

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES
EQUITY DIVISION

BETWEEN :

HOWARD SMITH LIMITED Appellant
(13th Defendant)

- and -

AMPOL PETROLEUM LIMITED Respondent
Plaintiff

R.W. MILLER (HOLDINGS) LIMITED	(1st)	Defendant
ARCHIBALD N. TAYLOR	(2nd)	Defendant
SIR EMIL HERBERT PETER ABELES	(3rd)	Defendant
ELIZABETH MILLER	(4th)	Defendant
ROBERT I. NICHOLL	(5th)	Defendant
EVAN DUFF CAMERON	(6th)	Defendant
KENNETH B. ANDERSON	(7th)	Defendant
WILLIAM A. CONWAY	(8th)	Defendant
PETER J. DUNCAN	(9th)	Defendant
ALAN V. BALHORN	(10th)	Defendant
F.M. MURPHY (a male)	(11th)	Defendant
C.J. WATT (a male)	(12th)	Defendant
SECURITY SHARE SERVICES PTY. LIMITED	(14th)	Defendant

RESPONDENTS

RECORD OF PROCEEDINGS

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

VOLUME I

- 4 JAN 1975

25 RUSSELL SQUARE
LONDON, W.C.1.

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Solicitors for the Appellant

Clifford-Turner & Company,
11 Old Jewry,
London, EC2R 8DS

Solicitors for Ampol Petroleum Ltd.

(i)

IN THE PRIVY COUNCIL

No. 9 of 1973

O N A P P E A L
FROM THE SUPREME COURT OF NEW SOUTH WALES
EQUITY DIVISION

B E T W E E N :

HOWARD SMITH LIMITED Appellant
(13th Defendant)

- and -

AMPOL PETROLEUM LIMITED Respondent
Plaintiff

R.W. MILLER (HOLDINGS) LIMITED (1st) Defendant
ARCHIBALD N. TAYLOR (2nd) Defendant
SIR EMIL HERBERT PETER ABELES (3rd) Defendant
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ROBERT I. NICHOLL (5th) Defendant
EVAN DUFF CAMERON (6th) Defendant
KENNETH B. ANDERSON (7th) Defendant
WILLIAM A. CONWAY (8th) Defendant
PETER J. DUNCAN (9th) Defendant
ALAN V. BALHORN (10th) Defendant
F.M. MURPHY (a male) (11th) Defendant
C.J. WATT (a male) (12th) Defendant
SECURITY SHARE SERVICES PTY. LIMITED (14th) Defendant

Respondents

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8. Notice of Appearance of the 13th Defendant	11th July 1972
9. Notice of Appearance of the 3rd Defendant	11th July 1972
10. Short Minutes of Order (Jenkyn J.)	12th July 1972
11. Notice of Appearance of 12th Defendant	17th July 1972
12. Notice of Appearance of the 6th Defendant	17th July 1972
13. Notice of change of Solicitor of the 4th Defendant	17th July 1972
14. Undertakings	18th July 1972
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17. Cross Claim by the 1st Defendant	1st Aug. 1972
18. Defence of the 14th Defendant	3rd Aug. 1972
19. Reply to Defence of the 6th and 12th Defendants	4th Aug. 1972
20. Reply to Defence of the 14th Defendant	4th Aug. 1972
21. Reply to Defence of 4th Defendant	4th Aug. 1972
22. Notice of Appearance of Bulkships Ltd.	4th Aug. 1972
23. Affidavit of Discovery of Plaintiff (sworn by R.M.Binsted)	8th Aug. 1972
24. Affidavit of Discovery of the 4th Defendant Elizabeth Miller	8th Aug. 1972
25. Affidavit of Discovery of the 14th Defendant (sworn by D.J. Waight)	8th Aug. 1972
26. Affidavit of discovery of the 2nd Defendant A.N. Taylor	8th Aug. 1972
27. Affidavit of discovery of the 7th Defendant K.B.Anderson	8th Aug. 1972
28. Affidavit of discovery of the 11th Defendant F.M. Murphy	8th Aug. 1972
29. Affidavit of discovery of the 8th Defendant W.A. Conway	8th Aug. 1972

30.	Affidavit of discovery of the 5th Defendant R.I. Nicholl	8th Aug. 1972
31.	Affidavit of discovery of the 1st Defendant (sworn by H.V.Ellis-Jones)	8th Aug. 1972
32.	Short Minutes of Order (Street C.J. in Equity)	8th Aug. 1972
33.	Affidavit of discovery of the 10th Defendant A.V. Balhorn	9th Aug. 1972
34.	Affidavit of discovery of the 13th Defendant (sworn by T. Maxwell)	9th Aug. 1972
35.	Affidavit of discovery of the 6th Defendant E.D. Cameron	10th Aug. 1972
36.	Affidavit of discovery of the 12th Defendant C.J. Watt	10th August 1972
37.	Defence to Cross Action by 3rd Cross Defendant	11th Aug. 1972
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41.	Reply to Defence to Cross Claim by 3rd Cross Defendant	15th Aug. 1972
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43.	Reply to Defence of 2nd Cross Defendant	16th Aug. 1972
44.	Interrogatories by 13th Defendant to Plaintiff	22nd Aug. 1972
45.	Affidavit of discovery by 3rd Defendant E.H. Abeles	22nd Aug. 1972
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48.	Interrogatories of Plaintiff to 1st Defendant	23rd Aug. 1972
49.	Interrogatories of Plaintiff to 2nd, 5th 7th, 8th, 9th and 10th Defendants	23rd Aug. 1972

50.	Interrogatories of Plaintiff to 4th Defendant	23rd Aug. 1972
51.	Interrogatories of 2nd Cross Defendant to Cross Claimant	24th Aug. 1972
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53.	Interrogatories of Plaintiff to 14th Defendant	25th Aug. 1972
54.	Interrogatories of Plaintiff to 3rd Defendant	25th Aug. 1972
55.	Verified Statement in answer to interrogatories by 14th Defendant (sworn by D.J. Waight)	29th Aug. 1972
56.	Verified statement in answer to interrogatories by 6th Defendant E.D. Cameron	1st Sept. 1972
57.	Verified statement in answer to interrogatories by 4th Defendant Elizabeth Miller	1st Sept. 1972
58.	Verified statement in answer to interrogatories by 3rd Defendant E.H.P. Abeles	1st Sept. 1972
59.	Verified statement in answer to interrogatories by 2nd Cross Defendant (sworn by K.D.Stewart)	4th Sept. 1972
60.	Verified statement in answer to interrogatories by Cross Claimant (sworn by H.V. Ellis-Jones)	5th Sept. 1972
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64.	Judges notes (Street C.J. in Equity)	20th Dec. 1972

LIST OF EXHIBITS OMITTED FROM RECORD OF PROCEEDINGS

Exhibit Mark	<u>Plaintiffs exhibits</u>
VV	Details of shareholdings

	<u>Defendants Exhibits</u>	
MH.3	Report and accounts	30th June 1972
MH.4	Draft Summary Consolidated Balance Sheets	30th June 1963 to 30th June 1971
MH.8	Form of unexecuted agreement Romanda Pty. Ltd. and Ampol Petroleum Ltd.	
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MH.12	Part not included in Part II thereof comprising correspondence	
MH.18	Summary of Hotel Trading Accounts	
MH.20	Letter Howard Smith Ltd. to Sydney Stock Exchange	4th July 1972
MH.21	Letters R.W. Miller (Holdings) Ltd. to Potter and reply	17th July 1972
MH.22	Letters R.W. Miller (Holdings) Ltd. to Bulkships Ltd.	3rd July 1972
MH.23	Letter Minister for Shipping and Transport to R.W. Miller (Holdings) Ltd. and R.W. Miller (Holdings) Ltd. to Minister for Shipping and Transport	24th May 1971 28th May 1971
MH.24	Ampol Petroleum Ltd. Minutes extracts	14th Jan. 1972
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MH.28	Debit note and receipt for M.T. "Amanda Miller"	1st March 1972 ³
MH.29	Amanda Miller Contract 1970	
MH.30	Robert Miller Contract	30th June 1971
MH.33	Medical Certificate re Duncan	
MF.11	Letter R.W. Miller (Holdings) to Bulkships Ltd.	16th May 1972
MF.12	Copy letter Tricontinental Corporation Ltd. to R.W. Miller (Holdings) Ltd.	16th Sept. 1972
MF.14	Telexes R.W. Miller (Holdings) Ltd. to Hambros Bank Ltd. and reply	6th July 1972
MF.15	Interrogatory 12 Howard Smith Ltd. to Ampol Petroleum Ltd. (rejected)	22nd Aug. 1972

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

No. 1

1240 of 1972

In the Supreme
Court of New
South Wales

No. 1

Statement of
Claim

25th July 1972

AMPOL PETROLEUM LIMITED

Plaintiff

and

R.W. MILLER (HOLDINGS) LIMITED & ORS.

Defendants

STATEMENT OF CLAIM

10 1. The Plaintiff is a company duly incorporated
in and in accordance with the laws of the State
of New South Wales.

20 2. The first defendant (hereinafter called
"Millers") is a company duly incorporated in and
in accordance with the laws of the Australian
Capital Territory. At all material times Millers
is and has been registered in the State of New
South Wales as a foreign company and has had and
still has its registered and head office in the
said State at 19 Bridge Street, Sydney.

3. The thirteenth Defendant (hereinafter called
"Howard Smith") is a company duly incorporated
in and in accordance with the laws of the State
of Victoria. At all material times Howard Smith
is and has been registered in the State of New
South Wales as a foreign company and has had and
still has its registered and head office in the
said State at 269-271 George Street, Sydney.

30 4. The fourteenth Defendant (hereinafter
called "Security Services") is a company duly
incorporated in and in accordance with the laws
of the State of New South Wales.

5. At all material times the Board of Directors
of Millers is and has consisted of the second
Defendant (hereinafter called "Taylor") as
Chairman, the third Defendant (hereinafter called
"Abeles"), the fourth Defendant (hereinafter
called "Lady Miller"), the fifth Defendant
(hereinafter called "Nicholl"), the

In the Supreme
Court of New
South Wales

No. 1

Statement of
Claim

25th July 1972
(Continued)

sixth Defendant (hereinafter called "Cameron"), the seventh Defendant (hereinafter called "Anderson"), and the ninth Defendant (hereinafter called "Duncan").

6. At all material times the eighth Defendant (hereinafter called "Conway") has claimed to be and to act and vote as alternate Director of Millers appointed by Anderson pursuant to the Articles of Association of Millers. The Plaintiff craves leave to refer to the Memorandum and Articles of Association of Millers when produced as if the same had been fully set forth herein. 10

7. At all material times the tenth Defendant (hereinafter called "Balhorn") has claimed to be and to act and vote as alternate Director of Millers appointed by Duncan pursuant to the aforesaid Articles.

8. At all material times the eleventh Defendant (hereinafter called "Murphy") and the twelfth Defendant (hereinafter called "Watt") are and were alternate Directors of Millers appointed respectively by Taylor and Cameron pursuant to the said Articles. 20

9. At all material times the nominal capital of Millers is and has been \$15,000,000 divided into 15,000,000 shares of \$1.00 each.

10. At all material times up to and including the 5th July, 1972, the issued capital of Millers was 9,000,786 fully paid ordinary \$1.00 shares (which fully paid ordinary \$1.00 shares are hereinafter referred to as "shares in the capital of Millers").

11. At all material times prior and up to the 6th July, 1972, the shares in the capital of Millers were, pursuant to the request of Millers, listed upon the Sydney Stock Exchange and all other member Exchanges of the Australian Associated Stock Exchanges (hereinafter called "the Exchanges"). The Plaintiff craves leave to refer to the Official List Requirements of the Exchanges when produced as if the same had been fully set forth herein. 30

12. At all material times Millers has kept and maintained in the State of New South Wales a Branch Register of its members. The said Branch Register has at all such times, been so kept and maintained at Mansfield Street, Balmain under the supervision and control of Security Services pursuant to an agreement made by and between Millers and the 40

said Security Services. The Plaintiff craves leave to refer to this agreement when produced as if the same had been fully set forth herein.

In the Supreme
Court of New
South Wales

No. 1

Statement of
Claim

25th July 1972

(continued)

13. The Plaintiff is and at all material times has been the holder of a large number of shares in the capital of Millers. As at the 6th July, 1972 the Plaintiff was the holder of 2,681,641 shares in the capital of Millers.

10 14. On the 24th May, 1972, the Plaintiff, pursuant to Section 184 of the Companies Ordinance of the Australian Capital Territory, (hereinafter called "the Ordinance") gave to Millers written notice of a take-over scheme (hereinafter called "the take-over offer"), involving the making of offers by it to acquire the whole of the shares in the capital of Millers then not already owned by the Plaintiff, namely 6,319,145 ordinary shares, for a consideration of \$2.27 for each such share, subject to the terms and conditions in the said written notice
20 therein set forth. The Plaintiff craves leave to refer to the said written notice when produced as if the same had been fully set forth herein.

30 15. On the 15th June, 1972, the Plaintiff caused to be issued and circulated to shareholders of Millers a formal offer to purchase the whole of the shares in the capital of Millers not already owned by it, namely, 6,319,145 ordinary shares for a consideration of \$2.27 cash for each such share subject to the terms and conditions therein specified, including the condition that acceptance of offers made under the take-over offer should be received by the Plaintiff in respect of not less than 5,687,230 Miller shares. The Plaintiff craves leave to refer to the said formal offer and accompanying documents when produced as if the same had been fully set forth herein.

40 16. By letter of 22nd June, 1972, Howard Smith advised Millers that Howard Smith intended to make an offer to acquire all the shares in the capital of Millers on the alternative bases of 2 ordinary \$1.00 shares in the capital of Howard Smith issued as fully paid plus \$6.00 in cash for each 5 shares in the capital of Millers, or alternatively, \$2.50 in cash for each share in the capital of Millers, subject to certain terms and conditions in the said letter set forth. The Plaintiff craves leave to refer to the said letter when produced, as if the same had been fully set forth herein.

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Court of New
South Wales

No. 1

Statement of
Claim

25th July 1972

(continued)

17. On or about the 27th June, 1972, Millers caused to be circularized to shareholders and to the Sydney Stock Exchange a Statement made pursuant to Section 184 of the aforesaid Ordinance, together with the recommendation of the Directors of that Company recommending that the shareholders of Millers reject the take-over offer made by the Plaintiff on the grounds, inter alia, that the price offered to shareholders by the Plaintiff was inadequate having regard to the valuable assets owned by Millers and its earning capacity and to the fact that Howard Smith had announced its intention to make a higher take-over offer. The Plaintiff craves leave to refer to this Statement, recommendation and accompanying documents when produced as if the same were fully set forth herein. 10

18. At all material times, Bulkship, Limited (hereinafter called "Bulkships") has been and is the holder of 2,257,100 shares in the capital of Millers.

19. On the evening of the 27th June, 1972, the Plaintiff, with the approval of Bulkships, caused to be released to the Exchanges and published a document, stating inter alia that the Plaintiff and Bulkships, between them, controlled in excess of 55% of the said shares in the capital of Millers and that agreement had been reached that day between the Plaintiff and Bulkships to the effect that the Plaintiff and Bulkships would, inter alia, not accept any take-over offer for their shares and would act jointly in relation to the future operations of Millers. 20
The Plaintiff craves leave to refer to the said document when produced as if the same had been fully set forth herein. 30

20. On the 6th July, 1972, at a meeting of the Board of Directors of Millers, Taylor, Nicholl, Anderson and Balhorn voted in support of a resolution (hereinafter called "the purported resolution") reporting to allot forthwith to Howard Smith 500,000 ordinary shares in the capital of Millers at \$2.30 per share of which 23 cents per share was payable on application and the balance of \$2.07 per share was payable on the 30th September 1972 provided that such balance should be accepted at an earlier date if tendered by Howard Smith and further provided that such shares should not participate in any dividend paid in respect of profits derived in the year ended 30th June, 1972 but would otherwise rank pari passu with existing shares in all other respects. 40
Lady

Miller and Cameron voted against the resolution. Taylor as Chairman of Directors of Millers ruled that Abeles was not entitled to vote on the resolution and prohibited Abeles from voting thereon. The aforesaid majority of the Board also purported to authorise the execution by Millers of an Agreement with Howard Smith (hereinafter called "the said Agreement") upon the terms of a form of agreement which had been submitted to Millers by Howard Smith.

10 The Plaintiff craves leave to refer to the Minutes of the said Meeting, the said Agreement and letter of application for the said shares when produced as if the same had been fully set forth herein.

In the
Supreme Court
of New South
Wales

No. 1

Statement of
Claim

25th July 1972

(continued)

21. On the said 6th July, 1972, in purported pursuance of the said resolutions referred to in paragraph 20 hereof and not otherwise, the Defendants Taylor, Nicholl, Anderson and Balhorn caused the seal of Millers to be affixed to a share certificate or share certificates in respect of the said 4,500,000 shares and to the said Agreement and caused the said share certificate or share certificates and the said Agreement so sealed to be forthwith delivered to Howard Smith.

20

22. Each of the purported resolution for the allotment of the said 4,500,000 shares to Howard Smith and the purported allotment thereof and the affixing of the seal of Millers to the said share certificate or share certificates in pursuance of such purported resolution was ultra vires the powers of the directors of Millers, and was an abuse of the said power and was and is ultra vires such powers and void and invalid in that:

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(a) The said Defendants who voted in favour of the said resolution for the said purported allotment so voted for the purpose of reducing the proportion of the shares in the capital of Millers held by each of the Plaintiff and Bulkships;

(b) The said Defendants so voted for the purpose of defeating the said take-over offer made by the Plaintiff and of facilitating and ensuring the success of the proposed take-over offer to be made by Howard Smith;

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(c) The said Directors so voted for the purpose of preserving the positions of themselves (and in the case of Balhorn, the position

In the
Supreme Court
of New South
Wales

No. 1

Statement of
Claim

25th July 1972

(continued)

of Duncan, as directors and alternate directors of Millers and to prevent a substantial reconstruction of the Board of Millers;

- (d) The said Defendants did not so vote bona fide in the interests of Millers as a whole; and
- (e) The said purported allotment was not made bona fide in the interests of Millers as a whole.

10

23. Each of the purported resolution for the execution by Millers of the said Agreement and the affixing of the seal of Millers to the said Agreement in pursuance thereof was ultra vires the powers of the directors of Millers and was an abuse of the said powers and was and is void and invalid in that the Defendants who voted in favour of the said resolution so voted only for the reason that Howard Smith had stated that it would not apply for or accept the said allotment of 4,500,000 shares unless Millers executed the said Agreement and in that:

20

- (a) The Defendants who voted in favour of the said resolution for the execution of the said Agreement so voted for the purpose of reducing the proportion of the shares in the capital of Millers held by each of the Plaintiff and Bulkships;
- (b) The said Defendants so voted for the purpose of defeating the said take-over offer made by the Plaintiff and of facilitating and ensuring the success of the proposed take-over offer to be made by Howard Smith;
- (c) The said Directors so voted for the purpose of preserving the positions of themselves (and in the case of Balhorn, the position of Duncan) as directors and alternate directors of Millers and to prevent a substantial reconstruction of the Board of Millers;
- (d) The said Defendants did not so vote bona fide in the interests of Millers as a whole; and

30

40

(e) The said Agreement was not made bona fide in the interests of Millers as a whole.

In the Supreme
Court of New
South Wales

No. 1

Statement of
Claim

25th July 1972

(continued)

24. Balhorn in voting in support of the said purported resolution for the allotment of 4,500,000 shares to Howard Smith and for the execution of the said Agreement so voted by reason of prior instructions given to him by Duncan, then residing in Japan, and was not acting independently as an alternate director and did not exercise his own independent judgment and fiduciary power as such in the interests of Millers as a whole.

25. Abeles was, without any proper justification and contrary to the Articles of Association of Millers prevented by Taylor, as Chairman of the said meeting, with the support of a majority of the other directors of Millers, from fully participating in discussion of the said resolution for the allotment of the said 4,500,000 shares to Howard Smith and of the said resolution for the execution by Millers of the said Agreement and from voting upon either of the said resolutions.

26. By reason of the facts and matters alleged in paragraphs 23 and 24 hereof and/or by reason of the facts and matters alleged in paragraph 25 hereof, neither of the said resolution for the purported allotment of the said 4,500,000 shares to Howard Smith nor the said resolution for the execution by Millers of the said Agreement was a valid or effective resolution of the Board of Directors of Millers and the said purported allotment and the said purported Agreement was therefore void and ineffective.

27. Howard Smith was, at the time of the purported allotment of the said 4,500,000 shares to it and at the time of the said purported execution by Millers of the said Agreement and at all material times, aware of each and all of the facts and matters alleged in paragraphs 1 to 25 inclusive of this Statement of Claim.

28. By reason of the matters aforesaid Howard Smith is not entitled to be entered in the Register of Members of Millers as the holder of the said 4,500,000 shares or to remain in the said Register of Members as the holder of such shares.

29. The Plaintiff charges and the facts are that:

In the Supreme
Court of New
South Wales

No. 1

Statement of
Claim

25th July 1972

(continued)

- (a) The said purported allotment of shares was made in breach of the Official Listing Requirements of the said Exchanges and, as a consequence of the said purported allotment of shares, trading in the shares of Millers was and has been suspended at the Sydney Stock Exchange and all other member Exchanges of the said Exchanges;
- (b) The existing shareholding of the Plaintiff in Millers would be and has been by the purported allotment of the said shares, reduced from approximately 30% to approximately 20.10%;
- (c) The value of the Plaintiff's said shareholding in Millers would be and has been by reason of the said purported allotment, substantially reduced.

10

The Plaintiff therefore claims:

1. A DECLARATION that the purported allotment and issue of a parcel of 4,500,000 ordinary \$1.00 shares in the capital of the Defendant R.W. Miller (Holdings) Limited (hereinafter called "the shares") made on the 6th July, 1972 to Howard Smith Limited was void.

20

2. Alternatively to 1. above:

(a) A DECLARATION that the purported allotment and issue of a parcel of 4,500,000 ordinary \$1.00 shares in the capital of the Defendant R.W. Miller (Holdings) Limited made on 6th July, 1972 to Howard Smith Limited was invalid and should be set aside;

30

(b) AN ORDER that the purported allotment and issue of the shares to the Defendant Howard Smith Limited be set aside.

3. A DECLARATION that the Agreement made the 6th July, 1972 between the Defendant R.W. Miller (Holdings) Limited and Howard Smith Limited was void.

4. Alternatively to 3. above:

(a) A DECLARATION that the Agreement made the 6th July, 1972 between the Defendant R.W.

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Miller (Holdings) Limited and the Defendant Howard Smith Limited was invalid and should be set aside;

In the Supreme Court of New South Wales

No. 1

(b) AN ORDER that the said Agreement be set aside.

Statement of Claim

5. In the event that the name of the Defendant Howard Smith Limited has been entered into the Register of Members of the Defendant R.W. Miller (Holdings) Limited.

25 July 1972

(continued)

10 (a) A DECLARATION that the name of the Defendant Howard Smith Limited has been without sufficient cause entered into the Register of Members of the Defendant R.W. Miller (Holdings) Limited as a member of that company in respect of the said shares;

20 (b) AN ORDER for the rectification of the Register of Members of the Defendant R.W. Miller (Holdings) Limited by the removal therefrom of the Defendant Howard Smith Limited as a member of the Defendant R.W. Miller (Holdings) Limited in respect of the said shares or any parcel thereof.

6. AN ORDER that the Defendant R.W. Miller (Holdings) Limited, and the Defendants Taylor, Murphy, Abeles, Lady Miller, Nicholl, Cameron, Watt, Anderson, Conway, Duncan and Balhorn, and each of them be restrained by themselves their servants or agents from:

30 (a) taking any step, or causing or permitting any further step to be taken to effect the registration of the Defendant Howard Smith Limited in the Principal or any Branch Register of Members of the Defendant R.W. Miller (Holdings) Limited kept by that Company in any part of the Commonwealth as a member of the Defendant R.W. Miller (Holdings) Limited in respect of the said shares or any parcel of them;

(b) treating, dealing with, or in any way recognizing or holding out the Defendant Howard Smith Limited as a member of the Defendant R.W. Miller (Holdings) Limited in respect of the said shares or any parcel thereof;

40 (c) permitting the Defendant Howard Smith Limited to attend and vote and exercise any other rights as a member of the Defendant R.W. Miller

In the Supreme
Court of New
South Wales

(Holdings) Limited in respect of the said
shares or any parcel thereof.

No. 1
Statement of
Claim
25th July 1972
(continued)

7. AN ORDER that the Defendant R.W. Miller (Holdings) Limited forthwith repay to the Defendant Howard Smith Limited the amount paid by that Company to the Defendant R.W. Miller (Holdings) Limited in respect of the purported allotment of the said shares.

8. AN ORDER that the Defendant Howard Smith Limited forthwith deliver up to the Defendant R.W. Miller (Holdings) Limited for cancellation the Share Certificate or Certificates issued to and received by it in respect of the said shares or any parcel thereof.

10

9. AN ORDER that the Defendant Howard Smith Limited be restrained by its servants and agents from:-

(a) acting as, voting or in any way holding itself out as a member of the Defendant R.W. Miller (Holdings) Limited in respect of the said shares or any parcel thereof:

(b) making any application for the registration as a member of the Defendant R.W. Miller (Holdings) Limited in the Principal or other Branch Register of Members of the Defendant R.W. Miller (Holdings) Limited kept by that Company in any part of the Commonwealth in respect of the said shares or any parcel thereof.

20

10. AN ORDER that Security Share Services Pty. Limited be restrained by itself, its servants and agents from:-

(a) taking any further step to register or enter in the Branch Register of Members of the Defendant R.W. Miller (Holdings) Limited kept by it in this State, the Defendant Howard Smith Limited as a member of the Defendant R.W. Miller (Holdings) Limited in respect of the shares or any parcel thereof;

30

(b) treating, dealing with or otherwise recognizing the Defendant Howard Smith Limited as a member of the Defendant R.W. Miller (Holdings) Limited in respect of the said shares or any parcel thereof.

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11. AN ORDER that the Defendant R.W. Miller (Holdings) Limited and the Defendants Taylor, Nicholl, Duncan, Balhorn and Howard Smith Limited pay the costs of the Plaintiff of these proceedings.

In the Supreme
Court of New
South Wales

No. 1
Statement of
Claim

AND for such other relief as the nature of this case may require.

25th July 1972

To the Defendants:

(continued)

10 You are liable to suffer judgment or an order against you unless the prescribed form of notice of your appearance is received in the Registry within (14) days after service of this Statement of Claim upon you (if you have not already filed such notice of appearance to the Summons herein) and further unless you comply with rules of Court and the directions of His Honour Mr. Justice Street given on the 8th July, 1972, whereby your said Defence must be filed and served upon the Plaintiff's Solicitors on or before 1st August, 1972.

20 Plaintiff: Ampol Petroleum Limited
of 84 Pacific Highway,
North Sydney being its
registered office.

Solicitors: Messrs. Dawson Waldron,
60 Martin Place, Sydney,
telephone 28-5931.

Plaintiff's
address for
service: In care of Messrs.
Dawson Waldron,
60 Martin Place,
Sydney.

30 Addresses of
Registry: Equity Office,
Supreme Court,
Elizabeth Street,
Sydney.

Filed: 25th July, 1972.

Sgd: A.R. EMMETT

Plaintiff's Solicitor.

In the Supreme
Court of New
South Wales
Equity Division

No. 2

DEFENCE OF THE THIRTEENTH DEFENDANT
HOWARD SMITH LIMITED FILED 31st JULY 1972

No. 2

Ampol Petroleum Limited Plaintiff

R.W. Miller (Holdings) Limited & Ors. Defendants

Defence of the
Thirteenth
Defendant
Howard Smith
Limited

filed
31st July 1972

1. The thirteenth defendant (hereinafter referred to as Howard Smith) does not admit the allegations in paragraphs 6, 7 or 8 of the statement of claim or any of them.

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2. Howard Smith does not admit the allegations in paragraph 13 of the statement of claim or any of them.

3. Howard Smith does not admit the allegations in paragraphs 14 or 15 of the statement of claim or any of them.

4. In answer to paragraph 16 of the statement of claim Howard Smith denies that such paragraph correctly or sufficiently states the terms or the effect of the letter therein referred to.

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5. In answer to paragraph 17 of the statement of claim Howard Smith does not admit that such paragraph correctly or sufficiently states the terms or the effect of the Statement, the recommendation or the accompanying documents in the said paragraph referred to or any of them.

6. Howard Smith does not admit the allegations in paragraph 18 of the statement of claim or any of them.

7. In answer to paragraph 19 of the statement of claim Howard Smith does not admit that the conduct of the plaintiff in such paragraph referred to occurred with the approval of Bulkships.

30

8. Howard Smith does not admit the allegations in paragraph 20 of the statement of claim or any of them.

9. In answer to paragraph 21 of the statement of claim Howard Smith admits that the seal of Millers was affixed to a share certificate in respect of

the 4,500,000 shares referred to in the said paragraph and that the said share certificate and the said agreement so sealed were delivered to Howard Smith. Save as aforesaid Howard Smith does not admit the allegations in the said paragraph contained or any of them.

In the Supreme
Court of New
South Wales
Equity Division
No. 2

10. Howard Smith does not admit the allegations in paragraphs 22, 23, 24 or 25 of the statement of claim or any of them.

Defence of the
Thirteenth
Defendant
Howard Smith
Limited

10 11. Howard Smith denies each of the allegations in paragraph 26 of the statement of claim.

filed
31st July 1972

12. Howard Smith denies each of the allegations in paragraphs 27 and 28 of the statement of claim.

(continued)

13. Howard Smith does not admit the allegations in paragraph 29 of the statement of claim or any of them.

14. In answer to the whole of the statement of claim Howard Smith says and the facts are -

20 (a) By an agreement made on or about the 6th July 1972 by and between Howard Smith and Millers it was agreed that Millers would allot to Howard Smith 4,500,000 ordinary \$1.00 shares in the capital of Millers at a premium of \$1.30 per share:

30 (b) It was a term and condition of the said agreement that the price of the said shares would be paid by Howard Smith as to the amount of 23c per share on the making of the said allotment and as to the balance of \$2.07 per share on the 30th September 1972 or on such earlier date as Howard Smith should elect to tender payment of such balance.

(c) Pursuant to the said agreement, on or about the 6th July 1972 Millers allotted to Howard Smith the said 4,500,000 shares and Howard Smith paid to Millers the sum of \$1,035,000 on account of the price therefor:

40 (d) On or about the 6th July 1972 Howard Smith became registered as the holder of the said 4,500,000 shares:

In the Supreme
Court of New
South Wales
Equity Division
No. 2

Defence of the
Thirteenth
Defendant
Howard Smith
Limited
filed
31st July 1972

- (e) On or about the 6th July 1972 a share certificate in respect of the said 4,500,000 shares, duly sealed with the common seal of Millers, was delivered to Howard Smith;
- (f) At the respective times of the making of the said agreement, of the payment of the said sum of \$1,035,000, of the said allotment, of the execution of the said share certificate, of the delivery of the said share certificate to Howard Smith, and at all material times, Howard Smith was a bona fide purchaser for value of the said 4,500,000 shares and Howard Smith did not at any of those times have any notice of any irregularity, defect, excess or abuse of power, voidness or invalidity, affecting either the agreement, or the allotment of the shares, or the issue of the said share certificate, or the registration of Howard Smith as the holder of the said shares, or of the delivery of the said share certificate to Howard Smith.

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Sgd. J.R. Kerrigan

Solicitor for Howard Smith

Filed: 31st July 1972

No. 3DEFENCE OF THE FIRST, SECOND, FIFTH,
SEVENTH, EIGHTH, NINTH, TENTH AND
ELEVENTH DEFENDANTS

In the Supreme
Court of New
South Wales
Equity Division
No. 3

Ampol Petroleum Limited Plaintiff

R.W. Miller (Holdings) Limited
& Others Defendants

Defence of the
First, Second,
Fifth, Seventh,
Eighth, Ninth,
Tenth and
Eleventh
Defendants

1st August
1972

10 1. In answer to paragraph 13 of the Statement of
Claim the first, second, fifth, seventh, eighth,
ninth, tenth and eleventh Defendants (hereinafter
collectively called "the Defendants") admit that the
Plaintiff is and at all material times has been the
holder of a large number of shares in the capital of
Millers but save and except as aforesaid do not know
and cannot admit that as at 6th July, 1972 the Plain-
tiff was the holder of 2,681,641 shares in the
capital of Millers.

20 2. In answer to paragraph 14 of the Statement of
Claim the Defendants admit that on or about
24th May, 1972 the Plaintiff gave to Millers a
written notice purporting to be pursuant to the pro-
visions of Section 184 of the Companies Ordinance
of the Australian Capital Territory but save and
except as aforesaid do not know and cannot admit
that the said notice or the contents thereof is suf-
ficiently correctly or fully set forth in the State-
ment of Claim.

30 3. In answer to paragraph 15 of the Statement of
Claim the Defendants admit that on or about
15th June, 1972 a document purporting to be a formal
offer was sent to shareholders of Millers but save
and except as aforesaid do not know and cannot admit
that the said document is sufficiently correctly or
fully set forth in the Statement of Claim.

40 4. In answer to paragraph 16 of the Statement of
Claim the Defendants admit the receipt by Millers of
a letter from Howard Smith but save and except as
aforesaid do not know and cannot admit that the said
letter is sufficiently fully or correctly set forth
in the said paragraph of the Statement of Claim.

5. In answer to paragraph 17 of the Statement of
Claim the Defendants admit that on or about
27th June, 1972 Millers caused to be circularized to

In the Supreme
Court of New
South Wales

Equity Division

No. 3

Defence of the
First, Second,
Fifth, Seventh,
Eighth, Ninth
Tenth and
Eleventh
Defendants

1st August,
1972

(continued)

shareholders and to the Sydney Stock Exchange a statement made pursuant to Section 184 of the said Ordinance together with the recommendation of the Directors of Millers recommending that the shareholders reject the takeover offer made by the Plaintiff but save and except as aforesaid the Defendants do not know and cannot admit that the said documents are in the Statement of Claim sufficiently correctly or fully set forth.

6. In answer to paragraph 19 of the Statement of Claim the Defendants admit that the Plaintiff caused to be published a document on or about 27th June, 1972 but do not know and cannot admit that it was published or caused to be released with the approval of Bulkships or that the said document is in the Statement of Claim sufficiently correctly or fully set forth.

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7. In answer to paragraph 20 of the Statement of Claim the Defendants admit that a meeting of Directors of Millers was held on 6th July, 1972 and that Messrs. Taylor, Nicholl, Anderson and Balhorn voted in support of a resolution allotting forthwith to Howard Smith 4,500,000 ordinary shares in the capital of Millers at \$2.30 per share payable in the manner said resolutions set out and otherwise on the terms and conditions set out in the said resolution but save and except as aforesaid do not know and cannot admit that the resolutions referred to in the Statement of Claim are sufficiently correctly or fully set forth.

20

8. In answer to paragraph 22 of the Statement of Claim the Defendants deny that the acts therein referred to or any of them were ultra vires the powers of the Directors of Millers and were an abuse of the said power and were and are ultra vires such powers and are void and invalid and each of the foregoing allegations.

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9. In further answer to paragraph 22 of the Statement of Claim the Defendants deny that the Defendants who voted in favour of the said resolution so voted for the purpose of reducing the proportion of the shares in the capital of Millers held by each of the Plaintiff and Bulkships.

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10. In further answer to paragraph 22 of the Statement of Claim the Defendants deny that the Defendants so voted for the purpose of defeating the takeover offer made by the Plaintiff and of facilitating and

ensuring the success of the proposed takeover offer to be made by Howard Smith.

In the Supreme
Court of New
South Wales

Equity Division

No. 3

Defence of the
First, Second,
Fifth, Seventh,
Eighth, Ninth
Tenth and
Eleventh
Defendants

1st August,
1972

(continued)

11. In further answer to paragraph 22 of the Statement of Claim the Defendants deny that the Directors so voted for the purpose of preserving the positions of themselves (and in the case of the Defendant Balhorn the position of Duncan) as Directors and alternate Directors of Millers and to prevent a substantial reconstruction of the Board of
10 Millers.

12. In further answer to paragraph 22 of the Statement of Claim the Defendants deny that they did not Vote bona fide in the interests of Millers as a whole.

13. In further answer to paragraph 22 of the Statement of Claim the Defendants deny that the allotment was not made bona fide in the interests of Millers as a whole.

14. In answer to paragraph 23 of the Statement of
20 Claim the Defendants deny that each or any of the resolutions and the affixing of the seal of Millers to the agreement or any of the foregoing was ultra vires the power of the Directors of Millers and was an abuse of the said powers and was and is void and invalid and each of the foregoing allegations.

15. In further answer to paragraph 23 of the
30 Statement of Claim the Defendants deny that the Defendants who voted in favour of the resolutions so voted only for the reason that Howard Smith had stated that it would not apply for or accept the said allotment of 4,500,000 shares unless Millers executed the said agreement.

16. In further answer to paragraph 23 of the Statement of Claim the Defendants deny that;-

(a) That the Defendants who voted in favour of the resolutions for the execution of the agreements so voted for the purpose of reducing the proportion of the shares in the capital of Millers held by each the Plaintiff and Bulkships.

40 (b) That the Defendants so voted for the purpose of defeating the takeover offer made by the Plaintiff and of facilitating

In the Supreme Court of New South Wales

Equity Division

No. 7

Defence of the First, Second, Fifth, Seventh, Eighth, Ninth Tenth and Eleventh Defendants

1st August 1972

(continued)

and ensuring the success of the proposed takeover offer to be made by Howard Smith.

- (c) That the Directors so voted for the purpose of preserving the positions of themselves (and in the case of Balhorn the position of Duncan) as Directors and alternate Directors of Millers and to prevent a substantial reconstruction of the Board of Millers.
- (d) That the Defendants did not so vote bona fide in the interests of Millers as a whole. 10
- (e) That the said agreement was not made bona fide in the interests of Millers as a whole.

And the Defendants deny each of the foregoing allegations.

17. In answer to paragraph 24 of the Statement of Claim the Defendant Balhorn denies and the other Defendants parties to this Statement of Defence do not know and cannot admit that Balhorn voted by reason of prior instructions given to him by Duncan and was not acting independently as an alternate director and did not exercise his own independent judgment and fiduciary power in the interests of Millers as a whole and each of the foregoing allegations. 20

18. In answer to paragraph 25 of the Statement of Claim the Defendants deny that Abeles was prevented without any proper justification and contrary to the articles of association of Millers prevented by Taylor as Chairman of the said meeting with the support of a majority of the other Directors of Millers or at all from fully participating in discussion of the said resolution for the allotment of the said 4,500,000 shares to Howard Smith and of the said resolution for the execution by Millers of the said agreement and each of the foregoing allegations. 30

19. In further answer to paragraph 25 of the Statement of Claim the Defendants admit that Abeles was excluded from voting on both the said resolutions but save and except as aforesaid deny that this was without any proper justification and contrary to the articles of association of Millers. 40

20. In further answer to paragraph 20 and 25 of the Statement of Claim the Defendants say that Abeles

was not entitled to vote on the said resolution by reason of the following facts:-

In the Supreme Court of New South Wales

Equity Division

No. 3

Defence of the First, Second, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Defendants

1st August, 1972

(continued)

- 10
- (a) At all material times including 6th July, 1972 Abeles was a Director of Bulkships Limited.
- (b) At all material times Thomas Nationwide Transport Limited was a substantial shareholder in Bulkships Limited.
- (c) At all material times Abeles had a substantial beneficial interest directly and indirectly in Thomas Nationwide Transport Limited.
- (d) In 1971 and 1972 Bulkships Limited through inter alia, Abeles sought to acquire a controlling interest in Millers.
- 20
- (e) Bulkships Limited through, inter alia, Abeles, offered to pay the sum of \$2.40 per share for the purchase of shares proposed to be purchased for the purpose of acquiring a controlling interest in Millers.
- (f) At all material times Abeles was well aware that the assets backing of shares in Millers exceeded \$3 per share.
- (g) Alternatively, at all material times Abeles was well aware that the true value of shares in Millers exceeded \$2.27 per share.
- (h) The Plaintiff, Bulkships Limited and Abeles were on 6th July, 1972 acting in concert:-
- 30
- (i) To prevent the takeover offer by Howard Smith or by any one else other than the Plaintiff, from succeeding;
- (ii) To ensure the success of the takeover offer by the Plaintiff;
- (iii) To force shareholders of Millers other than the Plaintiff and Bulkships to accept the Plaintiff's offer of \$2.27 per share which to their knowledge was less than the
- 40

In the Supreme
Court of New
South Wales
Equity Division
No. 3

Defence of the
First, Second,
Fifth, Seventh,
Eighth, Ninth,
Tenth and Eleventh
Defendants

1st August 1972

(continued)

the offer made by Howard Smith
and less than the true value of
the said shares.

(iv) Upon the acquisition by the
Plaintiff of control of the Board
of Directors of Millers to realise
the assets of Millers in the
interests of the Plaintiff and
Bulkships Limited.

(i) The Defendants charge and the fact is that
by reason of the foregoing facts Abeles
intended, unless excluded from voting
to vote against the resolution on 6th July,
1972 for reasons other than the interests
of Millers.

10

21. In answer to paragraph 26 of the Statement of
Claim the Defendants deny that the said resolutions
or any of them and the allotment and agreement or any
of them were invalid void or ineffective by reason of
the matters alleged in paragraphs 23 or 24 or 25 of
the Statement of Claim or by reason of any of them.

22. In answer to paragraphs 27 and 28 of the State-
ment of Claim the Defendants do not admit the alle-
gations therein contained or any of them.

20

23. In answer to paragraph 29(a) of the Statement
of Claim the Defendants do not admit the allegations
therein contained or any of them.

24. In answer to paragraph 29(c) of the Statement
of Claim the Defendants deny that the value of the
Plaintiff's shareholding in Millers would be or
has been substantially reduced by reason of the
allotment.

30

25. In further answer to paragraphs 24 and 26 of
the Statement of Claim the Defendants submit that
the facts alleged in paragraph 24 of the Statement
of Claim if established do not render the resolu-
tions or the allotment or any other action of the
Board of Directors void or ineffective.

26. In answer to the whole of the Statement of
Claim the Defendants repeat the allegations in
paragraph 20 hereof and submit that the Court will
in its discretion dismiss the Plaintiff's prayers.

40

27. In further answer to paragraphs 20 and 25 of
the Statement of Claim the Defendants submit that

even if the allegations therein were established the court will in its discretion dismiss the Plaintiff's prayers by reason of the fact that even if Abeles had voted against the said resolutions there was a majority in favour of carrying each of the said resolutions.

In the Supreme
Court of New
South Wales
Equity Division
No. 3

Filed: 1st August, 1972

Sgd. John Coulson

Solicitor for the first,
second, fifth, seventh,
eighth, ninth, tenth and
eleventh Defendants.

Defence of
the First,
Second, Fifth,
Seventh,
Eighth, Ninth
Tenth and
Eleventh
Defendants
1st August 1972
(continued)

10

PLAINTIFFS REPLY TO DEFENCE OF THE FIRST,
SECOND, FIFTH, SEVENTH, EIGHTH, NINTH,
TENTH AND ELEVENTH DEFENDANTS

No. 4
Plaintiffs
Reply to
Defence of
the First,
Second, Fifth,
Seventh,
Eighth, Ninth
Tenth and
Eleventh
Defendants
4th August 1972

Ampol Petroleum Limited

Plaintiff

R. W. Miller (Holdings) Limited & Ors. Defendants

20

1. The Plaintiff joins issue upon the facts and matters contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20(h), 21, 22, 23 and 24 of the Defence of the first, second fifth, seventh, eighth, ninth, tenth and eleventh Defendants save and except as to those facts and matters which are admitted or not denied in that Defence.

2. In reply to paragraphs 20 and 26 of the Defence the Plaintiff denies that Abeles was not entitled to vote on the said resolution by reason of all or any of the facts therein contained.

30

3. In further reply to paragraphs 20 and 26 of the Defence, the Plaintiff does not know and cannot admit the facts and matters contained in sub-paragraphs (b), (c), (d), (e), (f), (g) and (i) of paragraph 20.

4. In reply to paragraph 27 of the Defence, the Plaintiff does not admit that even if Abeles had voted against the said resolutions there was a majority in favour of carrying each of the said resolutions.

In the Supreme
Court of New
South Wales
Equity Division
No. 4

Plaintiffs
Reply to
Defence of
the First,
Second, fifth,
Seventh,
Eighth, Ninth,
Tenth and
Eleventh
Defendants

4th August
1972
(continued)

FIRST CROSS DEFENDANT'S DEFENCE TO CROSS CLAIM

1. The first Cross Defendant does not know and cannot admit the facts and matters contained in paragraph 3 of the Cross Claim.
2. In answer to paragraph 8 of the Cross Claim, the first Cross Defendant does not know and cannot admit the facts and matters contained in sub-paragraphs (b), (c), (d), (e), (f), (g) and (i) of that paragraph.
3. In answer to paragraph 8(h) of the Cross Claim, the first Cross Defendant denies that on the 6th July, 1972 it was acting in concert with Bulkships Limited and Abeles. 10
4. The first Cross Defendant does not admit the facts and matters contained in paragraph 8(h)(i), (ii), (iii) and (iv) of the Cross Claim.
5. In answer to paragraph 9 of the Cross Claim, the first Cross Defendant does not admit that even if the third Cross Defendant had voted against the said resolutions there was a majority in favour of carrying each of the resolutions. 20
6. In further answer to paragraph 8 of the Cross Claim, the first Cross Defendant submits that the facts alleged in that paragraph if established do not entitle the Cross Claimant to obtain the Orders and Declaration claimed.
7. In answer to the whole of the Cross Claim, the first Cross Defendant repeats the facts and matters contained in paragraph 20, 21, 22, 23, 24, 25 and 26 of the Statement of Claim herein and submits that the Court will dismiss the Cross Claimant's claims. 30

Sgd. A. R. Emmett

Solicitor for the Plaintiff and
First Cross Defendant.

Filed: 4th August, 1972

No. 5

PLAINTIFFS REPLY TO DEFENCE OF THE THIRTEENTH
DEFENDANT HOWARD SMITH LIMITED FILED
4th AUGUST 1972

In the Supreme
Court of New
South Wales
Equity Division

No. 5

Ampol Petroleum Limited Plaintiff
R.W. Miller (Holdings) Limited & Ors. Defendants

Plaintiffs
Reply to
Defence of
13th Defendant
Howard Smith
Limited.
filed 4th
August 1972

10 1. The Plaintiff joins issue upon the facts and matters contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the Defence of the thirteenth Defendant, save and except as to those facts and matters which are admitted or not denied in that Defence.

2. In reply to paragraph 14(a) and (b) of the Defence, the Plaintiff does not admit the facts and matters therein contained.

20 3. In further reply to paragraph 14(a) and (b) and in reply to paragraphs 14(c) and (e) of the Defence, the Plaintiff repeats the facts contained in paragraphs 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of the Statement of Claim herein and save and except these facts, it denies each of the allegations therein contained.

4. In reply to paragraph 14(d) of the Defence, the Plaintiff does not admit the allegations therein contained.

5. In reply to paragraph 14(f) of the Defence, the Plaintiff denies the allegations therein contained.

Sgd. A.R. Emmett
Plaintiff's Solicitor

Filed: 4th August, 1972

In the Supreme
Court of New
South Wales
Equity Division

TRANSCRIPT OF EVIDENCE ON TRIAL OF ACTION

6TH SEPTEMBER, 1972

No. 6

Mr. Deane

Transcript of
evidence on
trial of
Action
Plaintiffs
evidence
6th September
1972

I call, from the custody of Millers, for the original of the letter of 12th July, 1972 from the Sydney Stock Exchange, referred to in those minutes; and the draft of a proposed letter from Millers to the Sydney Stock Exchange of 12th July, 1972 referred to in those minutes. (produced)

(Letter from Sydney Stock Exchange dated 12th July, draft reply and reply of 14th July, 1972 tendered and admitted as Exhibit EE7)

10

Mr. Deane

I call, from my friend Mr. Hughes' clients custody, for a letter of 12th July, 1972 from the Sydney Stock Exchange. (produced)

(Letter of 7th July from the Sydney Stock Exchange to Howard Smith and reply dated 7th July, 1972 from Howard Smith to Sydney Stock Exchange and press release on 7th July, 1972 tendered and admitted as Exhibit FF as against Howard Smith only)

20

Mr. Deane

They are the documents we wish to tender at this stage.

(At this stage Mr. Rolfe stated there was no personal embarrassment to Tricontinental of the nature indicated this morning and he did not wish to be heard on files 3 and 6. His Honour stated that all Tricontinental documents may be seen by the parties except files numbered 3 and 6.)

30

MABEL JANET HILL

Sworn, examined as under:

(Order given regarding witnesses. Mr. Maxwell, secretary of Howard Smith; and Mr. Kosh, general manager of Ampol, permitted to remain.)

In the Supreme
Court of New
South Wales

Equity Division

No. 6

Transcript of
evidence on
trial of
Action

Plaintiffs
evidence
6th September
1972 (Contd.)

Mabel Janet
Hill
Examination
by Mr. Deane
Q.C.

Mr. Deane

Q. What is your full name please?

A. Mabel Janet Hill.

Q. Where do you live?

10 A. 40 Epping Highway, Lane Cove.

Q. I think you are an employee of R.W. Miller (Holdings) Limited?

A. Yes.

Q. In what capacity are you employed by that company?

A. I am secretary to the chairman and managing director.

Q. That is, you are Mr. Taylor's secretary?

A. That is correct.

20 Q. I want to ask you some questions in relation to a meeting of directors of that company, R.W. Miller (Holdings) Limited which took place on 6th July, 1972. Do you remember that meeting?

A. I remember that meeting, yes.

Q. Were you present at it?

A. Some of it, not all.

Q. In what capacity were you present?

30 A. I was there at the chairman's request purely to be in attendance in case they needed something or I had to get something for them; and to make rough notes, purely rough notes, in case the general secretary Mr. Ellis-Jones, who compiles the minutes, may want to make reference to them.

- In the Supreme Court of New South Wales
Equity Division
No. 6
Transcript of evidence on trial of Action
Plaintiffs evidence
6th September 1972 (Contd.)
Mabel Janet Hill
Examination by Mr. Deane, Q.C.
(continued)
- Q. Are you an experienced stenographer?
A. I am definitely not a court stenographer.
Q. I appreciate that, but are you an experienced stenographer?
A. Yes.
Q. You take shorthand?
A. Yes.
Q. You can, I presume, in most cases read your shorthand back and prepare a typed record of what the shorthand represents? 10
A. Yes.
Q. How many words per minute does your shorthand encompass?
A. I am afraid I would be only guessing. It is so long since I have ever had a test.
Q. You told his Honour that you were present at this meeting of directors on 6th July, 1972. Did you take shorthand notes of what was said at that meeting?
A. Not verbatim, just purely rough notes. 20
Q. Did you, yourself, type the minutes of the meeting which ultimately went into the company's minute book?
A. Yes.
Q. Who dictated those minutes?
A. Our secretary, Mr. Ellis-Jones.
Q. In dictating those minutes, did you observe whether Mr. Ellis-Jones was to any extent using the transcript prepared by you of the meeting of 6th July? 30
A. I'm sorry, could I correct that? Mr. Ellis-Jones did not dictate them. He wrote them out.

- Q. Did you see him write them out? In the Supreme Court of New South Wales
- A. No.
- Q. You did take a shorthand note in the manner you have described of part of what was said at this meeting of directors on 6th July? Equity Division
No. 6
- A. Yes. Transcript of evidence on trial of Action
- Q. Have you still got those shorthand notes?
- A. No. Plaintiffs evidence
- Q. They are not in this book that you produce? 6th September 1972 (Contd.)
- 10 A. Yes. Mabel Janet Hill
- Q. They are? Examination by Mr. Deane Q.C.
- A. Yes.
- Q. That notebook contains the shorthand notes you made as the meeting progressed? (continued)
- A. Yes.
- Q. Is the document I have just placed in front of you the transcript of what appears in your shorthand notes?
- A. Not exactly in respect that I have put some of my own words in it.
- 20 Q. But, subject to some alterations, it is the transcript?
- A. Yes.
- Q. When you say you put some of your own words in it, what do you mean by that?
- A. For instance, at the opening of the meeting I put here, "As the Chairman was reading from typed notes I did not attempt to take notes" and things like that I put in. In fact, when I was out of the room I put that in as well.
- 30 Q. Apart from alterations of that character, is that document in front of you the transcript of your shorthand notes?

In the Supreme
Court of New
South Wales

Equity
Division

No. 6

Transcript of
evidence on
trial of
Action

Plaintiffs
evidence
6th September
1972 (Contd.)

Mabel Janet
Hill
Examination
by Mr. Deane
Q.C.
(continued)

A. Yes.

Q. If we wanted to go through the process, and if we could understand it, you could take us from the shorthand to the typing, as it were?

A. I hope so.

Q. In that document, Miss Hill, there appears on a number of occasions the word "phone"?

A. Yes.

Q. That, I presume, is not a transcript of what was said, but it indicates an interruption so far as you were concerned? 10

A. It was when the phone rang and I had to go out and attend to it.

Q. Also, I think at some stage Sir Peter Abeles left the meeting to make a telephone call?

A. That is right.

Q. Did you accompany him?

A. Yes, he asked for a photostat copy of a letter. I think, from memory, it was a letter from Howard Smith. I went out to make it at the same time. 20

Q. When did you type the transcript of your shorthand notes?

A. I think it was not the next day, but the next working day - about two days afterwards I would say.

(Typed transcript tendered)

Mr. Glass

May I ask the witness some questions on the the voir dire? 30

His Honour

Yes.

VOIR DIREMr. GlassIn the Supreme
Court of New
South WalesEquity
Division

No. 6.

Transcript of
evidence on
trial of
ActionPlaintiffs
evidence
6th September
1972 (Contd.)Mabel Janet
HillExamination
Voir Dire
by Mr. Glass
Q.C.

Q. Miss Hill, you have told my learned friend that during part of the proceedings of the board meeting you were out of the room?

A. Yes.

Q. The number of times that that happened could be ascertained by inspection - at least six absences are recorded in your transcript?

10 A. That would be right.

Q. They were, each of them, were they, for the purpose of answering the telephone?

A. No, as I said, the first time was when Sir Peter Abeles went out to make a call. I think it was on the subject of whether he was qualified to vote or not at the time, and he asked for a photostat copy of the letter from Howard Smith and that is why I went out to do that. Another call I know was for Sir Peter. I had to give the message to him from his secretary; and another call was for Sir Peter from Ampol. Another was to get a copy of the memorandum and articles of association for Sir Peter. I just can't remember the others.

20

Q. Well, they varied in duration, no doubt?

A. Yes.

Q. What was the shortest time you were out of the room?

30

A. When perhaps the two phone calls I just mentioned, when it was his secretary and when there was the call from our office for Sir Peter.

Q. They were short, and they took how long?

A. It might have been five minutes perhaps.

Q. How long would the longest one have taken?

A. I was photostating - that could have been quarter of an hour or 20 minutes because I did several copies for the rest of the board members at the same time.

In the Supreme
Court of New
South Wales

Equity
Division

No. 6

Transcript of
evidence on
trial of
Action

Plaintiffs
evidence
6th September
1972 (Contd.)

Mabel Janet
Hill

Examination
Voir Dire by
Mr. Glass Q.C.

(continued)

Q. How long do you think that would have taken?

A. It could be 15 to 20 minutes.

Q. Each time you left the meeting was continuing was it?

A. Oh yes, yes.

Q. When you returned it was still in progress?

A. Yes.

Q. So far as you could see the meeting had continued during your absence?

A. That is right. 10

Q. When you were in the meeting did you set out to make a verbatim transcript of what each director said?

A. No, I have never been asked to do that in all the meetings I have attended. I have never been asked by the chairman or any of the directors to do that and I did not alter the the procedure for this meeting.

Q. So, for the most part, you would be selectively recording what was said in your notes? 20

A. Yes, and also what I could hear. It is rather difficult with the layout of the room for me to hear everything that was said.

Q. Does that mean that on occasions you were not sure what was being said?

A. That is right.

Q. You did not attempt to record those parts of the proceedings at all?

A. No, because I just could not hear properly. Several of the directors have their backs to me and they speak away from me and I just can't hear at times. 30

Q. Were there other parts of the meeting at which matters were being discussed which you did not fully understand?

A. Yes, particularly in regard to finance.

Q. Were there times, for example, when Mr. Kosh was expounding some dry financial material which you did not attempt to record?

A. That is correct, yes.

Q. You typed up the minutes which are in evidence as Ex. V.* You yourself typed the minutes of the meeting which were ultimately approved by the chairman?

10 A. Yes.

Q. Are you able to say that so far as concerns the part where you were present, they are a more accurate record of what was said than what appears in your transcript?

A. Yes.

Mr. Glass

I object to the transcript.

His Honour

20 I just do not understand what you meant by your last answer, Miss Hill?

Witness

I mean, the fact that as regards little things I might not hear correctly, whereas Mr. Ellis-Jones, the secretary, is sitting at the table and he can perhaps hear better than I can, and I might just take something down incorrectly in my notes.

Mr. Glass

Could I take it a little further?

30 Q. There are a number of passages in the minutes which are fuller and more detailed than what appears in your transcript?

A. Yes, that is right.

In the Supreme
Court of New
South Wales
Equity
Division

No. 6

Transcript of
evidence on
trial of
Action

Plaintiffs
evidence
6th September
1972 (Contd.)

Mabel Janet
Hill
Examination
Voir Dire by
Mr. Glass Q.C.

(continued)

*Exhibit V

In the Supreme
Court of New
South Wales

Equity
Division

No. 6

Transcript of
evidence on
trial of
Action

Plaintiffs
evidence
6th September
1972 (Contd.)

Mabel Janet
Hill

Examination
Voir Dire by
Mr. Glass Q.C.

(continued)

Q. Do you accept that that fuller and more detailed version is correct?

A. Yes.

Q. Where it differs from your transcript?

A. Yes, I would.

Q. On other occasions is the version in the completed minutes different from what appears in your transcript?

A. Not that I can remember, no.

Q. It is just a question of them being more detailed?

10

A. More detailed, yes.

Q. Did you, on 10th August, take down a motion whereby Sir Peter Abeles moved that the minutes of 6th July would be confirmed as a true record of what happened then?

(objected to by Mr. Deane - disallowed)

Mr. Glass

I have no further questions, but I submit that the answers on the voir dire examination are such as to make the transcript unreliable and inadmissible, as being a document which has been superseded by the minutes which my friend tendered in evidence.

20

(Close of voir dire)

By the Court
and
Plaintiffs
Counsel
Mr. Deane
Q.C.

His Honour

Do you want to put any further questions on the admissibility of this, Mr. Deane?

Mr. Deane:

No, your Honour, but I would like to be heard on the admissibility if your Honour is against me.

30

His Honour

The document which is tendered is objected to on the basis elicited in the questions and answers that have just been put to and given by Miss Hill. The objection is that the document is so fragmentary a record of what took place that it cannot be given any significant probative weight in determining what did happen at the meeting.

10 Substantially speaking, the weight of this objection turns upon the extent to which the document is fragmentary. It will, accordingly, be necessary for me to look at the document in order to rule upon it and I may then think it appropriate to clear up any doubts one way or the other by asking Miss Hill one or two questions myself. I shall read the document first, Mr. Glass, and then rule upon it.

His Honour

20 It can be noted that this document may be taken as recording the evidence which Miss Hill could be presumed to be able to give orally in the witness box if so required?

Mr. Glass

Yes.

His Honour

30 Q. Miss Hill, am I correct in my impression - and don't hesitate to take issue if this is not correct - that you say these notes are not complete because you were out of the room, and that others who were there throughout and who may have taken part in preparing the formal minutes would have a complete knowledge of what happened from beginning to end?

A. Yes, that is correct.

In the Supreme
Court of New
South Wales

Equity
Division

No. 6

Transcript of
evidence on
trial of
Action

Plaintiffs
evidence
6th September
1972 (Contd.)

Mabel Janet
Hill

Examination

By the Court
and

Plaintiffs
Counsel

Mr. Deane Q.C.

(continued)

By the Court

In the Supreme
Court of
New South
Wales

Equity
Division

No. 6
Transcript of
evidence on
trial of
Action

Plaintiffs
evidence
6th September
1972

Mabel Janet
Hill

By the Court

Q. But that is as far as these go, insofar as these do purport to record things that were said they are your recollection of what you then heard being said while you were there?

A. Perhaps not a complete record in this regard, that at times I can't hear what various directors say, especially when they are interjecting one another. I just can't hear them.

Q. That would not be represented by anything written in here?

10

A. No.

Q. It simply would not be here?

A. That is right.

Q. So far as it does contain anything, it is what you heard?

A. Yes.

His Honour

I am of the view that the document should be admitted.

Exhibit GG

(Transcript of Miss Hill's notes admitted and marked Exhibit GG.)

20

Mr. Rogers

I would like my formal objection recorded. I have nothing to add to what Mr. Glass said.

Examination
by Mr. Deane
Q.C.

(continued)

Mr. Deane

Q. Miss Hill, I show you a photocopy of a document which has been produced by the people representing R.W. Miller (Holdings) Limited in this case. Did you type the original of which that is a photocopy?

30

A. I think so, yes.

Q. What is that document?

A. Well, it is very similar to the other one, but in the first one I put in my own little wording to start with, and my own little words during the typing. This is straight as from the book, with nothing added. If you would like to compare the first page with that you will find that the beginning of the meeting is in capital letters, which means I have put it in myself.

In the Supreme
Court of
New South
Wales
Equity
Division
No. 6

Transcript
of evidence
on trial of
Action

Plaintiffs
evidence
Mabel Janet
Hill

6th September
1972

Examined by
Mr. Deane
Q.C.

(continued)
Exhibit GG

10

Q. Is that a photocopy of the first transcription?

A. Could I have a look at my book?

Q. Of course (shorthand book handed to witness). Do you know which came first?

A. This is the one I typed first. (indicating).

His Honour

Q. That is Exhibit GG?

A. Yes.

Mr. Deane

20

I tender the second transcript. (Objected to by Mr. Glass)

His Honour

Q. Which was the first one typed?

A. The one you read.

Q. That is the one I have already read?

A. Yes.

Q. Now, does that have the additional circumstantial material in it?

A. Yes.

In the Supreme
Court of New
South Wales
Equity Division

No. 6

Transcript of
evidence on
trial of Action
Plaintiffs
evidence
Mabel Janet
Hill

6th September
1972

Examination by
Mr. Deane Q.C.
(continued)

*Exhibit GG

Exhibit GG

Exhibit GG

(Direct transcript of shorthand notes
made by Miss Hill admitted to form
part of Exhibit GG)

Mr. Deane

Exhibit U

Q. How did the second typed one come into existence?

A. I was asked to sort of put it as it was in my notes.

Q. I will have this note made. There has now been produced for adding to Exhibit GG a document which represents a direct transcription of the shorthand notes made by Miss Hill. The document previously admitted contains a transcription of those notes with some additional circumstantial material regarding the context in which the discussion was taking place. Strictly speaking the document which ought to have been admitted is the second transcript - that is to say, the specific and unadorned transcript of the notes. It is, however, apparent that Miss Hill in the witness box would fill that out with the circumstantial matters included in the document Exhibit GG; and, as a matter of common sense, counsel do not differentiate between the two documents in terms of their admissibility. I have ruled, against the objection of Mr. Glass and Mr. Rogers, that the transcript should be admitted, and, consistently with the recognition of the substantial identity of the two documents, I shall add this second transcript to Exhibit GG.

10

20

Q. (Exhibit U shown to witness) Will you look at that document?

30

A. Yes.

Q. Have you seen it before?

A. I just can't recognise it off hand. I didn't type it.

Q. I show you a document amongst the documents produced by you?

A. Yes.

Q. You have seen the document you produced yesterday?

40

A. Yes. I am sorry.

- | | | |
|----|--|--|
| | <u>Q.</u> Did you type that document? | In the Supreme
Court of New
South Wales |
| | <u>A.</u> No. | Equity Division |
| | <u>Q.</u> How did that come into your possession? | No. 6 |
| | <u>A.</u> It was handed to me by the chairman. | Transcript of
evidence on
trial of
Action |
| | <u>Q.</u> When? | Plaintiffs
evidence |
| | <u>A.</u> Just after the meeting I would say. | Mabel Janet
Hill |
| | <u>Q.</u> After the meeting? | 6th September
1972 |
| | <u>A.</u> He read from it at the meeting. | Examination by
Mr. Deane Q.C. |
| 10 | <u>Q.</u> You saw him reading from it at the meeting? | (continued) |
| | <u>A.</u> Yes. | |
| | <u>Q.</u> Do you know how that document came into
existence? | |
| | <u>A.</u> No. | |
| | <u>Q.</u> Has Mr. Conway a secretary at Millers? | |
| | <u>A.</u> Yes. | |
| | <u>Q.</u> What is her name? | |
| | <u>A.</u> Mrs. Smith. | |
| 20 | <u>Q.</u> (Share certificate portion of Exhibit W shown
to witness) Did you yourself type the typed
part of the share certificate? | Exhibit W |
| | <u>A.</u> No. | |
| | <u>Q.</u> Did you see it being typed? | |
| | <u>A.</u> No. | |
| | <u>Q.</u> (Balance of Exhibit W shown to witness) Will
you look at that document, Miss Hill? Did you
type that? | Exhibit W |
| | <u>A.</u> No. | |
| | <u>Q.</u> (Exhibit CC shown to witness) Will you look
at that document? Did you type that? | Exhibit CC |

In the Supreme A. No.
Court of New
South Wales His Honour

Equity Division

No. 6
Transcript of
evidence on
trial of
Action

Plaintiffs
evidence
Mabel Janet
Hill

6th September
1972..

It can be noted that Mr. Deane offers to tender the document Miss Hill identifies as having been handed to her by the chairman after the meeting on 6th July, that document being a carbon copy of Exhibit U, and he is not required by any other counsel to tender the carbon copy, the original exhibit U being a sufficient representation of that document for the purposes of these proceedings.

10

His Honour

I shall have it noted by consent of all counsel questions asked by Mr. Glass of Miss Hill on the voir dire and the answers given by Miss Hill are to be treated as part of the evidence on the proceedings.

CROSS-EXAMINATION

Cross-
Examination
by Mr. Glass
Q.C. for first
Defendant

Mr. Glass

Q. I think you said, Miss Hill, that on one occasion Sir Peter Abeles came to the phone in your presence to answer a call from Ampol?

20

A. The phone rang. I went to the outside phone to take it and they told me it was Ampol calling Sir Peter, and I went in and asked him to come out of the board room and take the call.

Q. Were you present on any occasion when he phoned Ampol?

A. Yes (Objected to by Mr. Deane).

Q. You said "Yes", I think?

A. Yes. The switchgirl told me it was Ampol on the phone - (Objected to by Mr. Deane.)

30

Q. Did Sir Peter say something to you with regard to making an outward call?

A. Yes. At the time I went out to make the photostat copy of the letter from Howard Smiths - when I came down to hand him a copy he was in the room next door to the boardroom

and I went in to hand it to him and he had the phone in his hand and the phone book in front of him and he asked me what the Ampol phone number was. That is all I know. Then I went out of the room.

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Q. Did you tell him?

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A. Yes.

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Action

Q. Did you have any phone call to bring him to Bulkships?

Plaintiffs
evidence
Mabel Janet
Hill

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A. No. From memory the only call I had - (Objected to by Mr. Deane; admitted.) The only other phone call I can remember was the one when Sir Peter's secretary was on the phone - Miss Finlay - and it was something about Sir Peter had been trying to contact Fred Miller and she had left various messages about the place for Mr. Miller to ring Sir Peter when available. I think that was the message she gave me.

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1972

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Cross-exami-
nation by
Mr. Glass Q.C.
for First
Defendant

Q. Apart from what you told us you had no other messages for him or from him?

(continued)

A. No, not that I remember.

Q. Are you able to recall at what stage the phone call from Ampol to Sir Peter Abeles came through that morning?

A. I could not tell you the time. All I can tell you, it was after the time I left the room, as I said, for the photostating of the letter from Howard Smiths, and when Sir Peter asked me for the phone number of Ampol it was some time after that. I could not tell you which time.

30

Q. (Exhibit GG shown to witness) Can you in that document identify when that first call came through from Ampol to Sir Peter Abeles?

Exhibit GG

A. No. I would not be able to. The only one thing really I can identify is when I went out of the room and Sir Peter made phone calls out. But I could not tell you which one it was. I have just got "phone" and "telephone".

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Q. When did the outward call occur so far as the transcript was concerned?

A. Page 3. "M. Hill out of room photostating letters" on page 3. It is in capital letters, just about halfway down the page.

Q. Was the inward call before or after that?

A. After that.

Mr. Lockhart.

No questions.

Mr. Kirby

No questions.

Mr. Rogers

No questions.

Cross examina-
tion by Mr.
Masterman for
6th and
12th
Defendants

Mr. Masterman

Q. Miss Hill, you said that you definitely are not a court reporter.

A. No.

Q. Does that mean the speed at which people were speaking meant that you were unable to take down in your notes the whole of what was being said?

A. That is so.

Q. So that there would be sentences which you have wholly left out?

A. Yes.

Q. Even while you were in the room?

A. Yes. I did not attempt to take it down verbatim. As I said before, I only took rough notes.

10

20

- Q. So that what might in truth be represented by one and a half or two pages of verbatim transcript in your notes could represent, for example, half a page?
- A. I don't think as much as that. I don't think the difference would be as much as that - one and a half to a half.
- Q. Well, you may have got half of it down?
- A. At least. At least. Perhaps more.
- 10 Q. About 60 per cent.?
- A. At least.
- Q. You were not indicating to his Honour, were you, that the only additions were the explanatory notes as to what had happened?
- A. Yes.
- Q. You were indicating that, were you?
- A. Yes. It is my wording. My explanation.
- 20 Q. Just to take one that perhaps is of no relevance particularly, but just to see how you operated, on the bluish typing Lady Miller is recorded as saying "I am not happy about it at all. I don't like to be delisted".
- A. Yes.
- Q. In the photostat "I am not happy about it at all. I don't like the thought of being delisted," and some words have been inserted there, and I am deliberately taking a non-contentious matter. Would the words "the thought of" appear in your notes?
- 30 A. I would have to check with the notes.
- Q. Perhaps if you could do that?
- A. Yes. "I am not happy about it at all. I don't like to be delisted".
- Q. So that you have added "the thought of"?

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tion by Mr.
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(continued)

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Cross examination by Mr. Masterman for 6th and 12th Defendants
(continued)
- A. Yes.
- Q. In your first or second document?
- A. I don't know, without looking at it.
- Q. Perhaps you might look at it. There are more important examples of that?
- A. This is the correct one.
- Q. That is the blue typed document?
- A. Yes.
- Q. Which was what you typed first?
- A. Yes. I must have added "the thought of" in this one here. 10
- Q. In the second document?
- A. Yes, that is right.
- Q. Which you typed because you were told to type exactly what was in your notes?
- A. Well, can I explain? On the front page, for instance, all of this in capital letters was not in my notes because, if you look, I have said here that I did not ... (interrupted).
- Q. I am more concerned not about that explanatory material that you added, but changes in the context of what you appear to have recorded while people were speaking. Why did you make the changes in the second document? 20
- A. I don't know really. I suppose I thought it sounded nicer. I don't know.
- Q. So far as what appears exactly in your notes related to the notes that appear in shorthand, they are in each document?
- A. I would have to sit down and compare them both. 30
- Q. I am particularly concerned with differences in what Mr. Cameron is recorded as having said at the meeting?

A. Yes.

Q. Did you likewise make changes to what he said because you thought it sounded better?

A. Well, I would have to compare them. I don't know without comparing them.

Q. Perhaps take the first sentence where Mr. Cameron's name appears. In the second document put before the court Mr. Cameron is quoted as saying as the first sentence "We must consider the rights of all shareholders." In the first sentence of the other document there is something else, I think. There are some additional words added, is that right?

A. Wait until I just have a look. My notes start off "A number of people have said we must consider the rights of all shareholders".

Q. So that your shorthand notes say "A number of people have said we must consider the rights of all shareholders"?

A. Yes, That is in this copy - in the blue copy.

Q. Is that what you heard?

A. Yes.

Mr. Hughes

No questions.

Mr. Staff

No questions.

RE-EXAMINATION

Mr. Deane

Q. Miss Hill, do you think if His Honour released to you your shorthand book overnight you could type out precisely what appears in your shorthand notes?

A. Yes.

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Transcript of evidence on trial of Action

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Cross examination by Mr. Masterman for 6th and 12th Defendants

(continued)

Re-examination by Mr. Deane Q.C.

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Mabel Janet
Hill
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Evan Duff
Cameron
Examination
by Mr. Deane
Q.C.

Q. And bring it up here at 10 o'clock in the morning?

A. Yes, certainly.

His Honour

Q. That is just exactly what is in the shorthand if that can be done?

A. Yes, certainly.

(Witness stood down)

EVAN DUFF CAMERON
Sworn, examined as under:

10

Mr. Deane

Q. What is your full name, please, Mr. Cameron

A. Evan Duff Cameron.

Q. Where do you reside?

A. 6 Lonsdale Avenue, Pymble.

Q. I think you are a chartered accountant and a member of the firm of Hungerford, Spooner and Kirkhope?

A. Yes.

Q. For how long have you been a member of the firm?

20

A. About ten years.

Q. You are a director of the defendant, R.W. Millers (Holdings) Limited?

A. I am.

Q. When did you become a director of the company?

A. In May, 1971.

Q. Have you, in the performance of your duties as a director, tended to concentrate on one aspect of the company's affairs?

30

- A. Well, if any particular aspect, it would be the financial aspect. In the Supreme Court of New South Wales
- Q. Now, when you first joined the board of Millers in May 1971 what was the position in relation to the feeding of information to directors relating to the company's financial situation? Equity Division
No. 6
- A. You are referring to immediately after? Transcript of evidence on trial of Action
- Q. Yes.
- 10 A. Well, at the first meeting that I attended there was no financial information - using the normal term as I would use it - but steps were then taken to correct this situation. Plaintiffs evidence
Evan Duff
Cameron
6th September, 1972
- Q. Did you initiate those steps?
- A. I was asked to assist in initiating those steps. Examination by Mr. Deane Q.C.
- Q. What did you do?
- 20 A. I conferred with executives of the company and in fact we formed a sub-committee which consisted of myself and a number of executives of the company, and over a fairly short period we designed a system of reporting for the use of both the Board and management.
- Q. Have you, from the time of your appointment as a director, made or taken care to be acquainted with the company's financial situation from time to time.
- A. Yes, I have attempted to do so.
- Q. And with details of arrangements and negotiations insofar as they related to finance?
- A. Yes.
- 30 Q. I think you swore a verified statement in answer to certain interrogatories which you were required to answer at the request of the plaintiff in these proceedings, did you not?
- A. Yes.

In the Supreme Court of New South Wales
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Evan Duff Cameron
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Examination by Mr. Deane Q.C.
(continued)

Q. (Answers to interrogatories handed to witness)
I don't want you to read it to yourself at length. Can you direct your attention to para. 41. (Objected to by Mr. Glass)

Q. Mr. Cameron, what was your view as to the company's financial position shortly after your appointment as a director?

A. I thought that the company had serious financial problems.

Q. What did you see those problems as being? 10

A. Shortage of finance.

Q. And during the period between when you were appointed as a director and 6th July, 1972 did the company's position in that regard in your view get better or worse?

(Mr. Glass made an application that evidence in regard to the financial position of the company be heard in camera. He stated that he would make further submissions on the application on Thursday, 7th September, 1972). 20

(Further hearing adjourned to 10 a.m. on Thursday, 7th September, 1972)

7th September, 1972
Mabel Janet Hill (recalled)

THIRD DAY: THURSDAY, 7th SEPTEMBER, 1972

Mabel Janet Hill
on former oath:

His Honour

Miss Hill, you are still on the former oath administered to you to tell the truth. 30

Witness

Yes, your Honour.

Mr. Deane

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trial of
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Plaintiffs
evidence
Mabel Janet
Hill (recalled)

7th September,
1972

Further
examination by
Mr. Deane Q.C.

(continued)

Q. Miss Hill, I asked you would you be kind enough overnight to type out a transcript of precisely what appears in your shorthand book. Have you done that?

A. Yes.

Q. And is that the document?

A. Yes, that is the document.

10 Q. Miss Hill, in this transcript which has been taken from your shorthand book initials appear instead of names?

A. That is right

Q. You will see amongst those present K.B.A., Sir Peter and J. Aston?

A. Yes.

Q. In the course of the transcript a number of times occurs the abbreviation "Mr. A". Who does that represent?

20 A. That would be, in the first mention - that is Mr. Anderson, because he refers to ".A.C.", which is Mr. Conway, as his alternate.

Q. The second paragraph, "Mr. A" is again Mr. Anderson?

A. Yes, because Mr. Anderson is always the one who reported to the Board - not at this meeting, but in previous meetings - on share transfers.

Q. We go over the page, and there is "Sir A"?

A. Yes.

Q. I presume that is a reference to Sir Peter?

30 A. Yes.

Q. And then there is "A". That would seem to be Sir Peter Abeles again?

A. Yes. Underneath §2.30? Yes. Peter Abeles.

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trial of
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Mabel Janet
Hill
(recalled)

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1972

Further
examination by
Mr. Deane Q.C.
(continued)

Q. Going over to page 3, are the "A" there all Sir Peter Abeles?

A. The first one is Sir Peter Abeles, then Mr. Taylor, and Sir Peter again. The next one is Sir Peter. The next one, "Ast", is Mr. Aston. The next "A" is Sir Peter Abeles, and "Ast" is Mr. Aston.

His Honour

Mr. Deane, just interrupting you for one moment, the transcripts tendered yesterday were released for copying to Mr. Glass. 10

Mr. Glass

I return the two documents which together make up Ex. GG. There are copies which can be made available.

Mr. Deane

Q. Miss Hill, I think the next page on which possibly the problem occurs is on p. 5, where there are two plain "A"s. Would you agree that each of those is Sir Peter Abeles? 20

A. Yes.

Q. Don't just agree with me because I put it to you?

A. When you say two "A"s I gather you are referring to the part where it says "I have confirmation...", and one soon after that?

Q. Yes.

A. That is Sir Peter.

Q. The next time is on the top of p. 6. I don't know if you would be able to say who that is? 30

A. Yes. If you see just above that, it is Mr. Aston, where he starts off, and I was interrupted by the 'phone.

Q. So that is Mr. Aston?

A. Yes.

His Honour

Is not there one immediately before that?

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Mr. Deane

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No. That is spelt out in full. I am only referring to where there is only "A".

No. 6

I tender the document prepared by the witness

Transcript of evidence on trial of Action

His Honour

Mr. Glass, I take it you object to this document on the same ground as you objected to the earlier transcript?

10

Plaintiffs evidence Mabel Janet Hill (recalled)

7th September, 1972

Mr. Glass

I take formal objection.

Further examination by Mr. Deane Q.C.

His Honour

(continued)

Mr. Rogers, I take it you object?

Mr. Rogers

Yes.

His Honour

I over-rule the objections.

20

(Third transcript of Miss Hill's notes admitted and marked Ex. HH.)*

Exhibit H.H.

CROSS-EXAMINATION:

Further cross-examination by Mr. Glass QC

Mr. Glass

Q. (Exhibits GG and U handed to witness) Have you got those three documents, Miss Hill?

Exhibits GG and U

A. Yes.

Q. In regard to Ex. U. you said to me, did you not, this is not the copy you brought up?

Exhibit U

A. That is right.

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Exhibit U
Plaintiffs
evidence
Mabel Janet
Hill (recalled)
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Further cross-
examination by
Mr. Glass Q.C.

(continued)

Exhibit U

Exhibit U

Exhibit GG

Q. Is the copy you brought up, so far as you know, in the envelope?

A. It was.

Q. Is this document I show you the copy which you produced out of your possession?

A. Yes.

His Honour

In the absence of any objections of any party I add to Ex. U the copy of the document that the Chairman handed to Miss Hill and that was referred to yesterday in the course of evidence on p. 27 of the transcript. Two copies of the memorandum of 6th July 1972 will be Ex. U. Exhibit U has been noted as not evidence of which your client had knowledge, Mr. Hughes. It is evidence of what took place, and may or may not have significance.

10

Mr. Glass

Q. Is it correct that the only difference between the two copies of the document contained in Ex. U is that one has numbers in the margin and the other has not?

20

A. That is right.

Q. And do those numbers run consecutively from 1 to 6?

A. Yes.

Q. And did you have a copy of Ex. U with you during the course of the meeting?

A. Yes.

Q. And after the meeting was over did you produce, as a transcript of your shorthand notes, that document which is part of Ex. GG, which has immediately under "opening of meeting" that the Chairman is reading from typed notes?

30

A. Yes.

- Q. And did you in that transcript refer to paras. 1, 2, 3, 4, 5, on P. 1, and para. 6 on page 2? In the Supreme Court of New South Wales
- A. Yes. Equity Division
- Q. And are those paragraphs to which you refer in that document in Ex. GG the numbered paragraphs in the Exhibit U document which you just examined? No. 6
Transcript of evidence on trial of Action
- A. Yes.
- 10 Q. And did you subsequently produce the other document which is part of Ex. GG as a revised copy? Exhibit GG
Plaintiffs evidence
Mabel Janet Hill (recalled)
- A. Yes.
- Q. And is the only revision that you incorporated in it in terms those various numbered paragraphs? 7th September, 1972
- A. That is right. Further cross-examination by Mr. Glass Q.C.
- Q. Having produced that revised copy, was there then some collaboration between you and Mr. Ellis-Jones?
- 20 A. I handed the copies over to Mr. Ellis-Jones to prepare the minutes, and then was in turn handed them back for typing.
- Q. Did you see Ellis-Jones at the meeting?
- A. At the meeting, yes.
- Q. And did you observe what he was doing when discussion was in progress?
- A. Yes.
- Q. What was he doing?
- A. He was taking notes also.
- Q. He was also taking notes?
- 30 A. Yes.
- Q. And so far as you could see did the version of the minutes that he produced to have typed by you contain all of the material that was in your revised copy of the transcript? (Objected to by Mr. Deane; rejected.)

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South Wales
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Division

Mr. Masterman

Q. (Affidavit of Mr. Cameron dated 7th July 1972 handed to witness) Have you seen that affidavit before?

No. 6

A. No.

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evidence on
trial of
Action

Q. If I might refer you to annexure A, on p. 4? You see it says something in the last paragraph and proceeds "I then said...?"

Plaintiffs
evidence

A. Yes.

Mabel Janet
Hill (recalled)

Q. What I would like you to do, to save time, is to read pp. 5, 6, 7 and 8 to halfway down. 10

7th September
1972

Is there anything in those four pages which was to your recollection not said by Mr. Cameron? (Objected to by Mr. Glass; rejected.)

Cross-
examination
by Mr.
Masterman

Q. You told us yesterday, as I understand it, that even where you were in the room - even during the time you were in the room - there were considerable omissions from your notes of what was being said?

A. Yes. I have noted that in the paper I gave today. 20

Q. But even where you indicated - even where you did not indicate you were not in the room I suggest that there were sentences and paragraphs of what was said that are not recorded?

A. There were no paragraphs by any means. If you would like to refer to p. 4, for instance -

Mr. Masterman

Is there a spare copy of this document, your Honour? I have only seen it for about three minutes. (Copy handed to Mr. Masterman). 30

Witness

On p. 4, where it has "E.C." - Mr. Cameron - you will see on the fourth line, the fifth line and a couple of places further down where I have just put dashes. That is where I could not hear his words. It may have been the beginning or end of a sentence, or something like that.

Mr. Masterman

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Hill (recalled)

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1972

Cross-exami-
nation by
Mr. Masterman

(continued)

Q. Are you saying they are the only words that were omitted?

A. Yes, as far as I know. I could not tell you how many words, but they were not paragraphs by any means.

Q. Well perhaps you can help me with this?

10

A. Did Mr. Cameron, before asking "What is the maximum number of directors...", which is shown in the middle of p. 4, refer to the fact that the proposed issue was contrary - (Objected to by Mr. Glass: allowed.)

Q. I refer you to the middle of p. 4 of the document?

A. Yes.

20

Q. What I am suggesting to you is that before that question was asked, for example, Mr. Cameron referred to the fact that the proposed issue was contrary to the stock exchange listing requirements, and said that he presumed that the particular requirement concerned was one which precluded the issue of shares representing more than 10% of issued capital without the consent of shareholders in general meeting, and that Mr. Conway confirmed that. Do you know one way or another whether Mr. Cameron made those comments and whether Mr. Conway made a confirmation of them?

30

A. No, I don't. I have no record of them.

Q. From the fact that you have no record of it, do you tell the Court that it did not occur?

A. No, I just say - it may have been at this place where I pointed out to you there are dashes, where I did not hear what he said.

Q. But, reading your document, one would get the impression that there are only isolated words being left out?

40

A. No. I said I could not tell you how many words

In the Supreme Court of New South Wales.

were missed. They were not paragraphs. There were a number of words missed, but not paragraphs.

Equity Division

RE-EXAMINATION

No 6

Mr. Deane

Transcript of evidence on trial of Action

Q. Miss Hill, does Mr. Ellis-Jones write shorthand?

A. No, he writes in longhand.

Plaintiffs evidence

(Witness retired)

Mabel Janet Hill (recalled)

Mr. Deane

10

7th September 1972

I call from the custody of Millers, if the document now exists, or if it is in their custody, for the handwritten notes made by Mr. Ellis-Jones at the directors' meeting of 6th July 1972.

Re-examination by Mr. Deane Q.C.

Evan Duff Cameron
On former oath

Evan Duff Cameron recalled

His Honour

You are still on your former oath as of yesterday, Mr. Cameron.

Witness

20

Yes.

Order given regarding witnesses.

His Honour

That does not extend to parties to the proceedings or to those to whom I yesterday granted permission to remain in Court.

Further Examination by Mr. Deane, Q.C.

Mr. Deane

The managing director of Ampol, Mr. Harris, is in Court. Could I have permission for him to stay?

(continued)

His Honour

30

There is no objection to that, is there, gentlemen?

No objection voiced. He may remain

Mr. Glass

I now produce the notes of Mr. Ellis-Jones.

Mr. Deane

In the Supreme
Court of New
South Wales
Equity Division
No. 6

Q. At the adjournment yesterday I had asked you for your views as to the financial position of Millers at the time you joined the Board?

Transcript of
evidence on
trial of
action

A. Yes.

Plaintiffs
evidence

10 Q. I had asked you the question. I then asked the question whether between the time you joined the Board and 6th July 1972 that position had got either better or worse.

Evan Duff
Cameron
(recalled)

(Objected to by Mr. Hughes; rejected)

7th September,
1972

Q. Mr. Cameron, did a number of things occur after you joined the Board which in your opinion affected the financial position of Millers insofar as you have told us what it was at the time you joined the Board?

Further exami-
nation by
Mr. Deane Q.C.
(continued)

A. Yes.

Q. Now, what were those things?

20 A. A number of economies were made in normal expenditure of the company?

Q. Yes?

A. Negotiations were completed for the financing of the "Amanda Miller" which resulted in a figure of approximately just over \$7 m. being received I think in September 1971

Q. What was the source of these moneys?

30 A. Hambros Bank. These moneys were used to repay a number of short term loans and outstanding progress payments to the Australian Shipbuilding Board. Additionally, decisions were taken to sell a number of hotels. It was decided we should concentrate on selling the less profitable hotels. I should have mentioned earlier that there were independent valuations of all of the company's hotels, and an examination took place assessing which of these hotels were showing a

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Cameron

(recalled)

7th September

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Further exami-
nation by

Mr. Deane Q.C.

(continued)

relatively poor return on their estimated market value. During the year I think these sales resulted in \$3 to \$3½ m. being received by the company. Re-arrangements - internal re-arrangements occurred which resulted in a substantial deferment of income tax, or what we hoped to be a substantial deferment of income tax until some years hence.

Additionally, profits, of course, were being earned at a better rate than in the previous year, and throughout most of the period negotiations were taking place for long-term finance - for construction finance, and then long-term finance for the "Robert Miller", which was in the course of construction, and during June those arrangements were to the best of my knowledge and belief more or less finalised, although they were dependent on certain factors to occur.

Q. What were those arrangements?

A. Efforts throughout most of this period were towards obtaining construction finance from Hambros Bank. Earlier it was suggested it should be a consortium. I am sorry, it was a consortium, but most of the discussions were held with Hambros Bank, who were going to lead it, as I understand it. But those arrangements fell down during the last few months - during April, May, June - sometime during that period - and finally arrangements were made for bill finance from Tricontinental Corporation, and also a Euro dollar loan from the Bank of N.S.W. and, as I understand, a commitment on the Bank of N.S.W. for a further Euro dollar loan when a further progress payment was due later on this year in September and November, and I believe a letter of commitment was received from Hambros to the effect that on hand-over of the vessel long-term finance would be available from them.

Q. What was the amount of long-term finance to be received from Hambros?

A. I believe it is expressed in U.S. dollars, but it is estimated the amount in Australian dollars would be approximately \$7½m.

10

20

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- Q. What would that be used for? What was it planned to be used for?
- A. To repay amounts borrowed and to be borrowed from the Bank of N.S.W. on the Euro dollar loan and the Tricontinental bills.
- Q. In the light of what you have said what was your view as to Miller's financial position as at 6th July 1972?
- 10 A. It is rather difficult for me to answer that because I have not seen up to date figures. The accounts for the year have not been completed, or at least I have not seen them. But my assessment was that the company still had problems but that it was in a better financial position than it had been a year earlier.
- Q. After you joined the Board you told his Honour that you caused certain steps to be taken in relation to reports on finance?
- A. I think I said that I assisted.
- 20 Q. You assisted?
- A. Yes.
- Q. Did the Board subsequently receive written reports from management in relation to the financial affairs of the company?
- A. Yes.
- Q. How frequently were they received?
- A. To my knowledge every month.
- Q. Do you yourself keep a file in relation to this company?
- 30 A. Yes.
- Q. Of your own documents?
- A. Yes, although I don't keep all documents which I see.
- Q. Have you that file with you?
- A. Containing the monthly figures?

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Plaintiffs
evidence
Evan Duff
Cameron
(recalled)
7th September,
1972

Further
examination by
Mr. Deane Q.C.

(Continued)

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evidence on
trial of
action

Plaintiffs
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Evan Duff
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(recalled)

7th September,
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Further exami-
nation by
Mr. Deane Q.C.
(continued)

Q. Yes.

A. No, I have not. Most of those I have destroyed.

Q. Have you your file relating to this company with you?

A. Yes. There are still certain documents in my office which I did not think were relevant.

Q. Have you, amongst those documents, a report as to finance which was given to the directors by management at a meeting in May 1972?

A. May I have a look, please?

10

His Honour

Yes.

Witness

Yes, I have a copy of a report which is headed "Management report, May 1972" which I imagine was presented to the June meeting. But I have no other.

Mr. Deane

Q. That is the report which was received by you at a meeting of directors of the company?

A. Yes.

20

Q. Mr. Cameron, that is a photo copy of your report?

A. Yes.

Q. It purports to be signed by Mr. Koch, would you recognise his signature?

A. Yes.

Q. He was the general manager at this time?

A. Yes.

(Financial report of May 1972
tendered and admitted as Ex JJ)

- Q. Mr. Cameron, would you turn to p. 2 of that document?
- A. Yes.
- Q. Up the top is set out the position in relation to liability to the Commonwealth?
- A. Yes.
- Q. What was the situation in relation to that as at 6th July 1972?
- 10 A. I have been told that the amount of these progress payments had been paid.
- Q. As at 6th July on your understanding there was no default so far as payment of any moneys owing to the Commonwealth was concerned?
- A. That is right.
- Q. So far as your understanding goes, was there any default by the company in its payments to anyone at all as at 6th July?
- A. I don't know.
- Q. Do you know of any?
- 20 A. I don't know of any.

Mr. Deane

I call, from the custody of Millers, for a document which I think I can describe in a comprehensive form as the Cooper Brothers Report.

Witness

- 30 May I point out something? There is a pencil alteration on p. 2 of the copy I have, and that alteration was made by me. I forget when I made it. I don't know whether it is changed on any other copies.

Mr. Deane

- Q. The alteration you are referring to is the alteration of \$2,500,000 in respect of mortgage finance from the Commonwealth Superannuation Fund to \$3m.?

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A. Yes.

Q. And that alteration was made by you after you received the document?

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A. Yes.

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Q. Do you know what led you to make that alteration?

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evidence

A. If I remember correctly, it was a statement that the superannuation fund were likely to be going to lend the company \$3 m. instead of \$2,500,000.

Evan Duff
Cameron
(recalled)

Mr. Glass

I produce the document called for.

10

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Mr. Deane

Further exami-
nation by
Mr. Deane Q.C.
(continued)

Q. Mr. Cameron, I show you a document which bears on its face the description "R.W. Millers (Holdings) Limited. Report by Cooper Brothers Limited"?

A. Yes.

Q. Would you look at that document?

A. Yes.

Q. Have you seen a copy of that report before?

A. I have seen a copy of a report dated 21st June from Cooper Brothers, although I did hear at a later stage that the copy I had was not complete.

20

Q. You saw a draft copy?

A. No, it was in a nice folder, but I understand there were one or two schedules not included.

Q. Do you know how that report came to be prepared?

A. I can only say what I have heard.

Q. Were you a party to the giving of instructions for the preparation of that report?

30

A. No.

Q. Was that report ever discussed at directors' meetings of the company?

In the Supreme Court of New South Wales :

A. After it had been prepared?

Equity Division

Q. Before or after?

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A. After.

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Q. What was said at the directors' meeting as to the report so far as you can recall, and, if you can, indicate who said it?

Plaintiffs evidence

10

A. I should point out, Mr. Deane, that I was not present at two Board meetings in May when I think this report had been started, and obviously I would not know what happened at those meetings. Subsequently I remember it being mentioned that Cooper Brothers were in the course of preparing this report, and it was hoped that much information from this report would be able to be used in preparing the Part C statement.

Evan Duff Cameron (recalled)

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Further examination by Mr. Deane Q.C.

(continued)

20

Q. That is in relation to the Ampol take-over offer?

A. Yes.

Q. Cooper Brothers, of course, are a very well-known and respected firm of accountants in the city.

A. Yes.

Q. From what was said at Board meetings, was your understanding that that report was being prepared for the company, Millers?

A. Yes.

30

Q. With the assistance of officers of the company?

A. Yes.

Cooper Brothers report, 21st June 1972, tendered and admitted as Ex. KK.

Exhibit KK

Q. Mr. Cameron, the Cooper Brothers report is described as being private and confidential. Did you observe that?

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(continued)
- A. Yes, I did.
- Q. In your view would it be, so far as a company such as Millers is concerned - a confidential or very confidential document?
- A. Yes.
- Q. You told his Honour that you were not present at two of the May Board meetings?
- A. Yes.
- Q. You were present, though, were you not, at all of the June and July Board meetings? 10
- A. Yes.
- Q. Were you present at any meeting at which the directors of Millers authorised anyone to make a copy of the Cooper Brothers report available to Howard Smith?
- A. Would you mind repeating the question?
- Q. I said were you present at any meeting at which the directors of Millers authorised anyone to make a copy of the Cooper Brothers report available to Howard Smith? 20
- A. No.
- Q. Do you know whether or not a copy of the Cooper report was made available to Howard Smith?
- A. No.
- Q. Do you know whether or not a draft of the Cooper report, even before it had been finally settled, was made available to Howard Smith?
- A. No.
- Q. Just for completion, were you present at any meeting of the directors of Millers at which any person was authorised to make available to Howard Smith a draft of the Cooper report? 30
- A. No.

- Q. Were you present at any meeting of Millers at which - at any meeting of directors of Millers - at which any person was authorised to make available to Howard Smith confidential financial records of Millers?
- A. No.
- Q. Do you know whether any such records were in fact made available to Howard Smith? Do you know from your own knowledge?
- 10 A. No.
- Q. If I might now, Mr. Cameron, direct your attention to the meeting of directors of 6th July, 1972?
- A. Yes.
- Q. I think you remember the meeting without difficulty?
- A. Yes.
- Q. We have had tendered in evidence a copy of the agenda for that meeting. Have you a copy of that agenda in your file?
- 20 A. I believe so.
- Q. Could you have a look?
- A. Yes.
- Q. When did you first see that agenda?
- A. I believe it was when I arrived at the meeting.
- Q. When you arrived at the meeting?
- A. Yes.
- Q. That is on the morning of 6th July 1972?
- 30 A. Yes, I believe so. I cannot be sure of that, but I think so.
- Q. What time did you arrive at the meeting?
- A. At about 10 past 10.

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Q.C.
(continued)
- Q. And had the meeting commenced when you arrived?
- A. No.
- Q. Who was present? I will get the location, first of all. Where was it?
- A. It was in the Board room at the company's offices.
- Q. Who was present when you arrived?
- A. The Chairman - Mr. Taylor, Mr. Conway, Mr. Anderson, Mr. Nicholl, Lady Miller, Mr. Ellis-Jones, Mr. Koch, Mr. Aston, Miss Hill and I can't remember whether Sir Peter Abeles arrived just before me or just after me. 10
- Q. Mr. Cameron.
- A. I don't know whether I mentioned Mr. Balhorn?
- Q. No, you did not mention him.
- A. I am sorry. Mr. Balhorn was also present.
- Q. What, on your understanding, was Mr. Aston doing there?
(Objected to by Mr. Glass; question withdrawn)
- Q. On 7th July 1972 - that is, the day after this meeting - you made a statement setting out your recollection of what had been said at the meeting, is that so? 20
- A. Most of the statement was prepared on the 6th.
- Q. On the 6th and 7th?
- A. Yes.
- Q. Have you refreshed your recollection as to what was said at that meeting by reference to that statement?
- A. Yes, I have. 30

Q. What time to your recollection did it finish?

A. I think it was probably between 12 and 12.30. I cannot be sure. It was probably between 12 and 12.30

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Q. Now, prior to the commencement of this meeting had you heard from anywhere at all any suggestion of a possible allotment of shares by Millers to Howard Smith?

A. No.

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action

10

Q. Well now, at the time the meeting commenced can we take it that the people you mentioned as being there when you arrived, plus Sir Peter Abeles, if he was not there when you arrived, were all in attendance?

A. Yes, that is right.

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Q. Can you tell his Honour to the best of your recollection what was said, and by whom, at this meeting?

Further exami-
nation by
Mr. Deane Q.C.
(continued)

20

A. The Chairman opened the meeting, and the first item on the agenda was confirmation of minutes of a previous either one or two meetings. It was proposed and seconded that the minutes be confirmed, and this occurred.

The second item on the agenda was the confirmation of the minutes of the share transfers committee and there was some discussion about the procedure in relation to these shares transfer meetings.

30

The Chairman then stated that the third item on the agenda was consideration of the joint announcement which had been made by Ampol and Bulkships - I think any action that should be taken in relation thereto and any further approach which had been made or which might have been made by Howard Smith. He said that he proposed to delay dealing with that item because of a dramatic matter which had occurred at 9.30 a.m. that morning. He then said that at that time he had received a letter from Howard Smith and that he proposed to read the letter. He read the letter, and referred to an agreement or draft agreement or deed which had been attached to the letter, or enclosed with it, and he asked Mr. Conway to read that draft deed.

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nation by
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(continued)

The Chairman then stated that in his view, or he had been advised, that it was within the legal rights of the Board to make this allotment which was proposed. At or about that time he asked for someone to move and second the proposed allotment, and this occurred. If I remember correctly it was Mr. Nicholl proposed it and Mr. Anderson seconded it.

He then asked Mr. Conway to make some comments, and Mr. Conway commented to the effect that in his view the Board was within its legal rights in making the allotment. Both the Chairman and Mr. Conway indicated that they were aware that the allotment, if it took place, was contrary to the listing requirements of the Stock Exchange, but that they did not consider that this would be any serious detriment to shareholders. The Chairman at or about this time made some comments to the directors to the effect first of all that it was the duty of all directors to consider the rights of all shareholders; secondly, that he recognised that the proposed action was contrary to listing requirements; thirdly, that the influx of cash which would flow from this allotment would ease the company's financial burdens. I think there was one other comment he made, which I can't remember.

10

20

At or about this time Sir Peter Abeles said that if this allotment, which was proposed at \$2.30, took place, it seemed to him this would represent a considerable watering down of the equity of other shareholders in view of the remarks which had been made by the Chairman on many occasions to the effect that the asset-value of Millers shares was in excess of \$3.70.

30

The Chairman then said that in view - asked Sir Peter that, in view of his interest as a director of Bulkships Limited, he should disqualify himself from taking part in the debate and from voting thereon. Sir Peter refused to do this, and said that his interest in the matter as a director of Bulkships had always been known to the Board and that he should have the right to speak and vote. The Chairman then said that in view of this conflict of interest he would not let Sir Peter take part in the debate or to vote. Sir Peter then

40

referred, I think, to Mr. Aston, and said "Do you agree with that ruling?" and Mr. Aston said that he believed the Chairman did have that right. Sir Peter then asked if he could have legal representation, and the Chairman refused, Sir Peter then asked for the meeting to be adjourned while he made a 'phone call, or perhaps more than one 'phone call, and the Chairman said that he would be excused, but that the meeting would go on. The Chairman then asked the General Manager -

10 Q. You said the Chairman said that Sir Peter Abeles would be excused. What happened then? Did he stay, or did he go?

A. I beg your pardon. The Chairman said that Sir Peter Abeles would be excused. He then left the room.

20 Q. For approximately what period, to the best of your recollection, was Sir Peter Abeles out of the meeting?

A. Ten to fifteen minutes.

Q. During that period the meeting continued?

A. Yes.

Q. And continued to discuss the matter it was discussing when he left?

A. Yes, well, as soon as he left the Chairman then asked the General Manager to explain to the Board the company's - - I think he used the words "difficult financial position."

30 Q. Was Sir Peter Abeles present at any time while the General Manager was giving this report?

A. I think not. I think that he returned to the meeting while I was speaking.

Q. Coming back to where you were, we had reached the stage where Sir Peter Abeles was excused, and left the meeting?

A. Yes.

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nation by
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(continued)

Q. Will you carry on from there please? What happened then?

A. The General Manager stated that in his view there was a commercial need for this allotment. He had in front of him some notes which he said showed that there were short term liabilities to be met by the company over the next 12 months amounting to approximately \$10.3m. He was asked to give a breakdown of these figures - it was either at this time or a little later, but I think it was at this time - which he did. He broke those figures down into so much which was payable in July, and so much in August, and so forth.

10

I then asked the Chairman if I could make some comments. First of all I reminded the Board that we owed a duty to all shareholders. I reminded the Board, and in particular the Chairman, that they were aware how concerned I had been over the last month or two of the position that the minority shareholders were finding themselves in following the Ampol offer - the joint announcement by Ampol and Bulkships; that this proposal had the earmarks of being for the benefit of certain minority shareholders as compared with majority shareholders. I said I did not necessarily say that was so, but it had the appearance. Secondly, I asked Mr. Conway whether the listing requirement which it was said the company would not be complying with was the one where an issue representing more than 10% of the paid-up capital was made should be approved by a general meeting before it occurred. Mr. Conway agreed that that was the listing requirement. I then said that in my view the Stock Exchange would almost certainly de-list the company's shares. I think at that point both Mr. Conway and Mr. Aston and, I think, the Chairman stated that they did not think it was as certain as I did, but that, even if it did, it would not represent any serious detriment to the company's shareholders.

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30

40

I then asked what was the maximum number of directors of the company, and was told that it was seven, I then asked whether or not the holders of partly-paid shares had voting rights at a general meeting, and I was told they did.

10 I then stated that I had come to this Board meeting with my mind firmly made up as to the correct procedure to be followed in relation to the Ampol and Howard Smith take-over offers. I said that we should - my belief was that we should forthwith make a demand upon Howard Smith to tell the company whether or not it was going to proceed with its take-over offer. I said that if it was going to proceed then I felt that this Board should make up its mind whether or not it was going to recommend the offer and that I had formed the view - I was coming to the view that we should recommend the Howard Smith offer. I said that if Howard Smith indicated they were not going to continue with their offer that we should recommend - send a further communication to shareholders recommending they do not sell their shares to Ampol, but they should hold them, and we should give to shareholders such information as we could possibly give at that time. I believed that we could at that time give them an approximation of the results for the year of the trading profits and of the extraordinary items of profit, and that we could consider our dividend policy and give them an indication of that, and perhaps give them further information which was contained in the Cooper Brothers report if we felt so inclined.

20

30 I reminded the Board that if Ampol and Bulkships did have control of the company - that if they did, I think I used the word "sack" the Board, and replace it with a new Board, that new Board would have the same responsibility to act on behalf of all shareholders.

40 I then directed some remarks to the General Manager and asked him - I think I asked him some questions in relation to the listing of liabilities, and pointed out that the company had had financial problems for at least 12 months or more, and that I could not understand why it was now suddenly proposed that an issue of this magnitude be made, and furthermore I could not understand why it was being proposed without first considering making such an issue - the offer of such an issue - to our own shareholders.

It was about that time the Chairman thanked me for my remarks and said that he would like the

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nation by
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(continued)

motion to be put - that he would put the motion. I then said I would like to hear some comments from some of the other directors and Mr. Nicholl, Mr. Balhorn and Mr. Anderson all made some short comments. I can't remember the particular terms of their comments, but it was all to the effect that they were in favour of the allotment.

Lady Miller then briefly spoke to the effect that - I am not sure whether she said she was not in favour, or that she had not made up her mind. It was something along those lines.

10

Sir Peter Abeles, who, of course, had returned to the meeting, then proposed - and I think it was seconded by Lady Miller - that before putting the motion someone should contact the Stock Exchange to see whether or not they would de-list the company's shares if this allotment took place. I can't remember whether this motion was formally put, but it was decided that this should not occur.

20

The motion was then at or about this time, I think - I can't remember the exact words used, but the general manager mentioned that there was a clause - that is right. I think I referred to the Hambros commitment and that they would provide the end finance on the building of the "Robert Miller", and the general manager indicated that there was a clause in the agreement that if there was a substantial or material change in ownership of the company's shares the commitment would no longer apply. I reminded the general manager that both he and the Chairman had mentioned on a number of occasions that Hambros had said they were not interested in changes of ownership, but were most interested in any changes of management.

30

The proposal was then put, and Mr. Anderson, Mr. Nicholl, and Mr. Balhorn voted for it. Lady Miller and I voted against it. The Chairman then said that he would cast his vote in favour of it, and declared the motion carried by a four-to-two majority. I then pointed out to the Chairman that this was a very serious act which I believed had taken place, and that I thought he could

40

confidently expect an injunction to be taken out very soon afterwards, and he said that he recognised and expected some sort of action to be taken.

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The Board then considered the trading results for the 12 months to 31st May, and thereafter the meeting was closed.

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Q. Mr. Cameron, have you exhausted your recollection as to what was said at this meeting?

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10 A. I think so. At this moment anyway.

Q. Might I ask you, if, on reflection, you can recall you saying anything in relation to the proposed allotment being an attempt to justify making a placement on a particular basis -

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(Objected to by Mr. Glass; rejected)

Further exami-
nation by
Mr. Deane Q.C.
(continued)

Q. After this meeting did you have - say, a few days after the meeting, did you have a telephone conversation with Mr. Taylor?

20 A. I think I had a telephone conversation with him next day.

Q. Next day?

A. Yes, I think it was the next day I had a telephone conversation with him.

Q. What was said in the course of that telephone conversation?

30 A. I think that I had a telephone conversation. I may have also seen him on that day. It may be a combination of these two. I told him that in a conversation which I had with Mr. Balhorn shortly after the meeting closed Mr. Balhorn had said something to me which made me feel that he had known about the proposal prior to the meeting. Mr. Balhorn indicated that he had spoken on the telephone to Mr. Duncan who was in Tokyo, and I could not see where he would have had the time to make this 'phone call.

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nation by
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(continued)

Mr. Taylor told me that Mr. Balhorn had arrived at the company's office early that day I think he said about 9.20 or 9.30 - and that he had mentioned the matter to Mr. Balhorn and Balhorn had then made his telephone call to Tokyo.

- Q. Did Mr. Taylor indicate to you when he first had knowledge of the proposed allotment?
- A. I think the only things he told me - he told the Board that he had received it at 9.30 that morning. 10
- Q. Did anyone ever suggest at the Board meeting that the original suggestion for that allotment had come from Millers and not from Howard Smiths?

(Objected to by Mr. Glass; allowed)

- A. No.
- Q. Mr. Cameron, at the time of this meeting what was your belief as to the identity of the party who made the original proposal for the allotment? 20

(Objected to by Messrs. Glass and Hughes; rejected)

Mr. Deane

- Q. I think there is one matter you want me to bring out, as it were, and that is your firm are the auditors for T.N.T.?
- A. Yes.
- Q. You, yourself, are the member of the firm primarily responsible for that audit? 30
- A. Yes.
- Q. Have you ever regarded yourself as being, as it were, under any obligation to T.B.T. or any other company in relation to the performance of your duties as a director of Millers?
- A. No.

(Short adjournment)

CROSS EXAMINATION

Mr. Masterman

Q. Over the adjournment, Mr. Cameron, have you recollected something that you said at the meeting which you did not give in evidence, in relation to the possibility of share issue to existing shareholders?

A. Yes, I have.

Q. Perhaps you could tell the Court what was said at the meeting, to the best of your recollection?

A. After I had asked some questions of Mr. Koch I mentioned - I said the company had had problems for more than 12 months and that I wondered why it was only now being proposed that there should be an allotment of shares. I then said that no opportunity had been given to present shareholders to participate in such an issue. I went on further to say that I recognised that an issue to shareholders could hardly be at a price of \$2.30 per share, but that I felt that if an issue were warranted, that a smaller issue would have been sufficient. Mr. Nicholl then indicated that the possibility of an issue to shareholders had been raised at a prior meeting and I said that I recollected that that was so, but that I didn't think that any serious consideration had been given to it at that time.

(At this stage there was discussion over the order of cross-examination)

Mr. Lockhart

Q. Mr. Cameron, you gave evidence in answer to Mr. Deane's questions as to certain of the steps that were taken to ease the financial position of Millers since you joined its Board, and I want to take you through certain of those steps in detail. You said to Mr. Deane that certain action was taken with a view to achieving a number of economies in the company. Do you recollect that?

A. Yes.

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Cross-exami-
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Cross-
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by Mr.
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for 3rd
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nation by
Mr. Lockhart
(continued)

Q. Was that action successful?

A. I can only say I understand so. They were the sort of economies that it would be rather difficult for a Board member to know about the results of them.

Q. Did you form any view as to whether any savings were made as a result of the steps taken?

A. Yes.

Q. What view did you form?

A. That savings had occurred. 10

Q. After you joined the Board a system was adopted, was it not, of preparing a profit and loss forecast, cash flow statements and cash budgets?

A. Yes.

Q. Were they prepared for some five years, up to the years ended 30th June, 1976?

A. 1976?

Q. Yes.

A. Yes.

Q. Was that material which came before the members of the Board for their consideration? 20

A. I cannot remember.

Q. Well, did you yourself receive any such documents?

A. Yes.

Q. Did management receive it?

A. Yes.

Q. Was any corporation engaged by Millers for the purpose of assisting it by way of advice in relation to the easing of financial problems at Millers? 30

A. Yes.

- Q. What was that company? In the Supreme Court of New South Wales
- A. Tricontinental Corporation. Equity Division
- Q. Is that a company linked with American or English capital interests? No. 6
- A. I don't know. Transcript of evidence on trial of action
- Q. What were the terms of reference from Millers to Tricontinental? Plaintiffs evidence
- A. I don't know. Evan Duff Cameron (recalled)
- 10 Q. What was Tricontinental's functions, as you understood it? 7th September, 1972
- A. To advise and assist the company in relation to financial matters. Cross examination by Mr. Lockhart
- Q. And was advice received from time to time from Tricontinental? (continued)
- A. Yes, it was.
- Q. What was the advice?
- A. I can't remember the advice. There were a number of conferences which took place and I have no doubt there may have been other letters and other conferences at which I was not present.
- 20 Q. Was this a step that was taken, the retaining of Tricontinental, after you joined the Board?
- A. Yes.
- Q. You told Mr. Deane that a long term loan of, I think you said, about \$7.2 million was negotiated by Millers from the Hambros Bank?
- A. Yes.
- Q. And that that was a loan on the security of the vessel "Amanda Miller"?
- 30 A. Yes.
- Q. When was that loan made available to Millers by Hambros Bank?
- A. In or about September 1971.

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Cross exami-
nation by
Mr. Lockhart
(continued)

Q. You did tell the court in a general way what those funds were used for. Can you be more specific as to precisely what the destiny of the funds was.

A. It was used to repay an amount of about 2.2 million dollars owing to Chase N.B.A. It was used to reduce a temporary overdraft facility made available by the Bank of New South Wales - from \$4 million to its normal limit of approximately 1.87 million dollars and to pay an outstanding progress payment due to the Australian Shipbuilding Board.

10

Q. In what sum?

A. About, I think it was either 1.2 million or 2.4 million, I am sorry; and there were also some colliery capital expenditures which had not been paid for, and that was made. I think that was about half a million dollars.

Q. There was a progress payment made to the Australian Shipbuilding Board, was there not, as at the end of May 1971, of some 1.2 million dollars?

20

A. Yes.

Q. Was that paid?

A. I think that was paid prior to the end of June.

Q. 1971?

A. Yes, June 1971, yes.

Q. You mentioned that a certain number of hotels of the company were sold, and I think you said the moneys received were approximately \$3½ million?

30

A. I think I said three million to 3½ million.

Q. Thank you. How many hotels were sold, resulting in that receipt, do you recall?

A. I believe it was six or seven.

- Q. Over that period of time was it that those hotels were sold?
- A. Well, certainly during the 12 months from 1st July 1971 to 30th June, 1972.
- Q. The £3-million to £3½ million was the gross selling price, was it?
- A. Yes, I think the net price would have been in the vicinity of £3-million.
- 10 Q. Did trading profits of Millers improve or not improve during the year ending 30th June, 1972?
- A. Well, of course, I have not seen yet the account of the company for the year, but it is my understanding that they had improved.
- Q. To what reasons do you attribute the improvement?
- A. The major improvement would have come from the operation of the "Amanda Miller".
- Q. You mentioned in answer to Mr. Deane's questions that arrangements were made to enable outstanding progress payments in relation to the purchase of the tanker "Robert Miller" to be made, and I think you said the figure was about some £8 million, is that right?
- 20 A. I think - I think sorry would you mind repeating that question.
- Q. Was it some £8 million they would be required over all to pay off the tanker "Robert Miller"?
- A. As at what date?
- Q. As at the end of 1971, December 1971?
- A. No.
- 30 Q. Not so; well now, what arrangements were made for the financing of the payment of progress payments for the tanker "Robert Miller"?
- A. Negotiations took place throughout most of the year.

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(continued)

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Cross-examination by Mr. Lockhart (continued)
- Q. Which year is this?
- A. Most of the year ending 30th June 1971. Negotiations took place in an effort to arrange construction finance through a consortium of banks led by the Hambros Bank. A number of difficulties were encountered in these negotiations, and finally, round about May or June, 1972, it was decided to ask Hambros if the company itself could arrange construction finance, whether Hambros or a consortium led by Hambros would supply the end finance on delivery of the vessel. 10
- Q. Were arrangements made to obtain finance in the form of bills from Tricontinental Corporation?
- A. Yes.
- Q. In what sum, approximately?
- A. £3 million.
- Q. I think some steps were taken, were they not, within the Miller group, to, as it were, to spread the profitable activities of the group so far as possible into these companies where substantial colliery expenditure had been incurred with consequential income tax deductions. 20
(Objected to by Mr. Glass - rephrased)
- Q. Were any steps taken within the Miller companies to spread the profitable activities within the group, within certain members of the group?
- A. Yes.
- Q. What were the steps that were taken?
- A. A number of hotels were leased to the company which was incurring most of the colliery capital expenditure, where, of course, special tax deductions were available. 30
- Q. I want to take you to the meeting of 6th July, 1972. You mentioned in answer to some of Mr. Deane's questions that you had raised the fact that no opportunity had been given, or no consideration had been given to making capital issues to existing shareholders instead of proceeding with the Howard Smith transaction. Do you recall that? 40

- A. Yes, with the exception of the references I made to the discussion at an earlier meeting.
- Q. Quite so, yes. Did Sir Peter Abeles make any comment at the meeting in reference to that subject matter?
- A. Yes, he did.
- Q. What did he say?
- A. I can't remember the exact words or the exact meaning of his comment, but he did ask whether indicate that perhaps an issue could be successful particularly if it were underwritten - something along those lines - I can't remember.
- Q. Was there any further discussion on that matter at the meeting that you recall?
- A. There may have been one or two comments but I can't remember.
- Q. Do you recall who made the comments?
- A. No.
- Q. To your knowledge did Sir Peter Abeles play any role in the easing of Millers financial position, after the period when you joined the Board at Millers?
- A. Did he play any role?
- Q. Yes.
- A. As an individual, as compared with - I am not sure I understand the question, I am sorry.
- Q. To your knowledge did he do anything himself after you joined the Board of Millers in relation to easing Millers financial problems?
- A. Well, at the Board meetings he offered some advice which I thought was helpful advice from time to time, and in addition to that I know that he held discussions with certain outside parties in relation to finance or possible borrowings or assistance to the company.

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nation by
Mr. Lockhart

(continued)

Q. Did you have discussion with him from time to time about the company's financial position?

A. Yes, but not at any great length.

Q. Did Sir Peter Abeles express to you at any stage his views as to means of easing Millers financial problems?

A. Well, I knew that he felt - (Objected to by Mr. Hughes and Mr. Glass - disallowed).

Q. Did he express any views to you as to means of easing the financial position of Millers, firstly at Board Meetings? 10

A. Yes.

Q. Before you tell us what was said, can you recall when this was said?

A. No.

Q. Can you recall what was said?

A. He supported the management in their efforts to arrange long term finance on both the "Amanda Miller" and "Robert Miller" in the manner in which they were attempting to arrange those loans. He did his best to (Objected to by Mr. Hughes and Mr. Glass - disallowed) 20

Q. What was said?

A. I am sorry, he said that in relation to the loan outstanding from the Eastern Suburbs Leagues Club, every attempt should be made to receive from the Leagues Club the rate of interest to which the company was entitled under the agreement. I cannot remember any other specific comments. 30

Q. Pausing there for a moment, this loan was a loan by Millers to the Eastern Suburbs Leagues Club?

A. Yes.

Q. In what capital sum?

- A. I don't know the amount of the original sum. I think the amount outstanding was in the vicinity of \$2 million.
- Q. It was a loan made before you joined the Board?
- A. Yes.
- Q. What was the interest rate charged on the loan?
- A. Being charged?
- 10 Q. Yes - first of all, what was the interest rate in fact being charged on the loan when this discussion took place to which you have referred?
- A. I think it was 7½%
- Q. Was there, at any Board meeting of Millers, a legal opinion tendered as to the right of Millers to charge a higher rate of interest than 7½% on that loan?
- A. I do not remember the legal opinion being tendered.
- 20 Q. Did any member of the Board express a view at any Board meeting on that question of the entitlement to Millers to charge a higher rate of interest than the 7½%
- A. Yes.
- Q. Who said it and what was said?
- A. I think that the matter was referred to Mr. Nicholl, who indicated that the interest rate; that the company, under the agreement was permitted to charge an interest rate of 9% or thereabouts.
- 30 Q. Was that the Mr. Nicholl who was on the Board of Millers?
- A. Yes.
- Q. Was the interest rate in fact restored to 9% or not?
- A. No.

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nation by
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(continued)

Q. Do you know why not?

A. A number of Board members said at the meeting that they did not think that steps should be taken to increase the interest rate. It was said that Sir Robert Miller had made verbal arrangements with the club, and also it was pointed out that the club was voluntarily paying a higher instalment of principal in its repayments than was indicated in the agreement.

Q. Was any resolution made or passed by the Board referable to this question of the interest rate to be charged against that loan? 10

A. Yes, there was.

Q. What was the resolution?

A. I can't remember.

Q. Were there any dissentients from the resolution, do you recall?

A. I can't remember that either.

Q. At any rate, the interest rate stayed at 7½%, is that right? 20

A. No.

Q. It did not? Was it subsequently then increased to some figure of between 7½ and 9 per cent?

A. Yes.

Q. What figure?

A. I think 8¼.

Q. Do you know the circumstances in which the increase came to be achieved?

A. I understand it was through discussions between people representing Millers and people representing the club. 30

Q. Did you play a part in those discussions?

A. No.

Q. Do you know whether Sir Peter Abeles played a part?

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A. I do not know.

Equity Division

Q. Would you just tell me this; the difference between $7\frac{1}{2}$ per cent and 9 per cent - some one and a half per cent on the consumer capital outlay is about £30,000 a year, is that right?

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A. That is right.

10 Q. I asked you whether Sir Peter Abeles had expressed at the Board meeting of Millers any views as to easing the financial problems of Millers and you dealt with that. Did he express views to you otherwise than at Board meetings on that subject.

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(Objected to by Mr. Glass and Mr. Hughes - pressed - not allowed)

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20 Q. Mr. Cameron, did Sir Peter Abeles tell you at any board meeting of Millers what his views were in relation to the Ampol takeover bid.
(No answer)

Cross exami-
nation by
Mr. Lockhart
(continued)

Mr. Glass

Do you mean tell the Board?

Mr. Lockhart

Q. Did Sir Peter Abeles at any Board meeting at which you were present state his view as to the Ampol takeover bid?

A. Yes.

Q. First of all, do you recall when it was?

30 A. Well, he certainly stated a view at the meeting held on 23rd June and I think he also made statements at an earlier Board meeting.

Q. Can you recall firstly what was said at the earlier Board meeting?

A. The directors had been discussing the values placed on certain of the company's assets by independent valuers; in particular, the hotels and colliery interests. All of the directors said, or most of the directors said, that they

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nation by
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(continued)

were happy to accept the independent valuation of the hotels. Some directors said they were not prepared to accept the valuation of the colliery interests. A statement of the company's assets, or a summary of the company's assets was placed before the Board meeting and there was some considerable discussion as to what was a reasonable value to place on the colliery interests. If I remember correctly, that statement indicated that the assets, without the colliery interests totalled, or the net assets, totalled an amount in excess of the Ampol offer, and it was at that meeting that I thought Sir Peter said, as did the other directors, that they felt that the offer was too low, but I cannot be quite sure of that because a number of directors made statements that day.

Q. Coming to the later meeting, which I think you said was 23rd June, what was said by Sir Peter Abeles on that subject matter?

A. I cannot remember all that he said, but I do remember him saying that in his opinion the Board should recommend rejection of the Ampol offer on the basis that the price was too low in the first place, and in the second place that notice had been received that indicated a higher offer would be made by Howard Smith.

Q. Does that exhaust your recollection of what was said on that occasion?

A. Yes.

Q. Do you recall at any other Board meeting of Millers, whether he made any comments referable to the Ampol takeover offer?

A. I know that he did make a number of other comments, but I cannot remember their content.

Q. Apart from the meeting of 6th July, 1972, the subject of extensive documentation, do you recall at any other Board meeting of Millers Sir Peter Abeles had made any comments referable to the issue of shares to Howard Smith?

A. No.

10

20

30

40

Q. Ex. JJ was headed "Management report for May, 1972". Do you recall that document?

A. Yes.

Q. The one addressed from the general manager to the managing director. I think you said that was a report which in fact went before the Board of Millers, is that right?

A. Yes.

10

Q. Do you recall at which meeting of Millers that report was discussed?

A. I think it was at the meeting dated on 23rd June.

Q. Yes, and do you recall if there was any dissent as to the facts or opinions stated in the report expressed at that meeting by anybody present?

A. Well, I would have to examine the report.

Mr. Lockhart

Could Mr. Cameron see Ex. JJ please? (shown)

Witness

20

May I have a few minutes to read it?

His Honour

Yes.

Witness

(After appearing to read the document). Could you repeat the question again?

Mr. Lockhart

30

Q. Can you recall if any persons at that Board meeting to which you referred, at Millers, expressed dissent to any facts or opinions stated in that report, Ex. JJ.

Exhibit JJ
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(continued)

A. I have no recollection of any such dissent. If I may just qualify that, with the exception of some discussion on the mortgage finance from the Commonwealth Superannuation Fund - I have mentioned earlier that was estimated at 2½ million. There was some discussion about it being \$3 million.

Q. That is where you changed two and a half million to 3 million?

A. Yes.

10

Q. Was that a consequential change you made?

A. Yes.

Q. Making 6.285 million read \$6,700,000; and making \$3,300,000 read 3.8 million dollars?

A. Yes.

Q. Was the discussion at that meeting as to what the bridging arrangements with the Bank of New South Wales were in respect to the efficacy of the 1.8 million dollars?

A. Yes.

20

Q. What was said and by whom?

A. I think Mr. Koch was asked to explain the arrangements for the payment of the outstanding claims and I think he advised that the \$3 million mortgage finance either was not or probably would not come from the Commonwealth Superannuation Fund, but would come from a borrowing from Tricontinental; and I think he indicated that that may only be temporary and it may be replaced by the Superannuation Fund, but I cannot be sure of that, that an arrangement had been made for a Eurodollar loan from the Bank of New South Wales for an amount, I think of \$2.4 million. I am sorry, I cannot remember that amount, and that arrangements had been made for a further Eurodollar loan through the Bank of New South Wales in September or November, whenever it is that the next progress payment was to be made. Does that answer your question?

30

40

- Q. Yes, thank you. What was your opinion as at 23rd June, 1972 meeting as to the then financial situation of Millers?
- A. It was my feeling that the company still had problems, but that the major problems which had been suffered throughout the year or more had been overcome. As I mentioned before, I thought there were still some problems to be overcome, but I don't remember the details of them.
- 10 Q. Was that also your view as at 6th July 1972 meeting?
- A. Yes.
- Q. To which Mr. Deane already referred you?
- A. Yes.
- Mr. Kirby
- I have no questions, your Honour.
- Mr. Staff
- 20 Q. Mr. Cameron, in making your inquiries over the last 12 months into the financial operations of Millers, I suppose you looked at the operations of the "Amanda Miller" the tanker "Amanda Miller", did you?
- A. I am sorry - I do not know what you mean - "Looked at the operations"?
- Q. Did you look at the situation financially arising from the operations of the tanker "Amanda Miller" by the company?
- A. I find that rather difficult to answer, I am sorry.
- 30 Q. Well, did you make any inquiry as to whether the "Amanda Miller" had been chartered?
- A. Yes.

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Cross-examination by
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for 2nd Cross Defendant

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nation by
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(continued)

Q. What was the result of that inquiry?

A. A charter was arranged and came into effect either shortly before or shortly after the taking delivery of the vessel. To the best of my knowledge since that time it has been operating under charter.

Q. Did you come to know the charter rate per day, approximately?

A. I did know. I think it was in the vicinity of \$10½ thousand per day. 10

Q. I suppose you became aware of the fact that the tanker was guaranteed work on the Australian coast under the Commonwealth -

A. Yes.

Q. Similarly, that the "Robert Miller", once operative, would be guaranteed work on this Australian coast?

A. I understood so,

Q. Did you make yourself acquainted with the arrangements which had been made for the charter of the "Robert Miller" from the time of delivery, or shortly after that? 20

A. These negotiations for charter of the "Robert Miller" went on for a considerable period, and to the best of my knowledge the final agreement was reached quite late in the year ended 30th June, 1972, and I understand that the letter did pass between the parties agreeing to a rate.

Q. Can you tell us what that rate was per day, approximately? 30

A. I think it was about \$11,600.

Q. Anyway, something in the order of \$4 millions per year?

A. Yes. I have never calculated.

- | | | |
|----|--|--|
| | <u>Q.</u> From your knowledge of taxation matters, depreciation allowances in respect of tankers are very large? | In the Supreme Court of New South Wales |
| | <u>A.</u> I am no tax expert, I am afraid. I do not know the rate. | Equity Division |
| | <u>Q.</u> Have you formed any view about the volume of cash flow from the operations of a tanker such as the "Robert Miller" or "Amanda Miller", having regard to the depreciation allowances? | No. 6
Transcript of evidence on trial of action |
| 10 | <u>A.</u> I formed the view that there was a considerable cash flow from those operations. | Plaintiffs' evidence |
| | <u>Q.</u> Did you form the view that the flow from the "Amanda Miller" was operating to the company's benefit? | Evan Duff Cameron (recalled) |
| | <u>A.</u> Yes. | 7th September, 1972 |
| | <u>Q.</u> And similarly, you foresaw a similar improvement in the company's position as a result of the charter of the "Robert Miller"? | Cross-examination by Mr. Staff Q.C. |
| | <u>A.</u> Yes. | (continued) |
| 20 | <u>Q.</u> Do you recall what the rate of employment in the year was of the "Amanda Miller"? | |
| | <u>A.</u> The number of days? | |
| | <u>Q.</u> Yes. | |
| | <u>A.</u> Originally, if I remember correctly, it was estimated to be about 330 days per year. | |
| | <u>Q.</u> Did you know a similar estimate in relation to the "Robert Miller"? | |
| | <u>A.</u> I don't know. | |
| 30 | <u>Q.</u> You told us there had been the negotiations with the Commonwealth Superannuation Board in relation to the advance of some dollars premium on long term mortgage? | |
| | <u>A.</u> Yes. | |

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tion by

Mr. Scott Q.C.

(continued)

Q. Were they current as at 6th July this year?

A. I understood that the negotiations with the Superannuation Fund at least - either ceased or were temporarily postponed, and that that was when the arrangements were made with Tri-continental.

Q. Had you any knowledge of an offer made by the Board current, say, as at 30th June?

A. I have no knowledge.

Q. Had you heard any discussion at the Board meeting prior to 6th July or at that time in relation to the company's ability, if required, to roll-over the Tricontinental bill facility at the expiration of 12 months? 10

A. Are you referring to the \$3 million?

Q. The \$3.1 million, the bill arranged through Tricontinental?

A. I am aware there were roll-over provisions but whether I learned of that before or after 6th July, I don't know. 20

Q. But, anyway, you are aware that there were, in that arrangement, roll-over provisions?

A. Yes, but I do have notes - I am not sure whether it is on those papers or some other papers which I received later than 6th July, where I have written this, so I don't know whether I knew before or after.

Q. Indeed, financing transactions prior to this bill facility being arranged had been carried out by Tricontinental with Millers on a number of occasions, had they not? 30

A. Yes.

Q. I want to take you back to the meeting of 6th July when the proposed placement was in the course of discussion. You told my learned friend Mr. Masterman this morning that you recalled some further conversations, some further matter which you stated at that meeting. Have you any recollection of having

said anything, and if so what, as to the suggested justification for the proposed issue?

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A. I am sorry - could you repeat that?

Q. Yes. Have you any recollection of having said anything, and if so, what, as to the justification suggested for the issue (No answer)

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Mr. Glass

This, I understand, is put, at the Board meeting?

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10 Mr. Staff

Yes.

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Witness

I cannot remember whether I said it or not.

Cross-examination by Mr. Glass Q.C.

Mr. Staff

(continued)

Q. Have you any recollection as to anything you said, as to your concern about the suggested justification of the issue.

A. I am sorry, I would have to ask you to repeat that too.

20 Q. Have you any recollection as to anything you said about your concern about the justification suggested for the proposed issue?

A. I said that I was concerned that the proposal gave the appearance of being made for the benefit of minority shareholders and to thwart Ampol and Bulkships, but that I did not know whether this was the case, but I felt it had that appearance. Later on, when discussing financial aspects, and in particular, the list of liabilities, I asked about, why no suggestion had previously been made to make an issue for shareholders and asked why it was now being made. I cannot remember anything further than that.

30

Mr. Glass

Q. It is clear, Mr. Cameron, is it not, that prior to 23rd June you had formed an unfavourable

Cross-examination by Mr. Glass Q.C. for 1st Defendant

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view with respect to the Ampol offer of \$2.27?

A. Yes.

Q. You had communicated that view to the chairman in discussions with him?

A. Yes.

Q. You based that view that the offer was too low both upon the capital position of Millers and also upon their improved trading prospects?

A. Yes.

Q. At the 23rd June meeting the view that the \$2.27 offer was too low was espoused unanimously by all directors?

10

A. Yes.

Q. There was not a single Board member present who spoke in favour of it?

A. That is so.

Q. In each case, I suggest, it was opposed because it was simply not an adequate valuation of what shareholders should get for their shares?

20

A. At the meeting of 23rd June, the fact plus the fact that Howard Smith had given notice of an intention to make a higher bid. Both of those factors were brought out in discussion.

Q. Quite so, but the first, operating alone, was sufficient to produce that Board opinion that the amount was too low?

A. Yes.

Q. You recall that it was unanimously resolved that the offer to shareholders should be rejected upon the grounds that the price was inadequate.

30

A. Yes.

Q. And Sir Peter Abeles, among others, joined in that resolution?

A. Yes.

Q. It was therefore your view that it was not in the shareholders interest to accept that offer that Ampol had made to them?

A. Yes.

Q. And that it was the director's duty, so far as they were able, to prevent the shareholders being commercially forced to accept it?

A. I am sorry, would you repeat that?

Q. It was your view, as a director, that this was an offer which was inadequate?

A. Yes.

Q. And that shareholders should be told not to accept it?

A. Yes.

Q. And the directors should do what they could to prevent its acceptance if commercial pressure seemed likely to produce that result?

A. Yes.

His Honour

I am not sure what you mean by "that result".

Mr. Glass

I will put it again.

Q. If commercial pressure seems likely to force acceptance of the Ampol offer by shareholders, it was the directors' duty to try and prevent this happening?

A. Yes.

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Plaintiffs
evidence

Evan Duff
Cameron
(recalled)

7th September,
1972

Cross exami-
nation by
Mr. Glass Q.C.

(continued)

Q. And some pressure tending in that direction was clearly perceivable, was it not, in the joint statement made by Ampol and Bulkships on 27th June?

A. Yes.

Q. It was your view that that joint statement was harmful to the shareholders of Millers?

A. To all the shareholders of Millers?

Q. I suggest to you, to the interests of all those who had shares in Millers, pressure applied to accept an offer that was inadequate?

10

A. Yes.

Q. It was also apparent to you, was it not, that that joint statement was designed to procure the withdrawal of the Howard Smith offer of \$2.50?

A. Yes.

Q. It was a commercial development, that in the face of that joint a nouncement, their offer of \$2.50 would not be receivable?

20

A. Yes.

Q. If I may, I will come back to this question later; but in the chronology you have expressed the view that the financing of ships, as it had been undertaken, was not a sound way of doing things - if that is obscure, I will withdraw it - the best way to finance the purchase of ships is to arrange long term finance, is it not?

A. I don't think I can answer that question in its form.

30

Q. You would agree that if you were going to take a capital asset over a long period of time and you have to borrow money to acquire it, it is best to get it on the long term basis on a reduced rate of interest than on a short term basis at a higher rate of interest?

A. Yes.

- Q. If you cannot arrange long term finance the next best thing is to do it with equity capital?
- A. My difficulty, Mr. Glass, is to know what proportion of the amount -
- Q. Well, other things being equal, long term finance is the best and equity capital is the next best?
- A. Yes.
- 10 Q. But short term finance is utterly disastrous as a means of acquiring capital assets?
- A. To any material degree, yes.
- Q. Coming to the meeting of 6th July, your view in the end was, I suggest, that the resolution ought to be opposed because the capital which it raised was not really needed ?
- A. That was one of my reasons.
- Q. Would you not describe that as the dominant of your reasons?
- 20 A. That, plus one other reason.
- Q. What is the other reason?
- A. That I was given inadequate time to consider the proposal.
- Q. If it had turned out that this came up at a general meeting that would no longer apply and your principal reason would be that the money was not really needed
- A. Yes.
- Q. A contrary view was put, was it not, by Mr. Koch?
- 30 A. Yes.
- Q. The burden of what he had to say was "This money is urgently needed"?
- A. I don't think he used those words.

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(continued)

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Cross examination by Mr. Glass Q.C.

(continued)

Q. but was that not the sense in which you understood what he had to say?

A. I think not, Mr. Glass.

Q. Well, he gave details, did he not, of payments which would fall due in the ensuing 12 months?

A. Yes.

Q. And they totalled in all 10.7 million dollars plus, did they not?

A. My memory was 10.3 million.

Mr. Glass

I wonder if the witness might be allowed to examine the minutes of the meeting which I think are Ex. B.. (Shown).

Q. Could you turn to p. 5, folio 267?

A. I am sorry, I haven't got the folios marked.

Q. Page 5 of the meeting of 6th July?

A. Yes.

Q. You see these various payments described and dissected totalling 10.741 - ?

A. Yes.

Q. There isn't any doubt that that was the figure Mr. Koch mentioned at the meeting?

A. Well, I have no reason to doubt it.

Q. Likewise, would you agree that the various short term debts there specified were mentioned by him as the details of the forthcoming payments?

A. Are you referring to the 10.7?

Q. No, the amounts which collectively make up the 10.741. He mentioned, I suggest, not only the total, but the individual amounts that make it up?

A. Yes.

10

20

30

Q. And again, likewise, the dates that they individually fell due for payment?

A. Yes.

Q. The relevance of his reference to those matters was that the equity capital of some \$10 million to be raised by the allotment was vitally needed to meet these payments shortly to fall due?

A. Yes.

10 Q. Did he mention that additionally the company was committed to long term liabilities?

A. I think he did.

Q. And, likewise, to expenditure on various capital projects?

A. Yes.

20 Q. Was it suggested to the Board by him that if the \$10 million short term liabilities had been added to it, the long term liabilities plus capital expenditure, it would yield a total figure of something like 18½ million dollars?

A. I don't remember that.

Q. But does that amount of 18 million dollars plus seem a fair enough estimate to you of the combined total of long term liability of expenditure?

A. 18½ million dollars approximately?

Q. Yes.

A. That sounds a reasonable figure.

30 Q. You were aware of all these payments; short term, long term and capital falling due?

A. I was not aware of them.

Q. Not in detail, but in general?

A. Yes.

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tion by

Mr. Glass Q.C.

(continued)

In the Supreme Court of New South Wales

Q. Here was an opportunity to raise \$10 million as a source of funds directed to those forthcoming payments?

Equity Division

A. Yes.

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Q. But it was your view that it was not really needed?

Transcript of evidence on trial of action

A. That is so.

Plaintiffs evidence

Q. One of the factors which weighted with you in coming to that conclusion, I suggest, was a source of some seven-million-dollars odd - namely the Hambros Bank.

10

Evan Duff Cameron (recalled)

A. Yes.

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Q. A very important element in your thinking was that this amount of money could be counted upon as coming into the company's hands in the near future?

Cross examination by Mr. Glass Q.C. (continued)

A. Yes.

Q. Mr. Koch, on the other hand, expressed, did he not, at that meeting doubt whether that money could be counted upon?

20

A. Yes.

Q. He said that one reason which rendered it contingent was the condition that if control of the company changed the loan could be refused at the option of the lender?

A. Yes.

Q. Did you then, or had you ever, examined the terms of the letter of intent from Hambros dated 1st June, 1972?

A. No.

30

Q. Is this the position; that you counted upon this money as an element in your thinking, although you had never inspected the terms in which Hambros offered the money?

A. That is so.

Q. (Approaching). I think my learned friend Mr. Rogers reminds me that you have put it this way; In June arrangements were more or less completed for long term finance from Hambros for 7.4 million dollars.

In the Supreme Court of New South Wales Equity Division

A. Yes.

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Q. So you, in expressing the matter in that way, were aware that it was not by any means a binding arrangement?

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10 A. Yes.

Plaintiffs Evidence

Q. (Approaching). I am asking you to look at this Mr. Cameron with a view to getting your opinion as to what effect it may have had upon your position if you were, at the meeting of 6th July, conversant with the terms of this letter. Do you understand that?

Evan Duff Cameron (recalled) 7th September 1972

A. Yes.

Cross examination by Mr. Glass Q.C.

Q. I want to give you a fair opportunity to consider it, so don't let me hurry you. (No answer). (continued)

20 Luncheon adjournment

His Honour

You are still on your former oath, Mr. Cameron.

Witness

Yes, your Honour.

Mr. Glass

Could this document be handed back to Mr. Cameron please.

Q. Have you had an opportunity to consider the terms of this letter of intent?

30 A. Yes.

Q. There are some matters to which I wish to direct your attention. You will note that at the beginning of the second paragraph it is expressed in these words, "Subject to the correctness of the position outlined above, we are pleased in principle to offer you - "?

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tion by
Mr. Glass Q.C.
(continued)

A. Yes.

Q. As a man of commercial experience you would recognise that that is the very opposite of a binding arrangement, would you not?

A. Yes.

Q. You would acknowledge that the subject of correctness is a second matter that makes it conditional, quite apart from the reference to "in principle"?

A. Yes.

Q. So it is conditional firstly because they only put it in principle?

A. Yes.

Q. And secondly because they say it is subject to conditions which may or may not be fulfilled?

A. Yes.

Q. One of the conditions you will observe in the first paragraph is that the delivery from the yard of "Robert Miller" was to take place on or about 15th March, 1973?

A. Yes.

Q. The tanker was being built by Evans Deakin?

A. Yes.

Q. They had already run into some industrial trouble in relation to this vessel?

A. Well, I knew that they had run into industrial trouble.

Q. Would it not be your view that on 1st June completion of the vessel in the following March was by no means a certain outcome?

A. Yes.

Q. You would recognise that if the completion of the vessel was delayed appreciably beyond 15th March 1973, that would be a further matter as to which Hambros might say the money is not available?

10

20

30

- A. Yes. In the Supreme Court of New South Wales Equity Division
- Q. Was it not in July 1972 thought likely that the vessel would not be completed until June of 1973? No. 6
- A. I understood so. Transcript of evidence on trial of action
- Q. So, as at that time, one of the conditions to which the offer in principle was subject was unlikely to be fulfilled? Plaintiffs' evidence
- A. Yes.
- 10 Q. If I may invite your attention to p. 3 of the same letter - do you see in the third paragraph from the top the words "In the event of 50 per cent or more of the issued shares of Miller, Miller Holdings, being acquired by another company the banks reserve the right to either renegotiate the terms of the loan or ask for full repayment"? Evan Duff Cameron (recalled) 7th September 1972 Cross examination by Mr. Glass Q.C. (continued)
- A. Yes.
- 20 Q. They were clearly stating that that was required by them as another reason which would exempt them from an offer in principle?
- A. Would exempt them?
- Q. Would exempt them from going on with an offer made, in any event, in principle?
- A. Yes.
- Q. Was it not a real commercial possibility in July, 1972 that Ampol and Bulkships between them, holding 55 per cent, might make some arrangement which would vest the whole 55 per cent in one of them?
- 30 A. Yes.
- Q. If that event occurred Hambros and its associates would be given an extra ground for saying that this conditional offer was not going forward?
- A. Yes.

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tion by
Mr. Glass Q.C.
(continued)

Q. In the light of that, the terms of that letter of intent, are you prepared to accept that the claim of Millers to this money was much less secure than you believed it to be on 6th July?

A. Yes.

Q. Would you agree that if you had known how insecure that hold was on the Hambros money you would not have voted as you did?

A. No.

Q. Would you agree that if you had known how insecure the hold was you would have had an additional reason for supporting the allotment? 10

A. I am sorry, I would like to ask you to repeat that question.

Q. Yes. Do you agree that if on 6th July you had known the contents of this letter and how insecure Hambros were as a source of funds, that that would have given you a reason you did not then have for supporting the allotment? 20

A. Yes.

Q. I ask you about Tricontinental. That was regarded by you as a likely source of about \$3 million, was it not?

A. I thought that we had already received -

Q. You are quite right. I withdraw that. You know that the Tricontinental money was due for repayment within the next 12 months?

A. Yes.

Q. But you assumed in your thinking, did you not, that it was likely to be renewed? 30

A. Yes.

Q. And that therefore a renewed collection of bills, \$3 million in value, would be available towards the payment of the 10.7 million dollars short term loans which had been discussed?

A. Yes.

Mr. Glass

May I hand to the witness a copy of the Deed of 30th June, between Miller Holdings and Tricontinental Corporation.

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Q. Have you previously been given an opportunity to examine the terms of this deed?

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A. I think I have seen this deed at the meeting when we entered into the arrangement with Tricontinental. I have not read it in detail.

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evidence

10 Mr. Glass

May I interrupt myself to ask your Honour whether the old Equity practice of tendering documents at any stage is going to be perservered in?

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His Honour

Yes.

Cross examina-
tion by
Mr. Glass Q.C.
(continued)

(Letter of intent of 1st June, 1972 tendered and marked Ex. M.H.1 - two letters of 1st June, 1972)

Exhibit M.H.1.

Mr. Glass

20 Q. Perhaps Mr. Cameron, you might be re-examining this document?

A. Do you want me to read it?

Q. In particular I invite your attention to 1(g) and 1(h). Am I not right in saying that the \$3 million short term finance coming from Tricontinental was included in the 10.7 million dollars that was mentioned by Mr. Koch as falling due in the next 12 months?

A. I think it was.

30 Q. Would I be right in further saying that you took the view that that \$3 million would not create any problems for Millers because they were going to be able to renew the loan from Tricontinental as each bill fell due?

A. Yes.

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Cross-examination by Mr. Glass Q.C. (continued)

Q. Will you observe that the right to obtain renewal, which is set out in the document in cl.(d), "If, on priorfollowing provision shall apply".

A. Can I just have a moment -

Q. Yes, that is at the top of p. 3?

A. Yes.

Q. So the right to renew was subject to conditions set out thereafter, was it not?

A. Yes.

10

Q. I invite your attention to p. 5, par. (h) which provides, you will see, "The company may, at its option, pursuant to cl. (d) without notice".

A. Yes.

Q. "One, if any change occurs in the respective positions....."³

A. Yes.

Q. So the right to renewal, you would agree, would be defeated if the position of the borrower changed in a way which in the company's opinion adversely affects in any material way the borrower's financial stability?

20

A. Yes.

Q. So Tricontinental was given the right to decide whether the option would apply or not?

A. Yes.

Q. One of the conditions upon which it could refuse would be if, in its opinion, the borrower's position had in any material way been altered so that its financial stability was affected (Objected to by Mr. Deane).

30

His Honour

Are you confident in the form of that question, Mr. Glass? Are you content?

Mr. Glass

I will put it another way that will occasion no criticism.

10 Q. I will read it again, "The company may at its option refuse to renew any bills pursuant to Cl. (d) without notice, if any change occurs in the respective position of the borrower which in the company's opinion adversely affects in any material way the borrower's financial stability." So far so good?

A. Yes.

Q. Now, "position" is defined, is it not, in cl. G?

A. Yes.

20 Q. "It is agreed that the state of the borrower's position including without affecting the generality of the foregoing, liquidity, cash flow, profitability, portfolio, ability to meet bills thereunder, this facility and its other commitments and their respective other arrangements for obtaining credit or giving security all of which are hereinafter included within the designation 'position'."

A. Yes.

Q. Now, would you not agree that there was a high probability that in the ensuing twelve months there would be some change in Miller's position with respect to some or any of that very large range of financial matters?

30 A. Yes.

Q. In those circumstances, the renewal would be in jeopardy as you understood it?

A. No.

Q. The company Tricontinental, on the happening of any of those changes in the position of Millers, would have the right to refuse to renew?

A. It says "in the company's opinion adversely affected in a material way."

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Cross exami-
nation by
Mr. Glass Q.C.
(continued)

Q. That is right. Now, I will put it in that more extended form. Was there not a real possibility on 6th July that one of these many matters included under the heading "position" might change in the next twelve months in a way which adversely affected the borrower's financial stability in the opinion of the company?

A. You used the words "a real possibility"?

Q. Yes

A. Yes.

10

Q. And if that real possibility matured into effect, then a renewal could not be legally required?

A. Yes.

Q. That, if it happened, would mean that the \$3 million falling due to Tricontinental would have to be funded from some other source?

A. Yes.

Q. I gather, Mr. Cameron, that you did not regard that as a factor that ought to be taken into account when the decision was being made?

20

A. I had not seen this document.

Q. Quite. And I suggest to you that if you had seen it on 6th July you would have had very considerable doubt as to whether that \$3 million as it fell due in three parts could be obtained by renewal?

A. I don't think I would have had very considerable doubt.

Q. You would have had doubt?

40

A. I would have doubt.

Q. And that, in its turn, would have given you an extra reason that you did not then have for supporting the allotment which would raise \$10 million?

A. Yes.

- | | | |
|----|--|---|
| | <u>Q.</u> And it is true, is it not, that Mr. Koch did refer to the Tricontinental position during the meeting of 6th July? | In the Supreme Court of New South Wales |
| | <u>A.</u> Did refer to ...? | Equity Division |
| | <u>Q.</u> To the position of the renewal of bills from Tricontinental? | No. 6 |
| | <u>A.</u> If by that you mean the terms on which ... | Transcript of evidence on trial of action |
| | <u>Q.</u> No, to this unsecure situation which applied? | Plaintiffs evidence |
| 10 | <u>A.</u> If I remember correctly, he referred to normal roll-over provisions or something of that nature. | Evan Duff Cameron (recalled) |
| | <u>Q.</u> Did he not say this, Mr. Cameron - I am not suggesting he acquainted you in detail with the document, but did he not say - did this not happen - "Mr. Cameron asked Mr. Koch, commenting on \$4.8 million borrowings from Tricontinental; Mr. Koch said that these borrowings could possibly be renewed on maturity by the lender. However, one of the conditions of the deed securing the borrowings was that if control of the company changed from its present form, renewal of the borrowings could be refused in the option of the lender." Do you remember something like that being said? | 7th September, 1972 |
| 20 | <u>A.</u> In relation to Tricontinental? | Cross examination by Mr. Glass Q.C. |
| | <u>Q.</u> Yes? | (continued) |
| | <u>A.</u> No, I do not. | |
| | <u>Q.</u> I see. But it would be your present view, would it not, that the unsecured right to a renewal on the Tricontinental money had not been brought adequately to your notice at the time? | |
| 30 | <u>A.</u> Yes. | |
| | <u>Q.</u> If it had been you might well have taken a different view as to whether the allotment money was being ... | |
| | <u>A.</u> It would have been a factor I would have taken into account. | |

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tion by
Mr. Glass Q.C.
(continued)

Q. If you had the two factors brought clearly to your attention, that there was insecurity as regards the Hambros loan of 7.4 million and also as to the 3 million renewal from Tricontinental, would you not have been inclined to take a different view as to whether the 10 million funds were really needed by Millers at that time?

A. I would have wanted to give the matter more consideration.

10

Q. You would not have voted against it?

A. Against what?

Q. Against the allotment at that meeting?

A. I would have voted against it.

Q. But Mr. Cameron, you have said to me that, the two reasons, (1) because you had not had enough time to think about it, and (2) because you did not think the money was really needed?

A. I think I thought they were two of my reasons.

Q. And when you thought it was not really needed, your thinking was the Hambros money would be forthcoming?

20

A. Yes.

Q. And the Tricontinental renewal could also be counted upon?

A. Could be reasonably counted upon.

Q. Yes. So, you were, in effect, assuming \$10 million at least would be coming in in the next twelve months?

A. Yes.

30

Q. And if someone had clearly shown you then that \$10 million could not be counted upon, would that not have altered your views as to whether the \$10 million share capital was or was not needed?

A. It would have been a factor which I would have wanted to consider.

Q. A very important and weighty factor, I suggest?

A. Yes.

(Deed of 30th June, 1972 tendered without objection and marked Exhibit MH2) *

Q. At the time of the meeting, Mr. Cameron, it was stated by somebody that all the company's assets upon which money might be raised had already been given as security?

A. I think it was words to that effect, yes.

Q. And that was according to your understanding the undoubted position at that time?

A. Well, I didn't know.

Q. You have no reason to doubt that that was a true statement?

A. No reason to doubt it.

Q. One of the elements in your approach to the question whether the money was needed was, I think you have said, that the position in June 1972 had improved compared with that which existed in June 1971?

A. Yes.

Q. Now, may I ask you, Mr. Cameron, to have a look at this balance sheet as at 30th June, 1971. Now would you not agree as an expert in reading balance sheets, Mr. Cameron, as you are, that that discloses as at 30th June, 1971 a shortage of working capital to the order of \$10 million, 16 million, 377 thousand less, 6 million and twelve thousand?

A. I prefer to use "a deficiency" perhaps rather than a "shortage".

Q. Yes, a deficiency of working capital to the order of \$10 million plus. Is that right?

A. Yes.

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*Exhibit MH2
Plaintiffs evidence.

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(continued)

Q. Does it not also show long term liabilities amounting to \$1.9 million?

A. Yes.

Q. Does it not also show short term liabilities of approximately \$9 million, \$4 million plus \$4,932,000?

A. You said "short term liabilities". I suppose all current liabilities are short term but "short term loans" perhaps.

Q. Yes, short term loans. Now, if then the short term loan position at June 1971 is 9 million and the short term loan position in June 1972 is 10.7 million, that has already worsened by 1.7 million?

10

A. What has already worsened?

Q. The short term loan position?

A. Yes.

Q. And at the same time the 1.9 million long term loans have been replaced by long term loans in June 1972 totalling approximately 8.5 million dollars - that is the Hambros first loan on the "Amanda Miller" plus another loan of over a million. Anyway, you agree on 8.5 long term loans at June 1972?

20

A. I don't know the figure but it sounds close.

Q. Well, it was over 7 million, wasn't it?

A. Yes, certainly.

Q. So, in respect of long term loans, the company's position has worsened by over 400 per cent?

A. Yes.

30

Q. Now, were you in a position to know what the deficiency of working capital was at the end of June 1972?

A. No.

- Q. (approaching) I have here, Mr. Cameron, a set of figures which have not yet been audited but, with that reservation, I would like you to assume that that correctly records information taken from the company's books?
- A. Yes.
- 10 Q. Now, if they be true, would you not agree that deducting current assets from current liabilities as shown in the company's books as at June 1972, there is a deficiency of 12,482,000?
- A. Yes.
- Q. Which is, again, a considerable worsening of over 2 million in comparison with the position twelve months earlier?
- A. Yes.
- 20 Q. Now, if it then be the position that in twelve months the deficiency of working capital has gone up by 2 million plus, at a time when short term liabilities have gone up from 10 million - sorry, from 9 million to 10.7 - and long term liabilities have gone up from 1.9 million to 8.5 million, would you not say that that is a situation of very considerable deterioration in those twelve months?
- A. Well, there is another major factor which would have to be taken into account.
- Q. What is that?
- A. The commitment for capital expenditure and contingent liabilities.
- 30 Q. Now, how do they offset the worsening that emerges by looking at the three indicators that I just ...

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Cross examination by Mr. Glass Q.C.

(continued)

Mr. Masterman

He did not say that they did.

Mr. Glass

Q. Do you mean it makes it worse?

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Mr. Masterman

He did not say anything.

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Mr. Glass

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Q. Do you say that the matters to which you refer alleviate or intensify the worsening or are neutral in relation to it?

A. No, I say they must be taken into account.

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Q. They must be taken into account. But on the three indicators I have given, there is shown a distinct worsening in the company's financial position?

10

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A. The three indicators being the increase in long term liabilities, the increase in short term loans and the increase in deficiency?

Cross examina-
tion by
Mr. Glass Q.C.

Q. Yes?

(continued)

A. Those three indicate a worsening.

Q. A very considerable worsening, I suggest?

A. Yes.

Q. Because nothing could be more disconcerting, I suggest to you, than to multiply the long term liabilities by 400 per cent while at the same time a deficiency of working capital has got deeper?

20

A. Yes.

Q. That would cause alarm in the mind and soul of any company manager?

A. Yes.

Q. Now, you have told us, Mr. Cameron, that at the meeting not only the chairman but a number of other people said that the question whether the allotment be made or not had to be considered from the standpoint of the shareholders?

30

A. Yes.

- | | | | |
|----|-----------|--|---|
| | <u>Q.</u> | So, there was no doubt that all directors were given fully and properly to understand that the welfare of the shareholders was the only consideration? | In the Supreme Court of New South Wales Equity Division |
| | <u>A.</u> | I am not sure whether it was the only consideration; certainly a major consideration. | No. 6 |
| | <u>Q.</u> | The major consideration? | Transcript of evidence on trial of action |
| | <u>A.</u> | Yes. | Plaintiffs evidence |
| 10 | <u>Q.</u> | So, they were properly instructed, I suggest to you, as to how they should approach the issue? | Evan Duff Cameron (recalled) |
| | <u>A.</u> | They were given a proper instruction, yes. | 7th September, 1972 |
| | <u>Q.</u> | You agree with that? | Cross examination by Mr. Glass Q.C. |
| | <u>A.</u> | Yes. | (continued) |
| | <u>Q.</u> | Now, in the context of that proper instruction, Mr. Koch put the view, did he not, that the interests of the shareholders required that the allotment be approved? | |
| | <u>A.</u> | Yes, he may not have used those exact words. | |
| 20 | <u>Q.</u> | No, but would that not be the sense? | |
| | <u>A.</u> | Yes. | |
| | <u>Q.</u> | And Mr. Nicholl in his own way expressed the same view? | |
| | <u>A.</u> | Yes. | |
| | <u>Q.</u> | And the chairman also expressed that view? | |
| | <u>A.</u> | Yes. | |
| | <u>Q.</u> | And so did Mr. Conway express that view? | |
| | <u>A.</u> | I think so. I can't recall. | |
| 30 | <u>Q.</u> | And Lady Elizabeth Miller expressed no view on that question? | |
| | <u>A.</u> | I think that is so. | |

- In the Supreme Court of New South Wales
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- Transcript of evidence on trial of action
Plaintiffs evidence
Evan Duff Cameron
(recalled)
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Cross-examination by
Mr. Glass
Q.C.
(continued)
- Q. So, the only person who expressed the view at the meeting that the interests of the shareholders did not favour the allotment was yourself?
- A. I don't think that I actually put that view. I suggested that.
- Q. That is what I was going to put to you, Mr. Cameron, that you were not yourself unswervingly devoted to that opinion at the meeting, were you?
- A. No, no. 10
- Q. You thought at one stage that you were uncertain as to whether you should oppose or support the allotment?
- A. At no stage did I consider supporting the allotment.
- Q. But at one stage you said you were not opposed to it?
- A. I don't remember saying that.
- Q. Well, may I put this to you as something that occurs in the minutes and invite you to agree that it represents your view, namely, "Mr. Cameron then said he was not opposed to the proposal made by Howard Smith Limited but wanted its indications to be seriously considered." I will just read on: "He said also that he would like to hear comment by the other directors." 20
- A. I do not remember the exact words but I cannot imagine that I would have said it. I would have been more likely to have said "not necessarily opposed". 30
- Q. All right, "He said he was not necessarily opposed to the proposal but would like to hear the views of other directors." Does that seem right to you?
- A. Yes.

- Q. And that, I take it, was because of the balancing out, the factors for and against, you were then unable to come to any clear decision?
- A. I was hoping I would get more information to enable me.
- Q. Yes, but on what you then had you did not feel able to come to any clear decision for or against?
- 10 A. I had formed the opinion that I was against the issue but I was still prepared to hear further argument on it.
- Q. Yes, and you then did hear further views put in favour of the allotment?
- A. Yes.
- Q. And, it therefore had been revealed that Mr. Taylor, Mr. Conway, Mr. Koch, Mr. Nicholl, Mr. Anderson and Mr. Balhorn were all in favour of the allotment?
- 20 A. Yes.
- Q. All, you say, properly instructed in the way in which they should approach the question?
- A. Yes.
- Q. And you would agree, would you not, that different people asking themselves the same question could fairly and honestly come to different conclusions?
- A. Yes.
- 30 Q. Because it is a matter of weighting the various factors in the financial ambit?
- A. Yes.
- Q. And deciding whether money is or is not needed, you have to have regard to a number of different financial indicators in the past and in the future?
- A. Yes.

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Plaintiffs
evidence

Evan Duff
Cameron
(recalled)

7th September,
1972

Cross examina-
tion by

Mr. Glass Q.C.

(continued)

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7th September 1972
Cross examination by
Mr. Glass Q.C.
(continued)
- Q. Different men will give them a different weighting?
- A. I am sorry - different ...
- Q. Different men approaching it in the same way will give them a different weighting?
- A. Yes.
- Q. And accordingly they can easily come on the same material to a different conclusion?
- A. Yes.
- Q. You recognise as I think you have said that on material before the Board that day the other directors could honestly and fairly have come to the decision which they did? 10
- A. Yes.
- Q. Just a few more questions, Mr. Cameron would like to put to you one way in which the support for the allotment has been expressed and ask you whether it represents views that could fairly be arrived at. I will read them to you. They represent a series of financial points of view, Mr. Cameron. "The company was still suffering from a lack of working capital and was dependent upon expansive short term borrowings." Was that a view that could honestly and fairly be held on 6th July? 20
- A. Yes.
- Q. "Because the company's assets were all mortgaged, the company was unable to obtain proper long term finance." Was that a view that could honestly be held? 30
- A. Yes.
- Q. "The company had large short term commitments which it could not be sure of meeting." Would you agree with that as a fair view?
- A. Yes.

- Q. "Because of the forced sale of income producing assets, the company's growth was being retarded." Do you agree that that view could honestly be held?
- A. Yes.
- Q. And lastly, "The company did not have sufficient funds for projected expansion."
- 10 A. I don't really know what "projected expansion" would mean but if the person holding that view had some projected expansion in mind, yes.
- Q. You would agree that a person fairly holding all those views could then fairly conclude that the £10 million to be raised by the allotment was fairly needed for the benefit of the shareholders?
- A. Yes.
- Q. Now, as to the manner in which the money was raised, it was put on terms of a share premium of £1.30, as you know?
- 20 A. Yes.
- Q. £2.30 a share was a very satisfactory price, was it not, for the company to attach to this allotment having regard to the then state of the market?
- A. Yes.
- Q. I think your view was that 1% of the shareholders had been approached, the most that could reasonably have been expected from them was in the vicinity of £1.50 to £1.70 as opposed to £2.30?
- 30 A. Yes, that is a fair estimate.
- Q. But you yourself would not have thought it proper to ask the shareholders to pay that price on a new allotment, would you?
- A. Pay what price; I am sorry?

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Plaintiffs' evidence

Evan Duff
Cameron
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Cross examination by
Mr. Glass Q.C.

(continued)

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Plaintiffs evidence
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7th September, 1972
Cross examination by Mr. Glass Q.C.
(continued)
- Q. \$1.50 to \$1.70?
- A. I am not quite sure what you mean by "proper".
- Q. I will put it differently. Was it not your view that if the shareholders were to be approached there ought to be some profit element in it for them and they could not fairly be asked to pay more than \$1.35 or \$1.40 per share?
- A. That would be my view in retrospect. I don't think I had any view on that day.
- Q. That being your view in retrospect, is it not also your view in retrospect that to get \$2,30 was a very advantageous price for the company to secure on its allotment? 10
- A. Yes.
- Q. And it was an allotment of capital which could easily be serviced, could it not?
- A. Are you asking my opinion now or then?
- Q. Well, let us have your opinion, did you have an opinion then?
- A. No. 20
- Q. You have an opinion now and it is in the affirmative, is it?
- A. I really haven't given the matter sufficient thought.
- Q. Well, Mr. Cameron ...?
- A. I would think you would ...
- Q. I think you have directed your mind to it, have you not? Have you not been asked this question well, Mr. Cameron, I understand from my friend that you may wish to add to what you have just told me. 30
- A. I am sorry.

- Q. All right, Well, perhaps in the answer to the next question you can give it to us. Were you not asked this question and did you give this answer: "I did consider that the allotment would ease the financial problems of Millers. I say this simply on the basis, the replacing of liabilities with shareholders' equity obviously eases financial problems."?
- A. Yes.
- 10 Q. You said that and that is true, isn't it?
- A. Yes.
- Q. You also said the dividends in the near future on those shares would not be likely to exceed the net cost to the company of interest after allowing for tax deductibility of such interest on the liabilities repaid?
- A. Yes.
- 20 Q. And I am putting to you that in that answer you are saying that it was easier or at least as easy to service the equity capital as the loan capital which it would be replacing?
- A. Yes.
- Q. Would this be something near the mark. That if you got 10 million loan money carrying interest at 8 per cent there is \$800,000 to be paid and the tax saving would be a little under half of that, so you would be paying out something over 400,000?
- A. Yes.
- 30 Q. Whereas if you raise the same money by a share allotment of four and a half million at \$2.30 and you pay 8 per cent dividend on that you are only going to have to pay about \$360,000 to service the dividends on the 10 million?
- A. Yes.
- Q. And in that sense servicing the equity capital is a little bit easier than servicing loan capital?

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Plaintiffs
evidence

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Cross exami-
nation by
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(continued)

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Cross examination by Mr. Glass Q.C.
(continued)
- A. Well, if the dividend rate remains as it is, yes.
- Q. Yes, which of course, one would not expect reasonably to the contrary. Now, as to the allotment, there was some talk at the meeting, was there not, that it ought to be approved by the shareholders in general meeting in accordance with the requirements of the stock exchange?
- A. Yes. 10
- Q. Given the dominant position that Ampol and Bulkships had of 55 per cent, given the tenor of their joint announcement on 27th June, what chance did you think there was on 6th July that such an allotment would gain the approval of the shareholders in general meeting?
- A. None.
- Q. Another matter that came up was your suggestion, short of approving the allotment, that Howard Smith should be asked whether they were going to go ahead with their offer of \$2.50 without the allotment being made to them. Isn't that right? 20
- A. That was my intention to ask that before I knew of this.
- Q. And your view as to the proper approach was "Find out if they will go ahead with the \$2.50 offer without any allotment and if they will we ought to support them".
- A. Yes. 30
- Q. "And if they won't, then we will tell the shareholders not to accept the Ampol offer."
- A. Yes.
- Q. But it was clear to you, was it not, Mr. Cameron, that without the allotment the \$2.50 offer was not going to be persevered with?

- A. I thought that that would probably happen.
- Q. So, the position facing the directors did not permit that as a choice that was open to them; that was closed off?
- A. I am sorry - did not permit ...
- Q. The 27th June announcement closed off the possibility of the Howard Smith offer going ahead without any allotment to them?
- A. In my view, yes.
- 10 Q. Now, you have said and I think in an earlier document that the proposal before the meeting had the appearance of being for the benefit of minority of shareholders and against the interests of majority shareholders?
- A. Yes.
- Q. Now, there is not any doubt that the interests of the 45 per cent shareholders in Ampol or Bulkships was promoted by this proposal?
- A. I think that is so.
- 20 Q. And promoted because it was clearly in their interest to keep the bidding open?
- A. Yes.
- Q. That if by means of an allotment Howard Smith were encouraged to persevere with their offer of \$2.50 the shareholders at any rate had \$2.27 or \$2.50 to choose between?
- A. Yes, on the proviso that Howard Smith did not withdraw their offer, yes.
- 30 Q. Quite. And it was also possible that so long as the \$2.50 offer remained in the market that Ampol would make a higher offer?
- A. Yes.
- Q. So, it was therefore in the interests of the shareholders to try and keep that \$2.50 offer running?
- A. Yes.

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Cross examina-
tion by
Mr. Glass
Q.C.

(continued)

Q. And if it was - I think you have agreed that in the practical realities of the situation the only way to keep that \$2.50 offer running was to make the allotment to Howard Smith which they proposed?

A. I cannot really say that that would be the only way but it certainly appeared to be the only way.

Q. It appeared to be the only way. So, the allotment, by its indirect effect of keeping the market for the shares open was for the benefit of the shareholders?

10

A. For the benefit ...

Q. Of the shareholders?

A. Yes.

Q. Certainly the minority shareholders?

A. Yes.

Q. If one looks at Ampol and Bulkships, it was clear to you, was it not, that they had a dual role in the situation?

20

A. Yes.

Q. On the one hand, they were shareholders commanding a majority between them and on the other they were outsiders seeking to take over the control of the company?

A. By means of the take over offer?

Q. Yes?

A. I don't think I was aware that Bulkships were involved.

Q. All right, that Ampol was as an outsider soon to take over the company?

30

A. Yes.

Q. And in that sense not having any majority significance it could be regarded as a raider?

- A. Yes. In the Supreme Court of New SouthWales
- Q. Now, its interest as a raider, would you not agree, was different to its interest as a shareholder? Equity Division
- A. Yes. No. 6
- Q. As a shareholder its interests were advanced by keeping the Howard Smith offer in the field? Transcript of evidence on trial of action
- A. Yes. Plaintiffs evidence
- 10 Q. I suppose it is a fairly unusual situation that you had here with an outside raider having an arrangement with somebody else whereby the majority control of the shares inside existed. Evan Duff Cameron (recalled) 7th September, 1972
- A. I think it is unusual? Cross's examination by Mr. Glass Q.C. (continued)
- Q. Now, the two major shareholders with 55 per cent between them, they were not offering to lend any money to help Millers over its financial problems, were they?
- 20 A. Not that I am aware of.
- Q. And for how long had Sir Peter Abeles, in your view, been aware of Ampol's financial situation?
- A. I am sorry?
- Q. I am sorry, I withdraw that. For how long had Sir Peter Abeles been aware of Miller's financial problems? (Objected to by Mr. Lockhart)
- Q. For how long had he been on the board?
- 30 A. I think that he went on the board a month before I did in April 1971.
- Q. And would you not agree that from April 1971 until the denouement in July 1972 the financial troubles of Millers were a constant thing?
- A. Yes.

In the Supreme Court of New South Wales

Q. Had there been at any time an offer from Bulkships to provide finance to relieve that liquidity problem that Millers had?

Equity Division

A. Not to my knowledge.

No. 6

Transcript of evidence on trial of action

Q. Now, the only other matter I want to ask you about, Mr. Cameron, is the position of the stock exchange. You said, I think, that a number of persons present took the view that the stock exchange would not automatically de-list Millers for making an offer?

10

Plaintiffs evidence

A. Yes.

Evan Duff

Cameron
(recalled)

Q. And gave instances, did you not, of other breaches of stock exchange requirements calling for de-listing when de-listing had not occurred?

7th September
1973

Cross examination by Mr. Glass Q.C.

A. I am not sure they could be specific instances but it was mentioned there had been a number of other occasions.

Q. So, there was a difference of opinion as to whether de-listing would or would not follow the allotment?

20

A. Yes.

Q. You took the view that it would?

A. Yes.

Q. Was this one of the factors that weighed with you?

A. Yes.

Q. Mr. Nicholl expressed his attitude to that question, did he not, in terms to which these approximate: "Having regard to the alternate situation where you had two major shareholders together, he would rather face the company's shareholders having to accept the fact of being in breach of the stock exchange rules if the proposal from Howard Smith Limited was accepted." He said that?

30

A. Something like that anyway.

Q. There were, were there not, confronting the directors, two courses of action, one which might lead to de-listing but no allotment - all right - for "de-listing" substitute "suspension" - Mr. Cameron, one might lead to but would produce an allotment and the other one would not lead to but would yield no allotment moneys?

A. Yes.

10 Q. Assuming that the allotment was justified in the interests of the shareholders, would it not be proper to say that the suspension ought to be accepted if that was a possible outlet?

A. Yes.

20 Q. To put it another way, if directors were faced with two courses, one infringes stock exchange rules but produces money which is needed, and the other complies with stock exchange rules but gives no money which is needed, it would be proper for directors to adopt the former course?

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Cross examination by
Mr. Glass Q.C.

(continued)

Mr. Deane

If your Honour pleases, proper in this witness' opinion.

Witness

In my opinion, yes.

Mr. Rogers

30 Q. Mr. Cameron, your first reason for ascribing an improvement to the Miller financial position I think was the economies that were effected?

A. Yes.

Q. And these economies were not just cutting down on the lunch money but were major economies I take it?

A. I think that they involved a fairly substantial sum of money. Of course. it is all relative.

Cross examination by
Mr. Rogers
for 7th
Defendant

- In the Supreme Court of New South Wales
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(continued)
- Q. It is a fact, is it not, that during 1971 the company was obliged as part of this economy campaign to stop all its intended plans for expansion?
- A. Not all.
- Q. Not all; a majority of them?
- A. A number of them.
- Q. The company was forced to shelve the immediate modernisation of its hotels?
- A. I am sorry, the company was forced to ... 10
- Q. Cancel plans for modernisation of its hotels?
- A. I can't remember whether there was any modernisation work carried out in 1971 but certainly some of the plans were postponed.
- Q. There were plans for the mechanisation and modernisation of the collieries which were stopped?
- A. That expenditure was reduced considerably, the projected expenditure.
- Q. And I think the company had a collier, the Ironbark? 20
- A. A colliery?
- Q. A collier, a ship carrying coal called the Ironbark?
- A. Not to my knowledge.
- Q. Not to your knowledge. Now it would be accurate to say though, would it not, that capital expenditure was, by and large, frozen between the commencement of the 1972 tax year and its end? 30
- A. It was very nearly frozen except for committed expenditure.

- Q. Yes, and that meant that necessary modernisation of the company's assets was inhibited?
- A. Yes, I understand so.
- Q. So, it would be fair to say, would it not, that the economies which had to be practised were, by and large, undesirable economies?
- A. When I used the word "economies" I was referring to other, in my view, desirable economies.
- 10 Q. So far as we have been discussing various savings that were effective, they fall into the category of undesirable savings?
- A. Yes. If I may qualify that; in my view only some of them fall into that category.
- Q. At any rate, it would be fair to say this, that because of a shortage of funds the company was unable to carry out work which would have otherwise have been desirable?
- A. Yes.
- 20 Q. And in addition to that it was obliged to sell income producing assets?
- A. Yes.
- Q. And one of the assets which it sold was the North Bexley Hotel?
- A. Yes.
- Q. That was a very high income producing asset, was it not?
- A. Yes.
- Q. Indeed, it may be said to have been a flagship in the hotel chain of income producing hotels?
- 30 A. Yes.
- Q. And the only reason why it was sold was because of the necessity to obtain liquidity?
- A. Yes, that is true.

In the Supreme Court of New South Wales
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(continued)
- Q. And it was one, I think, of seven hotels which you mentioned were sold in 1971-1972?
- A. I think I said six or seven.
- Q. Six or seven?
- A. Yes.
- Q. It was clear to you, was it not, that any further sales of hotels and the company was running a serious risk of running foul of the Commissioner of Taxation in regard to the apparent profit that it was making on the sale of hotels? 10
- A. I had heard that chance discussed.
- Q. It was one of the reasons which would have impelled, all other considerations apart, a cessation of the company realising on any further hotels?
- A. I don't believe so.
- Q. If I understand the situation all right, the developments so far as the company's hotel interests are concerned is a swing towards taverns? 20
- A. Yes.
- Q. And that is a development which requires fresh capital expenditure within the last year or so?
- A. Yes.
- Q. The company has a number of sites available to it which are regarded as likely to be very profitable?
- A. So I understand.
- Q. And although not large sums compared to the building of a ship, the establishment of the taverns will involve the company in the expenditure of large capital sums? 30
- A. I assume so although I don't really know much about the quantum involved in taverns.

- | | | |
|----|---|---|
| | <u>Q.</u> Would it not be fair to say this that were it not for the infusion of fresh equity capital there was no likely source from whence the funds for tavern development could be obtained? | In the Supreme Court of New South Wales
Equity Division |
| | <u>A.</u> I had heard it suggested that borrower finance may be available or may be sought. | No. 6 |
| 10 | <u>Q.</u> It would be fair to say that the development of taverns gain is an expenditure which should not be satisfied out of short term loans? | Transcript of evidence on trial of action
Plaintiff's evidence |
| | <u>A.</u> I believe so. | Evan Duff
Cameron
(recalled) |
| | <u>Q.</u> Well, that is your view as a director? | 7th September, 1972 |
| | <u>A.</u> Yes. | |
| | <u>Q.</u> And as a careful financial adviser? | Cross examination by
Mr. Rogers |
| | <u>A.</u> Yes. | |
| 20 | <u>Q.</u> Now, it would be fair to say that if the company could not go ahead with its tavern development it would be to some extent left behind in the competition for customers? | (continued) |
| | <u>A.</u> I would say so, yes. | |
| | <u>Q.</u> The colliery business has become extremely competitive, has it not, in the last few years? | |
| | <u>A.</u> I really cannot compare it with what it was. | |
| | <u>Q.</u> So be it. But it is your understanding, is it not, that a high degree of mechanisation in collieries is required in order to ensure that Millers keep its share of the coal market? | |
| | <u>A.</u> I really don't know the answer. | |
| 30 | <u>Q.</u> Now, you told Mr. Glass that you knew of no offer by Bulkships to assist Millers financially? | |
| | <u>A.</u> That is so. | |
| | <u>Q.</u> You do know, do you not, of an occasion when Bulkships were called on to assist Millers by providing a guarantee? | |

- In the Supreme Court of New South Wales
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(continued)
- A. Yes.
- Q. That request was refused?
- A. As I understand it, yes.
- Q. Do you remember the circumstances?
- A. No, I don't; I was not present when the discussions took place but it was reported on a later occasion when I was present that they had been asked and had refused to provide them.
- Q. From your experience, Mr. Cameron, can you tell his Honour whether there is some acceptable or accepted ratio which is desirable as between shareholders' funds and loan funds for a business such as Millers? 10
- A. Loan funds or liabilities?
- Q. Equity as against loan funds, equity capital as against loan funds?
- A. I know of no such ratio.
- Q. Is there some accepted ratio between equities and liabilities? 20
- A. By "accepted", do you mean accepted throughout the profession? Is that what you mean?
- Q. Yes.
- A. I think not, although there is - I would say that there is a sort of acceptable range - a safe range.
- Q. Can you tell his Honour what that range is?
- A. I would say that it would vary between 35% to 40% up to 50% or maybe a little more, depending on the type of business, and therefore the type of assets. 30
- Q. Do you have any views -

A. I am sorry, you asked the ratio of liability. In the Supreme Court of New South Wales Equity Division
I was giving you the ratio of liabilities to assets. That ratio would in my opinion apply to the assets fairly stated, but not necessarily what is in the books or accounts.

Q. You considered that the company's position had improved, as I understand what you were telling Mr. Glass, because you took into account the likely availability of the Hambros Bank funds?

No. 6

Transcript of evidence on trial of action Plaintiffs' evidence

10 A. Yes, that is correct.

Q. Did you know of any source for the payment of short term loans which would otherwise have been satisfied from the Hambros Bank funds if that fund were not forthcoming?

Evan Duff Cameron (recalled)

A. I understand that the bank had indicated that once some form of finance had been arranged for the "Robert Miller" - (Answer interrupted).

7th September, 1972

Cross examination by Mr. Rogers

Q. Without wishing to interrupt -

(continued)

His Honour

20 The question was, Mr. Cameron, do you know of any other source of finance if the Hambros money had not been forthcoming.

That correctly paraphrases the question, doesn't it, Mr. Rogers?

Mr. Rogers

Yes.

His Honour

Q. What was the answer?

A. No.

30 Mr. Rogers

Q. It is right, isn't it, that the roll-over of the Tricontinental bills was to occur for a maximum period of 12 months from the date of the arrangement? That is correct, isn't it?

A. I don't think I was aware of that.

In the Supreme
Court of New
South Wales
Equity Division
No. 6

Transcript of
evidence on
trial of
action
Plaintiffs
evidence

Evan Duff
Cameron
(recalled)
7th September,
1972

Cross examina-
tion by
Mr. Rogers
(continued)

Q. If you will favour me with the assumption in my favour that at the end of a 12 months period the obligations to roll-over were to come to an end, did you know of any source of finance apart from the cash flow from which those moneys could be repaid?

A. No.

Q. Now, you remember at the meeting on 6th July Sir Peter Abeles protested the invitation to disqualify himself on the basis that he had made full disclosure?

10

A. Of his directorship of Bulkships?

Q. Does this sound to you like an accurate representation of what it was that he had said - that Sir Peter Abeles refused to disqualify himself from taking part in discussion of the proposal and voting thereon, saying he had always declared his interest, whereon the Chairman ruled that he was subject to a conflict of interest?

20

A. Yes.

Q. You were present, were you, when Sir Peter Abeles made his disclosure to which he was referring on this occasion? You were present at that time, were you?

A. I don't remember.

Q. Had Sir Peter Abeles at any time after you joined the Board made any disclosure to it that he was, either on his own behalf or on behalf of Bulkships, endeavouring to take over the shares in Millers either solely or jointly with somebody else?

30

A. No.

Q. Up until 27th June had there been anything said to the Board to suggest that Ampol and Bulkships were acting together?

A. No.

- Q. Had anything been said to the Board by Sir Peter Abeles to suggest that he had been having any discussions concerning Millers with Ampol?
- A. Not to my knowledge. I must point out that there were a couple of meetings at which I was not present. As I mentioned earlier I was not present at a couple of meetings in May.
- 10 Q. I am obliged to you. Mr. Cameron, you remember at the meeting of 6th July Sir Peter Abeles saying that he had confirmation from the Hambros Bank Limited that in the case of a change of ownership of the company the bank would increase its loan?
- A. I can't remember in exact words. I do remember him indicating that he had been talking to them, but I can't remember the exact words that he used.
- 20 Q. Had there been any request at any Board meeting that you attended that Sir Peter Abeles should make direct contact with Hambros Bank with connection with the Bank's proposed loan to Millers?
- A. I think that on earlier occasions it had been - he had either been requested, or he had stated that he had spoken to them.
- Q. Do you remember Mr. Koch enquiring why the company had not received this notification from the bank?
- 30 A. Yes.
- Q. And do you remember the reply by Sir Peter Abeles, that he, Sir Peter, had been informed by the bank that if the company's major shareholders were prepared to stand behind it the bank was prepared to increase the loan? Do you remember Sir Peter Abeles saying that?
- A. I can't remember Sir Peter's reply precisely. I can remember him making a reply; I cannot remember the details.

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Court of New
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No. 6

Transcript of
evidence on
trial of
action

Plaintiffs
evidence

Evan Duff
Cameron
(recalled)

7th September,
1972

Cross examina-
tion by
Mr. Rogers

(continued)

In the Supreme
Court of New
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No. 6

Transcript of
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Evan Duff
Cameron
(recalled),
7th September,
1972

Cross examina-
tion by
Mr. Rogers
(continued)

- Q. Now it was your understanding, was it, that Sir Peter was saying that he had been told by Hambros Bank that if Ampol and/or Bulkships were prepared to stand behind Millers then the bank was prepared to increase the loan? That was your understanding of what Sir Peter was saying?
- A. Yes, that was my understanding.
- Q. In common parlance, standing behind the company by other companies connoted to your mind, didn't it, the possibility of a guarantee? 10
- A. Yes.
- Q. That is right?
- A. Yes.
- Q. So that it appeared from what Sir Peter Abeles said to the meeting that he had been informed that if Ampol and Bulkships were guaranteeing Miller, then the loan might be increased?
- A. I am sorry. I don't quite understand the question. Could you perhaps re-frame it? 20
- Q. Was it your understanding that what the bank told Abeles was that if Ampol and Bulkships guaranteed Millers the bank was prepared to increase the loan? Was that your understanding?
- A. I think so. As I mentioned before, I can't remember exactly what Sir Peter said.
- Q. To guarantee Millers was precisely the thing that Sir Peter Abeles had declined to do on an earlier occasion, wasn't it?
- A. I assume you mean Bulkships? 30
- Q. Yes.
- A. As I understand it, yes.
- Q. He declined to do so both on behalf of Bulkships and on behalf of TNT, did he not?
- A. As I understand it, yes.

- Q. TNT standing for Thomas Nationwide Transport? In the Supreme
Court of New
South Wales
- A. Yes. Equity Division
- Q. You remember, Mr. Cameron, that you were asked to make an affidavit on behalf of the plaintiff in these proceedings very shortly after the meeting of 6th July? You remember that? No. 6
Transcript of
evidence on
trial of
action
- A. Yes.
- Q. And do you remember the circumstances in which you were so asked. Plaintiffs
evidence
- 10 A. Yes. Evan Luff
Cameron
(recalled).
- Q. I think that the request came from a Mr. Miller? 7th September
1972
- A. Yes. Cross examina-
tion by
Mr. Rogers
- Q. Did Mr. Miller tell you on whose behalf he was telephoning you or contacting you? (continued)
- A. Yes, I think he mentioned Ampol.
- Q. Did he say anything about Sir Peter Abeles, or did you?
- A. I did.
- Q. You did?
- 20 A. Yes.
- Q. What was that? What did you say?
- A. I asked him why it was that Sir Peter Abeles could not provide the company with an affidavit.
- Q. And what was the answer?
- (Objected to by Mr. Lockhart; question withdrawn)
- Q. Mr. Cameron, if I may just turn to something else, if you would be good enough? Sir Peter Abeles was undoubtedly a director of Millers?
- A. Yes, that is correct.
- 30 Q. And you know that he was a director of Bulkships?
- A. Yes, he was a director of Bulkships.

In the Supreme
Court of New
South Wales
Equity Division
No. 6

Transcript of
evidence on
trial of
action

Plaintiffs
evidence

Evan Duff
Cameron
(recalled)

7th September
1972

Cross examina-
tion by
Mr. Rogers
(continued)

Q. I think you have been told since the commence-
ment of proceedings, and I would be obliged
if you would accept it, that Sir Peter Abeles
had a number of discussions with Ampol from
towards the end of 1971 until 6th July 1972
relating to Millers?

A. Yes.

Q. Would you assume from me that these discussions
concerned ways and means whereby Ampol could
make a successful take-over bid for the shares
in Millers not already held by it or by
Bulkships, and consequent upon such a take-
over by Ampol there should be partitioning
or division of the tanker interests there-
tofore owned by Millers?

10

A. Yes.

Q. Now in your view as a director, and as an
accountant of many years standing in the
city of Sydney, does a director standing in
Sir Peter Abeles position put himself into
a conflict of interests by doing these assumed
acts?

20

(Objected to by Messrs. Deane and Lockhart;
rejected)

Cross exami-
nation by
Mr. Hughes
QC for 13th
Defendant

Mr. Hughes

Q. Mr. Cameron, would you please understand that
during the course of my cross-examination not
by one syllable that I utter do I propose to
suggest that your good faith in this matter
is open to challenge. Do you understand that?

30

A. Thank you.

Q. You knew, as a director of Millers, that
Ampol had become a very substantial share-
holder by a transaction which was completed
on 20th May, 1972? You knew that, did you
not?

A. I cannot vouch for the date, but I knew that
on or about that time.

Q. At that time, as you have indicated in the course of other answers today, the liquid position of Millers was serious, although you thought there had been some improvement?

In the Supreme Court of New South Wales Equity Division

A. Yes, that is correct.

No. 6

Q. And you knew, as a director, and as a gentleman practising your profession in the city, that Millers liquidity difficulties were common news in the market place, didn't you?

Transcript of evidence on trial of action Plaintiffs evidence

10 A. I understood so.

Q. So that you, as a man of your experience, knew very well that having regard to the untimely demise of Sir Rodney Miller sometime before, and to the difficulty in relation to liquidity, Miller was a prime target for a market raider? You knew that didn't you?

Evan Duff Cameron (recalled) 7th September, 1972

A. Yes.

Cross examination by Mr. Hughes Q.C.

Q. And you very quickly formed the view that Ampol was such a company? You quickly formed the view that Ampol was a market raider?

(continued)

20 A. You mean after May?

Q. After May, yes. You very quickly formed that view, didn't you, that Ampol was a market raider?

A. Yes.

Q. You were particularly concerned at the position created by Ampol's acquisition of this very large shareholding and its apparent intent as a market raider?

30 A. I was, yes. I was concerned.

Q. You were concerned?

A. Yes.

Q. And your concern, of course, stemmed from your very proper interest for the welfare of the general body of shareholders in Miller?

A. Yes.

In the Supreme
Court of New
South Wales
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No. 6

Transcript of
evidence on
trial of
action

Plaintiffs
evidence

Evan Duff
Cameron
(recalled)

7th September,
1972

Cross examina-
tion by
Mr. Hughes Q.C.
(continued)

Q. And do you remember pointing out to the Board of Miller at this fateful meeting on 6th July 1972 that over the last month or two you had become seriously disturbed concerning the situation of minority shareholders in Miller? You remember pointing that out to the Board at this meeting on 6th July?

A. Yes.

Q. Could I just clear up one thing with you? To whom were you referring when you referred to minority shareholders?

10

A. I was referring to shareholders other than Ampol and Bulkships.

Q. I see. You were referring, then, to 45% of the shareholders in the company?

A. Yes, that is right.

Q. Although, of course, you did not know, did you, prior to 27th June that Bulkships and Ampol had formed this alliance. You did not know that prior to 27th June, did you?

20

A. I did not know, no.

Q. So would it be correct to say that up to 27th June you in your own mind, so far as you adverted to the matter, classified Bulkships as one of the general body of shareholders?

A. Not really

Q. Why not? Because of its large shareholding?

A. No. I had suspicions that the two might be in some sort of - that they might in one way or another be in concert.

30

Q. Your suspicions were that they were probably in concert as joint market raiders, is that right?

A. Not really. I did not formulate any view, except that I just had a suspicion that they may be acting jointly in some way.

In the Supreme
Court of New
South Wales
Equity Division
No. 6.

Q. Your suspicion was that they might be acting in such a way as would not be good for the other shareholders of the company?

Transcript of
evidence on
trial of
action

A. Yes.

Q. Of course, these other shareholders in the company are a very large numerical majority, aren't they?

Plaintiffs
evidence

10

A. Yes, that is correct.

Evan Duff
Cameron
(recalled)

Q. That is right?

7th September,
1972

A. Yes.

Q. And this was a matter of such importance in your mind that you felt it proper to advert to it specifically at this meeting of 6th July?

Cross examina-
tion by
Mr. Hughes
Q.C.

A. Yes.

Q. Could I ask you this, and if you want a little time to reflect, please say so. You have now, do you, a clear distinction in your mind between the position of Ampol wearing the hat of a market raider and the position of Ampol wearing the hat of a shareholder in Miller?

(continued)

20

A. Yes.

Q. You have that clear distinction in your mind?

A. Yes.

Q. They are two very distinct circumstances, aren't they? They are two distinct situations?

A. Yes.

30

Q. Even though they happen to be held by the same person?

A. Yes.

In the Supreme Court of New South Wales
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Transcript of evidence on trial of action

Plaintiffs evidence

Evan Duff
Cameron
(recalled)

7th September, 1972

Cross examination by Mr. Hughes
Q.C.

(continued)

Q. What I want to ask you, if I may, do you think on reflection that on 6th July 1972 you had such a clear distinction between those two positions as you now do?

A. I don't think that I considered the two positions at that time.

Q. And, without in any way reflecting any criticism of you, you would agree with me that it is important in a situation such as the one you were confronted with on 6th July to bear in mind, if the problem was to be properly elucidated, the distinction between those two positions?

10

A. Yes.

Q. But the distinction, you say, was not really in your mind at the time?

A. I can't really tell. I was not aware of it.

Q. Can I follow that through a little bit and ask you about something else that I suggest happened at the meeting?

20

A. Yes.

Q. Did you say at the meeting of 6th July words to this effect, that Ampol and Bulkships still had the responsibility to act in the best interests of the company and the rest of the shareholders and they would have to treat their duties very seriously?

A. Yes. I think I said "They would have to." I think I used the words in the context if the Howard Smith offer was withdrawn and the smaller Miller shareholders retained their shares and if Ampol-Bulkships took control of the company then they would have to consider their duties very seriously.

30

Q. Did you also say that Ampol and Bulkships would have a serious responsibility?

A. Yes.

- Q. In saying that you were considering them in their position as shareholders rather than in their position as market raiders, weren't you? In the Supreme Court of New South Wales
- A. I think I was considering them more as directors. Equity Division
No. 6
- Q. As directors? Transcript of evidence on trial of action
- A. Yes.
- Q. (Ex. Q shown to witness) That press announcement had a very grave impact on your mind at the time, didn't it? Exhibit Q
Plaintiffs evidence
- 10 A. Yes, that is right, it did. Evan Duff Cameron
- Q. You discussed it with your Chairman, Mr. Taylor?(recalled)
- A. Yes. 7th September, 1972
- Q. And in discussion with Mr. Taylor the gravity of the announcement from the point of view of the Miller shareholders generally was discussed? Cross examination by Mr. Hughes Q.C.
(continued)
- A. Yes it was.
- Q. And you both expressed to each other your view - you expressed to each other your respective views that the joint statement, Ex. Q, was harmful to the Miller shareholders other than Bulkships and Ampol? Exhibit Q
- 20 A. Yes.
- Q. And the vice you saw in the joint statement was this, wasn't it that it gave you clear notice - and everyone else who read it - that Ampol and Bulkships were acting in concert to deprive other shareholders in Miller of any area of real choice?
- 30 (Objected to by Mr. Deane; allowed.)
- A. Would you mind repeating it? Would you mind repeating the question?
- Q. To your mind the vice in this document, Ex. Q was that it signalled to the world an apparent intention on the part of Ampol and Bulkships to deprive other shareholders of Miller of any real choice?

- In the Supreme Court of New South Wales Equity Division
- No. 6.
- Transcript of evidence on trial of action Plaintiffs evidence
- Evan Duff Cameron (recalled)
- 7th September, 1972
- Cross examination by Mr. Hughes Q.C. (continued)
- Exhibit Q
- A. Yes, that is right.
- Q. The impression it created on your mind was that Ampol and Bulkships were saying "Take our offer of \$2.27 or you will be locked in"?
- A. Yes, I think basically that was so, yes.
- Q. And the other clear impression, I suggest, that that document Ex. Q conveyed to you was that Ampol and Bulkships were not going to increase their offer? That is the other clear impression, I suggest, that that document conveyed to you? 10
- A. I don't think I got that impression. I don't think I got any impression in relation to that.
- Q. Could I ask you just to go through the document paragraph by paragraph?
- A. Yes.
- Q. To yourself? Will you do that for me, please?
- A. Yes.
- Q. And I ask you to concentrate, if I may suggest, on the last paragraph of Ex. Q? 20
- A. Yes.
- Q. In the first paragraph what is announced is that following discussions that "took place today" agreement had been reached between the two companies to act jointly in relation to the future operation of Miller?
- A. Yes.
- Q. In the second paragraph they said "We will reject any offer from Howard Smith or from any other source"? 30
- A. Yes.
- Q. And in the third paragraph they underline the fact, do you agree, that between them they controlled 55%. Do you agree that that is the position?

	<u>A.</u> Yes.	In the Supreme Court of New South Wales Equity Division
	<u>Q.</u> I am just putting it to you that, on reflection what was conveyed to you by the third paragraph in that letter was that they were not proposing to make any higher offer than \$2.27?	No. 6
	<u>A.</u> I am sorry. I did not get that impression.	Transcript of evidence on trial of action
	<u>Q.</u> You did not get that impression?	Plaintiffs evidence
	<u>A.</u> No.	Evan Tuff Cameron (recalled)
10	<u>Q.</u> You certainly got the impression that they were out to send Howard Smith off the course?	7th September, 1972
	<u>A.</u> Yes.	Cross examination by Mr. Hughes Q.C.
	<u>Q.</u> You certainly got the impression that they were out to achieve a situation in which the course was occupied by themselves as sole competitors?	(continued)
	<u>A.</u> Yes.	
	<u>Q.</u> If "competition" is the right word to use in that context?	
	<u>A.</u> Yes.	
20	<u>Q.</u> I think you told us that you instituted a system whereby monthly reports were made at Board meetings by Mr. Koch concerning the company's financial position? Am I correct in saying that you told us that?	
	<u>A.</u> I said that I assisted the executives to draw up some system.	
	<u>Q.</u> He was on your finance committee, was he-?	
	<u>A.</u> Yes, he was.	
	<u>Q.</u> And you, may I take it, relied upon the accuracy of the factual matters that he stated in his reports?	
30	<u>A.</u> Yes.	

- In the Supreme Court of New South Wales Equity Division
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- Transcript of evidence on trial of action
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- Evan Duff Cameron (recalled)
- 7th September, 1972
- Cross examination by Mr. Hughes Q.C. (continued)
- Q. And so far as you were concerned there was no ground for disputing the accuracy of the factual matters that he stated in relation to the company's financial position in his oral report to the meeting of 6th July?
- A. I am sorry, would you say that again?
- Q. You did not dispute the accuracy of any of the factual matters that he said to the meeting of 6th July?
- A. No. That is quite right. I did not dispute the accuracy of the factual matters that he put forward. 10
- Q. Of course, at that meeting of 6th July it was clear to you, wasn't it, that if the allotment to Howard Smith were made it would at least preserve a substantial area of choice in all probability to the shareholders of Miller, considered as a general body?
- A. Yes.
- Q. And was it clear to you at the meeting of 6th July that if the decision of your Board was against the allotment to Howard Smith, the effect of such a decision would be to deprive the general body of shareholders in Miller of an effective choice? 20
- A. Yes.
- Q. That was also clear to you at that meeting?
- A. Yes.
- Q. That the effect of such a decision would deprive the general body of shareholders in Miller of an effective choice in relation to the assets that they owned? 30
- A. They still had a choice, obviously - to stay in, or to sell.
- Q. To stay in or accept an offer that you regarded as too low?
- A. Yes.

- Q. And of course, it was an offer that Sir Peter Abeles, according to your earlier evidence, which I accept, expressly said that he regarded as too low? In the Supreme Court of New South Wales Equity Division
- A. Yes. No. 6
- Q. I suppose it struck you, did it, that there was a distinct element of incongruity in Sir Peter Abeles' position at this meeting of 6th July? Transcript of evidence on trial of action
- A. Yes, it did. Plaintiffs evidence
- 10 Q. In fact, "Incongruity" might be a euphemistic word in the context? Evan Duff Cameron (recalled)
- A. Yes. 7th September 1972
- Q. Could I just ask you this? Did anyone raise with Sir Peter at this meeting the fact that he was acting in a very curious situation? Did anyone raise that with him at this meeting? Cross examination by Mr. Hughes Q.C. (continued)
- A. At the meeting of 23rd?
- Q. Of 6th July?
- A. Of 6th July? you mean in saying that he believed the Ampol offer was too low?
- 20 Q. No. I am sorry. I withdraw the question. I want to ask you about the meeting of 6th July, and I misled you earlier. It was quite plain from what Sir Peter Abeles said at this meeting of 6th July that he wanted, not only to take part in the discussion, but to vote on the resolution relating to the allotment or proposed allotment of shares to Howard Smith? That was quite plain, wasn't it?
- 30 A. Well I believe so, yes.
- Q. You got the very distinct impression, from what he said, that if he were allowed to vote he would vote against the allotment? You got that distinct impression from what he said?
- A. Yes.
- Q. Even though it was plain for all to see at that meeting that the only way of making the offer of \$2.50 available to the Miller shareholders

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1972

Cross examina-
tion by
Mr. Hughes
.Q.C.

(continued)

would be to proceed with the allotment?

A. Yes.

Q. It no doubt struck you in that situation, didn't it, that there was an exquisite degree of incongruity in Sir Peter Abeles position at that meeting of 6th July?

A. I am sorry - could you put it in different words for me?

Q. Didn't it occur to you at that meeting of 6th July, having regard to what you regarded Sir Peter Abeles as wanting to do and how he wanted them to vote, that he was in a very incongruous position?

10

(Objected to by Mr. Deane: rejected)

Q. Now, can I ask you whether you recall another matter being mentioned at the meeting of 6th July, namely, that Mr. Conway said words to the effect that "it is of course to be anticipated that this company, namely, Miller, would sooner or later be taken over"?

20

A. Yes.

Q. Now, would you agree with me, having regard to your references at the meeting of 6th July to Ampol's and Bulkship's duty to act not without regard to the interests of other shareholders in their majority position, that your decision to vote against the issue of shares to Howard Smith may well have been based in part upon an assumption that Ampol and Bulkships would adhere to some such standard of duty as you had in mind?

30

A. I would naturally assume so.

Q. You agree, however, that on the tangible evidence before you at that time your view, as reflected by the concern that you expressed was that the prospects that they would adhere to such a standard of duty were rather remote?

A. I was referring, of course, to their standard of duty as directors in my comments earlier; I saw some difference between them and their

40

duty perhaps as shareholders, if there is such a duty between one shareholder and another shareholder.

Q. Were you aware, in your consideration of this whole problem on 6th July, that the majority shareholders do owe certain duties to minority shareholders?

A. Yes, but I have never thought of it along those lines. I have thought of it as their control through directorships.

Q. Could I just ask you some other questions concerning the general financial position of the company? Will you agree that Miller was forced, by practical considerations, to sell off these hotels in order to prevent its liquid position deteriorating further during 1972? Will you agree that that correctly reflects the position?

A. I believe that it was a necessary step to take to improve its liquidity.

Q. So that it was liquidating capital assets in order to overcome the effect of excessive short term borrowing?

A. That was one of the reasons.

Q. That was one of the reasons?

A. Yes.

Q. Will you agree that it was very much present in your mind that in 1967 through to 1971 the net profits - the profits of the Miller group had declined substantially and, with one possible exception, had declined progressively year by year?

A. I think that is so. I think that is correct. I am not too sure back in the earlier years. I knew that there had been a deterioration year by year. But I could not say how far back it went.

Q. Did you know there had been in fact during 1971 a situation in which the Commonwealth of Australia was threatening to sue Millers for a very substantial amount of money in relation

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Cross examina-
tion by
Mr. Hughes
Q.C.

(continued)

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South Wales

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No. 6

Transcript of
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Evan Duff
Cameron
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1972

Cross examina-
tion by
Mr. Hughes
Q.C.

(continued)

to the price of the "Amanda Miller"? Did you know that?

A. No, I don't think I was aware of that.

Q. Weren't you?

A. No.

Q. Did you ever become aware of that?

A. I don't think so.

Q. That there was a threat of proceedings by the Commonwealth against the company?

A. In relation to the price?

10

Q. In relation to shipbuilding?

A. I am sorry, I can't recall it.

Q. Was it in your mind on 6th July 1972 that the burden of increasing interest charges on both short and long-term commitments was more than³ could be safely stood?

A. I did not really consider the actual total interest charges and what was a safe level. I was more concerned in looking at the levels of loans.

20

Q. Was it in your mind on 6th July 1972 - generally in your mind - that the prospects of successful trading in the area of the company's colliery interests were not good?

A. Yes.

Q. The reason for that was that the export market had ceased to be as buoyant as it had been?

A. I think that was one of the main reasons.

Q. One of the main reasons?

A. Yes.

30

Q. The other reason was that the company's capital expenditure on modernisation of the collieries had to be retrenched because of financial stringency?

- | | |
|---|--|
| <p><u>A.</u> There were a number of reasons. That was another one.</p> <p><u>Q.</u> That was another one?</p> <p><u>A.</u> Yes, that was another reason. There were a number of reasons.</p> <p><u>Q.</u> And the company had in 1970 committed itself to modernise, by means of extensive capital expenditure, its mining facilities, is that right?</p> <p>10 <u>A.</u> In - ?</p> <p><u>Q.</u> In 1970?</p> <p><u>A.</u> I don't know.</p> <p><u>Q.</u> When you came on to the Board was the company engaged on a programme of capital expenditure to improve the productivity of its mining interests?</p> <p><u>A.</u> Yes,</p> <p><u>Q.</u> Would it be correct to say that the expenditure during 1971 had had to be cut back to the tune of about £3.m?</p> <p>20 <u>A.</u> During the 1970/71 year. The late calendar year, 1971, yes.</p> <p><u>Q.</u> And of course, that retrenchment was calculated only further to diminish the prospects of successful trading in the colliery field?</p> <p><u>A.</u> Yes.</p> | <p>In the Supreme Court of New South Wales.</p> <p>Equity Division</p> <p>No. 6</p> <p>Transcript of evidence on trial of action</p> <p>Plaintiffs evidence</p> <p>Evan Duff Cameron</p> <p>(recalled)</p> <p>7th September, 1972</p> <p>Cross examination by Mr. Hughes Q.C.</p> <p>(continued)</p> |
|---|--|

Witness stood down

His Honour

30 I will have it noted that the qualification appended to the admission of Ex. Q on the application of Howard Smith is withdrawn, and the document is now admitted as against all parties as a joint statement. Exhibit Q

Further hearing adjourned to 10.0 a.m. on Tuesday, 12th September, 1972.

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Court of New
South Wales

Equity Division

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Transcript of
Evidence on
Trial of Action
Between the
Court and
Counsel

12th September
1972

(continued)

FOURTH DAY: TUESDAY, 12th SEPTEMBER 1972

MR. MASTERMAN: There are a few corrections to the transcript. On p. 121 the sixth question - the seventh question - the phrase "... of the 4⁵% shareholders in Ampol or Bulkships" should read "... of the 4⁵% shareholders other than Ampol or Bulkships."

HIS HONOUR: Yes.

MR. MASTERMAN: On p. 129 sixth question from the bottom - in the answer to that question "I had heard it suggested that borrower finance.." the "Borrower" should be "brewery".

10

HIS HONOUR: Yes.

MR. MASTERMAN: At p. 78 in the middle of the page, in the long answer, "most of the year ending 30th June 1971." I don't know whether that is a transcript error or an error on the part of the witness. In any event, it should be most of the year ending 30th June 1972"

20

MR. HUGHES: On p. 95 the first line, there is reference to "A chairman's meeting." I think it should be "an adjourned meeting".

HIS HONOUR: Yes.

MR. HUGHES: At the bottom of p. 97 five lines from the bottom, there is a reference to "of expenditure". That should be "for expenditure".

HIS HONOUR: Yes.

MR. HUGHES: On p.125 of the transcript, the top line, the word "suspicion" should read "suspension." The same alteration should also be made in the second line on p.125 and the third line on p.125 and in the second question on p.125 .

30

At p.114 the long question in the middle of the page "Mr. Cameron then said he was not opposed to the proposal made by Howard Smith Limited but wanted its indications to be seriously considered." I think that "indications" should read "implications".

40

HIS HONOUR: Yes.

EVAN DUFF CAMERON
on former oath:

HIS HONOUR: You are still on your former oath
to tell the truth, Mr. Cameron.

WITNESS: Yes, your Honour.

10 MR. HUGHES: Q. I want to ask you a few questions
apropos to something said at p. 139 of the
transcript. Mr. Cameron, you may remember -
and tell if you do not - telling me on the
last occasion we were here that sometime prior
to 27th June - that being the date of the joint
announcement by Ampol and Bulkships - you had
developed a suspicion that Ampol and Bulkships
were acting jointly in some way? A. Yes.

Q. Do you remember saying that? A. Yes.

20 Q. And then you went on to give a further answer
to a question put to you in these terms. The
question was "Your suspicion was that they
might be acting in such a way as would not
be good for the other shareholders of the
company?" and you answered "Yes"? A. Yes.

Q. Do you remember that? A. Yes.

Q. I want to ask you this, if I may. Did you
communicate those suspicions to any of your
co-directors? A. Before 27th June?

Q. Yes. A. I don't think so.

30 Q. Did you, on reflection, perhaps talk to
Mr. Taylor about it? A. I am quite sure that
I did talk to Mr. Taylor, but I thought it
was after 27th June.

Q. At all events, may I take it that when the
announcement by Ampol and Bulkships was published
on 27th June that which had formerly been a
suspicion developed in your mind into a firm
conviction? A. A firm conviction, yes.

Q. And do you remember whether your firm
conviction to that effect was to any extent
founded on knowledge of Ampol's failure to

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* Exhibit D

Letter marked
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answer some specific questions put to Ampol
by Miller in a letter dated 16th May 1972?
A. No, it was not founded upon that.

- Q. Not founded upon that? A. No, it was not.
- Q. Were you aware on or shortly after 16th May 1972 that there had been written on behalf of Miller a letter to the chairman of directors of Ampol (part of Ex. D.) in which, amongst other questions, this question was put to Ampol "Is your company operating on its own account or is it acting in concert with any other person or company in the acquisition or proposed further acquisition of shares in Holdings" (meaning Millers)? A. Yes, I was. 10
- Q. Did you in due course become aware that Ampol had omitted to answer that question? A. I can't remember whether that was in fact answered.
- Q. May I show you this document? A. Yes. (Document handed to witness).
- Q. May I have it back for a moment? Did you become aware on or shortly after 16th May 1972 that a letter, being the one I have just shown you, was sent by your company to Bulkships asking certain questions about their intentions? A. I did not return from overseas until about 31st May, and I became aware of it shortly after that. 20
- Q. You became aware of it shortly after 31st May? A. Yes.
- (Letter shown to witness m.f.i.l.) 30
- Q. When you returned from overseas and became aware of this letter shortly after 31st May did you become aware that Bulkships had not given any answer to the questions asked of them in this letter which has just been marked for identification ? A. I am sorry. I read the letter. I did not notice who it was addressed to. It was addressed to Bulkships, was it?
- Q. Yes. Would you like to look at it again? A. May I?
- Q. Yes. (Letter handed to witness) A. Yes. 40

Q. My question to you was, did you become aware on your return from overseas that that letter, m.f.i. 1, had not been answered by Bulkships?
 A. I think that I was told but I can't be sure.

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Q. You can't be sure? A. No. I can't be sure.

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HIS HONOUR: Q. How long were you away for, Mr. Cameron? A. I was away for approximately a month.

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10 Q. From when? A. From about 3rd May to 31st May.

MR. HUGHES: Q. I want to take you, if I may, Mr. Cameron, to a portion of your evidence that was recorded at p. 69 of the transcript. The particular portion is part of a long answer you gave concerning the things that were said at the Board meeting on 6th July 1972. Part of what you said was this: "I reminded the Board that if Ampol and Bulkships did have control of the company - that if they did, I think I used the word 'sack' the Board, and replace it with a new Board, that new Board would have the same responsibility to act on behalf of all shareholders"? A. Yes.

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20

Q. May I take it that in saying that the viewpoint that you were reflecting was this, that no directors of Miller, by whomsoever appointed or elected, could conscientiously in the discharge of their duties recommend to shareholders the acceptance of the Ampol offer?
 30 A. No, that is not what I had in mind.

Q. Did you have in mind that incoming directors - assuming they were directors appointed by Ampol and Bulkships, as majority shareholders - would have perhaps less freedom of action than Ampol and Bulkships acting simply as majority shareholders? A. No, that was not my reason for making the statement.

40 Q. Did it occur to you at all at the time of this Board meeting that, as majority shareholders in Miller, Ampol and Bulkships by their joint announcement were exerting upon the other shareholders in Millers a form of commercial pressure that they would hardly be able to do or exert through their representatives on the

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Board of Miller if they exercised their majority power to sack the existing Board of Miller and put their own nominees on? A. I had that in mind, but that was not what I had in mind in making that statement.

- Q. What did you have in mind in making that particular statement? Can you help me on that?
A. I felt that the suspicions of other directors were to the effect that if Ampol and Bulkships did take control of Millers that that would break up the company, and by doing so that there would be some harm caused to the minority shareholders, and I wanted to impress upon them that those directions, if they did - those new directors would have the same responsibility to act for the benefit of all shareholders. 10
- Q. In just the same way it was in your mind that the new directors, assuming they were appointed by the Bulkships-Ampol majority, would have a responsibility to exercise in relation to any recommendation concerning the Ampol offer?
A. Certainly. 20
- Q. And the unanimous views, as you have told us, of the existing Board was that the Ampol offer was too low? A. Yes.
- Q. And you had in mind, did you not, at the time of the 6th July meeting that any other directors, acting reasonably and responsibly, would probably form the same view, by whomsoever they were appointed? A. Yes. 30
- Q. So I suppose it occurred to you, did it, that by refraining from sacking the existing Millers Board and remaining outside the Board as majority shareholders and market raiders Ampol and Bulkships might be giving themselves more freedom of action than they would have if they exercised their majority power to control the Board? A. I must confess it did not occur to me at the time. 40
- Q. In retrospect I suppose you would agree that is something that could well have occurred to one? A. Certainly I would agree it would be a possibility.

Q. And it would be a fairly valid supposition wouldn't it? A. Yes.

Q. There is just one other matter I want to ask you about. Reference has been made to Tricontinental's part in the whole action - scene - as a short-term lender on discounted bills. At the time you came on the Board had Tricontinental been appointed financial adviser to Miller? A. No.

10 Q. Was it so appointed after your appointment to the Board? A. Yes.

Q. And the suggestion that such an appointment should be made emanated from Tricontinental, I think, didn't it? A. In the first place?

Q. Yes. A. If I remember correctly it emanated from Sir Peter Abeles in the first place, but I cannot be sure of that.

20 Q. According to your recollection when did he first make that suggestion? A. I would think it would be about May or June 1971.

Q. That was at a time when Tricontinental - when Miller was very heavily indebted to Tricontinental in relation to the bills? A. No. In May-June 1971

30 Q. I am sorry. At all events, did the letter of 16th September 1971 of which I will show you a copy, which comes out of the Tricontinental documents produced on subpoena - did this letter come to your notice shortly after the date it bears? It is a long letter, but I invite your attention particularly to the last page - p.4? A. Yes.

Q. Did that letter come to your notice shortly after its receipt? A. I would normally have received copies of correspondence such as this, but I just can't remember whether I received it.

(Letter dated 16th September 1971 m.f.i.2.)

40 Q. At all events, what happened was that following that letter Tricontinental was appointed financial adviser on the basis of an annual

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fee? A. Yes, that is right.

Q. Did you become at any time aware of the composition of the Board of Tricontinental? A. I have heard of some people who are on the Board, but I don't know where I heard it.

Q. Has it ever come to your notice that two members of the Board of Tricontinental have been Sir Peter Abeles and Sir Ian Potter? A. I understood so. 10

Q. You say you understood so? A. Yes.

Q. When did that fact come to your notice? A. I think for probably more than a year, or two years, I have been aware that Sir Ian Potter was a member of the Board. I am not sure when I became aware that Sir Peter Abeles was also a Board member, but I think it would be in the last 12 months.

Q. You have known, haven't you, for sometime of their respective directorships of Bulkships? A. Well, I have known of that, of course. I think I have known of that ever since TNT first became interested in Bulkships. 20

RE-EXAMINATION:

MR. MASTERMAN: Q. Mr. Cameron, on p.106 of the transcript Mr. Glass was showing you a Tricontinental document, and the answer you made was "I had not seen this document." That is three-quarters of the way down the page. You wish to correct that answer? A. Yes. I think that I had indicated earlier in my evidence that I had seen that document on or before 30th June 1972, but that I had not studied the document in any way. 30

Q. Now, in cross-examination by Mr. Glass you were asked - he directed attention to the reasons why you voted against the issue of shares to Howard Smith, and he put to you two reasons, and you said "I think I thought they were two of my reasons"? A. Yes. 40

Q. Will you tell the Court what were your other reasons for voting against the issue?

A. May I ask what the two reasons - the first two that I mentioned? May I ask what they were?

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10 Q. You were asked "But, Mr. Cameron, you have said to me that, the two reasons, (1) because you had not had enough time to think about it, and (2) because you did not think the money was really needed." They were the reasons you assented to - that they were two of your reasons. The question I am asking you is what reasons other than those two motivated you? A. Other reasons were firstly that no opportunity was being given to present shareholders to participate in the issue or at least there had been no discussion at that meeting as to the possibility of making an issue to present shareholders. Another reason was that the Board was proposing to make an issue which in my opinion - and I believe in the opinion of all other directors - would not have been passed at a general meeting of shareholders. Nextly the proposal - as I mentioned earlier - the proposal had the appearance of being designed to thwart Ampol and Bulkships, and lastly, that it was contrary to the listing requirements of the Stock Exchange.

30 Q. Now, later on Mr. Glass showed you what he described as a set of figures which have not yet been audited? A. Yes.

Q. He showed you that set of figures, and he said "I would like you to assume that that correctly records information taken from the company's books"? A. Yes, I remember that.

Q. You remember being asked that? A. Yes.

Q. Now, had you seen that document before it was shown to you in the witness box? A. No, I had not.

40 Q. Had it, to your knowledge, been presented at any Board meeting of the company in draft? A. No.

Q. Now, my friend, on p. 112 of the transcript, took you to three factors which he said - and you agreed - indicated a distinct worsening

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in the company's financial position, the three indicators being the increase in long-term liabilities, the increase in short-term loans, and the increase in deficiency. Your answer was "Those three indicate a worsening"?
A. Yes.

Q. You were asked "A very considerable worsening, I suggest?" and you answered "Yes"? A. Yes.

Q. In your view are these three factors determinative of the question as to whether the company's financial position had deteriorated in the 12 months period? A. No, they would only be part of the matters to be taken into consideration. 10

Q. Only part of the matters to be taken into consideration? A. Yes.

Q. What other factors in particular do you consider should be taken into consideration? A. First of all in considering increase in liabilities one should also give consideration to the increase in the assets of the company of that period - one cannot look at liabilities in isolation. Nextly, one would have to look at the identity of commitments for capital expenditure. At 30th June 1971 there were commitments for capital expenditure in Millers of approximately \$18.6 m. I have not seen the draft balance sheet of the company at 30th June 1972. 20

Q. Other than it was shown to you briefly in the witness box? A. That was not in fact a draft balance sheet, if I remember correctly. But it would be my estimate that commitments for capital expenditure at 30th June 1972 would not have amounted to more than about \$4 m., so that commitments for capital expenditure at June 1971 were very real commitments and became liabilities during the year, and this factor would also have to be taken into consideration. But there was in fact a reduction in these commitments of, my estimate would be, about \$14 m. 30 40

MR. GLASS: I tender the annual report of Millers, 30th June 1971, and a summary of consolidated balance sheets for the period from June 1963 to June 1972.

(Report and accounts, 30th June 1971,
admitted and marked Ex. MH.3.) *

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MR. STAFF: I object to the consolidated balance
sheets for 1963 to 1972.

HIS HONOUR: Mr. Glass, may I take it you
foreshadow calling a witness to depost to the
preparation of these, if so required?
And that you proffer, if so required, the
company's records from which this has been
compiled?

10

MR. GLASS: Yes.

HIS HONOUR: Mr. Staff, on that basis why should
I not admit these now? You are entitled to
have the books actually tendered, but we need
not go to that length, I assume.

* Exhibit MH.3

MR. STAFF: On the assumption that what my friend
proposed to do is simply to call someone who put
the figures together and who will not even
vouch for their accuracy, but someone who
simply wrote the figures up from other records -
we would submit that would not make the
document admissible.

20

MR. DEANE: If that is all my friend proposes
to call evidence of, we would object also.

HIS HONOUR: If you wish to object to it,
Mr. Deane, the essential thing is the production
of the company's books. You are entitled to
have those tendered, but the proffer of them
is usually sufficient to overbear any objector.
But provided the books are proffered and then
a witness is called to depose to the
preparation of this, it would be admissible.

30

MR. DEANE: Provided the books were proffered.
If it were to be done that way, we would say
provided they were also made available to an
expert from our side to examine their
correctness.

HIS HONOUR: Am I correct in my anticipation,
Mr. Glass, that you proffer the records from
which this has been prepared?

40

MR. GLASS: Yes. The ordinary books of account

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* Exhibit MH.4

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from which these figures have been extracted

MR. STAFF: So long as the witness tendered is not simply some clerk or some person of that character - I am only anxious that it be someone I can usefully cross-examine.

HIS HONOUR: If you should deem it necessary, you can apply later to have this matter re-opened and to have the document rejected.

(Draft summary and consolidated balance sheet, 30th June 1963 to 30th June 1972 tendered and admitted as Ex. MH.4) *

10

HIS HONOUR: I will have it noted that this is admitted on the proffer by R.W. Miller (Holdings) Limited of the company's books of record from which it has been prepared and of a witness able to depose to the reliability of the document as a reflection of what is contained in the company's books of record. The proffer of these books of record will be a matter for specific acceptance by any of the other parties who wish to avail themselves of that proffer.

20

MR. MASTERMAN: Q. I hand you the annual report for the year ended 30th June 1971 and direct your attention to Note No. 2 - "Capital commitments not reflected in the accounts". Can you tell us first of all briefly what capital commitments are referred to in that note? I don't think there is a page number. What is their significance in the financial position of the company at that date?

30

A. The commitments in respect of oil tankers would consist of the remaining progress payments still to be made after 30th June 1971 in respect of "Amanda Miller" and would include all of the costs of the "Robert Miller" with the exception of the deposit which had been paid prior to that date. Other commitments - I can't remember how that amount was made up, but I would imagine most of it would be in respect of colliery capital expenditure.

40

Q. Would those two items be relevant in making a comparison between the financial position as at 30th June 1971 and the position as at 30th June 1972? A. Yes.

HIS HONOUR: Q. Mr. Cameron, I notice you have brought in, or the company has brought in the tankers under construction at a figure being the progress payments and cost to date?
A. Yes.

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10 Q. Am I correct in my anticipation that as at 30th June 1972 that asset would have increased by whatever amount had in fact been paid during the year ended 30th June 1972, the tankers still being then under construction ?
A. The second tanker.

Q. One had finished? A. Yes.

Q. So that it would not necessarily be the precise transfer of the capital commitment into the asset described as "tankers under construction"?
A. It would be my belief that about \$2.7 m. of that \$16.7 m. would still appear in the 1972 notes as a commitment.

20 Q. And the remaining \$13 m. would be partly translated across to the "tankers under construction" by direct transfer? A. It should be all under that heading, with most of it appearing on the other side as a liability, and some of it having been paid in cash.

30 Q. And some of it representing the item of "ships plant etc.", namely, the completed tanker? A. I am sorry, I can't remember whether that commitment included items which would later appear under "ships plant etc.", or whether it would all be under "tankers under construction" except that the completed tanker would be transferred.

Q. And it would be transferred at cost? A. Yes.

Q. So that whatever diminution took place in the capital commitments as at 30th June 1971 during the next ensuing financial year would be directly reflected in the two accounts of "ships plant" and "tankers under construction"? A. Yes.

40 MR. MASTERMAN: Q. I show you Ex. MH.4. Perhaps you might refresh your recollection of that document? A. Yes.

Exhibit MH.4

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- Q. My friend Mr. Glass referred you to three indicators indicating a very considerable worsening of the financial position of the company between the dates. Are there in your opinion any counter-balancing factors or any other factors that you would wish to mention in evaluating the company's position as shown by that document? A. A comparison of the 1971 figures and 1972 figures shows these relevant movements: total assets increased by approximately \$9.6 m. Total liabilities increased by approximately \$7.6 m., and commitments for capital expenditure reduced from \$18.6 m. to \$4 m. Shareholders' funds increased by approximately \$2 m. There may be other relevant factors, but I would need more time. There is one other one that should be noted, and that is that most of this increase in liabilities has occurred in long-term liabilities. 10
- Q. Do those figures - if correct - change the view which you held on 6th July as to the company's financial position? A. No.
- Q. Now, you agreed with my friend at p.144 , and other places, that Mr. Koch had put a number of matters before the Board accurately? A. Yes, that is correct.
- Q. Approximately for how long did he speak? A. He spoke for approximately 5 to 10 minutes, I would think. 30
- Q. In your view were there other matters relevant to the financial position of the company which were not put to the meeting? (Objected to by Mr. Glass: allowed.) A. I am sorry? Could you repeat the question.

(Preceding question read by Court Reporter.)

MR. MASTERMAN: Q. By Mr. Koch? A. Yes.

- Q. Will you tell the Court the nature of those omissions? A. I can only do so in a general fashion. The information which Mr. Koch provided was in relation to liabilities which fell due for repayment during the ensuing 12 months. He mentioned there were certain roll-over provisions in relation to some of them, 40

and also dealt with the Hambros loan in respect of which I understood that a letter had been received. That was a loan to be received late in the financial year ended June 1973. But in my view there were a number of other factors which should have been brought to the attention of the Board. Cash flows covering the next perhaps two, three or four years should have been brought to the attention of the Board, and considered. The profits which the management expected would be earned by the company over the ensuing three or four years I thought also should have been brought to attention so that the Board could have had the opportunity to consider the requirements, if any, for additional capital, and how much additional capital was required.

10

20

30

40

Q. Yes. A. I thought there was a good deal more of general information which could have been given and should have been given, but I cannot be more specific than that - just in relation to the company's financial position and its likely position over the next few years.

Q. At p. 131 you referred to the company's finance in connection with the "Robert Miller", and you stopped, and it was ruled that you were not answering the particular question. Don't answer this until my friend has an opportunity to object. What was your belief and understanding as to the attitude of the Bank of N.S.W. to the situation which would arise once finance for the "Robert Miller" had been arranged? A. It was my belief that the bank were prepared to favourably consider an increase in the company's normal overdraft limit from approximately \$1.8 m. to \$4 m.

Q. What was the source of your belief? A. I had been told on more than one occasion.

Q. At Board meetings? Had you been told that at Board meetings? A. Certainly at one, but I believe at two Board meetings. I think there was one late in 1971 and one I think round about April or May 1972. It may have been June 1972.

Q. That that was the case? A. Yes.

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Q. My friend Mr. Rogers at p.147 referred to the (sic) sale of a number of hotels and that one of the reasons was to overcome the excessive short term borrowings. Were there other reasons in your view for the sale of these hotels?

A. In my view that was the major reason. But also in my view there were a number of hotels where, if a valuation took place comparing the return or showing the return which could be expected against their realisable value, they were hotels which were not showing a reasonable return on the funds which were invested, and therefore it was commercially, I believe, the correct decision to sell some of these hotels.

10

Q. My friend Mr. Rogers also referred you to curtailment of capital expenditure in the colliery field? A. Yes.

Q. What was your view of the desirability of such curtailment - as to the reasons for which there was curtailment - as to whether curtailment was desirable, or not? A. Once again I think the major reason for a lot of that curtailment was to conserve the company's finances. ~~On the other hand, I for one, and I knew that Sir Peter Abeles mentioned to me that he felt the same way, and he also mentioned it -~~ (objected to: by direction portion indicated struck out.)

20

HIS HONOUR: Q. You can only give us your view, Mr. Cameron. Would you start your answer again, please? A. It was my view that additional capital expenditure in respect of collieries was not necessarily justified, as the company was not earning sufficient profits and, indeed, could be said to have been losing money from a lot of the colliery side of its business. This did not apply to all of the colliery capital expenditure. Some of it would have been desirable, in my opinion, to have been expended.

30

40

Re-examination
by Mr. Deane
Q.C.

MR. DEANE: Q. Mr. Cameron, you said in answer to my friend, Mr. Masterman, a few minutes ago that one of your reasons for being opposed to the allotment was that the proposal had the appearance of being designed to thwart Ampol and Bulkships. Do you remember saying that? A. Yes, I do.

Q. Has anything that has been put to you in cross-examination in relation to finance and other matters led you to alter your view that the proposal had that appearance to you? (Objected to by Mr. Hughes; rejected.)

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Q. Looking at it in retrospect, has what was done still that appearance to you? A. Yes.

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10 Q. What were the matters which occurred at the meeting which caused the proposal to have the appearance to you of being to thwart Ampol and Bulkships? Could you tell us what those matters were? A. The suddenness of the proposal, the appearance to me that a number of other directors had made up their minds that they were in favour of the allotment when I certainly had not made up my mind, and wanted a good deal more information in order to do so. The very nature of the allotment had that appearance to me.

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20 Q. Did the matters that you told his Honour you would have expected to have been put before the meeting but which were not put before the meeting have any relevance to the proposal having that appearance to you? (Objected to by Messrs. Hughes and Glass; rejected.)

30 Q. What relevance, if any, did the absence of matters which you have told us you would have expected to have been put before the meeting have to the proposal bearing that appearance to you? A. The fact that in my opinion those directors who had made up their mind had not considered all of the factors which they should have. (Objected to by Messrs. Hughes and Glass.)

(Preceding question read by Court Reporter.)

40 WITNESS: It was my view that the absence of additional information which one would normally expect in a situation such as this - in other words, a proposal to allot shares - that the absence of that information had the appearance to me as though the commercial necessity - real necessity - for the allotment was of secondary importance.

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- MR. DEANE: Q. You were asked both by my friend Mr. Glass and my friend Mr. Hughes a number of questions in which Ampol was described as either a "raider" or a "market raider"?
A. Yes.
- Q. You remember being asked those question?
A. Yes.
- Q. And I think you assented to that description?
A. Yes.
- Q. What meaning, in terms of your answers to those question, did you give to the words "raider" or "market raider"? A. A little more than a normal takeover offer. In other words, it was a takeover offer by someone in a fairly powerful position. 10
- Q. In the sense you were using the word, a "raider" applies to a company making a takeover offer in accordance with the provisions of the Companies Act? (Objected to by Mr. Hughes; rejected.) 20
- Q. Now, in your use or acceptance of the use of the word "raider" did you intend to imply anything discreditable? A. Yes, I did.
- Q. What? A. That Ampol was taking advantage of a situation of its position of strength to pay a price for shares less than someone else was prepared to pay.
- Q. Coming to the matter of the joint announcement on which you were asked some questions, you expressed, or you concurred with the proposition that the joint announcement was clear evidence that Ampol and Bulkships were setting out to thwart Howard Smith, or something to that effect? A. No, I did not say that. 30
- Q. Perhaps I might turn it up. You were asked, Mr. Cameron, a question, on p. 94 : "Q. It was also apparent to you, was it not, that the joint statement was designed to procure the withdrawal of the Howard Smith offer of \$2.50? A. Yes."? A. Yes. 40
- Q. You answered that question "yes"? A. Yes.

- Q. Let us assume that Ampol and Bulkships had had discussions in which each had agreed to retain its shares in Millers? A. Yes.
- Q. In those circumstances what is your view as to the propriety of making that public? (Objected to by Mr. Glass; question withdrawn.)
- 10 Q. Mr. Cameron, I would like now to take you over some matters to which my friend Mr. Masterman referred you this morning. You were asked a question on p.102 of the transcript: "Q. Do you agree that if you on 6th July had known the contents of this letter and how insecure Hambros were as a source of funds, that that would have given you a reason you did not then have for supporting the allotment" You answered "Yes" to that? A. Yes.
- 20 Q. I want to ask you some questions relating to the assumption in that question of "how insecure the Hambros funds were"? A. Yes.
- Q. (Ex. MH.1 handed to witness) Now, as I understand it, three matters were put to you in relation to this document. Before I come to them, do you know the identity of Hambros Bank? A. Yes.
- 30 Q. Well, what is it? Is it a small bank or a big bank? Is it small, big or well-known? A. It is a very large bank with its head office, I believe, in London.
- Q. What is your view as to its reputation? A. First class.
- Q. What is your view as to its likelihood of going back on a commitment in principle? (Objected to by Mr. Glass; rejected.)
- Q. Mr. Cameron, your attention was directed to the second page of Ex. MH.1? A. Yes.
- 40 Q. In the second paragraph of that page. Your attention was directed to the second paragraph? A. Is that the second page of the second letter?

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- Q. The second page of the Exhibit, which is the first page of the letter? A. Yes.
- Q. Your attention was directed to the second paragraph of that page, where it is stated "Subject to the correctness.... finance", and it was put to you that the use of the words "in principle" indicated that this was not a binding legal document? A. Yes.
- Q. Do you recall that being put to you?
A. Yes, I do. 10
- Q. What, in your view, would be the commercial likelihood of Hambros declining to go ahead with the transaction covered by this letter on the basis that what was involved was an agreement in principle? (Objected to by Mr. Hughes; allowed.) A. In my view it would be quite unlikely that they would refuse to go ahead simply on that basis.
- Q. You were referred to the first paragraph of that letter in which reference is made to the "Robert Miller" being completed on or about 15th March 1973, and to the second paragraph, where it says "subject to the correctness of the position outlined above." Do you follow the references? A. Yes. 20
- Q. And it was put to you that as at July 1972 the position was that the "Robert Miller" was unlikely to be completed, I think, until about the end of June 1973, is that right? A. That is right. 30
- Q. Was this factor mentioned by Mr. Koch at the meeting when he was talking about the uncertainty of the Hambros moneys? A. Not to my knowledge.
- Q. Did anybody, or are you aware whether anybody has ever approached Hambros to find out whether that would be treated by them as calling off the arrangement? A. I had been told that there had been a number of discussions with Hambros where the delivery date - (Objected to by Mr. Glass.) 40
- Q. Where were you told matters in relation to the Hambros Bank? A. The difficulty of arranging finance through Hambros was dealt with at Board

meetings earlier than 6th July 1972. I also had discussions with executives of the company prior to that in relation to the difficulties of arranging this finance.

MR. DEANE: Q. I think I will shorten matters. Mr. Cameron, I was referring you to the question of the date of completion on or about 15th March, 1973, as it appears in this document? A. Yes.

10 Q. Being a possible cause for questioning the availability of the loan from Hambros?
A. Yes.

Q. The other matter to which my friend referred to was on p.3 in the middle of the page. "In the event of 50 per cent or more of the issued shares of R.W. Miller & Company Property Limited and/or R.W. Miller (Holdings) Limited being acquired by another company, the banks reserve the right to either re-negotiate the terms of the loan or ask for full repayment". A. Yes.

20

Q. And it was put to you that there was a possibility that Ampol and Bulkships either by dealing with the shares or by forming a joint company could bring about a situation where 50 per cent or more of the issued shares of R.W. Miller & Co. Pty. Limited or the holding company were acquired by another company? A. Yes.

30 Q. And that was put to you on the basis that that was another matter relevant to the availability of the moneys from Hambros Bank? A. Yes.

Q. Well now, it was in the light of those three matters, that is, agreement in principle, delay in completion of the "Robert Miller" and possible acquisition of more than fifty per cent in the capital of either of the Miller companies that the loan from Hambros Bank was insecure?

40 A. May I ask that that question be re-read, the early part?

Q. Well, it was put to you that in the light of the three matters that I have referred you to, the loan from Hambros Bank was insecure? A. Yes.

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* Exhibit MH.1
**Exhibit MH.2

Q. And I think that was put to you in the context of a general question which I read to you? A. Yes.

Q. How insecure do those three matters in your view make the loan from Hambros Bank?

A. I do not believe that the first two matters would make it insecure, at least in my opinion. The third one may have some significance but I would be inclined to think that the loan was still more or less committed.

10

Q. Of course, the matter referred to in the third one had not taken place to your knowledge? A. No.

Q. Coming next to the questions you were asked in relation to the Tricontinental transaction (and could Exhibit MH.1 be handed back and * could the witness have Exhibit MH.2 if your** Honour pleases?) I think you have now examined that document just before you?
A. Parts of it.

20

Q. And you were asked some questions in relation to this transaction. Do you recall those? A. Yes.

Q. In answer to one of those questions (I am referring, your Honour to p.107 of the transcript, the second question) you referred to what you described as "normal roll-over provisions". Do you remember using those words? A. Yes.

30

Q. What do you mean by those words? A. That in transactions of this kind it is normal to have provisions whereby the bills having reached the maturity date, new bills are, new borrowings are provided by the lender.

Q. Are you aware of the security that was given by Millers in relation to this transaction?
A. There were three mortgages over a number of hotels.

Q. And I think if you look at the schedule of the document you will see set out those hotels. Do you see that? A. Yes.

40

- Q. And if I might just take you quickly through it, the hotels were the Sylvania Hotel, the Highway Hotel, the Fairfield Hotel, the Sefton Hotel, the Hume Hotel, the Riverwood Hotel, the Oak Flats Hotel, the Marayong Hotel and the Mount Druitt Inn?
A. Yes.
- 10 Q. Now, in terms of the situation, if this arrangement were terminated, what is your understanding as to the effect that would have on the company's ability to deal with these hotels? A. These hotels would then become available to be mortgaged as security for a further loan from someone else.
- Q. And in terms of the three to four million dollars envisaged in the Tricontinental transaction, what is your understanding of the value of these eight hotels?
A. I am afraid I don't know that.
- 20 Q. But that is something that I suppose is in the company's books dealing with valuations?
A. Yes.
- Q. Now, you will note, Mr. Cameron, that under this document in certain events, Tricontinental was entitled to decline to renew bills? A. Yes.
- Q. And I think it is cl.H on p.5? A. Yes.
- Q. And you will see, and you were referred to this, that if any change occurs in the respective position of the borrower or the guarantor, Tricontinental would be entitled to decline to renew? A. If it was a change which adversely affected it, yes.
- 30 Q. And at the foot of 6, Mr. Cameron, you will see some definitions relating to the sub-clause? A. Yes.
- Q. And one of the matters that would entitle the Tricontinental company to refuse to renew was somebody acquiring more than twenty per cent of the voting power in Millers. Is that your...A. I can't remember that, May I have a moment?
- 40

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- Q. Would you look at the top of p. 7? That is the reference to what is treated as control?
A. Yes.
- Q. Did anybody at this meeting mention that the allotment of these shares to Howard Smith would have the effect of entitling Tricontinental to refuse to renew...A. No.
- Q.these bills? A. No.
- Q. Well now, in relation to the clause concerning change in the position, have you, as a practising accountant, seen debenture trust deeds on many occasions? A. Yes. 10
- Q. Have you seen in those debenture trust deeds provisions relating to change in position in the opinion of the trustee? A. Yes.
- * Q. As you view the matter, and we are only concerned with your opinion, is there any great distinction between what is there and provisions in such debenture trust deeds? (Objected to by Mr. Glass: allowed) (Question marked * read) A. No. 20
- Q. Mr. Cameron, it was put to you that the matters to which reference has been made in this deed made the funds from Tricontinental insacure? A. Yes.
- Q. What is your view on that? A. I don't believe so.
- Q. And is that still your view? A. Yes.
- Q. You were also in cross-examination (I am referring to the bottom of p.109) referred to a statement at the meeting that "all the company's assets upon which money might be raised had already been given as security?" A. Yes. 30
- Q. And you were asked some questions in relation to that. Now, Mr. Cameron, had there in December 1971 been a revaluation of the company's hotels? A. I don't remember when it took place but during the year there had, yes. 40

Q. Mr. Cameron, I show you a letter from Millers to the Sydney Stock Exchange of 23rd December, 1971? A. Yes.

Q. Now, does that refresh your memory? A. Yes.

Q. There had been a revaluation of the company's hotels? A. There had been a...?

Q. Revaluation of the company's hotels?
A. There had been an independent valuation.

10 Q. And that was made in December 1971? A. I think it was done earlier than that but probably completed in about December.

Q. I think that revaluation had the consequence of valuing upwards the value of the company's hotels by an amount in excess of \$5,000,000?
A. Over and above their book value, yes.

Q. Apart from the giving of security over these hotels in relation to the Tricontinental transaction? A. Yes.

20 Q. To your knowledge had any effort been made to raise further capital, further loan capital or further loans on the security of these hotels as a consequence of that revaluation?
A. I don't remember any such.

Q. Are you aware whether the company rejected an offer of loan money on the security of some of those hotels? A. I don't remember.

30 Q. The next matter to which I direct some questions, Mr. Cameron, arises from p.119 of the transcript. You will remember Mr. Glass put to you a number of questions related to the advantages between raising money by way of loan and raising money by way of the allotment of shares? A. Yes.

Q. And he said to you:

"Would this be something near the mark. That if you got 10 million loan money carrying interest at 8 per cent there is \$800,000 to be paid and the tax saving would be a little under half of that, so you would be paying out something over 400,000?"

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A. Yes.

Q. And you agreed with that? A. Yes.

Q. He then said to you:

"Whereas if you raise the same money by a share allotment of four and a half million at £2.30 and you pay 8 per cent dividend on that you are only going to have to pay about £360,000 to service the dividends on the 10 million?"

A. Yes.

10

Q. Your answer to that was "Yes"? A. Yes.

Q. "And in that sense servicing the equity capital is a little bit easier than servicing loan capital?"

Your answer to that was:

"Well, if the dividend rate remains as it is, yes."

A. Yes.

Q. As at 6th July of this year, did you expect the dividend of Millers to remain at 8 per cent? A. No.

20

Exhibit KK

Q. Mr. Cameron, I show you the Cooper report, or rather Exhibit KK opened at Annexure D. Now, you have told us that your understanding is that this report was prepared by the firm of accountants, Cooper Bros., after consultation with the company's executive and other people? A. Yes.

Exhibit DD

Q. Now Exhibit DD is a projection of market value per ordinary shares based on 1972, 1973 and 1974 projected earnings. Do you see that? A. Yes.

30

Q. Now, the projected earnings for the 1972 year which had passed as at 6th July were £1,186,000? A. Yes.

Q. The projected earnings for the current year as at 6th July were £2,054,000? A. Yes.

- Q. Well now, might I ask you to assist me with a calculation relevant to the questions that my learned friend, Mr. Glass, asked you. The projection of \$2,054,000 was clearly made, was it not, by reference to the page before you on the basis that there would be no increase in capital? A. Yes.
- 10 Q. Which means it was made on the basis that the 10,000,000 that my friend was referring to would be by way of loan moneys? A. Yes.
- Q. Well now, on that basis, the amount of profits after tax available either to be distributed to shareholders, and might I call them the old shareholders?, or kept for their benefit by way of undistributed profits was \$2,054,000, was it not? A. Yes.
- 20 Q. Now, dealing with the old shareholders, as it were, as a separate category, the allotment effectively, on the basis of Mr. Glass's question, saved \$400,000 in respect of this year, that is, the \$800,000 interest, discounting it by approximately 50 per cent by way of tax deductibility? A. I don't quite understand when you say "dealing with the old shareholders".
- 30 Q. Well, can I put it to you this way. At the moment immediately prior to the allotment, one had a company with a little over nine million shareholders? A. Yes, nine million shares issued.
- Q. Now, what I am putting to you is this that immediately prior to this allotment on these projected profits the amount of \$2,054,000 was available to be applied for the benefit of the shareholders either by way of dividend or retained as undistributed profits? A. Yes.
- 40 Q. Which means that, looking at it from that point of view, each of the nine million shareholders in one way or another stood to benefit by \$2054,000 over nine million? A. Yes.
- Q. Now, on the other hand, the effect of the allotment was, was it not, that the company was going to save 800,000 which it would have paid in interest in terms of Mr. Glass's example? A. Yes.

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- Q. In terms of an effective saving, that being a tax deduction, it was going to save something in the vicinity of \$400,000, taking his figures? A. Yes.
- Q. Which means that on this new basis the effect of the allotment is to add \$400,000 to that \$2,054,000? A. Yes.
- Q. Which means that instead of having \$2,054,000 divisible among or to be applied for the benefit of 9 million shareholders, the consequence was that there was \$2,454,000 to be distributed among or to be applied as undistributed profits in relation to 13½ million shareholders approximately? A. Yes. 10
- Q. Now, did you think that is a relevant matter in, as it were, comparing the two means of getting finance? A. Yes, I do.
- Q. Now, if we look at it in the sense that the old shareholders, as it were, remain identified with the company - and I know it is hard but do you understand what I am saying? A. Yes, I do. 20
- Q. And we treat Howard Smith as still being not a shareholder but receiving a benefit equivalent to that which it would receive if it were a shareholder? A. Yes.
- Q. Would you agree with me that in terms of the cost to the old shareholders after tax, what was done had an effective cost of in excess of \$800,000 for the 1973 year? A. Could you - I am sorry, I can't readily see how you got that. 30
- Q. Well, if Howard Smith had lent \$10,000,000 at 8 per cent to this company, Millers, it would have received \$800,000 in respect of that year? A. Yes.
- Q. And Millers would have been entitled to a deduction in respect of that \$800,000? A. Yes.
- Q. Howard Smith would be required to pay tax on it? A. Yes. 40
- Q. By virtue of what was done and on an 8 per cent

dividend which you say you thought would be increased but, by virtue of what was done and on an 8 per cent dividend, would not Howard Smith in this example receive \$800,000 by way of dividend? A. No, in number of shares...

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Q. I am sorry, would not Howard Smith by way of dividend or the benefit of undistributed profits receive one-third of the 2,454,000 to which I referred you? A. Yes.

10 Q. Which is \$800,000? A. Yes.

Q. But the difference being, is it not, that whereas if it had been by way of loan it effectively costs the company, in the sense of the old shareholders, \$400,000? A. Yes, that is so.

Q. By what was done, it effectively costs them twice that amount, \$800,000? A. Yes.

20 Q. In terms of Howard Smith, instead of getting \$800,000 taxable - an effective benefit one presumes of \$400,000 - it received \$800,000 tax-free? A. An effective benefit.

Q. An effective benefit of \$800,000 tax-free? A. Yes.

HIS HONOUR: Why do you say "tax-free"? They would have had to pay tax on their dividend.

MR. DEANE: No, your Honour. It is a public company.

30 Q. Now, Mr. Cameron, in the light of those matters, do you regard the comparison that my learned friend Mr. Glass put to you in the terms he put it to you as being of any real relevance? A. It is of some relevance but not tremendously important.

Q. This may have been covered in re-examination; my note is defective. Mr. Cameron, you were asked a number of questions on Mr. Koch's financial summary showing 10.7 million lent in terms of projected liabilities? A. Yes.

40 Q. And you were shown the minutes of Millers in relation to that? A. Yes.

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* Exhibit V

Q. (Witness handed Ex.V). Can I take you back *
to appendix D? (In the Cooper Report).
This is probably stressing the obvious,
Mr. Cameron, but I referred you to the
projected net profits after tax in respect
of the 1973 year and asked you some questions
in relation to those. This document shows,
does it not, that the net profits in respect
of the 1974 year were anticipated as being
considerably higher? A. Yes.

10

Q. Well now, might I ask you in a shorthand
way, would the difference between the two
methods of procedure which I have put to you
in relation to the year in which the allotment
took place become even greater on this
projection in 1974? A. Yes.

Q. Now, what, on your understanding, were the
projections as to profits beyond 1974?
A. Even greater increases. I am sorry, even
further increases.

20

Q. So, the discrepancy, on what the company was
anticipating, would become more marked as
each year went by? A. I have seen
projections as far as 1976 but not beyond that.

Q. Well now, do you recall what the 1976
projection was? A. I think it was in excess
of \$3 million; it may be close to \$4 million.

Q. Now, you were referred in those minutes,
Mr. Cameron, to Mr. Koch's summary which appears
at the top of p.5 - a number of figures?
A. Yes.

30

Q. Was any reference made by Mr. Koch in giving
that summary to the Hambros Bank loan?
A. Either in giving that summary or shortly
thereafter, yes.

Q. Well, can you recall which it was? A. I was
going to ask if I may read the minutes.

Q. By all means, yes. A. The matter certainly
was raised later. I can't remember if it was
raised at that time. I thought it was.

40

Q. But you cannot recall what was said at that
time? A. It was later that the question of
the change of ownership was raised. I think

it was also raised at that point of time but I queried it later.

Q. By whom was it raised at that point of time?
A. By Mr. Koch.

Q. Was the Hambros Bank loan relevant to those figures put forward by Mr. Koch in your view? A. Yes. (Objected to by Mr. Glass: allowed).

10 Q. What was its relevance, Mr. Cameron? A. That arrangements had been made or it could be said that arrangements had been made to meet some of these commitments included in the \$10.7 million.

20 Q. Each of those commitments were covered by the arrangements made in relation to Hambros Bank? A. I can't identify them from the summary in the minutes because that only gives the dates when they fell due. The Hambros loan - it was planned to use that to repay the two Euro dollar loans from the Bank of New South Wales one of which had not yet been made at that point of time and the \$3 million or approximately \$3 million to Tricontinental.

Q. On your understanding of financial terms, approximately how much of the \$10.7 million had been covered by the Hambros Bank arrangement? A. About \$5½ million.

Q. More than half? A. Yes.

30 Q. Just one final matter, Mr. Cameron. It was put to you at p.123 of the transcript that Ampol was not offering to help Millers over its financial problems and I think you gave a non-committal answer to that? A. I can't remember the question.

Q. Well, Ampol, of course, only became a shareholder in this company on or about 20th May, 1972? A. Yes.

40 Q. Have you ever heard at a board meeting any suggestion that any approach had been made to Ampol for assistance in relation to the financial problems (if that is the correct word) in Millers? A. I certainly don't think so. I don't remember any.

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* Exhibit LL

**Exhibit MM

Exhibit NN

Exhibit NN

Exhibit OO

Exhibit PP

(Witness retired and excused)

"Letters from Millers dated 26th March, 13th October, 23rd December, 1971, and 16th August, 1972, tendered: letter of 16th August, 1972, objected to by Mr. Glass: letter of 16th August, 1972, withdrawn: remaining letters tendered without objection and marked Ex.LL.) *

(Interrogatories: Ampol to Millers and answers Nos. 4A and 4B, 5A and 5B, tendered without objection and marked Ex.MM.) **

(Memorandum dated 5th July and handwritten memorandum dated 20th June, 1972, called for: produced by Mr. Hughes.)

(Interrogatories: Ampol to Howard Smith and answers Nos. 1, 2, 3, 4, 7, 10, 13, 15, 16, 17, 18, 19, 23, 25, 26, 28, 29, 31, 33, 35, 36, 37, 38, 40, 41, 42, 43, 46A, 48, 49 tendered: Answer 46 A B objected to by Mr. Hughes: tender in relation to document referred to in 46B withdrawn: remainder of tender admitted without objection and marked Ex.NN.)

(Document dated 5th July, 1972, referred to in interrogatory No.40 and memorandum of 20th June, 1972, referred to in interrogatory 46A added to Ex.NN.)

(Luncheon adjournment).

(Interrogatories: Ampol to Taylor and answers Nos. 1, 2, 3, 4, 5, 14, 18, 19, 20, 21, 22, 23, 24, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 57, 63, 66, 68, 70, 71, 72, 73, 75, 76, 77, 78, tendered without objection and marked Ex.OO.)

(Interrogatories: Ampol to Nicholl and answers Nos. 13, 14, 23, 24, 25, 26, 27, 28, 33, 34, 38, 41, 45, 53, 54, 55, 57, 59, tendered without objection and marked Ex. PP.)

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(Interrogatories: Ampol to Balhorn and answers Nos. 1, 6, 15, 16, 17, 19, 29, 30, 31, 32, 33, 34, 35, 36, 40, 44, 45, 46, 48, 60, 62, 79, 80, tendered without objection and marked Ex.QQ.) *

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(Interrogatories: Ampol to Duncan and answers Nos. 1, 16, 17, 22, 29, 30, 31, 32, 33, 34, 35, 51, 55, 57, 70, 71, 75 tendered: tender withdrawn with leave given by his Honour to re-tender them if relevant.)

Transcript of
Evidence on
Trial of Action

10

(Interrogatories: Ampol to Anderson and answers Nos. 15, 16, 29, 30, 31, 32, 33, 34, 35, 36, 40, 48, 56, 58, 59, 60, 62, 82 tendered without objection and marked Ex. RR.) **

Plaintiffs
evidence
Evan Duff
Cameron
(recalled)

Marking and
admission of
exhibits
12th September
1972

(continued)

CASE FOR THE PLAINTIFF CLOSED.

CASE FOR THE FIRST DEFENDANT

* Exhibit QQ

20

(Interrogatories: Millers to Ampol and answers Nos. 1 - 9 inclusive, 11 and 12, 16 - 27 inclusive, 29 - 41 inclusive and 46 tendered without objection and marked Ex. MH5.)

**Exhibit RR

Exhibit MH.5

HIS HONOUR: I will have it noted that the document Annexure "C" to the interrogatories from Millers to Ampol was prepared on 9th February 1972.

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(Letter dated 24th May 1972 from Bank of N.S.W. to Ampol tendered; objected to Messrs. Staff, Deane and Lockhart; rejected.)

(Proposal for acquisition of shares, 14th January 1972, and addendum tendered and admitted as Ex. MH.6 only as against Ampol.)

Exhibit MH.6

(Heads of agreement tendered and admitted as Ex. MH.7 only as against Ampol.)

Exhibit MH.7

(Form of agreement, unexecuted, tendered and admitted as Ex. MH.8 only as against Ampol.)

Exhibit MH.8

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* Exhibit MH.9

**Exhibit MH.10

*** Analysis of
cost of shares
marked for
identification

**** Exhibit MH.11

(Agreement dated 12th May 1972 between
Romanda and Ampol tendered; objected to
by Messrs. Staff, Deane and Lockhart,
admitted and marked Ex. MH.9) *

(Analysis of cost of shares tendered;
objected to by Mr. Deane: admitted and
marked Ex. MH.10, only as against Ampol.)**

(Carbon copy of analysis of cost of shares
tendered; objected to by Mr. Deane;
rejected. The document was m.f.i.3.) ***

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(Interrogatories, Millers to Abeles, and
answers 7 to 14, 18 to 23, 28 to 30,
31 to 33, 38 to 41, 44 to 45, 47 to 63,
68 to 69, tendered; interrogatories 56
and 57 and answer to interrogatory 56
objected to by Mr. Lockhart. All the
above interrogatories and answers admitted
and marked Ex. MH.11.) ****

HIS HONOUR: Reference may be made to Exhibits
MH.6 and MH.7 in reading, as against the
defendant Abeles, the answers to his
interrogatories.

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(Further hearing adjourned to 10.0 a.m.
on Wednesday 13th September 1972).



EQUITY DIVISION

No. 1240 of 1972

CORAM: STREET, C.J. in Eq.

In the Supreme
Court of New
South Wales
Equity Division

AMPOL PETROLEUM LIMITED V. R.W. MILLER (HOLDINGS)
LIMITED & ORS.

No. 6

FIFTH DAY: WEDNESDAY, 13th SEPTEMBER, 1972

Transcript of
Evidence on
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HIS HONOUR: The documents produced by Mitsui & Co.
(Australia) Limited in response to the call made
on subpoena duces tecum by Mr. Staff on 5th
September, may be released back to a
representative of that Company.

Defendants
Evidence

Correction of
transcripts of
evidence
13th September
1972

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MR. ROFE: On p.170 of the transcript, the top line,
in the answer, "there were three mortgages...",
the word "three" should be "first".

HIS HONOUR: Yes.

MR. ROFE: Page 179 of the transcript, fifth
question from the top, the transcript reads
"Q. Each of those commitments were covered..."
the "each" should be "which".

20

HIS HONOUR: I think that is so. Is there any view
to the contrary to my altering "each" to "which"?
(No response).

On p. 179 in the fifth question "each" will
be altered to read "which".

MR. GLASS: On p. 106 of the transcript the question
"And if that real possibility matured into effect"
the "effect" should be "fact".

HIS HONOUR: Yes.

MR. GLASS: At p. 125 of the transcript, the second
question, the word "outlet" should be "outcome".

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HIS HONOUR: Yes.

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Defendants
Evidence

1st Defendants
Evidence
Leonard Dean
Koch

Examination by
Mr. Glass Q.C.

13th September
1972

LEONARD DEAN KOCH :

sworn, examined, as under :

MR. GLASS: Q. What is your full name, please, Mr. Koch? A. Leonard Dean Koch.

Q. What is your residential address? A. 23 Moonbi Crescent, French's Forest.

Q. What is your position in the Miller Company? A. I am general manager of the Miller Group of Companies.

Q. For how long have you been general manager? A. I have been general manager since June 1971. 10

Q. What professional qualifications do you hold? A. I am an Associate of the Australian Society of Accountants.

Q. Since when? A. Since 1966.

Q. When did you first join the Miller Group? A. I joined the Miller Group in South Australia in December 1959.

Q. In what capacity did you join the group? A. As assistant manager for South Australia. 20

Q. How long were you there? A. Some eight years. Until January 1967.

Q. You were then appointed where? A. I was appointed executive assistant to the managing director in the head office in Sydney.

Q. Who was the managing director? A. The late Sir Roderick Miller.

Q. Who was in 1967 the general manager? A. Mr. Cliff Jones.

Q. When did he cease to be the general manager? A. I believe he retired in 1968. 30

Q. Who replaced him when he retired? A. Mr. K.B. Anderson

Q. What duties were you assigned when Mr. Anderson became general manager? A. During my early days

in Sydney I was mainly involved in freight rate assessments for our tankers and also our other colliers. I was mainly associated with the shipping side of the business and, in particular, I gave evidence at the 1969 Tariff Board Inquiry into Shipbuilding. I collated the evidence for this Inquiry.

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Transcript of Evidence on Trial of Action

Defendants Evidence

1st Defendants Evidence
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Examination by Mr. Glass Q.C.

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(continued)

- 10 Q. When Mr. Anderson was appointed general manager in 1968 what duties were assigned to you? A. Mainly on the tanker side of it regarding freight rates.
- Q. What about the general financial operations of the company? A. During the course of these duties I did become involved in the overall general financial position of the company.
- Q. Are you prepared to give to the Court an account of the leading trading and financial events in the company's history from 1962 until 1971? A. Yes.
- 20 Q. Is that based partly on personal knowledge and, to the extent that it is not so based, is it based on documents in the company's possession? A. The early history of the company would be a matter of history and what I have discovered in my duties with the company up until I would say approximately early 1970, or late 1969, when I became more involved in the financial situation.
- 30 Q. Are these matters which are not really capable of bona fide dispute - the ones about which you are to tell - (Objected to by Mr. Deane: rejected.)
- Q. Now, R.W. Miller (Holdings) Limited was incorporated where and when? A. It was incorporated in the Australian Capital Territory in 1962.
- Q. At the time of its incorporation what were the principal activities of the Group? A. The principal activities were colliery and shipping interests and hotels. Those would be the main ones.
- 40 Q. Brewing? A. Yes. We owned a Brewery at Petersham.
- Q. Between 1962 to 1968 how could the activities of

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(continued)

the group be generally described? A. Well, it was basically an expansional period that the company went through during that period.

- Q. What were the areas of expansion in 1962-68?
A. In 1963-1964 the company entered the Australian Coastal tanker trade with the purchase of three tankers.
- Q. Yes? A. We purchased a wine and spirit merchants company called Cooper Nathan.
- Q. Yes? A. We went in to making loans to licensed clubs as an adjunct to our brewery interest, and also to the wine and spirit company. 10
- Q. Yes. What was the hotel position? A. The hotel position was I think during that period that we purchased some thirteen hotels - either purchased or constructed some thirteen hotels.
- Q. And the colliery position? A. We were always looking for new areas - coal-producing areas - for expansion in this trade.
- Q. How was the change 1962-1968 reflected in the value of the Company's investments? A. I am sorry, could you repeat the question, Mr. Glass? 20
- Q. As between 1962 and 1968 was there any increase in cost value of investments? A. Yes. I believe the company went - embarked into investment into listed public companies, and I believe the figure was in excess of \$1,000,000, \$1.2-million.
- Q. Starting at what figure in 1962? A. It would have started at about \$1-million in 1962. In 1962?
- Q. Yes? A. I am sorry. There would not have been any in 1962. 30
- Q. What were the main sources of finance for these expanding operations? A. In 1964 the company issued \$2-million of 7 per cent debenture stock payable partly in 1969 and partly in 1974. The brewery was also sold in 1967.
- Q. To whom was that sold? A. To Tooheys Limited.
- Q. Yes? A. One of our tankers in 1966 was out of work, so that was sold. That was the Miller "Canopus".

- Q. Yes? A. The company then sold its shareholding in the listed companies that it had acquired earlier in the period, and also raised, I think, approximately \$1million on short term borrowings and also another half-million from a business associate.
- Q. Were there any retained profits? A. Yes. These were utilised as well.
- 10 Q. I think you started to tell us that from the retirement of Mr. Jones in 1968 you had direct involvement in the shipping field? A. Yes.
- Q. What was the nature of the duties there? A. The nature of the duties were mainly in the assessing of charter rates and freight rates for our tankers because, although they were under charter from 1966 onwards, we were looking at developing our company further into the shipping field, so that it was mainly in the assessing of freight rates.
- 20 Q. Did that cause you to give evidence before any particular inquiry? A. Yes. In conjunction with the then assistant general manager, Mr. Taylor, I gave evidence at the 1969 Tariff Board Inquiry into Shipbuilding.
- Q. What were the topics upon which you gave evidence? A. The main topics were the unsatisfactory position regarding shipbuilding in Australia compared with what was happening overseas, and the main areas were additional subsidy for shipowners for vessels being constructed in Australia, a more liberal depreciation allowance, and also for Government assistance financially to shipowners when they were constructing ships in Australia.
- 30 Q. Did your interest in tankers lead you to any other particular area of investigation? A. With the tendering of evidence to the Tariff Board Inquiry I became aware of the financial implications in constructing vessels overseas compared with Australian conditions, and in doing so I became more involved and conscious of the financial position of our company.
- 40 Q. When was it that Sir Roderick Miller died? A. Sir Roderick died on April 26th, 1971.

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leonard Dean
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(continued)

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(continued)

- Q. Did that affect the duties that you performed for Millers? A. Upon Sir Roderick's death Mr. Anderson and Mr. Taylor were appointed joint managing directors and I worked in close conjunction with them regarding all matters relating to the company, but in particular to the financial position of the company's activities.
- Q. Now, during that period of expansion as you have described it from 1962 to 1968 what was the position as regards to liquidity? A. During that period the company did not experience any liquidity problems. 10
- Q. What was the share position and the dividend rate? A. In 1965 I believe there was a one-for-five bonus issue made to all shareholders, and in 1963 the dividend rate was eight per cent and from 1964 to 1968 it was increased to ten per cent.
- Q. During the financial year ended June 1969 what were the major activities of the company? A. I believe that during that year we constructed a hotel called the El Rancho Hotel. I believe the cost was just under \$1-million for that hotel. We placed an order for the construction of the "Amanda Miller". 20
- Q. At what price? A. The cost to the company was to be 10.3-million, and I believe - we would have in that year also paid a deposit. I think we paid something like \$800,000 in that year.
- In 1969 we repaid the debentures that fell due during that period, and to the best of my recollection I think it was \$780,000 that we paid on the redemption of the debentures. 30
- Q. What about colliers? A. We purchased a collier called "The Lisa Miller" at a cost just in excess of \$300,000. That was to replace an obsolete tanker that we had operating at that time.
- Q. Yes? A. We also acquired - I believe in 1969 - a 60 per cent interest in the Preston Coal Company. That was purchased to meet future demands and future sales to our export coal markets. 40
- Q. What was the capital cost of that? A. I believe during 1969 we only paid something like \$30,000-odd at that stage of the entry into the company.

- Q. What was the position in that year with regard to deferred loans? A. In 1969 I believe the deferred loans increased by some £2-million, making a total in all I think in excess of ~~£4~~^{£4½}-million that we had loaned to licensed clubs.
- 10 Q. From what source did the funds come to finance those expending activities in the year ended June 1969? A. I think we continually breached our overdraft limitations. We entered the short-term market again. I believe we increased - in 1969 we would have increased our short-term borrowings to a total, I think, in excess of £3-million. We did also receive another £1-million loan from a business associate, and I cannot recall ...
- 20 Q. Were there any investments realised? A. Yes, we would have realised the balance of our investments in listed public companies.
- Q. Raising about - A About £1-million, or slightly in excess.
- Q. Was any debenture issue considered that year? A. Yes. Ralph King & Yuill were authorised to raise £3-million by the issue of debentures but I believe that the trust deed requirements were so stringent that the company did not proceed with this.
- 30 Q. Were any alternative paths explored? A. Yes. Just following this decision, Patrick & Co. were authorised to raise some £5-million of long-term borrowings on the security of certain properties we held at that time. This did not become forthcoming, and I am not sure what the reason for that was.
- 40 Q. Were you introduced to anyone in connection with that? A. Yes. As a result of my dealings with Patrick & Co. we were introduced to Bill Acceptance Corporation and we then entered the bill market to that company.
- Q. Was there any movement in regard to working capital between 1968 and June 1969? A. Yes. Because of our entry into the short-term market our deficiency in working capital in 1969 increased, to the best of my recollection, from ~~£2½~~^{£2¼}-million in 1968 to approximately £5-million in 1969

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(continued)

- Q. I ask you likewise in general terms to discuss the main developments in the year ended June 1970?
A. We would have paid progress payments on the construction of the "Amanda Miller" during that year, and I believe it was an amount of some ~~£3~~^{£3½}-million that we paid on that ship.
- Q. What about debenture redemptions? A. Debentures - because of the conditions in the trust deed the company decided to redeem the debentures falling due in 1974, and to redeem them earlier, and it was commenced during this year, and I believe that there was some ~~£1~~^{£1½}-million worth of debentures redeemed during that year. We did also construct another hotel during that year called North St. Marys. 10
- Q. How much did that cost? A. I think that that cost in the vicinity of ~~£600,000~~.
- Q. Were there any other hotel improvements made in that year? A. Well, we were making improvements to hotels wherever possible. I don't think the expenditure on that was very considerable. It could have been about ~~£300,000~~ that we could have spent on hotel improvements. 20
- Q. Anything spent on colliers? A. In 1970 we purchased another collier called the "Ricky Miller", and that was to replace our remaining or existing colliers, which were becoming obsolete.
- Q. What did that cost approximately? A. I believe that it cost about ~~£430,000~~.
- Q. Was there anything spent on collieries? A. Yes. I believe in 1970 we embarked quite heavily on collieries. I am not too sure of the extent of it, but it could have been as high as ~~£2~~^{£2½}-million to ~~£3~~^{£3½}-million. 30
- Q. Was there any change in that year regarding the export of coal shipments? A. Yes. Towards the end of June 1970, or the latter half of 1970, the Japanese economy commenced its recession, and as a consequence of this exports of our coal to Japan dropped by some 50 per cent.
- Q. Was there any alteration in the manner of payment? A. Yes. During that year I have mentioned before that we had made arrangements for a loan of ~~£1~~^{£1½}-million from a business associate, and one of the conditions of 40

that loan was that payments for coal, instead of being as previously, payable cash against documents, would revert to a 30-day credit, and this in turn increased the amount of our trade debtors in that year.

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(continued)

Q. By what amount? A. I believe it would have been in the vicinity of \$2-million.

10 Q. In what manner did the company finance the expenditure you have mentioned in the year ended June 1970? A. I believe during 1970 we again embarked heavily in the short-term money market, and to my recollection the amount of short-term borrowings increased to something like \$4½-million to \$4.8-million. We also continually exceeded our bank overdraft limitations, and I believe in 1970 we sold two hotels which I believe netted something like \$4-million.

20 Q. Can I suggest that the hotels sold were the Sutton Hotel? Where is that? A. To be honest, I am not sure.

Q. Was it sold? A. It would have been sold.

Q. The Royal Hotel at Bowral? A. Yes.

Q. The Pacific Hotel? A. Manly, yes.

Q. The James Rouse Hotel. Where is that? A. At James Rouse, so far as I am aware. I have only been here a few years, and I could quite easily get out of my depth with this.

30 Q. Was there any change in long-term finance in that year as a source of funds? A. Are you referring to 1970?

Q. Yes? A. We did obtain a five-year loan from the Australian Resources Development Bank. I am not sure whether it was 1970 or 1971.

Q. I won't press you on that. Did something happen to the "Amanda Miller" in that year? A. Yes. On 18th April, 1971, it caught fire at Whalla.

Q. How much did the company have invested in her at that stage? A. Approximately \$3.9 million.

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(continued)

Exhibit MH.12

Exhibit MH.12

Q. How was she affected by the fire? A. She was virtually completely burned out. I believe the final assessment was a 80 per cent write-off, but the vessel virtually had to be reconstructed right from the start - right from the start again.

Q. This event had certain effects of a disastrous nature upon the company? A. Yes, it did.

Q. You will discuss that later? A. Yes.

(Binder tendered and admitted as EX.MH12.)

Q. Now, during the month of May 1970 did you have any dealings with Messrs. Patrick & Co. regarding a loan? A. Yes. In May 1970 Patrick & Co. were asked to raise an amount of \$2-million by way of security over our hotel properties, and we received a proposition from them in regard to a loan from the Defence Forces Retirement Fund. 10

Q. Could you, in the folder you have there, by turning to that division labelled Defence Forces Retirement Benefit Board identify a document dated 28th April, 1970, as a document from the Defence Forces Retirement Benefit Board, and the Patrick letter to you concerning it, dated 4th May, 1970? A. Yes. 20

(Documents in the section Defence Forces Retirement Benefit Board and Patrick & Company, added to Ex. MH.12.)

Q. Did the company take up that offer of a loan? A. No, they did not.

Q. What was the reason for that? A. The reason for not accepting this loan was that the company was confident that, as the result of the Tariff Board Inquiry Hearing in 1969, and at the weight of evidence discussed and disclosed at that Inquiry that it was quite likely that the Government would afford financial assistance to shipowners constructing ships in Australia, thereby bringing them into line with virtually every other shipbuilding nation in the world. 30

Q. And in those circumstances -? A. In those circumstances the offer was refused. 40

Q. Was that question of what was hoped to come out of the Tariff Board Inquiry referred to in a letter from Millers to the Bank of New South Wales on 8th May 1970, that is in the Bank of New South Wales section? A. Did you say 8th May, 1970?

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Q. Yes? A. Yes, it is referred to in that letter.

Transcript of
Evidence on
Trial of Action

(Letter dated 8th May, 1970 tendered:
objected to by Mr. Deane)

Defendants
Evidence

10 HIS HONOUR: I shall admit the document. I shall add to Ex. MH.12 a letter of 8th May, 1970, in the Bank of New South Wales section, No. 58.

1st Defendants
Evidence
Leonard Dean
Koch

HIS HONOUR: I will have it noted that this letter was objected to as irrelevant, bearing in mind that it is dated some two years prior to the critical transaction under challenge. I have ruled that the relevance of earlier material touching the company's capital position as at 6th June, 1972, will vary over the years and months, but that at this point of time I consider that Millers should have a reasonable degree of freedom to present their case on their capital need as they see that need having developed over the years.

Examination by
Mr. Glass Q.C.

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(continued)

20

Exhibit MH.12

MR. GLASS: Q. Did something happen in that year ended June 1972 with respect to Japanese steel exports - Japanese exports for steelmaking, rather? A. Yes. During that year, as I said previously, the Japanese economy commenced its recession which adversely affected our export coal commitments.

30

Q. What was the alteration between June 1969 and June 1970 in the company's deficiency of working capital? A. I have said in 1969 the deficiency was \$5-million. As at 30th June, 1970, it increased to \$8.6-million.

Q. Well now, we are launched in the year commencing July 1970. What were the main expenditures in that year? A. Well, there would be further progress payments on the "Amanda Miller".

40

Q. Yes? A. I believe they totalled \$1½-million for that year.

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(continued)

- Q. Yes. What about the "Robert Miller"? A. The "Robert Miller" - we placed an order for the "Robert Miller" towards the latter part of 1970, and as at 30th June, 1971, I believe we paid something in the order of \$640,000 as a deposit.
- Q. What was the contract price for that vessel?
A. The contract price to the company is \$12.3-million.
- Q. And it is to be built by - A. Evans Deakin Industries, in Brisbane. 10
- Q. What happened in that twelve months regarding debentures? A. The balance of the debentures which fell due in 1974 were repaid.
- Q. Involving approximately how much? A. \$1.2-million.
- Q. And hotels? Was money spent on them? A. In 1971 we did not build a hotel to my knowledge. I think North St. Marys was definitely the last one built.
- Q. On improvements? Did you spend any money on improvements? A. On improvements we would have, wherever possible, within our financial position. 20
- Q. What about mines? A. In collieries we did expend more capital, I am not too sure of the amount. It would have been in excess of \$1-million.
- Q. Where did the funds come from for those items of expenditure in the year ended June 1971?
A. It was during this year that we obtained a five-year loan from the Australian Resources Development Bank amounting to \$2.2-million. 30
- Q. Yes? A. We would have continued into the short-term money market, and I believe during that year it reached a peak of about 4.8 million.
- Q. Yes. Did you sell any hotels A. During 1971? Yes. I believe we sold either two or four hotels. I am not sure which years we sold them.
- Q. What was the position regarding bank overdraft?
A. In 1971 we would have continually exceeded our bank overdraft limits. 40

Q. Now, do you recall when the Mineral Securities Crisis developed? A. I believe it was round about February 1971.

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Q. Did that have any effect upon the company? A. Yes, it did have an effect. A lot of our short-term money we had in was either at call - the majority was at call, or seven-days, but certainly to a maximum of 30 days, and we found that following the Mineral Securities crash that a lot of lenders were recalling their money very promptly.

No. 6

Transcript of Evidence on Trial of Action

10

Defendants Evidence

Q. How much was required from you? A. I can recall that over a five or seven day period we had something just under \$2-million called back.

1st Defendants Evidence
Leonard Dean Koch

Q. In February 1971 did you make an approach to the Chase National Bank of America Limited? A. Yes, we did. We approached Chase and made a submission to them for the raising of £7-million on the security of the "Amanda Miller".

Examination by Mr. Glass Q.C.

13th September 1972

20 Q. How did you approach them in the first instance? A. We had been having dealings with them prior to this in the short-term money market. We had received a few loans from them at that stage.

(continued)

Q. Was it a face-to-face approach or meeting? A. No, I believe at that time we knew personally quite a few of the merchant bankers and also brokers, and I approached Chase myself.

30 Q. Would you be good enough to look at the pocket of the Chase-M.B.A. group which contains a letter of 22nd February, 1971. Is that a letter which you wrote on 22nd February, 1971, referring to your discussions on 15th February? A. Yes, that is right.

HIS HONOUR: In the absence of any other objection from any other party the letter of 22nd February 1971, No. 58 in the Chase-M.B.A. group section will be added to Ex.MH.12.

Exhibit MH.12

40 HIS HONOUR: I will have it noted that Bulkships and the third defendant also wish to object on the ground of relevance to these earlier documents, but the ruling I have had noted a short time ago will cover all such objections.

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MR. GLASS: Q What was the result of that application? A. Well, it appeared to be going along very nicely for a while and I believed it to have the support of the Chase-M.B.A. in Australia, but it had to be referred to New York for final approval, and I received a 'phone call saying apparently the vice-president in Manhattan held a meeting, and our submission had been refused.

- Q. Who did you next approach? A. I am not sure of the sequence, ~~but-it-was-about-this-time that-we-approached-virtually-anyone-we-could lay-our-hands-on.~~ (objected to by Mr. Deane; by direction portion struck out as indicated.) 10
- Q. May I suggest Martin Corporation Limited? A. Yes. We had approached Martin Corporation I believe verbally. I don't know of any correspondence on it.
- Q. What sort of proposition did you put to them? A. A similar proposition regarding raising finance either on the security of "Amanda Miller" or the hotel properties. 20
- Q. What result? A. They said they were not interested in such a proposition.
- Q. Did you approach the Commercial Banking Co. of Sydney? A. Yes. The Commercial Banking Co of Sydney were our second bankers at the time and we approached them with a submission for increased overdraft facilities with added security being given to meet their requirements. 30
- Q. Do you recall a particular event happening on 18th March, 1971? A. 18th March, 1971? It was about this time, I believe, we failed to meet a payment to Chase-M.B.A. for a debt we had for \$4 $\frac{1}{2}$ -million. It was round about that time.
- Q. We will come to that. Can I suggest an event in respect of payment for the "Amanda Miller"? A. "Amanda Miller" was launched in February 1971 and progress payments to be made to the Commonwealth regarding these events on construction are payable twenty one days after the event, so that it would have been round about that time for the launching payment, and I think that \$1.2-million would have been payable to the 40

Australian Shipbuilding Board, and we failed to make that payment.

(Series of documents in the compartment Department of Shipping and Transport, tendered: objected to by Messrs. Staff Deane and Lockhart.)

HIS HONOUR: These documents are objected to on the ground of relevance. I am of the view that they are relevant, and I admit, as part of Ex.MH.12, the documents in the section entitled "Department of Shipping and Transport."

10 MR. GLASS: Q. May I invite your attention to a letter of 17th June from the Minister to you?
A. Which year?

Q. 1971? A. Yes, I have it.

Q. Do you recall that that was a demand for \$620.150 to be paid by 7th July? A. Yes.

Q. When was that money paid? A. I believe it was by 30th June.

Q. From what source? A. I believe that was from - with the assistance of a loan from Tricontinental Corporation.

20 Q. Now, turning to the letter of 16th July, 1971, also from the Minister to you, demanding payment on the "Robert Miller" of a sum totalling \$2,465,820? A. Yes.

Q. When was that amount paid? A. I think it was about May 1972.

Q. Not until then? A. May or June.

30 Q. I would like to take you back to April 1971. Did something happen in April 1971 with regard to the Chase-M.B.A. position? A. Yes, in April 1971 we failed to pay a loan from Chase-M.B.A. when it fell due.

Q. How much was involved? A. \$500,000, plus interest. I think it was to the tune of \$509,000 all told.

MR. GLASS: I tender all the documents from and including April 1971 to the top of the file in the Chase-M.B.A. compartment.

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ON RESUMPTION

HIS HONOUR: I shall admit as part of Ex.MH.12 the documents in the section headed "Chase N.B.A. Group" from and including April 1971 on to 31st August, 1971.

MR. GLASS: Q. The documents, Mr. Koch, that have just been tendered start in April 1971 with dealings between the company and Chase N.B.A. and end up with financial arrangements between the company and All States Commercial Bills Limited?
A. Yes.

10

Q. Is that so? A. Yes.

Q. Now, what is the relationship between the Chase N.B.A. and All States Commercial? A. I believe All States Commercial Bills Limited is a subsidiary Company of Chase N.B.A.

Q. Now, in April 1971 when that file of correspondence begins, Chase N.B.A. was making demands, was it not, on the company in respect of sums of just over $\$ \frac{1}{2}$ million? A. That's correct.

20

Q. From what source did you obtain the money to meet that debt? A. We negotiated a commercial or discounted bill through Hill Samuel (Australia) Limited.

Q. And that was short-term accommodation? A. Yes.

Q. Between April, when the trouble started with Chase N.B.A. and May, when you made the deal with All States Commercial, had your company approached a number of other financial institutions? A. Yes, we had.

30

Q. For example, had you approached the Kent - in April 1971 had you approached Kent & Associates, Consultants? A. Yes.

HIS HONOUR: I shall add as part of Ex. MH.12 the documents in the section headed "Messrs. P. Kent" having overruled the objections as to relevance.

MR. GLASS: Q. How did you come to be put in touch with Kent & Associates? A. It was

Exhibit MH.12

through associations with Sir William Gunn.

- 10 Q. And what was the reaction of the company to the terms that Kent & Associates proposed for long-term finance on the "Amanda Miller"? A. Well, this was virtually a lead up to our - I am trying to think of the correct word - for our introduction to G.A.T.X. who we approached. It was through Sir William Gunn that we first met Messrs. Kent and, in effect, it flowed on that it was G.A.T.X.
- Q. That is how you came to make contact? A. That's correct.
- Q. And then you received the proposals and how did you react to the proposals in those letters? A. To the proposals from G.A.T.X; we did not receive anything from Kent & Associates. Our next contact was from a Mr. Shapiro who was managing director of G.A.T.X., Ship Mortgage & Leasing Company in London, who flew from London to Australia to see the late Sir Roderick, Mr. Taylor and myself, and we had discussions in our office in Sydney.
- 20 Q. Did anything come of either the Kent proposals or the G.A.T.X. proposals? A. No, nothing.
- Q. What was the reason for their breakdown? A. Well ~~the reason for the G.A.T.X. breakdown was that the terms were so generous that we felt that we just could not accept them.~~ (Answer objected to by Mr. Deane and struck out at his Honour's direction.)
- 30 Q. What was the relationship between the Kent terms and the G.A.T.X. terms? A. There were no terms at all from Kent & Associates. They did not put a submission to us at all or a proposal.
- Q. Well, after you had put your propositions to them, G.A.T.X. put proposals to you? A. Yes.
- Q. What were their proposals and were they in writing or orally? A. Firstly orally and we subsequently received a telex from Mr. Shapiro when he returned to London.
- 40 Q. What did he say to you whilst he was in Australia? A. Briefly, his main concern was that he wanted

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an equity.... (Objected to by Mr. Deane)

MR. DEANE: I gather our objections to the documents will cover objection to oral evidence on the same topics?

HIS HONOUR: Yes, Mr. Deane. Without recording it on each occasion, the objection to relevance upon which I have already ruled will cover evidence tendered of these earlier financial transactions and negotiations.

MR. GLASS: Q. What were the oral discussions with Mr. Shapiro? A. Well, the terms that he was prepared to make an offer to us was that G.A.T.X. wanted to participate on an equity basis in the operations of the "Amanda Miller" and the interest rate that he was proposing was eleven per cent. 10

Q. What was the company's response to these terms? A. I believe we forwarded back a telex saying we could not agree with these terms and conditions. 20

Q. Did you, about the same time, have discussions with Australian Finance & Investment Company? A. Yes.

Q. On what subject? A. On the financing of the construction of the "Amanda Miller".

Q. Did you also about this time approach Commercial Mortgages and Supervised Investments about finance for the "Amanda Miller"? A. Yes, we did.

Q. Did anything eventuate from those approaches? A. No, nothing at all. 30

Q. Did you also approach the A.N.Z. Banking Group and the Commonwealth Bank? A. Yes.

Q. For the purpose of getting long-term finance on the ship? A. That's correct.

Q. Did anything eventuate? A. No, nothing.

Q. Did you also approach Toohey's Limited for the same purpose about this time? A. Yes, but not to the extent that we did the other banks; it was on a smaller scale.

- Q. Well, in May 1971 when you entered into your agreement with All States Commercial Bills, was there any other source of finance then available to you? (Objected to by Mr. Deane: question pressed)
- Q. I will reframe it in this way. Did you know of any other source of funds at the time you entered into the agreement with All States in May 1971? (Objected to by Mr. Deane)
- 10 Q. Did you know of any other source of funds at that time available to you and acceptable to the company? A. All I could say to that is that I wasn't aware of any, Mr. Glass.
- Q. Did you regard the deal that All States Commercial offered as an attractive one? A. No, I did not.
- Q. What were the features of it which seemed unattractive to you? (Objected to by Mr. Deane: question withdrawn)
- 20 Q. What was the amount of money that was made available under this arrangement? A. There was an amount, a credit facility of up to \$2.5 million.
- Q. How much was in fact lent? A. \$2.2 million.
- Q. For how long was it lent? A. It was relatively short-term. From memory it was until 31st July, 1971, or upon delivery of the "Amanda Miller", whichever was the earliest.
- 30 Q. And which turned out to be the earlier? A. 17th July 1971.
- Q. And on that date what happened? A. From that date the terms were that the loan would then become a demand loan repayable at their request. Chase N.B.A. - I am sorry, All States agreed to an extension.
- Q. Till when? A. Well, I don't believe they gave any time; they just said they would agree to an extension but it still would become a demand loan when they so requested.
- 40 Q. What was the rate of the interest payable? A. I believe it was 9¼ per cent.
- Q. Was there anything payable in respect to a

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particular fee? A. Yes, one of the conditions of the offer was that we would appoint Chase N.B.A. as our financial advisers for a period of twelve months at a fee of \$10,000 payable in advance.

Q. Don't answer this question - did you regard the terms upon which the money was made available as acceptable if you were otherwise not able to obtain an amount of money of this order? (Objected to by Mr. Deane: rejected) 10

Q. When did you repay the whole of the \$2.2 million? A. Upon receipt of the Hambros loan regarding the "Amanda Miller".

Q. When was that? A. I believe it was on 17th September, 1971.

Q. What was the security that you gave for the \$2.2 million to All States Commercial? A. A first mortgage security over twelve hotels.

Q. Valued at approximately? A. In excess of \$6,000,000. 20

Q. Did you at this time make any application to the Bank of New South Wales for bridging finance? A. Yes, we did.

HIS HONOUR: Subject to having again over-ruled the objections as to relevance of these matters, I add to Exhibit MH.12 four letters of 22nd April, 1971, 23rd April, 1971, 10th May, 1971 and 14th May, 1971, in the section headed "Bank of N.S.W."

Exhibit MH.12

Q. Did you in June 1971 obtain a short term loan from Tricontinental Corporation of \$1 million? A. Yes, we did. 30

Exhibit MH.12

HIS HONOUR: I shall add to Exhibit MH.12 the letter of 17th June, 1971, in the section headed "Tricontinental Corp. Ltd."

Q. What was the effective rate of interest on that loan? A. I wouldn't know, Mr. Glass.

Q. All right. A. I wouldn't have any idea.

Q. As at May 1971, did the company's financial position have any effect upon its attitude to the building of tankers by others? A. Yes, just prior to that we had learned that both Caltex in conjunction with H.C. Sleigh and also Howard Smiths had made application to both build product carriers.

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10 HIS HONOUR: Q. To...? A. Product tankers; product tankers, I am sorry. And we had objected to them building these tankers to the Minister for Shipping and Transport. Consequently, or as a consequence of our position at about March, we were forced to withdraw our objections to these companies building the ships they so desired.

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MR. GLASS: Q. Had you been in funds, what would your policy have been? (Objected to by Mr. Deane: rejected)

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20 Q. Had the company been in funds, what advice would you have tendered to the Board? (Objected to by Mr. Deane: rejected)

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Q. What happened with respect to the hotel interests at this time? A. Well, the year 1971 was the first year to my knowledge that we had not constructed an additional hotel to our hotel group. At the same time, we had made certain economies and had not modernised or developed our existing hotels as we had so planned.

30 Q. You told us earlier that the "Amanda Miller" caught fire in April 1971. What effect did that have on the company's operations? A. It was April 1970.

40 Q. 1970, sorry. What effect did that have on the company's operations for the year ended June 1971? (Objected to by Mr. Deane: allowed)
A. As a result of the fire, the vessel's delivery was delayed by some six months which affected both the year ended 1971 and also 1972 as regards income and also profitability. I am not too sure just how it can be broken into each year but I do know that in total as regards income the company suffered to an amount of about £1½-million in income.

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Exhibit MH.4

- Q. Now, during this year was your income from the export of coal affected by any of your difficulties? A. Yes, we had negotiated a contract in Europe for the supply of coal but due to technical difficulties or commercial difficulties, whichever the case may be, this contract was not or this contract did not go ahead and we had spent quite a considerable amount of capital on our collieries to meet this contract which did not eventuate and, as a result of this, our income for the year ended 30th July, 1971, was affected by approximately £4,000,000 to £4½ million in revenue. 10
- Q. What was the position at the end of June 1971 with regard to the deficiency of working capital compared with the previous twelve months? A. At 30th June, 1970, I believe our working capital was... (Objected to by Mr. Deane)
- Q. (Witness shown Exhibit MH.4) From what source were the figures for the years ended 1963 to 1971 derived? A. They were extracted from our published annual report. 20
- Q. And the comparison of your published report for the year ended June 1970 and the year ended 1971 shows that you go again back from £8.6 m. to £2.3 m.? A. That is correct.
- Q. Well, in that situation you entered upon the year ending June 1972? A. Yes.
- Q. What were the major commitments which faced the company during that financial year? A. They totalled in all some £24 m. 30
- Q. Would you give us the items in round terms which made up that £24 m.? A. There were payments to the Australian Shipbuilding Board of, I think it was approximately £3 m. on the "Amanda Miller" and £8 m. on the "Robert Miller".
- Q. The collieries? A. The collieries either committed or necessary expenditure was to the order of £3 m. We were to pay back Chase or, I am sorry, All States the £2.2 m. that we had borrowed from them. We were committed to reduce our overdraft from £4 m. to £1.8 m. There would have been the repayments of the 40

Australian Resources Loan and also the Hambros loan on the "Amanda Miller", the payment of dividends and also a taxation commitment.

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Q. I think you told us that Sir Roderick Miller died in April 1971, did he not? A. That is correct.

10 Q. What changes did that bring about in the top management of the company? A. Mr. Taylor was appointed Chairman and Joint Managing Director; Mr. Anderson was appointed Joint Managing Director and I was appointed General Manager and Mr. Murphy was appointed Executive Assistant to the Joint Managing Directors.

20 Q. Were some special steps taken to deal with the company's financial position? A. Yes. When Mr. Taylor was appointed to the position of Chairman, he immediately formed a finance committee to handle the company's financial position. The committee consisted of myself, Mr. Cameron, Mr. Ellis-Jones, Mr. Murphy and Mr. Walker.

Q. What are the positions of the last three gentlemen you mentioned in the company? A. Mr. Ellis-Jones is the company Secretary; Mr. Murphy is Executive Assistant to the Managing Director or, at that time, Joint Managing Directors, and Mr. Walker is General Manager of Millers Hotels Pty. Limited.

30 Q. Since your appointment as General Secretary, what duties do you perform? A. I have been responsible for the overall management of the company with particular emphasis on the company's finances. In general, the overall running of the company.

Q. What has been your practice regarding Board meetings? A. Since I was appointed General Manager, at each Board meeting I have presented to the Board for their consideration a management report.

40 Q. In what manner were those reports presented to the Board members? A. They were presented to all Board members giving them a monthly activity report of the company's position during the preceding month.

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Exhibit MH.13

Q. How did they receive them? A. They received them with the agenda.

Q. What has been your practice as regards attendance at Board meetings? A. Well, the first few Board meetings since my appointment, I only attended the meeting when my management report was going to be considered by the Board, but I would say subsequently to October last year I have attended all Board meetings in their entirety except on one or two occasions when I was not in Sydney at the date of the Board meeting. 10

(Millers Board minutes and management reports, June 1971 to May 1972 tendered: Mr. Deane objected that the minutes and management reports had not been discovered.)

HIS HONOUR: I will reserve the liberty to object and I will re-open the admissibility of these if I am asked to do so at any stage. At this point of time I shall admit as Ex. MH.13 Millers Board minutes and management reports, June 1971 to May 1972. 20

MR. GLASS: Q.I would go to a meeting on 24th June 1971 to which the Board members came equipped with the management report, did they not, for June 1971? A. Yes, that would be correct.

HIS HONOUR: Q. Was Sir Peter Abeles a director at that stage? A. Yes, he was, your Honour.

MR. GLASS: Q. Could I then follow the proposed form and suggest to the witness: Did your report not contain this passage in the report of June 1971: 30

"At the present time our entire financial structure is being assessed by Tricontinental Corporation Limited for the purpose of a submission in the future financing of all capital development. Extensive projected cash flows and profit statements are being prepared and forwarded to them. Their report is expected within the next few weeks. As a short term measure we have accepted an offer by Chase N.B.A. Limited for a loan of \$2.5 m. to be repayable on the delivery of the M.T. "Amanda Miller"....." 40

(Mr. Deane objected to the minutes being incorporated in the transcript.)

HIS HONOUR: I am still concerned about the constitution of the Board at this point of time. As I understand it, there is room for seven seats and on 24th June there were five directors present, apologies for two others, none of whom includes Sir Peter Abeles.

10 MR. GLASS: Q. Well, Mr. Koch, are you able to throw any light on that? If you look at the minutes of 24th June, you will see those in attendance and those who apologised. I think it is cleared up as it is pointed out to me, if your Honour looks at the minutes of 31st May.

HIS HONOUR: Well, I have not got those.

MR. GLASS: Are not they in that compilation?

HIS HONOUR: No.

20 (At this stage Mr. Lockhart protested that the minutes had not been seen by him and had not been discovered.)

HIS HONOUR: Q. Was Mr. Parker a director, Mr. Koch?
A. He was an alternate director for Lady Miller, your Honour.

HIS HONOUR: I see. Well, that is the seventh seat.

(Millers Board minutes, 20th April 1971 and 31st May 1971 tendered and admitted as Ex. MH.14.)

30 MR. GLASS: The minute of 20th May is tendered only to show the appointment of Mr. E.H.P. Abeles. 184, under the heading "Tavern Development", I invite attention to that, and I also rely on what appears on folio 185 and 186, the whole of those matters under "Short Term Finance" and "Long Term Finance", and on folio 187 under the head "Any other business". I rely on what appears there.

(Luncheon adjournment)

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MR. GLASS: We are now up to the report of June 1971 which was presented to the meeting of 24th June and I have started to read those parts upon which we rely and, being discouraged in that effort, I now inform your Honour that we rely on all that appears on pp. 1 and 2 under the heading "Finance".

MR. DEANE: Perhaps at this stage I might indicate that having looked at these documents we object to them on the grounds of relevance. Your Honour has indicated the approach your Honour will take. 10

HIS HONOUR: I shall note the objection on the ground of relevance and take the same approach as I have taken heretofore on the financial documents and admit them as evidence or confirm the admission of these minutes and management reports as Ex. MH.13

MR. GLASS: Then I take your Honour to the minutes of that meeting of 24th May and draw attention to what appears on folios 192 and 193 upon which we rely. It comes under the heading "Other business" and the whole of the matter down to "Capital Expenditure" and "Collieries" on p.193. I next refer your Honour to the report which is described as "July 1971 Report". 20

Q. Now, Mr. Koch, that was presented, was it not, at the meeting of 29th July? A. Could I look at my folder, Mr. Glass? Yes, 29th July is correct. 30

MR. GLASS: I rely on what appears in that report under the heading of "Finance" on pp. 1 and 2 up to the heading "Colliery Capital Expenditure". Relevant to the first paragraph I now tender a letter of 13th July 1971 from Millers to the Bank of N.S.W. and enclosure. That will be found in Ex. MH.12.

Exhibit MH.12

HIS HONOUR: Do you object to it, Mr. Deane?

MR. DEANE: Yes, your Honour.

HIS HONOUR: On the same basis? 40

MR. DEANE: Yes.

HIS HONOUR: I shall add to Ex. MH.12 from the Bank of N.S.W. section a letter of 13th July 1971 and enclosures.

MR. GLASS: I now go to the minutes of the meeting of 29th July and draw attention to those parts on which we rely, namely "General Manager's Activity Report" commencing towards the bottom of folio 195 and going right through to the "Valuation of Hotel Properties" on p. 197.

10

Q. Now, Mr. Koch, in July 1971 - the point of the story which we have reached - what was the position regarding the Hambros commitment to provide finance on the "Amanda Miller"?

A. I think it was towards the end of July we received a letter from Hambros Bank making their offer, the end of July 1971.

Q. How much would they provide? A. It was a Euro dollar loan but the Australian equivalent was \$7.1 m.

20

Q. When was the money to be provided? A. It was to be provided upon a hand-over of the vessel.

Q. Was it subject to any conditions regarding employment of the vessel? A. Yes, it was subject to a satisfactory charter being negotiated for the employment of the vessel.

Q. With whom were you negotiating to get a satisfactory charter? A. We were negotiating with a consortium of oil companies. The companies involved were B.P., Caltax, Amoco, Mobil, Total - or could I put it another way: every oil company except Ampol and Shell.

30

Q. Now, did that condition attached to the long-term finance on "Amanda Miller" affect the company's use of the tanker in any way? A. ~~Well, it did affect us in our negotiations because the consortium members whom we were dealing with when negotiating the charter were aware of our financial problems and this made it exceedingly difficult.~~

40

(Mr. Deane objected: by direction answer struck out as indicated)

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- Q. How many kinds of charters are there? A. Two to my knowledge, a time charter and a voyage charter.
- Q. If you had been financing the tanker from your own resources, which charter would have been most beneficial to the company? (Objected to by Mr. Deane: question pressed; allowed.)
- Q. Now, what is the profitability of a voyage charter as compared with a time charter in general terms? A. Well, this is difficult to assess, Mr. Glass. There are different circumstances referring to different types of charter. A time charter which we have normally operated under - I think they call it a ball time charter - I believe that is the correct wording of it - provides for a certain daily hire for the vessel with the owners obliged to pay certain expenditure in the operations of the vessel and the charterers obliged to pay certain expenditure. A voyage charter virtually can be moulded in really with a freight rate. 10
- Q. Which is more profitable? A. Well, here again, this is difficult. It depends what is your time charter rate or what is your freight rate.
- Q. What sort of charter were you seeking to get for the "Amanda Miller"? A. I feel we were trying to get a time charter at the best possible rate we could negotiate.
- Q. What would you have been seeking if this condition of Hambros had not been applicable? A. ~~A much higher charter rate than we eventually concluded with.~~ (Objected to by Mr. Deane: answer struck out at his Honour's direction.) 30
- Q. Did the requirement of the Hambros Bank regarding the charter of "Amanda Miller" have any effect upon your negotiations with the consortium? (Objected to by Mr. Deane: allowed.) A. Yes, it did have an effect.
- Q. What effect did it have? 40
- MR. DEANE: Can the objection cover all questions, your Honour?

HIS HONOUR: Yes. I shall allow it.

WITNESS: Well, the effect that it did have on us was that we virtually had to obtain a charter party for this vessel before the money from Hambros would be forthcoming. It will probably be objected to, this answer as well, but if we were not in a position of requiring the money from Hambros and we had not been able to negotiate a time charter party at a rate which was suitable and acceptable to the company, we would not have entered into a time charter agreement at all for the vessel.

10

MR. GLASS: Thank you. Now I take your Honour to the report for August which was presented to the meeting of 26th August. It is headed "25th August" and I rely upon the material appearing on p.1 under the head "Finance" and on p.2 right down to the end of the second paragraph with the words "Hambros Bank" and thereafter under "Shipping", the material relating to "Amanda Miller" and "Robert Miller" on p.2. Now, at the meeting at which that report was presented, the meeting of August 26th, we rely upon those parts of the minutes appearing on folio 203 under the heading "Report on overseas trip by Messrs. Taylor and Koch." The setting is perhaps gathered from the entry at the bottom of folio 202, "The Chairman informed the Board...."

20

30 Q. Now, when was the charter on the "Amanda Miller" finally signed? A. Well, the vessel was handed over on August 31. I think the charter.... (Objected to by Mr. Staff: question withdrawn).

Q. When did you get the money from Hambros Bank? A. On 17th September 1971.

Q. How much did you receive? A. Approximately \$7.1 m. Australian.

MR. GLASS: Now, as to the disposition of that money, I refer your Honour to the management report of 28th September which was presented to the meeting on 30th September.

40

HIS HONOUR: That is down to "shipping", is it, on p. 2?

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Exhibit MH.12

MR. GLASS: Yes, your Honour.

Q. Now, Mr. Koch, in that report you say that from the \$7,187,391 you paid \$2.2 m. to Chase National Bank, \$1,997,260 to the Australian Shipbuilding Board. How was the rest of that \$7.1 m. disbursed? A. We had to repay to the Bank of N.S.W. or if I could put it another way, we had to reduce our overdraft which was temporarily increased by the Bank of N.S.W. from \$4 m. down to \$1.8 m. which is our normal overdraft facility.

10

Q. That took \$2.1 m., did it? A. With the \$2.2 m. repayable to Chase, there was interest on to that as well which from memory was about \$400,000. We repaid another short-term loan of \$100,000 which left the balance remaining of approximately \$400,000 which we utilised to pay creditors.

MR. GLASS: At the meeting of 30th September to which that report was present I invite your Honour's attention to entries on folio 207. The particular entry there is the sixth paragraph starting "Mr. E.H.P. Abeles" and folio 210 under the heading "Finance". Likewise, under the heading "M.T. Robert Miller" on 210 and 211 and on 212 "Revaluation of group assets".

20

Q. Now, at this stage was there any discussion with the Bank of N.S.W. about them acting as the bank? A. Yes, our financial advisers, Tricontinental Corporation, suggested the preparation of a submission to the Bank of N.S.W. which took two or three parts. One was the increase in our overdraft facilities from its then present...

30

Q. Well, there are written documents about this I think? A. Yes, there are.

HIS HONOUR: There will be added to Ex. MH.12 from the section headed "Tricontinental Corporation" the remaining three letters in that section, the whole of it now being part of the Exhibit.

40

MR. GLASS: Q. Now, at this time, Mr. Koch, round about September 1971, were approaches made in the quest of long-term finance to any other

- institutions? A. At about this time we made approaches to Hill Samuel who requested, or a submission to them for the raising of \$3 m. long-term finance on the security of our hotel property.
- Q. Did anything come of that? A. They refused the submission.
- 10 Q. Do you recall any other institutions being approached? A. We approached the Hong Kong Banking Group.
- Q. Yes, with what result? A. No result at all. They were not interested in this.
- Q. What others? A. We approached the Australian Industrial Development Corporation.
- Q. And what happened? A. They were not prepared to accept any proposition from us.
- Q. And anyone else do you recall? A. We made another approach to the ANZ Bank but I believe that was in the year 1972 sometime.
- 20 Q. Did you approach at this time Trans-City Limited? A. Yes, we approached Trans-City on ship financing for a loan of some \$7 m. to \$8 m. on first mortgage of the "Robert Miller" and we were informed that ship financing was not part of their business and that they were not prepared to go into anything to this extent but they would be prepared possibly to join a consortium if one could be arranged.
- 30 Q. In the case of the Australian Industrial Development Corporation and the Hong Kong Bank Group, what security did you offer them for long-term finance? A. Well, it did not get that far as security offering. We just approached them...
- Q. What security did you have though? A. At that stage we would still have been offering the "Robert Miller".
- 40 Q. At the Board meeting held on 13th October there wasn't I think any report by you circulated? A. No, that is correct.

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MR. GLASS: I invite your Honour's attention to an entry on folio 214.

HIS HONOUR: Mr. Glass, I am just looking at that meeting of 13th October. I am sorry to hark back to this but I get lost on the identity of who is there. There are seven directors present there and an apology for Mr. Abeles which makes eight. I thought this company was limited to seven.

WITNESS: Can I answer that for you, your Honour. You will notice at this meeting Mr. Wilkinson was in attendance. He, at that time, was Lady Miller's alternate director in place of Mr. Parker and with the Chairman's permission Mr. Wilkinson was allowed to sit in at that meeting together with Lady Miller.

10

MR. GLASS: That, I think, answers your Honour's query.

HIS HONOUR: It does.

MR. GLASS: Well, if your Honour will turn over to the next folio, 214, the second last paragraph refers at that stage to Mr. L.D. Koch. Perhaps you might also turn to your copy of the minutes, Mr. Koch.

20

Q. Are you able to recollect, Mr. Koch, what were the matters that were referred to with respect to the groups liquidity and the effect on it of a further dividend? A. I don't think so, Mr. Glass. I can't recall.

Q. There was discussion at a previous meeting when Sir Peter Abeles and Mr. Cameron were having a discussion regarding... (Objected to by Mr. Deane as not answering the question.)

30

MR. GLASS: I do want to go back if the witness feels it is relevant.

Q. Can you point to what section of the minutes of the previous meeting relates to what you are now discussing?

HIS HONOUR: It is the part I think you referred me to, Mr. Glass, is it not? The folio at the foot of 207?

40

MR. GLASS: Yes, I did.

Q. Do you see that, Mr. Koch? Three up from the bottom of folio 207 "Mr. E.H.P. Abeles stated"? Is that the part you had in mind? A. No, it wasn't; it wasn't at all.

10 Q. Are you able to give us a bearing in the minutes? A. It was to do with a dividend and discussion took place to the extent of the dividend that the company should pay and it is in the minutes somewhere at one meeting where Mr. Cameron said...(Objected to by Mr. Deane).

Q. Are you speaking, Mr. Koch, of what was in the minutes of a meeting you did not attend or what was said at a meeting you did attend which is referred to in the minutes? A. Until I could find the minutes where this was said, I would like to withhold my answer to that.

20 HIS HONOUR: It is not worth wasting time about, Mr. Glass. We are up to folio 214. Let us not go back; let us just keep moving forward.

MR. GLASS: Q. You cannot throw any further light on what appears in 214? A. No, the only thing I can recollect was when the discussion of the dividend was taking place consideration was given to the company's liquidity position and the amount of cash available to pay a dividend but the actual details I could not give you.

30 Q. Are you able to tell us what was the market value of the shares during the period, say, May to October 1971?

MR. DEANE: On the Stock Exchange?

MR. GLASS: Q. Yes. A. Well, I could not be specific on every month but I believe they reached a low of \$1.05 and I think during that period they did not get any higher than \$1.30 or \$1.35.

40 Q. During the period with which we are concerned, say, May to October 1971, was there any consideration given to raising the capital by a share or debenture issue? A. Yes, this was discussed with our financial advisers Tricontinental Corporation, and we discussed both matters... (Objected to by Mr. Deane).

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Q. Who are the "we"? A. In Tricontinental would have been Mr. Hanley, the managing director.

Q. Who is the "we" at Millers? A. It would have been Mr. Ellis-Jones, Mr. Murphy, Mr. Walker and myself.

Q. Where were these discussions held? A. In the offices of the company in Bridge Street.

Q. What was said with respect to a share issue or debenture issue? 10

HIS HONOUR: When was this?

MR. GLASS: Q. May to October? A. Yes, it would be within that period. I could not specify any particular time but it would be within that period. I think it would be closer to October than May. We were discussing... (Objected to by Mr. Deane on the basis that there were no directors there.)

HIS HONOUR: Mr. Glass, in what way do you anticipate that you will be seeking to make this relevant in the ultimate? 20

MR. GLASS: I expect that these discussions were brought to the knowledge of some at least of the directors.

HIS HONOUR: Was this the genesis of the 6th July 1972?

MR. GLASS: I would not say that, your Honour, no, but it is part of the antecedent events which influenced people present on 6th July. 30

HIS HONOUR: Yes, I am disposed to allow it, Mr. Deane. I regard it as being relevant for Mr. Glass to be able to establish what was being done both by way of loan as well as other finance in point of investigation as well as achievement.

MR. GLASS: Q. Well, Mr. Koch, can you tell us then what was said between these gentlemen at the time mentioned? A. Yes, we were discussing our financial position and, amongst a lot of other things, the question of the possibility of 40

raising capital through either a share issue or a debenture issue was raised and ~~we had quite considerable discussion on it.~~ (Objected to by Mr. Deane: portion of answer struck out at his Honour's direction.)

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MR. GLASS: Q. You were telling us not how long you spent on discussion, but what was said? Who said what, and what answer was given? Would you tell us what took place in that discussion?

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10 A. Mr. Hanley, the managing director of Tricontinental Corporation, said that in his opinion any suggestion of a share or debenture issue was completely out of the question.

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Q. What reason did he give? Will you tell us what reason he gave? A. One of the reasons he gave was the market value of the shares of the company on the Stock Exchange at that time, and I believe - and I am recollecting this one - that it was the appearance, or words to this effect, of the balance sheet as at 30th June 1971.

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Q. What was said with respect to this matter by the Miller executive? A. We virtually agreed with what Mr. Hanley had said, but we were looking at avenues of raising finance and we were asking his opinion as to whether this was a possibility.

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Q. In what circumstances, if any, did that conversation come to be passed on to the board or to the directors? A. I don't recall what directors would have been advised of this. Mr. Cameron may have been, but I could not say whether he was or not (objected to by Mr. Deane; allowed).

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Q. Was Mr. Taylor present on this occasion? A. No, he was not present.

Q. Representing Millers was yourself, Mr. Ellis-Jones, and - A. And Mr. Murphy and Mr. Walker.

Q. Now at this time was there any decision taken about modernising or not modernising hotels? Was there any decision taken in regard to that? A. Well at about this time, after the formation of the finance committee that Mr. Taylor formed, a meeting was held of the committee, with all members being present, and it was realised at

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that time that the position of the
company - (Objected to by Mr. Deane).

- Q. What was decided? A. The decision was to create economies wherever possible.
- Q. And, in respect of hotels, to do what? What was decided in respect of hotels? A. That the modernisation, other than essential maintenance, would be deferred.
- Q. Did that finance committee make any decision at about this time with respect to capital expenditure on collieries? A. All capital expenditure on collieries other than that in respect of which we were firmly committed was to be deferred wherever possible. 10
- Q. Were there any discussions with the Shell Company about finance for "Robert Miller"? A. Yes, discussions were held with the Shell Company.
- Q. Did anything come of them? A. I beg your pardon? 20
- Q. Did anything come of the discussions with the Shell Company about finance for "Robert Miller"? A. No. In November of last year they wrote to us and said that they could not provide any finance.
- Q. Now there was a meeting, I think, on 19th November, before which you had circulated a management report of 18th November, is that not correct? A. Yes, that is correct.
- Q. Following that meeting on 19th November did you and Mr. Taylor, the chairman, proceed overseas? A. Yes, that is correct. 30
- Q. And where did your duty take you? A. I went direct to London.
- Q. You say you went to London? A. Yes.
- Q. Who did you see? A. My principal reason for going to London was to see Hambros Bank.
- Q. When you got to London how long did you spend talking to Hambros Bank? A. Approximately one

week. I was engaged in discussion with them for approximately a week.

Q. Was Mr. Taylor with you? A. He joined me in London, yes.

Q. What were the subjects of negotiation with Hambros? A. We had been previously advised through correspondence from Australian Finance & Investment Corporation that Hambros Bank were only prepared to advance \$6 million as a loan against the "Robert Miller". However they required, or they suggested that they could increase this loan if we were able to obtain a guarantee from the Commonwealth of Australia, which we requested, but were refused.

Q. Yes. A. This is prior to my going to London.

Q. Yes. A. Then also through the Australian Finance & Investment Corporation we were advised that Hambros could consider increasing their loan if we were able to obtain a guarantee from Bulkships. ~~I do know that Mr. Taylor spoke to Sir Peter Abeles~~ (Objected to; by direction portion indicated struck out).

Q. Anyway, what did you tell them about the possibility of getting a guarantee from Bulkships? A. They didn't know anything about it.

Q. What was the next proposition you discussed? What was the next proposal? A. The next proposition was to try and convince them to increase the amount of their loan to the company on the mortgage of the "Robert Miller". They expressed concern of becoming too deeply involved, bearing in mind that they had committed themselves solely, to our understanding, anyhow, to the tune of \$7.1 million on the "Amanda Miller", and they felt to provide all the required finance for the "Robert Miller" they would become involved too much in the one company, so at that stage they said they were only prepared to commit themselves to a maximum of \$3 million, but they did say that if we were able to form a consortium of bankers they would be prepared to act as lead bank. They said they would not try to form the consortium - it was up to us to do it. They said did we have any suggestions on which banks we would approach and I told him that we had, and with one exception

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he said okay - that they were prepared to act as lead bank if all the other bankers were prepared to join a consortium or at least come to a meeting. He said that that would be okay with them if the others would at least come to a meeting. In London I went to see the East Midland and International Bank, Chase-Manhattan, Lloyds and Bolsa, and Security Pacific, and they all showed interest in at least coming to a meeting with Hambros Bank to see whether they would be prepared to join a consortium. This meeting was arranged on my last day in London, and when I left they had virtually said that they would be prepared to look at this and form a consortium. 10

- Q. Was the proposal under discussion construction finance or end finance? A. Both. They were both under discussion.
- Q. What kind of finance did they favour when you left? A. They only favoured end finance. They were showing a great deal of hesitancy in committing themselves to construction finance, mainly because of the peculiar methods of building ships in Australia compared with overseas. 20
- Q. You eventually got a letter of intent from them, which I think is in evidence - a letter of 1st June? A. Yes, that is right.
- Q. The amount you were ultimately promised by them in principle was what proportion of the total required? What proportion of the total required was the amount promised? A. 60%. 30
- Q. 60%? A. Yes, that is right.
- Q. And what proportion were you seeking from them? A. 80%
- Q. That takes us to November 1971. Did you have any discussion about that time or shortly after you returned from London with any other financier about funds for the company? A. Yes. It was upon our return from overseas following a discussion in Tokyo that we again approached the A.N.Z. Banking Group for financing - long term financing - of "Robert Miller" and I was told personally that this was too bulky for them to handle. 40

- Q. Did you discuss with Mr. Taylor the question of approaching anyone else at about this time, namely, on your way back from London? Did you discuss that with Mr. Taylor at all? A. When I did return from London I had a discussion with Mr. Taylor and in view of the hesitancy of Hambros Bank, particularly towards construction financing, I told him that I was going to see Mitsui on a proposition, and I briefly outlined what I intended to say to Mitsui. I subsequently had a meeting with Mr. Bjiri -
- Q. His position being what? What was his position? A. Chairman and managing director of Mitsui (Australia).
- Q. What did you say to him? A. I first asked Mr. Bjiri if Mitsui, through our close association over many years in coal exports, would be prepared to loan or make a loan to Millers of \$8 million on the security of the "Robert Miller".
- Q. Yes. A. To my recollection I suggested an interest rate of one-half per cent above the going bank overdraft rate.
- Q. Yes. Was that the whole of the proposal, or not? A. No. I also asked Mr. Bjiri that as Mitsui and Millers had been closely associated, would they be interested in taking up equity participation in the company.
- Q. How much equity did you refer to? A. I put it in two parts - the first part was for the allotment of 2 million shares at \$2 per share, and a further 2 million shares to be taken up at their option at a price of \$2.50 per share.
- Q. What did Mr. Bjiri say? A. Mr. Bjiri said words to the effect that we were talking a lot of money and it could possibly be too big for Mitsui; it was certainly too big for him, and he would have to refer this to Tokyo.
- Q. Did he get in touch with you later? A. I am sorry, Mr. Glass. I could not hear you.

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- Q. Did he get in touch with you later? A. Yes, he did.
- Q. When, approximately? When did he get in touch with you? A. It would have been towards the end of December 1971.
- Q. What did he say when he got in touch with you? A. He said that he had been advised from Tokyo that Mitsui could not be a party to this.
- Q. You said that you had a discussion with Mr. Taylor before you went to Mr. Bjiri? 10
A. Yes, that is correct.
- Q. Was the proposal you put to Mr. Bjiri one that you had discussed with Mr. Taylor? A. I had discussed it briefly with Mr. Taylor, yes.
- Q. Did you report to him on the Bjiri final answer? A. Yes, I did.
- Q. What possibly could the company do if Hambros had come through with their loan on the "Robert Miller"? Did you have any other security you could offer Mitsui? A. At that time we did have other security which we would have had to collate. 20
- Q. What did you have? What other security did you have? A. We had hotel properties at that stage.
- Q. You were, as you understand it, then willing to go on with that proposal, substituting hotel properties for the "Robert Miller"? (Objected to by Mr. Deane; rejected).
- Q. What would happen if the "Robert Miller" was not available as security for Mitsui? What would have been your recommendation to the board as to what it should do to get the Mitsui money? (Objected to by Mr. Deane; allowed). 30
- Q. On the assumption that the Hambros Bank came through with the money and the "Robert Miller" was not available as security, what proposal would you have made to the board to keep Mitsui interested, or what security would you have suggested be offered? A. I would have suggested the security of the available hotels at the time. 40

- Q. In your view could you have made use both of the money solicited from Hambros and the money solicited from Mitsui? (Objected to by Mr. Deane; rejected).
- Q. Now, I think we have come to the December 23rd meeting, before which you circulated, did you not, a report of 21st December? A. Yes, that is correct.
- 10 Q. I believe there was no board meeting in January, is that correct? A. Yes, that is correct.
- Q. And in the month of February had you secured construction finance for the "Robert Miller" or not? A. No.
- Q. By February? A. No, we had not.
- Q. What did you do about that? Did you go back to London? A. I went to London again in January or February of this year.
- Q. Yes. A. And I again tried to convince Hambros Bank that they should provide construction financing. We had altered the terms slightly so that post delivery or construction financing would be to the same extent as the end financing, because in the earlier discussions they were talking up to 80% construction finance with 60% end take out, and there appeared to be a bit of imbalance there, so the proposal was 60% construction finance. They still maintained before they would consider construction finance they would require a guarantee from the Commonwealth of Australia that if the ship delivery date was delayed they would be repaid their construction financing. I think they said they may be prepared to give us some months' grace. But they were concerned that when they had made a proposition it could have been a few months later before it was taken up, and this upset their whole financial structure. I informed them that obtaining Commonwealth guarantee would be completely out of the question. We then discussed an insurance policy - I think they call it a performance bond - whereby you can insure against delivery of a ship. It is quite foreign to us here, but I believe it is common practice overseas. We did attempt to get a performance bond on this, but just prior to this being negotiated the chairman
- 20
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- 40

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of Evans Deakin made some damaging reports in the press which reached London, and the underwriters immediately withdrew any suggestion of a performance bond and, as a consequence, Hambros Bank flatly refused to provide construction finance.

- Q. So when you returned the second time you were still empty-handed? A. Yes, that is correct.
- Q. Did you approach anyone else at about this time? Could I suggest the A.N.Z. Banking Group? 10
A. Yes. I believe I said I discussed it with them on the previous trip, but it was not on that previous trip. It was the trip this year that, from London, I visited Tokyo, and it was there that I was introduced to a senior official of the A.N.Z. Bank, and upon my return to Australia I approached them again.
- Q. With what success? Did you have any success?
A. None at all.
- Q. At the February Board meeting, on 24th February - 20
was there in the hands of the board your report of 22nd February? A. Yes, that is right.
- Q. I believe there was no Board meeting in March, is that correct? A. Yes, that is correct.
- Q. But in February and March had the company secured bill finance from Tricontinental?
A. Yes, we had. To my recollection we had obtained bill finance to the extent of \$1.5 million from Tricontinental.
- Q. Had you taken any decision in February-March 30
about hotels? A. Yes.
- Q. What had you decided in regard to hotels? A. We had decided that in order to help our liquidity difficulties we would sell off certain hotels that we now had, and we would try and expedite the sale of these hotels.
- Q. Which hotels were these? Can you recall which hotels were involved? A. No. I believe that there were six. I can't recall the names.
- Q. Did the final payment for "Amanda Miller" fall 40
due on 19th March 1972? A. Yes.

- Q. Do you remember what that was? Do you remember how much it was? A. \$2.99 million.
- Q. Do you remember from what source those funds were obtained? A. Yes. We had previously negotiated a loan through the B.H.P. This was payable at the time when the final payment on the "Amanda Miller" was to be made. The amount of that, I believe, was approximately \$1.5 million. We utilised \$1 million of the bill financing from Tricontinental that we had previously obtained, and the other \$400,000 I believe was from the sale of hotel properties.
- Q. Now, there were letters from July 1971, to March 1972 between the company and the Australian Shipbuilding Board regarding payments falling due, weren't there? A. Yes, that is correct.
- Q. Both on the "Amanda Miller" and "Robert Miller"? A. Yes.
- Q. And legal action was threatened? A. Yes, that is correct.
- Q. At the meeting on 5th April did you present your report dated March? A. Yes, that is right. I did.
- Q. Now, do you see these entries in the minutes, Mr. Koch, on Folio 244 under the heading of "Increase in Issued Capital"? A. Yes.
- Q. Are you able to add anything from your recollection as to what was said additional to what appears in the minutes? A. No. To the best of my recollection the discussion regarding the possibility of an issue in share capital was between Mr. Nicholl and Mr. Cameron.
- Q. You don't recall anything further being said? A. No, it was a very brief discussion. There was not very much said.
- HIS HONOUR: Q. I did not hear the answer? A. There was only a short discussion. There was not much said at all. It was only quite a short discussion.
- MR. GLASS: Q. The next event, I think - did you try and get any finance at about April this year

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13th September,
1972
(continued).

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Court of New
South Wales
Equity Division

No. 6

Transcript of
Evidence on
Trial of Action

Defendants
Evidence

1st Defendants
Evidence
Leonard Dean
Koch

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1972
(continued)

Exhibit MH.12

through Australian Finance and Investment Corporation from the Commonwealth Superannuation Board? A. Yes. We did authorise Australian Finance and Investment Corporation, in consultation with Tricontinental Corporation, to investigate the possibility of raising - originally we had hoped for \$4 million - on the security of our hotel properties, from any source whatsoever at that stage. They replied back to us and said they thought the Commonwealth Superannuation Board was interested.

10

Q. On 18th May did you make a further submission to the Bank of New South Wales? A. Yes, we did.

HIS HONOUR: I shall add to EX.MH.12, the section Bank of New South Wales, a letter of 18th May 1972 and annexures, and letters of 6th June 1972 and 28th June 1972.

MR. GLASS: Q. On p.3 of your letter of 18th May to the Bank of New South Wales you offered assignment of the interest in the contract between the Commonwealth and Miller for the construction of "Robert Miller". Was that done, as you recall? A. I am not too sure, Mr. Glass.

20

Q. The other thing you offered was the lodgment with the bank of title deeds to various hotels? A. Yes.

Q. Was that done? A. Yes.

30

Q. Now, did you receive a letter of 18th May notifying you of your unsuccessful efforts to get money from the Australian European Finance Corporation? A. I don't recall what date the letter was, Mr. Glass, but there was correspondence.

HIS HONOUR: There will be added to Ex. MH.12 from the Australian Finance and Investment Company portion two letters of 5th May 1972 and 18th May 1972, with the annexures to the letter of 5th May 1972.

40

Exhibit MH.12

MR. GLASS: Q. Did you prepare a report bearing date May 1972 which was circulated for the directors who met on 1st June 1972? A. Yes, I did.

(Miller's Board Minutes, 1st June 1972, tendered and admitted as Ex. MH.15).

- 10 Q. You see a reference in the Minutes of 1st June to the anticipated long term finance from the Commonwealth Superannuation Board? You see that reference in the minutes? A. Yes.
- Q. What happened about that? A. Just prior to that meeting a meeting was held with the Commonwealth Superannuation Board and the expression was given that although we were only counting on a loan now of £2½ million on the security of the hotels offered that they were hopeful they would be able to increase the extent of their loan to £3 million, and I just reported this to the Board because it differed from my management report.
- 20 Q. Did you ever get that loan? A. No, we did not.
- Q. What happened to prevent you getting it? A. We were advised - they were aware that we required settlement of this loan by 30th June 1972, which they were hopeful of getting.
- Q. You needed it by 30th June for what particular reason? Why did you require it by then? A. To acquit our debt to the Commonwealth regarding payments owing on the "Robert Miller".
- 30 Q. How much did that amount to? A. £8 million.
- Q. Were they able to provide you with the money by 30th June? A. No.
- Q. Where did you turn to to get money? A. We turned to Tricontinental Corporation.
- Q. How much did you raise from them in June 1972? A. £3 million.
- 40 Q. Was the £8 million paid to the Commonwealth? A. Yes, it was.

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Q. When was it paid to them? A. Approximately
\$2½ million was paid progressively from the
end of May to the end of June, and the balance
of \$5.2 million was paid on 30th June.

Q. From what source did you raise the \$5 million
that did not come from Tricontinental? A.
From the Bank of New South Wales.

Q. Did the sale of hotels play any part in the
raising of the money? A. Yes, it did.
When the money was realised from the sale of
those hotels - which, as I said, was towards
the end of May, through June - as we received
the money we paid it to the Commonwealth when
it was received by us. The total I believe
amounted to about \$2.8 million.

10

Q. So it would be \$2.8 million from properties,
\$3 million from Tricontinental, and the
balance from the Bank of New South Wales,
making \$8 million paid to the Commonwealth
before 30th June as payments due on the
"Robert Miller"? A. Yes, that is right.

20

Q. Now at that stage, 30th June, you were quit,
so far as the Commonwealth was concerned,
up to that point? A. Yes.

Q. Were there any other company assets which
had not by then been given as security?
Did you have any other assets left to pledge?
A. No, we had not. Can I correct that?
Could I say no major assets, because we
could talk of furniture and fittings as
assets, and a couple of coal trucks. But
nothing of any substantial kind that could
have been pledged.

30

(Further hearing adjourned to 10 a.m.
on Thursday, 14th September, 1972).

EQUITY DIVISION

No. 1240 of 1972

CORAM: STREET, C.J. in Eq.

In the Supreme
Court of New
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AMPOL PETROLEUM LIMITED v. R.W. MILLER (HOLDINGS)
LIMITED & ORS. SIXTH DAY: THURSDAY 14th
SEPTEMBER, 1972.

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(On the application of Mr. Deane Mr. Leonard
was exempted from the order in regard to
witnesses.)

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10 MR. GLASS: There is a small correction, I would
suggest on p. 205 of the transcript the third
question from the bottom of the page. It
reads "Since your appointment as General
Secretary..." It should be "General Manager".

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The only other observation in regard to
the transcript is that it is unfortunate that
those portions of documents to which I directed
your Honour's attention yesterday are not
noted in the transcript.

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(continued)

20 HIS HONOUR: Mr. Glass, the portions of Ex. MH.13
- that is, the minutes and management reports
to which you drew attention - have been marked
by me with a red line in the margin.

Exhibit MH.13

LEONARD DEAN KOCH
On former oath:

HIS HONOUR: You are still on the former oath
administered to you, Mr. Koch.

WITNESS: Yes, your Honour.

30 MR. GLASS: At p. 218 of the transcript, the third
question from the bottom, the witness referred
to a letter of November from Shell. I tender
that letter, or a photo-copy of it, bearing
date 17th November 1971.

HIS HONOUR: Apart from relevance is there any
objection to this document? (No response).

HIS HONOUR: The letter from Shell to Miller,
17th November 1971, will be admitted as Ex.
MH.16.

Exhibit MH.16

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bit
MH.
14

MR. GLASS: On p. 198, the sixth question, there is a reference to the negotiation of short-term finance through Hill Samuel (Australia) Limited. I tender, with respect to that, two documents to be found in MH.14 in the Australian Finance and Investment Company Limited compartment. They are a letter of Hill Samuel of 5th July 1971 and the deed which it encloses. (Objected to by Mr. Deane.)

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bit
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HIS HONOUR: I overrule the objection. I shall add to Ex. MH.12 the letter of 5th July 1971 and the enclosed deed from the portion entitled Australian Finance & Investment Company.

10

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(continued)

MR. GLASS: Q. That letter of 5th July refers to bills of $\$ \frac{1}{2}$ m. discounted by Hill Samuel. When was that bill finance originally made available? A. The $\$500,000$ from Hill Samuel was utilised to repay -

Q. When was it made available? I think it was in April, wasn't it? A. I am just trying to get the sequence of the Chase letter. It was in April. It would have been in April, yes.

20

Q. I want to take up with you now the short-term borrowings which were going to fall due in the financial year ended June 1973? A. Yes.

Q. Do you recall that you spoke on that subject at the Board meeting of 6th July? Do you recall that? A. Yes, that is true.

30

Q. As a matter of convenience can you turn to the minutes of that meeting and, in particular, to folio 267? Now, of the various sums falling due which total $\$10.7$ m. the last one was money due to the Bank of N.S.W., was it not? A. Part of it.

Q. Part of it? A. Yes.

Q. How much was due to the Bank of N.S.W.? A. $\$4.2$ m. was due to the Bank of N.S.W., and the remaining $\$250,000$ was for another deposit that we had received.

40

HIS HONOUR: Q. Another - A. \$250,000, from another lender, but it fell due in June 1973.

MR. GLASS: Q. Who was that? Was it Tricontinental? A. I am not sure whether that one was Tricontinental. I know that of the total of \$10.7 m. Tricontinental's contribution was \$4.875 m.

10 Q. Of the \$4.2 m. which was going to be payable to the Bank of N.S.W., had the whole of that been advanced in June 1972? A. No, it had not.

Q. How much by then had been advanced? A. \$2.2 m. I am sorry, \$2.4 m.

Q. When was the balance of \$1.8 m. due to be advanced? A. Upon the launching of the "Robert Miller" which is anticipated about November or December 1972.

20 Q. And of the \$10.7 m. how much in all was going to be payable to Tricontinental? A. I think the figure is \$4.87 m.

Q. Would it be correct to say, then, that apart from money due to Mitsui, Tricontinental and the Bank of N.S.W., the balance was deposits owing to various other lenders? Would that be correct? A. Yes, that is right.

30 Q. As at 30th June 1972 were there additionally long-term borrowings which were going to fall due for repayment in the ensuing 12 months? A. They were not going to fall due in total, but repayments were to be made on these long-term borrowings during the next 12 months.

Q. What repayments were they? (Objected to by Mr. Deane; allowed.)

Q. What were the long-term borrowings falling due for repayment in that 12 months period? A. They were from three sources. One was from Hambros Bank regarding repayments due on the loan for the "Amanda Miller".

40 Q. How much was that, approximately? A. That was approximately \$750,000.

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(continued)

Q. Yes. A. There was another repayment or further repayments due on the loan from the Australian Resources Development Bank.

Q. Yes. How much was that? A. To my recollection, just in excess of \$400,000. (Objected to by Mr. Deane.)

Q. Did you prepare a schedule deriving from information from the company's records?
A. Yes I did.

Q. With his Honour's leave, would you care to turn to that in search of the precise figures? I think if you turn to p.29? A. Yes, I have that.

10

HIS HONOUR: Mr. Glass, if you have a schedule, and if you have the supporting material from which it is derived, which may be in the file, which is not yet all before me -

MR. GLASS: Q. Where would one find the information which you extracted regarding long-term borrowings in the company's records?
A. Payments due to the Australian Shipbuilding Board regarding "Robert Miller" would be found in the sale contract we have with the Commonwealth. The Australian Resources Development Bank repayment would be in correspondence from the Bank of N.S.W. The Hambros Bank loan regarding the "Amanda Miller" would be found in correspondence from Hambros Bank, where each six months they tell us what will be the interest calculated for the following six months. Repayment of principal is static.

20

30

MR. GLASS: On my undertaking, your Honour, to produce those documents may the witness now give -

HIS HONOUR: I think perhaps the convenient course would be if you show Mr. Deane the schedule or the extracted figures; it may be able to go in as an Exhibit. Is it in a practical form, or is it part of your brief?

40

MR. GLASS: It is part of my brief, but I can tear it out of Mr. Roger's brief (Copy produced.)
(Loan repayment commitments tendered and admitted as Ex. MH.17.)

Exhibit MH.17

HIS HONOUR: I will have it noted that this document goes in as evidence subject to its admissibility being reconsidered either wholly or partly if application in that behalf is made on behalf of any other party.

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MR. GLASS: Q. The document which is tendered, Mr. Koch, gives a figure of \$8,941,900 in the short-term borrowings at 30th June?
A. Yes.

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10 Q. What is the explanation of the difference between that and the \$10.7 m. in the minutes?
A. The difference there is that in the minutes of the meeting held on 6th July I brought into account the full amount of the loan from the Bank of N.S.W. amounting to \$4.2 m.

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Q. That accounts for the difference of \$1.8 m. That part of the Bank of N.S.W. loan was not payable until the launching of the "Robert Miller", expected in November 1972? A. Yes.

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20 Q. But due for repayment by June the following year nonetheless? A. Yes.

Q. Now, what was the position regarding bank overdraft accommodation as at 30th June 1972?
A. At 30th June 1972 our bank overdraft was still at \$1.8 m.

Q. Is that included in any of the amounts totalling \$14.3 m.? A. No, it is not included.

Q. Do the amounts totalling \$14.3 m. include any provision for interest? A. No.

30 Q. In addition, was the company on 30th June 1972 committed to forward expenditure in the ensuing 12 months of a capital nature? A. Yes, we were.

Q. What was involved? A. With hotels we were committed, or it was necessary expenditure, amounting to \$1.8 m.

Q. Yes. A. With collieries we were committed, or it was necessary expenditure - (Objected to by Mr. Dean.)

40 MR. GLASS: Perhaps I could now get on the record

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*Exhibit MH.4

the various heads which collectively make up the \$4 m.? I think that figure has been mentioned. It was mentioned by Mr. Cameron.

Q. (Ex. MH.4 handed to witness) Have you got * that document? A. Yes, I have.

Q. I think you said yesterday that the columns from 1963 to 1971 inclusive are based on published financial statements? A. Yes, that is correct.

Q. And the 1972 column - who took out the figures which are included in that column? A. Mr. Ellis-Jones, the company secretary. 10

MR. GLASS: I will be calling Mr. Ellis-Jones in relation to them.

Q. Now, do the 1972 figures show the commitments for capital expenditure? A. Yes, they do.

Q. A total of \$4.012 m. at the bottom? A. Yes.

Q. To what headings of expenditure does that figure relate? What subjects? A. It would relate to collieries, hotels, taverns. I would not know what else it related to, Mr. Glass, as I did not compile these figures. 20

MR. GLASS: I will have to leave that for Mr. Ellis-Jones.

Q. Given that there were \$18 m. to be found for repayment of short and long-term borrowings, and \$4 m. to be found for capital expenditure in the ensuing 12 months - \$22 m. - plus bank overdraft of nearly \$ 2 m., plus interest on all of the sums except capital expenditure, what sources of outside finance were available to the company to meet those requirements for cash? A. The only agreement in principle we have at the moment is the Hambros Bank commitment regarding the construction of the "Robert Miller". 30

Q. For how much? A. It is a U.S. dollar loan. \$U.S.8.8 m. but we anticipate, subject to currency fluctuations, it will be in the vicinity of \$A.7.4 m. 40

- Q. What about Tricontinental? A. Well, Tricontinental - we have not anything guaranteed from Tricontinental except the bills that we now have from them.
- Q. Mr. Koch, were there any areas - my question was limited to outside sources? A. Yes.
- Q. But there was - for what it produced - an internal cash flow as well? A. Yes.
- 10 Q. Now, were there any areas of development which were curtailed in the period up to the end of June 1972 for financial reasons? (Objected to by Mr. Deane; allowed.)
- Q. May I ask you first of all about the Iron Bark Colliery? What happened there?
A. ~~With the colliery at Iron Bark we were committed for the development of this colliery to expenditure totally \$6 m.~~ (Objected to by Mr. Deane; by direction answer struck out as indicated.)
- 20 Q. What plans did you have for the Iron Bark Colliery, and to what stage had they progressed? A. Our plans for the Iron Bark Colliery were to develop this colliery to meet the future demands of the export coal industry. It was a completely new washery, and one which Sir Roderick Miller had given instructions to be developed to attain a through-put of 500,000 tons of saleable coal per annum.
- 30 Q. When had this plan been considered? A. It would be sometime in 1970, I would say.
- Q. To what extent, if any, was it pursued?
A. Well, it was not pursued very far. We went as far as possible with this project, but then we could see the extent of capital involved in the project, and this was one of the functions of the finance committee which Mr. Taylor formed upon his appointment as chairman, and it was decided by the finance committee that expenditure for the development of the Iron Bark Colliery must be deferred, and any commitments which we were involved with wherever possible we were to endeavour to get out of that commitment.
- 40

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Q. When was this decision taken? A. Shortly after Mr. Cameron's appointment to the Board - June of last year.

HIS HONOUR: Q. What was then the state of the export market for coal? A. The state of the export market regarding Japan had deteriorated, as I mentioned yesterday, but we were developing this colliery not only for the Japanese market but for the future of the European, and particularly the South American market, and the reason we had to go ahead with this project is because it takes a considerable time once you start development of a colliery until you finally win the coal. It can take up to two years. 10

MR. GLASS: Q. How much was involved in carrying out the plan? A. \$6 m.

Q. You said yesterday - you told us yesterday about the withdrawal of your objections to product tankers being built by Caltex. What was the reason for not pursuing these objections? (Objected to by Mr. Deane.) 20

Q. How far had the objections proceeded? A. The objections had proceeded quite a distance. I personally met with senior officials from the Department of Shipping and Transport when the company became aware that Caltex and Howard Smith both intended to build product carriers. We maintained that as we were the pioneers of Australian coastal tankers that, if a replacement vessel or an additional vessel was required on the Australian coast, we should have been given the first opportunity to construct such a tanker. 30

Q. When did you withdraw your objection? A. May 1971.

Q. For what reason? A. The reasons - the main one was that we were having difficulty with the repayments on the "Amanda Miller" as well as the "Robert Miller" and we just could not see our way clear at that stage - we could not see at that stage how we could finance another tanker. 40

Q. What was the project regarding incinerators,

10 and how far had it proceeded? A. The project for development or diversification into the incinerating business came from enquiries through a company called Goodrid Incinerator Company, whereby they asked us if we would be prepared to buy the company out, and so enter the incinerating business. We considered this for sometime, but here again the amount of money involved for diversifying it was \$500,000, and we just did not have the money.

Q. To what time did the company continue to expand its hotel interests? A. 1969.

Q. When was the last hotel that it opened? When did it open its last hotel? A. It opened its last hotel in 1969. It was the North St. Marys Hotel.

Q. Have any opportunities of building new hotels occurred since then? (Objected to by Mr. Deane; allowed.)

20 Q. What is the answer to that? Have you, or have you not, had opportunities to acquire further hotels since 1969? A. Yes, we did have.

Q. What sites have been offered? A. Well, there were land sites as well as hotels.

Q. Let us have the land first. What land sites were you offered? A. There was a site as - I am getting confused with suburbs again, not knowing them very well, Is it Granfield?

30Q. Glenfield? A. Yes. Warrilla. I can't recall any others, but -

Q. In price how much for sites? Do you recall that -

HIS HONOUR: You can prompt the witness, Mr.Glass.

MR. GLASS: Q. Emu Plains? A. Yes.

HIS HONOUR: Mr. Koch, I am allowing Mr. Glass to prompt you. Don't just agree because he says so. It is your knowledge we want.

WITNESS: Yes.

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MR. GLASS: Q. How far did things develop with the Emu Plains site offer? A. I would have no idea.

Q. Was a price ever fixed? A. I am not sure of that, either.

Q. Was there a site at Barrack Point? A. Yes, Barrack Point.

Q. Now, as regards to hotels, can you remember the names of any hotels that were offered?
A. There was a hotel at Pennant Hills, the Oxford at Petersham, and I think it is called The Cabbage Tree at Fairy Meadow. 10

Q. You mentioned Warrilla? A. Yes.

Q. Were any of these hotels the subject of offers by the company? A. This I would not know - whether they were direct offers from the company or direct offers to the company.

Q. Did anything come of any of these hotels or sites? A. No, we did not go ahead with any of these. 20

Q. You say you did not go ahead with any of them? A. No, we did not.

Q. What was the reason for not going ahead with any of them? (Objected to by Mr. Deane.)

Q. You told me the site at Emu Plains was not gone ahead with. Remembering that you are speaking from your own recollection, how did it come about that the Emu Plains site was not pursued? A. From my own recollection, Mr. Glass, I would not know why. If there were any specific reasons for these projects not being proceeded with I would not know. This would be the management of the hotel section who would know that. 30

Q. Are you able to tell us anything in regard to the failure to modernise selected hotels? A. I only know that it was deferred. But the actual details of that - here again, I would not know the intimate details.

Q. Did you take out figures relating to the 40

hotels which have in fact been sold in the two years ended June 1971 and June 1972?

A. Yes, we did.

MR. GLASS: I have a schedule in this respect that I am prepared to offer in evidence.

MR. DEANE: I object to the evidence, but provided the witness verifies the document I do not object to it being done in this way.

10 HIS HONOUR: I shall admit as Ex. MH.18 a summary of hotel trading results. I note that the document is admitted, but it is subject to its admissibility being reviewed if adequate verification is sought by the other parties is not proffered by Millers. *

Are you content with that, Mr. Deane?

MR. DEANE: Yes.

MR. GLASS: Q. Are these takings in the first column, or the price realised on sale? A. No, in the first column it is revenue - annual revenue.

20

Q. Revenue from the hotels? A. Yes.

Q. So that you have not set out in the schedule the amount realised on the sale of the hotels? A. No.

Q. What was the reason for the sale of those hotels? (Object to by Mr. Deane; rejected.)

Q. Have you got your copy of this schedule? A. Yes, I have.

30 Q. Now, were these hotels sold pursuant to a general resolution relating to hotels, or individual resolutions relating to each hotel? A. It commenced at the implementation of the finance committee that was formed, as I said before, when Mr. Taylor was appointed chairman, and this was part of the overall plan regarding the economies for the company, and also there were other things involved as well, but it was decided by the finance committee and recommended by the Board that the sale of selected hotels be initiated in an endeavour to raise up to

40 £3 m.

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- Q. And were the hotels set out in this list sold pursuant to that decision? A. The Board did not give any decision on which hotels should be sold. They left that to the management, and these were sold pursuant to that direction from the Board.
- Q. Mr. Koch, did you in the month of June have any discussions with representatives of Howard Smith? A. Yes.
- Q. When was the first of such discussions? 10
A. The first discussion was on 16th June.
- Q. Where was it held? A. It was held in the Board room of our office at 19 Bridge Street.
- Q. Who was present representing Millers?
A. Mr. Taylor, Mr. Conway and myself.
- Q. Who represented Howard Smith? A. Mr. Howard Smith, Mr. Griffin, the general manager, and Capt. Evans, the deputy general manager.
- Q. Can you tell us what the substance of the conversation was on that occasion? A. Yes. 20
First of all, the meeting was requested by Howard Smiths. They rang, I think. I don't know who rang. But I know our chairman told me that Howard Smiths wished to have a meeting with us, and were coming around, I think, at about 10 or 10.30 that day.
- Q. Yes. A. We let them in the Board room, and Mr. Howard Smith said that they had read about the proposed Ampol offer for the shareholding of Millers and he asked us if we would be prepared to sell our tankers to Howard Smiths. 30
- Q. Yes. A. Mr. Taylor said that under no circumstances would we contemplate such a happening.
- Q. Did he give a reason? A. The reason Mr. Taylor gave was that he felt that in his own mind the tankers were what Ampol were mainly interested in anyhow, and also that it would contravene - I am just recollecting the actual statement - the conditions relating to the Ampol offer. 40

- Q. Yes. What was next discussed? A. Mr. Howard Smith kept emphasising the fact that they wished to purchase the tankers from us.
- Q. Yes. A. His main reason being given that he felt that as they also were an independent tanker operator on the coast, and in view of the efforts Sir Roderick Miller made in pioneering Australian tankers, that in his opinion it would be a pity for our tankers to revert back to the oil companies' hands.
- 10 Q. Was anything said about the reason why it was undesirable for the tankers to be wholly in the hands of oil companies? A. Well, we felt it would be undesirable -
- Q. Was this expressed at the meeting? A. Yes, it was expressed at the meeting. It was discussed at the meeting - the desirability of keeping the tankers in either Millers' hands or - (Objected to by Mr. Deane.)
- 20 Q. Who was it that expressed this desirability? A. Mr. Taylor.
- Q. What did he say? A. He said that he felt that it would be desirable to keep our tankers in the hands of an independent operator rather than revert back to the oil industry.
- Q. Did he say why? A. Yes. He said that in his opinion the Government - the Commonwealth Government would not be particularly happy to see these tankers revert to the oil companies because the Government would then lose their yardstick as a control over the freight rates of Australian tankers.
- 30 Q. Did the other people understand what he meant by that? A. Yes, they all understood. Could I make a comment? (Objected to by Mr. Deane.)
- Q. Was anything further said about the loss of the yardstick? A. Could you repeat the question, Mr. Glass, please, I could not hear.
- 40 Q. Was anything further said at that meeting of the reason why the Commonwealth Government would be unhappy to see these wholly owned by oil companies in relation to the question of

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operating costs, or not? A. It was emphasised at the meeting that with independent operators owning tankers on the coast, particularly as far as Millers are concerned, the Department of Shipping and Transport have always had free access to our operating costs, and in fact we have given them to the department, and the result would be that if our tankers did revert to an oil company the question of whether these freight costs and operating costs would be available to the Government is questionable.

10

Q. Well now, was anything else said about offers running from Howard Smith to Millers? A. At that time Mr. Howard Smith was still hammering - for the want of a better word - at the fact that he still wished us to sell him the tankers. Mr. Conway said this was out of the question, but we would be pleased if they gave consideration to making an offer for the shareholding of Millers. Mr. Howard Smith then said - and I use his own words - "You mean we make an offer for the whole shooting-box?", and Mr. Conway said "Yes".

20

Q. Did anything further occur at that meeting? A. Mr. Howard Smith - after Mr. Conway had made this statement to him - said words to the effect "How on earth could we succeed with an offer when you have two shareholders owning more than 55% of the shareholding in Millers? All they would have to do is get together, and we would have no chance".

30

Q. Yes. A. Mr. Conway then said that we had given consideration to this happening since the Ampol offer was received, but at this stage we were of the opinion that Ampol and Bulkships were not working together.

Q. Did he give any reason for that belief on that occasion? A. Yes. We were quite confused - (Objected to by Mr. Deane.)

40

Q. I am asking you what reason, if any, Mr. Conway gave on that occasion for the view that you have just recounted? A. The reason Mr. Conway gave for his views was that in his opinion if Ampol and Bulkships were acting collectively he could not understand why in fact Ampol increased

their offer from \$2.25 per share to \$2.27 per share as, if they were working together, there was no reason for Ampol to increase the price of their bid.

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- Q. Did anything further take place on that occasion? A. To my recollection Mr. Howard Smith then said, "Oh well, we will think about it".
- 10 Q. Well, when was the next time you were involved in any contact between Millers and Howard Smith? What was the next occasion on which there was any contact between you? A. The next time was on 19th June.
- Q. As a matter of interest, was the 16th a Friday, and the 19th a Monday? A. Yes, the 16th was a Friday and the 19th a Monday.
- Q. What happened then? A. I am not certain who the representative from Howard Smith was who rang, but I received a message - I believe it was Mr. Maxwell, the secretary of Howard Smiths had rung. I don't recall him ringing me. It could have been our secretary. But they asked if Mr. Maxwell, the secretary, and also Mr. Mifflin, the chief accountant, of Howard Smiths could come around and see us, which they did.
- 20 Q. Who was present? Anyone besides Maxwell, and Mifflin from Howard Smith? A. No, they were the only two from Howard Smith.
- 30 Q. Who was present representing the Millers? A. Mr. Ellis-Jones, Mr. Murphy, Mr. Walker, Mr. Conway and myself.
- Q. Now, what transpired then? A. Mr. Maxwell said that following the meeting held with Howard Smith and ourselves on 16th they had been directed by Mr. Howard Smith to ask if we would be prepared to give them relative (sic.) information regarding the company virtually as a result of the meeting that we had held on
- 40 the 16th.
- Q. To which what response was given? What was said in answer to that? A. I said "Yes", that we would be quite happy to give them the

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*Exhibit MH.4

information that they required, depending on what it was.

- Q. What did they require, and what was given?
A. First of all they had a copy of our 1971 balance sheet and published accounts, and the main information they required was updating this information as far as we could from June 1971 till the present time.
- Q. To what extent were you able to do that?
A. Well, we did it in conjunction with our half yearly figures to 31st December 1971 and just estimates of what we considered would be the position as at 30th June 1972. 10
- Q. Were those figures that appear under the first column of Ex. MH.4 available at that meeting? *
A. No. If they were, they would only have been estimates, because we did not have this information available at that time.
- Q. You have said that they asked for, and you gave them, estimates bringing the financial position up to date? A. Yes. 20
- Q. What else was asked for, and given? A. They asked us about our charter arrangements for the "Amanda Miller", which I told them what the arrangements were. They asked what was our charter rate, and I said "I would be surprised if you don't already know it." They said "Well, it doesn't matter. We feel we know it close enough, anyhow." They asked details of our time charter party to see if there were any abnormal conditions in the charter party, which apparently there were not so far as they were concerned. At that meeting we did not give them any written documentation at all. It was just verbal, and they made notes of our discussion. 30
- Q. Is that all that happened on that date? A. Yes, that is all that took place on that occasion.
- Q. When did you see the Howard Smith people next? A. They rang up again the following morning, which was the 20th June. 40
- Q. Tuesday, 20th June? A. Yes, that is correct.

They rang up and said that they had a few more questions they would like to ask us - could they come and see us again. I said "Yes, that will be quite O.K."

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- Q. Who was present on that occasion? Were the same people present? A. Yes, the same people were present.
- 10 Q. Were there any additional people? A. Not at the commencement of the meeting to the best of my recollection, but I do know that towards the end of the meeting Mr. Goddard from Cooper Brothers arrived, and I believe Mr. Aston was with him, but I would not be too sure.
- Q. Before they arrived what information was exchanged? A. Just answering any queries they had on the information - (Objected to by Mr. Deane.)
- 20 Q. What did they ask, so far as you can recollect, and what did you tell them? A. I can't recall specifically what it was. It was just virtually a carry on from the previous meeting
- Q. When Mr. Goddard - you say that he is from Cooper Brothers? A. Yes, that is right.
- Q. When he arrived did he have any document with him? A. Yes, he had a draft copy of the report that Cooper Brothers were making in relation to Millers and the Ampol takeover bid.
- 30 Q. What was said in respect of that draft document? Perhaps I ought to make this clear. How did the draft compare with the document which is in evidence as Ex. KK? A. I did not see the draft copy of the Cooper Brothers report.
- Q. Well, who did see it? A. Mr. Goddard said that he had it in draft form, and before he completed it or put it in proper presentation he would like us to hear what the outcome of his findings were.
- 40 Q. Yes. What did he say on that topic? A. First of all he said "Well, this is a confidential report." He said that he realised that there were two people present that were not from Millers, and did he have permission to comment

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upon his report in front of Howard Smith
representatives.

- Q. What answer was given to that? A. I said
"Yes, you have that permission".
- Q. What authority did you consider that you had
to give that permission? A. I had discussed
this - I believe I 'phoned the chairman on
this, and told him of what we proposed to do,
and said "I feel we should allow Howard Smiths
to hear the summary of Mr. Goddard regarding
the report." Mr. Taylor agreed with me, and
it was from that I said that Mr. Goddard had
permission to discuss the details of it. 10
- Q. Now, was that the only occasion that the
report was revealed to people outside Millers?
A. Yes. To the best of my knowledge, yes.
- Q. Well then, was information in the report
disclosed to anyone besides Howard Smith
outside of your organisation? A. You are not
referring to directors as well, are you? 20
- Q. Outside of your organisation? A. No, it was
not.
- Q. I am sorry. I misunderstood you. Was
information of a confidential nature relating
to Millers position disclosed to other
organisations at about this time? A. Yes,
but not the Cooper Brothers report.
- Q. But other information? A. Yes.
- Q. What other persons were given access to
confidential information about Millers position
about this time? (Objected to by Mr. Deane;
question not pressed.) 30
- Q. You said that there was no objection. What
was then disclosed to the Howard Smith people
by Mr. Goddard? A. Mr. Goddard read from his
report, and he only summarised the salient points
as he saw them.
- Q. What did he say? A. He referred specifically
to the profitability of the company not only
as regards the present but the future
profitability as far as the information that 40

he was given permitted him to do so. He referred to each individual operation of the company. He discussed the position in regard to tankers, hotels, collieries. He also gave his opinion as to the valuation of the company's shares as per the information that he was given in his investigation.

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10 Q. Do you recall what valuation he expressed? A.
Well, it was subject to a lot of provisos. He
felt in his opinion that the asset-backing of
the shares was not a significant feature of
the company's position, particularly with
the unknown regarding the colliery interests.
He also stated that his valuation of the
tankers was governed by an offer which we had
received from H.C. Sleigh, and he just took
that as his valuation. The hotels valuation
he took from the valuation that we had
previously had carried out, and he took this
20 as being factual, but he was concerned with
the valuation - which again we had carried
out independently - he was doubtful as to the
value placed on this, and he would not be
prepared to commit himself as to whether these
were true values or not.

30 Q. With these reservations did he express any range
of asset-backing of the shares, or did he not?
A. Without looking at the document itself,
the asset-backing - to the best of my
recollection it was to the order of - it
varied from, I think, £2.20 to about £2.50
or £2.70. He did not place much importance on
the asset-backing of the shares.

Q. Now, when was it that you next attended a
meeting of Miller and Howard Smith representatives?

A. It was on 4th July.

40 Q. Between 20th June and 4th July did you have
any communication with them? A. Not to my
recollection. I may have spoken - I think I
spoke to Capt. Evans once regarding tankers -
regarding their "Nancy Heath" and our smaller
tankers. But it was just a general conversation.

Q. Where did the meeting occur on 4th July? A.
I beg your pardon, Mr. Glass, I could not hear
you.

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- Q. Where did the meeting occur on 4th July?
A. At the Board room in Howard Smith's office.
- Q. Who was there? A. Mr. Howard Smith, Mr. Trotter, who was a director of Howard Smiths, Mr. Griffin, Capt. Evans, Mr. Taylor and myself.
- Q. What was the first matter that you recall being raised? Incidentally, what time of day was this? A. 12 noon.
- Q. What was the first matter that was raised?
A. Mr. Howard Smith asked us once again would we be prepared to sell the tankers to Howard Smiths. 10
- Q. Yes. Could I ask whether the joint announcement of 27th came up first? A. Yes, it did. When we sat down at the Board table Mr. Howard Smith said that they proposed sending a letter to the Sydney Stock Exchange concerning the joint announcement made by Ampol and Bulkships regarding their intention regarding R.W. Miller & Company. 20
- HIS HONOUR: Mr. Glass, you have jumped from 20th June across to the 4th July, have you?
- MR. GLASS: Yes.
- HIS HONOUR: Did Mr. Koch say the 4th July was the next meeting or the next point of contact in which he participated?
- MR. GLASS: Except for a discussion with Capt. Evans about tankers.
- HIS HONOUR: About tankers?
- MR. GLASS: Yes. About the "Nancy Heath". 30
- Q. Do you have any recollection of any other exchange between you and anybody from Howard Smiths apart from that conversation with Capt. Evans about ships? A. No specific conversations, but I think I would have spoken to Mr. Maxwell and possibly Mr. Mifflin as well, because they were still talking about the information we had given them at the meetings on 19th and 20th, so I would have spoken to those three people from Howard Smiths. 40

Q. Well now, you say that the first matter discussed was the joint announcement. Mr. Howard Smith said they were thinking of sending a letter to the Stock Exchange. Did he tell you what the terms of the letter were? A. Yes, he did, but I don't recall what they were.

10 Q. What was said? Was anything said about that from the Miller side? A. Mr. Taylor said "This is a coincidence. We propose sending letters along the same lines to both the chairman of Ampol and the Chairman of Bulkships." He then said "Perhaps Mr. Trotter might care to read the letter out to those present at the meeting.

(Short adjournment)

20 MR. GLASS: Q. Mr. Koch, I have reminded you on occasions about the joint announcements. Before that you were going to tell us what Mr. Howard Smith said at the meeting. After the announcement had been talked about, what was the next step? A. Oh, I am sorry. Mr. Howard Smith then said that he would like to ask us again would we be prepared to sell our tankers to Howard Smith. Mr. Taylor replied words to the effect, "That is completely out of the question. Under no circumstances will we sell our tankers to you but if you are interested in a collier, I have one to offer you."

30

Q. Did that invoke any interest? A. Well, the interest was that Mr. Howard Smith then said, "I am not interested in colliers. I am interested in tankers only."

40 Q. Well, what was the next thing said? A. Mr. Howard Smith then said, "Well, it appears that you have made up your mind on this matter," and Mr. Taylor said, "Yes." Mr. Howard Smith then said, "Well, we have another proposition to put to you," and he asked Mr. Maxwell, the Secretary of Howard Smiths, if he would read out the proposition.

Q. Yes. What did he read out? A. Mr. Maxwell said that Howard Smith proposed to ask for the allotment of 3,000,000 shares in R.W. Miller (Holdings) at a price of \$2 per share. The

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terms of payment that they proposed were ten cents on allotment and the balance when three million and one thousand acceptances to the Howard Smith offer to shareholders in Millers was received.

- Q. Well now, what was said by anyone on Millers behalf to that? A. Mr. Taylor said that this would most certainly be unacceptable and he was not prepared to consider it.
- Q. Did he say why? A. He said that he felt that the Board of Millers would not be a party to such a proposition. 10
- Q. Did he specify any part of the proposition or the whole proposition? A. To the best of my recollection, the whole proposition.
- Q. Well, who else spoke for Millers about it? A. Mr. Taylor asked me my opinion on the proposal and I supported Mr. Taylor on his views and said that I couldn't see the Board of Millers accepting such a proposition and also that it was in contravention to the requirements under the Stock Exchange. 20
- Q. Did you express any reason why you thought it would be unacceptable to the Board? A. Yes, I said, firstly, the price offered of \$2 a share would not be acceptable to the Board. I don't recollect saying anything else.
- Q. What followed that discussion? A. I then asked would Howard Smiths be prepared to sell their tankers to Millers and 30
- Q. What tankers were referred to? A. I told them I was referring particularly to their vessels, the "Howard Smith" and the "Nancy Heath" or, if they so desired, their proposed new construction tanker that was about to be constructed to replace the "Nancy Heath" but I said that I would prefer the two tankers that were then in operation.
- Q. What else did you say regarding that proposition? A. I said that if Howard Smiths were prepared to sell the two tankers to Millers that I had estimated that the value that they would want for those two vessels would be approximately \$7½ m. 40

Mr. Maxwell said, "Well, your arithmetic isn't far out." I then said, that if Howard Smiths were prepared to sell the tankers to us we could propose to allot to them 3,000,000 shares at £2.50 per share. I then said that if this was acceptable and was carried by our Board that we could then make an issue to them of ten per cent of our then issued capital.

- 10 Q. Issue to them of ten per cent? A. Issue to them, Howard Smith, of ten per cent of our then issued capital which would have then been 12,000,000 shares which would have been a further placement of 1.2 million shares at £2.50 per share making a total cost of £3,000,000.
- 20 Q. Now, was anything said by you as to how this matched with the Stock Exchange regulations? A. I said that under the Stock Exchange regulations that a placement of ten per cent of the issued capital of the company was within their requirements.
- Q. Did you say anything about £3,000,000 which would result from such a placement? A. I don't recall mentioning anything about that at that meeting.
- 30 Q. Well now, did any agreement arise from that meeting? A. Mr. Maxwell said, "I like your proposition better than ours." Mr. Howard Smith then said, "Well, I don't, and under no circumstances are we going to sell our tankers to Millers." He then said, "Well, you will have to leave it with us and we will be in touch with you."
- Q. When did that happen? A. That was at the conclusion of the meeting.
- Q. When were they in touch with you? I am so sorry, I have gone ahead. That was 4th July? A. 4th July, that's correct.
- 40 Q. When did you speak to anyone regarding this matter next? A. On the following morning, 5th July, I called our management or senior management team into my office and related

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to them the happenings of the meeting the day before. I told them that we had rejected the offer proposed by Howard Smith and that I had made a counter-proposal for the acquisition of the Howard Smith tankers but this had been rejected and it became quite apparent to me that there is no point in pressing Mr. Howard Smith for the purchase of their tankers.

- Q. Who was there at this meeting? A. Mr. Ellis-Jones, Mr. Murphy, Mr. Walker, Mr. Conway and Mr. Aston and myself. 10
- Q. Mr. Taylor? A. No.
- Q. Approximately when was this meeting in your office on 5th July? What time of day? A. Oh, it would have been approximately 10.30.
- Q. Now, what ensued after you had reported on the discussion the previous day with Howard Smith? A. Well, everyone at the meeting agreed that the price offered for the proposed allotment of £2 per share was too low. Discussion took place between Mr. Aston and Mr. Conway regarding 20
- Q. In the presence of yourself and the others? A. Yes.
- Q. What did they discuss? A. They were discussing the legalities of an allotment of shares by Millers to Howard Smiths and the legal implications regarding the Howard Smith proposition. They all agreed that any such allotment would contravene the Stock Exchange regulations and they felt that the proposal of 3,000,000 shares at £2 a share would not be lawful. To the best of my recollection, they were discussing certain cases and precedents that had been set before and they agreed or came to the conclusion that if any allotment of shares to be lawful under such circumstances would have to be to an amount or to a total amount to cover the company's financial or liquidity problems. 30
- Q. Was anything said then to you about this subject? A. Yes, Mr. Aston and Mr. Conway said to me "What is the position with our current liquidity problem and our current short 40

term borrowings?". I said to them "At the moment, our current short term borrowings were approximately \$10 m." They both agreed that if there was to be any allotment for it to be within the law it would have to be to an extent to cover such short term commitments that we had.

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10 Q. Now, was the question of the price at which the placement was to be made also discussed?
A. Yes, this was discussed and the one thing that they were emphatic about was that under no circumstances could any allotment be made which was at a price less than that which had been offered by Ampol to all shareholders which was \$2.27 per share.

20 Q. What price, what figures were discussed in that context? A. We felt that the price should be \$2.50. We thought that a fair price but in any case it should not be less than \$2.27, and it was finally decided that a figure of \$2.30 or upwards would be acceptable.

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Q. At that stage was any calculation made? A. Yes, they asked me, bearing in mind a price of \$2.30 how many shares would have to be allotted to meet our financial needs and I calculated it at 4,152,000 at \$2.30 which would give us an infusion of capital of some \$9½ - \$9.6 m.

30 Q. To whom did you give the result of that calculation? A. To everyone who was at the meeting.

Q. While the meeting was in progress, did anyone have a telephone call? A. Yes, during the meeting Mr. Conway rang Mr. Maxwell.

Q. In your office? A. In my office.

Q. Did you hear what he said at his end?
A. At Mr. Conway's end.

40 Q. Yes. A. Not really. There was a lot of talking in the office while this conversation was on and I would have only picked up bits and pieces of it, but when Mr. Conway got off the 'phone he said he had mentioned to

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Mr. Maxwell what our thoughts were at this meeting and Mr. Maxwell had informed him that Howard Smith also realised that their offer was inadequate.

- Q. Approximately what hour of the day was it when this calculation you mentioned was made in your office? A. Oh, it would have been approximately 11.30 that morning.
- Q. Where did you have lunch that day? A. We had lunch in our board room. 10
- Q. Who was present on that occasion? A. Well, the people who were at that meeting. I am not sure whether Mr. Aston joined us for lunch or not but Mr. Nicholl, a director of our company, did join us for lunch.
- Q. And on the luncheon occasion what discussion took place? A. Well, we discussed the..... I am sorry.
- Q. Was Mr. Taylor at the lunch? A. No, he was not. 20
- Q. We have all the people who were there in the morning plus Mr. Nicholl with a possible minus of Mr. Aston at lunch? A, That's right.
- Q. What was discussed then? A. Mr. Conway outlined to Mr. Nicholl the text of the meeting that we had had with Howard Smith the day before and also the discussions that we had had in my office that morning and Mr. Nicholl then and Mr. Conway were again talking of the legalities of such an allotment. 30
- Q. Was the discussion aided by the presence of any written text? A. Yes, Mr. Nicholl had with him a law book. I don't know what it was but I know discussion was centred around the Burma Woodside case.
- Q. Apart from mentioning the name of the case, what was the tenor of the discussion you heard between Mr. Nicholl and Mr. Conway on the legality of what was being considered? A. Well, to the best of my recollection Mr. Nicholl agreed with Mr. Conway and Mr. Aston's point of view on this matter if such a proposal for an allotment of shares did reach fruition or came to pass. 40

Q. To be specific, what was it he was agreeing to that you heard? A. He said that he agreed with the findings of Mr. Aston and Mr. Conway, that if an allotment was to be made and it was made to cover a financial crisis or commitment in which the company found itself, that he felt that such allotment would be in order.

10 Q. Now, after the lunch, what happened to those present? A. I am not sure whether Mr. Nicholl remained or left but we were still in the board room discussing this matter and Mr. Conway had a 'phone call from Mr. Maxwell...

MR. DEANE: If your Honour pleases, perhaps I should have said this sooner. I will be commenting on the fact that certain of the directors are present in Court while this evidence is being given or certain of the people in these conversations.

20 HIS HONOUR: Namely?

MR. DEANE: Mr. Nicholl, for example.

HIS HONOUR: No, I don't think he is, Mr. Deane. This is Mr. Nicholl, is it?

MR. DEANE: Yes.

HIS HONOUR: There have been two Mr. Nicholls in Court at varying times. I had assumed that the party was the elder Mr. Nicholl.

MR. DEANE: No.

HIS HONOUR: Is that not so?

30 MR. DEANE: No.

HIS HONOUR: Well, Mr. Glass, it is a matter for you.

MR. GLASS: It is a matter for me and I wish my attention had been drawn to it earlier. I am asking Mr. Conway and Mr. Nicholl to retire.

(At this stage Mr. Nicholl and Mr. Conway retired.)

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HIS HONOUR: I had not realised this Mr. Nicholl was a party to the litigation. I thought it was the other Mr. Nicholl who was here on the first day of the hearing.

MR. GLASS: His father?

HIS HONOUR: Yes.

MR. GLASS: This Mr. Nicholl is the director. The other Mr. Nicholl, his father, does play a role too.

Q. Now, you were telling us that in the afternoon you were present in the board room when a call came through for Mr. Conway. Is that right? 10
A. That is correct, yes.

Q. About what time was this? A. Well, it would have been approximately 3 o'clock.

Q. Are you able to tell us what Mr. Conway said on the line or only what he said after he got off the line? A. Well, really only what he said when he got off the line.

Q. All right, well, what was that? A. Mr. Conway said that Mr. Maxwell had informed him that Howard Smiths were considering making an application for the allotment of 4½ million shares in Millers at a price of \$2.30 per share. 20

Q. Did Mr. Conway accompany this information with any particular gesture that you can recall? A. Well, he did. He put up his hand like that.

MR. GLASS: Perhaps the record will show he made a circular digital demonstration. 30

Q. What other event happened that afternoon, Mr. Koch? A. At approximately 5 o'clock the chairman buzzed me from his office and asked me to go down to his office and when I arrived there I found Mr. Maxwell, Mr. Taylor, naturally Mr. Taylor, Mr. Conway, and there were one or two other members of our senior management but I can't recall which ones they were.

(At this stage Mr. Taylor retired.)

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Q. What happened at 5 o'clock in Mr. Taylor's office? Was Mr. Maxwell there? A. Yes, Mr. Maxwell was there and when I joined the meeting Mr. Taylor said to me that Mr. Maxwell had shown him a letter whereby Howard Smiths were proposing to request or were applying for an allotment of 4½ million shares in Millers at an issued price of \$2.30 per share.

10 Q. Yes. Did you see the letter? A. No, I didn't.

Q. What was said by Mr. Taylor to Mr. Maxwell? A. Mr. Taylor said words to the effect "Well, this is all very well but before I do anything about it I would like to see your chairman's signature at the bottom of that letter."

20 Q. Did anything significant happen further on that day, 5th July? A. No, not to my recollection.

30 Q. What was the next event that happened on the following day, 6th July? A. 6th July was the day of a proposed board meeting of the company. At approximately 9.40 Mr. Taylor again buzzed me and asked me to go down to his office and he showed me a letter which was a letter from Howard Smiths signed by their chairman, Mr. W. Howard Smith, applying for an allotment of 4½ million shares in Millers at \$2.30 per share.

Q. I omitted to ask you in the narrative whether you became aware of the offer of 22nd June by Howard Smith. I take it that that was brought to your knowledge upon its receipt? A. Yes.

40 Q. Now, Mr. Koch, I want to ask you to give us your recollection of the events of the Board meeting of 6th July. A. Well, after the chairman declared the meeting open, to the best of my recollection the minutes of the previous meeting were confirmed, details of share transfers were read out and then the chairman said that an important matter had arisen this morning and he proposed to deal with this now and leave the rest of the agenda to follow from this subject. He said that that morning he had received a letter from Howard Smiths applying for 4½ million

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shares in R.W. Miller (Holdings) at an issued price of £2.30 per share and he wished to deal with this matter then. He said that he had had legal advice on this matter

- Q. He read out the letter of agreement. A. Yes, I am sorry, he read out the letter of application and then he asked if Mr. Conway would read the agreement which they both did.
- Q. What did then Mr. Taylor say? A. Mr. Taylor said that he had had legal opinion on this matter and that although it was a distinct breach of Stock Exchange regulations that his advice was that such an allotment would be lawful. He said that or he requested that all directors should view this matter in the interests of all shareholders and should vote accordingly. He then asked Mr. Conway if he would explain the legal ramifications of such an issue and Mr. Conway said virtually the same thing, that in his opinion it was quite lawful for this issue to be made but he stressed that all directors should view this and vote to what they consider is in the best interests of the company and the shareholders. He said that if the directors felt it was in the interests of the shareholders for such allotment to be made, then they should vote and accept the offer. If they felt it was not in the best interests of the company, then the offer should be rejected.
- Q. Who spoke next? A. I believe the chairman asked Mr. Aston who was also present at the meeting if he had anything to say on the matter. Mr. Aston said that he agreed with what Mr. Conway had said. It was - excuse me for hesitating; I am trying to get them in the right sequence of events.
- Q. Yes, certainly. A. I believe at this time Sir Peter Abeles made the point that at a previous meeting the asset backing of the company shares had been - I have lost the word again - that the company shares were audited and verified as being approximately £3.70 per share but here in fact now the board was being asked to decide on an offer of shares at a price of £2.30. He also said in his opinion that if the company made such an allotment they would be diluting the company's

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shareholding. Mr. Taylor then said that in his opinion a clear conflict arose in the position of Sir Peter Abeles due to his involvement as a director of Bulkships and that they had announced that they were going to act jointly with Ampol for the continuation of the company and he felt that a conflict arose within Sir Peter's duties as a director of both boards. He asked Sir Peter if he would wish to disqualify himself from voting or debating at this meeting. Sir Peter said that he would not disqualify himself as it had always been known the manner in which he held the directorship in Millers. The chairman then said that he ruled that there did in fact exist a conflict and that Sir Peter was not entitled to vote or debate on this matter. Sir Peter then asked Mr. Aston what his views were on this and Mr. Aston told Sir Peter that in his view the chairman's ruling was correct and that his decision was unchallengeable.

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Q. What happened then? A. As I recollect, Sir Peter then asked the chairman if he would be permitted to have legal representation at the meeting and the chairman refused this request. Sir Peter then said could he be excused from the meeting so that he could ring his legal adviser and requested the chairman to adjourn the meeting while he made the 'phone call. The chairman said that Sir Peter was quite entitled to leave the room; he granted permission for him to leave to make a 'phone call, but he did tell him that the meeting would continue during his absence.

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Q. What happened then? A. As Sir Peter stood up to go to leave the board room, he asked whether he could be shown anywhere in the company's articles of association that permitted the chairman to disqualify him from voting and he was told that there was no such article. Sir Peter then left the room as I recollect.

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Q. Yes, and what happened after that? A. So that the matter could be discussed, the chairman called for a motion on the matter and to my recollection it was moved by Mr. Anderson and seconded by Mr. Nicholl - that could be in reverse, I am not sure.

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- Q. Yes, and what happened then? A. The chairman then asked me if I would give a summary of the company's current financial position so that the board could be fortified with this information before they debated it any further and also that they could make their vote whichever way they thought fit. I then
- Q. Before you tell us what you said - Sir Peter Abeles had left before you started? A. Yes.
- Q. And what was the position when he returned? Were you still speaking? A. Yes, I was still speaking when he returned. 10
- Q. What is your estimate as to the length of time you addressed the board? A. It would be in the vicinity of fifteen minutes.
- Q. Can you tell us the things you recollect saying during that time? A. Yes, I firstly read an extract of a letter received from the Minister for Shipping and Transport - I believe it was dated 15th June - whereby he was most emphatic that if we failed to pay the amount still outstanding on progress payments due on the construction of the "Robert Miller"... (Objected to by Mr. Deane). 20
- Q. You read out that letter, did you? A. I did not read it out in its entirety. I read the last few paragraphs.
- Q. Yes, the proceedings. A. That's correct, yes.
- Q. Having read that letter or the relevant parts of it, what was the next matter to which you turned? A. I then advised the board how we had settled the account with the Commonwealth and gave them details on how the \$8 m. was paid. 30
- Q. Are you able to recollect how you dissected the sources of the \$8 m. paid to the Commonwealth? A. As I recollect, the first payment we made was towards the end of May and as I have said previously with the realisation of these hotels that we sold, as the money was received, we paid it immediately to the Commonwealth and I believe to my recollection there was \$2.7 m. or \$2.8 m. that we paid over a period from the end of May through 40

June from hotel properties. I also advised them that with the assistance of \$3 m. from Tricontinental this had been used to acquit our debt and the balance of \$2.2 m. was raised from portion of a Eurodollar loan negotiated through the Bank of New South Wales. I then advised the board that although we had acquitted our debt to the Commonwealth our position was still far from good in my opinion because our short term borrowings had reached what I considered a dangerous level in my opinion.

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* Exhibit V

10 Q. Did you give details? A. I gave details of the entire short term borrowings as at 6th July which, as I recollect, totalled \$10.7 m.

Q. You have a copy of the minutes accessible to you, have you not? A. Yes, I have.

HIS HONOUR: It is Ex. V. *

20 MR. GLASS: Q. Would you turn to 267. The details recorded in the minutes at that point are the details which you gave to the meeting?
A. That's correct.

30 Q. What was the next thing that you said? A. I said that in my opinion the extent of our short term borrowings was far from satisfactory. In fact, I considered it to be entirely suspect. I was most concerned about our level of short term commitments and I said to the board that I presumed I did not have to remind them of the position we were in a little over twelve months prior to this when certain action was taken as a direct result of our excessive borrowings on the short term money market.

Q. You said you did not have to remind them of it. Does that mean ... A. That is what I said to them. I said "I am sure I don't have to remind the board of the position we were placed in the previous year."

40 Q. Had that position been the subject of board discussion the previous year? A. Well, I wouldn't know because I was not general manager at the time and did not attend board meetings.

Q. What was the subject to which you were referring?

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A. I referred to the s.222 notice which was served on us by Chase-N.B.A.

- Q. What did you also say after that? A. I then said that our short term borrowings were serious enough as they then stood but I also advised the board that in order to obtain the short term borrowings we had been forced to virtually pledge all available securities in order to obtain this finance and the position was at that date that if we wished to raise any further capital we did not - perhaps capital is not the correct word 10
- Q. Any loan? A. Any further loans, that we did not have any security to offer. I then advised the board and explained to the board what securities were held by the lenders in relation to the \$10.7 m. that we had borrowed on short term.
- Q. What were those securities that you then mentioned? A. I mentioned the Tricontinental Corporation for their loans held as security first mortgage documents over, I think it is, eight or nine hotels at a value in excess of \$8 m. The bank, Mitsui & Company, who we had always been borrowing money from, held first mortgage over one hotel valued at approximately \$1½ m, and that the Bank of New South Wales had a floating charge over all securities and also held all title deeds to all sundry properties. 20
- Q. Did you have something in particular to say about the Tricontinental loan? A. I expressed my doubts and concern regarding the Tricontinental loan, that although there was provision in the agreement for the rolling over of these bills as they fell due that there were provisions in the deed also that Tricontinental could refuse such roll over and to my recollection I outlined two: one was that if the company, if the control of the company changed hands, they had the right to refuse a roll over and the other condition was that for any other reason they could refuse to roll the bills. I also expressed concern at the Hambros bank loan and said that we had hoped or we would hope that this money would be forthcoming but nevertheless in the 30

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- 10 letter that we had received from Hambros there was a condition in there also that if fifty per cent of the shares in the company changed hands or in excess of fifty per cent, they had the right to withdraw their offer and I said that these may or may not happen but the conditions are there in the deed for Tricontinental and also the letter from Hambros and, as they were mentioned, it was something that the board had to keep in mind when considering this offer as I felt they were my aspects on the whole subject.
- 20 Q. Did you make any recommendation yourself regarding the placement? A. Yes, I requested the board to think very seriously about this proposal from Howard Smiths. I said that I felt in my opinion that the company could ill-afford to let go or let pass the opportunity of an infusion of some \$10 m. into the company's funds in view of our current short term and liquidity problem which I considered to be quite serious and I recommended that the board should accept the offer.
- 30 Q. Did Mr. Cameron have anything to say about the Hambros condition? A. Yes, Mr. Cameron said that he appreciated the fact that Hambros had a condition in their letter stating that if control of over fifty per cent of the company changed hands that they could withdraw their offer. He said that on numerous occasions that both the chairman and myself had told him or told the board that Hambros had said that they were not particularly concerned with a change of ownership; they would be more concerned if there was a change in the management of Millers. I said to Mr. Cameron that this was quite true and I don't deny saying that because it was said but nevertheless this condition still did exist and it was something
- 40 in my opinion which should not be ignored.
- Q. What you just said was said by you to the board? A. I am sorry, I don't follow that question.
- Q. I withdraw that. Now, who contributed next to what you were saying? A. I think Mr. Cameron, to my recollection, spoke on this matter and he spoke at great length.

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- Q. Before we get to that, was something said by Sir Peter Abeles? A. I am sorry, I am getting out of context again. During my statement to the Board, Sir Peter rejoined the meeting and held a brief conversation with Mr. Cameron - it only lasted about thirty seconds or something like this. When I was referring to the Hambros loans, Sir Peter said that he had been advised from Hambros that they were prepared to increase the amount of their commitment on the "Robert Miller" and through the chair I asked Sir Peter why he was in receipt of such information and yet we were not and he said that it was an informal discussion he had had with them. 10
- Q. Are you able to recollect anything apart from what you have told us that you said to the meeting? I take it there would have been other things to occupy fifty minutes or so? A. No, I may have embroidered on that a little bit more but I can't recollect bringing up any other fresh subject. 20
- Q. All right. Now, Mr. Cameron was the next speaker? A. Yes.
- Q. What do you recollect he said? A. Mr. Cameron was concerned at this sudden event and he said that the board had previously rejected the Ampol offer and were now in a position to make a decision on the Howard Smith offer. He felt that an allotment of shares such as was proposed at that meeting should be approved by shareholders in general meeting although he did say that if this was put to a shareholders meeting it would certainly fail because fifty-five per cent of the shareholders would vote against it. As I recollect, he further said that at a meeting of shareholders the two major shareholders could virtually sack the board and replace it with members of their own if they so desired. He said that he felt - I am going to get a bit confused on what he said, he said so much. 30 40
- Q. Voting rights - did that come up? A. He did ask under the articles what were the maximum number of directors permitted and also if the holder of partly paid shares was entitled to voting rights and the secretary told him that

the maximum number of directors was seven and that the holders of partly paid shares were entitled to full voting rights.

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10 Q. Was the question of an issue raised by Mr. Cameron to the shareholders? A. He said that the matter of an issue of shares to the shareholders of Millers had been mentioned previously at previous board meetings and although a substantial premium could not be contemplated he felt that possibly a small premium could have been envisaged in such a proposition. He then discussed at great length his views as to the opinions of shareholders and his concern that the interest of shareholders should be protected.

20 Q. Did he state then what his own attitude was to the resolution? A. He said at that stage he would not say that he was not in favour of it but he would like to hear the opinions of other board members, he said, particularly Mr. Nicholl. In between this he did have a lot to say.

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30 Q. Did he say anything about the Cooper Bros. Report? A. Yes, he said that he had studied the Cooper Bros. report and in his opinion he agreed with their findings that the asset backing of the company shares should not be treated with any great significance but that he agreed that the future profitability of the company was a more sound basis on which to value the company shares.

Q. Was anything said by the Chairman about the shareholders generally? A. The chairman, to my recollection

40 Q. An announcement? A.... said that following the joint announcement of Ampol and Bulkships, the minority shareholders were virtually given one choice - that was to - or two choices: to accept the Ampol offer of \$2.27 or not accept it. They did not have any further offer with which they could make a decision and he felt that in his opinion that by the allotment of these shares all shareholders including major and minor alike, it would be to their benefit, that they would benefit by this.

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- Q. Benefit in what respect? The allotment....
A. Well, the allotment of the shares to Howard Smith was joined together with their overall offer; that if this was done then they would proceed with their offer for the entire shareholding of Millers and Mr. Taylor said in this respect all shareholders would certainly be given the opportunity to benefit by the higher offer.
- Q. Do you recall Sir Peter Abeles saying anything about this time? A. I don't know whether it was about - I know Sir Peter said something about Mr. Nicholl had spoken but I can't recall. 10
- Q. I suggest he said something about the offer, the right to withdraw. A. I am sorry, he did. He asked the chairman - I am sorry, he said to the chairman that he noted while the chairman was reading the offer from Howard Smith that they reserve the right to withdraw their offer and he asked for confirmation of this. The chairman said "That is correct." Mr. Aston then said that under the Companies Act such right of withdrawal in any takeover offer was statutory. 20
- Q. While Sir Peter Abeles was there, did you observe any occasion when he wanted to speak and was prevented from speaking? A. No, whenever Sir Peter wanted to speak, he was allowed to debate. 30
- Q. Now, you got to the point where you said Mr. Cameron expressed the view that he would like to hear other board members, particularly Mr. Nicholl? A. Could I go back just one thing, Mr. Glass. With Sir Peter, I do recall at some stage during the meeting - I think it was early - that he requested that all his comments be recorded in the minutes but I think that was early in the meeting.
- Q. Yes, fine. Then Mr. Nicholl took up the invitation, did he, from Mr. Cameron? A. Yes, Mr. Nicholl said that although the issue of shares to shareholders had been discussed at previous board meetings in his opinion an issue at a price of £2.30 to shareholders was out of the question and Mr. Cameron agreed with this opinion. Mr. Nicholl then.... 40

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10 Q. Before you go on, did Sir Peter Abeles say any-
thing about that question? A. Yes, I believe it
was at this stage when Mr. Nicholl mentioned
about the premium. Sir Peter said words
to the effect "It would depend who the
underwriters were". Mr. Nicholl then said
that in view of the joint announcement by
Ampol and Bulkships he would rather face a
meeting of shareholders having accepted the
Howard Smith offer than letting it - I think
he just - I don't know whether that makes a
sentence but this is what he said.

20 Q. Did he say anything about Stock Exchange
regulations? A. He said "Even though it was
a breach of Stock Exchange regulations."
Mr. Balhorn then said that he agreed with Mr.
Nicholl's views on this matter and said that
he was concerned that following the joint
announcement of Ampol and Bulkships that the
minor shareholders would be locked into a
situation where they only had one offer open
to them and were not given the opportunity to
accept any other offer with which Howard
Smith or anyone else may come along. He was
concerned with this. He then said that the
reason for him being late attending the
meeting was that when he arrived at our office
- I think it was about ten to ten - he then
realised or he was informed that Howard Smiths
30 had made this offer. He immediately 'phoned
Mr. Duncan in Tokyo and Mr. Balhorn told the
meeting that he had brought Mr. Cameron up with
the current position.

40 Q. Mr. Duncan? A. Mr. Duncan, I am sorry, up
with the present position and Mr. Duncan's
views were the same as his, that they felt it
was in the best interest of the company to
accept this offer. Mr. Anderson said that
he was aware of the company's financial position
and he felt that the company could ill-afford
to pass by the opportunity of accepting an
infusion of \$10 m. into the company's accounts.
I think Lady Miller spoke then. To my
recollection she said she would like more
time to think about it and she was concerned
at the possibility of the company shares
being delisted. It was about this time I
think Mr. Conway appeared to be concerned with
Lady Miller's comments about delisting on the

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Stock Exchange and Mr. Conway said that he felt sure that if the Stock Exchange were contemplating delisting that they would ask the company for clarification of a few issues before they made any decision.

- Q. Did anyone else say anything about the possibility of suspension? A. It was generally agreed that the company would run the risk of being suspended if this motion was carried. I believe Mr. Aston commented on it as well but I can't recollect what he said. 10
- Q. Was the vote then taken? A. Yes. I can't recall any further discussions. I believe the chairman then called for a vote on the matter and Messrs. Anderson, Nicholl, Balhorn and Taylor voted for the motion, Lady Miller and Mr. Cameron voted against and Sir Peter Abeles abstained from voting. I recollect that - I am sorry, that is not correct what I said then. I am getting confused. 20
- Q. It is all right. A. I recollect at that time Mr. Anderson said to Sir Peter that he had not voted and Sir Peter said "No, the chairman has ruled that I am not permitted to vote" and Mr. Anderson then said "In other words you are abstaining from voting?" and Sir Peter said "No, I am not permitted to vote and I would like this recorded in the minutes."
- Q. Did he say anything else on that subject? A. Well, after the motion was carried Sir Peter said that during his absence from the room he had had legal advice on the matter, that his legal advice was that the chairman did not have the right to exclude him from voting or debating on the matter and this would be challenged and he also said that the legal advice he had been given was that the company's decision or the directors' decisions could be considered fraudulent. Mr. Cameron at the conclusion of the meeting said that he felt sure that an injunction would be brought on regarding this decision of the directors. 30 40
- Q. Now, the motion was declared carried no doubt? A. Yes.

- Q. Now, what was the first thing you did after the meeting was over? A. Well, I was concerned with the statements Sir Peter made regarding Hambros bank when he said that he had been informed that Hambros bank were prepared to increase their commitment for "Robert Miller" so I immediately sent a Telex to Hambros bank.
- 10 Q. Now, do you produce two Telex messages, one your message to Hambros and the other their reply.
- (Two Telex messages tendered: objected to by Messrs. Deane and Lockhard: rejected: m.f.i.4) *
- Q. (Witness shown Ex. MH.4) Mr. Koch, I think you have already told us the source of the material contained in this exhibit MH.4?
A. Yes. **
- 20 Q. Now, taking the document as correctly reflecting the developments of the developing situation in which the company was placed, is there anything of significance in your view with respect to the movement of the deficiency of working capital from 1963 to 1972 inclusive? (Objected to by Mr. Deane: allowed).
- 30 Q. What trend did you discern in that situation from 1963 to 1972? A. That the deficiency in working capital from 1963 through to 1968 is for all intents and purposes reasonably static with the deficiency ranging from \$3.1m to \$2.1m but from 1969 onwards it shows quite an increase in deficiency going from in 1969 \$5m deficiency to 1972 which is \$12.5m deficiency.
- 40 Q. Now, what in your opinion was the reason for this developing lack of liquidity? A. The development of our increased lack of liquidity was due to financing long term assets with short term borrowings. During the year 1971 we did have some long term borrowings but these were insufficient to meet the needs of the company.
- Q. What was the original reason for the failure to employ long term finance in relation to the tankers? A. Well, the main reason there

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was optimism regarding the decision to be handed down by the Commonwealth Government as the result of the 1969-70 Tariff Board Inquiry into Shipbuilding. We were confident due to the weight of evidence at that Inquiry that the Government would give financial assistance to shipowners building vessels in Australia and thus bring them into line with virtually every other shipbuilding nation in the world.

10

Q. So, you say that the liquidity or the illiquidity in the first instance was due to long term borrowings on short term finance?
A. Yes.

Q. Were there any factors which aggravated that original wrong decision? A. Well, the major factors which seriously affected the 1971-1972 year was the fire on the "Amanda Miller" under construction which delayed the entry of this ship into service by approximately six months. Another significant factor was the Mineral Securities debacle in February 1971 and another major factor

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Q. Would you elaborate upon that a little? What was the impact of that situation on your illiquidity position? A. Well, at that particular time we had borrowings short term of well over \$4m at that stage and over a 7-day period we had nearly \$1.8m called back which seriously strained our liquidity position.

30

Q. When you came to replace the short term funds called up, did you get the same terms from lenders? A. Well, replacing it became extremely difficult because the entire short term money market was in virtually a state of chaos.

Q. In addition to it being difficult, did it prove expensive? A. Yes, interest rates increased quite dramatically.

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Q. What about income from coal? Did that play any role in aggravating your liquidity problem? A. Yes, the Japanese recession was still with us and also the domestic coal sales were affected as well as a result of the development of natural gas as a source of fuel and these factors seriously affected our profit for the year ended 1971.

- Q. I think you have already told us that when Mr. Taylor became the chairman he had appointed a special committee and you gave us the composition to recommend steps to be taken. A. Yes.
- Q. What were the principal recommendations of that committee? A. The principal recommendations were (Objected to by Mr. Deane).
- 10 Q. Is there a document, Mr. Koch? A. Not to my knowledge, no.
- Q. What were they? A. The principal recommendations were the re-negotiating of all short term borrowings as they fell due and an endeavour to reduce the extent of such borrowings. It was decided to raise some £3m on the sale of hotel properties. It was decided to curtail and defer as far as possible all capital expenditure as far as could be ascertained at that stage. Various internal economies everywhere we could possibly see a way of saving money were put into effect immediately. It was also agreed that we would endeavour to raise £3m on the first mortgage security of hotel properties.
- 20
- Q. On a long term basis? A. Well, it was agreed that we would endeavour to finalise the "Amanda Miller" loan through Hambros bank as quickly as possible and also to commence negotiations for the financing of the "Robert Miller".
- 30
- Q. Now, were any of those objectives unrealised at 30th June? A. Well, it is difficult to say what economies were realised but I would say in all, all of them were realised with the exception of the £3m to be raised on the security of hotel properties.

(Luncheon adjournment)

- 40 Q. Now, I asked you, Mr. Koch, as at 30th June what was your position as to the extent to which borrowing had gone on in the Miller group viewed from the standpoint of ordinary commercial prudence? (Objected to by Mr. Deane: allowed).

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Exhibit MH.4

Q. What was your view as an expert as to the borrowing position of the company on 30th June, 1962, from an ordinary commercial standpoint?

MR. DEANE: 1962?

MR. GLASS: Q. Sorry, 1972. A. In my opinion, the company was heavily committed in short term borrowings which in my opinion were not a normal or desired level of borrowings considering the activities of the company. 10

Q. As an expert, considering the company situation, did you see any risk in the future in industrial action which might involve it? (Objected to by Mr. Deane: allowed).

Q. Well, I will narrow it. With particular reference to the "Amanda Miller" did you see any risks it portended in the future? A. I was concerned with the excessively high level of our short term borrowings that the company in its financial position was relying heavily on the income derived from a single unit asset, namely the "Amanda Miller" and that the effect that this asset could have on the company's financial position if for any reason which may or may not be foreseen that that vessel was forced to withdraw from service for any considerable amount of time. 20

Q. Did you see any impact that might occur in the future on the company's position resulting from the hotel division? (Objected to by Mr. Deane: allowed) A. My main concern regarding the hotel division was that the profits or the future profits of the company would be seriously eroded by the number of hotels that we were forced to sell during the previous twelve months to assist in solving our liquidity problem. 30

Q. I invite your attention to Ex. MH.4. Do you see anything of significance in relation to the movement of that proportion of the company's assets which shareholders' funds represent? A. I have not got a copy. 40

Q. Do you see any significance in the alteration of that proportion of the assets represented

by shareholders' funds? A. You are talking, I take it, of the figure of shareholders' funds in this statement?

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10 Q. Yes. A. Well, although the value of shareholders' funds has steadily increased, not to any great proportion, in my opinion it is significant that the percentage of shareholders' funds to total assets has shown a sharp decline from a peak in 1968 of sixty-two per cent to 1972 where the figure is forty per cent.

Q. Looking at that document again, one sees long term liabilities have moved from 1.9m in 1971 to 8.5m in 1972? A. That's correct.

Q. Now, as far as the current loans are concerned, short term loans, that 10.7m that you mentioned to the board, that would be included, would it not, in the 17m shown in the 1972 figures? A. That's correct, yes.

20 Q. What would be the figure for short term loans in 1971 included in the overall figure of 16.3m? I think you will want MH.3 for that, will you not, the balance sheet? A. If I am permitted to look at the balance sheet, I could answer this question.

Exhibit MH.3

Q. You have it there? A. Yes. The figure of short term loans in the 1971 balance sheet including the Bank of New South Wales overdraft totals \$9m.

30 Q. Now, what have you to say as an expert concerning the alteration in the company's position in 12 months which involved short term loans going from \$9m to \$10.7m, long terms from \$1.9m to \$8.5m and deficiency in working capital going from \$10.3m to \$12.4m? What was your opinion about that alteration? A. Well, my opinion would be just related to the deficiency of working capital. In my opinion, in a balance sheet that is one of the most critical ratios to be ascertained. As I say, that is my opinion, and although the long term liabilities have increased, in my opinion the critical feature of the 1972 figures is the excessive deficiency in working capital.

40

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- Q. Is that change for the better or worse?
A. From 1971 it has changed to the worse by approximately \$2m.
- Q. Do you consider that the factors mentioned by Mr. Cameron, shareholders' funds were up \$2m, liabilities up \$7m and assets up \$9m offset that worsening condition in any way? A. No, not in my opinion. Mr. Cameron stated that the amount of shareholders' funds had increased by \$2m which in fact they have and I certainly would not try to dispute that but I think the significant point of that is that the percentage on shareholders' funds has been reduced from forty-five per cent to forty per cent. I think that is a more significant figure rather than the actual amounts. 10
- Q. Do you think that the alteration in the shareholders' funds and liabilities on the one hand and the asset position on the other balancing each other out, in any way mitigate the worsening liquidity position revealed by the deficiency in working capital? A. In my opinion it does not. 20
- Q. Mr. Cameron also referred to another change noted in this document, namely, the commitment on capital expenditure had decreased from 18m-odd in 1971 to 4m-odd in 1972. Do you think that that change in any way offsets the worsening effect of the liquid position? A. I would agree that the change is to a certain degree significant but, again, in my opinion, it does not improve the company's position regarding the liquidity position of the company which in my opinion is always a critical ratio. 30
- Q. What was the cause of the reduction of capital commitment from 18m to 4m over that twelve months? A. Well, the 18m in 1971 was basically, or the majority of it was for tankers' commitments. The reason for the 1972 figure which will be reduced to 4, bearing in mind these are unaudited, in my opinion, I think it would be closer to 6, was due to the fact that during the year ended 1972 we have not been in a position to commit ourselves for any further expansion and capital commitments to any great extent. (Mr. Deane 40

asked that the words "in my opinion I think it would be closer to 6" be struck out.)

HIS HONOUR: I will have this noted without it being excised that there should be treated as being struck out from the previous answer the witness's proffered opinion that 4m for committed liabilities would be closer to 6.

10 MR. GLASS: Q. Mr. Koch, you heard Mr. Cameron say something about cash flows. What information about cash flows had been made available to the board during the previous twelve months?
A. I am not sure the cash flows were made available to the board but each month with the agenda file and the board minutes when they were distributed each month was included a statement or a profit statement for the previous month's figures.

20 Q. What else was circulated to board members before each meeting in addition to profit and loss statements and agenda? A. Well, the last few meetings I have noticed a reconciliation of receipts and payments has been forwarded to all board members. The minutes of the previous meeting, my management report and also the agenda for the meeting and any other relevant correspondence that may have to be placed before the board.

30 Q. Does that mean that from June 1971 through to July 1972 each director would have received before each meeting the agenda, the manager's report, the minutes of the last meeting and profit and loss information? A. I am not sure whether they would have received all of that information at every meeting before the meeting but it was endeavoured to do this and wherever possible this was done.

Q. How was this information delivered to the directors? A. It was always hand-delivered.

40 Q. Hand-delivered. Now, on the occasion of the meeting was there any request from any director for more financial information to be placed before the board? A. No, there was none.

Q. Mr. Cameron referred to Tricontinental being appointed as financial advisers to the board.

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Did that happen before or after Mr. Cameron was made a director? A. Negotiations were held with Tricontinental prior to Mr. Cameron's appointment as a director to the board. I am not sure when the actual appointment of Tricontinental was made. It would have either been just prior to or just after Mr. Cameron's appointment but certainly negotiations had been in train for some time.

- Q. I think Mr. Cameron mentioned a reference to the Bank of New South Wales being willing to increase the overdraft from 1.8m to 4m. Do you recall that being said? A. Yes, I do. 10
- Q. Do you have any knowledge of that? A. No, none whatsoever.
- Q. Another thing mentioned by Mr. Cameron was the fact that the hotels had been revalued so as to increase in overall value by 5m. In your opinion did this offer any prospect of more being borrowed on them? A. No, not really. The valuations that were made on our hotels were based on a walk in/walk out formula whereas if any hotels are being lodged as security for a loan, the lender invariably has his own valuation carried out which is always on the real estate valuation, not walk in/walk out. 20
- Q. During the period in June 1971 when you were made general manager up to July 1972, what proportion of your time would have been spent in seeking finance. A. That is a difficult question to answer, Mr. Glass. I would say in excess of fifty per cent of my time. 30
- Q. What about other persons in management besides yourself? A. Well, other members of the finance committee would have spent more time on it than I would and I would say the majority of their time would be spent in an effort to raise finance, all of them who were on the committee with the exception of Mr. Cameron. 40
- Q. Now, I bring you to an occasion, Mr. Koch, when you and others attended at Sir Peter Abeles' office. Do you remember that

happening this year? A. Yes, I do remember it.

Q. When was it? A. It was on 5th June.

10 Q. Can you tell us in general terms the events which led to that visit starting with the Ampol takeover offer? A. Well, it commenced with the Ampol takeover offer and as would be appreciated, once the Ampol offer was received, there were numerous meetings held amongst the senior management of our company and a lot of matters were discussed at this meeting. The members who were present would have been - at all these meetings would have been Mr. Taylor, Mr. Ellis-Jones, Mr. Murphy, Mr. Walker, Mr. Conway and myself and there was some confusion in our minds as to the (Objected to by Mr. Deane).

20 Q. Just the matters you discussed among yourselves and the steps that you took as a result?
A. The matters we discussed.... (Objected to by Mr. Deane: allowed).

Q. You say that you had learned of the Ampol offer and had letters been written to Ampol by Millers? A. Yes.

Q. They sought, did they not, certain information?
A. Yes, they did.

30 Q. Was any information given by Ampol in answer to those letters? A. To my recollection, there was one answer from Ampol to, I think, possibly three letters that we wrote to Ampol.

Q. Had you been given answers to a number of the questions that you put? A. No, we had been given answers to very few questions that we had put.

Q. Was there discussion between the gentlemen you mentioned as to the relationship in this affair between Ampol and Bulkships? A. Yes, there was.

40 Q. What was the opinion expressed in the group to which you referred on that subject? (Objected to by Messrs Staff and Deane: allowed).

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Q. Well, Mr. Koch, in general terms what was said among you about relations between Bulkships and Ampol? A. Well, this matter was the centre of considerable discussion and bearing in mind that we were trying to endeavour to establish something because we felt that the shareholders should be aware of it

HIS HONOUR: Well now, Mr. Glass, I think the last part should be struck out. I will permit you to have what took place within this committee and then what representatives of the committee may have done in consequence to that. 10

MR. GLASS: That is all I seek.

WITNESS: At the time of the meeting we were of the opinion that (Objected to by Mr. Deane: rejected).

MR. GLASS: Q. What was said by each of you to the other on that question of Bulkships' relation to Ampol on the takeover offer? A. Well, I know what I want to say. I don't know whether I can say it. This is the trouble. 20

Q. I think you are at liberty to say what one member of the group said to the other so far as you are able to recollect on this subject? A. Well, perhaps I could say, I said to the meeting that in my opinion I did not think that Ampol and Bulkships were working together on this matter. 30

Q. And in the light of that expressed opinion was a decision taken as to how the matter might be pursued? A. Yes, it was.

Q. What was the decision? A. The decision was made to arrange a meeting with Sir Peter Abeles to discuss this matter with him.

Q. When that had been arranged did you attend at his office? A. Yes, I did.

Q. On 5th June in company with whom? A. With Mr. Taylor and Mr. Aston. 40

Q. Was there anyone else besides those two and

Sir Peter Abeles present when the meeting occurred? A. No, no one else.

Q. What was the first matter that was raised at that meeting? (Objected to by Mr. Deane).

MR. DEANE: If I can make one objection which covers all this evidence.

10 HIS HONOUR: I will note your objection, Mr. Deane, and I will note that it covers this particular line of evidence. I will allow the evidence.

MR. STAFF: We have the same objection.

MR. GLASS: Q. With his Honour's leave you may continue. What was the first matter discussed when the meeting began? A. To the best of my recollection the first matter that was discussed was in relation to the Ampol takeover.

20 Q. Yes. Could I just suggest that there was some talk about coal exports before that?
A. Very briefly. At a previous meeting of directors of the company, Sir Peter had requested certain information regarding our coal projections and profit statements whereat we had recommended a 2-man sales team travelling overseas to furtherance the coal interests of the company and Sir Peter at that meeting had requested that I give him estimates of the profits of the coal section of our company and in particular
30 relation to our future prospects in Europe and he also asked for a profit statement showing the revenue and profitability of the "Amanda Miller" and I had this prepared and took them with me to the meeting.

Q. That was the subject of early discussion?
A. Yes, very briefly.

40 Q. Then you say you went on to Ampol. What was then said? A. Well, to the best of my recollection, Sir Peter opened the conversation and said that he was aware that we wanted to discuss the Ampol situation. He said that for some time he had been contemplating and proposing to the company

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that with our various activities we should divisionalise more in our activities, particularly with coal, hotels and tankers. He said that he had been associated with Ampol for many, many years and had always found them honourable people to do business with. In fact, he laid emphasis on one point, that if it had not been for the assistance of Ampol to his company that he could have been in a difficult position and he did emphasise that Ampol was the company that assisted him greatly at this time.

10

Q. When he talked of the various sections of Millers' trade, did he say anything about tankers? A. Yes, he said that he wanted the tankers to come under the control of Bulkships. He then discussed the position of Millers' staff and said that Ampol were very intelligent people; he felt confident that they would absorb the Millers' staff but if for some reason they wished to dispense with their services that he wanted the first opportunity to absorb them within his group and he went on further to say that with their acquisition of Union Steamship Company there were plenty of opportunities for senior management within that group. He then said that following the death of Sir Roderick Miller he was advised by the board of Bulkships to acquire the shares in Millers held by Romanda Pty. Limited but he said that he acted against this advice because he did not think there was any hurry for this to happen. He also said that following the acquisition of these shares by Ampol - I think he used the words - he was hauled over the coals by the Bulkships board.

20

30

Q. Why? A. I beg your pardon.

Q. Hauled over the coals by the Bulkships board for what? A. For not taking their advice and acquiring Romandas shares when they suggested it. He then concluded by saying that he felt sure that he would be able to come to an arrangement with Ampol that he and Mr. Leonard were very close friends and he intended to see him about this matter as soon as possible.

40

Q. Was any more said or was that the end of the meeting? A. To my recollection, that was the end of the meeting.

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CROSS-EXAMINATION

HIS HONOUR: Mr. Kirby, do you wish to ask any question?

MR. KIRBY: I have no questions.

HIS HONOUR: Mr. Rogers?

10 MR. ROGERS: No, your Honour.

HIS HONOUR: Yes, Mr. Hughes?

MR. HUGHES: Mr. Koch, may I take you back to the conversation between Mr. Mifflin and Mr. Maxwell and yourself, Mr. Ellis-Jones, Mr. Conway, Mr. Walker and Mr. Murphy on 19th June this year. Do you remember you gave some evidence about that conversation this morning? A. Yes, I had two meetings with them. I went on the 19th and on the 20th.

20 Q. Yes, I want to invite your attention for the moment if I may to the conversation on the 19th. Do you recall whether or not in that conversation Mr. Maxwell made some comment to you about the capital position of Miller?

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A. Yes, I do recall that. Mr. Maxwell and Mr. Mifflin had copies of our 1971 balance sheets and Mr. Maxwell said words to the effect "It seems clear" or words to the effect of this, "It seems clear to us that you are greatly under-capitalised. I am surprised you have not made a share issue before."

- Q. Do you recall whether you made any reply to that comment? A. Yes, to my recollection I said "Well, you don't have to tell us that. We have been aware of it for some time but unfortunately Sir Roderick would not have a bar of it." 10
- Q. Did you say anything else about Sir Roderick's attitude to that issue of share capital? A. No, I didn't.
- Q. Of course, it is the fact, is it not, that Sir Roderick, during his lifetime, had a position of great power and influence on the Miller board? A. He was chairman and managing director if that is what you mean. 20
- Q. Yes, but - his position went perhaps a little further than those formal titles might ordinarily imply, did it not? A. Yes, I would say that is a fair comment.
- Q. He was the emperor, wasn't he? A. I think king would be closer.
- Q. King. Well, I don't want to do any disrespect to his memory in saying that. And, of course, it was a family-centred business? A. Originally, it was but the other two brothers sold their shares and Sir Roderick was the remaining Miller. 30
- Q. Of course, Sir Roderick's father before him had been the king? A. Yes, Sir Roderick's father founded the company.
- Q. In short, would you agree that any views that Sir Roderick may have had as to the question whether new capital should be issued would have carried very great weight indeed with the board as constituted in his time? A. I couldn't comment on the board but I know from 40

a management point of view whatever he said was virtually carried out.

- 10 Q. Now, I want to ask you a question if I may about 30th June. Do you recall having a conversation with Capt. Evans of Howard Smith on or about 30th June this year? A. I couldn't say to the date but as I said previously I can recall having conversations with Capt. Evans, Mr. Maxwell and also Mr. Mifflin from Howard Smith but what dates they would be, I would not know.
- 20 Q. Do you recall, if I may put this to you, specifically having a telephone conversation that you initiated on or about 30th June with Capt. Evans in which you suggested that Millers' board might consider the placement of shares to Howard Smith? A. No, I certainly do not. Firstly, if I could comment regarding Capt. Evans. I have never rung him; it has been he who has rung me; but to my recollection, I have never discussed a placement or allotment of shares with Capt. Evans.
- Q. Could I ask you whether what you are putting to his Honour in answer to my question is that you do not recall such a conversation? A. That's correct.
- Q. You do not recall such a conversation? A. Yes.
- 30 Q. You appreciate there is a difference between not recalling such a conversation and denying firmly that it did take place? A. I am certainly not denying that it definitely did not take place but as far as I can recollect it did not take place.
- 40 Q. The next matter I want to ask you about is something that you gave evidence about yesterday at pp.198 and 202 of the transcript. You told his Honour that some short term finance was obtained from a company, All State Commercial Bills? A. Yes.
- Q. Do you remember saying that? A. Yes.
- Q. And you mentioned that part of the arrangement

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as a result of which that finance was obtained was that your company had to pay an advisory fee of \$10,000? A. That's correct, yes.

Q. Was that advisory fee to be paid on an annual basis? A. The \$10,000 was payable in advance.

Q. In advance? A. Yes.

Q. Was any advice ever received for the fee? A. No, but I might add it was never sought either.

Q. In other words, this, would it be fair to say, was a - this fee was in effect an extra charge for the loan, wasn't it? I am not putting that in any way to imply criticism of your company. That is the position, isn't it? A. Well, this is the way we took it, anyhow, or paid it, not took it. 10

HIS HONOUR: A sweetener.

MR. HUGHES: Q. Of course, at that time when this fee was requested, if I can use a neutral term, your company's liquid position was so serious that you could hardly afford to refuse the request if a refusal might result in the withholding of the loan? A. That's correct. 20

Q. Now, was it the fact to your knowledge in the early part of this year through to the time when this allotment was made to Howard Smith that Millers' difficult liquid position was well known in commercial circles? (Objected to by Mr. Deane as leading). 30

Q. To your knowledge what was the extent during the first half of this year of public acquaintance in commercial circles of Millers' financial position in terms of liquidity? A. Well, we found it extremely difficult to raise funds, even short term, at that particular time.

Q. Could I ask you about another advisory fee that you had to pay. You had to pay an advisory fee of \$12,000 to another company, did you not? A. That's correct. 40

- Q. And what company was that? A. Tricontinental Corporation.
- Q. Was that a fee payable in advance?
A. Payable 6-monthly in advance.
- Q. Payable 6-monthly in advance? A. Yes.
- Q. So, it was an annual fee of \$12,000?
A. That's correct.
- Q. Payable 6-monthly in advance? A. Yes.
- 10 Q. Was that fee in the same category as the fee you had had to pay to All State Commercial Bills? A. No, it was entirely different.
- Q. Entirely different, I see. In the sense that you actually got some advice? A. Yes, we did.
- Q. You gave some evidence about what was done during 1971 to obtain finance. What was the extent of your search for finance through 1971? Was it as thorough as it could be or was it otherwise? (Objected to by Mr. Deane: question withdrawn).
- 20 Q. You gave some evidence yesterday about two letters each of which is to be found in the exhibit MH.12. One was a letter dated 16th July, 1971, and if I may, your Honour, I will show Mr. Koch a copy of it. A letter from the Minister for Shipping and Transport dated 16th July 1971. Do you see on the right-hand margin of that letter at the top there are some initials? A. That's correct.
- 30 Q. Do those initials indicate the distribution list for that letter? A. Yes, that is my handwriting.
- Q. Oh, that is your handwriting? A. Yes.
- Q. Do those various initials indicate the names of, the identities of the persons to whom the letter was distributed? A. That's correct.
- Q. And was Mr. Cameron, according to one of the initials in your handwriting, one of those persons? A. Yes, he was.
- 40 Q. May I have that back and I will find another

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Exhibit MH.13

letter for you and just ask you a question about it. Would you have a look at this letter of 15th June, 1972, from the Minister for Shipping and Transport to your chairman, Mr. Taylor, and do you notice that at the top of that letter there are some initials?
A. Yes.

Q. Do you recognise the handwriting? A. Yes, that is Mr. Murphy's handwriting.

Q. Mr. Murphy's handwriting? A. Yes. 10

Q. And are your initials amongst them? A. Yes, they are.

Q. Well, did you receive the letter in the ordinary way in the intra-office distribution?
A. That's correct, yes.

Q. May we take it that those initials indicate the identity of the persons to whom that letter was distributed inside the Miller office? A. That is true, with Mr. Taylor keeping the original. 20

Q. With Mr. Taylor keeping the original, yes.

HIS HONOUR: Q. There is an initial there that has been rubbed out underneath W.C. whom I assume is Mr. Conway, is that right?
A. Yes, that is Mr. Conway, your Honour.

Q. There appears to be something A.C. under that rubbed out, M.A.C. or W.A.C.? A. Well, W.A.C. is Mr. Conway's full initials.

Q. I see. A. It does not appear on this copy, your Honour. I can't pick it out. 30

Q. Immediately below the W.C.? A. It is not marked on this copy.

Q. At all events, it is not Mr. Cameron?
A. No, it is not Mr. Cameron.

MR. HUGHES: Q. I want to refer the witness to folio 267 which is a Miller minute of a meeting of 6th July, folio 267 part of Ex.MH.13.

WITNESS: I have a copy here.

MR. HUGHES: Q. I invite your attention to the top of folio 267 of those minutes -

HIS HONOUR: May I just correct you, Mr. Hughes? It is not Ex. MH.13 - it is part of Ex. 3. *

MR. HUGHES: Q. May I invite your attention to the figures on the top of folio 267. One of those figures is 406,900 appearing under the description "at call"? A. Yes.

10 Q. What would have been the company's ability at that date, namely, 1st July 1972, if the depositors of those moneys had demanded immediate repayment? A. That was without the Howard Smith million?

20 Q. Without the Howard Smith million? A. I could not answer that. I would not know what our financial position was at that date unless I saw the current sheet. I can only say that our financial position regarding our bank overdraft limitations - we were always just bordering on the overdraft limit on the top.

Q. I think you said that earlier? A. Yes.

30 Q. If you were able to consult the bank sheets you might be able to give a more definite answer to that question? A. I could. But I know what our position was right throughout that period, and it would have been difficult to meet these calls if they had been called up unless we could have re-financed them.

Q. Would the re-financing have involved further short-term borrowing? A. Yes, it would have.

Q. Did any officer of the Bank of N.S.W. ever express any view to you concerning the company's capital position? (Objected to by Mr. Deane; allowed.)

Q. Did any officer of the Bank of N.S.W. ever express any view to you as to your company's capital position? A. Yes, they did.

40 Q. Who was it? A. Mr. Timmins, the Balmain manager for the Bank of N.S.W.

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* Exhibits
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Exhibit B.

Q. Did your company then bank at that branch?
A. Yes. We still do.

Q. What did he say to you about that topic?
A. That was at a time in 1971 - early 1971 -
when we were heavily engaged in short-term
borrowings, and he said to me that he was
concerned about our excessive short-term
borrowings, and what we needed was an infusion
of share capital.

HIS HONOUR: Q. When was that? A. That was in 10
1971.

Q. Early, or late? A. It was just prior to the
Mineral Securities crash.

Q. That would be January? A. January, 1971, yes.

MR. HUGHES: Q. Did you pass that opinion on
to any member of your Board? A. No, I did not.

MR. ROWLINGS: No questions.

MR. LOCKHART: Q. Mr. Koch, I want to read to you
from the minutes of the Board meeting of
Millers of 6th July 1972. (Ex.B.) I want to 20
read the following extract with reference
to Hambros Bank. Do you have a copy there
yourself? A. Yes, I have one here.

Q. On p.6, at the bottom of the page, do you
see the minutes state "Sir Peter Abeles...
was prepared to increase the loan." Does
that substantially accurately record what
was said by Sir Peter at that meeting?
A. Yes, I believe it does.

Q. You gave some evidence to his Honour about 30
the meeting at Sir Peter Abeles' office on,
I think you said, 5th June this year, was it?
A. 5th June, yes.

Q. What did Mr. Taylor say at that meeting?
A. The main thing that Mr. Taylor was talking -
everyone was talking, really - and particularly
Sir Peter Abeles and Mr. Taylor - I will
correct that. They did most of the talking,

the two of them, Mr. Taylor to my recollection said that "We wish to see Sir Peter regarding the Ampol offer and would like Sir Peter's views upon a few matters we wish to raise with him," and then we raised the matters I have just discussed.

- 10 Q. Any others? A. I can't recall any. I am not saying there were not any other matters discussed, but they are the ones I can recollect.
- Q. Of course at that stage the Ampol takeover offer had been made, hadn't it? A. Yes, it had.
- Q. And indeed at that stage the Romanda shares had been acquired by Ampol? A. That is right.
- 20 Q. Do you recall Mr. Taylor saying anything at this meeting on 5th June about his capacity to obtain 15% of the Millers share capital for Bulkships if they were prepared to make a counter offer against Ampol? Do you recall that being said? A. I don't recall it being said at that meeting, but I do recall Mr. Taylor telling me at some stage or other - I don't know when it was - that he had made such a suggestion to Sir Peter, but I don't recollect whether it was at that meeting or not.
- 30 Q. The suggestion being that Mr. Taylor could obtain 15% of the capital other than that held by Ampol and Bulkships? A. Yes, that is as I understand what Mr. Taylor told Sir Peter, but I am not sure whether it was at that meeting or not.
- 40 Q. Your understanding of what Mr. Taylor told you was that he was saying to you that he could obtain 15% of the issued share capital of Millers for Bulkships? A. I don't know whether he said he could obtain them or whether he said he could influence them. I am not too sure whether it was "obtain" "influence" or "secure", or what. But I know he did offer to Sir Peter approximately 15% of the shareholding in Millers to Bulkships if they so desired. That is as I understand the position.

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Q. If they made a counter offer against the Ampol bid? A. That is as I understand the position.

HIS HONOUR: Q. This was not an allotment? 15% of the existing capital? A. Of the existing shareholding, yes.

MR. LOCKHART: Q. Was it your understanding that Sir Peter declined to be a party to that? A. That is my understanding.

MR. DEANE: Q. Do you know who the shareholders that Mr. Taylor was referring to were? 10
A. He did not discuss them with me.

Q. Do you know? A. I can assume, and guess.

Q. Who would you assume were the shareholders he was referring to? A. I would assume he was referring to the Eastern Suburbs Leagues Club. I would assume he was referring to the shares held by Mr. Duncan.

Q. Yes. A. They would be the two major ones.

Q. What is your understanding as to the final ownership of the shares held by Mr. Duncan? 20
(Objected to by Mr. Glass; allowed.)

Q. What is your understanding as to the ownership of the shares held by Mr. Duncan?
A. I don't know about ownership of the shares. My only understanding is that he has a company which I believe is called Ardry.

Q. Did Mr. Taylor tell you whether he had had any discussions with Mr. Duncan in relation to this approach to Bulkships? A. No. 30

Q. You have told his Honour that you first joined Millers in 1959? A. Yes, that is right.

Q. What was your background before that in terms of working life? A. From the time I left school?

Q. Yes, if you don't mind? A. I left school after obtaining my Leaving Certificate in South Australia. I worked initially for the Electricity Trust of South Australia.

- Q. In what capacity? A. Junior clerk.
- Q. Yes. A. From there - I think I was at the Electricity Trust for some four years - I then went into a public accountant's office as an audit clerk for approximately one year. I then joined Australian Gypsum Industries in the position of accountant, although I was not qualified at that stage. I was there for some five years before I joined Millers.
- 10 Q. Have you ever practised as an accountant?
A. No.
- Q. You became general manager of Millers when? A. In 1971.
- Q. What month? A. June.
- Q. At the time you became general manager I think there were two joint managing directors, weren't there? A. It was a simultaneous appointment, yes.
- 20 Q. For how long did there continue to be two joint managing directors? A. Until Mr. Anderson retired. It was towards the end of 1971. I am not sure of the exact date.
- Q. From 1971 on, at the end of 1971, did Mr. Taylor remain as sole managing director? From then on has he been sole managing director? A. Yes.
- Q. As well as being chairman? A. Yes.
- 30 Q. And does Mr. Anderson still enjoy an executive position with the company, or is he a non-executive director now? A. He comes in, I would say, at least once a month - possibly more. It may be twice a month, mainly to sign cheques, and sort of have a look through the cheques as he is signing them.
- Q. A number of documents have been put before his Honour, being your finance reports for periods 1971 to 1972 which you have identified? A. Yes.
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- Q. Those finance reports are headed from "Managing director" - I am sorry, from "general manager to joint managing directors" or to "managing director"? A. Yes, that is right.
- Q. Were they reports from you to the managing director or the joint managing directors, or reports from you to the Board? A. They were reports from me to the Board through the joint managing directors or the managing director. 10
- Q. What is the situation in terms of responsibility? To whom did you regard yourself as being responsible? A. At what period?
- Q. During the period you were general manager of this company? A. Well, Mr. Anderson and Mr. Taylor were joint managing directors. I felt I was directly responsible to both of them. And then, when Mr. Anderson retired, I was responsible to Mr. Taylor. 20
- Q. And through them, and only through them, responsible to the Board? A. Yes.
- Q. For example, if you heard Mr. Taylor say something which you thought was deliberately misleading at a Board meeting would you regard it as part of your function to inform the members of the Board that what was being said was incorrect? A. Yes, I would say so.
- Q. If you saw a letter written over Mr. Taylor's name on an important matter which was misleading would you regard that as a matter you should bring to the attention of the Board? A. I am sorry, I don't quite follow that. 30
- Q. I said if you saw a letter written by Mr. Taylor on behalf of the company that you thought was deliberately misleading, was that something which you would regard as being your duty to bring to the attention of the Board? A. I think I would first possibly discuss it with Mr. Taylor. 40
- Q. If you saw a press statement that you

thought was misleading attributed to Mr. Taylor is that something that you would regard it as your duty to follow up?
A. Yes, I would certainly discuss it with him.

Q. Do you remember seeing, in December of 1971, any press statements attributed to Mr. Taylor in relation to Millers financial position?
A. No, I don't recall that.

10 Q. Part of your functions and duties were to keep yourself informed as to what Millers were being reported in the press as saying?
A. Yes.

Q. Do you recall reading in December 1971 a statement attributed to Mr. Taylor in these words: "As for the company having financial worries, Mr. Taylor said this was in no way true"? A. No, I don't recall that. Could you tell me what publication it is?

20 Q. I show you a photo-copy of a large story in the "Sydney Sun". You saw that when it was published? A. Yes, I did. I saw that, yes.

Q. Would you read out what Mr. Taylor said? Would you read what Mr. Taylor is reported as saying in that story? A. I recall this, yes. Where do you want me to read from, Mr. Deane?

Q. Do you see in the centre of the third column the word "Unprofitable"? A. Yes.

30 Q. Would you read from there? A. "Mr. Taylor said the group had no immediate plans to sell any of its hotels. 'We do have a standing policy on selling any unprofitable concerns, though,' he added. 'The Merryfield Hotel in Woolloomooloo, for example, is open to offers.' As for the company having financial worries, Mr. Taylor said this was in no way true".

40 Q. Will you read on? A. "Long-term loan arrangements with Hambros Bank Ltd., London, for £U.S.8.3 million to finance operations of the Amanda Miller had no flaws in them. Likewise, negotiations for moneys to cover the construction and subsequent operation

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of the sister-ship to the Amanda Miller,
now being built, were going smoothly."

- Q. Read on, please? A. "Look, take it from me, there are no ins-and-outs manoeuvres going on within the company' Mr. Taylor said. 'Muckrakers have always tried to damage the company. Their mongerings should be passed by. I don't take any notice of them. Believe me. The company is very strong'".
- Q. Now, of course, when you read that you realised that that was a statement by the chairman of the company to the public that Millers had no financial worries, did you not? A. Yes. 10
- Q. What did you do about it? A. I discussed it with Mr. Taylor. I think at round about that time there were many reports in the papers. Some were misleading; some were factual. I was not aware of what Mr. Taylor had said. Sometimes when we discussed the press cuttings he informed me that he had not said that. I am not saying that he said it to that one. It could have been others that he attributed this remark to. So from there on we did not take a great deal of notice of what was appearing in the press. 20
- Q. Was anything done to correct that statement? A. No.
- Q. Do you recall seeing in the Australian Financial Review of Wednesday, October 13th, a statement attributed to R.W. Millers, and I refer you to the first paragraph. Would you read that out? Do you recall seeing that, first of all? A. I don't recall, but I would have seen it. I get the Financial Review every day. 30
- Q. Would you read it out, please? A. "R.W. Miller (Holdings) Ltd. is reported to have overcome a temporary liquidity problem arising from the building of the 62,000 ton crude oil tanker Amanda Miller by means of a Euro dollar loan." 40
- Q. Did you take any action when you saw that? A. No.

- Q. Of course, from what you have told his Honour, the statement attributed to Mr. Taylor in the Sun was untrue, wasn't it? A. No, I am not saying that it was untrue.
- Q. So that you would not disagree with the statement in December 1971 that R.W. Millers had no financial worries? A. In December?
- Q. December 1971? A. No, I would not have agreed with that.
- 10 Q. You say that you would not say that was untrue. What do you say about it?
A. I think, if I recollect the question you asked me, it was "Did Mr. Taylor say it." I said that I would not deny that he said it.
- Q. I am sorry. I will re-frame the question. From what you have told his Honour a statement made in December 1971 that R.W. Millers had no financial worries would be simply untrue? A. Yes.
- 20 Q. And so far as you are concerned it was a statement which was demonstrably untrue?
A. Yes.
- Q. Now, is what you tell his Honour that you, as general manager of this company, saw that statement attributed to the chairman of your company, and you did nothing to correct it? A. That is correct.
- Q. And you stood by while nothing was done to correct it? A. That is correct.
- 30 Q. Knowing full well, of course, that the ordinary people who buy shares on the Stock Exchange in public companies were likely to act on that statement? (Objected to by Mr. Glass; question not pressed.)
- Q. In December 1971 when you saw this statement did you believe it was likely that people would, in terms of dealings on the Stock Exchange, act on it? A. I should say it was fair to say that they possibly could.
- 40 Q. Would it be true to say that in terms of the evidence you have given in this Court you

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could not think of a more misleading statement as to the affairs of R.W. Miller as at December 1971? A. December 1971, yes. It was not as bad as June, but I would say "Yes" - that it was not an accurate statement.

- Q. Coming back to these finance reports, were they all prepared by you? A. Yes.
- Q. Were they submitted to anybody before they were, as it were, made available to members of the Board? A. I submitted them direct to the secretary of the company for inclusion in the Board folders. 10
- Q. Now, at the various meetings at which these finance reports were considered, did you supplement them in any way? A. How do you mean, Mr. Deane?
- Q. I mean did you add to them? A. I added to them where I thought it necessary to. I felt that I had given the required information, and the idea of the reports was that I would submit those and be thereto answer any questions that the Board might have. 20
- Q. You, of course, made some corrections to them on occasions, did you not, orally? For example, the May report indicated a possible loan of \$2½ m. from the Commonwealth Superannuation Fund? A. Yes.
- Q. There you indicated at the Board meeting that it looked as though that might be \$3 m.? A. Yes. 30
- Q. Apart from that type of amendment, and apart from answers to questions, would it be true to say that your finance reports accurately reflected what was put before the Board members on the question of finance? A. Allowing for reasonable latitude for verbal discussion, yes.
- Q. And of course, those documents were written by you to be acted on by the Board? A. Yes, that is right. 40
- Q. Now, a number of letters have been put into

evidence which have your signature to various borrowing institutions. Who wrote those letters? A. If they have my signature, I would have written them.

Q. In other words, letters you signed you wrote? A. I would say in most cases. Not in every case, but in most cases.

10 Q. In some cases there are letters over the signature of Mr. Taylor to borrowing institutes, such as the Bank of N.S.W.?
A. Yes.

Q. Who would have, as it were, drafted those letters? A. I would say in most cases it would have been Mr. Murphy, the chairman's executive assistant.

Q. Would you have seen those before they went? A. Yes, in most cases I would say so.

20 Q. For example, do you recall a letter of 18th May 1972 over the signature of Mr. Taylor to the manager of the Bank of N.S.W. in which a submission was made for a loan of up to \$5 m.? A. I think I saw it after it went, yes.

30 Q. Before I take you to this letter, you would agree with me, wouldn't you, that in terms of letters written by you to banks and other financial institutions in which you were seeking to borrow money you were inviting the bank or the financial institution to whom you were writing to act on the basis of the information you gave them? A. That is right, yes.

Q. And to lend money? A. Yes.

Q. And you would agree, wouldn't you, that in those circumstances there was a clear duty to be scrupulously honest? A. Yes.

40 Q. And indeed, in circumstances where money was advanced on the basis of such a letter or presentation, to disclose to the lender any material matters that might have arisen between the facts presented to it on which it was acting and the time the loan was being made? A. Yes.

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- Q. Now, would you read the letter of 18th May 1972 to the Bank of N.S.W.? A. Out aloud?
- Q. No, to yourself. If you feel you know it well enough go quickly; if you feel you would like to read it carefully, do so? A. Yes.
- Q. Now, is there any statement in that letter, Mr. Koch, which you think is inaccurate? A. There is one that I would say could be inaccurate. That is on p.4, where the estimated value of our two small tankers would not be less than \$2.5 m. (sic.) I think that is a bit excessive. 10
- Q. Otherwise you say, in the context in which the letter was written - that is to say, to a bank who had been asked to lend \$5 m. what is stated is accurate? A. I cannot see anything that sort of readily hits me that could be wrong.
- Q. But of course the bank, on the basis of this proposal, did not lend \$5 m. did it? It lent \$4.2 m.? A. It lent \$4.2 m. That is right. 20
- Q. Which means you got almost what you set out to get? A. Yes.
- Q. And indeed, the approach was for a loan of up to \$5 m.? A. Yes.
- Q. Now, you put this forward, or this was put forward on a basis of fact, and that was that the making of this loan would enable you - I am reading from the first paragraph of the letter - "to secure our company's major objective and at the same time provide the basis of a sound financial plan for the future"? A. Yes. 30
- Q. And that was accurate? A. No, I would not say that that was accurate.
- Q. Well now, is there anything else in this letter in relation to which you want to correct your previous statement that what was in it was accurate? A. Perhaps it may be quicker if you asked me what you feel is inaccurate. 40

Q. No. I am asking you, Mr. Koch. Is there anything else you wish to say was inaccurate?
 A. The other one, on p.3, where we were asking for \$5 m. I think cl.3 says "To provide additional working capital in meeting our commitments for the normal operations of the group between now and June 1973." I would not pass that as being accurate.

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10 Q. Anything else? A. Well, it is said again under "repayment". The same thing is said about providing working capital there.

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HIS HONOUR: Q. What was the last bit?
 A. Item 3 on p.3, where it says "On delivery of the vessel clear title is given to our company and on execution of the mortgage document the \$7,397,460 would be applied...
 3. to provide additional working capital for the company".

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20 MR. DEANE: Q. Is that all? A. So far as I can see, Mr. Deane, yes.

Q. Could I take you back to p.2? A. Yes.

Q. The second paragraph? A. Yes.

Q. "The end financing for operation of the vessel is secure." Is that accurate?
 A. On 18th May we had not received the letter from Hambros. I believe that was dated 1st June.

30 Q. Would you agree with me that in mid-June your company is writing to the Commonwealth of Australia saying the Hambros finance is secure? A. We could have. I cannot recollect.

Q. Of course, Hambros finance was at all times secure, wasn't it? A. I would have hoped it would have been, but I was not certain.

40 Q. But isn't it a fact that after you got the letter of 1st June with all the conditions you agreed with Hambros, by a letter of 26th June, to pay the original commitment fee of \$US.66,000 forthwith? A. Yes, that is right.

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- Q. And you agreed to pay that \$US.66,000 in respect of Hambros loan before the Board meeting on 6th July? A. Yes.
- Q. Now, when you were talking at the Board meeting about the Hambros money being insecure did you mention that you had agreed to pay the \$US.66,000 within 14 days on 26th June? A. No.
- Q. And of course, shortly after the Board meeting your company in fact paid that \$US.66,000 didn't it? A. I am not sure of the date we paid it. I am not sure when we paid the money, but I know I paid it. 10
- Q. Do you really suggest to his Honour that you, as general manager of this company, in the financial straits of which you have given evidence to the Court, paid out \$US.66,000 in respect of finance that you thought was insecure? A. Yes, I did.
- Q. And which you would never get back if, for the reasons which you raised, the finance went off? (Objected to by Mr. Glass; question withdrawn.) 20
- Q. You would agree with me, wouldn't you, that your view at the time you paid this money was that it was a commitment fee, and if the loan went off because of change of control - which is the only thing you mentioned - you would never get the \$US.66,000 back? A. Yes, that is right. 30
- Q. This letter to the Bank of N.S.W., in which your company stated that the loan will provide the basis of a sound financial plan for the future, went on, didn't it, to indicate the whole basis of financing for the "Robert Miller"? A. Yes, it did.
- Q. And the approach that was taken was Hambros end finance, short-term finance to construction finance? A. Yes.
- Q. And the reason that had come about, was it not, was that, whereas Hambros were originally willing to lend both construction and end finance, the uncertainty of the date of delivery led them to be unwilling to assist 40

with construction finance? A. They were never willing to assist with construction finance.

Q. They were prepared to discuss it? A. They were prepared to discuss it, yes.

Q. And it was the uncertainty of the date of delivery which, as it were, turned them off construction finance A. That was one of the reasons, yes.

10 Q. In this letter you are dealing with construction finance, aren't you? A. In this one, yes.

Q. And the whole basis that you are putting forward is "We will finance this tanker by short-term construction finance while it is being built - long-term finance on delivery"? A. Yes.

20 Q. And the long-term finance will, as it were, eliminate the short-term finance? A. Not all of it. Part of it.

Q. And that is a very common way of financing the construction of a ship, isn't it? A. Well, our company has never done it this way before.

Q. Did you enquire how this type of ship is normally financed? A. Yes.

30 Q. Were not you told that there were taxation and other benefits in having short-term finance during construction, capitalising interest, and then payment out with long-term finance? A. I don't think we were ever advised that.

Q. If the Hambros finance was secure, as is said here, the short-term finance for the construction of the vessel needs to be viewed in a different light from other short-term commitments, doesn't it? A. No, I don't think so.

40 Q. What I am putting to you is this, that if you have short-term finance which covers an interim period, and secure long-term finance available to cover repayment of that short-term finance, the situation in terms of comparing short-term liabilities and the like with current

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assets is very different from the situation which exists if you have got short-term liabilities but with no long-term loans secured to meet them? A. Yes, that makes a difference.

- Q. In other words, if one were to combine the lenders and take a situation where the people providing the construction finance and the people providing the end finance were to amalgamate in terms of the transaction, what you would have would be that group providing construction finance which was going to be allowed to remain outstanding on a long-term basis when construction was completed? A. I don't quite follow your question. 10
- Q. What I am saying to you is this: let us presume that in the case of the "Robert Miller" you had the Bank of N.S.W. providing all the construction finance? A. Yes. 20
- Q. I know this is not the case, but let us presume that is the situation? A. Yes.
- Q. And let us presume that you had end finance secured under which Hambros Bank were going to provide the end finance to pay out the Bank of N.S.W.- A. Yes.
- Q. If in those circumstances you were simply to group Hambros and the Bank of N.S.W. together, being, as it were, a joint venture, the result would be, would it not, that you would have your short-term finance on the basis that at the end of construction the moneys would be allowed to remain outstanding on a long-term basis? A. If that was the case, yes. 30
- Q. Which, for practical purposes, would be long-term finance? A. I do not consider five years "long-term". I prefer to use the term "medium term".
- Q. Whichever term you prefer to use, for practical purposes it would not be short-term finance? A. That is right. 40
- Q. So far as the Bank of N.S.W. short-term

finance was concerned, and subject to the possibility that you would pay \$US.66,000 for nothing in relation to the Hambros plan, that was, for all practical purposes, the situation which existed, wasn't it?

A. No, I am not too sure. No, I don't agree with you.

- 10 Q. You see, did you not procure for the Bank of N.S.W. from Hambros a letter of commitment under which Hambros undertook that they would make the payment direct to the Bank of N.S.W.? A. Yes.
- Q. In respect of moneys advanced by the Bank of N.S.W.? A. That is so, yes.
- Q. And you were aware that that document was sent to the Bank of N.S.W.? A. Yes, I was.
- Q. Did you send that letter to them? A. No, I did not.
- 20 Q. Well then, of course, unless the Hambros loan went off, insofar as the moneys advanced by the Bank of N.S.W. were concerned you were never going to have to physically repay it - Hambros was going to do it on your behalf? A. That is right.
- Q. That is correct, isn't it? A. Yes.
- Q. And it was going to do it by means of an arrangement which resulted in medium or long-term finance? A. Yes.
- Q. Whichever phrase you prefer to use? A. Yes.
- 30 Q. Well now, in those circumstances would not you agree with me that, subject to the possibility that this Hambros loan was insecure, insofar as the moneys owing to the bank on short-term finance were concerned they were, for practical purposes, in the same position as if long-term finance had been involved? A. No, I don't agree with that.
- Q. You don't agree with that? A. No.
- 40 Q. Why not? A. Unless I am misunderstanding your question, the Bank of N.S.W. loan is

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repayable on 30th June 1973. The Hambros loan, if it is forthcoming, is payable upon delivery of the vessel, which could be any time.

Q. Mr. Koch, the whole of the arrangements with the Bank of N.S.W. was on the basis that the moneys advanced by it would be repaid from the Hambros loan, wasn't it? A. Yes.

Q. And the Bank of N.S.W. was fully acquainted by you, I presume, of the fact that the Hambros moneys only became available on completion of the "Robert Miller"? A. Yes. 10

Q. And I presume that since you were dealing with someone lending on information that you put before it, the bank was also informed that there was a possible delay in delivery involved? A. I could not answer for the bank.

Q. You don't really suggest, do you, that there is any doubt in your mind that in the event of a delay in delivery the Bank of N.S.W. under this arrangement would have carried you until Hambros money became available? A. I am saying it is a possibility. 20

Q. A real possibility? A. Well, it has been done before.

HIS HONOUR: Mr. Deane, I think you left a "not" out of your question.

HIS HONOUR: Q. Did you understand that? A. I know what I meant to say. Perhaps I did not understand the question fully. 30

(Question marked * read by Court Reporter.)

WITNESS: Could I answer that "Yes, there is doubt in my mind".

MR. DEANE: I am satisfied with the question and answer.

Q. Of course, in your management report to the directors in May 1972 you dealt with this matter, didn't you? A. Yes.

Q. That was a report that you were writing to

the directors of the company that employed you?
A. Yes.

Q. And a report in which you were being as frank as you possibly could? A. Yes.

Q. And pointing out any possibility of danger or doubt or anything else? A. Yes, I believe so.

Q. You said to your directors "Prior to this we had once again....\$4.2 m."? A. Yes, that is right.

10 Q. If this possibility of a gap and of the bank withdrawing its finance was one that was really present in your mind don't you think you should have told your directors about it?
A. I don't think so. I don't feel that is the case.

Q. What do you think any of your directors would understand by reading "On Friday 26th May we were advised....\$4.2 m."? A. I am sorry. Are you asking me a question?

20 Q. Yes. A. I am sorry. I believe they would have felt that bridging finance for the construction of this vessel had been obtained.

Q. And of course - that bridging finance had been obtained from the Bank of N.S.W. ? A. Yes.

Q. And of course that sentence comes immediately after details of Hambros agreement to the end term finance, doesn't it? A. Yes.

Q. In your report? A. Yes.

30 Q. You see, I suggest to you that any director, or that you would expect any director reading that to read it as stating "Hambros is providing end-term finance. As to \$4.2 m. of the construction finance, that is completely fixed."? A. That is correct. For construction finance it was.

Q. Bridging finance? A. Well, bridging finance, yes.

40 Q. Finance up until the time the money comes from Hambros Bank? A. No, it is for bridging finance to 30th June.

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- Q. I ask you to take your report of May 1972?
A. Yes, I have the report.
- Q. Where do you say "Finance up to 30th June"?
A. No, I would not have mentioned a date.
- Q. You are talking about - in this report you are talking about two sorts of finance, aren't you? A. Yes, that is right.
- Q. The first, construction finance, and the second, end finance? A. Yes.
- Q. And you are drawing a distinction between them? A. Yes. 10
- Q. You then say that the end finance is secure because you have got a letter of commitment from Hambros, or Hambros have committed themselves by Telex? A. By Telex they had, yes.
- Q. So that what remains is bridging finance or construction finance up until that end finance? A. Yes.
- Q. You then say "On Friday, 26th May we were advised that the Bank had agreed to make available bridging finance to the extent of \$4.2 m."? A. Yes. 20
- Q. Would not you agree with me that any director reading that would be expected by you to accept that as a statement that the \$4.2 m. was available up until the time when the moneys would be received from Hambros? A. No, I would not say that at all. I would not agree with that. 30
- Q. Did you ever do anything between the meeting in June 1972, when that May report was presented, and the meeting of 6th July to correct the statement to which I have referred you relating to bridging finance? A. No, I did not.
- Q. So that insofar as the directors would recall the information you had given them, they would recall that you had told them that Hambros had agreed to end finance and the Bank of N.S.W. had agreed to make available \$4.2 m. bridging finance? (Objected to by Mr. Glass.) 40

- Q. As at 6th July 1972 - at the end of the meeting - insofar as you are concerned any of the directors who recalled what you had told them would understand that the Bank of N.S.W. had agreed to make available bridging finance to the extend of \$4.2 m. up until the Hambros loan? A. Yes, they would have been - they could have assumed that, yes.
- 10 Q. And of course, for all practical purposes that was the true situation, wasn't it?
A. No, it was not.
- Q. Because of this possibility that, in the event of a delay beyond 30th June 1973, the bank, which was looking for its money to Hambros, would not agree to hold its hand?
A. It was a possibility, yes.
- Q. Might I ask you some questions about this Tricontinental short-term finance? A. Yes.
- 20 Q. As I understand the situation, in June of 1972 you were in negotiations with the Commonwealth Superannuation Fund for a loan of \$2.5 m. and then \$3 m. from that source?
A. That is right.
- Q. And negotiations were proceeding favourably, were they not? A. Slowly.
- Q. Slowly, but favourably? A. At that stage, yes.
- 30 Q. Would you agree with me that as at the end of June your understanding was that the only reason that that loan had not proceeded to fruition was that your demands as to time of payment were a little bit too much for the pace at which the Commonwealth Superannuation Fund works? A. No, I would not agree with that.
- Q. What was the value of the hotels which you were offering to the Commonwealth Superannuation Fund? A. To my recollection they were \$5 m. to \$6 m. Yes, I would say \$5 m.
- 40 Q. On which you were seeking to borrow \$3 m.?
A. Yes, that is right.

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- Q. Did the Commonwealth Superannuation Fund have any objection to the nature of the security? A. Not as I recollect, no.
- Q. And of course, these very same hotels were then secured to Tricontinental, were they not? A. Yes.
- Q. Which means that in the event of the Tricontinental short-term finance ceasing to be available you would have had available, unencumbered, hotels of a value, you say, of \$ 5 m.? A. That is right. 10
- Q. Which the Commonwealth Superannuation Fund, so far as you are aware, thought were acceptable in respect of a loan of \$3 m.? A. At the time we were asking for the loan, yes.
- Q. Of course, the Commonwealth Superannuation Fund, to your knowledge, is not, as it were, the most liberal of lenders in terms of the ratio between loan money and security? A. I don't think they are much different to anyone else. 20
- Q. So far as short-term Tricontinental moneys were concerned there were two matters, weren't there? The first was that they were the subject of a specific agreement? They were subject to a specific agreement? A. Yes.
- Q. And that specific agreement provided for the rolling-over of bills on maturity for a minimum period of 12 months subject to certain conditions? A. Yes. 30
- Q. Which means that the normal expectation would be, I suppose, that that minimum period of 12 months would at least be observed? A. It was a possibility one way or the other.
- Q. Insofar as Tricontinental was concerned you were aware, of course, that Sir Peter Abeles was on the Board? A. Yes, I was.
- Q. And you have always been aware of that? A. Yes.
- Q. And indeed all the members of the Millers Board, to your knowledge, had been aware of 40

it at least from the time you attended. -
from the time you started attending Board
meetings? A. Yes, that is right.

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10 Q. Did you really think that there was any
chance of Tricontinental, with this security
over hotels worth \$5 m., acting in such a
way as would prevent you re-negotiating loan
moneys in terms of these bills? A. The
possibility existed, and I felt it was one
which could not be ignored.

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Q. Of course, if that possibility came about,
you would have been in the situation that
you had assets of a value of \$5 m.
unencumbered? A. Yes.

20 Q. Which means, doesn't it, that if you wanted
to safeguard against that possibility you
could yourself, at the beginning of July
1972, set about negotiating long-term finance
to replace the Tricontinental short-term
finance? A. Yes, I could have done.

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Q. And in time you have no real doubt you would
have been able to do that? A. We had failed
before - there was the possibility we could
fail again.

Q. Of course, it is a matter of what interest
rate you are prepared to pay, isn't it?
A. Not necessarily.

30 Q. Have you any doubt that if this company
was prepared to, say, in July this year, pay
10% on assets of a value of \$5 m. it would
have had any real trouble in obtaining long-
term finance of \$3 m.? A. It depends, really,
if you are talking after 6th July it would
depend on the state of the money market.

Q. As at 6th July did you have any doubt, if you
set out to obtain \$3 m. on these hotels at,
say, a rate of 10% interest, you would have
been able to obtain it? A. We had tried with
the Superannuation Board.

40 Q. What was the rate of interest? A. I believe
it was 9 $\frac{1}{4}$ %.

Q. I would like, before the adjournment, to ask

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you a few questions in relation to unrelated matters, and I would come back to this subject later. Can you repeat for me the dates on which you had meetings with representatives of Howard Smith in June and July this year? A. The first meeting was 16th June, the second was 19th June. The next one was the 20th. The next one, to my recollection, which was of very short duration, was on 27th June, with Mr. Maxwell only. I think it was Mr. Ellis-Jones, Mr. Walker, and myself, I think at that meeting, and 4th July. 10

Q. Did you take notes at any of these meetings?
A. No, I did not.

Q. Did anyone take notes? A. Not to my knowledge.

Q. No-one from Millers wrote anything down? A. No.

Q. How do you remember the dates? A. I recall them. The first date was the 16th June. I recall that, because it was the day I had lunch with Mr. Cribb, from Bulkships or TNT.

Q. And from there you have counted the dates on? A. Yes. 20

Q. You told my friend, Mr. Hughes, that you could not remember ringing Mr. Evans on 30th June and suggesting a share placement? A. That is right.

Q. But I think you said to him that you were not prepared to deny that you may have done so?
A. I think I said to the best of my recollection no such conversation took place.

Q. I want to ask you some questions about the meeting of 4th July 1972. Do you remember that meeting?
A. Yes, I do. 30

Q. I suggest to you that the question of share placement was raised at that meeting by Mr. Howard Smith referring to a telephone conversation? A. No. To my recollection, he did not.

Q. I suggest to you that he referred to a telephone message that had been received from Millers concerning the possibility of a placement being favourably considered by the Miller Board? A. Not to my knowledge, he did not say that.

Q. Do you deny he said it? A. To the best of my recollection he did not say it. 40

Q. Do you deny he said it? A. I don't know what the implications are of that. Yes, to the best of my recollection I deny that he said that.

Q. What I am suggesting to you, Mr. Koch, is that the original suggestion of a placement of shares by Millers to Howard Smith was made by Millers? A. No, that is not correct.

Q. No doubt? A. No doubt in my mind.
(Further hearing adjourned to 10.0am on Tuesday, 19th September, 1972.) 50

EQUITY DIVISION

No. 1240 of 1972

CORAM: STREET, C.J. in Eq.

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AMPOL PETROLEUM LIMITED v. R.W.MILLER (HOLDINGS)
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SEVENTH DAY: TUESDAY, 19th SEPTEMBER, 1972

MR. GLASS: There are a few corrections to the transcript I wish to suggest. On p. 259 the beginning of the second question: "Q. Did that invoke any interest", "Invoke" should be "Evoke".

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10 HIS HONOUR: Yes.

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MR. GLASS: Page 259 of the transcript, about 12 lines from the bottom, the transcript shows ... "that they had announced that they were going to act jointly with Ampol for the continuation of the company ..." "continuation" is obviously wrong. I don't know what the witness said. Perhaps he may have said "continued operation".

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20 MR. DEANE: I have no recollection. Perhaps I might suggest that Mr. Glass can clear it up with the witness.

MR. GLASS: At p. 260 the third question from the bottom, the transcript shows "Q. Yes, the proceedings." I suggest there is something left out there. It probably should be "Yes, relating to the proceedings" or some such question as that.

HIS HONOUR: Yes.

LEONARD DEAN KOCH
On former oath:

HIS HONOUR: You are still on the former oath administered to you, Mr. Koch.

30 WITNESS: Yes, your Honour.

MR. GLASS: Q. Mr. Koch, the transcript records on p. that you at the meeting of 6th July -

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HIS HONOUR: I shall hand the witness a copy of the transcript.

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MR. GLASS: Q. You see about 12 lines from the bottom, "they had announced that they were going to act jointly with Ampol for the continuation of the company..." Are you able to recall that those were your words on Thursday, and, if not, what words did you use? A. To the best of my recollection, Mr. Glass, I think they would have been the words that I used.

Q. You think they would be right? A. I think so, yes. 10

MR. DEANE: Q. Mr. Koch, I want to ask you some questions in relation to the "Robert Miller". As I understand the situation the contract delivery date of that vessel was 15th March 1973? A. Yes, that is correct.

Q. And, under the contract, if delivery is delayed for more than 30 days there is a penalty of S/4,000 per day payable to Millers? A. That is right.

Q. Now, in your May report you referred to an interview that you and your chairman, Mr. Taylor, had with the chairman of the Evans Deakin Company? A. Yes, that is right. 20

Q. At that meeting the possibility of delivery being delayed beyond 15th March 1973 was raised, wasn't it? A. Yes, it was.

Q. What did the chairman of Evans Deakin tell you on the question of when delivery would be effected? A. The chairman of Evans Deakin did not raise it - did not mention the matter. It was the managing director of Evans Deakin who raised the matter. 30

Q. Who was that? A. Mr. Nevitt.

Q. What did Mr. Nevitt tell you as to when the vessel would be delivered? A. Mr. Nevitt said that at that time the vessel was on schedule and that at that stage he could see no reason why the contract delivery date could not be met. He said he could see no reason why the delivery date could not be met.

Q. That was 15th March 1973? A. Yes. 40

Q. You were a little skeptical about that? A. Yes.

Q. I think, indeed, in the representations your company made to the bank in relation to the requested \$5 m. loan you indicated that you thought delivery might be delayed beyond 15th March? A. Yes, we did think this.

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Q. And that you expected delivery would be effected in May or June? A. Well, that was the opinion of our resident engineer on the job.

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10 Q. Now, when did you receive the letter of 1st June 1972 from Hambros Bank setting out the commitment? A. I am not sure of the dates. It would have been possibly within the following week.

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Q. Now, have you your file with you there?
A. Yes. In respect of what, Mr. Deane?

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Q. In respect of these documents on finance that you had last week? A. No. I have my management report and the minutes of meeting.

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20 Q. You have not any of these financial documents?
A. No.

Q. (Ex. MH. 12 handed to witness) Would you turn in that exhibit, Mr. Koch, to the pocket relating to the Department of Shipping and Transport, and, in particular, to the letter of 13th June 1972 from your company to the Minister for Shipping and Transport? A. Did you say 13th, Mr. Deane?

Exhibit M.H.12

Q. 13th June, yes? A. Yes, I have that.

30 Q. It is quite clear, of course, that by that time the letter of 1st June 1972 had been received from Hambros? A. I would say it would have been. I don't know the exact date, but I assume that is correct.

Q. Did you see this letter at the time it was written? A. Yes, I believe so.

Q. Would you agree with me that in the second last paragraph your company informed the Commonwealth in these terms "We are pleased to report that Hambros Bank Ltd. have now made a firm commitment ... M.T. Amanda Miller"? A. Yes.

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Q. Was that your belief at the time that letter was written? A. Well, it is probably as firm a commitment as we would receive.

Q. As you could ever hope to have? A. I believe so, yes.

Q. Now, coming, if I may, to the question of finance in relation to these ships, I would like to ask you first of all some questions in relation to the "Amanda Miller". As I understand the situation - and correct me if I am wrong - end finance for the "Amanda Miller" was provided by Hambros? A. Yes, that is correct. 10

Q. Upon similar terms and conditions to those which applied in relation to the "Robert Miller", speaking generally? A. Not in every respect.

Q. But in most respects? A. In most respects, yes.

Q. And in that case the loan moneys were repayable - the loan moneys were, or are, repayable by nine equal six monthly instalments of \$US.415,000? A. Yes, plus interest. 20

Q. Plus interest? A. Yes.

Q. Indeed, the terms of that loan appeared, did they not, in summary form in the letter of, I think, 3rd May 1971 in the folder in front of you under "Amanda Miller"? A. The date has been obliterated, Mr. Deane, but I think it is 3rd May.

Q. It looks like "3rd May" to me. You have that letter, do you? A. Yes, I have. 30

Q. Would you agree with me that the letter sets out in summary form the terms and conditions of the loan in respect of the "Amanda Miller"? A. Yes, I would say so.

Q. I assume that that was subsequently carried into effect by formal documentation? A. I believe we had further discussions with them before we accepted this loan. For example, just one thing which comes to mind was that the half-yearly instalments in this document is based on one-sixteenth of the loan, whereas we negotiated 40

one twentieth. There are a few other discussions we had regarding the assignment of freights, and things like this, that we were not in complete agreement with, so that the actual agreement, or the actual final agreement, could have differed in various ways from this letter.

Q. Where is the final agreement? A. For the "Amanda Miller"?

10 Q. Yes. A. Hambros' solicitors would have a copy of it. I believe we might have a copy in the office.

Q. Can you check and see whether you do have a copy? A. Yes, Mr. Deane, I can check on that.

Q. Am I correct that you say the half-yearly instalments were decreased from 1/16th to 1/20th?
A. Yes, that is right.

Q. Under the arrangement between yourself and Hambros, Hambros was, of course, given a first priority mortgage on the vessel? A. Yes.

20 Q. Is the vessel subject to any other form of charge? A. No, not to my recollection.

Q. Apart from the security over it given to Hambros it is quite free from any charge or encumbrance or anything like that? A. I believe so, yes.

Q. The arrangement between yourselves and Hambros also included an assignment by way of charge on all charter hires, freights, and other earnings?
A. Yes.

30 Q. Am I correct that the earnings from the vessel are paid in the ordinary course to Hambros?
A. No, that is not correct.

Q. You say that is not correct? A. That is not correct.

Q. Well then, what happens with the moneys received from charter and freight? A. Well, at the beginning of each six months Hambros Bank notifies us of the interest rate chargeable for the following six months.

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Q. What is that interest rate? Within what limits has that interest rate fluctuated?

A. 1½% above the going Euro dollar.

Q. I know that. But what is the practical interest? A. 10¼% was the first six months. The second six months was 7%, and we were notified today, in fact, that the following six months rate will be 7-9/16ths per cent.

Q. Will you continue, please, with what you were saying? A. They advise us the amount that is to be paid at the end of the next six months. Our charter income when it is received each month goes into a special account at the Bank of N.S.W. and the bank retains a sufficient amount each month to meet the following six months payment and the balance is transferred to our own working account.

10

Q. That is done at six monthly periods? A. The charter income is transferred each month as we receive it.

20

Q. It is transferred each month? A. Yes, transferred each month as we receive it.

Q. When was the "Amanda Miller" first put into service? A. August 31st, 1971.

Q. And the amounts deducted by the bank are sufficient to cover not only all payments of interest to Hambros in respect of the six month period, but all repayments of capital?

A. Yes, that is right.

30

Q. Has there been any month since the "Amanda Miller" went into service when your company has not received an amount in excess over the commitments for principal and interest? A. No, I can't recall. I don't recall any time when there was any month that we did not exceed it.

Q. Have you prepared any cash flow documents in relation to the "Amanda Miller" since it went into service? A. Yes.

Q. Have you those with you? A. No, Mr. Deane, I do not have them with me.

Q. In terms of cash flow, what, on your understanding, is the cash flow arising each year from the operations of the "Amanda Miller"?

A. Are you referring to gross, or net?

Q. I am referring to gross? A. Gross?

Q. Yes, and before tax? A. Before operation expenses?

10 Q. No, after operation expenses? A. This depends on the number of days that the vessel is operating.

Q. What has been the average cash flow each month, Mr. Koch? A. Slightly in excess of \$300,000.

Q. Per month? A. Yes, that is right. That is income. That is not allowing for operating expenses. That is only charter income.

Q. That is after the repayment of the instalments of principal and interest? A. No, before that.

20 Q. After the repayment of instalments of principal and interest, and after operating expenses, what is the approximate cash flow from the "Amanda Miller" each year? A. After tax?

Q. No, before tax -

MR. GLASS: We would prefer that this be given to your Honour alone, by having the witness write it down.

WITNESS: We are quite prepared to give this information, naturally, but these are things that, in my opinion - particularly from the ship owners' point of view - are relatively confidential.

30 MR. GLASS: In the circumstances would your Honour allow the witness to write his answer down?

MR. DEANE: I can see force in what my friend says. I should say that I will be quite a long time on this subject, and what has been suggested to be written down is central to the cross-examination. Subject to that, it is a matter for your Honour.

HIS HONOUR: If the figure is written down, Mr. Deane, is that going to inhibit you in further cross-examining?

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MR. GLASS: We would not want to do that. Your Honour will appreciate that industrial relations with unions would be affected if the figure were fully disclosed.

HIS HONOUR: I am not concerned with what the reason might be. If Mr. Koch tells me - as he does - that the matter is something that they prefer not to disclose unless required to, I would assent to that.

MR. GLASS: Could the matter be adjusted by allowing my friend to cross-examine freely, subject to an order by your Honour that the contents of the questions and answers be not publicly disclosed by the press. 10

HIS HONOUR: I think it is better that it be written down, Mr. Glass.

I think it is not unreasonable, Mr. Deane, to respect the defendant's wish in this regard. One knows that, for whatever reason, freight rates are a sensitive matter.

MR. DEANE: I don't mind the answer to this being written down, but I have difficulty in seeing how I can cross-examine without reference to figures. There will be a great many figures involved. 20

HIS HONOUR: Deriving from simply the "Amanda Miller" or other fields?

MR. DEANE: And the "Robert Miller".

HIS HONOUR: The difficulty is, Mr. Glass, that central to the case that you have represented is a cash stringency position, and Mr. Deane must be permitted to probe that. I have already made clear to you my aversion from anything being done behind the scenes or behind closed doors or in camera unless it is absolutely necessary. Without infringement of that, I am prepared to have this answer written down, and we will see how far we can go. 30

MR. DEANE: Q. Would you write down for me the figure which represents your estimate of cash flow from the "Amanda Miller" for the current year, after allowing repayments of principal and interest and all estimated operating expenses, but before tax? A. Before tax, but including after interest? 40

Q. After interest, repayments of principal, and all operating and other expenses related to the vessel? A. Excuse me, Mr. Deane. You are talking about the current year - the year ended 30th June 1973 - I take it?

Q. Yes. A. I will have to base this on what we anticipate is the number of operating days, because this can vary with anything that happens during the year.

10 Q. You have worked all this out before? A. I have worked it out on the basis of 335 operating days per year.

HIS HONOUR: Q. Would not there be some analysis of these figures in the company's records, Mr. Koch? A. Yes. ~~As-a-matter-of-fact, I gave these exact figures to Sir Peter Abeles at the meeting~~ - (Objected to; by direction answer struck out as indicated).

20 MR. DEANE: Q. Can you obtain the figures over the luncheon adjournment, Mr. Koch? A. Yes.

Q. In terms of income is it anticipated that the "Amanda Miller" and the "Robert Miller", when the "Robert Miller" is commissioned, will bring in roughly the same amount? A. Are we talking gross income or net income?

Q. Gross income? A. The gross income of "Robert Miller" will be in excess of the "Amanda Miller".

Q. They are sister-ships? A. Yes, they are.

30 Q. In that folder in front of you I ask you to turn to the pocket for Australian European Finance Corporation? A. I am not sure that it is in this file. I can't find it. I am sorry. I have it.

Q. Would you turn to the letter of 5th May 1972 from your company to the Australian European Finance Corporation? A. Yes, I have it. I have that letter.

Q. And with that letter your company forwarded, didn't it, a submission in relation to the financing, construction and subsequent operation of the "Robert Miller"? A. Yes.

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Q. That letter contains a number of annexures?

A. Yes, that is right. I have it.

Q. Now, the money you were seeking to raise from the Australian European Finance Corporation Ltd. was in respect of construction and end finance for the "Robert Miller" wasn't it? A. I am not sure whether it was construction finance or end finance.

Q. I suggest to you that it was both? A. I would say it would have been for both construction and end finance. 10

Q. Of course at that stage you were negotiating with the Bank of N.S.W. for construction finance?

A. That is correct.

Q. And Hambros for end finance? A. Yes.

Q. Which means that this was, as it were, an alternative to the Bank of N.S.W.-Hambros situation? A. Yes.

Q. In this submission - did you see the submission before it went? A. No, I don't recall seeing it before it went. 20

Q. Did you know it went? A. Yes, I knew it went.

Q. You would agree with me that it, being a submission on which it was suggested that money should be advanced, was a document that needed to be prepared with great care? A. Yes.

Q. Would you turn to Appendix D to that submission? A. Yes.

Q. Have you seen that before? A. I have seen one similar to it. I would have seen this, because I read the correspondence after this went to the banking corporation. 30

Q. Who prepared Appendix D? A. I would not have any idea. I didn't, anyhow.

Q. Now, there one finds Miller's estimates in relation to the profits and cash flow from the "Robert Miller"? A. That is right.

Q. Looking at this document, Mr. Koch, would you direct your attention to the cash flow part? A. Yes.

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Q. Well now, the operating expenses remain the same, of course, whether the money is obtained from Hambros-Bank of N.S.W. or from these people?

A. Yes, that is correct.

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Q. So that in the situation of what has happened the operating expenses as estimated are those there?

A. Yes, that is correct.

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10 Q. Interest would vary under the Bank of N.S.W.-Hambros as compared with this situation? A. That is correct, yes.

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Q. Would you agree that the variation would not be very great? A. Well, it says that the interest has been calculated at 8½%. We had to strike a figure for this express purpose.

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20 Q. You have calculated interest at 8½%, which is slightly more than the average rate you will have paid Hambros for the first 18 months in respect of the "Amanda Miller"? A. Well, the percentage would be slight, but the amount would be considerable when we are talking of repayments of money of this size. Even though it is a slight percentage increase, the amount is considerable.

Q. What I am suggesting to you is that in terms of what has happened in respect of the "Amanda Miller" you can anticipate that the interest rate on the "Robert Miller" will be something less than 8½%? A. From Hambros?

30 Q. Yes. A. We could not guarantee that, no. We have no idea what the interest rate will be on the "Robert Miller".

Q. Income tax, of course, is something that will be adjusted according to the result? A. Yes.

40 Q. And the only adjustment that would flow from the loan being from Hambros instead of it being from the Australian European Finance Corporation Limited will be as a consequence of more or less interest being paid? A. And more or less of the amount being loaned.

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HIS HONOUR: Q. Mr. Koch, it is only a small point, but I want to follow you precisely. You say this cash flow is prepared on an interest rate of 8½%?
A. Yes.

Q. Now, is that so? The interest you have shown there is computed at 8¼% isn't it? If you look on the lefthand column, under "operating expenses"? A. Yes, it is. I don't know whether one is a typographical error or not, because the amounts are exactly the same. I am not sure which it is - either 8¼% or 8½%. I would not know without working it out again. Without working it out again I would not know which one is correct.

10

MR. DEANE: Q. Coming to the repayment of loan principal, what is the figure in respect of the six-monthly repayments to Hambros? A. Well, it is 1/20th of \$7.1 m. That is in respect of the "Amanda Miller".

Q. In terms of the "Robert Miller"? A. Well, we have to work in U.S. dollars on this one, because we don't know what the conversion rates will be. It would be 1-16th of \$US.8.8 m.

20

Q. Which is something in the vicinity of \$900,000?
A. That would be right.

Q. Per year? A. Yes.

Q. These are the yearly figures, I presume?
A. Yes, they are. It would be in excess of that.

Q. US dollars? A. Yes.

Q. What is the equivalent of that in Australia?
A. At the moment there is a conversion rate of 1.1934.

30

Q. I suggest to you on the present interest rate the total repayments of principal under the present Hambros arrangement for the "Robert Miller" are in the vicinity of \$A.925,000.

A. On the "Robert Miller" from Hambros?

Q. Per year? A. Including interest?

Q. Excluding interest? A. Excluding interest?

Q. Yes. A. Yes, that would be approximately right.

Q. Which means that on these cash flow figures one will increase \$739,000 to \$925,000, speaking generally? A. Yes.

Q. Which means, of course, doesn't it, that when one comes to interest it will be a decreasing amount as the years go on, because you are repaying more principal? A. Yes, that is right.

10 Q. Looking at that estimated cash flow statement, do you see an amount of income tax being brought into year one? A. Yes.

Q. You would agree with me, I presume, that in a cash flow statement that is a mistake? A. No, I don't think so. Yes, I can see what you are getting at. Your taxation is paid the following year.

20 Q. There is no question that in a cash flow statement, as distinct from a profit statement, you don't show as an outgoing income tax which is not assessed or payable until the next year? A. Yes, that would be correct.

Q. Which means that in terms of the "Robert Miller" the situation at July was this, was it not, that subject to the contingency of her not being delivered - by the way, would you call a ship called "Robert Miller" her, or him? A. Her.

30 Q. Subject to the contingency of which you have spoken of her not being delivered until after June 1973, and the Bank of N.S.W. being difficult as to finance - subject to that, the situation was this, was it not, that construction finance had been arranged? A. Yes, that is right. Construction finance had been arranged.

Q. And subject to whatever contingencies there may have been in relation to Hambros, the end finance had been arranged? A. Subject to contingencies, yes.

40 Q. And once the end finance had been applied and the "Robert Miller" was put into commission the situation was, was it not, that after payment of all operating expenses, after payment of all

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interest in respect of loans secured on her, after repayment of the principal of the Hambros loan, there was a surplus cash flow anticipated from the first year of operations of the figure resulting from the adjustments which you have agreed should be made to appendix D, to avoid stating the precise figure? A. Well yes. As regards actual cash coming in, the taxation would not be paid until the following year. I agree for the purpose of making an estimated profit and cash flow statement I would have done it exactly the same way as it is done here. 10

Q. If one goes up to the table above the estimated cash flow, one comes to a profit situation

A. That is right.

Q. And again you would agree with me, wouldn't you, that the income to be earned from the "Robert Miller" was anticipated as being such as to enable all operating expenses to be paid? A. Yes.

Q. To enable all repayments of principal and interest to be made? A. Yes. 20

Q. And to leave a substantial profit? A. Well, I would argue on what your definition of "substantial" is.

Q. To leave a profit represented by those figures after adjustments similar to the adjustments suggested to the cash flow statement had been made? A. Yes, I would agree.

HIS HONOUR: That is assuming no depreciation, Mr. Deane. 30

MR. DEANE: No, I was coming to that.

HIS HONOUR: After you moved from the cash flow statement to the profit statement you put the profit statement would be enough to cover principal and interest?

MR. DEANE: Yes.

HIS HONOUR: Is that so? When determining profit you obviously would bring depreciation in.

MR. DEANE: I am sorry. I accept what your Honour says. 40

Q. What I put to you last, Mr. Koch, should be qualified in the sense that no allowance was made in the question for depreciation? A. In respect of what, Mr. Deane?

Q. In respect of the profit remaining after paying a number of things? A. When you talk "profit" you are talking of net cash, or profit as per normal accounting principles?

10 Q. I was talking of net profit? A. The figure in the estimated profit statement, of course, does take into consideration depreciation, but it would not take into consideration repayment of principal. That would only be in the cash flow statement.

Q. Now, Mr. Koch, in note 4 to these figures you say, or your company says, that the statement has been prepared on the basis that the vessel will average 335 operating days per annum? A. Yes, that is right.

20 Q. You then say that it is your experience from having operated three tankers that a higher degree of annual utilisation will be achieved? A. This has a lot of uncertainties, of course, in it. There are so many uncertainties in shipping you cannot guarantee anything.

30 Q. That is a true statement, isn't it? A. Well, it depends what side of the fence you are on. If we are after money, of course, we are going to paint the rosiest picture we can; if we are after a charter rate we are going to paint the blackest picture we can.

Q. This was a representation made by your company on the basis of which it was asking another company to lend £8 m.? A. Yes, that is correct.

Q. You don't suggest, do you, in that context you would make an inaccurate statement? A. Yes.

40 Q. You would? A. I think so. As I said before, if we are after money - take my own personal position. If I wanted an overdraft from my bank manager I would make it as easy for him as I could for him to lend me the money. I think that is normal. If you are after something I believe, without being dishonest about it, you should paint as rosy a picture as possible.

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Q. Is that statement accurate or inaccurate?
A. It could be accurate; it could be inaccurate.

Q. I am asking you which it is? A. I would say that it would be more inaccurate.

Q. In your mind is the making of an inaccurate statement on the basis of which you are asking somebody to lend \$8 m. merely painting the lily as distinct from gross dishonesty? A. No, I don't think this particular point has a great bearing on the matter.

10

Q. But it was a matter which apparently your company thought was relevant in terms of preparing the document? A. The thing is, Mr. Deane, in shipping there are so many uncertainties, and it is possible for a ship to average 335 operating days a year; it is also possible for it not to achieve 335 operating days. There are so many uncertainties in it. If everything goes well, of course, you would operate for 335 days.

Q. Note 4 is not talking about possibilities in the second sentence at all. It says "It has been our" - that is, your company's - "experience in the operation of our" - that is, your company's - "other three tankers that worked under continuous surveys a higher degree of annual utilisation will be achieved." A. That is a very true statement. Under continuous surveys you do achieve a higher degree of utilisation than when you don't work under continuous surveys.

20

Q. Is that or isn't it an accurate statement of your company's experience? A. With regard to one vessel, yes. We have operated 335 days in one year. There are other times when, even though you are working under continuous surveys, you cannot work 335 operating days. There are times when you have to go into dock.

30

Q. With regard to your other three tankers is it or is it not a true statement? A. With the "Amanda Miller" for the first year of operation that would be a true statement.

40

Q. What about your other two tankers? A. The other two tankers I would not know. I am not too sure what their degree of utilisation is. But for the last year it would be reasonably accurate.

Q. Is what you tell his Honour this, that even if that had been an inaccurate statement of fact you would, in the context of this document, consider it as being merely painting the lily, as distinct from dishonesty? (Objected to by Mr. Glass; rejected.)

10 Q. Is what you tell his Honour that if that statement had been inaccurate you would not regard the making of it, in the context of this document, as dishonest? A. I said, Mr. Deane, that this particular statement, when it is referring to operating days, I do not think in my opinion it has great bearing on it because of uncertainties. There could have been 335, 330, 340, 350 days, and I would say it could have been correct. It may also be not correct.

Q. Note 5 refers to income tax. Do you see that?
A. Yes.

20 Q. And it points out that the document has been prepared on the basis of a higher rate of income tax than is applicable overall to the company's income? A. For the last year. I don't know how much longer we can do that. I think our last year was our last, to be honest.

30 Q. The statement is that the overall effective rate of income tax payable on the company's assessable income will be substantially lower than the rate adopted? A. We are hoping for it. This is something we will have to take up with the taxation experts.

Q. So that the words "will be" represent a hope?
A. No, in our opinion we feel there can be some tax concessions. But we are not sure until we consult with taxation experts.

Q. Will you turn to p.2 of the statement to which that document is an annexure? A. Yes.

Q. This, of course, was written in May 1972?
A. Yes, that is correct.

40 Q. Had anything happened in relation to the "Amanda Miller" between May and July 1972 which would cause a change of anticipation as to her operations?
A. I don't quite follow the question.

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Q. In other words, was the situation in relation to the "Amanda Miller" in July 1972 similar to the situation that existed in relation to her in May 1972? A. So far as I can recollect, yes.

Q. Now this document which was submitted by your company as the basis for a loan of £8 m. says that the vessel is of proven design - that is referring to the "Robert Miller" - and is a sister-ship of the "Amanda Miller", which was built by Broken Hill Proprietary Company Limited at the Whyalla shipping yards? A. Yes.

10

Q. You see that? A. Yes.

Q. That is accurate? A. Yes.

Q. It then says that the "Amanda Miller" was handed over in August 1971, and it sets out some details of her operations? A. Yes, that is right.

Q. "The performance of MT. "Amanda Miller" under operational conditions has exceeded budget standards both technically and financially."? A. Yes.

20

Q. And that is an accurate statement? A. Yes, that is an accurate statement.

Q. Which means that the situation insofar as the "Amanda Miller" was concerned - we will get the precise figures after lunch, if we can - the situation was that she was bringing in a substantial cash flow to Millers after payment of all operating expenses, after payment of all interest and principal, and after allowance for income tax? A. Yes, with the reservation that your interpretation of "substantial" and mine may be different. But for this, yes, it was reasonably substantial.

30

Q. And it was anticipated that a similar situation would apply in relation to the "Robert Miller"? A. Yes, that is right.

Q. Now, on the question of depreciation, Mr. Koch, what is the rate of depreciation that these vessels adopted? A. On the calculation of charter rates and cash flow as it is it would have been calculated at 6 $\frac{1}{4}$ %.

40

Q. Which is the income tax figure? A. Yes.

Q. Which gives an effective life of 16 years?
A. Yes.

10 Q. You would agree with me, wouldn't you, that insofar as one can anticipate the future, "Robert Miller" 16 years after construction will not be worthless? A. I could not answer that question, Mr. Deane. We have had assessments done - assessments of the life expectancy of these vessels - and the experts have said 12 years. It depends on the trade it operates in. So many factors can come into this.

Q. What is your own anticipation?
A. We hope for 16 years.

Q. No more? A. Naturally we will keep it as long as we possibly can.

Q. And then sell her? A. Either as a ship under operation or scrap value, whichever the market is at that time.

20 Q. Under terms of current values you would receive a substantial amount, sold on either basis, wouldn't you? A. In 16 years?

Q. Yes. A. I could not answer that.

Q. Couldn't you? A. No.

30 Q. What about a 16 year old ship of comparable size to the "Robert Miller"? Do you know what sort of price they are selling at? A. Yes. You can just about pick them up anywhere at this stage, I believe; there are so many tankers on the beach. I am sorry, we have enquired. No, not for one 16 years old. I would not know.

Q. How old are the Howard Smith tankers? A. I would not know, to be honest. I believe it was built in the 1960's sometime.

Q. The ones that you offered to buy? A. No, I don't know. I am not sure. I think one was built in - I would have to look at the tanker register to find out.

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Q. Do I understand you correctly, that you don't know how old the ships were that you offered to buy from Howard Smith? A. I think that they were built in the early 1960's.

Q. You think that they were? A. Yes.

Q. Which means what? Ten years old?
A. Approximately 10 to 12 years old. That was my estimation of them.

Q. There were two of them? A. Yes, that is correct.

Q. What was their tonnage? A. The "Howard Smith" was 54,000 tons, and the "Nancy Heath" I believe was 24,000 tons dead weight.

Q. What is the tonnage of the "Robert Miller"?
A. Dead weight, 62,000 tons.

Q. So that it is substantially bigger than the larger of the Howard Smith vessels? A. Yes. Not collectively. Individually, yes.

Q. Substantially bigger than the larger of the two? A. Yes.

Q. In what order are the Howard Smith ships?
A. We believe they are in quite good order.

Q. You have inspected them? A. I am not a technical man, no.

Q. You told his Honour that you can pick up a 16 year old ship of the "Amanda Miller" size for next to nothing? A. Depending on what condition it was in. It depends on the condition. It depends on what trade you want to put them in. It depends on what the purchaser - it depends on whether the purchaser is anxious to sell, or if he is not keen on selling.

Q. The situation, as I understand it, is that you offered to spend \$7 m. of this company's money in buying two smaller vessels in a condition unknown to you of an age unknown to you except in the vicinity of 10 or 12 years, is that so?
A. Ten years was my recollection of how old I thought they were.

10

20

30

(sic)

Q. Now, might I pass from that to the Tricontinental transaction? A. Certainly.

Q. One thing which you might solve for me is what is the relationship, if any, between the \$3 m. Tricontinental loan which was negotiated after the Superannuation moneys were not available in June and the additional \$1.8 m. owing to Tricontinental as at 6th July? A. Well, the \$1.875 m. worth of bills were negotiated subsequently to Tricontinental being appointed financial advisers to us.

Q. Were they under an agreement? A. No.

Q. Was any security given in relation to them?
A. Yes.

Q. What security was given in relation to them?
A. Two hotels.

Q. And then when the new, or additional, \$3 m. was negotiated they had the agreement and security over additional hotels? Is that right?
A. Additional nine hotels, yes.

20 Q. In answer to the question put by my friend, Mr. Glass, sometime last week you said that the value of the hotels upon which Tricontinental had security was in excess of \$8 m.? A. Yes, I believe that was so.

Q. There you are referring to the whole 11 hotels?
A. To the 11 hotels, yes.

30 Q. Mr. Koch, we had better clear this up. It is pointed out to me that in the transcript you are reported as saying "I think it is 8 or 9 hotels at a value in excess of \$8 m." A. Nine hotels were for the \$3 m., and the other two hotels, \$1.875 m.

Q. Should the value in excess of \$8 m. be taken as applying to eight or nine hotels, or is that an error? A. That could be an error. It would refer to the whole lot.

40 Q. I want to pass now to some questions relating to evidence you gave in your capacity as an expert and, in particular, to your evidence on the asset backing per share. What do you understand by "asset backing per share"? A. My understanding is that the net tangible assets is the total value of the total shareholding.

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South Wales
Equity Division

No. 6

Transcript of
Evidence on
Trial of Action

Defendants
Evidence
1st Defendants
Evidence

Leonard Dean
Koch

Cross-
examination by
Mr. Deane Q.C.

19th September
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(continued)

Q. Which means, doesn't it, that your backing per share is a figure which, on a balance sheet approach, one would reach by taking the shareholders' funds and dividing that by the number of shares issued? A. Yes, that is right.

Q. Prior to 6th July there had been, as it were, a great many variations or a great many assessments of the asset backing of Millers shares, hadn't there? A. Yes.

Q. We had the auditors at one stage reporting on an adjusted balance sheet basis a share backing of \$3.71? A. Yes. 10

Q. I think when that report was received the Board resolved to keep that figure private, didn't it? A. That is correct, yes.

Q. And would it be true to say that discussions took place and the view was commonly held that the figure was misleading because of the value it placed on the company's collieries? 20

A. There were doubts about their value. Some thought that the value placed on the company's collieries was realistic - others thought that it was not.

Q. What was the basis on which the company's coal reserves were valued? A. They were valued by an independent valuer on the value of the properties held, the coal stocks, and the coal in situ.

Q. My question was directed to the coal in the ground? A. Yes. 30

Q. What was the basis of valuation adopted there for book-keeping purposes? A. For what purposes?

Q. What was the basis of valuation adopted there for book purposes? A. You are talking about the independent valuation?

Q.. What I am talking about is this. \$3.71 was the figure reached by the company's auditors, wasn't it? A. Yes.

Q. By taking balance sheet figures and adjusting them in relation to the hotels and the tankers? A. Yes. 40

Q. But in leaving the balance sheet figures in relation to the collieries? A. No, I don't think so.

Q. That is not your understanding? A. That is not my understanding of it, no.

Q. Of course, when Cooper Brothers came to examine the assets of the company for the purpose of determining the asset backing they dissented very strongly from the approach in relation to the value of the collieries, didn't they?

10 A. I would not say they dissented strongly. They disagreed.

Q. Well, the disagreement led, didn't it, to the asset backing in the Cooper Brothers report being not \$3.71, but a figure in between \$2.70 and \$3.30?

A. Well, I would have to look at the report to see. I know that they did have a variance in their asset backing.

20 Q. Because of the uncertainty as to the value of the collieries? A. Yes, but not only that. With the tankers, they took as the basis of their valuation the price we had been offered for them.

Q. If one takes the Cooper Brothers approach one gets an asset backing a share of at least \$2.73?

A. Without looking it up, that figure does sound familiar.

HIS HONOUR: \$2.70, I think, Mr. Deane.

MR. DEANE: \$2.70.

30 Q. Mr. Koch, I now hand you Ex. MH.4. What, as an expert, is your understanding of the nature of a balance sheet? A. The main thing is that it balances, I suppose. But it is the assets and liabilities of a company with unappropriated profits included in shareholders' funds, and virtually all items that do not appear in a revenue statement.

Q. Is it a statement of value? A. It can be either historic value or book value.

40 Q. A balance sheet is, generally speaking, isn't it, an historical document? A. Yes.

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Exhibit M.H.4

Q. For example, your company recently got valuations increasing the values of these hotels by \$5 m.? A. Yes, that is right.

Q. That increase in values is not reflected in the balance sheet? A. We did not take the revaluations into our figures.

Q. If you wanted to you could have created an assets re-valuation reserve in respect of your part of it? A. Yes.

Q. But you did not do so? A. It was decided not to. Can I correct that for one minute? The audited figures have not been completed. I don't know. The Board may decide to do that. 10

Q. I am talking about the document in front of you. If, of course, your company had purchased these hotels last year for their market value, on any approach to accountancy unless there had been a sudden drop in their value they would have been brought in at the purchase price? A. Yes.

Q. Which means that if the hotels had been purchased last year they would have been shown in this balance sheet, or reflected in this balance sheet as an asset of a value of \$5 m. than is the actual case? A. Yes. 20

Q. Now you told his Honour, or you swore in relation to some questions my friend Mr. Glass asked you that it is a significant thing, by reference to this document Ex. MH.4, that the proportion of shareholders' funds to total assets has shown a sharp decline from a peak in 1968 of 62% to 1972, where the figure is 40%. Do you remember giving that evidence? A. Yes, I do. 30

Q. Is not that a complete mis-use of the document in front of you? A. No, I don't see that.

Q. You see, Mr. Koch - what, in your view, is the asset backing per share of the shares in Millers? A. In my view?

Q. In your view? A. Well here again in my opinion I would say it would be approximately the \$2.50-2.60 mark. 40

Q. Certainly not \$3.71? A. Well, I would not have thought it would be as high as that. But if the auditors verified that, they are greater experts than I am.

Q. What about the \$2.70 to \$3.30 of Cooper Brothers? A. Well, that was based on a lot of assumptions, and they made their conclusion on the evidence placed before them, and a lot of inferences on their part, and there again, they are the experts. I certainly would not dispute their findings.

Q. Of course, if one takes the figures in the 1972 column one has, doesn't one, shareholders' funds shown as being less than \$17,864,000 as being \$17,864,000? A. Yes, that is right.

Q. There are over 9 m. shares? A. Yes.

Q. Which means that that shows an asset backing per share at less than \$2 per share? A. That is right.

Q. Which is nonsense on any approach, isn't it? A. Yes, that is correct.

Q. And you would agree with me, wouldn't you, that for there to be any meaningful comparison between the shareholders' funds and assets employed in the business one must be talking in real figures and real values? A. I am sorry, could you just repeat that, Mr. Dean?

Q. Would you agree with me that for there to be any meaningful comparison between shareholders' funds and assets employed in the business one needs to be talking in true figures in relation to shareholders' funds? A. Yes.

Q. That is right, isn't it? A. Yes.

Q. And the very first thing one can say about this document is that any comparison between shareholders' funds and assets employed in the business based on it would be of no practical significance at all? A. This all depends, Mr. Deane. I am not sure I entirely agree with you on this.

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Q. The value of the hotels are shown or are reflected in this document as being \$5 m. less than what your auditors accepted and what your chairman announced to the public? A. Yes.

Q. That is so, isn't it? A. Yes, that is right.

Q. Well, the first thing that one must do, isn't it, in producing any meaningful comparison between the shareholders' funds and what is employed in the business - assets employed in the business - based on this document is to make the adjustment that results from that? A. On this question of revaluation of hotels, I think I mentioned last week that that was based on a walk-in-walk-out basis, and for what is its true value - for the true value of a hotel on a walk-in-walk-out basis, or as real estate - it depends what side of the fence you are on.

10

Q. If your company had bought these hotels last year on the valuation which your company published the balance sheet would have shown the shareholders' funds as being \$5 m. more? A. Yes.

20

Q. And is what you tell his Honour this, that it is a meaningful thing in those circumstances to talk about proportions or relationship between shareholders' funds and assets employed in the business on the basis of this document? A. Yes, I do.

Q. What I am suggesting to you, Mr. Koch, is that any accountant who was told that the balance sheet relationship between shareholders' funds and total assets was such a percentage would immediately ask "What is the relationship between the balance sheet value of assets and the true value of assets?" A. Yes, this could be a possibility, yes.

30

Q. Because it is only if one is talking of the true value of assets that there is any meaningful result obtained by a comparison between shareholders' funds and assets employed in the business? A. Yes, but you get to the story - what is the true value?

Q. Your minimum view of the asset backing or your minimum view as to the asset backing of Miller shares is how much per share? A. I did not say "minimum".

40

Q. I am asking your minimum? A. In my opinion the asset backing would be in the vicinity of \$2.50.

Q. But you would not dispute Cooper Brothers value as between \$2.70 and \$3.30? A. Certainly not. I would not dispute that.

Q. I presume that you would not accept for one moment the view that it was \$3.71? A. I would have doubts about that.

10 Q. Of course, if one adjusts the shareholders' funds to reflect your view as to the asset backing relationship the percentage calculated by reference to relationship between the shareholders' funds and total assets will be very substantially higher than the figure of 40%? A. I don't know "substantially", it would be higher, yes.

Q. And of course, if one does it by reference to the \$3.30 figure I suggest that one has gone over 50%? A. Yes. It could have. I have not worked it out.

20 Q. If one takes the minimum Cooper Brothers valuation, it is something round about 47.5%, I suggest to you? A. I won't disagree with that. You have obviously worked it out. I have not.

Q. It is my mathematics? A. I will accept it.

30 Q. The next matter I want to ask you some questions on is your evidence, as an expert, in relationship to commitments. I am referring to p. 274 of the transcript. My friend asked you this question, and I want to ask you a number of questions about the answer. The question was: "Q. Mr. Cameron also referred to another change noted in this document, namely, the commitment on capital expenditure had decreased from \$18 m. odd in 1971 to \$4 m. odd in 1972. Do you think that that change in any way off-sets the worsening effect of the liquid position." Do you remember being asked that question? A. Yes, I do remember that question.

40 Q. Your answer was "I would agree that the change is to a certain degree significant but, again, in my opinion, it does not improve the company's position regarding the liquidity position

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of the company which in my opinion is always a critical ratio." A. Yes, I recollect saying that.

Q. What did you understand by the word "commitment" in the context of that question?

A. "Commitment" as I understood it would be for contracts or expenditure that we were committed to go ahead with, and could not legitimately withdraw from those commitments.

Q. At the end of 1971 the document in front of you shows these commitments as being $\$18\frac{1}{2}$ m. approximately? A. That is right, yes. 10

Q. And they were moneys that had to be found during what? The next 12 months in the main?

A. No, moneys that had to be found as at 30th June 1971.

Q. They had to be found when? A. That would depend.

Q. They were moneys that had to be paid?

A. Yes. 20

Q. And, within the main, paid within the next 12 months? A. Some of them. The bulk of this $\$18$ m. odd was tankers, and that would naturally depend on the progress of the construction of the vessels.

Q. And of course at that stage there had been no arrangements made in respect of the financing of the "Robert Miller" at the end of June 1971?

A. No, there had not been.

MR. DEANE: Q. I think arrangements had been made, had they not, in relation to the end financing of the "Amanda Miller"? A. I don't think they had been concluded at that time. 30

Q. But certainly no arrangements had been made in relation to the construction finance of the "Amanda Miller"? A. No, we did not raise construction finance for the "Amanda Miller".

Q. That means, does it not, that as at 30th June, 1971, the whole of the commitments for the "Amanda" and "Robert Miller" existed? A. No, that is not correct. 40

Q. Well, correct me. Where am I wrong? A. At 30th June, 1971, we had already paid \$3.9m for the construction of the "Amanda Miller" so there would have been another \$6m. approximately for the "Amanda" and the total, \$12m., for the "Robert Miller" which would be the \$18m.

Q. And insofar as the "Amanda Miller" is concerned, those \$6m. all had to be found in the coming financial year? A. Yes, as regards the "Amanda Miller" that is correct.

Q. Now, in that context ... A. Could I interrupt there, Mr. Deane? I don't know whether they had to but that did finally result in this happening.

Q. And that was money that you knew you had to pay?
A. Yes.

Q. And you knew you had to find and there were no arrangements covering where you were going to find it? A. The \$18m.?

Q. No, the \$6m. for the "Amanda Miller"?
A. Yes; that is not entirely correct too, as well. Under the contract for the "Amanda Miller", there was a clause in our sale contract with the Commonwealth that the final payment would be payable six months after delivery of the vessel so within that time we would have received the Hambros loan.

Q. Except the payments had to be made to the Commonwealth as they fell due? A. Oh, yes. yes.

Q. Now, might I direct your attention to an alternative situation and that is where a company, let us say Millers, owes money as a result of operation on the bills market? A. Yes.

Q. Where it has a bill that is due to be met in two months' time but it has an agreement under which the bills can be rolled over for a period of about a year. Would you accept that as an example? A. Yes.

Q. And it has arranged long-term finance on - I withdraw that. It has assets worth twice the amount of the bill pledged as security for the bill? A. Yes.

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Q. Which means that in the event of the bill being met, those assets, the bill or payment of the bill being called, those assets will be free and unsecured? A. Yes.

Q. Now, in terms of their effect on the liquidity position of the company which would you think was more important; a commitment to pay moneys in respect of the "Amanda Miller" and in relation to which no arrangements at all had been made or the liability eventually to pay the value of the bill? A. Well, I don't know that you could draw a distinction; they would both be important.

10

Q. Except, as I understand your evidence, what you say is that the commitment is of comparative insignificance because the change in the amount of commitments does not improve the company's position regarding the liquidity position of the company which in my opinion is always a critical ratio? A. The current liquidity position, yes, I do, in my opinion.

20

Q. What ratio are you referring to when you say "a critical ratio"? A. Well, the current assets less current liabilities, the quick asset ratio I think they call it.

Q. Is the situation this, that if you had Company A which had no commitments at all, which had many assets but which, as it were, owed on short term loan more than it borrowed, more than was owed to it ... A. Yes.

Q. And let us say the rest of the current assets more or less cancelled out or could be ignored - is what you say that in that situation its liquidity position would be worse than the situation of a company which owed nothing at all but which had commitments over the next twelve months which it had no finances available to meet? A. I would say that looking at it at the immediate position, yes, I would consider that the liquidity position would be more critical than the commitments.

30

40

Q. But, of course, in terms of the situation of this company - that is Millers - as at 30th June, 1972, its short term loans were by and large moneys which would be repaid from sources that had been arranged? A. I don't follow your question there, Mr. Deane.

Q. What I am putting to you is this, that so far as the short term loans of Millers as at 30th June, 1972, they were either in a situation where it was hoped they would not have to be repaid in the short future, that is Tricontinental, for example, Mitsui? A. Yes.

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10 Q. Or they were in a situation where arrangements had been made to provide the finance to extinguish them - Hambros and the Bank of New South Wales? A. Oh, no.

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Q. In the main? A. No, not in the main either. I don't think the Bank of New South Wales' loan comes into it at all because that is a short term loan.

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Q. It is repayable June next year? A. That's correct.

Q. And it is repayable unless something goes wrong from the moneys which Hambros have already agreed to advance? A. That's correct.

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20 Q. Which means, let us take the Bank of New South Wales, it is a short term loan, but if things go as planned, the company will never have to, from its internal funds, repay it? A. If things go as planned.

30 Q. And, of course, if things go as planned, the moneys used to repay it will never have to, as it were, come from the internal funds of the company in the sense that the date in relation to that will progressively be repaid from the operating profits of the "Robert Miller"? A. No, I don't agree with that. No, we are talking about a set short term loan.

40 Q. Yes, I appreciate that. Now, is what you tell his Honour this, that in terms of assessing the liquidity position, the fact that the short term loan from the Bank of New South Wales existed in circumstances where it did not have to be repaid for a year and where long term finance had already been arranged to finance the repayment, is a more adverse factor than a situation where a similar amount has to be found for a commitment within a period of three or four months and no arrangements at all have been made as to where the money is to

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come from? A. Well, I am afraid you lost me in the middle of that, Mr. Deane. (Question read by Court Reporter) A. Yes, I would say it is a more adverse position.

Q. And would it be true to say that that approach of yours underlies the whole of the evidence you gave in terms of comparing the liquidity position of the company as at June 1971 and as at June 1972? (Objected to by Mr. Glass)

Q. Mr. Koch, can we take two examples and I will try and do it without such an involved question? A. Thank you. 10

Q. The first, a case where a company has borrowed a short term loan of \$4m. from the bank as at 30th June, 1972; it does not have to repay it for twelve months and it has already made long term arrangements to repay it. A. Yes, I understand that example.

Q. That is Case A? A. Yes.

Q. Will you take as Case B the situation where a company has a commitment to pay the same amount of money in three or four months and has made no financial arrangements whatsoever in respect of getting the money to pay it and let's call that Case B? A. Yes. 20

Q. In terms of the liquidity position which of Case A and Case B would, in your view, have the more adverse effect looking at it as at 30th June, 1972? A. Well, I think there are a lot of factors you have to take into this. I would say that Case A is adverse and in Case B, depending upon what security that the company had with which to obtain this money, what efforts it had made previously to obtain this money, I think these are things which would have to be taken into consideration. I don't think you can say just a blank "this will be better than the other". There are so many circumstances. 30

Q. Let's assume one has some security available in both case A and Case B because the only relevance as security is, is it not, the source to discharge either the commitment or the short term liability? A. Yes, well, you are asking my opinion again 40

and I think, here again, all cases differ and I think each case has to be treated on its merits and if we are talking about Millers, which I assume you are not - you are talking about a hypothetical case, are you not?

Q. Yes, all other things being equal. A. All other things being equal, I maintain that the liquid situation is still critical.

10 Q. Which of Case A or Case B has a more adverse effect on that? A. I don't know if you can differentiate between those two. They are both reasonably important but security has a great deal to do with it, what arrangements it had been attempted to make; I don't think a general answer can be given to this.

20 Q. Isn't the only or isn't the critical difference between them that in Case A you do not have to find \$4 million in the foreseeable future and in Case B you have to find it within three or four months? A. Yes.

Q. Doesn't that mean that from the point of view of the liquidity position case B is infinitely more adverse than Case A? A. No, there are some commitments, and we did this ourselves in the year from 1971 to 1972. We were committed to certain expenditure and we were able to defer that commitment and this is possible.

30 HIS HONOUR: Q. Mr. Koch, as I understand it, what Mr. Deane is putting to you is a contrast between long term finance available to cover a given commitment and no long term finance but that commitment falling due in the near future? A. This would certainly have a big bearing, your Honour.

Q. As I understand the question, those are the two contrasting elements in Case A and Case B.

40 MR. DEANE: I am sorry, your Honour. What I am questioning Mr. Koch on is the distinction he draws between a short term liability and a commitment based on the fact that one exists at the moment, the other does not exist until a month later, which is critical to his evidence on p. 274.

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HIS HONOUR: I just want to make sure that Mr. Koch appreciates - may be I have not appreciated it, Mr. Deane, but I want to make sure that he has clearly in mind the two opposing contrasts.

WITNESS: Yes, I think I understand what Mr. Deane is getting at, your Honour.

(Short adjournment)

MR. DEANE: Q. Mr. Koch, you have identified a number of management reports which were put before board meetings of directors of Millers? A. Yes. 10

Q. And the last of them I think was May? A. It was the May report for the meeting held on June 1st I believe.

Q. When in the ordinary working of Millers would these management reports have been prepared in relation to the meeting for which they were prepared? A. Well, this would depend on the date of each meeting. I would normally like to leave it as late as possible so that I could give the latest information. 20

Q. For example, when would the May management report have been prepared? A. That would have been prepared some time the last week in May.

Q. How was it prepared? Did you do the first draft or did you get somebody to run out the first draft? A. It was dissected into various headings concerning the various aspects of the company. Regarding the finance, the section dealing with finance, I prepared that myself. 30

Q. What, from first draft to final draft?
A. Yes, I would say this, yes. My normal method was with our colliery section to get a report from the colliery superintendent, also from the shipping manager, from the general manager of our hotels and then I would collate that information, put it in draft form, read it and then get it re-typed for presentation to the board.

Q. A management report was, as a matter of course, prepared each month? A. Yes, where possible. 40
There may have been one month where there was not one. I may have been overseas at the time.

Q. What stage of preparation had the June management report reached at the meeting of 6th July?

A. I had not prepared one in June.

Q. Why not? A. Well, mainly because there were various - there were numerous meetings in June. I think I discussed this matter with the chairman and he may have mentioned it to other board members but it was agreed that I would not prepare one for the month of June.

10 Q. At all? A. No, that is correct. If any information was raised at meetings, it was orally given.

Q. What about July 1972 - was a management report prepared for that? For the 6th July meeting?

Q. No, was there a July management report?

A. No, May was the last one.

Q. Why was there no July management report?

A. I am not sure that we have had a meeting since 6th July.

20 Q. There was one on 14th July for example and another on 10th August? A. Yes. There was none prepared because the only business that was discussed at those meetings were the takeovers received from both Ampol and Howard Smith.

Q. Has any written document in relation to finance been prepared for the board since the May management report? A. No, not to my knowledge.

Q. None at all? A. No.

30 Q. Would you agree with me that that is completely contrary to what had been established as the policy of the company by May of 1972? A. Well, when I say there was no management report, I believe at one meeting some monthly profit statements were discussed. Yes, it was a change of procedure but I felt and I discussed this with the chairman that the only matters that were to be raised at these meetings were in relation to the takeover offers and no board member asked me to prepare a management report for the following meeting.

40 Q. But of course way back in 1971 on the motion of Sir Peter Abeles the board had directed you to have

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these and other reports prepared for each month?
A. I am not sure that they directed me; they requested me.

Q. Let us say requested instead of directed?
A. Yes.

Q. Can I ask you some questions on a number of miscellaneous matters? The first is the fire to Amanda Miller. At the time that fire took place, your company had not accepted delivery of the Amanda Miller? That is so, isn't it? A. At the date of the fire we had not accepted delivery of the vessel, yes, that is correct. 10

Q. Which means that the only loss to your company arising from the fire was the delay in delivery?

A. And the value of the money that we had already paid under the construction terms, yes.

Q. But of course that flows from the other, doesn't it? It was the delay in delivery?

A. Delay in delivery was the principal matter.

Q. Were there any arrangements in relation to penalties for late delivery? A. Yes. 20

Q. So far as the Amanda Miller was concerned?
A. Yes, there were

Q. What were they? A. Similar to the Robert Miller. The contract delivery date I believe was April 1972 and there was a thirty day grace period either side for either penalty or bonus on late delivery.

Q. When was she delivered? A. August 31st.

Q. Which was? August 31st? A. 1971. 30

Q. Which means she was delivered within the contract time? A. Oh, no.

Q. Well, I think I misunderstood you. When was the date for delivery under the contract?

A. I think, I am not sure of the actual day, but it was April 1971.

Q. 1971? A. Yes.

Q. Well then, you received penalty payments?

A. No.

Q. You did not. Why not? A. We are still, not in litigation - we are still discussing this matter with the ship building board and before this can be valued, we have to come to an agreement on force majeure claims with the builder.

Q. But your company has a claim in relation to penalties for late delivery? A. Yes, we have a claim.

10

Q. In relation to your evidence on "no new hotels have been acquired", would you agree with me that the current trend in this State is to some extent away from hotels in the traditional sense and towards what are called taverns? A. No, I would not agree with that.

Q. Would you agree with me that taverns are a comparatively new development? A. In Sydney, yes.

20

Q. Well now, have there been any new taverns developments in relation to Millers in the last couple of years? A. Yes.

Q. Would you tell us what they are? A. Yes, we are hoping and proposing to construct three tavern in the Sydney area.

Q. Where are they? A. One is at the site of the old Metropole Hotel.

Q. What commitments have been reached in relation to that? A. We have a lease of the space for a tavern.

30

Q. And when was that taken? A. I am not sure whether it actually has been signed or is about to be signed.

Q. Well, when was the arrangement for it finalised in terms that you would have it? A. It would only be a couple of months ago, I would say.

Q. Before or after 6th July? A. I think it looked reasonably certain that we were going to get it prior to 6th July.

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1st Defendants
Evidence
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Cross-
examination by
Mr. Deane Q.C.

19th September
1972

(continued)

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(continued)

Q. What are the other two taverns? A. One is at the site of the old St. James Theatre.

Q. What stage did negotiations reach for that at 6th July? A. I don't think they have reached very far at this stage.

Q. But they have started? A. They have started, yes.

Q. As at 6th July negotiations were well under way? A. Discussions were. I don't know if negotiations were, but discussions were. 10

Q. Where is the third one? A. The third one is at the site of the new TNT building at Redfern.

Q. And as at 6th July negotiations had again progressed in relation to that? A. Yes, they had.

Q. So, while your company, as it were, did not acquire any hotels in the twelve months ending 30th June, 1972, it did within that period institute and push ahead with negotiations for three taverns? A. Yes.

Q. I want to now ask you some questions in relation to your evidence of an approach to Mitsui and I am referring to p. 221 of the transcript. Over what period of time, to your knowledge Mr. Koch, have relationships between your company and Mitsui existed? A. I believe from about 1959. 20

Q. And your company has for a number of years constantly been a debtor of Mitsui. Is that so? A. I believe since about 1969.

Q. And at least in recent years its indebtedness to Mitsui has been secured by a mortgage over the El Rancho Hotel? A. For two of those years I think, yes. 30

Q. And the value of that hotel is what? A. Approximately \$1.2 million.

Q. 1.2 million? A. Yes.

Q. At the time you saw Mr. Ejiri, what was the amount of your company's indebtedness to Mitsui? A. I wouldn't know at that time. Mr. Deane. It has been progressive. I would only be guessing if I gave an amount at this stage. 40

Q. To your knowledge, does Mitsui own in its own name any shares in Millers? A. Not to my knowledge.

Q. To your knowledge does Mitsui have an indirect interest in any shares in Millers? A. Not to my knowledge.

Q. You have never heard it suggested that Mitsui has a large indirect interest in your company?
A. No, I have never heard it mentioned.

10 Q. You told his Honour that when you approached Mr. Ejiri you put to him a proposition of a loan of \$8 million and a possible allotment of two million shares with an option over a further two million? A. That's correct.

Q. You had discussed this with Mr. Taylor before you put it to Mr. Ejiri? A. Very briefly; not at any great length.

Q. Had you obtained his authority to put it?
A. Yes.

20 Q. And you told his Honour that in late December, towards the end of December 1971, Mr. Ejiri contacted you and told you that Mitsui could not be a party to what you proposed? A. Yes.

Q. That was they could not lend the money and they would not take up the shares? A. That's correct.

Q. Did you tell Mr. Taylor that Mitsui had given you that answer? A. Yes.

30 Q. That answer was given to you in late December 1971. I am correct there, am I? A. Well, in December 1971, yes.

Q. Well, when was your approach to them?
A. It was in November 1971.

Q. Late November or early November? A. I can't recollect the actual date.

Q. This was at the time when the Hambros loan in respect of the Robert Miller seemed to be in some uncertainty? A. Yes.

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Q. Now, apart from that approach to Mitsui, did your company to your knowledge approach any other foreign entity suggesting an allotment of shares to it at any time? A. No, not to my knowledge.

Q. Now, in recent times, apart from this conversation with Mr. Ejiri, has any foreign entity every approached Millers suggesting that it will take up shares in Millers? A. No, not to my recollection, they have not.

Q. Now, I want to direct your attention to the meeting of April 1972 when there was a brief discussion initiated by Mr. Nicholl as to the possibility of the company making a placement of shares? A. Yes. 10

Q. Mr. Taylor when that was raised informed the directors, did he not, that Mitsui had shown interest in receiving an allotment of shares? A. I am not sure whether he mentioned regarding the allotment of shares or whether they were interested in our company hiving-off our coal interests to them. I know there was discussion regarding Mitsui hiving. 20

Q. I suggest to you that Mr. Taylor indicated to the board that Mitsui had shown interest in receiving an allotment of shares? A. To be honest, I don't recall him saying that.

Q. Well, have you got the minutes there? A. Yes.

Q. Look at them by all means? A. What was the date of the meeting, Mr. Deane?

Q. 5th April. It is the third last paragraph. 30

HIS HONOUR: Q. Folio 244? A. No, I am sorry. I have not got the 5th April minutes here with me. I am sorry, I think I am looking at the wrong year. 1972, I would have them. 5th April?

MR. DEANE: Q. Yes, the third last paragraph on folio 244? A. Mine is not folioed.

Q. On the last page? A. Yes, this is recorded in the minutes.

Q. Is that your recollection of what was said?

A. I was just seeing to see if I was at the meeting but I notice I was there. My understanding of this meeting was - as this is in the minutes, I certainly would not dispute it but I thought the main discussion was regarding the hiving-off and forming a separate company for the coal interest with Mitsui.

10 Q. Would you agree with me that the one thing that you are clear Mr. Taylor did not say to the directors is that "we made an approach to Mitsui involving the allotment of shares to them and Mitsui rejected it." A. No, I would not.

Q. He never said that, did he? A. I am not sure he said that. He could have. I have no recollection of that.

20 Q. See, I suggest to you that Mr. Cameron, for example, was never given any information in relation to the possible allotment of shares to Mitsui? A. This is a possibility, yes. I certainly did not.

Q. And that Sir Peter Abeles was never given any information? A. To my knowledge, not from me. I don't know from anyone else.

30 Q. Of course, this was at a time, was it not Mr. Koch, when Mr. Taylor had expressed to you his concern over the possibility that Lady Miller would sell the Romanda shares and there could be a change of control in the company? A. It was about this time that there were rumours that this could happen.

Q. And there were constant discussions between you and Mr. Taylor about it? A. Not constant; it had been discussed, yes.

Q. Frequent? A. I would not say frequent either.

Q. And Mr. Taylor expressed great concern, did he not? A. Yes.

40 Q. Would you regard the statement appearing in the minutes that Mitsui and Company Limited had expressed interest in obtaining an equity in the company as being accurate? A. Yes.

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(continued)

Q. When did they express the interest?

A. The interest was expressed when I spoke to Mr. Ejiri and it was also expressed when Mr. Taylor and I were in Japan.

Q. You see, you have told his Honour that Mr. Ejiri said "It is too big for me. I have got to refer it to Japan" and Japan said they would have no part in it? A. That's right.

Q. In your view, that is showing interest?

A. Yes, they were interested to listen to it and ask for other information. They did not discount it out of hand. 10

Q. In your evidence, Mr. Koch, you said in 1966 a loan of \$500,000 was received from a business associate? A. Yes.

Q. Who was that business associate? A. Mitsui.

Q. You said in 1969 a loan of a million was received from a business associate. Who was that business associate? A. Mitsui.

Q. Now, in relation to the 1969 loan of a million, that was applied, was it not, as part of the moneys used in making a loan of \$2 million to the Eastern Suburbs Leagues Club? A. Not to my knowledge, no. 20

Q. Do you recall a loan being made to the Eastern Suburbs Leagues Club? A. I do recall it, yes.

Q. And it was to that loan you referred when you said that in relation to the year 1969 loans to licensed clubs increased from \$2½ million to \$4½ million? A. Yes, I remember saying that. 30

Q. And that was the only loan involved, was it not? A. No, I would not be sure that was the only loan. It would have been the majority of it.

Q. It was a loan of \$2 million? A. Yes, it was approximately \$2 million.

Q. Of course, when your company first started its policy of making loans to licensed clubs, it ran a brewery? A. That's correct.

O N A P P E A L
FROM THE SUPREME COURT OF NEW SOUTH WALES
EQUITY DIVISION

B E T W E E N :

HOWARD SMITH LIMITED	<u>Appellant</u>
- and -	(13th Defendant)
AMPOL PETROLEUM LIMITED	<u>Respondent</u>
	Plaintiff
R.W. MILLER (HOLDINGS) LIMITED	(1st) Defendant
ARCHIBALD N. TAYLOR	(2nd) Defendant
SIR EMIL HERBERT PETER ABELES	(3rd) Defendant
ELIZABETH MILLER	(4th) Defendant
ROBERT I. NICHOLL	(5th) Defendant
EVAN DUFF CAMERON	(6th) Defendant
KENNETH B. ANDERSON	(7th) Defendant
WILLIAM A. CONWAY	(8th) Defendant
PETER J. DUNCAN	(9th) Defendant
ALAN V. BALHORN	(10th) Defendant
F.M. MURPHY (a male)	(11th) Defendant
C.J. WATT (a male)	(12th) Defendant
SECURITY SHARE SERVICES PTY. LIMITED	(14th) Defendant

RESPONDENTS

RECORD OF PROCEEDINGS

VOLUME I

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