect of his services under this agreement
a salary at the rate of £2750. 0. 0. per
annum payable monthly as on the last day of
each month for the month ending that date
or as otherwise may from time to time be
arranged.
5. The Director shall serve the Company at such
place or places within the Commonwealth of
Australia as the Directors of the Company
shall require and shall for the purposes of
the Company's business visit such places
(both within and without the Commonwealth
of Australia) as the Directors may require.
- 40 6. The Director shall receive all reasonable
travelling, hotel and other expenses in-
curred by him in or about the performance of
his office as Director.
7. The Company shall provide the Director with
the use of a suitable motor car during the
term of his employment hereunder and on the
terms and conditions normally applicable
to the provision of cars for employees of

companies in the Stenhouse group.

In the Supreme
Court of N.S.W. 8.
Exhibit A.

8. The Director shall not without the consent in writing of the Company during the continuance of this agreement be directly or indirectly engaged or concerned or interested in any other business whether in competition with the Company or not nor shall the Director in competition with the Company solicit the business of any person firm or corporation who during the continuance of this agreement shall have been a client of the Company. This clause shall not prevent the Director from investment as a shareholder or debenture holder in any Company officially listed on any recognised Stock Exchange provided however that the Director shall not own or in any other manner of way whatsoever be interested in more than five per cent of any class of the issued share or loan capital (whether or not quoted or dealt in on a recognised Stock Exchange or elsewhere) of any Company carrying on business as insurance brokers. 10
9. The Director shall not (either during the currency of this agreement or after the termination thereof) except in the proper course of his duties divulge to any person whomsoever and shall use his best endeavours to prevent the publication or disclosure of any trade secret or any information concerning the business or finance of the Company, or any of its dealings, transactions or affairs which may come to his knowledge during or in the course of his employment. 30
10. The Director as a separate and independent covenant enforceable as though Clause 11 were not contained herein covenants and agrees with the Company that he will not for Five years after the determination from any cause whatever of his services hereunder within Twenty-five miles radius of the General Post Office Sydney directly or indirectly engage or be concerned whether as principal servant or agent in the business of insurance broking or the business of an insurance agent or solicit the custom of any person, firm or corporation who during the continuance 40

of this agreement shall have been a customer of the Company and/or Stenhouse Holdings Limited and/or any Company associated therewith or a subsidiary thereof in competition with any such Company.

In the Supreme
Court of N.S.W.
Exhibit A.

11. The Director as a separate and independent covenant enforceable as though Clause 10 were not contained herein covenants and agrees with the Company that he will not for Five years after the determination from any cause whatever of his services hereunder directly or indirectly engage or be concerned in the business of insurance broking or the business of an insurance agent in any town in Australia in which the Company and/or any of its associated insurance broking companies shall have at the date of termination of this agreement a recognised place of business or in any place within Australia solicit the custom of any person, firm or corporation who during the continuance of this agreement shall have been a customer of the Company and/or Stenhouse Holdings Limited and/or any Company associated therewith or a subsidiary thereof in competition with any such Company.
12. The Company shall be entitled to terminate this agreement at any time during its currency without notice and without payment in lieu of notice if in the opinion of a majority of the Board of Directors of the Company the Director -
- (a) should contravene any of the obligations hereby incumbent on him, or
 - (b) act in any way to the prejudice of the Company and/or its business, or
 - (c) be grossly negligent in the exercise of his duties, or
 - (d) be guilty of grave misconduct.
- In the event of the termination of this agreement by the Company under sub-clauses (a) (b) (c) or (d) hereof, the Director shall have no claim against the Company for compensation for loss of employment or otherwise however.
13. The Director shall be entitled to Three weeks holiday in each calendar year during the term of this agreement and such holidays shall be

In the Supreme
Court of N.S.W.
Exhibit A.

- taken at such time as shall be approved by the Directors of the Company.
14. In the event of the Director becoming incapacitated through illness or otherwise from performing his full duties hereunder prior to the expiration of this agreement he shall for a period of three consecutive months then continue to draw full salary and on the expiration of the said period for a further period of three months the Company shall pay the Director one-half of his full salary. The Director shall join such disability scheme which the Company shall have established for its staff as the Directors of the Company shall direct such joining to be effective as from an entry date to be nominated by the Directors. 10
15. The Director shall join the pension scheme which the Company has established for its staff (hereinafter called "the Scheme") from the next entry date provided for under the Scheme, namely, 1st April 1965 and as from and after the date on which the Director shall have joined the Scheme the following provisions shall come into effect: 20
- (a) The Director will be deemed to retire from the service of the Company on his 65th birthday provided however that should his employment hereunder terminate before his 65th birthday in accordance with Clause 3 hereof then he shall be deemed to retire on the date of such earlier termination. 30
- (b) The Company shall continue to maintain the membership of the Director of the Scheme during the subsistence of this agreement subject to the rules and conditions of the Scheme. 40
- In addition the Director shall be entitled at retirement to a supplementary pension of such an amount as when added to the pension to which the Director is entitled under the Scheme and to any other pension to which the Director may be entitled pursuant to any pension scheme established by any other Company which is a subsidiary or associate of the Company and to any pension provided by the Commonwealth Government to which the Director may be entitled shall provide 50

In the Supreme
Court of N.S.W.
Exhibit A.

10 a total pension of two-thirds of his
salary at retirement subject always to
the Director having served a total of
25 years with the Company or a subsid-
iary or associate of the Company. Pro-
vided that should the Director have
served for less than 25 years as afore-
said then the rate of pension herein-
before provided shall be proportionately
reduced in accordance with the number
of years served. The Company shall make
suitable arrangements with an Insurance
Company of standing for the provision
of this supplementary pension in which
case all premiums payable to the Insur-
ance Company will be paid by the Company
or at its option shall on the Director's
retirement make such payments as shall
be required to provide the supplementary
20 pension. The supplementary pension shall
be payable monthly in advance for the
remainder of the lifetime of the Director.

(c) In the event of the Director prede-
ceasing the wife to whom he is
married at the time of this agreement
while in the service of the Company
such wife as his widow shall be en-
titled during her lifetime but only
so long as she shall not remarry to
30 annual pension at such a rate as
when added to the pension arising
from any Widow's Pension Scheme for
the Company's staff established by
the Company or by any other company
which is a subsidiary or associate
of the Company and the pension equiva-
lent of any capital sum which may be
payable to her under the Life Assur-
ance Scheme for the Company's staff
and to any pension provided by the
30 Commonwealth Government to which she
shall be entitled shall amount to
not less than one-third of the sal-
ary to which the Director was en-
titled at the date of his death.

(d) In the event of the Director prede-
ceasing the wife to whom he is
married at the date of this agreement
after his retirement on pension such
40 wife as his widow shall be entitled
during her lifetime but only so long

In the Supreme
Court of N.S.W.
Exhibit A.

as she shall not remarry to an annual pension equivalent to one-third of the total pension to which the Director was in receipt at the date of his death after taking into account the pension equivalent of any capital sum which may be payable to her in terms of the Scheme or of any other Scheme established by the Company or by any other company which is a subsidiary or associate of the Company. 10

16. Any notice hereunder may be served by the Company on the Director either personally or by leaving it or sending it by registered post to his last known place of abode. Any notice sent by post shall be deemed to have been served on the day following that on which it was posted (not being a Saturday, Sunday or Bank or Public Holiday) and in proving such service it shall be sufficient to show that the notice was properly addressed and posted. 20

17. This agreement is subject to ratification by the Board of Directors of Stenhouse Holdings Limited and it shall not hereafter be altered unless with the consent of the Directors of Stenhouse Holdings Limited.

18. In the event of any question or dispute or difference arising between the parties as to the true intent and meaning of this agreement or the fair interpretation or due implement thereof the same shall be referred to the President for the time being of the Law Institute of Victoria whom failing an Arbiter to be appointed by him, as sole Arbiter and awards of such Arbiter, partial, interim or final shall be binding on all concerned. 30 40

IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year first hereinbefore written.

THE COMMON SEAL of STENHOUSE SCOTT NORTH
AUSTRALIA LIMITED was hereto affixed in)
the presence of :)

Director
Director
Secretary

In the Supreme
Court of N.S.W.
Exhibit A.

SIGNED SEALED AND DELIVERED by)
the said MARSHALL WILLIAM)
DAVIDSON PHILLIPS in the) Signature indecipherable
presence of :)

Signature indecipherable

EXHIBIT B.

AGREEMENT MADE BETWEEN STENHOUSE
SCOTT NORTH AUSTRALIA LIMITED,
STENHOUSE AUSTRALIA LIMITED, AND
MARSHALL WILLIAM DAVIDSON PHILLIPS
6TH SEPTEMBER, 1966

In the Supreme Court of N.S.W. Exhibit B.

AN AGREEMENT made the 6th day of September 1966 BETWEEN STENHOUSE SCOTT NORTH AUSTRALIA LIMITED the registered office of which is at 107 Pitt Street Sydney in the State of New South Wales (hereinafter called "Stenhouse Scott North") of the first part STENHOUSE AUSTRALIA LIMITED the registered office of which is at 20 Queen Street Melbourne in the State of Victoria (hereinafter called "Stenhouse Australia") of the second part and MARSHALL WILLIAM DAVIDSON PHILLIPS of 5 Oswald Street Cremorne in the State of New South Wales Insurance Broker (hereinafter called "the Director") of the third part WHEREAS by an Agreement made the 11th day of December 1964 BETWEEN Stenhouse Scott North of the one part and the Director of the other part it was agreed that the Director should serve Stenhouse Scott North upon the terms set out therein AND WHEREAS by reason of changes in the capital structure of Stenhouse Scott North it is desired that henceforth the Director shall be employed by Stenhouse Australia and its subsidiary and associated companies NOW IT IS HEREBY AGREED AND DECLARED as follows:

1. Henceforth Stenhouse Australia shall employ the Director who shall serve Stenhouse Australia and perform such duties and exercise such powers in the conduct and management of the business of Stenhouse Australia and/or any company a subsidiary of or associated with Stenhouse Australia as may from time to time be assigned to or vested in him by the Directors of Stenhouse Australia and generally upon the terms and conditions as are contained in the said Agreement.

2. Henceforth the Director shall serve Stenhouse Australia generally upon the terms and conditions set out in the said Agreement.

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In the Supreme Court of N.S.W. Exhibit B.

3. The said Agreement shall be construed and shall operate as though it were originally entered into with Stenhouse Australia Limited named therein as "the Company" and service by the Director with Stenhouse Scott North pursuant to the terms of the said Agreement shall for all purposes be deemed to be service by the Director with Stenhouse Australia.

10 4. The Director shall notwithstanding the execution hereof continue to be bound to Stenhouse Scott North to observe the terms of clauses, 9 10 and 11 of the said Agreement but subject thereto Stenhouse Scott North and the Director hereby mutually discharge each other of them from any obligations to further perform the terms of the said Agreement.

20 5. Stenhouse Australia hereby undertakes to assume all of the obligations of Stenhouse Scott North as contained in the said Agreement and hereby indemnifies Stenhouse Scott North in respect thereof.

6. This Agreement is subject to ratification by the Board of Directors of Stenhouse Holdings Limited.

IN WITNESS whereof the parties hereof have hereunto set their hands and seals the day and year first hereinbefore written.

30 THE COMMON SEAL of STENHOUSE SCOTT)
NORTH AUSTRALIA LIMITED were hereto)
affixed in the presence of:)

Signature indecipherable Director The Common Seal of
Signature indecipherable Director Stenhouse
Signature indecipherable Secretary Scott North
Australia
Limited.

THE COMMON SEAL of STENHOUSE)
AUSTRALIA LIMITED was hereto)
affixed in the presence of :)

40 Signature indecipherable Director
Signature indecipherable Director
Signature indecipherable Secretary

In the Supreme Court of N.S.W. Exhibit B.

SIGNED SEALED AND DELIVERED by the)
 said MARSHALL WILLIAM DAVIDSON) Signature
PHILLIPS in the presence of :) indecipherable

Signature indecipherable

This Agreement has been exhibited to and approved of by the Board of Directors of Stenhouse Holdings Limited.

DATED the 26th day of January 1968 7.

Signature indecipherable
.....

Secretary.

EXHIBIT C.

AGREEMENT MADE BETWEEN STENHOUSE
AUSTRALIA LIMITED AND MARSHALL
WILLIAM DAVIDSON PHILLIPS
23RD MARCH, 1972

In the Supreme
Court of N.S.W.
Exhibit C.

AN AGREEMENT made the 23rd day of March 1972
BETWEEN STENHOUSE AUSTRALIA LIMITED of 8-12
 Market Street, Melbourne in the State of
 Victoria (hereinafter called "Stenhouse") of
 the first part and MARSHALL WILLIAM DAVIDSON
PHILLIPS formerly of 5 Oswald Street, Cremorne
 in the State of New South Wales but now of 34
 Perth Avenue, East Lindfield in the said State,
 Insurance Broker (hereinafter called "Mr.
 10 Phillips") of the second part

WHEREAS by an Agreement dated 11th December
 1964 made between Stenhouse Scott North Australia
 Limited of the one part and Mr. Phillips of the
 other part it was agreed that Mr. Phillips
 should serve that Company upon the terms set
 out therein AND WHEREAS by an Agreement dated
 6th September 1966 between Stenhouse Scott
 North Australia Limited of the first part
 20 Stenhouse Australia Limited of the second part
 and Mr. Phillips of the third part it was
 agreed that Mr. Phillips should serve Stenhouse
 and that the said Agreement dated 11th December
 1964 be construed as though originally entered
 into with Stenhouse AND WHEREAS Mr. Phillips
 was heretofore a Director of the following
 companies namely Stenhouse Scott North Australia
 Limited, Stenhouse Reinsurance Pty. Limited and
 Robert Paxton (Insurances) Pty. Limited but
 30 has tendered his resignation as a Director there-
 of with effect from the 9th day of July 1971
AND WHEREAS Mr. Phillips has tendered his re-
 signation as an employee of Stenhouse and has
 requested Stenhouse to release him from his ob-
 ligations under the abovementioned Agreements
AND WHEREAS Stenhouse has agreed so to release
 Mr. Phillips but only on the conditions that he
 undertakes to be bound by the obligations here-
 inafter stated NOW IT IS HEREBY AGREED AND
DECLARED as follows:

- 40 1. With effect from the 9th day of July 1971
 notwithstanding the date hereof the above-
 mentioned Agreements and Mr. Phillips'

In the Supreme
Court of N.S.W.
Exhibit C.

- employment pursuant thereto and his obligations thereunder shall cease and determine.
2. Stenhouse by its execution hereof acknowledges that Mr. Phillips' resignation as a Director of the following companies, namely Stenhouse Scott North Australia Limited, Stenhouse Reinsurance Pty. Limited and Robert Paxton (Insurances) Pty. Limited with effect from the 9th day of July, 1971 has been accepted. 10
 3. Mr. Phillips covenants that he will not divulge to any person whomsoever and shall use his best endeavours to prevent the publication or disclosure of any trade secret or any information concerning the business or finances of Stenhouse or its associated companies or any of its dealings, transactions or affairs which may have come to his knowledge during or in the course of his employment with Stenhouse or in his capacity as a Director as aforesaid. 20
 4. Mr. Phillips covenants that he will not for a period of five years from the said 9th day of July, 1971 unless with the prior written consent of Stenhouse directly or indirectly as principal servant or agent solicit whether by written or oral communication or otherwise insurance business from any client as herein-after defined. 30
 5. In the event that any client of Stenhouse shall within a period of five years from the said 9th day of July 1971 (and that whether or not such client is a client of one or more of the Stenhouse companies at the time) place insurance business whether or not business of a type presently transacted by Stenhouse for such client through the agency of Mr. Phillips or through any agency other than that of one of the Stenhouse companies referred to in Clause 2 of this Agreement so that Mr. Phillips or any person firm or corporation for whom Mr. Phillips is a 40

principal or agent or by whom Mr. Phillips is employed and with whom he is associated or connected in any other way receives or becomes entitled to receive directly or indirectly any financial benefit from the placing of such business then Mr. Phillips agrees to pay or procure that there shall be paid to Stenhouse a one-half share of the commission received in respect of such transaction and such commission shall be the gross commission (including any allowances) paid by the Insurance Company in respect of such transaction without allowance for any rebate made to the client and after deduction of any procurement fee properly payable in respect of prospective clients as hereinafter defined to any third party for the introduction of such business such procurement fee not to exceed one-third of the total initial commission. The sums payable to Stenhouse pursuant to this clause shall continue to be paid for a period of five years (but only if there is a financial benefit as aforesaid for each year) from the date on which such insurance business is so first placed and shall be paid to Stenhouse concurrently with the settlement of the net premium due to the Insurance Company concerned.

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6. Mr. Phillips covenants that except in the circumstances provided for in Clause 5 hereof he shall not for a period of three years from the said 9th day of July 1971 unless with the prior consent in writing of Stenhouse directly or indirectly as principal servant or agent act as Insurance Broker for any client as hereinafter defined.
 7. Mr. Phillips agrees he will not at any time within the period of five years from the said 9th day of July 1971 whether for himself or on behalf of any other person or any firm or corporation directly or indirectly entice or attempt to persuade any person who is at present or shall within such period be an officer or employee of Stenhouse or any associated

In the Supreme
Court of N.S.W.
Exhibit C.

company of Stenhouse to vacate his office or leave such employment and that he will not directly or indirectly make or cause to be made any offer of employment to any such officer or employee with whom he had personal association or contact whilst he was employed by Stenhouse and he further agrees so far as he is able to make any person firm or corporation by whom he is employed at any time during the said five years or for whom he is acting as agent at any time during the said five years observe similar terms provided however that this clause shall not apply to any offer of employment made to any such officer or employee of Stenhouse pursuant to any application for employment by any such officer or employee as a result of any public advertisement offering employment made by or on behalf of Mr. Phillips or any person firm or corporation by whom he is employed or for whom he is acting as agent.

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8. For the purposes of Clauses 4, 5 and 6 of this Agreement the word "client" shall mean any person firm or corporation who at the said 9th day of July 1971 or in the preceding month was a client of Stenhouse or any of its associated companies with whom in the course of his employment with Stenhouse Mr. Phillips has had dealings or negotiations and further shall mean a prospective client of Stenhouse or of its associated companies whose insurance business was the subject of negotiation with Stenhouse through the services or agency of Mr. Phillips either at the said 9th day of July 1971 or within the period of 12 months preceding that date but shall be construed as excluding any person firm or corporation who was a client or prospective client of Stenhouse as aforesaid and whose business is acquired by or who becomes thereafter a subsidiary of any other person firm or corporation which is at the said 9th day of July 1971 or may become during the term of this Agreement a client of Mr. Phillips or any

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person firm or corporation by whom he is employed or for whom he is acting as agent, and further shall be construed as excluding any Insurance Company.

In the Supreme Court of N.S.W. Exhibit C.

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9. For the purposes of this Agreement "associated company" or "associated company of Stenhouse" shall mean and include any company which is a subsidiary or related corporation of Stenhouse within the meaning of Section 6 of the Companies Act 1961.

IN WITNESS whereof these presents have been executed the day and year first hereinbefore written.

THE COMMON SEAL of STENHOUSE AUSTRALIA)
LIMITED was hereto affixed in the)
presence of:)

Signature indecipherable Director

Signature indecipherable Director

20

Signature indecipherable Secretary

SIGNED SEALED AND DELIVERED by the said)
MARSHALL WILLIAM DAVIDSON PHILLIPS in) Signature
the presence of:) indecipherable

H.J. Preston

DEFENDANT'S EXHIBITS

EXHIBIT 3.

LETTER MARSHALL PHILLIPS TO J.A.
NEWTON, DEPUTY MANAGING DIRECTOR
STENHOUSE AUSTRALIA LIMITED
12TH MAY, 1971

12th May, 1971

In the Supreme Court of N.S.W. Exhibit 3. J.A. Newton Esq.,
Deputy Managing Director,
Stenhouse Australia Limited,
19 Pitt St, Sydney.

Dear John,

Please accept this as confirmation of my verbal advise to you and Mr. Rundle that I shall resign from Stenhouse Australia Limited and subsidiaries in eight weeks time.

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Yours sincerely,

Marshall Phillips.

EXHIBIT 4.

LETTER STENHOUSE AUSTRALIA LIMITED
TO M.W.D. PHILLIPS
13TH MAY, 1971

13th May, 1971.

In the Supreme
Court of N.S.W.
Exhibit 4.

Mr. M.W.D. Phillips,
19 Pitt Street.

Dear Marshall,

Your letter of 12th May is received and I note the confirmation of the verbal advise given to me and conveyed to Mr. Rundle.

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There are certain contractual obligations to be fulfilled within the terms of your appointment as a Director and I am accordingly referring the matter to Glasgow and advising Mr. Kidd. In the meantime, I should indicate that I could not, in any case, accept anything less than three months as due notice of your intentions.

Yours sincerely,

J.A. Newton
DEPUTY MANAGING DIRECTOR

EXHIBIT 6.

LIST OF SUBSIDIARY AND ASSOCIATED
COMPANIES OF STENHOUSE AUSTRALIA LIMITED
AS AT THE 9TH JULY, 1971
AND 23RD MARCH, 1972
29TH SEPTEMBER, 1972

STENHOUSE AUSTRALIA LIMITED

The following is a list of Subsidiary &
In the Supreme Associated Companies of Stenhouse Australia
Court of N.S.W. Limited as at the 9/7/71 and 23/3/72
Exhibit 6.

SUBSIDIARY COMPANIES:

Stenhouse Victoria Limited	
Danby, Giddy & Outhwaite Pty. Limited	
John C. Lloyd & Co. Pty. Limited	
Stenhouse (N.S.W.) Limited	
Stenhouse Reinsurance Pty. Limited	
Stenhouse Scott North Australia Limited	10
Robert Paxton (Insurances) Pty. Limited	
Stenhouse Newcastle Limited	
Stenhouse Insurance Services Limited	
Stenhouse Nominees Limited	
Stenhouse Queensland Limited	
Noble Hall & Co. Pty. Limited	
Stenhouse (N.T.) Limited	
Stenhouse Wallace Bruce & Co. Limited	
Stenhouse (W.A.) Limited	
Wynn Roberts Pty. Limited	20

ASSOCIATED COMPANIES:

Stenhouse Baxter Nind Pty. Limited (now Stenhouse
New Guinea Pty. Limited)

N.B. This Company approx 40% owned at both of
the above dates. H.J.B.

H.J. Bodinnar,
.....
H.J. Bodinnar,
FINANCIAL DIRECTOR,
STENHOUSE AUSTRALIA
LIMITED

NOTE:

The Companies listed above are all "related" Companies as defined by Section 6 of the Companies Act of New South Wales 1961 as amended.

The said Companies were all wholly owned Subsidiaries of Stenhouse Australia Limited as at the 23rd March, 1972. At the 9/7/71 Stenhouse (W.A.) Limited was a partly owned Subsidiary.

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The Board of Directors of all the above Subsidiary Companies were controlled at the relevant dates by the Board of Directors of Stenhouse Australia Limited.

In the Supreme
Court of N.S.W.
Exhibit 6.