

IN THE PRIVY COUNCIL

No. 9 of 1973

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) CITY OF LONDON

(11th) Defendant

C.J. WATT (a male) THE COAST GUARD

(12th) Defendant

SECURITY SHARE SERVICES PTY.

LIMITED

(14th) Defendant

- 4 JAN 1975

25 RUSSELL SQUARE
LONDON, W.C.1.

RESPONDENTS

RECORD OF PROCEEDINGS

VOLUME III

Linklaters & Paines,
Barrington House,
59-67 Gresham Street,
London, EC2V 7JA.
Solicitors for the Appellant

Clifford-Turner & Company,
11 Old Jewry,
London, EC2R 8DS
Solicitors for Ampol Petroleum Ltd.

- Q. Did he say to produce any particular figure?
A. \$9½ million, as I recollect it.
- Q. Now, do you recall speaking to Mr. Maxwell at round about that time? A. Yes. Mr. Koch said to me, "Look, you had better ring Tom Maxwell". I phoned from the office with all the others present. I phoned Howard Smith, and asked for Mr. Maxwell, and was told that he was in a meeting. I said that the matter was urgent, and would they get him to phone me back as soon as possible. He phoned me back in Mr. Koch's office.
- Q. Roughly what hour was this, on 5th July? A. This would have been, I would think, round about midday. He phoned me back in Mr. Koch's office and I said, "Tom, this is Bill here. We have been discussing this matter of your offer here, and we don't think three million shares is enough". I said that to Mr. Maxwell. I said, "We reckon that if you are minded to make an application at all it should be for not less than 4,152,000 shares at a price of not less than \$2.30 per share".
- Q. What did he say? When you said that to Mr. Maxwell, what did he reply? A. He said, "That is a coincidence. That is the figure" - \$2.30 I mean - "\$2.30 is the figure that I have recommended. We have already made up our minds that three million shares are not enough and we are considering the matter", and at that stage he said, "Look, I will have to go, they are calling me back to the meeting". I said, "All right Tom," and hung up.
- Q. Now, where did you take lunch that day? A. We had lunch down in the board room at Millers.
- Q. Who was there? Who else was there? A. Mr. Taylor, Mr. Koch, Mr. Walker, Mr. Ellis-Jones. I am not certain about Mr. Murphy - I think he was there - and also Mr. Bob Nicholl junior.
- Q. Can you remember any discussion you had with him in particular? A. Yes, I can. Mr. Nicholl had brought down with him a couple of textbooks, one of which was a report dealing with a case called Hogg v. Cramphorn, and the other was in the Australian Law Journal, in which there was a comment or an abridged report of the Woodside-Burmah case. Mr. Nicholl and I discussed the

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No. 6

Transcript of
Evidence on
Trial of Action

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8th Dependants
Evidence
William Andrew
Conway

Examination by
Mr. Glass Q.C.

27th September
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(continued)

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(continued)

question of an issue, and we also considered what was written in the A.L.J. about Woodside-Burmah, and we had a look at Hogg v. Cramphorn as well, and at that stage we were considering whether or not an issue of shares - (Objected to my Mr. Rofe)

Q. Who was the "we", who were considering it?
A. Mr. Nicholl and I.

Q. Did any of the other persons have any worthwhile contributions to make to this discussion? A. 10
No, I don't think they did, because we were - -

Q. What was the substance of the conversation between you and Mr. Nicholl, aided and abetted by the Law Journal and Hogg v. Cramphorn?
A. That the issue of shares could be justified if it were for a proper amount bearing in mind the company's cash requirements, and by cash requirements - yes, bearing in mind the company's cash requirements.

Q. In terms of clarification, when you say "proper amount" there, are you referring to the total amount raised, or the price per share, or both? (Objected to by Mr. Rofe) 20

Q. Did any parts of the conversation deal with the price per share or the overall amount of the share issue? A. ~~The overall amount of the share issue was not known at that time.~~ (Objected to by Mr. Staff. By direction answer struck out as indicated)

Witness: I am sorry. Could I have the question again?

Mr. Glass:

Q. The question is, is there anything more to tell us about the discussion between you and Mr. Nicholl on the subject of a share issue and the legal principles involved? I will withdraw that. Would you be able, in volume 42 of the A.L.J.R., to identify the passages, or passage, that you and Mr. Nicholl referred to at that luncheon meeting? A. I think so. (Objected to by Messrs. Staff and Rofe) 30

His Honour: Mr. Conway, you understand the the refinements of what is involved in that question? You are able to draw attention to such parts of this article as you and Mr. Nicholl adverted to in your discussion. 40

Witness: If your Honour pleases.

His Honour: It is not what you had in mind, but the parts you referred to in your discussion.

Witness: I understand that.

Mr. Glass:

Q. Now, have you got the report open? A. Yes.

10 Q. Have you found the part that you had that day?
A. Yes. It is only a short paragraph.

Q. You have got it? A. Yes.

Q. Now, will you tell us the substance of the discussion between you and Mr. Nicholl about the part of the articles? A. Well, I read part of the article to Mr. Nicholl.

Q. You read part of it to Mr. Nicholl? A. Yes.

Q. Which part did you read to him? A. May I read the part I read?

20 Q. Yes. A. It is 42 A.L.J.R. at pages 264-265. I read the whole lot of it, not aloud, but the particular part on which I commented -

His Honour:

30 Q. The part you read to Mr. Nicholl. A. "...the High Court was asked by Harlowe, a substantial shareholder in the company, to set aside an allotment of nine million shares issued at a premium that paid up only to ten cents per share to Burmah Oil Australia Ltd. Harlowe alleged that, as the company had sufficient funds at the time of allotment, it was unnecessary to issue these further shares to raise capital and that the allotment was made in lieu of an issue to the public in order to prevent Harlowe from increasing its holding in the company. The Court (Barwick, C.J. McTiernan and Kitto, JJ) did not find that these allegations were supported by the evidence. The rule that directors must at all times act bona fide for the benefit of the company did not involve as a corollary that an exercise of the power vested in directors to issue new shares cannot be maintained as having been bona fide in the interests

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of the company unless the company had at the time of the exercise an immediate need of the capital to be paid up on the new shares. 'In many a case this may be true as a proposition of fact; but in our opinion it is not true as a general proposition of law. To lay down narrow lines within which the concept of a company's interest must necessarily fall would be a serious mistake...An enquiry as to whether additional capital was presently required as often most relevant to the ultimate question upon which the validity or invalidity of the issue depends; but that ultimate question must always be whether in truth the issue was made honestly in the interests of the company.'

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Mr. Glass:

Q. Did you make any comment on it when you read it? A. Yes, I did.

Q. Will you tell us what your comment was? A. I said to Mr. Nicholl, "That is spot on with our case. In fact, our case is stronger, because, as I understand Woodside-Burmah, they did not need money as quickly as we do".

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Q. And did Mr. Nicholl say anything to you??
A. Mr. Nicholl agreed with that.

Q. Well, that is lunch time. When did Mr. Nicholl leave, as you recall? A. He would have left shortly after 2 o'clock. He left, and took his books with him.

Q. Mr. Nicholl left when? A. He left either at 2 o'clock or very shortly thereafter.

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Q. What was the next major event that afternoon?
A. Well, I stayed on in the board room. We all stayed on. When I say "we" I mean the rest of us except Mr. Nicholl stayed on in the board room discussing the matter.

Q. Can I interrupt to ask you this? Was there any further discussion between you and the others on the subject matter of the discussion between yourself and Mr. Nicholl after he had gone?
A. Not that I recall. I think - not that I recall.

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- Q. What was the next thing that happened?
A. Whilst I was in the board room a telephone call came through for me, and it was Mr. Maxwell on the line.
- Q. About what time was this? A. So far as I can recollect this would have been some time after 3 o'clock.
- Q. You say Mr. Maxwell came on the line through to you? A. Yes.
- 10 Q. What did he say? A. He said, "Bill, I am ringing up to let you know that we have decided to offer for 4 $\frac{1}{2}$ million shares at \$2.30 per share, and I will be bringing a form of letter around later on setting this out".
- Q. When you received that intelligence by phone did you make any outward indication of your inward reception? A. Yes, I did.
- Q. What did you do? A. Well, at that stage they were sitting at the table. We were all sitting at the table. I was on one side, and when I got this information I just cupped my hand over the phone and said "4 $\frac{1}{2}$ million shares at \$2.30 a share".
- 20 Q. And you made a sign which the record will show as a circular digital gesture? A. If you say so, Mr. Glass.
- Q. What gesture or words from the others did your news provoke? A. I don't know what they said. It certainly did not provoke any gestures.
- 30 Q. What is the next thing that you recall that afternoon, Mr. Conway? A. I forget when we left the board room, but not long after that, and about a quarter to five that afternoon Mr. Maxwell came around to our office with a form of letter on a Howard Smith letterhead setting out the proposal. I read the letter, and when I saw him I was in the ante-room just outside Mr. Taylor's office and I cannot remember whether I read the letter first, or whether I took him into Mr. Taylor's room and read the letter there. I think Mr. Koch was there, but I am not certain. There were other people in that room, too, but I am not sure who was there. Certainly Mr. Taylor was there when I took Mr. Maxwell in.
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- Q. Was any comment made by anyone on the form of the letter? A. Only myself. I read through the letter either in the ante-room or in Mr. Taylor's room and I said to Mr. Maxwell, "Well, Tom, that seems fine, but the reference here to 'development' I am not too keen on." He said, "All right. Well then, so far as we are concerned you can take it out, or we will take it out".
- Q. Can you recollect in greater detail what that reference to development was? A. Yes, I can. The letter referred to the infusion of capital either resolving or going some distance to resolving the company's problems and to enable it to engage in further development. 10
- Q. Did you say why you were not too keen on the reference to development? A. I don't know whether I did or not. I would be guessing if I answered that.
- Q. Did Mr. Taylor make any comment on the letter? A. The only comment I can recall him making on the letter was saying "Well look, I will want a letter in those terms with your chairman's signature on it before the board meeting tomorrow". 20
- Q. Was any explanation offered as to why the letter proffered was unsigned? A. No. The letter referred to an agreement which was not with the letter. But I don't know that there was any comment made as to why the letter was not signed. 30
- Q. Well now, did you talk to anyone that evening about the matter? A. Yes, I did. I was at home that evening, and I was telephoned by Mr. Kerrigan, of Allen Allen and Hemsley, who told me that he was drafting - -
- Q. You had a discussion with Mr. Kerrigan? A. Yes, I had a discussion with Mr. Kerrigan of Allen Allen & Hemsley about the agreement.
- Q. Don't answer this - it may be objected to. What was the discussion? (Objected to by Mr. Rofe). 40
- Q. Now, on that same day, 5th July, did you have any discussion with anyone about Sir Peter Abeles' position? A. Yes.

- Q. With whom did you have that discussion? A. It was with Mr. John Aston.
- Q. About what time did you have the discussion? A. It was at the - it was during the conference in Mr. Koch's office which took place from half past ten onwards.
- Q. You told us that Mr. Aston was not there at lunch time. Approximately when did he leave? A. I don't remember, Mr. Glass. I am not even certain that he was not there at lunch time, but I don't remember him being there at lunch time. I think he left some time before lunch. But it was during the conference in Mr. Koch's office that started around about half past ten and carried on when this discussion took place, and Mr. Taylor was present, as I recollect it, and - (interrupted)
- Q. Could I just interrupt to ask this? Had Mr. Taylor reported any particular event to the people in Mr. Koch's room before this conversation took place? A. I don't know whether it was before or after it. I think it was - no, I am not certain. Mr. Taylor did come in and report a certain event to the people in the office.
- Q. What was it? What did he say? A. He said that he had been speaking to Sir Peter Abeles on the telephone. His words as I recollect them now, were "Well, this is a declaration (Objected to by Mr. Lockhard; allowed).
- Q. What was it that Mr. Taylor said about his phone conversation with Sir Peter Abeles to those present in Mr. Koch's office that morning, 5th July? A. He came in and said "Well, this is a declaration of war". He said, "I have just been talking to Sir Peter Abeles on the phone and he threatened to - " I can't remember the precise words - "he threatened to rip up the board", or "tear the board apart". Mr. Taylor said, "I heard him out. I said, 'You are a very clever fellow, Peter'", or something of that kind. That is the only recollection I have of the conversation. I am not certain whether that took place before or after the discussion with Aston.

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Q. Well, what has the discussion with Mr. Aston?
(Objected to by Mr. Lockart; allowed)

Q. You and Mr. Aston had a discussion? A. Yes, that is correct.

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Q. What was the substance of the discussion you had with Mr. Aston? A. Mr. Aston said to all present, but particularly, I think, to Mr. Taylor, "Well, there is the clearest possible conflict between Peter Abeles' position as director of Bulkships and any proposal for an allotment of shares. He has no right to vote or engage in the debate". He turned to me and said, "Don't you agree?" and I said "Yes", or words to that effect. Certainly I supported him. We then got the articles of association of the company and had a look at the relevant article.

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27th September 1972 (continued)

Q. Do you recall the number of that relevant article? A. No, I don't recall the number of the article. I could identify it if I had a copy of the articles in front of me.

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Q. (Copy of Articles of Association handed to witness) Can you identify the number from that?
A. Yes, it is article 97, on page 46.

Q. What did you and he say about it? A. We both agreed - (Objected to by Mr. Rofe)

Q. You said to each other - A. I said to Mr. Aston, "Well, he certainly is not disqualified by this article", or words to that effect.

His Honour:

Q. "certainly not disqualified by this article".
A. Yes, or words to that effect. Aston said, "No, but it has been the law for hundreds of years that where a director is in conflict he is not entitled to vote", and I agreed with that proposition.

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Mr. Glass:

Q. Was Mr. Taylor present? A. Yes, Mr. Taylor was present.

Q. You later prepared the memorandum which is in evidence as exhibit - anyway it is in evidence?
A. Yes.

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- Q. How did you come to do that? How, when and under what conditions did you come to prepare it?
A. I can't remember now whether I said to Mr. Taylor, "Well, Arch, I will prepare the brief for you for this meeting," or whether he said to me, "I want you to draw up something for me for the meeting", but I prepared the memorandum on that evening of the 5th, as I recollect, and on the following morning before the meeting.
10 To my recollection I handed it to Mr. Taylor some time after nine o'clock on the morning of the sixth.
- Q. Some time after nine o'clock on the morning of the sixth? A. Yes.
- Q. Now, on that morning when did you - what do you know about the arrival of the Howard Smith letter?
A. Well, the Howard Smith letter arrived at not earlier than 20 to ten. Mr. Maxwell brought the letter around. It would have been about 20
20 to ten, because I can remember looking at my watch. I took him in to Mr. Taylor's room. I was down in the ante-room. I took him in Mr. Taylor's room. To the best of my recollection I read that letter before I took him in because he came in and I read through the letter to make as certain as I could that it was in the same terms of the form of letter he had shown to me the previous night, and so far as I can - -
- Q. Was it, except - A. Except for those two lines.
- 30 Q. Yes. A. Also there was the agreement with it that was referred to in the letter, and I ran through that quite quickly and that seemed to me to be all right, too. Anyway, I took him in to Mr. Taylor and that letter, incidentally was signed by Mr. Howard Smith.
- Q. Well, do you remember any discussion with Mr. Taylor when Mr. Maxwell and the letter and the agreement went in? A. To the best of my recollection I said to Mr. Taylor "Well, there
40 is the letter, and it is the same as yesterday with the exception of those two lines, and I have had a look at the agreement and it is okay".
- Q. All right. When did you see Mr. Balhorn that day? A. I saw him in Mr. Taylor's room. I think it was just after the letter from Howard Smith had arrived. I think he came in just after the letter had arrived.

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(continued)

Q. And did he say anything about what he wanted done? A. Yes. He said that he had - wait a moment. When he came in he was handed - I think Mr. Taylor handed him the letter for him to read it and Mr. Balhorn said - not to me, but to Mr. Taylor - "I spoke to Peter in Tokyo about this last night - about this matter last night - but we did not make much progress, and I rang him again this morning, but I think we have got to ring him up and acquaint him with the actual contents of this letter".

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Q. Yes. A. Mr. Taylor said, "All right, I will get him", and he ordered a call to Mr. Duncan in Tokyo.

Q. Yes. A. Mr. Balhorn said to me, Well, Bill, will you speak to Peter and explain the proposition to him, because I had better go down to the board room." I had never met or spoken to Duncan before, and when the call came through Mr. Taylor spoke to him and virtually introduced me to Duncan over the phone and I took the phone and spoke to Duncan.

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Q. Did anything pass between you and Mr. Balhorn before he left? A. Yes. I think just after I got on the phone to Duncan Mr. Balhorn said to me, "Bill, ask Peter whether it is 'vote yes' or 'abstain'." I think at that stage I was on the phone, and I just made a sign to him - I just indicated "Yes", I heard what he said. Then he handed me a piece of paper on which the words "yes" and "abstain" were written. I then spoke to Mr. Duncan on the telephone.

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Q. Yes. Well, what did you say to him? A. I said, "Well, we have just got this letter from Howard Smith a few minutes ago, and it is a proposal we should allot to them 4½ million shares at \$2.30 a share, which means roughly about \$10 million. The company has got at the present time short term loans of approximately \$10 million, and this cash infusion will go a long way towards solving its problems". Duncan said, "Yes, but is this legal?" I said, "There is nothing in the Companies Act which precludes the directors from making an allotment, but if they do they have got to do so bona fide and in the interests of all shareholders. Also, they run the risk of the company being suspended or de-listed for some period, because it is a breach of the Stock Exchange Regulations". He then said, "But is not this a bit unethical?" and I said,

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"As it stands the directors have got to have regard to all the shareholders, and, so far, as minor shareholders are concerned, well, there could not be any argument about that anyway, because if in fact Howard Smith stay in with their offer then the minor shareholders are going to get the opportunity to accept a higher price than Ampol's. So far as Ampol and Bulkships are concerned, well then from their point of view they can either take their money and go with a handsome capital profit or alternatively, if they prefer to do so, they can hold their shares. But in any event I cannot see that the legitimate interests of shareholders are being prejudiced".

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Q. Yes. A. He said, "Well thank you for a very lucid exposition of what the position is." I said, "Well, before Alan Balhorn went down to the board room he asked me to ask you whether you thought he should abstain from voting or vote 'Yes', and Duncan said, 'Well, on the basis of what you have told me', or some similar words to that effect, 'I would say "yes"', so I said, 'all right, I will let you know'", and that terminated the conversation.

Q. And what did you then do? A. I took the piece of paper that Balhorn had handed to me and I ticked the word "yes" on it and went down to the board room. I walked around to Balhorn and gave him the piece of paper and then just went to my seat at the table.

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

(Mr. Kirby requested leave to be excused from 28th September, to time. His Honour granted leave for Mr. Kirby 1972 and other counsel to be absent as necessary.)

His Honour: Are there any matters arising out of the transcript?

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Mr. Rofe: The third question from the top. The answer should read "He gave me some facts and figures as to Millers' financial position and pointed out to me that from a short term liability point of view the company was urgently in need of cash" etc.

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Archibald Norman Taylor
on former oath:

His Honour: I will have it noted that you are now commencing your re-examination of Mr. Taylor.

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Mr. Glass:

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Archibald
Norman Taylor
(recalled)

Re-examined by
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- Q. At P. old 392 of the transcript, Mr. Taylor, you were asked questions about your release to the Stock Exchange of the 327 valuation when the Board had previously decided it should not be made available. Do you remember that? A. 371 10
Mr. Glass.
- Q. Sorry, 371 A. Yes, I do recall.
- Now, I ask you for what reason did you decide on learning of the Ampol takeover offer to make the Rettio and Vickery valuation public? A. I believed that 50% of the shareholders the company were aware of that valuation by Rettie and Vickery and I felt it my duty as chairman to inform the other 50% shareholders of the company. 20
- Q. Now, you said at p. old 419 to my learned friend Mr. Deane with respect to the Hambros letter of intent that there were various escape clauses, the final preparation, delivery of vessel, change of ownership and world crisis. Do you remember saying that? A. Yes, I remember saying that.
- Q. I ask you were those matters present to your mind on July 6th 1972? A. Yes, they were
- Q. You were asked questions about letters which you had written, one to the Bank of N.S.W. in May 1972, one to the Commonwealth in June 1972 with regard to the Hambros loan. Do you remember? A. Yes, I remember. 30
- Q. Had there been any events since those letters which in your belief affected the security of the Hambros loan since the last of the two? A. There was on the 27th the joint announcements by Bulkships and Ampol and I believe that announced that there would be a change of ownership in the company. 40
- Q. What bearing in your belief did that have on the security of the Hambros loan? A. Well, it

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(continued)

would make it more insecure. The loan would have to be re-negotiated or repaid.

Q. And lastly, Mr. Taylor, I ask you this - I might even require leave, your Honour, to deal with this topic. By what date had public circulation developed regarding the sale of the Romanda shares in Millers. (Objected to by Mr. Staff)

Q. Had you read in financial columns any discussion that the Lady Miller, rather, Romanda shares in Millers were up for sale? Had you read it?
A. Yes.

Q. When did you first start reading it and where?
A. I can't recall the dates. November, certainly November and December in 1971 in the financial pages of the various media.

His Honour: Well, insofar as that may be re-opening, Mr. Deane, do you want to ask anything on that last topic.

Mr. Deane: No, your Honour.

(Witness retired.)

William Andrew Conway
on former oath:

William Andrew
Conway
(recalled)

Mr. Glass:

Examination by
Mr. Glass Q.C.
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Q. Mr. Conway, you got to the point in the narrative where you gave a piece of paper to Mr. Balhorn and went to your seat at the Board table? A. Yes.

Q. Did Mr. Balhorn say anything to you when you gave him the piece of paper? A. No.

Q. Was the meeting then already in progress or was it about to begin? A. It was about to begin. It had not commenced.

Q. What were the first matters of business dealt with in general terms? A. Well, it was a confirmation of the minutes as I recollect it of the previous meeting. I think then we went on to the

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(continued)

question of share transfers and the third item on the agenda was the joint announcement of Ampol and Bulkships if I remember correctly.

- Q. What did the chairman say according to your recollection? A. He said "The third item on the agenda is the joint announcement of Ampol and Bulkships but there has been a dramatic development this morning and I will defer dealing with this item until we have dealt with this further matter." He said "About 9.30 this morning I received a letter signed by the chairman of Howard Smith Limited and I propose to read this letter to you." 10
- Q. Did he do that? A. Yes, Mr. Taylor read the letter out.
- Q. What was the next thing that happened? A. Mr. Taylor then said "I will ask Mr. Conway to read the agreement." This was the agreement which was referred to in the letter he had read out. 20
- Q. Did you do that? A. Yes, I read the agreement out to the meeting.
- Q. What happened next? A. Mr. Taylor said "I have been advised by the company's legal officer and by Mr. John Aston that there is nothing in the Company's Act which precludes the directors from making an allotment of shares but, if they do, they would commit a breach of Stock Exchange regulations which, if not waived, could result in the suspension or de-listing of - 30
suspension of the company from trading or de-listing of the company for some period. I am further advised that the directors must act bona fide in the interests of the company and that means all of the shareholders, that they are not justified in acting in their own interests or in the interests of some of the shareholders only. Mr. Aston and Mr. Conway, as you know, are here to answer any legal questions." He then turned to me and said 40
"Do you have anything to add to this, Mr. Conway?"
- Q. Yes, and what did you add? A. I said "Well, not a great deal really except that so far as de-listing is concerned I do not think the Stock Exchange would de-list us without giving

us an opportunity to make representations, and, in any event, I don't know that de-listing is going to affect the shareholders because at some stage we are going to be de-listed and in the meantime the shareholders would have two alternative offers available to them." I said "In my view the Board has a duty to consider the interests of all shareholders, both major and minor, and if it is satisfied that it is in the interests of all the shareholders then, in my view, they should accept the offer but, if they are not satisfied that it is in the interests of all the shareholders, then they should reject it."

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Q. Yes. Now, did you express any view yourself as to what the Board should decide? A. No.

Q. Who was the next person to speak? A. Mr. Aston spoke - I am not certain whether it was at Mr. Taylor's invitation or whether he did it on his own accord.

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Q. Well, either of them spoke? A. Mr. Aston said "I would not presume to predict the attitude which the Stock Exchange might adopt either on suspension or de-listing but I am personally aware that over the last 12 months or so there have been 16 occasions on which there has been a breach of Stock Exchange regulations and no action has been taken by the Exchange."

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Q. What was the next thing that happened? A. I think Sir Peter Abeles then said "Mr. Chairman, what was the price per share?" and Mr. Taylor said "\$2.30". Sir Peter Abeles then said so far as I can recall, "Well, here we are being asked to allot shares at \$2.30 when statements have been made that we have got an asset backing in excess of \$3.70 and this would be a dilution of the company's capital." Mr. Taylor said "I note your comments."

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Q. What else did he say? A. Mr. Taylor then turned to Sir Peter Abeles and said "Sir Peter, as a director of Bulkships and bearing in mind the joint announcement by Ampol and Bulkships of their intention to act jointly in respect of this company I consider that there is a clear conflict of interest in your case as a director of this company and your interest in Bulkships and I invite you to disqualify yourself from taking part in the discussion or the vote on this matter."

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- Q. Yes, and what was then said? A. Sir Peter Abeles said, "Well, I am certainly not disqualifying myself. I have always disclosed my interest." I think that was all Sir Peter said. Then Mr. Taylor intervened and said "Well, I think there is a conflict of interest and I rule that you are not entitled to take part in the debate or to vote on the question."
- Q. Then? A. Sir Peter said, "Well, Mr. Chairman, I do not accept your ruling" and Sir Peter Abeles turned then to Mr. Aston and said words to the effect "What is your opinion, John?" and Mr. Aston replied "In my opinion, the chairman's ruling is correct and is completely unchallengeable." Sir Peter Abeles said, "Well, where is it in the minutes?" - he could have added some other words but certainly he said "Where is it in the minutes?" - and Mr. Aston replied "There is no minute covering this matter but it has been part of the law for over 100 years." 10
- His Honour:
- Q. You said "minutes". I think you mean "articles" don't you? "Where is it in the articles?" A. "Where is it in the articles?" and Mr. Aston...
- Q. You said "minutes"; you meant "articles"? A. Yes, sorry, your Honour; "Where is it in the Articles?" and he said "It is not in the articles but it has been part of the law for over 100 years." Sir Peter Abeles then said to the chairman, "Well, I want to take legal advice; I want my legal adviser here and I request that you suspend the meeting, suspend proceedings whilst I go and arrange it." Mr. Taylor said, "I don't think you are entitled to have your legal adviser here but there is a 'phone next door, in the room next door, and if you wish to go and telephone you may do so but, in the meantime, we will go on with the meeting," and at that point Sir Peter Abeles got up and left the room. 30
- Mr. Glass:
- Q. And what happened after that? A. It was then I think that Mr. Taylor said "So that the matter may be discussed, will somebody move that the agreement be signed and subject to the application for shares and cheque being received, that the 4½ m. shares be allotted to Howard Smith Limited?" That was moved and seconded and... 40

Q. Do you recollect who moved and seconded it? A. It was, I think, moved by Mr. Anderson and seconded by Mr. Nicholl. That is my recollection of it. Then Mr. Taylor said "So that you may be fortified with the company's financial position and the events which led to the repayment of our indebtedness to the Commonwealth. I will ask the general manager to give you some particulars of the - "or summary I think he said " - of the company's present financial position."

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Q. Then Mr. Koch addressed the meeting, did he?
A. Yes, Mr. Koch addressed the meeting.

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Q. For approximately what length of time did he speak? A. I think that he would have spoken anywhere between 10 and 20 minutes - perhaps 20 minutes is a bit excessive but certainly not less than ten.

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Q. And not more than - 10 at the least? A. 10 at the least and I would think not more than 20 minutes.

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Q. I won't ask you, Mr. Conway, to tell us the substance of what he said except can you recollect that he made any particular recommendation?
A. Yes, he did.

(continued)

Q. What was that? A. When he finished giving the details, he said "I strongly recommend the proposal."

Q. Yes, and on what grounds do you recollect that he recommended the proposal when speaking that day? (Objected to by Mr. Deane)

Q. You have already told us what you recollect Mr. Koch recommended to the meeting. Can you recollect, and tell us if you do, any particular grounds which he stated to the meeting for that recommendation? (Objected to by Mr. Rofe; allowed) A. Yes, in the course of the summary, Mr. Koch listed out the short term financial commitments of the company and according to my recollection this figure came out at \$10.7 m. He stated that all of the assets of the company were pledged and that there was nothing further that the company had open with which to raise money. He stated also that the letter of commitment which had been received from them Hambros Bank was not a firm commitment because it had a provision in it allowing the bank to

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withdraw in the event of the control of the company changing from what it was when the commitment was given. He also commented on the Tri-continental loan of \$3.1 m. and stated that there were provisions in that document which also gave the mortgagee the right to refuse to roll over the bills - was the expression which was used - in the event of the control of the company being changed, and he also said that there were other clauses in the document which left it pretty largely to the discretion of Tricontinental to roll over the bills when the appropriate time came.

Q. Was there anything else? A. Yes, there was one other thing he said. He said something to the effect "I remind members of the difficult financial position in which we were some 12 months ago" and I think he said "I would not want to go through that again."

Q. And what, if anything, did he say with respect to the relationship between the allotment and the company's financial position? A. He said that the moneys which would come from the allotment would solve the company's immediate financial liquidity problem. That is all I can remember he said about that.

Q. What were Sir Peter Abeles' movements while Mr. Koch was speaking? He had left the room you told us? A. Yes.

Q. At what stage did he return? A. Sir Peter Abeles came back to the meeting whilst Mr. Koch was still speaking. I can't recollect at what particular stage but Mr. Koch spoke for sometime after Sir Peter had got back and Sir Peter sat down and was then speaking to Mr. Cameron who was sitting on his left, in a low voice on his return.

Q. Did he say anything, Sir Peter Abeles? A. I think - yes, he did say something, but I think I might have to back-track before I get to this. In regard to the Hambros loan, Mr. Cameron said to Mr. Koch "But Hambros are more interested in a change in management rather than in a change in control" and Mr. Koch replied to that by saying "Well, maybe that is so but in their letter they refer to a change of control" and Sir Peter Abeles - I think it was about that time - said he had been in touch with Hambros Bank and that

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the bank had indicated that if the company was backed by its major shareholders it would increase the amount of the loan. Mr. Koch answered that and said "Well, Mr. Chairman, why wasn't the company told about this?" and Sir Peter Abeles, as I recollect it, answered Mr. Koch direct and said "It was not official". He said something else as well but I can't remember. He said certainly it was not an official communication.

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Q. Did Sir Peter Abeles say anything about the Howard Smith proposal? A. Yes, he did. He said that the Howard Smith proposal provided that they could withdraw it at any time and he was answered by Mr. Aston - I am not certain that he did not address this comment to Mr. Aston but whoever he addressed the comment to, he made the comment that the Howard Smith proposal contained the statement but they could withdraw it at any time and that was answered by Mr. Aston who said that this was a statutory provision applying to offeror companies.

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Q. Who was the next per on to speak at any length after Mr. Koch? A. Mr. Evan Cameron was the first person to speak after Mr. Koch.

Q. For how long did he speak approximately? A. He spoke for what seemed to be a long time and he covered a lot of ground. It is very difficult to say how long he spoke. I would be guessing but I would think he spoke for not less than 15 minutes.

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Q. Can you recollect what he said with respect to the Howard Smith proposal at the end in conclusion? A. Well, I can't remember the sequence in which Mr. Evan Cameron put his various points ...

Q. I am not asking you to review the points which Mr. Cameron made? A. I understand.

Q. But ask you what his concluding observation was with respect to the offer? A. Well, I think the concluding observation he made was that he would like to hear from other directors on the subject, particularly Mr. Nicholl.

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Q. Now, before that did he state his own attitude towards it according to your recollection? A. Oh, yes.

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Q. What did he say? A. At some stage in his address he said that he was not to be taken as necessarily being opposed to the Howard Smith proposal but he wanted its implications to be fully considered by all the directors. He said that the Board knew that he had been concerned for a long time about the position of minority shareholders. He also said, and I think this was early in the peice, that the Stock Exchange regulations were there for a purpose, were there for a good reason, and that he was concerned about a breach of those regulations and he did not agree that the shareholders would not suffer by reason of a breach of the regulations.

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Q. Now, I take you back to the end of his remarks as recollected by you. He said that he would like to hear from the other directors, particularly Mr. Nicholl? A. Yes.

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Q. Did Mr. Nicholl than speak and what did he say? A. Yes, Mr. Nicholl spoke. Mr. Nicholl said, "The question of an issue or a placement of shares has been considered by the Board on a previous occasion." I can't remember what happened then but there was an interchange across the table between Mr. Nicholl and Mr. Cameron. They were virtually seated opposite to one another and I can remember that Mr. Cameron made some remark about a placement and Mr. Nicholl said "Yes, but you could not place the shares at \$2.30" and Mr. Cameron said "No, that is right" and it was at this stage I recollect too that Sir Peter Abeles intervened again and said "Well" - well, he said words to the effect "It all depends who your underwriter is." Mr. Nicholl went on to say that where you were faced with the position of two major shareholders in combination that he would rather face the shareholders knowing that he was in breach of the Stock Exchange regulations than "just quietly fade away" - I think were his words - and he finished up by saying "I am at present in favour of the proposal."

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Q. Yes, now, who spoke after him? A. It was Mr. Balhorn.

Q. Do you recollect what he said, what attitude

he adopted? A. I can't recollect all Mr. Balhorn said. He started off by saying he supported Mr. Nicholl's remarks and he also said that he had spoken to Mr. Duncan in Tokyo.

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- Q. Can you recollect what attitude he expressed regarding the proposal? A. Yes, he had already said that he supported Mr. Nicholl and he indicated that he supported the proposal.
- 10 Q. Who was the next director to speak? A. Mr. Anderson, according to my recollection, spoke next, and Mr. Anderson simply endorsed Mr. Nicholl's remarks (objected to by Mr. Rofe).
- Q. The substance of what he said? A. Mr. Anderson said words to the effect "I agree with Mr. Nicholl."
- Q. Who was next? A. Lady Miller.
- Q. What did she say? A. She said, "I am not happy with the proposal. I would have liked more time to think about it. I don't like the thought of being delisted."
- 20 Q. Did anyone comment on that? A. Yes, I answered that. I said, "Well, so far as delisting is concerned, I don't think that the Stock Exchange will delist us without giving us a chance to state our case and they would only in my opinion delist us if there was a flagrant breach of the spirit of their regulations."
- Q. Was that the substance of the discussion as you recollect it? A. Ah.
- 30 Q. Is there anything else you wish to add? A. The only thing I feel I can usefully add is at this stage Mr. Taylor asked would somebody move the resolution and he was - well, I think it was Mr. Anderson said, "Look, I have already moved the resolution." Then the resolution was put.
- Q. And how did the voting go? A. Am I to name the people who voted for and against it.
- Q. Yes please. A. The people who voted for the resolution were Mr. Nicholl, Mr. Anderson, Mr. Balhorn and Mr. Taylor. Those who voted against it were Mr. Cameron and Lady Miller.
- 40 Q. What happened with respect to Sir Peter Abeles? A. After the voting was over, Mr. Anderson turned to the Chairman and said, "Mr. Chairman,

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Sir Peter did not vote," and Sir Peter Abeles said, "No, I did not vote," and Mr. Anderson said to him, "You abstained from voting?" and Sir Peter Abeles said, "No, I did not abstain from voting. I was refused the vote by the Chairman and I want that recorded in the minutes and I am advised that the action of the Board could be fraudulent."

- Q. What was the next thing the Chairman said?
A. The Chairman said, "Well, I declare the motion carried. I will now sign the agreement and I will ask Mr. Anderson to sign with me." 10
- Q. What happened with the agreement? A. The agreement was then signed by the Chairman and Mr. Anderson and the Secretary Mr. Ellis-Jones, and was sealed.
- Q. Then what was done with it? A. I took the agreement and the share script was also there at the time and was sealed. I took the agreement... 20
- Q. When was it sealed? A. It was sealed at the same time as the agreement. I took the agreement and the scrip, excused myself and left the meeting. I went upstairs to one of Millers' offices where I saw Mr. Tom Maxwell of Howard Smith. I exchanged the agreement with him and handed the share scrip over in exchange for the letter of application and a cheque for the ten per cent which the agreement provided should be paid. 30
- Q. Then you returned? A. I returned to the meeting with the agreement signed by or executed under the seal of Howard Smith Limited.

His Honour: Mr. Kirby is not here; Mr. Rogers is not here either. Mr. Hughes or Mr. Gleeson - Mr. Rowling?

Mr. Rowling: No questions.

His Honour: Mr. Lockhart?

Mr. Lockhart: No questions.

His Honour: Well now, Mr. Staff, as between you and Mr. Rofe? 40

Mr. Staff: I had anticipated we would follow the same course, your Honour.

CROSS-EXAMINATION

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Mr. Rofe:

- Q. Mr. Conway, as I understand it, you were appointed Legal Officer of Millers in November 1971 to take up your duties in January 1972, is that right? A. I think that is right. I can't remember the date of the agreement but I certainly took up duties in January.
- 10 Q. And I think you first attended a board meeting of Millers on 15th May, 1972, as Legal Officer. Would that be about right? A. That probably would be right, Mr. Rofe. I don't recollect.
- Q. As Millers' Legal Officer, did you regard yourself responsible to any particular executive or the Board generally or both or what? A. Yes, I did. When I was appointed Legal Officer, I was advised by the Chairman that I would take instructions from the General Manager, Mr. L.D. Koch, and I regarded myself as being under his directions and, of course, the Chairman's if he
- 20 chose to issue any directions to me but only to those two gentlemen.
- Q. And did you, prior to 12th May, 1972, have any discussions with the Chairman, Mr. Taylor, concerning the sale or rumoured sale of any shares in the company owned by Romanda Pty. Limited? A. Yes.
- Q. And did Mr. Taylor during this period - that is January when you took up your duties to 12th May - did he express to you opposition to the sale of the Romanda parcel of shares? A. Yes I think
- 30 he did.
- Q. And did he do that on one occasion or more than one occasion during that period? A. He would have done it more than once during that period.
- Q. And these were occasions I take it when you were at Millers performing your duties as Legal Officer? A. That's right.
- Q. Then, of course, you were aware or became aware shortly after 12th May, 1972, that the Romanda parcel of shares had been sold to Ampol? A. Yes.
- 40 Q. And following that date and prior to 22nd May when the Ampol announcement was made that it would seek to acquire all the shares, between

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the 12th and the 22nd, did you have any discus-
sions with Mr. Taylor about the sale of the
Romanda shares to Ampol? A. Yes.

Q. And on any of those occasions did Mr. Taylor
express to you his disappointment or disgust
at the sale of the Romanda shares to Ampol?

A. I think he expressed disappointment. I
don't know that he expressed disgust.

Q. Did he express concern? A. Well, he did. He
expressed concern about the effect on Sir
Roderick Miller's children on the sale of the
shares. 10

Q. Did he express concern in relation to the price?
A. Partly the price. He regarded the price as
too low.

Q. Then on 22nd May, of course, you became aware
of this announcement by Ampol that it would
proceed to seek to acquire all the shareholding.
Is that right? A. Yes.

Q. And indeed, some few days later, you became
aware of the notice of the proposed take over
scheme? A. Yes, I was called down when Mr.
Binsted came with the notice of take over
scheme. 20

Q. Can we assume that from 22nd May, 1972, Mr. Taylor
expressed to you desires to somehow or other
frustrate - and I am suggesting these are the
precise words - the Ampol take over scheme?
A. No, I don't think he expressed any views
about frustrating it. 30

Q. Did he express any views about seeing someone
else to make a counter take over offer? A.
Well, that was a constant source of discus-
sion between all of the Millers group.

Q. Then I think it is correct to say, isn't it,
that there was a great deal of discussion
amongst yourself and Mr. Taylor and other
Miller directors about seeing if somebody
could be involved or become interested in
making a counter take over bid? A. Well, 40
between myself and Mr. Taylor but not with
the other directors of the Miller group because
I just did not see them. See, the other
Miller directors were virtually outside
directors at this stage.

- Q. Well, at the meeting, you were present at the meeting of the Board on 26th May, 1972; (Witness shown Exhibit MH13)* Do you have that? I think it is Folio 249? A. Yes, these are the minutes of the meeting of 26th May.
- Q. Yes, you are shown there as being present as Legal Officer. Is that correct? A. That's correct.
- 10 Q. I think this is the first meeting at which you had been present in any capacity. Is that right to your recollection? I think you can assume that is what the minutes show but would that probably be right? A. If the minutes show this was the first occasion, that would probably be right.
- Q. And at that meeting the Board discussed the appointment of outside expert advisers? A. Yes.
- 20 Q. Was that with a view from your recollection of discussion with a view to seeing ways and means by which somebody could be attracted to somehow or other stop or defeat the Ampol take over offer? A. No, it was not for that purpose. The purpose of appointing outside expert advisers was to advise us as to the best means of dealing with a take over bid, whether by getting an outside, another competitor, to in effect increase the price and create some competition between the parties. It was not for the purpose of frustrating the Ampol bid.
- 30 Q. When I say "frustrating", I mean defeated at that figure? A. Well, certainly defeated at that figure, yes.
- Q. And during the course of the discussion, you advised the selection of an outside legal adviser. You recommended it to the Board, I think, at the foot of p.250? A. Yes.
- Q. And I think you had a panel of possible people presented to you for your recommendation? A. No.
- 40 Q. You recommended, Mr. Aston, did you of Bowen and Packham? A. Yes.
- Q. Did you recommend him on the basis that you believed he had some expertise in take over situations? A. Yes.

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Q. I think that that meeting also you were appointed alternate director for Mr. Anderson? That is Folio 251? A. Yes, that's correct.

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Q. Now, the next meeting you attended was, I think, on 1st June, was it not? This time in your capacity as Legal Officer, not as alternate director. That is Folio 252. A. 252? It seems to finish at 251.

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Q. Exhibit MH15.* A. Yes, I have it, Mr. Rofe, Folio 252. 10

Q. You were there as Legal Officer? A. That's right.

Q. Mr. Anderson being present? A. That's right.

Cross-Examination by Mr. Rofe

Q. And on that occasion the Board was notified by Sir Peter Abeles that Bulkships would not be making a counter bid? A. That's right.

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*Exhibit MH15

Q. Had you had any discussions with Mr. Anderson prior to that notice as to the possibility whether Bulkships were a suitable vehicle or likely to make a counter bid? A. No. 20

Q. Mr. Taylor did not mention anything to you? I am sorry, I withdraw that. You had no discussion with Mr. Anderson? A. I had...

Q. What about Mr. Taylor? A. As to whether Bulkships would make a counter bid.

Q. Would be likely, would be encouraged to? A. I don't recollect a discussion that Bulkships would be, with Mr. Taylor that Bulkships could be influenced to make a counter bid. 30

Q. Were there any discussions perhaps that Bulkships might make a counter bid as distinct from "might be influenced" to make a counter bid? A. I think this was in our minds at the time.

Q. Did you try to ascertain perhaps whether you remember discussing it with Mr. Taylor? A. Well, we thought that Bulkships were in a very advantageous - they were in a key position.

Q. So, can we assume that you did possibly discuss that with Mr. Taylor? Would that be likely?
 A. Oh, we certainly would have agreed that Bulkships were in a key position in the matter but we could not see them engaging in a contest.

Q. It was your view at that stage that Ampol and Bulkships were not working together? A. That's right, it was.

10 Q. Well now, following the announcement at the meeting by Sir Peter Abeles - that is the meeting of 1st June - that Bulkships did not intend to make a counter bid, did you and Mr. Taylor have any discussions as to, after that date, as to seeking somebody else out who may be prepared to make a counter bid? A. No, I don't think so because at that meeting the question of the merchant bankers came up and despite the advice that had been tendered that we ought to appoint a merchant banker, I think the views of Sir Peter
 20 Abeles were that we should wait for merchant bankers to beat a path to our door. He, in effect, said, "the more the merrier; they will come to you. I don't recommend this," and we were at that stage waiting for somebody to come in and make an offer.

Q. I take it during this period you would be seeing Mr. Taylor every day in the course of your duties, practically every working day? A. Well, every day that he happened to be there. He did go
 30 interstate quite a lot.

Q. I appreciate that. A. But generally speaking I suppose I would see him most working days anyway.

Q. Now, I want to take you then to the next board meeting at which you were present, 9th June, Folio 256. A. It does not appear to be in this.

His Honour: It is in the main bound part.

Witness: Thank you, your Honour.

Mr. Rofe:

40 Q. MH13*, it is June 9. Have you got that? Now, on that occasion you were present as alternate director for Mr. Anderson? A. I finish at 251.

His Honour:

Q. Well, it may be in the front then. A. No, your Honour, all I have in the front is...

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*Exhibit WW

Q. It may be out of sequence at the back. I think that one is there at the back; perhaps it isn't
Mr. Rofe: Maybe, your Honour, it is not in evidence.

His Honour: On second thoughts, I don't think it is in evidence.

(Minutes of 9th June called for: produced)

(Millers' minutes 9th June, 1972 tendered without objection and marked Exhibit WW)*

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Mr. Rofe:

Q. Mr. Conway, you see yourself there as present as alternate director on this occasion? A. I do.

Q. And that was a Friday? A. Yes.

Q. I just want to ask you in relation to some days earlier whether Mr. Taylor had told you of a meeting that he had had with Sir Peter Abeles, Mr. Aston and Mr. Koch on 5th June. A. Yes. 20

Q. And did he tell you, do you remember when he told you - was it on the same day or after the meeting or did you know in advance he was having this meeting or can you recall?
A. I think I knew in advance that he was having the meeting although I could not - I was going to say I could not swear to that and that is exactly what I am doing but I don't know, I think I did know in advance.

Q. I take it that at the discussion which you think was in advance of the meeting you were firmly of the view that Ampol and Bulkships were not working together? A. Yes, I think that that is - that was my own view. 30

Q. I appreciate that. I remind you this was the view you expressed on the 16th? A. Yes.

Q. So, we may take it your view at the discussions preceding this meeting was that Ampol and Bulkships were not working together? (Nodded).

- Q. During this discussion preceding the meeting with Sir Peter Abeles did Mr. Taylor tell you why he was calling the meeting or arranging it? A. Yes, I think he did.
- Q. Do you recall what he said? A. I can't recall the words he said.
- Q. The substance? A. I can pretty well give you the substance of them: that the meeting was called with Sir Peter Abeles from the point of view of discussing the future of Millers and endeavouring to ascertain Sir Peter Abeles' attitude towards the Ampol bid and the effect that it would have if it succeeded. I got the impression that it was a sort of feeling out meeting.
- Q. Did he tell you at this discussion before the meeting that he proposed to tell Sir Peter Abeles that he could offer or influence the offer of a percentage swing of shares to Bulkships, anything like that? A. He may have done, Mr. Rofe, I can't recollect that he did so but I could not deny that he may have said that to me.
- Q. Do you recall anything you said to him when he told you about the meeting, the reason for the meeting? A. Yes, I think that so far as I was concerned...
- Q. No, what you said? A. Oh yes, I think what I said was "Well, look, it would probably be better to be owned by two than by one."
- Q. Can you recall how you came to say that? Was that in response to something specific that Mr. Taylor had said? A. Well, if I can tell you why I said it, my own views about it, as to why I said it, yes.
- Q. Was it provoked by something Mr. Taylor said? A. No, it wasn't provoked by something Mr. Taylor said. It was a view I had formed myself.
- Q. I am only at this stage interested in what was said rather than what your views were? A. Right, I won't disclose those then.
- Q. Did you speak to Mr. Taylor about the meeting after it took place which you can assume was on 5th June? A. I can't remember whether I did or not. I probably did but I can't remember.

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Conway
(recalled)

Cross-
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Mr. Rofe

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(continued)

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- Q. Well, do you recall what Mr. Taylor said had happened at the meeting of 5th June with Sir Peter Abeles, Mr. Aston, Mr. Koch? A. So far as I can recall, and it may have not been Mr. Taylor who told me - it could have been Mr. Aston - but somebody who was there... (Objected to by Mr. Glass.)
- Q. I am asking you to recollect as to what Mr. Taylor said to you following this meeting or what Mr. Aston said to you following this meeting in the presence of Mr. Taylor? 10
- His Honour: Well now, on that basis the objection is withdrawn.
- Q. Witness: Well, I am sorry but I can't remember whether Mr. Taylor was present when I spoke to Mr. Aston or whether I spoke to Mr. Taylor.
- Q. His Honour: Well now, you can only have, Mr. Rofe, that which Mr. Conway remembers as having been in Mr. Taylor's presence. 20
- Mr. Rofe:
- Q. Well, did Mr. Taylor tell you that he had offered to Sir Peter Abeles without authority on this occasion a percentage swing of shares? A. I don't recollect...
- Q. In Millers? A. I don't recollect him doing so.
- Q. You don't recollect him ever telling you that? A. I can't recollect a specific occasion on which he told me that, although he may have done so. I just can't recollect.
- Q. You were aware, were you, at some stage prior to the joint announcement that Mr. Taylor had offered to Sir Peter Abeles on behalf of Bulkships 15% of the shares in Millers which he said he could influence? A. I was aware that he was stated to have said that he could influence these shares. I certainly was not aware that he said he could offer them. 30
- Q. Well, at this meeting on 9th June was there any discussion about this earlier meeting with Mr. Taylor, Mr. Aston and Sir Peter Abeles? You can assume there does not appear to be anything in the minutes but do you recall whether it was discussed? A. No, I don't. 40
- Q. I take you then to the meeting at which you were present on 7th June 1972. Had you and Mr. Taylor discussed having this meeting with Mr. Howard Smith before the date? A. No.

- Q. Well, how did you come to be present on this occasion? A. My recollection of the meeting of 7th June with the Howard Smith representatives was that I was told on that morning by Mr. Taylor that I think he said Mr. Howard Smith and some of his people were coming round to see us and would I please be there.
- 10 Q. Did he say whether they had asked to come or whether he had asked them? A. No, they had approached him.
- Q. Did Mr. Taylor tell you what the purpose of the meeting was to be? A. No, I don't think he knew the purpose of the meeting.
- Q. And at this meeting the first topic or the first proposal put was, was it, by Howard Smith as to whether Millers would sell the tankers? A. That's right.
- Q. That was firmly rejected? A. It was.
- 20 Q. Then I take it the next proposal came from you? A. That is my recollection that it was I who instigated it.
- Q. Suggesting that Howard Smith might be interested in a counter takeover? A. That's right.
- 30 Q. Well now, I take it that you had discussed this with Mr. Taylor before this meeting, namely, that a suggestion might be made to Howard Smith that they put in a counter takeover offer? A. I had discussed it with Mr. Taylor but that suggestion you have just mentioned was not made because we thought they were coming down to make an offer for the company. We were taken by surprise when they wanted to buy the ships.
- Q. I see. You were anticipating an offer. When they did not make the offer, did you take it on yourself to suggest that they make an offer? A. Yes, I did. They did not seem to be getting too far with it. Although it put us in a weak bargaining position, I felt something had to be done about it and that is why I intervened myself.
- 40 Q. Would it be correct to say that Mr. Taylor at this stage was very keen on getting some takeover offer higher than the Ampol offer? A. We were all keen on getting a takeover offer.
- Q. I am just asking you in relation to Mr. Taylor? A. Yes.

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Q. And the first reaction of Howard Smith was that it would not work - and I am not quoting the words - it would not work because Ampol and Bulkships owned the majority of the shares?
A. That's right.

Q. And then you, as I understand it, set out to persuade Howard Smith that in your view they were not working together? A. Yes, I did, but I would like to make it clear that that was my view at that time. I genuinely believed it.

10

Q. Yes, I am not suggesting to the contrary? A. Certainly I was at pains to make clear to Howard Smith what my views were because, if there was any chance of getting them into the bidding, I wanted to get them in.

Q. And that was also - was that also Mr. Taylor's view or had he expressed a contrary view about Ampol and Bulkships working together? A. I think that every one of our team had expressed a contrary view to my own view in the matter. I am afraid I was a voice in the wilderness. I was the only one who did not think they were working together.

20

Q. When you say "every one of the team"? A. I mean Mr. Taylor, Mr. Koch, Mr. Ellis-Jones, Mr. Walker - what might be referred to and has been referred to as the Millers executive team.

Q. Is that the management - I am not quite sure - there is a management committee and a finance committee. Are they the same members, the management committee and the finance committee, the same, with the exception of Mr. Cameron who is on the finance committee or what is the position? A. Mr. Cameron is on the finance committee and Mr. Walker is on the finance committee and Mr. Ellis-Jones and Mr. Koch. I think they are the finance members. The management committee consists of those people less Mr. Cameron and also the management committee includes, and I think I am right on this, the interstate managers of Victoria and South Australia and probably somebody from the shipping section too.

30

40

His Honour:

Q. And you, Mr. Conway? A. No.

Q. You are not in it? A. No.

Mr. Rofe:

Q. You are not on either the management committee or the finance committee? A. No.

(Short adjournment)

Mr. Rofe:

10 Q. Just reverting to this meeting on 16th June, you said the meeting ended on the comment by Mr. Howard Smith that "We will have to have time to think about this"? A. Yes.

Q. Approximately how long did that discussion or meeting take? A. I would think that they were there close on an hour, but there was a certain amount of socialising and talk not germane to the subjects that we were dealing with, about an hour all told.

20 Q. At the conclusion of that meeting did you and Mr. Taylor have any discussions about the probability that Howard Smith would make a counter offer? A. Yes, there were discussions with Mr. Taylor - well, those of us at the meeting, we discussed probably after they left.

Q. Including Mr. Taylor? A. Including Mr. Taylor.

30 Q. Was the general concensus of the discussion that probably Howard Smith would make a counter offer? A. No, it was not. We were a bit "down in the mouth" about this and I think we then tried to comfort ourselves with the thought that they had not really wanted to buy the ships, that they had come around to have a look at us, but we could not be sure about it, and the concensus of the discussion between us at that stage was that we could not be sure whether they would or would not.

Q. But the concensus of discussion was that if they did so show further interest every effort was to be made to encourage them? A. If that wasn't said I would say it was understood.

40 Q. That was the general concensus? A. That was the atmosphere of it, yes.

Q. Did the discussion with Mr. Taylor, the discussion after the meeting, involve a question of making available to Howard Smith, if they came back, all

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the financial figures and documents? A. I can't recall whether that was discussed. It may have been, but I can't recall it.

Q. Well, did you discuss this meeting of the 16th with any other director of Millers besides Mr. Taylor? A. Not that I can recall.

Q. For instance, did you discuss it with Mr. Anderson? A. No.

Q. Are you sure of that? A. I have no recollection at any time of discussing that meeting with Mr. Anderson. 10

Q. What about Mr. Nicholl? A. No, I don't remember discussing it with him either.

Q. What about Mr. Cameron? A. No.

Q. Well then, Mr. Balhorn? A. No.

Q. Did you deliberately not do this or was it your view at that stage there was really nothing concrete to discuss? A. I certainly formed the view at that stage there was nothing concrete to discuss. I do not know that I applied my mind very deliberately towards abstaining from discussing it with other directors. If I had met a director I might easily have spoken to him about it. 20

Q. Did Mr. Taylor tell you whether or not Mr. Aston had been sent along to Howard Smith on the afternoon of that day to discuss the possible takeover offer by Howard Smith? A. No, I don't recall him doing that.

Q. Were you aware of that? A. I became aware afterwards that Mr. Aston had had some discussions with Howard Smith, but when I did not know. 30

Q. How did you become aware? A. I don't know how I became aware.

Q. Would it be with Mr. Taylor? A. I don't think it was Mr. Taylor. It could have been Mr. Aston himself who told me.

Q. Did you become aware that during that afternoon discussion with Mr. Aston and Howard Smith that Mr. Aston had indicated that Howard Smith would be provided with figures prepared by Cooper Bros? A. No, I did not. 40

- Q. You were present then at the next meeting on the Monday, 19th June 1972? A. I was.
- Q. Once again, how did you come to attend that meeting? A. Well, as I recollect it Mr. Taylor was in Melbourne and I think it must have been Mr. Koch who told me that Howard Smith were sending some representatives down to see us and I wouldn't have invited myself to it. I would have been asked to come.
- 10 Q. At this meeting Mr. Maxwell was present amongst others, representing Howard Smith? A. Yes, there were two from Howard Smith.
- Q. Was this the first time you had met Mr. Maxwell? A. Yes, this was the first time.
- Q. Was Mr. Aston present at that meeting? A. No.
- Q. Are you sure of that? A. I will think again about it - no. I do not recollect him being there at all.
- 20 Q. Mr. Taylor was in Melbourne you told us? A. He was certainly in Melbourne.
- Q. Do you know when he went to Melbourne? Was it during the week or did he leave on Monday morning, do you remember? A. No, I don't know. I have an impression, but it is only an impression, that he went over the weekend.
- Q. During the course of this meeting, the substance Howard Smith were asking a lot about figures? A. That is right.
- 30 Q. You did not participate on that side whatsoever? A. No, I didn't. I would have been useless.
- Q. I take it you had not concerned yourself with the financial side of Millers? A. No, I hadn't.
- 40 Q. Did Mr. Koch give you any communication as to why he was inviting you? A. No, he gave me no information as to why he was inviting me, but on reflection I have wondered since why I was there either on the 19th or 20th. I suppose just in case some legal point arose on which they thought I might be able to advise.
- Q. During the course of these financial discussions, did you see certain documents being handed to Howard Smith? A. No, I don't recollect any document being handed.

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Q. Shown, handed over or shown? A. No, I do not recollect that.

Q. Well, so far as you can recollect, it was just Howard Smiths asking financial questions and Mr. Koch supplying the details? A. Well, not only Mr. Koch. Other people who were there at that time, too, and I think it was Mr. Walker, Mr. Murphy and Mr. Ellis-Jones.

Q. These were all members of the Millers finance committee, with the exception of Mr. Cameron? A. Yes, I think that is the whole finance Committee. 10

Q. Is it your recollection on that occasion that at the end of the meeting that Howard Smith did not take away any documents supplied by Millers? A. I don't remember them taking away any documents. You are talking about the meeting of the 19th?

Q. Yes. A. I don't remember them taking away any documents, unless it was - I have some recollection of an annual report, but I do not know whether they brought that with them or had it there. I can't even be certain that it was the 19th that they had it, but I do have some recollection of an annual report being on the table. 20

Q. Approximately how long did that meeting last? A. That was longer than the first one. That would have lasted anywhere between one hour and two hours, I would think. 30

Q. Can you remember how the meeting ended, on what note? A. If you mean by that was any decision arrived at or any commitment or any remarks made, no. There was no firm commitment at all. The fact that they had come down to ask questions was an encouraging sign. That was the most one could say about it.

Q. To your recollection no question then asked on the financial side - no answer was refused, or anything of that nature? A. No, I don't think so. 40

- Q. It was a clear disclosing of all financial requests or details? A. I don't know whether all financial requests were disclosed or all financial information was disclosed, because as you probably know, and as I found out -
- Q. I am not asking you that. I am just asking you whether there were any questions asked about financial details which were not answered on the basis that it was too confidential or something like that? A. I cannot recall that being done, but I cannot say that there was not stuff held back.
- Q. You were present again on the 20th June, a Tuesday? A. I was.
- Q. And with the same people present again? A. Yes.
- Q. Can you remember whether Mr. Aston was present on that occasion? A. No, I can't remember. He could have been present.
- Q. Approximately how long did that meeting last? A. I can't remember. In so far as I have an impression of the meeting, it lasted at least as long as the meeting on the 19th - perhaps a little longer - I would place that as between an hour and two hours.
- Q. During the course of that meeting Mr. Goddard arrived with the draft Cooper Bros. report? A. Yes.
- Q. Had you or Mr. Koch, to your knowledge, arranged for him to arrive? A. I had not arranged for him to arrive, and to my knowledge Mr. Koch did not either.
- Q. During the course of this meeting did Mr. Koch indicate he would ring Mr. Taylor in Melbourne, or did he ring somebody? A. I have no recollection of him doing so.
- Q. He was asked by Mr. Goddard whether he could disclose this Cooper Bros. report and he said "Yes". A. Yes.
- Q. Do you recall whether before giving that answer he made any telephone call? A. I don't recollect any telephone call. He may have made one.

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Q. How did that meeting end up? A. It ended up the same as the second meeting did, with no firm commitment, but on the second occasion we felt even a little more encouraged because at least they had come back for the third interview.

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His Honour:

Q. The third interview, you say? A. Yes, the first one was with Mr. Howard Smith, and then the one on the 16th, one on the 19th and one on the 20th, your Honour.

10

Mr. Rofe:

Q. At the end of that interview were you fairly confident that Millers would receive a takeover offer? A. No - hopeful but not confident.

Q. Well, did you discuss the three meetings or any one of them with any other director after the 20th? A. Not that I can recollect.

Q. Did you telephone Mr. Taylor in Melbourne and report to him? A. No I didn't.

Q. Did you express any opinion to Mr. Koch as to whether or not he should show the confidential Cooper Bros. draft report? A. No.

20

Q. You were present at the meeting on 23rd June - that is the - A. The Board meeting.

Q. The Board meeting, yes. A. Yes, I was.

Q. At that stage of course the proposed takeover offer letter had been received? A. Yes, we had got a letter on the 22nd.

Q. Prior to that meeting had you discussed with Mr. Taylor what had happened at the two meetings on the 19th and 20th, at which he had been absent, the meetings with Howard Smith? A. I don't recollect discussing it with him although I may have done.

30

Q. Prior to that meeting on the 23rd, at all events, had you discussed with any other directors what had happened on the 16th, 19th and 20th? A. Not that I can recollect.

- Q. At that board meeting on the 23rd had anyone told the board that Howard Smith had been provided with financial figures and documents, including the draft Cooper Bros. report? A. I don't recollect them being told that.
- Q. I think on that occasion you were an alternative director? A. I was, and Mr. Anderson.
- 10 Q. What part, if any, did you play in the preparation of the Part "C" Statement? A. I drafted the Part "C" statement originally and it was not a full draft because we had to get some information as to directors' shareholdings and so forth, but in the main I drafted the Part "C" Statement.
- Mr. Rofe: Could the witness be shown exhibit "P"* please? (shown)
- 20 Q. Mr. Conway, when you say you drafted it, I wonder if you would turn to the statement there, which is part of it? A. The statement on the back of the form?
- Q. Yes. You see under "g" "there have been material changes in the financial position of the company" ? A. Yes.
- Q. Did you play a part in drafting that, that was simply information provided to you? A. That was information provided to me because I would not have been capable of drafting that myself.
- 30 Q. Provided by Mr. Koch presumably, do you remember him - A. No, I think it was actually provided by Mr. Murphy and Mr. Ellis-Jones.
- Q. The members of the finance committee? A. Yes.
- Q. The next matter I would like to take you to is the telephone conversation you had with Mr. Maxwell on the morning of 27th June 1972? A. Yes.
- 40 Q. Had you spoken to Mr. Maxwell, yourself, between 20th June and this conversation on the morning of the 27th? A. 20th June was the first meeting day that we had with Howard Smith. I cannot recollect speaking to Mr. Maxwell between those dates. I can't think of anything I would want to talk to him about.

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* Exhibit P

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- Q. Well then, you had this discussion on the morning of 27th June, which you related in your evidence, and told Mr. Koch what you had said and what he had said? A. I am sorry I did not follow that.
- Q. You had a conversation with Mr. Maxwell on 27th June? A. That is right.
- Q. He told you something and you related it to Mr. Koch, is that right? A. No.
- Q. I am sorry. I have put it the wrong way round. You had a conversation with Mr. Koch and then you related that to Mr. Maxwell? A. I asked Mr. Maxwell would he come around to our office. I saw him there and to my recollection Mr. Koch and Mr. Walker and Mr. Murphy and Mr. Ellis-Jones were present with me when we saw Mr. Maxwell. 10
- Q. Would this be correct? This was the first-occasion that it was brought to your notice that there might be a threat to the Howard Smith counter-offer? A. Yes. 20
- Q. Presumably you were somewhat concerned about that? A. Yes, I was.
- Q. You were concerned because you thought they might not proceed with the offer? A. That is right.
- Q. No doubt you expressed that concern to Mr. Koch? A. Yes, I did.
- Q. And Mr. Taylor? A. I can't recollect whether Mr. Taylor was there, but if he were there I would certainly have expressed this concern to him. 30
- Q. Did you express it to any other director prior to the actual joint announcement. A. Not that I recollect.
- Q. You learned of the joint announcement yourself on the 28th, to the best of your recollection? A. Yes, that would be right, I don't think I heard about it on the 27th.
- Q. On the 28th, having learned of the joint announcement, this confirmed your fears, did it, or your concern which you had felt the previous day in the mornings? A. It certainly confirmed the concern. 40

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Q. The concern being that Howard Smith might not proceed? A. That is right.

Q. And it was an important matter, presumably, to you - you regarded it as important? A. Well, not to me personally. I regarded it as an important matter from the point of view of the company's shareholders.

10

Q. I appreciate that, but it was sufficiently important for you to discuss it with Mr. Taylor on the 28th? A. If Mr. Taylor was there I would have regarded it as sufficiently important, but I can't remember whether he was there or not. I was concerned and I did regard it as being important.

Q. Did you discuss it with Mr. Anderson? A. No, not that I recollect.

Q. Or Mr. Balhorn? A. No.

20

Q. Mr. Nicholl? A. I can't recollect discussing it with Mr. Nicholl, although he would be the most likely one for me to discuss it with because he was closer to us than the others. I don't remember discussing this with him. The discussions were virtually confined to within the company itself.

30

Q. From the 28th were there not discussions involving Mr. Taylor as to certain ways and means of keeping the Howard Smith counter-offer on? A. I can't remember any particular discussions, yet I feel there probably were. The only suggestion I could come up with was the one I came up with to Mr. Koch.

Q. You can remember some discussions with him? A. Yes, I gave it in evidence.

Q. What about, take 30th June, do you know whether or not Mr. Koch spoke to Mr. Evans of counsel on that date? A. 30th June? (Objected to by Mr. Glass).

40

Witness: No, I don't recollect any conversation. I am trying to relate to the significance of 30th June.

Mr. Rofe:

Q. I will withdraw the question and put this one; did Mr. Taylor ever tell you that Mr. Koch had spoken to Mr. Evans on or about 30th June?

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- A. I certainly don't recollect his ever telling me that.
- Q. In relation to your knowledge of the proposed meeting with Howard Smith on 4th July, you say you became aware of that on the 3rd, the day before? A. No, no. The meeting with Howard Smith, on 4th July, was the meeting that Mr. Koch and Mr. Taylor had up there.
- Q. Yes, I know, but you became aware, didn't you, that before it took place, that there was going to be a meeting? A. Yes, but as I recollect it, only on the morning of the 4th. 10
- Q. You did have some discussions with Mr. Koch prior to that meeting? A. Yes, I did, but I don't remember whether it was on that day. My recollection is that it was some days prior to that.
- Q. Did you become aware of this proposed meeting from Mr. Koch or Mr. Taylor or some other person? A. I don't know. All I can say is that I became aware that they were to go to the meeting on the 4th and it could have been either Mr. Koch or Mr. Taylor who told me. I don't know. 20
- Q. You say you went into Mr. Koch's room on the occasion of this discussion with him, before the Howard Smith - whether it was the 4th or the 3rd - A. That is right, yes.
- Q. When you had that discussion did you know there was to be this meeting? A. No, I did not. 30
- Q. You raised at the meeting the possibility of endeavouring to buy some of the Howard Smith ships? A. Yes.
- Q. Was that the reason you went into the room, just to raise that matter or had you been called in to the room? A. No. that was why I went into the room.
- Q. You had a thought about the matter? A. I had thought about the matter.
- Q. So you got this idea that perhaps Miller could endeavour to buy the Howard Smith ships? A. I suppose one could call it an idea, yes. 40
- Q. You said that one way to keep Howard Smith in

the race would be if "We can buy their ships for an issue of shares"? A. Yes.

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Q. So the thought of keeping Howard Smith in the race was still very much to the fore in your mind? A. Yes.

Q. Did Mr. Koch agree with that proposal or express any view on it or not? A. I think he thought it was a possibility, but was hampered by not knowing what the ships were worth.

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10 Q. He made that quite clear? A. He didn't know what they were worth, but I remember him picking up a book that he had behind him and having a look at some particulars on either the "Howard Smith" or the "Nancy Heath", but that didn't get us much further either.

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Q. Did you discuss that proposal with Mr. Taylor before this meeting? A. No, the only one I discussed it with was Mr. Koch.

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20 Q. He was the only person you discussed it with? A. I could have discussed it with Mr. Walker on the night - wait a moment - no, I didn't. I am getting the dates mixed up. I discussed it with Mr. Koch.

Q. Did you discuss it with Mr. Nicholl, being a person whom you saw from time to time? A. No, I certainly did not discuss it with him.

30 Q. Can you recall what time you saw Mr. Taylor and Mr. Koch after this Howard Smith meeting on the 4th? A. My recollection is that I saw them either just before lunch on the 4th or during the course of the afternoon.

Q. Presumably when they returned back to Millers? A. Yes, they came back to Millers.

Q. So far as you are aware, did they come straight in to see you? A. No, I don't think they did that because I am up on the 9th floor and they are down on the 1st floor.

40 Q. Did Mr. Taylor call you down to his office or come up to your office? A. No, he didn't come up to my office. I think Mr. Taylor probably called me down to his office.

Q. I wonder whether you could tell us what you were told, again, as precisely as you can, for instance, who did the talking as to what

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happened at this meeting? A. Well, I think it probably was done by both Mr. Taylor and Mr. Koch, although probably Mr. Taylor.

Q. You were present, Mr. Koch was present. Was anyone else present? A. Not that I can recall. There again, I can't be dogmatic because it was not unusual for Mr. Ellis-Jones, the secretary, to be called in.

Q. Can you tell us again as best you can what Mr. Taylor told you had happened? A. Well, he said "When we got around there Mr. Howard Smith said, 'Archie, have you changed your mind about selling us the ships?'" and Mr. Taylor told me, or as I say it could have been Mr. Koch who told me, "No, we haven't changed our minds". He then said that Mr. Howard Smith said, "Look, we have got a proposal and I will get Mr. Maxwell to read it out to you". Mr. Maxwell then read the proposal out - remember I am quoting what I was told by Mr. Taylor.

Q. Yes, I appreciate that? A. Mr. Maxwell read the proposal out and the proposal was that Millers should allot to Howard Smith three million shares at \$2 per share payable, I think it was 10% on issue of the shares, and the balance of the moneys to be paid when Howard Smith had obtained three million and some extra amount, whether it was 100,000 or 30,000 I can't remember - their acceptances of their offer. And to that proposal Mr. Taylor had said, "I could never" - as far as I can recall he said, "I could never get that through the board". He also expressed to me, and I don't know whether he expressed this to Howard Smith, he expressed dissatisfaction over the terms of the payment, where the balance of the money was to be paid when Howard Smith had got a certain amount, and I also -

Q. No, what you recollect him saying? A. I recollect him saying, - I don't recollect whether he expressed this to Howard Smith, but he certainly expressed this to me, his dissatisfaction with the method of payment.

Q. Do you remember anything else he said had happened? A. I can't remember whether it was Mr. Taylor or Mr. Koch who had then said, "Well, we have got another proposal. Would you be prepared to sell us your ships, the "Howard

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Smith" and the "Nancy Heath" for shares at \$2.50 per share. On my figuring that would be "

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- 10 Q. Is this what was being said? A. I am being told this by either Mr. Taylor or Mr. Koch, yes, "On our figuring the cost would be round about 7½ million dollars" and I recollect, I think it must have been Mr. Koch, saying that Mr. Maxwell said, "Your arithmetic is pretty near the mark".
- Q. I take it he told you then that Mr. Howard Smith had rejected that proposal? A. Yes.
- Q. I am sorry. I did not want to interrupt you? A. It is all right.
- 20 Q. There was also a placement involved in that proposal? A. Yes, there was. Mr. Koch apparently had said - either Mr. Taylor or Mr. Koch said to me that Mr. Koch had said, "If we issue shares we would be entitled, within the regulations of the Stock Exchange, to make a placement of up to 10% in your favour" and he worked that out - if it was three million shares at \$2.50 that brought the capital up to \$12 million and placed at 10%, that brought it up to 13 and something million shares - that would be the capital.
- Q. Did Mr. Taylor and Mr. Koch tell you that Mr. Howard Smith had rejected that in substance? A. Yes, they did. They said Mr. Howard Smith said he preferred his proposal.
- 30 Q. Then did they tell you what happened after that? A. I don't think anything happened after that. I think they packed up and came home.
- Q. Did Mr. Taylor or Mr. Koch tell you that after the rejection by Mr. Howard Smith of Mr. Koch's proposal there had been further discussion about the possibility of Howard Smith applying for three million shares at \$2 per share? A. No, I thought that issue had been concluded. They had put up their proposal, or at least Mr. Koch had come back with a counter-proposal. I don't
- 40 recollect him saying there was then any further discussion of the three million shares proposal.
- Q. No discussion of the three million shares at \$2, but different terms of payment, such as 10 cents a share payable on application and the balance to be paid on a date to be fixed at the discretion of the Miller board or \$2 share per share payable

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in full on application? A. I don't recollect them telling me that that had taken place at that meeting.

Q. Well, did Mr. Taylor tell you that he had told Mr. Howard Smith the board was meeting on Thursday, 6th July? A. He may have done. I can't recall.

Q. And that he, Mr. Taylor, wanted a letter from Howard Smith before the board, applying for shares? A. No, I don't recollect that. At least, I don't recollect him telling me that.

Q. Did Mr. Taylor tell you that they had reached a stalemate or words to that effect, that Howard Smith - a stalemate with Howard Smith - that they had rejected the Howard Smith proposal and Howard Smith had rejected Millers proposal? A. I don't know that they had reached a stalemate about it.

Q. No, did they tell you that or words to that effect? A. No, I can't recall that.

Q. Did Mr. Taylor tell you he was anticipating Howard Smith would apply for shares? A. No.

Q. Were you present when Mr. Taylor telephoned Mr. Anderson? A. No.

Q. Did Mr. Taylor tell you that he had telephoned Mr. Anderson after this meeting with Howard Smith on the 4th? A. He certainly told me he had telephoned Mr. Anderson, but he did not tell me when he had telephoned him though, that I recollect.

Q. Did you gather from what he did tell you that it was after the Howard Smith meeting? A. Yes.

Q. Did he tell you what he had told Mr. Anderson? A. No, I don't remember whether he told me that he had told Mr. Anderson, although he could have done.

Q. Were you present when Mr. Taylor telephoned Mr. Duncan in Tokyo after this meeting? A. Not that I recollect.

Q. Did Mr. Taylor tell you he had telephoned Mr. Duncan in Tokyo after this meeting? A. I

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believe he did.

- Q. Did he tell you what he had told Mr. Duncan?
 A. I am only guessing that if he said anything to me - I have a recollection that he told me about speaking to both Duncan and Anderson and that he had told them about the Howard Smith proposal, but whether he developed it any further and spelt it out as he spelled it out to me earlier I don't know, and I can't recall.

- 10 Q. Were you present when Mr. Taylor telephoned Mr. Nicholl after the Howard Smith meeting?
 A. No.

- Q. Did Mr. Taylor tell you that he had telephoned Mr. Nicholl? A. Yes.

- Q. Once again, do you remember what Mr. Taylor said he told Mr. Nicholl? A. No, I am afraid I don't.

- Q. Did you telephone Mr. Nicholl after the Howard Smith meeting and before the luncheon meeting?
 20 A. No.

- Q. Did you have any contact with Mr. Nicholl between the afternoon of the 4th and the luncheon meeting on the 5th? A. No, I don't think I did. I am trying to remember whether he spoke to me on the telephone. My recollection is Mr. Taylor on the 5th invited Mr. Nicholl down for lunch and I think that was the first talk I had with Mr. Nicholl by phone or any other way between that meeting on the 4th.

- 30 Q. You mean at the lunch? A. At the lunch, yes. I can't remember. It is possible that Mr. Bob Nicholl Jnr. telephoned me on that morning, but I don't think he did. I don't think there was time.

- Q. After this meeting did you phone Mr. Balhorn, the meeting of the 4th? A. I am just waiting until Mr. Balhorn left the room - I don't think I spoke to Mr. Balhorn on the 4th -

- 40 Q. Did you hear Mr. Taylor speak to Mr. Balhorn on the 4th? A. No.

- Q. Did Mr. Taylor tell you he had spoken to Mr. Balhorn after the Howard Smith meeting on the 4th? A. Yes.

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- Q. Did he tell you what he had told Mr. Balhorn?
A. I thought I answered this question before.
- Q. I don't think I asked you about Mr. Balhorn?
A. No, I don't recollect him telling me what he said to Mr. Balhorn.
- Q. Did you contact Mr. Maxwell on the 4th after the Howard Smith meeting?
A. Yes, I spoke to Mr. Maxwell on the telephone.
- Q. Do you remember what time that was. (no answer)
- Q. Approximately?
A. I think it must have been in the afternoon. 10
- Q. After Mr. Taylor and Mr. Koch had come back?
A. Yes.
- Q. Do you remember whether he rang you or you rang him?
A. I think I rang him.
- Q. Do you remember why you rang him?
A. Yes, so far as I can recollect, I said to him, "Tom, this offer of three million shares at \$2 a share with deferred payment just isn't on. What about our ships, our offer to buy your ships?" And Mr. Maxwell said, "No, that's just no good because if we sell you the ships then we have to buy them back again if we did not succeed in our takeover bid." And that was about all there was to that conversation. 20
- Q. You had expressed to Mr. Taylor, or was it to Mr. Taylor and Mr. Koch, that the Howard Smith proposal of the three million shares for \$2 wasn't on, wasn't realistic in view of the fact that Ampol had made an offer of \$2.37 per share - is that what was said?
A. Yes, I did. 30
- Q. Then, so far as your conversation with Mr. Maxwell was concerned, that afternoon on the 4th, nothing was arranged, or there were no other proposals?
A. No, at that stage it would be true, and so, as you stated before, it was a stalemate where we wouldn't have a bar of their proposal and they wouldn't have ours.
- Q. That was the situation?
A. That was the situation.
- Exhibit NN
Mr. Rofe: Could the witness be shown exhibit NN, the annexure to the Howard Smith interrogatories (shown). Would you just have a look at this document that is shown to you, dated 5th July 1972?
A. Yes, I have read that. 40

Q. Have you seen that document before? A. Not that I recollect.

Q. I direct you to perhaps paragraphs 5A and B.

Mr. Glass: With respect, I don't know what this document is but so much as appears indicates that it is not the witness' document and he cannot recall seeing it before.

His Honour: I will allow you to direct the witness' attention to it, Mr. Rofe.

10 Mr. Rofe:

Q. Just look at A and B under figure 5? A. Yes, I see those.

Q. During this telephone conversation with Mr. Maxwell that you had on the afternoon of the 4th, did he indicate Howard Smith was going to make a proposal or had made a proposal in terms of A or B? A. I don't recollect him doing so.

20 Q. Did he not indicate to you that Howard Smith, proposed to apply for three million shares at \$2 per share; 10 cents payable on application and the balance, \$1.90, to be paid on a date to be fixed at the discretion of the Millers' board; or, alternatively, \$2 per share payable in full on application. (objected to by Mr. Glass - rephrased).

30 Q. Did Mr. Maxwell in this telephone conversation indicate to you that Howard Smith had, at this earlier meeting with Mr. Taylor and Mr. Koch, made a proposal to apply for three million shares at \$2 per share with terms of payment either 10 cents on application and the balance on a date to be fixed at the discretion of the Miller board; or, alternatively, \$2 per share payable in full on application? A. No, that is directly opposed -

Q. No, did he indicate that to you on the telephone? A. Well, I certainly don't recollect him indicating that.

40 Q. Coming to the morning of 5th July you say at 10.30 there was a meeting of committee. Was it the management or finance committee? A. In actual fact it was not a meeting of the committee at all. It was merely a gathering of individuals who

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had assembled in Mr. Koch's office. There were members of the finance committee there.

Q. Mr. Aston was one of the persons present? A. He was.

Q. He was not a member of the management or finance committees? A. No, he was the independent consultant employed by them.

Q. And Mr. Cameron, a member of the finance committee, was not present? A. No.

Q. Was Mr. Taylor there, for any substantial part of the time during these discussions, commencing at about 10.30? A. He was there at various times, and it is very difficult to pinpoint his movements. He was not there for the whole of that conference. He came in and went out and, as I recollect, came back again, but if you say was he there for some substantial time, he was there long enough for Mr. Aston and I to discuss with him the question of the disentitlement of Sir Peter Abeles.

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Q. You had referred to it as a "conference". By that do you mean it was a formal gathering? A. No, I am sorry, if I have misled you in that regard. I have indicated that it was a gathering of individuals who were discussing -

Q. Did you ask Mr. Aston to attend? A. No, I did not ask Mr. Aston to attend.

Q. Did Mr. Taylor tell you he had asked Mr. Aston to attend? A. No, I don't know how Mr. Aston came to be down there on that day.

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Q. This meeting was a gathering that went on till just about lunch time? A. Yes, it did. It would have gone on until just about lunch time.

Q. I don't want to go into the whole of what was said, but there were discussions there concerning the allotment of shares? A. Yes.

Q. That involved, essentially, you and Mr. Aston? A. Yes.

Q. And Mr. Taylor was present for part of the discussion? A. I cannot recollect whether he was

there at the discussion of the allotment of shares. I rather fancy he wasn't.

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Q. Then, there was also discussion on the de-listing of Miller's shares, or suspension of Miller's shares in the event of an allotment? A. Yes.

Q. That was a discussion essentially, what, between you and Mr. Aston? A. Yes.

Q. Was Mr. Taylor involved in that? A. I don't know. When you say "was he involved in it?" was he present - I don't know.

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Q. Thirdly, there was discussion relating to the exclusion of Sir Peter Abeles from the board meeting to be held the following day? A. Not "exclusion". I am sorry. I used that word. It was not "exclusion". It was his exclusion from voting and also from taking part in the discussions if he refused to disqualify himself. He was - there was discussion on that point.

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Q. And was Mr. Taylor present during that part of the discussion? A. Yes, to my recollection he was.

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(continued)

Q. Was a decision reached that Sir Peter Abeles would be excluded from the discussion - from the discussion and voting on the allotment proposal? A. As far as I was concerned, yes.

Q. I think when you say so far as you were concerned - A. I had made up my own mind.

Q. Well, you told them, you gave your views to Mr. Taylor on that matter? A. I did.

30, Q. What did Mr. Taylor say? A. I think that Mr. Taylor just accepted the view. I don't know that he commented on that particularly, but even then or later, I think, he said, "You will have to give me some sort of briefing about this."

Q. To get the picture, there was discussion on three, you would agree, fairly important matters, is that right? A. Yes.

Q. The allotment of shares? A. Yes.

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Q. The de-listing or suspension of shares, and the exclusion of Sir Peter Abeles from debating and voting on an allotment proposal? A. Yes.

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- Q. This, as I understand your evidence, is at a time when so far as you were concerned your last discussion with Mr. Maxwell was that there was a stalemate? A. That is not quite right.
- Q. I rather thought that was the word you agreed - A. That is the word I did use. At that stage I was referring to the position as it stood on the 4th. You are dealing at present -
- Q. May I just ask you - did you speak to Mr. Maxwell again after that telephone conversation on the 4th, prior to the meeting or gathering of personnel at Miller offices at 10.30? A. No, I am sorry. I anticipated your question wrongly. No, I did not speak to him. 10
- Q. Did Mr. Taylor tell you whether he had spoken to Howard Smith between the time he left the meeting on the 4th and the time that he was present at the Howard Smith gathering on the 5th? A. No, not that I can recollect.
- His Honour: Mr. Rofe, there is a big time span there. You said at the time of the 10.30 gathering - what do you mean by that? I am not sure what you mean. 20
- Mr. Rofe:
- Q. My questions were in relation to communications between Mr. Taylor, Howard Smith, yourself and Mr. Maxwell in respect of the period on the afternoon of the 4th to the commencement of the gathering on the 5th. You say there were no such communications? A. I had no communication with Mr. Maxwell to my recollection between the telephone conversation I had with him on the afternoon of the 4th and the beginning of the meeting or conference - call it what you will - on the 5th. I am not aware of Mr. Taylor having told me that he had any contact with anybody from Howard Smith in that same period. 30
- Q. Well then, coming to this meeting, what were the matters discussed? Which subject matter was discussed first; the issuance of the allotment of shares, the delisting or the exclusion? A. The allotment of shares was first discussed, and as part of that almost and probably following on that, the question of de-listing; and lastly, the question of the exclusion of Sir Peter Abeles - I am sorry - I am using the wrong 40

word - the disqualification of Sir Peter Abeles.

Q. At about 11.30 you telephoned Mr. Maxwell? A. I would be guessing, Mr. Rofe.

Q. Approximately? A. Yes, approximately I suppose 11.30.

Q. You told him you had telephoned Mr. Maxwell. "We have been discussing your offer and we don't think three million is enough"? A. That is right.

10 Q. That is how it started. Do I take it then that part of the preceding discussion had been a discussion of the Howard Smith offer of the three million shares at \$2? A. That is right.

Q. When the luncheon meeting began, the situation was, was it, that Mr. Maxwell told you that Howard Smith were considering the proposal? A. Yes.

Q. In substance? A. Yes.

20 Q. And it was left at that, for the lunch meeting? A. Well, he went further than that.

Q. Would you just tell us? A. May I recount the evidence I gave here before?

Q. Just briefly, you say it went further than that? A. You will recall that Mr. Maxwell rang me back.

30 Q. Well, what time was that? A. I think I would have to take you back to where I started from. I rang Mr. Maxwell at some time that morning and at that moment - I am accepting 11.30 - I was told he was in a meeting. He then phoned back shortly afterwards and I said to him when he phoned back, "Tom, we have been discussing this matter here and we don't think that three million shares is enough. We feel that you must apply, if you are minded, to make any application at all, for not less than 4,152,000 shares and at a price of not less than \$2.30. "Mr. Maxwell answered that and said, - I should have made this clear yesterday - I can't remember whether he said, "This is a coincidence" or "Strangely enough, that is the price I had recommended and we have already
40 decided three million shares is not enough", and at that stage he said, "Well, I will have to go because they are calling me back to the meeting". That was the situation when we went to lunch.

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- Q. The impression he gave you was that the matter was still under consideration? A. Yes.
- Q. When you went to lunch Mr. Nicholl was present?
A. He was.
- Q. Were you expecting him to be there? A. Yes, Mr. Taylor had told me that he had invited Bob Nicholl down to lunch.
- Q. Did he say why he had invited him down to lunch?
A. I think he probably did. I think he said he invited him down for lunch to discuss the matter. 10
- Q. To discuss - A. This question of the allotment.
- Q. Can you recall how Mr. Taylor put it? A. No, I can't because at the present time, all I knew was that Bob Nicholl was coming for lunch, but he must have told him that because he brought his books with him.
- Q. I am just wondering whether Mr. Taylor told you that he asked him to lunch for what purpose, if any? A. All I can do is to say that yes, he told me he was coming to lunch and he had asked him to lunch to discuss this question of Howard Smith's proposed allotment. 20
- Q. Mr. Nicholl had the two books with him and presumably you sat near him during the lunch, at which this reading out of the textbook took place at the luncheon table? A. No, it took place just a bit away from the table as a matter of fact. He put the books on the floor and we walked over and looked at the books. 30
- Q. Was the first matter you took up with Mr. Nicholl, the question of the legality of the issue of shares? A. Yes. When you say "legality of the issue of shares", Yes, I suppose that is a correct description of it. I would sooner use the word "justification". I was not worried about the legality of the issue. I was satisfied it was legal.
- Q. Justification? A. Justification.
- Q. There was this reading out of the text book and your statement that it was "spot on" and so forth? A. Yes. 40

- Q. After that matter did you discuss with Mr. Nicholl the de-listing of the Miller shares? A. I think I probably did.
- Q. Well, that was an important matter? A. It is an important matter and I would be very surprised if I had not done it. The discussion on justification is imprinted on my mind by the fact that these books, that I am quite clear on, but so far as the de-listing was concerned, I would feel that we certainly had discussed it.
- Q. Did you also discuss with Mr. Nicholl the exclusion, or perhaps exclusion from voting on any allotment of Sir Peter Abeles? A. I don't think I did.
- Q. That was a fairly important matter in your mind? A. Yes, I agree.
- Q. You went to lunch and Mr. Nicholl was another legal man? A. Yes.
- Q. Would it not be very probable that you did so discuss it with him? A. I don't think I did. I may have been derelict in not doing so, but I cannot recollect discussing it with him

(Luncheon adjournment)

Mr. Glass: At the suggestion of my learned friend, Mr. Deane, and with the approval, I gather, of Mr. Lockhart and Mr. Staff, we can deal with certain undertakings which were given by me in the course of tendering certain evidence. One is at p.84 old and the other is at p.old135. At p.old84 about two-thirds down, your Honour admitted into evidence exhibit M.H.4* on certain conditions. I understand that my friends are prepared to have me released from that undertaking and I am not unwilling to have that result.

Mr. Deane: What I have said to my friend is that the document was admitted on the basis that if something did not happen we could apply to have it rejected. I have informed my friend that if the evidence stays in its present state we will not be making such application. Of course, it is a matter for him, but we will not be applying.

His Honour I do not think this needs any further evidence. You have made a continuing

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*Exhibit
M.H.4 and
M.H.18

offer which I have had noted as a matter of acceptance. I do not think that calls for any further note.

Mr. Glass: Atp. old 135 that appears to be subject to the same condition. We are informally told that they do not seek the verification. Perhaps that can be noted on the record.

His Honour: Really, Mr. Glass, what I have done at pp 84 and 135 is in effect to reverse the onus of proof in respect of admissibility so I will just note that no further step is to be taken in respect of the observations made at pp.84 and 135. In order to place it beyond doubt I shall have it noted that I shall regard M.H.4* and M.H.18* as having been before the court for the purposes of this suit.

Mr. Glass: I am also able, with my friend's concurrence, to tender the Bulkships' minutes subject only to relevance, the objection to admissibility now being waived.

(Mr. Deane and Mr. Lockhart objected to this tender and the tender was confined to the formal parts of the minutes and such portions as relate to one or other of the Miller companies. Mr. Staff requested that the whole minutes go in; Mr. Gleeson and Mr. Rowlings stating they did not want to be heard on the matter)

Exhibit M.H.26

His Honour: I shall admit, as exhibit M.H.26** a bundle of extracts from the minutes of the directors' meeting of Bulkships, limited to so much of the extracts as are; formal and as relate expressly to the affairs of one or other of the Miller companies. The evidence will be admitted only as against the defendant Abeles and as against the defendant on the cross-claim, Bulkships. I specifically reject the tender as irrelevant in so far as the documents are sought to be tendered against the plaintiff.

Mr. Rogers: In my own case I would be wishing to tender it against Ampol and support the tender by this submission. I would be submitting that one of the facets in the defence is that we were justified in excluding Sir Peter Abeles from voting and a number of reasons are advanced for that exclusion. In my submission

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the material tendered there is relevant to support that defence.

His Honour: I will not extend my ruling at this stage. When you come to your case, if you wish to re-tender it you may.

Mr. Conway, you are on your former oath.

Mr. Rofe:

- 10 Q. Was Mr. Nicholl told by you and Mr. Taylor about the discussion that had taken place earlier that morning at 10.30 a.m.? A. I believe he was.
- Q. Did you tell him or Mr. Taylor? A. I think I told him.
- Q. Did you tell him about the telephone conversation with Mr. Maxwell? A. I believe so.
- Q. You gave him full details of those, as you have already given in evidence? A. Yes, I believe so.
- 20 Q. When Mr. Nicholl left at about 2 p.m. did he leave on the basis that he would be notified if and when any communication was received from Howard Smith? A. No.
- Q. You received this phone call from Mr. Maxwell about 3 p.m. you have told us and this apparently brought not unjoyous news to the board room, is that the position? A. That is true.
- Q. Did Mr. Maxwell in the phone conversation mention anything about Howard Smith requiring an agreement or a deed? A. Not that I recollect.
- 30 Q. Did he mention anything about a phone conversation about the terms upon which the shares would be paid? A. Yes, I think he did.
- Q. He mentioned what? A. 10% on the allotment of the shares and the balance on 30th September or earlier at Howard Smith's option.
- Q. Are you sure that was mentioned during this telephone conversation? A. No, I am not sure. I believe it was.

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Discussion
between the
Court and
Counsel

William
Andrew Conway
(recalled)

Cross-
Examination
by Mr. Rofe

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(continued)

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Q. After the telephone conversation Mr. Taylor was still in the board room, is that right? A. Yes.

Q. Then were any steps taken by you to notify the contents of this communication with Mr. Maxwell to any one director? A. No.

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Q. Did Mr. Taylor have any discussions with you about not notifying any of the directors? A. Not that I recall.

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Q. Or some of the directors? A. No.

8th Defendants Evidence

Q. Were you asked not to notify Sir Peter Abeles, for instance? A. No. 10

William Andrew Conway (recalled)

Q. Or Lady Miller? A. No.

Cross-Examination by Mr. Rofe

Q. Or Mr. Cameron? A. No.

Q. Did you suggest any other directors should be notified of this communication? A. No.

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Q. Well then, the picture is that shortly after this telephone conversation everyone dispersed from the board room and went about their business? A. Yes.

Q. And the next you were informed in the matter was about 5 o'clock - that was when you were next involved in the matter? A. Shortly before 5. 20

Q. When Mr. Taylor asked you to come to his office? A. Yes, I think so.

Q. You had told Mr. Taylor, I think, as a result of what Mr. Maxwell told you, that a letter would be sent around from Howard Smiths that day? A. Yes.

Q. You were asked at 5 o'clock, or shortly before 5 to go to Mr. Taylor's office in relation to the arrival of Mr. Maxwell? A. Yes. 30

Q. When you arrived at the office who was actually there? A. Mr. Taylor has an ante-room outside the office and I walked into that. I believe his secretary was there and Mr. Maxwell was there.

Q. Mr. Maxwell had this draft letter? A. Draft letter?

- Q. You recall it was on the letterhead of Howard Smith? A. Yes.
- Q. What is your recollection now, that you read it then or in Mr. Taylor's office later? A. I think I read it in Mr. Taylor's office when I took him in.
- Q. Was there any discussion between Mr. Maxwell in the ante-room before you went into Mr. Taylor's office - A. If there was I can't recollect it.
- 10 Q. In Mr. Taylor's office there was yourself, Mr. Maxwell - anyone else? A. Mr. Taylor was there and I think there were others.
- Q. No other directors? A. No other directors, no.
- Q. No other director other than Mr. Taylor. Did Mr. Taylor appear to read the letter or was it read out to him? A. I read the letter myself and it was handed over then to Mr. Taylor, and as I recollect it, he read the letter.
- 20 Mr. Rofe: Can I have exhibit T please.*(handed to counsel)
- Q. If you would have a look at exhibit T (shown). As I understand your evidence, that is an exact copy of the draft letter, with the exception of the deletion of certain words relating to the words "to enable it to engage in further development", at possibly p. 37 A. Yes. When I read this particular letter it seemed to me to be the same as the draft with the deletion of those words.
- 30 His Honour:
- Q. It is not specific what those words are, Mr. Rofe.
- Witness: With the deletion of the words comprising about two lines relating to "development".
- Mr. Rofe:
- Q. If you would have a look at the first paragraph, p. 3 it says "notwithstanding the current circumstances". Do you see that? A. Yes.
- Q. Did the draft letter read, after those words, "I believe that the opportunity of placing such a large parcel of shares at a substantial premium is likely to be of considerable benefit to your company". That is as in the draft letter? A. I believe so.

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* Exhibit T

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Q. And the next sentence, "The infusion of \$10,350,000 cash is likely to ease the financing problems your company has faced in recent years, and enable you to re-arrange your dealings with the prospect of interest savings and to enable it to engage in future development". A. Yes, those additional words you have quoted, and there are other words that I can't recall, but those words would be.

Q. Those are the words you have suggested be deleted? A. Yes. 10

Q. The words "and to enable it to engage in future development" - are they the words you suggested might be deleted? A. Those are words of similar import.

Q. In the draft letter? A. In the draft letter.

Q. At this meeting did Mr. Maxwell inform the Miller representatives that Howard Smith would require them to enter into a deed? A. Yes.

Q. That was the first mention of a deed other than a reference in the draft letter? A. That is so. 20

Q. Was that reference to a deed or agreement - do you remember whether it was a reference to a deed or an agreement? A. An agreement.

Q. Was that made in the presence of Mr. Taylor, in the office of Mr. Taylor? A. I am sorry - I don't understand that question.

Q. Where and when was it that Mr. Maxwell informed the Miller representatives that Howard Smith would require the parties to enter into a deed or agreement? A. Yes. 30

Q. Where? A. That was in Mr. Taylor's office.

Q. On this occasion? A. On this occasion.

Q. About 5 p.m.? A. Yes.

Q. And did Mr. Taylor say anything about that? A. No, I don't recollect Mr. Taylor saying anything about that.

- Q. Did you say anything about it? A. Yes, I said, "Well, what would this agreement contain?" I can't remember Mr. Maxwell's reply in full.
- Q. Well, tell us the substance of it? A. The substance of the reply was that it would contain conditions precluding us from precluding Millers from issuing further shares or options to take up shares; and certain other conditions, the exact nature of which I now cannot recall.
- 10 Mr. Rofe:
- Q. Going back to one matter before that, did you say to Mr. Maxwell why you wanted the words "to enable it to engage in future development" deleted? A. I said, "I don't like those words too much", and he said, "All right, we will take them out".
- Q. Did you say why you did not like them? A. No, I don't think I did.
- 20 Q. How long did this meeting in Mr. Taylor's office with Mr. Maxwell and yourself and others last? A. I think about half an hour.
- Q. During the course of this meeting was there some conversation with Mr. Maxwell about de-listing of Miller shares, possible de-listing of Miller shares? A. Yes, there was.
- Q. Did you raise that or Mr. Taylor or Mr. Maxwell or somebody else? A. I don't remember who raised that.
- 30 Q. During the course of this discussion was there raised any reference to the decision taken to exclude Sir Peter Abeles from discussion and voting on the allotment? A. No.
- Q. Were there any telephone calls made from Mr. Taylor's office during the course of this discussion? A. Not that I recollect.
- Q. Mr. Maxwell, I assume, left first, or before you? A. Yes.
- 40 Q. You and Mr. Taylor and the others remained on? A. Yes, well, Mr. Maxwell certainly left first and that would have left us there.

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* Exhibit U

Q. What arrangement, if any, had been made about the following day with regard to Mr. Maxwell and the letter of final form and the agreement?
A. Mr. Taylor said to Mr. Maxwell, "I will want to see a letter in this form with the exclusion of those couple of lines, signed by your chairman before the board meeting tomorrow".

Q. Is that all; the only arrangement made, in relation to Mr. Maxwell returning the next day?
A. Yes, I think that is all.

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Q. After Mr. Maxwell had gone, how long did you remain in Mr. Taylor's office?
A. I have no recollection of how long I remained.

Q. Were any telephone calls made to any other directors after Mr. Maxwell had left, in relation to this proposed allotment?
A. Not that I recall.

Q. Did you notify any director?
A. No.

Q. Were you asked not to?
A. No.

Q. You did not speak to Mr. Anderson -
A. No.

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Q. - who was the alternative director?
A. No.

Q. I wonder if you would look at exhibit U, which is the document variously described as the stage directions, the memorandum? (handed to witness)* I think you have seen this document before?
A. Yes, I have.

Q. I would like to ask you, if I may, when - as precisely as you can - were you asked by anyone to prepare that document?
A. If I was asked to prepare it it would have been in the morning, before lunch.

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Q. The morning of -
A. Of the 5th, after the discussion about the disqualification of Sir Peter Abeles, or after Mr. Maxwell's visit that night.

Q. That is the 5 p.m. visit?
A. Yes.

Q. Presumably Mr. Taylor asked you, did he?
A. Yes, either Mr. Taylor asked me or I offered to do it, I can't remember which, but I think he asked me to do it.

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- 10 Q. I think you said yesterday that from your recollection in relation to that document you could not remember now whether you said to Mr. Taylor: "'Well, Arch, I will prepare the brief for you', or whether he said to me, 'I want you to draw up something for me for the meeting,' but I prepared the memorandum on that evening of the 5th, as I recollect, and on the following morning before the meeting". Just refreshing your recollection from what you said yesterday, does that perhaps help you to - A. No, I don't desire to change that.
- Q. Your best recollection is the evening of the 5th - A. Or the morning of the 6th.
- Q. Would you just have a look at the document, the second last paragraph starting the third item, on page 1. A. Yes.
- 20 Q. Are you able to tell us whether you prepared that page on the evening of the 5th or was that prepared the morning of the 6th? A. I believe on the evening of the 5th.
- Q. So the evening of the 5th you prepared the document in which you stated: "In view of a development which has occurred only this morning -" A. Yes.
- Q. "I propose to defer this item until we have dealt with a further matter". A. Yes.
- 30 Q. What part, if any, can you recall of this document did you prepare on the morning of the 6th? A. I think it was that part of the document commencing at page 3 with the word "chairman" last occurring.
- Q. "Chairman: Does anyone wish to make any comment?" A. Yes.
- Q. So that everything before that had been prepared on the evening of the 5th? A. From my recollection, yes.
- Q. Was it prepared in the office or at home? A. No, in my office.
- 40 Q. At your office after the 5 p.m. discussion? A. Yes.
- Q. Did you speak to Mr. Balhorn after the 5 p.m. discussion? A. I spoke to him on the 5th but I can't remember when.

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Q. Did you say you can't remember when? Or in relation to any event on that day? A. To the best of my recollection I spoke to Mr. Balhorn some time that afternoon, the night after the 5 p.m. meeting.

Q. That would be after the telephone call of Mr. Maxwell about 3 p.m.? A. Yes, I think it would have been.

Q. Did you telephone him or did he telephone you? A. No, Mr. Taylor telephoned Mr. Balhorn, as I recollect it, and then put me on to speak to him. 10

Q. Was this from the board room or Mr. Taylor's office? A. No, it was from Mr. Taylor's office if I recollect.

Q. So you had been to Mr. Taylor's office between 3 p.m. and 5 p.m.? A. Yes, yes that would be right.

Q. Can you recall why you went to Mr. Taylor's office between those hours? A. No, I don't know. 20

Q. Was it at his request or - A. I can't recall.

Q. What did Mr. Taylor say which preceded him ringing up Mr. Balhorn? A. I can't remember what he said to him.

Q. Well, what did you hear Mr. Taylor say to Mr. Balhorn before he handed over the telephone to you? A. He said, "Bill Conway wants to have a word with you".

Q. Did you understand what you were to say to Mr. Balhorn? A. I understood that I was to speak to him about the possibility of Howard Smith making an offer. 30

Q. It was more than a possibility, wasn't it, at this point of time? A. We didn't regard it as that. At least, I didn't regard it as that.

Q. Did Mr. Taylor say, to your recollection, why he was ringing Mr. Balhorn as distinct from Mr. Anderson and the other directors? A. No, he didn't. 40

- Q. What did you say to Mr. Balhorn? A. So far as I can recall I said to Mr. Balhorn, "Alan, we are expecting to get an offer from Howard Smith before the board meeting tomorrow," and I believe Mr. Balhorn replied "Well, that is fine. I will believe it when I see it", or words to that effect.
- Q. Anything else? A. Not that I can recall.
- 10 Q. Didn't you discuss with Mr. Balhorn as to the justification for the allotment? A. Yes, I did. As I recollect it Balhorn said to me, "But isn't this a bit unethical?" I said, "No, it is not unethical. It is unusual perhaps."
- Q. Could I suggest to you that before you said that you told him what the offer was? A. No, I don't think I did. All we knew - all I said was that they were going to make an offer.
- 20 Q. Yes, but an offer to acquire by allotment of $4\frac{1}{2}$ million shares at \$2.30 per share? A. I have no recollection of quoting those figures to Mr. Balhorn.
- Q. You just said, "Howard Smiths are proposing - or might make an offer"? A. Yes.
- Q. To do what? Did you tell him? A. Yes, an offer for shares in R.W. Miller (Holdings).
- Q. And Mr. Balhorn said, in effect, "That seems a bit unethical"? A. That is right. I said that there was no bar in law to such an offer being made or the directors allotting the shares.
- 30 Q. Anything else? A. No, I can't recall anything else.
- Q. Did he say that he would speak to Mr. Duncan about it? A. I don't know. I can't remember.
- Q. Did you tell Mr. Balhorn it was in breach of the Stock Exchange rule? A. I can't remember whether I told him that, either.
- Q. Did you tell him that the decision had been made to exclude from voting and from debating on the proposed allotments, Sir Peter Abeles? A. No, not that I recall.
- 40 Q. Is it just that you do not recollect or do you actually deny that you made reference to those two topics, the de-listing and the exclusion? A. I don't deny that I made reference to the de-listing

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*Exhibit U

I just can't recollect it. So far as excluding or disqualifying Sir Peter Abeles, no, I didn't say that.

Q. Do you remember what Mr. Balhorn's parting words were in that conversation? A. I think they were as I said before, that he would want to see it, see the offer.

Q. Had Mr. Taylor told you to prepare everything for this board meeting tomorrow, the 6th? A. Assuming he gave me instructions, he gave me instructions to prepare this. (indicating document) 10

Q. But did he limit you to that or give you a general instruction to have everything ready? A. No, no my instructions were to prepare a memorandum for him.

Q. What time did you arrive at Miller's office on the 6th, approximately? A. I can't remember the particular morning, but if I followed my usual practice it would have been about nine o'clock. 20

Q. And after that I presume you finished exhibit U; did you, the memorandum? A. Yes, I can't remember now, but I may have put it on tape the night before.

Q. But I thought you said there was part of it you - A. I put it on tape; the part that I prepared and did on the 6th was that part from "Chairman" onwards, on page 3.

Q. Which you put on tape on the 6th, the morning of the 6th? A. No, I probably dictated that to my girl on that morning. 30

Exhibit U

Q. Then is this the position: the whole of Exhibit U**, the memorandum, had been prepared either in the sense of being taped or dictated, before the Howard Smith letter arrived? A. Yes.

Q. And that arrived, you say, about 9.40? A. That is right.

Exhibit T

Q. You received that Howard Smith letter, exhibit T***, from Mr. Maxwell personally? A. Yes. 40

- Q. Did he also give you the letter of application at that same time? A. No.
- Q. You are sure of that? A. He gave me the agreement.
- Q. Is it possible he gave you three documents - two letters and the agreement? A. Not to my recollection, no.
- 10 Q. What arrangements did you make with Mr. Maxwell when he gave you these documents? A. I arranged with him to stay at our office and, assuming that the board passed the allotment, I would come out and see him.
- Q. So far as you recall, Mr. Maxwell remained in your office at that time when he arrived about 9.40 until the time he gave you the cheque? A. That is right.
- Q. Did he say he had got a cheque with him? A. I believe he did.
- Q. And also the letter of allotment - (withdrawn).
- Q. Also the letter of application? A. Yes.
- 20 Q. You read the letter Ex. T* just to see that it was in accordance with what you had suggested the day before, is that right? A. Yes.
- Q. And you read the agreement? A. Yes.
- Q. Did you read it at any length or just fairly quickly? A. I read it quite quickly.
- Q. Quite quickly? A. Yes.
- Q. Time was moving on? A. That is right.
- Q. Did you take the letter of proposal, Ex. T, and the agreement then to Mr. Taylor's office? A. Yes.
- 30 Q. Mr. Balhorn was there in Mr. Taylor's office at that stage was he? A. No, I thought that Mr. Balhorn came slightly after that.
- Q. Was Mr. Anderson there in Mr. Balhorn's office? A. I saw Mr. Anderson in Mr. Balhorn's office but according to my recollection he left the office before the letter came in; had gone down to the board room.

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*Exhibit T

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 *Exhibit U
- Q. Did Mr. Taylor tell you that he had briefed Mr. Anderson about what had happened the last two days? A. No, he didn't tell me that.
- Q. Nothing like that? A. No.
- Q. Did he give any indication that he had "filled Mr. Anderson in" on developments? A. No.
- Q. I think you told us Mr. Balhorn came into the office? A. Yes.
- Q. Whilst you were there? A. Yes.
- Q. Did Mr. Nicholl come to the office whilst you were there? A. Not that I recall. 10
- Q. Whilst in the office with Mr. Taylor did he indicate that he had communicated the developments of the last couple of days to any other director? A. No.
- Q. Did he say to you, "We must get this meeting over quickly," or anything like that? A. No, he did not.
- Q. Did he appear to read the document you gave him, Ex. U, *the memorandum? A. I can't say whether he read it or what. I handed it to him. 20
- Q. You made no comment, that - "This looks all right," or - A. No.
- Q. Presumably this is the first time you had given Mr. Taylor such a script or memorandum? A. No, I had prepared memoranda before, particularly in regard to the Part C statement.
- Q. But this is really a script, isn't it? A. Yes.
- Q. This is a document you prepared as a script for Mr. Taylor? A. Yes. 30
- Q. To read from? A. Yes.
- Q. At that board meeting? A. Yes.
- Q. You have never done that before, surely, for Mr. Taylor? A. Not that I recollect. no.
- Q. You say Mr. Taylor made no comment when you handed it to him? A. No.

- Q. Did Mr. Taylor tell you that the share script - share register entry had already been prepared? A. No.
- Q. Did you know that? A. I knew it was being prepared.
- Q. How did you come to know that? A. Because I had seen Mr. Murphy and Mr. Ellis-Jones that morning filling in the share scrip document and filling in the share registry entry.
- 10 Q. Something that had not come to your experience before, I take it? It was contrary to the normal practice of Millers as you knew it? A. I didn't know what Millers normal practice was.
- Q. Did you precede Mr. Taylor to the board room or did you both go together? A. No.
- Q. What was the order of progression? A. Mr. Taylor and Mr. Balhorn left Mr. Taylor's office and left me there on the telephone talking to Mr. Duncan.
- 20 Q. So you were in after them? A. That is right.
- Q. And the meeting started about 10.15, Mr. Cameron being a little late, Sir Peter Abeles being a little late, is that right? A. That would be correct, yes.
- Q. Is this the position? Is this the picture: We have Mr. Maxwell waiting at another office, with a cheque and a letter of application; this is at 10.15? A. Yes.
- 30 Q. We have the share scrip and share register entry forms prepared ready to be sealed? A. Yes.
- Q. We have Mr. Taylor with the script and you have a copy presumably? A. Yes.
- Q. And you have a form, piece of paper, from Mr. Balhorn with a tick against "Yes"? A. Yes.
- 40 Q. Incidentally, on that piece of paper there was only "Abstain" and "Yes" as the two alternatives? A. Yes.

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*Exhibit HH

Q. No "No"? A. No.

Q. When you went into the board room for that meeting there was no reason that you knew of why Mr. Cameron, Sir Peter Abeles or Lady Miller would have had any notice of what was about to happen so far as the allotment proposal was concerned? A. That is right.

Q. Certainly you, Mr. Taylor and Mr. Balhorn at least knew about it? A. Yes.

Q. As you understood it? A. Yes.

Q. And presumably Mr. Anderson knew about it, as you understood it? (objected to by Mr. Rogers; not pressed.)

Q. Mr. Conway, I wonder if you would be good enough to look at Ex. HH?* We are told that is a transcript of notes made by Miss Hill. I do not know whether you have seen that document before? A. This is the one that Miss Hill typed, I think, at Mr. Deane's request?

His Honour:

Q. This one was prepared by Miss Hill after the case began, the particular one you have before you, Mr. Conway? A. Thank you, your Honour.

Mr. Rofe:

Q. I wonder if you would turn to p. 7 of that document? A. Yes, I have p. 7.

Q. Do you see about one third of the way down of the initials A.B.? A. Yes.

Q. "I endorse Mr. N. comments". Do you see that? A. Yes.

Q. "I would be a little disturbed on the ethical side of this but Mr. Duncan said 'See what the Board generally thinks of this and to go along with it on what they think'". Is that what Mr. Balhorn said to your recollection? A. I thought Mr. Balhorn said...

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*Exhibit V

**Exhibit HH

- Q. I am just asking you? A. No.
- Q. Thinking back? A. Thinking back, that is not what he said.
- Q. Look at Ex. V* which is the formal minutes. Have a look at P. 8. Have you got p.8? A. Yes, I have P. 8.
- 10 Q. Do you see the fourth line down Mr. A.V. Balhorn said that he agreed with the remarks made by Mr. Nicholl as the company's shareholders would receive \$2.75 per share if the Board accepted the proposal of Howard Smith Limited rather than being locked in with only Ampol's offer of \$2.27 to accept. A. Yes.
- Q. Is that an accurate transcript of what Mr. Balhorn said, record rather? A. Not all of what he said.
- Q. Well, of that part that he said, is that accurate? A. Yes.
- 20 Q. Going back then to Ex. HH**omp. 7, do you say you do not recall Mr. Balhorn saying "I would be a little disturbed about the ethical side of this." Do you remember that much of what he said? A. Oh yes.
- Q. So, that is accurate? A. I think so.
- Q. "But Mr. Duncan said see what the Board generally thinks of this and to go along with it on what they think." A. Yes.
- Q. You say that is inaccurate? A. No, I don't say that is inaccurate.
- 30 Q. So, that is an accurate transcript of what Mr. Balhorn said? A. It is an accurate transcript of part of what he said.
- Q. It is accurate as to that part? A. According to my recollection, it is.
- Q. Would you have a look at p. 6 of that transcript which is Ex. HH. Do you see about two-thirds of the way down against the letter "C" the question asked "What are the advantages of making a placement outside the company over a placement to our shareholders?" A. Yes.
- 40

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(continued)
*Exhibit U
- Q. Do you remember Mr. Cameron asking that question?
A. No I can't remember him asking that question.
- Q. Well, that is a matter going to your recollection. You are not suggesting it was not asked; you just cannot recollect? A. I cannot recollect that.
- Q. Do you remember Mr. Taylor answering "Because the majority of shares, 55%, is held by two shareholders which would increase their shareholding. "? A. I don't remember Mr. Taylor saying that. 10
- Q. Once again, is it a matter of your recollection or do you say he did not say it? A. He said something.
- Q. Similar to that? A. No, I don't think it was even similar to that.
- Q. But Mr. Taylor had said to you on previous occasions, had he not, that the effect of a placement to shareholders in a situation where 55% was held by two shareholders would only increase the shareholding of those two shareholders? A. No. 20
- Q. Hadn't he ever said that to you? A. No, he had not said that to me.
- Q. Well, Mr. Nicholl had said that to you prior to the meeting, hadn't he? A. No.
- Q. It had been discussed. It was a matter of discussion, was it not, prior to the meeting, the fact that a placement of shares to shareholders in a situation where Ampol and Bulkships held 55% would only achieve the result of increasing their shareholding? A. No, I don't recollect that discussion. 30
- Q. Now, if you look at Ex. U*again, your memorandum, at the bottom of the page on the right-hand side there is some writing is there not or block letter writing? A. I am sorry, I do not have it.

- Q. Just going back then to Ex. HH*at p. 6, there I directed your attention to what appears to be an answer by Mr. Taylor? A. Yes, I see the answer.
- Q. Do you recall you say to the best of your recollection you do not recall that being said by Mr. Taylor? A. No.
- Q. Do you recall it being said by Mr. Nicholl? A. No.
- 10 Q. Mr. Anderson? A. No.
- Q. Anyone else? A. No.
- Q. Just going above that, I put it to you that Mr. Cameron asked a question "What are the advantages of making a placement outside the company over a placement to our shareholders" and I interpreted the C" as Cameron. Perhaps I am wrong there. Do you recall anyone asking that question? A. No, I don't.
- 20 Q. Presumably the "C" is not you; you did not ask it? A. No, I did not ask it.
- His Honour:
- Q. Does it follow that there was no discussion you recollect at the meeting about a placement to existing shareholders at all? A. No, your Honour there was a discussion about a placement to existing shareholders at the meeting and it was raised by Mr. Cameron.
- Mr. Rofe:
- 30 Q. Perhaps just to clear that up there was no discussion about a placement to existing shareholders before this meeting? A. No.
- Q. Now, what I was directing your attention to, p. 2 of Ex. U*on the bottom of the page on the right hand side there is some block letter writing "Sir Peter Abeles left to seek legal opinion". Have you got that in your copy? A. Yes.
- Q. There is a time. Can you read that on your copy? A. 10.50.
- 40 Q. Now, does that accord with your recollection of the time that Sir Peter Abeles left the meeting? A. I don't know what time he left the meeting.

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- Q. Approximately how long had the meeting been going before he left? A. I could have been going half an hour.
- Q. About half an hour? A. Yes.
- Q. And how long was he away? A. I thought he was out of the room about ten minutes.
- Q. About ten minutes? A. Yes.
- Q. And it is correct to say that during that ten minutes Mr. Koch had given his summary or substantially given his summary of the financial position? A. He had partly given it. 10
- Q. He had given all the figures of short term borrowing repayments, hadn't he? A. I believe so.
- Q. Can you tell us approximately what time it was that the motion which had been moved by Mr. Anderson was voted on? A. I would say just shortly after midday.
- Q. Shortly after midday. And as soon as it was voted on you saw the seal being placed on the share scrip and on the agreement? A. Yes. 20
- Q. And you immediately left the meeting, did you? A. Yes.
- Q. And took those two documents to Mr. Maxwell in another office? A. Yes.
- Q. Received the cheque and the letter of application? A. Yes.
- Q. Brought those back to the meeting? A. No.
- Q. Did you come back to the meeting? A. I did, yes.
- Q. How long were you away attending to that matter and obtaining the cheque and the letter of application? A. I suppose about ten minutes. 30
- Q. When you came back to the meeting did you bring the cheque and the letter of application with you? A. No.
- Q. You dealt with them in some other part of the office, did you? A. That's right,

- Q. When you came back to the meeting was it still in progress? A. Yes.
- Exhibit V Q. Can you recall what the meeting was discussing at the time you got back? To help you, if you look at Ex. V, p. 9, formal minutes, was it on Consideration of Group Results or had it proceeded to Any other Business? A. I can only say that it was before Sir Peter Abeles? nominated Sir Ian Potter as his alternate. I can recollect that being done but nothing before that.
- 10 Q. Approximately what time did the meeting finally end? A. I think shortly after 1 o'clock.
- Q. And do I take it that when you were out of the meeting obtaining and delivering the share scrip and signed agreement that you also arranged for a letter enclosing the register entry to be delivered to Security Services? A. No.
- Q. You did not organise that yourself? A. No.
- 20 Q. Did you give instructions for it to be done? A. No.
- Mr. Staff
- Q. But a few questions. Mr. Conway, had you known Mr. Maxwell before any of the relevant events in June or July? A. No, I met him for the first time on the 19th.
- Q. On the 19th? A. 19th June.
- Q. On 19th June and you quite quickly got on to Christian name terms, did you? A. We did.
- 30 Q. Now, Mr. Conway, after the joint announcement came to your knowledge may we take it that you were in effect given a brief distinct from your normal routine legal duties in Millers? That is a brief in relation to the situation which gave you concern in Millers as a result of the joint announcement? A. No.
- Q. May I take it that in the normal course you attended to legal matters only as distinct from management and financial matters in the Company? A. That would be correct.
- 40

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Q. And the legal matters would come to your desk through the general manager or the managing director, would they, or direct to your desk?
A. Some came direct to my desk.

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Q. And others would be referred by the managing director or the general manager? A. And other officers.

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Q. I suppose at some point of time in May or June you had referred to or it came to your attention, the Tricontinental agreement in relation to the bill facility for 3.1 m? A. Yes.

10

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Q. And that was towards the end of June? A. Yes, it was towards the end of June.

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Q. I suppose you examined the agreement with a view to seeing what its provisions were? A. I did.

(continued)

Q. And the effect that they might have upon your company? A. I did.

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Q. And similarly I suppose you had examined the letter of commitment which had earlier come in from Hambros in relation to the Robert Miller end finance? A. I had seen the letter.

10

Q. Again, I suppose, as legal officer it was part of your task to look at it and see what its consequence to the company was? A. I was not, to my recollection, asked to advise on it.

Q. Had you, by contrast, been asked to advise specifically on the Tricontinental document? A. Yes, it was my job.

Q. In any event, I suppose you saw at the time the provisions to which subsequently Mr. Koch referred at the 6th July Board meeting as the change of control provisions? A. Yes.

30

Q. And you read them and noticed them? A. Yes.

Q. I suppose you were quite familiar with their operation? A. I don't know that I was familiar with their operation.

Q. Had you given advice to Mr. Koch about what they said and meant? A. I think I gave the advice to Mr. Murphy.

His Honour:

Q. Mr. Murphy? A. Mr. Murphy, yes.

Mr. Staff:

Q. And of course in the case of the Tricontinental agreement the provision about change of control was related to a change of control which existed as at 30th June, wasn't it? A. That is so.

10 Q. I suppose when you heard Mr. Koch at the 6th July Board meeting you had those provisions in mind? A. Yes.

Q. Did you believe Mr. Koch's account of the provisions to be accurate? (Objected to by Mr. Glass)

Q. In any event, you did not say anything at the Board meeting, Mr. Conway, about those provisions? A. No.

Q. Nor about the effect of the Hambros loan, the letter of commitment? A. No.

20 Q. And nor I think you say had you been asked to give Mr. Koch any advice about them prior to the 6th July meeting? A. Advice about it?

Q. About those provisions? A. In the Tricontinental one?

His Honour: Mr. Staff, I think Mr. Glass, from the pained expression on his face is having difficulty in hearing.

Mr. Staff:

30 Q. Nor, prior to 6th July had Mr. Koch asked you to give any advice about these change of control provisions in either document, had he? A. No.

Q. Now, Mr. Conway, prior to the 4th July meetings with the Howard Smith representatives you had been directing your attention to a means of, to use your own words, keeping Howard Smith in the race? A. Yes.

Q. That really was the target to which you were directing your legal talents at that point of time? A. In this matter, yes.

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In the Supreme Court of New South Wales Equity Division Q. So too in conjunction with you were other members of the Millers organisation, were they not? A. I can't recollect anybody coming up with any other ideas.

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Q. No, but you and Mr. Taylor and Mr. Koch and perhaps others on the management and financial committees were working at that objective, were they not? A. Well, I had it in mind. What the others were doing, I don't know,

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Q. But you were discussing the matter with them, weren't you, Mr. Conway? A. The only one I had the discussion with was Mr. Koch. 10

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Q. But didn't you discuss your concern about the effect of the joint announcement with Mr. Taylor? A. Oh, yes.

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Q. And didn't you discuss with him the need to find some way of keeping Howard Smith in the race? A. No, I don't know that I did.

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Q. He was concerned about keeping him in the race, wasn't he in his discussions with you? A. Yes. 20

Q. And you expressed the same concern to him? A. Yes, I suppose I did.

Q. So, you anyway directed your energies to that end so far as they were directed to this matter? A. Yes.

Q. And it became apparent to you, I suppose, very quickly, that the only way it was likely to be done was by an allotment of shares to Howard Smith? A. That was one of the ways. 30

Q. Well, the first idea you came up with involved such an allotment? A. Yes.

Q. May we take it that you did not discover any other or have any other idea which might have kept them in the race, to use your words? A. That's right, no, I did not.

Q. And I suppose you told the other Miller executives who were interested in the problem that an allotment was the only way you could see by which they could be kept in the race - that is, Howard Smith kept in the race? A. No, I don't recollect telling anybody else that. 40

- Q. Did anybody else tell you that? A. No, I don't think so.
- Q. Anyway, nobody else came up with any other means of keeping Howard Smith in the race, did they? A. No.
- Q. And may we take it then that so far as you were concerned it was obvious to you that a large parcel of shares in Millers would have to be allotted to Howard Smith if they were to be kept in the race? A. I did not at any stage in the proceedings apply my mind to how many shares would have to be allotted.
- Q. Oh no, not the precise number but it was obvious to you that a substantial parcel would have to be allotted, wasn't it? A. Yes, I suppose that would be right.
- Q. Mr. Conway, you told us that I think on a couple of occasions that in your first telephone call which you made to Mr. Maxwell on the morning of 5th July and you were unable to contact him? A. Yes.
- Q. You left a message for him that the matter was urgent and would he ring back? A. Yes.
- Q. Now, do I understand what you said that at the time you made that call there was really no outline of a proposal which you regarded as promising in existence? A. You mean the proposal from Howard Smith?
- Q. Yes. A. That's right, I did not at that time.
- Q. But you were anxious to see if something was going to come? A. Yes.
- Q. And you were anxious to find out along with the other people present on that morning of 5th July whether Howard Smith were going to make some proposal that day, were you not? A. No.
- Q. I see. Well, you left a message for Mr. Maxwell that the matter was urgent? A. Yes.
- Q. Would you tell his Honour, Mr. Conway why - I withdraw that. Did you regard the matter as urgent? A. I did.

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Q. That is, to speak to Mr. Maxwell? A. Yes.
Q. For the purpose of ascertaining whether he had or was likely to have a proposal to put?
A. No, for the purpose of advising him of our views.

Q. And tell me, did you regard that matter as urgent because of the imminence of the Board meeting of the next day? A. No.

Q. It had nothing to do with that? A. I knew the board meeting was on. No, it didn't - the urgency wasn't concerned with the board meeting.

10

Q. I see. Was the urgency concerned with the implementation of a proposal which you had in mind? A. No, we did not have a proposal in mind.

Q. It was simply that you wanted as urgently as possible to acquaint Mr. Maxwell of the views which you had formed? A. That's right.

Q. In that gathering? A. That's right.

20

Q. What was the urgency for that purpose which troubled you on that particular morning, Mr. Conway? A. Because of the unsatisfactory proposal which had been made the previous day.

Q. But - have you finished your answer or not? A. Yes, because of the unsatisfactory proposal which had been made on the previous day.

Q. And do you tell us that you were concerned that you should pass on your views of that particular morning of July? A. Yes.

30

Q. For no other reason than information to Mr. Maxwell? A. No.

Q. But you emphasised, did you not, that it was urgent that particular morning? A. Yes.

Q. It would not have mattered if the information had not been conveyed until the next day, would it? A. In my view, it would.

Q. I see. Well, why was it so urgent, Mr. Conway? A. Because I feared that the unsatisfactory

proposal would have hardened into fact before we had an opportunity of putting our views to the other side.

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Q. And that thereby you would have no satisfactory proposal ever? A. That's right.

Q. And that is the whole element of urgency that you then had in mind? A. That's right.

10 Q. That evening when you saw the draft letter that Mr. Maxwell brought round, I suppose you saw that his proposal required, as framed, required a decision the following day? A. I did.

Q. Did you suggest to him that in a matter of such significance the directors might well require more than a cursory consideration on the following day? A. I do not admit that they would only give it cursory consideration.

Q. You knew the Board meeting was the next day and also so did Mr. Maxwell? A. Yes, he did.

20 Q. And you were aware that some of the directors, in fact the majority of the directors, had not been told of the proposal or indeed the possibility of it? A. Yes.

Q. And you were aware that they would come, as it were, cold the next day? A. Yes.

Q. And did it not occur to you to suggest to Mr. Maxwell that directors might want more time than that 6th July to make a decision on a matter of such a character as this? A. No, it did not.

30 Q. It involved enlarging the capital by 50%? A. Yes, it did.

Q. And did Mr. Maxwell not say to you either at this time or earlier that if more time were needed it would be available or something to that effect? A. No.

Q. Was there any discussion about the necessity for a decision on 6th July or otherwise? A. The whole term of the offer was that it was to be dealt with on the 6th.

40 Q. Was there any discussion between you and Mr. Maxwell or anyone on either side in your presence about the reason or necessity for a decision to be made on the 6th? A. Not that I can recall.

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Q. Did it not strike you as surprising that a matter of this significance should have to be decided on one day? (Objected to by Mr. Glass; rejected)

Q. Mr. Conway, may I take it when you got the formal agreement the next day it was somewhere close to the commencement of the meeting or at any rate close to the time when you made the telephone call to Mr. Duncan? A. That's correct.

10

Q. You had but a few minutes to look at it? A. That's right.

Q. Had you given any detailed consideration to its terms overnight as a result of your conversation with Mr. Cameron? A. I did not give detailed consideration to the terms of it.

Q. And you did not give any detailed consideration on the following day either before its execution? A. I did not give any lengthy consideration.

20

Q. And you gave no advice to Mr. Taylor about it except to say "It is O.K." or something to that effect? A. That's right.

Q. And I take it Mr. Taylor did not appear interested to know any more about it? A. I wouldn't know. (Objected to by Mr. Glass; question withdrawn).

Q. Did Mr. Taylor ask you any other question about it or its effect? A. No.

30

Q. Did Mr. Taylor in your presence read it? A. Not that I recall.

Q. Did he ever have it in his hands in your presence? A. Yes.

Q. Turn the pages in your presence? A. I can't recall that either.

Q. I gather you received it from Mr. Maxwell with the letter? A. I did.

Q. You took it in to Mr. Taylor? A. Yes.

- Q. You gave it to Mr. Taylor with the letter? A. Yes. In the Supreme Court of New South Wales Equity Division
- Q. And he read the letter in your presence, did he, or appeared to? A. He did. Yes, he appeared to.
- Q. Having read the letter did he appear to read the agreement? A. Well, I did not notice whether he did or not. No. 6
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- Q. Well, it is a matter of you do not recall one way or the other or you do not recall that he did? A. I don't recall one way or the other. Defendants Evidence 8th Defendants Evidence
- 10 Q. And then I think you did not look at it until just before you got on the telephone to Mr. Duncan? A. I looked at the agreement as soon as Mr. Maxwell arrived with it and the letter. I read both. William Andrew Conway (recalled)
- Q. And you appreciated, did you, that it imposed some pretty onerous restrictions upon Millers freedom of action for an indefinite period of time? A. I did not regard these restrictions as onerous. Cross-Examination by Mr. Staff Q.C.
- 20 Q. Did you regard them as being very unusual restrictions to submit to in favour of a bidder for the capital of the company? A. Not in the circumstances. 28th September 1972 (continued)
- Q. You realised, did you, Mr. Conway, that one of the provisions restricted the borrowing power of Millers to borrowing by overdraft and excluded all other borrowings? A. That is true.
- Q. For an indefinite period of time? A. Until 30th September.
- 30 Q. Or during the period of any substituted offer, wasn't it, Mr. Conway? A. Yes, that probably was right.
- Q. And of course, it preserved to Howard Smith the right at any time to withdraw it, that is, its offer? A. Yes.
- Q. Of course, any way you drew none of these matters to Mr. Taylor's attention or to that of any other members of the Board I take it? A. No.
- 40 Q. And you appreciated, did you not, that the effect of the terms of the agreement put the Howard Smith interests in a very powerful position as a bidder for the capital of the company? (Objected to by Mr. Rogers; supported by Mr. Glass.)

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Q. At any event, Mr. Conway, may we take it then that none of these matters that we have referred to were present to your mind as significant matters nor matters which you mentioned to the directors? A. I read the agreement, of course, to the meeting.

Q. But you did not point out the consequence in any respects of the provisions of the agreement to any of the directors either at the Board meeting or elsewhere? A. No. 10

Q. Nor what I put to you is the powerful position in respect of which Howard Smith would be put by the terms of the agreement in relation to any possible other bidder for the shares in Millers? (Objected to.)

Q. Firstly then, Mr. Conway, you did not put or explain to any of the directors at the Board meeting, did you, the very powerful position in which the terms of the agreement put Howard Smith in the event of any other bidder for the capital coming along? A. Do you mean a third bidder? 20

Q. Yes. A. No, I did not.

Q. And you did not explain that effect to any of the directors individually away from the Board meeting? A. No.

Q. May I take it that you did not discuss with Mr. Maxwell or any other Howard Smith representative the consequence of any of these provisions, that is, the provisions I have mentioned to you? A. No, I don't think I did. 30

Q. And you did not, nor did anyone else in your presence, I take it, say to Mr. Maxwell or any of the other Howard Smith representatives "What's the hurry?" or something like that? A. No.

Re-Examination:

Re-examination
by Mr. Glass Q.C.

Mr. Glass:

Q. Starting where we are now you said, I think, that before the meeting you read through the agreement and the letter. Is that right? A. That's correct. 40

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- Q. Did you see anything objectionable in the terms contained in the agreement and outlined in the letter? A. No.
- Q. What advice did you give to Mr. Taylor separately from the Board regarding the terms of the agreement? A. Regarding the?
- Q. Letter and the agreement? A. Well, I just told Mr. Taylor that I had read the agreement and it seemed to me to be O.K.
- 10 Q. When it came to the Board, I think we know that both of them were read out in full? A. They were.
- Q. And did you express any opinion about them to the Board? A. No, I merely read the agreement.
- Q. Did anyone ask you any questions about the agreement? A. No.
- 20 Q. Did Mr. Taylor say anything about what you had said to him. To the Board did Mr. Taylor say anything about what you had said to him about the agreement? A. No.
- Q. You said that at 4th July it was your understanding that there was a stalemate between Howard Smith and Millers, both offers having been rejected? A. Yes.
- Q. And you said also the following day, 5th July, "We discussed the offer of 3 m. shares at \$2"? A. Yes.
- 30 Q. Now, in what terms was it discussed? A. Well, it was discussed in these terms that when we looked at our short term liabilities, the amount to be raised was nowhere near enough, the price offered of \$2 was considerably lower than the Ampol offer which we had already stated was too low.
- 40 Q. And lastly, you said that it was urgent for you to speak to Mr. Maxwell round about noon on the 5th July "for the purpose of advising him of our views" and I ask you what were those views that you wanted urgently to communicate? A. The views were that it was pointless then making any offer, any

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application for shares of less than a sufficient amount which would give \$4,152,000 at less than - I am sorry, 4,152,000 shares at a minimum price of \$2.30 and that was only if they were minded to make an offer. Anything other than that we regarded as unsatisfactory.

(Witness retired and excused)

(Original page substituted for photo copy
in Ex. X.)

Exhibit X

(Further hearing adjourned to 11 a.m.
Tuesday, 3rd October, 1972.)

AMPOL PETROLEUM LIMITED V. R.W. MILLER
(HOLDINGS) LIMITED & OTHERS

Thirteenth day: Tuesday 3rd October 1972

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Corrections to
Transcript of
Evidence
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MR. GLASS: Might I suggest a few small corrections to the transcript, your Honour? At p.722 the seventh question elicits the answer "Ah". The answer should be "Yes",

HIS HONOUR: The answer to the seventh question should be "Yes".

10 MR. GLASS: On p.727 the thirteenth question, the answer is "I had ... ". The witness believes he said "I had no discussion."

HIS HONOUR: If Mr. Conway asserts that is what he said, I would accept that. The answer to the thirteenth question should be extended to read "I had no discussion".

20 MR. DEANE: Whilst on that page, the fourth question on that page, p.726 the firm of solicitors should be Barkell & Peacock, and not Bowen & Packham".

HIS HONOUR: Yes.

MR. GLASS: Page 731 and 732 questions 9 and 10 refer to the 7th June. I believe that should be 16th June in each case.

MR. DEANE: We agree with that.

HIS HONOUR: The sixth and seventh questions on p.731 and 732 should be "16th June" in lieu of "7th June."

30 Are there any other matters in the transcript?

MR. DEANE: On p.725 the third line, the word "not" should appear between the words "am" and "suggesting". The phrase "I am suggesting" should read "I am not suggesting".

HIS HONOUR: Yes.

40 MR. DEANE: Page 758 the fourth question, the words "about a" should read "during the". The question should be "did he mention anything during the 'phone conversation..." instead of "did he mention anything about a 'phone conversation ...".

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HIS HONOUR: Yes.

MR. DEANE: At p. 775 the first word in the answer to the third question should be "it" rather than "I".

At p. 783 eight questions from the bottom, in the second line, the reference should be to Mr. Kerrigan, and not to Mr. Cameron.

HIS HONOUR: Yes.

ROBERT IAN NICHOLL
Sworn, examined, as under :

10

MR, GLASS: Q. What is your full name, please, Mr. Nicholl? A. Robert Ian Nicholl.

Q. And what is your residential address?
A. 1 Tottenham Street, North Balgowlah.

Q. You are a duly qualified solicitor of the Supreme Court of New South Wales? A. Yes.

Q. Since what year? A. Since May 1957.

Q. And your present professional position is?
A. I am a partner in the firm of Nicholl & Nicholl.

20

Q. For how long have you been a partner?
A. I have been a partner since the partnership was formed in, I think, 1960, and prior to that I was a partner from 1957 to 1960 in a firm known as Nicholl & Hicks.

Q. When were you first appointed to the board of Millers? A. I think it was in August 1968.

Q. How did that come about? Who appointed you?
A. I was appointed by Sir Roderick Miller, I think to fill a casual vacancy, and the first approach came from my father, Mr. R.W. Nicholl, who said he had had some discussions with Sir Roderick Miller and that he would like me to go on the board of the company.

30

- Q. What was your state of mind in relation to that suggestion? A. I had previously been advised by a master solicitor (objected to by Mr. Deane: allowed).
- Q. What was your state of mind in regard to that suggestion, Mr. Nicholl? A. My previous master solicitor had expressed the view that positions as directors of public companies were undesirable from a solicitor's point of view as they interfered with the normal running of your practice and their rewards are usually not sufficient or commensurate with the amount of work you put into the job.
- Q. What factors weighed with you in neglecting that advice in this instance? A. The fact that my father and Sir Roderick Miller had been closely associated over a number of years, and I more or less accepted the position because my father wanted me to.
- Q. Have you made any other exception to a policy of not going on to boards of public companies? A. A similar exception when Mr. Hudson requested me to go on the board of Australasian Oil Exploration, which was not a public company quoted on the Stock Exchange, it was a wholly-owned subsidiary of a company called Kathleen Investments.
- Q. Apart from that and Millers, have you ever accepted a position on the board of a public company? A. No.
- Q. Now, at the meeting of November - the general meeting of shareholders of November 1968 - what happened regarding your position on the board? A. I was elected as a director of the company by a meeting of shareholders at the annual meeting in November.
- Q. And what happened thereafter as regards re-election? A. I think I have come up once since then on rotation of retirement of directors and was re-elected, I think, in 1971.
- Q. What had been your practice since your first appointment as regards attendance at board

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meetings? A. I think I have attended every meeting except two, and they were occasions when I was in the country in relation to my practice.

- Q. And what are your fees as a director? A. I receive a director's fee of \$2,000 a year, and these fees are paid into the partnership income and divided equally between myself and my two partners.
- Q. And during what hours do you attend board meetings? A. Normally the attendance at board meetings is during office hours, or invariably it is during office hours. 10
- Q. And to what extent have your duties as a director impinged upon your professional work as a solicitor? A. It is only a relatively small firm. There are only three partners, and no clerks in the office, and if I am at a meeting and I have a case listed for hearing somewhere then either my father, or usually my brother, has to attend in my place, which interferes with their work. 20
- Q. And, speaking generally, how have you found your duties as a director affecting the performance of your professional work?
A. Well, in recent months, or since the death of Sir Roderick Miller, board meetings have been held more and more frequently, and I have been spending far too much time on the company's affairs and less and less on office affairs. I have still been able to do my work, but it is more difficult. 30
- Q. When did you first become aware of the Howard Smith offer of 22nd June A. I think that was at a board meeting on 23rd June.
- Q. When did you first become aware of the joint announcement by Ampol and Bulkships?
A. When I read the report in the paper of 28th June.
- Q. Following that did you have a conversation with Mr. Taylor? A. Yes, I 'phoned Mr. Taylor and I said "Have you read the notice?" and he said that he had. I can't remember the precise words of the conversation, but something like 40

"This flushes it out into the open", or something like that, and I said, "What are Howard Smith going to do about this?" and Mr. Taylor said, "I will be in touch with them".

HIS HONOUR: Q. "I will be in touch with them", or "I will be in touch with you"? A. "I will be in touch with them".

10 MR. GLASS: Q. Was anything further said about flushing it out into the open? What was "it"? A. Well, I had suspected for some time that there was - (objected to by Mr. Deane).

Q. Just limit yourself to what was said between you and Mr. Taylor on this occasion?
A. The "it" referred to an association between Ampol and Howard Smith - I am sorry, an association between Ampol and Bulkships.

20 Q. Yes. Did you say anything to Mr. Taylor at that stage about what this development meant?
A. I may have mentioned to Mr. Taylor that it could mean that the small shareholders could be locked in and forced to either hold their shares or accept the Ampol offer.

30 Q. Had there been any statements at earlier meetings of the board on the subject - which touched the subject of whether Ampol and Bulkships were working together? A. I think Mr. Taylor had been trying to obtain from both Ampol and Bulkships (objected to by Mr. Deane).

40 Q. I want you to tell us, Mr. Nicholl, the things that were said at board meetings on the question of whether they were working together? A. At board meetings letters to both companies - both Ampol and Bulkships - were discussed and the fact that no replies to these letters had been received, or no replies answering the various questions had been received. That was discussed.

Q. Do you recollect anything being said by Sir Peter Abeles at board meetings on the question?
A. Sir Peter Abeles did not mention anything about an association between Bulkships and Ampol.

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- Q. Did he say anything that affected your mind as to whether there was or was not an association? A. No, I can't recall that. I can recall having a discussion with Mr. Cameron on the subject.
- Q. I will take you to that in a moment. Did Sir Peter Abeles say anything about merchant banks? A. Yes. When we were discussing - I think at this stage we had received some notice from Howard Smith to the effect - No, it was not that, it was in relation to the Ampol offer and our rejection of it. There was a discussion about appointing a merchant bank to advise us in relation to the whole takeover situation. 10
- Q. Yes. What did he say? A. We were trying to get a specific bank appointed, and Sir Peter said "I think you should keep -" words to the effect "keep your options open. Don't limit yourselves to the one. Go out into the market place and feel around for any offers you can get." He said it would not be desirable to restrict ourselves to one particular merchant bank. 20
- Q. You were going to tell us about a conversation with Mr. Cameron? A. Yes. It was at or immediately after the board meeting. I was talking to Evan Cameron, and I said, "Do you think" - (objected to by Mr. Deane: allowed). 30
- Q. Is that date approximately correct? A. If there was a board meeting on 9th June - which I think there was - it was immediately after the board meeting on 9th June.
- Q. What was said? A. I said to Mr. Cameron, "Do you think that Ampol and Bulkships are in this together?", and he said he didn't think so - that he thought Sir Peter Abeles was only in it for money, and that he would accept the highest offer available. 40
- Q. When was it that you first learned that Howard Smith might apply for an allotment? A. It was on the morning of 5th July. Either Mr. Taylor or Mr. Conway 'phoned me at my office, and I remember that I was fairly actively

engaged in my practice at the time and I think I left it on the basis, "I will get back in touch with you or come down and see you at lunchtime".

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Q. What was your state of mind when the question of an allotment to Howard Smith was raised? (Objected to by Mr. Deane: rejected.)

10 Q. What legal reflections entered your mind when the question of an allotment was raised? (Objected to by Mr. Deane: rejected).

Q. Can you tell us with greater precision when it was that you had the telephone call with Mr. Conway or Mr. Taylor? A. As I say, I was actively engaged. I think I had people in my room at the time, but it would be somewhere between halfpast ten and halfpast eleven in the morning.

Q. Of 5th July? A. Of 5th July.

20 Q. As a result of that conversation did you turn your mind to any relevant legal questions?
A. Well, I knew that I was by no means an expert in the field of takeovers, but I had sufficient knowledge of it to realise that you just could not go and issue shares without looking into the legal consequences of it in a takeover situation, and I did in fact, in the very short time available to me, look up a couple of articles that seemed to have something to do with the subject, and I
30 took these down to this lunchtime meeting with Mr. Conway.

Q. And what did you take with you? A. I took a volume of The Australian Law Journal and a volume of the Commonwealth Law Reports.

Q. Do you produce the two volumes that you had with you, for the purpose of identification?
A. They are the two, yes.

40 Q. Now, what is the volume of the Commonwealth Law Reports that you had with you? A. Volume 42. I am sorry, Commonwealth Law Reports? It is volume 90.

Q. Yes. What particular case in that volume was

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the subject of later discussion? A. I am not sure whether it was discussed. I took it down to the meeting.

- Q. You took the volume down with you because of what case in it? A. I can't pronounce the name, Nguri Limited & Anor., and a number of other people, and I have noted that I put a faint pencil line down the side of p.439 of that report, which I am in the habit of doing if I think there is something relevant. But I am not sure whether this was read at the meeting. 10
- Q. You took it down? A. Yes.
- Q. At the meeting, who was present? A. The only person I was really interested in was Mr. Conway. I think Mr. Taylor was there, if not for the whole period I was there, for some part of it. I think Mr. Koch may have been there. Mr. Murphy may have been there.
- Q. Did you have discussions with Mr. Conway of a legal character? A. Yes. 20
- Q. And in those discussions what parts of the volume of the Australian Law Journal were read by either you or him? (Objected to by Mr. Deane).
- Q. Are you able to recollect the substance of the discussions that you had with Mr. Conway? A. I can't recollect in detail the substance of the discussions. It was mainly an exercise of either myself or Mr. Conway reading various passages from the report. I either read them to Mr. Conway or we read them to ourselves or we read them out aloud at the meeting. I do have the passages that were read marked. 30
- Q. Which, according to your recollection, were the passages in the Australian Law Journal which were dealt with in that way? A. Well, I think the whole of the summary on p.254 of the actual Australian Law Journey part - it is only relatively short - I think that was read. And I think, going to the actual report of the Woodside Lakes Entrance case, there are various passages in the report which 40

I have marked in the margin, and I think they were read by either myself or Mr. Conway.

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10 Q. As the result of the reference to these passages in the Journal itself or the report did either you or Mr. Conway state, the one to the other, the principle to be extracted from this material? A. I think Mr. Conway read a particular passage from the report and he mentioned something like "That is spot on", or something like that, and it was that specific passage which he was quoting as the summary of the law on the situation.

Q. What did you understand he was saying was the summary of the law on that situation? A. That it was quite legal for a company to make a placement of shares in a situation where the money was immediately required to meet the company's present and future financial requirements.

20 Q. What was your belief as to whether that was a correct statement of the legal position? A. Well I had not done any real research on it. I thought it would be probably a correct statement of the law but I certainly was not relying on my own legal research into this topic because the company had employed someone expert in the field.

30 Q. Now, at the time of this discussion at lunch-time on 5th July, what was your understanding, if any, as to the number of shares involved and the price in any allotment? A. I did not pay much attention to the number of shares of the allotment or the price. There was some talk of three-million shares. I think Mr. Conway had said that he had informed Howard Smith or Howard Smith were going to submit some other proposal, and for that reason I did not look specifically into the number of shares or the price because I knew that something was going to develop in this regard. I had no knowledge of what it was but I assumed it was something better than the previous figure.

40

Q. When did you first learn of the proposal for the placement of four-and-a-half million shares at £2.30? A. When the letter received

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* Exhibit PP.

by the company from Howard Smith was read out at the meeting by Mr. Taylor.

- Q. I refer to Ex. PP, which contains question and answer No. 27, and that question and answer, Mr. Nicholl, asks you did you have any prior knowledge of the allotment of four-and-a-half million shares and the answer is "Yes." "When where and with whom", and the answer is "In the boardroom of Millers on 5th July, 1972, with Messrs. Taylor and Conway." Is that a correct answer to that question? A. No, it is not. The answer should be "No". It was "No" on my draft. 10
- Q. You prepared a draft, did you, of answers to interrogatories? A. Yes.
- Q. And in that draft your answer to that question was "No"? A. "No."
- Q. And when you came to swear the final interrogatories did you read them through beforehand? A. No, my interrogatories had been chasing me around the town, and in fact I it was the 6th - No, I am not sure when it was, but, whenever it was, I just signed it, thinking it had been done in accordance with my draft. The answer should have been that I was aware of an approach about an allotment of shares, but I was not aware of the specific figure of four-and-a-half million shares, or the price. 20
- Q. When did you first become aware of that figure? A. When the letter was read out at the meeting of the company on 6th July. (Objected to by Mr. Deane). 30
- HIS HONOUR: Q. When did you first become aware of this mistake in the engrossment, Mr. Nicholl? A. I think it was either Thursday or Friday of last week, your Honour, when I saw that I was reasonably close to being put in the witness box I read through the answers. 40
- Q. You drew Counsel's attention to it? A. Yes.
- Q. Over the weekend, or since the last sitting? A. Yes, your Honour.

MR. GLASS: Q. Now, we are at the meeting of 6th July, Mr. Nicholl? A. Yes.

Q. Can you recollect what you contributed to the discussion? A. The discussion relating to the proposed placement?

Q. Yes? A. I don't have any precise recollection of what I said on 6th July. I can remember - I think first of all -

Q. Perhaps before you give us your recollection -

10 May I invite the witness's attention to Ex.GG or Ex.HH? *

HIS HONOUR: Probably Ex. HH is the better of the two, isn't it, Mr. Glass? Of the three exhibits, EE, GG and HH, the preferred version seems to me to be HH, subject to what counsel may say. **

MR. GLASS: Q. Have you Ex.HH? A. Yes.***

Q. Page 7 of Ex.HH is what I draw your attention to? A. Yes. ***

20 Q. You will notice that what is attributed to there is divided by "telephone"? A. Yes.

Q. Would you read the words that are there attributed to you? A. Yes, I have read them.

Q. Now, what do you say as to the accuracy of the remarks attributed to you in that document? A. As I say, I don't have any detailed recollection of what I said on the day, but I would doubt very much whether that was all I said on that occasion.

30 Q. So far as it goes, do you have any complaint with it? A. I see that the second-last sentence "I would rather face the shareholders having to accept this situation and rather than fade away into the background" - I don't think that makes much sense, but I don't deny I would have said it. But I think I would have said more than that.

Q. What are the other things you believe you said that are not reproduced there? A. I think after

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* Exhibits GG
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** Exhibits HH
EE and GG.

***Exhibit HH

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- "solving our ...", I think "financial problems" would have gone in there.
- Q. I am sorry, I don't follow you. A. In the first sentence, "solving our" - I would have said "financial commitments" or "problems" or "difficulties".
- Q. Do you recall other things you said that are not present in that transcript? A. I think I went on to say that it was my belief that the company's available assets had all been mortgaged to the limit, or something like that, and that we would have no means of raising any further money in this regard - in this manner. 10
- Q. What was your understanding of the company's financial position during the period in which you had been a director? A. I think the question of the construction of the "Amanda Miller" came up very shortly after I was appointed to the board, and, just as a new boy, it seemed rather unusual to embark upon the construction of a \$10 million tanker without having any idea of where the moneys were coming from or any guarantee that the ship was going to get employment when it was finished, but I can remember Sir Roderick Miller saying "The main thing is to get the tanker built, and I will worry about the money and Mr. Taylor can worry about the jobs", or something like that. But it did seem strange to me. That was my initial approach to it. Then, as a- 20 30
- Q. Let me stop you there to ask you one question in regard to finance. Did the question of long-term finance on the "Amanda Miller" come up, whilst Sir Roderick was alive, at board meetings? A. I had previously discussed with a friend of mine, who is qualified in the field, how you would normally go about financing the construction of a tanker and it all seemed to be related to long-term finance. But the question of finance was left to Sir Roderick Miller, and as the various progress payments for the "Amanda Miller" fell due it became apparent that he was financing these from short-term money, and up until the Minsec crash it seemed that he was being successful in this regard. 40

But when the Minsec crash cut this out as a source of finance the truth of the advice that I had obtained became apparent - that the company was very short of funds, and as the various payments fell due for the "Amanda Miller" the company's liquid situation became more and more acute.

10 Q. Now, independently of the "Amanda Miller" what was your understanding of the company's financial situation from the time of your appointment in 1968 until the death of Sir Roderick in 1971? A. In the early days, before the various progress payments for the "Amanda Miller", gradually aggravated the situation, the company was fairly well-balanced. It had three baskets, or three avenues, of income. First and foremost was the coal, which was what the company was founded on. The coal market seemed to be reasonably successful.

20 At that stage we could not meet our commitments under the contracts which the Japanese seemed to go along with, but we were in a situation where any coal we produced we could sell. Another avenue was hotels, and the hotels were performing very satisfactorily and producing a good cash flow, for whatever that term means, but there were liquid funds always available. The third avenue was in the coastal tanker trade, and in that trade

30 we had the Millers "Macarthur", I think, and the "R.W. Miller" and they were both on permanent charter. There were a few problems associated with keeping them in employment, but they seemed to be performing well, and bringing in regular sources of money.

40 That was the situation when I first joined the company and up until the stage that the "Amanda Miller" progress payments started to fall - I think they were behind - we were behind with those. Then in the middle of all this Sir Roderick Miller decided to build the "Robert Miller" which again shocked me, and I was met with the same answers - "You have got to have two tankers as a balance in case one of them meets with some form of accident or gets out of work."

Q. What did you understand to be the company's overall financial position in April 1971 when Sir Roderick died? A. In April 1971

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we were really at the stage - we really had our backs to the wall so far as our commitments for the payments on the "Robert Miller" were concerned, and although everybody was trying very hard it seemd to be a little out of the company's league to raise this type of finance.

- Q. What was done after Mr. Taylor became chairman of the board to cope with the financial problems? A. Well, I think Mr. Evan Cameron was appointed to the board shortly after Sir Roderick Miller's death, I think towards the end of May 1971, and prior to that a finance committee was formed to look into the various financial commitments of the company and just to find out exactly what the company was committed to pay out, where the company was going to get the money from, and whether or not any of these commitments could be cut down or reduced or delayed. 10
- Q. To what extent were financial matters under discussion between April 1971 and July 1972 at board meetings? A. Well, there was much more financial information available to the board than there ever had been in the past, and the company - the directors were kept, as best they could, informed as to the progress both in regard to cutting down the demands for cash and the efforts - the results or lack of results of the efforts that the finance committee had been able to achieve. 30
- Q. During that period of April 1971 to July 1972 did you observe the extent to which the time of the company's employees was devoted to financial problems of the company? (Objected to by Mr. Deane).
- Q. You understand you are limited in your answer to those matters that came under your own observation? A. Yes.
- Q. Limiting yourself in that way, can you tell us during that period of the activities of members of Millers to deal with financial problems? (Objected to by Mr. Deane). 40
- Q. To what extent were you brought into contact with senior employees of Millers? A. I was in

fairly active communication with Mr. Murphy in relation to the Hambros loan relating to the "Amanda Miller" and knew how much time he devoted to meeting the various requirements that kept being put up to us in that regard, and I think that he was full-time on that for probably four or five weeks. I was fairly closely associated with Mr. Koch, the general manager of the company, because, quite apart from our work association, we were personal friends.

10

Q. What was your belief as to the amount of effort he devoted to the company's financial position? (Objected to by Mr. Deane: allowed.)

Q. What was your belief as to the amount of effort Mr. Koch was devoting to the company's financial problems? A. I would probably have a telephone discussion on one matter or another with Mr. Koch each week and always made it a point to ask him how his various efforts to obtain finance were progressing, as I was concerned in the matter, and he would keep me informed as to who they were approaching and what efforts they were making and what success they were having relating to finance. I knew that he had had, I think, three trips overseas to try and get finance, and my general impression was that he was more involved in obtaining finance than in - I was under the impression that the major portion of his time was spent on this question of seeking finance.

20

30

Q. What was your belief round about July 1972 as to the progress payments that were due to the Commonwealth on the two tankers and the circumstances surrounding payment? A. I was very concerned up until 30th June, 1972, that the company was substantially in arrears with its commitments to the Commonwealth in relation to the construction or progress payments for the "Robert Miller", and I know the effort - I know all the effort that Mr. Conway put into the financial deadline which was set at, I think, about 4.30 p.m. on Friday, or 30th June, if that was a Friday, when, with the co-operation of a number of members of the legal profession, they finally, at 4.30 p.m. met this commitment.

40

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Q. Did you have any understanding as to what had been the Commonwealth attitude prior to that payment? A. I think the Commonwealth understood our difficulties - while we were having difficulties - but I think they realised they just would have to lay down a deadline.

Q. Did you know what they said they would do if the deadline was not met? A. That they would commence legal proceedings to recover the moneys. 10

Q. Did you have any belief as to the effect, if any, on the company's expansion, of its financial position? A. Well, in relation to coal, I know that Mr. Murray, the colliery superintendent, had worked out a grand scheme for updating and improving the efficiency of the company's various coalmines and also in regard to opening a new mine - I think it was the Iron Bark Colliery. I know as a result of the vast pruning down that was done by the finance committee that his pursuits or efforts in this regard were substantially frustrated, and that as far as any capital expenditure on the coalmines was concerned, any substantial expenditure - I think anything over \$20,000, - had to be approved of by the Board. That was in relation to the coal. 20

In regard to hotels, the pattern in the past was to try and build one new hotel per year. That involved acquiring sites and looking into the feasibility of different areas, and in regard to the construction of hotels a site had been acquired in Wollongong for the construction of a hotel, and a licence transferred, and I think that there have been several extensions in relation to that licence and the construction of that hotel, and that unless something is done between now and December I think the whole thing will have to go back to square one and start again. 30 40

And there is another hotel - a site owned by the company at Warriswood - the company has been seeking approval to transfer of a licence for that site for some time. I was aware of the fact that one application for a transfer had been rejected and that another

application was in the process of being made and I was not aware on 6th July, but am now aware, that that licence was granted last Friday.

HIS HONOUR: I do not think we should have that, Mr. Glass. (Not pressed)

MR. GLASS: Q. On 6th July what was your belief as to the prospect of raising cash by an issue to the shareholders? A. I did not think that an issue to shareholders could be made at any worthwhile premium having regard to the state of the company's finances and commitments and to the probable state of the share market as a whole.

10

Q. What was your belief as to the acceptability or otherwise of the placement at a premium of £1.30? A. ~~If anybody had come along in regard to a proposition of a placement of £1.30 that is an effective £2.30 per share - I wouldn't have let them out the door.~~
(Objected to by Mr. Deane - struck out by direction.)

20

Q. (previous question read) A. This question prior to 6th July was never considered by me ~~because I did not think anybody would -~~
(objected to by Mr. Deane - struck out by direction).

30

Q. What was your belief as to the acceptability of the placement at £2.30 on 6th July from the point of view of what was commercially desirable? A. I considered that any director who did not vote in favour of a placement of shares at that premium, having regard to the company's financial situation, could find it difficult to answer to the shareholders having rejected the opportunity.

40

Q. What was your belief as to raising £10.7 million cash by an allotment of shares as compared with borrowing it at the rates of interest then likely to be charged? A. I have always been in favour of share capital because if you get into any difficulties in relation to servicing the capital by way of loan, then you are in strife; but if you get into difficulties in relation to your

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shareholders you can always place the reasons for the difficulties before them. One has to be paid - that is the loan capital or the interest on loan capital - and the share capital does not have to be paid.

- Q. You heard Mr. Koch's observations that day at the meeting? A. Yes.
- Q. Did you hear him make any recommendation at the end of his remarks? If so, what did he recommend? A. I don't recall what his recommendation was in detail, but basically he firstly outlined what the company's immediate commitments were and then he strongly recommended to the Board that they approve of the placement of 4½ million shares to Howard Smith at a premium of \$1.30 as a means of relieving the company's urgent need for capital finance. 10
- Q. What was the state of your mind in regard to that recommendation? A. I was always conscious of the company's need, present need, for capital and it was my belief that this was a means of solving these problems and getting over the company's difficulties. 20
- Q. What were your purposes, or what was your purpose, in voting for the allotment?
A. I voted in favour of the allotment to get a capital infusion into the company of \$10 million.
- Q. Did you have any other purpose? A. That was my prime purpose in doing it. 30
- Q. Was there any other matter in your mind?
A. I was aware of the fact that as a result of making this placement to Howard Smith, that it could result in the shareholders still having available to them the opportunity of accepting Howard Smith's takeover offer or any other takeover offer that might be made in the meantime.
- Q. Was that a factor in the thinking? A. It was a factor, but not the prime factor. 40
- Q. What was your belief when you voted as to the security or otherwise of the Hambros loan

money? A. I acted for the company in relation to the Hambros loan in relation to the Hambros loan in relation to the "Amanda Miller" and we went through several weeks of apprehension, meeting all the various requirements that were put up by Hambros or their solicitors, some of which were difficult to achieve. They were ultimately achieved, but it certainly illustrated to me that unless you saw the bank cheque or the cash in the bank there was nothing certain about the loan. I was fairly confident that in the long run those moneys may be available, but certainly it was not a surety from my point of view.

10

Q. Were there any particular contingencies that you had in mind? A. Well, one was the documentation I believe, and I can recall in relation to the previous loan that this presented some difficulty. Another was the change in the ownership of the company which, although I did not consider would affect their application, it certainly gave them a means of escaping from the obligation if they wanted to.

20

Q. What about delivery? A. On the question of delivery, I believe that Hambros were given some forewarning that there may be some delay of say three months in the delivery of the vessel, but it was my view, particularly in regard to our experience with the "Amanda Miller", that it could be sometime well after June of next year that the ship could be delivered, and this was another reason why Hambros, if it suited them, could get out of their obligation.

30

Q. Did you consider that the company had a legally enforceable contract with Hambros?
A. I do not consider it was legally enforceable.

40 Q. What was your belief as to the security or otherwise of renewals of loans from Tricontinental? A. I thought in that present financial climate where there seems to be an excess of money, that if it suited Tricontinental's convenience they would give us the money or roll the loans, but if anything more advantageous turned up for them,

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that they had the opportunity to avoid their obligations

- Q. Assuming the company had received the Hambros loan after 6th July what need, if any, did you consider there was for 10.7 million dollars? A. Well, firstly, in the coal interests, the opening of the "Ironbark" Colliery was certainly quashed by action of the directors and there was the considerable amount of money - I don't know the figure, but it is probably in excess of \$2 million required to have that available to go into production should there be an upturn in the demand for coal - and I believe that Mr. Murray, the colliery superintendent, could spend to advantage other moneys at the company's other mines. In relation to hotels, we had the Wollongong Hotel that is to be built. We now have, and did have under consideration, the Warriewood Hotel. The company had also achieved remarkable success in relation to the conversion of some of their hotels to taverns, and Mr. Walker, the hotel manager, was anxious to convert other of the company's hotels to this type of trading, particular hotels that he considered were suitable and lent themselves to this type of development and I suppose he would have had, under the normal course other sites to acquire. That is in relation to the hotels. In relation to tankers, there was money required for future progress payments, required for the "Robert Miller".
- Q. What was your view as to the propriety or otherwise of making available the Cooper Bros. report to Howard Smith? A. I was not aware of the fact that the Cooper Bros. report had been made available to Howard Smith. (objected to by Mr. Deane).
- Q. Lastly, what was your belief as to the effect of your decision on the board if the Howard Smith takeover had succeeded? A. It was my belief no matter which offer succeeded, Howard Smith or Ampol, that I would no longer be a director of Millers.
- Q. How did you view the prospect of ceasing to be a director? A. It did not concern me very much. I was finding the obligations as a director more and more onerous and the remuneration less

and less rewarding.

Q. What part, if any, did your position on the Board play in your decision. A. None.

MR. KIRBY: I have no questions, your Honour.

MR. ROGERS: No questions, your Honour.

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by Mr. Hughes
Q.C.

CROSS-EXAMINATION

10 MR. HUGHES: Q. Did you, at some time after your appointment to the Miller Board, form a belief as to the adequacy or otherwise of the Miller issued share capital? A. Yes, I considered that the share capital was inadequate, particularly as these two tankers were built.

Q. Can you tell his Honour approximately when you first formed that belief? A. Probably from towards the end of 1969 or early 1970, as the progress payments for the "Amanda Miller" became more and more onerous.

20 Q. Can you tell his Honour whether or not you continued to hold that belief from the time you first formed it until the events of July 1972? A. I have always held that belief.

30 Q. Did you form in your mind any belief or understanding as to the way in which in your opinion the Miller capital had become inadequate, the share capital had become inadequate? A. Well, Sir Roderick Miller kept a pretty tight fist on the running of the company and from my own knowledge of his affairs and strain that was put on his own

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* Exhibit V

liquidity situation at the time of the T.N.T. takeover raid, it was my opinion that he had his own liquidity problem and for that reason he probably chose not to make any issue of capital to shareholders.

MR. ROWLING: I have no questions, your Honour.

MR. LOCKHART: I have no questions, your Honour.

MR. DEANE: Q. Could Mr. Nicholl have exhibit V, *
the minutes of the meeting of 6th July (handed
to witness). Do you recognise those as being 20
the minutes of the meeting of 6th July?
A. Yes, I recognise those.

Q. I ask you to turn to p.9. You will observe
that the question of the allotment of shares
was dealt with at the top of p.9 - do you see
that? A. I don't think so. Mine starts with
"Sir Peter Abeles stated".

Q. By that time the motion had been passed?
A. Yes, that is right.

Q. After the first two paragraphs the Board went 20
on to consider a number of other matters?
A. I think I am on the wrong page. You said
at the top of p.9?

Q. Yes, I said after the first two paragraphs on
page 9. "The Board went on to consider
other matters"? A. Yes.

Q. "The first was the consideration of group
results"? A. Yes.

Q. Would you read what is there and then, to the 30
best of your recollection, would you tell his

Honour what was said? A, In regard to the question of group results?

Q. Yes. A. I have no recollection of what was said in that regard.

Q. Do you recall being told that the group profits for the year ending 30th June 1972 would be in the vicinity of £2 million?

10 A. I believe figures like that were being discussed, and also that this was a rather extraordinary year with capital profits on the sale of hotels and other items.

Q. Of course, the capital profits were on top of group profits of £2 million, weren't they?

A. I am not a financial man.

Q. Well, is the situation that you don't know?

A. I can see by reading this, yes.

Q. So the capital profits were going to add the group profits to £3 million? A. That is what is down here, yes.

20 Q. Which, of course, would more than double the profits of the previous financial year?

A. Yes, I believe that is so.

Q. A little further down do you see what was discussed in relation to coal? A. Yes.

Q. Will you agree that the view was expressed that the present time was not the appropriate time to dispose of the company's colliery interests? A. Yes.

30 Q. On the question of disposing of those interests, that was something that had been before the members of the Board on a number of occasions? A. There had been directors in favour of disposing of them and others in favour of retaining them.

Q. Of course, the director most in favour of retaining them.

Q. Of course, the director most in favour of retaining them was Mr. Taylor, was he not? A. Yes.

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- Q. We find immediately after this allotment Mr. Taylor commenting that the opinion had been expressed that the present would not be an opportune time to consider disposing of the colliery interests? A. Yes.
- Q. Did you regard that as surprising? A. No.
- Q. Were you one of the directors in favour of disposing of the colliery interests?
A. I had an open mind in regard to it.
- Q. Of course, if they had been disposed of there would be no need for any capital? A. I did not consider that we should dispose of the coal interests at a time when the coal industry was on a down turn. 10
- Q. But if they had been disposed of, far from there being a need for capital, there would be a considerable receipt of capital? A. That may be so, but I did not see any reason for selling them out for the sake of selling them out. 20
- Q. My question to you I think was a simple one. If they had been disposed of there would have been a receipt of capital instead of outgoings? A. If they had been disposed of, yes.
- Q. Coming back, we have the situation of a profit of £3 million in respect of the year ended 30th June 1972, including an abnormal amount of £1 million? A. Yes.
- Q. Did that come as a surprise to you? A. It did. 30
- Q. Immediately after the allotment of shares it came as a surprise to you? A. No, not immediately after the allotment of shares. I knew we were going to have a considerably improved year, but it was a peculiar year.
- Q. So, can I take it, that in the consideration of the question of whether or not shares should be allotted, you asked no questions at all as to the provisions for the current year, the profits for the current year?
A. I did not ask any questions in that regard, no. 40

Q. Did you direct your mind to it? A. No.

MR. DEANE: Could the witness be shown exhibit KK *
please (shown)

Q. I think you have seen a copy of that report
before, have you not? A. Yes.

Q. I ask you to turn to annexure D? A. The
annexure or appendix?

Q. The appendix, you have seen that before?
A. When I say I have seen it before, that
is exactly what I mean. I have seen it, but
not looked at it in any great detail.

10

Q. You were aware, of course, that this report
had been prepared by a well known firm of
accountants in relation to the value of
shares in Miller's? A. Yes.

Q. No doubt you assumed that it would contain
projections of profits? A. I have no knowledge
of what it would contain at all. I am by no
means a financial man.

20 Q. Looking at it now, do you see that it contains
projections of profits? A. Yes.

Q. Do you see that the projected profits in
respect of the 1973 financial year are in
excess of £2 million? A. Yes.

Q. After tax? A. Yes.

Q. Which means, of course, a considerable increase
again in 1973 over the profits of 1972?
A. That may have been their view on projected
profits. I have my own views on it.

30 Q. You see, 1974, it goes up again? A. Yes.

Q. You were aware, were you not, that the staff
of the company had prepared projections up to
1976? A. If that is the information that was
submitted to the Board from time to time, I
was aware of goals or estimates of profits
and cash flow.

Q. Of course, in terms of cash flow the projected
profits of this company could be rather

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misleading, couldn't they, for one reason,
and that reason is depreciation. Do you
agree with that? A. I honestly would not
know.

Q. Well, you see, in terms of cash flow the
company was depreciating its ships at a very
high rate, was it not? A. I am not aware of
that.

Q. Well, I suggest to you that plans would show
that in respect of the "Robert Miller" and
"Amanda Miller" depreciation of something
in excess of a million dollars for the two -?
A. You might suggest it to me. I truly would
not know. 10

Q. Well, can we take it in terms of your
consideration of this allotment, you paid no
attention whatsoever to the question of
internal cash flow of the company? A. As I
say, I have my own views about the internal
cash flow of the company in the immediate
situation in which we were placed on 6th July. 20

Q. Well, what were they? A. Firstly in relation
to coal -

Q. Interrupting you, could I ask you this, did
you pay consideration to this at the meeting?
A. Yes. Firstly, in relation to coal, I had
doubts as to whether any profit at all was
being made out of the sale of coal - I think
our demand was about one million tons down on
what the Japanese said they were going to buy
from us. That was in relation to coal. I
did not therefore have or see the possibility
of any great cash infusion coming from there. 30

In relation to hotels, we had just sold
six hotels to finance the commitment to the
Commonwealth, and I thought that cash coming
in from the hotels would be substantially
repleted as a result of the sales of these
hotels, one of them being one of the top
performers; and thirdly, in relation to the
tankers, I knew as at September this year -
the month just gone - our two other tankers,
the Miller's "MacArthur" and the "R.W. Miller"
would have run out of their terms of charter
and that no further work had been obtained 40

for them. The "R.W. Miller" is at present I think tied up and out of work and costing the company money. I think that October will see out the "Miller's McArthur"; and then consideration has got to be given to selling them for scrap.

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Q. In this picture of gloom as at July 1972 could you see one bright spot? A. Yes.

10 Q. Can you tell us about that? A. Yes, the Howard Smith allotment.

Q. And of course, apart from that, could you see any other bright spot? A. The fact that the takeover fever had caused the shares to go up in value.

Q. I am asking you about the prospects of the company? A. The prospects of the company, I thought, in the long run were good, but in the immediate term they were very doubtful.

20 Q. What was your estimate as to the cash flow of the company? A. I really did not make any estimate as to the cash flow. As I said, I have my own beliefs on it. I know the Finance Committee had come up with figures, put up lots of figures to us on cash flow that were very rarely met.

30 Q. Would the situation be this; that on cash flow you had your own views which you were aware were in contrast to the views expressed in the documents which had been placed before you, in conflict with those? A. The only documents placed before me were the monthly forecasts, and our experience with those was that the forecasts were rarely met and the reason for that being that the company, or those making the forecasts were not particularly experienced in the field of making forecasts because this was the first time that they had had to do it.

40 Q. Not as experienced as you? A. I do not claim any experience. All I can judge on is what results I saw compared to what the forecasts were.

Q. Of course, you had a situation, did you not,

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where you knew Cooper Bros. had prepared a detailed report relating to the affairs of Millers? A. I knew Cooper Bros. had been asked to make a report.

- Q. You had been given a copy of the report?
A. I had not.
- Q. You had seen the report? A. I have seen the report since 6th July, but prior to 6th July I had had a discussion with Mr. Cameron in which I asked him had he seen the report and he said he had and the only thing he said, mentioned to me as being of interest, was that they put a value on the shares of something between I think \$2.70 and \$2.30, and for that reason he thought that probably the Howard Smith offer was not such a bad one after all. 10
- Q. Did it occur to you at the meeting of 6th July that the Cooper Bros. report might contain information which would be of great value as to the projecting of the profits of the company? A. I was not interested in projecting profits. I was interested in the immediate problems of the company. 20
- Q. Well, in the projected cash flow? A. No, I did not. I am afraid I could only see one thing at that stage.
- Q. You would agree with me, I presume, that the financial position of the company as at 6th July 1972 in so far as any liquidity problems were concerned was far better than the situation as it existed as at 30th June 1971? A. Well, I did not think so. 30
- MR. DEANE: Could the witness be shown exhibit MH.3 please? That is the Annual Report. (shown)
- Q. I show you the annual report of Millers and its subsidiary companies. Would you turn to the page after the profit and loss accounting for the holding company - the page has not been numbered. It is a bit more than half way through? A. Yes. 40
- Q. "As at 30th June 1971 Millers had capital

Exhibit MH.3

commitments in respect of tankers of more than 16½ million dollars". A. That is what it says there.

Q. You would not question that? A. No.

Q. You, no doubt, saw those accounts when they were published? A. Yes.

Q. They had other commitments in the vicinity of \$2 million? A. Yes.

10 Q. The commitments in relation to the tankers were of course as to part in relation to the "Amanda Miller". That is so, isn't it? A. Yes.

Q. And as to the residue in relation to the "Robert Miller"? A. Yes.

Q. In so far as the "Amanda Miller" was concerned, delivery of that vessel was to take place in the coming financial year, that is the year ending 30th June 1972? A. Yes.

20 Q. So far as the "Robert Miller" was concerned, delivery was to take place in the year ending 30th June 1973? A. That was when the contractual date for delivery was, yes.

Q. Would you agree with me that as at 30th June 1971 on your understanding Millers had made no arrangements whatever to meet those commitments of something less than \$ 17 million falling due in the next two financial years? A. They had made no successful arrangements.

30 Q. Would you agree with me that the problem of those commitments was the most important problem facing Millers as it entered the financial year which ended on 30th June 1972? A. That was a substantial problem, yes.

40 Q. It was the overwhelming problem, was it not, Mr. Nicholl? \$17 million to be found in two years and no arrangements to find it? A. As I say, so much of the company's time was spent in meeting this problem. I suppose it was the overwhelming problem.

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- Q. Of course halfway through the year which ended June 1972 the opportunity came of selling one or both of these tankers?
A. Halfway through?
- Q. Halfway through the year ended June 1972?
A. Yes.
- Q. At a profit, on your understanding?
A. I assume it was at a profit, yes.
- Q. You were opposed to the idea? A. Yes.
- Q. Coming, if I may, to the things that took place after 30th June 1971, did you from time to time receive copies of the management reports? A. Yes. 10
- Q. Did you read them? A. I read them at the meetings.
- Q. Carefully? A. Yes.
- Q. Indeed, it would be true to say, would it not, that these were the most important sources of information available to you as to the financial affairs of Millers?
A. I was also in personal contact with Mr. Koch and Mr. Taylor, discussing the same subject matter. 20
- Q. But the management reports, to your knowledge, were prepared by Mr. Koch? A. Yes.
- Q. And placed before the directors by him with the object of frankly informing the Board of the true position? A. Informing the Board of their progress in these matters and the true position, yes. 30
- Q. And doing it frankly? A. As far as I knew, yes.
- Q. You never at any time questioned the frankness or accuracy of what was stated in these reports, did you? A. I had no occasion to, no.
- Q. You accepted them? A. I accepted what was said in the reports.
- Q. I presume you accepted them on the basis that what was said in these reports was said by the people actually involved in attempting to 40

solve Miller's financial problems?
A. I accepted what was said.

MR. DEANE: Could Mr. Nicholl be shown exhibit MH.13 please, the annual report perhaps could be handed back. (complied with). *

- Q. Would you turn first to the management report of 28th September 1971? A. Which date?
- 10 Q. 28th September 1971, the management report?
A. Yes.
- Q. Do you see the heading "Finance" at the bottom of the first page? A. Yes.
- Q. Would you read to yourself what appears under that heading? A. Yes, I have read that.
- Q. I suggest to you that when you read that you saw that the first steps were being taken for the resolution of Miller's liquidity problems. Would you agree with that?
A. I saw that steps were being taken to finance the construction of the "Robert Miller".
- 20 Q. Well, first, the moneys from Hambros had come through? A. Yes.
- Q. Which removed all the commitment problems that had existed in relation to the "Amanda Miller"? A. They relieved the commitment problem but the loan had to be serviced.
- Q. Second, short term finance had been repaid to a considerable extent? A. Yes.
- 30 Q. Third, the Commonwealth was not pressing in respect of any outstanding payments in relation to the "Robert Miller"? A. I think it was my understanding that they were pressing but they understood our situation.
- Q. Well, do you see the sentence, "At this stage they are not pressing for the "Robert Miller" outstanding payments? A. Yes.
- Q. You say that is inaccurate? A. I do not say it is inaccurate, but I think they were demanding

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Equity Division

No. 6

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3rd October 1972
(continued)

the payment and in fact they were saying
"Well, keep up your efforts".

- Q. Do you see the next paragraph that the Hambros bank is anxious to make a start on finance for the "Robert Miller"? A. Yes, I see that.
- Q. Did you doubt that? A. I did not doubt it, no.
- Q. I suggest to you that the matters there indicate a great improvement in the liquidity problems facing Millers as at 30th June 1971? A. Steps had been taken to improve them. 10
- Q. I will put the question again, I suggest to you that the matters referred to there indicate a great improvement in the liquidity problems facing Millers as at 30th June 1971? A. A great improvement towards obtaining the finance relating to the problems, but not a great improvement in relation to the servicing of those moneys.
- Q. With whom did you discuss the question of servicing long-term finance on ships? A. I did not discuss it with anyone. I had my own - 20
- Q. Didn't you tell his Honour that you had some discussions with someone whom you knew, about financing ships? A. Yes.
- Q. Who was that? A. Mr. John Field.
- Q. What is his position? A. He is a graduate of the Harvard Business College or something and at the time I think he was working for the Wells Fargo bank in America. 30
- Q. He told you that the ideal finance for tankers was a long-term finance? A. Yes.
- Q. Because the income they generated was such that you could pay, as it were, from the income if the loan were properly constructed, all interest and all capital and still have a healthy excess? A. That is assuming that the ships continued in work, yes.
- Q. Has the "Amanda Miller" every been out of work 40

since she was commissioned? A. She has not been out of work, but in my opinion she should have been. She should have been put in for quite a bit of work to be done on her.

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- 10 Q. You mean the ordinary repairs? A. Not the ordinary repairs. It was due to go in in November of this year for the first time to have any mechanical work and other matters attended to, and in my opinion, having regard to some photographs that the Board was shown of the ship, that it would be in requiring treatment, particularly painting treatment, for some considerable time.
- 20 Q. You have seen the cash flow documents prepared in relation to both the "Amanda Miller" and the "Robert Miller"? A. I do not think I have seen them in detail. I have seen figures presented at Board meetings but I do not think I have seen or specifically asked for and seen the cash flow figures.
- Q. You are aware that there are cash flow figures in relation to the operations of the "Amanda Miller"? A. Yes.
- Q. You are aware that the facts on the operations of the "Amanda Miller" by 6th July assisted the projected situation? A. I would agree with that, at the expense of the ship.
- 30 Q. Did you raise that at the board meeting prior to 6th July? A. Some photographs which I have in court if you care to see them were presented to the board and concerned me.
- Q. When? A. Sometime between March and June.
- 40 Q. In so far as the servicing of the loan to which you have referred is concerned, would it be accurate to say that your understanding was that unless something went wrong the operations of the ship would produce sufficient revenue to provide for all repayments - capital and interest - and leave a substantial profit? A. Assuming everything went regularly, that is so.
- Q. And a very substantial profit A. I have asked for somebody to run out figures on that and I have never seen them.

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- Q. A million dollars a year? A. That is one thing I did ask for, in relation to when they were considering the charter for the "Robert Miller", to see how in actual fact the "Amanda Miller" was performing, and nobody to date has produced the figures to me.
- Q. Of course, if it were a million dollars a year it would have to be something very substantial going wrong, wouldn't it? 10
A. Well, there are lots of things that can go wrong.
- Q. As a solicitor, of course, no doubt you have come across the concept of insurance?
A. Yes.
- Q. Might I take you from the management report of 28th September to 18th November 1971, the management report? A. Yes.
- Q. Do you see the first paragraph of that report, "As advised in the September report we are proceeding as quickly as possible with our financial negotiations to cover our immediate and future capital commitments"? A. Yes. 20
- Q. You read that, I presume, at the time the report was made available to you? A. I think so. Yes, I would have read that.
- Q. Would you agree with me under "Finance" - and if you would like to check before answering the question - that what was involved in the financial negotiations "to cover our minimum and future capital commitments" was the following; first, the arranging of construction finance for the Robert Miller - would you agree with that? 30
A. This was - yes.
- Q. Second, the arranging of long-term finance for the Robert Miller? A. Yes.
- Q. Third, the arranging of some long-term finance on hotel properties? A. Yes.
- Q. And fourth, the selling of certain hotels to raise money? A. Yes. 40

- Q. That was what was involved? Those were the four things that were involved in the reference in the first paragraph of this report, to "proceeding as quickly as possible with our financial negotiations to cover our immediate future capital commitments?"
A. That is assuming that the company's only activity related to tankers.
- 10 Q. No, what I am putting to you is that on a fair reading of that management report, on the reading of it and as you read it at the time, the four matters I have put to you were the matters involved in the financial negotiations to cover "our immediate and future capital commitments" referred to in it? A. I did not read it that way.
- Q. Well, show me where the report indicates that any other matters were - A. Nowhere in the report would indicate that.
- 20 Q. Then, would you agree with me that on any reading of the report the four matters that I have put to you were the principal matters involved in relation to what is referred to in the first paragraph? A. Subject to the qualification I have just mentioned, that would be so.
- Q. No, I will put the question again and you may make any qualification to it, would you agree with me that on a reading of this report it is clear that the probable matters to which the report refers as being related to the "financial negotiations to cover our immediate and future capital commitments" are the four matters I put to you? A. If you read the report in isolation and assume that I knew nothing else about the affairs of the company that would be so.
- 30 Q. Can we turn now to the March 1972 report?
A. Yes.
- 40 Q. Oh, I think I will take you straight to the May report, Mr. Nicholl. Have you that report now? A. Yes.
- Q. Do you recall seeing that before? A. I was at the meeting, yes. I would have seen it before.

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- Q. Subject to the problem of servicing long-term bank capital, I think you have agreed with me that the problems in relation to the commitments concerning the "Amanda Miller" were solved by September 1971?
A. I think there may have been some additional payments, or one further payment, but basically they were solved.
- Q. I suggest to you that the Hambros loan covered many other things but final payments? 10
A. I just have it in the back of my mind there was some other payment, but I would agree with that basically.
- Q. Of course, the remaining problem in so far as commitments were concerned, as at 30th June 1971 concerned payments for the "Robert Miller"? A. The remaining problem in relation to tankers, yes.
- Q. In relation to any commitments? A. All other commitments had to take second place. 20
- Q. You have told his Honour that when the opportunity for selling one or both of the ships presented itself in early 1972 you were against it? A. I was against it because apparently it was a very good idea to build them.
- Q. Would you look at the May report in so far as finance is concerned and see if it rings a bell to you? A. Yes.
- Q. That contains, does it not, the planned method of financing the "Robert Miller"? 30
A. It contains the solution that the Finance Committee came up with, yes.
- Q. Apart from the proceeds of the sales of the hotels, the planned procedure was, short-term, for construction finance from the Bank of N.S.W., and long-term, mortgage finance from the Commonwealth Superannuation Fund, and financing from the Hambros bank? A. Yes.
- Q. Would you agree with me - and I would ask this as a general question at first - that by 30th June, subject to delayed negotiation in relation to the Commonwealth Superannuation 40

Fund loan and subject to your only being fairly confident in relation to the Hambros loan, all of the planned projects contained in the May report had been, as it were, achieved - the planned objectives had been achieved, in the May report? A. They had been achieved in principle, yes.

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- 10 Q. When this May report came out did you agree this was a good way of doing things? A. I went along with it, but I was not in favour of it.
- Q. You were not in favour of it? A. I didn't like selling the hotels.
- Q. Did you express your opposition to it? A. I did not express my opposition. We did not have any alternative.
- Q. What about selling the Bexley North Hotel? That was something that was not originally planned, was it? A. No.
- 20 Q. Were you against that? A. I went along with it, but I did not like selling a top performing hotel.
- Q. Did Mr. Taylor express the view that the price offered was such that directors would be in breach of their duties to shareholders if they did not accept? A. I would not have thought he put this as highly as that, but it was an opportunity, in the circumstances, to raise money.
- 30 Q. Were you in court when Mr. Taylor said in his evidence that the price offered in relation to the Bexley North Hotel was so good that the directors would have been in breach of their duties to their shareholders? A. I do not think I was in court (question objected to by Mr. Glass - disallowed).

40 MR. GLASS: Before your Honour adjourns, a matter has just arisen upon which I would like your Honour to rule. There has been a particular sensitivity on our part to publishing details of the "Amanda Miller"'s earnings. This morning a question was put to Mr. Nicholl as to what those earnings

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would be after allowance for principal and interest. The witness did not agree to it. He said he did not know one way or the other. We are apprehensive that the question, though unanswered, might find its way into the financial press and we ask your Honour to give an indication that that be not published.

MR. DEANE: I agree with that, with respect.

HIS HONOUR: The question was put. Mr. Nicholl did not agree to it so there is no evidence that that is the earnings, but beyond that I do not think I should intervene. There being no evidence about it, I shouldn't imagine there is any purpose in publishing non-evidence. 10

(Luncheon adjournment)

HIS HONOUR: You are still on your former oath, Mr. Nicholl.

WITNESS: Yes, your Honour.

MR. DEANE: Q. Coming to the meeting of 6th July, is the position this, that you yourself did not make any calculations in respect of future cash flows? A. No. 20

Q. Did anybody mention the anticipated cash flows to the meeting? A. They may have. I have no recollection.

Q. I suggest to you that nobody said one word about moneys being available from internal cash flows? A. That could be so. I just have no knowledge.

Q. You appreciate, of course, that in so far as the existing shareholders are concerned, the allotment of share capital can have disadvantages? A. There may be, but I cannot see them. 30

Q. For example, normally that share capital would be serviced by dividends, would it not? A. Yes.

Q. And at this time the company was paying a dividend of 8%? A. Yes.

Q. I think it was anticipated, was it not, that the dividend would be increased to 10% in the coming year? A. It was anticipated, but the finance had not been finalised. 40

Q. Did you do any calculations as to the effective cost in so far as the existing shareholders were concerned of paying a dividend at 8% as distinct from paying interest at 8%?

A. I did not. I made no calculation - I am not a mathematician. I roughly worked out that I did not think there was very much in it.

10 Q. Of course, you were aware that moneys paid by way of dividend would be payable from moneys remaining after tax had been paid?

A. Yes, that would be so.

Q. And moneys paid by way of interest constitute a tax deduction? A. Yes.

Q. Did you do any calculation in relation to that? A. I didn't, but I still had my own idea that there would not be very much in it.

20 Q. Did anybody mention the relationship in so far as the effective cost to the old shareholders of paying money by way of dividend and paying money by way of interest? A. It may have been mentioned. I do not have any recollection of it.

Q. I put it to you that it was. Would you agree with that? A. I just do not have any recollection. It may have been mentioned or it may not have been mentioned. I do not recall it being mentioned.

30 Q. Quite apart from what was paid by way of dividends, if shares are allotted the recipient of the shares enjoys an interest in undistributed profits, does he not? A. I would assume that to be the case.

Q. Which, of course, is another disadvantage to the continuing shareholder? A. That has got to be balanced up against the amount that the new shareholder brings into the company.

40 Q. Was anything said about that at the meeting? A. I don't think anything had to be said about it. They were bringing in \$2.30 per share.

Q. What did you think of the fairness of the Ampol offer of \$2.27? A. I thought it was too low.

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- Q. You thought the shares were worth more?
A. I thought the shares were worth more, yes.
- Q. Which means, of course, that involved in this issue was a dilution of shareholders' equity. Would you agree with that?
A. A slight dilution.
- Q. What do you mean by a "slight dilution"?
A. Perhaps somewhere between 10 cents and 20 cents.
- Q. You thought that the shares were worth about \$2.50? A. That was about the lower end of the range I had in mind. 10
- Q. The lower end was \$2.50? A. Yes.
- Q. Notwithstanding this picture of unmitigated gloom? A. I think anybody that had shares in the company, the majority shareholders in the company had remained with it through thick and thin and I think that anybody who had waited and ridden that out until now would be prepared to wait for another couple of years when things would have improved. 20
- Q. If you thought the shares were worth \$2.50, the fact that money had been subscribed at \$2.30 would effectively, as it were, nullify your comment in relation to undistributed profits, would it not. (objected to by Mr. Glass - rephrased).
- Q. You said that this infusion of \$2.30 would overcome, as it were, any disadvantage to the new shareholder, sharing undistributed profits? A. I can't think I said it. I may have agreed with you. 30
- Q. Well, do you say it? A. I have never really given it any consideration.
- Q. Nothing was said about it about that at the meeting? A. I don't recall anything being said.
- Q. Was anything said at the meeting, apart from Sir Peter Abeles' comment about the allotment, bringing about a dilution of shareholders' equity? A. I do not recall anybody other 40

than Sir Peter Abeles mentioning anything about that.

Q. What you tell his Honour, as I understand it, you first knew of the proposed allotment of 4½ million shares at £2.30 when Mr. Taylor read out the letter? A. Yes, that is so.

Q. Of course, the picture that Mr. Taylor had given before reading the letter was that there had been a dramatic development?
10 A. Yes, I think that is fair.

Q. They were the words he used? A. I don't recall the exact words he used.

Q. And the letter was presented, as you understood it, as being an unsolicited approach from Howard Smith? A. Yes, that is so.

Q. You knew that Howard Smith were offering to pay £2.50 for these shares, as shares in Millers, in the market place? A. Yes.

Q. Did it not occur to you that it might be possible to negotiate a price of £2.50 in respect of the shares being allotted?
20 A. Negotiate a price of £2.50 with whom?

Q. With Howard Smith? A. I did not give any consideration to that. I was considering the offer or the application, as it was made.

Q. But, you see, Howard Smith, to your knowledge, had offered £2.50 for shares in Millers, had it not? A. Yes.

Q. Which means that they had indicated that to their minds at least the minimum value of these shares in Millers? A. Indicated what they were prepared to pay.
30

Q. Wouldn't you agree that, as you understood it, they had indicated that they were of the view that the shares were worth at least £2.50? A. Yes.

Q. And here comes an unsolicited offer at £2.30? A. Yes.

Q. Did it not occur to you that perhaps you

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Exhibit Y

* Exhibit DD

should attempt to negotiate a higher price?
A. I frankly was quite prepared to accept
their price at £2.30 without trying to
prejudice the situation by asking for more.

- Q. Do you think it would have prejudiced the situation for somebody to have said, "Look, you have already offered £2.50 for shares in Millers. Surely the correct price on your own approach is £2.50". Do you think that that would have prejudiced it? A. In my experience of negotiations people can often just turn on their heel and walk away, and I have missed out on a few opportunities like that myself. 10
- Q. Would you agree with me that no one word was said at this meeting about the possibility of negotiating a higher price? A. I think I would agree with you on that, yes.
- MR. DEANE: Could the witness be shown exhibit DD,* the minutes of the meeting of 14th July please and could he also have exhibit Y, the shareholders' circular of 7th July. (shown to witness.) 20
- Q. Will you turn to p.3 of the minutes of the meeting of 14th July please? A. Yes.
- Q. Do you see half way down the page, "Ratification of correspondence, etc." - at the Sydney Stock Exchange? A. Yes.
- Q. You were present at that meeting? A. Yes.
- Q. At the meeting the directors present ratified, among other things, the sending of a circular to shareholders dated 7th July? A. Yes. 30
- Q. You have that circular in front of you, I gather? A. Yes.
- Q. Had you seen that before? A. I have seen it before, but I do not recall the details of it.
- Q. Did you play any part in the preparation of that? A. I doubt it, but I will check - no, I did not.
- Q. At the time of this meeting on 6th July what 40

was your view as to the possibility of further takeover offers from Millers, apart from the existing Ampol and Howard Smith takeover offers? A. It was always on the cards that somebody could come in.

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- 10 Q. You see in the letter of 7th July, fourth last paragraph, last sentence, "Irrespective of such suspension", referring to the suspension of shares on the Stock Exchange, "You are now in a position to assess any further offers which may be made, as well as have been received from Howard Smith"?
A. Yes.
- Q. Did you take any objection to that statement when you saw it in the circular of 7th July?
A. I do not think I paid much attention to it.
- 20 Q. At this meeting of 6th July did you consider the effect that the allotment might have on any other possible takeover offers for Millers? A. Not really.
- Q. You will agree with me, would you not, that in the company consideration it was faced with a completely different situation as a result of the allotment? A. Yes, I would agree with that, but they would have themselves to blame.
- Q. By that you mean I suppose either Ampol or Bulkships? A. Sorry?
- 30 Q. By that you mean either Ampol or Bulkships?
A. By themselves to blame? No.
- Q. What do you mean by that? A. I mean any other company that might be interested in taking over and making an offer.
- 40 Q. Of course, the effect of the allotment was that any company proposing a takeover offer would have to find 50% more money as a result of the allotment than it would have had to have found if the allotment had not been made? A. That is true, but they would take over a company that did not have liquidity problems.
- Q. Will you just answer the question please?

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A. I honestly thought I was answering the question.

Q. You would agree with me that any company considering or proposing to make a takeover offer in respect of Millers would have to find 50% more money as a result of the allotment?

A. Yes.

Q. Of course, on what you have said, any company proposing to make a takeover offer, if it shared your views, would be of the view that the shares were less valuable because of the allotment? A. I wouldn't agree with that.

10

Q. The situation is, is it not, that in your view the existing shares were of value of at least £2.50? A. That was my view, yes.

Q. And you have issued shares in a price of £2.30? A. Yes.

Q. Which must have a consequence of reducing the value of the shares, mustn't it? A. It may seem that way, but -

20

Q. Well, did that consideration enter your mind at the meeting of 6th July? A. I don't think it did, no.

Q. I suggest to you that nobody said anything about that at this meeting? A. I think Sir Peter Abeles said something about "Watering down".

Q. At the commencement of the meeting? A. Yes.

Q. Apart from that, would you agree with me that nobody said anything about that at the meeting? A. I don't think so no, I don't recall.

30

Exhibit D

MR. DEANE: Could Mr. Nicholl have exhibit D please, the minutes of the meeting of 6th July (shown).

Q. We have been told that at this meeting Mr. Koch gave a financial report? A. Yes.

Q. To shorten matters, I would refer you to the second half of page 4 and page 5 down to where Mr. Koch recommends the allotment? A. You want me to read it?

- Q. If you could refresh your memory in relation to it? A. Yes.
- Q. You would agree with me, would you not, that that is a fair summary of what Mr. Koch said at the meeting? A. I would agree with that, yes.
- 10 Q. What was being put to the meeting was that the short term commitments of Millers constituted a financial consideration justifying the allotment? A. I think that was the basis that Mr. Koch put it on, yes.
- Q. Indeed, he spelt them out, on the list there? A. Yes.
- Q. Of course, involved in that, there were two major things, were there not, the first being the Hambros bank finance, or the availability of the Hambros Bank finance - do you agree with that? A. Is that mentioned here?
- 20 Q. I am just asking you whether on your understanding of what has been put in relation to the immediate financial needs of Millers, was one of the main things involved the availability of the Hambros finance? A. It was the financing of the "Robert Miller", yes.
- Q. Because, if Hambros finance were available half of the short-term commitments were covered? A. Yes, that is so.
- 30 Q. The other major thing involved was the Tricontinental finance? A. Yes.
- Q. Because, there you were aware that negotiations as at 30th June had reached the advanced stage for a loan of \$3 million from the Commonwealth Superannuation Fund? A. Yes.
- Q. It was anticipated that that loan would be available in the near future - (objected to, rephrased).
- 40 Q. You had been told, had you not, that the management of the company anticipated that the loan would be available in the near future?

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Exhibit PP

A. There was talk of a loan from the Commonwealth Superannuation Fund and I thought that the money to be paid on 30th June was coming from that source. I do not think I was aware until this meeting that the money in fact came from Tricontinental.

Q. But you were told, were you not, that there had been a holdup in the moneys from Commonwealth Superannuation Fund and Tricontinental had, as it were, arranged finance pending the arrangement of long-term finance? A. I am not sure that I was told that. I have been told it since. 10

Q. Did you ask about it? A. The only thing I knew, the company had in fact met the deadline imposed upon it by the Commonwealth.

Q. Of course, the other main factor in the \$10 million was the Mitsui loan, was it not? A. The sum of \$800,000 referred to was another ingredient, yes. 20

Q. So long as you have been a director of Millers, Mitsui had been prepared to renew loans if and when they were needed? A. I think there was a very good association between Sir Roderick Miller and whoever it is from Mitsui that made these moneys available.

MR. DEANE: Could Mr. Nicholl have exhibit PP please. (shown to witness).

Q. No doubt in your experience as a solicitor you have arranged mortgage finance for clients? A. Yes. 30

Q. On many occasions? A. On a fair number of occasions.

Q. If, for example, a client were to go into you and say, "I have a house of the value of \$40,000 on which there is one mortgage, and one mortgage only, and I owe \$20,000. The mortgage is repayable in six months time. Could you re-negotiate another mortgage for me over my house to enable me to repay the existing mortgage?" What would your answer be to him in terms of whether or not he had 40

any security to offer. (objected to by Mr. Glass - allowed).

HIS HONOUR: Q. Can you remember the question?

A. Yes, I can remember the question. I would say his chances of re-negotiating the loan would be fairly good, but it would involve checking out again the security to see that there was no main road running through it or encroachment or something that had developed since the previous mortgage, and also, the mortgagor's ability to service the loan - you do not rely upon the security itself, or we don't.

MR. DEANE: Q. You certainly would not suggest he had no security to offer? A. It would depend on what the results of the inquiry were.

Q. You would certainly not suggest he had no security? A. I would not suggest he had no security.

Q. Of course you were aware that the Hambros Loan was the end finance for the "Robert Miller"? A. Yes.

Q. And was to be secured over the "Robert Miller"? A. Yes.

Q. So if the Hambros Loan did not come through, in terms of repaying any construction finance the "Robert Miller" would itself be available as security? A. It would be available, yes.

Q. You were also aware that the Tricontinental moneys were secured over a number of companies' hotels? A. Yes.

Q. Having a value of approximately £8 million? A. There are different ways of looking at values. There is our way, the mortgagee's way and all sorts of ways, but it would be a figure in that order, yes.

Q. You were aware that if the Tricontinental moneys came to be repaid all those hotels would have been available by way of security? A. Yes.

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- Q. The Mitsui money of \$800,000 was secured by a mortgage over the El Rancho Hotel? A. I believe it was, yes.
- Q. To a value of \$1½ million approximately?
A. I am not aware of that.
- Q. Would you dispute that fact? A. No.
- Q. If the Mitsui loan was to be repaid, the El Rancho Hotel would be immediately available in terms of security for further loan moneys?
A. It would be immediately available, yes. 10
- Q. I would refer you to interrogatory 76?
A. Yes.
- Q. Is that an interrogatory that you approved? Is the answer to that an answer that you approved? A. Yes.
- Q. Do you think it is a fair answer? A. Yes.
- Q. When Mr. Koch raised some question of the uncertainty of the Hambros Loan Mr. Cameron disputed it? A. I do not recall.
- Q. What did Mr. Koch say in relation to the Hambros loan? A. I do not recall in detail what he said. I think he just pointed out that there were certain escape routes in it. 20
- Q. I suggest to you he only mentioned one possible escape, that being a condition relation to change of control? A. That could be so. I am not sure.
- Q. You knew that a formal letter of commitment had been received? A. Yes, I think I did.
- Q. And you told his Honour that you had acted in relation to the Hambros Loan for the "Amanda Miller" end finance? A. I acted in relation to the documentation in respect of the loan. 30
- Q. Was your understanding that the terms in relation to the "Robert Miller" loan were similar to the terms in relation to the "Amanda Miller" loan? A. That was my understanding, but I was not really aware of the nature of

Q. Which means that you were aware that a very substantial commitment fee was payable at the time of receipt, or shortly after the receipt, of a letter of commitment?

A. I was not aware of that, no.

Q. That was done in the case of the "Amanda Miller"? A. I assume it was, but I don't know.

Q. So you have no knowledge of that? A. No.

10 Q. Did you observe that neither of the lawyers present - apart from yourself - Mr. Conway or Mr. Aston, made any comment in relation to an uncertainty of the Hambros Loan?

A. Was that do I recall whether they did?

Q. I am putting to you that neither of them made any comment at all in relation to the uncertainty of the Hambros Loan? A. I do not recall them making any, but I am not saying that they did not.

20 Q. You were a solicitor there? A. Yes. I was not there as a solicitor.

Q. But you were a solicitor? A. Yes.

Q. And you were a solicitor who had had intimate knowledge of the previous Hambros Loan?

A. Of the documentation of it, yes.

Q. Did you ask to see the documents relating to the Hambros Loan A. Relating to the "Robert Miller" Hambros Loan?

Q. Yes? A. No.

30 Q. Here one has a situation in which it had been suggested to the Board that the Hambros Loan would be available in respect of the construction finance of "Robert Miller", the end finance of "Robert Miller"? That is so, is it not? A. On certain condition, yes.

Q. And the situation was that if that loan were available half of the short term finance was covered? A. If the loan was available, yes.

40 Q. Didn't you consider it a critical question to ascertain the precise terms of the Hambros

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Loan, of the Hambros commitment? A. It was my view that it was a commitment only. It may have been a commercial commitment, but I doubt whether it could have been legally enforced.

- Q. Didn't you consider it was your duty to find out? A. I had that view of it, that it was not a legally enforceable commitment.
- Q. But you had a situation where Mr. Koch suggested that because of this one condition the Hambros moneys might be uncertain? 10
A. I do not remember whether he mentioned one condition or more conditions, but I had enough problems in getting the first lot of money to make me realise that until the money was there in the bank that could not be certain.
- Q. Except, of course, if the "Robert Miller" was in the same terms as the "Amanda Miller" loan the problems had, by and large been resolved, had they not? A. There were problems of exchange control and all sorts of approvals that had to be given that may or may not have been given in relation to the "Robert Miller". 20
- Q. When Mr. Koch said the Hambros loan was uncertain because of one or a number of conditions, didn't Mr. Cameron subsequently dispute that? A. He may have. I do not recall in detail what Mr. Cameron said.
- Q. Did he say in effect "It is not true to say that the change of condition clause makes the loan uncertain"? A. "The change of condition clause"? 30
- Q. "The change of control clause makes the loan uncertain"? A. Sorry, could that question be read?
- Q. Didn't Mr. Cameron make the comment that on his understanding it was not accurate to say that the change of control condition made the loan uncertain? A. I think he mentioned something about that. They were not interested in change of control, they were interested in the management or, that Mr. Taylor had told him that, or something. 40

- Q. You yourself said that you were fairly confident of the Hambros Loan? A. Yes.
- Q. I again suggest to you that surely the natural thing in these circumstances for you to have done was to have asked to see the documentation? A. No.
- 10 Q. Because if the Hambros Loan was reasonably secure, the immediate need in relation to moneys to satisfy short-term commitments was halved, was it not? A. I do not consider that it was secure as the Howard Smith money.
- Q. Coming to the Tricontinental Corporation finance, had you had any experience of rolling-over bills? A. No.
- 20 Q. You were aware that some arrangement existed under which bills could be rolled over as they came to maturity? A. My understanding on that was that if it suited the convenience of Tricontinental they would roll them over.
- Q. You were aware that that was covered by a formal document? A. I had assumed it would be, yes.
- Q. Did you ask to see that? A. No.
- 30 Q. Did it occur to you that you should satisfy yourself as to whether or not the terms of the document were such as to make the loan moneys liable to immediate recall? A. My understanding of the roll-over provisions was that they could not be enforced by Millers and that it was only if it suited Tricontinental that they would do it.
- Q. Again neither of the other lawyers present expressed any view on that? A. Not to my knowledge.
- 40 Q. Looking at the position that existed at 6th July 1972, as against the position that existed at 30th June 1971, the situation was that all the liquidity problems which existed in relation to the commitments for "Amanda Miller" had been solved on a long term basis?

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A. All the finance for the "Amanda Miller"
had been paid?

Q. Yes, that is right? A. Yes, that is right.

Q. And so far as the "Robert Miller" was
concerned, subject to the finalising of the
long term finance on the security of the
hotels pledged to Tricontinental, and subject
to any uncertainty that may have existed in
relation to the Hambros Loan becoming available,
all of the commitments which existed as at 10
30th June 1971 had, from the point of view
of liquidity problems, been covered and the
liquidity problem had been solved? A. No, I
would not agree with that.

Q. What would you disagree with? A. My concern
was the company's ability between 30th June
1972 and whenever the "Robert Miller" was
handed over to service the various advances
that had been made to us.

Q. How much do you think would have been 20
involved in the servicing of those
conveyances? A. If the "Amanda Miller" came
off the run or went off hire for any reason
I did not think the company had the ability
to service that loan.

Q. And how much do you think was involved in the
service of that loan? What figure were you
thinking of? A. I did not calculate it on
the basis of any specific figure. I knew 30
that it was a very substantial amount of
money and that with the coal situation the way
it was, with the lesser hotels earning money,
with the two other tankers off hire and if
the "Amanda Miller" was off hire I just did
not see the way the company could meet its
obligations.

Q. So far as the Hambros Loan was concerned,
for long term finance for "Robert Miller" we
are talking about something in the vicinity
of \$5½ million? A. I am sorry? 40

Q. So far as the Hambros long term finance for
"Robert Miller" was concerned, something
like \$5½ million was involved?
A. I don't know.

- Q. What was your belief as to the amount of the Hambros Loan in respect of "Robert Miller"?
 A. It was expressed to me in U.S. dollars or some sort.
- Q. How much? A. 7.6 million or something.
- Q. What was your belief in relation to the "Amanda Miller" loan? A. I think that was eight point something million.
- 10 Q. What you are saying now is that you thought there could be a problem in servicing those loans? A. Not so much the "Robert Miller" loan but servicing the loans between 30th June this year and whenever the "Robert Miller" started earning money.
- Q. What was your estimate as to that period?
 A. The length of time?
- Q. Yes? A. It is very difficult to estimate. I would have thought that the "Robert Miller" would have been delivered some time between
 20 June and December 1973.
- Q. So, a period of eighteen months at the most?
 A. Yes.
- Q. If something went wrong? A. Well, I had something specific in mind about the "Amanda Miller".
- Q. But if something went wrong? A. Yes.
- Q. On this approach an amount of far less than \$10 million would have been more than adequate to cover your problems? A. Assuming
 30 that the company's only activity was ships, tankers.
- Q. We have been told that at this meeting discussion took place as to disposing of the collieries? A. At which meeting?
- Q. At the meeting of 6th July? A. Is that mentioned in the minutes?
- Q. Yes. A. Well, yes, I will agree with that.
- Q. And you had an open mind on the matter?

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A. Yes. It is not something I would have jumped into without a lot of thought.

Q. You have agreed with me that, even as you would put it, you were fairly confident of the Hambros Loan finance? A. Yes.

Q. You have indicated that you were not fully aware of the state of the Commonwealth Superannuation Fund negotiations as at 30th June. Is that so? A. Yes.

Q. Would you not agree with me that an obvious matter to be discussed at the meeting was whether or not four-and-a-half million shares should be allotted, in terms of that number? A. In terms of what number?

10

Q. Four-and-a-half million? A. You mean whether four-and-a-half million was too many shares to issue?

Q. Yes. A. I thought it exactly coincided with our commitments.

Q. The basis on which you thought it coincided was what Mr. Koch said? A. Basically, yes.

20

Q. Did you anticipate that if the shares were allotted you would tell Hambros that you were not going ahead with what had been agreed in principle? A. I did not give any real consideration to that at this stage.

Q. Of course, if you were going to go ahead with Hambros, half of the justification immediately disappeared? A. Assuming that Hambros money was available that could be so, yes.

30

Q. And if long term finance could be negotiated in relation to the Tricontinental loan on the security of the £8 million worth of hotels, almost the whole of the justification disappeared? A. That is assuming that could be negotiated, yes.

Q. And if a loan from Mitsui, or some other source, secured over the El Rancho Hotel could be negotiated, the only thing that remained in terms of immediate or short term commitments were the amounts of money at call?

40

A. That is assuming you wish to finance all your activities out of borrowing.

Q. Could we just test that; are you suggesting that that approach means that you are financing all your activities out of borrowing? A. Not all our activities, but I do not like owing money.

10 Q. You have told his Honour that you had a policy of not accepting an appointment to boards of public companies, but you made two exceptions? A. I cannot say I have been inundated with requests.

Q. What other invitations have you received? How many invitations approximately to go on the boards of public companies? A. I have not received any.

20 Q. What I suggested to you was that at this meeting there was no discussion at all aimed at the question whether an allotment of a lesser number of shares should be negotiated? A. I did not see the need to discuss it, but it was not discussed.

Q. Were you aware that as at the time of this meeting half of the moneys shown here as being short term borrowings, insofar as the Bank of New South Wales was concerned, had not even been borrowed? (Objected to by Mr. Glass as not being in accordance with the evidence. Not pressed).

30 Q. You were aware that a large part of this \$10,741,000 shown as short term borrowings represented moneys which had to be repaid to the Bank of New South Wales? A. Yes.

Q. Which was providing, on your understanding, the bridging finance for "Robert Miller" pending the availability of the Hambros Loan? A. Yes.

40 Q. Were you aware that a large part of those moneys had not even been borrowed in fact from the Bank of New South Wales as at 6th July? A. I am not sure of whether I was aware of that or not at the time. I am since aware of it.

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- Q. Did you ask Mr. Koch one question in relation to the financial situation that he presented ?
A. No.
- Q. Did you ask him to explain one statement he made? A. No. I think I understood what he was saying.
- Q. Another matter that was discussed at this meeting was the question of Stock Exchange listing? A. Stock Exchange --?
- Q. Listing? A. At which meeting? 10
- Q. At the meeting of 6th July? A. Yes.
- Q. The possibility was raised of the shares in Millers being suspended or de-listed at the Sydney Stock Exchange? A. That was discussed, yes.
- Q. You take the view, I presume, that the continued listing of the shares in a public company on the Stock Exchange is a matter of vital importance to shareholders? A. Generally or specifically? 20
- Q. Generally? A. Generally, yes.
- Q. First, it gives them a ready market for their shares? A. Well, I agree. Yes.
- Q. Because people can sell their shares? A. Yes.
- Q. Whereas, of course, in a takeover situation, if a takeover offer is made the normal course is that anybody accepting the offer cannot expect to receive payment for a matter of months? A. Yes, that is so.
- Q. In terms of security, the shareholder can borrow moneys on shares in a company which is listed on the Stock Exchange far more readily than he can in shares of an unlisted company? A. As a general principle yes, I would agree with that. 30
- Q. And in terms of people who borrow money on their shares, de-listing could have very severe financial consequences? A. In my experience you do not seem to be able to

borrow much on the security of shares.

- Q. And very very little on the security of un-listed shares? A. True
- Q. I suppose that you presumed that the shares in Millers were listed on the Sydney Stock Exchange in pursuance of a contract between Millers and the Sydney Stock Exchange?
A. Yes, I was aware of that.
- 10 Q. Did you presume that the allotment of shares would be a breach by Millers of that contract?
A. Yes.
- Q. Did you ask to see the contract? A. No.
- Q. Did you endeavour to ascertain, from the point of view of Millers, what were the possibilities consequent upon such a breach? A. I think that had been covered by comments made by Mr. Conway and Mr. Aston at the meeting.
- 20 Q. Did you presume that what was being done was in breach of the listing requirements of the Sydney Stock Exchange? A. I had been told it was, yes.
- Q. Had you looked at the relevant listing requirements? A. I was aware of them vaguely from previous experience. I had no doubt that it would be a breach of them.
- Q. But it would be necessary, to determine the extent of the breach, to examine the listing requirements? A. It would be, yes.
- 30 Q. Did you do so? A. No.
- Q. Did you inquire from anyone "Well, what are the listing requirements we are in breach of"?
A. No. I thought I was aware of what they were.
- Q. Did you inquire how many of the listing requirements you would be in breach of?
A. No.
- Q. How many do you now think you were in breach of? A. I am not aware.

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- Q. Did you ever direct your mind to that?
A. No.
- Q. Don't you think it was a relevant consideration? A. On the 6th July?
- Q. Yes? A. No.
- Q. So you would agree with me that for a company to act in breach of its contractual obligations to the Stock Exchange is a very serious matter?
A. I considered it very serious, yes.
- Q. And it is something that goes to the heart of the basis on which financial affairs are conducted in this State? A. Yes. 10
- Q. You knew that people were buying shares in Millers on the basis that they were listed on the Stock Exchange? A. I do not think they would be buying them just on that basis, but they were buying them as being listed shares.
- Q. On the basis of being able to sell them at any time if they were listed? A. There may have been some people trading on the takeover situation. The bulk of the shareholding would have been old Miller's shareholders. 20
- Q. I am talking about people buying shares currently on the Stock Exchange? A. The current ones would be.
- Q. You would assume that many of those would be buying their shares on the basis that if they needed their money they could sell them? A. That is probably so, yes. 30
- Q. It would be fair to say that it was your view that if the shares were suspended or de-listed by the Sydney Stock Exchange no shareholders, for practical purposes, could anticipate selling his shares for at least three months and getting the money for them?
A. On the Stock Exchange.
- Q. Or at all? A. I do not think he could not sell them at all.
- Q. How did you think he could sell them?
A. They could be sold privately off the Stock Exchange. 40

Q. What, by advertising them in the newspaper?
A. No.

Q. You are aware that no stockbroker can deal in shares while they are suspended or de-listed? A. I was not aware of it but I would not be surprised.

10 Q. Is that you tell his Honour this: That you would assume that a shareholder would be able to sell his shares in a situation where the Stock Exchange was closed? A. I do not think that it was impossible to dispose of his shares.

Q. At anything like their proper market? A. I do not recall what the proper market price was at that time, but I think £2.50 would be in excess of it.

20 Q. You are not suggesting, are you, that he would have gone and sold them to Howard Smith and got cash for them? A. No, but I think he may have been prepared to wait.

Q. Is what you tell his Honour this: That you did not think those matters were of great importance? A. I considered that your observations would apply to a very limited number of shareholders in the company and that I had to consider what in my opinion was in the best interests of all the shareholders of the company.

30 Q. We have been told that in the course of this meeting the chairman ruled that Sir Peter Abeles could not participate in either discussion or voting. Would you agree with that? A. That we have been told?

Q. Yes? A. Yes.

Q. Would you agree that is what Mr. Taylor ruled? A. That is what he ruled, yes.

Q. When were you first aware of a suggestion that Mr. Taylor might make such a ruling? A. When it was raised at the meeting of the 6th.

40 Q. Where were you sitting in relation to Mr. Taylor at the meeting on the 6th?

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A. I was sitting on his left, about three or four people up the table.

Q. Did you observe that he was reading from a document? A. I knew he had a document before him. I was not aware of when he was not reading from it or when he was reading from it.

Q. Did you make any comment at the meeting in relation to the ruling of Mr. Taylor?

A. ~~I was not surprised with his ruling, I had previously disqualified myself for much lesser reasons than this.~~ (Objected to by Mr. Lockhart and Mr. Deane. Struck out by direction.)

10

Q. (Question read) What is the answer?

A. I do not recall. I could have mentioned something about the fact that I had previously disqualified myself.

Q. Apart from that did you make any comment?

A. No.

20

Q. The only matter mentioned as a ground for precluding Sir Peter Abeles from participating in debate or from voting was the joint announcement? A. I think that is so.

Q. The joint announcement by Ampol and Bulkships that they did not propose to sell their shares and that they proposed to co-operate with one another? A. Whatever the joint announcement was, Yes.

30

Q. Sir Peter Abeles was involved in the joint announcement, as was suggested, in that he was a director of Bulkships? A. I do not recall whether he was associated with the joint announcement. I only read it in the paper.

Q. But it was Sir Peter Abeles being prevented from voting? A. Yes.

Q. The only suggested basis was the joint announcement? A. Yes.

Q. Which means that there must have been some connection between Sir Peter Abeles and

40

Bulkships? (Objected to by Mr. Glass: allowed). Which means there must have been some relationship between Sir Peter Abeles and Bulkships that was being referred to as raising a conflict of interest? A. Yes.

10 Q. The situation would have been far stronger if, instead of the joint announcement being Ampol and Bulkships, it had been Ampol and Sir Peter Abeles? (Objected to by Mr. Glass as not being relevant; allowed).

20 Q. Would you agree with me that the position would have been far stronger if, instead of Ampol and Bulkships making a joint announcement, Sir Peter Abeles had personally owned the shares owned by Bulkships, and Ampol and Sir Peter Abeles had made a joint announcement? A. I do not think so. Sir Peter Abeles was Bulkships' representative on Miller's board. (Objected to by Mr. Staff; allowed).

Q. Would you agree the situation would have been even stronger if, instead of Sir Peter Abeles being the holder of the Bulkships' shares and Ampol being the holder of a number of other shares and having to get together, Sir Peter Abeles had himself held more than 50% of the shares and announced that he was not going to accept the offer or any offer? A. Well, I have lost the question.

30 HIS HONOUR: Put it again.

MR. DEANE: Q. Would you agree with me that the position would have been even stronger if Sir Peter Abeles had himself held more than 50% of the issued shares in Millers and had made an announcement that he was not going to accept any offer to sell his shares? A. What position would be made stronger?

Q. The position of a possible conflict? A. Yes, I would agree with that.

40 Q. The conflict was that the majority shareholders did not want to sell their shares at all? Would you agree with that? A. I just did not see how one man could act in the best interests of everybody in that situation.

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- Q. But the minority shareholders, as you saw it, wanted to be able to sell their shares to Howard Smith? A. Not necessarily.
- Q. They might have? A. They might have liked to have had the right to.
- Q. And you thought it was important that they be given the opportunity of being able to sell their shares to Howard Smith? A. I thought that was important, yes.
- Q. And you were a minority shareholder? A. A very minor shareholder, yes. 10
- Q. But you were a minority shareholder? A. Yes.
- Q. And every other director sitting on that Board was a minority shareholder? A. They had to be. I do not think - yes, that is right.
- Q. Did you think there was any conflict there? A. I did not think the degree of conflict was as great as if somebody had owned 25% of the shareholding. 20
- Q. In other words the majority shareholder who did not want to sell is in conflict and should be excluded, but the minority shareholders who want to have the opportunity of selling are not in conflict at all? Is that the proposition? A. I think there are degrees of conflict concerned. Certainly the degree of conflict relating to one thousand shares is not as great as it is in relation to millions of shares. 30
- MR. GLASS: My friend indicated he is going to another subject. I should like to renew my submission that none of the material elicited from the witness on the subject of conflict between the interests of Sir Peter Abeles and his duty is admissible because it was not the decision of this witness that he be excluded, and this witness is not privy to the considerations of the mind of the chairman who made the decision and it is therefore argument only between the cross-examiner and the witness as to the nature of the conflict and is not properly the subject of evidence. 40

HIS HONOUR: This did not follow the line that I had anticipated, but Mr. Nicholl has, as I understand it, assented to the chairman's ruling or stated a view in concurrence with the chairman's then ruling. This whole context of the intervention by the Board in what might otherwise have been the internal structure of the shareholding underlies what took place on the 6th July, and the views of each director on that go to the heart of what I have to decide. It seems to me this could be relevant evidence and I decline to have it struck out.

10

MR. DEANE: Q. Mr. Taylor ruled that Sir Peter Abeles should not vote on the motion? A. Yes.

20

Q. That was early in the discussion on the motion? A. Yes. He offered, or suggested that he should disqualify himself, and when he would not do that I think he said that he was not entitled to vote.

Q. And Sir Peter Abeles did not vote? A. No.

Q. When he did not vote Mr. Anderson suggested to him that he had abstained from voting?
A. I think Mr. Anderson noticed that he had not voted.

Q. And said "Are you abstaining from voting"?
A. Something like that, yes.

Q. And Sir Peter Abeles said, "No, the chairman ruled I could not vote?" A. Yes.

30 Q. Which means that, so far as voting was concerned, it was clear to you that Sir Peter Abeles obeyed the chairman's ruling? A. Yes.

Q. Would you agree with me that Sir Peter Abeles was prevented from voting? A. Yes.

Q. The Chairman also ruled that Sir Peter Abeles should not participate in debate?
A. Yes.

40

Q. Prior to that ruling Sir Peter Abeles had, when the proposal was made, been the person who said most? A. Prior to —?

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Q. Prior to the ruling? A. Are you talking about the meeting of the 6th?

Q. Of the 6th, prior to the ruling was it not the situation that once the proposal was made and the letter and the agreement had been read out, the main participant in the discussion was Sir Peter Abeles? A. At that time, yes.

Q. And after the ruling would you agree with me that Sir Peter Abeles did not address any lengthy comments at all to the meeting? 10

A. I would not agree with that. For somebody who was not meant to take part in the debate he had a lot to say.

Q. By way of interjection, I suggest? A. The whole thing was just open discussion.

Q. You tell us what he said? A. As I say, I do not recall the words said. I remember him saying something about "It depends on who the broker is" when some question was raised about making this placement to our shareholders. 20

Q. That was an interjection? A. I suppose it was an interjection, yes.

Q. What else do you recall him saying? A. I think he was talking about the watering-down of capital.

Q. Wasn't that before the chairman's ruling? A. It may have been. I do not recall in detail what he said, but I just have the impression that he had a lot more to say after that. But it may have been by way of interjection. 30

Q. Would you agree with me that he did not address any considered remarks at length to the motion after it was ruled he could not participate in debate? A. He was talking to Mr. Cameron a lot and Mr. Cameron was saying a lot.

Q. Did you get the impression that Sir Peter Abeles was suggesting things to Mr. Cameron that might be said by Mr. Cameron? A. It would not have surprised me. 40

- Q. Would you not agree that it was clear that the reason for that was that it had been ruled that Sir Peter Abeles should not participate in the debate? A. I was not aware of the reason.
- Q. Had you ever before seen Sir Peter Abeles suggesting to somebody else to do his talking for him? A. No.
- 10 Q. I suggest to you that it was quite apparent to you that Sir Peter Abeles was, as it were, getting Mr. Cameron to put to the meeting things that Sir Peter Abeles would want to put? A. I would not disagree with that.
- Q. That he was prevented from putting because of the chairman's ruling? A. Prevented from putting it himself?
- Q. Yes. A. Yes.
- 20 Q. And subject to the chairman's ruling Sir Peter Abeles had asked for the opportunity of obtaining legal advice? A. Yes.
- Q. He was told that he could get legal advice but the meeting would go on without him? A. Yes.
- Q. And during his absence almost all of the financial information provided by Mr. Koch was provided to the meeting? A. I do not recall that. I think that could be the case.
- Q. Might the witness have Ex. PP (Shown). Would you look at interrogatory 38 and your answer to it? A. Yes.
- 30 Q. Was that answer in accordance with the draft document prepared by you? A. Yes.
- Q. Do you think it is a fair answer? A. Perhaps the word "fully" might be a little strong.
- Q. Apart from that you think it was a fair answer? A. I think so.
- Q. I show you Ex. DD, the minutes of the meeting of 14th July. (Shown). Again you were present at that meeting? A. Yes.
- 40 Q. If you look at p.3, the fourth paragraph, you will see that you moved a resolution? A. Yes.

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- Q. That resolution was: "That upon the request of the Director or Directors in question, this company should meet the proper legal expenses of any Director or Directors named in the proceedings presently pending who may be separately legally represented therein"?
A. Yes.
- Q. Did it occur to you at the time you moved that resolution that there might be a conflict of interests in relation to the people voting on it? A. It did not, no. 10
- Q. You gave no thought to that? A. It was my belief that all directors had acted honestly, and I did not see that they should be brought into these proceedings at their own expense for having acted in that way.
- Q. It did not occur to you that there might be some conflict in the directors themselves voting on it? A. No.
- Q. In relation to the meeting of 6th July what is your recollection as to what Lady Miller said? A. As I say, I have not committed any of this conversation as such, nor have the ability to remember what was said in detail, but I think she seemed more concerned with the fact that she was not given much time to think. She seemed more concerned about the prospect of being suspended on the Stock Exchange than applying her mind to what I considered was the really important thing to be decided. 20 30
- Q. Did you think that the suggestion that perhaps she might be given a little more time to consider the matter had some merit? A. It was my opinion that the offer or application by Howard Smith was made on terms that this was something that was being offered specifically on that day and that an answer had to be given on that day.
- Q. You were aware that this offer had grown out of negotiations between Mr. Taylor and Mr. Koch, on the one side, and Howard Smith representatives on the other? A. I do not think so, no. 40

- Q. You had been told that there had been discussions at a meeting of 4th July? A. I had not been told that, no.
- Q. You had been told there had been a proposal in respect of £3 million shares at £2 a share? A. That was mentioned to me on 5th July.
- Q. You had been told that Mr. Conway had had a telephone conversation with Mr. Maxwell on the morning of 5th July? A. No.
- 10 Q. Do you deny you were told that, at the lunch time meeting on 5th July? A. I do not deny it, no.
- Q. I suggest to you that you had been told that by lunch time on 5th July there had been a number of proposals and counter-proposals passing between Millers and Howard Smith? A. No, I had not been told that.
- 20 Q. What was the first information you received as to a proposal of an allotment of shares by Millers to Howard Smith? A. It was on the morning of 5th July, as I said, when I probably had people in my office and either Mr. Taylor or Mr. Conway phoned me and mentioned something about an allotment of shares or an application by Howard Smith for an allotment, and I said "Well, I haven't got time to think about it now. I will come down and see you at lunch time", or something like that.
- 30 Q. I suggest to you that Mr. Taylor telephoned you on the afternoon of 4th July? A. He may have.
- Q. (Referring to p. 579) And I suggest to you that in that telephone conversation he gave you details of a proposal to allot £3 million shares of £2 per share to Howard Smith? A. I do not recall that. He may have.
- Q. I suggest there was a discussion between you as to such an allotment? A. What time was this conversation?
- 40 Q. On the afternoon of 4th July? A. Yes.
- Q. I am suggesting to you that there was a

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discussion between you and Mr. Taylor in relation to a proposed allotment or a proposal for an allotment of three million shares at \$2 a share to Howard Smith? A. There could have been. I do not recall.

- Q. And that Mr. Taylor said to you that he had told Howard Smith he did not think he could get that through his board? A. As I say, I do not recall this conversation but I am not denying that it took place. 10
- Q. I suggest to you that you agreed with that comment of Mr. Taylor's? A. I could have, I don't know.
- Q. If that could have taken place would you also agree with me that Mr. Taylor could have given you other information as to what happened at that meeting of 4th July? A. He could have. I do not --
- Q. Such as a proposal to acquire the Howard Smith's ships in return for an issue of shares? A. I do not recall that ever being discussed. 20
- Q. Do you deny that you were ever told that? A. I am more definite about that than the other conversations.
- Q. Are you prepared to deny that you were told that? A. Yes, I think I would be.
- Q. Coming to the meeting on 5th July, Mr. Nicholl, I suggest to you that at that meeting - and I am using "meeting" in a loose sense - A. Yes. 30
- Q. At that meeting Mr. Conway told you that he had had a telephone conversation that morning with Mr. Maxwell? A. He may have.
- Q. And he told you what was said in that conversation? A. He may have told me.
- Q. You see, I suggest to you that he told you that he had rung Mr. Maxwell and left a message asking Mr. Maxwell to ring him back on an urgent matter? A. I don't recall that. I don't recall that, but I would not deny it. 40

- Q. I suggest to you that he told you that he told Mr. Maxwell - and I am referring to p.702 of the transcript - that he told Mr. Maxwell that the Millers people had been discussing an offer to apply for 3-million shares at \$2 a share? A. He told me? He told me that is what he told Mr. Maxwell?
- Q. Yes? A. I don't recall that.
- 10 Q. Do you deny he told you that? A. No, I was not completely interested in what he was saying to Mr. Maxwell.
- Q. Now, what was your understanding as at the luncheon meeting on 5th July as to the stage negotiations had reached between Howard Smiths and Millers? A. At the meeting on 5th July I was mainly concerned with the question of an issue or an application by Howard Smith to Millers for an allotment of shares in a takeover situation. I did not have any
- 20 specific number of shares or price in mind.
- Q. But didn't Mr. Conway tell you that he had suggested to Mr. Maxwell in this morning conversation that the appropriate price was \$2.30, or not less than \$2.30? A. No.
- Q. Do you deny he told you that? A. I don't deny it, no.
- Q. Didn't he tell you that Mr. Maxwell said, "This is a coincidence", or "strange enough, that is the price I have recommended"? A. No, once
- 30 again I don't recall it. But I don't deny it
- Q. And didn't he tell you that when he said to Mr. Maxwell that the number of three-million was not enough Mr. Maxwell agreed with him? Didn't he tell you that? A. The same applies.. (answer not completed).
- Q. Of course, you regarded this matter as being of great importance to Millers, did you not? A. I did, yes.
- 40 Q. And you were there at the luncheon meeting on 5th July advising in relation to a particular matter? A. No, I was not advising.

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- Q. Well, expressing your views in relation to a particular matter? A. I was just discussing a particular matter.
- Q. In a context where you knew that negotiations had been taking place between representatives of Millers and representatives of Howard Smith? A. In a context where I knew that perhaps some application may be made by Howard Smiths for an allotment of shares.
- Q. There is no doubt, is there, that at this luncheon meeting you knew that Howard Smith had indicated that they would be prepared to subscribe for three-million shares at a price of \$2 per share? A. That fact may have been mentioned. 10
- Q. Is there any doubt about that? A. I would not deny it, but I did not ... (answer not completed).
- Q. Have you any doubt that you knew that such a proposal had been made? A. No. 20
- Q. There is or there is not doubt? A. No, there is no doubt.
- Q. There is no doubt? A. No.
- Q. So that it is clear beyond doubt that at this meeting you had been informed that Howard Smith had indicated that they were prepared to apply for three-million shares at \$2 per share? A. Yes.
- Q. Would you agree with me that there is no doubt that Mr. Conway told you that he had had a subsequent conversation with Mr. Maxwell? A. As I say, I don't recall this. 30
- Q. Was the three-million shares at \$2 the current stage of negotiations at lunchtime on 5th July? A. I don't recall. I went down in my lunch hour to discuss the legalities of this and, as I recall, I had to be back in the office at two o'clock.
- Q. But you were discussing the legalities of an allotment of shares by Millers to Howard Smith? A. Yes. 40

- Q. In a context where you knew there had been a proposal made by Howard Smith? A. A proposal, yes.
- Q. And where, I suggest, you knew there had been further discussions? A. Yes.
- Q. And I suggest to you that you were informed as to what the present state of negotiations was? A. I probably was, yes.
- 10 Q. Which means, I suggest to you, that you had been informed that Millers had gone back to Howard Smith with a counter-suggestion? A. I don't think I knew that.
- Q. Well, do you suggest that if that were the fact you were not told about it? A. I just went down there with one aim in mind, and the other details - it may have been gone into, but I did not pay particular attention to it.
- 20 Q. You said in evidence earlier that you took some books with you. What books did you take with you? A. The two books that I referred to in evidence in chief this morning.
- Q. What about Hogg v. Cramphorn? A. No, I didn't take it.
- Q. Did you have that book with you that morning? A. No, I did not.
- Q. Did anyone have it with them? A. There was some reference to that case in the report that I had.
- 30 Q. But no one was looking at Hogg v. Cramphorn at the meeting? A. There may have been a quotation from it in the Australian Law Journal Report. I remember the name Hogg v. Cramphorn and Woodside and something being mentioned.
- Q. When did you first discuss, apart from in a board meeting, the question of allotting shares in Millers to Howard Smith with Mr. Koch? A. With Mr. Koch?

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- Q. Yes. A. I think Mr. Koch was present at that meeting of the 5th, and, if he was there may be my discussion with Mr. Conway could be construed as a discussion with Mr. Koch.
- Q. But was not that whole lunch hour gathering about the negotiations that had been going on between Millers and Howard Smith?
A. I only had eyes for Mr. Conway at that meeting. There were people walking in and out all the time and I was reading and Mr. Conway was reading. 10
- Q. What, may I ask you again, was the view of the law to which you finally came? A. I did not come to any final view.
- Q. What was the view of the law that Mr. Conway finally enunciated? A. That it was quite legal for a board to make an allotment of shares to meet its immediate financial commitments provided that the price was correct, or something like that. 20
- Q. So that would it be true to say that what was involved was, in your view, working out the immediate financial commitments and saying, "We can make an allotment in respect of that amount"? A. I did not take it much further than that on the 5th. I went back to the office and got on with my work.
- Q. Of course, the question of the allotment was being discussed at this meeting, was it not, in a context where it would enable the Howard Smith offer to remain open to shareholders? A. I don't recall the question of the Howard Smith offer being kept open being discussed. 30
- Q. You see, I suggest to you that that was what the discussion was all about? A. That may have been what other people were discussing, but it certainly was not what I was discussing.
- Q. Didn't Mr. Conway or Mr. Taylor tell you that at the meeting of 4th July it had been made quite clear that unless something was done Howard Smith would not go ahead with its offer? A. I don't recall that. 40
- Q. Do you deny you were told that? A. It may

have been said while I was there, but ...
(not completed).

- Q. Was not it made clear to you that the meeting of 4th July had turned, as it were, into a committee of ways and means of keeping the Howard Smith offer open? A. I was not informed of that.
- Q. You were not informed of that? A. No.
- 10 Q. Was not it clear to you that what you were doing in terms at this luncheon discussion was working out how you could legally justify an allotment? A. No.
- Q. You see, I suggest to you that you were under no misapprehension at all that the whole basis behind this suggested allotment was to keep the Howard Smith offer open? A. No, that may have been Howard Smith's idea. It was not Miller's idea, or my idea.
- 20 Q. May I suggest to you that you were under no misapprehension that the function of this lunchtime meeting was to try and work out how an offer made for that purpose could be dressed up in terms of legal justification? A. That was not my understanding.
- Q. That thought never occurred to you, that the whole function that was being performed at the lunchtime meeting was to work out how an offer made for the purpose of keeping Howard Smith in the race could be dressed
- 30 up in such a way as to be legally justified? A. No, that was not my understanding of it.
- Q. It never occurred to you? A. No.
- Q. And nothing was said at all at this lunch time meeting to indicate to you that keeping Howard Smith in the race was an important factor in Mr. Conway's mind? A. I did not see it as that. That may have been an important factor in Mr. Conway's mind.
- 40 Q. I am asking you was anything said at this lunch time meeting which made it clear to you that keeping Howard Smith in the race, as it were,

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was an important factor in Mr. Conway's mind. A. I don't recall anything being said along those lines.

Q. While Mr. Taylor was in the room? A. I don't recall that either.

Q. While Mr. Koch was in the room? A. I don't recall that. There were lots of discussions going on at this meeting, but my discussion was basically with Mr. Conway.

Q. But, Mr. Nicholl, you were there as a director of Millers? That is right, isn't it? A. Yes, that is correct. 10

Q. You were not there as a solicitor? A. No.

Q. You were there as a director of Millers? A. Yes.

Q. And you were there in a context where you knew negotiations in relation to allotment of shares had been taking place between representatives of Howard Smiths and Millers? A. I knew that Howard Smiths had applied to Millers for an allotment of shares. I was not aware of the fact that negotiations were taking place. 20

Q. Then would you agree with me that it was clear to you at the board meeting of 6th July that there had been a change in the original proposal? A. Yes.

Q. Did you presume that there had been negotiations? A. No.

Q. What? You thought Howard Smith had said three-million at \$2, and then, without more, they had said four and a half million at \$2.30? A. I would assume something had been said to them. 30

Q. Why didn't you ask at the meeting, "How did this offer come about?" if you didn't know whether there had been negotiations or not? A. I did not wish to question how the offer came about. I was delighted to receive it.

Q. Did you think the statement that there had 40

been a "dramatic development this morning" was completely accurate when you heard it?
 A. It was a dramatic development so far as I was concerned.

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- 10 Q. Didn't you think the other directors should have been filled in on the fact that at some stage at least there had been discussions as to the allotment of three-million shares at \$2 per share? A. I think it was more important to make a decision in regard to the actual offer that had been made.
- Q. Of course. Did Mr. Taylor indicate to you that he supported the offer or proposal to allot three-million shares at \$2 per share? (objected to by Mr. Glass.)
- Q. Did Mr. Taylor indicate to you what his attitude was to the offer of three-million shares at \$2 per share? A. He may have. I don't recall.
- 20 Q. You can't recall whether he did or did not? A. No, I can't.
- Q. Do you think you would recall if he did? A. As I say, in my office the 'phone is ringing fairly frequently throughout the day and there are all sorts of things going on and I seem to be able to just take in what I need to take in and ignore things that are not going to happen.
- 30 Q. This was one of two public companies of which you were a director? A. Only one at that stage.
- Q. It was the only public company of which you were a director? A. Yes, that is right.
- Q. And here comes a proposal for the allotment of millions of shares in that company? A. Yes.
- 40 Q. Is what you tell his Honour this, that that is something that you heard and can't remember what you have been told about it? A. I feel that I must have been - that there must have been some indication given to me that that would not be the eventual proposal and that

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Exhibit HH

something else would be done, but I did not wish to consider the matter until I actually saw it there in black and white, because I did not believe it had happened.

- Q. That negotiations were being carried on?
A. I did not know what was going on
- Q. Well, what was all your research for?
A. Well, when you say all my research, it involved about a quarter of an hour's research in looking up a few books and then a discussion with Mr. Conway relating to the allotment of shares in a takeover situation. 10
- Q. Would not you agree that it is obvious your discussion would have been far more meaningful if it had taken place in the context of the present state of negotiations? A. Well, that is what makes me think that I must have been informed at some stage that these three-million shares they were talking about was not going to be the figure and that it was some other figure. 20
- Q. In excess of four-million? A. I don't think anything was mentioned about figures. I assumed it was more shares at a better price.
- Q. But you did not ask "What stage have we reached?" A. No, I did not have a lot of time.
- Q. Mr. Nicholl, coming back to the meeting of 6th July - A. Yes.
- Q. Will you look at Ex.HH? A. Yes. 30
- Q. Can you turn to p.7 of that exhibit - the page to which Mr. Glass referred you this morning? A. Yes.
- Q. You see your comments on p.7? A. Yes.
- Q. Now, you are reported as saying there, "I still feel that I would rather face the shareholders having to accept this situation and rather than fade away into the background." What is your recollection as to whether or not you said that? A. I would not deny saying it, but it does not sound like - I don't recall saying it. 40

- Q. Of course, there is no doubt in your mind as to what it means, is there? A. Well, there is. I can't think what I mean, if that is what I said.
- Q. Doesn't it mean "Stand up and fight rather than fade away"? A. It could mean that I was just fading away from responsibility and taking the easy way out. I suppose that is the same as standing up and fighting.
- 10 Q. Doesn't it mean "no majority shareholder is going to remove me from the board of directors"? A. No.
- Q. Of course, that was your view, wasn't it? A. Which?
- Q. That no majority shareholders would remove you from the board of directors? A. I had no doubt they could. But I was quite prepared to face a general meeting of the company to air the whole thing so that they would not know that I just accepted an invitation to resign. (sic)
- 20 Q. You told us that you had a primary purpose in voting for the allotment, is that so? A. Yes.
- Q. And that you were aware that the result of the allotment would bring about some other results? A. Yes.
- Q. Was that phrased in terminology taken from anywhere? A. Not that I am aware of.
- 30 Q. Such as the Woodside case? A. Not - if it was, it was not deliberate.
- Q. Was your only purpose in voting for this allotment the financial needs of the company? A. I saw an opportunity of achieving for the company - and for the shareholders - some benefit from the fact that two large public companies were fighting for control of the company - namely, the infusion of this money into the company.
- 40 Q. Will you now answer my question? A. I am sorry.

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- Q. Was your only purpose in voting for the allotment the financial benefit of the company?
A. I think my prime purpose was, yes.
- Q. Was that your only purpose? A. No.
- Q. What was your other purpose? A. The fringe benefit so far as I was concerned was the fact that the market place would be kept open.
- Q. Except, of course, if the Stock Exchange objected to your company making its allotment, then the market place would be closed? 10
A. I did not mean that market place.
- Q. You mean that the Howard Smith offer would stay open? A. The Howard Smith and Ampol offer.
- Q. The Howard Smith offer? A. And others.
- Q. What others? A. Well, the Ampol offer.
- Q. Did you see any point in the Ampol offer being open while the Howard Smith offer was open? A. I did not think that Ampol would take the Howard Smith's offer - that they would take it lying down; quite on the cards that they would come back with another offer. 20
- Q. But, Mr. Nicholl, this very allotment made it certain, didn't it, that Ampol would not come back with a higher offer? A. It did not make it certain in my mind.
- Q. It made it far more unlikely, didn't it?
A. Probably made it more unlikely. But it depends on how much they wanted the tankers. 30
- Q. So that to the extent of keeping the Ampol position open the offer was likely, as it were, to prevent Ampol making any further offer? A. I did not consider that that was so.
- Q. It certainly did not achieve any purpose in terms of keeping the Ampol offer open, did it? A. It was still open.
- Q. You see, what I am suggesting to you is

that the allotment served the purpose of keeping the Howard Smith offer open?

A. That was one of the purposes it served.

Q. And Howard Smith, in the letter that was read on 6th July, had made it quite clear that if the present situation remained their offer would not go ahead? A. That was Howard Smith's view, yes.

10 Q. And the reason it would not go ahead was that two shareholders held between them the majority of shares in the company and were not going to accept the Howard Smith offer? A. I didn't know. They may have been prepared to be third partners with the others.

20 HIS HONOUR: Q. Mr. Nicholl, you said a moment ago that you had in mind that this allotment might have resulted in the Ampol remaining open, or some words to that effect; am I correct in that? A. It was open. There would be two offers open.

Q. When you said "the Ampol offer", did you mean the Ampol offer of \$2.27, or that Ampol would come back with a larger offer? I want to know what you had in mind? A. I had in mind -

30 Q. Before you answer that, don't rush in, because if it was a larger offer it would necessarily have to be more than \$2.50, which would necessarily be putting 20 cents plus into Howard Smith's pocket. I want to be clear what you meant when you said "remain open", and that is why I stopped you before you rushed into an answer. Did you have anything in mind in this regard? What did you have in mind, if you had thought about it at all? A. Well, I considered that the shareholders would have two offers open to them - the existing Ampol offer and the Howard Smith offer. I had in mind that other offers
40 could be made.

MR. DEANE: Q. In excess of \$2.50? A. I would assume that, yes.

Q. Now, you have in front of you Ex.T? A. Yes.

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- Q. Have you physically seen this letter before, as distinct from having heard it read?
A. I think perhaps copies of it were circulated at a meeting, and I probably read it then.
- Q. Do you know whether or not such copies were circulated? A. I have a recollection of Miss Hill going and having copies made, so I assume I would have got one.
- Q. Would you read the bottom paragraph on the first page of that letter to yourself? 10
A. Yes, I have read that.
- Q. You would agree with me that Howard Smith were making it quite clear that they would not go ahead with their offer while Ampol and Bulkships continued to hold more than half of the issued capital? A. Yes. That is what they are saying in this letter.
- Q. And of course, in so far as the object of keeping Howard Smith in the race was concerned in terms of this allotment it was clear that the only way that could be effected was by cutting down the percentage shareholding of Ampol and Bulkships? 20
A. That is obviously the way they saw it, yes.
- Q. And indeed you would agree with me, wouldn't you, that insofar as the motion allotting shares may have been motivated for the purpose of keeping Howard Smith in the race, the only relevant way of doing that was by cutting down the proportionate shareholding of Ampol and Bulkships? A. Yes, that could be so. 30
- Q. It would be true to say, wouldn't it, that among your purposes in voting for this allotment, whether it be primary, secondary, or however you put it, was the purpose of reducing the proportionate shareholding of Ampol and Bulkships so that the Howard Smith offer could go ahead? A. As I said, that was a fringe benefit of the allotment of shares to Howard Smith. 40
- Q. Mr. Nicholl, that was one of the matters that

you thought made the allotment a desirable thing? A. That was one of the matters, yes.

Q. And it was one of the influences working on your mind? A. It was one of them, yes.

10 Q. Again I put to you, would not you agree with me that, forgetting primary and secondary, one of the purposes that motivated you in voting for this allotment was the purpose of reducing the proportionate shareholding of Ampol and Bulkships so that the Howard Smith offer could go ahead? A. I cannot say I considered that as a real purpose. I can see your suggestion that that is one of the purposes is probably correct, and I cannot deny it. It certainly was not my purpose.

Q. This meeting started, didn't it, with the reading of the Howard Smith letter? A. Yes.

20 Q. That set out that purpose as the primary purpose of the allotment? A. That was their purpose.

Q. The primary purpose? A. Their primary purpose.

Q. And your company the next day adopted this letter as its own, and inserted it in a full-page advertisement in The Financial Review? A. I think that was done as a quick means of getting the contents of this letter to our shareholders.

Q. Putting the second part of the third paragraph in italics? A. I was not aware of that.

30 Q. But at the next meeting you voted in favour of a resolution confirming the chairman's action in inserting the letter and in publishing the advertisement? A. Yes.

Q. Which means you examined the advertisement? A. I don't think the italics meant much to me. I am not denying certain parts of it were in italics -

40 Q. (Exhibit X handed to witness). You saw that advertisement when it was published, did you not? A. I did not buy The Financial Review to see it. I think I saw it on a tear sheet, or something like that.

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- Q. There is no doubt you saw it, is there?
A. Well, I saw it, just like looking at it, yes.
- Q. Did you see it before it was published?
A. No.
- Q. Then you saw it when it was at the meeting of 14th August? A. Yes.
- Q. When it was the subject of some discussion?
A. Yes.
- Q. And some questions as to why it had been inserted? A. Yes. 10
- Q. And Mr. Balhorn said "It states the position properly", or words to that effect? A. Yes, I think he said something like that.
- Q. And you voted in favour of the resolution that the action in publishing it be approved?
A. Ratified, yes.
- Q. What I am suggesting to you is that it must have been obvious to you at that time that this letter puts forward the cutting down of the proportionate shareholding of Ampol and Bulkships as being the primary objective to be achieved by the allotment? A. That would be Howard Smith's primary objective. 20
- Q. And Millers had taken the letter and published it as its own? (Objected to by Mr. Glass: rejected.)
- Q. Would you agree with me that the advertisement sets out the letter in full? A. Yes.
- Q. And thereunder says that the matter was considered by the board, which resolved to issue the shares? A. Yes. 30
- Q. With nothing at all about "The methods in the letter are not, however, our methods"?
A. I think the letter was published in its exact terms.
- Q. Were you aware that the form of the letter had, as it were, been settled by Mr. Conway in Mr. Taylor's presence? A. No, the form of which letter? 40

Q. The form of the letter of 6th July, 1972, from Howard Smiths to Millers? A. No, I was not.

Q.* Would you agree with me that the only reasons advanced in that advertisement as supporting the action of the directors in allotting shares to Howard Smith are the reasons contained in the Howard Smith letter itself? (Objected to by Mr. Glass: allowed.)

Q. Would you agree with that? -

10 HIS HONOUR: Take your time if you want to look at the advertisement, Mr. Nicholl.

WITNESS: Thank you, your Honour.

MR. DEANE: Q. Would you agree with that?
A. I am sorry. I have been looking at this, and I have forgotten the question.

(Question above marked * read by Court Reporter.)

WITNESS: Yes, I would agree with that. It does mention the infusion of £10,000,000.

20 MR. DEANE: Q. What does? A. The letter from Howard Smith.

Q. I don't know if you understood my question. What did you understand my question was?

A. That the only reasons in support of the allotment were set out in this letter.

Q. The question I asked you was, would you agree with me that the only reasons appearing in that advertisement as supporting the allotment are the reasons set out in the Howard Smith letter? A. Yes.

30

Q. And as set out in the priorities contained in that letter? A. They may have been Howard Smith priorities. They were not mine.

Q. You voted in favour of ratifying the Chairman's action in publishing that advertisement?

A. As a means of placing the letter before the shareholders, yes.

Q. In that form? A. Well, we were stuck with the

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form of the letter. You can't alter letters.

- Q. There would not have been any difficulty, would there, in saying "Even though the letter represents the prime purpose of the allotment as being such and such, the directors do not make it for that purpose"? (Objected to by Mr. Glass: allowed). A. There may not have been any difficulty in doing that but, as I recall, the main purpose of inserting this notice in the paper was to order tear sheets of it so that they could be included in a letter we proposed to send to shareholders at a later stage. 10
- Q. When were you told about that? A. At the time it was decided to put the letter in the paper.
- Q. So that you were party to the decision to put the letter in the paper? A. Yes.
- Q. When was that decision made? A. I don't know whether I was party to the decision, but I knew it was happening. I think it was made after the meeting of the 6th. 20
- Q. So that after the meeting there was discussion between directors that this Howard Smith letter should be published in The Financial Review? A. I don't think it was between directors as such.
- Q. Well then, between whom? A. I think management and Mr. Cameron and some people were left - a letter was going to be sent to shareholders that was going to be settled by the Miller management. 30
- Q. Mr. Nicholl, a few moments ago you said you were party to a discussion that the Howard Smith letter be published in an advertisement in The Financial Review? A. Yes.
- Q. What I want to know is when that discussion took place? A. I think it was shortly after the meeting of the 6th.
- Q. And who was present at it? A. I don't recall. 40
- Q. You were? A. I was present, yes.

- Q. Mr. Taylor? A. I think so. I am not sure.
- Q. Mr. Balhorn? A. He could have been.
- Q. Mr. Cameron was not, was he? A. I don't think so.
- Q. Was Mr. Anderson? A. I would be guessing. I certainly was not the only one.
- Q. Of course, that was immediately after the allotment had been made? Immediately after the meeting? A. Yes.
- 10 Q. The allotment had been made on a letter from Howard Smith setting out reasons for the allotment? A. I am sorry?
- Q. The allotment had been made consequent upon a letter from Howard Smith setting out reasons for the allotment? A. It was not made as a result of the reasons they set out.
- Q. The letter was read at the meeting? A. Yes.
- 20 Q. Nobody at the meeting said anything about that not being "an accurate statement of our reasons"? A. I don't think our reasons were discussed.
- Q. Nobody at the meeting said there was anything wrong with the way Howard Smith had put it? A. Well, that is how they had put it. No, nobody.
- Q. You all said "Very well" "When these reasons had been read out? A. Howard Smith's reasons, yes.
- 30 Q. Not being put forward as Howard Smith's reasons - being put forward as reasons why you, Millers should be in favour of the allotment. (Objected to by Mr. Glass.)

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HIS HONOUR: Q. Mr. Nicholl, what Mr. Deane is putting to you in substance is this, that the letter, although it is a Howard Smith letter, is couched in terms which may be thought to have been terms which would commend the offer to the Millers board. In other words, it was a letter of salesmanship. Do you follow the proposition? A. Yes.

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Q. And then it is being put that so successful was the salesmanship, if you like, that the Millers board took up the letter and published it. Do you follow the drift of the cross-examination? A. Yes.

Q. It is in that context now that these questions are being put to you. That is the line Mr. Deane is taking, or seeking to pursue, in the cross-examination. That may assist you in following the questions and answering them? A. Yes.

10

MR. DEANE: Q. You see, Mr. Nicholl, you would agree with me, wouldn't you, that this letter does not purport to contain a statement of the reasons motivating Howard Smith to apply for the shares? A. I thought it did.

Q. For example, the first reason motivating Howard Smith would surely be that they thought the price was a good one from their point of view? A. Which price, \$2.30?

20

Q. \$2.30? A. It could have been.

Q. The next reason would be that Howard Smith wanted to get control of Millers, and this would enable them to do so? A. Yes.

Q. But what is being published here is that this is good from Millers' point of view and the point of view of the Millers' shareholders, would you agree with that? A. That is probably why it was framed in this way, yes.

Q. In other words, what has been put were reasons which should, on the Howard Smith approach, be relevant to the decision of the directors of Millers? A. Yes, that is so.

30

Q. And those reasons were read in full at the meeting? A. Yes.

Q. Nobody expressed any disagreement with the way they were expressed? A. No.

Q. And immediately after the meeting, when things were still fresh in everybody's minds, those present at the meeting decided that Millers should publish the letter from Howard Smith in full in an advertisement inserted by Millers? A. Yes.

40

Q. And in an advertisement which contained nothing at all modifying or altering the statement of reasons contained in the Howard Smith letter? (Objected to by Mr. Glass: question withdrawn.)

(FURTHER HEARING ADJOURNED TO 10 A.M. WEDNESDAY 4TH OCTOBER, 1972)

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HIS HONOUR: Are there any matters in the transcript, gentlemen? 4th October 1972

10 MR. GLASS: No, your Honour, not so far as we are concerned.

MR. DEANE: There is one alteration to the transcript at p. - the third question. The reference to the exhibit should be Ex. "V" and not "D".

Exhibit V

HIS HONOUR: Yes.

ROBERT IAN NICHOLL, on former oath:

HIS HONOUR: You are on your former oath to tell the truth, Mr. Nicholl.

WITNESS: Yes.

20 MR. DEANE: Q. (Exhibit HH shown to witness) Mr. Nicholl, would you look at p.6 of that document? A. Yes.

Exhibit HH

Q. About two-thirds of the way down do you see the letter "C", representing Mr. Cameron, I think? A. Yes, that would probably be right.

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Q. Can you see there a comment made or attributed to Mr. Cameron "What are the advantages of making . . . shareholders"? A. Yes, I can see that.

Q. Do you recall Mr. Cameron saying that at the meeting? A. I don't, really. But I would not deny that he said it.

Q. You see Mr. Taylor is reported as saying "Because the majority of shares . . . shareholding". A. Yes, I can see that. 10

Q. Do you recall Mr. Taylor saying that? A. I don't, but I would not deny that he said it.

Q. Now, you told us yesterday about a conversation you had with a Mr. John Field? A. Yes.

Q. When did you have that conversation? A. I think that it was - it was some time after the construction of the "Amanda Miller" or when we were - Mr. Field resides in America, and he was out here on a visit. I don't really recall when it was. 20

Q. What was said in that conversation to the best of your recollection? A. I just mentioned to him the difficulty we were having in regard to obtaining finance for the construction and the end finance for the "Amanda Miller".

Q. What did he say? A. I said that I was concerned about the short-term borrowings and the fact of the Minsec crash, and he more or less said "Well, I have never heard of anybody trying to finance a ship on short-term money". 30

Q. Did he say anything more about the accepted way of financing shipbuilding? A. He said "It is normally done on long-term finance" - that the lending bodies are not particularly interested in the ship as a ship; they are only interested in the ship as a job - in other words, the ship as a means of servicing their loan. 40

- Q. Did he say anything else about how it is normally done? A. I don't think he did. I was not consulting him as an expert - I was just discussing it with him as a friend.
- Q. If I may, I want to direct your attention again to the conversations you had with Mr. Taylor. A. Yes.
- 10 Q. Now you would agree with me, would you not, that the conversations that you had with Mr. Taylor and with Mr. Conway on the 4th if the conversation occurred, and the 5th July, were, so far as you were concerned, in retrospect, preliminaries to the actual allotment of the 6th July? A. Well, I frankly did not believe that Howard Smith would be seeking an allotment. I had not really considered that. But it was preliminary to it.
- 20 Q. It was, as it were, a building up of your knowledge of possibility into fact? A. Well, I only directed my attention to the legal side of it.
- Q. Now, when did you first become aware that proceedings had been instituted in this Court in relation to the allotment?
A. Very shortly after the allotment was made.
- Q. And you were aware that you were named as a defendant in these proceedings? A. Yes, that is correct.
- 30 Q. Which means it would be true to say, would it not, that within days of your conversations with Mr. Taylor and Mr. Conway you were aware that what was said in those conversations could be a relevant factor in the proceedings in this Court? A. Yes.
- Q. Now, don't you find it a little surprising that you can remember the casual conversation which you had with Mr. Field in 1971 so clearly, but that your recollection of these conversations immediately prior to the institution of proceedings is so hazy? A. No, I don't find that surprising at all.
- 40 Q. You don't find that at all surprising?
A. No, I don't.

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- Q. Now, you told his Honour that in your conversation with Mr. Conway at lunchtime on 5th July you referred to the Woodside Burmah case? A. I referred to the Australian Law Journal report.
- Q. You had a volume of the Australian Law Journal with you? A. Yes, I did.
- Q. I think that you told us yesterday that you put a special mark - put a pencil mark beside what you thought were the more important passages? A. I put some marks there on things that I thought may have been relevant. 10
- Q. And at one stage someone made the comment "That is spot on"? A. Yes, that is right.
- Q. Was that in relation to a passage in the Woodside Burmah case? A. I would think it was, yes.
- Q. You see, I show you the volume. You see, on p.125 of that report, there is a pencil mark? Do you see the mark to which I am referring? A. Yes. 20
- Q. I suggest to you that it was in relation to that comment - that it was in relation to that part of the judgment that the comment "That is spot on" was made? A. Well, it could have been. I don't recall.
- Q. Now, would you refresh your recollection by looking at that paragraph again if you are not familiar with it, Mr. Nicholl? A. Yes, I have read that. 30
- Q. Now you would agree with me, would you not, that the allotment was being proposed or considered in a context where it would have the result of cutting down the proportionate shareholding of Ampol and Bulkships? I am not asking about your purposes. I am saying the allotment was being considered in that context. A. Yes. The timing was unfortunate.
- Q. Of course, the cutting down of the proportionate shareholding of Ampol and Bulkships would have the effect of enabling the Howard Smith offer to proceed? A. Keep it alive, yes. 40

Q. And you thought that was a desirable thing?
A. Yes.

Q. Now, would you agree with me that when you read the passage that you have marked in the Woodside Burmah case you noticed that the High Court of Australia had drawn a distinction between the purpose of an allotment and the result of an allotment? A. No, I did not notice that.

10 Q. Well, that appears quite clearly in the passage you have marked, doesn't it?
A. Yes, if you say it does.

Q. Well, will you read it? -

HIS HONOUR: Where does the passage begin?

MR. DEANE: The top half of the right-hand column.

WITNESS: Yes, I have read that.

MR. DEANE: Q. Would you agree with me that the High Court in that passage drew a distinction
20 between the purpose of an allotment and an incidental result of an allotment? A. Yes.

Q. And would you agree with me that when you read that passage you understood it as saying if the purpose is a financial purpose or some other justifiable purpose the allotment will be valid, notwithstanding that the allotment achieves a result which, if it were the purpose of the allotment, might invalidate it?
30 A. Well, I must say I really did not - the company employed some people that were experts in the field to advise, and frankly I was there as a director of the company and not as a solicitor giving a legal opinion.

Q. But there is no doubt that you read that passage that you have marked, is there?
A. I must have read it, but I must say I read through the whole report and just marked different things that I thought were relevant.

40 Q. You see, what I am suggesting to you is that after reading that passage you subconsciously, as it were, concentrated your efforts on

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having the prime purpose in your mind the financial purpose, and the cutting down of Ampol and Bulkships as it were as simply a result, and not a purpose at all? (Objected to by Mr. Glass; allowed).

A. I think I always had been acutely conscious of the company's financial difficulty. I have always been acutely conscious of that.

- Q. Mr. Nicholl, I am not suggesting to the contrary at the moment. What I am putting to you is that, having read in the judgment of the High Court of Australia that a distinction could be drawn between "purpose" and "result", you then subconsciously, as it were, set out to arrange your motivation so that financial consideration was "purpose" and the cutting down of the Ampol and Bulkships shareholding was "result"? A. I don't agree with you. 10
- Q. Of course you would agree with me, would you not, that when you were first asked in-chief as to your reason for voting in favour of the allotment you drew the precise distinction between "purpose" and "result" which is drawn by the High Court in that passage? A. If I did, it was not consciously. 20
- Q. But you see, you thought the cutting down of the Ampol-Bulkships proportionate shareholding would have the effect of keeping the Howard Smith offer open when you voted for the allotment, did you not? A. Yes I did. 30
- Q. And you thought very strongly that that was a desirable thing? A. I thought it was a fringe benefit of the overall allotment.
- Q. You thought very strongly that it was a desirable thing for the Howard Smith offer of \$2.50 to be kept open? A. If it had been for that reason alone I can assure you I would not have voted in favour of the allotment. 40
- Q. Now would you please answer my question? You thought very strongly that it was a

desirable thing for the Howard Smith offer of £2.50 to be kept open? A. Yes, I did.

- Q. Well then, if you thought that that was an effect which the allotment would achieve, and if you thought that that was a very desirable thing, why is it in your evidence that you have dissented from the proposition that that was one of the purposes that you had in mind in voting for the allotment? I am not saying the main purpose, but one purpose.
- 10 A. It was incidental to my purpose of voting in favour of the allotment.
- Q. You have told us that your view was that the allotment would achieve a desirable result?
- A. Yes.
- Q. A very desirable result in so far as the Howard Smith offer was concerned? A. A desirable result.
- Q. A very desirable result? I think you have already agreed with that. A. Yes, a very desirable result.
- 20 Q. Why is it, as it were, that you dissent from the proposition that among your purposes - I am not putting it to you as your main purpose - among your purposes in supporting the allotment was the purpose of achieving this result which you thought was very desirable?
- A. Because if the allotment was not made in the atmosphere of a takeover I still would have voted in favour of it.
- 30 Q. You had a number of purposes in your mind when you supported the allotment? A. I had one purpose in mind.
- Q. Only one? A. One main purpose. The others were just incidental.
- Q. Can I just ask you to ignore the distinction between main and incidental? What I am asking you is, did you not have in your mind as a purpose for supporting the allotment the fact that the allotment would achieve this very desirable result? A. I had it in mind, but it was not - it did not play any important part in the way I voted.
- 40

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Q. Or did you consciously say "I can't have the object of cutting down the Howard Smith and Bulkships proportionate shareholding" - I am sorry, the Ampol and Bulkships proportionate shareholding as a purpose: therefore I must categorise it as a result"?
A. I only had eyes for the money, I am afraid.

Q. What was your view, Mr. Nicholl, at the time you voted as to the permissibility of an allotment for the purpose of cutting down the Ampol and Bulkships proportionate shareholding? (Objected to by Mr. Glass; question withdrawn).

10

Q. What was your view at the time you voted for the allotment, Mr. Nicholl, on the permissibility of making an allotment for the main purpose of cutting down the Ampol and Bulkships proportionate shareholding?
A. My view of the law, or my view of what I would have done?

20

Q. Your view of the law. A. I did not think it was permitted.

Q. Of course, at the meeting as things proceeded the main steps concerning the allotment were, were they not, first the announcement of Mr. Taylor of receipt of the letter, and the reading of the letter in full? A. Yes, that is right.

Q. And you agreed with me yesterday - and I am not going back to redundancy, if your Honour please - you agreed with me yesterday that the letter represented a cutting down of the Ampol-Bulkships shareholding as the main purpose advanced by Howard Smith? (Objected to by Mr. Glass).

30

Q. Well then, after that the agreement was read?
A. Yes, that is right.

Q. Had you seen the agreement before? Had you seen the agreement before it was read?
A. No, I had not seen it before it was read.

40

Q. Did you see it at the meeting? A. I think - no, I don't recall seeing it.

- Q. Mr. Nicholl, are you able to understand the full import of an agreement of this nature if it is simply read to you at a board meeting? A. When it was read there was nothing in it that stuck out to my mind as being objectionable.
- Q. Well anyway, the agreement was read? A. Yes, the agreement was read.
- 10 Q. There was then a discussion and the ruling in relation to Sir Peter Abeles? A. Yes.
- Q. And then Mr. Conway gave some legal views, didn't he? A. Yes.
- Q. And would you agree with me that Mr. Conway's legal views consisted of, in the main, that the directors must think that the allotment is in the interests of all shareholders and not just some of them? A. I don't recall in detail what Mr. Conway said.
- 20 Q. I suggest to you that the main advice he gave was that the directors must consider the interests of all shareholders, and not just some of them. A. I can remember him saying something like that. I don't recall exactly what he said, but I can recall him saying something like that.
- Q. And you would also agree with me that nobody at this meeting said "Look, one thing must be clear. You cannot make this allotment for the purpose of cutting down Bulkships and Ampol's proportionate shareholding?"
- 30 A. I am sorry, could you repeat that?
- Q. You would agree with me, would you not, that nobody at this meeting said anything to this effect: "Look, you can't make this allotment for the purpose of cutting down Bulkships and Ampol's proportionate shareholding?"
- A. ~~I don't think anybody at the meeting would have voted to that effect.~~
- MR. DEANE: Could that be struck out?
- 40 HIS HONOUR: Yes, I think that answer should be struck out.

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MR. DEANE: Q. Will you answer my question?

A. Did anybody mention?

Q. Yes. A. I don't recall it being mentioned.

Q. Of course then there was discussion, was there not, on the basis, or to this effect, that the allotment was in the interests of all shareholders because Ampol and Bulkships could accept the Howard Smith offer? A. Have the opportunity of accepting it, yes. 10

Q. Which means there was a discussion that an allotment which cut down the proportionate shareholding of Ampol and Bulkships was in the interests of Ampol and Bulkships because they could accept the Howard Smith offer? A. They could accept it, or keep their shares.

Q. But that was discussed at the meeting? A. Yes, I recall it being discussed.

Q. And it was discussed, was it not, in answer to Mr. Conway's comment or recommendation - it was discussed in the context of Mr. Conway's comment that it had to be in the interests of all shareholders? A. I suppose it was, yes. 20

Q. Didn't it occur to you, Mr. Nicholl, that your other directors might be going right off the rails? A. It was a matter of individual decision in my opinion.

Q. But you were the only lawyer on this board, weren't you? A. I was not on the board as a lawyer. 30

Q. But you were a lawyer, and you were on the board? A. Yes, that is right.

Q. And this was a matter of great importance to your company? A. Yes.

Q. And if directors, as it were, were voting with impermissible motives it was something which should be of concern to you? A. If that was the case, yes.

Q. Didn't it occur to you, in the context of 40

the discussion that took place, that it is quite clear that some of the directors at least did not appreciate the distinction between permissible and impermissible purposes? A. I was not aware of what the other directors had in their minds.

- Q. Were you concerned about it? A. I was more concerned about my own decision.
- 10 Q. Mr. Nicholl, there are just a couple of other matters about which I wish to ask you. I show you Ex. AA, which is a letter from * Millers to the Secretary of the Sydney Stock Exchange. A. Yes.
- Q. It is the top letter I am referring to. A. Yes.
- Q. Have you seen that letter before? A. I don't think so, no.
- 20 Q. I suggest to you that that was one of the documents that was considered at the board meeting of 14th July? A. Yes, that was probably one of the letters that were ratified.
- Q. Did you look at it at that board meeting? A. It had been sent. I looked at it briefly. I don't recall . . . (answer not completed).
- Q. Indeed, there was some comment at the board meeting in relation to it, wasn't there? A. I don't recall.
- 30 Q. Did not Mr. Cameron protest at the last paragraph of the letter? A. He may have. I don't recall.
- Q. Did you take any objection to that last paragraph? A. I don't think I considered it.
- Q. You would agree with me it is quite misleading? A. "Fullest" - that is probably misleading.
- 40 Q. The chairman informed the meeting of 14th July that a sub-committee had been formed to deal with correspondence with the Stock Exchange, didn't he? A. I think he did, yes.

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- Q. Were you on that subcommittee? A. No, I was not on the subcommittee.
- Q. Who was on it? A. I don't know who was on it.
- Q. Would you look at the first page of the letter, at the fourth paragraph, beginning "It was at all times open to Millers . . ." Will you read that paragraph? A. Yes.
- Q. Did you read that at the meeting of 14th July? A. Probably. I probably did, but I don't recall. 10
- Q. You would agree with me, would you not, that that is quite misleading? A. The company did endeavour to project the image of being a wholly-owned Australian company.
- Q. The directors of the company had never, since you became a director, considered allotting shares to foreign entities, had it? A. I heard something about Mitsui or one of the Japanese companies. I don't think the directors ever considered it, no. 20
- Q. Which means that this statement is quite misleading, isn't it? (Objected to: allowed).
- Q. It means that this statement is quite misleading, doesn't it? A. I had only been with the company since 1968 - August 1968 and am still learning things about the company, and whether that had been something obvious in the past I would not know. Sir Roderick Miller did a lot of things that the rest of us did not know about. 30
- Q. Do you deny that you read that paragraph of that letter at the meeting of 14th July? A. As I say, I read it. The letter had gone. I read it quickly, and nothing in it hit me as being anything that warranted, to my knowledge, highlighting whatever may have been in it that was objectionable by writing another letter about it.
- Q. But you see, had not Mr. Koch told you in these conversations you had with him frequently as to the financial affairs of 40

Millers - hadn't he told you that he had made an approach to Mitsui in relation to allotting shares to them? Had not Mr. Koch told you that in one of these many conversations you had with him? A. I don't recall. He may have.

Q. Didn't he tell you that Mitsui had rejected the approach? A. As I say, I don't recall it.

10 Q. Is the situation this, that you are neither prepared to assent to that proposition or to deny that Mr. Koch told you these things?
A. I am probably handicapped by the fact that I was in Court for a fair bit of the time while Mr. Koch was giving his evidence, and I am not in a position to know whether I learned it from his evidence in the box or from him previously. But I don't recall him having mentioned that to me.

20 Q. Of course, the fact that the letter had gone did not prevent any incorrect or inaccurate statement in it from being corrected, did it?
A. No. It was considered by whoever drafted it - the panel who drafted the letter - and I actually did not consider it in detail.

Q. Mr. Nicholl, I want to ask you some questions about the loan of \$2m to the Eastern Suburbs Leagues Club which was made in 1969, I think?
A. I don't know when it was made.

30 Q. Did you have anything to do with the negotiations in regard to that loan? A. Not one thing.

Q. And you have no knowledge of the circumstances in which that loan was made? A. No, I have not.

Q. Subsequently the question came before the board, did it not, that Eastern Suburbs Leagues Club was not paying interest at the rate specified in the mortgage? That matter came before the board, didn't it? A. Yes, that is right.

40 Q. And that matter was considered by the board?
A. Yes, it was considered by the board.

Q. And indeed, a motion was put that the Eastern

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Suburbs Leagues Club be required to pay the mortgage - I am sorry, that the Eastern Suburbs Leagues Club be required to pay the amount of interest specified in the mortgage?
A. Yes.

- Q. That motion was put, was it not? A. Yes, that motion was put.
- Q. And you voted against that motion? A. Yes.
- Q. What were your reasons for voting against it?
A. Well, Sir Roderick Miller did a lot of business on a handshake basis - his word - and I did not wish to poach upon some agreement that he may have made during his lifetime, and I think the Eastern Suburbs Leagues Club were in fact paying back more principal than they had to under the mortgage. 10
- Q. Except, of course, Millers was a public company? A. Yes.
- Q. And here one had a mortgage document specifying interest at nine per cent? A. Yes, that is right. 20
- Q. And there was nothing in writing to indicate anything to the contrary? A. No. That is so.
- Q. And there was nothing in any of the minutes of Millers which would, as it were, authorise anyone to reach an oral agreement cutting down that rate of interest? A. No, not that I am aware of.
- Q. And a very substantial amount was involved each year in the difference between the interest payable under the terms of the mortgage and the interest being charged? That is correct, is it not? A. I suppose so, yes. 30
- Q. Is what you say that you supported, or you voted against the motion that the company charge Eastern Suburbs Leagues Club the full amount specified by the mortgage on the basis that there was some arrangement which Sir Roderick Miller had entered into? A. That is right - but with the knowledge that somebody from the company was going out to put the hard word on them. 40

- Q. What was your understanding as to the arrangement that Sir Roderick Miller entered into? A. I had no idea.
- Q. You did not ask what the arrangement was? A. I don't think anybody knew.

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- MR. STAFF: Q. Mr. Nicholl, you gave some evidence
yesterday (p. 847) about the disqualification
of Sir Peter Abeles for what you regarded as
10 his conflict of interest. Do you remember
giving evidence in regard to that matter
yesterday? A. Yes.
- Q. You were aware, were you, that Sir Peter was
one of a considerable number of directors on
the Bulkships board? A. Yes.
- Q. Some seven, or eight, or more? A. I have no
idea. But one of a number of directors.
- Q. And you were aware, of course, that he had no
executive capacity or office in Bulkships?
20 A. I was not aware one way or the other.
- Q. You, may I take it, made no inquiry as to
whether he had participated in the Bulkships
decision which led to the joint announcement?
A. To my knowledge he was Bulkships
representative on Millers board.
- Q. Mr. Nicholl, will you now answer the question

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I asked you? Did you make any inquiry as to whether Sir Peter had participated in the decision made by Bulkships which led to the joint announcement? A. I assumed he had.

- Q. That is not what I asked you. Did you make any inquiry? A. No, I did not make any inquiry.
- Q. And you could, of course, have readily asked Sir Peter at that meeting, couldn't you? A. I did not doubt that he had some knowledge of it. 10
- Q. You did not know one way or the other? A. I did not know, but I did not think it would be made without his knowledge.
- Q. You did not care to make any inquiry of him? A. No, I did not see any reason to make any inquiry.
- Q. And you, of course, still, I suppose, don't know whether he in fact participated in it - voted for the decision or against the decision? You still don't know that? A. No, I don't. 20
- Q. And no one at the meeting gave Sir Peter any opportunity to say one way or another, did they? A. I am sure he would have.
- Q. Now would you answer the question I asked, Mr. Nicholl? No one at the meeting gave Sir Peter any opportunity to say one way or another, did they? A. The opportunity was there if he wished to say it. 30
- Q. Did anyone invite him? A. He did not need to be invited.
- Q. Are you anxious to avoid answering the questions I ask? A. No.
- Q. Do you find it difficult to answer them? A. Not at all.
- Q. Well, would you just answer them in future? You told us yesterday, at p. 847 that you had a belief that Sir Peter was a representative director for Bulkships on the Miller board? A. Yes. 40

- Q. You were a member of the Miller board when Sir Peter was invited to join the board by Sir Roderick Miller, were you not? A. Yes, I was.
- Q. And I suppose you voted in favour of his appointment? A. Yes.
- Q. You were aware that Sir Roderick Miller had invited Sir Peter to join the board, were you not? A. Yes.
- 10 Q. And you were aware that Bulkships had not made any request for any director to be appointed - either Sir Peter or anyone else? You were aware of that, were you not? A. I was not aware of that.
- Q. You were not aware of any request having been made by Bulkships, were you? A. No.
- Q. Were you aware that following the invitation made by Sir Roderick Miller to Sir Peter, Sir Peter asked the assent of Bulkships to his accepting the appointment? A. No.
- 20 Q. You never made any inquiry about that? A. No.
- Q. And you have simply proceeded on the assumption, have you, that he in some way was a representative of Bulkships? A. Yes.
- Q. And I suppose the only basis for that assumption which you had was that he in fact was a member of Bulkships board? A. Yes.
- 30 Q. Mr. Nicholl I think you told us - correct me if I am wrong - that throughout the period from 30th June, 1971, to 30th June, 1972, you were seriously concerned about the Miller company's liquidity? A. I think it went back prior to that.
- Q. At least throughout that period? A. Certainly. Very.
- 40 Q. Is it fair to summarise the views you have expressed that your opinion was that the liquidity problem was getting worse as that financial year proceeded? A. The period to service borrowings was.

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* Exhibit 13.

- Q. The shortage of money which existed in the company at 30th June, 1971, was getting better, or worse? A. It was my impression that the whole situation was deteriorating.
- Q. And indeed in July 1971 the liquidity situation was so bad that consideration of the payment of a dividend was deferred, was it not? A. I know we had lots of doubts about payment of a dividend.
- Q. And what I want to put to you is that at a meeting of directors of Miller on 29th July of 1971 consideration of the payment of a dividend was deferred because of the liquidity situation of the company? A. I don't recall that, but I would not deny it. 10
- Q. (Exhibit 13 handed to witness) Would you * look at p.5 of those minutes, Mr. Nicholl? A. Yes.
- Q. At the end of p.5, under the heading of "Financial Results" - the second paragraph. A. Yes. 20
- Q. I think you were present at the meeting, Mr. Nicholl, if you look at the beginning of p.1. A. Yes.
- Q. Would you agree that at that meeting because of the liquidity position it was determined by the directors that you should not make a decision on payment of a final dividend for the time being? A. Yes.
- Q. And may I take it it was then your view that the company's ability to service its existing borrowings and its capital was such that the payment of a dividend at that point of time was not justified? A. Money that should have been used to pay a dividend was spent otherwise, yes. 30
- Q. Well, was it your view then that the payment of a dividend at that point of time would not have been justified? A. I do not think it would be fair to the shareholders to deprive them of a dividend merely because we had used their profits to solve the company's problems, or help try and solve them. 40

- Q. In any event, it was then your view, was it, that the liquidity position was so bad that you were not justified in declaring a dividend in July 1971? A. I think the profits were there, but the money was not.
- 10 Q. Of course, by October of that year there was in your view sufficient money and profits available to declare a dividend? There were sufficient profits and money available to declare a dividend, weren't there?
A. Accountants can do wonders with figures.
- Q. You participated in the decision in October to pay a final dividend, didn't you? A. Yes.
- Q. And you agreed with that decision, didn't you? A. Yes.
- 20 Q. You thought that the situation had improved sufficiently from June to October to justify the payment of the dividend? A. I had very much doubt as to whether the bank would meet the cheques.
- Q. You had doubts as to whether the bank would meet the cheques? A. Yes.
- Q. Did you express those doubts at the October meeting when the dividend was declared? A. No.
- Q. You did not think them worthwhile expressing then? A. I was just hoping that the bank would see us through.
- 30 Q. Do you tell his Honour that you participated in a decision to pay a dividend when you had grave doubts whether the dividend cheques would be met by the Bank? A. I thought they would, but I had doubts. You said "Grave".
- Q. Did you have doubts, or grave doubts, or what sort of doubts did you have? A. It would not have surprised me if the bank had said something.
- Q. It would not have surprised you if the bank had said something? A. No.
- 40 Q. What? "We don't like paying these cheques",

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or "We won't pay them"? A. Well, I think we reduced the dividend rate. We reduced the rate of dividend, and I think we demonstrated to the bank we were pulling things into line.

- Q. A few minutes ago you said that you had doubts, and I suggest to you grave doubts, that the bank would pay the dividend cheque. Was that true, or not? A. Yes.
- Q. And you say, do you, that you participated in a decision to declare a dividend, having at the time grave doubts whether the bank would pay the dividend cheques sent out to your shareholders? A. Doubts, yes. 10
- Q. Were they doubts, or grave doubts? A. It is all a matter of degree.
- Q. But in any event you thought it was the proper exercise of your function as a director to agree to the declaration of a dividend, having such doubts, did you? A. The fact is the dividend was met. 20
- Q. Now, would you answer the question I asked you? A. I have forgotten the question.
- Q. You thought it was a proper exercise of your function as a director to agree to the declaration of a dividend whilst having such doubts, did you? A. Yes.
- Q. Mr. Nicholl, you were in Sydney during December 1971, were you not? A. Yes, I was.
- Q. Up until Christmas, at any rate? A. So far as I know, yes. 30
- Q. Would you agree that in December of 1971 Millers had no financial worries? A. No.
- Q. What was your opinion of Millers' financial situation in December 1971? A. They had lots of financial worries.
- Q. And do you recall in December 1971 discussing Millers' financial position with Mr. Taylor? A. I do not recall it.

- Q. Well, would you have been aware of Mr. Taylor's view at that time? A. I don't recall.
- Q. I suppose you customarily read the financial press at that time in so far as, at any rate, it reported Millers' affairs? A. I did not read it personally, no.
- Q. Never? A. No.
- 10 Q. Have you ever been in the habit of reading financial news in so far as it relates to Millers? (Objected to by Mr. Glass).
- Q. I will come directly to it. Would you look at the publication or the sheet from the Sun of December 17th which I show you? A. Yes.
- 20 Q. I direct your attention to the fourth paragraph - to four paragraphs following the subheading "Unprofitable". Would you just read those to yourself, would you? They are in the third and fourth columns. Would you read those to yourself? A. Yes.
- Q. Did you, at or about December 1971, read or otherwise see that article? A. I think I would have seen it, yes.
- Q. And do you recall reading the words "Millers had no financial worries at all" attributed to Mr. Taylor? A. I would have read them, yes.
- Q. When you read that did the statement accord with your own belief? A. No.
- 30 Q. Did you speak to Mr. Taylor about it? A. I think there may have been a board meeting shortly after that.
- Q. And you raised the matter at the board meeting? A. I don't think I raised it. I think Mr. Taylor had just gone through his first annual meeting of the company as chairman, and I think that he had had a bit of a verbal exchange with Frank Browne at the annual meeting, and I think as a result of different things that he was purported or
- 40 reported to have said that were reported in

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the press he said "Look, just don't speak to them. If you have got anything to say, say it in writing".

- Q. Do you recall any discussion about the truth or otherwise of the statement to which I have directed attention? A. No.
- Q. Were you concerned about it having appeared in the press? A. I think Mr. Taylor was probably trying - was I concerned about it? No. 10
- Q. It did not occur to you that it ought to be corrected? A. I considered it, but usually when correcting things you tend to highlight it more.
- Q. And you thought that the shareholders and anyone else - creditors trading with Millers - could happily trade or hold their shares, or buy or sell shares, on the faith of it? A. I didn't think it would do them any harm.
- Q. Now, Mr. Nicholl, you gave some evidence yesterday (pp.865 & 866) as to your belief that the consequence of the allotment of shares to Howard Smith might be a higher offer by Ampol or by somebody else? A. Yes. 20
- Q. And that was present to your mind when you were considering the way in which you should vote at the meeting of 6th July was it? A. It was present in my mind.
- Q. And did you give consideration to the consequence of making the allotment to Howard Smith in the light of that factor? A. No doubt I had that in mind when considering it, yes. 30
- Q. Then, as you told his Honour in answer to a question from his Honour, you were conscious that any further offer that might be made would have to be at "20¢plus", or any further offer made by Ampol - made by Ampol or anyone else, would have to be at \$2.50, or in excess of it? A. I would assume that would be so, yes. 40
- Q. You were conscious, you told us, when you made the decision to vote for this allotment

that if somebody else made an offer or if Ampol increased its offer to something in excess of \$2.50 you would have made a present to Howard Smith of something like \$1 m. by reason of the allotment? A. I did not work the figure out.

- 10 Q. You were conscious of the potential gift which may be involved in the placement to Howard Smith? A. I can see that there was a potential gift there, but I don't say I was conscious of it at the time.
- Q. You would agree, would you not, that in terms of mathematics it had to be something more than \$1 m? A. If you have worked it out. I am no mathematician.
- Q. Well, are you able to tell his Honour now whether you had that matter in your mind at the time you decided to vote for the allotment? A. Which matter?
- 20 Q. That potentially there was a very substantial gift to Howard Smith in making the allotment? A. I did not have that in mind.
- Q. You will agree that that was a significant consideration in determining whether to make an allotment or not? A. All I could see was the salvation of the company's problem.
- 30 Q. Would not you agree that if such a gift to Howard Smith came about it would only be at the expense of all the pre-existing shareholders of Millers? A. I did not see that.
- Q. Would not you agree now that would be the effect of it? A. No.
- Q. And you don't think that is the consequence of such an allotment in such circumstances? A. No.
- 40 Q. Mr. Nicholl, at the time you voted in favour of the allotment you entertained no belief that the company needed immediately money to cover its short-term borrowings and existing commitments, did you? A. What do you mean, "immediately"? That day?

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- Q. Within a week or a fortnight or within a month. A. Well, there was some money due. I regarded twelve months as short term.
- Q. I appreciate that. But you did not regard the possession of \$10 m. as something which the company had to have within a month or even three months, did you? A. It was something I would have liked to have had.
- Q. Of course, the proposal was that there would only be \$1 m. immediately, and the rest in some months' time, wasn't it? A. I think it was to that effect, yes. 10
- Q. So that you did not have present to your mind any consideration of such urgency that it was necessary to make a decision upon the matter on the spot, did you? A. Yes, I did.
- Q. You did not have any consideration present to your mind of a pressing need to have in your hand \$10 m. within a matter of weeks, did you? A. No. 20
- Q. And you, I suppose, made no inquiry as to whether Howard Smith was prepared to give Millers more than that day to make a decision upon the proposal? A. I did not think they were.
- Q. You did not think they were? A. No.
- Q. Did you make any inquiry to find out whether they were or were not? A. Just construing the terms of the letter.
- Q. The letter, of course, spoke of the making of an application to be handed in that day? A. Yes. 30
- Q. An allotment which was sought to be made to Howard Smith on that day? A. I did not want them to go away thinking about it.
- Q. You did not think they had not thought about it before they made the offer did you? A.No.
- Q. Well in any event you say, do you, that you were fearful that if it was not taken up that very day they might change their mind? A.Yes. 40

- Q. You honestly feared that result, did you?
A. Yes.
- Q. Did you say anything about it at the meeting?
A. No.
- Q. Mr. Nicholl, ordinarily would not you agree that for a man who is not a financial man, before deciding upon a proposal of such significance as this allotment to Howard Smith you would desire some advice from the company's financial experts? A. I thought we had had that.
- 10 Q. You had a year or so earlier engaged a financial adviser - Tricontinental Corporation - at a retainer, had you not? A. The company had.
- Q. And you participated in that decision to engage that company, did you not? A. I didn't know anything about it. It was not my decision. I went along with it.
- 20 Q. And indeed, in May or June 1972 the company renewed that annual retainer for a further year, didn't it? A. I don't know.
- Q. Anyway, you were aware that Tricontinental was retained as the company's financial adviser? A. I was aware of that, yes.
- Q. You had no knowledge on 6th July of any advice about the proposed allotment given by Tricontinental? A. No.
- 30 Q. Nor of any advice being sought from them?
A. No.
- Q. May I take it that you, with your knowledge of Millers' financial position, felt no need of any advice from Tricontinental? A. No.
- Q. Well, did you feel in need of financial advice on this occasion? A. No.
- Q. Of course, Mr. Cameron you regarded as a reputable and competent financial man, didn't you? A. Yes.
- Q. And you told us you regarded yourself as not

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being a financial man? A. Yes, that is right.

- Q. You were conscious of the enormous commercial and financial consequences of the allotment of another fifty per cent of Millers' capital? A. Yes.
- Q. And Mr. Cameron urged not direct opposition, but further consideration, of the proposal, did he not? A. Yes.
- Q. You felt financially competent to reject that recommendation, did you? A. Not financially competent. 10
- Q. Well, at any rate you saw no need for it - for further consideration? A. No.
- Q. And your sole reason for desiring to make an immediate decision was your fear that Howard Smith may change their mind, was it? A. Yes.
- Q. The sole reason? A. I don't know about the sole reason. It was certainly in my mind.
- Q. Can you think of any other reasons you had in your mind for requiring an immediate decision on that very day? A. It was the nature of the offer. 20
- Q. You were conscious, were you not, that the Howard Smith offer or request so far as Howard Smith was concerned was directly related to the existence of its takeover offer? A. Yes.
- Q. And that the two were to go hand in hand? A. Yes.
- Q. And do you tell his Honour, Mr. Nicholl, that you thought that if the decision were not made that very day Howard Smith might abandon its takeover offer and withdraw its request for an allotment immediately? A. It was a possibility, yes. 30
- Q. When you say it was a possibility, a theoretical possibility or a practical possibility? A. No. You read it in the papers every day that offers for some reason or another just go - a particular one with a 40

person involved in this case in mind, too.

Q. As a lawyer you are conscious that there are very often different views in different lawyers' minds about legal problems, are you not? A. Yes.

Q. You had had your own doubts about the principles of law which were applicable to the allotment of shares in a takeover situation on the previous day, had you not? A. Well, I knew what I didn't know.

Q. I suppose you were also conscious of the possibility of differing views about Sir Peter Abeles' position as a matter of law? A. I don't think there was any room for doubt there.

Q. You were quite ready to make the decision on the spot on that question of law?
A. It was not my decision.

Q. You were quite ready to make a decision in your mind that the chairman's ruling was correct at that point of time? A. It was not for me to say. But I did not dispute his ruling.

Q. Mr. Nicholl, as a lawyer do you entertain any serious doubt - I will withdraw that if I may. Had you entertained any serious doubt upon the regularity and lawfulness of the ruling would not you have offered your view to the meeting? A. Yes. I did not challenge the ruling.

Q. Would not you have offered a view if you had entertained any serious doubt about the chairman's ruling? A. I did not entertain any doubt.

Q. Sir Peter, of course, wished to get some legal advice about the matter? A. Yes.

Q. May I take it that you agreed with the chairman's refusal to adjourn the meeting even for a short time while Sir Peter sought some advice? A. That was the chairman's ruling - not mine.

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- Q. But you agreed with it? A. I did not have any choice in the matter.
- Q. You did not dissent from it? A. No, I did not dissent from it.
- Q. You offered no suggestion that it might be fair to Sir Peter to allow him five minutes or ten minutes to seek some independent legal advice? A. He was allowed to leave the meeting.
- Q. It did not occur to you that it might be fair to him to adjourn the meeting for five to ten minutes whilst he attempted to get advice? A. I did not give it any consideration. 10
- Q. Why were you so anxious that the meeting should go on without adjournment? A. It was a decision that had to be made.
- Q. But you had all day to make it on your understanding of the proposal, didn't you? A. It was a matter of each individual director making up his mind. 20
- Q. Well, it came to the question of Sir Peter's situation at half past ten or 11 o'clock in the morning, did it not? A. I don't recall the time.
- Q. At any rate, it was early in the meeting, wasn't it? A. Yes, I think it was.
- Q. And Sir Peter, of course, was a layman, to your knowledge? A. A very well educated layman. 30
- Q. Did you think it was an unreasonable request on his part to have an adjournment whilst he sought to get some advice upon this ruling? A. Well, Mr. Aston was there advising the board.
- Q. And you thought, of course, that Sir Peter should simply accept Mr. Aston's say-so? A. He was in favour of Mr. Aston's appointment, as I understand it.
- Q. Now will you answer my question? A. I am 40

sorry, I have forgotten the question.

- Q. You thought it was fair and proper that Sir Peter should be expected to accept Mr. Aston's say-so on such a matter as this?
A. I did not consider it.

- 10 Q. Didn't it cross your mind that the fair course would have been to yourself suggest that you have a quarter of an hour's adjournment? A. I had - as I said previously, I think - I had disqualified myself from voting on a particular matter on a much lesser ground than Sir Peter Abeles had.

- Q. What matter? A. A particular client of mine was being discussed, and I offered to withdraw from the meeting.

- Q. In what way was he being discussed? The subject of some decision? A. Yes.

- 20 Q. You thought that was an analogous situation? A. I thought it was a much lesser position of conflict than Sir Peter Abeles' position.

- Q. And of course, you thought that Sir Peter should not be given any opportunity to get advice before the meeting proceeded further?
A. No, I did not think it was necessary.

- Q. And the matter that was being discussed to which you referred was a matter which concerned litigation with your client - between Millers and your client? A. No, that is not right.

- 30 Q. Or projected litigation? A. No.

- Q. Mr. Nicholl, you recall, I think, Lady Miller suggested that the meeting might be adjourned for a little time to see what the Stock Exchange's attitude to the proposed allotment would be? A. I recall something like that, yes.

- Q. And again you did not consider it worthwhile to entertain that idea? A. No.

- 40 Q. I suppose you envisaged that if you told the Stock Exchange in advance they might take steps

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to prevent you making the allotment? A. I did not give it any thought.

Q. You knew there was a contractual undertaking between the company and the Stock Exchange?
A. Yes.

Q. Will you tell us, why did you think it not worthwhile to ascertain or make inquiries directed towards attempting to ascertain what attitude the Stock Exchange would adopt?
A. It was a matter for any individual decision -10 not a ruling of the Stock Exchange.

Q. Not even worthwhile making an inquiry to see what the consequences of your decision would be? A. No.

Q. In other words, you thought you were thoroughly justified, as a director in this company, in participating in a decision committing a breach of the contract with the Stock Exchange, did you? A. Having regard to the result we achieved, yes. 20

Q. Without any knowledge in advance, or any attempt to gain foreknowledge of what the Stock Exchange would do? A. I did not consider it, really.

Re-examination
by Mr. Glass Q.C.

RE-EXAMINATION

MR. GLASS: Q. You were asked at p. 816 did you not know that the contract date for completion of the "Robert Miller" - I am sorry that the "Robert Miller" was due to be completed in March 1973, and you said that that was the contract date. Do you remember that?
A. Yes. 30

Q. What was your belief then as to the point of time at which the "Robert Miller" was likely to be delivered? A. On the information that was available to me at that stage, and the opinion of our own marine superintendent, he could not see how they could possibly finish it by March, and he was doubtful about June. There was some talk about painting being short, 40 or not adequate painting, but the ship would be delivered when it was completed, and that was a matter of guesswork.

Q. Did you expect it to be completed in the twelve months commencing 1st July, 1972? A. During the twelve months?

Q. Yes. A. I doubted it.

Q. What was your belief as to the earliest time when you could get the Hambros money, assuming it became available? A. We could not get it until after the ship was delivered because we did not own it - it is a Commonwealth ship.

10 Q. You said, at p. 820, that some photographs that you had in Court were presented to the board, and they gave you concern? A. Yes.

Q. When were these photographs presented to the board? A. In April or May I think - 1972.

Q. Are these the photographs to which you referred?

MR. DEANE: Whilst the witness is looking at those, might I draw attention to an error in the transcript on p.820, in the second line? The word "assisted" should be "exceeded".

20 HIS HONOUR: Yes.

MR. GLASS: Q. Are those the photographs to which you referred? A. Yes.

30 Q. What was the concern that these photographs caused in your mind? A. These photographs to my knowledge, or I was informed they were taken in March of this year, which is roughly a nine-months-old ship, and they showed disgraceful paint work in my opinion. I am no expert on paint work, but I was not happy with this ship being our flagship in that condition, and my concern was that when the ship went in for its annual overhaul or repairs or whatever it was that that work in my opinion was absolutely essential to be attended to, and I could not see that being done in any quick time, or not done in a way that I would approve of.

(Photographs tendered; objected to by Mr. Deane; rejected).

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* Exhibit HH

MR. GLASS: Q. At the top of page 839 in your answer to the second question you said "My concern was the company's ability between 30th June, 1972, and whenever the "Robert Miller" was handed over to service the various advances that had been made to us."
A. Yes.

Q. Now, what were the advances to which you there refer? A. I think it was the figure of \$10 million that Mr. Koch had referred to. 10

Q. You were asked this morning about a remark attributed to Mr. Cameron in Ex. HH about * placement to shareholders, namely, "What are the advantages of making a placement outside the company over a placement to our shareholders" A. Yes.

Q. Was anything else said about the respective advantages of placement to shareholders and placement outside the company at the meeting? A. I think I said that a placement to shareholders at \$2.30 a share would not be likely to meet with success. I think Mr. Cameron agreed with this. 20

Q. You have before you, I think, your copy of 42...

HIS HONOUR: Q. Mr. Nicholl, in that context, was any thought given to the prospect of a placement at \$2.30 coupled with a contractual obligation that Howard Smith would go ahead with the takeover offer at \$2.50? A. I don't recall directing my mind to that, your Honour. 30

MR. GLASS: Q. Have you got your copy of 42 Australian Law Journal there, Mr. Nicholl?
A. It was here.

Q. Will you address your mind to the report starting at p.123 and tell me whether the markings which now appear there were present on 5th July? A. Yes, they were the markings I put there on 5th July before I went down to the meeting with Mr. Conway. 40

Q. Do they mark the passages which, inter alia, were discussed between you and Mr. Conway?
A. Yes.

Q. I think you said earlier that in discussions between you and Mr. Conway the article in that same volume as well as the report were referred to? A. Yes, I recall that article being read. It is only short and I think it was probably read fully. I don't know whether I read it or Mr. Conway read it but that is not marked.

10 Q. You told my learned friend Mr. Deane this morning that you thought it desirable - I withdraw that - that you knew that cutting down the Ampol/Bulkships proportion of shareholding would keep the Howard Smith offer open? A. Yes.

Q. And that you thought that was a desirable outcome? A. Yes.

Q. You said that it was only a purpose incidental to your main purpose? A. It wasn't my purpose; it was incidental to the placement.

20 Q. To the extent that it was incidental to your main purpose, how did you regard the maintenance in being of the Howard Smith offer from the standpoint of the shareholders as a whole? A. I think it was important to keep the offer open to the shareholders. They could either accept it or keep their shares.

30 Q. So far as their interests were concerned, what did they achieve? A. It gave them an opportunity, if they so desired, to get a higher price for their shares.

Q. You told my friend, Mr. Staff, that you did not know to what extent Sir Peter Abeles participated in the joint announcement. What was your belief regarding that? A. I believed that he would have been fully aware of the joint announcement.

Q. You told him you did not know that he represented Bulkships. What was your belief in that respect? A. It was my belief that he represented Bulkships.

40 Q. Between July 1971 and October 1971 - I withdraw that. You said that in July 1971 the dividend was not passed and in October it was approved. Do you remember that? A. Yes.

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- Q. How did the liquidity position of the company in October 1971 compare with its liquidity position in July 1971?
A. I don't recall. The accountants had gone into the figures in more detail.
- Q. Was there any member of the Board who expressed a view as to whether the dividend should be declared in October 1971?
A. I am sorry?
- Q. Did any member of the Board that you recall express a view as to whether the dividend should be declared in October 1971? A. I think they were all in favour of a reduced dividend. 10
- Q. Can you recall what view Mr. Cameron took? A. I don't recall specifically what view Mr. Cameron took, no.
- Q. Lastly, you said to my friend, Mr. Staff, or he asked you did you need advice from the financial expert and you said, "I thought we had had that", do you remember?
A. Yes. 20
- Q. Who was the financial expert to whom you were referring? A. Mr. Koch.
- Q. To what extent did you place reliance upon the views and recommendations he expressed? A. I accepted what he said as being the fact.
- Q. As to his recommendations, what was your attitude to them? A. I independently of his recommendations came to the same conclusions as he did. 30
- Q. Did the fact that he recommended weigh in any way with you? (objected to by

Mr. Staff; allowed)

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Exhibit T.

Q. What was your state of mind with respect to the recommendation he made?
A. I accepted Mr. Koch's recommendation but I did not vote in favour of the allotment merely because he suggested I should.

10 Q. Your reasons being initially? A. It was my decision and it was my opinion that we required the money.

20 MR. HUGHES: Just one matter that arises out of a question that your Honour put to Mr. Nicholl. Your Honour asked whether consideration had been given to obtaining contractual obligations from Howard Smith to go ahead with the takeover offer. I simply, if I may at this stage, invite your Honour's attention, so far as it may be material to do so, to the first page of Ex.T. Ex. T. is the Deed of Undertaking, but it is a bilateral document, - it is executed by both parties - and the first operative part of the deed is that Howard Smith agrees, so we would contend, to proceed with an offer and, if one reads clause 2 with clause 4, the offer referred to in the first operative part of the deed is the
30 relevant offer, the \$2.50 one.

HIS HONOUR: That is the \$2.50 offer?

MR. HUGHES: Yes. I only mention it in case anything

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HIS HONOUR: I just don't at the moment see
what you have in mind, Mr. Hughes.

MR. HUGHES: I thought your Honour put a
question to Mr. Nicholl to suggest
that it might be, suggesting that
nothing was done in the way of obtaining
from Howard Smith some sort of
contractual obligation.

HIS HONOUR: No, what I was putting to
Mr. Nicholl was simply the question of
whether, when discounting the suggestion
that shareholders in general would pay
£2.30, anybody had stopped to think
"Well, Howard Smith is binding itself
to paying £2.50" and I should have thought
that if shareholders were told "You can
get shares at £2.30 and we have obtained
for you a binding offer at £2.50" the
reluctance of the shareholders might
well have been somewhat modified. That
was the thought. I wanted to put it to
Mr. Nicholl to see the depth, if any,
of the consideration of shareholders.

10

20

(Witness retired and excused)

(Short adjournment)

- - - - -

ALAN VARDY BALHORN
Sworn, examined as under:

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MR. GLASS: Q. What is your full name, Mr. Balhorn? A. Alan Vardy Balhorn.

Q. And your address? A. 7 Erilyn Court, Vermont, Victoria.

Q. And your occupation? A. Commercial agent and journalist.

Q. You are an alternate director of Millers, are you not? A. Yes.

10 Q. Alternate to which director? A. Mr. Peter John Duncan.

Q. When were you appointed to that position? A. May 31st, 1971.

Q. Do you hold shares in Millers, Bulkships, Howard Smith or any other company connected with this matter? A. No.

Q. Have you received any remuneration from Millers in respect of your services to the Board or expenses incurred in those duties? A. No.

20 Q. Prior to 1970, Mr. Balhorn, what was your employment? A. I was employed by the Herald and Weekly Times, Melbourne, as Editor of their Horticultural Magazine "Your Garden."

Q. How did you come to be appointed as Mr. Duncan's alternate? A. Mr. Duncan suggested a couple of years ago that because of his health problems he would like someone to represent him in Australia both on personal and business matters and I agreed.

30 Q. In what way have you represented him since then? A. In many personal and business respects.

Q. In what places? A. Melbourne and Sydney mainly with an occasional country trip.

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- Q. Had you had before accepting this position any previous commercial experience? A. No.
- Q. And perhaps I ought to ask you, you represented Mr. Duncan at these places and on those occasions in regard to what business interests of his? A. Investments mainly.
- Q. Do you recall meeting Mr. Taylor in Melbourne in the month of June this year? A. Yes, June 20th I think it was.
- Q. Did you have lunch together? A. Yes. 10
- Q. Was anything said to you by Mr. Taylor regarding matters relevant here on that occasion?
A. Yes.
- Q. What was it? A. Mr. Taylor said over lunch that there was a possibility of Howard Smith making a take-over bid.
- Q. What was your answer? A. I think I said to Mr. Taylor words to the effect, "Arch, I have heard so many rumours and propositions in the past six months I will only believe it when I see it." 20
- Q. Was any further detail given to you beyond that? A. No.
- Q. What was the next action you took in this matter? A. The following day, the 21st, I spoke to Mr. Duncan by phone from Tokyo - whether he rang me or I rang him, I am not too sure. It was not on Miller business; it was on another matter and in passing I mentioned that I had had lunch with Mr. Taylor and he had suggested that there could be a take-over bid made by Howard Smith. 30
- Q. What did he say? A. "Keep me informed."
- Q. When did you learn of a meeting to be held on 23rd June? A. On 21st or 22nd. I am not sure.
- Q. When did you receive your agenda for that meeting? A. At the meeting or at Miller's office.

- Q. What is your recollection of the business transacted at the meeting of 23rd June?
A. We approved the draft C statement.
- Q. Draft Part C statement? A. Sorry, draft Part C statement regarding the Ampol, the projection of the Ampol bid, and we postponed any discussion to a further meeting on the Howard Smith - it wasn't an actual offer. I think there was a letter at that time indicating that they would be making a take-over bid.
- Q. What discussion was there regarding the adequacy of the Ampol take-over bid?
A. Too low.
- Q. Did any director dissent from that view?
A. No.
- Q. Had it been discussed on an earlier Board occasion? A. It was mentioned at a Board Meeting of 9th June I think when we instructed management to prepare the Part C statement.
- Q. What opinion was expressed on 9th June regarding the Ampol offer? A. That it was inadequate.
- Q. On those two occasions, 9th and 23rd June, was Sir Peter Abeles present? A. Yes.
- Q. When did you learn for the first time of the joint announcement? A. In Melbourne in the press on the 28th, ~~and also I noted that Sir Peter Abeles had been offered a seat on the Ansett Board.~~ (Objected to by Mr. Lockhart; portion of answer struck out at his Honour's direction)
- Q. When were you next in communication with any member of Miller's Board or with Mr. Duncan?
A. I am not sure about Mr. Duncan. I could have spoken to him between then and early July but Mr. Taylor rang me on 4th July in Melbourne. I was in Melbourne; he was in Sydney.

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- Q. Yes, and what did he say? A. Mr. Taylor suggested that Howard Smith could be proposing an allotment of shares to them. I think he mentioned the figure 3 million at \$2 each.
- Q. Was any remark made by him on that? A. Not that I recall.
- Q. Did you speak to anyone else? A. Not on the 4th, no.
- Q. What was your reply when Mr. Taylor told you of a possible offer of 3 million shares at \$2 each? A. I mean I dismissed it in a few words by saying again. "Arch, there are too many airy fairy stories floating around and I won't believe anything until I see it in writing." 10
- Q. Did you speak to anyone else at the time of that telephone call? A. I don't think so.
- Q. Did you speak to Mr. Conway? A. Not on the 4th.
- Q. At this time. When did you speak to him? A. On the afternoon of 5th July. Mr. Taylor rang me in Melbourne and said "I will put Bill Conway on. He wants to have a word with you." 20
- Q. Yes, what did he say? A. Mr. Conway said that if an allotment of shares to Howard Smith were to be made by Millers it would not be in breach of the Companies Act but could be a technical breach of Stock Exchange Regulations.
- Q. Who raised this question with Mr. Conway? Did you raise it or did he raise it? A. No, he raised it. 30
- Q. What did you ask of him? A. I said words to the effect "Bill, wouldn't this be a bit unethical?" or I did question the ethics of it.
- Q. Yes, and what did he say? A. Mr. Conway said, "It would not be unethical but unusual perhaps" - words to that effect.

- Q. Was anything said as to the way in which directors ought to approach the question?
A. Yes, Mr. Conway said that all directors would have to give due consideration to such a matter on behalf of the company and of its shareholders.
- Q. Did he mention any figure to you in that conversation about shares or price? A. No figures; no price.
- 10 Q. When did you come to Sydney? A. That afternoon, I think shortly after I had spoken to Mr. Conway. I had my bag packed and I was in the Wentworth Hotel for dinner that night.
- Q. Did you phone anyone that night? A. Yes, I phoned Mr. Duncan in Tokyo.
- Q. Would you tell us the conversation you had with him? A. The basic reason for ringing him was in relation to alterations that were being made to his home at Palm Beach. I had spoken to the builder and there were certain matters coming up every few days and I was actually supervising the job and in the course of this discussion I said to Mr. Duncan that Bill Conway had spoken to me that day about a possible allotment of shares and he seemed to be in the picture because I think he said Mr. Taylor had spoken to him about the same matter.
- 20
- 30 Q. Did he say anything to you regarding the situation? A. We discussed it for a few minutes and I said, "Well, if something does come up, Pete, have you got any ideas on the subject yourself?" and he said, "Well, we are completely in the dark but if an issue, if the matter should come up" his advice to me was to study it carefully and only to agree to it if I thought it was in the best interests of the company and of its shareholders.
- 40 Q. Now, did you speak to him before the Board Meeting? A. On the 6th?
- Q. Yes. A. No.

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- Q. I mean on the morning of the Board Meeting?
A. I am sorry, yes.
- Q. Did you speak to him before going to Miller's Board Room on 6th July? A. Yes, he rang me at the Wentworth probably about 8.30 that morning. He had thoughts overnight on what I had discussed with him about his Palm Beach place, particularly in relation to a rock retaining wall.
- Q. Now, with respect to the Howard Smith situation, was anything further said? A. He asked me was there anything new on the Miller front and I replied, "No, not to my knowledge." 10
- Q. Had any amount or any number of shares or price been discussed between you and him on that day or the previous evening? A. No, I think he knew the figure 3 million at \$2. In fact, I think he mentioned 3 million at \$2.50 at one stage, but that was as a result of a conversation I think he had with Mr. Taylor. 20
- Q. Well, when you left him that morning I think you said this was the last conversation you had with him? A. That morning?
- Q. Yes. What was the understanding between the two of you? A. Regarding?
- Q. Regarding any Howard Smith offer? A. Well, only the advice he had given me the previous night that I would consider - if a proposition should be put up, to give it careful consideration, listen carefully to what other Board Members might say about it and I think he used the words "and play it accordingly." 30
- Q. Yes. What did you understand by the phrase, "play it accordingly"? A. I understood that any decision I made would have to be in the interests of the company and of the shareholders.
- Q. When did you arrive at the Miller offices? A. It would probably be around between 20 to 10 and 10 to 10. It was after half past nine when I left the Wentworth. 40

- Q. Who was there when you arrived? A. I normally visited Mr. Taylor's secretary, Miss Hill, to pick up an agenda for board meetings because they usually are only prepared within a day or so of the meeting and in mailing them to me in Melbourne, they could cross paths so it was my normal practice to drop in to Miss Hill's office, pick up an agenda, before proceeding to the Board Room. This was usually about 10 to 10 before each board meeting.
- 10 Q. Did you follow that practice this day? A. No, I went into Miss Hill's office and I was ushered into Mr. Taylor's office.
- Q. Yes, who was there? A. There were several people there but Mr. Taylor and Mr. Conway were the only two I could guarantee.
- Q. And what was said? A. Mr. Taylor had a piece of paper in his hand and he said words to the effect that Howard Smith had proposed an allotment of $4\frac{1}{2}$ million shares at \$2.30, the proceeds of which could, words to the effect, save the company.
- 20 Q. Save the company from what? A. I presume he meant financially.
- Q. What did you say? A. I asked if I could read the letter and also asked him if I could make a phone call to Mr. Duncan to put him in the picture.
- 30 Q. Did you read the letter? A. I read the letter. Mr. Taylor picked up the phone and booked a call to Tokyo.
- Q. How long did it take for the call to come through? A. Possibly five to ten minutes.
- 40 Q. What happened when it did? A. Well, it was just on the dot of ten when it came through. Mr. Taylor and I were both due in the Board Room and I asked Mr. Conway would he please tell Mr. Duncan what was going on. Mr. Taylor answered the phone and said, "Peter, Alan is with me, We are due in the Board Room. I will put Bill Conway on," or words to that effect.

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Q. Did you have any discussion with Mr. Conway before you left? A. Well, it was a confusing situation with people coming and going and I intimated to Mr. Conway that ...

MR. DEANE: Could we have what was said if your Honour pleases.

MR. GLASS: Q. The substance of what you said to him, Mr. Conway? A. Well, to the best of my recollection I said to Mr. Conway, "I am inclined to go along with this proposal and you can tell Peter Duncan that" and also that, "If I have any doubts in my mind in the Board Room, I will abstain from voting". In this confusing situation I was not sure whether - I think Mr. Conway was then speaking to Mr. Duncan and I wasn't sure whether I had got the message across to him so I wrote on a piece of paper "Yes, abstain" which I left by his hand.

10

Q. Were those words arranged one above the other or side by side? A. One above the other I think.

20

Q. And you left that piece of paper with him? A. Correct.

Q. What was your purpose in writing out those two words on paper to Mr. Conway? A. To advise Mr. Conway what to advise Mr. Duncan of my intended actions, action or actions.

Q. What happened when Mr. Conway in due course came to the Board Room? A. He passed me the same slip of paper with a tick against the word "yes".

30

Q. What did you understand that to mean? A. I understood that he agreed with the course of action I intended taking.

Q. Had Mr. Duncan at any time during the period you were his alternate given you directions as to how you should vote? (objected to by Mr. Deanse: rejected)

- Q. Now, on this occasion when you did come to vote, whose views were you giving effect to?
A. My own personal views.
- Q. Now, the Board Meeting commenced and I won't ask you the various contributions that different people made, but do you recall Mr. Koch's remarks to the board? Yes or no?
A. Yes.
- 10 Q. For approximately how long did he address the Board? A. Possible 20 minutes.
- Q. Do you recall if he made at the end of his remarks any particular recommendation? Yes or no? A. Yes.
- Q. What, according to your recollection, did he recommend? A. He strongly recommended acceptance of the Howard Smith proposal as a means of overcoming our desperate immediate liquid financial situation.
- 20 Q. What was your state of mind in regard to that recommendation? A. I agreed with it.
- Q. What were your reasons in voting as you did? A. Well, I believed it was a golden opportunity to overcome our immediate liquidity problems to get the company out of a, what was a stagnant situation, to implement sound plans that the company had and had been pidgeon-holed and virtually get ourselves off the hook where at that time all assets of the company were mortgaged.
- 30 Q. What was your belief as to the company's liquid position on that date? A. Critical.
- Q. What was your belief as to what it's liquid position had been in the past? A. Critical.
- Q. What was your understanding as to the effect of the company's liquid position on its planned activities? A. Most of the economies had been instituted from the time I joined the Board in May, 1971, up till this present date in all fields: Collieries, hotels. We had plans for - we still have plans for three taverns in the City area. We had downgraded what we intended
- 40

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to do with the hotel at Wollongong. We had virtually stopped all action regarding collieries. In fact, it was a stagnant situation.

- Q. What did you believe the allotment offered to the company? A. Sorry!
- Q. What did you believe the allotment offered to the company? A. I believed it would assure the company of progress and profitability in a verty short time.
- Q. In terms of money what did you believe the allotment offered the company? A. Ten point something million dollars in cash. 10
- Q. What did you then believe was the company's future requirement for money? A. Mr. Koch had laid it on the line that we had outstanding debts of ten point something million dollars. We had to pay off in the next twelve months, we were responsible for.
- Q. What was your belief as to the connection between those short term debts and the allotment? A. I think it was explained by Mr. Conway or possibly Mr. Aston that the allotment would be legal, would not breach the Companies Act, if the amount of money received under the allotment equal our immediate short term committments. 20
- Q. What was your belief as to whether it did or did not have that relationship? A. It did.
- Q. Did you have any other matters in mind apart from the provision of ten million dollars to the company in voting as you did? A. No, I am voting I believe on behalf of the company and its shareholders. 30
- Q. What in your belief was the effect of the allotment on the Howard Smith offer of \$2.50? (objected to by Mr. Deane: allowed)
- Q. What in your belief was the effect, if any, of the allotment on the Howard Smith take-over of \$2.50? A. I believed Howard Smith would continue with its take-over offer of \$2.50. 40

- Q. What was your view as to whether that was a good or a bad thing? A. It was a good thing.
- Q. For whom? A. For all shareholders in my opinion. It left the minor shareholders out of being locked in with the Ampol offer of \$2.27 and could also encourage possibly a higher bid again.
- Q. From whom? A. Ampol would come to mind immediately.
- 10 Q. What in your belief was the effect of keeping the Howard Smith offer alive, upon Ampol and Bulkships as shareholders? A. I couldn't say it affected them to any great degree. I believed that the Howard Smith take-over offer added spice to the battle if anything and either Ampol or Bulkships could either, Ampol and Bulkships in concert could raise their offer or sell to Howard Smith and make a nice profit.
- 20 Q. I invite the witnesses attention to Ex. HH, particularly that part which attributes certain remarks to him; I think it is p.7, you see those remarks which are alongside A.B.? A. Yes.
- Q. Take the first sentence attributed to you, "I endorse Mr. N. comments" did you say that or something like that? A. Yes.
- Q. Is it all that you said with respect to Mr. Nicholl? A. No.
- 30 Q. What else did you say? A. I mentioned the infusion, the benefit of an infusion of ten million to the company and also agreed with him that - I think I mentioned the small shareholders being locked in on the previous Ampol offer.
- Q. Take the next half sentence, "I would be a little disturbed on the ethical side of this". Did you say that or something like that? A. I said something like it, not in those words
- 40 to the best of my knowledge.

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- Q. Is it a complete statement of what you did say? A. No.
- Q. What, according to your recollection, did you say on the ethical side of the thing? A. To the best of my knowledge I said words to the effect I had earlier been concerned about the ethics of this matter but had been reassured or had taken Mr. Conway's opinion on this matter.
- Q. And take the next half sentence "Mr. P.J.D." presumably Mr. Duncan, "said, see what the Board generally thinks of this and to go along with it on what they think." Did you say that or something like that? A. Words to that effect but I did not say, I am sure, the words, "I believed that Mr. Duncan would agree with my agreement to this proposal", words to that effect. 10
- Q. In addition to what appears there? A. Yes. 20
- Q. Did Mr. Duncan ever discuss with you his position as Director on the Board? A. I suppose he did.
- Q. Do you recollect what he said? I am sorry, that is too general. Did he discuss with you about the time of the Ampol take-over any change that might occur in regard to his position on the Board? A. Sometime after the Ampol take-over offer Mr. Duncan told me by phone from Tokyo that Mr. Taylor had called him and that Sir Peter Abeles had asked Mr. Taylor to request Mr. Duncan's resignation from the Board. 30
- Q. What did he tell you that he had said? A. He said to me that he would not resign so indirectly and he would certainly not resign by telephone.
- Q. What was your belief as to the effect of the allotment to Howard Smith on Mr. Duncan's position on the Board? A. I think Mr. Duncan believed that....(objected to) 40

Q. What did you believe? A. My belief that whichever party involved here or any other party that may win the take-over battle, there would be every possibility of Mr. Duncan being removed from the Board.

Q. Was Mr. Duncan's continued position on the Board a factor in any way in the vote you cast? A. No.

10 Q. What was your belief at the time you voted regarding the security or otherwise of the Hambros Loan? A. As far as I am concerned, no loan is secure until you get the money in the bank.

HIS HONOUR: Q. Mr. Glass, do you mind if I just ask one question?

MR. GLASS: No.

20 HIS HONOUR: Q. You said a moment ago, Mr. Balhorn, whichever party may win the take-over battle, Mr. Duncan would no longer, or might no longer be there. I am not just clear on what you meant by "whichever party may win the take-over battle." What did you have in mind in that regard? A. My feeling is that the battle continues, your Honour. I am sorry if it has nothing to do with this. I am not sure.

HIS HONOUR: Do you wish to take exception to this, Mr. Deane or Mr. Glass?

MR. GLASS: Q. You say whichever party...

30 HIS HONOUR: Just a moment. If you prefer that I don't ask...

MR. GLASS: I don't mind if your Honour explores it or I will explore it myself.

40 HIS HONOUR: I think if you have no objection I will let Mr. Balhorn answer. What did you have in mind, Mr. Balhorn? I just want to be clear what you had in mind in the context "whichever party may win the take-over battle". A. I think there will be a restructuring of the Board and my own belief is with Mr. Duncan there will be a great possibility of him being removed from the Board in any restructuring of the Board.

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Q. Yes, but it was the earlier part I was concerned about, whichever party may win the take-over battle. What did you have in mind in that regard? A. At the moment we have Ampol/Bulkships in one corner, we have Howard Smith in another, and it is still feasible in my book that something else could occur in this matter before it is all over.

Q. And the stage when it is all over would be when what had happened? A. When I would think the Board would be restructured. 10

Q. As a result of what having happened? A. Well, my feeling is that R.W. Miller and Company is up for cash at the moment; virtually it is on the chopping block and there will certainly be Board changes if and when everything is settled.

HIS HONOUR: Yes, thank you, Mr. Balhorn.

MR. GLASS: Q. Mr. Balhorn, I asked you what about the Hambros loan and you said no loan is secure until you receive it? A. Correct. 20

Q. Were you aware of any contingencies which affected the Hambros loan on 6th July? A. Yes.

Q. What were they? A. One was the possible change in ownership of the company or control of the company and the other was - another major condition was delivery of the "Robert Miller" for March of this year, ~~and--since--then--I--knew--that--the--ship--can't--be--completed--before--June--and--even--last--night--a--fire--aboard--the--ship~~ (objected to by Mr. Deane: portion of answer struck out at his Honour's direction. 30

WITNESS: Well, could I answer it another way without mentioning that subject, that I know that while negotiations for the loan for the "Robert Miller" were being discussed, the Hambros consortium people put up the question, "What if a fire occurred on this ship?" They were relating this to what happened with the "Amanda Miller". 40

MR. GLASS: Q. What, according to your belief, was their attitude going to be in regard to a possible fire? A. Well, it gave them an escape clause. It was one of the escape clauses for the delayed delivery of the ship.

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Q. When did you think, as at July the ship was likely to be ready for delivery? A. June at the earliest, July/August possibility.

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Q. In what year? A. 1973.

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10 Q. What was your belief as to the security or otherwise of the Tricontinental role over funds? A. Well, to my knowledge Tricontinental had the option at any time of refusing to roll over a loan and also I think change of ownership of the company or control of the company applied to that too. It was another escape clause.

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20 Q. What was your belief on 6th July as to the Millers need for funds assuming the Hambros loan became available? A. Well, the Hambros loan is not due anyhow until the handing over of the vessel which is long-term. We are talking twelve months hence possibly. Millers have in the meantime suffered from lack of cash. That has virtually brought the company to a standstill.

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30 Q. What in your mind in particular had resulted from the company's lack of cash, yes, had resulted from the company's shortage of cash? A. We are going backwards rather than forwards in selling hotels which I objected to or particular hotels I objected to being sold but our colliery development, as I have said, was at a standstill; the hotel development virtually at a standstill. We need the company needs the cash immediately for the Wollongong hotel, the development of the three taverns we have in the Sydney area, another proposed hotel at Warriewood, and although we are in a coal slump at the moment, the export coal slump, I think the company should be ready to be able to supply orders which I think should be coming through within the next twelve months.

40

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Q. Were these matters present to your mind on 6th July? A. My word. There was also the fact that we had to give up our priority for a product tanker during the previous twelve months because of lack of funds.

Q. What knowledge did you have on 6th July regarding the efforts which had been made to secure finance for the company? A. It was a constant effort by management since I joined the Board.

10

Q. Attended with what degree of success? A. Little success; it ranged between the mood of the company ranged between gloom and optimism, but mainly gloom where they were optimistic one day of getting a loan and finding out the following day that it had failed.

Q. What was your belief as to the possibility of making an issue to shareholders at \$2.30 on 6th July? A. I did not think it would have any hope whatsoever.

20

HIS HONOUR: Mr. Rowling, do you wish to ask any questions?

MR. ROWLING: No, your Honour.

HIS HONOUR: Mr. Rogers?

MR. ROGERS: No thank you.

HIS HONOUR: Mr. Hughes?

MR. HUGHES: No, your Honour

HIS HONOUR: Mr. Lockhart?

MR. LOCKHART: No, your Honour

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HIS HONOUR: Mr. Deane?

MR. DEANE: Yes, your Honour.

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*Exhibit V

Q. Mr. Balhorn, you were present at the meeting of the Directors of 14th July? A. Correct.

Q. And you supported the resolution confirming the minutes of the previous meeting? A. Yes.

10 Q. (Witness shown Ex.V*) You would agree with that they are the minutes of the previous meeting? A. Minutes of meeting of directors held on 23rd June and 30th June.

Q. Ex.V, 6th July? A. No, this is not 6th July.

Q. Would you turn over? A. Yes, I am sorry.

Q. Would you agree with me that throughout the whole of those minutes apart from where the way people voted is recorded your name occurs but twice? A. Yes.

Q. And that is in the first two paragraphs on p. 8 ? A. Correct.

20 Q. And of course, there what has been recorded relates to comments you made after Mr. Nicholl had spoken? A. Yes.

Q. And Mr. Nicholl had said that he supported the proposed allotment? A. Yes.

Q. And you are recorded as saying you agreed with the remarks made by Mr. Nicholl? A. Yes.

Q. Which I presume means supporting the proposed allotment? A. Yes.

Q. And then a reason is stated? A. I don't agree with it in those words.

30 Q. But Mr. Balhorn, by 14th July you were a defendant in court proceedings, were you not? A. Yes.

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- Q. And here in relation to the very matter involved in those court proceedings there is a statement of your reason for agreeing with the allotment? A. It is an abbreviation, Mr. Deane.
- Q. There is a statement as to your reason for agreeing to the allotment? A. I cannot accept the minutes as being a verbatim report of what happened at that meeting.
- Q. I am not suggesting you do, Mr. Balhorn, but I am suggesting in that paragraph in clear words there is a statement of your reason for agreeing to the allotment? A. One of the reasons. 10
- Q. Mr. Balhorn, I will put it to you in that paragraph as it reads there is a statement of your reason for agreeing to the allotment? A. One of the reasons only and a minor one at that.
- Q. Now, is this the situation, as at 14th July you were involved in litigation. That is so? A. Yes. 20
- Q. You knew your motives for supporting this allotment were attacked in that litigation? A. Yes.
- Q. You saw the minutes of the meeting of 6th July? A. Yes.
- Q. You saw that they put forward only one reason attributed to you as being a reason for supporting the allotment? A. There was more than one. 30
- Q. Where? A. Not in this, not in the minutes I agree, but certainly that was not the reason there as given there.
- Q. Mr. Balhorn, would you be kind enough to answer my question? A. Would you care to repeat it please.
- Q. My question was you would agree with me, would you not, that in the minutes there is only one reason attributed to you as being your reasons for supporting the allotment? A. Yes. 40

Q. And is what you tell his Honour - and you voted at the meeting of 14th July in favour of a resolution confirming those minutes as a true record of the proceedings at the meeting of 6th July? A. Yes.

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Q. And is what you tell his Honour that in so far as what you said is concerned it is an untrue record? A. It is an untrue record.

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10 HIS HONOUR: Mr. Deane, it is not quite correct to say that Mr. Balhorn voted in confirmation of those minutes on 14th July. I don't know whether you want me to proceed. You might prefer to look yourself. It was the August 10th meeting. That is correct, is it not?

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MR. DEANE: Yes, I stand corrected.

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Q. Mr. Balhorn, what I put to you was wrong. The motion for confirmation of these minutes was passed at a meeting of 10th August? (nodded)

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20 Q. And you would agree that you were present at that meeting? A. Yes.

Q. And that you voted in confirmation? A. Yes.

Q. Which means that when you voted in confirmation of those minutes you were well aware of the issues involved in the suit? A. Yes.

30 Q. Mr. Balhorn, I want to ask you a few questions as to what happened before the Board Meeting on 6th July. You have told us you arrived at Millers at what time? A. Between twenty and ten to ten I would think.

Q. And you went into Mr. Taylor's office? A. Correct.

Q. Mr. Conway and Mr. Taylor were definitely there? A. Definitely.

Q. Other people were there also? A. Yes.

Q. Can you try and remember who else was there? A. I would be guessing.

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Q. I would suggest to you that when you came into the room Mr. Taylor handed you the copy of the letter? A. I requested it.

Q. And I suggest to you that you said, "I spoke to Peter in Tokyo about this matter last night but we did not make much progress"? A. Correct.

Q. "And I rang him again in the morning"? A. That is incorrect; he rang me.

Q. "But I think we have got to ring him up and acquaint him with the actual contents of this letter"? A. I would agree with that. 10

HIS HONOUR: Q. What was that answer? A. I would agree with that, put him in the picture.

MR. DEANE: Q. I suggest Mr. Taylor then said, "All right" - I beg your pardon did you add to that answer?

HIS HONOUR: "Put him in the picture" instead of "acquaint him with the contents of the letter". Mr. Balhorn corrected it to "Put him in the picture". 20

MR. DEANE: Q. I suggest that Mr. Taylor then said, "All right, I will get him". A. Words to that effect.

Q. And I suggest you said subsequently to Mr. Conway, "Well, Bill, will you speak to Peter and explain the proposition to him because I had better go down to the Board Meeting"? A. Yes.

Q. And I suggest that just after Mr. Conway got on the telephone you said to him, "Bill, ask Peter whether it is vote yes or abstain"? A. No. 30

Q. You deny you said that? A. I deny I said that.

Q. You never said anything like it? A. I told Mr. Conway I wasn't sure whether he got the message over loud and clear because he was already on the phone that it was my intention or inclination to vote yes but if I had any doubts I would abstain.

Q. See, I again suggest to you that what you said to Mr. Conway was, "Bill, ask Peter whether it is vote yes or abstain"? A. No.

Q. And that it was in that context that you handed to Mr. Conway a piece of paper with the words, "yes" and "abstain" written on it? A. No, I did not expect to see that piece of paper again.

HIS HONOUR: What page of the transcript?

10 MR. DEANE: Page 711.

(Luncheon adjournment)

MR. DEANE: Q. Mr. Balhorn, you described yourself as a commercial agent and a journalist?

A. Yes.

Q. What did you mean by "a commercial agent"?

A. In the duties I conduct on behalf of Mr. Duncan and an overseas company they are commercial duties.

20 Q. Well now, is the situation this then, in your activities as a commercial agent you at present act for two entities, Mr. Duncan?

A. Correct.

Q. And another company? A. Correct.

Q. What is the other company? A. It is an overseas company called Chesham Limited.

Q. Not connected with Mr. Duncan? A. No.

Q. What about your activities as a journalist? A. I contribute odd articles occasionally on request.

30 Q. Would it be true to say that your main activities are in the context of agent for Mr. Duncan? A. Yes.

Q. And I presume you are paid for what you do in those activities? A. I am on a retainer basis.

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- Q. Which covers everything that you do for Mr. Duncan? A. Not at the moment.
- Q. Well, put it this way: The basis of your payment is that it covers what you do for Mr. Duncan? A. That is the basis, yes.
- Q. Including attendance at Miller's Board Meetings? A. Normal board meeting, yes.
- Q. In relation to attendance at Miller Board Meetings, it would be true to say, would it not, that during the last financial year you attended most of the Board meetings? A. I missed four, Mr. Duncan attended three last year, and I missed one this year. 10
- Q. I suggest to you that from the beginning of October until 7th July there were eleven board meetings. I don't expect you to....A. No.
- Q. But would you accept that? A. Yes.
- Q. And I suggest to you that you attended ten of those eleven board meeting? A. From November you say? 20
- Q. From the beginning of October to 7th July? A. Nine more likely. I think Mr. Duncan attended a board meeting in November of last year. I missed one in April.
- Q. Well, Mr. Duncan attended a board meeting in November of last year but you also attended it? A. Yes, that is possible.
- Q. Which means that of the eleven meetings in that period you attended ten, Mr. Duncan attended one? A. Correct. 30
- Q. And the one that you did not attend, Mr. Duncan did not attend? A. Correct.
- Q. Now, during the period you have been an alternate director of Millers, apart from attending board meetings, what have been your activities in relation to Millers? A. I kept in close touch with Millers mainly in relation to the fact that Mr. Duncan's company in Tokyo represents

Millers particularly in the coal trade and on certain occasions Millers have not contacted Mr. Duncan direct on Miller business; Millers have asked me to convey information to Mr. Duncan.

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- 10 Q. Apart from those matters where particular dealings were involved, what was the extent of your contact with Millers apart from your attendance at board meetings and receipt of reports? A. Very little because I live in Melbourne.
- Q. So it would be true to say, would it not, that your assessment of the financial position of Millers would be dependent almost entirely on what you were told at board meetings or what was contained in the various reports that were given to you? A. Yes.
- 20 Q. (Witness shown Exs. MH3* and MHL3) Now, you were an alternate director of Millers as at the end of June, 1971? A. Yes.
- Q. And indeed you had attended the May board meeting of that year? A. Of 1971?
- Q. Yes, the meeting of 31st May? A. Yes, that would be correct.
- Q. Would you agree with me that as at 6th July, 1972, it was clear to you that in so far as any liquidity problem was concerned the position of Millers was far better than it had been as at 30th June, 1971? A. No.
- 30 Q. Well, what would you say in relation to the position of Millers in so far as liquidity problems were concerned as at 30th June, 1972, compared with 30th June, 1971? A. We were still desperately short of cash.
- Q. And had the position improved at all?
A. No.
- Q. Not at all? A. Not to my way of thinking.
- 40 Q. You have before you the annual report of Millers as at 30th June, 1971. You have seen this document before? A. Yes.

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*Exhibit M.H.3.

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Q. And I direct your attention to the notes forming part of the accounts of R.W. Miller (Holdings) Limited and subsidiary companies which are a little beyond half way. You have seen those before? A. Yes.

Q. And indeed, Mr. Balhorn, it would be fair to say would it not, that apart from the occasions when your name has been specifically mentioned you have been in court during most of this case? A. Yes.

10

Q. And you have been in court throughout almost the whole of my cross examination of previous witnesses? A. No.

Q. You have been in court throughout some of that cross examination, have you not? A. Yes.

Q. You were in court for a large part of my cross-examination of Mr. Taylor? A. That occurred in the afternoon. I was out of this court by 3 p.m. I would think.

HIS HONOUR: Q. That was longer than one afternoon, Mr. Balhorn? A. I am sorry. I am not here full time, your Honour.

20

MR. DEANE: Q. But you were in court for example when I asked witnesses questions about the capital commitments as at 30th June, 1971? A. I suppose so. I don't actually recall. A lot of words have been spoken in this Court Mr. Deane. I feel my memory isn't that good.

Q. Would you look at the document before you and would you see as at 30th June, 1971, the commitments of Millers in relation to oil tankers were \$16,700,000 odd. Do you see that? A. Yes.

30

Q. And other commitments were almost \$2,000,000? A. Yes.

Q. In relation to the tanker commitments would you agree with me that those commitments were in relation to the "Amanda Miller" and the "Robert Miller"? A. Yes.

Q. So far as the "Amanda Miller" was concerned, as at - I must say I apologise for having to go over this again, your Honour. I have tried to work out a means of avoiding it but I can't.

HIS HONOUR: No, I don't think there is any way, Mr. Deane.

MR. DEANE: Q. Would you agree with me as at 30th June, 1971, the delivery date for the "Amanda Miller" was prior to December, 1971?

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A. Yes.

Q. And indeed the "Amanda Miller" was in fact delivered prior to December, 1971? A. Yes.

Q. Now, in so far as those commitments represented moneys that had to be paid in relation to construction costs of the "Amanda Miller" it was clear as at 30th June, 1971, that they all had to be found prior to December, 1971? A. I believe so.

20 Q. And you would agree with me, would you not, that no arrangements at all had been made as at 30th June, 1971, as to where those moneys would come from? A. I can't recollect, Mr. Deane.

Q. Is the situation you don't know one way or the other? A. I do know that a loan was organised through Hambros Bank for take-over of the vessel and Millers were still permitted to find another roughly \$3 million.

30 Q. But you do not suggest, do you, that the Hambros loan had been arranged as at 30th June, 1971? A. I have no recollection.

Q. In so far as the commitments for the Robert Miller were concerned, if that vessel were to be delivered on the contract date, all those moneys had to be found by March, 1973? A. Correct.

Q. That is, within the next two financial years looking at things as at 30th June, 1971? A. Yes.

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Q. And you would agree that no arrangements at all had been made in respect of those moneys as at 30th June, 1971? A. I don't think any agreements had been made but certainly we were trying to make some.

Q. You would agree with me that there was no source from which it could be said the moneys were coming? A. I would probably agree with you Mr. Deane. I am a little out of my depth in this matter. 10

Q. Well, so far as you were concerned as at 30th June, 1971, the company had commitments which had to be met within the next two financial years in the amount of \$16,705,000 for oil tankers? A. That is what it says here.

Q. And you cannot suggest to his Honour any source which had been arranged from which those commitments would be met? A. I am not sure whether the Hambros loan on the Amanda had been negotiated at that time or not. 20

Q. I think you can accept, Mr. Balhorn, that it had not? A. I will take your word for it, Mr. Deane.

Q. Which means as at 30th June, 1971 you cannot suggest any source available to Millers in respect of the meeting of those commitments? A. I suppose so. I was a brand new director at that time. I did not know much about the activities or what went on in a board room.

Q. Yes, but of course the main concern of the directors during the next financial year during which you attended most meetings was in making arrangements to meet those commitments? A. Concentration on it at virtually every board meeting I attended. 30

Q. To meet those commitments? A. And other commitments.

Q. Well, those commitments in particular? A. Yes.

- Q. And of course it would be true to say, would it not, that in the year ended 30th June, 1972, Millers was for practical purposes, going through a great period of expansion?
A. The date again, Mr. Deane?
- Q. In the financial year ended 30th June, 1972. Millers was going through a great period of expansion? A. No.
- 10 Q. You see in that financial year the delivery of the first tanker was accepted, was it not?
A. Yes.
- Q. And in that financial year progress was made towards acceptance of the delivery of the second tanker? A. Yes, but everything else had stopped.
- Q. But in that financial year and the year that preceded it, wasn't the situation this, that Millers had in relation to these two tankers expanded to such an extent that they comprised a very large proportion of the assets of the company? A. I will agree with you on the "Amanda Miller" but certainly not on the "Robert Miller". It is not an income earner until it carries its first load.
- 20 Q. As at January, 1972, an offer was received, was it not, for the purchase of one or both of the "Amanda Miller" and the "Robert Miller"?
A. Yes.
- Q. And an offer which would have enabled them to have been sold at a very profitable figure?
A. I don't recall the figure.
- 30 Q. Were you against the proposition that either should be sold? A. Yes.
- Q. A period of desperate liquidity problems? A. The tankers seemed at that stage to be our saviour.
- Q. A period of desperate liquidity problems?
A. Yes, everything stopped in our other fields of endeavour to get - we already had the Amanda Miller in the water but to finance the second ship and at that time we were economising in
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every other field of the company to raise the money and selling hotels and whatever to do it.

- Q. Because of this tremendous expansion on the tanker side of the business? A. I will agree with you expansion on the tanker side but not as a general company expansion.
- Q. You were aware of course that a finance committee was set up in Millers? A. Yes.
- Q. And the results of that committee's activities were to a large extent reflected in the management reports? A. Yes. 10
- Q. You received those management reports? A. Usually with the agenda, yes.
- Q. You read them? A. Yes.
- Q. And we have been told that apart from the odd particular comment that was made at the meeting, Mr. Koch did very little to add to what was contained in those reports? A. Yes, I relied on Mr. Koch and the finance committee of which Mr. Cameron was a member to lay it on the line. 20
- Q. And what you relied upon was to a very large extent what was put before you in these management reports? A. Yes.
- Q. Which you accepted without question? A. Normally, I think I might have had doubts about some of them.
- Q. See, I want to take you if I may to some of these management reports and first the report of 28th September which is in the folder to your right. Mr. Balhorn, do you keep yourself a file in relation to Millers? A. No. 30
- (sic) Q. You do not keep anything at all? A. Normally meetings of meetings are forwarded to Mr. Duncan in Japan. Usually there is only one copy made available between the two of us.
- Q. What do you keep at your own office in relation to your activities as an alternate director in Millers? A. Very little.

Q. What, most of what you get goes to Mr. Duncan?
 A. Mr. Duncan. I pass it on to Mr. Duncan.

Q. Can you find in that folder the September management report.

HIS HONOUR: I note incidentally while this is being looked for Mr. Deane, that those August minutes are not in evidence. I had them in this volume but they are not in evidence.

10 MR. DEANE: Could they be added? Might I ask my friend to add them.

Q. Management report of September, 1971? A. 28th September, 1971, I have management report of September, 1971 dated the 28th.

Q. Do you see a section of that report dealing with finance commencing at the bottom of the first page? A. Yes.

Q. You have seen this before, have you? A. Yes.

Q. In that report the board was informed that the Hambros loan had come through? A. Yes.

20 Q. And that long-term or end finance for the construction of the Amanda Miller? A. And finance on a five-year basis I believe.

Q. A five-year basis with a provision that an extension at the end of five years would be favourably considered? A. I have no recollection of that.

Q. Have you ever seen the relevant documents?
 A. The actual loan agreement?

Q. Yes. A. No.

30 Q. You would agree with me, would you not, that that was a very great step towards solving the liquidity problem that existed as at 30th June, 1971? A. No.

Q. Well, a step? A. I think there would be a difference between a loan in a matter like this and having a dollar in the bank. A dollar in the bank is liquidity to me.

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Q. Mr. Duncan (sic), except as at 30th June, 1971, Millers had to find \$16,700,000 during the next financial year, the next two financial years? A. The next two financial years.

Q. They were moneys that they had to pay?
A. Yes.

Q. And that created a very great liquidity problem? A. Yes.

Q. Debts that had to be paid and no arrangements to pay them? A. Yes.

Q. Now, you see, I will again put it to you that the Hambros arrangement which provided for \$7,187,000 amounted to a great step towards solving that liquidity problem? A. It got us over that immediate hurdle, yes.

Q. It was a great step towards solving the liquidity problem that existed as at 30th June, 1971? A. In regard to the Amanda Miller, yes. In regard to other matters of the company, no.

Q. In relation to the companies position as a whole, Mr. Balhorn, it was a great step towards solving the liquidity problem that existed as at 30th June, 1971? A. Yes.

Q. Thank you. Now, if you go over the page you will see that the company had discharged certain short-term borrowings that existed at that date? A. Yes.

Q. Again, a step towards solving existing problems existing as at 30th June, 1971? A. Yes. Could I take you back to the first part again, Mr. Deane?

Q. Certainly. A. Although this 7,000,000 came through we still had to find an extra three million at that time.

Q. In respect of the Amanda Miller? A. Yes.

Q. Mr. Duncan (sic) would you like to think about it - Mr. Balhorn, I am sorry, would you like to think about it? A. I am pretty sure

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that that did not cover the amount outstanding at the time. I am pretty sure in this case we were still something like three million short of the commitment on the Amanda.

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Q. But you see the loan from Hambros was secured on the Amanda Miller, was it not? A. Yes, but I doubt if it was the total amount that we were committed for.

10 Q. What I am putting to you is that you were aware that the loan from Hambros was secured on the Amanda Miller? A. Yes.

Q. And the company could not get the Amanda Miller until it paid for it? A. Yes.

20 Q. Isn't it quite clear to you that the fact that the company had received the moneys from Hambros meant that all of the moneys due in respect of the Amanda Miller had been paid? A. I may be wrong, Mr. Deane, but I have a feeling that we still had to find extra cash to fulfil our agreement.

Q. Perhaps you would check this overnight, Mr. Balhorn, but I would suggest to you that the position is quite clear that the loan from Amanda Miller - that the loan from Hambros covered all of the outstanding commitments in respect of the Amanda Miller? A. It could have. I just have a doubt about it in my mind.

30 HIS HONOUR: Mr. Deane, I am not sure that it is fair to ask Mr. Balhorn to check that overnight. Who is he to check it with?

MR. DEANE: Yes, I accept that, your Honour.

WITNESS: Mr. Deane could be correct. I just have a doubt about it your Honour, about extra money.

HIS HONOUR: I am just thinking to relieve you from having to go and do homework, Mr. Balhorn.

WITNESS: Thank you.

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MR. DEANE: Q. Would you look at page 2 and do you see the third paragraph which says: "The commonwealth is not pressing for the construction moneys for Robert Miller"?
A. Yes.

Q. You accepted that as being correct? A. Yes.

Q. And then the next paragraph "We have been in touch with Hambros bank in London. They have advised us as soon as the charter for M.T. Amanda Miller is executed, they are anxious to make a start on the finance of the M.T. Robert Miller." A. Yes.

10

Q. Which means the resolution of the commitment problem in so far as the Robert Miller was concerned was beginning to be in sight? A. Hopefully.

Q. But you were told that Hambros Bank were anxious to make a start with financing of the Robert Miller? A. As I said earlier, Mr. Deane, a loan is not a loan until it is effected.

20

Q. I know you said that earlier but you had been told that Hambros Bank were anxious to make a start on the financing? A. Yes.

Q. You knew that they had in fact provided the finance for the Robert Millers sister ship, Amanda Miller? A. Yes.

Q. You were told they were anxious to proceed with financing the Robert Miller? A. Yes.

Q. And you accepted that? A. Not necessarily.

30

Q. What, you questioned that Hambros were anxious to make a start on the financing? A. As I said earlier, I assumed the optimism and gloom of the board room at Millers where the people had been optimistic about something one day and it had been knocked on the head on the next and that is why I say a loan is not a loan until you have got the money in the bank.

- Q. It would be true, I suppose to say that the greatest contrast you have ever seen in the Millers board room was the optimism you saw when the May report was tabled as far as finance was concerned and the gloom of Mr. Koch's statement as at 6th July? A. I would have to refer back to the May report, Mr. Deane.
- 10 Q. Well, we will take you to it. I ask you to turn now to the November report which is the report of 18th November, 1971? A. This is under "General Manager's Activity Report" is it, at page 219?
- Q. No, the document 18th November, 1971, headed "Management Report November"? A. Yes, I have it.
- Q. Now, you saw that when it was issued?
A. Yes.
- 20 Q. Would you refresh your recollection by looking at the entries under the heading "Finance"? A. Yes.
- Q. Now, the first paragraph there says, "We are proceeding as quickly as possible with our financial negotiations to cover our immediate and future capital commitments A. Yes.
- Q. Then is set out, is it not, what is involved in the financial negotiations to cover the immediate and future capital commitments
A. Yes.
- 30 Q. Would you agree with me that the first of those things was short term finance for the Robert Miller for construction finance?
A. The first items is on end finance mentioned here.
- Q. Might I put it to you this way. Would you agree from your reading of that that involved in those financial negotiations to cover the immediate and future capital commitments was first in point of time construction finance for Robert Miller?
40 A. Yes.

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- Q. Second the arranging of long-term finance for Robert Miller? A. Yes.
- Q. Or end finance. Third the arranging of some long-term finance on hotel properties? A. Could you point out where the hotel properties come into this, Mr. Deane, please. I am still on the Robert Miller here.
- Q. I am sorry, it is not mentioned. But I would suggest to you that in the financial negotiations at this stage was a proposal to arrange long-term finance on certain hotel properties? 10
A. Yes, we mortgaged everything.
- Q. Well, you had not at this stage, had you?
A. No, we were in the process of.
- Q. And the final thing that was involved at this stage and again this is not spelt out in this report was the selling of certain hotels to raise money? A. Yes, I objected to some of this myself.
- Q. And also there was a suggestion of increased overdraft facilities from the Bank of New South Wales? A. Yes, that was mentioned. 20
- Q. And I would suggest to you, Mr. Balhorn, that they were all the matters that were involved at this stage in the financial negotiations to cover the immediate and future capital commitments? A. We still needed money over and above.
- Q. But here you had a clear statement of policy?
A. Yes. 30
- Q. And that was the policy? A. We could not go any further.
- Q. Would you just answer my question? A. Yes.
- Q. Might I ask you to turn to the May management report? A. May?
- Q. May, 1972. Now, you have seen that before?
A. Is this actually headed "Management Report"?

- Q. Yes, management report May 1972? A. The management report of June, 1971.
- Q. It would be pretty close to the back, Mr. Balhorn? A. Sorry, yes.
- Q. Now, you saw this, did you not, at the meeting of 1st June, 1972? A. I am not too sure, we had a meeting on 1st June. I remember one on the 9th and the 23rd, but if you say we did, I will go along with it.
- 10 Q. Don't do that. I might be wrong? A. There was one on the 19th and one on the 23rd.
- Q. Yes, there was one on 1st June? A. Was there.
- Q. Would you agree with me that this was the last management report that you saw prior to the carrying of the resolution at the meeting on the 6th July, 1972? A. I think so.
- Q. This deals, does it not, with what had taken place in terms of the programme of the finance committee to solve the commitment problems?
- 20 A. Yes.
- Q. And would you agree with me that it says in so far as construction finance is concerned that has been arranged to the Bank of New South Wales? A. Yes.
- Q. "In so far as end finance is concerned, we have received a telex from Hambros saying that end finance is agreed to." Do you see that in the third last paragraph on the first page? A. Yes.
- 30
- MR. DEANE: Q. And over the page one sees the progress in relation to sale of hotels?
A. Yes.
- Q. And one sees a provision in relation to mortgage finance from the Commonwealth Superannuation Fund? A. Yes.
- Q. And I think the situation was, was it not, that that figure was corrected at the meeting from 2½ m. to 3 m.? A. Yes, Again I had doubts about this and still have doubts about it.
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Q. You see the figure? A. Yes.

HIS HONOUR: Q. Was the 2½ m. corrected to the
3 m., do you remember? A. I think 3 m. was
mentioned.

MR. DEANE: Q. Would you agree that any deficiency
is covered by the bridging or construction
finance arrangements which had been reached
with the Bank of N.S.W.? A. Yes.

Q. If, of course, everything spelt out in that
May report as having been arranged would have
come to fruition, all of the commitments of
the \$16,700,000 odd which existed as at 30th
June 1971 would have been covered? A. I don't
think so. I am not an accountant. You are
leading me from that date to this particular
date. 10

Q. You have agreed with me as at 30th June 1971
commitments in respect of the two oil tankers
existed in an amount of \$16,700,000? A. Yes.

Q. And you have not been able to suggest to me
any source which had been arranged from whence
the moneys to pay those commitments could come
as at 30th June 1971? A. Yes. 20

Q. You have agreed with me that the commitments
in relation to the "Amanda Miller" had been
met? A. Yes.

Q. I suggest to you that if what is set out in
this May report as having been arranged were
to come to fruition, the commitments in
relation to the "Robert Miller" would have
been reached? A. I had doubts about them coming
to fruition. 30

Q. If the matters which in the May report were
stated as having been arranged were to come to
fruition, all of the commitments in respect
of the "Robert Miller" would have been covered,
wouldn't they? A. I am not sure.

Q. Can you suggest any that would not have been
covered? A. I am still in great doubt about
this Commonwealth Superannuation Fund loan being
upgraded from 2½ to 3 m. for a start. 40

- Q. My question to you is if all those matters which were represented in the May report as having been arranged were to come to fruition, all of the commitments in respect of the "Robert Miller" would have been covered?
A. Yes.
- Q. I want to take you to the situation that existed as at 6th July 1972. You would agree with me that as at that date the bridging finance from the bank had been definitely arranged? A. I think so.
- Q. Have you any doubt? A. Yes.
- Q. I suggest to you that a large part of the moneys had already been advised? A. Yes.
- Q. Which means the bridging finance had been definitely arranged? A. I am sorry, yes.
- Q. So far as the Hambros loan was concerned, a formal letter of commitment had been received? A. Yes.
- Q. And the company thought sufficient of that to agree to pay US \$66,000 to commit them?
A. Yes.
- Q. And that fee was paid round about 6th July?
A. I wouldn't know of that.
- Q. But you know that a commitment fee of US \$66,000 was paid in respect of what existed there? A. Yes.
- Q. And you would agree with me, would you not, that for a company in Millers situation that was a very substantial fee? A. Yes.
- Q. There was a formal letter of commitment?
A. Yes.
- Q. And up until the 6th July you will agree with me that nobody had suggested at any Board meeting that there was any doubt about the Hambros moneys coming through? A. I had no certainty in my mind of it.

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Q. Would you agree with me that up until the 5th July nobody suggested at any Board meeting that there was any doubt that the moneys would be coming through? A. I think the matter had been raised at Board meetings.

Q. And I suggest to you that it was treated on the basis that the moneys were secure? A. We were hopeful.

Q. I suggest to you it was treated on the basis that the moneys were secure? A. I cannot agree. 10

Q. Were you aware that Mr. Taylor was writing to the Bank of N.S.W. saying the moneys were secure? A. Yes.

Q. Were you aware that Mr. Taylor was writing to the Commonwealth saying the moneys were secure? A. Yes.

Q. I will again put to you that up until the meeting in July the whole basis on which the question of the Hambros loan was approached at Board meetings was that the moneys were secure? A. I must answer yes to that, but not in my mind. 20

Q. You had never seen the letter of commitment? A. No.

Q. And up until the meeting of the 5th July you had never enquired as to any terms or conditions attached to the loan? A. Yes.

Q. When did you enquire prior to the 5th July? A. I think it had been mentioned over the previous month or so. Particularly we were concerned about the completion date of the ship. 30

Q. Who had raised that? A. I had spoke mainly I think with Mr. Koch on that matter.

Q. Hadn't you been told way back in 1971 that one of the reasons why Hambros was not keen on getting involved in construction finance was the uncertainty of the date of completion? A. I think that was mentioned. 40

- Q. And that insofar as any finance was concerned, the precise date of completion was not something of concern? A. It was in the agreement.
- Q. But you had never seen the agreement? A. I had been told of it.
- 10 Q. Nothing, of course, was said about this particular thing at the meeting of the 6th July, was it? A. No, but it was in my mind.
- Q. Would you answer my question? A. I don't think so.
- Q. The only thing that was said on any question of the Hambros loan being uncertain at that meeting was in relation to the condition relating to change of control? A. Yes.
- 20 Q. And Mr. Koch made that comment and Mr. Cameron disputed it? A. I am not sure what Mr. Camerson said in relation to that.
- Q. Do you deny he disputed it? A. No.
- Q. And none of the lawyers present expressed any view? A. I have no recollection of that.
- Q. So the situation as at 6th July was you knew that the company Millers had agreed to pay a commitment fee of US\$66,000 in relation to the Hambros loan? A. I am not too sure of the figure. I take your word for that, it is US\$66,000.
- 30 Q. You knew that the company had represented to the Commonwealth and to the Bank of N.S.W. that the loan was secure? A. Yes.
- Q. You knew that a formal letter of commitment had been received? A. Yes.
- Q. And would it not be true to say that you were confident that the loan would come through? A. No.

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Q. You were pessimistic about it? A. There has been a lot of pessimism in the company and as I said earlier until a loan is effected I would not guarantee anything. I have said he was not over-confident of getting it.

Q. But would you agree with me that subject to your view that you cannot arrange finance in advance and that a loan is not a loan until the money is in the bank - A. Many things can happen.

10

Q. Subject to those things, would you agree with me that you were confident that the moneys would come through? A. Subject to those things, yes.

Q. Have you ever in your experience heard of a bank of the standing of Hambros going back on a letter of commitment? A. Not to my knowledge.

Q. As at the 6th July you were aware, were you not, that the negotiations with the Commonwealth Superannuation Fund for a loan of 3 m. were continuing? A. They were dragging along slowly.

20

Q. And indeed you are aware now that subsequently the Commonwealth Superannuation Fund offered that 3 m.? A. No.

Q. You never heard that? A. To the best of my knowledge negotiations are still dragging along.

Q. I suggest to you that the Commonwealth Superannuation Fund offered to Millers a loan of 3 m. on the security of these hotels and Millers asked that the loan be kept open, that the opportunity to take the loan be kept open for a further period of three months? (Objected to by Mr. Glass; rejected).

30

Q. As at 6th July you say that you were aware that the negotiations with the Commonwealth Superannuation Fund for a loan of 3 m. were continuing? A. Slowly.

- Q. But you would agree with me, would you not, that apart from the slowness, everything you had been told indicated optimism as to those moneys being available? A. No. I did not like the rate of interest.
- Q. What was the rate of interest? A. $9\frac{1}{4}\%$.
- 10 Q. Would you agree with me that everything you had been told as at 6th July 1972 indicated optimism as to the moneys being available on a long-term basis from the Commonwealth Superannuation Fund? A. No, I was certainly not sure at that time.
- Q. Pessimistic? A. Not necessarily. I think it was the company's intention to get the $2\frac{1}{2}$ or 3 m. from the Superannuation Fund before June 30th this year to help us overcome our payment due to the Commonwealth on the "Robert Miller" and at that stage, at 6th July the discussions were still dragging on.
- 20 Q. But of course the moneys, the $\$3m.$ had been made available by Tricontinental as at 6th July? A. Yes.
- Q. And that was, as it were, in placement for the budgeted moneys from the Commonwealth Superannuation Fund? A. I would not guarantee that, but I would presume that would be correct.
- 30 Q. And insofar as the moneys from Tricontinental were concerned, they were the subject of a written agreement? A. Yes.
- Q. Did you see that written agreement? A. No.
- Q. And of course the basis of those moneys was that the bills against which they were borrowed could be rolled over for a period up to 12 months, did you know that? A. At Tricontinental's discretion.
- Q. Is that your understanding? A. Yes.
- 40 Q. That Tricontinental had a discretion at any time to refuse to roll over one of the bills? A. Yes.

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Exhibit V

- Q. Absolute unfettered discretion? A. I believe so and they also had the right to, I think, increase the rate of interest if in rolling over a loan.
- Q. The Tricontinental moneys were secured on the mortgage of hotels? A. Yes.
- Q. Of a value of \$8 m.? A. I could not guarantee the figure.
- Q. Would you dispute that figure? A. No.
- Q. Which means that assuming that figure is correct, if the Tricontinental moneys were to become repayable the company had hotels of a value of \$8 m. against which it could borrow? A. That depends on the economic climate of the day. 10
- Q. If you assume that the Tricontinental moneys had to be repaid, the company would have hotels of a value of \$8 m. against which it could borrow? A. I am not sure of the figure of 8 m., but I won't dispute it. 20
- Q. And of course if anything happened to the Hambros loan the company, insofar as the end finance for the "Robert Miller" was concerned, would have the "Robert Miller" unencumbered against which it could borrow? A. Yes, with that proviso of the economic climate. I recall the Minsec crash.
- Q. What was your understanding of the value of the "Robert Miller"? A. I am not sure. Taking into account the Commonwealth subsidy, it would be in the vicinity of \$15 m. I would think. 30
- Q. Are you aware of the H.C. Sleigh offer to "Robert Miller"? A. No. I possibly knew at the time, but I have no recollection of it today.
- Q. (Ex. V shown to witness) You have before you the minutes of the meeting of 6th July 1972? A. Yes.

- Q. I ask you to turn to p.5. Would you agree with me that the basis on which Mr. Koch presented the financial situation of the company appears in summary form, as it were in the summary of current short-term borrowing? A. Yes.
- Q. Insofar as 4.4 m. of those moneys were concerned, they were moneys which were due to be repaid to the Bank of N.S.W.? A. Yes.
- 10 Q. And you were aware, I presume, that an arrangement had been made under which Hambros would pay those moneys direct to the Bank of N.S.W.? A. I believe that was the situation.
- Q. Millers had obtained from Hambros an undertaking to pay the moneys direct to the Bank of N.S.W. and had handed it along to the Bank of N.S.W.? A. I think that is correct.
- Q. Which means of course that apart from the question of any uncertainty that may have existed as to the availability of the moneys from Hambros, the \$4.4 m. were covered? A. Yes, if the Hambros was not going through.
- 20 MR. GLASS: The evidence is that of the \$4,450,000 4.2 represented the Bank of N.S.W. money.
- MR. DEANE: Q. Instead of the 4.4 would you accept 4.2 m? A. Yes.
- Q. The other main payments involved there were payments, on your understanding, were they not, which were due to Tricontinental? A. Yes.
- 30 Q. An amount of \$4.8 m.? A. Yes.
- Q. And you will see that immediately under those figures? A. Yes.
- Q. Of course those moneys were to some extent subject to the roll over provisions? A. Correct.
- Q. Tricontinental was the Millers finance adviser? A. Yes.

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Q. There had been no suggestion that any precipitated payment be made for repayment of those moneys by Tricontinental? A. Not to my knowledge.

Q. And those moneys were secured on hotels which were otherwise unencumbered? A. To the best of my knowledge.

Q. Which means if they had to be repaid the hotels were available to be offered as security? A. Yes.

10

Q. The next main factor in that list of current short-term borrowings is a Mitsui loan in the amount of \$800,000? A. Yes.

Q. You were aware, of course, that moneys had been owing to Mitsui by Millers over a considerable period of time? A. I have only discovered this in the past few months.

Q. As at 6th July? A. Yes.

Q. And you knew that it was the company's policy to rearrange these loans with Mitsui to keep them at a figure of roughly \$800,000? A. That would appear to be the situation.

20

Q. And there had never been the slightest problem in the world? A. I hadn't heard it any other way.

Q. And the Mitsui loan was, of course, secured by a mortgage of the El Rancho Hotel? A. I believe so.

Q. At a value of \$1½ m.? A. I take your word for that.

30

Q. Which means in the unlikely event of Mitsui refusing to permit the standing arrangements to continue that El Rancho Hotel would have been available unencumbered to be offered as security? A. Yes.

Q. When Mr. Koch put this situation as he put it to the Board, Mr. Cameron disputed it? A. I don't recall Mr. Cameron's words.

- Q. You would agree with me that Mr. Cameron made - A. I would not deny he disputed it.
- Q. He made it quite clear he did not accept what Mr. Koch was saying? A. I don't recall.
- Q. Would you agree with me that when you heard Mr. Koch reading out these figures all totalling \$10.7 m. you got the clear impression that he was trying to build up a picture? A. He laid it on the line.
- 10 Q. Of course he did not lay it on the line in any complete sense, did he? A. I think he did.
- Q. I suggest to you that he did not in building up these figures say in relation to the Bank of N.S.W., "While I say short-term borrowings of \$4.2 m. a lot of that money has not even been advanced". He did not say that, did he? A. But it is due for repayment at the end of this financial year, I think.
- 20 Q. But you knew it had not even been advanced, a lot of it, as at 6th July? A. Yes.
- Q. And he did not say that 4.2 m. of those short-term borrowings will be repaid from the Hambros loan if it comes through? A. Not to my knowledge.
- Q. And he did not say "And we are sufficiently sure of the Hambros loan to be prepared to pay a very substantial sum in respect of the letter of commitment"? A. Not to my recollection.
- 30 Q. He did not say "If the Tricontinental moneys become repayable there will be hotels at a value of \$8 m. to offer as security? A. Not to my recollection.
- Q. He did not say "If the Mitsui moneys become repayable there will be a hotel worth a million and a half to offer as security"? A. No, but at the same time he pointed out that -
- 40 Q. He did not say that? A. The mortgage is involved in this.

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Q. He did not say, did he, that if the Mitsui moneys become repayable there will be a hotel of the value of $\$1\frac{1}{2}$ m. to offer as security?
A. I am not too sure, I feel that Mr. Koch did mentioned somewhere along the line that it could be difficult to re-negotiate loans on some of these mortgaged properties.

MR. DEANE: Q. I suggest to you, Mr. Balhorn, that Mr. Koch said nothing at all about properties being available to be offered as security in the event of any of these moneys becoming payable? A. Certainly not in those words, but I think the words "mortgage properties" were mentioned.

10

Q. He also did not say, did he, that in the event of this condition that he referred to making the Hambros loan uncertain - causing the Hambros moneys not to come through - the whole of the "Robert Miller" would be available to be offered as security for end finance? A. He did not. Not to my knowledge.

20

Q. Of course, you knew every one of these things that I have put to you Mr. Koch did not say?
A. Generally speaking.

Q. Every one? A. I am not sure on a point or two, but I won't deny it.

Q. Now, would you look at the minutes under those figures? You see four paragraphs down: "Mr Koch also informed the board . . . as security"?
A. Yes.

30

Q. And that was in a context where Mr. Koch was advocating an allotment of shares to provide funds for the current short-term borrowings?
A. Yes.

Q. You see, I suggest to you that Mr. Koch did not say anything to the effect that if these short-term borrowings become repayable, for every dollar that is owing property in excess of $\$2$ has been pledged by way of security?
A. I have not done my arithmetic on that, either.

40

- Q. You see, what I am suggesting to you is that it was clear to you at this meeting, in the light of the things that you have told his Honour you knew and in the light of the things that Mr. Koch did not mention, that what Mr. Koch was putting to the directors was a lot of nonsense? A. I disagree strongly, Mr. Deane. Mr. Koch pointed out in no uncertain terms that we did not have another asset we could mortgage in the company; all our assets were pledged, and that is an unhealthy way for any company to be.
- 10 Q. You are aware, of course, that most of the leading public companies in this country have debenture issues, are you not? A. I would not say all the leading companies.
- Q. A large number of them have debenture issues? A. Some.
- 20 Q. And any company that has a debenture issue normally has every one of its assets pledged? A. I am not an accountant, Mr. Deane.
- Q. But, Mr. Balhorn, you have expressed views in relation to the comparative liquidity position? A. What I have heard and studied in the boardroom.
- Q. You have expressed very strong views as to the comparative liquidity position. That is so, isn't it? A. That is in relation to Millers' internal affairs.
- 30 Q. You see, I again put it to you that the situation that existed as at 30th June, 1972, in so far as liquidity was concerned, was a much better position than existed as at 30th June, 1971? A. Possibly someone else can put you in the picture of what happened on 30th June this year in Millers regarding raising money owing to the Commonwealth Government.
- 40 Q. I will put to you again that as at the end of June 1972 Millers' liquidity position was in a far better position than as at the end of June 1971? A. I disagree.

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- Q. You see, I suggest to you that one of the problems which the finance committee set out to solve in the beginning of the financial year ended 1972 had either been solved or was very close to being solved? A. I disagree.
- Q. Now, you have told his Honour of some conversations that took place between yourself and Mr. Duncan, yourself and Mr. Taylor and yourself and Mr. Conway? A. Yes.
- Q. I want to ask you some questions about that. First of all, how do you fix the dates of these conversations? A. The date of my luncheon with Mr. Taylor - 10
- Q. I think that you fixed that by reference to an objective fact that happened on that day? A. I was invited to lunch by Mr. Taylor with his Victorian manager and one or two other people.
- Q. How do you fix the date? A. It was the first time I think I had had lunch or seen Mr. Taylor in Melbourne. 20
- Q. Did you make a note of it? A. No.
- Q. What day of the week was it? A. It was a Monday or a Tuesday.
- Q. What I suggest to you is that it is rather strange that you can remember that it was the 20th, and you can't remember whether it was a Monday or a Tuesday? A. Well, it is firm in my mind that it was the 20th, and it was two days before the board meeting on the 23rd (sic). 30
- Q. Can you tell us again what was said in that conversation? A. With Mr. Taylor in Melbourne.
- Q. Yes. And in relation only to Millers and Howard Smith. A. Mr. Taylor said to me over lunch that there was a possibility of Howard Smith making a take-over offer for R.W. Miller & Co.
- Q. Did he say anything else? A. No, because I virtually dismissed it.

- Q. Did he tell you that the idea of Howard Smith making a take-over offer for Millers had come from Millers to Howard Smith?
A. No, he did not.
- Q. You asked no questions at all about it?
A. No. As I said before, I said "Look, Arch, there has been too much of this going on. I will believe it when I see it."
- 10 Q. You then informed Mr. Duncan of what Mr. Taylor had told you in your next telephone conversation with him? A. I was speaking to Mr. Duncan the following night. Whether he rang me or I rang him I am not too sure, but in general conversation I mentioned having lunch with Mr. Taylor, and his suggestion.
- 20 Q. When was the next occasion that you had a telephone conversation in relation to Millers with Mr. Taylor or Mr. Conway?
A. 4th July, to the best of my knowledge. There could have been something in between, but I have no recollection.
- Q. You had no conversation with them after the joint announcement? A. There was a board meeting on 23rd June. I was present at that.
- Q. You had no conversation with them after the Ampol-Bulkships joint announcement? A. No.
- Q. You did not discuss that with either? A. No.
- 30 Q. Did you discuss it with Mr. Duncan? A. I may have. I have no recollection. If I was talking to Mr. Duncan after the 28th I would have mentioned it to him.
- Q. On 4th July you had a telephone call from Mr. Taylor? A. That is correct.
- Q. And Mr. Taylor informed you that he and Mr. Koch had been at a meeting with representatives of Howard Smith? A. No.
- 40 Q. I suggest that he informed you of a number of offers and counter-offers - I withdraw that; of a number of suggestions and counter-suggestions that had been made at that meeting?
A. No. Emphatically no.

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- Q. You see, I suggest to you that he informed you that Howard Smith had again sought to buy the Millers tankers? A. Never mentioned.
- Q. I suggest that he informed you that Howard Smith had suggested that Millers allot 3 m. shares at a price of \$2 per share to Howard Smith? A. That figure was mentioned.
- Q. Associated with, and a term of the suggested allotment, was that Howard Smith would not have to pay most of the purchase money unless and until they got control of Millers? A. No mention of that. 10
- Q. Is what you tell his Honour this, that the only suggestion Mr. Taylor mentioned to you was an allotment of 3 m shares at \$2 per share? A. A possibility of Howard Smith making such a proposition.
- Q. He rang you to tell you that? A. Yes.
- Q. How did he lead into it? A. I would not remember, Mr. Deane. 20
- Q. Will you try? A. I think I was sitting in my office, and the 'phone rang. "Arch here." Or it could have come through the switchboard, and I said "Yes". He said "Well, I have heard today that Howard Smith could be making a proposal that we allot them 3 m shares at \$2 each".
- Q. Yes. What else did he say? A. Nothing more on that subject. I think I replied "As I told you a couple of weeks ago, well, Arch, when I saw you in Melbourne," something like this, "I will believe it when I see it. There has been too much of this going on for me to expect anything until I see it in writing, or a concrete proposal." I asked him if it was a concrete proposal, and he said "No". 30
- Q. Did he seem pleased about the proposition? (Objected to by Mr. Glass; rejected).
- Q. Did he express pleasure at the proposition? A. Not to my recollection. 40

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Q. He certainly did not express dismay?

A. No.

Q. And he did not indicate any disagreement with the proposal? A. He just made the statement, and that was all, and I did not take it as fact.

10 Q. As I understand your evidence, you then spoke to Mr. Duncan on the telephone, did you? Correct me if I am wrong. A. I think it was the following evening from Sydney, Mr. Deane. I could have spoken to Mr. Duncan on that day, but my next thought on the matter would be from the Wentworth Hotel on the following night.

Q. What is the next telephone or other conversation you recollect having in respect of an allotment of shares in Millers to Howard Smith? A. With Mr. Conway, on the afternoon of the 5th.

20 Q. And you were in Melbourne? A. Yes.

Q. He was in Sydney? A. Yes.

Q. And can you tell us again what was said in that telephone conversation? A. It was probably mid-afternoon. The 'phone rang. Mr. Taylor said "Is that you Alan?". I said "Yes." He said "Arch Taylor here. I will put Bill Conway on. He wants to have a word with you," or words to that effect.

30 Q. Yes. What was said then? A. Mr. Conway mentioned the possibility again of Howard Smith making a proposition for an allotment of shares. He did not mention number or price, and the purpose of the 'phone call was to put me in the legal position of such an allotment should it be proposed.

40 Q. I suggest to you what Mr. Conway first said to you was "Alan, we are expecting to get an offer from Howard Smith before the board meeting tomorrow"? A. He could have said that. I could not deny it. To the best

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of my knowledge or recollection it was "If an offer should be made," and he then outlined the legal situation.

Q. Why was he outlining the legal situation to you on your understanding? A. It just came out of the blue so far as I was concerned.

Q. Did you say to Mr. Conway "That seems a bit unethical"? A. After Mr. Conway outlined it he said "If an allotment should be proposed it would not be in breach of the Companies Act, but it would be a technical breach of the Stock Exchange Regulations," and he may have said a few more words along those lines, and I then said "Isn't this a bit unethical?" or words to that effect.

10

Q. What did you mean by "a bit unethical"? A. Well I was thinking at the time of the breach of the Stock Exchange Regulations, and Mr. Conway replied "No, Alan, not unethical, but unusual, perhaps", or words very close to that.

20

Q. And what Stock Exchange Regulations did you understand were being breached, or would be breached? A. I am not sure whether Mr. Conway told me on the 'phone that afternoon or the following morning, but the two I understood to be were one, that a company should not allot more than ten per cent of its shareholding without the shareholders' approval, and the other, that no shares should be allotted by a company in a takeover situation.

30

Q. Mr. Conway told you that, or did you already know it? A. I didn't know it. I was told, and it was Mr. Conway who told me, but whether he told me on the 'phone that afternoon or at the board meeting the following day I am not sure.

Q. Was anything said about such an allotment would enable the Howard Smith offer to go ahead? A. No.

40

Q. Was anything said about the purposes of the allotment in this telephone conversation with Mr. Conway? A. Not to my recollection.

- Q. You had assumed, no doubt, by the 4th or 5th July, 1972, that unless something was done to alter the situation the Howard Smith offer would not go ahead? A. I had not applied my mind to this, Mr. Deane. I may have, but I don't recall.
- Q. You see, Howard Smith had made an offer for all the shares in Millers? A. Yes.
- 10 Q. And two shareholders, holding more than half the shares, said they would not accept it? A. Yes.
- Q. Did not you assume that unless something was done the Howard Smith offer would not go ahead? A. Yes.
- Q. And you thought that was a very bad thing from the point of view of the shareholders? A. I was hoping that someone else would come to the party with a higher take-over bid.
- 20 Q. You thought it would be a very bad thing at least from the point of view of the minority shareholders if the Howard Smith offer did not go ahead, did you not? A. Yes.
- Q. And of course, you would agree with me that the only way that you could see to enable the Howard Smith offer to go ahead was by reducing the proportionate shareholding of Ampol and Bulkships? A. That was not in my mind.
- 30 Q. What you tell his Honour is that when you were told of a proposed or a possible allotment of shares by Millers to Howard Smith it did not occur to you that that would have the effect of permitting the Howard Smith offer to go ahead? A. I had my own - on this figure of 3 m shares at \$2 I had my own thoughts, which I will tell you what they were, if you wish.
- 40 Q. What I am asking you is, were you not of the view, or did it not occur to you when you were told of a possible allotment of shares in Millers to Howard Smith that one of the results of it might be to keep the Howard Smith offer open? A. No.

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- Q. It did not occur to you? A. It could have occurred to me, but I don't think Mr. Conway or Mr. Taylor intimated that to me.
- Q. You were suggesting that I may be interested in your view on an allotment of 3 m shares at \$2 a share. What would have been your reasons? A. I would have voted against such proposal. Too low.
- Q. \$2 was too low? A. Yes.
- Q. What did you think was the value of the shares? 10
A. I could only guess at it. My guess would be around the \$2.50 mark.
- Q. \$2.30 not too low. A. No, it was higher than the market price when the shares were last listed.
- Q. What you tell his Honour in this picture of unmitigated gloom that you painted in relation to Millers as at 6th July, 1972, - A. I don't think I used those words.
- Q. Didn't you use the words "terrible price", 20
"critical"? A. Critical financial situation.
- Q. "Terrible"? A. No. I don't think I used the word "terrible".
- Q. "Desperate"? A. "Critical" or "desperate" one of those two words.
- Q. And the shares were worth more than \$2?
A. I am sorry?
- Q. Shares worth more than \$2? A. Yes. I think that the company had - and still has - a very bright future. 30
- Q. Anyway, coming back to this conversation, can you remember anything else that was said in the conversation between yourself and Mr. Conway? A. No.
- Q. So, so far as you can recollect, what was involved in this situation was a 'phone call from Mr. Taylor, in which he said "I will put Mr. Conway on; he has something to say to you,"

and Mr. Conway told you of the legalities of a possible allotment of shares? A. Yes.

Q. Did you regard it as rather extraordinary that he should be ringing you to tell you about that? A. I thought it unusual, yes.

10 Q. Extraordinary? A. No, I think that Millers kept me in the position - kept in the picture - on many things. It was not unusual for Millers to ring me about matters that related to Japan and Mr. Duncan and hotel business.

Q. Going from there, what is the next conversation in relation to this possible allotment? A. I flew to Sydney that evening. It was probably shortly after I spoke to Mr. Conway. I think I was at the Wentworth Hotel round about dinnertime - possibly 8 o'clock - and I rang Mr. Peter Duncan in Tokyo. Not purely on the Miller matter - I had other matters to discuss with him.

20 Q. Mr. Duncan told you that he had been in conversation with Mr. Taylor? A. Yes, he said - he gave me to understand that he was in the picture.

Q. Did he tell you Mr. Taylor had told him the proposal to exclude Sir Peter Abeles from voting? A. No, he did not.

Q. Nothing said about that? A. Nothing was said about that at all.

30 Q. Did you have any prior knowledge of the proposal to exclude Sir Peter Abeles from voting? A. No.

Q. What did Mr. Duncan say to you that indicated that he was in the picture? A. He said he had spoken to Mr. Taylor.

Q. Yes? A. And he knew of this suggested - this suggestion of an allotment.

40 Q. Of an allotment of what? A. 2 m shares at, I think I mentioned, \$2,30. He said "I though it might have been \$2.50", or words to that effect.

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Q. Where had you got the figure of \$2.30 from?
A. I am sorry, Mr. Deane. I am getting my
figures confused. 3 m shares at \$2, and Mr.
Duncan mentioned also 3 m shares, but he was
not too sure whether it was \$3 or \$3.50.

Q. \$3? A. I am sorry, your Honour.

HIS HONOUR: Start it again.

WITNESS: A figure of 3 m shares at \$2.

HIS HONOUR: Q. That was what Mr. Duncan mentioned
to you? A. Which I mentioned to Mr. Duncan,
and he mentioned 3m shares, and he was not
sure whether it was \$2 or \$2.50.

10

MR DEANE: Q. Yes? A. We then agreed that it was
useless discussing this anyhow, because we
were still completely in the dark on what
might be the formal proposal. We had not seen
or heard of anything concrete, and we then
discussed other matters.

Q. That was on the night of 5th July? A. Yes,
that is correct.

20

Q. You spoke to him again? A. I also put the
proposition to Mr. Duncan that evening - I
said "Look, Peter, if there appears to be
what could be a viable proposition put up, do
you have any ideas on the subject?". He said
"Alan, all I can advise you is that if you
think it is a good proposition and you think
it is in the interests of the company and the
share-holders and you listen carefully to what
the other board members say on the subject, play
it accordingly," and he actually used the words,
"play it accordingly".

30

Q. I see. The next conversation was early on the
morning of the 6th, was it? A. Yes. Mr. Duncan
rang me at the Wentworth at about 8.30.

Q. Can we go back for a moment? A. Yes.

Q. You had been Mr. Duncan's alternate on the
board of Millers for a considerable time?
Twelve months? A. Yes. Twelve or thirteen
months.

40

Q. Had you been his alternate on any other board?
A. No.

Q. Have you been a director of any other company?
A. No.

Q. No doubt you discussed the affairs of Millers with Mr. Duncan on many occasions? A. Yes.

Q. And no doubt you discussed your approach to certain problems on many occasions? A. Yes, particularly in relation to coal.

10 Q. Had he ever on any other occasion delivered this homily about the interests of the company as a whole, and shareholders, et cetera? A. During that twelve months he has pointed out my duties as a director.

Q. Having acted as a director for in excess of twelve months didn't you find the little homily somewhat suprising in a long distance 'phone call? A. Mr. Duncan and I - we don't operate on a strict business basis- formal relationship, Mr. Deane. It is more of a friendly, informal relationship, where we feel free to discuss many things that do not normally occur under normal business practice.

20

Q. Your answer to my question is that you did not find the homily at all surprising? A. No.

HIS HONOUR: Q. Mr. Balhorn, what Mr. Deane is putting to you is that it might be thought to be a rather stilted conversation when he told you to listen carefully to what other board members had to say? A. It certainly was not a stilted conversation. It was just a very casual, friendly, informal conversation.

30

MR. DEANE: Q. So that there can be no doubt, what I am suggesting to you is that your account of the conversation is inaccurate? A. I don't think so, Mr. Deane.

Q. And quite misleading? A. I can't recall anything else said at that time.

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Q. Let us come to the morning conversation on 6th July -

HIS HONOUR: I would like to ask Mr. Balhorn to repeat the conversation again without dressing it up. Have you gentlemen any objection?

MR. GLASS: I Have no objection.

MR. DEANE: No, your Honour.

HIS HONOUR: Q. Mr. Balhorn, can you give the conversation again? Don't dress it up. If there were expletives, and so on, just tell us what was said. Let us have it, as best you can recall it. A. On the evening of 5th July I rang Peter Duncan regarding other matters - matters other than Millers.

10

Q. Leave those out. A. Right. We got around to talking Miller business, and I said "By the way, there is a suggestion that Howard Smith might be proposing an allotment," and Peter Duncan said words to the effect "Yes, I am in the picture on that one, Alan. I have spoken to Arch about it already." We agreed it was not worth going into in any lengthy discussion of the matter because we did not have anything concrete to discuss, and then I think I asked - I said "Well, Pete, if some viable proposition should come up which looks interesting what would you suggest?" and he said "I can't suggest anything, because we have not got anything concrete to discuss anyhow, but I would ask you to listen carefully to the advice - to the other members of the board; get their feelings on whatever the proposal might be, and to play it accordingly." Virtually that is about all I recall of the conversation, your Honour.

20

30

MR. DEANE: Q. What about the interests of shareholders as a whole, and the company? A. Yes, he mentioned that, too. He said - I am sorry, he said - during the conversation he said "Well, if you vote for or against anything in the boardroom it must be on behalf of the company and the shareholders." That is about all I recall of the conversation.

40

- Q. Now can we come to the morning of 6th July?
A. Yes.
- Q. You telephoned Mr. Duncan early in the morning, or did he telephone you? A. He telephoned me, which is a contradiction of my interrogatory, by the way.
- Q. What was said? A. He rang me regarding alterations to his home at Palm Beach - particularly in relation to -
- 10 Q. I am only concerned with what was said regarding the allotment of shares in Millers to Howard Smith. Would you just confine it to that, please? A. Yes. He said "Anything new on the Miller front?". I said "No." He said "Will you keep me informed?".
- Q. And you went to Millers? A. Yes, I went to Millers later on in the morning.
- Q. As I understand your evidence, you went in and there were a number of people in Mr. Taylor's room. You can only remember Mr. Taylor and Mr. Conway? A. Yes. People were coming and going at that time.
- 20 Q. Do you remember Mr. Anderson? A. I don't think so. He could have been there, but I don't think so.
- Q. You read the letter? A. Yes.
- Q. Quickly? A. Yes, I just scanned it.
- Q. Did you read the agreement annexed to it?
A. No, I did not read the agreement.
- 30 Q. Have you ever read that agreement? A. I have read a document relating to the allotment. I don't think - I think it is a deed of commitment. I think it may be different to the agreement. The agreement was read out at the board meeting.
- Q. Of course, when you read the letter it was clear to you, wasn't it, that Howard Smith was proposing an allotment of shares by Millers to them? A. Yes.

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- Q. And Howard Smith were advancing reasons to support such an allotment? A. Yes.
- Q. And they were reasons advanced as justifying the making of such an allotment from the point of view of Millers? A. Well, my eyes were glued on the ten point something million.
- Q. Mr. Balhorn, you would agree with me, would you not, that the letter was not saying why it would be good for Howard Smith for the allotment to be made? A. I would have to have another look at the letter to agree or disagree with you on that. 10
- Q. Let me test your recollection, if I may? A. Yes.
- Q. Would not you agree with me that when you read the letter it was clear that Howard Smith was proposing to Millers that Millers allot shares to Howard Smith so as to enable the Howard Smith offer to go ahead? A. I was mainly interested in the £10m. 20
- Q. Can you answer my question. A. I suppose so.
- Q. You then requested Mr. Taylor to get Mr. Duncan, did you? A. I think I said "Arch, I think you should put Pete in the picture here. Do you mind if I 'phone him?". Mr. Taylor said "That's okay", picked up the 'phone and booked it through his switchboard.
- Q. What was the next thing that happened? A. It was a minute to ten, or virtually on 10 o'clock when the 'phone call came through. Arch picked up the 'phone. I said "We are due down below, Arch. Would you mind if Bill Conway passed on the information," and Mr. Conway agreed to this. People were coming and going at the time. Arch passed - Mr. Taylor passed the 'phone to Mr. Conway, and I said to Mr. Conway while he was on the 'phone to Mr. Duncan "Please tell Peter that I am inclined to go along with this proposition, but if I have any doubts in the boardroom I will abstain." 40 At that stage I was not sure whether Mr. Conway had got the message or not, and I wrote "Yes" and "Abstain" on a piece of paper.

The purpose of this was to pass on information, and not to seek anything from it. If I had intended seeking anything -

- Q. What size was the piece of paper? A big one, or a small one? A. Just torn off the end of a pad.
- 10 Q. (Piece of paper handed to witness) Can you write there, in the same position, the words you wrote? A. Yes. (Witness complies with request).
- Q. You say you were not sure whether in the confusion Mr. Conway had, as it were, understood what you said? A. That is correct.
- Q. So you were not sure whether Mr. Conway would know what to say to Mr. Duncan? A. That is right, because the purpose of the 'phone call really was to put - was to give him the information that we had received that morning.
- 20 Q. You said nothing to Mr. Conway when you handed him this piece of paper? A. No.
- Q. But, in a situation where you thought that Mr. Conway would not know what to say, you handed him this bit of paper? A. Well, I though I had the message through verbally, but I was not sure.
- Q. In a situation where you were not sure whether Mr. Conway knew what you wanted him to say, you handed him this piece of paper? A. Yes.
- 30 Balhorn's intention was to either "Yes" or "Abstain".
- Q. You handed him this piece of paper? A. Yes.
- Q. You told his Honour that your reason for handing this piece of paper was so that there could be no doubt as to what he was to say to Mr. Duncan? A. Yes.
- Q. Now, when you received that document back from Mr. Conway there was a tick on it? A. Yes.

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* Exhibit XX

Q. Will you put a tick on it which corresponds, to the best of your recollection, to that tick? A. Yes (Witness complies with request).

(Mr. Balhorn's notes tendered and admitted as Ex.XX)*

Q. Well then, when you went down to the board meeting - to the boardroom - was it down, or up? A. Down.

Q. When you went down to the boardroom from Mr. Taylor's office did Mr. Taylor go with you? A. Yes. 10

Q. Who was present, can you recollect, when you arrived at the boardroom? A. Let us say Mr. Cameron was missing, Sir Peter Abeles was missing, Mr. Conway was missing, because he was still upstairs -

Q. I am only concerned with directors. A. The Chairman, Lady Miller, Mr. Nicholl, Mr. Anderson, Balhorn, with two missing.

Q. The meeting did not commence for some time? A. No, probably 10.15 or so. 20

Q. Mr. Conway was there before the meeting commenced? A. I think so, yes.

Q. So that you received this document from Mr. Conway before the meeting commenced? A. Thereabouts. People were sitting around the boardroom table at that time.

Q. I suggest to you that there was a coffee break before the meeting? A. Yes. People were sitting around the table. 30

Q. The coffee break was for ten minutes or so? A. Yes.

Q. You don't suggest that Mr. Conway was not in the boardroom well before the end of the coffee break? A. No.

Q. So that what I am putting to you is this, that you had not started when Mr. Conway came in and handed you a bit of paper? A. That is correct.

- Q. Did it occur to you to ask him "What on earth is that tick doing on the bit of paper?"? A. As he walked into the room he walked around and dropped it and kept walking. I picked it up, screwed it up, and left it on the table.
- Q. But you got a bit of paper that you had never expected to see again? A. I did not expect to see it again, no.
- 10 Q. On it was a tick? A. Yes.
- Q. And you presumed, I suppose, that Mr. Conway's had been the hand that added the tick? A. Yes.
- Q. Well, did it not occur to you that perhaps you might ask why you had got the bit of paper back, and why the tick? A. I think there was conversation going on in the boardroom. The meeting could have been at that time formally opened by Mr. Taylor. I am not sure.
- 20 Q. You had no doubt, did you, what the tick was about? A. I did not expect to see the piece of paper again. So far as I was concerned it was an agreement by Duncan of a course of action I had intended to take - either to vote "Yes" or "Abstain". If I were requesting an answer to the "Yes" or "Abstain" I would have put a question mark against both of those words.
- 30 Q. You handed to Mr. Conway a document with the words "Yes" and "Abstain" on it? A. Yes, that is right.
- Q. For the purpose of conveying to Mr. Duncan that - I think I can summarise your evidence - you were uncertain, and were considering whether you would vote "Yes", or in certain circumstances you would abstain? A. That is correct.
- Q. And you got back a document which had a tick opposite "Yes"? A. Yes.
- Q. Now, I suggest to you that you were under no misapprehension at all - that Mr. Duncan was saying "Vote 'Yes'"? A. It had no influence on me whatsoever, Mr. Deane.

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- Q. I suggest to you that you were under no misapprehension at all - that Mr. Duncan was saying to vote "Yes"? A. I disagree.
- Q. It did not occur to you? A. I took that to mean that the course of action I was going to adopt he agreed with - "Yes" or "Abstain". If I had wanted "Yes" or "Abstain" answered, I would, as an old journalist, put a question mark against either of those words.
- Q. Of course, alternatively you could have said something to Mr. Conway as you handed the paper to him, couldn't you? A. I am sorry, I missed the last words. 10
- Q. Alternatively to putting a question mark you could have said something to Mr. Conway as you handed the bit of paper to him? A. I don't quite get what you mean.
- Q. You could have said to Mr. Conway "Find out what Mr. Duncan wants"? A. No, I did not.
- Q. I presume, Mr. Balhorn, you have voted in many Commonwealth elections? A. Yes. 20
- Q. Where you go in and get a little ticket? A. Yes.
- Q. Which has some names on it, and you indicate a preference? A. Yes.
- Q. Do you really say that, as a journalist, you just would not, as it were, present a choice to someone on a paper without a question mark? A. To this day I don't know what Mr. Duncan - I have spoken to Mr. Duncan, and to the best of my knowledge he received this information - 30
- Q. Mr. Balhorn, we will hear from Mr. Duncan what he says. Now, the meeting having started, formal matters were dealt with, and the letter from Howard Smith was read out in full? A. Yes.
- Q. And that went on for a considerable time, I suppose? A. Eight or nine minutes, I suppose.
- Q. And then Mr. Conway read out the whole of the agreement? A. Yes.

- Q. Did you listen to Mr. Conway reading the agreement? A. Yes.
- Q. Did you understand what the terms were? A. I think so, at the time.
- Q. You are able, are you, to sit and hear somebody read an agreement of this nature and have an understanding of what its provisions are? A. He read it very slowly, I think, for this purpose. I am quite sure that the board (sic) - it did not rattle it off.
- 10 Q. Have you ever actually looked at this agreement? A. No, I have not.
- Q. You have never seen it? A. Except, there is another document which could be the agreement, but I doubt it.
- Q. Were you in Court while any questions were being asked as to the contents of this agreement? A. I could have been, but I don't have any recollection.
- 20 Q. What was your understanding as to the provisions of the agreement relating to payment by Millers of dividends to its shareholders as at 6th July? A. You mean Howard Smith's participation in the -
- Q. What was your understanding as to restrictions placed on Miller's right to pay dividends to its shareholders by the agreement? A. I think it was necessary - I think the agreement called for written agreement from Howard Smith.
- 30 Q. Is that your understanding? A. Whether that applies to the 1971/72 year or the 1972/73 year I am not sure.
- Q. Are you aware that the agreement contained a provision relating to Millers' right to pay a dividend to shareholders during the currency not only of the proposed Howard Smith offer but of any substituted takeover offer by Howard Smith? A. Not in those words.

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Q. You would agree with me, wouldn't you, that that would be a very grave matter from the point of view of the directors of Millers?

A. I don't think we were precluded from nominating a dividend.

Q. So that that was your understanding of the agreement as it was read, that your right to pay a dividend remained completely unfettered?

A. No, there is something about getting approval in writing from Howard Smith to do this.

10

Q. But no prohibition? A. Not as such, no.

(Further hearing adjourned to 10 a.m. on
Thursday, 5th October, 1972).

HIS HONOUR: Are there any matters in the transcript gentlemen?

MR. DEANE: On p.892 the second question, the first line of the answer, I would suggest the word "doubts" should read "doubt".

HIS HONOUR: Yes.

MR. HUGHES: On p.912 the third last question, the second line, I suggest that the word "projection" should read "rejection".

20

HIS HONOUR: Yes.

ALAN VARDY BALHORN
On former oath:

HIS HONOUR: You are still on your former oath, Mr. Balhorn.

WITNESS: Yes.

(Mr. Nicholl's extracts from 42 A.L.J.R. and 42 L.J.R. tendered and admitted as Ex.MH.27.)

Exhibit MH27

MR. DEANE: Q. Mr. Balhorn, I asked you yesterday some questions about your views as to the relationship of the financial position of Millers as at 30th June 1972 as compared to 30th June 1971. Do you recall that I asked you some questions in regard to that yesterday? A. Yes.

Q. You told me you did not think things had improved? A. Correct.

10 Q. Had they got worse? A. Possibly.

Q. Considerably worse? A. I would not say that.

Q. Now of course you recall, do you not, in relation to the Ampol offer, the directors of Millers on two occasions considered a Part C statement? A. That is correct.

Q. And of course, that was a document that you understood had to be furnished in compliance with the Companies Act? A. Yes.

20 Q. And it was a document over which much care was taken? A. Yes.

Q. And over which there was much concern that it be precisely accurate? A. Yes.

Q. And you shared that concern? A. Yes.

Q. And you participated in two meetings of the directors which considered first the draft and then the final document? A. Yes.

30 Q. (Ex. P handed to witness) Will you look at that document, Mr. Balhorn? I think you recognise it as the Part C statement? A. I presume the back page of this is the actual Part C statement.

Q. Of course, you will observe down the bottom that this is not a document signed by Mr. Taylor for and on behalf of Millers? A. Yes.

Q. It is a document signed for and on behalf of the directors? A. Yes.

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- Q. You being one of them? A. Yes.
- Q. And in par. 2 you are specifically mentioned as being one of the people involved? A. Yes.
- Q. Well now, as at the date of this Part C statement the last balance sheet of Millers was the one as at 30th June, 1971, wasn't it?
A. Yes.
- Q. And one of the matters that you, as a director, was required to address your mind to was the matter of material changes in the financial position of the company since that date?
A. Yes. 10
- Q. Would you read to yourself, firstly, cl. 2(g)? A. Yes.
- Q. Now, there there is the statement "There have been material changes in the financial position of the company since 30th June 1971"? A. Yes.
- Q. And they are set out? A. Yes.
- Q. The first was "There has been a substantial increase in group trading profits before and after income tax since 30th June 1971"?
A. Yes. 20
- Q. A material change in the financial position of the company? A. Yes.
- Q. The second: "Subsidiary companies have sold freehold properties since 30th June 1971 with the result that the group has derived substantial capital profits from the sale thereof"?
A. Yes.
- Q. A material change in the financial position of the company since 30th June 1971? A. Yes. 30
- Q. The next "A subsidiary company has ...Amanda Miller"? A. Yes.
- Q. The next "The Company is currently negotiating ...group? A. Yes.

- Q. The next "Since 30th June 1971 subsidiary companies...colliery development"? A. Yes. I would not agree with the "colliery development" part.
- 10 Q. Mr. Balhorn, the next of the material changes stated in this Part C statement to which you were a party was, was it not, "Since 30th June 1971 subsidiary companies have expended considerable sums on tanker progress payments and colliery development"? A. In regard to colliery development some money was spent, but certainly not what we intended or planned to spend.
- Q. Mr. Balhorn, did you understand my question?
A. I think so.
- 20 Q. Well, I will ask it again, in case you did not. The next of these matters set out in the Part C statement to which you were a party as being a material change in the financial position of the company since 30th June 1971 was, was it not, "Since 30th June 1971 subsidiary companies have expended considerable sums on tanker progress payments and colliery development"?
A. Yes.
- Q. And those matters are the only matters which were raised in this Part C statement as being material changes in the financial position of the company since 30th June 1971? A. Yes.
- 30 Q. And every one of them is a favourable change?
A. Yes.
- Q. Do you tell his Honour that that Part C statement of 27th June 1972 was a misleading document? A. Not necessarily, no.
- Q. Do you tell his Honour that this Part C statement of 27th June 1972 did not give a true and fair picture? A. In relation to this I think it did. We were on a more profitable basis than the previous year. But our commitments - mortgaging of properties - I think were in a worse position.
- Q. Mr. Balhorn, "The Company is currently negotiating...group"? A. Yes. All of them.

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- Q. An optimistic statement? A. Yes.
- Q. Were you optimistic? A. As I said yesterday, we were all optimistic on occasions and the opposite on other occasions.
- Q. Of course, so far as the Part C statement was concerned all that was involved was presenting a fair picture of the financial position, wasn't it? A. Yes.
- Q. And that was treated as a matter of great importance? A. Yes. 10
- Q. So far as the allotment of shares was concerned what was involved was finding financial justification for it, was it not? A. I am sorry, could you repeat that, Mr. Deane? I am sorry, I did not quite understand it.
- Q. So far as the allotment of shares was concerned, what was involved was finding financial justification for it, was it not? A. Correct.
- Q. So that the approach taken was "Let us appear as gloomy as we can"? A. No. 20
- Q. "Let us forget the Hambros loan"? A. The Hambros loan is something in the future. It is not an immediate liquidity.... (Answer not completed.)
- Q. The Hambros loan came between the very payments which you say justified the allotment? A. I am sorry, Are you referring to the Hambros loan regarding the "Amanda Miller".
- Q. No. Regarding the "Robert Miller"? A. We still have not got that loan. 20
- Q. A loan is not a loan until it is money in the bank? A. Correct.
- Q. No matter what the documentation? A. I have doubts.
- Q. No matter who the lender is? A. An agreement or a document with escape clauses in it such as are in the Hambros document to me leaves doubt in my mind.

Q. Mr. Balhorn, three of the witnesses in this case have used the phrase "A loan is not a loan until the money is in the bank." Is that something that used to be discussed at Board meetings? A. I possibly have said it at Board meetings.

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Q. When? A. I cannot recall any occasion - any particular occasion.

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10 Q. Is what you say - and I want you to take your time - is what you say this, that in your view the contents of cl.(g) of par. 2 of that Part C statement are consistent with the view that the company's financial position had not improved since 30th June 1971? A. Yes.

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20 Q. And is what you say, that you suggest to his Honour that cl.(g) of par. 2 of that Part C statement does not, in strong terms, present a picture that things had greatly improved insofar as the financial position of Millers was concerned since 30th June 1971? A. I believed the company had a bright future ahead of it. It might have been a long, hard road without the allotment.

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Q. Mr. Balhorn, I will stop you, if you don't mind. Would you answer my question? A. I am sorry.

(Question marked * read by Court Reporter")

WITNESS: If it is a straight yes or no, the answer is "No."

30 MR. DEANE: Q. It does not present such a picture? A. I am sorry. Yes, it does present such a picture.

Q. It presents a picture that things had greatly improved finance-wise since 30th June? A. Had improved. I would not use the word "greatly".

40 Q. I suggest to you it presents a picture that things had greatly improved since 30th June 1971 so far as the financial position of Millers was concerned? A. It certainly was not my understanding, and it is not my understanding.

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Q. That is not your understanding of cl.(g)?

A. The actual fact -

Q. I am asking for your understanding of cl.(g)?

A. Yes, I would agree with that, Mr. Deane.

Q. What you would ask his Honour to believe is what? Your evidence that what is in (g), subject to the matter of the collieries, is accurate, or the evidence that you have given in the witness box. (Objected to by Mr. Glass; rejected).

10

Q. What is the true position on your understanding - the position presented by sub-cl. (g) of cl. 2 of the Part C document, or the position presented by your evidence in the witness box? (Objected to by Mr. Glass; question withdrawn.)

Q. Mr. Balhorn, you stated in evidence this morning that the financial position of Millers had not improved between 30th June 1971 and 30th June 1972? A. It was my opinion.

20

Q. And you stated in evidence that, if anything, it had got worse? A. Possibly.

Q. And possibly considerably worse? A. No, I did not say that.

Q. You also agreed with me that sub-cl. (g) of cl. 2 in the Part C statement presented a picture of improvement in the financial affairs of Millers since 30th June 1971? A. Yes.

Q. Which of those alternative views do you say is correct? (Objected to by Mr. Glass; allowed.)

30

Q. Will you answer the question? A. You want a straight yes or no?

Q. Yes. A. I can't elaborate?

Q. I am asking you which of the two pictures is, in your view, the accurate one? A. My personal view?

- Q. Yes. Which? The picture painted by sub-cl. (g) of cl. 2, or the picture painted by you in your evidence? A. The picture painted by me.
- Q. In your evidence? A. Yes.
- Q. So in your view the picture painted by sub-cl. (g) is misleading? (Objected to by Mr. Glass; allowed).
- 10 Q. So in your view, from what you tell his Honour the picture painted by sub-cl. (g) of cl. 2 of the Part C statement is misleading?
A. Excuse me for a minute, Mr. Deane. I will just have a look at this. With the exception of the colliery development and No. 4 of that statement I would agree with it.
- Q. Well, without making any exceptions, in your view is the picture painted by sub-cl. (g) of cl. 2 misleading? A. No.
- 20 Q. Mr. Balhorn, returning, if I may, to the point we had reached yesterday, which was the meeting of 6th July - A. Yes.
- Q. You told his Honour that you had heard the agreement read? A. Yes.
- Q. And you told us your understanding of its provisions in relation to dividends? A. Yes.
- Q. Now you, of course, voted in favour of the resolution relating to dealings with Howard Smith which was passed at that meeting?
A. The allotment of shares?
- 30 Q. You voted in favour of the resolution which related, amongst other things, to the allotment of shares? A. Yes.
- Q. And, as I understand from what you have told his Honour, the desirability of the Howard Smith offer remaining open played no significant part at all in your purpose in voting for that resolution? A. Not a major consideration, no.
- Q. Not even a significant consideration? A. No.

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*Exhibit V

Exhibit T

- Q. (Ex. V* handed to witness.) Mr. Balhorn, would you look at p.4 of the minutes of the meeting? A. Yes.
- Q. Halfway down the page do you see the paragraph commencing "In order that the matter could be discussed..."? A. Yes.
- Q. And there is set out the text of the resolution that was under consideration? A. Yes.
- Q. And the text of the resolution was, was it not, "That the form of agreement with Howard Smith Limited be entered into and executed .. cheque"? A. Yes. 10
- Q. In other words, it was a resolution dealing with two matters? A. Yes.
- Q. One, the execution of an agreement with Howard Smith? A. Yes.
- Q. The second, the allotment of shares? A. Yes.
- Q. And you say that you heard the agreement read? A. Yes, I heard the agreement read.
- Q. Have you ever seen it? A. Not since, no. 20
- Q. (Ex. T handed to witness.) You will see annexed to the letter the form of agreement? A. Yes.
- Q. I would ask you to read it through to yourself? A. Yes. Mr. Deane actually I have seen this document since the meeting.
- Q. You will observe in cl. 4 of the agreement that "offer" is defined as covering not only the proposed Howard Smith offer but any substituted offer? A. Yes. 30
- Q. And you heard that read at the meeting? A. Yes.
- Q. Which meant that the promises by Millers contained in this agreement which were to operate in some cases, or to operate while the Howard Smith offer was on foot, extended not only for the whole period of the contemplated offer but for the period of any substituted offer? A. That could be so.

Q. That was your understanding, wasn't it?
 A. Not at that time, no.

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* Q. Well now, assuming that - and I think you
 can assume it - by cl.3 Millers bound itself
 by this deed, didn't it, not to pay any
 dividend at all to its shareholders during
 that period? A. I think I read earlier, Mr.
 Deane "Subject to approval in writing from
 Howard Smith" I think applied to that
 10 paragraph.

Q. ~~*Well, I think you can assume that you were
 quite wrong? A. Well, that was my understand-
 ing.~~ (Objected to; question and answer struck
 out as indicated.)

(At the request of his Honour question and
 answer marked * read by Court Reporter.)

HIS HONOUR: I am still not sure I understand the
 answer. Mr. Balhorn's answer is not meaning-
 ful to me.

20 MR. DEANE: I will clear the matter up with the
 witness, your Honour.

Q. Mr. Balhorn, am I right that your under-
 standing of the provisions of this agreement
 so far as they related to the payment of
 dividends was that the company promised not to
 pay dividends without the written consent of
 Howard Smith? A. Yes.

Q. As distinct from an unfettered promise not to
 pay them? A. Yes.

30 Q. Now in cl.2, of course, you see that the
 company - Millers - made many promises in
 relation to the conduct of its affairs during
 the relevant period? (Objected to by Mr.
 Glass; allowed.) A. I note cl. (b) where
 Millers have promised "not to mortgage
 or charge...ordinary course of business."
 I think that covers quite a wide field.

Q. Mr. Balhorn, if you look at cl.2, there is (b)
 and (c), (d), (e), (h), (i). I put it to you
 that by those terms - by those promises -
 Millers, for practical purposes, tied itself
 hand and foot during the relevant period?

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A. I think this document would be a pretty standard form in any takeover situation such as this.

Q. Really? A. I would think so.

Q. Did anyone tell you that? A. Mr. Aston may have. I am not sure.

Q. What is your experience of takeovers? A. None.

Q. You see, the document states the consideration that led Millers to make all those promises, doesn't it? A. I am sorry, could you repeat it? 10

Q. The document states the consideration which led Millers to make all those promises, doesn't it? A. Yes.

Q. And that was read at the meeting? The document was read at the meeting? A. Yes.

Q. And of course, the document was executed by Millers? A. Yes.

Q. And adopted by Millers? A. Yes.

Q. And the very first consideration stated "In consideration of Howard Smith agreeing to proceed with the offer to secure all the issued shares in the capital of Millers..."? A. Yes. 20

Q. That is the very first consideration stated? A. Yes.

Q. And do you tell his Honour that that was an insignificant matter so far as you were concerned? A. I did not say that. You said it was a significant one. So far as I was concerned it was a minor matter. 30

Q. Do you tell his Honour that was a minor matter? A. In my mind at the time, yes.

Q. You have told his Honour, Mr. Balhorn, that Mr. Duncan exhorted you to consider the interests of all shareholders? A. Yes.

- Q. What did you consider that meant? A. All shareholders.
- Q. What did you understand by the "interests of all shareholders"? What did you understand by that? A. Any decision made would be for the good and benefit of all shareholders.
- 10 Q. Now, what if it was for the good of some shareholders and not for the good of others? How do you then, in your concept of obeying this exhortation, consider the interests of all shareholders? (Objected to by Mr. Glass; question withdrawn.)
- Q. Mr. Balhorn, on your understanding Howard Smith made it quite clear, did they not, in their letter of 6th July that they could not proceed with their takeover offer as things stood? I refer you to the last paragraph on the first page? A. Yes.
- Q. That is correct, is it not? A. Yes.
- 20 Q. And something had to be done if the Howard Smith offer were to go ahead? A. Yes.
- Q. And what Howard Smith was saying, on your understanding, was "We can't go ahead with the takeover offer while Ampol and Bulkships between them hold the majority of the shares? A. Yes.
- 30 Q. Well now, that meant, didn't it, that your understanding was that what they were saying was "Reduce the proportionate shareholding of Ampol and Bulkships and we will go ahead with our takeover offer"? A. Yes. I could not see that precluded other parties being precluded from the action at the time. (sic.)
- Q. You were aware that Ampol and Bulkships did not want to accept the Howard Smith offer - the Howard Smith takeover offer? A. Yes.
- 40 Q. Now let us assume, for the sake of the question I want to ask you, that in that situation the reducing of the proportionate shareholding of Ampol and Howard Smith was

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against the interests of Ampol and Howard
Smith - I am sorry, Ampol and Bulkships was
against the interests of Ampol and Bulkships?
A. I don't agree.

- Q. I am not asking you to agree. I am saying,
let us assume. Assume with me, for the sake
of the question I want to ask you, that in
these circumstances the reduction of the
proportionate shareholding of Ampol and
Bulkships was against the interest of Ampol
and Bulkships. Make that assumption. The
next assumption I want you to make (Objected
to by Mr. Glass.) 10
- Q. Let us assume that the reduction of the
proportionate shareholding of Ampol and Bulk-
ships in those circumstances was not in their
interests as shareholders. You understand?
Assume that to be the position? You understand
the assumption? A. Yes.
- Q. Let us also assume that by reason of the 20
Howard Smith offer, which some of the minority
shareholders may have wanted to accept, the
reduction of the proportionate shareholding of
Ampol and Bulkships was in the interests of
minority shareholders as shareholders? Do you
understand that assumption? A. Yes.
- Q. Well now, how, on your understanding, do you
obey the exhortation to think of the interests
of all shareholders in those circumstances?
A. Well, these shareholders - it did not in
my mind preclude them from carrying on with
their takeover activities. It gave them an
opportunity of making a handsome profit by
accepting the Howard Smith offer. 30
- Q. And these were things that were very much in
your mind at the meeting? A. Yes.
- Q. To which you gave great consideration? A. I
did consider them, yes.
- Q. As being very important? A. On behalf of all
shareholders. 40

- Q. I want you to direct your mind to what happened at the meeting of 6th July. Would you agree with me that immediately after, or very shortly after the resolution relating to the allotment of shares was passed, the directors were informed that there had been a substantial increase in the profits in relation to the previous financial year? A. I think there was some discussion of that matter.
- 10 Q. And a substantial capital profit? A. Yes, but there were extraordinary items involved in this.
- Q. Of course, you had received the copy of the Cooper Report? A. Yes.
- Q. And you knew that the projected profits for previous years were on the increase? A. Yes.
- Q. Was anything said about these matters at the meeting in relation of the allotment of shares? A. No.
- 20 Q. Was anything said about cash flow? A. In relation to the allotment?
- Q. Yes. A. I don't think so.
- Q. Was anything said about calculation, insofar as the existing shareholders were concerned, of the costs of paying interest on loan moneys as against the cost of servicing dividends on share capital and the cost of a decreased share in undistributed profits? A. I am not sure whether I understand the question, but I don't recollect.
- 30 Q. Was anything said about the effect of the allotment on any other takeover offers? A. We had already rejected the Ampol offer.
- Q. Would you now answer my question? A. My attitude was "The more the merrier".
- Q. Now will you answer my question? My question to you was, was anything said in the discussion of this possible agreement and allotment as to the effect it would have on any future takeover offer? A. No, I don't recollect.
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- Q. Of course you would agree with me, would you not, that Millers covenanting by deed with Howard Smith not to do any of the things covered by this agreement during the relevant period of time would make any further takeover offer from anyone else extremely unlikely?
A. Yes.
- Q. Nothing was said about that? A. Not to my recollection.
- Q. As I understand it, Mr. Taylor opened the meeting with a statement of a dramatic development that morning? Not opened to the meeting, but opened the discussion on this matter with a statement of a dramatic development that morning? A. I am not sure whether he used the word "dramatic". 10
- Q. On your understanding was this letter from Howard Smith expected or unexpected? A. The first I knew about it was when I went to Mr. Taylor's office immediately before the Board meeting. 20
- Q. You knew that so far as Howard Smith was concerned it was offering to buy shares in Millers on the market at \$2.50? A. Yes.
- Q. And here was an offer to buy them at 20¢ less than that? A. Yes.
- Q. Now, was anything said about "Can't we negotiate with Howard Smith to get them to pay for the shares they are getting from us the price they are prepared to pay to everyone else"? A. No. It was their offer. I don't think we could change it. 30
- Q. Your approach is, is it, that if someone offers to buy something from you you cannot seek to negotiate a better price? That is your approach, is it? A. I think that was their offer, and we either had to accept it or reject it.
- Q. Is it your approach when someone offers to buy something from you that you cannot seek to negotiate a better price? (Objected to by Mr. Glass; question not pressed.) 40

- Q. Of course, you knew that Howard Smith was prepared to buy shares from anyone else who might have them for 20¢ more than they were offering Millers? A. Yes.
- Q. And do you tell his Honour it did not occur to you that you might attempt to negotiate with Howard Smith to get \$2.50? A. I don't think that was likely to develop. I think Howard Smith's offer was a straight yes or no - accept or reject.
- 10 Q. Was anything said about the possibility of negotiation at the meeting? A. No.
- Q. One thing that was not said, I put to you, was that the Howard Smith offer was either accept or reject the offer? A. I think it was put.
- Q. You think it was put? A. Yes.
- Q. By whom? A. I can't recall.
- 20 Q. I suggest to you it was not? A. I can't deny it, but I have a feeling that someone did mention it.
- Q. Was anything said "Well, in view of the Hambros letter of commitment and the Commonwealth Superannuation Fund and the assets that will be unencumbered if we repay the short-term borrowings perhaps we should consider an issue of a lesser number"? A. Mr. Cameron brought up the subject of why should not we issue shares - allot shares to our
- 30 shareholders, but then he contradicted himself by saying that there was no hope of getting shareholders to pay \$2.30 for a share.
- Q. Apart from that was anything said to the effect that in the light of the matters I mentioned to you "Perhaps we should make an allotment in a smaller number"? A. No, not to my recollection.
- Q. Was anything said to the effect that "In
- 40 view of these matters we might consider making an allotment to our shareholders at a lower price"? A. There could have been some

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discussion on that, but it would certainly have been a much lower price.

- Q. You see, I suggest to you that nothing at all was said? A. The subject of issuing shares to shareholders was discussed, and it was agreed that there would be no hope of an issue at a premium of \$1.30.
- Q. I suggest to you that nothing at all was said about considering an issue to shareholders at a lower price than \$2.30? A. there could have been, but not to my recollection. 10
- Q. You see, Mr. Balhorn, don't you find it extraordinary that at this meeting, considering an allotment of shares to an amount of 50% of Millers then issued capital, none of these matters were discussed or considered? A. I was more interested in the \$10 m. that was being waved in front of us at that stage.
- Q. Of course, the matter was being rushed through, wasn't it? A. I think everyone had an opportunity of saying their piece. 20
- Q. When Sir Peter Abeles had to leave the room an adjournment for 10 to 15 minutes was refused? A. Yes.
- Q. When Lady Miller wanted time, she was told she could not have it? A. Because the documents were dated that day, and the arrangement - the documents were dated that day, and if the thing was not put through that day apparently it may never have gone through. 30
- Q. That day did not end at lunch-time did it? A. No.
- Q. There was that afternoon, and there was that evening. You agree with that? A. Yes.
- Q. And again I put it to you that the matter was rushed through? A. Well, the Board meeting took its normal course of events so far as the time usually taken to discuss matters at Board meetings.
- Q. Of this importance? A. No. 40

- Q. Where were you sitting in relation to Mr. Taylor? A. On his left, about four or five chairs down.
- Q. Who was sitting next to Mr. Taylor? A. It would be the secretary, Mr. Ellis-Jones, I would think.
- Q. And on the other side? A. Lady Miller.
- 10 Q. Did you observe Mr. Taylor reading from a document for a large part of this meeting?
A. No.
- Q. You did not? A. No.
- Q. After the formal meeting had ended there was a gathering, was there not, of some of the directors and executives of Millers? A. After the Board meeting?
- Q. Yes. A. Yes.
- Q. Mr. Cameron left? A. He remained after the Board meeting.
- 20 Q. I suggest that he had left by the time the discussion took place as to what should be done next? A. Well, I remember having a conversation and a drink with Mr. Cameron after the meeting. I think I left shortly after that myself.
- Q. You were present, though, were you not, when a discussion took place with, among others, Mr. Nicholl, as to the insertion of the letter of 6th July from Howard Smith in an advertisement in the Financial Review? A. I don't think so.
- 30 Q. Do you deny you were present at such a discussion? A. I don't deny it, but I don't recall being present in the discussion of that after the meeting.
- Q. (Ex. DD handed to witness) You recognise this, Mr. Balhorn, as being a copy of the minutes of the meeting of 14th July? A. Yes.

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(continued)

*Exhibit X

- Q. You were present? A. Yes.
- Q. Will you turn to p.3? A. Yes.
- Q. Do you see, halfway down, "Ratification of correspondence.."? A. Yes.
- Q. That entry is concerned, is it not, with ratification of the chairman's action in inserting the advertisement in the Financial Review? A. Yes.
- Q. And you have seen the advertisement? A. Yes.
- Q. It was before you at the meeting? A. What meeting? 10
- Q. It was before you at that meeting of 14th July? A. Yes, that is correct.
- Q. (Ex. X* handed to witness) That is the advertisement? A. Yes.
- Q. Now, on this motion you are reported in the minutes - and I am referring to the last paragraph of the minutes - "Mr. Balhorn commended the chairman...facts"? A. Correct.
- Q. You said that? A. I think I added the words "That it was a straightforward statement of fact without comment" that is why I commended him, because it did not make any comment, which I would have considered to be a Board matter. 20
- Q. Of course, will you look at the advertisement insofar as the letter from Howard Smith is concerned? A. Yes.
- Q. That is the main content of the advertisement, isn't it? A. Yes, correct. 30
- Q. And certain sentences or certain words have been placed in italics? A. No.
- Q. In block type? A. In bold type.
- Q. And of course, that bold type had been added by Millers to the Howard Smith letter? A. Presumably.

- Q. You were aware of that when you made the comments at the meeting? A. Yes.
- Q. Also at that meeting, if you would turn over to p.4, there is consideration of a draft letter to the Sydney Stock Exchange. Do you see that? A. Yes.
- 10 Q. (Ex. EE* handed to witness.) Now, the first letter - and I would only ask you to glance at that at this stage - was the letter from the Stock Exchange which was before this meeting of directors, wasn't it? A. Yes.
- Q. And the question that was being discussed was what answer should be given to that letter? A. Yes.
- Q. And the letter requested, on your understanding, advice as to Miller's intentions in relation to calling a meeting of shareholders to consider the allotment? A. Yes.
- 20 Q. Now, if you can turn to the minutes again, would you agree with me that Mr. Conway raised a problem - and I am referring to the fifth paragraph of the minutes? A. Yes.
- Q. And the problem he raised was the problem of endeavouring to answer the Stock Exchange without pointing out that it was an impossibility to meet their requirement in the present situation? A. Yes.
- 30 Q. Because, so far as he saw it, if this litigation were to fail there was nothing that the shareholders could do about the allotment? A. Yes.
- Q. Which means that a meeting of shareholders would be, as it were, completely without point? A. Yes.
- Q. Well now, in that context you approved, did you not, the form of the letter in reply which was sent to the Stock Exchange? A. This was after discussion with Sir Ian Potter.

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*Exhibit HH

MR. DEANE: Could that answer be struck out, your Honour?

HIS HONOUR: It can stand, Mr. Deane. It was not in answer to the question, but I will allow it to stand.

MR. DEANE: Q. Looking at the letter of 14th July, do you think that is a fair letter?
A. Yes.

Q. (Ex. HH* handed to witness.) This document, Mr. Balhorn, is a transcription of Miss Hills' shorthand notes taken at the meeting which was prepared after the commencement of the case?
A. Yes.

10

Q. Will you look at p.6 of the document? A. Yes.

Q. Do you see, two-thirds of the way down the page, a statement attributed to somebody "C"?
A. Yes.

Q. Now, I think you would agree, would you not, that your recollection is that the "C" there represents Mr. Cameron? A. Yes.

20

Q. Can you recall Mr. Cameron making that statement? A. Yes, he did discuss the possibility of making an issue to shareholders.

Q. Do you see the next statement attributed to Mr. Taylor? A. Yes.

Q. Do you recall Mr. Taylor making that statement? A. Words to that effect, yes.

MR. STAFF: No questions.

Re-examination
by Mr. Glass
Q.C.

RE-EXAMINATION:

MR. GLASS: Q. You were asked some questions yesterday, Mr. Balhorn, about the effect of the Hambros loan on the "Amanda Miller" and on the liability that the company had to make payments for the "Amanda Miller"? A. Yes.

- Q. Do you recall that you said "I am pretty sure in this case we will still something like 3 m. short of the commitment on the "Amanda Miller"? A. Yes.
- Q. And then on the next page - p. 940 - it was put to you, in the second question: "Q. Perhaps you would check this overnight, Mr. Balhorn, but I would suggest to you that the position is quite clear that the loan from Amanda Miller - that the loan from Hambros covered all of the outstanding commitments in respect of the Amanda Miller" in reply you said "It could have. I just have a doubt about it in my mind."? A. Yes.
- 10 Q. Now, are you able to answer that question better this morning? A. Yes.
- Q. Did the Hambros loan cover all outstanding commitments for the "Amanda Miller"? A. No.
- 20 Q. How much of the commitment did it not cover? A. Approximately £3 m.
- (Debit note and receipt for "Amanda Miller", 1st March 1972, tendered and admitted as Ex. M.H.28.)
- 30 Q. According to your understanding, Mr. Balhorn, from what source were the funds derived to make that payment of nearly £3 m.? A. We borrowed, I think, £1.5 m. from B.H.P.: we borrowed £1 m. from Tricontinental, and we sold hotels to the value of roughly £400,000.
- Q. Now, you had a number of matters placed before you by my learned friend, Mr. Deane, with respect to the position in July 1971, changes between then and June 1972, in regard to the Part C statement, and various other matters? A. Yes.
- 40 Q. Giving the fullest regard to all the subjects raised in cross-examination, I ask you what was your belief on 6th July as to the need of the company for cash? (Objected to by Mr. Deane; rejected.)

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*Exhibit P

- Q. I call to your attention the matters that were referred to in the Part C statement which you were shown this morning? A. Yes.
- Q. Do they in any way affect the belief you stated on 6th July that the company had a need for cash? (Objected to by Mr. Deane; rejected)
- Q. (Ex. P* handed to witness.) Now, you recall these parts of par. (g) to which your attention was referred today? A. Yes.
- Q. What is the date of that statement? A. 27th June, 1972. 10
- Q. Now, in the light of matters mentioned in that statement, giving full weight to them, what was your belief on 6th July as to the company's need for cash? (Objected to by Mr. Deane; rejected).
- Q. Having regard to the various matters raised with you in cross-examination, what do you say was the belief you held on 6th July as to the company's requirement for cash? (Objected to by Mr. Deane; rejected.) 20
- Q. Having regard to the developments which occurred between July 1971 and 30th June 1972, what was your belief on 6th July as to the company's liquid position? (Objected to by Mr. Deane; objection withdrawn.)
- Q. Giving full weight to all the matters to which your attention has been drawn in cross-examination, Mr. Balhorn - do you understand that? A. Yes. 30
- Q. I ask you what was your belief on 6th July as to the company's need for money? A. Critical.
- Q. And how much money did it need, in your belief, then? A. \$10 m. plus.
- Q. For what purpose? A. Mainly to cover short term commitments due to be repaid within 12 months.

Q. Now, you were asked some questions about Mr. Koch, and as to him you said that he "laid it on the line" and he mentioned various things to the meeting? A. Yes.

Q. I ask you to what extent did you rely on the 6th July upon the views and recommendations expressed by Mr. Koch? (Objected to by Mr. Deane; allowed.)

10 MR. GLASS: Q. You recall the advice that Mr. Koch expressed at the meeting of 6th July and the recommendations he made? A. Yes.

Q. I ask you to what extent you relied upon those views and recommendations which he made? A. Very heavily.

20 Q. Now, you said to my friend at p.956 the very last answer, or rather I should say the question put was; "The liquidity situation in June 1972 was better than in June 1971?" and you answered: "Possibly someone else can put you in the picture of what happened on 30th June this year in Millers regarding raising money owing to the Commonwealth Government." Do you remember that? A. No, I am sorry.

30 Q. Well, perhaps I ought to read to you again, Mr. Balhorn, the question and answer. "I... put", said Mr. Deane, "...the situation that existed as at 30th June, 1972, in so far as liquidity was concerned, was a much better position than existed as at 30th June, 1971?" Do you remember that question? A. Yes.

Q. Do you remember the answer you gave: "Possibly someone else can put you in the picture of what happened on 30th June this year in Millers regarding raising money owing to the Commonwealth Government." Now, I ask you... A. I am just trying to remember, Mr. Glass.

40 HIS HONOUR: Q. It would be easier for Mr. Balhorn - just look at the transcript. I think you will find it easier, Mr. Balhorn. It is at the foot of that page. A. Yes.

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MR. GLASS: Q. Now, what was your belief on 6th July as to what had happened on 30th June?
(Objected to by Mr. Deane)

Q. (By leave) What did you believe on 6th July, 1972, had happened in Millers on 30th June with regard to money owing to the Commonwealth Government? A. The company scraped the bottom of the barrel. (Objected to by Mr. Deane)

Q. I think you had not quite finished your answer, Mr. Balhorn. A. Well, it is my belief it was not until somewhere around four o'clock or later that afternoon that the funds from various sources were finally put together to pay this money to the Commonwealth Government. Unless this had been paid on that day, legal action would have been taken against the company.

10

Q. Now, lastly, you were asked about that agreement between Howard Smith and Millers. Do you remember that agreement? A. Yes.

20

Q. And you said it was in standard form so far as you knew. Did you have any belief as to how it compared with the Ampol take over agreement? (Objected to by Mr. Deane)

Q. All right, the Ampol take over conditions? (Objected to by Mr. Deane: rejected.)

Q. Well then, I ask this question in relation to it. You were asked did anyone tell you anything about the agreement? A. Yes.

Q. Had Mr. Conway expressed any view to the Board about the agreement? (Objected to by Mr. Deane: rejected.)

30

(witness retired and excused)

(Minutes of 2nd April, 1971, 27th April, 1971, 23rd June, 1972, and 30th June, 1972, tendered without objection and added to Exhibit MHL3*)

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*Exhibit M.H.13.

HIS HONOUR: I will have it noted that these are added with the intention that this completes all Board minutes from April 1971 through to July 1972.

KENNETH BARTON ANDERSON
Sworn, examined as under:

10

MR. GLASS: Q. Your full name please, Mr. Anderson? A. Kenneth Barton Anderson.

Q. And where do you live? A. 21 Kuroki Street, Penshurst.

Q. What is your position now in the Miller organisation? A. I am a director only.

Q. I want to ask you when you left school? A. At the end of 1928.

20

Q. And where did you first gain employment? A. In April 1929 with the Wallarah Coal Company Limited.

Q. Wallarah Coal Company, and what work did you do for that company? A. General clerical work throughout the time I was employed finishing as a senior clerk.

Q. And I think it was taken over by J. & A. Brown in 1956? A. About that date, yes.

Q. When did you join Millers? A. 14th April, 1958.

30

Q. What work did you do for them? A. Mainly in the shipping department until - I was in charge of shipping from 1960 and also industrial, a lot of industrial matters.

Q. These ships were mainly colliers, were they, plying between Sydney and Newcastle, Newcastle and Melbourne? A. Yes.

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- Q. I think that was the sort of work you had been doing for Wallarah Coal Company, was it?
A. Yes.
- Q. Did you at some stage become personal assistant to Sir Roderick Miller? A. Yes, about 1966 I think.
- Q. What were your duties from that time on? A. Much about the same as I did previously, possibly with a wider range of duties.
- Q. And when did you become General Manager of the company? A. January 1968. 10
- Q. And, as General Manager were you concerned with all its operations, coal, hotels and...A. As General Manager, yes.
- Q. When did the company first go into the tanker business? A. 1963, the end of 1963.
- Q. And at that stage was it your view that its finances were in good condition, the company's?
A. At that point of time, yes.
- Q. When did you become aware of a deterioration in the company's financial position? A. Really in 1968, late 1968. 20
- Q. When was the construction of the "Amanda Miller" commenced? A. Early 1969 to the best of my recollection.
- Q. Did the question of obtaining long term finance for "Amanda Miller" come up in discussions between you and Sir Roderick Miller? A. On many occasions, yes.
- Q. What views did you express? A. I expressed the view that only long term finance was the safe way to finance the construction of a new vessel such as the "Amanda Miller". 30
- Q. What views did he express? A. He did not express any views. He just would not accept my views at that time.

- 10 Q. Did the Commonwealth play any role in the views that he took? A. I think one of the factors that was exercising his mind was the outcome of a Tariff Board Inquiry on the ship building industry which was completed early in 1971 and he was hopeful that the submissions made to the Board would result in much greater subsidy and also some finance by the Commonwealth Government for the ship building of ships at a comparatively low rate of interest.
- Q. What in fact eventuated when the Board made its report? A. Well, it only made its report a couple of months ago and it has not been agreed to or otherwise by the Commonwealth Government.
- Q. Was any long term finance obtained during the lifetime of Sir Roderick Miller? A. No, not to my knowledge.
- 20 Q. Was he ever in favour of efforts being made in that direction? A. No, he would not agree to any efforts being made.
- Q. Do you recall a fire in the "Amanda Miller"? A. Yes.
- Q. When was that? A. I think it was April 1970.
- Q. What effect did that have upon the operations? A. Well, it delayed the delivery of the vessel for some months with a consequent loss of earning power and also we had been making progress payments of which the funds were just lying idle.
- 30 Q. What was the position regarding the overdraft of the company at this stage? A. It was well over its limit.
- Q. What was its position vis a vis trade creditors? A. We were delaying payment and that was embarrassing to me in particular because these trade creditors were always approaching me.

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Q. Between then and the date of Sir Roderick Miller's death did the position remain the same or get better or get worse? A. In my view it got worse.

Q. When he died in April 1971, what changes were made in the company's management on the Board? A. Mr. Taylor and I were appointed joint managing directors and Mr. Taylor was appointed Chairman.

Q. Until when did you remain Joint Managing Director? A. Until 31st January, 1972. 10

Q. When did you become a member of the board? A. 7th October, 1971.

Q. And you have remained a member until...A. I beg your pardon. 7th October, 1967, I was appointed to the board.

Q. You have been a member of the board continuously since then? A. Yes.

Q. Now, what did you devote yourself to principally during the time you were joint managing director? A. Well, industrial matters, superannuation matters; that included not only the staff superannuation but we were under pressure at times from various unions to implement retirement funds for those employees which we did. 20

Q. After your retirement did you continue to attend regularly meetings of the board? A. Yes, until I was away from Sydney in June.

Q. Prior to June had you examined the financial reports that regularly came from Mr. Koch? A. Yes, I studied those. 30

HIS HONOUR: Q. When were you away from Sydney between, Mr. Anderson? A. From 6th June to either 29th or 30th June, Your Honour.

MR. GLASS: Q. Now, on what date did you go to Queensland? A. 6th June.

- Q. When did you return to Sydney? A. Either 29th or 30th. I just haven't got a note of that, the precise date.
- Q. When did you learn first of the Howard Smith offer for takeover? A. I read it in the press whilst I was away from Sydney.
- Q. And when did you first learn of the joint announcement? A. That was by Ampol?
- 10 Q. Ampol and Bulkships? A. On 28th June also in the press.
- Q. During the time you were away did you have any contact with Mr. Taylor or anyone else in the company? A. Not to my recollection.
- Q. When you returned did you speak to Mr. Taylor about developments in your absence? A. Yes.
- Q. Approximately when was that? A. I would say on the 30th, that was a Friday.
- Q. 30th June? A. 30th June.
- 20 Q. Where did you see him? A. I spoke to him on the telephone.
- Q. What was the substance of your conversation? A. Well, firstly in relation to the announcement by Ampol and Bulkships the comment was, "Well, this is what we have suspected for some considerable time and we are not surprised".
- Q. In relation to what activity of theirs did you say that? You were not surprised by what? A. The joint announcement that they would control the Miller organisation.
- 30 Q. And what comment did either of you make regarding the effect of the joint announcement on the position of shareholders? A. Well, we both felt that the shareholders - -
- Q. What you said to each other rather than what remained unexpressed? A. We said that this would have some effect on the shareholders who may not be able to obtain the best price for their shares if Howard Smith's offer was withdrawn.

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- Q. Was anything said about the constitution of the board? A. Yes, Mr. Taylor told me that he had been asked by Sir Peter Abeles to arrange for the resignation of Mr. Nicholl, Mr. Duncan and myself from the board.
- Q. What reply did you make to that suggestion? A. Well, I said "the shareholders put me in; let them put me out."
- Q. Since you retired as joint managing director, what remuneration have you received from the company? A. No remuneration but certain travelling expenses have been paid in connection with my duties as director. 10
- Q. When did you first learn of a proposed allotment by Millers to Howard Smith? A. On 5th July.
- Q. And who told you? A. Mr. Taylor told me.
- Q. About what time was it on 5th July? A. It would be some time in the morning of 5th July.
- Q. What did he say? A. Well, I said...
- Q. What did Mr. Taylor say first? A. He said they proposed that we should issue 3,000,000 shares at \$2 a share. 20
- Q. Did he express any view about it? A. He asked for my view.
- Q. What view did you express? A. I expressed the view that \$6,000,000 was nowhere near sufficient for our needs.
- Q. Was that the substance of the conversation then? A. Yes.
- Q. Did you go to the office - you went to the meeting the next day, the 6th. When did you arrive? A. I would say at about 9.30. 30
- Q. And did you see Mr. Taylor? A. Yes.
- Q. Did he say anything to you then? A. He said to me that he had nothing in writing from Howard Smith concerning the offer but that he was expecting written advice prior to the meeting commencing.

- Q. Did he say anything about what kind of offer he was expecting? A. No.
- Q. Were you there when the Howard Smith letter arrived? A. No, I was down in the board room.
- Q. When did you first hear of the terms of the offer? A. When Mr. Taylor announced that he had a letter from Howard Smith and he read the letter to the Board.
- 10 Q. What followed after he had read it, immediately after? A. Immediately afterwards?
- Q. I won't cover this ground with you, Mr. Anderson. It has already been covered. Various persons spoke? A. Yes.
- Q. Before it was put to the Board. Was one of those Mr. Koch? A. Yes, Mr. Koch spoke and made a recommendation to the Board.
- Q. What was his recommendation as you recollect? A. That the Board should accept the offer.
- 20 Q. Did he give reasons for that? A. Yes, his reasons were that we were urgently in need of additional capital.
- Q. Did he say how much additional capital was needed? A. Well, he talked in figures in excess of \$10 million. He did not say precisely but he did indicate that in excess of \$10 million arising from a proposed issue would somewhat alleviate our position.
- 30 Q. Did he say for what purpose \$10 million was needed by the Company? A. Well, partly to, nearly all of it, to repay or be in a position to meet our liability to repay short term borrowings which were becoming due between then and 30th June next year.
- Q. What was your state of mind with regard to Mr. Koch's recommendation? A. Well, I thoroughly concurred with his recommendation because I had previously formed my own conclusion and he confirmed my conclusions.

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Q. What was the conclusion on your part which he confirmed? A. That we badly needed over \$10 million to meet these loans falling due.

Q. And you voted in favour of the allotment?
A. Yes.

Q. And I ask what were your purposes or what was your purpose in voting for the allotment?
A. The urgent need to obtain something over \$10 million to ease the liquidity problems of the company. 10

Q. Was there any other purpose beside that? A. That was the paramount purpose but I did also consider the position of shareholders as a whole being in a position to accept Howard Smith's offer.

Q. What did you feel about that? A. Well, I felt that the shareholders should be in a position not only to accept Howard Smith's offer but any other higher offer which may come along.

Q. What was your belief on 6th July as to the security or otherwise of the loan from Hambros? 20
A. I did not think it was completely secure, far from being completely secure.

Q. What matters in your mind prevented it being completely secure? A. Well, as I understood it the Hambros loan which was originally to be much smaller than eventually proposed to contribute - they eventually came, as I understand it, to a figure of \$ 3 million and also that should the control or ownership of the company change they could possibly not proceed with the loan. I think that was a condition of their offer and also they 30
apparently raised the point that should there be a fire in the building of the Robert Miller similar to the Amanda Miller they could also withdraw.

Q. Did you have any understanding of the course of the loan in regard to the Amanda Miller? 40
A. I understood that the Hambros bank had loaned the full amount that they were prepared to lend and that was subject to first mortgage for a period of five years I believe.

- Q. What proportion of the total cost of Amanda Miller did you understand Hambros had lent?
A. About 75 per cent.
- Q. What was your understanding of the course of negotiation between the company and Hambros in getting that loan? A. I beg your pardon?
- Q. What was your understanding on 6th July as to the course of negotiations? A. For the Amanda Miller?
- 10 Q. Yes, between the company and Hambros - that was to get 75 per cent of the money? A. Well, that was negotiated over quite a long period by Mr. Taylor and Mr. Koch particularly Mr. Koch, overseas and locally, and eventually it was completed.
- Q. Was it your belief that the money had been obtained with ease or not with ease? A. No, it was not obtained with ease. It was obtained with great difficulty in my opinion.
- 20 Q. What did you know about the negotiations to date regarding the money for Robert Miller, how they had gone? What on 6th July was your understanding as to the course negotiations had taken between the company and Hambros to get money for the Robert Miller? A. Well, negotiations had been proceeding for some considerable time and had reached the stage where Hambros said they would contribute \$3 million American and a consortium of banks with Hambros being the lead bank would be formed to provide the balance of what those banks were prepared to contribute. As I recall it originally there was talk of Hambros providing 60 per cent of \$12½ million and Millers, from their other resources, providing the balance, making about \$12½ million.
- 30
- Q. On 6th July what was your belief as to whether the Hambros moneys could be certainly counted upon or not? A. I did not believe it was certain.
- 40

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- Q. If it did come through, when in your belief was the earliest it would be available? A. Well, I would say it would be quite late this year.
- Q. Did you think on 6th July 1972 that if it did become available it would become available before June 1973? (Objected to by Mr. Deane).
- Q. What was your view on 6th July about the security of the Tricontinental moneys? A. There again, that was doubtful because they also had provisions in their terms that they could also withdraw if the control or ownership of the company changed. 10
- Q. What did you believe was the company's need for money on 6th July even if the Hambros loan ultimately became available? A. I still believed that we would require large sums of money such as the \$10 million.
- HIS HONOUR: Q. You still believed "we would require"? A. Large sums of money such as the \$10 million plus. 20
- MR. GLASS: Q. What was your belief as to the company's need for money if the Hambros loan failed? A. It would be even worse; it would be even worse.
- Q. What was your belief then as to the availability of any other assets of the company as security? A. There were no other assets available. They were all fully committed.
- Q. What understanding did you have on 6th July as to the attempts which had been made to get finance in the previous two years? A. Well, I consider in particular that Mr. Koch, Mr. Taylor, and indeed all the senior executive officers of the company who were involved in finance had worked very hard and explored every avenue. 30
- Q. With what degree of success according to your belief? A. They did not have a great deal of success. It was very slow coming through, particularly the Amanda Miller loan. 40

- Q. Were you aware of any failures which they had suffered in that quest? A. Oh, yes. The bank was not prepared to agree to our proposals for increased overdraft. I don't know of any others.
- 10 Q. On 6th July were you aware of any effect upon the company's plans to expand because of its financial position? A. Well, the company was not expanding in any way at all. In fact, it was going in the other way.
- Q. What matters did you have in mind in particular in that regard? A. Well, there was the sale of six hotels, the cessation of plans to spend money on collieries, to increase production and so forth. We were committed and some of that - by contract - and some of that had to be met.
- 20 Q. Were you aware of any plans which had been shelved because of finance, lack of finance? A. Lack of finance. Yes, principally the collieries and in particular one colliery where it was virtually brought to a standstill and no production was made.
- Q. What was your belief as to the future of your position on the board if Ampol succeeded in a takeover? A. I had no doubt in my mind that I would be removed from the board.
- 30 Q. What was your belief as to your future as a director if Howard Smith succeeded in a takeover? A. The same. I would not be continued on the board.
- Q. Were you influenced in voting as you did by your position, the future position on the board? A. No.
- Q. Now, do you recall that also at the meeting of 6th July I think Mr. Conway read out an agreement between Millers and Howard Smith? A. Yes.
- 40 Q. And you in due course signed that agreement with Mr. Taylor on behalf of Millers? A. Yes.

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Q. What advice did you receive from anyone regarding that agreement before you signed it?
A. I did not receive any advice.

Q. You know Mr. Conway? (Objected to by Mr. Deane; allowed)

Q. Who is Mr. Conway? A. He is the company's legal officer.

Q. Where was he on 6th July? A. He was at the board meeting whilst I was there.

Q. What, if anything, was said by him regarding this agreement which you signed? A. I can't recall him saying anything at all.

10

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

CROSS-EXAMINATION:

MR. HUGHES: Q. Mr. Anderson, you told us that you first took up employment in April 1929 for Wallarah Coal Company? A. Yes.

Q. Could you tell us how old were you then?
A. 16.

Q. How would you describe the influence which Sir Roderick Miller during his lifetime exerted in the affairs of the Miller group? A. Would you kindly repeat that?

20

Q. How would you describe the influence that Sir Roderick Miller exerted during his lifetime while he was in office in the affairs of the Miller group of companies? A. He influenced the affairs to a very large extent.

Q. To a very large extent, yes. You mentioned the Bank of New South Wales, the group's bankers?
A. Yes.

30

Q. Did you as general manager of the company ever have any conversation with the manager of the branch of the Bank of N.S.W. at which the

company or the group banked? A. No, I was present on a couple of occasions when he was discussing the company's matters with the company secretary.

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Q. Now, who is he in that context? A. Mr. Ellis Jones

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Q. Mr. Ellis Jones, yes, but who was the bank manager who was discussing the affairs in your presence with Mr. Ellis Jones? A. Mr. Timmins I believe.

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Q. Was he the manager of the branch of the Bank of N.S.W. at which the Miller group had its current accounts? A. Yes.

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Q. Could you tell his Honour approximately when those conversations took place? A. No, I could not.

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Q. Could you give us some idea of what year or years? A. 1968.

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20

Q. 1968. And what was the substance of those conversations? (Objected to by Mr. Deane; rejected)

Q. Could you tell his Honour if you would what impact did the Ampol-Bulkships joint announcement have on your mind as a director of Millers? A. Well, the impact was that they, having about 55 per cent of the shares, would in fact control the company.

30

Q. Did the announcement have any impact on your mind in relation to the effect of the announcement if any on shareholders with respect to the Ampol takeover offer? A. I felt that it would possibly prevent other shareholders from obtaining a higher price for their shares.

Q. Yes, what other shareholders. A. All shareholders.

Q. Yes. Did you as a director of Millers at this time, June July this year, have any belief in your mind as to whether you had a duty to protect the shareholders as best you could? A. Yes.

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- Q. With respect to takeover offers? A. In all respects, yes.
- Q. Did you have any belief in your mind as to whether you had a duty as a director to see as far as you could that the shareholders in a takeover situation got the best deal that was available? A. Yes.
- Q. You have told us that in your view and may we take it on the basis of your own experience, Sir Roderick Miller exercised a very great influence in the affairs of the Miller group of companies? A. Yes. 10
- Q. Did his passing from the scene leave to your mind a very big gap in the management of the company? A. Yes, it would leave a gap.
- Q. Yes, it did. A. It did leave a gap, yes.
- Q. That was not meant as any reflection on you, I hope you understand. But in that situation did you form any belief after his death when he was removed from the management of affairs as to the likelihood or otherwise as a takeover situation developing in relation to Millers? A. I always considered that a possibility. 20
- Q. You always considered that a possibility? A. Yes.
- Q. When you say always do you mean at all times after Sir Roderick Miller's death? A. Yes.
- Q. And could you tell his Honour why this matter as it were, the possibility of a takeover situation developing, intruded itself into your mind? A. Well, I was of the opinion that Sir Roderick would have resisted any takeover offer. 30
- Q. And therefore after his passing from the scene you meant you felt that the ability of the Company or the group to resist a takeover was diminished, is that right? A. Yes.
- Q. Did you ever form any view after your accession to the board, appointment to the board of the holding company, the Miller holding

company, as to the adequacy or otherwise of the group's issued share capital? A. Yes, I considered in view of the expansion that would normally take place and the building of new ships that it was under capitalised.

- 10 Q. You said earlier that you regarded yourself as having, during June and July of this year, some duty as a director to protect the shareholders as best you could in this takeover situation so as to see that they got the best possible deal? A. Yes.
- Q. How did you see yourself best able to discharge what you conceived to be your duty in that respect? A. By considering what offers we were made.
- Q. Yes, A. And then in view of the offers that were likely to be made or were made then I would consider whether they were appropriate to the interests of the shareholders.
- 20 Q. Did you regard the Ampol takeover offer in terms of price as being adequate in the circumstances or otherwise than adequate? A. I did not consider Ampol's offer to be adequate. (Objected to by Mr. Deane)
- Q. Did you at any time during May, June or July have in your mind a belief as to the adequacy or otherwise of the Ampol takeover offer in terms of price? A. I did not consider the price was adequate.
- 30 Q. When did you first form that belief? A. As soon as it was made.
- Q. Did you ever change that belief? A. No.
- Q. (Witness shown exhibit F) I just want to ask you this Mr. Anderson. Would you look at exhibit F please and in particular would you direct your attention to page 2 of the formal written offer, clause 2 on page 2. I just want to ask you this question when it is convenient for you to deal with it. Did you ever turn your mind to the conditions set out in clause 2 of that offer? A. Well, I did -
- 40

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I am not, having no legal training - I did feel that this was quite a normal kind of a condition that would be put in any takeover offer.

HIS HONOUR: Mr. Masterman?

MR. MASTERMAN: No questions, your Honour.

HIS HONOUR: Mr. Lockhart?

MR. LOCKHART: No questions, your Honour.

HIS HONOUR: Mr. Deane?

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

MR. DEANE: Yes, thank you.

10

Q. Would you look again at the conditions in clause 2 to which Mr. Hughes drew your attention?
A. Yes.

Q. Are you suggesting that you considered it a normal thing that the company in Miller's position should by deed covenant not to do any of those things during a takeover offer?
A. Yes, as I said before, I considered them normal conditions that would be applicable to a takeover offer.

20

Q. Do you appreciate the difference, Mr. Anderson, between a company making a takeover offer, saying to the company whose shares it is seeking, "If you do any of these things we will be entitled to revoke the takeover offer" and a situation where the company whose shares are being sought covenants by deed that it will not do any of those things? A. It is rather a long and involved question you are asking me.

Q. Well, might I put it to you this way. Will you look at the conditions contained in clause 2?
A. Yes.

30

- Q. By the Miller's covenants not to mortgage or -
I am sorry, by them a condition is imposed as
a term of the offer that Millers will not
mortgage or charge any property or borrow any
money otherwise than by way of overdraft. Do
you see that? A. Yes.
- Q. That it will not sell, transfer or dispose
of any of its assets except in the ordinary
course of business. Do you see that?
10 A. Yes.
- Q. Make any change in the basis of remuneration
of any of its senior employees? A. Yes.
- Q. Incur any liability for a provident fund?
A. Yes.
- Q. 9, enter into any long term contract?
A. Yes.
- Q. Enter into contracts of service? A. Yes.
- Q. And many other things. A. Yes.
- Q. Now, as you understand this document, Ampol
is saying to Millers, if you do any of these
things we will be entitled to withdraw our
takeover? A. Yes.
20
- Q. Millers is not saying to Ampol "We covenant that
we won't do any of these things"? A. That is
so.
- Q. You would agree with me, would you not, that
if Millers were to say to Ampol we covenant
that we won't do any of these things during
the period in which your takeover offer might
be on foot, Millers would have tied itself
hand and foot? A. That is correct.
30
- Q. And it would be an outrageous thing for Millers
to do? A. Yes.
- Q. Of course, if you add to those things the prob-
lems that for so long as you might see fit to
keep your takeover offer on foot we won't pay
any dividends to our shareholders, the
situation would be so much worse, would it not?
A. Yes.

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- Q. Now, just a couple of minor matters first, Mr. Anderson. You said in answer to my friend Mr. Glass that one colliery had been closed down I think? A. Well, one colliery - if I said it was closed down, the expansion was not continued with.
- Q. Which colliery was that? A. It was known as Ironbark.
- Q. Now, as managing director of Millers as at 30th June and I regret, your Honour, that I am back on a course that I cannot see any way of avoiding - as managing director of Millers as at 30th June 1971 - A. 1971. 10
- Q. Joint managing director, you would, of course, have been concerned about Millers financial situation? A. Yes.
- Q. And as a director of Millers as at 30th June 1972 you would have considered it part of your duties to be acquainted with Miller's financial situation? A. That is true. 20
- Q. You have told his Honour that from time to time you received the management reports? A. Yes.
- Q. And I think your word was that you studied them? A. Well, I read them usually prior to the meeting when they were presented to the board, were tabled.
- Q. And would it be true to say you placed reliance on them? A. Yes.
- Q. And unless something was raised at the meeting by way of correction of what was said in the report, you accepted what was said in the reports? A. I did. 30
- Q. And without question. A. Without question, yes.
- Q. The management reports throughout the financial year ending 30th June 1972 would have been the main basis as to your knowledge of the financial affairs of Millers as at 30th June 1972? A. Yes.

- Q. And we have been told, Mr. Anderson, that apart from the occasions where a correction was made to something in the written document in the course of a meeting, generally speaking, the information provided was as in the document. Would you agree with that?
A. Yes.
- 10 Q. There was not a great deal by way of supplementary information given by Mr. Koch or management. Now, would you agree with me that in your view Millers was in a very difficult position insofar as liquidity was concerned as at 30th June, 1971? A. Yes.
- 20 Q. The main problem was, was it not, that because of the policy which Sir Roderick Miller had adopted in relation to long term finance Millers was facing commitments in relation to the payments for the Amanda Miller and the Robert Miller which had to be met within the next two years? A. That is right, yes.
- Q. (Witness shown Exhibit MH3*) You have Mr. Anderson, the annual report in respect of the year ending 30th June 1971. A. That is right.
- Q. Which no doubt you saw at the time it was published? A. Yes.
- Q. And no doubt to some extent you had a hand in its preparation I suppose, didn't you? A. No.
- Q. You did not? A. No.
- 30 Q. I show you the annual report opened on the lefthand side at the page headed, "Notes to and forming part of the accounts for the year ended 30th June 1971". Do you see that?
A. Yes.
- Q. See under heading 2, "Capital commitments not reflected in the accounts - oil tankers \$16,700,000". A. Yes.
- Q. Other commitments a little less than two million? A. Yes.

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- Q. Now, the frightening commitment as at 30th June 1971 there was that \$16,705,000 was it not? A. That is right.
- Q. And would you agree with me that as at 30th June 1971 no arrangements had been made in respect of a source for the moneys that were needed to discharge those commitments? A. No firm arrangements had been made. Negotiations were proceeding.
- Q. But no firm arrangements had been made? A. No. 10
- Q. And those payments were as to operate in respect of the Amanda Miller? A. Yes.
- Q. Which delivery was due in the second half of 1971? A. Yes.
- Q. Within the next six months? A. Yes.
- Q. The balance of the commitments were in respect of the Robert Miller? A. Yes.
- Q. Where payments had to be made in the financial year ending 30th June 1972, some payments? A. Some payments, yes. 20
- Q. And if the ship were to be delivered on the contract date, all of the payments had to be met by March 1973? A. That is my understanding.
- Q. Which means that the situation facing Millers was commitments in that amount having to be discharged over the next two financial years with no real provision having been made for the source of payments? A. At that point of time, yes.
- Q. And the only thing that was obviously available to provide some of the payments that would be required was Millers own cash flow? A. To provide some of the payments, yes. 30
- Q. That was the only thing that could be confidently looked at, the cash flow within the company? A. Yes.

- Q. And without being critical, you would agree with me that that situation which arose in Millers as at 30th June or which existed in Millers as at 30th June 1971 was in your view directly attributable to the late Sir Roderick Miller's disinclination to arrange long term finance? A. It could have influenced it, yes.
- Q. Well, that was the reason why the situation existed? A. Yes, I will agree.
- 10 Q. In that if long term finance had been arranged in respect of the Amanda and the Robert Miller the problem would not have been there?
A. That is so.
- (Luncheon adjournment)
- HIS HONOUR: You are still on your former oath, Mr. Anderson.
- MR. DEANE: Q. (Witness shown MH3*) Mr. Anderson, before the adjournment I was asking you some questions in relation to Miller's commitments as at 30th June 1971. A. Yes.
- 20 Q. Now, would you look at the centre page of that annual report that is headed "Balance sheet of Millers and its subsidiary companies as at 30th June 1971", the centre page right in the centre. Do you see that? A. Yes.
- Q. And no doubt you have seen this document before? A. Yes.
- Q. I direct your attention to current liabilities and provisions. Do you see those on the left-
- 30 hand side? A. Yes.
- Q. There is a reference to trade creditors. A. Yes.
- Q. Reference to other creditors and a reference to short term loans? A. Yes.
- Q. Now, would you agree with me that insofar as the problems of Millers as at 30th June 1971 were concerned the main problem and indeed the overwhelming problem consisted of the commitments in respect of tankers of a little less than 17 million? A. Yes.
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Exhibit M.H.13

Q. Together with the four million short term loans. Do you see that "short term loans four million"? A. Yes.

Q. Which together amounted to something like 21 million? A. Yes.

Q. Would you agree that those combined were the overwhelming problem that Millers faced as at 30th June 1971? A. Of course, the Bank of N.S.W. overdraft was a - -

Q. Was a problem also? A. Was a problem. 10

Q. Now, it was those - I will withdraw that. Would you agree with me that you saw that problem in terms of a liquidity problem? A. Yes.

Q. Tremendous sums of money to pay and no arrangements as to where the money was to come from? A. That is so.

Q. And it was that problem in the main that the finance committee set out to solve during the coming 12 months? A. Yes.

Q. (Witness shown exhibit MH13) That exhibit, Mr. Anderson, consists of a number of minutes of meetings of directors and the management reports presented each month. Now, you have told his Honour that when those management reports were received by you you studied them. That is so, isn't it? A. Well, yes, I think the words, I said I perused them at the meetings, prior to the meetings. 20

Q. I thought "studied" was your word but you read them anyway? A. Yes. I read them. 30

Q. And you accepted what they said without any qualification? A. Yes. I did.

Q. Because as you were aware the management committee included not only the executives of Millers but it included a director who was a partner in one of Australia's leading firms of accountants? A. Yes.

Q. Mr. Cameron? A. That is so, yes.

- Q. Could I direct your attention to the management report of 28th September 1971. A. Yes.
- Q. You agree with me you would have read that, I suppose, in October 1971 or round about the time it was prepared? A. Round about that time, yes.
- Q. You see down the bottom of the first page the heading "Finance"? A. Yes.
- 10 Q. Now, the first paragraph there states the receipt of \$A.7,187,000 in respect of the Hambros bank loan for end finance for the Amanda Miller? A. Yes.
- Q. Would you agree with me that that was a step towards solving the problem that existed as at 30th June 1971? A. Yes, it was a step towards it.
- Q. And it was a very significant step, \$7 million of long term finance? A. \$7 million is quite a significant contribution.
- 20 Q. Would you look over the page "repayment of 2.2 million to Chase - N.B.A." A. Yes.
- Q. That was short term finance? A. Yes.
- Q. And that again was a step towards overcoming the problem? A. It only necessitated further short term finance as time progressed.
- Q. Or did it come from the Hambros loan? A. Well, on that particular occasion it did come from the Hambros loan.
- 30 Q. Which means that one of the short term liabilities was being extinguished out of long term finance? A. Yes.
- Q. And a repayment to the Australian Shipbuilding Board. Do you see that? A. Yes.
- Q. That, of course, was one of the commitments that existed as at 30th June 1971? A. Yes.

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- Q. Then a statement that the Commonwealth was not pressing for the Robert Miller outstanding payments. Do you see that in the third paragraph? A. At this stage, yes, they were not pressing hard.
- Q. Or just not pressing. Do you see that? A. Yes.
- Q. And you accepted that of course? A. Yes.
- Q. And then the next paragraph "We have been in touch with Hambros Bank in London and they have advised us that as soon as the charter agreement for the Amanda Miller is executed they are anxious to make a start on the financing of the Robert Miller? A. I see that. 10
- Q. And you accepted that when you saw it? A. Yes.
- Q. Would you agree with me that the matters referred to in the September management report clearly indicated a significant improvement in the financial situation of Millers? A. The management report does indicate that.
- Q. And of course you accepted it? A. Yes. 20
- Q. Now, could you turn from that to the management report in respect of November 1971.
A. Management report of November 1971. Yes, I have that.
- Q. You see the statement in the first paragraph "As advised in the September report we are proceeding as quickly as possible with our financial negotiations to cover our immediate and future capital commitments"? A. Yes.
- Q. What is being set out there under the heading "Finance" is the financial programme in respect of the commitments of the company which the finance committee had evolved. Would you agree with that? A. Yes, I would. 30
- Q. And again, of course, you adopted that the members of the finance committee, and I suggest in particular Mr. Cameron, would be in a better position than you to assess what was the best financial programme? A. They would be in a better position than I. 40

- Q. And you would agree in particular Mr. Cameron? A. Yes.
- Q. Because there you had the men who had been brought on your board as you understood it as an expert in finance and an expert accountant? A. That was my understanding.
- Q. And indeed at one stage when he was brought on the board it was contemplated that he might be called the Finance Director, was it not?
 10 A. I don't recall that.
- Q. Can I suggest to you that it was suggested that Mr. Cameron might be called the Finance Director but he was reluctant in that that might indicate that he was an executive director?
 A. Well, I don't recall that.
- Q. If you do not recall it, I accept it. Now, looking at the problems which the finance committee were setting out to deal with, would you agree with me that as at November 1971 subject to a final delivery payment the Amanda Miller had been paid for? Perhaps that is unfair. Can I help you this way. The Hambros loan was on the security of the Amanda Miller?
 20 A. Yes.
- Q. So, the fact that the money had been received from Hambros meant that the company was in a position to give security over the Amanda Miller?
 A. Yes.
- Q. Which means that subject to the delayed payment in respect of the Amanda Miller as at November 1971 the Amanda Miller had been paid for? A. Yes, it had been paid for. There were some outstanding loans.
 30
- Q. Oh, I appreciate that. There was the Hambros loan itself for example? A. Yes.
- Q. Now, would you agree that at this stage as you understood it the programme of the finance committee was aimed first at providing construction finance for the Robert Miller?
 40 A. Yes.

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- Q. Second, at providing end finance for the Robert Miller? A. Yes.
- Q. Third, at arranging some long term finance on the security of hotels? A. Yes, I think so.
- Q. And fourth, at raising money from the sale of a number of hotels? A. Yes.
- Q. And the activities of the finance committee were aimed in those four directions as the means of solving the financial problems that Millers were facing? A. They were aimed in that direction. 10
- Q. Can I take you from there to the management report of May of 1972. A. May 1972; yes, I have that.
- Q. Now, I do not want you to read this out but could you glance at or take whatever you need at the matters under "finance" and I am only going to ask you some general questions. Have you glanced at that? A. Yes, I have glanced at it. 20
- Q. You can accept it from me that this management report was presented at a meeting of the directors on 1st June 1972. A. I will accept that.
- Q. At which you were present. A. Yes.
- Q. Which means that you have seen it before. You have seen it before? A. Yes, I have seen it.
- Q. Now, would you agree that when you read this you were acquainted with the fact that initially it was proposed that both construction finance and end finance in respect of the Robert Miller would come from Hambros Bank? A. No, from a consortium of banks. 30
- Q. Oh, I accept that; from a consortium of banks led by Hambros? A. Led by Hambros, yes.
- Q. And this indicates that that had not been effected, that is, both construction and end finance had not come from that source? A. That is so.

- Q. And a new approach had been taken? A. Yes.
- Q. And would you agree that when you read this you were informed that Hambros had agreed to provide end finance in respect of the Robert Miller? Do you see the third last paragraph on page 1, "On the 25th May a telex was received from them advising us that this was agreed to and a formal commitment letter outlining the terms and conditions would be sent to us within approximately one week".
10 A. I see that.
- Q. So, at that stage you were aware that Hambros had telexed that they agreed to supply end finance and a formal letter of commitment would be sent. That is so, isn't it? A. That is so, yes.
- Q. And you were also informed that the Bank of N.S.W. had been approached in relation to construction finance or bridging finance?
20 A. Yes.
- Q. And that the bank had agreed to pay bridging finance, to provide bridging finance to the extent of 4.2 million? A. Yes.
- Q. Which means that great progress had been made insofar as the bridging and end finance for Robert Miller is concerned? A. Yes, that would appear to be the case.
- Q. You had the Bank of N.S.W. firmly committed to provide bridging finance of 4.2 million, you had a consortium led by Hambros telexing agreement to provide end finance and saying a formal letter of commitment was on its way?
30 A. Yes, that is the case.
- Q. Now, coming over we see that additional funds would be available from the sales of a number of hotels. Do you see that? A. Yes.
- Q. And would you agree with me that in the original approach to selling hotels, the approach that was adopted was only the less satisfactory hotels will be disposed of? A. Not only the
40 less satisfactory hotels.

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- Q. Well only the less profitable will be disposed of? A. Not only, no. I won't agree with the word "only".
- Q. I am saying originally, Mr. Anderson. A. Not even originally.
- Q. Because what I suggest to you is with one exception in these management reports one finds advanced reasons why particular hotels should be sold. Would you disagree with that? A. No.
- Q. The one exception being the Bexley North Hotel? A. That is right. 10
- Q. And Mr. Taylor has told us that it was not planned originally to sell the Bexley North Hotel. Would you agree with that? A. I can't say that I agree and I do not disagree.
- Q. Well then, Mr. Taylor has told us that - (Objected to by Mr. Glass)
- Q. Well, would you agree that the sale price offered for the Bexley North Hotel or the purchase price offered for the Bexley North Hotel was so good that the directors took the view that they had no real alternative but to sell? A. I will agree with that. 20
- Q. And that meant, did it not, that over this period more money had come from the sale of hotels than the finance committee had originally budgeted for? If you are not in a position to answer that, say so? A. No, I can't answer that.
- Q. Anyway, the planned sales of hotels had been effected satisfactorily? A. Yes. I don't know whether the funds had actually been received from the sales. 30
- Q. You can take it I think that some, as at the date of this report, had been received, some had not? A. Yes.
- Q. Then the next thing of course was in this May report mortgage finance from the Commonwealth Superannuation Fund? A. Yes.

- Q. And you see there the figure $\$2\frac{1}{2}$ million?
A. Yes.
- Q. I suggest at the meeting you were told that it was hoped or anticipated that would be three million instead of $2\frac{1}{2}$ million? A. That is so, yes.
- Q. And there is an additional sum for repayment of the loan finances. Do you see that? A. Yes.
- 10 Q. Total funds available there $\$6,285,000$ leaving a deficiency of 1.82 million and under the arrangement with the Bank of N.S.W. that was covered? A. Yes, but may I say that the Superannuation Fund loan of $\$3$ million ~~is still not available.~~
- Q. ~~Well, Mr. Anderson, you say it is still not available. A. To the best of my knowledge.~~
- 20 Q. ~~I suggest to you that the true position there is that the moneys became available after 6th July and Millers indicated to the Fund that they did not want them at that time.~~ (Objected to by Mr. Glass; above questions and answers struck out at his Honour's direction)
- Q. Mr. Anderson, you would agree with me, would you not, that you read this May report with a great deal of pleasure? A. No, I would not agree with that.
- 30 Q. But we have looked at the problems of Millers which existed as at 30th June 1971. We have seen have we not partial solution back in September? A. Yes.
- Q. And now we come to May and the programme worked out by the finance committee to deal with the problem seems to be on the verge of being effective? A. I don't follow that, Mr. Deane.
- Q. You see, we have a consortium led by Hambros Bank? A. Yes.

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- Q. Saying they agree to end finance. We have the Bank of N.S.W. providing bridging finance; we have the sales of the hotels having been effected successfully and we have a suggestion that the long term finance will be available from the Commonwealth Superannuation Fund?
A. Some long term finance, yes.
- Q. And looking at that I would suggest to you that all the commitments that existed at 30th June 1971, are, if what is suggested there as being going to happen does happen, covered?
A. I am afraid that is not the position as I see it. 10
- Q. Well, what do you disagree with? A. Although the management report sets out these funds have become available it does not set out the continued borrowing on short term that will come in the subsequent - -
- Q. Well, we will come to that subsequently. See I suggest to you that in your evidence you said insofar as the financial side of this allotment was concerned the relevant factor was the 10 million plus short term borrowings?
A. Yes. 20
- Q. Now, I suggest to you that if all that is set forth in the management report as at May 1972 became effective, for practical purposes those ten plus million borrowings would, with the exception of some moneys on call and the Mitsui loan which I will ask you about, either ceased to exist or be covered by end finance?
A. Not completely. 30
- Q. Well, why do you say "not completely"? A. End finance you are referring to the - ?
- Q. The Hambros loan? A. The Hambros loan. But there was no certainty that the Hambros loan would be -
- Q. I appreciate, Mr. Anderson, that you want to make that point. With respect, that is not an answer to my question. My question is, assuming all the things that are there stated as being either arranged or in the process of arrangement had been carried into effect? A. On that assumption, yes. 40

- Q. You agree with my question? A. Yes.
- Q. Well now, you were in Queensland from 6th June, was it? A. Yes, about 6th June.
- Q. You are aware, of course, that in relation to the Ampol takeover offer the directors of the company had to issue a Part C statement? A. Yes.
- 10 Q. And that was considered at two meetings of directors while you were in Queensland I understand? A. Yes.
- Q. (Exhibit B* shown to witness) The Part C statement, Mr. Anderson, appears at the back of that document? A. Yes.
- Q. And of course you have seen that before? A. I have, yes.
- Q. And you will see that you are mentioned in clause 2(a) as a director? A. Yes.
- 20 Q. And in (b) there is a statement that no director or alternate director presently intends to accept the takeover offer. Do you see that? A. I see that.
- Q. And down the bottom Mr. Taylor has signed this document not on behalf of Millers but on behalf of the board of directors of Millers? A. Yes.
- Q. Which means on behalf of the directors including yourself? A. That is right.
- 30 Q. Now, did you give anyone authority to authorise the signature of this document on your behalf? A. I don't recall that I did because I wasn't in Sydney at the time and I had no discussion.
- Q. But you have no doubt you saw it shortly after your return to Sydney? A. That is right.
- Q. And of course you observed it had been signed for and on behalf of the directors? A. Yes.
- Q. Which means for and on behalf of you? A. Yes.

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Q. And I presume you were told that great care had been taken in working out the Part C statement?
A. No, I wasn't told that that I recollect.

Q. Well, you presume that it had? A. Yes, well, I would presume it.

Q. And you no doubt read it with care since it was a document purportedly being put forward on your behalf among others? A. Yes.

Q. And you assumed I suppose that the matters in it had been carefully considered by the directors of Millers who were present at the meeting? A. I assumed that, yes.

10

Q. And you accepted the statements contained in it as being accurate statements of fact? A. Yes.

Q. Because you knew this had come from the company and it had come from the people who had knowledge of the affairs of the company from being inside? A. Yes, I would agree with that.

Q. And would you agree with me that when you read it there was nothing in it which you questioned or disagreed with? A. No, I did not disagree with anything in it. I understood that it was normal procedure and it was compiled in accordance with the Companies Act.

20

Q. When you read that you did not presently, that is, as at 27th June, intend to accept the takeover offer made by Ampol did the query raise itself to you "how did Mr. Taylor know as at 27th June that I did not intend to accept the takeover offer?" A. I can only assume that I must have discussed this with Mr. Taylor before I went to Queensland and after the Ampol offer had been made and I probably told him then that I had no intention of accepting it.

30

Q. But I mean we are here at 27th June when a number of things had happened. A. Yes.

Q. But you cannot recall anything other than that which would lead to Mr. Taylor saying in 2(b) that you did not as at 27th June intend to accept the Ampol offer? A. Not on that date, no.

40

- Q. Now, you have told us that when you read this you accepted the information contained in it?
A. Yes.
- Q. And of course, insofar as the financial affairs of Millers were concerned, it contained in summary form some very important information and I am referring to clause (g) right down the bottom? A. Yes, I see that.
- 10 Q. And this, of course, was a document which you understood had been prepared by the executives and directors of Millers to comply with the requirements of the board? A. Yes, I think so.
- Q. And to give frank and full information to shareholders in a situation where they were considering whether or not to sell their shares. That is so, isn't it? A. That is so.
- 20 Q. Which means the shareholders had the, or those who had been shareholders at the time would have had the benefit of knowing what was in the annual report as at 30th June 1971? That is so, isn't it? A. Yes.
- Q. And the essential thing since that was a public document available to all shareholders who wanted it was to fill them in on the good things and the bad things that had happened since 30th June 1971. You would agree with that? A. Yes.
- 30 Q. And that as you read it was what subclause (g) was doing. Do you see? A. Yes.
- Q. It refers to the balance sheet in effect saying "Anybody can get our balance sheet but we need to tell you the good and the bad things then to enable you to consider the offer".
A. Yes.
- Q. And you see it then sets out five material changes since then? A. There have been material changes in the financial position. Yes, I see that.

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Q. And the first of those changes was a substantial increase in the group trading profits. Do you see that? A. Yes.

Q. Something very much on the good side from the point of view of the financial position in Millers? A. On the good side, yes.

Q. Very much a substantial increase? A. Well, a substantial increase in the profits compared with our liabilities, our liquid position is two different things. 10

Q. I agree with you, Mr. Anderson, but all I said, all I put to you was that factor on its own. I withdraw that. What I meant to put to you if I did not put it clearly was that that factor on its own was a very real improvement on the financial situation? A. It was an improvement, yes.

Q. A very real improvement, a substantial increase? A. I don't agree it was a substantial improvement. 20

Q. But it was a substantial increase, wasn't it? A. A substantial increase in relation to the profits of the previous year.

Q. Well, something very much on the positive side or on the plus side? A. On the plus side, yes.

Q. Next, "Subsidiary companies have sold freehold properties since 30th June 1971 with the result the group has derived substantial capital profit from the sale thereof". A. Yes.

Q. Again, insofar as the financial position of Millers is concerned, something very much on the plus side? A. On the plus side, yes, but there again I must repeat my previous reply concerning the substantial capital profits as compared with the total capital investments. 30

Q. But where is that said to the shareholders? A. It is not said at all.

Q. What I am asking about is what this document says? (Objected to by Mr. Glass; objection overruled) 40

- Q. You see, you have told his Honour that you accepted this as being a careful statement showing the good things and the bad things that happened to Millers since 30th June 1971. Now, that is so, isn't it? A. That is so, yes.
- 10 Q. Now, I want to make clear with you what you accepted, and as I understand it you say that you do not think a substantial increase in group trading profits in the context that it occurs there is a very real plus or positive factor? A. That is what I said, yes.
- Q. It is just a positive factor? A. Yes.
- Q. But of course, you would agree with me, would you not, Mr. Anderson, that in terms of a shareholder trying to value his shares there are really only two principal factors. The first is the asset backing of the shares; the second is the profits the company is earning. Would you agree with that? A. I would agree with you, yes.
- 20 Q. Here we have in relation to one of those factors a statement that there has been a substantial increase in the profits? A. Yes.
- Q. Wouldn't you really agree with me that in the context of this that is a very, very much a positive or plus factor? A. You mean so far as shareholders are concerned in assessing the value of the shares?
- 30 Q. Yes. A. Oh yes, from the shareholder's point of view.
- MR. DEANE: Q. Of course these things are only being put in terms of changes in the financial position of the company since 30th June 1971, you appreciate that? A. Yes, I do.
- Q. So a substantial increase in group trading profits must mean an improvement in the financial position of the company? A. An improvement, I agree with that, yes.

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- Q. The next matter is: subsidiary companies have sold freehold properties from which they have derived substantial capital profits. Again you would agree an improvement in the financial position of the company? A. That is what it was designed for, yes.
- Q. You would not agree with a very real improvement? A. Not a very great improvement.
- Q. The next, "A subsidiary company has concluded negotiations for and has received long-term finance on the security of the vessel MT 'Amanda Miller'". Again you would agree a clear improvement in the financial position of the company? A. Yes, I would agree with that. 10
- Q. Insofar as the balance sheet showed all the moneys that had not been paid in respect of the "Amanda Miller" as commitments as at 30th June 1971, you would agree with me there, would you not, that that represented a very great improvement in the financial position? A. In itself, yes. 20
- Q. The next, "The Company is currently negotiating short, medium and long-term finance on the security of assets owned by the Group". You see that? A. Yes.
- Q. You would agree with me that that means, or as you read it you interpreted it as meaning finance is under control? A. Not at all, no, I would not agree with that, it is not under control at all, we are currently negotiating. 30
- Q. That was accurate, of course, was it not? A. Yes.
- Q. Would you not agree that so far as the person reading that is concerned you would expect him to read it as a confident or a positive statement? A. I don't know how.
- Q. Would you read that as a negative? A. Not as a negative.
- Q. What, as a neither positive nor negative? A. No, it is certainly positive. We are negotiating for finance on the security of the assets. 40

- Q. And the next, "Since 30th June, 1971, subsidiary companies have expended considerable sums on tanker progress payments and colliery development"? A. Yes.
- Q. A positive statement? A. A positive statement but -
- 10 Q. "We have continued to expand"? A. No, that was only in connection with things, items that have already been contracted for, progress payments on the tankers and colliery development was all contracted for.
- Q. But it was coming to fruition, was not it?
A. Well, they were one of the factors or the major factors that caused our liquid position to deteriorate, progress payments on tankers and the money we had expended on colliery development.
- 20 Q. But, Mr. Anderson, here we have a statement that since 30th June 1971 "we have expended considerable sums on tanker progress payments"?
A. Yes.
- Q. Now a progress payment means "We are going forward to get the tanker"? A. That is so, yes.
- Q. Which means "We are continuing along the paths of expansion"? A. Insofar as tankers are concerned, yes, that was committed for.
- 30 Q. "And we are continuing with our colliery development"? A. Only insofar as we had already been committed prior to the 30th June 1971.
- Q. Where does it say that? A. It does not say that anywhere.
- Q. But you agree with me that you accepted what was there as being an accurate statement of the changes since the 30th June 1971 - (Objected to by Mr. Glass; allowed.)
- 40 Q. You see, you told his Honour, did you not, that you accepted what was stated there as being accurate? A. On the face of it, yes.

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- Q. You read it and you read it with care? A. I read it but I would say that when I read it it was too late for me to raise any objection because it had been carried out during my absence.
- Q. You told his Honour that you read it and read it with care? A. Did I use the words "with care"? I don't think I did, I may have.
- Q. The transcript will speak for this, and I suggest you told his Honour you read it with care because it was a document which had been published on behalf of yourself among others? A. Yes. 10
- Q. And I suggest that you told his Honour that when you read it you accepted what was stated in it as being accurate? A. That is so, yes.
- Q. And of course here was a document speaking as at the 27th June 1972; that is so, isn't it? A. Yes.
- Q. Which you saw at the beginning of July 1972? A. Yes. 20
- Q. Days before the meeting of the 6th July 1972? A. Yes.
- Q. You would agree with me, would you not, that as at the 30th June 1972 there had been tremendous improvements in the financial position of Millers as compared with the position that existed at the 30th June 1971? A. No, I would not agree with that.
- Q. Any improvement? A. I could not say for certain but I still - something you will probably come to a bit later on - but at the meeting of the 6th July certain facts were put forward and I accepted those and I thought that they were accurate from the knowledge that I had during the years. 30
- Q. Let there be no mistake about this, you are not prepared to concede that as at the 30th June 1972 there had been any improvement at all in the financial position of Millers as compared with 30th June 1971? A. No, I am not 40

prepared to concede that there had not been any improvement. There may have been some improvement but I still repeat the position regarding the company's liquidity at the 30th June 1972 was still very critical.

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10 Q. Can we come to the minutes of the meeting of the 6th July - before I depart from that, you still say, do you not, that when you read that document you accepted the statements in (g) as being accurate? A. Yes, reading it as a document.

Q. And nothing occurred, did it, to cause you to alter that acceptance between the time you read the document and the end of July? A. The end of July?

Q. Yes. A. I did not consider it.

20 Q. It and the management report were among the sources available to you of financial information as to the affairs of Millers as at 6th July? A. Yes.

MR. DEANE: Could Mr. Anderson have Ex. B, if your Honour pleases? (Document handed to witness.)

Exhibit B

Q. Would you turn to p.5 of those minutes?
A. Yes.

Q. You see set out there the list of what are described as current short term borrowings?
A. Yes.

30 Q. And you would agree with me, would you not, that those are the moneys you were referring to in the 10-plus-million, I think, to use your phrase? A. Yes.

Q. And those were the moneys which you said you related to the amount raised by the allotment?
A. Yes.

Q. Looking at those moneys, would you agree with me that as you understood it of the \$10,700,000 -odd mentioned there 4.2 m. represented repayments to the Bank of N.S.W.? A. I believe that is the figure.

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- Q. And you are aware that Hambros had provided a letter to Millers which Millers had given to the Bank of N.S.W. under which Hambros undertook to pay those moneys direct to the bank from the coming Hambros loan? A. I am not aware of that. I do not recall it.
- Q. Is the situation this that you do not know one way or the other? A. That is right.
- Q. Your understanding about it was, was it not, that the 4.2 m. owing to the Bank of N.S.W. was to be provided from the proceeds of the Hambros loan? - I withdraw that. Your understanding was that the 4.2 m. included in this list as on account of payment to the Bank of N.S.W. was to be paid from the proceeds of the Hambros loan? A. I do not see that. 10
- Q. Can't I remind you that in the May reports the 4.2 m. loan from the Bank of N.S.W. was described as the bridging finance up to the Hambros loan? A. Yes. 20
- Q. So you now agree with me that the 4.2 m. was to be repaid from the proceeds of the Hambros loan? A. Yes.
- Q. Which of course accounts for and I assume that you knew this, accounts for all but 2,500,000 due in June 1973 - you see that there is a figure for 4,450,000? A. Yes.
- Q. And 2.5 was for something else and the 4.2 was for the bank? A. Yes.
- Q. As far as the figure in excess of 4 m. was concerned, that was in respect of the Tricontinental loans was it not? A. That is so. 30
- Q. And of course you are aware that those loans were subject to formal documentation? A. Yes.
- Q. And there were provisions for rolling over bills? A. Yes.
- Q. And Tricontinental was your company's financial adviser, was it not? A. Yes, I believe so.

- Q. And there was a close association between Millers and Tricontinental? A. There was.
- Q. Indeed 3 m. of the Tricontinental moneys had been made available because of delay in negotiating the Commonwealth Superannuation Fund loan? A. I am not aware of that.
- Q. Never heard it suggested? A. No, I do not recall it.
- 10 Q. Do you deny that you knew about it? A. No, I do not deny it.
- Q. The other main item on this list is the Mitsui loan in respect of \$800,000. Now you were aware, were you not, that for years Mitsui had been making loan moneys available to Millers? A. For a couple of years, not too many years.
- Q. Isn't the situation that back in 1968 Mitsui had made considerable sums available to Millers by way of loan? A. I can't recall. I did not think it went as far back as that.
- 20 Q. But there had never been any problem, had there, in keeping the Mitsui loans on foot? A. Keeping their loans - ?
- Q. In borrowing new moneys from Mitsui? A. It was not quite as easy as just that. Those were negotiated between Mitsui and the company from time to time.
- Q. Apart from the Mitsui loan, the only remaining amounts there were some moneys on call?
- 30 A. Yes.
- Q. Which of course Miller would readily have financed from their cash flow if they were demanded? A. No, I don't agree with that.
- Q. What was your view as to the cash flow of Millers for the coming financial year, how much? A. It was very adversely affected by the industrial troubles that we had on the coal fields and the Japanese shipping strike prevented sale of coal to Japan for sometime.

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- Q. You know that estimates had been made for the cash flow for the coming financial year? A. Yes.
- Q. What was your view of the amount of the likely cash flow? A. Well, cash flows can be affected by so many things from time to time that it is not possible to say with any degree of accuracy just what the cash flow would be.
- Q. Subject to likely or unlikely events, what was your anticipation of the cash flow? A. You mean in terms of money? I have not got the figures in front of me. 10
- Q. Would you tell us, say, to the nearest half million? A. I could not.
- Q. To the nearest million? A. No, I could not.
- Q. To the nearest 2 million? A. Not without putting pen to paper and making calculations from other information, not just from memory.
- Q. On what basis did you say to me a few minutes ago that you did not agree that the residual moneys on call in this list could not be repaid from the cash flow if you cannot estimate the cash flow to the nearest \$2 m.? A. Well, I cannot answer that. 20
- Q. Would you like to withdraw your answer? (Objected to by Mr. Glass; allowed.)
- Q. Do you wish to reconsider your previous answer? A. Under the circumstances I would say yes I would.
- Q. And would you like to withdraw it? A. Under the circumstances, yes, I would have to withdraw it because of the fact that I cannot calculate just what the cash flow is although - 30
- Q. You told his Honour that you were of the view that there was an element of uncertainty as to the Hambros finance? A. Yes.
- Q. And of course Mr. Koch suggested that there was such an element of uncertainty at this meeting, did he not? A. That is so.

- Q. And Mr. Cameron immediately expressed disagreement? A. I do not recall that.
- Q. Do you mean to say that you do not recall at this meeting when Mr. Koch - A. I well remember what Mr. Koch said about the Hambros loan.
- Q. And I suggest to you that Mr. Cameron indicated disagreement with that? A. I cannot recall that.
- 10 Q. Are you prepared to deny Mr. Cameron expressed disagreement? A. No, I am not prepared to deny it.
- Q. But you see, if the Hambros loan was definite, end finance had been arranged to cover \$4.2 m. of the moneys in that list? That is so, isn't it? A. That is right, yes.
- Q. Do you suggest to his Honour that in those circumstances you would remember Mr. Koch's statements as to the uncertainty of the Hambros loan and you would not remember Mr. Cameron's statements disputing the views expressed by Mr. Koch? A. To the best of my recollection there was some comment made by Sir Peter Abeles.
- 20
- Q. You understood in relation to the Hambros loan that a Telex had been received saying that the consortium agreed to make the end finance available. That is so, isn't it? A. Yes, that is right.
- 30 Q. And you were aware that a formal letter of commitment had been received. That is so, isn't it? A. I just can't recall that I said that.
- Q. I am not saying you said it. I am putting it to you that you were aware of that? A. No, I don't agree that I was aware of it.
- Q. What were you talking about when you said that the Hambros loan was subject to a condition about the change of ownership? What were you referring to? A. That is the advice I had from Mr. Koch.
- 40

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Q. Where did you think the condition about change of ownership is? In a Telex? A. No.

Q. Well, where? A. I don't know where.

Q. I suggest to you it was quite clear to you at this meeting that a formal letter of commitment had been received from Hambros? A. I am not aware of that.

Q. You go into Millers not infrequently to sign cheques, do you not? A. Not infrequently. Towards the end of the month. 10

Q. Were you one of the signatories on a cheque the equivalent of \$U.S. 66,000 for the commitment fee in respect of the Hambros loan? A. I don't recall it. I may have been.

Q. Do you deny it? A. No, I don't deny it.

Q. Of course, when you are signing cheques for Millers you make sure you know what you are signing, don't you? A. I usually accept - my usual procedure is that I inspect the documents and the cheques are signed by some other signatory within the organisation. If they are satisfied I will also sign that cheque. But if I am not satisfied I have in some cases raised questions. 20

Q. You would not sign a cheque for \$U.S. 66,000 without knowing what it was, would you? A. I hardly think so, no.

Q. Do you still say that you don't know whether you are a signatory for a cheque for the equivalent of \$U.S. 66,000 representing the commitment fee in respect of the Hambros loan? A. I still say that. 30

Q. You don't deny that you were a signatory? A. I don't deny it.

Q. Of course, if you were a signatory to the cheque you would have no doubt seen the relevant documentation? A. That would be so, yes.

- Q. I suggest to you that if you were a signatory to the cheque you saw the document under which Millers, prior to 6th July 1972, agreed to pay that commitment fee? A. Yes.
- Q. Do you deny that you saw that document?
A. I don't know.
- Q. You don't know? A. I don't know.
- 10 Q. So, is the situation this, that you are unable to tell his Honour whether, as at 6th July 1972, a formal letter of commitment had been received from Hambros? Is that the situation? A. That is so.
- Q. You are unable to tell his Honour whether, as at 6th July 1972, you were aware that Millers had agreed to pay a commitment fee equivalent to \$U.S. 66,000 as a commitment fee for that loan. Is that what you tell his Honour? A. That is right.
- 20 Q. And that, while you can recollect Mr. Koch making some comments as to the uncertainty of the Hambros loan, you cannot recollect Mr. Cameron questioning these comments. Is that what you tell his Honour? A. Yes. I think Mr. Koch's remarks were minuted. If I may refer to p.6 the second last paragraph -
- Q. Mr. Anderson, I am asking you for your recollection in relation to your state of knowledge and what you heard at the meeting?
A. Well, I recollect Mr. Koch making those remarks about the Hambros loan containing certain provisions, but I cannot recollect anything said by Mr. Cameron.
- 30 Q. Of course you were aware, were you not, that the Hambros loan was, as it were, to provide the end finance for the "Robert Miller"?
A. Yes. I associated that with the \$4 m.-odd to come but out of that for the Bank of N.S.W.
- Q. That was the \$4.2 m. on this list?
A. \$4.2 m.
- 40 Q. And the Hambros loan was in the vicinity, was it not, of \$7.3 m.? A. Yes, that is right.

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- Q. And not \$3 m., as you told us this morning?
A. Hambros themselves provided \$3 m., but the consortium of banks provided the \$7 m. There is a big difference, to my way of thinking.
- Q. Your understanding was that it was one loan?
A. Yes, but -
- Q. One loan made by the consortium? A. Yes.
- Q. \$7.4 m.? A. Yes.
- Q. Well now, of course, if for any reason that Hambros loan turned out not to be available, the "Robert Miller" would have been available to be offered as security for replacement finance, wouldn't it? A. To some other party? 10
- Q. Yes. A. Yes.
- Q. What did you understand, as at 6th July, to be the value of the "Robert Miller"? A. When delivered?
- Q. Yes, when delivered? A. \$12.3 m.
- Q. Paid for by Millers? A. Well, from wherever Millers could raise finance. 20
- Q. But it would have cost considerably more than \$12.3 m.? A. I don't know about that.
- Q. Was not the Commonwealth subsidising it?
A. Well, the Commonwealth does subsidise it. I don't know what the shipbuilder's price is to the Shipbuilding Board.
- Q. At any rate, you would agree that the "Robert Miller" would have been available as security for replacement finance? A. It would have been if it had not been committed to anyone else. 30
- Q. And of course, way back in 1970 and 1971 you were firmly of the view that the ideal way of financing shipping operations was long term finance. That is correct, is it? A. Indeed.
- Q. And indeed, from the Hambros loan negotiated in respect of the "Amanda Miller" you were aware that it was possible, from the operations of the

vessel, to repay instalments of capital, to repay interest, from receipts, and to still make a handsome profit? A. Still make a profit, yes.

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- Q. A handsome profit, I put to you? A. Well, I don't think the profit would be regarded as particularly handsome, but I would say a satisfactory profit.
- 10 Q. Well, how much? After repayment of all running expenses, instalments of principal and interest, how much? (Objected to by Mr. Glass; allowed.)
- Q. How much? A. 10%.
- Q. That is \$1.2 m.? A. On the "Robert Miller"? (sic)
- Q. Yes. A. Yes.
- Q. After providing for all running costs? A. Yes.
- 20 Q. And repayment of principal and interest? A. Yes.
- Q. Insofar as the Tricontinental loan was concerned you were aware, of course, that that was secured on a number of hotels owned by Millers? You were aware of that, were you not? A. Yes.
- Q. Would you agree with me that the total value of these hotels was, to your knowledge, as at 6th July 1972 in the vicinity of \$8 m.? A. Yes. To the best of my knowledge, yes.
- 30 Q. And of course, the total moneys owing to Tricontinental were \$4 m.-plus? A. Yes.
- Q. Well now, the Commonwealth Superannuation Fund loan was still, as you understood it, in the process of negotiation on 6th July? A. Yes.
- Q. And that was a long-term loan on the security of some of the hotels which had been pledged to Tricontinental? A. I am not aware of which hotels were pledged.

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- Q. I suggest to you that at 6th July you were aware that the long-term loan being negotiated with the Commonwealth Superannuation Fund was over the security of the hotels pledged to Tricontinental? A. I cannot recall which hotels were pledged.
- Q. Well, assuming that that was so, it would be clear to you, would it not, that the long-term loan of \$3 m. being negotiated from Tricontinental (sic.) was to replace \$3 m. of short-term finance that had been borrowed from Tricontinental, if it was over the same security? A. Tricontinental, or do you mean the Superannuation Board? 10
- Q. I asked the wrong question, I am sorry. You would agree with me, would you not, that assuming that the \$3 m. loan which was being negotiated from the Commonwealth Superannuation Fund was to be on the security of the hotels over which Tricontinental had security, it is clear that that \$3 m. long-term finance was to replace \$3 m. of short-term finance owing to Tricontinental? A. That is a reasonable assumption, yes. 20
- Q. And of course, if that \$3 m. long-term loan did not become available, there was still the relationship between Tricontinental and Millers which would make it unlikely that Tricontinental would call up the money in circumstances that would embarrass Millers. Do you agree with that? A. I would not agree with that. I would not be sure of that at all. 30
- Q. Not sure? A. No, I would not be sure of that.
- Q. Well, in the event that the long-term loan from the Commonwealth Superannuation Fund did not become available, and notwithstanding the relationship between Tricontinental and Millers, in the event that Tricontinental required Millers to repay the money at an inconvenient time, Millers would have the \$8 m. worth of hotels to offer as security for re-negotiating finance? A. Yes. 40

- Q. And for re-negotiating long-term finance?
A. Yes.
- Q. And in the event that, notwithstanding the past relationship between Mitsui and Millers, Mitsui required repayment of the moneys due to it at a time inconvenient to Millers, Millers would have the El Rancho Hotel freed from security to offer as alternative security?
A. Yes.
- 10 Q. Value, \$1.5 m. - almost twice the amount owing to Mitsui. You would agree with that, wouldn't you? A. Yes.
- Q. Which means really, Mr. Anderson, are not we left with the odd amount of money that was owing on call? A. I don't see it that way, but -
- Q. But what? A. But that is how you have put it to me from referring to these amounts outstanding, and so forth, up to the end of June
20 next year on short-term borrowings.
- Q. Of course, they were the only matters to which you referred, were they not, when you would not agree with my suggestion to you that as at 30th June 1972 there had been a tremendous improvement in the financial position of Millers as compared to 30th June 1971? A. I do not agree that it was a tremendous improvement.
- Q. Let me be fair to you, because I don't want there to be any mistake on this. You have
30 agreed with me that as at 30th June 1971 Millers were facing a tremendous problem?
A. Yes.
- Q. And that problem was that they had commitments of \$16,700,000? A. Yes.
- Q. In respect of tankers? A. Yes, that is right.
- Q. With no provision made? A. That is right.
- Q. And that they had short-term borrowings in excess of \$4 m. coming due? A. Yes.

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- Q. Which means in excess of \$21 m. there alone and also commitments to the bank? A. Yes, that is right.
- Q. Let us keep to the \$21 m. No provision at all made in respect of payment? A. That is right.
- Q. I suggest to you as at 30th June 1972 to the extent that that \$17 m. had not been paid provision had been made for its payment? A. Not long-term provision.
- Q. Well, there was the Hambros loan on the security of the "Amanda Miller"? A. Yes. 10
- Q. Hambros were getting their repayments of principal and interest? A. Yes.
- Q. From the operating revenue of the vessel? A. Yes.
- Q. And the company was making a handsome profit after those amounts were deducted? A. Yes, they were making a profit, as I said.
- Q. There was the Bank of N.S.W. arrangement in respect of construction costs for the "Robert Miller". That is so, isn't it? A. Yes. 20
- Q. Subject to the question of uncertainty you raised - covered by the Hambros end finance on the "Robert Miller". That is right, isn't it? A. Yes.
- Q. Repayment of that anticipated - so far as principal and interest is concerned - to be made from the operating revenue of the vessel? A. Yes, but -
- Q. And a handsome profit to the company? A. The operating date of the vessel has great bearing on these repayments. 30
- Q. If uncertainty as to the Hambros loan had any justification, in fact a situation where new finance could be re-negotiated on the security of the "Robert Miller"? A. Yes. That would take some considerable time.

- Q. But you see, really, Mr. Anderson, the position that existed at 30th June 1971 was, as I think you agreed with me, the result of Sir Roderick Miller's refusal to arrange long-term finance?
A. Yes, I would agree with that.
- Q. And, so far as the "Amanda Miller" was concerned, that had been overcome. That is so, isn't it? A. Not completely. It had been overcome to a large extent by the Hambros loan providing, I think, about 75% of the valuation of construction.
- Q. And, so far as "Robert Miller" is concerned, subject to your comment as to uncertainty, that had been overcome? A. Only as to about 60% of the cost of the vessel.
- Q. Now, do you say that in your view there had been no improvement in the financial position of Millers between 30th June 1970 and 30th June 1972? A. No, I don't say that.
- 20 Q. You now agree that there had been improvement?
A. There had been an improvement.
- Q. And a very great improvement? A. I suppose it could be said to be great. But it was still critical.
- Q. What was critical Mr. Anderson? A. The fact that we needed \$10.74 m.
- Q. But you did not need that? A. In my view we did. That was what I considered to be the position at 6th July.
- 30 Q. What did you need to pay as at 6th July?
A. The whole of the money listed there.
- Q. But you didn't? A. That was to be repaid by 30th June next year, progressively due, and there was not any certainty, in my view, that these bills would be rolled over.

(In response to an enquiry from his Honour as to whether he would like a short adjournment, Mr. Anderson expressed his willingness to continue.)

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MR. DEANE: Q. Mr. Anderson, at the meeting of 6th July you listened carefully, I presume, to the letter from Howard Smith as it was read? A. Yes I did.

Q. Had you ever heard any parts of that letter read before? A. No.

Q. And you had never seen the letter before it was produced at the meeting? A. No.

Q. You would agree with me, would you not - A. May I say there that I did not even see the letter at the meeting. Is not that the question you asked me - did I see the letter at the meeting? 10

Q. I said "Before the meeting"? A. Before the meeting, or at the meeting?

Q. Before the meeting? A. I had not seen it before the meeting.

Q. Did you see it at the meeting? A. No. It was read over.

Q. Were not copies run off at the meeting? A. Not to my knowledge. 20

Q. Did not Miss Hill go out and Zerox copies of this letter? A. I left the meeting immediately after it concluded. I don't know what time that was. But copies may have been brought back to the board room after the meeting was closed.

Q. To the best of your recollection no copies of this letter were available to directors during the meeting? A. That is so. 30

Q. Now of course, when you heard the letter from Howard Smith being read out you understood it, did you not, as saying to Millers "Make an allotment of shares to us, and we put forward the following reasons which should encourage you to make such an allotment"? A. Yes.

Q. The primary reason put forward was that it would keep the Howard Smith offer open? A. I don't know that that was.

ON APPEAL
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

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.

(14th) Defendant

LIMITED

RESPONDENTS

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VOLUME III

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