

IN THE PRIVY COUNCIL

29
No.

OF 1976
of 197

ON APPEAL from the Supreme Court of New South Wales
Equity Division in Proceedings No. 707 of 1975

IN THE MATTER OF:-

CUMBERLAND HOLDINGS LIMITED

AND IN THE MATTER OF:-

THE COMPANIES ACT, 1961

LF 9 1977

TRANSCRIPT RECORD OF PROCEEDINGS

Volume I

SOLICITORS FOR THE APPELLANT

Sinclairs,
5 Elizabeth Street,
SYDNEY

By their Agents:

Coward Chance,
Royex House,
Aldermanbury Square,
LONDON. EC2V 7LD

SOLICITORS FOR THE RESPONDENT

Allen Allen & Hemsley,
2 Castlereagh Street,
SYDNEY

By their Agents:

Slaughter & May,
35 Basinghall Street,
LONDON. EC2V 5DB

IN THE PRIVY COUNCIL

29
No.

OF 1976
of 197

ON APPEAL from the Supreme Court of New South Wales
Equity Division in Proceedings No. 707 of 1975

IN THE MATTER OF:-

CUMBERLAND HOLDINGS LIMITED

AND IN THE MATTER OF:-

THE COMPANIES ACT, 1961

TRANSCRIPT RECORD OF PROCEEDINGS

Volume I

SOLICITORS FOR THE APPELLANT

Sinclairs,
5 Elizabeth Street,
SYDNEY

By their Agents:

Coward Chance,
Royex House,
Aldermanbury Square,
LONDON. EC2V 7LD

SOLICITORS FOR THE RESPONDENT

Allen Allen & Hemsley,
2 Castlereagh Street,
SYDNEY

By their Agents:

Slaughter & May,
35 Basinghall Street,
LONDON. EC2V 5DB

ON APPEAL from the Supreme Court of New South Wales
Equity Division in Proceedings No. 707 of 1975

IN THE MATTER OF:-

CUMBERLAND HOLDINGS LIMITED

AND IN THE MATTER OF:-

THE COMPANIES ACT, 1961

TRANSCRIPT RECORD OF PROCEEDINGS

INDEX OF REFERENCE

PART I

List of documents included in the Transcript Record of Proceedings

No.	Description of Document	Date	Page
<u>VOLUME I</u>			
1.	Amended Winding-Up Petition	2 April,	1975 1
2.	Defence	7 May,	1975 12
3.	Transcript of Oral Evidence before his Honour, Mr. Justice Bowen		
<u>EVIDENCE-IN-CHIEF FOR PETITIONER</u>			
<u>DONOHOO - Glen Laurence Albert</u>			
	Examination	14, 15 October, 1975	17
	Cross-Examination	15, 16 and 17 October, 1975	75
	Re-Examination	17 October, 1975	281
	Further Examination	21 October, 1975	297 (Vol. II)
	Further Cross-Examination	21 October, 1975	301 (Vol. II)
	Further Examination	28 November, 1975	962 (Vol. IV)
	Further Cross-Examination	28 November, 1975	964 (Vol. IV)
<u>CURRAN - Charles Paul</u>			
	Examination	17 October, 1975	270
	Cross-Examination	17 October, 1975	276
	Index "A"		

No.	Description of Document	Date	Page
-----	-------------------------	------	------

Evidence-in-Chief for Petitioner (Cont'd)

HARPER - Ian Rainy Lance

Examination	17 October,	1975	289
Cross-Examination	17 October,	1975	290

VOLUME II

BUNN - Edward Garnet

Examination	21 October,	1975	294
Cross-Examination	21 October,	1975	297

EVIDENCE-IN-CHIEF FOR COMPANY

ATKINSON - Thomas Eric

Examination	21, 22 October,	1975	305
Cross-Examination	22, 23, 28 October,	1975	357
Re-Examination	28 October,	1975	541

WILSON - James Reuben

Examination	28 October,	1975	550
Cross-Examination	28 October,	1975	565

VOLUME III

WILSON - James Reuben

Cross-Examination	29 October,	1975	577
Re-Examination	29 October,	1975	664

ADLER - Lawrence James

Examination	30 October,	1975	667
Cross-Examination	30, 31 October,	1975	680

VOLUME IV

ADLER - Lawrence James

Cross-Examination	27 November,	1975	844
Re-Examination	27 November,	1975	870
Further Cross-Examination	27 November,	1975	878

FURTHER EVIDENCE FOR PETITIONER

MILLNER - James Sinclair

Examination	27 November,	1975	879
Cross-Examination	27,		
	28 November,	1975	881
Re-Examination	28 November,	1975	952

Index "B"

No.	Description of Document	Date	Page
<u>Further Evidence for Petitioner (Cont'd)</u>			
<u>THYNNE - James Bernard</u>			
	Examination	28 November, 1975	960
	Cross-Examination	28 November, 1975	961
	Re-Examination	28 November, 1975	962
4.	Reasons for Judgment of his Honour, Mr. Justice Bowen	4 May,	1976 976
5.	Order for Winding-Up	31 May,	1976 1045
6.	Order granting Conditional Leave to Appeal to Privy Council	31 May,	1976 1047
7.	Order granting Final Leave to Appeal to Privy Council	6 September,	1976 1050
8.	Certificate of Registrar in Equity Verifying Transcript Record	17 September,	1976 1051
9.	Certificate of Chief Justice	21 September,	1976 1052

PART II

List of Original Exhibits included in the Transcript
Record of Proceedings

Exhibit Mark	By Whom Tendered	Nature of Exhibit	Page
1.	Petitioner	Articles of Association of Cumberland Holdings Limited Numbered 83 to 125 inclusive (Note: Complete Memorandum and Articles of Association to be handed up in Court)	
2.	Petitioner	Photocopy letter Solicitors for the Company to Solicitors for the Petitioner of 15 May, 1975, together with photocopy copy letter Solicitors for Petitioner to Solicitors for Company of 30 May, 1975 together with photocopy letter Solicitors for Petitioner to Solicitors for Company of 13 October 1975, together with further particulars relied upon by the Petitioner in support of the allegations specified in the Petition	1460 (Vol. VI)
3.	Petitioner	1974 Annual Report of FAI Insurances Limited (Note: To be handed up in Court)	
4.	Petitioner	1974 Annual Report of Cumberland Holdings Limited (Note: To be handed up in Court)	
6.	Petitioner	Photocopy letter the Sydney Stock Exchange Limited to Cumberland Holdings Limited 4 September, 1974	1104 (Vol. V)
7.	Petitioner	Photocopy letter Cumberland Holdings Limited to Shareholders 13 September, 1974	1108 (Vol. V)
8.	Petitioner	Photocopy letter FAI Insurance Group to G.L.A. Donohoo 21 October, 1974, together with Draft Part A and Part B of Take-Over documents	1131 (Vol. V)
9.	Petitioner	Photocopy Minutes of Meeting of Board of Directors of Cumberland Holdings Limited 4 November, 1974	1164 (Vol. V)
10.	Petitioner	Photocopy letter G.L.A. Donohoo to Cumberland Holdings Limited 14 November, 1974	1175 (Vol. V)

Exhibit Mark	By Whom Tendered	Nature of Exhibit	Page
11.	Petitioner	Take-Over Offer — FAI Insurances Limited offer to purchase Ordinary and Preference stock units in Cumberland Holdings Limited in exchange for Ordinary and Preference Shares respectively in FAI Insurances Limited of 20 November, 1974, together with Form of Acceptance and Transfer	1195 (Vol. V)
12.	Petitioner	Photocopy Transfer Journal of Cumberland Holdings Limited Sheets Number 1, 2, 3 and 31	1212 (Vol. V)
13.	Petitioner	Photocopy circular G.L.A. Donohoo to the Ordinary Stockholders of Cumberland Holdings Limited of 21 November, 1974, together with photocopy letter G.L.A. Donohoo to the Preference Shareholders of Cumberland Holdings Limited of 21 November, 1974	1217 (Vol. V)
14.	Petitioner	Photocopy letter Australian Shareholders Association to Cumberland Holdings Limited of 22 November, 1974, together with reply from FAI Insurance Group to Australian Shareholders Association of 25 November, 1974 together with letter Australian Shareholders Association to FAI Insurances Limited of 27 November 1974, together with photocopy letter FAI Insurance Group to Australian Shareholders Association of 2 December, 1974	1232 (Vol. V)
15.	Petitioner	Circular letter FAI Insurance Group to the Ordinary Stockholders and the Preference Stockholders of Cumberland Holdings Limited of 22 November, 1974	1241 (Vol. V)
16.	Petitioner	Photocopy copy letter G.L.A. Donohoo to Cumberland Holdings Limited of 29 November, 1974	1264 (Vol. V)
17.	Petitioner	Photocopy circular Washington H. Soul Pattinson & Co. Limited to the Ordinary Stockholders and the Preference Stockholders of Cumberland Holdings Limited of 27 November 1974	1257 (Vol. V)

Exhibit Mark	By Whom Tendered	Nature of Exhibit	Page
18.	Petitioner	Photocopy circular FAI Insurance Group to the Ordinary Stockholders and the Preference Stockholders of Cumberland Holdings Limited of 27 November, 1974	1261 (Vol. V)
19.	Petitioner	Photocopy circular FAI Insurance Group to the Ordinary Stockholders and the Preference Stockholders of Cumberland Holdings Limited of 6 December, 1974	1269 (Vol. V)
20.	Petitioner	Photocopy circular G.L.A. Donohoo to the Ordinary Stockholders and the Preference Stockholders of Cumberland Holdings Limited of 10 December, 1974	1292 (Vol. V)
21.	Petitioner	Photocopy copy letter G.L.A. Donohoo to Cumberland Holdings Limited of 13 December, 1974, together with photocopy letter Cumberland Holdings Limited to G.L.A. Donohoo of 16 December 1974, together with photocopy copy letter G.L.A. Donohoo to Cumberland Holdings Limited of 16 December, 1974	1293 (Vol. V)
22.	Petitioner	Photocopy letter Solicitors for Petitioner to FAI Insurances Limited of 13 December 1974, together with photocopy letter Solicitors for Company to Solicitors for Petitioner of 20 December 1974, together with photocopy letter Solicitors for Petitioner to Solicitors for Company of 24 December 1974, together with photocopy letter Solicitors for Company to Solicitors for Petitioner of 3 January, 1975	1296 (Vol. VI)
23.	Petitioner	Photocopy Minutes of Meeting of Board of Directors of Cumberland Holdings Limited of 18 December 1974	1303 (Vol. VI)
24.	Petitioner	Photocopy letter G.L.A. Donohoo to Cumberland Holdings Limited of 18 December 1974 together with photocopy letter FAI Insurance Group to G.L.A. Donohoo of 18 December 1974,	

Exhibit Mark	By Whom Tendered	Nature of Exhibit	Page
24. (Cont'd)		together with letter G.L.A. Donohoo to Cumberland Holdings Limited of 24 December 1974, together with photocopy letter Cumberland Holdings Limited to G.L.A. Donohoo of 3 January, 1975, together with photocopy copy letter G.L.A. Donohoo to Cumberland Holdings Limited of 8 January, 1975, together with photocopy letter Cumberland Holdings Limited to G.L.A. Donohoo of 14 January 1975	1305 (Vol. VI)
25.	Petitioner	Photocopy copy letter Norton Smith & Co. to Cumberland Holdings Limited of 25 November, 1974, together with photocopy draft Minutes of Meeting of Board of Directors of Cumberland Holdings Limited of 15 November, 1974 containing handwritten emendations together with further draft Minutes of Meeting of Board of Directors of Cumberland Holdings Limited	1244 (Vol. V)
26.	Petitioner	Photocopy copy letter G.L.A. Donohoo to Cumberland Holdings Limited of 2 January, 1975	1324 (Vol. VI)
27.	Petitioner	Photocopy Minutes of Meeting of Board of Directors of Cumberland Holdings Limited of 15 November, 1974	1180 (Vol. V)
28.	Petitioner	Photocopy letter FAI Insurance Group to G.L.A. Donohoo of 22 January, 1975	1335 (Vol. VI)
29.	Petitioner	Photocopy Minutes of Meetings of Board of Directors of Cumberland Holdings Limited of 22 January, 1975 and 28 January 1975	1337 (Vol. VI)
30.	Petitioner	Photocopy letter FAI Insurance Group to G.L.A. Donohoo of 29 January, 1975 together with photocopy letter FAI Insurance Group to Cumberland Holdings Limited of 29 January, 1975	1364 (Vol. VI)

Exhibit Mark	By Whom Tendered	Nature of Exhibit	Page
31.	Petitioner	Photocopy letter FAI Insurance Group to the Ordinary Stockholders and the Preference Stockholders of Cumberland Holdings Limited of 29 January, 1975	1366 (Vol. VI)
32.	Petitioner	Photocopy circular G.L.A. Donohoo to the Ordinary Stockholders and the Preference Stockholders of Cumberland Holdings Limited of 29 January, 1975	1368 (Vol. VI)
33.	Petitioner	Photocopy Notice of Extraordinary General Meeting of Cumberland Holdings Limited of 30 January, 1975, together with photocopy Proxy Form Annexed	1370 (Vol. VI)
34.	Petitioner	Photocopy Minutes of Meeting of Board of Directors of Cumberland Holdings Limited of 30 January 1975	1372 (Vol. VI)
35.	Petitioner	Photocopy letter FAI Insurance Group to the Ordinary Stockholders and Preference Stockholders of Cumberland Holdings Limited of 4 February, 1975	1374 (Vol. VI)
36.	Petitioner	Photocopy letter G.L.A. Donohoo to L.J. Adler of 13 February, 1975, together with photocopy letter Cumberland Holdings Limited to G.L.A. Donohoo of 17 February, 1975	1378 (Vol. VI)
37.	Petitioner	Photocopy circular G.L.A. Donohoo to the Ordinary Stockholders and the Preference Stockholders of Cumberland Holdings Limited of 19 February, 1975 together with annexure being photocopy of list of daily Stock Exchange quotations and photocopy of details of sales by L.J. Adler's interests, together with letter Washington H. Soul Pattinson & Co. Limited to the Ordinary Stockholders and the Preference Stockholders of Cumberland Holdings Limited of 28 February 1975, together with annexure being photocopy form of resolution and reply paid envelope	1382 (Vol. VI)

Exhibit Mark	By Whom Tendered	Nature of Exhibit	Page
38.	Petitioner	Photocopy of text of speech of G.L.A. Donohoo of 4 March, 1975	1415 (Vol. VI)
39.	Petitioner	Minutes of Extraordinary General Meeting of Stockholders of Cumberland Holdings Limited of 4 March, 1975	1425 (Vol. VI)
40.	Petitioner	Photocopy letter Cumberland Holdings Limited to the Sydney Stock Exchange Limited of 7 March, 1975	1427 (Vol. VI)
41.	Company	Photocopy copy letter L.J. Adler to Washington H. Soul Pattinson & Co. Limited of 1 July, 1974	1070 (Vol. V)
42.	Petitioner	Extracts from Australian Associated Stock Exchange's Listing Manual - being Section 1A1, Section 3H (18) Section 5	1429 (Vol. VI)
43.	Company	Article by L.J. Adler printed in FAI Insurance Group Reporter Volume I, Number 8 of October 1974, Page 1	1130 (Vol. V)
44.	Company	Letter G.L.A. Donohoo to L.J. Adler of 14 March 1974, together with notice to FAI Insurance Group Directors, Executives, Staff Members and Associates together with application for allotment of shares	1063 (Vol. V)
45.	Company	Letter Sydney Stock Exchange Limited to Solicitors for Petitioner of 10 October, 1975, together with annexure being list of Stock Exchange transactions in Cumberland Holdings Limited stock units, together with letter Sydney Stock Exchange Limited to Solicitors for Petitioner of 16 October, 1975, together with annexure being daily quotations of Stock Exchange for Cumberland Holdings Limited stock units	1439 (Vol. VI)
46.	Company	Photocopy letter FAI Insurance Group to the Sydney Stock Exchange Limited of 23 July 1974, together with photocopy copy letter Sydney Stock Exchange Limited to Cumberland	

Exhibit Mark	By Whom Tendered	Nature of Exhibit	Page
46. (Cont'd)		Holdings Limited of 25 July, 1974 together with photocopy copy letter Cumberland Holdings Limited to Sydney Stock Exchange Limited of 31 July, 1974 together with enclosure of list of shareholdings in Cumberland Holdings Limited of 21 July, 1974 together with photocopy copy letter Sydney Stock Exchange Limited to FAI Insurances Limited of 2 August 1974 together with photocopy letter FAI Insurance Group to Sydney Stock Exchange Limited of 12 August 1974	1088 (Vol. V)
47.	Petitioner	Document containing admissions by Cumberland Holdings Limited	1100 (Vol. V)
48.	Company	Photocopy copy letter G.L.A. Donohoo to Cumberland Holdings Limited of 20 February, 1975 together with photocopy letter Solicitors for Company to G.L.A. Donohoo of 21 February 1975, together with photocopy letter Solicitors for the Petitioner to the Solicitors for the Company of 24 February, 1975, together with annexure being photocopy letter Solicitors for the Petitioner to G.L.A. Donohoo of 24 February 1975, together with photocopy copy letter Solicitors for the Company to the Solicitors for the Petitioner of 28 February 1975, together with photocopy copy letter Solicitors for the Petitioner to Cumberland Holdings Limited of 28 February 1975, together with photocopy letter Solicitors for the Company to the Solicitors for the Petitioner of 3 March 1975, together with photocopy copy letter Solicitors for the Petitioner to the Solicitors for the Company of 4 March 1975	1400 (Vol. VI)
49.	Company	Photocopy copy letter Solicitors for Petitioner to Commissioner for Corporate Affairs of 9 December, 1974 together with photocopy copy letter Solicitors for Petitioner to Commissioner for Corporate Affairs of 25 February 1975	1277 (Vol. V)

Exhibit Mark	By Whom Tendered	Nature of Exhibit	Page
50.	Petitioner	Photocopy letter Sydney Stock Exchange Limited to FAI Insurances Limited of 27 November, 1974, together with letter Cumberland Holdings Limited to Sydney Stock Exchange Limited of 28 November, 1974 together with letter Solicitors for the Company to Sydney Stock Exchange Limited of 28 November 1974, together with copy Sydney Stock Exchange Limited letter to Solicitors for the Company 28 November 1974, together with letter Solicitors for the Company to the Sydney Stock Exchange Limited of 29 November 1974, together with copy letter the Sydney Stock Exchange Limited to Solicitors for the Company of 29 November 1974, together with letter Solicitors for the Company to Sydney Stock Exchange Limited of 2 December 1974	1284 (Vol. V)
51.	Petitioner	Buying Order of Fire and All Risks Insurance Company Limited for stock in Cumberland Holdings Limited of 19 August 1974, together with Selling Order of Fire and All Risks Insurance Company Limited for stock in Cumberland Holdings Limited of 7 August, 1974 together with Selling Order of Fire and All Risks Insurance Company Limited for stock in Cumberland Holdings Limited of 24 August, 1974	1103 (Vol. V)
53.	Petitioner	Photocopy letter Solicitors for Petitioner to Solicitors for Company of 20 October, 1975	1451 (Vol. VI)
54.	Petitioner	Selling Order of Mrs. Marjorie Wilson for stock in Cumberland Holdings Limited of 16 July, together with Seller's Record of transaction	1073 (Vol. V)
55.	Petitioner	Buying Order of Fire and All Risks Insurance Company Limited for stock in Cumberland Holdings Limited of 16 July 1974, together with Buyer's Record of sale transaction	1075 (Vol. V)

Exhibit Mark	By Whom Tendered	Nature of Exhibit	Page
56.	Petitioner	FAI Insurances Limited Register of Directors Shareholdings	1076 (Vol. V)
58.	Petitioner	Photocopy Fire and All Risks Insurance Company Limited Directors Report of 18 September, 1974	1109 (Vol. V)
59.	Petitioner	Facts agreed between the Petitioner and Cumberland Holdings Limited re: Falkirk Properties Limited	1129 (Vol. V)
66.	Petitioner	Photocopy bundle of 97 consents of shareholders of Cumberland Holdings Limited to Resolution to be carried at Meeting of Minority Stockholders on 10 March 1975, together with list of supporting minority stockholders (Note: One only consent as specimen included together with list)	1438 (Vol. VI)
67.	Company	Photocopy Minutes of Meeting of Board of Directors of FAI Insurances Limited of 11 July, 1974	1072 (Vol. V)
68.	Company	Photocopy Minutes of Meeting of Board of Directors of FAI Insurances Limited of 1 November, 1974	1163 (Vol. V)
69.	Company	Photocopy Minutes of Meeting of Board of Directors of FAI Insurances Limited of 29 November, 1974	1265 (Vol. V)
70.	Company	Photocopy Minutes of Meeting of Board of Directors of FAI Insurances Limited of 6 December, 1974 together with annexure being photocopy circular FAI Insurance Group to the Ordinary Stockholders and the Preference Stockholders of Cumberland Holdings Limited of 6 December, 1974	1271 (Vol. V)
71.	Company	Letter FAI Insurance Group to Sydney Stock Exchange Limited of 6 December, 1974	1274 (Vol. V)
72.	Company	Photocopy letter Sydney Stock Exchange Limited to FAI Insurances Limited of 10 January, 1975, together with Subpoena issued by Solicitor for Petitioner dated 16 October 1975 addressed to Secretary of Sydney Stock Exchange Limited	1325 (Vol. VI)

Exhibit Mark	By Whom Tendered	Nature of Exhibit	Page
73.	Company	Photocopy Minutes of Meeting of Board of Directors of FAI Insurances Limited of 10 January, 1975, together with annexure being photocopy letter J.R. Wilson to FAI Insurances Limited of 10 January 1975	1329 (Vol. VI)
74.	Company	Photocopy Draft Minutes of Meeting of Board of Directors of Cumberland Holdings Limited of 15 November 1974	1186 (Vol. V)
75.	Company	Photocopy Minutes of Meeting of Board of Directors of FAI Insurances Limited of 28 January 1975	1346 (Vol. VI)
76.	Company	Minutes of Meeting of Board of Directors of Fire and All Risks Insurance Company Limited of 28 January, 1975 together with annexure being copy letter Fire and All Risks Insurance Company Limited to Cumberland Holdings Limited of 29 January, 1975	1347 (Vol. VI)
77.	Company	Notice of Annual General Meeting and Annual Reports and Accounts of Cumberland Holdings Limited for 1975	1349 (Vol. VI)
78.	Petitioner	Calculation of earnings per share for year ended 30 June 1974 for Cumberland Holdings Limited and FAI Insurances Limited	1068 (Vol. V)
79.	Petitioner	Broker's Transfer Form for T.E.A. Nominees (N.S.W.) Limited to Tynedale Investments Pty. Limited for 4,000 Ordinary Shares in FAI Insurances Limited of 3 December 1974 together with Broker's Duplicate Buying Slip	1267 (Vol. V)
80.	Petitioner	Broker's Advisors copy duplicates for transfers of stock in FAI Insurances Limited of 21 November 1974 for L.J. Adler, E. Adler, R.P. Adler, K.S. Adler, R. Adler, Eagle Corporation Pty. Limited, Falkirk Properties Limited, A. Belfer, R.L. Herman, J. Tronchin, together with Broker's advisors copy Cancellation Advice for L.J. Adler	1225 (Vol. V)

Exhibit Mark	By Whom Tendered	Nature of Exhibit	Page
81.	Petitioner	Letter Sydney Stock Exchange Limited to Solicitors for Petitioner of 30 October, 1975 together with letter Sydney Stock Exchange Limited to Solicitors for Company of 3 December, 1975, together with letter Sydney Stock Exchange Limited to Solicitors for Petitioner of 3 December, 1975	1454 (Vol. VI)
82.	Petitioner	Typed notes of T.E. Atkinson	1458 (Vol. VI)
83.	Petitioner	Photocopy Minutes of Meeting of Board of Directors of Cumberland Holdings Limited of 10 September 1974, together with annexure being photocopy letter Sydney Stock Exchange Limited to Cumberland Holdings Limited of 4 September 1974, and with photocopy circular letter Cumberland Holdings Limited to Shareholders of 13 September, 1974	1105 (Vol. V)
84.	Petitioner	Photocopy Minutes of Meeting of Board of Directors of FAI Insurances Limited of 3 April, 1974, together with annexure being photocopy copy letter J. Belfer to FAI Insurances Limited of 3 April, 1974	1066 (Vol. V)
85.	Company	Letter Gibbings & Webb to Solicitors for Company of 10 October, 1975	1450 (Vol. VI)
86.	Company	Photocopy copy letter L.J. Adler to Washington H. Soul Pattinson & Co. Limited of 23 January, 1974	1062 (Vol. V)
87.	Petitioner	Photocopy return for six months ended 31 December, 1974 of Cumberland Holdings Limited, together with list of movements in share stock of Cumberland Holdings Limited from the 1 July, 1974 to October, 1975	1316 (Vol. VI)
88.	Petitioner	Facts agreed between Petitioner and the Company for sale price of FAI Insurances Limited shares on the Sydney Stock Exchange	1321 (Vol. VI)

Exhibit Mark	By Whom Tendered	Nature of Exhibit	Page
89.	Petitioner	Photocopy the Chairman's, Mr. L.J. Adler, address to the Shareholders at the 20th Annual General Meeting of FAI Insurances limited of 6 December 1973, together with notations of G.L.A. Donohoo on the top right hand corner of the first page thereof	1058 (Vol. V)
90.	Company	Paragraph 18 of Draft Statement of J.S. Millner and G.L.A. Donohoo on the dismissal of Washington H. Soul Pattinson & Co. Limited as suppliers of pharmaceuticals to Cumberland Holdings Limited	1322 (Vol. VI)
92.	Petitioner	Information extracted from Cumberland Holdings Limited share transfer journal	1323 (Vol. VI)
94.	Petitioner	Photocopy Memorandum of G.L.A. Donohoo to J.S. Millner of 19 December 1973	1053 (Vol. V)
95.	Company	Photocopy letter Cumberland Holdings Limited to Norton Smith & Co. of 4 November 1974, together with photocopy letter Norton Smith & Co. to Cumberland Holdings Limited of 13 November 1974, together with photocopy letter Norton Smith & Co. to Cumberland Holdings Limited of 18 December 1974, together with photocopy copy letter Norton Smith & Co. to Cumberland Holdings Limited of 25 November 1974, together with photocopy copy letter G.L.A. Donohoo to Cumberland Holdings Limited of 19 December, 1974	1166 (Vol. V)
96.	Company	Photocopy letter FAI Insurance Group to Cumberland Holdings Limited of 20 November 1974	1194 (Vol. V)
97.	Company	Photocopy letter Solicitors for Company to G.L.A. Donohoo of 21 November 1974	1231 (Vol. V)
99.	Company	Photocopy minutes of Meeting of Board of Directors of Cumberland Holdings Limited of 17 July 1974	1087 (Vol. V)

Exhibit Mark	By Whom Tendered	Nature of Exhibit	Page
100.	Company	Photocopy Minutes of Meeting of Board of Directors of Cumberland Holdings Limited of 14 August, 1974	1101 (Vol. V)
101.	Company	Photocopy Minutes of Meeting of Board of Directors of Cumberland Holdings Limited of 7 March 1975	1437 (Vol. VI)
102.	Company	Photocopy Minutes of Meeting of Board of Directors of FAI Insurances Limited of 18 November 1974	1193 (Vol. V)

PART III

List of Formal and Other Documents and Exhibits omitted
from the Transcript Record of Proceedings

No.	Description of Document	Date	
<u>Formal and Other Documents Omitted</u>			
1.	Appearance of Company	9 April,	1975
2.	Affidavit of Robert Lawrence Herman	18 April,	1975
3.	Affidavit of William James Sinclair	21 April,	1975
4.	Summons	22 April,	1975
5.	Affidavit of James Bernard Thynne	30 April,	1975
6.	Affidavit of James Bernard Thynne	30 April,	1975
7.	Short Minutes of Order for time for filing Defence, etc.	5 May,	1975
8.	Order pursuant to Section 227 of the Companies Act, 1961	5 May,	1975
9.	Short Minutes of Order pursuant to Section 227 of Companies Act, 1961	30 June,	1975
10.	Order pursuant to Section 227 of Companies Act, 1961	30 June,	1975
11.	Notice to Answer Interrogatories by Petitioner	9 September,	1975
12.	Affidavit of Robert Lawrence Herman	8 October,	1975
<u>Subpoenas</u>			
13-20. inc.	Eight (8) Subpoenas (Production) by Petitioner	2 October,	1975
21.	Subpoena (Production) by Company	8 October,	1975
22.	Subpoena (Production) by Petitioner	9 October,	1975
23.	Subpoena (Production) by Petitioner	13 October,	1975
24-25. inc.	Two (2) Subpoenas (Production) by Company	13 October,	1975

No.	Description of Document	Date	
26.	Subpoena (Production) by Petitioner	13 October,	1975
27-30. inc.	Four (4) Subpoenas (Production) by Petitioner	14 October,	1975
31-32 inc.	Two (2) Subpoenas (Production) by Petitioner	16 October,	1975
33.	Subpoena (Evidence) by Petitioner	17 October,	1975
34-46. inc.	Thirteen (13) Subpoenas (Production) by Petitioner	21 October,	1975
47.	Subpoena (Production) by Company	23 October,	1975
48.	Subpoena (Production) by Petitioner	27 October,	1975
	<u>Notices of Intention to Appear on Petition by:-</u>		
49.	<u>CARLIN</u> - David Winston Thomas	October,	1975
50.	<u>DONOHOO</u> - Glen L.A.	October,	1975
51.	<u>HATMAX NOMINEES PTY. LIMITED</u>	October,	1975
52.	<u>KATANDRA INVESTMENTS PTY. LIMITED</u>	October,	1975
53.	<u>BAMBER</u> - Ivy Acacia	14 October,	1975
54.	<u>BURBURY</u> - John Leonard	14 October,	1975
55.	<u>BUTCHER</u> - Alan	14 October,	1975
56.	<u>BUTLER</u> - Thomas Basil	14 October,	1975
57.	<u>BUTTRISS</u> - Ian William	14 October,	1975
58.	<u>CAMILLERI</u> - Lazarus	14 October,	1975
59.	<u>CIORPAC</u> - Mary	14 October,	1975
60.	<u>COLMAN</u> - Lionel Frank	14 October,	1975
61.	<u>COMBES</u> - Leo	14 October,	1975
62.	<u>CRAWFORD</u> - Hugh Maynard	14 October,	1975
63.	<u>CUNYINGHAME</u> - Reginald William	14 October,	1975
64.	<u>ENGEL</u> - Anthony Norman	14 October,	1975

No.	Description of Document	Date	
65.	<u>GOULD</u> - Mavis Jean	14 October,	1975
66.	<u>GOULD</u> - Raymond Desmond	14 October,	1975
67.	<u>HILL</u> - William Charles	14 October,	1975
68.	<u>JONES</u> - Alan Frederick	14 October,	1975
69.	<u>JONES</u> - Reginald Bruce	14 October,	1975
70.	<u>LENEHAN</u> - Ruth Susan	14 October,	1975
71.	<u>MACKEY</u> - Herbert Mazlin	14 October,	1975
72.	<u>MACKEY</u> - Una Clare	14 October,	1975
73.	<u>MATCHETT</u> - Gordon Richard James	14 October,	1975
74.	<u>MORROW</u> - Jean Elna	14 October,	1975
75.	<u>McCORQUODALE</u> - Duncan	14 October,	1975
76.	<u>McDONALD</u> - Alexander Woodford	14 October,	1975
77.	<u>O'DONNELL</u> - Catherine	14 October,	1975
78.	<u>POLLACK</u> - John Samuel and Kathleen	14 October,	1975
79.	<u>REID-HILL</u> - James	14 October,	1975
80.	<u>SANDS</u> - Keith Kilpin	14 October,	1975
81.	<u>SHAW</u> - Barbara Alison	14 October,	1975
82.	<u>TEGGAH INVESTMENTS PTY. LTD.</u>	14 October,	1975
83.	<u>THE MERCANTILE MUTUAL LIFE INSURANCE CO. LTD.</u>	14 October,	1975
84.	<u>VICARY</u> - John Dymond	14 October,	1975
85.	<u>WARD</u> - Eileen Mary	14 October,	1975
86.	<u>WEINE</u> - Eric Ernest	14 October,	1975
87.	<u>WILLIAMS</u> - C.B. & M.H.	14 October,	1975
88.	<u>WILSON</u> - Robert James and Dianne Margret	14 October,	1975
89.	<u>ARENDTS</u> - Max James	15 October,	1975

No.	Description of Document	Date
90.	<u>BAKER</u> - William Henry Mark	15 October, 1975
91.	<u>BLACK</u> - Dorothy Joyce	15 October, 1975
92.	<u>BOSTON</u> - Ernest Cyril	15 October, 1975
93.	<u>CHATHAM INVESTMENTS CO. LIMITED</u>	15 October, 1975
94.	<u>CHICK</u> - Jack Wesley	15 October, 1975
95.	<u>COWARD</u> - Geoffrey Albert and Mary Evelyn	15 October, 1975
96.	<u>CRAVEN-SANDS</u> - Colin	15 October, 1975
97.	<u>CROFTS</u> - Frederick	15 October, 1975
98.	<u>CURTIS</u> - Trevor Lyle	15 October, 1975
99.	<u>DANCASTER</u> - William Jack	15 October, 1975
100.	<u>DEERY</u> - John and Muriel	15 October, 1975
101.	<u>DOUGLASS</u> - Kevin B.	15 October, 1975
102.	<u>DRAKE</u> - Alan C.	15 October, 1975
103.	<u>EMERY</u> - Lucy Essie	15 October, 1975
104.	<u>FENELEY</u> - Clare Viti	15 October, 1975
105.	<u>FORREST</u> - James S.	15 October, 1975
106.	<u>GOLDSMITH</u> - Nora Kathleen	15 October, 1975
107.	<u>HAMMOND</u> - Francis R. and Shirley M.	15 October, 1975
108.	<u>HINE</u> - Francis Thomas and Marjorie	15 October, 1975
109.	<u>HOLLOWAY</u> - Kevin George and Audry Joan	15 October, 1975
110.	<u>KURTZ</u> - Edna Angelina Mary	15 October, 1975
111.	<u>LANDEL HOLDINGS PTY. LIMITED</u>	15 October, 1975
112.	<u>MILLANE PTY. LIMITED</u>	15 October, 1975
113.	<u>MILLNER</u> - James S.	15 October, 1975
114.	<u>MOORE</u> - Josephine Doreen	15 October, 1975
115.	<u>MCPHIE</u> - R. & P.E.	15 October, 1975

No.	Description of Document	Date
116.	<u>NELSON</u> - Mona Gertrude	15 October, 1975
117.	<u>OXSPRING</u> - Walter Gilbert	15 October, 1975
118.	<u>POND</u> - Florence Nightingale	15 October, 1975
119.	<u>RAMSAY</u> - Robert B.	15 October, 1975
120.	<u>SCHIPP</u> - Joseph John and Rhonda Daisy	15 October, 1975
121.	<u>SOWDEN</u> - Raymond L.	15 October, 1975
122.	<u>ALLIS</u> - Gwendolyn M.	16 October, 1975
123.	<u>ALLIS</u> - Gwendolyn M.	16 October, 1975
124.	<u>BENNETT</u> - Victor Sydney	16 October, 1975
125.	<u>CROFTS</u> - Frederick	16 October, 1975
126.	<u>OXSPRING</u> - Walter Gilbert	16 October, 1975
127.	<u>RAMSAY</u> - Robert B.	16 October, 1975
128.	<u>TREE</u> - Ernest Edward	16 October, 1975
129.	<u>WEST</u> - David John James	16 October, 1975
130.	Notice of Change of Address for Service for Company	17 March, 1976
131.	Notice of Motion by Company for Leave to Appeal to Privy Council	31 May, 1976

Exhibit Mark	By Whom Tendered	Nature of Exhibit
--------------	------------------	-------------------

Exhibits Omitted

- | | | |
|-----|------------|--|
| 5. | Petitioner | Deed dated 28 April, 1972 between G.L.A. Donohoo and the Petitioner |
| 52. | Petitioner | Draft letter G.L.A. Donohoo to the Ordinary Stockholders and the Preference Stockholders of Cumberland Holdings Limited of November 1974 with handwritten emendations of Solicitors for the Petitioner |

Exhibit Mark	By Whom Tendered	Nature of Exhibit
57.	Petitioner	Photocopy Application by the Registrar of the Workers' Compensation Commission of New South Wales pursuant to Section 29 (1) of the Workers' Compensation Act 1926 as amended in the matter of Australian and International Insurances Limited together with Notification to Licensee Under Section 29 (3)(a)
60.	Petitioner	Photocopy Annual Return by a Company having a share capital for Lader Pty. Limited made up to the 20 December, 1974
61.	Petitioner	Photocopy Annual Return by a Company having a share capital for Midland Corporation Pty. Limited made up to the 20 December 1974
62.	Petitioner	Photocopy Annual Return by a Company having a share capital for Eagle Motors Pty. Ltd. made up to the 20 December, 1974
63.	Petitioner	Photocopy Annual Return by a Company having a share capital for Eagle Corporation Pty. Ltd. made up to the 20 December, 1974
64.	Petitioner	Photocopy Annual Return by a Company having a share capital for Midland Insurances Pty. Limited made up to the 20 December, 1974
65.	Petitioner	Photocopy Annual Return by a Company having a share capital for Belanna Pty. Ltd. made up to the 20 December, 1974
91.	Petitioner	Photocopy document listing support for lodgement of petition by minority shareholders marked Cumberland Holdings Limited Winding-Up Petition by Washington H. Soul Pattinson & Co. Limited with emendations of Solicitor for Petitioner
93.	Company	Subpoena to Henry Davis York & Co. issued by Solicitors for Company together with documents produced in answer thereto, being:- Letter Holman Webb & Co. to Henry Davis York & Co. of 16 July, 1971 Letter Henry Davis York & Co. to Holman Webb & Co. of 2 November, 1971 Letter Rankin Nathan & Derkenne to Henry Davis York & Co. of 25 August 1972 enclosing Notice of Change of Solicitor in the Workers' Compensation Commission

Exhibit Mark	By Whom Tendered	Nature of Exhibit
93. (Cont'd)		<p>Letter Rankin Nathan & Derkenne to Henry Davis York & Co. of 7 March, 1973</p> <p>Letter Rankin Nathan & Derkenne to Henry Davis York & Co. of 7 March, 1973</p> <p>Letter Rankin Nathan & Derkenne to Henry Davis York & Co. of 10 April, 1973</p> <p>Letter Rankin Nathan & Derkenne to Henry Davis York & Co. of 2 July, 1973</p> <p>Letter Rankin Nathan & Derkenne to Henry Davis York & Co. of 30 August, 1973</p> <p>Letter Henry Davis York & Co. to Rankin Nathan & Derkenne of 10 September, 1973</p> <p>Letter Rankin Nathan & Derkenne to Henry Davis York & Co. of 12 September, 1973</p> <p>Photocopy Application by Registrar in the Workers' Compensation Commission of New South Wales in the Matter of Australian and International Insurances Limited, together with Notification to Licensee under Section 93 (3)(a)</p> <p>Order of McGrath, J., in the Workers' Compensation Commission of New South Wales of 16 April, 1975</p>
98.	Company	<p>Photocopy copy letter Washington H. Soul Pattinson & Co. Limited to the Sydney Stock Exchange Limited of 5 December, 1974, together with photocopy Application by Registrar in Workers' Compensation Commission of New South Wales in the Matter of Australian and International Insurances Limited together with Notification to Licensee under Section 93 (3)(a)</p>

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

No. 707 of 1975

IN THE MATTER of CUMBERLAND HOLDINGS LIMITED
AND IN THE MATTER of the COMPANIES ACT, 1961
AMENDED PETITION

To the Supreme Court of New South Wales Equity Division.

1. The petitioner is Washington H. Soul Pattinson and Company Limited of 158 Pitt Street, Sydney.

2. Cumberland Holdings Limited (hereinafter called "the Company") was on 10th February, 1960 incorporated under the Companies Act, 1936. 10

3. The registered office of the Company is at FAI Insurance Buildings, 185 Macquarie Street, Sydney.

4. The Company's issued capital consists of 757,536 ordinary stock units of 50c each fully paid, 303,768 8% cumulative preference non participating stock units of 50c each fully paid and 300,000 8% cumulative redeemable preference non participating stock units of 50c each fully paid. 20

5. The petitioner is the holder of 46,000 ordinary stock units, 183,520 8% cumulative preference non participating stock units and 118,000 8% Cumulative redeemable preference non participating stock units in the capital of the Company. The petitioner is the beneficial owner of a further 4,000 ordinary stock units in the capital of the Company.

6. The petitioner craves leave to refer to the Memorandum and Articles of Association of the Company
1. Amended Petition

Amended Petition

when produced as if the same had been fully set forth herein.

7. The Company is and at all material times has been a subsidiary of FAI Insurances Limited (hereinafter called "FAI").

8. Lawrence James Adler, John Belfer and Glen Lawrence Albert Donohoo were at all material times until 22nd January 1975 the only Directors of the Company.

9. The said Lawrence James Adler and the said John Belfer are and at all material times have been Directors of FAI and of Fire and All Risks Insurance Company Limited (hereinafter called "Fire and All Risks") and the said Lawrence James Adler is and at all material times has been the Chairman of Directors of FAI and Fire and All Risks.

10

10. Fire and All Risks is and at all material times has been a wholly owned subsidiary of FAI.

11. Prior to July 1974 Fire and All Risks was the holder of 545,748 ordinary stock units, no 8% cumulative preference non participating stock units and no 8% cumulative redeemable preference non participating stock units in the capital of the Company.

20

12. In or about July 1974 Fire and All Risks increased its holding of stock units in the capital of the Company to 603,298 ordinary stock units, 9,428 8% cumulative preference non participating stock units and 128,700 8% cumulative redeemable preference non participating stock units.

Amended Petition

13. Fire and All Risks' holding of ordinary stock units in the capital of the Company was thereby increased from approximately 72.04% to approximately 79.63%.

14. (a) Of the 57,550 ordinary stock units in the capital of the Company acquired by Fire and All Risks in or about July 1974, 35,950 of such ordinary stock units were purchased at \$1.25 in cash per stock unit from members of the family of the said Lawrence James Adler or from companies owned and controlled by the said Lawrence James Adler or members of his family. A further 19,900 of such ordinary stock units were purchased at \$1.25 in cash per stock unit from Falkirk Properties Limited being a company of which the said Lawrence James Adler was Chairman of Directors and in which he and companies owned and controlled by the said Lawrence James Adler or members of his family held 283,100 out of 2,295,500 issued ordinary shares.

10

(b) The whole of the 9,428 8% cumulative preference non participating stock units and the whole of the 128,700 8% cumulative redeemable preference non participating stock units in the capital of the Company acquired by Fire and All Risks in or about July 1974 were purchased at 50c in cash per stock unit from companies owned and controlled by the said Lawrence James Adler or members of his family.

20

15. The Company's stock units are and at all material times have been listed on the Sydney Stock Exchange.

Amended Petition

16. The acquisition by Fire and All Risks of further stock units in the capital of the Company as aforesaid has placed in jeopardy the continued listing of the Company's stock units on the Sydney Stock Exchange.

17. FAI by an offer dated 20th November 1974 addressed to the holders of stock units of all three classes in the Company offered to acquire all of the issued stock units of all three classes in the Company on certain terms and conditions as set forth in the offer. The petitioner craves leave to refer to the offer and accompanying documents when produced as if the same had been fully set forth herein.

10

18. The said offer provided inter alia that the consideration to be paid to each accepting holder of stock units in the Company should be as follows:

- (a) To each accepting holder of the issued and fully paid ordinary stock units of 50c each in Cumberland, one ordinary share of 50c fully paid in FAI for each stock unit in respect of which the offer was accepted.
- (b) To each accepting holder of the issued and fully paid 8% cumulative preference non participating stock units of 50c each in Cumberland, one 8% cumulative preference share of 50c in FAI for each stock unit in respect of which the offer was accepted.
- (c) To each accepting holder of the issued and

20

Amended Petition

fully paid 8% cumulative redeemable preference non participating stock units of 50c each in Cumberland, one 8% cumulative preference share of 50c in FAI for each such stock unit in respect of which the offer was accepted.

19. At the time of the said offer the latest available market sale price of FAI ordinary shares was only approximately 55c.

20. At the time of the said offer each ordinary stock unit in the Company had a net tangible assets backing of approximately \$1.22 whereas each FAI ordinary share had a net tangible assets backing of only approximately 52c.

10

21. The said Lawrence James Adler and the said John Belfer being Directors of the Company have acted in the affairs of the Company in the interests of themselves as Directors, Executives and Shareholders of FAI and companies in the FAI group rather than in the interests of the members as a whole in that they have sought to advance the interests of FAI and thereby of themselves as such Directors, Executives and Shareholders at the expense of the interests of the members of the Company as a whole.

20

22. The said Lawrence James Adler and the said John Belfer being Directors of the Company have acted in the affairs of the Company in other ways which are unfair and unjust to other members.

Amended Petition

23. The affairs of the Company are being conducted in a manner oppressive to one or more of the members.

24. It is just and equitable that the Company be wound up.

25. The grounds relied on in support of the allegations made in paragraphs 21, 22, 23 and 24 hereof are the matters alleged in paragraphs 26 - 35 hereunder.

26. The said Lawrence James Adler urged the holders of ordinary stock units in the Company to accept FAI's
10
aforesaid offer of one ordinary share in FAI for each of their ordinary stock units in the Company although -

- (i) In or about July 1974 (a) members of his family and companies owned and controlled by him or members of his family had sold 35,950 ordinary stock units in the Company to Fire and All Risks at \$1.25 in cash per stock unit and (b) Falkirk Properties Limited (being a company of which he was Chairman of Directors and in which he and companies own-
20
ed and controlled by him or members of his family had a large shareholding as referred to above) had sold 19,900 ordinary stock units in the Company to Fire and All Risks at \$1.25 in cash per stock unit; whereas the latest available market sale price of FAI ordinary shares at the time of the offer was only approximately 55c.

Amended Petition

- (ii) At the time of the offer each ordinary stock unit in the Company had a net tangible assets backing of approximately \$1.22; whereas each FAI ordinary share had a net tangible assets backing of only approximately 52c.

27. The said Lawrence James Adler, when urging the holders of ordinary stock units in the Company to accept FAI's aforesaid offer of one ordinary share in FAI for each of their ordinary stock units in the Company, failed to disclose to such holders particulars of the sales of ordinary stock units as set forth in paragraph 26(i) above or particulars of the other matters set forth in paragraph 26(i) and (ii) above. 10

28. The said Lawrence James Adler and the said John Belfer as Directors of the Company refused to permit of FAI's offer being evaluated by a merchant banker or a firm of chartered accountants so that its or their report might be available for the guidance of the holders of stock units in the Company in deciding whether they should or should not accept the offer. 20

29. The said Lawrence James Adler and the said John Belfer as Directors of the Company failed at the time of FAI's offer to advise the holders of stock units in the Company that the Registrar of the Workers' Compensation Commission of New South Wales had instituted proceedings which were still current for the suspension or termination of FAI's licence to carry on its business

Amended Petition

as an insurer under the Workers' Compensation Act.

30. The said Lawrence James Adler and the said John Belfer as Directors of the Company failed to resist FAI's take-over offer and to advise the holders of stock units in the Company that it was not in their interests to accept it.

31. The action of the said Lawrence James Adler and the said John Belfer, in their capacities as Directors of FAI, in causing its subsidiary Fire and All Risks to increase its holding of ordinary stock units in the Company from 72.04% to 79.63% and thereby jeopardise the listing of the Company's stock units on the Sydney Stock Exchange was calculated to undermine the position of the holders of stock units in the Company other than Fire and All Risks and to place them in a position where they had no practical alternative but to accept the FAI offer for their stock units.

10

32. After the Sydney Stock Exchange had by letter dated 4th September 1974 notified the Company that its stock units might be delisted unless the Exchange was advised prior to 3rd December that Fire and All Risks had reduced its holding of stock units in the Company, the said Lawrence James Adler and the said John Belfer as Directors of the Company failed to take any steps to procure Fire and All Risks to reduce its holding of stock units in the Company so as to comply with the Exchange's requirements.

20

Amended Petition

33. On 22nd January 1975 the said Lawrence James Adler and the said John Belfer as Directors of the Company caused Thomas Eric Atkinson and James Reuben Wilson both Directors of FAI and Fire and All Risks to be appointed additional Directors of the Company.

34. Thereafter the said Lawrence James Adler and the said John Belfer, in their capacities as Directors of FAI and Fire and All Risks, have caused its subsidiary Fire and All Fisks to requisition the convening of an Extraordinary General Meeting of the Company with the object of removing the aforesaid Glen Lawrence Albert Donohoo from office as a Director of the Company and thereby creating a situation where all of the remaining Directors of the Company were and are Directors of FAI and Fire and All Risks.

10

35. On 4th March 1975 the said Extraordinary General Meeting of the Company was held and the said Glen Lawrence Albert Donohoo was removed from office as a Director of the Company, since which time all the Directors of the Company have been and are Directors of the FAI.

20

36. This Petition is supported by a substantial majority in number and nominal value of the minority stockholders of the Company other than the Petitioner.

THE PETITIONER THEREFORE CLAIMS AS FOLLOWS:-

- (1) That Cumberland Holdings Limited may be wound-up by the Court under the provisions of the Companies Act, 1961.

Amended Petition

(2) That Charles Herbert Rutherford Jackson and Gary Felstead Warhurst of the firm of Messrs. Hungerfords, Chartered Accountants of Macquarie House, 167 Macquarie Street, Sydney or such other official liquidator as the Court may see fit appoint may be appointed liquidator of the Company.

(3A) (a) Alternatively to (1) and (2), that

Cumberland Holdings Limited, or, in the

alternative, Fire and All Risks Insurances

10

Limited, be ordered to purchase the ordinary

and preference stock units of the Petitioner

and of such other members of Cumberland

Holdings Limited as to the Court seems fit

at the price of \$1.70 (or at such other price

as to the Court seems fit) in cash for each

ordinary stock unit, at the price of 50 cents

in cash for each 8% cumulative preference

non participating stock unit and at the

price of 50 cents in cash for each 8% cumu-

20

lative redeemable preference non participat-

ing stock unit; and

(b) that the capital of Cumberland Hold-

ings Limited be reduced accordingly.

In the event that the Court makes an order

pursuant to prayer 3 hereof, that any divi-

dends (including any apportionable parts

thereof) which may be payable upon any stock

units the subject of any such order in

Amended Pursuant to leave granted by the Chief Judge in Equity on the 4th day of December, 1975

Ian R.L. Harper Solicitor for Petitioner

Amended pursuant to leave granted by the Chief Judge in Equity on the 4th day of December, 1975

Ian R.L. Harper Solicitor for Petitioner

Amended Petition

relation to any period up to the date of payment of the purchase price of the said stock units shall be paid by Cumberland Holdings Limited to the vendor of such stock units.

- (4) That the costs of the petitioner may be provided for.
- (5) That such other order may be made in the premises as shall be just.

DATED this 2nd day of April 1975.

10

Ian R.L. Harper
.....
Solicitor for the Petitioner

NOTE:

- (a) This amended Petition was presented by Ian Rainy Lance Harper of Messrs. Allen, Allen & Hemsley, Solicitors, 2 Castlereagh Street, Sydney, the Solicitor for the abovenamed Petitioner.
- (b) It is intended to serve this amended Petition on Cumberland Holdings Limited of FAI Insurance Building, 185 Macquarie Street, Sydney, N.S.W.

20

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

No. 707 of 1975

IN THE MATTER of CUMBERLAND HOLDINGS LIMITED
AND IN THE MATTER of the Companies Act, 1961
DEFENCE OF CUMBERLAND HOLDINGS LIMITED

1. As to paragraph 5 of the petition, the Company does not admit that the petitioner is the beneficial owner of 4,000 or any further ordinary stock units in the capital of the Company. 10
2. The Company does not admit the matters alleged in paragraphs 7, 14, 19, 20, 26, 32, 33, 34, 35 and 36 of the petition, or any of them.
3. The Company denies the matters alleged in paragraphs 16, 21, 22, 23, 24, 27, 28, 29 and 31 of the petition and each of them.
4. As to paragraph 15 of the petition the Company denies that its stock units, other than the 757,536 Ordinary stock units, are or were at any material time listed on the Sydney Stock Exchange. 20
5. As to paragraphs 17 and 18 of the petition the Company says:-
 - (a) That the terms of the offer therein alleged are not fully or sufficiently set forth in the said paragraph;
 - (b) That the Company was informed on or about 6th December 1974 that the said offer had been withdrawn.

Statement of Defence

6. In answer to paragraph 30 of the petition the Company denies that it was not in the interests of holders of stock units in the Company to accept the said offer.

W. J. Sinclair
.....
(W.J. Sinclair)
Solicitor for the Company.

FILED: 7 May 1975.

1 RJH BF

SINCLAIRS

24 JUN 1975

Solicitors & Notaries

William James Sinclair

Notary Public 117 Pitt Street

Commissioner for Sydney, 2000

Affidavits C.D.E. 660

David Bruce Armati, LL.B.

Telephone 233.3377

Cables "Sinsol"

WJS.ECD C.132

20 June 1975.

0012

10

Messrs. Allen, Allen & Hemsley,
Solicitors,
2 Castlereagh Street,
SYDNEY.

Dear Sirs,

CUMBERLAND HOLDINGS LIMITED ats
WASHINGTON H. SOUL PATTINSON &
COMPANY LIMITED

Your reference: JBT:IRH

20

We refer to the Statement of Defence filed by us
on behalf of Cumberland Holdings Limited in this matter
and, in particular, to paragraph 4 thereof.

This paragraph was inserted in error and at the
hearing of the Petition the Company will seek leave to
withdraw it.

Yours truly,

W.J. Sinclair
S I N C L A I R S.

30

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

No. 707 of 1975

CORAM: BOWEN, C.J. in Eq.

TUESDAY, 14TH OCTOBER, 1975

CUMBERLAND HOLDINGS LIMITED & COMPANIES ACT

MR. HUGHES, Q.C., with MESSRS. VOSS and OSLINGTON for
the petitioner.

MR. BAINTON, Q.C., with MESSRS. HELY and WEST for the
company.

10

(Petition dated 2nd April, 1975.)

(Affidavit of J.B. Thynne of 30th April 1975 read
by Mr. Oslington.)

(Affidavit of J.P. Bergin of 27th March 1975 read
by Mr. Oslington.)

(Petitioner's exhibits to be marked numerically.)

(Memorandum and Articles of Association tendered
and admitted as Exhibit 1.)

(Letters dated 15th May, 1975, 30th May 1975 and
13th October, 1975 tendered and admitted as
Exhibit 2.)

20

(The Registrar of the Workers' Compensation Commis-
sion of New South Wales called on subpoena duces
tecum by Mr. Voss. Mr. Badgery-Parker answered
the subpoena on behalf of the Registrar. Mr.
Badgery-Parker produced photostat copies of court
files in answer to the subpoena, and stated that
there was no objection to the documents produced
being made available for inspection. His Honour
directed that access be available to the documents.)

30

(Mr. Voss called the manager, Cumberland Holdings
Limited, on subpoena dated 2nd October, 1975.
Mr. Bainton answered the subpoena and stated that
the documents in paragraphs 1 to 6 were being
brought into court. He stated that the "thing"
mentioned in paragraph 7 does not now exist. Mr.
Voss stated that he wished to reserve his rights
in respect of paragraph 7.)

(Mr. Voss called the manager, Cumberland Holdings

Limited, on subpoena dated 13th October, 1975. Mr. Bainton answered the subpoena, and stated that there was nothing produced under the terms of the subpoena.)

(Mr. Voss called the managing director, FAI Insurances Limited, on subpoena dated 2nd October, 1975. Mr. Bainton answered the subpoena and stated that there were five paragraphs. He stated that the documents contained in paragraphs 1 to 5 were available now; that those in paragraphs 6 and 7 were not available as yet. So far as the documents produced in answer to paragraphs 1 to 5 were concerned he stated there was no objection to inspection. In regard to the minute books, Mr. Bainton conceded that there were some portions which may be relevant. He stated that he had no objection to Counsel looking at the minute books, but objected to divulgence of the contents of the books embodied in paragraph 5.)

10

(Mr. Voss called the manager, FAI Insurances Limited, on subpoena duces tecum dated 13th October, 1975. Mr. Bainton answered the subpoena and stated that at the moment he was not in a position to fulfil the terms of the answer as the subpoena was served but yesterday, and required some fairly detailed records. Call on the subpoena deferred.)

20

(Mr. Voss called John Maurice Messara on subpoena duces tecum dated 9th October, 1975. Robert Keith Payne, of 3/112 Bower Street, Manly, answered the subpoena on behalf of John Maurice Messara. He produced the documents called for under the terms of the subpoena and stated that there was no objection to the documents produced being made available for inspection.)

30

(Mr. Voss called the manager, Eagle Corporation Pty. Limited, on subpoena duces tecum dated 2nd October 1975. Mr. Bainton answered the subpoena and stated that the documents called for were produced other than the 1975 accounts, which as yet did not exist. He stated that there was matter in the minute books which was completely irrelevant and confidential; so long as any inspection did not go beyond Counsel there was no objection to inspection.)

40

(Mr. Voss called the manager, Midland Corporation Pty. Limited, on subpoena dated 2nd October, 1975. Mr. Bainton answered the subpoena and stated that all documents were produced other than the 1975 accounts. He stated that there were matters in the minute books which were irrelevant to the proceedings and were confidential; so long as any

50

inspection did not go beyond Counsel there was no objection to inspection.)

(Mr. Voss called the manager, Lader Pty. Limited on subpoena duces tecum. Mr. Bainton answered the subpoena and stated that all the documents were produced other than the 1975 accounts, which had not yet been done. He stated that there were matters irrelevant to the proceedings and of a confidential nature; so long as any inspection of the minute books did not go beyond Counsel there was no objection to inspection.)

10

(Mr. Voss called the manager, Falkirk Properties Limited, on subpoena duces tecum dated 2nd October, 1975. Mr. Bainton answered the subpoena and stated that other than for the 1975 accounts, which had not yet been done, the other documents were available. He stated that there was matter in the minutes which was irrelevant to the present proceedings, and confidential; so long as any inspection did not go beyond Counsel there was no objection to inspection.)

20

(Mr. Voss called the manager, Fire & All Risks Insurance Co. Limited on subpoena duces tecum dated 2nd October, 1975. Mr. Bainton answered the subpoena, and stated that documents in paragraphs 1, 2, 3 and 4 were produced. The 1975 accounts had not yet been done, and nothing was produced in answer to paragraph 6.)

(The documents in answer to the subpoena addressed to Cumberland Holdings Limited dated 2nd October, 1975 were produced by Mr. Bainton, other than that contained in paragraph 7. Mr. Bainton stated that there was matter contained in the minute books which was irrelevant to the proceedings, and confidential; so long as inspection did not go beyond Counsel there was no objection to inspection.)

30

(Mr. Bainton called the secretary of Washington H. Soul Pattinson and Co. Limited on subpoena duces tecum. John Patrick Bergin, secretary of the company, appeared in answer to the subpoena. Mr. Bergin produced the documents called for under the terms of the subpoena. Access was granted on the same basis as that granted in respect of documents produced in answer to calls made by Mr. Voss.)

40

(Report and consolidated accounts for FAI Insurances Limited, 30th June, 1974, tendered and admitted as Exhibit 3.)

(Report and consolidated accounts, Cumberland

Holdings Limited, 30th June, 1974, tendered and admitted as Exhibit 4.)

GLEN LAWRENCE ALBERT DONOHOO
Sworn and examined:

MR. HUGHES: Q. What is your full name, please,
Mr. Donohoo? A. Glen Lawrence Albert Donohoo.

Q. And you reside at 5 Woodlands Avenue, Blakehurst?
A. Yes.

Q. And what is your position? A. I am a director
and general manager of Deposit and Investment Company,
and also a director of the parent company, Washington
H. Soul Pattinson & Co. 10

Q. Do you have any qualifications in the field of
accountancy? A. Yes, I have. I am a Fellow of the
Institute of Chartered Accountants of Australia.

Q. Did you become a director of Cumberland Holdings
Limited in April 1972? A. Yes, I did.

Q. Prior to that time had you acted as alternate dir-
ector of Cumberland for Mr. James Sinclair Millner?
A. I had. 20

Q. He being at all relevant times the chairman of
Washington H. Soul Pattinson & Co. Limited? A. Yes,
that is right. Mr. Hughes, Mr. Millner became the
chairman on the death of Mr. Pattinson, but I cannot
recall when he died. There is that reservation.

Q. When did you commence acting - in what year did
you commence acting as alternate director of Cumberland?
A. I would say about 1971.

Q. 1971? A. Yes, about 1971.

Q. Ever since you have been associated with Cumberland
has it been a company whose ordinary shares have been
listed on the Sydney Stock Exchange? A. They have. 30

Q. Would you tell his Honour something, please, about
the nature of Cumberland's business during the time of
your association with the company? A. Cumberland
Holdings runs a series of geriatric hospitals, and has
recently acquired two surgical hospitals - a total of
nine hospitals in all.

Q. Is that the main business of the company? A. It
is. 40

Q. Does it have any other business at all? A. No, no
other business.

HIS HONOUR: Q. It is an operating company? Although it is called "Holdings" it is an operating company?

A. Yes.

Q. In these respects? A. Yes.

MR. HUGHES: Q. Mr. Donohoo, when you became a director of Cumberland did you acquire some shares to serve as a qualification for that office? A. Yes, I did. I acquired 4,000 ordinary stock units.

Q. Four thousand ordinary stock units? A. Yes. 10

Q. In relation to your holding of these stock units did you execute this document dated 28th April 1972 which I now show you? A. Yes I did.

Q. The other party to that deed is Washington H. Soul under its common seal, is that right? A. Yes, that is right.

(Deed dated 28th April, 1972 tendered and admitted as Exhibit 5.)

Q. On 9th September, 1974 did you have a conversation with Mr. Lawrence James Adler? A. Yes, I did. 20

Q. I don't want to ask you about the substance of that conversation, but I want to ask you this question. In that conversation did Mr. Adler make any mention to you of the receipt by Cumberland of any letter from the Sydney Stock Exchange concerning the listing of Cumberland shares? Did he make any mention of that to you in that conversation? A. He did not.

Q. He did not? A. No.

Q. On the following day, that is, 10th September, 1974, was a directors' meeting of Cumberland Holdings held? A. Yes, there was. 30

Q. Did you attend that meeting? A. Yes.

Q. Whereabouts was it held? A. It was held in Mr. Adler's office.

Q. In the FAI building, in Macquarie Street, Sydney? A. Yes.

Q. Was that the usual venue for meetings of directors of Cumberland Holdings Limited? A. It was.

Q. At that meeting who was present? A. Mr. Adler,

Mr. Jack Belfer, or John Belfer - I don't know his actual Christian name and myself.

Q. At that meeting was the receipt of a particular letter the subject of discussion? A. Yes, it was.

Q. Who brought that up? Who raised the subject for discussion? A. Mr. Adler tabled a letter that had been received from the Sydney Stock Exchange dated 4th September.

Q. I show you a photostat copy of a letter dated 4th September, 1974 from the Sydney Stock Exchange addressed to Cumberland Holdings Limited. Is that a photostat copy of the letter that was tabled by Mr. Adler at this meeting held on 10th September, 1974? A. It is.

10

MR. BAINTON: I have the original of the letter here, if my friend wishes it.

(Original letter of 4th September, 1974 tendered and admitted as Exhibit 6.)

Q. Now, when that letter was tabled what discussion took place? Would you tell his Honour what the conversation was? Who spoke, and what was said? A. I said to Mr. Adler "Are you going to reduce your holding down to 75% in order to maintain the listing of the company's shares on the Sydney Stock Exchange?" He said, "We are not, We are not prepared to do so." I said, "Well, in that case our shareholders holding the other 20% will be holding shares in an unlisted company, and they have bought these shares on the basis of being listed shares". He said, "Well, we are going to make an offer for the remaining 20%". I said, "What are the terms of the offer?" He said, "We don't know at the moment." He then tabled a letter - a draft of a letter to go to the stockholders to comply with the demand of the Sydney Stock Exchange that we notify Stockholders of the position that the company was placed in if Fire & All Risks did not reduce its holding from 80% down to 75%.

20

30

Q. Will you look at the photostat document I show you? Is that a photostat of a letter, a draft of which was tabled at that meeting? A. Yes, it is a photostat copy of that letter.

40

Q. And did that letter ultimately go out to the stockholders in Cumberland on the date it bears? A. Well, it went out - it is dated 13th September. I presume it went out round about that date.

(Letter dated 13th September, 1974 tendered and admitted as Exhibit 7.)

Q. Now, was there any discussion, and if so, what, about the contents of the draft letter tabled by Mr. Adler? Was there any discussion about that? Was there any discussion about the letter which, in its ultimate form, is Exhibit 7? A. Yes. We took the draft, and we made a few alterations.

Q. Made a few alterations to it? A. Made a few alterations to it, yes.

Q. Can you tell me this: At the time of this meeting of directors held on 10th September 1974 what knowledge, if any, did you have as to share transfers - share dealings - that had taken place prior to that date back in July between Mr. Adler's family companies and Fire & All Risks Insurance Limited? A. I had almost no knowledge. At the meeting held on 16th August, 1974 the share journal was tabled at the meeting and there were certain transactions, but of course in the short time available I could not go through them. But there was one transaction concerning Lader Pty. Limited, and Jack Belfer, who was sitting next to me, said "That is one of Larry's companies". But that is all I knew.

Q. That was on 16th August? A. Yes, that is right.

Q. Have you given his Honour your recollection of the substance of the conversation that took place on the meeting on 10th September? Is there any more you wish to add to that? A. No.

Q. Was there a directors' meeting of Cumberland Holdings on 16th October? A. There was.

Q. 1975? A. 1974.

Q. 1974, I'm sorry. Was there a directors' meeting of Cumberland Holdings on 16th October, 1974? A. Yes.

Q. Who was present at that meeting? A. Mr. Adler, Mr. Belfer and myself.

Q. Will you give his Honour your recollection of what happened at that directors' meeting? What was said, and what was done? A. Yes. At this meeting I said to Mr. Adler, as chairman of the company, "What are we going to do to discharge our obligations under Part B of the Companies Act?" Mr. Adler then tabled a typewritten list of the courses that were available to us under the Companies Act: (a) The Board recommends the offer; (b) the Board does not recommend the offer; (c) The Board does not wish to make a recommendation, and (d) the Board does not consider that it is justified in making a recommendation. Mr. Adler said, "In view of

the conflict of Jack Belfer and myself I recommend that we opt for course number three". I agreed to that.

Q. At that stage had you seen any draft take-over offer documents? A. No, I had not.

Q. At that stage had you received any information from either Mr. Adler or Mr. Belfer - or for that matter, anybody else connected with FAI - of the consideration that was going to be offered to the Cumberland shareholders? A. No.

10

Q. At that meeting of directors was there any discussion about the content of the take-over - of the proposed take-over offer, apart from the matter of recommendations? A. I asked Mr. Adler what the amount of the take-over consideration was, and he said, "We are still working on it".

Q. "We are still working on it"? A. Yes, that is right.

Q. Have you given his Honour the totality of your recollection of what happened at that directors' meeting?

20

A. No, there was another aspect. At that meeting I said to Mr. Adler "I would like to see the investigating accountant's report pursuant to Part A of the Companies Act prepared by a firm of chartered accountants that is independent of both Cumberland and FAI," because Gibbings & Webb, the firm from Parramatta, was the auditor of both Cumberland and FAI, and I felt in the interests of the minority stockholders this report should be prepared by an independent firm.

Q. What did Mr. Adler say to that, if anything?

30

A. He said, "I understand".

Q. Did Mr. Belfer say anything to that proposal?

A. No, I don't think so.

Q. You don't think so? A. No.

Q. Is there anything else you can remember as being the subject of discussion or conversation at that meeting - at the directors' meeting? A. Not that I can recollect.

Q. Not that you can recollect? A. No.

Q. Following that meeting was there held on the same date a meeting of the stockholders in Cumberland Holdings? A. A meeting of the stockholders?

40

Q. The Annual General Meeting. Was that held on the same date? A. Yes, that is right.

Q. Do you remember any discussion in which Mr. Adler took part at that meeting? A. Yes. At the meeting was a stockholder called Malcolm Campbell. He said to Mr. Adler "What are the terms of the take-over offer?" Mr. Adler said "We don't know. We are still working on it". Then Mr. Adler stated "The market in Cumberland shares has been very thin. In fact, the market would not have existed only for us over recent years". He then went on to state - he said "A market such as this, where there is one major stockholder, is susceptible to market rigging, and is not a genuine market".

10

Q. At that stage - talking about 16th October - what was your knowledge, if any, as to dealings in Cumberland stock between Mr. Adler's family companies and Fire & All Risks Insurance? A. At that stage, apart from a fleeting glance at the transfer journal, we did not go into the ins and outs of it, and I caused searches to be made of the various vendors of the shares, and I got these back on 29th October.

20

Q. When did you receive from Mr. Adler the draft take-over documents? A. I received them on 21st October, 1974.

Q. On receipt of them did you study them? A. I did.

Q. Did you, shortly after you received them, draft a letter that ultimately went out under your name dated 14th November 1974? A. I did.

Q. I show you a photostat of a particular page or pages, the first one of which is "draft statement of importance of Part A .. offer", and a photostat copy of a letter dated 21st October, 1974. Are these documents respectively the draft take-over documents that you received from Mr. Adler on 21st October and the covering letter from Mr. Adler to you on the same date? A. Yes.

30

(Draft take-over and accompanying letter, 21st October, 1974, tendered and admitted as Exhibit 8.)

Q. On 28th October did Mr. Adler telephone you with some information about certain approvals? A. Yes. Mr. Adler rang me on the date of 28th October and stated that the take-over documents Part A had been approved by the Commission of Corporate Affairs and by the Sydney Stock Exchange.

40

Q. And did he tell you that the printed documents

would be lodged with Cumberland by a certain date?

A. Yes.

Q. When did he say they would be lodged? A. He told me that they would be lodged with Cumberland by Monday, 4th November, 1974.

Q. Did you attend a meeting of the directors of Cumberland held on 4th November, 1974? A. I did.

Q. Now, at that meeting was the take-over offer, in documented form, tabled? A. Yes, it was. Not actually a printed copy that finally went out. It was not the printed copy that finally went out to the stockholders. 10

Q. Would you look at this document which I now show you? It extends over two pages? A. Yes.

Q. Is that a photostat of the minutes kept by Cumberland of this meeting held on 4th November? A. Yes, it is.

(Minutes of directors' meeting of 4th November, 1974 tendered and admitted as Exhibit 9.)

Q. Now, would you please tell his Honour what conversation took place at this meeting between you and your co-directors about the impending take-over offer, and matters associated with it. Just give us the conversation to the best of your recollection, please. A. We once again discussed the content of the Part B statement. We agreed that we would opt for course number three, and the company - the Board would not make a recommendation. I said to Mr. Adler "I want the right to circulate the stockholders and give them my opinion of the take-over offer." He said "You are entitled to do that, as a director". I then asked who was going to look after the legal side of it, and - 20 30

Q. Could I ask you to pause for a minute? At that stage had you been informed by Mr. Adler or anyone as to the consideration that was proposed to be offered? A. Yes, because it was in the draft take-over documents that I got on 21st October.

Q. You were going to say that you asked Mr. Adler who was to look after the legal side of it? A. Yes, that is right. I asked him who was going to look after the legal side. He said "The documents are being prepared by Messrs. Sinclair, and there was nothing to it". I said, "I don't think that is correct. I believe it would be improper. I expected that we would have an independent firm of lawyers - solicitors - advising us, because the take-over document may be invalid." 40

Q. Just pausing there, why did you mention the need for an independent firm of lawyers? What was your understanding as to Sinclairs' position? A. They were acting for FAI in this matter. Mr. Adler said to me "would you agree to Wronker & Associates acting for us?" I said, "No, I would not, because they have acted for FAI in other matters, and I would prefer a firm who was completely independent". I then suggested Mr. David Walker of Norton Smith. Mr. Adler said, "Yes, I will agree, provided they do the work quickly". I said, "I don't think a fair market has existed in our company's securities over recent months". Mr. Adler said, "Yes, I agree". I then moved a motion- I said I felt - I said "We, as a Board, should have an independent assessment in view of the common directors on the Boards of both companies. There are only three directors in Cumberland, two of whom are on the offeror company" so it left the recommendation to come solely from me. I said that I felt our minority stockholders were entitled to another viewpoint. I said "I would like to have an independent firm of chartered accountants or a leading merchant banker appointed to assess the merits of the take-over offer". Mr. Adler said to me "But that would cost \$20,000". I said, "Well, the report I have got in mind would not cost anything like that. It would cost possibly \$3,000 to \$6,000". He said "But the cost of that would be borne 80% by us, because we hold 80%". I said "That does not come into it. I believe our minority stockholders are entitled to an independent assessment of the take-over bid". I then moved that a firm of chartered accountants or a leading merchant banker be appointed to assess the merits of the take-over bid and that the report be forwarded to the stockholders for their guidance as to whether they accepted the offer or not. The motion was defeated 2 to 1. Mr. Adler and Mr. Belfer voted against it.

Q. Can you remember what happened after that? Can you remember anything else that was said by you to Mr. Belfer or by Mr. Belfer to you? A. Yes.

HIS HONOUR: Q. This is at the meeting? A. Yes. At the meeting on 4th November. I said to Mr. Adler, "I don't think it is a fair go to expect people to exchange a share in Cumberland Holdings Limited with a net tangible asset backing of \$1.25 for a share in FAI Insurances Limited with a net tangible asset backing of 52 cents". He said, "That is the offer. Fullstop."

MR. HUGHES: Q. Prior to this meeting had you done some calculations based on certain documents? A. I had.

Q. As to what was the net tangible asset backing of

ordinary stock units in Cumberland? A. Yes.

Q. And in FAI Insurances Limited? A. Yes.

Q. What was the procedure you used for the purposes of your calculation? A. I took the fixed - taking Cumberland first - I took the fixed assets and took the current assets and added them together. I then deducted the current liabilities and provisions and also the long term liabilities, and struck a figure. From that figure I then deducted the interest of the minority shareholders in a 66 and two third per cent. owned subsidiary, Cumberland Holdings Limited, and I arrived at a net tangible asset backing of the issued capital, both ordinary and preference, of Cumberland. I then calculated the figure for the preference stock unit and deducted the preference capital to calculate the net tangible assets backing of the ordinary issued shares of Cumberland Holdings.

10

Q. What was that? A. \$1.22.

Q. Was that calculation based on published accounts of Cumberland for the year ended 30th June, 1974? A. Yes, on the consolidated accounts.

20

Q. On the consolidated accounts? A. Yes.

Q. In your opinion, as a chartered accountant, what do you say as to the propriety from the viewpoint of proper accounting principles of the approach which you adopted for the purpose of evaluating the net tangible asset value of an ordinary stock unit in Cumberland as just described by you in your evidence? A. I believe it to be the proper method of calculating the net tangible assets backing of ordinary stock units of Cumberland.

30

HIS HONOUR: Q. You used the word "backing" in answer to Mr. Hughes' question as to whether it was asset value. It is not necessarily a valuation, I take it - it is the asset backing that you calculated? A. It is the assets backing based on the consolidated balance sheet of the company and its subsidiary as at 30th June, 1974.

MR. HUGHES: Q. In your view what guidance, if any, does that calculation give to the value of the shares that are the subject of the calculation? A. I think it is an important consideration to a person being offered a share in another company when they compare the value of their share with the share in the other company being offered.

40

Q. Would you please tell his Honour how, for the purposes of making the comparison to which you alluded at the meeting of 4th November, did you approach the task of evaluating the net tangible asset value of the ordinary stock units in FAI Insurances Limited? A. I did it on the same basis.

Q. On the same basis? A. Yes.

Q. Did you reach a figure? A. Yes.

Q. What was the figure you reached? A. 52 cents. 10

Q. Per ordinary share? A. For each 50 cent ordinary share in FAI Insurances Limited.

Q. Just to come back to the meeting, was that the comparison to which you alluded at the meeting of directors held on 4th November? A. It was.

Q. When you put those figures to the meeting as being the comparable net tangible asset value of the respective stock units in the two companies - the ordinary stock units in the two companies - did either Mr. Adler or Mr. Belfer dispute the figures? A. No, they did not. 20

Q. You got to the point in this conversation at which Mr. Adler, according to you, replied, "That is all we are prepared to offer. Fullstop"? A. That is what he said.

Q. Will you go on from there, please, as to what was then said? Will you tell us what was said from then on? A. I have covered the appointment of the legal people? I have covered the appointment of an independent firm? 30

Q. Yes. A. Net tangible asset backing?

Q. I want to ask you this. Please go on, and see if there is anything else you can recall? Was there at any time a break in the meeting? A. Yes. At the meeting of the 4th towards the end of the meeting Mr. Adler left the meeting and I said to Jack Belfer, "I believe that we, as directors of Cumberland, have an obligation to ensure that they get full advice on this matter, and I believe that we should give them an independent assessment of it". 40

Q. Was that after or before you moved your motion?
A. That was after.

Q. That was after? A. Yes.

Q. The motion for the appointment or the retainer of an independent expert? Was it before or after that?

A. It was after that. It was right towards the end of the meeting.

Q. What did Mr. Belfer say to your assertion?

A. Mr. Belfer said to me, "I can see your point. But you will never shift Larry on that. He is very stubborn."

Q. Is there anything else you can recollect as having been said at that meeting? A. No, I don't think so.

10

Q. Now, on 5th November 1974, did Mr. Adler get in touch with you by telephone? A. On the 5th November?

Q. Yes. A. Yes, he did.

Q. Was that to advise you of the date of another directors' meeting? A. Yes. That was the meeting that was set down for the 8th November.

Q. The meeting did not take place on that date?

A. No, it did not take place on that date.

Q. On 6th November did you ring Mr. Adler to inquire whether Norton Smith & Company had come forward with the advice you wanted? A. I did.

20

Q. What did Mr. Adler say? A. He said, "No, we have not got it yet". He said, "It will be tabled at the meeting on 8th November". I said, "Well, I would like Mr. Walker to be in attendance at the meeting". He said, "We will table the advice if we receive it. The meeting has been set. That is it".

Q. What, if anything, was said by Adler to the proposal that Mr. Walker should attend? What did he say when you said that? A. He agreed that he should attend, if he were available.

30

Q. If he were available? A. Yes.

Q. Then you heard from Mr. Adler that the meeting set down for the 8th was not to take place on that date?

A. Yes.

Q. On 12th November did you ring Mr. Adler again?

A. Yes, I did.

Q. Did he inform you that he still had not received Mr. Walker's advice? A. Yes, that is right.

Q. On 13th November did Mr. Adler telephone you to say that he expected to get Mr. Walker's advice that evening? A. He expected to get it that night, yes.

40

Q. And ultimately was a meeting held of the directors of Cumberland on 15th November? A. It was.

Q. Had you prior to that meeting composed a letter which bore date 14th November? A. I had.

Q. Is this a photostat copy of the letter to which you have just referred? A. Yes, it is.

(Letter dated 14th November, 1974 tendered and admitted as Exhibit 10.)

Q. Was that letter tabled at the meeting of 15th November? A. It was. 10

Q. I show you this group of photostats. Is that a photostat copy of the take-over offer and the accompanying documents? A. Yes, that is right.

(Printed copy of take-over offer and accompanying documents tendered and admitted as Exhibit 11.)

Q. I want you to tell his Honour everything you recollect of the conversation that took place at the Board meeting of Cumberland held on 15th November? A. The Board meeting was opened by the chairman, and he tabled the Part A statement that had been received in respect of the take-over document. He then called upon Mr. David Walker. 20

Q. Who was present at that meeting, apart from the three directors and Mr. Walker? A. Mr. Herman and Mr. Sinclair.

Q. Mr. Herman being the secretary of the company? A. Yes, that is right.

Q. You were going to tell us what happened? A. The Board meeting was opened by the chairman. He tabled the Part A statement that had been received in respect of the take-over document, and he then called upon Mr. David Walker to speak on the take-over documents from the legal point of view. 30

Q. By the way, before I get you to go on with that, did you come to the meeting prepared with an aide memoire? A. I did, yes.

Q. In your treatment of the subject matters that were discussed at the meeting did you follow your written or typed aide memoire? A. I certainly did, yes. 40

Q. Have you keep that document, or a photostat copy of it? A. Yes I have.

Q. Do you have it in your possession? A. Yes, I have.

Q. Where is it? Is it in your pocket? A. No, it is in my briefcase. (Briefcase handed to witness by court officer.)

Q. Is that the document from which you spoke? A. It is.

Q. At the meeting? A. Yes.

Q. Did you follow, in your treatment of the subject matters that were discussed at the meeting, the aide memoire that you have singled out of that file? A. I did. 10

MR. HUGHES: May the witness have permission to refresh his recollection from it?

MR. BAINTON: I have no objection.

HIS HONOUR: Very well. The witness may use it to refresh his recollection.

MR. HUGHES: Q. Availing yourself of his Honour's permission, would you please tell us what was said at that meeting? A. Mr. David Walker was called upon by the chairman to comment on the validity of the take-over documents. Mr. David Walker used a letter that he had sent to the company dated 13th November setting out a number of points - observations - on the take-over bid. But Mr. Walker spoke on point 4, I think it was. 20

Q. Yes. A. Point 4 I think referred to the resolution that had been passed at the time the stock units had been split from \$1 shares into 50 cent shares or stock units, and Mr. Walker questioned the validity of the resolution at that time. Mr. Walker went on to say that he did not feel - "I do not feel it relevant. It is not a matter that anybody can use to ambush the take-over offer". He then went on to point 5. I can't recall the details of that, I think point 6 was the directors' qualification shares, but that article had since been rescinded, so that it did not apply. But I cannot recall point 5. 30

Q. Go on, will you, please? A. He then called upon - he questioned the company secretary as to whether the take-over documents had been received at the company's office during office hours. The company secretary, Mr. Herman, said "Yes". 40

Q. Yes. A. Then Mr. Adler tabled the Part B statement.

Q. Yes. A. Now, the question that I put to Mr. Walker was "Are Mr. Adler and Mr. Belfer entitled to vote on this matter? I know of another case where there were common directors of the offeror company and the offeree company. The common directors did not attend the meeting at which the offer was discussed, nor did they vote on it". Mr. Walker said "Provided Mr. Adler and Mr. Belfer disclose their interests they are entitled to vote on this matter". Mr. Sinclair said, "I agree with that view".

10

Mr. Adler had tabled the Part B statement, and I said "I would like to ask Mr. Walker a number of questions. In this regard I table a letter from me raising a number of points. I also table for inclusion in our minutes -"

Q. Was that the letter of 14th November, Exhibit 10?

A. Yes. But my letter had a photostat of the transfer journal of the company, together with copies of searches that had been carried out at the office of the Commission of Corporate Affairs.

10

MR. HUGHES: I call for those documents - that is to say, the original letter dated 14th November 1974 from Mr. Donohoo to the company and the annexures thereto, as described by the witness.

MR. BAINTON: They are not produced at this stage.

MR. HUGHES: Q. Just what were those documents that you produced at the meeting? A. With that letter I produced a photostat of Cumberland Holdings Limited share transfer journal for the ordinary stock units and the two types of preference stock units. I also tabled with my letter copies of searches that I had instructed one of my assistants to make at the office of the Commission of Corporate Affairs. These searches were of companies which were Mr. Adler's family companies.

20

Q. What were they? Can you tell us what those companies were? A. Lader Pty. Limited, Midland Corporation Pty. Limited, Eagle Corporation Limited, and another company that Mr. Adler is chairman of - Falkirk Properties Limited.

30

Q. What period did the folio for the transfer journal cover? A. That would have covered the period from the time of the meeting through to July and even prior to July. I would say for the major part of 1974 it would

be for that period, and possibly for the preference stock - whether or not there were a greater number of transactions - it would possibly have covered a longer period.

Q. Before I go on to get you to describe what was said at that meeting consequential upon the production of this set of documents would you tell his Honour what was your state of knowledge at this time - 15th November - as to dealings in Cumberland shares by Mr. Adler's family companies on the one hand and any company in the FAI group on the other hand - vendor and purchaser dealings? A. I don't quite follow. 10

Q. At the time that this meeting took place what knowledge, if any, did you have as to share dealings between Mr. Adler's companies by way of sale to Fire & All Risks Insurance Limited? A. On 12th July 1974 Mr. Adler's family companies, three of Mr. Adler's children and Falkirk Properties Limited had sold a total of some 194,000 shares - ordinary and preference stock units - to Fire & All Risks Insurance Company Limited. 20

Q. What was your knowledge at the time of this meeting as to the consideration that had passed to the vendors per ordinary stock unit? A. The consideration shown on the share transfers which I actually inspected showed that these vendors had all received \$1.25 cash in respect of every 50 cent ordinary stock unit, and 50 cents cash in respect of every 50 cent preference stock unit, and that covers both classes of preference stock units.

HIS HONOUR: Q. You had seen that before 15th November? A. Yes, I had. Actually I might, if I can, just interpose here? After I had received the take-over documents from Mr. Adler I sought his permission to inspect the share register of the company, and he said, "Yes, you are entitled to do so as a director". At that time I also called for a copy of the Memorandum and Articles of Association of the company. 30

MR. HUGHES: Q. That being the state of your knowledge as to share dealings between Mr. Adler's family companies and members of his family on the one hand, and Fire & All Risks Insurance on the other, I would like you now, if you would, to go ahead and tell his Honour what discussion took place at the meeting of 15th November. You have told us some things that were said concerning Mr. Walker's letter of advice? A. Yes. 40

Q. Can you go on from there, please, if you would?
A. I said to the meeting - I tabled the documents and share transfer journal, and I said that FAI must consider the price of \$1.25 cash to be fair. I said "In support

of my contention I table a copy of the transfer journal, together with details of the transactions plus searches".

Q. Yes. A. "I also table a copy for inclusion in our minutes". At that point Mr. Adler said "The facts are not in doubt". I then proceeded to address a question to Mr. Walker. I said "Mr. Walker, in the light of these transactions are we required to make mention of these matters in our Part B statement pursuant to s. 181G(2)." Mr. Walker then referred to the Companies Act, and he read the relevant section. Mr. Walker said "The directors are entitled to include any information in the Part B statement that they consider necessary".

10

Q. Yes. Will you go on from there? What was next done, or said? Can you carry on from there, please?

A. Yes. Wait there. That's right. I said to the Board - yes. I then said that FAI's offer appeared to be contrary to the listing requirements of the Sydney Stock Exchange, and referred to requirement 5.10.1(e).

Q. Did you explain why you thought so? A. Yes. I felt that pursuant to that section the minority stockholders should receive the same consideration as Mr. Adler and Mr. Adler's family companies had received. Mr. Walker read the section, and said that if the shares had been acquired in contemplation of a take-over bid they should be shown, and it could not be avoided because the shares had been acquired in the name of a wholly-owned subsidiary. Mr. Sinclair said that he agreed with that view.

20

MR. HUGHES: Q. Which was the subsidiary company?

A. Fire & All Risks.

30

HIS HONOUR: Q. And the take-over being by FAI? A. Yes.

MR. HUGHES: Q. Did you have a copy of the Stock Exchange listing requirements with you at this meeting?

A. Yes I had.

Q. Did you show it to the meeting? A. Yes, I showed it to Mr. Walker. He went through it.

Q. Mr. Walker gave that advice, and then what happened? What was said then? It was agreed to by Mr. Sinclair, you said? A. Yes.

40

Q. And then what happened? A. That was at the time I said to Mr. Walker "Should we include this in our Part B statement?" and Mr. Adler, as chairman, said "You have no right to ask Mr. Walker that question. If you have a motion, put it". That was then the motion that I moved.

Q. Was that the mode of speech Mr. Adler usually used? Was that mode of speech usual on his part in your dealings with him at Board level? A. It had been since I refused to approve the take-over offer, yes.

Q. Go on, will you, please. A. The motion I put to the meeting was "I move that in view of the fact that a subsidiary of FAI Insurances Limited has recently paid \$1.25 cash for an ordinary share and 50 cents cash for an 8% preference share in respect of shares acquired from Mr. L.J. Adler's family and from companies in which Mr. Adler's family appears to have an interest we instruct Mr. Walker to advise FAI Insurances Limited that an offer for shares of minority shareholders in Cumberland for a price less than those shown above appears to be in contravention of the official listing requirements of the Australian Associated Stock Exchanges, s. 5(10)(e). That motion lapsed for want of a seconder.

10

(Luncheon adjournment.)

AT 2 P.M.:

20

HIS HONOUR: You understand you are still on your former oath Mr. Donohoe?

WITNESS: Yes, your Honour.

MR. HUGHES: Q. Before the luncheon adjournment you had given his Honour an account of the moving by you of a motion that in effect the consideration for the take-over offer should be a price not less than that which Mr. Adler's family company and members of his family had received earlier in the year. Do you remember giving that account? A. Yes, I do remember that.

30

Q. I think just prior to the adjournment you were about to proceed to give an account of what happened from there on? A. Yes.

Q. Would you proceed with your account, please?
A. The motion that I put lapsed for the want of a seconder.

Q. Yes? A. At that time Mr. Adler said "The price paid of \$1.25 was the market price at that time, and I do not feel that it is relevant that the Board should consider that at this point when the market has fallen so much in the intervening period".

40

Q. Yes. Did you say anything to that? A. No. I had other things coming up here.

Q. Yes. Will you go on, please, Mr. Donohoe? A. As

that motion lapsed I then said that I felt the company should advise - should request Mr. Walker to contact the committee of the Sydney Stock Exchange Limited, seeking from them an opinion as to whether the FAI Insurances take-over bid contravened the listing requirements. I was going to discuss this matter with Mr. Walker, and Mr. Adler said "If that is your motion, put your motion". So I then moved "That the Board of this company request the committee of the Sydney Stock Exchange Limited to advise whether the take-over offer received from FAI Insurances Limited contravenes the official listing requirements of the Australian Associated Stock Exchanges".

10

Q. Was there any discussion of that motion? A. No. It also lapsed for want of a seconder.

Q. Will you carry on please, Mr. Donohoo? What was next discussed? A. I then said to the meeting "In my opinion there has been an unusual pattern in our share market quotations over recent months. In support of my contention I table a copy of the share quotations for our ordinary shares, expected from the Financial Review". I then tabled the list that had been prepared at my office.

20

HIS HONOUR: Q. Did you state what period? A. I think the period covered from the - I think from memory it covered either mid-April or mid-May right through until that time. I would say that it would be a period of some six months.

MR. HUGHES: I call for that document.

30

MR. BAINTON: It cannot be produced for the moment.

MR. HUGHES: Q. Would you look at this photostat document of two pages, numbered respectively - obviously for the purpose of reference 217 and 218? Can you tell his Honour, please, whether those two pages are a copy of the share quotations to which you have just referred as having been tabled by you at this meeting? Is that a copy of the document that you tabled at that meeting? A. No, this is not a copy. This goes on further, because this covers the period up to February 1975, and I would say that this was a copy that went out with my letter at a later date.

40

Q. Well, what did you say once you had tabled it? By the way, can you tell us from your recollection what the pattern of prices was in the document that you tabled? -

MR. BAINTON: If this may be got in a documentary form it is much better than recollection.

MR. HUGHES: I don't propose to desist from the call that I made, but I want to preserve some continuity in the story. That is the purpose.

HIS HONOUR: I will admit it, and bear in mind that it is subject to the production of the information in a document of some form. 10

MR. HUGHES: Q. Can you give your recollection, as best you can, of what the pattern of the prices was at this period? A. Yes. The prices built up about May. I think it was from about 78 or 80 cents right through to about \$1.25 in the first week in July. It remained at \$1.25 I think for, from memory, about four working days, and then the market fell away, and the next buying quotation that came on the market was, I think, 50 cents. 20

Q. Having tabled the document of which you have given your recollection as to its substance, what discussion took place? A. I then said "To protect our shareholders, who will be guided by the high and low prices of our shares during 1974 as quoted in the Financial Review daily, I would like to ask Mr. Walker what action we, as a Board, should take in regard to this matter."

Q. Did Mr. Walker make any reply when you said that? A. I then addressed this to Mr. Walker? "Mr. Walker, in view of these quotations should we seek an opinion from the Commissioner of Corporate Affairs as to whether a full and fair market has existed over recent months in respect of our company's securities?" 30

Q. Did Mr. Walker make any reply? A. He did not get the opportunity to reply. Mr. Adler then said "If you have a motion, move it."

Q. Yes. A. So my motion was "I move that we instruct Mr. Walker to write to the Commissioner of Corporate

Affairs seeking his opinion as to whether a full and fair market has existed in regard to our listed securities."

Q. What happened then? What happened to that motion?

A. That motion also lapsed for the want of a seconder.

Q. You did not speak to the motion, I take it? A. No.

Q. Through lack of a seconder? A. Yes.

Q. When the motion lapsed did you say anything? A. I directed a question to Mr. Walker. I said to Mr. Walker "Now that the Board has refused to carry my motions what do I do to properly discharge my duties as a director of Cumberland Holdings Limited?" Mr. Walker then said that the minutes of meeting should be a full record of my actions and that I, as a director of Cumberland Holdings, was entitled to write to the Corporate Affairs Commission or the Stock Exchange if I so desired.

10

Q. Now what next happened at the meeting? A. At that stage Mr. Adler again said "The Board cannot take into consideration a share price that existed back in July. The market has since fallen." Mr. Walker said that in view of the conflict of interests that he and Jack Belfer had extra efforts had been taken to ensure that the company complied with all Acts, Regulations, laws, etcetera. I then said to him "Do you believe that the minority stockholders are getting a fair go? They are being asked to exchange a stock unit with a net tangible asset backing of \$1.25 for one with a net tangible asset backing of 53 cents?"

20

30

Q. Did you say "\$1.25"? A. I beg your pardon. "\$1.22", I'm sorry. \$1.22, and 53 cents.

Q. Yes. What happened then? A. He then said "I don't give a damn about the success of the offer." I then said "We as a company should be - "I then moved a motion. I will put it this way: "I move that it is the usual practice with reputable companies in a takeover offer where there are common directors, and particularly where two of our three directors are directors common to the Board of both companies, that a

40

leading merchant banker or an independent firm of chartered accountants be retained to express an opinion on the adequacy or otherwise of the take-over offer for the guidance of the minority shareholders." This motion also lapsed for the want of a seconder.

Q. Was there any discussion prior to this lapsing about the substance of it? A. Not that I can recall at the moment. Before the motion lapsed I must say that Mr. Adler - how did he put it? He said "I object to your use of the word 'reputable'". I did apologise to the chairman for the emphasis that I had placed on the word "reputable".

10

Q. Carry on, please. What happened next? A. I then said to Mr. Walker "In view of the unusual circumstances that exist in this take-over offer, would I be justified in seeking such a report, say from Hill Samuel Limited? If so, would I be entitled to charge the expense to our company under s. 180P of the Companies Act?" Mr. Walker looked at the particular section in the Companies Act and said "I believe that such a report would only be one that was as a result of a resolution of the directors, and I do not know whether this would be covered by that circumstance." Mr. Sinclair said "I agree with that view".

20

Q. Was there any further discussion at that meeting?
A. No sir.

Q. Now you mentioned earlier that the letter that you dated 14th November which is, I think, Exhibit 10, was tabled at the meeting? A. Yes, that is right.

30

Q. I now show you Exhibit 10, Would you be good enough to look through that letter, just to refamiliarise yourself with its contents, and I will ask you some questions? A. Yes.

Q. Have you finished that? Have you familiarised yourself with its contents? A. Yes.

Q. Did you provide Mr. Adler and Mr. Belfer with a copy of this letter? A. I did.

Q. At the meeting? A. Yes.

Q. Did they each appear to read it? A. They did.

Q. I want to go through certain parts of it with you. Did either Mr. Adler or Mr. Belfer join issue with you on your assertion in the second paragraph on p.1 that Cumberland was a thriving and expanding nursing home and surgical hospital group? Did they join issue with you on that? A. No.

Q. Did either of them dispute your allegation that FAI Insurances was heavily involved in the insurance industry? A. No, they did not. 10

Q. Did either of them dispute your allegation that the insurance industry appeared to be going through particularly difficult times, and that the outlook for the industry was uncertain? Did either of them dispute that allegation? A. No, they did not.

Q. Did either of them take issue with your attribution to Mr. Adler of a statement about the future of the insurance industry in the event of inflation remaining unchecked? A. No. 20

Q. Did either of them take issue with you on the statements of fact contained in the third paragraph on p.1 of the letter? A. Does that include the opening paragraph?

Q. The third paragraph on p.1. Did either of them take issue with you on the statements of fact contained in that paragraph? A. No.

Q. Did either of them dispute the method of valuation - the method of calculation - set out by you in the fourth paragraph on p.21 as being the method by which you ascertained the net tangible asset value? A. No. 30

Q. Did either of them dispute the statement of fact contained in the fifth paragraph on p.1 that if the offer proceeded, and on the assumption of 100% acceptance, Cumberland ordinary shareholders would hold ordinary shares in FAI with a net tangible asset backing of approximately 53 cents each? Did either of them dispute that statement? A. No. I might point out that Mr. Belfer is also a chartered accountant.

Q. Did either of them take issue with the statement contained in the last paragraph on p.1 of the letter that in your opinion the offer was most unsatisfactory not only with regard to the relative tangible assets backing of Cumberland and FAI shares, but also the absence of any cash alternative? A. We did have discussions, but not at this meeting, about a cash alternative.

Q. Did either Mr. Adler or Mr. Belfer - turning to the top of p.2 of the letter - did either of them dispute your assertion in the first paragraph of that page that over recent months Fire & All Risks Insurance Co. Limited had "acquired the entire holdings of shares in Cumberland owned by members of your family and companies in which you and your family appear to be interested at \$1.25 cash for each ordinary Cumberland share and 50 cents cash for each 8% preference share?" A. No. On the contrary Mr. Adler said, when I put these facts to the Board, "The facts are not in doubt".

10

Q. In the second paragraph on p.2 you expressed your belief that a similar offer to minority shareholders of Cumberland should be made. Do you see that?A.Yes.

20

Q. You went on to explain your belief by saying "A subsidiary of FAI having paid the above prices for the shares of your family and family companies, FAI must obviously consider them to be worth that much. I am not aware of any factors which would justify a lower offer. In fact, Cumberland's profits are running at a considerably higher level now than in July when these share purchases were made." To what extent, if at all, were these suggestions controverted by either Mr. Adler or Mr. Belfer? A. Mr. Adler rejected that statement, because he said that the Board of Cumberland, in assessing the take-over - the Board of FAI, I'm sorry, in assessing a take-over offer could not be guided by prices that existed at the moment, which were considerably less than the market they reached in July 1974. He also made the same comment that the Board of Cumberland could not be.

30

Q. Could not be? A. Yes.

40

Q. The next part of the letter deals with stock exchange listing? A. Yes.

Q. In the second paragraph under that heading you said "I believe it is your intention to encourage acceptance of the take-over offers by pointing out to stockholders that if they do not accept the offers and delisting follows, stockholders may find considerable difficulty in disposing of their holdings at a later date"? A. Yes.

Q. To what extent, if at all, did either Mr. Adler or Mr. Belfer dispute that assertion? A. They did not dispute it.

10

Q. The letter went on to say, in the next short paragraph on p.2, "This statement may be factual, but it certain savours of standover tactics." A. Yes.

Q. To what extent did Mr. Adler or Mr. Belfer dispute that assertion? A. They did not dispute it.

Q. Your next paragraph says "In fairness to the small shareholders who have supported Cumberland over the years, I do not believe it is a fair go to hold the gun at their head and say accept otherwise you may not be able to dispose of your shares in the future". Did either of them - that is, Mr. Adler or Mr. Belfer - dispute that assertion in any way? A. No.

20

Q. I take you to the next paragraph: "After all, it is FAI's own action in increasing its holding from 72% to 80% of the ordinary capital that has precipitated the threat of de-listing." Did either of them dispute that in any way? That is, Mr. Adler or Mr. Belfer? Did either of them dispute that in any way? A. On this point when this came up Mr. Adler made the statement that surely - that it is not improper for the holding company to increase its holding in a subsidiary.

30

Q. I now come down to page 3, towards the bottom, under the heading "Investigating Accountant's Report". You there say "I am disappointed to see that in the take-over documents the investigating accountant's report on the financial accounts of FAI has been prepared by the auditors of Cumberland, Gibbings & Webb of Parramatta I would have thought that under these circumstances it would have been preferable to have the investigating accountant's report prepared by a firm of chartered accountants which is in no way connected with either company"? A. Yes.

40

Q. Was any comment made by either Mr. Adler or Mr. Belfer disputing any of those assertions that I have just read out from your letter? A. No.

Q. Will you tell his Honour, please, why, in the exercise of your judgment as a director of Cumberland, you thought it appropriate to have the accounting section of the take-over documents prepared by independent accountants rather than by Gibbings & Webb? A. First of all, I always felt that Gibbings & Webb, which was quite a small firm, was under the domination of Mr. Adler. Back in 1971 I read the reports on the application that was made by the Registrar of the Workers' Compensation Commission to the Commission to terminate or revoke the licence to write workers' compensation of Fire & All Risks Insurance Company Limited. In this particular report there were certain allegations about the adequacy or otherwise of certain provisions, and in my view, I always feel, in looking at the accounts of an insurance company, one has got to be certain that the provision for outstanding claims and the provision for unexpired risks are adequate. We have seen over recent times some disastrous results in some quite large and well known insurance companies in Australia in the last couple of years, and that is why I wanted an independent report done by a firm Peate Marwick or Price Waterhouse, because of their knowledge in assessing the adequacy or otherwise of these two important items in the balance sheet of an insurance company.

10

20

Q. You went on to say in par. 4 of your letter - I'm sorry, on p. 4 of your letter - that your request for an independent firm of accountants to do the accounting side of the take-over documents was intended in no way as a reflection upon the competence or integrity of the auditors, Gibbings & Webb? A. Yes.

30

Q. Then you went on to argue your case for an independent firm to do the particular job? A. Yes I did.

MR. HUGHES: Q. Did either Mr. Adler or Mr. Belfer at the meeting dispute anything in that second last paragraph of the letter on p. 4, starting from the word "however" down to the end of the paragraph?

40

A. No sir.

Q. Does the account that you have given of what happened at the meeting exhaust your recollection?

A. I think so, yes.

Q. I pass on to the next matter. You made some reference earlier to the fact you had produced at this meeting a copy of the share transfer journal of Cumberland and you specified a period. Could I show you this document, please? Would you have a look at sheet No. 317 (Witness shown document). Is that the original, although it is detached from the binding in the share register, the page of the transfer journal relating to ordinary shares that you produced at this meeting of the 15th November? A. It is.

Q. When I say the page you produced, I mean copy?
A. A photostat.

Q. A photostat? A. Yes.

(Page 31 from share register tendered without objection and marked Exhibit 12).

Q. As far as you can recall was the next contact between yourself and Mr. Adler a telephone call that took place on the 18th November, 1974, three days after the meeting of the 15th? A. Yes.

Q. What was the substance of the discussion in that telephone call? A. I sought information as to when the part A and part B statements would be forwarded to the minority stockholders.

Q. What did Mr. Adler reply? A. He said "It should be going out in the next day or two, depending upon the printers".

Q. Then, on the 19th November, did Mr. Adler telephone you to say that the part A and part B statements would be going out on Wednesday the 20th or Thursday the 21st November? A. Yes.

Q. Then did it come to your knowledge that the offer posted as the formal offer on the 20th November - ?
A. Mr. Hughes, may I just interpose a moment?

Q. Yes? A. In regard to the meeting held on the 15th November, after I had put all these resolutions and they had lapsed, the meeting did adjourn so that Mr. Sinclair, Mr. David Walker and I could discuss the final

settlement of the part B statement where I was not recommending the offer. I overlooked mentioning that and it was also to give me an opportunity to ring Allen, Allen & Helmsley, who were my legal advisers.

Q. The meeting was not concluded? It was adjourned?

A. Adjourned, Mr. Hughes.

Q. To a particular date? A. No, adjourned I would say for an hour or so.

Q. And then, when it was resumed, did anything of substance take place? A. Well, sir, we signed the part B statement.

10

Q. Did it come to your notice that the offer had been posted on the 20th November? A. I was advised it had been posted, yes.

Q. On the 21st November did you circularise the ordinary and preference stockholders of Cumberland Holdings in terms of a document, a photostat of which I show you?

A. I did.

(Two circulars from witness to shareholders, each dated 21st November, 1974, tendered without objection and marked Exhibit 13).

20

Q. Shortly after you sent that letter did anything come to your notice concerning an attitude taken up by the Australian Shareholders Association? A. Yes Mr. Hughes. I was rung by Mr. Dick Tanner, an executive member of the Australian Shareholders Association.

Q. Did he, following the telephone call, forward any document or documents to you? A. He gave me a copy of a letter that they were sending to Mr. Adler.

30

Q. I show you - ? A. Actually sir that was not given to me. He rang me. I had a discussion with him and a Mr. Peter Graham, and that letter was then forwarded to me, after that.

Q. Well, I show you this letter. Is that the letter that you got? A. Yes it was.

(Letter dated 22nd November 1974 from Australian Shareholders Association to chairman, Cumberland Holdings, tendered, objected to, admitted subject to relevance and marked Exhibit 14.)

(Reply dated 25th November 1974 from Chairman Cumberland Holdings tendered, objected to, admitted and marked further part of Exhibit 14.)

Q. Would you have a look please at this photostate of a circular letter to ordinary and preference shareholders of Cumberland Holdings under the letterhead of FAI? Did you receive that document on or about the date it bears? A. I did.

10

(Letter dated 22nd November 1974 under FAI Insurances Limited letterhead to ordinary and preference stockholders tendered, objected to, admitted and marked Exhibit 15.)

MR. HUGHES: That is the letter to which I made specific reference when opening the case, as a letter signed by Mr. Adler in a dual capacity.

20

(Letter from Australian Shareholders Association dated 27th November, 1974, tendered, objected to, admitted subject to relevance and marked further part of Exhibit 14).

MR. HUGHES: I have asked my friend to produce the acknowledgement of it.

MR. BAINTON: I am not aware of that. We will make some enquiries.

MR. HUGHES: Q. On the 29th November did you write a letter to Mr. Adler in terms of a document, of which I show you a photostat? A. I did.

30

(Photostate copy letter 29th November 1974 from witness to Mr. Adler tendered without objection and marked Exhibit 16).

Q. On the 27th November did this circular go out from

Washington H. Soul Pattinson & Company Limited to the ordinary and preference stockholders of the Company?

A. It did.

(Circular dated 27th November 1974 tendered without objection and marked Exhibit 17).

Q. Did you receive this circular addressed to ordinary and preference stockholders in Cumberland from FAI dated 27th November 1974? A. I did.

(Circular dated 27th November 1974 from FAI to ordinary and preference stockholders in Cumberland tendered without objection and marked Exhibit 18).

10

Q. On the 6th December did you have a telephone conversation with Mr. Adler? A. Yes I did.

Q. What was discussed in that conversation? A. I said to Mr. Adler "May I have a copy of the draft minutes of the meeting of the 15th November 1974?"

Q. What did he reply? A. He said they were still being considered.

Q. Later that day, that is the 6th December, did you have a telephone call from Mr. Adler? A. Yes I did, at ten past five that day. He rang to say that the takeover bid had been withdrawn.

20

Q. Was anything else said in that conversation by either of you? A. Not that I could recall.

Q. On the 10th December did you circularise the ordinary and preference stockholders of Cumberland in terms of a document of which I now show you a photostat? A. I did.

(Abovementioned document tendered).

30

MR. HUGHES: Before that is given a number, could I tender first the circular from FAI, I think, withdrawing the offer.

(Circular from FAI tendered and marked Exhibit 19).

(Circular to shareholders of 10th December, 1974 tendered: Objected to on the ground of relevance: admitted subject to relevant, marked Exhibit 20).

MR. HUGHES: Q. Did you on 13th December, 1974 write to Mr. Adler as chairman of directors of Cumberland a letter in terms of the photostat document that I now show you? A. I did.

Q. Did you receive a reply to that letter? A. I think I received a reply of 16th December, did I not? 10

Q. Yes. Is that it or a photostat of it? A. It is.

(Letter of the 13th December, 1974 and reply of 16th December, 1974, tendered: Objected to on the ground of relevance: admitted and marked Exhibit 21).

Q. I next show you a photostat copy of a letter dated 13th December, 1974, from Allen, Allen & Hemsley, to Mr. Adler. Was that letter written on your instructions or on the instructions of the petitioner? A. It was.

Q. Is this a photostat copy of the reply from Mr. Sinclair's firm Sinclairs? A. It is. 20

(Two letters dated 13th December, 1974 from Allen, Allen & Hemsley and 20th December, 1974 from Sinclairs, tendered, marked Exhibit 22).

MR. HUGHES: I will put the original in. It will be easier for your Honour to read.

Q. Would you have a look at this photostat of a letter dated 16th December, 1974. Did you write that letter to Mr. Adler? A. I did.

(Letter of 16th December, 1974, to Mr. Adler tendered and marked part of Exhibit 21). 30

Q. When was the next Board meeting of Cumberland held after 15th November? A. On 18th December, 1974.

Q. Did you attend? A. I did.

Q. Who was present apart from yourself? A. Mr. Adler and Mr. Belfer.

Q. Mr. Herman, or can't you remember without looking at the minutes? A. No, I can't remember that.

Q. What took place at the meeting? First of all, do you have any notes that you made? A. Yes, I have.

Q. Were they before or after the meeting? A. No, they were copies of the protests I wanted to enter at the meeting.

Q. Were they notes to which you adhered in your presentation of your case at the meeting? A. Yes, that is quite so. 10

Q. Do you wish to have access to them to refresh your recollection? A. I would like.

MR. HUGHES: May he?

HIS HONOUR: Yes.

MR. HUGHES: Q. What are you going to look at? Just what you are refreshing your recollection from? A. Here I have a copy of Cumberland Holdings Ltd. notes of the meeting of directors on 18th December, 1974 and the points I was going to raise. I have also noted here who was present and you asked me whether the Secretary was present - I have got here "No Secretary." I have also got here the copies of the requests and the motions I was going to move at that meeting. These are photostats. 20

Q. Did you adhere to the programme that you outlined for yourself on paper before going to the meeting? A. I did.

(Notes of meeting of 15th November, 1974, from which the witness refreshed his recollection, mf.i.i.)

Q. Would you proceed, please, to give an account to his Honour of the discussion that took place at the meeting of the 18th December? A. At the state of the meeting I entered a protest where I said I request that it be noted in the minutes that I register my protest that the chairman refused to provide me with a copy of the minutes of the previous meeting prior to this meeting, particularly as they were available to him, having been approved by the company's Solicitors Norton Smith & Co. 30

Q. Was any response made to that protest? A. The protest was noted and it was minuted.

Q. Did either Mr. Adler or Mr. Belfer make any comment?

A. Mr. Adler said that the company was only continuing its usual policy in regard to minutes, they were not circulated to directors prior to the meeting; they were not circulated to directors prior to the meeting.

Q. Had that been the usual policy? A. It had been but it had been agreed at the earlier meeting that we would have a copy of the minutes circulated afterwards.

10

Q. Would you go on, please? A. At this stage Mr. Belfer said "Can we not restore the harmony that existed in this Board prior to a few months ago?" Mr. Adler very quickly responded "You are either for me or agin me. If you are agin me I will go my hardest." Mr. Belfer said "Would it be possible to reach a compromise? Can I see Mr. Milner?" I said "Check by all means because I feel Mr. Milner would also like to reach a satisfactor compromise."

20

Q. Go on? A. I then moved that a copy of the minutes of each directors meeting be forwarded to each director at least 7 days before the holding of the next meeting, or in the event of the next meeting being held within 7 days or less after the next preceeding meeting at least one day before the following meeting. That motion lapsed for the want of a seconder.

Q. What happened next? A. Next I suggested that my voting against the increase in the final dividend of five to six percent be noted. This transpired at a meeting back in August 1974. Mr. Adler said "I agree you spoke against the motion. I do not believe that you voted against it". Mr. Belfer said "I agree. He was against it but I cannot fully recall." This are my words down here.

30

It was then noted that I did demur from the increase in the dividend from 5 to 6%.

I then went on to say "I wish to draw the attention of the meeting to s. 148 of the Companies Act, 1961, as amended in that minutes of meetings of directors have not

40

been entered in the book required to be kept for that purpose. This being the case officers of the company are in default, which is an offence under the said Act and steps should be taken to remedy the situation forthwith". My request was noted.

I said then "I request that a note of this matter be made in the minutes of this meeting. I then moved that in future the minute book used for the recording of minutes and proceedings of meetings of directors of this company be in a bound book with pre-numbered pages." That motion also lapsed for the want of a seconder. Mr. Adler did say that he would seek legal advice, and re-submit after receipt of the advice.

10

Q. Were any notes of the meeting of 15th November, 1974, tabled at this meeting on 18th December? A. Yes.

Q. Did any, and if so what, discussions take place concerning those minutes? A. The minutes of the meeting, as drafted by Norton Smith, or as drafted by the company secretary, and then vetted by Norton Smith, were tabled at the meeting. I then said that I wanted to move an amendment to the motion to incorporate numerous amendments because I did not feel that the minutes properly recorded the events that took place at that meeting. I asked for an adjournment to do this. Mr. Adler declined my request.

20

I then sat down and very laboriously started to go through the draft, not having had a copy of it before, and tried to insert my amendments into this draft. After getting I think to the end of the second page - it was quite a laborious task - Mr. Adler was quite flushed and he said "You can have the minutes - have a copy of the minutes and take them away and do it at your leisure". I was then --

30

Q. Did you avail yourself of that invitation? A. I did.

HIS HONOUR: Q. Was the meeting adjourned not having confirmed the minutes, or what happened? A. No. I did seek an adjournment but my request was refused, and that is why I had to sit down and laboriously go through and check them.

40

Q. I thought ultimately you were granted - A. Yes, I was - ultimately, yes. Mr. Adler agreed that that matter would not be dealt with at the meeting and the meeting was adjourned so that the minutes would be dealt with at the next meeting of directors.

MR. HUGHES: Q. Have you summarised or given an account of what took place at the meeting, or was there something else? A. No, that completes the matters.

(Documents referring to meeting of 18th December, 1974 from which the witness refreshed his recollection m.f.i.2.) 10

Q. Is this a copy of the minutes entered in Cumberland's minute book of the proceedings of the meeting of the 18th December? A. Yes.

(Minutes of meeting of 18th December, 1974, tendered and marked Exhibit 23).

Q. Following that meeting did an exchange of correspondence, constituted by these two letters both of 18th December, take place between you and Mr. Adler? A. Yes. 20

(Two letters of the 18th December, 1974, tendered and marked Exhibit 24).

Q. Then on 24th December, did you write this letter to Mr. Adler? A. Yes I did.

(Letter of 24th December, 1974, tendered and made part of Exhibit 24).

Q. Did you receive a copy of Mr. Walker's version of the minutes or draft minutes? A. I did.

Q. Would you have a look at this. Is that a photostat of draft minutes as amended in the handwriting of Mr. Walker? A. No, this is a final typed copy after Mr. Walker had put his amendments down the side. There is a copy that he amended and this is a final draft. 30

Q. So there is the copy that he amended and then the final draft consequential upon his amendments - is that right? A. Yes.

MR. HUGHES: I tender those two documents together with Mr. Walker's covering letter to the company, dated 25th November.

Q. Is that right? A. Yes.

Q. Have you got a better copy of that. A. Yes I have.

Q. Would you produce it from your file? A. I think that has got more information on the back. The resolution on the back of that page - is that on your copy? That was handed to me with that draft of the minutes.

10

Q. Who handed it to you? A. It was given to me by Norton Smith.

Q. This is what was given to you by Norton Smith.

A. Yes, right.

(Accompanying letter and draft minutes of Norton Smith admitted, marked Exhibit 25).

(Letter dated 24th December, 1974, tendered and without objection made part of Exhibit 22).

MR. HUGHES: Q. Did you get a copy of Mr. Walker's letter to Cumberland forwarding draft minutes? A. Yes. It was given to me after the meeting of the 18th.

20

(Letter dated 25th November, 1974 added to Exhibit 25).

(Letter dated 2nd December, 1974, tendered; objected to admitted subject to relevance and made part of Exhibit 14).

Q. Did you speak to Mr. Adler on the 2nd January, 1975? I am sorry, did you write to him on 2nd January, 1975, in terms of this brief letter which I show you? A. I did.

(Letter dated 2nd January, 1975, tendered and without objection marked Exhibit 26). 30

Q. Is that a letter from Cumberland Holdings in response to your letter of 24th December, 1974, Exhibit 24? (shown) That is from Mr. Adler? A. It is.

(Letter dated 3rd January, 1975, tendered and without objection made part of Exhibit 24.)

(Letter dated 3rd January, 1975, from Sinclairs to Allen, Allen and Hemsley tendered and without objection made part of Exhibit 22.)

Q. Did you write a letter dated 8th January, 1975, of which this is a photostat copy, to Mr. Adler (shown)?

A. I did.

(Letter dated 8th January, 1975, tendered and without objection made part of Exhibit 24). 10

Q. On the 14th January, 1975, did you receive a letter from Mr. Adler, of which this is a photostat copy?

(shown) A. I did.

(Letter dated 14th January, 1975, tendered and without objection made part of Exhibit 24).

Q. On the 22nd January, 1975, was a meeting of the directors of Cumberland held? A. Yes.

Q. Did you attend? A. I did.

Q. Who was present in the first instance? A. Mr. Adler and Mr. Belfer. 20

Q. Have you any notes that would assist you to give your recollection of this meeting? A. I have.

Q. When were those notes made? A. As soon as I returned to my office after attending the meeting.

Q. Have you got those notes with you? A. I have.

Q. With his Honour's permission, will you get them?

A. (Complies).

(Notes made by witness following directors' meeting of 22nd January, 1975, m.f.i.3.) 30

Q. Assisting your recollection from your notes as far as you wish to, would you tell his Honour please what took place at this meeting which in the first instance

was composed of Mr. Adler, yourself and Mr. Belfer?

A. That is correct. Mr. Adler declared the meeting open, then he said "I move that Mr. Eric Atkinson, a director of FAI Insurance Limited, be appointed a director of Cumberland Holdings Limited". I vigorously opposed this. I said, "I would have liked notice of this appointment, I was not furnished with an agenda prior to the meeting". At this stage Mr. Belfer backed me up. He objected to the way in which the chairman had proposed this resolution.

10

Q. Was Mr. Atkinson known to you? A. Yes. I had met him once or twice, that is all.

Q. By the way, are Mr. Adler and Mr. Atkinson both in the court? A. Yes, they are.

Q. Have they been in court throughout this hearing? A. They have.

Q. Go on. A. As I said, Mr. Belfer said, "I object to the way in which you have approached this matter, Larry, you should explain the reasons behind it". Mr. Adler then said that the quorum of three that we then had was not workable. I then proposed "Why don't we reduce the quorum to two, and furthermore, it has worked quite well since I have been on the board for the past three years". I then said "If we need another director I would be quite happy to see the appointment of another director but a person who was not connected with FAI Insurance Limited" because they already had two out of the three directors. Mr. Adler said "No". The motion was then not put to appoint Mr. Atkinson to the board. Mr. Adler and Mr. Belfer both voted in favour of the motion, I voted against the motion.

20

30

Q. When you said, as you have just recounted, that in your view if anyone else was to be appointed to the board it should be an independent person from outside, did you make that statement in the light of any particular knowledge you had as to Mr. Atkinson's position? A. Yes, of course.

Q. What was that? A. Because he was a director of FAI Insurance Limited.

40

Q. Go on. After the motion was carried against your dissenting vote, was Mr. Atkinson admitted to the meeting? A. He was.

Q. Before he came into the meeting did you say something to Mr. Adler? A. Yes. I said to Mr. Adler "Is this a furtherance of your policy enunciated at the December meeting where you said you are either for me or agin me?" Mr. Adler said, "That is a lie".

Q. What did you say? A. I hotly denied that. I said, "You did say that at the December meeting". 10

Q. What was the next business? A. Mr. Adler then put a motion that Professor Wilso be appointed to the board of Cumberland. I objected. I said "I have got the same objection to his appointment as I have to Mr. Atkinson's, because Pr. Wilson is a member of the FAI board. If we need another director I would be quite happy to see the appointment of an independent person".

Q. What was done about the proposal to appoint Professor Wilson: A. The motion was put to the board and it was carried with Mr. Adler, Mr. Belfer and Mr. Atkinson voting in favour of the motion. I voted against the motion. 20

Q. Was Professor Wilson then admitted to the meeting?
A. No, he was not in attendance, he was away.

Q. What was the next business? Mr. Adler then tabled a completely new draft of the minutes of the meeting of the 15th November and started to read this draft.

Q. Was anything said about the origin of this draft?
A. Yes. I objected. I said, "We retained Mr. Walker to prepare a draft. Who has prepared this draft?" He said, "This has been prepared by senior counsel." I said, "Who?" He said, "Mr. Russell Bainton". I said, "Well, I object to Mr. Bainton acting in this matter as he is already acting for FAI in this matter". And I said, "We did retain Norton Smith for the specific purpose of settling the minutes of the meeting, and furthermore, Mr. Walker was actually in attendance at the meeting." 30

Q. Perhaps I should get you to go on and describe what debate took place, anything further said about these draft

minutes? A. Mr. Adler said "If you had of got yourself a better solicitor (meaning Walker) this would not have happened". I then said, "Mr. Walker's secretary rang me early in January to say that Mr. Walker had agreed that the draft as prepared by him and amended to include my amendments was in order". I then said to her "Have you told Mr. Adler this?" She said, "No, but I have Mr. Walker's instructions to ring Mr. Adler straight away, and I shall do that". I recounted this to Mr. Adler and he denied her ever ringing him. He said "She did ring me but she said that Mr. Walker would be getting in touch with me; this he did't do."

10

Q. This is what Mr. Adler said to you? A. Yes.

Q. Then what happened, was anything said about what should go in the minutes? A. I said to Mr. Adler "You have deleted a lot of the matters from the minutes" and he said, "We have been instructed by senior counsel that we need only include in the minutes resolutions passed at the meeting". In reading this draft I very quickly said to Mr. Adler, "It suited your purpose though to include the section where I apologised for the emphasis I placed on the word 'reputable'".

20

Q. What did he say, that you can recall? A. "No comment" here. I then went on to object that a number of the documents that I have tabled at the meeting had not actually been included in the minutes, the minutes did not state that I had physically tabled these documents at the meeting of the 15th November.

Q. What were the documents to which you were referring?
A. My list of the share quotations of the Cumberland Stockmarket prices extracted from the Financial Review.

30

HIS HONOUR: Q. Was there a copy of the share transfer journal tabled at that meeting of the 15th November?
A. The one that we looked at earlier, your Honour?

Q. Yes. A. No, sir.

MR. HUGHES: Q. What was made of that protest, what was done about that protest? A. Well, none of my protests ever got very far, Mr. Hughes. The chairman then read the minutes.

40

Q. The draft minutes? A. The draft minutes as prepared - as settled by Mr. Bainton.

Q. Would you have a look at this document? (shown)
A. Yes.

Q. Do they appear to be the minutes as ultimately confirmed - that is the minutes of the meeting of the 15th November as ultimately confirmed at the meeting of 22nd January? Is that right? A. No, sir. Well, yes, I beg your pardon. I am sorry, they were confirmed by the board, but of course I put a motion amending these minutes, but only two or three technical matters of my motions were accepted by the board.

10

Q. Does that document there represent the minutes of the meeting of 15th November, 1974 as ultimately confirmed, adopting some of your suggestions as to amendment? I just want to get that quite clear? A. Well, Mr. Hughes, after the - going on a little further, if I may?

Q. All right, yes. A. It was agreed at the board meeting, after my motions had been put - a couple of them succeeded; the others were rejected. It was agreed that a fresh copy would be prepared of the minutes of 15th November incorporating those of my amendments that were carried by the board. Frankly, I cannot say whether this is actually a clean copy off the cuff like this without going through to check it.

20

Q. Perhaps you will have to have a look at it to tell his Honour, if you can, whether that is the draft read to the meeting or is it - just have a look at that and tell his Honour what that represents, the draft read at the meeting, as confirmed at the meeting, or is it a document ultimately confirmed but different from the draft that was read? A. I would say it is the latter, Mr. Hughes, because it is actually signed by Mr. Adler as chairman of the meeting.

30

(Copy of minutes of meeting of 15th November, 1974, tendered and without objection marked Exhibit 27.)

Q. Just proceed. When Mr. Adler read a draft did you proceed - I think you said you moved some amendments, some of which were successful. Just give us the course

40

of the events. A. No, not at that time, sir. That was at the meeting that was held on 29th January.

Q. Go on and tell us what happened at this meeting?

A. The chairman then read the revised draft of the minutes of the meeting of directors of November the 15th, 1974. I moved an amendment to the motion that the minutes be confirmed subject to the following amendments - Mr. Atkinson was acting as secretary, the company secretary was not in attendance, and I had challenged Mr. Adler earlier on this. I said, "Will there be a secretary in attendance?" He said, "No". Mr. Atkinson then started to take down my first amendment. The chairman said "Put your amendments individually, otherwise the lot will be wiped".

10

Q. Did you comply with that suggestion? A. I said, "I refuse to do that, because I do not believe it is a proper way to put an amendment to the motion before the meeting".

Q. Go on, just describe what happened? A. Mr. Adler then asked for an adjournment of the meeting. After a short time of reflecting I agreed to the adjournment of the meeting.

20

Q. Did Mr. Belfer then say something? A. Yes. Mr. Belfer said, "I have spoken with Mr. Milner," who would only see him. Mr. Belfer said, "I had a pleasant meeting with Mr. Milner and Mr. Milner pointed out the Weedman's case and certain share transactions that had taken place in July, 1974". Mr. Adler and Mr. Atkinson said that Mr. Belfer had reported to them that Mr. Milner had stated he had the best Q.C. and that he would be proceeding with the petition. Mr. Atkinson said "I was surprised at that". Mr. Adler said he was also surprised. I expressed my surprise, because I knew that Mr. Milner was seeing Mr. Belfer with the idea of some form of compromise. I said to Mr. Belfer, "Did you put a compromise proposal to Mr. Milner?" Mr. Belfer said, "No, I did not". I said, "Well, what more could Mr. Milner do at this stage?" The discussion was dropped. Mr. Adler then handed me a letter calling for my resignation from the board of Directors of Cumberland Holdings Limited.

30

40

HIS HONOUR: Q. At the meeting? A. During the adjournment, your Honour.

G.L.A. Donohoo, x

MR. HUGHES: Q. Is that a photostat of the letter he handed you? (shown) A. It is, Mr. Hughes.

(Letter dated 22nd January, 1975, tendered and without objection marked Exhibit 28.)

(Further hearing adjourned until 10 a.m. Wednesday, 15th October, 1975.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 707 of 1975

CORAM: BOWEN, C.J. in Eq.

CUMBERLAND HOLDINGS LIMITED & COMPANIES ACT

SECOND DAY: WEDNESDAY, 15TH OCTOBER, 1975

GLEN LAWRENCE ALBERT DONOHOO
On former oath:

HIS HONOUR: You are still on your former oath to tell
the truth Mr. Donohoo.

10

WITNESS: Yes, your Honour.

MR. HUGHES: Q. At the adjournment yesterday I was asking you to give your account of the meeting of directors of Cumberland held on 22nd January, and you were part of the way through that task. I want to go back, if I may, for the moment to one aspect of the meeting of 15th November. Do you recall telling his Honour yesterday that you tabled certain documents at that meeting?

A. I do.

Q. Do you recall saying yesterday that one of the documents you tendered on that occasion was a list taken from the Australian Financial Review of stock exchange quotations in the shares of the company over a period of time? A. I do.

20

Q. Do you also remember saying that you tabled at that meeting photostats of pages in the company's share register journal? A. I do.

Q. Did those pages relate to the ordinary and two classes of preference shares? A. They did.

Q. Would you have a look at these photostat documents that I show you? Would you look at them with a view to answering this question: is each of these pages an identical photostat of the photostat documents you tabled at the meeting? A. It is.

30

Q. (Approaching witness) Would you look at Exhibit 12? Exhibit 12 and the documents in front of you are not identical in relation to the matters entered upon them, are they? A. No, that is quite so.

Q. In the column headed "occupation" in paragraph 12 there is nothing but some occasional ticks? A. Yes.

Q. In the column headed "occupation" in the photostat page which corresponds with Exhibit 12 there are some entries in the column? A. There are.

10

Q. Are those entries in your handwriting? A. Yes, they are.

Q. When did you make them? A. I made them at the time. I was perusing the share transfer journal of Cumberland Holdings and I was also looking at the share transfers, and from these share transfers I was able to note the name of the selling or buying broker as the case may be from the duties impressed stamp that appeared on the share transfer.

(Three photostats of the list of share transfers produced to the meeting of 15th November tendered and admitted as part of Exhibit 12.)

20

Q. I will ask you to come back now to the meeting of 22nd January. You gave some evidence towards the end of yesterday's proceedings of a conversation between yourself and Mr. Belfer concerning discussions or a discussion that had taken place between Mr. Millner and Mr. Belfer. Do you remember that? A. Yes, I do.

Q. Then I got you to identify the letter dated 22nd January, which is now Exhibit 28, which was Mr. Adler's request for your resignation. Do you remember that? A. Yes.

30

Q. Well, will you go on now with your account of the meeting at that point? A. Yes. This took place at the adjournment of the meeting on 22nd January.

Q. This is the tender of the letter? A. Yes. Now, the letter called for my resignation. I read the letter and said to the chairman: "Mr. Chairman, I shall refer this

letter to my legal advisers, but I have no intention of resigning at this stage. I am here to protect the interests of all minority stockholders, not just one stockholder".

Q. What happened then? What did Mr. Adler say to that, if anything? A. Mr. Adler said "I want your personal undertaking that you will not act on this letter, and I will not do so either". Then Mr. Atkinson said "We don't want to be hit with a petition just like that. All our tactics have been based on Jack Belfer's advice that a petition was proceeding".

10

Q. Did Mr. Adler go on to say anything? A. Yes. Mr. Adler said "We are one of the major insurers in Darwin and have a big problem. It may take months to assess the total loss. Claims that were originally for \$3,000 have now gone to \$17,000" - that is, individual claims - "due to monsoonal damage. The government will not let us in to repair the damage. The government has confiscated all building materials. This matter will end up before the Privy Council".

20

Q. Will you go on with your account? A. Mr. Atkinson said "We must therefore preserve liquidity to meet claims". Mr. Adler said "A cash offer would cost us half a million dollars." Mr. Adler then said "We will not be making an offer pursuant to our letter of 6th December, and we will be advising the stock exchange accordingly within 48 hours." Mr. Atkinson stated "The Exchange cannot be given the proper reasons." I then asked -

30

Q. Did he say for what? A. I have not got it in here, but what he was talking about was he could not give the proper reasons for why they could not proceed to make an offer pursuant to the letter of 6th December 1974.

Q. Go on. A. I said "When will the half-yearly results be available?" Mr. Adler said "We can only refer to these in that statement as we will not know the total claims for the reasons I have stated".

Q. Yes. What was next said? A. The next remark I think came from either Mr. Atkinson or Mr. Adler. I believe it was Mr. Atkinson. It says "We cannot

40

consider a share offer as we would have to make a statement as to whether our results have been adversely affected, and this we are not prepared to comment on."

Q. Go on. A. Mr. Adler said to me "It is pointless for you to liquidate Cumberland as the homes are unsaleable."

Q. Yes. A. Mr. Belfer then said "The status quo has been restored." I said to him "Jack, the status quo has not been restored." I said "We, the minority stockholders, now have shares in a company whose listing is in jeopardy". Mr. Atkinson then said "Had the stock exchange done their homework the shares should have been de-listed years ago." Mr. Adler then said "There has been no market in Cumberland shares." I replied "One could hardly expect it, in view of the amount of the take-over bid." Mr. Adler then said "There would not have been a market for years only for us." Mr. Belfer then said "Can we wait to see what happens within the next six months?" Mr. Adler then stated "We may be in no better position then to make an offer." Jack Belfer then said "I suggest I have another meeting with Mr. Millner." I agreed to his suggestion. Mr. Adler then said to me - he said "Your amendments to the meeting held on 15th November 1974 are a waste of time and will be defeated in their entirety." Mr. Adler then said to me "I agreed that you could send out one letter to the stockholders - not two." I don't know the next remark. I don't know his caustic remark, but my aide-memoire says that Adler was also caustic about Souls coming into the fight and sending out a hard-hitting letter, but I cannot recall his actual caustic remark.

Q. Did the meeting then formally resume? A. It did.

Q. What took place between the directors at the resumed meeting? A. My amendment to the motion was discussed. I said to the meeting "To save time, will you give me adequate time to do a proper job to compare the revised draft minutes that have been prepared by Mr. Bainton, and to do so can the meeting be adjourned?" Mr. Adler said "I suggest that the previous draft" - referring to the draft by Mr. David Walker - "plus your amendments be attached to the new draft." I said "No, I will not agree to that. I wish to move an amendment to the

motion." Mr. Adler then said "You can write a letter and I will append your letter to the new draft." I said "No, I don't agree to that." I then asked that in the minutes be entered my protest that I had not received a modified copy of the minutes of the meeting of 15th November 1974, and I then proceeded to draft my protest for inclusion in the minutes. You may recall that yesterday I said that Mr. Herman, the secretary, was not at this meeting, and Mr. Atkinson was acting in that capacity?

10

Q. Yes. A. Mr. Atkinson said "Your protest will be noted," and then proceeded to draft my protest. I said "This is an invidious state of affairs where a director of FAI is actually drafting my protest."

Q. What did Mr. Atkinson say? A. I handed him my draft, and he pushed it aside. He then read out his wording of my protest, so the only opportunity I was given was to amend the wording that Mr. Atkinson had prepared, and I did amend it in a few respects.

20

Q. After you had amended it what happened next? A. Mr. Adler, in his capacity as chairman, ridiculed my wish to submit my own wording, and then adjourned the matter to 28th January 1975.

HIS HONOUR: Q. He adjourned which? A. He adjourned the meeting to give me the opportunity - they had agreed that I be given Mr. Bainton's draft of the minutes so that I could compare it.

MR. HUGHES: Q. Did anything happen between and you Mr. Adler by way of correspondence or personal contact between 22nd and the next meeting held - the adjourned meeting held on the 28th? A. That is between the 22nd and the 28th? I can't recall. There were so many letters. I can't recall if there was one between those two dates.

30

Q. Would you please tell us who was present at the meeting on 28th? A. There was Mr. Adler, Mr. Belfer, Mr. Atkinson, Professor Wilson, was attending for the first time in his capacity of director of Cumberland, and myself. I have not got my notes here.

40

Q. Have you got notes of this meeting? A. I believe so.

Q. Of the same kind as the notes you have been refreshing your recollection from? A. Yes, I have them, I think, yes.

Q. Were they made as an aide-memoire before the meeting or made after the meeting as a record? A. These notes were made during the course of the meeting and some notes were made immediately after the meeting.

Q. With his Honour's permission will you search his records, if they are in court, and see if you can find your notes? - 10

HIS HONOUR: He may do that.

(Witness leaves box to secure notes)

MR. HUGHES: Q. With the assistance of those notes will you tell us - so far as you may require them - will you tel his Honour what happened at the adjourned meeting on 28th January? A. Mr. Adler, as chairman, declared the meeting open. He then tabled the revised draft of the minutes of the meeting held on 15th November. I then tabled my various amendments to the motion - I think there were eight in all - and we dealt with all of my amendments, one by one. I think out of eight amendments all of them were defeated with the exception of two, and they were for the attachment to the minutes of certain documents that I had tabled at the meeting on 15th November and the tabling of the documents were not actually referred to in the revised draft of the minutes. But they were all defeated, 4-1. 20

Q. Will you go on. A. I said to Mr. Adler "How did we pay for the purchase of the Belgrave Nursing Home at Kogarah?" Mr. Adler said "I can't remember." I said to Jack Belfer "Do you know, Jack?", and Jack said "No, I can't remember, either." Mr. Adler said "if the funds were not provided by the Bank of New South Wales they probably came from FAI." 30

Q. Yes. What happened next? A. Can I explain my reasoning as to why I was putting these questions, or does that come later?

Q. Why did you raise this question? (Objected to; question withdrawn). 40

Q. Go on, please. A. I then asked for a cash budget to be prepared for submission to the next Board, because we had extensive borrowings and I wanted a cash budget. I had not seen a cash budget for many many months.

Q. What else happened? A. At that meeting we discussed the purchase of the Buena Vista Hospital at Bellevue Hill. We were advised of the details of that, and also there were tabled the figures in respect of - for the six-monthly period up to December, I think it was. 10

Q. Was there some discussion about the question of your resignation? A. Yes. We had quite a lengthy discussion on the moratorium that was applying to the letter calling for my resignation that had been handed to me during the adjournment of the previous meeting on 22nd January.

Q. What was that discussion, please? A. Mr. Adler said "We will not act on this letter if you give us an undertaking that you will notify us 48 hours before you take action." Mr. Adler said "This letter is operative as far as we are concerned until such time as Allen Allen & Hemsley advise us of the withdrawal of the petition by Soul Pattinsons to seek the compulsory winding-up of Cumberland Holdings Limited." 20

Q. What else, if anything, was said? A. I gave this considerable thought, and I then said to Mr. Adler "You have actually got a stay of proceedings for 10 days, because Mr. Millner is overseas and will not be returning to Sydney for at least 10 days." Upon further reflection I then said "I will agree to give you an undertaking that I shall not act on that letter before 10 a.m. tomorrow morning." I also indicated that I had meetings the next day. 30

Q. Yes. Did Mr. Adler say anything during this conversation that you have not told us about so far? A. Yes. On a number of occasions Mr. Adler said "We have the initiative, and we are not prepared to let it go." Mr. Adler repeated the word "initiative" at least three or four times.

HIS HONOUR: There is just one thing that perhaps you might clarify. 40

Q. Your account of the conversations seems to suggest there was a petition on foot at that time, whereas the petition before me was presented, I think, on 4th April. Was there an earlier petition, or to what was that reference made? A. No, there was not an earlier petition.

MR. HUGHES: Q. I think, as your earlier evidence has indicated, there was discussion between you and your co-directors in which the proposal, or a proposal, to lodge a petition was mentioned, is that so? A. That is correct, yes. 10

HIS HONOUR: Q. Proposed or threatened? A. Yes.

MR. BAINTON: Exhibit 22 might throw some light on that.

(Photostat copy of minutes of meeting of 22nd January 1975 and photostat copy of minutes of adjourned meeting of 28th January 1975 tendered by Mr. Hughes and admitted as Exhibit 29.)

MR. HUGHES: Q. Now, on 29th January did you receive two letters from Mr. Adler? A. I did.

Q. That had been delivered at your office? A. That is correct. 20

Q. Are these photostats of the two letters? A. They are.

(Two photostat letters of 29th January 1975 tendered and admitted as Exhibit 30).

Q. On receiving these letters did you immediately get in touch with Mr. Alder? A. I did.

Q. By telephone? A. I did.

Q. What was the conversation that took place between you? A. I said to Mr. Adler "This is a breach of the undertaking that I had given you. My secretary rang you well before 10 o'clock to say that I was out of the office and would be getting in touch with you upon my return to the office at 11.30." Mr. Adler said "Your secretary did not give me an unequivocal undertaking that the moratorium was still effective. I immediately 30

at 10 o'clock sent a letter to the Stock Exchange saying that Fire & All Risks Insurance Company Limited will be calling an extraordinary general meeting of stockholders of Cumberland to have you removed from the Board."

Q. Had you been engaged on other business between 10 a.m. and 11.30? A. I had. Not related to the company.

Q. Not related to the company? A. No.

Q. Now, did you, on 29th January or thereabouts, receive, as a stockholder in Cumberland, a circular letter from Mr. Adler, on the FAI letterhead, being the document of which this is a photostat? A. I did. 10

(Circular letter of 29th January tendered and admitted as Exhibit 31).

Q. Did you attend a meeting of Cumberland directors held on 30th January at 10 o'clock in the morning?
A. I did.

Q. Who was present at the meeting? A. Mr. Alder, Mr. Belfer, and Mr. Herman, the secretary of FAI and Cumberland. 20

Q. And yourself? A. And myself, yes.

Q. Before the meeting commenced did Mr. Adler make any remarks to you? A. Yes he did.

Q. What did he say? A. He said "I regret that it has come to this".

Q. Did you say anything? A. He made a few laudatory remarks, the exact nature of which I can't remember.

Q. Laudatory? A. Yes.

Q. Anyhow, what happened at the meeting? Have you got notes? A. The secretary tabled a letter received from Fire & All Risks Insurance Company Limited requisitioning an extraordinary meeting of stockholders of Cumberland for the purpose of considering a resolution to have me removed as a director of Cumberland Holdings Limited. 30

Q. I want to go back to the 29th for a moment. Did you issue a circular to shareholders in Cumberland on 29th January? Have a look at that document? A. I did.

(Circular issued by Mr. Donohoo on 29th January tendered and admitted as Exhibit 32).

Q. I'm sorry, I diverted you from the meeting on the 30th. Will you go on and tell us what happened? You said that Mr. Adler tabled a requisition? A. The secretary tabled a requisition.

10

Q. I am sorry - from Fire & All Risks? A. That is right.

MR. HUGHES: That is part of Exhibit 30 - the requisition.

Q. After the secretary had tabled that document what happened? A. Mr. Adler suggested the meeting be held at the Australian Institute of Management Offices over at North Sydney. I had so many phone calls from disgruntled stockholders of Cumberland that were in the city that I said I would prefer to have the venue in the city instead of an out of city venue. Mr. Adler said "I shall see if it is available".

20

The motion was then put to the meeting that an extraordinary general meeting be called for 4th March. Mr. Adler and Mr. Belfer voted for the motion. I voted against it. The secretary then pointed out that it was incumbent upon the company to call a meeting. I could see the mistake I had made, and I said "If you withdraw it I will now vote for it." The motion was put again, and it was carried unanimously.

30

My secretary rang to find out whether the venue was available for that day. It was. When the notice was issued it was still held at the Australian Institute of Management Offices at North Sydney.

Q. Is this a photostat of the notice and attached proxy form issued to shareholders for that extraordinary general meeting? A. It is.

(Notice and proxy form for extraordinary general meeting tendered and admitted as Exhibit 33).

(Photostat copy of minutes of meeting of 30th January tendered and admitted as Exhibit 34).

Q. Now, did you receive on 4th February a circular on FAI letterhead signed by Mr. Adler to ordinary and preference stockholders of Cumberland dated 4th February 1975? A. I did.

(Circular on FAI letterhead dated 4th February 1975 tendered and admitted as Exhibit 35). 10

Q. Did you send to Mr. Adler on 13th February a letter of which this document is a photocopy? A. Yes.

(Letter dated 13th February 1975 and reply dated 17th February 1975 tendered and admitted as Exhibit 36).

(Two circulars, 19th February 1975 and 28th February 1975 tendered and admitted as Exhibit 37)

Q. Now will you come, please, to the meeting of 4th March - the meeting that was requisitioned to procure your dismissal. Do you have a note of what happened at that meeting, or notes that you took to the meeting and followed? A. Yes, I have a copy. 20

Q. Do you want to refresh your recollection? A. I have the speech that I made.

Q. Have you? Would you like to refresh your recollection from it? A. Yes.

Q. Is that document you have produced the speech you delivered, word for word? A. It is.

Q. You read it? A. I read it. 30

Q. Was the meeting taped? A. Yes it was.

(Speech tendered and admitted as Exhibit 38).

Q. You told us you read your speech from your speech notes? A. Yes.

Q. That document has gone into evidence? A. Yes.

Q. Would you tell his Honour, however, how the meeting started and what was said, if anything, before you made your speech in your own defence? A. Mr. Adler was to take the chair, and a proxy stockholder who is connected with me in business got up and protested to the chairman in taking the chair of this meeting where he was the accuser - my accuser - and he was sitting in judgment on me. Mr. Adler refused to vacate the chair. There was a stony silence, and Mr. Adler said "I will now call upon Mr. Donohoo to speak on the motion."

10

Q. Someone moved the motion, I take it? A. Yes, I think it was moved by Mr. Sinclair. I refused to speak. I said "Mr. Chairman, you are my accuser. I must expect you to speak on the motion first." Mr. Adler said "I refuse to." I said "Mr. Adler, you can't. You must speak on the motion." He said "I am not going to." I said "You are making allegations. You must speak." He said "I refuse." So I had no option but to then stand up, and I read the speech that has been tabled in evidence. Partly through that speech, where I called upon FAI to show that there was no conflict of interest so far as they were concerned in my removal from the Board, I called upon them not to exercise their overwhelming voting power of 80%, and Mr. Adler made the quip - he said "You can tell that to the marines." Mr. Alder did not speak on the motion at all.

20

Q. Did anyone condescend to answer your speech? A. No.

Q. Did anyone, including Mr. Adler, contest the accuracy of any of the allegations you made in your speech?
A. He did not. Neither did anyone else.

30

Q. So that when you made your speech, what happened?
A. A number of stockholders spoke on the motion.

Q. Both for and against? A. Everyone of them spoke for the motion (sic). They gave me a great deal of support.

Q. For the motion? A. My apologies. Spoke against the motion. One particular stockholder - only one out of the whole lot - got up, and said "Is this a fight between Souls and FAI?"

40

Q. Did anyone answer that? A. Not that I can recall, no.

Q. Approximately, if you can recollect, how many stockholders or their representatives got up and supported you? A. I would say at least half a dozen.

Q. Do you remember who they were? A. Yes, I can recall there was a Mr. Weine of Dulwich Hill, a Mr. Tree, Mr. McKenzie of C.S.R., chairman of the New South Wales Branch of the Australian Shareholders Association. He got up and put a number of questions to Mr. Adler. He said to Mr. Adler "At the time you claim this buying order was on the market was it a fully-informed meeting (sic).

10

Q. Fully-informed meeting? A. Fully-informed market. Mr. McKenzie said "Mr. Chairman, did you advise the press; did you advise your stockholders; did you advise the stock exchange," and Mr. Adler refused to answer the question.

Q. Refused to answer? A. Yes.

20

Q. What words did he use? A. He did not answer the question.

Q. Did he state his refusal, or just fail to answer? A. He failed to answer the question.

Q. Do you remember any other questions that were put to Mr. Adler that he either answered, or failed or refused to answer? A. One of the stockholders got up and challenged Mr. Adler to appear on television, and said "I will soon take the wind out of your sails in this matter." Mr. Adler did not accept the challenge.

30

Q. Is that all you can remember? A. The motion was then put to the meeting.

Q. Yes. A. And every stockholder on the floor voted against the resolution.

HIS HONOUR: Q. That is in the first instance on a show of hands? A. Yes. Every stockholder voted against the resolution. Mr. Adler and his fellow

directors of FAI who had shares in Cumberland voted for the resolution, and the resolution was defeated on a show of hands by 17-4. Mr. Adler then called for a poll.

MR. HUGHES: Q. Was it Mr. Adler, or Mr. Sinclair?

A. It was one of Mr. Adler's confreres. Yes, I think it was Mr. Sinclair. He was sitting in the front row.

Q. A poll was demanded? A. A poll was demanded, and a poll was subsequently taken by Mr. Harris, of Gibbings & Webb, or at least ballot papers were circulated by him. 10

HIS HONOUR: Q. Was it adjourned to a later date for the declaration of the poll, or was it fairly quick?

A. I left the meeting before the poll was declared. The secretary of Cumberland and FAI subsequently rang me at my office and gave me the details of the declaration of the poll.

(Minutes of extraordinary general meeting of 4th March tendered by Mr. Hughes and admitted as Exhibit 39).

(Letter of 7th March 1975 tendered by Mr. Hughes and admitted as Exhibit 40). 20

MR. HUGHES: Q. Did you attend a meeting on 10th March 1975 of certain minority stockholders in Cumberland?

A. I did.

Q. Can you recall who was present at the meeting apart from yourself? A. (Objected to)

Q. On 10th March 1975 was there a meeting of certain persons that you attended? A. There was.

Q. Where was the meeting held? A. At my office.

Q. Who had taken steps to convene the meeting? A. Wash- 30
ington Soul Pattinson and Company Limited.

Q. Can you recall who was present at the meeting?

A. Mr. J.S. Millner, Mr. Eyres, representing the Mercantile Life Insurance Company Limited (objected to).

Q. Give us the names of the people present, will you?

A. Mr. J.S. Millner, W. Eyres, Mr. R.J. Wilson, Mr. Weine, and -

Q. Just have a look at part of the document I am going to show to you. Those first two paragraphs. (handed to witness)

WITNESS: Mr. J.S. Millner, Mr. R.B. Ramsay, Mr. R.J. Wilson, Mrs. P.F. Jones, Mr. E.E. Weine, Mr. Sowden.

MR. HUGHES: Q. Mr. R.L. Sowden? A. Mr. R.L. Sowden, I am sorry. Mr. M.N. Powell, and Mr. W. Eyers; in attendance Mr. J. Thynne. 10

Q. That is Mr. Thynne of Allen, Allen & Hemsley? A. Right, yes. Mr. J. McKenzie and Mr. R. Tanner, can I say representing?

Q. No, that is what you cannot do. A. Mr. R.H. Neilson, Mr. M.H. Campbell and Mr. Jones. I haven't got his initials.

HIS HONOUR: Q. Have you got his initials? A. No, sir. 20

Q. You need them more than anyone else's. And you were there, of course? A. Yes, your Honour.

MR. HUGHES: Q. Not only Mr. Millner, but you were there as well? A. That's correct.

Q. The next question I want to ask you is did anyone say anything as to the purpose of the meeting? (Objected to: allowed).

Q. Was a resolution passed at the meeting? A. There was.

Q. Was it by majority or unanimous? A. Unanimous. 30

Q. Can you remember the terms of the resolution exactly or would you wish to refer to these minutes to give his Honour an accurate account (Objected to: admitted subject to relevance.)

Q. Would you just look at the part of the minutes headed "Resolution" and from that tell his Honour what the resolution was that was passed?

HIS HONOUR: Q. Perhaps you had better read it aloud or state it to us, Mr. Donohoo? A. "This meeting fully supports the lodgement of a petition in the Equity Division of the Supreme Court of New South Wales by Washington H. Soul Pattinson & Co. Limited, in its own name and at its own expense on behalf of the minority stock holders of Cumberland Holdings Limited seeking an order to have the company wound up or, alternatively, to have FAI Insurances Limited purchase the stock units of the other members of that company at \$1.25 in cash for each ordinary stock unit and 50 cents in cash for each preference stock unit".

10

MR. HUGHES: Q. By the way, is Mr. Belfer now in court? A. He is.

(Leave to file in court notices of intention to appear on petition pursuant to Rule 27 given to Mr. Hughes.)

20

MR. HUGHES: I appear with my learned friends Mr. Voss and Mr. Oslington for the following contributories who have given their notice under rule 27.

Joseph John and Rhonda Daisy Schipp, holding
2,000 preference shares
Josephine Doreen More, 500 preference shares

The following ordinary shareholders :

Jack Wesley Chick, 400
R. & P.E. McPhie, 400
Max James Aréndts, 400
Kevin B. Douglass, 400
Trevor Lyle Curtis, 400
Geoffrey Albert Coward and
Mary Evelyn Coward, 400
William Henry Mark Baker, 800

30

Persons who hold both ordinary and preference shares :

Francis R. and Shirley M. Hammond, 1,000 ordinary
and 100 preference

Clare Viti Feneley, 350 ordinary and 700 preference

HIS HONOUR: I think I should deal with it by giving you leave but on the terms that they are at their own risk on costs.

(Short adjournment)

MR. HUGHES: Q. Mr. Donohoo, using for the purposes of answering this question your knowledge of the business and affairs of Cumberland, can you tell his Honour whether or not during the period of time between 30th June 1974 and 20th November 1974, the latter date being the date of the formal offer for takeover, the business of Cumberland had been affected in any way so as to have an impact of any kind on the net tangible asset value of its ordinary stock? A. I know no event that would reduce the net tangible asset backing of that company. In fact, it would have been enhanced because the company was trading profitably at the time. 10

Q. To what time do you refer? A. Up to 20th November the profits that had been tabled to the board of directors were showing an upward trend and, of course, this was retained profit that does enhance the net tangible asset backing of the shares. 20

CROSS-EXAMINATION

MR. BAINTON: Q. Mr. Donohoo, I think you have been a director of Washington H. Soul, Pattinson & Co. Limited for a number of years? A. I have.

Q. Going back to 1970 or perhaps earlier? A. Earlier.

Q. So, you would have knowledge of when it was and the circumstances in which that company became a shareholder in Cumberland Holdings Limited? A. I have. 30

Q. It initially acquired 50,000 ordinary shares and 108,000 redeemable preference shares from a placement of 150,000 ordinary shares and 150,000 redeemable preference shares which the company made through Constable & Bain, stockbrokers? A. That's right. They were known as Rudd, Bain, McDonald & Co. at the time, though, not Constable & Bain.

Q. I don't want to spend time over what their name was at the time. The placement of ordinaries was at fifty-five cents? A. I think that is correct, yes.

Q. And the preference shares at par? A. That's correct, yes.

Q. At the time those shares were taken up by - I will use the abbreviation "Souls" if I may, perhaps saving us an hour or so - Cumberland Holdings was then and was known to Souls to be a subsidiary of FAI? A. That was probably the case but I think, what, fifty-two per cent held?

10

Q. Whatever it was, it was a sufficient holding to cast a majority of votes at a general meeting? A. That would be correct.

Q. After those shares were taken up, Souls became the supplier of pharmaceuticals to the various nursing homes that Cumberland then had and thereafter acquired? A. We were approached to take up the shares. We did not approach them, Mr. Bainton.

20

Q. Well, whether that be so or not, the fact is that Souls became the supplier of pharmaceuticals to the nursing homes? A. That would be correct but that was not our main intention at the time we took them up, Mr. Bainton. We are an investment company as well.

Q. There is no need to be sensitive about it at the moment. You just answer the questions.

HIS HONOUR: No, it is a fair comment, though. I don't think you need comment on his answer. I think it is a fair response to the connection between the two things to clarify it.

30

WITNESS: Could I explain the situation?

HIS HONOUR: Just answer Mr. Bainton's questions.

MR. BAINTON: Q. The shares were taken up as an investment? A. As an investment, yes, in a listed company.

Q. But, of course, the preference shares were not and

have not been listed? A. I don't agree with that, Mr. Bainton.

Q. You don't? A. No.

Q. I thought you told us yesterday that that was the fact? A. That the listed shares have never been listed? (sic.) - that the preference shares have never been listed? I never said that, Mr. Bainton. I have got quotations given to me by the Sydney Stock Exchange showing the quotes of the preference units on the Sydney Stock Exchange. 10

Q. In 1971 Souls purchased two other substantial parcels of preference shares? A. That would be correct.

Q. 24,100 preference shares from F.A.R., which I will use for shortness, and 157,370 preference shares from FAI? A. Could I just have that again, please? I can't hear you very well.

Q. 24,100 from F.A.R. and 157370 from FAI? A. I would have to take your word for that. I couldn't say whether they were purchased from the respective vendors you are mentioning. 20

Q. Leaving the vendors out of it for the moment, you would recollect a purchase of shares of about those numbers? A. Yes.

Q. Can we take it, again as an investment? A. Yes.

Q. They were eight per cent preference shares?
A. Right.

Q. A reasonable yield to an investment company, bearing in mind that it is tax free? A. Yes, rebatable under s.46, yes. 30

Q. Souls is a listed public company? A. It is.

Q. The ordinary shares taken at fifty-five cents again, you have said, were regarded as an investment? A. That's correct.

Q. What was the yield at that time from those shares - do you recollect? A. I couldn't answer that.

Q. Do you know what the asset backing was at that time? A. If I had reference to our records at the time we did it, I may have, Mr. Bainton. You are asking me to go back a long time.

Q. Would you mind having a look at the 1971 annual report which gives you figures as at 30th June of that year. If you were to assume, which I would ask you to do for the purpose of this question, that there was no significant alteration during the period of the twelve months - - A. Of the end of June 1971? 10

Q. At 30th June, 1971, other than the share placements, I think you would calculate the asset backing in the way you did it the other day at a little over seventy cents per ordinary share. Perhaps if I just give you the calculation, you might tell me whether you agree with it. You would take the shareholders funds shown in that balance sheet? A. Yes. 20

Q. You would deduct from it the preference capital? A. Yes.

Q. The provision for bad or doubtful debts? A. Deduct - why would you deduct that?

Q. You would deduct the following items: preference capital? A. Yes.

Q. The provision for bad or doubtful debts? A. I wouldn't do that, no.

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

Q. Formation expenses? A. Well, I wouldn't go about it the way you are talking of it. I would take the total assets, the tangible assets. I would take off the liabilities and provisions, long term and current, and arrive at the net tangible assets backing. If there was preference capital, I would deduct that preference capital. I would then divide the resultant figure by the number of ordinary stock units on issue. 30

Q. I think we are both doing the same thing in a different way. I suggest you would arrive at 70.6 cents, something more, if you would not make an allowance for the provision of bad debts? A. You are suggesting you would write it back. It is a free and uncommitted provision. Is that what you are saying?

Q. I was seeking to take off all the items which may not in truth represent available assets and I, for that purpose, was prepared to take off so much of the debts as may be doubtful. If you disagree with that, please give your answer? A. No. As I say, I would take a different tack, take the total assets and take off these provisions. 10

Q. No doubt, may I assume, before Souls made this investment it did take the trouble of endeavouring to establish what were the net tangible assets behind the shares it was buying? A. I would expect that would be a reasonable thing for any prudent investor to do, yes.

Q. I wonder if over the lunch hour you would make a calculation and tell me if you arrive at a figure somewhere in the vicinity of the one I put to you. If that figure is correct, your initial acquisition of ordinary shares was at a price a fair way below their then net tangible asset backing? A. That would appear to be the case. 20

Q. But you would not regard that as unusual, would you? A. Well, the investment policy of any company takes in many facets. In buying it, we felt that the geriatric industry was a growing industry. That is why we would take up the shares if they were offered to us at fifty cents and they have a net tangible asset backing of seventy-one cents, Mr. Bainton. We are not prepared to say, "We will pay you seventy-one cents for them." 30

Q. No, of course you wouldn't. The concept of what is the net tangible asset backing of a share is but one of a number of ingredients that you would take into account? A. That is fair comment.

Q. Varying in importance depending on the nature of the assets and the business? A. And its growth prospects, yes. 40

Q. And its growth prospects. And I suppose if one sits down to think about it, a number of other factors as well? A. Correct.

Q. So that the view that Souls took, may we take it, back in 1970 and 1971 was that these shares were likely to be a good investment? A. Correct.

Q. Now, the arrangement, and I have deliberately chosen that word to try and be as neutral as I can, by which Souls was supplying pharmaceuticals to the various hospitals in fact came to an end on 30th July, 1974, did it not? A. It did. 10

Q. I think a letter was written by Cumberland Holdings to the Chairman of Souls to that effect. Do you recollect seeing or being told of that letter? A. I was told of the letter, Mr. Bainton, but I have never seen this attachment that is on the back of it.

Q. Well, I am not at the moment troubled about the attachment. A. Oh, I see. I thought it was the enclosure in the letter. 20

Q. Well, I think it was originally. It may have been taken off before you saw the letter. But, in fact, Cumberland Holdings did cease to deal in pharmaceuticals with Souls after receipt of that letter? A. That's correct.

(Letter from Cumberland Holdings Limited to Washington H. Soul, Pattinson & Co. Limited of 1st July, 1974, tendered and admitted as Exhibit 41).

Q. Mr. Donohoo, the cessation of that business arrangement in July 1974 did not lead Souls to endeavour to dispose of any of its preference shares in Cumberland or any of its ordinary shares in Cumberland? A. We had contemplated it, yes. 30

Q. You took no steps of any nature to endeavour to dispose of any shares in either of those categories, did you? A. Not that I can recall.

Q. They were still regarded as a good investment? A. We had decided to place an order of 10,000, I think it was,

ordinary but I don't think that ordinary - you are talking about preference?

Q. I am talking about both classes. A. Both classes, yes.

Q. I will talk about them one at a time if it would make it easier for you and can we deal with preference shares first. No selling order - I am sorry, no endeavour was made to sell any preference shares? A. Not of the prefs.

10

Q. Or to sell any of the ordinary shares? A. Discussions did take place, yes.

Q. No selling order in respect of any was placed, at least with any member of the Sydney Stock Exchange?
A. No, we had discussed this but I don't think the order was actually placed.

Q. And the discussion, I take it, from what you said, was in respect of 10,000, a parcel of 50,000 beneficially held? A. That's right, yes.

Q. So that, may I take it then, that Souls continued to regard these shares as a good investment? A. At that time, yes. They were still a listed share and the portfolios were varied from time to time.

20

Q. I don't think Souls have ever sold a single ordinary share in Cumberland on the Stock Exchange? A. That would be correct.

Q. And the holding of preference shares taken up in the placement and subsequently purchased together add up to 301,520 out of a total issued number of 603,768 of the two classes of preference shares? A. That's correct.

30

Q. Just a few under half of the total on issue? A. Yes.

Q. Is there a vote attaching to those shares? A. Well, I should imagine when you are talking of preference shares, Mr. Bainton, the only vote would be in the case of a winding up or a down-grading in the rights of the preference shares. I would have to look up the articles.

Q. Somebody would certainly have looked at the articles on behalf of Souls before such a large parcel of those shares was acquired? A. I couldn't answer that.

Q. It would be a very imprudent investment if at least that enquiry was not made, wouldn't it? A. That would seem to be the case, yes.

Q. If somebody did make that enquiry, the investment was a deliberate investment in a company, then a subsidiary of FAI? A. Right.

10

Q. And to the extent that FAI chose properly to use its voting power under the control of the company? A. I am sorry, I didn't hear the last part?

Q. To the extent that FAI chose properly, and by that I mean in accordance with the articles, to use its voting power at a general meeting, Cumberland Holdings was under the control of FAI? A. That would be correct.

Q. At the time that Souls made its investment in it? A. That would be correct.

Q. You have described in your evidence, I think, from recollection, and certainly in your circulars, and by "it" I mean the business of Cumberland Holdings as both thriving and expanding? A. Correct.

20

Q. The dividend in respect of the last financial period of the company, in respect of which a dividend has been declared, worked out at 5½ cents a share? A. The dividend or the earnings per share?

Q. No, the dividend. A. On the ordinary shares, the ordinary stock units?

Q. The ordinary shares, yes. A. No, the last dividend declared - you are talking of the year ended June 1975?

30

Q. I am talking about the twelve month period. There was an interim dividend of 6.5% and a final dividend of 6%? A. With respect, Mr. Bainton, I think the dividend for the year totalled 13%, 6½ cents per share.

Q. That represents something of the order of 12% to

Souls on its investment in the ordinary shares? A. 12%, yes. Of course, that is subject to the s.46 rebate too; that is so. It is tax-free in our hands.

Q. It is tax free marginally over 12% on your original investment? A. Yes.

Q. And if you could get out of your original investment -- A. Yes, all right, yes.

Q. If you could get out of your original investment now a return of \$1.25 in cash, particularly bearing in mind the rather general shortage of that commodity over the last twelve months, it would be making a pretty good capital profit? A. We would only be getting the same price as Mr. Adler got for his, though, wouldn't we? 10

Q. Whether that be so or not, might I have my question answered? A. We would make a profit, yes.

Q. Quite a good capital profit - more than 100%? A. Well, it showed wise investment at the time, didn't it?

Q. Would you agree with me - I think the mathematics are correct - your profit would have exceeded 100%? 20
A. In round figures, yes.

Q. Now, the dividend on the ordinary shares, whether it be your figure or mine, the correct one, was much more than covered by the actual profits? A. The dividend declared was only - was covered by profits. In respect of later years there has been a higher dividend cover, yes, but before - -

Q. I am talking at the moment about the year ended 30th June, 1975? A. Yes, that's correct, yes. 30

Q. And as far as anybody can see into the future at the moment, in any company, it looks as though the business of Cumberland is going to continue to prosper and the profits to continue to increase? A. That could be the case, yes.

Q. Well, I am simply trying to put into other words what I thought you might have meant by your expression "a thriving and expanding business". A. Yes.

Q. You were rather referring then to the profits than to the size of the hospitals, weren't you? A. Yes, quite.

Q. As far as one can see at the moment, the probabilities are that the dividend will either increase or, if it does not, the retained profits would increase considerably? A. Well, yes, of course that depends upon the way in which it is conducted by the now-existing board.

10

Q. Of course, it does, yes, and of course the board that is conducting it now, apart from not having the benefit of Mr. Millner's advice at one stage or yours at one stage, is substantially the same board as has conducted it since the first hospital was acquired? A. Yes, plus the addition of Mr. Atkinson.

Q. Plus the addition of Mr. Atkinson and Professor Wilson? A. That's correct.

Q. And the recent acquisition of the two surgical hospitals in your view is likely to add to the profits also, isn't it? A. Well, that depends upon whether the one at Bellevue Hill which has been purchased, whether it can be fitted out to serve the higher number of patients. It is only approved for a much lower figure than what it is being wired up for, yes.

20

Q. Let me put it this way. You were certainly not against the acquisition of those hospitals? A. No, I was against the way in which we were financing these things and the higher gearing that we were having at the time.

30

Q. What was the approximate time of acquisition? A. The one at Bellevue Hill, Buena Vista, the purchase appeared as capital expenditure in the 1974 balance sheet, so it would have been say, May 1974, yes.

Q. And the other one- before or after? A. I think that was - well, it is either before or after. I just can't recall.

Q. And just so that we can be precise about it, is your complaint that too much money was borrowed or that too

much interest was being paid on the borrowed money or what? A. Mr. Bainton, I was always concerned - -

Q. But could I have that answered, please? A. Well, I can't answer it Yes or No. I have got to give you an explanation. The success of Cumberland - it is rather highly geared. Every home it has got is encumbered and, of course, all these loans are from banks and even though they are on a term basis they are repayable at call at the bank's discretion.

10

Q. Of course, whether you operate that way or in some different way, it is a matter of business judgment?

A. Yes, and if the money comes from FAI it depends upon whether there is any financial collapse in FAI and the domino effect it would have on Cumberland.

Q. Do you know how much money Cumberland has in FAI as at the last balancing date? A. June 1975 - I haven't got a copy of the balance sheet; it hasn't been provided yet.

Q. The date of the last accounts - that is July 1974?

20

A. Well, it fluctuated rather violently, Mr. Bainton. I think it was about 50,000 at that time from memory or 63 - I can't recall.

Q. Do you suggest that at that time there was any difference in the financing policy that Cumberland adopted from that which it adopted ever since it went into that line of business? A. No, that was the general way it was geared up, yes.

Q. It is, after all, not uncommon for a parent company to lend some financial assistance to a subsidiary, even if not a wholly-owned subsidiary? A. It can be done, yes.

30

Q. So far as Cumberland was concerned, that business policy has obviously been quite successful? A. It has to date, yes. That was before the possible effect of Cyclone Tracey, though, on FAI.

Q. I will come to that in due course. The profit increase since the published accounts for the period ended 30th June, 1974, was described in a document which

was tendered yesterday - no, I am sorry, was described in an announcement to the Stock Exchange on 7th March this year as up 31%? A. That is the profit in respect of the six months ended 31st December, 1974?

Q. 1974, yes? A. Yes.

Q. I suppose you saw that announcement? A. I did. (Witness shown Exhibit 40) Yes, I did see it, Mr. Bainton.

Q. Those figures would accord with the accounts that you examined for that period while you were still a director of the company? A. We were given preliminary trading results progressively through the half year. 10

Q. Do I take it from that then that the answer to my question is Yes? A. I couldn't say Yes without checking the preliminary figures that I had, Mr. Bainton, with the announcement you have just shown me.

Q. Something of that order? A. I would expect so.

Q. And being a thriving expanding company, that would, one would hope, unless there is a change in circumstances, continue or even improve? A. I would expect that could be the case. 20

Q. While you were a director of Cumberland Holdings Limited, which I think was commenced on 14th July, 1971, when you became an alternate for Mr. Millner and as a director as such from 19th April, 1972? A. That's correct.

MR. BAINTON: Q. During the period or before from the time Souls first took up shares in this company, did you take any notice of the movement of shares in the company on the Sydney Stock Exchange? A. I watched them, yes. 30

Q. Did you watch prices? A. From time to time.

Q. Did you take any notes or obtain any information in respect of turnover figures? A. I watched the turnover figures.

Q. Would you agree that the transactions in the shares for Cumberland Holdings Limited throughout the whole

of that period have been slight in the extreme? A. In the extreme.

Q. Very few at any time at all? A. Yes, there have been few.

Q. Very few? A. I could not answer very few. It has got a big turnover.

Q. Did it come to your attention throughout that period that the number of shareholders was gradually becoming less and less? A. No, I could not say that.

10

Q. Let me put some figures to you, from the beginning of 1972 or thereabouts until the middle of 1974, the total number of shareholders was reduced to 37 in respect of - I withdraw that - the total number of shareholders of ordinary shares was reduced to 37? A. I was not aware of that.

Q. Would you have noticed that the custom was for those Cumberland, if in fact there were share transfers which had come from between the time of the meeting and the time of the previous meeting? A. Could I have that again?

20

Q. The shares of Cumberland Holdings are freely transferable - the directors consent is not required? A. For the actual transfer, yes.

Q. But notwithstanding that, the company's custom for transfers, which had occurred since the previous directors' meeting, if there had been any at all, would be tabled at the meeting next after they were received by the company? A. I would not know whether that was the custom. The transfer journal was not tabled very often.

30

Q. I suggest to you whenever there was a transfer it was tabled together with the transfer itself? A. There is no resolution, there is nothing noted in the minutes so I could not answer yes or no.

Q. You would not recall either way? A. I did see the transfer journal occasionally.

Q. That was not my question. You would not recall

whether or not there had been a transfer and the transfer documents were tabled at the next meeting? A. When you say "the next meeting", I could not say "yes". I do not know.

Q. Or at a meeting which occurred sometime after that?
A. There were transfer journals occasionally tabled. I could not say whether they were tabled consistently after the transfer.

Q. Was it your practice to look at all to see if F.A.R. had been disposing of shares and who had been acquiring them? A. Not really. The thing was made available but I would not say we went into great detail with it. 10

Q. Would you be able to agree with the proposition that throughout the period I have mentioned, namely as soon as you became a director, with very few exceptions, there had not been any purchasers on the market for shares in Cumberland Holdings other than F.A.R. or Mr. Adler or a company associated with him or some member of his family?
A. I would have to look at the journal to verify what you are saying. 20

Q. You are not able to say from the knowlege you have acquired whether that assertion is right or wrong?
A. I think that would be a reasonable statement but I could not testify the accuracy of it.

Q. Would it be within your recollection that very few occasions have occurred when shares have been sold to somebody who has not been a shareholder at the time of acquisition - that they have been sold to F.A.R. or Mr. Adler or someone associated with either of them?
A. When you talk of Mr. Adler, I would not know. He has so many companies and I have no idea who owns the company who acquires the shares. 30

Q. You would not be able to answer that either way?
A. No. I could not answer for the name of any of the companies.

Q. Can you tell his Honour if there have been any purchases of ordinary shares in Cumberland Holdings in the last three years by someone on the market that you believe not to be associated with Mr. Adler or with FAI? 40

A. Yes, I did see some names that I would not expect, as far as I know, are related to Mr. Adler.

Q. On how many occasions did you observe Stock Exchange transactions in which someone associated with Mr. Adler was not a party? A. I am sorry, I cannot hear you.

Q. What I suggest is on the market generally people who were not at the time shareholders, or associated with shareholders, have never had any interest in Cumberland Holdings or they simply have not been purchased on the market, except perhaps a very small number of purchasers of a very small number of shares? A. I think that would be correct. 10

Q. If you could take your mind back twelve months to the market condition and if a parcel of 30,000 ordinary shares from Cumberland Holdings had been put on the Stock Exchange for sale, could you suggest any possible purchasers of those that would occur to you? A. I have been talking about Mr. Adler. He may be a purchaser. It depends who puts them on the market. 20

Q. The suggestion was made that Fire & All Risks should put a substantial parcel of its ordinary shares on the market - can you give us an idea who might possibly have bought them? A. I would think when you talk of the Cumberland company - I would think that if FAI wanted to reduce its holding from 80 to 75% so our listing was not in jeopardy you could approach a firm of underwriters who would verify it and there would be a buyer for those shares.

Q. You think so? A. I think that could be. 30

Q. Bearing in mind the market conditions in the second half of 1974? A. Yes, the market was not particularly buoyant but the ordinary index did not fall in the period July-November, they only fell 16% and there could be a possibility.

Q. I think your 16% is calculated taking the lowest figure in July and the highest for September? A. No, that is on the ordinary index at the relevant date.

Q. Did you make any inquiries from any of the companies with which you were associated or any of the directors 40

of other companies you knew personally to find out if anybody might be interested in a parcel of shares in Cumberland? A. I would think that pointless because Mr. Adler said they were not prepared to dispose of any of the shares.

Q. You did not? A. I did not.

Q. Not even in an endeavour to dispose of some Soul's shares? A. No.

Q. Did anybody else on behalf of Soul's to your knowledge? A. No. 10

Q. - did they make any inquiries? A. I do not know. I could not answer for other people.

Q. The question was, did anybody make inquiries as far as you know? A. Not to my knowledge.

Q. Do you know how many holders of ordinary shares there were in Cumberland Holdings when you became a director? A. No.

Q. Do you know how many shareholders there were in Cumberland Holdings when you ceased to be a director? A. I think in the order of about 130. 20

Q. Do you know what is the minimum number of holders of ordinary shares which the Stock Exchange Listing requires for the listing of companies? A. As far as I was concerned they said they would retain the listing if Fire & All Risk reduced its holdings from 80 to 75%. They put no limitation on the number of stockholders.

Q. Do you know what the listing regulations stipulate is the minimum number of holders of ordinary shares? A. No, I am not aware of other companies but I know the requirements in regard to Cumberland Holdings. 30

Q. Would you look at s.1A of the Australian Stock Exchange Listing Manual? A. Yes.

Q. Cumberland Holdings has never, since you have been associated with it, been able to satisfy that particular requirement - (Objected to).

MR. HUGHES: I tender the listing.

(Sydney Stock Exchange Listing Manual tendered and marked Exhibit 42.)

HIS HONOUR: If there is any dispute about the manual, both parties can have access to satisfy themselves it is in proper order.

MR. HUGHES: I am instructed what your Honour has is a document in force between September, 1974 and July, 1975.

HIS HONOUR: I will allow that question.

10

MR. BAINTON: Q. If Cumberland Holdings then being unlisted, had made an application to be listed at any time while you were on the Board of Directors, it simply could not have satisfied the requirements I drew your attention to? A. If it came within the category of the Industrial Company Section, that appears to be the case.

Q. You know it does? A. Yes, it is a limited liability.

Q. Are you still considering your answer? A. What you say appears to be correct.

20

Q. Indeed at no time while you have been on the Board has it ever had as many as 200 holders of ordinary shares? A. I cannot answer that.

Q. Are you familiar in a general way with the Stock Exchange requirements regarding the continuation of listing? A. In regard to Cumberland Holdings.

Q. In some of your circulars you refer to the specific provisions in the listing manual? A. Yes, in regard to takeovers, yes.

Q. Do you have a general knowledge of the type of provisions made for the continuation of the listing? A. Quite frankly, no.

30

Q. I show you Exhibit 6. Would you be content to assume that second paragraph of that letter reasonably summarises those requirements? A. Yes, in regard to

Cumberland Holdings there is an overrider in the third paragraph. They make no requirements concerning the stockholders.

Q. May I take it that the "Yes" preceding your answer means you do agree with the question I asked. The second paragraph substantially contains a reasonable summary? A. Yes.

Q. Of the Stock Exchange requirements relating to a group of shareholders? A. You must take other factors into consideration otherwise they would not put the third paragraph in. 10

Q. Perhaps we are understanding different things by the word "regulation" - by the provisions of the listing manual? A. I assume it is verbatim what the listing manual says, yes.

Q. The fact is there is a large measure of discretion in the Stock Exchange presumably as to whether or not it will take action in a particular case? A. That would appear to be the case. 20

Q. You read the third paragraph as an assertion that the company would be delisted if FAI did not reduce its holding to less than 75%? A. That is what I understood by the letter. The list was in jeopardy only if they reduced their holding to 75%.

Q. You would have understood that as a reference to 75% of the ordinary shares? A. It does not make it clear but I would expect that to be the case.

Q. That was an assumption you made.

Q. That in fact has not happened from the date of the letter until now? A. I cannot speak for the Stock Exchange. I presume they are waiting for the outcome of this matter. 30

Q. The reduction has not occurred? A. No.

Q. The shares are still listed? A. They are still under the threat of delisting.

Q. They are still being quoted on the Stock Exchange whilst there is anybody prepared to place a buying or selling order? A. I expect they would continue pending the outcome of these proceedings.

Q. Is that your belief or have you some reason for saying that? A. It is a belief based on that letter.

Q. The basis of your interpretation given of that letter?
A. That is correct.

Q. You personally have been involved in other takeover situations? A. I have. 10

Q. You are not unfamiliar with the tactics normally employed in these circumstances? A. It depends on what you mean.

Q. The general cut and thrust situation between the offeree and offeror company that goes on? A. I think there are certain business ethics to be observed in all takeover offers. I would certainly subscribe to the view that should be done.

Q. And there are certain defensive mechanisms which are advanced that are frequently employed by some people?
A. Yes. 20

Q. They are all fairly well known to those who direct public companies? A. Yes, some would be used by some and not by others.

Q. Would you agree that a very common tactic employed by an offeree company seeking to resist an offer is to publish a figure for the nett tangible asset backing into the share if it happens to be more than its valuation price? A. I have seen that happen. 30

Q. That is often put forward as an argument why an offer should not be accepted? A. I have seen it done.

Q. To speak of the nett tangible asset backing for a share without a lot more information may be quite misleading? A. It depends on the circumstances.

Q. Let me take one extreme example, to talk of the nett

asset backing when those assets are things for which there simply is not a market, or at least no ready market, can be misleading unless the person being told what the nett asset backing is, is already told there was not much prospect of reselling - (Objected to; allowed.)

Q. If you were told for example that the nett asset backing of a share is \$1, that may mislead someone if the fact is that the nett asset backing of this share is virtually unsaleable - unless he is already told of that fact? A. That could be the case, but in the case of Cumberland, the nett assets were bricks and mortar and were saleable. 10

Q. The calculation of the nett tangible asset backing leaves out any figure for goodwill, if it exists?

A. That is so.

Q. There are a number of types of businesses which do in fact have some valuable goodwill? A. It could be so.

Q. You know it to be so? A. Yes, depending on the situation. Goodwill may be a figure if you have a business monopoly and obviously there is something attaching to the goodwill. 20

Q. It is saleable quite readily, saleable on the market?

A. It is saleable. I do not know about readily. A monopoly can be saleable.

Q. To be given the nett tangible asset backing of a share in a company of that nature, without being told there is a value for goodwill, can also be misleading?

A. That seems a very nebulous thing. You have to stick to the facts, what the people regard as a basis, they were both on the same basis, Cumberland and any other Company. 30

Q. The answer to my question surely is "yes"? A. Could I have that again.

Q. If the figure for example on a \$1 share is given as the nett asset backing of the company, which also has a valuable goodwill, the figure is misleading unless the statement is also made that there is a valuable goodwill

not taken into account? A. If the company has goodwill, that is saleable and readily so, it could be, yes.

Q. Not could be, but it is misleading? A. It depends on the circumstances. The monopoly may not be transferable under a government regulation.

Q. That is not the question. I ask you to assume that the company did have a valuable and saleable goodwill?

A. Yes, the answer would be, yes, under those circumstances.

10

Q. Let me put a third situation to you, a business without much by way of bricks and mortar, but depending very much for its profitability on the skill and knowledge of its management team or its employees generally, and to give you an extreme example, an incorporated architect's practice, the value of the shares in that sort of entity - I am sorry - to give the nett tangible asset backing of those shares, in a real way would be completely misleading? A. Because the goodwill is attaching to the talents of the directors of that firm, who could drop dead, yes.

20

Q. There are a number of factors that one would have to take into account over and above the nett tangible asset backing to fix any real assessment of the value of the shares? A. It is supposed to be the nett value of the shares.

Q. In the entirety of your circulars in relation to this matter you have given no reference at all to anything in respect of Cumberland Holdings or FAI, except a figure for the nett tangible assets? A. It is not encumbered upon me to assess the value of goodwill.

30

Q. The fact is in your circulars on the matter and your letters the only aspect of the valuation you mention at all was the nett tangible asset backing of the shares in the two companies? A. I adopted the same basis for both shares.

Q. You could answer that yes or no. Do you want to look at the circulars or do you have a sufficient recollection to agree that is the only aspect of the valuation you have mentioned? A. No, that is not altogether correct

40

because in my advice to the ordinary stockholders and the preference stockholders I pointed out that the difference between their dividend income - I pointed out to the people if they took ordinary shares in FAI, provided the company did not reduce its dividend policy for the 10% issue in October, their income would be slightly higher than what they were getting at that time from Cumberland Holdings. I pointed out to them if they were to take it at its best, they would be enhancing the tangible asset backing of the preference stock units they would have in FAI compared with what they had in Cumberland Holdings.

10

Q. You pointed out to the preference shareholders that the nett tangible asset backing would improve? A. Yes.

Q. I put it to you the only value you sought to place on the shares in either company was that which you derived from your calculation of the nett asset backing? A. I am not a clairvoyant and I took

Q. May I have your agreement with the assertion that the only basis of valuation you used in the language of your circulars and correspondence was what I have just put to you? A. With the proviso that I put the difference in dividend income. That is another factor in considering the merits of the takeover offer.

20

Q. With that proviso would you agree with what I have said? A. Broadly, yes.

Q. Have you had any experience as a chartered accountant in valuing shares? A. Yes, I was a practising chartered accountant before taking up my present position.

30

Q. On what basis, assuming Cumberland Holdings was not listed on the Stock Exchange, would you value a parcel of 10% of its ordinary shares? A. Could I have that question again?

Q. On what basis, making the assumption that Cumberland Holdings was not listed, would you value a parcel of 10% of its ordinary shares? A. What?

Q. There are \$757,530 ordinary stock units on issue? A. Yes.

Q. Let us say a parcel of \$75,000? A. That's assuming it is a unit bearing and they are not listed.

Q. As a basis of valuation, what do you do - as a chartered accountant considering it properly - please do not think I am asking you to do the mathematics, but tell us the basis? A. In valuing any share I look at the circumstances in respect of that particular share and the particular aspects at that time.

Q. Assume you were asked to do so in September of last year in respect of a parcel of shares in Cumberland Holdings and assuming that Cumberland Holdings had been delisted in August of last year? A. And that 80% was owned by FAI? 10

Q. The other circumstances being as they are, or as known to you to be? A. In considering my valuation I would have to take cognizance of the integrity of the people who may be running the place because in a case like this, a company, they may adopt a different dividend policy and it would have a very marked influence on the value of the shares. 20

Q. Can I take it from that, the basis of the valuation would be the earnings basis? A. I do not think you can take that from what I have said.

Q. What would be the basis and if so, give your qualifications? A. I would have to be mindful of what I thought was going to be the future dividend policy of that company.

Q. Would you like to think about it over the lunch hour and tell me at 2 o'clock? A. Yes. 30

Q. And would you do that other calculation? A. By all means.

(Luncheon adjournment).

MR. BAINTON: Q. Remembering those hypotheses I put to you, how would you go about it? A. Mr. Bainton, you are asking me to advise a person acquiring 10% in an unlisted company, I would say to this person ---

Q. Interrupting you, I have not asked you that. I have asked you in your capacity and experience as an accountant to say how you would go about valuing a parcel of shares? A. I am telling you what I would be putting in the valuation.

Q. Before that, can you tell us the particular bases you would use? A. The bases I am telling you are I would talk to the person and ask what he would be prepared to pay for the shares and the matter is put to them ---

10

Q. Let me make it clear. Assuming you were being asked to value an estate for death duty purposes. Would you please tell me the basis on which you would go about making a valuation? A. That is not the question you put to me.

Q. Let me put that to you now and we can put the other question later? A. I have only been reflecting on the proposition you put to me before the luncheon adjournment, not on a probate basis. I want to explain to you the basis upon which you asked me and I would advise the person with these shares. I would point out ---

20

Q. I did not ask you that. I will repeat the question again. Assume I ask you to value the shares on the basis you are being asked - how would you value the shares on the basis that you were being asked to make a price which in your opinion a willing if not anxious purchaser would pay a willing but not anxious vendor to secure shares rather than lose the bargain? A. In Cumberland Holdings?

30

Q. In Cumberland Holdings, in September - on the last day of August, 1974? A. You said in September. I was basing it on the assumption that you said an unlisted company and it was after they had been advised that the listing was in jeopardy.

Q. I do not mind, August or September. Assuming it is not in fact listed at the time you are asked to make a valuation and its shareholding is as you know it, the business is as you know it to be, with the history you know it to be -- A. I would say to my client ---

40

Q. And the prospects which you believe to exist? A. I would say to my client, "The shares you are purchasing in Cumberland Holdings, are a minority shareholding, in an unlisted company, the amounts you are likely to get for the shares when you sell would be completely at the option that the majority shareholder was prepared to pay you for those shares". I subscribe to the theory that I would not take a minority stockholding in an unlisted company and I would have to convey this to my client.

10

Q. Having conveyed all that to your client, if you sought to place a value on it at all, how would you go about it? A. If he felt that the company was going to go into, or could go into liquidation the value you would be prepared to put, would be a figure of around about the lowest, whatever he decided, and the net tangible assets of the company.

Q. Would you tell him that a minority shareholding would not enable him to force a winding-up? A. I would.

Q. If he said - supposing it is not going to go into liquidation, would you put a value on it? A. I would not be prepared to put a value. I would tell him he could buy it as his risk.

20

Q. If he was as persistent as I am and asked you to advise him to fix a price, what advice would you give? A. I would ask what return he expected for the investment and we would work out a figure based on the yield that he expected from the shares.

Q. In other words you would value it on a capitalisation of the expected future profits? A. No, I would not. I would not think it is an option available to me.

30

Q. How would you go about it? Would you clarify your answer? A. If he said "I am prepared to buy the shares knowing full well the problems and the dangers", I would indicate to him, in buying them they would return him X yield on the investment and I would ascertain the yield and if he desired, value the shares accordingly.

Q. Assuming that he told you he expected a yield of 10%. How would you fix the figure? A. I would probably take an average of the dividends of the company over the past five years, look to the current

40

profitability and see the average dividend received and work out the value. I would work on the basis of the average of the return that he wanted and I would be in a position to fix a price that he would pay for these shares.

Q. In fact you are basically capitalising the future maintainable profits? A. That is a risk, but in this case I would not adopt this basis, in a professional basis, because they are the minority shareholding in a company, 80% owned by another company and the value that he will get, will be the figure given to him by the major holder. 10

Q. You would advise him not to buy at all? A. In the circumstances, yes.

Q. But he, being persistent, asking you to value notwithstanding, may I take it your bases of valuation would be to look at the past profits in order to form an estimate of what the future maintainable profits would be and to value on a capitalisation of earnings bases? A. That is one aspect but I would also give him another bases of taking a mean between the two figures and the net tangible assets backing of the company. 20

Q. You are being asked as a person who is thought to be an expert, to value shares. Do you say you would not arrive at a figure or you would give your client a range - you are asked by this client who has not been frightened off, to place a value on the shares for him? A. In view of the reservations I would hold I think I would ask him to do his own valuation. 30

Q. Let me go to the alternative position and ask you would you value those shares, on the same assumption, for the purpose of New South Wales death duty, bearing in mind you must arrive at a figure? A. I would not be aware at the moment - it is many years since I have been practicing - of the requirements of the Commissioner for Stamp Duties in this type of valuation.

Q. Assuming you are asked to express an opinion as to what figure a willing but not anxious purchaser would pay a willing but not anxious vendor to secure the shares rather than not have them? A. I do not think 40

with respect, Mr. Bainton, it is fair to ask me when I have this feeling against that fact. I know it is only worth what you can get but I do not think it is fair to persist. I cannot go ahead and talk of that type of person as a professional man when I have raised these reservations with the client.

Q. Are you saying you cannot divorce yourself from your feelings in this matter sufficient to make a valuation of that nature? A. I am talking of the situation where you have one major shareholder in any company. 10

Q. I am asking you to take that into account in forming your valuation and to value it on the basis I have put to you, on the assumptions I have put that the shareholder died and one has to place a value on the shares for probate? A. I think under those circumstances it may be a fair valuation to take the mean between the earnings derived and the net tangible asset backing.

Q. Is that the way you as an expert would arrive at the figure? A. In this case. We are talking of Cumberland Holdings, I would not, but you are talking about another matter. 20

Q. I think I have said a dozen times that I am talking about Cumberland Holdings. Do you want me to repeat all the hypotheses? A. No. I cannot say I could do anything else but tell you the numerous bases of valuation I have already done and given these to the particular client but when it comes to the estate duty matter I find it hard in the shortness of time to give an answer to that. 30

Q. You are not prepared to express any view as to the basis on which in these circumstances a proper valuation of these shares would be made? A. I suppose if it gets down to the nth degree, it would come out at the net tangible asset backing.

Q. Can I suggest to you in the circumstances, nobody purchasing a parcel of \$75,000 shares, slightly less than 10% of the capital, could hope to get the net asset backing of those shares? A. Yes, unless they went into liquidation. 40

Q. Over which he has no control? A. Unless he was an oppressed stockholder.

Q. I will repeat the question to you. Are you not prepared as a chartered accountant to tell us on what basis, on the assumptions I have been putting, you would value that parcel of shares? A. I have enumerated to you all my reservations. You are asking me for an equivocal answer which I find difficult to give under the circumstances and you are forcing an answer. I would say I would probably have to value them as the mean between the earning value and the net tangible asset basis.

10

Q. Why take the asset backing into account in that way - by way of increasing the figure you could reach on the earning basis? A. That would depend on what effect it had on the figure and I do not know whether they would reduce or increase it.

Q. If the effect would be to increase it, would you say the valuation was the higher figure? A. It depends on the wishes of my client.

20

Q. No, you are being asked with a hypothetical client for your opinion as to the value? A. Could you give me that question again?

Q. Assuming or imagine that I am your client and I am asking you for a value for probate purposes of a parcel of 2000 ordinary shares in Cumberland Holdings for the estate of a deceased person, who died some time in August or September, 1974, on the basis of the facts as you know them, and making the one assumption, contrary to the true fact, that the shares were not then listed? A. Under those circumstances, with the qualifications I have enumerated, I would probably go for the earning value.

30

Q. Now tell me what the qualifications are that you have in mind now in case there is any mistake? A. They are shares that represent 10%, of the capital. It is an unlisted company where the balance of 90% is held by one holder representing 80% and there is no prospect of the company being liquidated.

Q. These are the assumptions. Do you have any qualifications? A. I beg your pardon?

Q. They were the assumptions, the facts on which you were asked to reach a valuation. You said you made that an earnings basis and you wanted to put some qualifications on it. I want to know the qualifications? A. They represent 10% of the issued capital of an unlisted company. The company would not be going into liquidation because if it was the prospect is they would be worth more. This is the earnings basis. When he came to sell them he could possibly only sell them to the one major holder. 10

Q. But your client is the executor of a deceased estate who did not buy them. He had them thrust on him and he has to pay the duty in respect of their value. That is the figure you are being asked to fix. I thought we had got to that stage. A. The client would probably elect for the lowest figure.

Q. We have got to the stage where you as an expert would use the earnings basis for valuation. You would then have to decide on an appropriate capitalisation, selecting a capitalisation rate as the essential step in a valuation on that basis? A. Yes. 20

Q. And in determining that rate you take a lot of factors into account? A. Yes.

Q. You would do that of course? A. Yes.

Q. Having come to your decision you would make your valuation on that basis. I think you have conceded you would? A. Yes, with the reservations.

Q. They were qualifications a while ago and now they are reservations? A. My apologies. 30

Q. What were the qualifications or reservations? A. The qualifications I would put in my report to the client, who is the executor of the estate?

Q. Who is going to give the valuation to the Commissioner of Stamp Duties? A. Under the circumstances you have put I would probably go for the earnings basis on the assumption of the continuity of the business.

Q. I think you would find yourself in the majority view but you did say you had some qualifications. Do you say you have some qualifications? A. In the circumstances you have enumerated and for the purpose for which the valuation is being sought by you from me, probably not.

Q. If I were to come to you as a client and ask you to value the shares on the basis I was contemplating buying them. What advise would you give as to that? A. This would be the advice I would give if you were buying shares in an unlisted company with only 10%. 10

Q. If I asked you as a client to value them for me so I could decide to take them, would you use the same bases? A. I would give you a number of bases because it is your money and you could decide what you want to do. I do not think it is incumbent on me to tell you what to pay.

Q. You may suggest things. Assuming you are asked to value a parcel of shares in Cumberland Holdings and let us take the last day of August, 1974 but on the terms that the shares were not listed and let us say that the person asking your advice already has more than 75% and wants to know your opinion as to how he can value some outstanding ordinary shares which he contemplates buying? A. That is an entirely different situation. He is a majority holder. He controls the company. 20

Q. Making those assumptions and bearing in mind that he could pass a resolution for the winding up at any time, how would you go about fixing a figure that he could properly pay? A. I think I would in my valuation give him a number of values based on the different yields that he may expect to derive from the investment, capitalise on three yields and I would also give him a value of the net tangible asset backing as he is in a position to have the company liquidated and realise on the assets. 30

Q. Assuming that he is a person without any business experience and he comes to you for advice and you have given him this advice and he asks you what is the proper basis on which he should value them? A. I would expect if he owned 75% of the capital he would have sufficient business experience of his own to decide what is proper to pay for the shares. 40

Q. Would you try very hard to make the assumption that he wants your advice on that? A. He would indicate to me what he expects as a return on his investment because in buying these shares he must take cognizance of other investment opportunities available to him. When he told me what he expects to get on his investment by way of yield, I would value that according to his request.

Q. What he wants to know is what price he can pay to get the shares rather than lose them or give them to someone else? A. There would not be many buyers of the shares probably. 10

Q. Assuming there is someone in the market, if you can? A. Under those circumstances I do find it difficult to make those assumptions.

Q. He could put the company into liquidation at any stage and recover the tangible asset backing? A. Yes.

Q. That would be a most important ingredient in coming to a conclusion as to the value of the shares to that person? A. Yes, I think I have said that. 20

Q. Much more important than the yield? A. It would be, depending on whether he wanted to continue that business or if he had an idea to wind it up.

Q. He has the ability to do whatever he wishes to. He could change his mind overnight? A. He could.

Q. I want to put a slightly different situation to you. Again I am dealing with Cumberland shares, and I am assuming - I am dealing with Cumberland ordinary shares, and I am assuming they are not listed. Otherwise the same circumstances. Do you follow what I am putting to you? This time you are being asked to advise someone who has already got 72%, and is being offered a parcel of 4%, or 4% plus, taking his holding to 76%, and he is asking you to advise him what those 4% would be worth. On the basis of that assumption that I have put to how would you go about that? A. If he explains to me that by acquiring the extra 4% it would put the listing of that particular company in jeopardy, and thus squeeze the minority shareholders - 30

Q. That is not what I am putting to you. I am asking you to assume that they are not listed? A. I beg your pardon. I am sorry.

Q. I am asking you to assume that they are not listed. I am also asking you to assume that he is asking you for financial advice, not for ethical advice? A. I beg your pardon?

Q. He is asking you for advice as to what the value of the shares is - not as to business ethics. He is asking you for financial advice, and not for ethical advice? 10
A. Well, I think the same conclusions as I have advised before. He would have to - you put these stipulations on it. I would give him the alternatives of the various yields he would expect and mention to him the net tangible backing - the net tangible asset backing.

Q. If he is persistent, and he wants your advice as to which is the proper one of these alternatives for him to adopt, what would you tell him? In those circumstances what would you tell him? A. You are assuming he has no knowledge at all - no business acumen at all? 20

Q. I don't mind whether you make that assumption or not. I want you to assume that he wants your advice, as a businessman. A. I would say to him that if you require to buy "X" shares, and they have a yield of so much, that is the amount you would pay for the shares, and the tangible asset backing is "X" number of dollars.

Q. Can't we go the further step? Could not you possibly tell him what, in your opinion, if those two figures differed, was the one that he should take into account? 30
Couldn't you go that much further and tell him that?
A. Well, I would tell him to offer the lower of the two figures.

Q. No doubt that is a significant piece of commercial advice, but that is not what you are being asked for. That is not what I am asking. You are being asked to tell the figure at which these shares should be evaluated so that he can go off and do his negotiating with the benefit of that advice. That is what you are being asked for. A. Well, as he is doing the negotiations I would give him the parameters, and let him make the 40

decision in the course of negotiations. He would make his own decision on the basis of what I told him.

Q. You would not be prepared to tell him what, in your opinion, the value to him of these shares was? You would not be prepared to do that? A. I don't think it is - it is not incumbent on me to do that for him.

Q. It is not incumbent on you to do that? A. No.

Q. So that you would refuse, in effect? A. No, I don't think that I am refusing. What I am doing, I am giving him the various bases. I am not refusing.

10

Q. I want to put a slightly different set of facts this time. I am still dealing with Cumberland Holdings, but I want to put to you a slightly different set of facts. This is dealing with Cumberland Holdings at the same time - that is to say, at the end of August last year, and again I want you to assume that the shares are not listed? A. Yes.

Q. Will you make that assumption - that the shares are not listed? A. Yes.

20

Q. But this time the major shareholder has, say, 51% - over 50%, but not significantly over. Say he has 51%. He has something slightly over 50% - say 51% - and somebody else is contemplating purchasing a parcel of, say, 50,000 ordinary shares, and he asks you to value them for his information. What basis would you use? A. The same basis that I have referred to if he was buying an extra 4%.

Q. In other words, you would use the earning basis?
A. And give him the net tangible asset backing at the same time.

30

Q. Can you tell me what the dividend had been on the Cumberland Holding shares for the years 1968, 1969 and 1970, either in terms of so many cents per share or a percentage? A. I am sorry, I could not hear that.

Q. Could you tell me what the dividend on the Cumberland Holding shares had been for the years, 1968, 1969 and 1970? Could you do that, either in terms of so

many cents per share or percentage? A. No, I can't do that.

Q. Have you ever known what those figures were? A. I cannot recall it to my memory, no.

Q. If in all of these examples that I have put to you we alter one factor, and assume that the Cumberland shares were in fact listed, would that alter the basis of the sets of assumption that you would use in making your valuations? A. If they are listed, their value would be the market value on the exchange. 10

Q. It would be the value on the exchange? A. Yes.

Q. So that in each and every one of these cases you would simply take the market value, you would adopt the market value in each case? A. That would be a consideration I would have to bring into the valuation. I would have to bring the market value on the exchange into consideration in coming to the valuation.

Q. I hoped to be able to get an answer in short form. I did not want to go through each hypotheses again. Perhaps I will have to. The first one you have got someone already with 80%. A. With 80%? 20

Q. And there is a parcel of 10,000 shares to be valued?
A. And they are unlisted?

Q. A parcel of 75,000. Round about 10%. It is listed?
A. I'm sorry, could you give me that again, please. I could not quite hear what you were saying.

Q. The shares you are being asked to value are shares in Cumberland Holdings Limited? A. Yes.

Q. They are shares in Cumberland Holdings Limited. They are listed on the Stock Exchange. You know that the major shareholder has approximately 80% of them. You are being asked to value a parcel of 75,000 shares. I think that was the figure we had - A. That is 10%? 30

Q. Yes. Being offered by a stranger to the company - someone who is not the major shareholder? A. In doing the valuation for a client I would show what the earnings would be at a certain price, what the net tangible asset backing was, and what the market value

of these shares was, and what that market value would return on the present dividend of the company. Those would be the matters that I would pay regard to.

Q. Perhaps I will put it this way. He is still as persistent as he was a while ago, and he wants your advice as to the figure. How do you go about getting that figure? A. Well sir, at the expense of repeating myself, just by giving those different bases that I have enumerated. I would just give those different bases which I have already stated. 10

Q. They all arrive, let us assume, at different figures, and then he says "which is the proper one?" In that position, what are you going to tell him? If they are different figures, and he asks you which is the proper one what will you tell him? A. Well, I would expect, taking the shares - if these other two figures that we have worked out were considerably in excess of the market value, I would have to tell him that he buy at the market value, obviously. Obviously I would tell him that. 20

Q. I rather thought we were trying to get to what the market value was. A. That is what is shown on the Sydney Stock Exchange quotations, isn't it? That is the market value?

Q. Do you mean you would simply value them on the figure being quoted on that day on the Sydney Stock Exchange quotations? A. After expounding the various bases of valuation I would not expect my client to offer a higher figure than what they were on offer for at the Sydney Stock Exchange. I would not expect him to offer a higher figure than that for which they were available on the Sydney Stock Exchange. 30

Q. Supposing he said to you "I have already done.."
A. I beg your pardon. I can't hear you.

Q. Supposing he said "I have already done that, and there are no sellers at that figure. What is the proper price to offer?" Supposing he said that to you? If he said that, how do you approach it? A. No sellers at that figure?

Q. Yes. A. And he is a buyer? 40

Q. Yes. A. How does he go about acquiring these shares?

Q. I put to you before a series of hypothetical situations calling for valuation, all of them on the assumption that the shares were unlisted, and you told us how you go about your valuation. You remember that series of hypothetical situations that I put to you? A. Yes.

Q. I now want to go through some circumstances, changing just one hypothesis, and I am asking you to assume that the shares were in fact listed. Do you understand what I am putting to you? A. Yes, I think so. 10

Q. What I really want to know is whether you would have any regard to the figures quoted on the Stock Exchange, and, if so, what importance you would attach to those quotations on the Sydney Stock Exchange? A. Well, it is obvious that some regard must be had to the market value - the quotations, as you call them. Some regard must be had to them.

Q. When you say "market value" do you mean the quoted figure? Do you mean the figure quoted on the Stock Exchange? A. Yes, the buying and selling quotes that appear on the exchange. 20

Q. I suppose you would regard the buying - I am sorry, I suppose you would regard the selling quote as the more important of these figures, wouldn't you? A. Not necessarily, no.

Q. You would give some regard to this in each of the four situations. Would you regard it as decisive in any of the situations, or would you regard it simply as a factor? A. I'm sorry? 30

Q. Would you regard it as decisive in any of the situations, or would you simply regard it as a factor?
A. It must be taken into consideration, yes. It is a factor which must be taken into consideration.

Q. But again, the question was would you regard it as decisive in any of the circumstances, or would you regard it simply as one factor to be taken into account along with others? That is the question. A. Being a

listed company, I should imagine it would have to be given a lot of weight, yes. Being a listed company, yes.

Q. Would you regard it as a decisive factor in any of the four circumstances that I put to you? A. Well, it would be important, yes.

Q. That is not what I asked you. Would you regard it as a decisive factor in any of the four circumstances that I put to you, if you like, I will run through them again. A. They are a listed share? 10

Q. From somebody with 80%, and another person contemplating acquiring 10%; - someone with - I have forgotten the exact figure but someone with more than 75%, acquiring some more; someone with 73% - I think that was the figure I used - acquiring a parcel that took him over 75%, and finally, there was a major shareholder with 51%, or 50% plus something, and someone else considering taking up a parcel of 50,000. Those are the four situations. A. If I was of the opinion that it was a genuine and fair market I must make that a decisive consideration. 20

Q. In each of the four situations I have put to you? A. If it is a listed company, yes, and it is -

Q. I gave you four situations. A. They are all listed?

Q. Let us take them one at a time.

HIS HONOUR: I think that answer was intended to apply to each of the four.

Q. Is that so? That answer was intended to apply to each of the four? A. Provided they were listed. 30

Q. With the qualification you put on about a fair and genuine market? A. Yes.

MR. BAINTON: Q. That is a most important qualification, isn't it? A. Yes.

Q. You would need to know, among other things, what the turnover had been? A. I'm sorry?

Q. Among other things you would need to know what the turnover had been? A. Yes. The number of shares turned over, yes.

Q. You would give more regard, I assume, to a turnover of several thousand shares than you would to a parcel of 100 shares? A. Yes, that is right.

Q. I suppose you would, in some circumstances, at any rate, want to know who the buyer and seller was?

A. Well, that information would not be readily available, would it? 10

Q. I suppose you might like to know, anyway, even if you could not find out? A. I'm sorry?

Q. I suppose that is something you might like to know, even if you could not find it out? A. If it was available it would be useful, yes.

Q. You would regard it as having relevance? A. If I had it, yes. If I had it it could certainly be of relevance.

Q. Let me just put this question to you on the last of the four hypotheses - a major shareholder with a bit over 50% - say 51% - and someone with a parcel of 50,000 shares. Do you follow that? A. Yes. 20

Q. The shares are listed? A. Yes.

Q. You are being asked to value them, and you have ascertained that in the whole of the history of the company since incorporation there had not been 50,000 change hands. What effect would that have on your valuation?

A. Well, it would certainly have to be taken into consideration, Mr. Bainton. 30

Q. It would have to be taken into consideration? A. Yes.

Q. Well, having taken it into consideration, how would it affect your valuation? A. I think it would be fair to say it would probably down-grade the valuation.

Q. Down-grade the valuation? A. Yes.

Q. It would very considerably down-grade it, wouldn't it, in the sense that you could not assume that this hypothetical parcel of 50,000 shares could be sold on the market, even if they are put up for sale? A. It would reduce the valuation, yes.

Q. It would mean that you could have very little regard, indeed, to the buy-sell prices being quoted on the exchange? A. Very little regard to them?

Q. Yes. It would mean that you could have very little regard to the buy-sell prices being quoted on the Stock Exchange? A. It certainly would have to be taken into consideration. 10

Q. We know that. You would pay very little attention in those circumstances to the quoted prices for those shares, wouldn't you? If the question is giving you difficulty, let me put it a different way to you. You would know that the prospects of being able to market this parcel of 50,000 shares on the Stock Exchange except at give-away prices were virtually nil? You would know that, wouldn't you. A. Well, if the other majority holder came in as a buyer there may be more of a market there. 20

Q. Unless that happens your prospects of disposal of your parcel on the Stock Exchange are slight, to say the least, unless at a give-away price? That is so, isn't it? A. I don't know whether I would use the word "slight", but they are certainly reduced, yes.

Q. What you would need to do - and you would know this - if you were going to buy this parcel - if you wanted to sell this parcel you would virtually have to offer them to the major shareholder or try to make an off-market placing with somebody else. That would be the position, wouldn't it? A. On the assumptions you have made, yes, I think that would be fair comment. 30

Q. You would agree with that? A. On the assumptions you have made, yes.

Q. And you would agree that that would be pretty obvious to anybody who had a reasonable amount of business experience in Sydney? A. I suppose it depends on who they are dealing with. 40

Q. What do you mean by that? What did you mean by that answer? A. If they were aware of the facts you have enunciated -

HIS HONOUR: Is part of the assumption, Mr. Bainton, that the 50,000 shares have to be sold as one parcel, or is there an option in the seller to sell the 50,000, firstly as a parcel, or can he dribble them as he thinks fit?

MR. BAINTON: Q. You have got 50,000 shares? A. Yes.

Q. Did the answer you gave me assume a sale in one parcel, or did it assume that you would try and dribble them out over a period of time? A. It would certainly be the common-sense approach to try and dribble them out, because you are more likely to get higher prices in putting them out in small parcels. That would be the common-sense approach. 10

Q. Assuming that a person decided that he could afford to spend six months trying to dribble this parcel of 50,000 shares out, but he knows that over the last 10 years or so that is more than the total turnover of the shares in the company he would inevitably conclude, would he not, that he would either have to come to a deal with the major shareholder or he would have to go around and place them profitably with some institution or some other prospectively interested person? A. Well, that is always a possibility - approaching an institution. 20

Q. But those are the only possibilities, aren't they?
A. I think that that sums them up, yes.

Q. Any competent businessman would know that that was the situation, wouldn't he? On the assumptions I have put, any competent businessman would know that was the situation? A. On the assumptions you have made that appears to be a reasonable statement. 30

HIS HONOUR: If you are leaving that, Mr. Bainton, there is a question which I would like to ask.

Q. Earlier in your evidence on valuation you spoke of valuing on a yield basis? A. Yes.

Q. Which I took to be referable to the dividends likely to be gained.

You then spoke of a basis which I took to be referable to the net maintainable profits of the company. I am not sure whether you wish to draw any significance between those. Is there any significance in them?

A. When I was referring to yield, I was referring to the dividend yield based on the company's dividend policy.

Q. That introduces additional factors, doesn't it? You spoke of and you deliberately were referring to dividend yield? A. Yes. 10

Q. But when you spoke of profit earning bases you were deliberately referring to the net maintainable profit base? A. I think that that point was mentioned by Mr. Bainton.

Q. You then had some exchanges with Mr. Bainton, and I want to make sure that when you were referring to that aspect you were not dealing with the yield basis. Do you understand what I am referring to? A. I think so.

HIS HONOUR: Where you have a minority shareholder without any control over dividends it introduces another factor. I am not sure that it is clear on the cross-examination that you are both talking about dividend yield. I don't know, Mr. Bainton, whether anything can be done to clarify it. 20

MR. BAINTON: Q. Did you understand me to be talking about the dividend yield in these examples, or did you think I was talking about the company's profits as distinct from the dividend. A. No, on the basis you were putting it I was assuming there was continuity of dividends and the majority shareholder would not use his power to let the minority wither on the vine. 30

Q. Or alternatively, to wither the vine by paying too much out? You made both of those assumptions? A. I was referring mainly to the one I have just spoken of. I was not referring to the second one.

Q. If you were being asked to value a parcel of shares in a listed public company where there is quite a fair turnover on the market between unrelated people - in other words, a reasonable amount of what I will describe 40

as genuine transactions - you would normally simply look to the quoted figures, would you not? A. In those circumstances, yes.

Q. I should add if you were advising someone who was contemplating buying a minority interest? A. A minority interest? Just 200 shares in a listed company?

Q. Any number you like, short of a number that could conceivably give any form of control. Any number you like, short of that. A. Well, he would be guided by the market value. 10

Q. They would not take any notice of anything else, would they? A. Well, I would.

Q. Except, perhaps, the prospect that the value was likely to go up or down for some reason? A. Well, of course, that would be the market value. But that would be contingent. If I thought the market value was excessive, or excessively high, obviously I would not buy shares. If I thought it was a take-over prospect I would buy. 20

Q. Those factors would decide you whether or not you were a likely purchaser? A. Yes, and other considerations such as if I was buying them for the children, which would be a different factor than if I were buying them for my parents.

Q. The only influence on what you are going to pay is the quoted price? A. Yes.

Q. In those circumstances what regard would you have to the asset backing of the shares, if you knew it? A. If I knew it? 30

Q. Yes. A. I would certainly know it, because it is quoted in the Financial Review each day.

Q. What regard would you pay to it? What regard would you pay to the asset backing of the shares? A. Well, I would certainly take it into consideration when I was buying shares.

Q. So that it might influence you not to buy at all?

A. It could influence to certainly buy, because it does indicate to me how much I am paying for "blue sky", doesn't it?

Q. If it is at less than the quoted price it might turn you off buying it? A. It depends on whether I had confidence in the company and in the management of the company.

Q. I said "might"? A. Yes.

Q. If it was a lot more, it might encourage you to buy? 10
A. Yes. There are a lot of considerations which you have to take into account.

Q. It might even set you to wondering why the market price was so much below the asset value? A. Well I would think of that aspect, yes.

Q. It very often happens that there is a great deal of difference between the market price of shares and the tangible asset backing of those shares.

HIS HONOUR: Is that a question?

MR. BAINTON: Q. That is certainly so, isn't it? A. Yes, 20
in many instances, yes.

Q. In all of the circulars that you sent out you quoted a figure for the net asset backing of FAI? A. I quoted the net tangible asset of FAI based on its consolidated balance sheet as at 30th June 1974.

Q. That is not significantly different from the time of your calculations, is it? A. Well, I based it on them. If they were losing money the net tangible asset backing would have been lower than I quoted.

Q. Did you ever give any thought to the disparity between the market price of FAI shares and the asset backing from time to time when you were advising people to whom your circulars were directed? Did you ever give any thought to that disparity? A. Well, the market in FAI shares has been a very thin one, and I don't know whether it is a genuine one, so obviously the only thing I had to go on was the audited balance sheet as at 30th June, and 30

I was not competent to comment on the genuineness of the market at that time.

Q. Did you make any enquiries as to that? A. Did I make any enquiries?

Q. Yes. Did you make any enquiries as to that? A. I don't quite understand what enquiries you have in mind. Ought I ask Mr. Adler?

Q. Did it occur to you when you were telling these various shareholders that the asset backing of the FAI shares was on 52 cents that it might be of some interest to them to know what the market had priced these shares at at times when the asset backing was more, or less, or round about that figure? A. Mr. Bainton, I was in a difficult position. I had no independent report to help me - no independent investigating accountant's report, or no report from a merchant banker, and it was incumbent on me to advise the stockholders in regard to the position. Under the circumstances, in view of the unusual pattern that had existed in Cumberland shares over recent months, I felt that the market value was not one I could rely on, and the only thing I could give these people for their guidance was the net tangible asset backing based on the consolidated balance sheet.

Q. The balance sheets for FAI back to 1971 and beyond were readily available, were they not? A. Yes. I would expect, as a public company that there would be copies available.

Q. Readily available? A. Yes.

Q. To quote the prices at which these shares were changing hands over these periods was something that could have been ascertained in half an hour, was it not? A. But the information in regard to the movement of the shares was already included in the take-over documents. Why would I have to duplicate that?

Q. What information of that category do you suggest was in the take-over documents? A. With respect, Mr. Bainton, I think that under the provisions of Part A it is incumbent upon the company where they are offering a share consideration and not a cash consideration, that

they must give the market valuation of that security over a period of, I believe, three months prior to the announcement of the take-over offer. Whether the market value is of any relevance to that - what it was two years ago - I doubt if that is of any relevance to a person considering whether he would take shares in FAI.

Q. You were pressing hard upon these people an asset backing figure, weren't you? A. I was not pressing hard on anything on these people. I was setting out the facts for their guidance, as the only person who was able to give that information, and I do not agree that I was pressing hard. I gave them information, and it was entirely up to the stockholders to come to their decision. I merely gave them information, and it was up to them to come to their own decision - it is their money, and it was up to them to make their own decision. I could only give them the information as I saw it at that time. 10

Q. The only figure for FAI shares that you gave them in any of your circulars was your calculation of the asset backing? A. Yes. As I stated, the market figures were shown in the documents submitted by FAI to each shareholder. The market figures were shown in the documents submitted by FAI. 20

Q. The short, simple answer to the question is "Yes" isn't it? A. I did not give them any information.

Q. You did not? A. No, but it was available to them in the take-over documents.

Q. Some information. What I am putting to you is that you gave no attention to the price that FAI shares had commanded on the market over any period of time beyond the period of the take-over offer itself? A. Well, at the meeting we have referred to yesterday - 30

Q. We will come to that later. You need have no fear about that. But the question I asked you can be answered yes or no, can it not? A. I did not give that information. But, when I requested in the take-over documents that we give information in respect to Mr. Adler's sales it was not agreed to by the Board.

Q. We will come to that in a moment. You need have no 40

fear on that aspect of it. We will deal with that matter later. What information, then, over and above the information in the take-over offer and what you set out in your circulars did you consider the shareholders should have had? A. First and foremost, when you say "what information", I think they were entitled to an independent assessment. That is what I wanted.

Q. Let us deal with that. An independent assessment of Cumberland Holdings Limited? A. An independent assessment of Cumberland Holdings Limited? No, we would have to look at FAI, too, because they were being asked to accept shares in FAI. 10

Q. Let us go through it stage by stage. I want to know what you thought they should have an independent assessment of? What did you think they should have an independent assessment of? Did you think they should have an independent estimate of the valuation of the Cumberland Holdings shares? A. I suggested an independent report - that they should have an independent report. 20

Q. I think again that question is capable of a yes or no answer, and if you want to explain it later you will have the opportunity. Did you think they should have an independent assessment of or report upon the value of the Cumberland shares? Did you think that? A. In an independent report that would be one facet of the report prepared by a merchant banker.

Q. What is your answer? That is capable of being answered with a yes or no? A. I don't think it is capable of being answered yes or no. It is just one facet of a report. 30

Q. The answer is you did think they should have information on the value of the Cumberland Holding shares among other things, that is so is it? A. Yes, of course.

Q. What information beyond that that was given to them relating to the value of the Cumberland Holding shares did you think they should have? A. What information I thought they should have?

Q. Information on what matters relating to the value 40

of the Cumberland Holding shares? What information did you think they should have in regard to that? A. Well, as the shares were being de-listed market values were not of much relevance. They were being asked to take a share in FAI, and that was a most important thing. They were being asked to swap their shares.

Q. We will come to FAI in a moment. Please do not think that we will not. We will come to that in a moment. I want to know, for a start, what else about the value of the Cumberland shares you thought they should have known, and by "what else" I mean by "what apart from what they were given in the take-over documents"? A. Well, that additional information would be - it would depend upon who prepared the independent report, and what they thought should go in their report. 10

Q. I want to know, please, what aspects of Cumberland Holdings assets or business or anything else you thought the shareholders should be informed about, whether by the directors or by some independent person? A. From the Cumberland Holdings point of view they knew what they had in that share. They were more concerned in what they would be getting, and that is what I said would be dependent on what the independent person gave them. 20

Q. We will come to that part in a moment. I still want to know whether there was anything you think they should have been told about Cumberland Holdings Limited that they were not told in the take-over documents? A. No, I concentrated on FAI. I don't know of anything else I should have told them. 30

Q. You gave a lot of consideration, may I take it, to the terms of the take-over offer? A. Quite.

Q. To the Part B statement? A. Quite.

Q. And, except to the extent that it may have said something about the value of the FAI shares, you were content with it? A. I was content with it, did you say?

Q. You were content with the information given in it? I don't mean the fact that it had to be given, but what

was in it? You were content with the information given in it? A. Yes.

Q. So that when you were asking for an independent valuation by a merchant banker or a chartered accountant, what you had in mind was a valuation of the FAI shares being offered in exchange for the Cumberland shares?

A. I think that is an over-simplification, Mr. Bainton. They were being asked to exchange one share for another, and they had to consider the relevant merits of both shares - whether they stayed with one, or took the other.

10

Q. I appreciate that. I thought we had got to the stage where you were of the opinion that they were given adequate information relating to the value of the Cumberland shares, and the next matter they had to consider was what the FAI share they were being offered was worth, so that they could decide whether to take it? A. That is quite so.

Q. That is right, isn't it? A. Yes, that is right.

Q. So that the independent valuation you wanted was the valuation of the worth of the FAI shares, both ordinary and - A. In relation to the share that they already held, yes.

20

Q. So that it could be compared? A. Exactly.

Q. You did not envisage the merchant banker or the chartered accountant going through the books and records of Cumberland? A. That would depend upon what the independent party wanted to do.

Q. You thought it was a possibility that they might have to do that? A. Well, I don't know. It was entirely up to that party as to what they wanted to do. They may have been prepared to base their report simply on the balance sheet. But I would certainly suggest to you that in the case of an insurance company an independent chartered accountant would ask them as to what principles they adopt in assessing the amount of provision for unexpired risk and the provision for outstanding claims. An independent chartered accountant would ask them in regard to those matters.

30

Q. When you say "balance sheet" - when you said that a moment ago you were talking about Cumberland? A. No, in these circumstances we were talking about FAI, and the consolidated balance sheet as at 30th June 1974.

Q. You would expect someone to go beyond the balance sheet? A. I would expect them to go beyond the balance sheet in respect of certain items. I do not expect them to check petty cash, or things of that nature. I expect them to look at the important elements in the insurance company's accounts. 10

Q. Having been told what the principles were, what did you envisage then might have to happen? A. The independent accountant or merchant banker would make an assessment as to whether it was considered that the principles adopted by the company were proper principles and in accordance with the generally accepted accounting principles for the insurance industry.

Q. Having done that, would you expect him to assume that the principles were correctly applied in the company? A. He might make test checks. That is entirely up to him. 20

Q. You expressed the view in one of your circulars that you had no challenge to make of the integrity on competence - A. I beg your pardon. I'm sorry, I could not hear you.

Q. I should have said "letters". You expressed the view that you had no - that you wished to cast no doubts on the competence or integrity of the auditors of FAI? That is so, isn't it? A. If I am writing a letter I have to be very careful about what I say in casting aspersions on someone's integrity. 30

Q. You did say that? A. In the letter of the 14th November, yes.

Q. When you said that, did you mean it, or not mean it? A. I would have preferred, because of the thoughts I had about this firm being dominated by Mr. Adler, that the Part A accounts report would have been prepared by a firm of entirely independent accountants - prepared by a firm entirely independent of Cumberland and FAI. 40

Q. Did you mean what you said in the letter about the auditors, or not? A. Well, I did have reservations. I would be less than frank if I did not say I had reservations about their ability to do this type of audit. I would much have preferred Price Waterhouse or Peate Marwick, because of their expertise in these matters, and they have persons in these firms who specialise in the insurance industry.

Q. Do you say the method of assessing unexpired risks is not a matter of fairly general knowledge in the insurance industry and in the accounting profession? A. There are numerous ways of doing it. But I have reservations - 10

Q. Will you please answer my question first, and we will come to the others later. Never fear, we will come to the others later. I am talking about knowledge of the principle, leaving open the question of whether it is applied or not. Is this an esoteric matter, or is it not the subject of plenty of writings known in the profession? A. I am not competent to comment on the way in which these two provisions are assessed. I have not got the technical knowledge. But I do know they are terribly important in order to assess the accuracy or otherwise of insurance companies' accounts. 20

Q. Are you suggesting that you had doubts as to whether Messrs. Gibbings & Webb had the knowledge, or are you asserting that you had doubts as to whether they would apply them properly? A. I had doubts -

Q. Or is it both? A. I beg your pardon?

Q. I think there were three possibilities? A. In view of the information in the reports I had read on the case that the Registrar of the Workers' Compensation had instituted against Fire & All Risks in 1971, where he claimed that Fire & All Risks were not making adequate provisions for both of these items I did have reservations about the accuracy of them, and I did have reservations about whether Gibbings & Webb were competent to properly assess the amount of both of these important provisions. 30

Q. You said that you read in the report an assertion that Fire & All Risks was not making. Did you mean that 40

or did you mean that you read in the past it had not made? A. I read the report where it was claimed by the Registrar that they were not doing it properly.

Q. Would you mind telling us what report you are referring to? A. A report of the proceedings before Judge Ferrari in August/September 1971 brought to court by the Registrar of the Workers' Compensation Commission.

Q. Those are the proceedings. I would like you to identify the report? A. The report I had - I had two reports, one taken out of the Australian Financial Review, dated 21st September, 1971, and one taken out of the Newcastle Herald, dated 8th September, 1971. 10

Q. So, they were newspaper cuttings, in effect? A. Yes.

Q. That you were relying on? A. I have no reason to doubt their accuracy because it was in two papers.

Q. What were the two papers again? A. The Australian Financial Review and the Newcastle Herald.

Q. I take it from your precise identification of the dates you have still got those cuttings? A. I have. 20

Q. You might be kind enough - have you got them here? A. Yes.

Q. You might be kind enough to produce them, perhaps after four, would you? A. I will get them now.

Q. I just did not want to take up time with something that could be done later.

HIS HONOUR: If you want to examine them now, he can get them now.

MR. BAINTON.: I am quite content to get them later.

HIS HONOUR: If you get them after 4 o'clock and give them to Mr. Hughes, he can see what should be done with them. 30

MR. BAINTON: Q. When did you last read those, Mr. Donohoo? A. Last night.

Q. And before that? A. Well, I have always had them in my file. I suppose I got them out after this take over offer got underway. Prior to that I probably had not taken much notice of them.

Q. So that your state of mind virtually was that there may well be improper provision or inadequate provision against unexpired risks? A. And outstanding claims, yes.

Q. And outstanding claims? So you, had in mind a checking or evaluation of that? A. I had in mind that the person charged with the job of preparing the report would take these matters into account and find out the principles used by the company. 10

Q. Of course, if there was any substance in the allegation of the Workers' Compensation Commission, as you read it anyway, in the press, you would have to do a lot of spot checking, wouldn't you? A. I don't think you would have to do a lot. I think that a reasonable check would probably suffice and, after all, if the first dozen came out and there was no problem and the first fifty - I don't know what sort of sample he would require, but if he found when he did the first twenty and the first fifteen did not comply with proper accounting principles, obviously he would make the check proper. 20

Q. Do you know how many separate branches, in effect, operated independently of one another, there were of FAI at this date? A. Well, I have seen the list in their accounts and I think they have branches in most States.

Q. Do you know how many there were? A. No, I do not. 30

Q. Do you know anything of the volume of business being carried on at any of those branches? A. Most of this would be done through head office, would it not?

Q. Well, do you know? A. No, I don't know, no.

Q. Do you know the types of business being conducted at these various branches? A. I understand they were doing all types of general insurance. They haven't got a life assurance licence, but all others I understand they do.

Q. You said you thought the type of valuation you had in mind might only cost somewhere between \$3,000 and 6,000? A. Yes.

Q. What is the basis of arriving at that figure? A. Well, for the type of valuation I think that any firm worth their salt who had specialised in the insurance industry could very quickly come to a decision as to whether they felt that the company's accounts were being prepared on a basis that was in accordance with generally accepted accounting principles. If it were not, well, of course, obviously, the cost must be higher. I concede that.

10

Q. The cost of this sort of report sometimes gets up to six figures, doesn't it? A. Not the type of report --

Q. To use one example? A. Not the type of report I had in mind, Mr. Bainton, no, because it was relatively simple. They were two companies and they were making a decision on this whether they advise people to take one share in preference to the other. I think it is relatively simple.

20

Q. What experience do you have in the insurance business? A. I was a partner in a firm of chartered accountants, that conducted the audit of the M.L.C. but I was not actually engaged on that audit so my knowledge, as I said before, in regard to the provisions, my knowledge in insurance is limited.

Q. What experience have you had in the insurance industry? A. None.

Q. But you were prepared to act on the basis of the view that you must have thought that this investigation would just be a simple operation? A. I do not envisage one as complicated as you appear to envisage.

30

Q. Your assumption was, and you acted on it, whether it is right or wrong is beside the point at the moment, that it would be just a simple matter? A. Well, simple or not, I took the view that the minority shareholders were entitled to such an investigation. Cost is not a factor.

Q. Is it correct to say that you did take the view that

the sort of investigation you wanted was a simple matter which would not cost much? A. I wouldn't think it would cost - I think it would be relatively simple because of the conditions in this take-over offer.

Q. I am not asking you what you think now. I want to know what you thought at the time you asked the Board of Cumberland to agree to this valuation? Did you then have the view and act on it yourself that it would be a simple matter and it would not cost much. A. I did have that view, yes. 10

Q. Mr. Adler made it plain enough, didn't he, that in his view an evaluation of an insurance company such as FAI was not simple and it would be expensive? A. He did not make the, draw the first conclusion or make the first statement that you are referring to. He simply said, "We don't want to bear 80% of the cost of the report."

Q. And he said - I don't suggest these were his words, but the fact was that he was expressing the opinion that it would inevitably be an expensive valuation? A. The cost would be dependent on the state of the records of FAI. 20

Q. I am not asking you whether he is right or wrong at the moment but simply for your statement as to what he was saying. He was saying that in his opinion a valuation of that nature would be expensive and he quoted a figure of \$20,000, didn't he? A. Yes, and he would have to bear 80% of that.

Q. Yes. He, at least, I think you would concede, knows something about the insurance industry? A. Yes. 30

Q. And is in a better position to assess the probable cost of one of these valuations than you were? A. He would know the state of his accounts better than I would and whether he followed normal principles.

Q. For whatever reason, he would be in a better position to make that assessment than you were? A. Yes, I would agree to that.

Q. But you completely disregarded his estimate of what the likely cost was, didn't you? A. Mr. Bainton --

Q. Again -- A. The two of us could have gone along to the merchant banker and asked them what it was going to cost and then we would have known.

Q. The inevitable answer you would have got was, "We don't know until we start work," isn't it? A. No, they would have given us a reasonable estimate of what they think the price would be. After all, they do these reports every day of the week. 10

Q. The plain fact is that you took no notice at all of Mr. Adler's view of what the likely cost would be, did you? A. I was more content in giving to people what I thought they were justly entitled to. We made no attempt to get - I mean we don't know whether my figure was right or Mr. Adler's figure was right; we didn't go along together to a firm of merchant bankers and say, "Could you please give us an idea of what it is going to be?"

Q. But your future conduct proceeded on the basis that your estimate was probably right, and his was probably wrong, didn't it? A. Mr. Bainton, even if his figure had been right, I still think that we, as directors of a company, whether as directors common to the Board of both, should have paid twenty thousand to get the report. I don't think cost is a major consideration in cases like this. 20

Q. Do you know how many outstanding ordinary shares in Cumberland Holdings there were? A. 20% of the capital it must have been which would be, what - about 150,000 stock units. 30

Q. And about 300,000 preference shares? A. No, I think it would be more than that. I think it would be ---

Q. It is 301,000? -- A. That is the capital, though. It would be twice that, would it not? Wouldn't it be 602,000?

Q. I am sorry, I was taking -- A. As I said, 604,000 preference stock units (sic).

Q. Including those held by Washington H. Souls?

A. Yes.

Q. So far as they are concerned, the asset backing of FAI appeared to be of the order of \$6 a share on your calculation? A. Of the preference stock units?

Q. Yes? A. Based on FAI's accounts?

Q. Yes? A. Yes, that was my assessment, yes.

Q. Those accounts would have had to have been catastrophically wrong to reduce that below about \$3 a share.

10

A. I don't agree with that, Mr. Bainton.

Q. You don't? A. I don't, because the tangible shareholders' funds of FAI are only \$2.7 million and that could be wiped out by a disaster overnight, a disaster such as Cyclone Tracy, and then you have no preference - you have nothing at all.

Q. Would you suggest an investigating accountant would have predicted Cyclone Tracy? A. No, I am not, but I am talking about the smallness of it. You said it could never get down to \$3.

20

Q. We are talking about the adequacy at the time the offer was made. A. The backing?

Q. Yes? A. I think one must take into account what that \$6 comprises. Frankly, in my opinion, I would prefer to have \$3 of bricks and mortar backing my preference share than possibly \$6 of something that might not be quite as good.

Q. Of course, that is your business judgment? A. Quite.

Q. You would not want to spend 3,000, 6,000 or 20,000 asking a merchant banker whether that is right or wrong, would you? A. I think this is a consideration that people may be entitled to - after all.

30

Q. It is possible to tell them that without spending that amount of money for the signature of a merchant bank underneath the letter, isn't it? A. Mr. Bainton, I do not subscribe to that because \$6 is tied up in an

insurance industry and Mr. Adler had already said in the October copy of the FAI reporter that the problems facing the insurance industry if inflation is not stopped will be disastrous and he said all the financial expertise at the time could not even prevent these problems.

Q. Don't you think you have taken that extract a little bit out of context, Mr. Donohoo? A. I don't think so, no, because you are talking about the asset backing of these stock units.

10

Q. You might just identify that as the publication from which you took that extract. (Witness handed copy of FAI reporter.) Would it help you if I pointed out to you just where it is? A. Yes, it would.

Q. (Approached) You took the last paragraph in the last column on the first page? A. Well, it is a very telling statement, isn't it? After all, that sums up the whole thing, surely? It does in my view.

Q. Do you recollect what was being said before that paragraph? It is a complaint, Mr. Donohoo? A. I beg your pardon?

20

Q. It is a complaint about the effect of inflation generally with particular reference to the insurance industry? A. Yes.

MR. HUGHES: "Inflation = Disaster for Insurance Industry" is the heading.

(FAI house magazine issue for October 1974 tendered and admitted as Exhibit 43).

MR. BAINTON: Q. You then would have had very grave doubts about taking even preference shares in FAI - you personally? A. Well, I would have expected that - I wouldn't exchange the preference share I have in Cumberland for one I have in FAI, no.

30

Q. So that the asset backing of \$6 odd in your view must have been quite suspect? A. I would not exchange the asset backing of Cumberland for the asset backing of FAI, no.

Q. I am not sure what you mean by that? A. If I had a preference share in Cumberland with a \$2.02 tangible backing, I would not exchange my preference share in Cumberland or preference stock unit, I should say, in Cumberland with that sort of asset backing for one in FAI with a \$6 tangible asset backing.

Q. That is because of the doubts you felt about the insurance company shares, I take it? A. Yes, because the insurance industry at that time, Mr. Bainton, was going through a particularly troublesome time - Commercial Union, QBE, all of them - not just FAI, the insurance industry itself. 10

Q. Do you suggest that the signature of a merchant bank to that statement would have given it any more weight? A. I thought it would have given a certain amount of satisfaction to the minority stock holders to know there was another view point on my thoughts. The merchant banker may not have agreed with me, Mr. Bainton. I don't know. 20

Q. But you would think it was quite justified to spend a substantial amount of money to see whether he did or he did not agree with your commercial assessment? A. But it would have served the purposes of both the preference stock holders and also the ordinary stock holders.

Q. I am only asking about the preference shareholders at the moment. Do you say that you thought Cumberland Holdings was justified in spending what might have been a substantial sum to find out whether a merchant bank held the same view of insurance shares as you held? A. A Preference share or an ordinary share? 30

Q. A preference share? A. A preference share.

Q. For the benefit of the preference shareholders? A. That is a hypothetical question because this take over offer involved both classes of shareholders, and, frankly, I have never ever considered just for one class of shares. We were looking at two classes of people and they were some quarter of a million share holders who were being offered shares in FAI. They held a quarter of a million shares, I should say. 40

Q. Substantially, may I take it, your concern was in respect of the quarter of a million shares when you were seeking the valuation? A. I don't think it is possible to differentiate. My concern was for people. I knew my feelings on it.

Q. And your view was that an expenditure which, if Mr. Adler was right, could have been \$20,000 or more for that purpose was justified? A. See, these people in aggregate held three quarters of a million stock units. Yes, I agree that that expenditure would have been justified.

10

Q. Do you think there is any room for a different view or are you quite convinced that your own is the only possible view? A. No, my viewpoint is not the only viewpoint. Of course not.

Q. So, you do agree then that there is room for the view that that expenditure was not justified? A. That was Mr. Adler's viewpoint. He made that perfectly clear. The Australian Shareholder's Association supported my stand. There is another person who would back me up.

20

Q. The question was: Do you say that nobody else could reasonably have had a different view from yours? A. Well, under the circumstances I thought it was the right viewpoint, but I am not saying that anybody else - I can't speak on behalf of other people; they could have a different viewpoint, yes.

Q. The plain fact is that the major interest in this company was held by the FAI group? A. That's correct.

Q. And had been, if not since its incorporation, at least fairly soon afterwards and certainly since long before Washington H. Soul came into it? A. I don't know about long before but, as you mentioned this morning, I think it was about 52% at the time they came into it.

30

Q. If you accept that the offer was being made to give shareholders the alternative, if they wanted to take it, of getting out or, if they did not, of staying in, rather than any endeavour to acquire any of the shares?
A. Could I just have that again - I don't follow - please?

Q. If you are prepared to accept that the take over offer was made not for the purpose of acquiring voluntarily or compulsorily any shares but to give the shareholders an opportunity of remaining shareholders or getting out of the terms offered - do you follow? A. I don't follow, Mr. Bainton; sorry.

HIS HONOUR: What is the question?

MR. BAINTON: I haven't finished the question.

HIS HONOUR: I thought you had. There was a long pause. 10

MR. BAINTON: I got to the stage where Mr. Donohoo interrupted me because he said he had not understood me at that stage before.

HIS HONOUR: Perhaps you had better start again.

WITNESS: If you would, please.

MR. BAINTON: Q. If you accept the take-over offer was made not for the purpose of acquiring the shares either voluntarily or compulsorily but to give the shareholders in Cumberland an opportunity of remaining shareholders or getting out on the terms offered, the cost of the sort of investigation, bearing in mind that 80% of it is going to be borne by the major shareholder, is something that you would expect that major shareholder properly to take into account, isn't it? A. With respect, Mr. Bainton, I cannot subscribe to that. I believe minority stock holders are entitled to an independent report where there are common directors to the Boards of both companies. 20

Q. Have you previously encountered a case of a take-over offer made otherwise than for the purpose of trying to obtain shares? A. A take-over offer for purposes otherwise than acquiring shares? I don't follow? 30

Q. Of trying to get the shares as distinct from giving shareholders an opportunity? A. I am sorry, could I have that again please?

Q. Ordinarily, a take-over offer is made with the object of acquiring shares? A. Yes, in the offeree company, yes.

Q. With the object of, if there are enough acceptances, compulsorily acquiring the shares in respect of which there are no acceptances? A. Yes, if they get over the 90%.

Q. If this offer was not made for that purpose, but simply to give shareholders an opportunity to remain as such or not, wouldn't you look at it from a somewhat different point of view? (Objected to).

HIS HONOUR: Mr. Bainton, is it that he is to assume it was for the purpose to the exclusion of any desire? I don't think you can put that. It had better be made clear. 10

MR. BAINTON: If your Honour is giving a narrower meaning to "Purpose", than I had intended, I will try and make it clear.

Q. If a take-over offer is made not caring whether there are any acceptances or not but so as to give shareholders an opportunity to remain as such or get out, would you not look upon that on a slightly different basis than the take-over offer intended to acquired shares or as many shares as possible? 20

HIS HONOUR: Or motivated primarily by a desire to acquire shares?

MR. BAINTON: Thankyou.

WITNESS: This is on the assumption that the people if they do not take up the shares will be blocked in as a minority stock holder in an unlisted company and not have any further market for their shares?

MR. BAINTON: Q. Well, if you like to add that factor, yes? A. I think the adequacy of the consideration comes into account. If I felt it was a fair and reasonable offer, for example, if the offer that was made to these people had been the same as Mr. Adler got for his shares, I would never have objected, and I think that is a consideration that must be taken into account when you are referring to this one, Mr. Bainton. 30

Q. Mr. Donohoo, you have said that on paper a number of

times and it was not an answer to the question. What I am suggesting to you, inviting your comment on, is the proposition that you must look somewhat differently upon a take-over made by somebody who does not care whether there are acceptances or not but makes it to give the shareholder an opportunity, then you would regard a takeover offer motivated by the intention of acquiring the shares or as many shares as possible? A. I think I follow the question, Mr. Bainton, but whether a person making that type of takeover offer cares whether it succeeds or not because he has got these minority stock holders squeezed anyway, so if they don't accept this it doesn't matter so far as he is concerned. 10

Q. Again, that is a comment but it is not an answer to the question. Are you able to answer the question?

A. We are talking about a general takeover or this particular takeover for the interests of the minority stockholders of Cumberland Holdings Ltd?

Q. I was talking, rather, in the abstract at the moment. 20

A. In the abstract?

Q. Yes. A. There may be special considerations, yes.

Q. The question was, would you look differently upon the two situations or would you think they were quite identical, for all relevant purposes? A. No they are not identical because in the type of hypothetical case you are putting, the shares in the particular company, irrespective of the success or otherwise of the takeover offer, may remain listed and the people are not disadvantaged but, in the particular case we are talking of, the people were at a distinct disadvantage. 30

Q. It is the fact, is it not, that FAI has not ever been a shareholder in Cumberland Holdings? A. That's correct, yes.

Q. It is also the fact that you were informed that FAI had considered whether or not it would sell some of its shares in Cumberland and decided that it would not - ?

A. Whether you say they had considered it - I was told that they were not prepared to do it, so, obviously, to come to that conclusion, they must have considered it, yes. 40

Q. The situation was reached where a shareholder had increased his shareholding to a point that attracted that letter from the stock exchange? A. That's correct.

Q. Did you regard that increasing of the shareholding as reprehensible in some way? A. Yes, because it placed the continued listing of the company in jeopardy.

Q. So, in your view, a majority shareholder owes an obligation not to do that? A. I did not say that, Mr. Bainton.

10

Q. Well then, why do you consider it to be reprehensible? A. I think it is reprehensible when they do it, when they acquire the extra five per cent and they pay one price for the chairman's shares and then offer the locked-in minority shareholders a greatly reduced price. That is when I believe it is reprehensible.

Q. Now, let me come back to my question. It is not that yet.

MR. HUGHES: But it was. I object to that. (Question allowed)

20

MR. BAINTON: Q. You appreciate, Mr. Donohoo - I think I have asked you this before - the directors of Cumberland Holdings have no power to refuse to register a share transfer? A. I couldn't give an answer to that but if you say that is the case.

Q. You would take it? A. I would accept it, yes.

Q. So, there was nothing whatever the directors of Cumberland Holdings could do in their capacity as such directors to prevent a major shareholder increasing his shareholding except, perhaps, to ask him politely not to? A. When they control that major shareholder, they decide the policy, don't they?

30

Q. I am asking you the question that there was nothing they could do in their capacity as directors of Cumberland Holdings Limited? A. To refuse to register the transfer?

Q. To prevent the major shareholder increasing his

shareholding by buying more shares? A. As common directors on the Boards of both companies, they could have --

Q. Mr. Donohoo, you were a director of Cumberland Holdings when this transfer occurred? A. Yes, but I wasn't notified of it. The first I knew of it was the presentation of the letter from the stock exchange.

Q. When you knew of it, there was nothing you could do as a director of Cumberland Holdings, was there? A. Only ask them to reduce their holding back to 75%, to reduce the holding, which they did do. 10

Q. Not anybody else in his capacity as a director of Cumberland Holdings could do more than you did? A. Well, Mr. Adler and Mr. Belfer in their capacity as directors of the particular company in question, they could have done something about it.

Q. But you see, they made it quite clear that that other company would not? A. They did, that is correct.

Q. So, so far as the directors of Cumberland Holdings were concerned, there was nothing else that they could do? A. That would be correct, yes. 20

Q. Do you regard it as reprehensible for a major shareholder to increase its shareholding, quite independently at the moment of what it may pay, to the stage at which the company's listing is possibly prejudiced? A. Well, I would answer the question in the same way as I did the previous question, where they pay one price for the chairman's shares, and another price for the locked-in minority stockholders. I believe that to be reprehensible. 30

Q. Mr. Donohoo, I am asking you whether you regard it as reprehensible simply to acquire that number of shares. I put nothing to you about making any offer for any others. A. Mr. Bainton, these people who have acquired these shares over a period of time have bought them in a listed company. They bought them on the faith that that listing would continue.

Q. Did they? A. Well, this would be the normal assumption, I believe, yes, and they did do that. They

bought these shares on the basis that they were listed shares, and they would continue to be listed.

Q. Let me repeat the question. Do you regard it as reprehensible of such a person to keep buying to the stage at which the listing is imperilled? A. It is certainly putting at a disadvantage the remaining minority stockholders.

Q. Yes, I appreciate that and I put the question again. In your view, is that reprehensible conduct on the part of the major shareholder? A. In some other companies it may not be but, in this particular circumstance we are talking about, I believe it is. 10

Q. Why do you distinguish this company from any other in that respect? A. Because the fact that the locked-in minority were offered a much lesser price for their shares than what the chairman got.

Q. We will come to the offer later. I am asking you at this stage only what view you have, if you have one at all, as to the acquisition by a major shareholder of a sufficient quantity of shares to imperil the listing. Nothing more than that? A. I would believe that it would be incumbent upon the directors of that company to consider the interests of their minority stockholders. 20

Q. Which company? A. The company that is increasing its holding that puts the listing of the other company in jeopardy.

Q. You mean you think the acquirer of further shares should consider the other shareholders in the company in which it is acquiring the shares? A. In other words, you are suggesting that they should entirely disregard the interests of the other minority stockholders? 30

Q. I am simply asking for your views. I am not suggesting anything. A. Well, sir, I don't believe that they should entirely disregard the interests of the other minority stockholders. It would depend on the circumstances that existed. Some companies are still listing when there's 93% of the shares held by one party.

Q. I am asking you to consider at the stage where that imperils listing. Do you say that that is reprehensible conduct in your view? A. Where it puts listing in jeopardy.

Q. Yes, that is part of the assumption? A. And the people have purchased the shares on the faith of the continued listing. I don't know whether I would use the word reprehensible but I believe it is something that would have to be considered by that Board before they did place that listing in jeopardy. 10

Q. Would you, as a director of such a hypothetical major shareholder dissent from the proposition that your company should purchase more shares if it is in the financial interests of the company of which you are a director that it should do so? A. Am I a director of the other company that is being put into this squeeze or not?

Q. No, I am asking you at the moment to assume you are on the board of the major shareholder who is contemplating buying more to the stage of jeopardising the listing of the company whose shares you are contemplating acquiring? A. And we have got no common directors at all between the boards of both companies? 20

Q. No common directors at all. I want to know whether you as a director of that company when considering, assuming, you have concluded that it is in the financial interests of the company of which you are a director, to make this acquisition, would, nonetheless, dissent from acquiring anymore? A. At the time that decision was made to put that listing in jeopardy, I think we, to preserve our good name and integrity, would have to consider what we would do for the locked-in minority stock holders. 30

Q. That is a somewhat different question, and perhaps it will be repeated again, but, could you answer the one that I put to you? Do you follow the assumptions? You are on the Board of major shareholder; it is considering acquiring more; it realises that if it does it will put the listing in jeopardy, but the acquisition is in its financial interest. Would you dissent from the acquisition as such a director? A. It would depend. My 40

G.L.A. Donohoo, xx

attitude would depend on what we were going to do for the other locked-in minority stockholders.

Q. If the view of all the other directors was that nothing would be done, what would you do? A. With more than three directors, my view wouldn't have any bearing on the matter, would it?

Q. I would still like to know how you would vote. And the next question I am going to ask you is, how would you vote if you had the casting vote? A. There could be circumstances where I would vote for it.

10

(witness stood down)

(Further hearing adjourned to 10.00 a.m.,
Thursday, 16th October, 1975)

-o0o-

141. G.L.A. Donohoo, xx,
stood down.

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 707 of 1975

CORAM: BOWEN, C.J. in eq.

CUMBERLAND HOLDINGS LIMITED & COMPANIES ACT

THIRD DAY: THURSDAY, 16TH OCTOBER, 1975

MR. VOSS: I call on subpoena duces tecum the manager of Falkirk Properties Limited, the subpoena being dated and served on 14th October 1975.

MR. BAINTON: I answer the subpoena. There are no documents produced in answer to the subpoena.

10

(Subpoena m.f.i.4)

* MR. VOSS: There are four corrections to the first day's transcript. The first one is on p.32, about two thirds of the way down. The question was "Yes. Will you go on from there? What was next done, or said? Can you carry on from there, please? A. Yes. Wait there. That's right. I said to the Board - yes. I then said that FAI's offer appeared to be contrary to the listing requirements of the Sydney Stock Exchange, and referred to requirement 5(10) (2)." That should be "requirement 5(10) (e)." In fact, there is no requirement 5(10) (2).

20

** The second correction is on p.36, in the middle of the page, where the question is "Yes, what happened then" and, inferentially it looks as if Mr. Walker said "I don't give a damn about the success of the offer." That should be "Mr. Adler".

MR. BAINTON: The real error is two questions earlier, in the question which begins "Now, what next happened at the meeting." On the fourth line, in the answer, "Mr. Walker" should be "Mr. Adler". That then makes the transcript read correctly.

30

*** MR. VOSS: The third correction is on p.39, the second question and answer. The answer, as recorded, says

(* Original Transcript page 13)

(** Original Transcript page 16)

(*** Original Transcript page 18)

"Mr. Adler rejected that statement because he said that the Board of Cumberland, in assessing the take-over - the Board of FAI, I'm sorry, in assessing a take-over offer could not be guided by prices that existed at the moment...etcetera". That "could not" in our submission should be "could only".

MR. BAINTON: The transcript accords with the note that I have.

(In the absence of agreement as to the expression used, this issue was to be resolved during the further examination of the witness.) 10

* MR. VOSS: There is a further correction at p.48 of the transcript, the third question and answer from the bottom of the page: "Q. What happened next? A. Next I suggested that my voting against the increase in the final dividend of five to six per cent be noted. This transpired at a meeting back in August 1974. Mr. Adler said 'I agree you spoke against the motion. I do not believe that you voted against it'. Mr. Belfer said 'I agree. I was against it but cannot fully recall' those are my words down here." The portion "Mr. Belfer said 'I agree. I was against it but cannot fully recall'" should be "Mr. Belfer said 'I agree he was against it but I cannot fully recall.'" 20

HIS HONOUR: I substitute "he" for "I" so that it will read "... he was against it but I cannot fully recall".

MR. VOSS: On the first day I called on subpoena duces tecum John Maurice Messara, and a gentleman came from Mr. Messara's office and produced some documents. As I understand it, he has now come with some further documents in response to the same subpoena. 30

(Robert Keith Paine, of 3/112 Bower Street, Manly, appeared in answer to a further call on subpoena. In reply to Mr. Voss Mr. Paine stated that he appeared in response to a new subpoena dated 14th October 1975, and that he produced the whole of the documents called for under the terms of the subpoena, together with a copy of the subpoena itself. Mr. Paine excused.)

(* Original Transcript page 25)

GLEN LAWRENCE ALBERT DONOHOO

On former oath:

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

WITNESS: Yes, your Honour.

MR. BAINTON: Q. Mr. Donohoo, were you sitting in court when the discussion about the transcript occurred?

A. Yes, I was.

* Q. I would just like to try and clear up the suggestion that there is an error on p.39. Would you read the whole of the question and answer second from the top on p.39? Would you please read that to yourself? A. Yes. 10

Q. You are recorded as having said "Mr. Adler rejected that statement...1974" do you recall that is what you in fact said? A. I had confused this point - that is why I had the correction -

Q. Yes, I know. But you see, you are saying that he said that the Board "could not be guided" - that is, the Board of FAI or Cumberland could not be guided by prices that existed at the moment. First of all did you in fact say that, do you remember? A. Mr. Adler rejected - 20

Q. I'm sorry, I want to know if the transcript correctly records what you did say, for a start, and then I am going to ask you, if that is what you meant to say, and then -

HIS HONOUR: He had better read the next question and answer, too.

MR. BAINTON: Q. I think you did say it, but if you think that you did not, please tell us? A. Well, I think I could have put it more clearly, yes. 30

Q. I am sorry to keep being insistent with you, but do you remember whether you did say what is recorded there, or not? A. I think I did say that, but I didn't do it deliberately.

(* Original Transcript page 18)

Q. What did you mean to say? Will you tell us that?

A. At that time Mr. Adler said that "the Board of FAI, in preparing its take-over bid, could not be guided by the share market prices that had existed in July 1974, and which have since fallen so dramatically. Also the Board of Cumberland could not be guided by share prices that existed at that time in considering a take-over offer."

Q. "That time" being July? A. No, at the time when the Board of Cumberland was considering it. 10

HIS HONOUR: Q. Could not be guided by the share prices existing in July? A. Yes, at that time in November.

MR. BAINTON: Q. The substance of what they were saying was that the share market had dropped a long way since July? A. Yes, that is right.

Q. And it would be commercially unreal to calculate a take-over offer then on the basis of what the prices had been in July? A. That would be the substance of it.

MR. HUGHES: In response to my friend's call yesterday afternoon for the production of newspaper articles, I have them available for my friend. 20

MR. BAINTON: I was not really calling for them. I was asking if, instead of going to the trouble of getting our own copies, I could use your copies.

MR. HUGHES: If you call for them, they are available.

MR. BAINTON: Q. Did you calculate the asset backing of the shares in Cumberland? A. Yes, I did.

Q. What figure did you arrive at? -

HIS HONOUR: You had better identify which shares you are speaking of. 30

MR. BAINTON : Q. The ordinary shares in Cumberland Holdings Limited in accordance with the balance sheet as at 30th June 1971? A. Yes.

Q. What was the calculation at which you arrived?

A. The figure I came to was 78.9 cents. Almost 79 cents. Shall I explain how I arrived at that figure?

Q. No, I think I know how you arrived at that. The difference between that and the 70 cent figure would depend upon whether or not you deducted, in arriving at the net asset backing, one of the figures in the balance sheet? A. That is not the difference, no. On the contrary, there was an addition to the net tangible assets, because on this the investments were shown in the books at a value of \$122,532. At the time when this balance sheet was prepared, 30th June 1971, the market value of these shares was shown in the balance sheet at \$205,447. Hence I have added to the net tangible assets the sum of \$82,915.

10

Q. The figure, for practical purposes, is near enough to 79 cents? A. Yes.

Q. You also told us yesterday that you really were not very favourably impressed with insurance company shares as an investment proposition, and you would not have taken shares in FAI? A. Yes.

20

Q. Will you look at this document I now show you, and tell me if you received a copy of it in the first half of 1974? A. Yes I did.

Q. Now would you look at this document which I show you, and tell me if that has got your signature on it? A. Yes, it has got my signature on it.

Q. You have changed your mind about insurance shares since March 1974? A. That is not a true assessment of the case. May I explain?

30

Q. Perhaps it is not, and you will be given every opportunity to explain it. But would you please answer my question first? The question was, have you changed your mind about insurance shares as an investment since March 1974? A. 1974?

Q. The date on the document which bears your signature? A. Well, I have always had this view, because insurance companies have had a rather torrid time over the last few years.

Q. The answer is that you have not changed your view between the date of the document with your signature on it and the views you expressed yesterday? A. I had this view even prior to this date.

Q. You had better tell us why it was you responded to the invitation to take up shares in FAI by taking some up in your wife's name? A. At this time, as you can see from the notice, it is addressed to all FAI insurance group directors, executives, staff members and associates. 10

Q. Yes. A. I was placed in a rather unenviable position in regard to this, because Mr. Adler said to me at a Board meeting "I have set aside for you 225 shares", or a couple of hundred shares, which turned out to be 225, because of the subsequent bonus issue. He said "I have set aside for you a couple of hundred shares in FAI". I was in a rather unenviable position. I spoke to my chairman about it because I was not happy about taking them up, but in view of my appointment as a director of Cumberland I felt I had very little alternative - I could hardly say to him "No, I don't want them". 20

Q. You felt obliged to take them up? A. Yes, I did.

Q. Why in your wife's name then? A. I beg your pardon?

Q. Why were they taken up in your wife's name? A. For taxation reasons.

Q. Does she still have them, by the way? A. I'm sorry?

Q. Does your wife still have them? A. Yes she had.

(Circular and letter of 14th March 1974 tendered and admitted as Exhibit 44) 30

Q. I was asking you yesterday in effect what would be your view of your duty as a director of a company already holding the majority of shares in another company when considering whether to acquire a further parcel which would be advantageous to it, with the knowledge that that might bring about de-listing, and you told me that there could be circumstances where you would vote in favour of that acquisition. Would you enlarge upon that,

and tell us whether there are any circumstances in which you would vote against it? A. First of all, Mr. Bainton, when I said I felt there were circumstances where I could vote for it, you said I was not on the Board of that particular company - the other company - and hence I would not have a conflict of interest. I would only have an obligation to the shareholders of the company on which I am sitting on the Board.

Q. The question I am putting to you is on the same assumption that I put yesterday afternoon, and that is one of them? A. In view of the fact that there would not be a conflict of interest I conceive there would be circumstances where I would vote for such a proposal. 10

Q. The question this morning is, are there any circumstances where, on those assumptions, you would vote against the acquisition? A. If I felt it would do our company a tremendous amount of harm because of the effect it may have in the mind of the public, or on our customers or on our image on the stock exchange I can see there would be circumstances where, as a member of the Board, I would try to induce the Board not to acquire the additional shares so that the listing of that particular company was placed in jeopardy. 20

Q. Are there any others? A. Not that I can recall at such short notice, no.

Q. What you are in effect saying is you would reach a decision whether in your opinion it was for the benefit of the company of which you were a director to take a further parcel or not. If you thought it was, you would take them; if you thought it was not, you would be against it? A. In view of the fact there was no conflict of interest I could be in favour, yes. 30

Q. You say, do you, that your attitude on a director of that company might be different, if you were also a director of the subsidiary company concerned? A. That is a fact.

Q. Would you tell us why? A. Because of the conflict of interest.

Q. Do you say that because you are a director of the 40

subsidiary in this hypothesis you would not properly discharge your duty as a director of the parent? A. I would be placed in a conflict of interest situation, and by agreeing to it at the parent company level I would be placing the minority stockholders of the second company of which I am a director at a distinct disadvantage.

Q. You are a director, as you have told us, of Washington Soul Pattinson? A. Yes, that is right.

10

Q. You are a director of Deposit and Investments?
A. Yes.

Q. Which is a subsidiary of Washington Soul Pattinson?
A. Yes.

Q. I suppose there is at least the possibility that a conflict of interest might arise between those two companies? A. I cannot imagine how that could be the case, because Deposit and Investments is a wholly-owned subsidiary of Souls, and I cannot see how a conflict of interest could come about, because I would have in consideration in coming to any decision the shareholders in Deposit and Investments.

20

Q. You cannot see any possibility of conflict between those two companies? A. At the moment, no.

Q. Well, I will not use that as an example. Do you think it is possible that under any circumstances you may be persuaded to take a seat on the board of a company and on the board of its, say, 55% owned subsidiary? A. I suppose there could be such circumstances if we had an interest in it.

30

Q. Let us assume that you are on the board of the parent? A. Yes.

Q. The parent, of course, on that hypothesis has a very considerable interest in the subsidiary? A. It has.

Q. And I take it, if invited to do so, you think you may be persuaded to take a seat on the board of the subsidiary? A. Depending on the circumstances. I suppose there could be a case such as that.

Q. And there is, of course, the possibility of conflict of interest between the parent and such a partly-owned subsidiary? There is the possibility of a conflict of interest, isn't there? A. There could be, yes.

Q. Do you suggest that when you are sitting at a meeting of the Board of the parent you would not discharge your duty to that company simply because you thought that the interests of the other company of which you are a Director - though not at the board meeting at the time - happened to conflict? A. Mr. Bainton, if I am sitting on a board and making decisions which I believe are in the interests of the parent company and are not prejudicial to the minority stockholders in that subsidiary, I cannot see where the conflict would come in, because I would put it to you that where I am looking after the parent company's interest I am also looking after the minority stockholders' interests, provided I am doing my job properly and bona fide.

10

Q. I will ask you to assume that the conflict was one in which the interests of the parent company and of the minority shareholders in the subsidiary were in conflict? A. Could I have that again, because they are talking over here - at the side - and I can't hear you very well.

20

Q. You are sitting as a member of the Board of the parent, and this question comes up. Do you say that in those circumstances, in considering that question, you would not consider what was in the best interests of the parent company? A. Mr. Bainton, in the circumstances, if it was such that it was quite a major item I would resign my directorship of the subsidiary company.

30

Q. Having done that, as a director of the parent company your decision would take into account what was in the best interests of the parent? A. Under those circumstances once I had resigned, yes, because I would then be discharging my duties to the stockholders of the parent company.

Q. Notwithstanding that your decision as such might turn out to be to the detriment of the holders of the minority interest in the company from whose board you have just resigned? A. You mean because I have resigned?

40

Q. Not because you have resigned. Because of the conflict? A. Could I have it again, please?

(Following question read by court reporter "Q. Notwithstanding that your decision as such might turn out to be to the detriment of the holders of the minority interest in the company from whose Board you have just resigned")

WITNESS: I can see that it could be to the detriment of the minority stockholders, but -

10

MR. BAINTON: Q. Do you still consider it to be your duty as a director of the parent to put its interests before the interests of the minority shareholders in the other company? A. I don't think so. If I felt that there was a conflict of interests I think I would more likely to tend to side with the minority stockholders. I think this would be duty bound on us as directors of a public company, knowing we are going to be put in the position where we could be accused of not serving the interests of the minority stockholders.

20

Q. You would go against what you would otherwise have thought to be the interests of the company of which you were a director because you thought it might adversely affect other shareholders in another company? If I felt it was to the detriment of, say, the minority stockholders, and our action was going to result in the de-listing of their shares I certainly would not agree to it, because people bought those shares on the basis of their continued listing. I find it hard to take into account the circumstances you are trying to convey to me, but I do believe that if I was in a situation of conflict of interest I would certainly do what I think would be the honourable thing, and I certainly would not want to put the minority stockholders' interests in jeopardy by an action of mine; I think somehow we could come to a satisfactory conclusion that it did not hurt either side.

30

Q. Let me put the question to you again, because you have overlooked one of the ingredients. You are on the board of what I have described as the parent company? A. Yes.

40

Q. It has the opportunity - let me put it specifically

- to acquire a further parcel of shares. It would be to its advantage commercially? A. To the stockholders of the parent company?

Q. Yes. It would be to its commercial advantage to acquire that further parcel? A. Yes.

Q. You believe that by acquiring it the listing of the subsidiary might be put in jeopardy, and you infer from that that the minority stockholders would thereby be prejudiced? A. Mr. Bainton, I would urge -

10

Q. My question is - so that you are clear about it - would not you, as a director of the parent, act on the basis of what was in the interests of the parent company rather than what was in the interests of the minority shareholders in the other company? A. I would use my best endeavours to urge my board to make a satisfactory take-over offer for the locked-in minority stockholders in a situation such as that so that they are not defeated by our action.

Q. That predisposes that you would favour acquiring the parcel that I mentioned in my question? A. Yes, because otherwise we would not be putting listing in jeopardy, would we?

20

Q. Can I take it that as a director of the board you would consider it your duty to vote in favour of the acquisition of that parcel? A. It could be in that case.

Q. Are there any circumstances you can think of in which you would hold the view that it would not be?

A. Presently I can't, in the short time, no.

30

Q. So that add that you would think it proper for the company to make an offer to the holders of the minority shares in the subsidiary company? A. I said a "satisfactory offer".

Q. A satisfactory offer? A. Yes.

Q. In giving those answers have you assumed that you were or were not on the board of the subsidiary at the time the decision was made? A. I thought you were

giving me these questions on the basis that I was on the board of both companies.

Q. On the board of both companies? A. Yes. Was that correct?

Q. I had intended putting them to you on the basis that you were only on the board of the parent company, so obviously one must get the same answer? A. Could you put it -

HIS HONOUR: There are three circumstances, Mr. Bainton. One was that he was on the board only of the parent. That is quite clear. The second was that he was on the board of both. That also is quite clear. The third position was that he started out on both, but resigned from the subsidiary because of a conflict of interest. It should be made clear to the witness to which it relates.

10

Which one do you want to put?

MR. BAINTON: Q. For a start, the answers you have just given would apply to the situation where you were a director of the parent company and had not ever been a director of the subsidiary? A. Can you give me the three cases as his Honour has mentioned, and I can give the answers clearly.

20

Q. If you don't mind, I would rather try and do it my way. A. I'm sorry.

Q. I am not trying to confuse you or anybody else, I assure you. You told me a moment ago that on the hypothesis I was putting to you you, as a director of the parent, would favour the acquisition of the parcel of shares; you would then go on to try and persuade your directors to make a satisfactory offer for the minority interests in the subsidiary? A. Am I on the board of the subsidiary, or not?

30

Q. When you gave me those answers you were obviously assuming you were on the board of the parent company? A. I am sorry, I am getting confused. If I can have them singly I will try and give you a satisfactory answer.

Q. Situation 1, you are on the board of the parent company, and you are not, and have not at any time been on the board of the subsidiary, and -

HIS HONOUR: Perhaps that had better be dealt with.

MR. BAINTON: Q. Do you want me to repeat the rest of the hypothesis? A. Yes.

Q. The hypothesis, then, is that a parcel of shares is offered to the parent. It is to its commercial advantage to accept the offer. You, as a director, know that the result may be to jeopardise the listing. You believe that if the subsidiary is de-listed that would be to the detriment of the minority shareholders? A. Yes.

10

Q. In those circumstances I think it follows, from the answer you gave a while ago, you would vote as a director of the parent in favour of the acquisition? A. Yes. But I did say that I would urge my co-directors -

Q. You would vote in favour of it? A. Yes.

Q. You were not able to think a moment ago of any circumstances in which you would not vote in favour of it? A. If I felt that it would be detrimental to the interests of the parent company - the company of which I am a board member - if it were detrimental to our name in the commercial world -

20

Q. I'm asking you to assume it is to the commercial advantage. (Objected to).

Q. When I said "commercial advantage" I mean not only pounds shillings and pence, but in considerations of reputation, commercial morality, or whatever other label you might like to give it. Taking all of those other things into account, you believe it was to the advantage of the parent to acquire? A. We were talking in dollars and cents, but I would not do anything detrimental to our company, and I would not do anything I thought was morally improper.

30

Q. You have already told us that several times, and I am not quarrelling with it. I am asking you to assume that you came to that conclusion on the hypothesis I

put to you, and I had intended, by the expression "commercial advantage" that all of those other considerations that you mentioned be taken into account to be weighed, and the decision made that it was to the commercial advantage. Do you follow that? Do you follow what I am putting to you? A. I think so, yes.

Q. Having reached those decisions, are there any circumstances at all which would lead you, as a director of the parent, not to favour the acquisition of these parcels of shares? A. There could be circumstances, yes. 10

Q. Can you think of any? A. As I said before, I would not agree to anything where the minority stockholders were locked in and I felt it was improper from a business ethics point of view. If it was morally improper I would not agree to anything. I would rather resign from a board of a company if I thought that what we were doing was morally improper.

Q. If you felt that the interests of the shareholders of another company were in conflict with the interests of the company of which you were a director, rather than favour the company of which you were a director you would get off the Board? A. No, not necessarily. I am trying to get the circumstances. If I felt it was a very improper action that my company was contemplating I would get off the Board. I would not prostitute my position. 20

Q. In what circumstances would it be, in your view, improper for the company of which you are a director to acquire shares or other assets, if you like, when that acquisition is to its commercial advantage, using that phrase in the sense in which I defined it a moment ago? A. Could I have the question again? I did not quite follow you. 30

Q. I want to know what, in your opinion, are the circumstances in which you, as a director of a company, would not act in the best interests of the company in the sense I have just described because you thought its interests conflicted with the interests of the shareholders in a different company? A. If it was a morally and commercially proper proposition - a proper transaction - I would not resign. If I felt it was a transaction 40

that was not a proper and moral type of proposition I would consider resigning from the board.

Q. They are very fine phrases. But would you mind telling me what sort of situation you have in mind by those words? A. In the shortness of time I can't think of a hypothetical case. How long have I got to think about a possible hypothetical case?

Q. Let me put something specifically to you. Would you regard it as a proper discharge of your duties as a director of a public company to refrain from acquiring a parcel of shares offered to it in another company because you believed that the result of acquisition may be that the other company would be de-listed through action of the Stock Exchange? A. I would give deep consideration to it, because I would feel that even though we had the advantage to start with of getting these shares and forcing these people into this predicament that they would be in - I would feel that some form of offer must be given to the other people - some form of satisfactory offer - so that we were not .. (not completed). I don't think you can look at just a circumstance in isolation. You have to take it to its final conclusion. 10 20

Q. I would like you to answer the question, if you possibly can. Can you give me an answer to my question? A. If I have not answered it, could I have the question again, please?

(The question "Q. Let me put something specifically to you. Would you regard it as a proper discharge of your duties as a director of a public company to refrain from acquiring a parcel of shares offered to it in another company because you believed that the result of acquisition may be that the other company would be de-listed through action of the Stock Exchange." was read by the Court reporter.) 30

WITNESS: Would I refrain from agreeing? In most circumstances I should imagine I would probably agree provided, as I said, that we had a satisfactory solution to the problems of the other people in contemplation.

MR. BAINTON: Q. Let me add one other ingredient, that at the time this decision had to be made by the company 40

of which you are a director you did not know whether or not there could be any solution to any problem that these other minority shareholders might find themselves in? A. At that time I felt there was no solution available to their predicament?

Q. Let us assume, just as an illustration, that you were given 24 hours to decide to take the parcel or you would lose it. A. Under those circumstances I would expect that I would probably agree to it.

10

Q. There could hardly be any other proper decision while you were a director of that company, could there?
A. Probably not.

Q. Do you suggest that the decision in the circumstances that I have just put to you would be different - that is, your decision as a director of this parent company - if at that time you were also a director of the subsidiary?
A. And I knew that our action would put their listing in jeopardy?

Q. Yes. It is on the same assumptions, but adding the other one, that you are also on the board of the subsidiary? A. I would have a very real conflict of interest, and this would have to be resolved to the benefit - to the satisfactory conclusion for both parties - the parent company and the minority stockholder - because I have a duty to the minority stockholder - I would not be on the board of the subsidiary representing wholly and solely the parent company. I would be representing every solitary stockholder in that company.

20

Q. When you are making the decision I am asking you to consider you are sitting as a director of the parent. You have told me what that decision would have to be if you were not a director of a subsidiary company? A. I have.

30

Q. Would you tell me now whether or not your decision as a director of the parent would be different if you were also a director of the subsidiary? A. It could be, yes.

Q. Why? A. Because of the conflict of interest.

Q. So that do you say because of the circumstance that you are also on the board of the subsidiary you would have a different view of your duties as director of the parent company? A. I would have different considerations yes, because I am one person and I am wearing two hats.

Q. Your problem, then, may I take it, is your personal embarrassment at being put in that situation? A. Quite so.

Q. Do you say that you would put that personal embarrassment in front of the duty you have as a director of the parent company to act in its best interests? (Objected to; rejected.) 10

Q. You have told us what your views would be as a director of the parent if you did not sit on the subsidiary company? A. I have.

Q. As a director of the subsidiary you would feel, I take it, that the result of that acquisition would be to the detriment of some of the shareholders of the subsidiary? A. It could be if we did not make a satisfactory offer for their shares, yes. 20

Q. In these circumstances it would be your preference, may I take it, as a director of the subsidiary that the acquisition should not occur? A. My attitude.

Q. Would that be your preference as a director of the subsidiary? A. I cannot answer that way. My attitude as a director of the subsidiary would be dictated by the attitude of the parent company in regard to the locked-in minority stockholders.

Q. This question I am asking you to assume arises at a board meeting of the parent company. You have a very limited time to make a decision. You have told us what the decision would be if you were not also on the board of the subsidiary (Objected to; admitted; question read to witness by court reporter). 30

MR. BAINTON: Q. Would you tell us then how you would act as a director of the parent in that situation if you were also a director of the subsidiary and the reasons? A. First of all, I would have to disclose in the minutes of the parent company the conflict of interest, I would have to ask my co-directors what they would do about the other people and I would come to a decision 40

based on the attitude of the board in respect of the locked-in minority stockholders.

And the mere fact, Mr. Bainton, of being 24 hours, I would never rush into any decision, irrespective of what it is, if I felt I was committing or doing an action which I felt may be detrimental to a certain body of people.

Q. If your other directors said, "look, we can't decide what we are going to do about those minority shareholders yet. What we must decide now is whether we acquire the parcel or not."? A. Mr. Bainton, in the short time I have to think of this, I would probably agree to the purchase of the shares. If my board did not later on make a satisfactory offer, I would probably resign from the board of the parent company because I would not have faith in my co-directors.

10

Q. So that it would be your view that in those circumstances as a director of the parent you would consider its interests over and above the interests of the minority shareholders in the subsidiary? A. I don't believe that in these circumstances they can be put in self-contained compartments. I am wearing two hats, Mr. Bainton. The size of the hat for one company compared with the size of the hat of the other I don't think makes any difference to the circumstances. I have got a moral obligation to two sets of people.

20

Q. Might it not, Mr. Donohoo, be a little more correct, if one is using the analogy, to say that at a particular time you were wearing one hat and at a different time you were wearing another hat? A. But in the circumstances you have set before me, Mr. Bainton, I must surely be wearing both hats. I can't say, "I must forget" and set aside that I am a director of the subsidiary company. I don't think things work that way, sir.

30

HIS HONOUR: It may be difficult to wear two hats at the same time but it may be incumbent upon a director to disclose that he owns the other hat at board meetings.

MR. HUGHES: Some people can wear even three hats.

MR. BAINTON: Q. I had rather been assuming, and I

40

hoped you had too, that the board of the parent company would know that you were on the board of the subsidiary?

A. Yes, I would assume that, yes. I mean that is common sense. Yes, I would assume that.

Q. Now, would you take it just a step further. You have told us that if your co-directors on the parent company did not make the sort of offer that you thought would be proper you would resign from the parent? A. I wouldn't stay on any board, Mr. Bainton, where I felt that the people were not discharging their duties properly and faithfully to all the shareholders.

10

Q. Let me ask you what, with your other hat on; that is, as a director of the subsidiary, you suggest you could do about the situation that has occurred? A. I would expect that I could urge my fellow directors to do, if I could summon up, the decent thing, and I feel that if I could not urge my directors or could not get their co-operation to do what I felt was the proper thing in regard to all stockholders, I would certainly resign from the board.

20

Q. You are talking there about your co-directors in the parent company? A. Yes, because that was the proposition I think you put to me.

Q. It was not? A. I'm sorry.

Q. I am asking you what, on the assumption that the parent company acquired these shares and that the other directors would not make what you regarded as a satisfactory offer for the minority, you, as a director of the subsidiary, suggest that you could, as a director of the subsidiary, do about this situation? A. I am on the board of both companies?

30

Q. Well, you are on the board of the subsidiary. I do not, for the purpose of this, mind whether you have already resigned from the parent or whether you are still there. I want to know what you say that, as a director of the subsidiary, you can do about the situation?

A. I would expect that in the circumstances, and they are serious circumstances, I would make my feelings known to the minority stockholders and, if I felt that it was detrimental to their interests and there was some

40

advantage in my staying on the board of the subsidiary, I would probably stay on the board to endeavour to protect their interests.

Q. Well now, what do you suggest that you, as a director of the subsidiary, or the board of the subsidiary as a whole, can do about the situation that has just, on this hypothesis, occurred? A. From what you have said, very little.

Q. Well, anything at all? A. Well, there is very little from a practical point of view, so far as numbers are concerned, because I would be outvoted because they have got 80 per cent of the capital. But if I felt that I could circularise the people properly, I would seek legal advice and I would see what I could do to properly discharge my duties to all stockholders. 10

Q. Mr. Donohoo, let me ask you to assume that all of the directors of the subsidiary strongly disapproved of what had happened. What I ask you is, what can they do about it? A. I would think they would be in a position to give vent of their feelings in this matter. 20

Q. Well, to whom? A. To the stockholders and possibly to the Sydney Stock Exchange, but of course it wouldn't be the Stock Exchange because it would have been delisted by now.

Q. They tell the stockholders that they do not like what had happened? A. I would expect that - yes, yes.

Q. Anything else? A. I doubt whether I would resign under those circumstances until such time as a satisfactory resolution had been made of the problem that is now confronting the minority stockholders. I can't think of any other point. We tell the stockholders; we try to look after their interests. I can't think of any other thing quickly, Mr. Bainton. 30

Q. Isn't it quite plain, Mr. Donohoo, that that situation has come about without the board of the subsidiary being able to do anything about it and it having come about there is nothing they can do to undo it? A. And we have common directors to the boards of both companies, the parent, in this hypothesis, and the subsidiary? 40

Q. Let's assume for the moment they are completely different people? A. Where there are completely different boards. No, they are the subsidiary directors because they can be removed at the next annual general meeting or even before in some cases.

Q. If there are common directors, those common directors can do nothing about it unless they do so in their capacity as directors of the parent company. A. In their capacity as directors and wearing both hats, they should certainly give consideration to the other minority stockholders. They are wearing two hats, Mr. Bainton. 10

Q. The only useful hat in that circumstance for the minority shareholders is the hat of the director of the parent. (Objected to; allowed)

HIS HONOUR: I think the hypothesis is that the hat is only of use for practical steps.

MR. BAINTON: Q. Do you follow the question? A. Could I have it again, please, sir?

HIS HONOUR: Q. He said the only hat that would be of any use, as I understood the question, for any practical step to be taken, would be the hat worn as a director of the parent. That is the proposition put to you in the question. A. That would appear to be correct, yes. 20

MR. BAINTON: Q. Mr. Donohoo, the mere circumstances that a company's shares or some class of them is listed on the stock exchange cannot be taken as any guarantee that they will always remain so, can it? A. No.

Q. Any person with any experience of the stock market would know the company's securities can be delisted or suspended and then delisted for any one of quite a number of reasons? A. But usually only as a result of a full take-over. That is the normal case when they are delisted or suspended. 30

Q. That is one case but it is not the only case. A. It is not the only case.

Q. And, again, anybody with any investment experience would know that circumstances can arise in which a

company's securities can be delisted without the company having any control at all over whether that situation occurs or not? A. This is assuming that it is brought about by the building up of the parent company's interest in that particular company.

Q. That is one -- A. That is subsequently delisted.

Q. That is one fairly common cause of delisting?

A. Well, I wouldn't agree that it is common, Mr. Bainton, but it may be.

10

Q. It has occurred with some frequency perhaps this way over the last four or five years? A. I can't think of a case.

Q. Can you think of any circumstances at all in which the shares in a company may become delisted? A. They are invariably delisted as a result of a successful takeover offer being made for a company. If it is a successful one they normally, once they get the ninety per cent, they then impose the compulsory acquisition and, hence, it is delisted.

20

Q. In those circumstances, the company, having but one shareholder, would request delisting? A. I don't know whether it would request it or whether it would be notified by the stock exchange.

Q. It is not usual in those circumstances for the company to continue to pay \$1,000 a year for the privilege of having its shares listed when there are no sellers?

A. I could not disagree with that, Mr. Bainton, no.

Q. Well now, if there is a takeover which does not succeed to the extent of enabling compulsory acquisition within the non-accepting shareholders, there may, nonetheless, be a de-listing occur because there is not enough spread? A. That could be the case.

30

Q. And anybody with any investment experience would know that that could happen in respect of a company in which he has shares? A. It could happen to any company, yes.

Q. He who invests in that situation takes the risk,

which may be small or great depending on the circumstances, that the company in which he buys shares will remain on the list for quotation? A. He takes the risk, yes.

Q. It would not be correct, Mr. Donohoo, to assert, as you have sometimes done, that people with shares in a company which is listed have got some sort of legal or commercial or moral right, however you like to describe it, to have those shares always listed? A. I think it depends entirely upon how the circumstances have arisen concerning the listing being placed in jeopardy.

10

Q. Whatever those circumstances are they are quite outside the control of the particular shareholder? A. Which shareholder are you referring to?

Q. The minority shareholder.

HIS HONOUR: Is that question a proposition or is it a hypothesis? I am not quite clear, Mr. Bainton.

MR. BAINTON: Q. It is a question.

WITNESS: Could I have it again please.

20

HIS HONOUR: In any circumstances?

MR. BAINTON: Q. It is quite plain that whether or not such circumstances as you have just described to me, occur, it is quite outside the control of the holder of this minority parcel? A. That is so, yes.

Q. That is the risk you are running when you buy shares on the Stock Exchange? A. That would appear so.

Q. Since you became aware of what were to be the terms, including the consideration of the takeover offer that FAI stated it intended to make, you have opposed it as vigorously as you have been able to do? A. That's correct.

30

Q. You have taken all steps that you thought were at least properly open to you? A. I took the steps that I thought were appropriate in the interests of the minority stockholders.

Q. Was there anything you thought might have helped them that you omitted to do? A. I am sure they would have been helped if they had had the benefit of an independent assessment of the takeover bid.

Q. Was there anything you omitted to do that you thought you could have done? A. Not that I can recall at the moment, Mr. Bainton, no.

Q. May we take it that in the various circulars you sent round or the speeches you made you used all the arguments which you thought were properly available to persuade shareholders not to take up the takeover offer? A. Mr. Bainton, I don't think it is fair to say that I persuaded them. I, sir, made a recommendation to the people.

10

Q. I said "try to persuade"? A. No, I made a recommendation and, whether they accepted my recommendation or not, Mr. Bainton, is entirely up to the option of the individual stockholder.

Q. Did you in the various documents you disseminated make all the points that you thought should be taken into account in considering whether or not the shareholders should accept the offer? A. Mr. Bainton, I felt I made all the points but the benefit of an independent report would have highlighted any motion on my part.

20

Q. You were not in a position to do that? A. No, I tried, sir.

Q. The question I was asking you is whether you put all the matters that you were able to put and thought proper to be put? A. All the matters I could think of at the time, yes, sir.

30

Q. Have you thought of any since which you, on hindsight, might have put had you thought of them at the time? A. No, Mr. Bainton, I can't think of any point.

Q. And your prime purpose in all this, I suggest to you, was to do your very best to bring about a situation in which FAI would make a cash offer of \$1.25, at least, or thereabouts anyway, for the ordinary shares

and 50 cents for the preference shares? A. That was my prime objective, to get the same offer for the minority stockholders as Mr. Adler got for his shares.

Q. The tactic you adopted, and I don't mean that in any derisory sense, was to take all steps that you thought might force a situation in which FAI would make some such offer? A. I don't know whether I would use the word "force", Mr. Bainton, but induce them maybe.

Q. To bring about a situation? A. To bring about a situation where the minority stockholders got the same consideration as Mr. Adler got for his. 10

Q. And, as part of that tactic, and, again please don't think I am using that in any other sense than to describe what you did, you recommended in quite strong terms to the preference shareholders not to accept the offer? A. I don't believe that it is proper to use the words "very strong terms", Mr. Bainton. I pointed out to these people that if they were to accept the offer, they could be enhancing the amount of the net tangible asset backing for the 50 cent preference stock unit. 20

Q. The circular of 21st November that you sent to preference shareholders which became part of Exhibit 13 (shown to witness) which is occasionally in small print - it is, Mr. Donohoo, for the most part, in small type; it is mostly in small type? A. It is, sir.

Q. Apart from the heading, it bursts forth, as it were, into capital letters twice? A. Yes, where it says "This is important. Please read carefully." Yes. 30

Q. I regard that as the heading. If you look about two-thirds of the way down the first page and at the second last paragraph on the third page, capital letters are used? A. But, sir, they are only used in two very small paragraphs which consist of a line and a half and it is two and a half foolscap pages.

Q. Those are the only two occasions where it is used?
A. Yes.

Q. Both of them are your recommendations against

acceptance. In the first one, you have even underlined "Do not"? A. That's correct.

Q. Yet, you cavil with what I put to you a moment ago, that you strongly recommended to these people not to accept the offer? A. I do not subscribe to your view, sir, because I feel that I put it very clearly to the people that they would only be getting what appeared on paper to be an enhanced tangible asset backing for their stock units. I put it to them if they wanted to accept that it was their prerogative. 10

Q. Mr. Donohoo, you twice put to them your personal recommendation? A. They did not have an independent report. That is why I went down there. Surely I was entitled to give them some guidance. That is what I am there for.

Q. I have not suggested that you should not. A. I am sorry, that was my interpretation.

Q. But it was the fact that you strongly recommended to these people, the preference shareholders, that they should not accept the offer. The plain fact is you did, didn't you? A. I told them not to accept. Can I give you the reasons? 20

Q. No, they are in the document, aren't they? A. No, not all of them, sir. I would like to give the background to it if I may.

Q. No, you have done that already. In the discussions you had had with Mr. Adler and any other directors of FAI - - ? A. Of FAI? Not Cumberland?

Q. FAI, you had been told as clearly as could be and, indeed, I think on one occasion of which you told us yesterday, Mr. Adler's words were, "I don't give a damn about the success of the offer"; you had been told that it was not FAI's motive to endeavour to acquire any of the minority shares in Cumberland but merely its name to offer the shareholders an opportunity? A. That is what Mr. Adler claimed, yes. 30

Q. He claimed it from start to finish and so did the other directors? A. I never spoke to any of the

other directors, sir.

Q. The only director with whom you had a discussion of the matter made it clear from the start and maintained it throughout that that was his view anyway? A. That's correct.

Q. Is it then your assertion that FAI not only should have made an offer but should have made a cash offer?

A. Yes, an offer that was comparable with what Mr. Adler got, yes, and that was a cash offer in both instances. 10

Q. And your reason, may I take it, and your sole reason, I suggest to you, is that you thought there should be such a cash offer because some months earlier there had been an acquisition of shares at that price for cash? A. I felt that because Fire and All Risks were prepared to pay \$1.25 cash for the ordinary stock units and 50 cents cash for the preference stock units, all 154,000 of them held by the Adler interests, that the locked-in minority stockholders were entitled to the same offer. 20

Q. Notwithstanding that, by reason of the different circumstances the two were in - -

MR. HUGHES: Which two?

MR. BAINTON: Q. By "two" I mean FAI or FAR and the minority shareholders. The basis on which you would value a parcel of shares to be acquired by the parent is quite a different basis from that on which you would value it in the hands of the minority shareholders, as you told us yesterday. (Objected to: question withdrawn) 30

Q. When I was talking about valuation yesterday, one of the situations I put to you was the basis on which you would value a parcel of shares to somebody who already had, or would with the parcel acquire, enough votes to pass a special resolution - that is, more than 75 per cent - and you told me that such a person would pay most regard to the asset backing of the shares he was acquiring. Do you recollect that? A. Mr. Bainton, you put so many propositions to me yesterday, I'm sorry, I just can't put them in compartments. We must have 40

had fifty.

Q. I put another series of questions to you asking you how you would value a parcel - I think we used 10 per cent - of shares in the company of which somebody else had more than 50 per cent? A. You did put the proposition, yes.

Q. And you told me you would value those on the basis of what somebody would pay for what you would infer to be the probable future yield from dividends? A. I think, sir, these were shares that had been acquired and there is no contingency - I find it very hard, Mr. Bainton, to recollect so much that went on yesterday.

10

HIS HONOUR: I think, in the circumstances, perhaps you could put the two positions to him and get his view on the valuation?

MR. BAINTON: I thought I had.

HIS HONOUR: I will take a short adjournment. You may be able to find it in the transcript and put it to him, but I think his attention should be directed to that if you are relying on what he said yesterday, otherwise it can be put to him afresh.

20

(Short adjournment)

* MR. BAINTON: Q. Mr. Donohoo, one of the questions I put to you yesterday - it is at p.102 - was to ask you the basis on which you would value for probate purposes a parcel of 2,000 ordinary shares in Cumberland Holdings on the basis that the deceased person died in August or September 1974 and, on the basis of the factors as you know them but assuming the shares were not listed. Do you recollect those questions? Would you like to look at the questions and answers? A. Yes, it could be helpful. Thank you, Mr. Bainton.

30

** Q. I think it is the sixth question on p.102 where it begins. There's a copy there. You might like to read it yourself. I think it goes to the end of the first

(* Original Transcript Page 59)

(** Original Transcript Page 59)

* question, Mr. Donohoo, on page 104. I think you agreed there that that parcel would be valued on the earnings basis? A. This is for estate duty purposes, sir?

Q. Yes? A. Yes.

Q. And then, if you read the fourth and fifth questions on the next page where I asked you how you would value a similar parcel for somebody who came in and suggested he was contemplating buying them and wanted your advice, what you really told me then was that you would give him a number of calculations and let him make up his own mind? A. I recall an answer something similar. Could I just read the fourth question, please sir? 10

Q. Yes? A. I would have thought, sir, that the last word in the fifth question would have been "what to pay", not "what to buy".

MR. HUGHES: "To pay".

MR. BAINTON: Yes, I think you may well be right. I think that may well be what you did say.

HIS HONOUR: Should that be corrected? 20

MR. HUGHES: Yes.

MR. BAINTON: Yes, I think it should.

WITNESS: Your Honour, could I alter this copy?

HIS HONOUR: Yes, if it is an agreed correction, you can make it.

** MR. BAINTON: Q. And then, if you look at the series of questions which begin next and go to the end of the page that is numbered 105, I was asking you how you would value a parcel of shares offered to somebody who already had more than 75 per cent. Do you recollect those questions or would you like to read them? A. Sir, I would like to read them if I may. 30

Q. I think you did agree with the proposition that

(* Original Transcript Page 59)

(** Original Transcript Page 61/2)

was put to you that in those circumstances the majority shareholder contemplating purchasing more had the ability to get his money back if he wanted to or, rather, get the asset backing of the shares back if he wanted to by putting the company into liquidation which he could or could not do at his own whim? A. I agreed, yes.

Q. And that he would necessarily or naturally give much more regard to the asset backing of the shares in determining his price than the minority holder would do? 10

A. That could be the circumstance if he was considering putting it into liquidation, if he considered continuity of business.

Q. He knows he has the ability to do it at any time should it become necessary for him to realise on his investment? A. Yes, yes.

Q. Now, in the whole of the circulars which you disseminated after this takeover offer was announced, you have been asserting that minority shareholders who have had the ability to sell their shares on the stock exchange presumably have not exercised that option but still have shares? A. They haven't exercised it? Because of the thinness of the market? 20

Q. Whatever reason, they obviously have not exercised it because they are still shareholders? A. Quite.

X Q. You were suggesting that they should receive a price for their shares much greater than the price at which you would value them had you had to do so for probate purposes, simply because a controlling shareholder had made a purchase off the market at that price some five months earlier? (Objected to: Objection withdrawn) 30

HIS HONOUR: Q. Is that right or not? That that is what you were doing? Do you follow that, Mr. Donohoo?
A. Could I just have it again please.

(Question marked X read)

MR. HUGHES: It is not five months.

WITNESS: It is not five months.

MR. BAINTON: Q. It is 12th July to the time of your first circular of 21st November. I think it is four months, sorry. Four months? (witness nodded)

HIS HONOUR: Q. Can you answer that question, Mr. Donohoo? A. I think so, your Honour.

Q. What is your answer? A. I beg your pardon?

Q. Will you give your answer? A. Yes. It is true, Mr. Bainton that I was asserting that I felt these people should receive the same price as the chairman received for his shares. 10

MR. BAINTON: Q. Notwithstanding that, if the listing continued, their prospects of being able to realise the shares at that price could only be described as minimal, firstly, because there never had been any demand for shares on the market and, secondly, because there was simply nobody at that time offering to buy at anything like \$1.25 for ordinary shares or at all for preference shares? A. Could I just have the question please?

Q. Yes. At the time of your circulars, and I intend that to include the period from the first one, the one you looked at a moment ago - - 20

HIS HONOUR: That is 21st November, is it?

MR. BAINTON: Q. The 21st or the 24th? A. 21st November.

MR. HUGHES: 21st November, Exhibit 13.

MR. BAINTON: Q. -- until the last one you sent out which was after the withdrawal of the offer? A. 10th December.

Q. I think that is the right date. Yes, 10th December - none of the minority shareholders, and I include in that Washington H. Soul Pattinson & Co. Limited could possibly have realised \$1.25 for the ordinary shares or 50 cents for the preference shares by putting their parcels on the market? A. Yes, they certainly could not realise that figure after FAI had withdrawn its buying quote off the Sydney Stock Exchange. 30

Q. Do you suggest that there was a buying quote from FAI between those two dates? A. Between what two dates, Mr. Bainton?

Q. 21st November and 10th December? A. I couldn't answer that.

Q. I put my question to you again. Had any of those minority shareholders, and I intend that to mean everybody other than FAR, sought to realise their investment in Cumberland Holdings between those dates - - A. I didn't - I am sorry, I beg your pardon? 10

Q. - - they could not have achieved a price of \$1.25 for the ordinary shares or 50 cents for the preference shares, firstly, because there was no demand for the shares; secondly, because there were no persons offering to buy any at all at those prices and, thirdly because there was no person offering to buy any preference shares at all at any price? A. On the two dates you mentioned, that's correct.

Q. Between the two dates? A. Yes, that's correct. 20

Q. That would also be true from at least the end of July 1974 until today for the very same reasons? A. Mr. Bainton, my recollection of the buying quotes on the exchange - I think the price went up from 80 cents to \$1.25 about four days before Mr. Adler sold out and then four working days after that the buying quote disappeared from the market and, sir, I thought it was restored to the market again about 31st July at 50 cents. I am referring to the ordinary stock units.

Q. We will, in due course, have those quotes in evidence. 30

(Letter from Sydney Stock Exchange setting out certain details of transactions in the ordinary shares from 1st November, 1973 to 9th October, 1975 tendered and admitted as Exhibit 45)

Q. Mr. Donohoo, would you for the moment take this copy of Exhibit 37 which is your circular of 19th February?
A. Right.

Q. At the back of it I think you set out quotes and

quotes and turnovers extracted from "The Financial Review". A. That's correct.

Q. And I take it that to the best of your ability you extracted that with accuracy? A. That would be correct.

Q. It discloses buying offers at \$1.25 over twelve working days which seem to have attracted 1,900 ordinary shares? A. How do you get 1,900, sir?

MR. HUGHES: 1,700.

MR. BAINTON: Q. Well, there's 200, 400, 500, 600 and 1,200 which makes 2,900, does it not? A. That's correct. 10

Q. And then a parcel of 500 at \$1.23? A. Yes.

Q. There are buying and selling offers on each business day until the end of your analysis which is - is it the beginning of February 1975 or round about the date of your circular? A. I am sorry, Mr. Bainton, I don't follow. There is not a buying order beyond 17th July. There is a selling order.

Q. Well, buying or selling orders, I am sorry. A. Oh, I beg your pardon, yes, yes. And then the buying order comes on at July 31 at 50 cents for four days and disappears again for eight working days, is restored again and then, I think, disappears completely. 20

Q. Throughout the period there were selling orders?
A. There were, yes.

Q. The total market activity for 17th July, 1974 until whatever date in February is the end of your analysis appears to have been the sale and purchase of 100 shares on 15th August, 1974? A. That is according to this, yes. 30

Q. Have you any reason to doubt that it is accurate?
A. No, sir, I have not.

Q. You would not describe it as an active market, would you, Mr. Donohoo? A. No, I would not, Mr. Bainton.

Q. Not a market on which any of the minority shareholders could have expected readily to realise their investments? A. Well, sir, they may have been anxious to realise their investment but, of course, the buying quote dictated how much they would get for their share if they were to realise it.

Q. Nobody, it would seem, was interested in buying at any of the prices which sellers had posted which dropped down to fifty-one cents other than somebody who bought this parcel of one hundred. There just weren't any buyers, were there? A. On these facts, that seems to be fair comment, Mr. Bainton. 10

Q. Wouldn't that necessarily lead you to agree with the proposition that the minority shareholders would have had a great deal of difficulty in disposing of their shares at all on the market, irrespective of the cost? A. Well, Mr. Bainton, I would suggest, sir, that because of the inadequacy of the takeover that was given to these people that they were not prepared and nobody would want to be on that because they could end up with just a share in an unlisted company and there was just not the incentive. 20

Q. The fact, nonetheless, remains quite clear? A. I beg your pardon?

Q. The fact remains quite clear that there were not persons interested in buying shares in Cumberland Holdings other than somebody who bought one hundred at one dollar - at seventy cents, I am sorry? A. There again, sir, the figures that you are quoting show the position after 13th September when it was advised that the listing was in jeopardy and, hence, I would not expect that a person with business acumen would come in to buy those shares. 30

Q. So, in effect, the threat to delist, you say, virtually has taken away your available market? A. I would suggest, sir, that it would have some effect upon the market, yes.

Q. Mr. Donohoo, let's take it step by step. There wasn't a market in fact in any real sense of the word between those two dates when total turnover was one hundred shares? 40

A. Yes, for the reasons I have stated, I believe that is the reason for the absence of the market.

Q. Let's come to reasons in a moment. The plain fact is there wasn't one? A. That's correct.

Q. The reason, I suggest, is the threat to delist?

A. One of the reasons, yes.

Q. Well, can you suggest any other? A. Well, the person would not buy them, sir, because they realised they would be in a locked-in situation and the only purchaser would be the eighty per cent holder and they would have to take what that holder was prepared to offer them.

10

Q. That is just another way of describing the first reason with elaboration, isn't it? A. Yes, that could be said.

Q. Can you suggest any other reasons? A. Well, I would suggest, sir, that that is a rather substantial reason.

Q. It may or may not be. I just want to know if there are any others that you have to suggest? A. No others exercise my mind at the moment, Mr. Bainton.

20

Q. Do you think there may be others and you have not had sufficient time to think of them? A. That could be the case, yes.

Q. Or would you be prepared to say that with your general business knowledge the only other possible one is just sheer disinterest in buying or selling these shares on the market? A. That may be an over-generalisation on the situation.

Q. Other than the threat to delist and general disinterest, does any other reason suggest itself to you? A. Not at the moment, sir, no.

30

Q. Mr. Donohoo, the first and only public announcement of the threat to delist is the circular of 13th September, 1974, Exhibit 7, I would suggest to you? A. That would be correct, yes.

Q. So that, prior to that date, any threat to delist

did not exist and could not have affected the market?

A. That would be correct.

Q. According to your summary at the back of Exhibit 37, there were buying quotes and selling quotes from 31st August - sorry, 31st July until 9th September at various prices none of which attracted any transactions other than the sale of one hundred shares at seventy cents?

A. That is correct.

MR. BAINTON: Q. So that in that period the only reason is simply a market disinterest in the shares? A. That would seem to be the case.

10

Q. If you can assent to this general proposition it may save time but do not unless you agree with it. For several years at least prior to July 1974 there had been very little market activity in any shares in the companies? A. We are talking of Cumberland Holdings, yes, I think that would be a reasonable statement.

Q. You took the view and expressed it to the minority shareholders that they should receive at least for their shares the price that the controlling shareholder had paid for a parcel of those shares some four months earlier? A. I did.

20

Q. Notwithstanding if that transaction had not occurred, they could not in their wildest dreams expect to realise those prices for their shares? A. I felt because ---

Q. Would you please answer the question before you explain. A. Could I have that again?

(Above question read)

WITNESS: On the market as it existed at the time you are talking about, 31st July, they could not have realised that.

30

MR. BAINTON: Q. And there was no reasonable probability of the market developing in the foreseeable future? A. That would appear to be a reasonable statement.

Q. The position you sought to get them in was one in which they would be very considerably better off than

they would be had they remained shareholders in Cumberland Holdings and had those shares remained quoted on the Stock Exchange? A. I tried to get them in the same position as Mr. Adler got himself into.

Q. Would you answer the question. Do you recall it?
A. No.

(Previous question read)

WITNESS: That is correct.

MR. BAINTON: Q. You sought to do that for the reason that FAI or the controlling shareholder had paid those prices in cash some four months earlier? A. FAI must have felt it was a reasonable price to pay otherwise they would not have paid that sum four months earlier. I was endeavouring to get the same price for the ordinary stockholder as Mr. Adler got. 10

Q. Would you answer the question now. The sole reason for your suggestion to the shareholders was they should not take less than \$1.25 on their ordinary shares and 50 cents for the preference shares was that the controlling shareholder paid that price for a substantial parcel four months earlier? A. I felt they were entitled to the same price, yes. 20

Q. Your sole reason in suggesting to the minority shareholders that they should not accept less than \$1.25 for ordinary shares and 50 cents for preference shares in cash was that those were the prices paid by the controlling shareholder for a substantial parcel of shares some four months earlier? A. Are we not confusing the issue? I felt this was a price that was fair and reasonable but we had received, or the minority stockholders had received a takeover offer and I was suggesting they should not take the offer they had received. 30

Q. You were also suggesting they should not take anything less than the prices I have mentioned? A. Not in the document of the 25th November because I did not mention the price Mr. Adler got.

Q. In your subsequent document you did? A. I think at a later date I did in my recommendation to the stockholders.

Q. The stage was reached at which you put the recommendation to the shareholders that they should not accept less than the figures I have mentioned? A. I think in my letter of the 10th December, after Mr. Adler had withdrawn the takeover offer, I wrote to the stockholders and told them the offer had been withdrawn. I felt that it indicated what I have said. I said that I sincerely hoped when the next offer was made, that had been foreshadowed in Mr. Adler's letter of 6th December, that the offer would be comparable with what Mr. Adler received for his family shares. 10

Q. Can you assent to this proposition. The figure of \$1.25 for ordinary shares whenever it was mentioned in one of your letters, or Mr. Millner's, and the figure of 50 cents for preference shares, whenever it was mentioned in this correspondence, was selected for the sole reason that it represented the price that the controlling shareholder had paid for a large parcel of shares four months earlier? A. It represented the price they must have considered was a fair price because otherwise they would not have paid it. 20

Q. Were you present at the directors' meeting of Souls for the resolution to present the winding up petition?
A. I believe I was.

Q. I suppose you were in favour of that action? A. I certainly would not have voted against it.

Q. My question was - were you in favour of that action?
A. I was.

Q. You would have read the petition by that stage? 30
A. I had.

Q. Do not tell me any of the things that were said but you had some discussion with some person in Allen Allen and Hemsley prior to that date regarding the matter generally? A. Yes, that would be the case.

Q. And provided that firm with some documentary material? A. I cannot recall.

Q. And I suppose some statements as to what had occurred in the past? A. I would have been aware of that.

Q. You would have seen the petition in draft form?

A. I think in this case because of my conflict of interests most of this was handled by Mr. Millner.

Q. I am not trying to suggest you did it all. I want to know if you were familiar with the allegation in the petition? A. I am.

Q. Did you see it -- A. On the 4th April, yes.

Q. You are aware that it sets out in a number of paragraphs, numbers 26 to 35 inclusive what are the complaints that the petitioner makes and asserts to justify the winding up order? A. I would be aware of those grounds. 10

Q. I propose to ask you about them. Would it assist you to have a copy of the petition in front of you?

A. Yes.

Q. I hand you this copy and I would like you to read paragraph 21 to 35? A. In one go?

Q. Read them now to the extent that you need to look at them to recall what is in them? A. Yes. I have read that. 20

Q. You understand it is being asserted that the matters set out in paras. 26 to 35 inclusive are the matters relied upon to base the charges made in paras. 21, 22, 23 and 24? A. Yes, I follow that.

Q. In paras. 26 it is asserted that Mr. Adler urged the holders of ordinary stock units to accept FAI's offer although the members of his family or the companies controlled by him received more and although the net tangible asset backing of Cumberland Holdings' shares was greater than that of FAI's shares? A. Yes. 30

Q. The latter being true only of course of the ordinary shares - only being asserted in respect of the ordinary shares? A. Yes.

Q. It is clear that within a short period of time after the time of making the takeover offer, these two factors had been communicated to the shareholders? A. That is the fact about the sales of Adler's shares?

Q. Yes. A. They were not communicated to the stockholders until after the FAI offer had been withdrawn. It was withdrawn on 6th December - my apologies, they were communicated in the letter of 27th November.

Q. It is true to your knowledge that the offer was withdrawn and no shares were acquired under the offer? A. The offer was withdrawn and I was advised by Mr. Adler's letter that no shares had been secured as a result of the offer.

10

Q. By FAI? A. F.A.R.I.

Q. It would be simple to verify that by an inspection of the share register? A. Yes.

Q. In fact as it turns out whether the complaint was well founded or not, no shareholder suffered any detriment as a result of the making of the offer? A. The listing of the shares was put in jeopardy and that is to the detriment of the minority stockholders.

Q. As a result of the making of the offer? A. I beg your pardon, this was a result of the position leading up to the offer.

20

Q. No shareholder today is in any different position than the position he would have been in had no offer been made at all? A. No. That is right, as far as the offer, yes. I would agree with that.

Q. There is no room for argument about that at all?
A. Not that I can think of at the moment.

Q. You became aware of all the terms of the proposed takeover? A. Yes, on 21st October.

Q. I was going to put to you more than a fortnight or more than three weeks before the offer was despatched?
A. The offer was lodged with the office of the company on 4th November. I became aware of the terms of the takeover offer when I received the draft copy on 21st October.

30

Q. You had from 21st October until 20th November when

the offer was despatched in which you could consider the terms of that offer? A. Yes.

Q. And you reached the decision perhaps with the aid of others quite early in that period to take whatever steps were appropriate to oppose it? A. To not recommend acceptance, yes.

Q. To advise shareholders against it? A. Yes, my recommendation was they did not accept the offer.

Q. May I take it the present petitioner reached a decision fairly early that it would not accept the offer - early after you became aware of the terms - that is, not very long after 21st October? A. I do not know when the petitioner came to that decision. It was communicated to the ordinary stockholders that I was not the beneficial owner of the shares. I had them in my name but I was advised by the beneficial owner they would not be asking me to accept the offer. 10

Q. Is it not a fact that Souls had decided quite some time before the actual despatch of the takeover offer that it would not accept it? A. I do not know how one would define "quite some time" but they did come to a decision before 21st November. 20

Q. That being so, there was no prospect at all, no matter what other acceptances were received of the compulsory acquisition of any of the shares under offer -- Souls had also half of the preference shares and considerably more than 10% of the ordinary shares? A. With respect --

Q. The issued capital is 757,530 ordinary stock units and Fire and All Risks then allegedly increased its stockholding from 545,748 to 603,298, leaving outstanding 254,000 and some shares? A. Yes. 30

Q. Twenty five per cent of that is 25,000 and some?
A. I think your subtraction is incorrect.

Q. I am sorry, 154,000 and ten per cent is 15,000?
A. Yes.

Q. Souls had beneficially 50,000? A. Yes.

Q. And also 50% of the preferences? A. On aggregating the two types of preferences.

Q. How much? A. Around 80%.

Q. If Souls did not propose to accept the offer there was no question of a compulsory acquisition of any shares, the subject of the offer? A. That would be correct.

Q. During the course of the exchange of circulars the shareholders were told that Souls was not going to accept the offer? A. Yes. 10

Q. I suppose you spent some little time between 21st October and 20th November deciding what you would say in the circular you were going to send the shareholders? A. Yes.

Q. May we take it when you drafted that circular or any circular it contained all the matters which you thought should be communicated to the shareholders? A. That is correct.

Q. At that stage you knew all the facts which you know now? A. Yes, I believe I went to great pains particularly in the absence of an independent report. 20

Q. You did not in your first circular make any mention of the prices at which the large parcel changed hands in July? A. No.

Q. May we take it you did not think at that stage that was a relevant matter? A. It was certainly a consideration which was relevant but whether relevant to the particular document that was going out which was required pursuant to the part B Statement. 30

Q. The document that was going out that I have been referring to and you have in the last few questions was your circular? A. It was pursuant to my rights under the part B statement.

Q. I am not concerned under whose rights but the fact is you sent out a circular? A. Yes, I did.

Q. It was dated 21st November and obviously compiled over a period before that date? A. Yes, quite so.

Q. And compiled, I suggest, with considerable care?
A. Yes.

Q. Intended to acquaint the shareholders with the matters you thought material that they should know? A. Yes.

Q. The prices which the parcel of shares exchanged hands in July 1974 are not referred to in that circular?
A. That is correct. 10

Q. Or in part B? A. You will recall I endeavoured to get that information under s.180G.

Q. You knew from 29th October at the earliest the exact detail of these July transactions? A. Yes, from 29th.

Q. That is to say three weeks and a bit prior to the circular going out? A. Yes.

Q. You were aware of those facts and discussed them at the directors' meeting of 5th November? A. Yes.

Q. You asked Mr. Walker's advice about that? A. Yes, I sought the inclusion under s.180G. 20

Q. You asked Mr. Walker whether or not Part B statement was required to contain any reference to this transaction? A. I did.

Q. You were told by him I suggest it was not required to contain a reference to this? A. He said it could if the board elected to do so pursuant to s.180G.

Q. But the board did not? A. That is correct.

Q. And the board either as a whole or the individual members made it clear to you that you were free to send out such circulars as you thought proper? A. They did. 30

Q. You did that? A. Yes.

Q. The circulars you sent out are those which are dated 21st November? A. Yes.

Q. And are exhibit 13? A. Yes.

Q. They contain no references to those prices? A. No.

Q. May I take it when you composed and despatched those circulars you did not think that the price which a parcel of ordinary shares and preference shares had been acquired by the controlling shareholder four months earlier was a matter relevant to these considerations of the minority shareholders in deciding whether or not they should accept the offer? A. I cannot recall the reason for its exclusion but I would certainly have considered including it. I cannot recall the reason for its exclusion. I was called on to make a recommendation whether they exchange one share for another share and I made the recommendation on the basis of the offer.

10

Q. Do you have a sufficient recollection of the contents of these two circulars to answer questions about them or would you like to have a copy? A. I would prefer to have a copy.

(At this stage Exhibit 13 was handed to the witness)

20

Q. Would you take Exhibit 13, it is the letter to the ordinary shareholders and I would like you to look at it? A. Yes.

Q. You refer to the fact that two of the directors of Cumberland Holdings are also directors of FAI? A. I do.

Q. You recommended that the offer was not to be accepted? A. Yes.

Q. Coming to the next paragraph you noted that the board of Cumberland Holdings had declined to have an independent valuation? A. I do.

30

Q. That may I take it was something that you thought they may properly take into account as a reason why they should not accept the offer? A. No, that was explaining the absence of such a report which I think one must expect where there is a conflict of interest between the two companies.

Q. If that had been asked for and refused you would

expect anyone reading it would think may be there is something suspicious? A. I would not subscribe to that. It was a statement explaining why they did not have one. I would have thought any reasonable person would have said why was it not provided and it was incumbent to explain the absence of such a report.

Q. You go on to say - you set out the reasons which have influenced you not to recommend acceptance? A. I do.

10

Q. You refer to the insurance industries probable future and Mr. Adler's comments about it, the last two paragraphs on page 1? A. Yes.

Q. That was intended to dissuade people accepting the FAI share? A. No, to give them an indication of the problems facing the insurance industry. I felt I could not quote a better person than Mr. Adler who had given this information to his own company.

Q. It was not intended to dissuade people from taking the FAI shares? A. It was intended to put the facts before them. Their decision was up to them.

20

Q. On page 2 you pointed out the net tangible asset backing of the Stock Unit? A. Yes.

Q. You say that the holdings are expected to accept a share with a net asset backing of 52 cents? A. Yes.

Q. Intending to point out the considerable disparity?
A. Yes.

Q. Which you perhaps appreciated might be regarded as a reason why the offer should not be accepted? A. It was expected to be brought to their notice, for their consideration, whether they accepted or rejected the offer.

30

Q. It being intended to assert that Cumberland Holdings' shares are worth \$1.22 or of that order and that FAI shares were only worth 52 cents or of that order?
A. As I said, Mr. Bainton, it was to give them a statement of the circumstances and the facts as they existed, as on the consolidated balance sheet of 30th June, 1974.

Q. And you go on in summary saying that you were showing them the potted value of the shares? A. Not exactly. It was brought to their notice.

Q. You say that the real benefit of the takeover offer would be going to the shareholders of FAI? A. I did.

Q. You thought that was most unsatisfactory? A. That was my opinion.

Q. Bearing in mind also the absence of the cash alternative? A. Yes, because of the disadvantages to the holders of trust and wills were placed in the takeover offer.

10

Q. You pointed out the dividends and yields of the shares? A. I explained the dividends of FAI would be higher than they got at present on Cumberland Holdings shares.

Q. You refer to the possible delisting and the difficulties that might cause? A. Yes.

Q. You recommended against it and say that you are not accepting? A. I did.

20

Q. Then you wrote to the preference shareholders and you pointed out, summarising it this way, the difference in the business of the two companies? A. Yes.

Q. The difference in the asset backing of the two shares? A. Yes.

Q. The respective dividend entitlement of each? A. Yes, they were the same in regard to preference shares.

Q. Unless you take the view that the taking of shares in an insurance company was a risky proposition and on all those comparisons that would tend to indicate that the FAI share was likely to be more valuable than the Cumberland Holdings preference share? A. I would not agree with that assumption.

30

Q. You finally say your view is that the offer by FAI should include a cash alternative and you recommend against acceptance? A. That is correct.

Q. Why is it you did not regard as material for the shareholders consideration at that stage that they should be informed that four months earlier there had been a cash purchase by FAI - (Objected to)

HIS HONOUR: I think he regarded it as material and endeavoured to give reasons for that. Perhaps you might rephrase the question.

MR. BAINTON: Q. You did say you composed it with care? A. Yes.

10

Q. And it included all the matters you thought the shareholders should take into consideration? A. Yes.

Q. If those two answers are correct, it must follow you did not think that the fact, four months earlier, the controlling shareholder had purchased a large parcel of ordinary shares for cash for \$1.25 - (Objected to)

Q. It follows from the two answers you just gave that you did not think, when you signed the circular on 21st November, that it was material that the shareholders should know in July that F.A.R.I., the controlling shareholder had paid \$1.25 in cash for ordinary shares which it acquired and 50 cents in cash for preference shares it acquired, being the shares that resulted in the increase you have mentioned in the last paragraph of page 2 of your letter to the ordinary stockholders which you annexed to your letter to the preference shareholders.
(No answer)

20

HIS HONOUR: Q. Do you follow that question? A. I think so.

Q. Do you agree that follows from the two previous answers, as to that not being material? A. I disagree it was left out because I did not feel it was relevant. It was certainly considered for inclusion but frankly I cannot recall the reason for its exclusion.

30

(Luncheon adjournment)

MR. HUGHES: I tender a document showing the details of sales of shares in the company from 1st November, 1973 to October.

(Above document marked part of Exhibit 45).

MR. HUGHES: There are two admissions I would seek to be noted by consent but they will be handed up in typed form.

MR. BAINTON: Q. Do you still have a copy of the petition? A. I have.

Q. I have been asking you about the matters in paragraph 25(1)? A. 26(1).

Q. May I next direct your attention to paragraph 26 (ii)? 10
A. Yes.

Q. It is as clear as anything possibly could be, if that was a relevant matter, the shareholders were told of it at the latest within a day of receiving the take-over offers, namely by you in your circulars? A. Yes.

Q. Did you raise at any of the meetings with the Cumberland Holdings' directors before the part B statement was agreed to and signed the question of whether or not the part B statement should contain a reference to the facts mentioned in paragraph 26 (ii)? A. I believe that this information is included in the letter to the board of directors, to the chairman of Cumberland Holdings dated 14th November and this matter was discussed at the board meeting of 15th November. 20

Q. You made some notes of the events of that meeting which you used to give evidence yesterday? A. Yes.

Q. I think it is the top one of that bundle, is that correct? A. Yes, that is what I took to the meeting.

Q. Would you have another look and refresh your recollection again if you would or if you would like to? 30
A. Yes.

Q. My question is was the desirability or otherwise of including in that part B statement the information mentioned in paragraph 26 of the petition discussed at any meeting of the directors of Cumberland Holdings - if you would like to look at any other notes of any other meeting, I do not mind? A. I made reference here where I

said the suggested price of \$1.25 - "I went and asked David Walker in the light of this transaction, are you required to make mention of those matters in the part B statement pursuant to s.180G(2)".

Q. I am not asking you at the moment about the July transaction when FAI purchased shares at this price. I am asking you about the matter that appears in paragraph 26 (ii) of the petition which asserts that the two shares in question had a particular asset backing. Now the question I asked you is, was the question of including a statement to that effect in Cumberland Holdings part B statement discussed at any meeting of directors of Cumberland Holdings Limited? A. Mr. Bainton, I mentioned this in my letter addressed to the chairman dated 14th November but whether this was actually discussed on that particular point - it would certainly be brought to the notice of the directors but whether I asked the inclusion of that statement in part B, I cannot recall. 10

Q. You did mention it in the letter of 14th November which has become Exhibit 10? A. Yes. 20

Q. In a context where you were saying you did not think the offer was a proper offer. You thought it was inadequate? A. Yes.

Q. Inter alia by reason of the divergence of the asset backing of the two shares. Would you like to refresh your recollection from the document? A. Yes.

(At this stage Exhibit 10 was handed to the witness)

WITNESS: I mentioned it in the letter you have drawn my attention to. I do not recall whether I asked for the inclusion of that statement in the part B statement of the takeover document. 30

MR. BAINTON: Q. You spent a fair amount of time discussing the content of that part B statement with the other directors and Mr. Walker? A. Yes.

Q. You received advice about it before you ultimately sent it? A. Yes, I did.

Q. From your solicitor? A. I did.

Q. Can we infer from that, when you sent it, you were satisfied with it as a proper part B statement? A. That could be an inference.

Q. Is it correct that you were satisfied when you signed it that it was a proper part B statement? A. I was.

Q. Again, so far as you can recollect now, did you or anybody else suggest that information relating to the net asset backing of the shares should or should not be mentioned in the part B statement? A. May I have that again - do I recall anybody asking for its inclusion? 10

Q. Do you recall whether you or anybody else suggested that information relating to the net asset backing of the two shares either should or should not be included in the part B statement? A. I cannot recall any request.

Q. You have no note in your aid to memoir to suggest you or anybody else brought it up? A. No.

Q. If you had brought it up and there had been any dissent from your suggestion it would certainly have appeared in your notes? A. I expect so, this aid to memoir I took before the meeting, not after. 20

Q. All of it? A. This part you have given me to read. These are the resolutions I put to the meeting.

Q. You were at this stage, after these meetings, making notes of what occurred there and after? A. Yes.

Q. Taking great care to note any disagreement from what you suggested should be done? A. I would expect so. It was a very hectic meeting.

Q. What do you mean by that? A. I did not have much luck. 30

Q. You were not getting what you wanted? A. Everything lapsed for want of a seconder.

Q. Had you asked for information to this effect to be included in the part B statement and your co-directors refused you would I suggest in the first place remember

it and secondly you would have noted it? A. Yes, it probably would have met the same fate as everything else I asked for. Had I asked I doubt whether I would have succeeded in getting that.

Q. All I am asking at the moment is to the best of your recollection, whether or not you asked for it and I am suggesting if you did ask for it and were refused, you would remember it? A. I think so, I agree.

Q. And you would have noted it? A. Yes. 10

Q. You do not remember it and you have no note? A. No.

Q. Would you look at paragraph 27? A. Yes.

Q. It alleges in substance that Mr. Adler failed to disclose the matters in paragraph 26 (1), the July transaction and the asset backing referred to in 26 (ii). Now the question of referring to the July transaction had been brought up and Mr. Walker's advice had been asked about it? A. Yes.

Q. His advice had been that it was not necessary to refer to it - I am simply repeating what you told me shortly before the luncheon adjournment? A. Mr. Bainton, I think my recollection is I said before - I sought his opinion on this and asked whether it should be included and I think I said that he said it was at the option of the board under s.180.G. 20

Q. You asked whether the company was required to mention it and you were told it was not required to mention it but it was free to mention it? A. That would be a fair assessment, yes.

Q. You did not? A. I did not. 30

Q. You did not in your circular which was intended in part at least --- A. I asked for it to be included in part B. I said here "In the light of this transaction are we required to make mention of these matters in part B."

Q. You asked Mr. Walker if it was a requirement to do so?

Q. He said it was not? A. Yes, but we could, if the board elected, to do so.

Q. Do you say you then went on in fact to suggest to the board or move to that effect that this information be in fact referred to in the part B statement and you were refused? A. It would appear I did not actually put it in the form of a motion but I would hardly have failed to tell the board that it was free to do so. I doubt whether I would have overlooked asking my co-directors whether they were prepared to put it in.

Q. If you had asked the co-directors it is plain they must have refused you? A. Yes, it was not included. 10

Q. Do you recall your asking and the refusal - have you any note? A. Not on this particular set of notes. Could I go to the others?

Q. Have you other notes that you would like to consult - if you have other notes, by all means? A. Yes.

Q. Are these notes made at the meeting or shortly afterwards? A. Yes.

HIS HONOUR: Q. When were they made? A. At the meeting. The ones I am referring to are the ones I prepared and brought to the meeting. 20

(At this stage the witness left the witness box, perused certain documents and then returned to the witness box.)

WITNESS: I am sorry, I cannot put my hands readily on those documents. I had them earlier, they are in some other file but they are out of chronological order.

MR. BAINTON: Q. A request to include that in the part B statement, if by a motion or an informal request followed by a refusal, that is something you would remember just as clearly as the refusal to refer to the July transaction, surely? A. I think that is a reasonable assumption, yes. 30

Q. Unless you can find some note, may we take it you could reasonably infer that you did not ask for its inclusion and it was not refused? A. At this time but if I can locate a note later which shows otherwise, may I bring it up?

Q. Yes. A. Thank you.

Q. The complaint in paragraph 27 of the petition says that Mr. Adler did not do something that you did not seek to have done, in other words include any reference to either of these matters in the part B statement - as to the two matters that you did not see fit to refer to yourself in the first circular, the July transaction and that you did cover fully in your first circular, namely the asset backing? A. I covered the asset backing.

10

Q. That is what paragraph 27 is complaining about? A. Are you placing Mr. Adler's responsibilities on my shoulders?

Q. I am asking your assent to the proposition that the petitioner complains that Mr. Adler did not do something and you were there to champion the minority at that stage and did not seek to have that done yourself? A. I do not know how much more fully I could have put it. I had this advice. I asked Mr. Walker whether it should go in. I do not know how much further I could take it.

20

Q. Mr. Adler was present when you put that question to Mr. Walker and heard the answer? A. He was there, yes.

Q. Mr. Walker was there? A. Yes.

Q. Mr. Walker was at the meeting at your request as an independent solicitor to advise the board? That is correct, isn't it? A. Yes that is right.

Q. You don't suggest that Mr. Adler should have disregarded his advice, surely? You don't suggest that do you? A. Well, he did disregard it. When I asked whether it was available and whether it should go in he did not volunteer to put it in. When Mr. Walker said "It is not essential to go in", he did not volunteer to put it in.

30

Q. Your question was - and I think I am quite accurately reproducing your evidence - you asked Mr. Walker whether directors - (Objected to)

* MR. HUGHES: With respect to my friend, this matter is dealt with on page 32 of the transcript. Actually it starts at the top of page 32 of the transcript.

MR. BAINTON: Q. When I put it to you earlier this morning that what you asked Mr. Walker was the question whether directors required to refer to this, and that his advice was "No, but they are free to if they wish" you had not the slightest hesitancy in agreeing that that is what you did ask him? That is the position, is it not? 10

HIS HONOUR: Q. That is still your view, Mr. Donohoo, is it? It is still your view that that is what you put to Mr. Walker, and that that is what his advice was?
A. Yes, because -

Q. I just want to know whether you wish to qualify it any way. Do you wish to qualify that? A. No.

HIS HONOUR: He agrees that that is the position. I don't think that departs from the earlier evidence.

What then follows on, Mr. Bainton? 20

MR. BAINTON: The motion here relates to something quite different on page 32.

Q. Mr. Donohoo, you put the question to Mr. Walker?
A. Yes, that is right.

Q. You got his answer? A. Yes.

Q. That it was not required, but that the board may. That is the answer you got, wasn't it? A. Yes, that is correct.

Q. And then Mr. Adler said something about you asking Mr. Walker questions. Is not that what happened? That is what happened, wasn't it? A. Yes, that was the result of my inquiries of Mr. Walker. 30

Q. And then you went on to put the next of the motions that you had written out beforehand to put to the meeting? A. Yes.

(* Original Transcript Page 14)

Q. And the next one - the next motion was a motion that the company should instruct Mr. Walker that a takeover - to advise FAI that an offer for shares in Cumberland for less than the price paid in the July transactions contravened the listing requirements? A. That transpired later, yes.

Q. That did not obtain acceptance? A. No that lapsed for want of a seconder, too.

Q. Whether it lapsed or was defeated, the result was the same? A. It never went before the meeting if it was not seconded. 10

Q. I beg your pardon? A. It never went before the meeting if it was not seconded.

Q. At no stage at that meeting did you suggest to the board of Cumberland Holdings Limited that the part B statement sent out in relation to the takeover offer that had been received should refer in any way to the July transaction or the asset backing of the two shares? A. I would answer the second part in the affirmative, but the first part was covered by the motion you are referring to now on page 32. 20

*

Q. The motion was to advise the offeror that it is an offer contravening the listing requirements? A. Is there not an earlier motion there?

Q. No, there is not. Do you say now that there was one? Do you now say that there was an earlier motion? A. No, I will not say that.

Q. I put it to you again - and I would like it answered, please - it is a fact, is it not, that at no time did you formally or informally suggest that the part B statement that the meeting was then considering to go out with reference to the takeover offer received should refer to the price paid in the July transaction or to the asset backing of the shares? (Objected to: admitted) 30

Q. That is the fact, is it not, that at no time did you suggest, either formally or informally, that the part B

(* Original Transcript Page 14)

statement that the meeting was then considering with reference to the takeover offer received should refer to the price paid in the July transaction or to the asset backing of the shares? A. Mr. Bainton, my recollection of these things, when I sought information from Mr. Walker I was usually cut short in my tracks, and I was required to put things in the form of a motion. If it is not in my transcript apparently I did not ask it.

Q. You did, however, ask Mr. Walker what you, as one of the directors, ought to do properly to discharge your duties? You did ask Mr. Walker that, did you not? A. Yes, that is right. I did ask him that. 10

Q. And Mr. Walker said that he thought the minutes should contain a full record of your actions? A. He did, and he also said that I had the liberty, as a director, to write to the Commission of Corporate Affairs and to the Sydney Stock Exchange.

Q. There had already been discussions from which you were left in no doubt that you were free to send out a circular yourself? There had already been discussion in regard to that? A. I was free, yes. 20

Q. Now, may I take it that the minutes, as ultimately adopted after a lot of exchanges, do in fact contain matters, or at least a reference to the matters that you wanted brought up? A. No, I would not agree to that, because -

Q. I don't want to interrupt you, but when I say "minutes" I mean the combined effect of what were ultimately adopted as the minutes of that meeting and the minutes of all the other meetings discussing - 30

HIS HONOUR: Just a moment. I don't quite follow that myself. If I am going to get anything from the answer I would like to follow what the question is. There was a point of time at which minutes, after dispute, were confirmed at a later meeting, having attached to them some prior drafts. Are you referring to those?

MR. BAINTON: I am referring to the totality of what appears in the minute book.

WITNESS: By that you are saying that the minutes approved by the minute incorporating all the matters I put, with amendments I put to the meeting that were not carried?

Q. Yes. A. All my amendments, plus what were carried, yes. I would agree.

Q. Collectively? A. Yes.

Q. They were all the matters that you brought up?

A. And what I wanted recorded, yes. I would agree to that.

10

Q. And the circular that you prepared - may I take it, after the meeting on 15th November - A. Yes.

Q. That set out the matters not in the takeover offer or the part B statement that you thought the shareholders should be informed about? That is so, isn't it? A. Mr. Bainton, the matter that you are referring to was certainly considered for inclusion, but quite frankly and quite sincerely I can't remember the reason for its exclusion. That matter to which you are referring was certainly considered for inclusion.

20

Q. The assets backing was mentioned clearly in both of them? A. Yes, but the share transactions of Mr. Adler were not mentioned for some reason or another.

Q. The fact of the acquisition was mentioned? A. Yes. Not the price.

Q. The acquisition was mentioned? A. In my letter of 21st November?

Q. Yes. A. I don't think I referred to the acquisition of those shares in my document to the ordinary shareholders and preferential shareholders.

30

MR. HUGHES: I may say - and this may shorten the matter - that I propose to call Mr. Harper, of Allen Allen & Hemsley, who has been acting in this matter from its inception, to give some evidence bearing on the subject

matter of my learned friend's present inquiry. I only make this offer to shorten the matter. It may be that when my learned friend has heard what Mr. Harper has to say this subject will assume, in his mind, less importance. I am quite happy to interpose Mr. Harper now, if my friend would like to hear what he has to say, because he will give what, in his view, is the explanation.

MR. BAINTON: I would prefer to finish, so far as I can go, with Mr. Donohoo.

10

Q. In the letter of 21st November to the ordinary stockholders you refer in the last paragraph of page 2 to the fact of the increase in shareholding from 72% to 80%?

A. I do.

Q. Do you suggest that the shareholders were in any way disadvantaged by having the information relating to asset backing from you rather than from Mr. Adler? Do you suggest that? A. Well, as long as they had it from somebody. That is the important point.

Q. Your circular went out on the same day, or the day after the takeover offer itself was dispatched. That is correct, isn't it? A. That is right.

20

Q. Now, would you look, please, at paragraph 28 of the petition? A. Yes.

Q. Will you just read that, please, so that you will appreciate the purport of the next questions? A. Yes.

Q. The absence of any evaluation by any such merchant banker was a matter that received specific mention in each circular that came from you, or from Washington H. Soul? A. Yes. It was mentioned by the Australian Shareholders' Association, too.

30

Q. And it got some mention in the press? -

HIS HONOUR: I did not hear that.

MR. BAINTON: Q. It got some mention in the press? A. It did.

Q. No shareholder who read any of the documents that

came out to him from your side or looked at the press was unaware of - A. I'm sorry.

Q. I will put it this way. Any shareholder who read any of the documents that came out to him from your side, or who looked at the press, was well aware that there had been such a valuation? A. Yes, that is correct.

Q. In the light of the withdrawal of the offer and the fact that there were no shares acquired under it, would you be prepared to agree that in fact no shareholder was disadvantaged by the absence of such a valuation, even if it is correct to say that one should have been obtained? A. No, I do not agree with that. I emphatically disagree with that, because they received the offer on 21st November, and they did not have the benefit of an independent viewpoint, and the mere fact that it was subsequently withdrawn I don't think has any bearing on it. I feel they were entitled to such an independent report in view of the conflict of interest that existed between FAI and Cumberland.

10

20

Q. To determine whether or not they should accept the offer? A. Yes.

Q. The offer disappears? A. Yes. Later. It disappears later.

Q. So that, looked at with the benefit of knowing that the offer is going to be withdrawn, would not you agree that it turns out that it just does not matter? (Objected to) A. What do you mean, going to be withdrawn?

Q. From the point of view of the shareholder to whom the offer was addressed, bearing in mind that it was subsequently withdrawn the end result is that he has been saved from reading another piece of paper.

30

HIS HONOUR: That is a question, I take it, Mr. Bainton?

MR. BAINTON: Q. That is what that adds up to, isn't it? A. Had he had the benefit of an independent report at the time he received the takeover documents he may have accepted, and this may have induced FAI to proceed with their offer.

Q. That is the only answer you can give to that question? A. I beg your pardon?

Q. That is the only answer you can give to that question? A. What you say was the ultimate end result. But at the time we did not know what the future held.

Q. Would you look now at paragraph 29? A. Of the petition? You mean paragraph 29 of the petition?

Q. Yes paragraph 29 of the petition. Would you look at that, please? A. Yes I have looked at that, Mr. Bainton. 10

Q. Was the subject matter mentioned in paragraph 29 of the petition - that is to say, the pending proceedings - mentioned by anybody at any of the directors' meetings of Cumberland Holdings at which you were present? A. No.

Q. You did know about this matter at the time, because you had read newspaper reports? A. No, I did not know of this matter. This is entirely different. It is an entirely different matter to the one I referred to in 1971. This one is pending. The one in 1971 -

Q. Mr. Donohoo, you can take it from me that at the time of the takeover offer the one and only set of proceedings that had been commenced were those commenced in 1971, and they were still pending? A. With respect - 20

HIS HONOUR: You are asking him to make that assumption?

MR. BAINTON: Q. You disagree with that? A. Yes, I do disagree with that.

Q. What proceedings - I'm sorry, what do you say happened to the 1971 proceedings?

MR. HUGHES: Against which company, because that might cause some confusion? 30

HIS HONOUR: He is questioning Mr. Donohoo about paragraph 29 of the petition. It must be FAI.

WITNESS: Mr. Bainton, the proceedings that I referred to yesterday were instituted by the Registrar of the Workers' Compensation Commission against Fire & All Risks

Insurance Company Limited in 1971, and were heard before Judge Ferrari. Before his Honour handed down his judgment I understand that Fire & All Risks Insurance Company Limited voluntarily relinquished their licence to write workers' compensation insurance, and the matters referred to in paragraph 29 of the petition are the current proceedings. The proceedings mentioned in paragraph 29 of the petition - paragraph 29 is referring to proceedings that are on foot at the moment. They were originally started against Australian and International Insurance Limited, which subsequently changed its name to FAI Insurance Limited.

10

MR. BAINTON: Q. On 30th May 1975 Messrs. Allen Allen & Hemsley, when asked to identify the proceedings referred to in paragraph 29 of the petition, identified them as those numbered 3923 of 1971 in the workers' compensation Commission of New South Wales? A. Yes.

Q. Do you understand, or believe, that paragraph to refer to those proceedings or to some other proceedings? Do you understand it to refer to those proceedings or to something different? By "those proceedings" I mean proceedings 3923 of 1971 against FAI under its then name, Australian and International Insurance Limited? A. Mr. Bainton, I understand that paragraph to refer to those proceedings, yes.

20

Q. And the complaint is that they were not mentioned in the offer documents? A. Yes, that is right.

Q. I want you to assume for the purpose of the next question that what I am now going to read out is a summary of the progress of those proceedings. Not a summary, but a detailed step by step recording of the progress of those proceedings. Before I do that, I will indicate the date on which they were commenced. They were commenced by an application made on 23rd June 1971 by Terrence Higgins, the Registrar of the Commission, and I have read that from the Commission documents. A. Yes.

30

Q. On 16th July 1971 the solicitors for FAI - and I will give it its present name - wrote to the Commission's solicitors asking for some particulars of the complaints; on 22nd November 1971 a letter which described itself as an interim reply, giving some particulars, and indicating

40

that the rest would be furnished later, was sent to the solicitors for FAI; on 25th August 1972 the solicitors for FAI wrote to the solicitors for the Registrar, reminding him that those particulars had not yet been furnished, and asking for them. There was no reply to that letter, and on 7th March 1973 the solicitors for FAI wrote another letter to the solicitors for the Registrar, reminding him that he had not furnished particulars yet, and asking for them. There was no reply to that letter, 10
and on 10th April 1973 the solicitors for FAI wrote again to the solicitors for the Registrar, requesting the particulars that had been promised earlier. There was no reply to that letter. On 2nd July 1973 the solicitors for FAI wrote another letter to the same effect to the solicitors for the Registrar. There was no reply to that letter. On 30th August 1973 the solicitors wrote again to the solicitors for the Registrar, seeking the particulars. On 10th September there was a reply, that the solicitors for the Registrar had asked for some instructions regarding particulars, and he had not received 20
them. On 12th September 1973 the solicitors for FAI acknowledged that letter and said they would be glad to get those particulars in due course. Nothing else at all happened in that proceeding until 7th March 1975, when it was dismissed on the application of the Registrar himself, he asking for an order against himself that he pay the costs of FAI on a solicitor and client basis.

Bearing in mind all the history of those proceedings, would you say that they were live proceedings that ought to be referred to, in your view, in the takeover documents? Would you say that they ought to have been referred to in the takeover document? A. Well, an application had been made by the Registrar to the Workers' Compensation Commission making a number of allegations, and I doubt whether the delay that existed at that time was a reason for excluding it completely. 30

Q. Although the proceedings had been instituted more than three years earlier, and had not got beyond supplying what were conceded to be only partial particulars of complaints? A. But, Mr. Bainton, the same proceedings were virtually - I don't know the legal term, but were engrossed or incorporated in new proceedings that started off again at the same time on 14th March. 40

Q. Do you suggest that in November 1974 the directors of Cumberland or of FAI should have known, or even suspected, that in the following year - 1975 - the Registrar would start other proceedings relating to other matters? A. The proceedings were on foot, and it would have a very serious effect upon the business or the company if they were unable to - if they were delicensed. It must have some effect upon people who would be placing their insurance with the company to know that the company had transgressed, 10 or that allegations had been made against the company. Surely this, in turn, would affect their business, and any person contemplating or any person taking up business with the company should be aware of the situation. What weight they placed on the information was up to the particular persons, but they should have been aware of it.

Q. The directors have to keep in mind that for the last three years there is something on foot that never progressed? Is that what you say? A. It is not unusual for legal proceedings, though, is it? With respect to 20 the court.

Q. In the Workers' Compensation Commission? A. A delay of three years from my experience is not an undue delay in legal proceedings. I don't think it affects the substance of the allegations. The mere fact that a certain time has elapsed does not alter the allegations.

Q. Do you think it is just remotely possible that the directors of FAI had quite forgotten that these proceedings were still on foot? Do you think that is just remotely possible? A. If I were a director of FAI I am 30 sure that I would not have forgotten such allegations.

Q. What are the allegations? A. They are too long to go into.

Q. To long to go into? A. Yes.

Q. Have you ever seen them? A. Yes, I have.

Q. When did you see them? A. About the end of November, I think it was.

Q. That is, November 1974? A. About the end of November 1974, yes.

Q. For what purpose? You made it your business to go and find out what they were? A. Yes, I did.

Q. For what purpose did you do that? A. To enquire as to the seriousness of the allegations, particularly in view of the fact that I knew that similar allegations had already been instituted against Fire & All Risks Insurance Company some years ago, and, without being provocative, with respect, it takes government departments a long time to get on to things and get action, but when they take action against virtually the same group of companies within four years I do believe that it is a serious matter.

10

Q. You have described these proceedings as "taking action" rather than "taking inaction"? A. It may take a long time for the action to start, but nevertheless it is still on the basis of an action which has come before the court, and the matter is still on foot.

Q. On 8th April 1975 the Workers' Compensation Commission made an order that the application herein be struck out and that the Registrar of the Workers' Compensation Commission of New South Wales had to pay the respondent's costs of and incidental to the application on a solicitor and client basis. It was hardly still on foot? A. I am not asking the questions, but I understand that that has since been replaced by another summons, or whatever you call it from the legal point.

20

Q. Have you any knowledge of what the other proceedings were about? A. I understand they are in substance updating the allegations made in the earlier application.

30

Q. That is what you understand them to be? A. Yes.

Q. Who have you to understand that? A. I was told that that was the case.

Q. Who told you that? A. A representative of the Workers' Compensation Commission.

Q. And did he tell you in proceedings earlier that two of the three complaints in these proceedings were struck out by the Commission? A. He did not tell me that, no.

Q. He did not tell you that? A. No, he did not tell me that.

Q. Would that have any effect on you? A. Depending on which allegations were struck out.

Q. Would you look now at the next paragraph in your petition - your next paragraph in the petition? A. Yes.

Q. Have you looked at that? That is paragraph 30?
A. Yes, I have looked at it.

Q. You are of the view, I take it, that the shareholders should have been advised, as you advised them, to reject the offer. You were of that view, were you? A. I believed that to be the case, yes. 10

Q. Would you be prepared to go so far as to assert that no reasonable man could take a view different from yours and think that the offer was one which ought to be accepted? A. To use an old cliché, Mr. Bainton, no one has a mortgage on all the brains, and I suppose there can be different points of view. Unfortunately, there was only one point of view put to the stockholders. 20

Q. Yours was put? A. Yes. I regard that it was not complemented or supplemented by an independent party.

Q. My question to you is, are you prepared to say that in your opinion no reasonable man could have thoughts that this takeover offer was beneficial to the minority shareholders? A. Well, I cannot speak for other people. In my viewpoint it was not in their interests, but naturally I cannot speak for other people.

Q. You would concede, then, that there is room for a different opinion which could be honestly formed and could possibly be correct? A. There is always room for legitimate difference on all subjects. 30

Q. The other two directors expressed to you the view that it would be in the interests of the minority shareholders to accept the offer? A. They must have, because they recommended it.

Q. So that you would be prepared to concede that that

was an opinion which they could have honestly formed?
A. I don't know about the word "honestly", but anyway it is an opinion they could form, yes.

Q. I put the word "honestly". An opinion honestly formed on a proper commercial basis. A. They came to that opinion, yes.

Q. Do you intend that to be the answer to the question I just put to you? A. I cannot speak for them, Mr. Bainton. They can say whether they came to it honestly or not. It is not for me to say whether they came to it honestly. 10

Q. I appreciate it is not, and I do not ask you to say that. What I did ask you was, do you say - how did I put it - if I differ from how I put it a moment ago.... (not completed). You are not asserting, I take it, that the opinion that they came to was a conclusion that they simply could not have reached honestly? (Objected to).

Q. Do you say, Mr. Donohoo, that at the time that this takeover offer went out, and the circulars that followed it, did you believe that the views Mr. Adler and Mr. Belfer expressed in the documents were views that they simply could not have honestly formed and held? (Objected to; rejected). 20

MR. BAINTON: Q. Did you believe at any time from the time the terms of the takeover offer were made known to you until they were withdrawn, that neither Mr. Adler nor Mr. Belfer could have honestly formed the opinion that it was in the interests of the minority shareholders to accept the offer? (Objected to: rejected). 30

Q. Mr. Donohoo, paragraph 26 of the petition asserts that Mr. Adler urged the holders of ordinary stock units to accept the FAI offer and we have been told that that is intended to be a reference to the letter that accompanied the takeover offer and any further circulars that came out from Mr. Adler. Do you have in mind what they were or would you like each one identified? A. In my view, Mr. Bainton, he certainly did not deter them. I don't know what you mean by the word "urged" but he certainly did not deter them taking them over. 40

Q. They are not my words but the petitioner's words, but whatever it means, it is a reference to what Mr. Adler said in his letters or circulars. Would you just accept that as that is from me at the moment. Now, what I want you to tell me please is that do you say that at any time between the time you first saw any of those letters or circulars and the time of the withdrawal of the offer it was your believe that Mr. Adler did not in fact hold the views that he expressed in any of those documents? 10

A. I am sorry, sir, I don't quite follow the question.

Q. The takeover offer itself begins by a letter of 20th November, 1974? A. Yes, I am familiar with the letter.

Q. With a printed signature? A. Yes.

Q. It makes a number of statements? A. Yes.

Q. Then, to try and treat the matter chronologically --

A. Sir, would you refer to the part B statement too at the back behind that one?

Q. Yes, it contained a part B statement? A. Where they recommended the offer? 20

Q. No, they did not recommend the offer? A. Where Mr. Adler recommended it individually and Mr. Belfer recommended it individually.

Q. It says that Mr. Adler and Mr. Belfer are in favour of the scheme? A. Well, that is recommending it, isn't it?

Q. That is what you mean by recommending it? A. That is the legal terminology. If a person said to me they are in favour of it, I would expect them to be recommending it. 30

Q. Then you sent your circular out? A. I did.

Q. And then on 27th November Mr. Adler sent one out which became Exhibit 17 and do you recollect generally what that deal with? A. I do.

MR. HUGHES: Q. I think Mr. Adler sent one out on the 22nd, wasn't it? That was the two-hatted letter.

MR. BAINTON: Q. Do you recollect generally the terms of that one - that was Exhibit 15? A. I do, yes.

Q. What I want you to tell me is whether, having read those, you formed the opinion that Mr. Adler did not in fact hold the beliefs that he expressed in those documents? A. I hope I understand -- (Objected to: Question withdrawn).

Q. Did you form the opinion that Mr. Adler did not hold any of the beliefs that he expressed in any of these documents? A. Are you asking me whether I thought he said something that he did not believe? 10

Q. Yes, I am? A. Well, I am in no position to know what Mr. Adler believes. I don't know whether he held the beliefs that he expressed on paper. I couldn't answer for him.

Q. I asked did you at the time form the opinion that he did not and you either did or you did not or you had no opinion or you can't remember it. I think those are the possibilities? A. I am getting lost in them, Mr. Bainton, I am sorry. Could I have the question again please? 20

Q. The question was, did you, having read any of those documents, form the belief that Mr. Adler did not in fact hold any of the opinions that he said in those documents he held? A. I would have to read every document again, Mr. Bainton, to go through, because I couldn't answer that question yes or no.

Q. You have got no recollection at the moment of, in effect, forming the opinion at the time that he was telling lies? A. I remember one thing in particular where it was a lie, yes. 30

Q. Which one? A. About the cash alternative.

Q. What was said about that that you thought was untrue? A. If you will read it out to me, sir, I will explain the situation of what did in fact transpire.

Q. Which document do you have in mind when you say you read something which you thought was untrue? A. Mr.

Adler's letter I would say dated round 22nd November, from memory, Mr. Bainton.

Q. That is Exhibit 15 (shown to witness) A. Mr. Bainton, could I read the offending paragraph or should I just refer to it by number?

Q. Tell me which one it is for a start? A. It is the third paragraph on page 2 of FAI's letter dated 22nd November, 1974.

Q. You mean "So far as the insurance industry is concerned"? A. No, sir, relating to the cash alternative, the third paragraph on page 2. It must be a different copy, sir, because the paragraph I have got starts off with "Mr. Donohoo's second objection is FAI ought to have offered". 10

Q. You must have another photostat. That is the second paragraph on the first page. You assert, do you, that it is an untrue statement? A. I do, Mr. Bainton.

Q. What is the untrue statement? A. The way in which Mr. Adler has -- 20

Q. No, just tell me which statement there. Read it out - what you say is untrue? A. "Nevertheless, when Mr. Donohoo indicated his interest in a cash alternative being made available, I asked him whether his own group would be prepared to make such an offer in which event we would gladly put it forward to stockholders. This suggestion, however, was declined." Or "was, however".

Q. Do you say that did not happen? A. I am saying the way in which that is placed is untrue.

Q. Are you saying that did not happen? A. Can I explain the circumstances? 30

Q. Are you saying that that did not happen? A. He is saying there ---

Q. Mr. Donohoo, are you saying that that did not happen? Now, it is a simple question; would you please answer it?

MR. HUGHES: Nothing in that sentence, do you mean, or those two sentences?

MR. BAINTON: Do you want me to break it up bit by bit?

WITNESS: No, the second sentence. I am saying that he asked me to make - well, it is not a cash alternative - he has indicated a cash alternative.

MR. BAINTON: Q. You have said, Mr. Donohoo, that that is an untrue statement. The question I asked you is, do you say that what is said in those two sentences to have occurred did not occur? A. The way that is put, it didn't occur; the way it is written there.

10

Q. Well, you indicated an interest in a cash alternative to the one -- ? A. I did, yes. I indicated that in my letter of 14th November.

Q. Did Mr. Adler ask whether the Washington H. Soul Pattinson group would be prepared to make such an offer? A. I ---

Q. Did he or did't he? A. The cash offer - it was not put that way, Mr. Bainton.

20

Q. Did he ask whether your group would be prepared to make a cash offer or did he not? A. No.

Q. He did not? A. No.

Q. What did he say on that subject matter? A. Could I preface it with what I said?

Q. Yes, most certainly? A. I said I felt that there should be a cash alternative in this offer. I also said that in view of the thinness of the market that existed in FAI shares Mr. Adler should have the price, the cash price of the FAI shares underwritten by a member of the Sydney Stock Exchange. He said to me. "Would you be prepared to do it?" I said, "No." He said, "I will see what I can do."

30

On 20th November Mr. Adler rang me and said, "I have been in touch with Jackson, Grahame, Moore & Partners and they are not prepared to underwrite a cash

value for FAI shares in this economic climate." Mr. Adler then added, "Jackson, Grahame say this is no reflection upon FAI."

Q. You say, do you, that what is erroneous there is that you were not asked whether you would be prepared to make a cash offer but you were asked whether you would be prepared to underwrite a cash offer? A. Underwrite the value of FAI shares I said.

Q. What do you mean by that, Mr. Donohoo? A. As I indicated, Mr. Bainton, the market in FAI shares was very, very thin. A person could put their shares - if they accepted this offer, they could put their shares on the market and not find a buyer and I said that I felt that the value of the FAI shares should be underwritten for a certain cash figure so that people would know what they could get for their shares in cash if they wanted to convert them into cash. 10

Q. So that they would have a guarantee that there would be cash forthcoming if they wanted to sell? A. Yes, that's correct, because of the thin market that exists for FAI shares. 20

Q. So, the untruth, you say, is that you were not asked whether you would be prepared to buy them straight out, but, simply whether you would be prepared to underwrite the FAI shares on the Stock Exchange? A. Underwrite a cash value of the FAI shares. In other words, if somebody came along and said, "I have ten thousand FAI shares. They are worth so many cents. We cannot sell them on the market. Will you give us the cash for them?" That is what I said and I don't believe that paragraph in Mr. Adler's letter correctly states the situation. 30

Q. Is there anything else in any of these letters that you assert from your recollection at the moment? A. I believe that these letters are deficient in what they fail to tell people.

Q. Mr. Donohoo, I haven't asked you about that. I asked you quite clearly I thought, whether you formed the belief, having read any of these letters, there were 40

untrue statements in them? A. I believe there are many half truths in them, Mr. Bainton.

Q. You pointed to the one you have just deal with. Did you form the belief that there was any other untrue statement? A. I believe there are half truths because of the lack of information.

Q. Mr. Donohoo, please; I think the question was fairly clear. Did you form the belief that there were any other untruths? A. I believe they were misleading because of lack of information. 10

Q. Tell me which ones you believe to be misleading?

MR. HUGHES: Could I just for one moment see the exhibit because I am puzzled by the disparity in pagination.

MR. BAINTON: That is not an exhibit; it is from my brief.

HIS HONOUR: It was fortuitous that the one shown to the witness was identical with the exhibit.

MR. HUGHES: Yes, I see what your Honour means. My copy is in a different typescript. 20

MR. BAINTON: Q. Mr. Donohoo, it would seem inevitable that you will be back here tomorrow morning? I will be due for long service leave.

Q. Would you care to look through these documents at your leisure overnight or would you care to do it now? A. Mr. Bainton, I think I can assist you by referring you to my letter of 19th February, where I drew the stockholders' attention to what I felt were mis-statements of fact in Mr. Adler's various correspondence. I think that will short-circuit things from your point of view. 30

Q. Do you say you, in that document, drew attention to all the statements you regarded as misleading? A. Mr. Bainton, in that document I did not refute the statement that I have just explained to you of the cash alternative. The offer had been withdrawn on 6th December and I could see no point in going through the ropes of sending people,

as you said earlier, a lot of circulars and I covered just the salient points at that time. But, I certainly did not in my letter of the 19th encompass my objection to the letter we have just spoken of, of the 22nd. You asked me did it encompass everything and I am saying it did not.

Q. Please don't think I am being critical. You were trying to assist me, and no doubt shorten the matter by referring me to the letter of 19th February suggesting it would answer my question; the question being one asking you to identify what you said were misleading statements in Mr. Adler's various letters and circulars and, apart from the one about the cash offer, were there any others which, in your belief, you did not cover in your letter of 19th February? If there were, tell us about them now? A. Nothing immediately springs to mind, Mr. Bainton.

10

Q. If anything does spring to mind overnight, you might like to mention it in the morning. A. I shall.

20

Q. Would you now look at - - ? A. I mean by that, anything apart from what is mentioned in my letter of 19th February.

Q. Yes, I understand that. A. Thank you.

Q. Would you now look at paragraph 31 of the petition?
A. Yes, Mr. Bainton.

Q. In fact, as we had earlier, the shares are still listed? A. At the moment?

Q. Yes. A. Yes, sir.

Q. If de-listing does occur it will be the consequence of, first, the decision of the majority shareholder to acquire further shares? A. It results from that decision, did you say?

30

Q. That is the first step in bringing that consequence about. The second step is that that further parcel takes its holding up to a figure which the Stock Exchange regards as unacceptable? A. That is correct.

Q. The third step is that the Stock Exchange decides to de-list? A. Right.

Q. There is nothing else than those three steps involved in that, is there? A. No, I don't believe so, sir.

Q. No director of Cumberland Holdings in his capacity as such a director took any part in any of those steps?

A. I disagree with that because - in their capacity as directors of FAI --

10

Q. No directors in their capacity as directors of Cumberland Holdings Limited, I specifically put to you, took any step or did anything which brought about any of those steps? A. I would suggest that the way in which the letter was phrased that went to the Stock Exchange - it was phrased in such a way that may bring on consideration of the continued listing of Cumberland Holdings Limited.

Q. Which letter? A. Cumberland's letter to the Stock Exchange dated, I think from memory, about 24th July.

20

Q. Would you look, please, at a letter of 23rd July from the FAI Group to the Secretary of the Stock Exchange? (Handed to witness) A. Yes, I am looking at that, sir.

Q. Would you next look at the Stock Exchange reply of 25th July and, with it, the letter from the Secretary of Cumberland Holdings Limited to the Secretary of the Stock Exchange of 31st July. A. Yes.

Q. Next, the letter from the Stock Exchange to the Secretary of FAI Insurances of 2nd August, 1974? A. Mr. Bainton, who sent that one? Mr. Herman is the Secretary of both companies. Is that an FAI letter or a Cumberland letter?

30

MR. HUGHES: Q. What is the date? A. 31st July, Mr. Hughes.

Q. That is a Cumberland letter. Has it got the number "HLH"? A. "RLH".

Q. 93091/4? A. Is it 83 or 93 - 93091/4?

Q. Yes? A. Yes, it has.

Q. That is a Cumberland letter. A. Cumberland, yes.

MR. BAINTON: Q. Have you looked at that one? A. Yes.

Q. Would you now look at the letter from the Share Registrar of Cumberland Holdings to the Stock Exchange of 12th August, 1974? A. Yes, I have got that.

Q. Are you aware of any other letters passing between any of those parties relating to the subject matter of those letters other than the set I have just produced? 10

A. Yes, there was another letter that was sent by FAI in 1975, but actually bearing a 1974 date enclosing a letter that had been overlooked being sent in 1974.

Q. I accept your answer. What I had intended to ask you about was, are you aware of any other letters passing between any of those parties during the period in which those letters passed relating to the subject matter of those letters? A. I don't think so, Mr. Bainton, no.

Q. What I have given you then is, to the best of your belief anyway, a full set? A. It is, yes. 20

Q. Which, if any of them, have you seen before? A. I have seen a copy of the letter to the Stock Exchange from FAI dated 23rd July, 1974.

Q. When I say have you seen the letter, I mean a letter or any copy? A. I was given a copy, yes. I recall having seen that letter dated 12th August, Mr. Bainton, addressed to Mitchell, Hill on an FAI letterhead. I couldn't be certain in regard to the other three letters. 30

Q. Do you suggest, having looked at them now, that the information requested by the stock exchange could have been accurately given otherwise than it was given in those letters? A. I am of the opinion, Mr. Bainton, that the second paragraph in the letter of 23rd July was couched in such a way to stimulate the interest of the Stock Exchange in looking at whether the company complied with their listing requirements.

Q. How could you have given the information in that letter in any more neutral way than it was given, namely, to say, "A further 197,973 ordinary and preference shares have been acquired in Cumberland Holdings Limited already a member of the FAI Insurance Group."? A. It is my view, sir, that if they had written and said, "We have acquired 35,000 ordinary shares in Cumberland Holdings Limited", I don't know whether the exchange would have had their interest in the continued listing of the shares stimulated to make them take the further action.

10

Q. That would have been only half the truth, if that statement had been made? A. Well, 35,000 ordinary plus details of the preference - sorry, I meant that - to give a full break up of 198,000 shares.

Q. You think if the information given in the letters had been given in the first place it might have slipped unnoticed through the Stock Exchange? A. I feel that could be a possibility, yes.

Q. And you would have liked to have seen it done that way, would you? A. I am just saying that had it been done that way.

20

(Correspondence between Cumberland Holdings Limited, FAI and the Sydney Stock Exchange tendered and admitted as Exhibit 46)

Q. They became produced because in answer to my question whether there was anything the directors could have done as such in respect of any of the three steps that we went through, you said they could impart the information to the Stock Exchange differently, or words to that effect. Now, that is one suggestion. Have you any other suggestion as to anything the directors of Cumberland as such could have done in respect of any of those three steps? Shall I go over the three steps again?

30

A. Please.

Q. The acquisition by the major shareholder of another parcel the fact that that parcel brought its holding to a figure regarded as unacceptable by the stock exchange, and the decision of the stock exchange to de-list?

A. I believe that is correct.

40

G.L.A. Donohoo, xx

Q. There isn't anything else other than the method of imparting information originally that you have just mentioned? A. That's correct.

(Witness stood down)

(Further hearing adjourned to 10.00 a.m. Friday, 17th October, 1975)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
EQUITY DIVISION)

No. 707 of 1975

CORAM: BOWEN, C.J. in Eq.

CUMBERLAND HOLDINGS LIMITED & COMPANIES ACT

FOURTH DAY: FRIDAY, 17TH OCTOBER, 1975

* MR. VOSS: There are some corrections to the transcript,
your Honour. On page 89, the second last question, it
is recorded as "Q. I think your 16% is calculated taking
the lowest figure in July and the highest for September." 10
"September" should be "November".

** On page 119 of the transcript, the second last ques-
tion "But your future conduct proceeded on the basis that
your estimate was probably right, and his was probably
wrong, didn't it? A. Mr. Bainton, even if his figure
had been right, I still think that we, as directors of a
company, whether as directors common to the board of
both..." etc., the "whether as" should be "where there
were".

In the previous question, it is recorded as "Q. 20
The plain fact is that you took no notice at all of Mr.
Adler's view of what the likely cost would be, did you?
A. I was more content in giving to people what I thought
they were justly entitled to..." The "content" should,
I think, be "concerned".

Those are the only substantial ones.

(Written admission tendered by Mr. Hughes and admit-
ted as Exhibit 47)

GLEN LAWRENCE ALBERT DONOHOO

On former oath:

30

HIS HONOUR: You are still on your former oath, Mr. Dono-
hoo.

(* Original Transcript Page 51)

(** Original Transcript Page 78)

WITNESS: Yes, your Honour.

MR. BAINTON: Q. You were going to look through Mr. Adler's circulars, Mr. Donohoo? A. Yes, I did that.

Q. You did that? A. Yes, I did.

Q. Do you wish to assert there are any other matters in them than the ones you mentioned yesterday? A. There are.

Q. Which you say are misleading? A. There are.

Q. Will you tell us what they are? A. Mr. Bainton, taking paragraph 6 of Mr. Adler's letter to the stockholders of Cumberland Holdings Limited, enclosing the takeover offer.

10

Q. Yes. A. Paragraph 6. That is the one that commenced "As regards..." I claim that the last sentence is incorrect.

Q. The last sentence? A. Yes, I claim that the last sentence is incorrect.

Q. In what way do you claim it is incorrect? A. I do not believe that the asset backing for FAI shares was substantially above the par value of the FAI ordinary stock units.

20

Q. In making that statement may I take it you refer to net tangible assets in the way you have used that expression earlier in your evidence? A. Yes.

Q. You exclude, do you, any element of business goodwill? A. Yes. I would put it to you -

Q. I really do think that the question is capable of being answered yes or no. A. Net tangible asset backing, yes.

30

Q. When you expressed the view that it is not correct to say that the equity capital in each company has a value substantially above the par value of the ordinary stock and ordinary shares - A. Could I have that again, please?

Q. You told us you disagreed with the statement in the last sentence? A. Yes.

Q. I took you to mean that you were disagreeing with the statement that the equity capital in each company has a value substantially above the par value of issued ordinary stock and ordinary shares respectively. Did I misunderstand you? A. No, that is correct. But they have got there "latest published accounts" - that is what I am basing it on.

10

Q. Were you looking at the accounts of FAI or the consolidated accounts of the group? A. The consolidated accounts of FAI.

Q. That is the second statement that you do not accept. Is there anything else? A. The following paragraph, in which Mr. Adler says "I don't consider it would serve any useful purpose to comment on such dealings as have taken place in the two securities during that time." I would submit that there would have been a very useful purpose served in giving details of those transactions.

20

Q. Yes. Is there anything else? A. Yes, the next letter you asked me to comment on was Mr. Adler's letter dated 22nd November 1974 addressed to the ordinary and preference stockholders of Cumberland Holdings Limited.

Q. Yes. A. I would certainly disagree that any of my comments were misleading.

Q. You think that is a misleading statement by Mr. Adler, do you? A. Yes.

Q. To say your statements are misleading? A. Yes.

Q. All right. A. In the next paragraph it states "FAI has never attempted to obtain 100% control of Cumberland." I would disagree with that statement because I believe the very purpose of this takeover offer was to achieve that purpose.

30

Q. Do you? A. Yes, I do.

Q. Of course, if your belief happens to be erroneous,

the statement there would be quite correct? A. That could be the case, yes.

Q. Can you tell me when you first expressed the belief that you have just told us you had to any minority shareholder in Cumberland other than perhaps Washington H. Soul? A. Well, that is a difficult question, because I was absolutely plagued with telephone calls from disgruntled minority stockholders, and I daresay I may have mentioned that to them.

10

Q. Can you point to any statement in any circular which you sent out where you stated that that was your belief? A. No, I can't.

Q. Is there anything else in this circular? A. Yes, on the foot of the page - if I may digress for a moment, you asked me yesterday to point out where I thought Mr. Adler was urging minority stockholders to accept the share offer. I would submit that the last sentence on that page is certainly a subtle urging that they take the takeover offer. It starts "If Cumberland stockholders ... stockholders I believe this is a form - a gentle and subtle form - of urging them to take the offer.

20

Q. Yes. Is there anything else? A. On the next page with the paragraph starting "I wish...profitably", I would submit that if he did not share my view, why did FAI pay \$1.15 for the shares they bought in Cumberland Holdings? I beg your pardon, \$1.25.

Q. It was the "risk free" part he was commenting on? A. I put to you that every form of business has got some degree of risk.

30

Q. What else do you want to comment on? A. The following paragraph, starting with the words "So far as the insurance industry is concerned...". It states that the group has deliberately diversified its activities into other major fields of interest outside insurance. Unfortunately I did not have with me at home last night a copy of the 1974 FAI consolidated accounts, but I would submit to you that the contribution made in the form of diversification by FAI to its overall consolidated net profit is very small indeed.

40

Q. What do you base that submission on? Do you base it on some recollection? A. Yes, of what is in the accounts. As I said, I did not have a copy of them at home last night.

Q. What else do you want to quarrel with? A. The very last sentence, starting "For this reason my colleagues and I ...". Mr. Adler claims - in his dual capacity of wearing both caps as chairman of FAI Insurances and Cumberland - claims that the stockholders of Cumberland - he could not accept that the stockholders of Cumberland would be laying themselves open to any greater risk by becoming members of FAI. I would submit that the very nature of insurance, where you have underwriting risks, must mean that it is a riskier-type of business than the bricks and mortar type of business carried on by Cumberland. 10

Q. Go on. A. The next paragraph. In this paragraph - I shall read the sentence that I am complaining on - "This, however, seems to my colleagues and I to be a pointless suggestion since any cash alternative would have to be based on the current market price of Cumberland's ordinary and preference shares and any stockholders who wished to obtain such a figure could therefore just as easily sell his stock through the market in the first place." Now, I would suggest to you that this is in direct contravention of the statement made on page 2 of Mr. Adler's letter dated 27th November 1974. I shall read to you that statement. Mr. Adler said in that letter - he states "In the result at the time when FAI was making its offer to you no buyers for Cumberland stock had appeared on stock exchanges for several weeks, and none have appeared since that time". There I believe it makes a lie of that statement, particularly with the word "easily" inserted in the sentence. Now, yesterday I alleged - 20 30

Q. Just a moment. You say the two statements you read out are quite inconsistent? A. I do. Now, in the same paragraph there is the portion that I registered an objection about yesterday, and I don't think there is any point in recapitulating the fact that I thought that was an outrageous lie. 40

Q. It has become an outrageous lie since yesterday, has it? A. It was yesterday.

Q. Anything else in the document of 22nd November?

A. In the next paragraph it states "As Cumberland and FAI have been closely associated over a period of years it was considered no useful purpose would be served by getting an independent report." I would submit that a very useful purpose would have been served to help guide the minority stockholders in coming to a decision as to whether they should accept the takeover offer.

10

Q. Anything else? A. You will be relieved to hear that in the penultimate paragraph of that letter I wholeheartedly agree with Mr. Adler. I think that is another form of urging the stockholders to take it.

Q. Yes. Is there anything else? A. In the last paragraph it states that the acceptance of the takeover would be in the best interests of all parties concerned. I could not accept -

Q. Just a minute. A. It is the last sentence, I am sorry the second last sentence.

20

Q. You were remarking a moment ago on the last paragraph? A. No, the penultimate paragraph. I said that I thoroughly agreed with Mr. Adler's statement there.

Q. Now the last paragraph? What do you say about the last paragraph? A. In the last paragraph I disagree that it is in the best interests of all parties concerned. It was certainly in the best interests of the FAI party, but not the Cumberland party.

Q. Are you quite sure you have not missed anything in that letter? A. If you think I have, I would be pleased if you would draw my attention to it.

30

Q. What is the next one you want to come to? Is there anything else? A. Yes. The next letter you have asked me to comment on is the letter dated 27th November 1974.

Q. Yes. A. May I say at the outset that it would take a person utterly devoid of any business morality to write

a letter such as this. I draw attention to the third paragraph in that letter, where it alleges that Soul Pattinsons had supplied virtually all the pharmaceutical requirements of the nursing homes run by Cumberland. Now, prior to the agreement with Souls being terminated on 1st July 1974, just 12 days prior to Mr. Adler selling his 194,000 stock units in off-market transactions, Cumberland conducted 10 nursing homes, including Mayfair, which I believe was conducted by Cumberland on behalf of Mr. Adler or FAI (sic), out of 10 homes Souls serviced only six, and I don't think it is correct to say that we virtually supplied all their pharmaceutical requirements. While we are on the subject - 10

Q. I think the "virtually" might have been a concession to you there. A. I don't think that six out of ten is "virtually all".

Q. I misunderstood you. I thought you were saying even as to six, even there Souls did not supply all of the requirements? A. I was saying - 20

Q. I have misunderstood you. A. I want to make that point clear. We were only supplying six out of ten of the homes, and even then I cannot say whether we were in fact supplying all their requirements. I would not have that knowledge. I think it may be relevant at this point, where this allegation is being made, to give some details of what actually Souls were doing for Cumberland. Soul Pattinsons -

Q. I don't want this case to embark into an enquiry into trade dealings. I asked you to tell me what statements in the circulars you alleged were misleading. You referred to paragraph 3. Do you suggest there is anything else misleading in that? A. No. I just felt I could give you further information that would back up my statement concerning that allegation. 30

Q. I don't seek that from you. A. On the next page, with the paragraph commencing "When those sales...", there is a sentence that states there had in fact been unsatisfied ordinary stock buyers at \$1.25 on the Stock Exchange for several days before and after that date. I have been advised by a disgruntled stockholder - (Objected to.) 40

Q. I don't want that sort of account thrust at me. Do you say that statement is not correct? A. I have been advised by another party that it is incorrect, and I was seeking his Honour's guidance as to whether I could mention an allegation made by another party to me.

Q. Another shareholder? A. Yes.

Q. Have you made any inquiries at the Stock Exchange to see whether that assertion is right or not right?

MR. HUGHES: I will be calling evidence -

10

MR. BAINTON: I want Mr. Donohoo to answer the questions. He is making the accusation that this was misleading.

HIS HONOUR: Mr. Donohoo, you will have to answer counsel's questions. The other is hearsay.

MR. BAINTON: Q. Have you made any inquiries at the Stock Exchange to see whether that statement is right or wrong? A. No, I have not.

Q. Has anybody else made them and reported the results of them to you? A. Well, I have caused an inquiry to be made, yes.

20

Q. And when was this done? A. I don't know. You would have to speak to my legal people.

Q. Were you basing your assertion that this statement was misleading on these inquiries or on what some disgruntled stockholder told you? A. I was basing my assertion on what I was told by this stockholder, and I believe that this information has been backed up.

Q. And when was this statement made? A. The statement was made at the meeting held at my office on 10th March 1975 of all minority stockholders.

30

Q. Is there anything else in that circular that you say is misleading? Q. In the paragraph starting "I am advised that when the FAI offer came..." there is a sentence "At the same date...57 cents." I would have thought that if the buyer were someone connected with FAI, that should have been stated in the letter.

Q. And do you suggest that the buyers were not? A. I don't know. They may have been.

Q. You have no knowledge either way? Is that the position? A. Mr. Adler has made so many allegations about a market not existing in Cumberland except for his activities, and knowing that there is a thin market in FAI I would assume that some of the sales have been connected, and I have in fact searched the register and found transactions between Mr. Adler's interests and Mr. Belfer's interests. 10

Q. You are prepared to assert on that material that that statement might be misleading? A. I am asserting if there was information to be given in addition to that it should be for the assistance of stockholders.

Q. You don't know if the buyers were of that category or not? A. That particular date I could say "no".

Q. Anything else in that circular? A. I certainly reject the last paragraph, where Mr. Adler refers to Soul Pattinsons - the last paragraph. 20

Q. Just before you get to the last paragraph, you have got no complaints with the paragraph mentioning "Naturally no company..." I take it? You don't suggest that is misleading? A. Well, under the circumstances that existed in this particular takeover offer I would submit that it could certainly be misleading.

Q. Now, the last paragraph. You mentioned something in regard to the last paragraph? A. In the last paragraph, because of the smallness of the amount of business that Souls have done with Cumberland in relation to our total turnover, I believe that to call Souls a prejudiced stockholder is outrageous. As I said, I am prepared to back up my statement with the actual figures, if you were to give me an opportunity. 30

Q. Is there anything else you wish to point to in any of the circulars? A. Yes.

Q. What other one? A. The circular that Mr. Alder, in this case as chairman of the FAI Insurance Group, has sent to the stockholders on 6th December 1974.

Q. Yes. A. Mr. Adler states -

Q. That, I think, became Exhibit 19? A. Mr. Adler makes the statement "The suggestion is made that FAI Insurances Limited is endeavouring to force you to dispose of your shares to them for an inadequate consideration. Nothing could be further from the truth." I believe that statement is certainly very much inconsistent with the second last paragraph that we referred to before in Mr. Adler's letter dated 22nd November 1974, where he said that if every merchant banker in the land were to suggest to him that he remain a minority stockholder in an unlisted company he would not take their advice. 10

Q. You find that statement and what you have already read as inconsistent, do you? A. I do.

Q. That is your view? That is your considered view? A. I believe that the statement he made in the second last paragraph was a statement certainly to force them to dispose of their shares or to induce them to dispose of their shares. 20

Q. You see no distinction between "inducing" and "forcing"? A. He uses the word "force".

Q. Is there anything else in that letter? A. No.

Q. I think that is the last of them, isn't it? A. No. There is one dated 29th January.

Q. That is Exhibit 31, I think? A. I take strong exception to the first paragraph. I believe that this paragraph was deliberately couched in language to persuade minority stockholders to assume that Washington H. Soul Pattinson had endeavoured to have FAI make a cash offer for Souls' shares alone at the prices prevailing in July 1974. I would certainly reject that statement in its entirety. 30

Q. Where do you find that in the paragraph? A. It is not only my impression. I had some disgruntled shareholders ring me and ask me whether in fact we were endeavouring to get a price over and above, and just leave them to wither on the vine. I believe that the last two sentences of that paragraph, read in conjunction, do give that impression. 40

Q. Is there anything else about that particular circular? A. No.

Q. That, I think, is the last? A. No, there is one on the fourth.

Q. The fourth? A. One on the 4th February.

Q. You are quite right? A. Now, Mr. Bainton, in the first paragraph of that letter I disagree that any of my statements were misleading and malicious.

Q. I would expect that you would. Is there anything else in that letter? A. I would reject the statement that I attempted to blacken Mr. Adler's character. If his character has been blackened it is by his own actions - not mine. 10

Q. Yes. Is there anything else? A. In the next paragraph he asserts that my propositions "every one of which were either totally false or misleading.." I would certainly reject that statement. In the next paragraph Mr. Adler claims that my principal complaint is that his family received \$1.25 for the shares and that the other people were being offered shares in FAI. My principal complaint was not that he received it. My principal complaint was that the locked-in minority stockholders were not given the same favourable terms that Mr. Adler received. 20

Q. Is not that exactly what the paragraph says? A. Not in my view. In the last paragraph on that page it claims that the offer available to Mr. Adler's family was also open to any stockholder at that time, and in view of the information given to me by another stockholder I believe that statement to be incorrect. 30

Q. Yes. Is there anything else? A. Now, in the next paragraph - I think there are two drafts of this letter, aren't there? On the next page, the first full paragraph starts off "Donohoo's complaint.."

Q. Yes. A. Now, Mr. Adler alleges that the fall in Cumberland prices resulted from one of the worst collapses in living memory.

Q. Where does he say that, in that paragraph? A. In the fourth line.

Q. "The Australian stock market suffered one of its worst collapses in living memory"? A. Yes.

Q. Do you say that is to be read as a reference to the Cumberland shares, and not to the market generally?

A. He is referring to the amount that is being offered for the Cumberland shares, so I would take it that it has a particular reference to Cumberland stock units. 10

Q. Is that the way you read it? A. Could I just read it again to refresh my memory? I do believe it is referring to Cumberland stock units, yes, because the price which FAI had paid for ordinary stock units - he is referring to Cumberland stock units.

Q. Do you say that you read the reference to the market collapse as being intended to convey that it was the market in Cumberland Holding shares that had collapsed?

A. He is referring to all the market, but in Cumberland in particular. 20

Q. Is he? A. Well from what I have ascertained, on 12th July, when Mr. Adler sold his shares, the all ordinaries index of the Sydney Stock Exchange stood at 371.16. On the date of the takeover, 21st November 1974, the all ordinaries index of the Sydney Stock Exchange stood at 308.36 and that was a fall of 16.92%, yet the figures he was offering to people was actually a reduction on what he got to 56%.

Q. Anything else in this letter? A. The next paragraph, where he claims that it is untrue that they deliberately purchased these shares with the intention of jeopardising the stock exchange listing of Cumberland shares. I believe the shares were purchased for that particular motive, particularly in view of the language in which the letter advising the Stock Exchange was couched on 23rd July. 30

Q. When did you form that opinion? A. After the scenario started to develop.

Q. Try and place it, if you can. If you can't give me a

date, give me an event. I want to know when you formed that belief? A. I would say that it crystallised on 29th October 1974, when I received back the various searches that I had caused to be made at the office of the Commissioner of Corporate Affairs.

Q. And you have had it ever since? A. Well, I have had nothing to change my viewpoint.

Q. So that you have had it ever since? A. Yes.

Q. Will you tell me when you first put it in writing to anybody? That is, if you ever have at all. If you have ever put it in writing at all, will you tell me when you first did so? A. I beg your pardon? 10

Q. If you ever have at all put it in writing to anyone tell me when you did? A. 10th December 1974.

Q. Can you identify that writing? A. I beg your pardon?

Q. Tell me what the writing is that you mentioned?
A. The letter dated 10th December 1974.

Q. A letter to whom? Do you mean a letter to the stockholders? A. Yes. 20

Q. That is Exhibit 20. Would you just help us, please, by pointing out what part of Exhibit 20 it is to be found in? That is a one-paged letter? A. I'm sorry. My apologies. It is not in that letter, is it?

Q. No it is not. Would you like to try for some other date or event? A. Yes. My letter of 29th January 1975, in paragraph 3.

Q. The statement "I believe this was intended...stock units."? A. That is right. 30

Q. Is that what you are referring to? A. Yes.

Q. And you say that is an expression of opinion which you formed that the purchase in July 1974 was part of a deliberate plan to endeavour to obtain the outstanding shares at an under price? A. That is my honest belief.

Q. And that is the belief you are expressing there, is it? A. Yes.

Q. Anything else in your letter of 4th February? A. In the same paragraph, Mr. Bainton, it commences with "(2). FAI and I are..." in that paragraph Mr. Adler says "In point of fact my colleagues and I had realised for a long time previously that in view..defend it." All he had to do to defend it was to reduce the holding from 80% down to 75%, and this course of action was actually suggested to them by the Sydney Stock Exchange, so that it certainly could not have escaped his knowledge.

10

Q. Anything else? Is there anything else you wish to refer to? A. That, I believe, also makes the next sentence untrue. The next paragraph starts off "Donohoo talks about the July transaction..." -

Q. Just let me stop you there. The first of the sentences you read is plainly referring to the position prior to the July transaction when their holding was 72% approximately, so that your comment of reducing it from 80% to 72% - A. 75%, I said, because that was the figure nominated by the Sydney Stock Exchange.

20

Q. The sentence you have just referred to quite plainly refers to the situation as it was before the July acquisition, doesn't it? A. I don't believe that to be the case.

Q. I'm sorry? A. I don't believe that to be the case.

Q. Just read it again. Given the context of the previous sentence, and with the benefit of the one that follows it, will you read it again? A. I am sorry, but I believe they could have defended the listing, to use their term, if they had reduced their shareholding from 80% down to 75%, as suggested by the Stock Exchange in its letter.

30

Q. You said to me a moment ago, in answer to my invitation to specify anything misleading, that you thought the sentence beginning "In point of fact" and going down to the words "defend it" was misleading? A. Yes, that is right.

40

Q. You said it was misleading because there was something that could have been done about it, namely, reduce it from 80% to below 75%? A. To 75%.

Q. Well, to 75%. A. Yes.

Q. What I am suggesting to you is that the sentence that you cavil about is quite plainly, to anybody who reads and understands the English language, referring to the situation as it was prior to the acquisition in July 1974 of the additional parcel of shares? A. I do not subscribe to that point of view. 10

Q. I'm sorry? A. I do not subscribe to that point of view.

Q. You don't read it that way? A. I don't subscribe to that because I believe it is taken away from that implication by the words "whatever we might try to do to defend it".

Q. What else, if anything, is there in this letter that you say is misleading? A. The next paragraph starts with the words "This is nonsense ... procedure." I take exception to the words "promptly notified." They were not notified until 11 days after Mr. Adler had sold his shares, and four days after FAI had withdrawn its buying bid on the Exchange. 20

Q. Is there anything else? A. The paragraph commencing with the words "I have already commented ..." in this paragraph Mr. Adler claims that FAI had no desire whatever to force anyone who might not agree with our views to sell their units to it. I believe that is in conflict with page 3 of the 22nd November 1974 letter of Mr. Adler. 30

Q. That being what? A. I believe that it is in conflict with the paragraph where he says "Speaking personally I would never dream of allowing myself to be put in the position of a minority shareholder in an unlisted company even if every merchant banker in the country should advise me to the contrary." I believe that it is in conflict with that statement.

Q. So that you still see no distinction between advising

someone to do something and forcing someone to do it?

A. In the circumstances that existed in this, no.

Q. Is there anything else? A. Yes. At the top of page 3, paragraph 4, it states "FAI is said now to have forced Mr. Donohoo off the board because he stood up for the minority shareholders in opposing the FAI takeover." This again is totally untrue. I disagree with that statement.

Q. You do not think, may I take it, then, that there would be any other possible reason for wanting you off the board of Cumberland? A. Mr. Adler may have many reasons, in view of the circumstances that have existed in this takeover offer.

10

Q. Do you say there could be no reason for wanting you off the board other than you stood up for minority shareholders? A. Well, in view of the laudatory remarks he had made from time to time about my contributions - unless it was a very recent reason, and that is virtually what I am saying.

20

Q. Do you think the board of a company of this nature can function when the directors are at loggerheads, calling one another names, accusing one another of being liars, and so forth? A. It makes things difficult, but still it is in the interests of the minority stockholders, isn't it, to preserve their interest. I was not doing it for any other purpose than that.

Q. What about the major stockholder? Don't you think he has some interest in the satisfactory conduct of the business? A. I think that all stockholders have an interest in the satisfactory conduct of the business - not only the major stockholder.

30

Q. If someone presented a petition for the winding up of Washington H. Soul Pattinson would you like him to be on the board of the company? A. If the same circumstances existed in Soul Pattinsons as exist in this particular case I think he would have every right to remain on the board of Soul Pattinson.

Q. I didn't ask you that. A. But that is what I was answering.

40

Q. I asked you if you, as a director, would be happy to have him there? (Objected to; rejected)

Q. I will try and put it as precisely as I can. Would you, as a director of a company the subject of a winding up petition not in any circumstances take the view that you would not wish to have on that board a director of the company that was bringing that petition? A. Well, personally I don't quite follow the words "subject to the winding up". I believe we have to differentiate between "subject to winding up" and actually when the petition has been lodged. 10

Q. I do mean in the context that a petition had been lodged? A. Well in the circumstances of Cumberland no petition had been lodged.

Q. I have not got to the circumstances of Cumberland as yet. I asked you a general question as to what attitude you would take as a director of a company, having on the board of that company a director of a company which had presented a petition to wind up on the grounds, inter alia, that the directors had been acting in their own interests rather than in the interests of the members as a whole? A. Would I be one of the directors of the board who was alleged to be acting in his own interests? 20

Q. Whether you were or were not? A. If I were a director and it was alleged that I was acting in my own interests I suppose I would want the other director off the board, but if he were making these allegations against another director who was alleged to be acting in his own interests I would certainly want him to remain on the board. 30

Q. You would? A. Yes.

Q. Why? A. Because I believe he is looking after the interests of all stockholders.

Q. Would your attitude be any different if, before the petition was actually presented, it was threatened and the threat was not withdrawn? A. The allegations are the same? Am I one of the people alleged to have acted improperly?

Q. If your answer is different in those two contexts, deal with each. I am merely asking you to go back in point of time now to the period between the threat of the petition and the actual serving of it? A. Well, I think my answer would be the same as my previous answer.

Q. Well now, you got to the first paragraph on page 3 of Exhibit 35. Is there anything else in that document?

A. Yes, the second last paragraph.

Q. What do you wish to say in regard to that? A. In the second last paragraph Mr. Adler states "He will, however, no doubt have the opportunity to explain this in due course in legal proceedings which FAI and I intend taking against him." I believe that was a lie and a deliberate attempt to try and shut me up, and I believe that if Mr. Adler's legal advisers had stated to him that he had proper grounds to institute legal proceedings against me, I am certain Mr. Adler would have issued such a writ. 10

Q. Yes. Is there anything else? A. In the last paragraph he accuses me again of false and misleading statements, and, of course, I repudiate that. 20

Q. Have we now in fact reached the end of the circulars?
A. We have.

Q. Do you still have available to you a copy of the petition? A. No I have not.

Q. I wonder if whosoever has the one you had yesterday may return it? (Copy of affidavit handed to witness)
Do you have it? A. Yes.

Q. Will you now look at paragraph 32? A. Yes. 30

Q. Will you read that, please? A. Yes.

Q. Have you read it? A. Yes I have.

Q. Would you give us, please, the benefit of your knowledge generally by telling us what steps - and I quote - "Lawrence James Adler and John Belfer as directors of Cumberland Holdings Limited failed to take to procure" - I am sorry, I will start again. I wish you to tell us,

please, what steps Lawrence James Adler and John Belfer, as directors of Cumberland Holdings Limited, could have taken to procure Fire & All Risks to reduce its holding of stock units in Cumberland Holdings Limited? A. In view of their conflict of interest -

Q. Please tell me what steps you believe were open to them, as directors of Cumberland Holdings, to take.

A. To submit a resolution to the board of Fire & All Risks Insurance Company Limited, of which they were directors, that the holding of that company in Cumberland be reduced from 80% to 75% so as not to precipitate the action that was being taken by the Stock Exchange.

10

Q. That is one step they could have taken? A. Yes.

Q. Would you please tell me how, in their capacity as directors of Cumberland Holdings Limited, they could present a resolution to the board of Fire & All Risks?

A. In view of the conflict of interest that existed, being directors of the three companies we are talking about at the moment, I believe they could put that motion to the board.

20

Q. As directors of Fire & All Risks? A. Yes.

Q. My question to you was what steps could they have taken, and I am now quoting again from the petition, "as directors of the company, Cumberland Holdings Limited"?

A. Well, take steps as directors of Cumberland Holdings to induce Fire & All Risks to reduce their holding.

Q. Take steps to induce the parent company to sell some of its shares? That is what you mean? A. For them to "take steps to procure", are the words used here.

30

Q. My question to you was deliberately framed, and I would like it answered. I want to know what steps you suggest that Messrs. Adler and Belfer, as directors of Cumberland Holdings Limited, could have taken to procure Fire & All Risks to reduce its holding of stock units in Cumberland Holdings Limited? A. In their capacity as directors of Cumberland?

Q. Yes. A. They could make representations to that particular company.

Q. Is there anything else they could have done to procure Fire & All Risks to reduce its holding? A. They could make representations.

Q. We have had that. I invite you to tell us of anything else which in your belief, they could have done as directors of Cumberland Holdings Limited? A. Well, to put a motion to the board of that particular company. Of course, you are asking -

Q. I am asking you about the petition presented by the company of which you are a director resolved to be presented at a meeting of directors that you were present at? A. I would say they could make representations to that company, and they could, in their capacity as company directors of the other company, put the motion to the board. 10

Q. Will you please listen, if you would, to the question that I am asking you. If it is not clear to you will you please tell me; if it is, would you please answer it. The question was, what steps do you suggest Lawrence James Adler and John Belfer, as directors of Cumberland Holdings Limited, could have taken to procure Fire & All Risks to reduce its holding of stock units in Cumberland Holdings Limited. You have told me they could have made representations. I accept that. I now ask you what, in your belief, other steps were open to them, if any? A. I think the making of representations covers it. 20

Q. I am sorry. It is as plain as can be there is not another thing they could have done, as directors of Cumberland Holdings, isn't it? A. Not that I can think of at the moment. 30

Q. I suppose you have given a good deal of thought in the last 12 months to these problems, including that one, haven't you? A. Quite frankly, Mr. Bainton, I asked Mr. Adler to reduce it down. He was so emphatic in his refusal that I knew I was up against a brick wall.

Q. I have not asked you that. A. That is why I didn't give very much attention to it.

Q. I am seeking to discover whether, in your belief, there is anything else at all that the directors of 40

Cumberland Holdings Limited as such directors, could possibly have done to procure Fire & All Risks to reduce its holding other than to ask it to do so, and I suggest to you it is as plain as anything that there are no other steps that could have been taken? A. I would agree with that.

Q. Would you now please read paragraphs 32 to 35?

A. Yes.

Q. Have you gone through those? A. Yes.

10

Q. Do you understand the substance of the assertions there to be that Messrs. Atkinson and Wilson, then being directors of FAI and Fire & All Risks, went onto the board of Cumberland Holdings, and you were put off? I have tried to summarise it? A. They went on and I went off, yes.

Q. They went on and you were put off? A. Yes. That was the result of it, yes.

Q. Do you personally assert some impropriety was committed in the removal of yourself from the board of that company? A. I believe it is irregular to remove a director because he stood up for the rights of minority stockholders. I would believe that would probably come within your term of "impropriety".

20

Q. Do you personally assert that there was any impropriety in the appointment of Mr. Atkinson to the Board? Do you assert that? A. I believe the appointment was made to give backbone to Jack Belfer.

Q. I didn't ask you that. I asked you did you believe there was any impropriety committed in the appointment of Mr. Atkinson to the board? A. Can you please define what you mean by "impropriety" in an industry such as this, please?

30

Q. I am content to have it answered by you in accordance with your belief as to what is or is not impropriety? A. In the circumstances that had existed in this takeover I believe it was improper to load the board the way that was done in the interests of FAI, yes.

Q. So that you would therefore believe also that it was improper to appoint Professor Wilson to the board?

A. Because of his directorship of FAI, yes.

Q. For any other reason? A. No.

Q. Now would you say, sitting here now, with the benefit of knowing what has happened since this takeover offer was made, and with the benefit of such reflection upon the events as you have had over the last few months, that nothing had occurred to justify your removal from that board? A. I don't believe that because I stood up for the minority stockholders I should have been removed from the board, and if they wanted me off the board I believe I should have been replaced by an independent person. That, I believe, would have been the just course.

10

Q. My question to you was - and I will put it to you again, and if it is not clear tell me and I will repeat it - do you now, with the benefit of your knowledge and the reflection you have had over the recent months, assert that nothing had happened to justify your removal from the board of Cumberland Holdings? A. I do not believe I acted irresponsibly or improperly in this matter to justify my removal from the board.

20

Q. I repeat the question, because I think you have not yet answered it. Do you say, or do you now assert, that nothing had happened - nothing at all had happened - to justify your removal from the board of Cumberland Holdings? A. Apparently in Mr. Adler's view something must have happened.

Q. I am sorry. I am asking you whether you say, in your own personal thoughts, nothing had happened which would justify your removal from the board? A. I believe nothing happened to justify my removal.

30

Q. Do you believe that nothing had happened that other directors could reasonably regard as justifying your removal? A. Well, what they regard was justified I don't know.

Q. I am asking you at the moment. It may be difficult for you to try and sit in judgment on your own conduct. A. I don't believe it is.

40

Q. You don't believe it is difficult? A. Not in this case.

MR. BAINTON: Q. Do you say that nothing had occurred which the other directors could reasonably regard as justifying your removal from the board? A. I still do not admit that my actions justified my removal from the board.

Q. Do you recall it was on the 13th - or by a letter dated 13th December 1974, now Exhibit 22, that Messrs. Allen, Allen & Hemsley, written on behalf of Soul Pattinsons threatened to present a petition for the winding up of Cumberland Holdings unless FAI made an offer to purchase the shares of Soul Pattinsons & Company at the price that had been paid back in July and by that I mean \$1.25? A. I do not believe that letter required them to purchase Soul Pattinsons' shares. I believe that said they make an offer for all stockholders.

10

Q. The author did not say that because he wrote a letter saying that is what he meant? A. It was certainly the intention all the way through I can assure you.

20

Q. The plain fact of the matter is Washington H. Soul Pattinson & Company had threatened a petition to wind up Cumberland Holdings unless an offer was made which at least included the purchase of its substantial parcel of shares --

MR. HUGHES: I think the key to this letter might be found in the circular letter of 20th December.

MR. BAINTON: Q. Would you answer the question? A. Could I have that again?

30

Q. By a letter dated 13th December 1974, a threat was made by Washington H. Soul Pattinson to present a petition to wind up Cumberland Holdings unless FAI made an offer to purchase the substantial shareholding of Washington --- (objected to; rejected)

Q. I had not finished the question - whether with or without, I am not concerned which, shares held by other minor shareholders (Objected to; rejected)

Q. Do you have a copy of the letter? A. No.

(Exhibit 22 handed to witness)

Q. I am concerned only with the final paragraph on page 4? A. Yes.

Q. Do you understand the expression "minority stockholders" to include the ordinary shares held by or on behalf of Washington H. Soul Pty. Ltd. and the accumulative preference and redeemable preference shares held by Washington H. Soul? A. I understand it to include those shares, yes.

10

Q. This was a threat to present a winding up petition unless a cash offer were made for those shares and I do not mean to suggest by that it also asked for a cash offer for either - A. Is that a question?

Q. The question is, it is as plain as can be from the letter that Soul Pattinson was threatening to present a petition for the winding up of Cumberland Holdings unless FAI made a cash offer at the prices mentioned for among others the shares held by Washington Soul Pattinson Limited? A. It was a statement that they would do it.

20

Q. Mr. Millner before you, and you, came onto the board of Cumberland holdings because of either or both, the holding of shares for the supply of pharmaceuticals?
A. With all due modesty I would suggest the appointment of Mr. Millner was done to enhance the credibility of Cumberland Holdings.

Q. Would you take the next step and tell us what you think you were appointed for? A. I could not comment on that. I would not know.

30

Q. By a letter dated 17th December 1974, beginning "Mr. Adler and I have both received identical letters dated 13th December from Allen Allen & Hemsley on instructions" - and referring to those letters and mentioning a threat to take winding up proceedings, it was suggested to you that under the circumstances Mr. Belfer and I feel you should now offer your resignation to the board - that you should now offer your resignation and it would be right and proper - I will go back further - A. Which letter is that?

40

Q. I show you a carbon copy of a letter dated 17th December 1974 written by Mr. Adler to you ending up "The proper thing for you to do is to resign from the board of Cumberland Holdings"? A. I do not think I have ever seen that letter. It is not in my documents.

Q. Reading it now - (objected to) - the question I wanted to put to you was this, reading it now, I want to know whether you think the views expressed in the final paragraph are views which might reasonably have been taken by your co-directors on the board of Cumberland Holdings - (Objected to; rejected).

10

(Short adjournment)

MR. BAINTON: I have ascertained that letter was not in fact dispatched and I withdraw my questions about it. Could the letter be returned.

(Document handed to Mr. Bainton)

Q. Do you happen to know what is the quorum for a meeting of the board of directors of Cumberland Holdings?

A. At the meeting of 22nd January 1975 Mr. Adler informed me that the quorum was three.

20

Q. Did you take his word for it or did you check it?

A. No. I did not check it. I took his word for it.

Q. Assuming that he correctly construed the provisions of article 104 the position had been since you had been on the board of Cumberland Holdings that any one of the three directors, could if he wanted to, frustrate the meeting by simply not turning up? A. That could be the case.

Q. Would you think it prudent that two of the three directors of a company such as Cumberland Holdings with a current business, when they were in a position of dispute with the third director to let the situation come about where the third director could, if he chose, frustrate the meetings of the board by staying away? A. The third director did not do that. The occasion never arose.

30

Q. I am not suggesting it did but my question was would you think it prudent commercial practice for the other

two directors to take the chance that the third director might not turn up? A. If he did that I would suggest there would be legal remedies. He could call a meeting to have that director rescinded from the board.

Q. In the meanwhile you have no operative board of Cumberland Holdings? A. It would only be for a comparatively short time.

Q. How long would it take to convene an extraordinary general meeting for the purpose of removing that director and appointing another one? A. Normally 21 days - quite a few -- normally 21 days. 10

Q. Bearing in mind one of the shareholders is the hypothetical third director who if he chose to embark on that course is hardly likely to consent and bearing in mind there are about 180 shareholders with votes, the question is would you think it commercially prudent for the other two directors to take the chance or would you not regard it as prudent for them to increase the board by at least one? A. I think in view of the conflict of interest that occurred right throughout this as far as Mr. Adler and Mr. Belfer, they could have delayed doing that until the third person, me in particular, had actually stayed away from the meetings. 20

Q. So for a period of 21 days, plus the time for the dispatch of the notice, there would be no effective board? A. In the way you are putting it, but the company would still go on. I would suggest it would not be adversely affected. People do go overseas. I have been overseas and Mr. Adler and the board continued on. We had no problems - it was a lot longer than 21 days. 30

Q. But with alternative directors? A. I do not think I ever appointed an alternative when I was overseas for two months.

Q. The question is would you believe it to be commercially prudent in the circumstances I put to you for the two directors to run the risk, however slight, of the frustration of board meeting by the third director remaining away? A. Are you putting a hypothetical case or Cumberland? 40

Q. I am putting a case of dissention having arisen between two directors on the one hand the third director on the other, in a company where the articles provide the quorum is three and there are in fact only three directors? A. This is a hypothetical case not Cumberland?

Q. I will put it as a hypothetical case for a start?

A. As a hypothetical case there could be some justification for making a further appointment, depending on the circumstances. If that third director had shown that he had frustrated the company by staying away there would be justification.

10

Q. If he stayed away the only way you could increase the board would be by an extraordinary general meeting which takes more than 21 days? A. That is correct.

Q. If you are sensible and move early in the piece, the two directors could do it themselves and thus avoid the risk of being without an effective board for that period. Would not that be prudent? A. In the circumstances that you are putting, it could be prudent.

20

Q. Do you suggest there was anything in the circumstances of Cumberland Holdings which rendered what would have been prudent in the hypothetical situation also prudent? A. On the contrary. I was calling for board meetings and they were not acceding to my request to have them so that it had never arisen in the case of Cumberland Holdings.

Q. Did it occur to you perhaps the other directors thought they might get in and increase the board before you thought of staying away? A. I believe my past conduct had never given them a reason to think they should follow that course.

30

Q. It was made apparent to you at the discussions that occurred during the period of the adjournment of the meeting of 28th January 1975, that is Cumberland Holdings' meeting, it was the view that the other directors express to you that you should resign? A. They gave me a letter calling for my resignation. That is so.

Q. They gave you a letter to that effect? A. Yes.

Q. They made it clear to you in the discussions that unless the threat of the petition to wind up Cumberland Holdings was withdrawn, their view was that you should resign? A. At the same time ---

Q. Can I have an answer to that question. They made that clear to you? A. They asked me to resign, yes.

Q. They made it clear to you also that if you did not do so voluntarily Fire and All Risks would call an extraordinary general meeting for the purpose of removing you? A. They did not verbally say that but it was contained in the letter they handed me, yes. 10

Q. You understood that? A. Yes, it was in the letter, yes.

Q. You understood that Fire and All Risks clearly had the voting strength to do so? A. Yes.

Q. You also understood that unless the threat to wind up was withdrawn F.I.A. indicated they intended, if you did not want to resign, to take steps to remove you? A. I understood that. 20

Q. As a result of the discussion there was, I think your word was a "moratorium" for a period? A. Yes.

Q. You chose the period namely until 10 a.m. on the following day? A. Yes.

Q. The fact is that 10 a.m. came and went without you having extended that period? A. That is completely untrue. I had an agent, my secretary, ring Mr. Adler and tell him it would be extended - I would be returning to the office at 11.30. That is completely untrue.

Q. The message I suggest was that you would be returning to the office some time later and you would ring Mr. Adler? A. And I would not be acting on the letter. I am most emphatic on that. 30

Q. You were there and heard the message conveyed? A. My Secretary normally carries out my instructions and I expect she would have in this case and I make it clear that I had every intention to resign as soon as the petitions were filed, if they were filed.

Q. Did you say so to any of your co-directors? A. I could not honestly recall.

Q. Would you look through this bundle of correspondence I hand to you please, one of the letters is already Exhibit 37. I put it there so you will have the complete sequence of this particular subject matter. Are you sufficiently familiar with the correspondence to answer questions about it? A. I think so with the one exception of the letters criss-crossing between the solicitors. 10 I have not seen those.

Q. It was 10 a.m. on the morning of 29th January this year when the moratorium, to use your phrase, ran out?
A. Yes.

Q. That day FAI sent a circular to its stockholders informing them that a meeting would be convened inter alia to remove you from the board. I refer to Exhibit 31?
A. That is correct.

Q. The following day, referring to Exhibit 33, a notice convening an extraordinary general meeting went out? 20
A. That is correct.

Q. You knew by then you would cease to be a director or Cumberland Holdings on 4th March 1975 at the latest?
A. That is on the assumption Mr. Adler used his 80% to vote me off.

Q. Did you assume that he would not? A. I asked him not to but as I said he told me to tell it to the marines.

Q. He made it clear by that to you that he proposed that you would be removed from the board? A. Patently clear. 30

Q. You were not left in any doubt? A. None whatever.

Q. Also you were told there would not be convened, unless it became necessary, any meeting of the board of Cumberland Holdings between the sending out of this notice and the holding of the extraordinary general meeting? A. I was not told that at all.

Q. You were not? A. No.

Q. In fact they had none? A. He told me in a letter but at the time of sending out the notice you are inferring that he told me this at the time of sending out the notice.

Q. No. I was not intending that. It was made clear to you during the period of the dispute, I do not care whether by letter or discussion that unless something arose which required a convening of the meeting of the board of directors of Cumberland, there would not be one? A. Yes, that is so. 10

Q. Would you tell me why in the light of these facts as known to you that you wished to inspect the records mentioned in these letters - you spent many hours doing that? A. Yes, my main purpose was to see the mortgages - as you are aware every nursing home owned by Cumberland Holdings is encumbered, subject to a registered first mortgage and I wanted to see the mortgages particularly to see if those mortgages included a covenant that provided on presentation of a petition to wind up the company, the whole of the principal due under the mortgage became payable forthwith and we did not want to do anything that would jeopardise the assets of Cumberland Holdings by the presentation of our petition. 20

Q. That was the only purpose? A. That was the prime purpose.

Q. What others did you have? A. I had great difficulty in getting the mortgages. I was not allowed to see them. I was told to see them at the office of the mortgagee. I was presented with one mortgage that I did not know existed, that had never been put to the board pursuant to the 180 day discount which I did not know existed in Belgrave Nursing Home which I did not know the detail and --- 30

Q. My question was and you are not making any attempt to answer it - what other records did you look at?
A. I wanted to look at the minute book which was handed to me one hour and 40 minutes before 5 o'clock on the day before I was due at the board.

Q. What did you want to see that for? A. To see what transpired in regard to mortgages and this type of thing, 40

to see whether there were resolutions and what the minute contained. I was told Mr. Adler had the minute book. My inquiries always came back with the same answer. Mr. Adler had it.

Q. That is the mortgages and the minute books you wanted, what else? A. I wanted to look at the private ledger and the private journal.

Q. What else? A. I was not aware in fact of certain assets from Falkirk Properties Limited, of which Mr. Adler was chairman. I saw these leasing agreements which I had no idea were in existence. It was only by going to the office I found out. 10

Q. My question was what were the records you wanted to look at. I did not ask you what you found when you got there? A. I wanted to look at what I would call the accounting records as defined under the Companies Act. I was told I was not allowed to look at anything such as mortgages and documents and things like that. That was Mr. Sinclair's advice to the company. 20

Q. You wanted to look at the accounting records, is that a fair expression? A. I think that is fair, within the meaning of the Companies Act.

Q. Why did you want to look at them bearing in mind your tenure of office was about to be brought to a close and there would be no meetings in the meanwhile? A. As I said before my first and prime object was to look at the covenants of the mortgages but when I found the existence of the leasing agreements with Falkirk Properties, I felt I should go further to see what else I had not been informed of. 30

Q. Would you tell us how many hours you did in fact spend looking at the records of Cumberland Holdings? A. I have a complete resume of the time I spent. I can tell you the times I went and left.

Q. I do not want all the details, the number of hours? A. I would have to sit down and count it out. I could not tell you. I have the details in my book.

Q. To the nearest 5 or 6 hours? A. No, I could not.

Q. To the nearest 10 hours? A. My records could.

Q. What is your recollection? A. I could not answer that.

Q. How many days did you spend? A. The way they were refusing to give me the records - I could have done what I wanted to in a couple of days but I was being given the records in drips and drops. It was unbelievable the way in which I was frustrated.

Q. How many days did you spend doing that? A. I could not answer that. I can tell you accurately by going through the records. 10

Q. I suggested to you yesterday your conduct, at least from the time the takeover offer became known to you, was directed towards trying to force a situation where FAI would make a cash takeover offer at \$1.25 for the ordinary shares and 50 cents for the preference shares. What do you say now to that assertion? A. In view of the way Mr. Adler had acted I do not think any action I took was unreasonable. 20

Q. I have not got to that stage. I want to know whether you will now concede that the whole of your tactics were directed to trying to force a situation where FAI would have to make such an offer and it is fair to say I was endeavouring to get the same offer for the minority stockholders as Mr. Adler got for his family holdings.

Q. Is that intended to be an answer "Yes" to my question or "Yes, with some sort of qualification" or is the answer "No"? A. If I had to answer yes or no, I must answer in the affirmative. 30

Q. Would you tell me whether the instructions to Allen Allen & Hemsley to write to the Commissioner for Corporate Affairs making a number of complaints about Cumberland Holdings - I am sorry about FAI - perhaps I should use the heading on the letter, about an offer which FAI had made to purchase stock units of Cumberland Holdings on 9th December 1974 and again in February 1975, both dates being after the withdrawal of the takeover offer? A. May I see the letters. I am not clear. These are 40

the letters Allen Allen & Hemsley wrote to the Commissioner for Corporate Affairs.

Q. On instructions from Soul Pattinsons given pursuant to a resolution of the directors of that company according to their minute book when you were present - I show you this copy of the letters? A. Thank you.

(At this stage the previous correspondence shown to this witness was tendered and marked Exhibit 48)

MR. BAINTON: Q. You have read the letters? A. Yes. 10

* Q. Were those letters written on instructions of Soul Pattinson's because it thought as a matter of public priority or something the possibility of an offence should be investigated or were they written in the hope that any investigation from the Corporate Affairs would induce them to make a takeover offer in the terms you wanted, in effect to shut off the investigation? A. I would certainly resent the second part of your statement.

Q. You resent the second part. Do you say it did not enter into your head that could be a purpose? A. At all times our actions for --- 20

Q. Can I have your answer to the question - would you like it read? A. You asked me in two parts - can I have the first part again.

(Question above marked with * read)

Q. You told me you resented the second of those possibilities being put to you? A. Those letters --

Q. You did say that? A. Yes, the implication that you are putting.

Q. I will ask you this, do you now say it did not enter into your thinking at the time that one of the consequences of the writing of these letters might be the second alternative that I have suggested? A. I always felt if anybody had been guilty of an offence they should come before the courts. It was our duty to point these factors out if we thought that such factors may have been in existence. 30

Q. Would you read please with care the final paragraph of the letter of 9th December 1974? A. Yes.

Q. Does reading it with care cause you in any way to modify the answer you gave a moment ago? A. I can see the interpretation you have obviously placed on it.

Q. Having seen it and taking such time as you need to reflect on it, do you wish to modify the answer you last gave to me? A. If you are indicating whether we are vindictive about this, I would flatly deny that. I had no intention of being vindictive. 10

Q. I was not suggesting you were being vindictive. I was suggesting that you were taking every step, of any sort, which you thought in any way might bring pressure on FAI to make a takeover offer which you wanted and which it had refused to make and those letters were part of that campaign. That is the suggestion? A. It was a campaign to get the same offer for the minority stockholders as Mr. Adler got for his and this letter was sent. If you refer to it as part of a campaign, I suppose it could be said to be the case. 20

(Letters dated 9th December 1974 and 25th February 1975 from Allen Allen & Hemsley to the Corporate Affairs Commission tendered and marked Exhibit 49)

Q. By the time the second of those letters was written on 25th February you had been told there was every possibility that this group had suffered disasterously as a result of cyclone Tracy in Darwin? A. I was informed on the 25th.

Q. It was discussed among other things at a meeting of directors? A. On the 22nd January, yes. 30

Q. What you were told was that the magnitude of the claims from Darwin were not then known and might not finally be known for many months? A. That is correct.

Q. And that in the meanwhile it was necessarily encumbant on the FAI Group to preserve the liquidity it had against the possibility of very substantial claims? A. Yes.

Q. And in those circumstances there simply was not any possibility whatever of the board of FAI making any takeover offer involving cash for the shares in Cumberland Holdings at least until the result of that cyclone on that group was finally known? A. They had a five million share allotment in Mosbart.

Q. A long way before? A. This was the 6th March was it not?

Q. I am talking to you about what you were told in January. I put it to you it was made as clear as anybody could make it that until the result of that cyclone on this particular insurance group was finally known, there was not any possibility of it making any cash offer to buy any shares in Cumberland Holdings? A. Mr. Atkinson did say at the meeting of the 25th they would have to preserve their liquidity. 10

Q. And that until the situation was finally known there could be no cash offer made? A. I do not recall him making that statement. He told me they would have to preserve their liquidity. 20

Q. Did you not understand him to mean that there would be no cash offer? A. I would not know their situation. I would not know their resources but they have a lot of ads in the Financial Review saying they have money available.

Q. He was making it clear to you that the directors did not know, was not he? A. These ads I am adverting to appeared in the Financial Review with great regularity.

Q. When? A. I see them from time to time. 30

Q. Did you see them in January? A. I do not know. I cannot recall.

Q. I am asking you what you were told in January, at that time as you agree you were told that the impact of the cyclone on this group was then unknown and might not be known for a long while? A. I was not told in the words you are putting.

Q. I am not suggesting they were the words. I am

suggesting that was the clear effect of them? A. They said they would have to preserve their liquidity.

Q. Did you not understand that in the context I am repeating, of your repeated request for a takeover offer, there would not be one forthcoming in those circumstances? A. At that time Jack Belfer asked whether it could be delayed for six months to give him an opportunity - to give the board an opportunity to look at the situation at that time but that was rejected immediately by Mr. Adler.

10

Q. He simply said that the FAI Group would not know the outcome of cyclone Tracy on the funds even after six months? A. That was the claim that he made at the time but I would have thought within six months they would have a reasonable knowledge of their situation.

Q. Whether he was right or not, that was what he said to you? A. That is what he said, yes.

Q. Did you not at least infer from that that you were being told there would be no cash offer of any size during that period? A. I think I could infer that from it, yes.

20

Q. Did you? A. I cannot recall. It could be an inference from it, yes.

Q. Would you mind telling us why even after that information had been conveyed to you, instructions were given to the petitioner's solicitor to write again to the Commissioner for Corporate Affairs, encouraging him as it were to take up the matters mentioned in the letter of 9th December? A. Because they would know the truth of Mr. Adler's arguments.

30

Q. This was just another endeavour to try and bring about a situation where the FAI Group would be forced to make a sort of cash offer - (objected to; rejected in form)

* MR. BAINTON: Q. Mr. Donohoo, on the first day at page 22 of the transcript you were being asked something of

(* Original Transcript Page 6)

what occurred at the annual general meeting of Cumberland held, I think it was, 16th October, 1974? A. That is correct, yes.

Q. And you were asked if you remembered any discussion in which Mr. Adler took part and you are recorded as having given this answer, "Yes. At the meeting was a stockholder called Malcolm Campbell. He said to Mr. Adler 'What are the terms of the takeover offer?' Mr. Adler said 'We don't know. We are still working on it'. Then Mr. Adler stated 'The market in Cumberland shares has been very thin. In fact, the market would not have existed only for us over recent years.' He then went on to state - he said 'A market such as this, where there is one major stockholder is susceptible to market rigging and is not a genuine market.'" So far as you can recollect, is that an accurate record of what you did say?
A. That is correct.

10

Q. This was all said ---

HIS HONOUR: Who said?

20

WITNESS: Mr. Adler said.

HIS HONOUR: What Mr. Adler said, do you mean? I thought in your question you meant was that an accurate record of what Mr. Donohoo said.

MR. BAINTON: Of what Mr. Donohoo said.

WITNESS: The evidence I gave, yes, that is correct.

MR. BAINTON: Q. And these, you were telling us, were statements made out to the meeting in general? A. That's right, yes.

Q. And Mr. Adler, do you say, was saying to the world in general, as it were, that he had been rigging the market? A. I was absolutely astounded at those statements, particularly made in front of a member of the press.

30

Q. Well, I can understand you being astounded? A. Yes, I was truly astounded.

Q. And what - you went away and wrote this little bit down so that you would remember it, did you? A. I certainly did, yes.

Q. Have you got your note? A. I could have.

Q. When did you last look at it? A. I have included it in all the details, the notes I have been making from time to time. I can assure you he said it Mr. Bainton.

Q. You think Mr. Adler had set about starting to bring a situation into existence back in July 1974 where he could get all the minority interests at a very small price? That is your belief, you have told us? A. Yes, yes.

10

Q. And he gets up at the meeting and announces to the world at large that he has been rigging the market?
A. This is quite so. (Question objected to).

HIS HONOUR: Q. Mr. Bainton is accepting that you took as the purport of it that he said he was rigging the market and is putting the question to you on that basis, not on the basis of what was actually said? A. Could I say what I felt in retrospect now?

20

MR. BAINTON: Q. Mr. Adler did state that there had been very few transactions on the market in the Cumberland shares and that, in effect, I think he used the words "The market had been thin". A. Yes.

MR. HUGHES: "Very thin".

HIS HONOUR: Q. You agree with that, do you? A. Yes, I do.

Q. So that the court reporter can get it, where you are assenting would you speak up? A. Yes.

30

MR. BAINTON: Q. I suggest to you he did not say anything at all about the market being rigged by anybody. He did not even use the expression? A. Well, that is my comment concerning what took place at that meeting. In retrospect, I believe that he was ---

Q. I don't want to know that. Mr. Adler's remarks that

in his view there had been very few transactions and that the market was thin in Cumberland shares was repeated to you at the meeting on 4th November when the question of having independent solicitors to look at the documents was brought up? A. Yes, he made that statement and I believe it was with the intention so that I would not rely upon those share transactions that had applied in the past and Mr. Adler did refer in one of the documents to the fact that an independent market had not existed in the shares. 10

Q. Mr. Adler has always stated that, I suggest to you. Whether it be at board meetings or at shareholders' meetings or anywhere else, he has always said for the benefit of anyone interested that the market in Cumberland shares has always been very slight. Now that is so isn't it? A. Well, at the particular instances I have quoted here, he has said that, yes.

Q. He has never said anything to the contrary? A. No, he has referred to it as a thin market. 20

Q. In fact, he has gone further and said, publicly in this sense, that the market which has existed has been supported by FAR or other companies in which he has got some concern? A. May I just have that again please?

Q. Yes. He has said to you at board meetings and publicly, whenever the occasion has arisen, that what market there has been in Cumberland shares has been there to a large extent at least because it has been supported either by Fire & All Risks or by other companies that Mr. Adler is associated with? A. I would say that that would be correct. 30

Q. There has never been any secret about that. It has been public knowledge to anyone with any interest in Cumberland for many years, hasn't it? A. Well, I couldn't go along with that statement but I certainly agree to your earlier assumption.

Q. You have known it and you have heard Mr. Adler say it publicly? A. The first time I ever heard him say it publicly was at that annual general meeting on 16th October, 1974. 40

Q. Where, if he were setting out as part of a deliberate plan to acquire the shares cheaply, you might have expected him to want to say that the stock exchange market had been a genuine one, mightn't you? It would have helped him? A. No, I would disagree with that view.

Q. Would you? You said you would disagree? A. Yes. Could I have the question again if you are in any doubt, please?

Q. Mr. Healy thought you might have said "Wouldn't". 10

MR. HUGHES: No, he said, "I would disagree".

WITNESS: "Would disagree".

* MR. BAINTON: Q. Mr. Donohoo, at page 40 and indeed, I think for some while beforehand, you were being asked a series of questions as to whether anybody had disputed things that you were reading out from your prepared notes or that were in the letter you had written? A. That's correct.

Q. Would you agree that the situation at that meeting was simply that the other directors were sitting and hearing you out on these questions and just not getting into arguments over them? A. No, I would not agree with that at all. 20

HIS HONOUR: Which meeting is this?

MR. BAINTON: Q. Any of the meetings at which this occurred? A. No, I would not agree with that, Mr. Bainton.

Q. The matters that did give rise to some dispute which in fact occurred are recorded in the minutes, aren't they? A. Yes, I believe - yes.

Q. So far as they are not, the others heard you out? 30
A. I beg your pardon?

Q. So far as there are matters in your letters or speeches that are not referred to in the minutes, what in effect happened was that the other two at the meeting

(* Original Transcript Page 18)

just sat and heard you out? A. The other two - you mean the company secretary and Mr. Belfer?

Q. Mr. Adler and Mr. Belfer? A. Mr. Adler had a lot to say.

Q. When there was something to be said, some matter that provoked discussion, there is a reference to that in the minutes? A. I don't quite follow. I am sorry.

Q. You were asked a number of questions in the course of your evidence whether you said something at a meeting or put something in a letter that was tabled and whether anybody disputed it. Do you remember a long series of questions? A. Yes, I do. 10

Q. What I am suggesting to you happened is this. There were some of the matters that you referred to which provoked a deal of discussion and they are there referred to in the minutes? A. That's correct.

Q. As to the rest, the other directors sat and heard you out and left it at that? A. Mr. Adler made plenty of comments on what I said. 20

* Q. You said that at the meeting, I think, of 15th November - and I am referring to page 47 of the transcript - sorry, it is 18th December, that you started off by lodging a protest in the minutes that you had not got a copy? A. That wasn't at 15th November, sir.

Q. 18th December? A. Oh, I beg your pardon, I'm sorry. Yes. Yes, I did enter a protest, yes.

Q. And then you went on to say that it was noted?
A. Yes.

Q. And that Mr. Adler simply said that they had been continuing with what had been the policy in the past?
A. He did say that, yes. 30

Q. And that was a correct statement? A. Yes.

Q. In regard to the past policy? A. That's correct, yes.

(* Original Transcript page 25)

Q. And then Mr. Belfer raised the question of whether or not harmony could be restored? A. That's correct, yes.

Q. What happened when that statement was made? A. That was the time when Mr. Adler said to me or said to the two of us, "You are either for me or agin me and, if you are agin me I will go my hardest".

Q. And then what happened? A. That was the time that Jack Belfer discussed the possibility of meeting with Mr. Millner in order to come to some satisfactory compromise.

10

Q. And then? A. Well, I was reading, sir, from my note memoire the other day when I went through - I put a resolution, if I can summarise it, about the continuity; I put a resolution concerning that we use a fixed minute book with pre-numbered pages and not a loose leafed one. I wanted noted in the minutes that I had demurred on an increase in the dividend from 5% to 6% at the meeting held in August 1974.

20

Q. Just let me interrupt you there. If you were setting out to try and acquire the minority shareholders' shares at the lowest price you could get, would you increase the dividend or would you try and keep it down? A. It would depend upon my integrity, but as a matter of tactics, I expect one would keep it down.

Q. That would be the obvious tactic, wouldn't it? You were telling me your recollection of what happened at this meeting? A. It only went up 1%.

Q. I interrupted you in your account of what happened? A. Yes. I have covered the minute book. There was another resolution that I just can't recall. I have covered the minute book ---

30

Q. Mr. Donohoo, what I am suggesting to you is that the phrase you have attributed to Mr. Adler he simply did not use?

MR. HUGHES: What - "agin me"?

MR. BAINTON: Q. "You are either for me or agin me."

It is just not his language at all? A. I would deny that. (Objected to). He certainly used it, Mr. Bainton.

Q. And you have it recorded, do you? A. Well, I have my notes and notes I have made all the way through, yes. I have that in my notes.

Q. Have you? A. Yes, I have made a note of these things as I have gone through.

* Q. At page 47 where you were giving evidence as to what happened at a meeting of 22nd January 1975 you are recorded in the last question and answer this way. There had been a discussion of the minutes, you had apparently objected to the person who settled them having done so because you thought he had been engaged by somebody else, and you are recorded as having said, "We did retain Norton Smith for the specific purpose of settling the minutes of the meeting, and furthermore, Mr. Walker was actually in attendance at the meeting". And then you were asked, "Perhaps I should get you to go on and describe what debate took place, anything further said about these draft minutes?" You are recorded as having said, "Mr. Adler said 'If you had of got yourself a better solicitor (meaning Walker) this would not have happened.'." Does that correctly record the evidence you gave? A. It does, sir. 10 .. 20

Q. I put to you quite bluntly that Mr. Adler never said anything to that effect at all? A. He did say that, Mr. Bainton.

Q. What possible bearing could Mr. Walker's competence or incompetence, and I don't mean to suggest by that that he is incompetent, have on the matters that were being discussed? (Objected to: allowed.) 30

Q. Do you remember the question? (Question read.)
A. I believe that Mr. Walker is a fine solicitor, otherwise I would not have recommended his appointment as Cumberland's solicitor, but Mr. Adler was making this the excuse for not sticking to Mr. David Walker's minutes.

(* Original Transcript Page 30.)

If I might go on, I had spoken to Mr. Walker; he agreed that his draft, the draft that he - first of all, the draft was prepared by Cumberland's secretary, then revised by Mr. Walker, and I asked for certain amendments and Mr. Walker agreed that all my amendments should be embodied in the revised draft that he had agreed to, and I believe that the reflection on Mr. Walker's incompetence by Mr. Adler was purely for the purpose of pushing aside the minutes that had been settled by Mr. Walker. 10

Q. Mr. Adler, after, you would, I suppose, infer, incurring some expense in going to see counsel over the question of what ought to be in the minutes? A. Could I have that again? I don't follow.

Q. Yes. That Mr. Adler after going to the expense of consulting Queen's Counsel over the minutes uses as his excuse for not wishing to adopt Mr. Walker's draft that he was incompetent. Is that what happened? A. Yes, I would agree. 20

* Q. Now, at page 61 you gave further evidence as to what occurred at the meeting of 22nd January, and you told us that Mr. Adler referred to the fact that they were one of the major insurers of Darwin and so forth? A. That's correct.

Q. And you are recorded as saying, "Mr. Atkinson said" - in the middle of the page - " 'We must therefore preserve liquidity to meet claims.' Mr. Adler said 'A cash offer would cost us half a million dollars.' Mr. Adler then said 'We will not be making an offer pursuant to our letter of the 6th December and we will be advising the stock exchange accordingly within forty-eight hours.' Mr. Atkinson stated 'The exchange cannot be given the proper reasons.' I then asked - 30

"Q. Did he say for what? A. I have not got it in here, but what he was talking about was he could not give the proper reasons for why they could not proceed to make an offer pursuant to the letter of 6th December, 1974."

Do you recollect that? A. I do. 40

(* Original Transcript Page 34)

Q. Do you intend that to give rise to the inference that Mr. Atkinson was saying that the Exchange was going to be given an untrue statement? Is that the inference you draw? A. That would be an inference, yes; not a full statement, not a complete statement. That would be the inference. I am not saying "Untrue" but not a complete statement.

Q. Now, there may be a difference. Do you say that you took Mr. Atkinson to be telling you that there was going to be an untrue statement made? A. I took it from Mr. Atkinson that he was saying that they would not be making a full statement. Mr. Atkinson could answer that better than I. 10

Q. Let me put to you what I suggest was said about it for your comment. Mr. Adler, as you have said, raised the question or made the statement to the effect that it would be some time before the results of Cyclone Tracy could possibly be known. This arose in the context of your having raised again the cash offer? A. Is that what I have said there? 20

Q. I am suggesting to you that it is the fact? A. I don't know whether I raised the point. Certainly that is what was said at the time. That is my note memoire of it.

Q. You raised it every chance you got, Mr. Donohoo, didn't you? A. I raised it on more than one occasion, yes.

Q. Mr. Adler said or what then came to be discussed was the question of whether or not there was any possibility of a compromise. 30

HIS HONOUR: Who said that, Mr. Bainton?

MR. BAINTON: I am not at the moment putting that any specific person said it.

HIS HONOUR: I thought you were?

MR. BAINTON: Q. The question of the possibility of a compromise was brought up. You had something to say about it and Mr. Belfer had something to say about it.

A. Yes. Well, Mr. Belfer made the allegation that the status quo had been restored and this I certainly contested.

Q. Now, in that context, Mr. Adler said something to the effect that it would not be possible to formulate any sort of offer on a compromise basis until the results of the Cyclone Tracy disaster were known? A. Well, I had difficulty in interpreting what Mr. Adler wanted, because he could easily be blaming Cyclone Tracy for not proceeding with the offer, because he had the people locked in, so it did not really matter so far as he was concerned; it could be in his interests to delay the making of a further take-over offer. 10

Q. Perhaps it could. I am asking you now what was said and I am suggesting to you that that was said? A. That he said they may not be in a better position to do it in six months' time?

Q. No, I am suggesting it to you this way, that he said it would not be possible to formulate any proposal until the results of Tracy were known. I am not suggesting those are the exact words but they are the substance of it? A. I don't think he put it in exactly that type of - in those words - but -- 20

Q. I am suggesting to you next that you said, "Can something be formulated next month?" And that Mr. Adler replied that it could well be six months before the results of Tracy would be known? A. Well, I haven't got that in my note memoire that I made the suggestion.

Q. Do you recollect a conversation to that effect? A. You are saying that I said, "Well, maybe in one month it could be"? 30

Q. Yes, or words to that effect and Mr. Adler was saying, "It may be six months or more." A. No, I honestly --

HIS HONOUR: Mr. Belfer suggested the six months, and Mr. Adler something different, I think you were putting before, were you not?

MR. BAINTON: Q. No, I am suggesting now that Mr. Adler

said it could well be six months or more before the results of Tracy were known? A. I don't know about the "More" part. He did indicate it may be six months, yes.

Q. I will leave the "more" out if you like? A. Yes, all right.

Q. And it was in that context that Mr. Atkinson came into this discussion, he having only just been appointed to the board. Would that accord with your recollection?

A. What are you saying Mr. Atkinson said after that?

10

Q. I suggest to you that he said something or words to the effect that the Stock Exchange had written enquiring whether or not FAI was proposing to make the invitation that it foreshadowed when it withdrew its offer? A. The Stock Exchange had written to FAI?

Q. Yes. A. No, I can't recall that, sir.

Q. And that he then said words to the effect that there was no way at that time with what they knew and did not know about Tracy that they could explain to the Stock Exchange why they would have to wait a month or six months, or whatever period before they could make another invitation? A. I don't recollect Mr. Atkinson going into the detail that you are claiming he did.

20

Q. Well, are you prepared to say now that he did not?

A. No, I am not prepared to say he did not.

Q. And that he added that looked at from the commercial point of view the FAI group simply could not make any public statement at that stage in the light of all the uncertainty that then existed? A. A public statement in regard to what?

30

Q. In regard to its losses in respect of Tracy? A. Right at that point of time?

Q. Yes, making it quite clear in his view that the uncertainty was such that any statement might turn out to be misleading. A. Well, he did not say it that way, but I could expect that he may have indicated that.

Q. He then went on to say that in the light of - in

effect, in the light of the absence of knowledge, no truthful statement could be made to the stock exchange at that stage relating to the effects of Tracy and the only course open was to say nothing? A. Well, I would say, Mr. Bainton, you are attributing more words to Mr. Atkinson than I think I have ever heard him speak ever. He is a very quiet man and I don't think I have ever heard him say so much because Mr. Adler normally dominates the conversation when they are together.

10

Q. I think you had only met him once before this occasion? A. Yes, that is quite so. No, at a luncheon I think. I met him at a luncheon on, I think, two occasions, and I think he hardly said "boo".

Q. Just one more question, if I could, on that. And that is what he said was that what was proposed was to make a statement to the Stock Exchange making no reference, in effect, to Tracy and simply saying that as there was a subsisting threat to wind-up no invitation would be made while that subsisted? A. Mr. Atkinson certainly did not say all that, Mr. Bainton.

20

Q. I am not suggesting that they are the exact words, but the substance? A. Even in substance, I don't agree with that.

Q. You deny it, do you? A. I don't agree with it.

Q. Do you deny that he said words intended to convey the substance of that? (Objected to)

Q. Or words that would convey to you --

HIS HONOUR: You can't have "intended".

MR. BAINTON: Q. Or words which did convey to you the substance of what I just put? A. Could I just have that again please?

30

HIS HONOUR: I think, because it is the earlier question, you had better reframe the question Mr. Bainton.

MR. BAINTON: Q. He was saying to you, in effect, that because they simply did not know what Tracy had done to them, the only statement that could be made at that

stage was that there being a petition or threat at least, while that threat remained, no invitation would be made? A. Sir, I would concede that he could have said the earlier part of it, but he did not advert to the threat of the petition.

Q. Did you see the announcement that was, in fact, made, or reply that was in fact made to the Stock Exchange?

A. I suppose I would have got a copy of it, yes.

Q. It did, in effect, say there being a threat to wind- 10
up no invitation would be made? A. Yes.

(Luncheon Adjournment)

* MR. BAINTON: Q. Mr. Donohoo, at page 69 you told us that you read your speech to the extraordinary general meeting? A. I did.

Q. Would you mind telling us why you sent a copy of that to the Stock Exchange, and to the Commissioner for Corporate Affairs? A. Well, it had been my custom all the way through to send copies to both bodies.

Q. Why do you do that? A. Well, it had been my custom 20
throughout the whole of the proceedings to give them a copy of the letters I was sending to the stockholders and --

Q. In the hope of getting a bit of publicity for it, I take it? A. No I wouldn't say that.

Q. Just because it was customary? A. It was customary, yes, sir, to do so.

Q. You were asked did anyone condescend to answer your speech and you said, "No". You were asked did anyone, including Mr. Adler, contest the accuracy of the allegations made in your speech and you said they did not. 30
The fact is, I suggest to you, when Mr. Adler rose to speak at that meeting, he commenced to speak and the interjection and the booing was such that after a few minutes he was compelled to sit back down and was unable to speak? A. Well, I wouldn't agree with that, Mr.

(* Original Transcript Page 39)

Bainton. I don't think that Mr. Adler would let a few interjections stop him from speaking if he felt as though he did want to speak.

Q. Did he rise to speak? A. Straight after I spoke, my recollection as I said before, if we had the tape-recording of what went on that Mr. Adler took, this would be so much easier. But I thought - I didn't keep notes of this meeting because I didn't think it was really - I didn't keep them as I did on the other directors' meetings - but In this particular case I thought that my speech was followed by a number of speakers from the floor. 10

Q. At any stage of the meeting after you had spoken did Mr. Adler rise to speak? A. I can't recall Mr. Adler speaking before the motion was put. He certainly did speak after the motion had been carried, after the poll had been taken.

Q. Do you recollect an occasion when there were numerous interjections and booing from the floor? A. Well, I don't recall booing as you say. It wasn't a political meeting that you are referring to. I don't call it booing. There were some interjections but I wouldn't say that he was intimidated by booing. 20

Q. Do you remember Mr. Adler sitting down after he was unable to make himself heard? A. Oh, Mr. Bainton, Mr. Adler could always make himself heard if he felt as though he wanted to be heard. I don't think he wanted to be heard, frankly. I asked him to speak on the motion firstly and he would not agree to speak. I asked him on two or three occasions, "Would you please speak? You are my accuser. You are putting the motion before the meeting," and he bluntly refused to speak. 30

Q. Mr. Donohoo, we have had all that. I am asking you now after you spoke, have you a recollection of what happened? A. I would put it to you that the stockholders who spoke were so outspoken in their comments that possibly he felt it was not appropriate for him to continue and he would take that excuse to sit down if he felt it was in his interests to do so.

Q. Whether that be so or not, the question I asked you was, was it not the fact that he did speak and he was 40

constantly interrupted with interjections and so forth, and, after persevering for a while, he did in fact sit down. A. I couldn't agree with that, Mr. Bainton.

Q. Do you say it did not happen? A. There were some interjections.

Q. Do you say it did not happen? A. And people spoke but I can't recall Mr. Adler feeling he was intimidated and could not proceed with his speech. He, as chairman, could have easily said, "May I have a little quiet while I put my point of view". 10

Q. I did not ask you that. Would you please listen. Did he rise to speak? Was he interrupted by numerous interjections and so forth and did he, after a while, sit down? (Objected: Allowed).

Q. Did that happen? A. I would say that he took the excuse of a few interjections.

Q. Never mind --- A. To return to his seat.

Q. ___ whether it was an excuse or not at the moment, Mr. Donohoo, - we may come to that - did it happen for a start? A. I don't recall it anyway in the form you are referring to, Mr. Bainton. 20

Q. Nearly? A. Well I must agree that the stockholders gave vent to their feelings, sir.

Q. While he was on his feet trying to speak? A. I don't know. I could not honestly say that, sir. I can't recall whether they intimidated him to such an extent they caused him to sit down but I would hardly suspect that would be the case with Mr. Adler.

MR. HUGHES: With your Honour's leave and with your Honour's consent may I defer re-examination of Mr. Donohoo until I have called another witness who I think may be reasonably short. 30

(Witness stood down.)

(Charles Paul Curran, Vice Chairman of the Sydney Stock Exchange, appeared on subpoena duces tecum and produced the documents set out in the subpoena together with the subpoena)

CHARLES PAUL CURRAN

Sworn and examined:

MR. HUGHES: Q. Mr. Curran, your name is Charles Paul Curran, you are a stock broker and you are Vice Chairman of the Sydney Stock Exchange? A. Yes, I am.

Q. Where do you live? A. I live at 59 Arnold Street, Killara. 10

Q. How long have you been a member of the Sydney Stock Exchange? A. Eleven years.

Q. Are you a member in a firm of brokers, members of the Exchange? A. Yes I am.

Q. How long have you been on the committee of the Exchange? A. Four years.

Q. Does that period include one completed term as Vice Chairman? A. Two completed terms.

Q. I beg your pardon, two completed terms? A. As Vice Chairman. 20

Q. Yes. Now, I want to ask you first of all do you know Mr. L.J. Adler, the Chairman of the FAI Insurance Group? A. I have had a meeting with Mr. Adler.

Q. When was that? A. In December of last year.

Q. Do you remember the date? A. Yes, I do, by subsequent reference to material - 4th December.

Q. Where did the meeting between you and Mr. Adler take place? A. In the committee room of the Sydney Stock Exchange. 30

Q. Did you have a conversation with Mr. Adler on that occasion? A. Yes, I did.

Q. Would you tell his Honour please your recollection of the conversation. A. The conversation followed

discussions in relation to a takeover by FAI of Cumberland Holdings.

Q. A takeover scheme? A. A takeover scheme. And there had been negotiations or discussions between FAI and the Stock Exchange regarding certain terms of that scheme. There were matters in dispute and the meeting was called to discuss those matters.

Q. That is the background. Now, would you be kind enough to give us the conversation? A. I asked Mr. Adler, and he had an associate with him, Mr. Atkinson, as to why a price of \$1.25 was not being offered to the remaining shareholders of Cumberland, the response to that, as well as I can recall it, was that the board had decided on another price which was the price that was then offered and which, in fact, I don't recall. 10

I then asked as to how the price had been determined of \$1.25 as an appropriate price for FAI to have purchased shares from interests associated with Mr. Adler some months previously and Mr. Adler replied to that question by saying that - if I can try and recall his words - "It was the market price. You should be happy with that, Mr. Curran. It was the market price". 20

Q. Did you then say something to Mr. Adler? A. Yes, I did. I said, "Not if a party interested in the transaction had been actively involved in the market at that time".

Q. Did Mr. Adler make any reply to that observation? A. No, he did not say anything.

Q. Did you observe anything about Mr. Adler's expression when you made that observation? A. He seemed surprised or disconcerted or shocked or something of that nature. 30

Q. Was that observation and, indeed, this whole conversation between you and Mr. Adler one that took place in the presence and hearing of Mr. Atkinson? A. Of Mr.?

Q. Atkinson, his associate? A. Yes, and others.

Q. Now, the next thing I want to ask you about is this.

Have you, not only as a stock broker in the course of your professional activities, but as a member of the committee of the Sydney Stock Exchange, been personally involved in either of those capacities in takeover situations? A. Yes, I have.

Q. Have you been so involved in one capacity or the other in takeover situations in a case or in cases in which the offeror company and the offeree company have directors in common? A. Yes, I have.

10

Q. Can you say, as a result of your experience, whether or not in such cases there is any practice in relation to the valuation of the position financially in relation to the takeover scheme of the companies involved? (Objected to: allowed.) A. Yes. ~~I can say there has been such a practice from a number of specific examples that I can call to mind.~~

Q. What is the practice? (Previous answer objected to: portion struck out at his Honour's direction).

EXAMINATION ON THE VOIR DIRE

20

MR. BAINTON: Q. Mr. Curran, when you say that you have had such a practice, are you relying on your own experience in forming that view or on something else? A. I am relying on both my own experience and the discussion that has occurred from time to time in Stock Exchange Deliberations.

Q. Just dealing with your own experience, how many occasions, and I appreciate that you may not be able to answer this exactly, have you been involved in takeover situations?

30

MR. HUGHES: As a broker?

WITNESS: As a broker?

MR. BAINTON: Q. Well, as a broker or in any other case? A. Or as an observer?

Q. Short of being a member of the public reading the exchanges in the press, as a broker or as a director? A. I see. Well, as a broker, I suppose there have been hundreds of takeover offers that I have been

involved in and I have had to observe in order to be in a position to advise clients on.

Q. Of those, how many can you tell me would have been offers made by somebody who already controlled more than 50% of the voting power of the offeree company and, again, I appreciate you may not be able to give me a precise answer? A. My answer to that must be in the range of guess but I wouldn't have guessed about ten within that range of a couple of hundred could have been of that nature. 10

Q. And narrowing it a bit further, how many can you tell me would have been offers by somebody who already had 75% of the offeree company? A. I don't think I can recall any one and there is a reason for that but that is probably going beyond the question.

Q. Yes, I appreciate that. Is the reason you want to give one why you can't recall or one why there haven't been any? A. No, one why there wouldn't have been any.

Q. You don't know of your own knowledge any situations that would have been in that category? A. I can't recall, but I don't know why you want me to volunteer the reason as to why. 20

Q. If you have one, please tell us? A. Most of the companies I would have been observing would have been companies that complied with the listing requirements and, broadly speaking, companies of the smaller type of companies must have 25% of the capital in the hands of the public, so that a company where there was one controlling bidder holding more than 75% would be very very rare. It would be a company that failed to meet our listing requirements. 30

(VOIR DIRE CONCLUDED)

MR. BAINTON: I would object to the question that was asked before I asked those questions.

MR. HUGHES: I would press it.

HIS HONOUR: I will admit the question, Mr. Hughes.

MR. HUGHES: Q. You have been allowed so far to say there is a practice on the matter I mentioned to you. The next question which his Honour now allows you to answer is, what is that practice? A. That there should be independent financial advice provided.

Q. As to what? On what subject? A. Generally speaking, as to the appropriate value of the offeree company, but, if it is a share exchange, it would also extend to the value of the offeror shares. 10

Q. Can you say whether or not that practice is a practice that could be described as a usual practice in the securities industry in this country?

HIS HONOUR: In New South Wales.

MR. HUGHES: Q. Sorry, in New South Wales? (Objected to: allowed.) A. To answer in terms of the specific word of "usual" I would say yes.

Q. Now, the next matter about which I want to ask you is this. His Honour has been made aware in the evidence in this case that on 4th September, 1974, the Sydney Stock Exchange wrote a letter to Cumberland drawing attention to the spread of share holdings in that company and intimating or requesting to be advised within three months whether the holding of the majority shareholder, namely, F.A.R.I., had been reduced below its then percentage level down to 75% of the total ordinary issued capital. You are familiar with that? A. Yes, I am. It is the usual practice. 20

Q. That is Exhibit 6. (Witness shown Exhibit 6). I might just ask you to look at that letter to refresh your recollection? A. Yes. 30

Q. Now, after receipt of that letter, did it in due course come to the notice of the stock exchange committee that the majority shareholder, that is, Fire and All Risks Insurances Limited, did not propose to reduce its shareholding below its then level of 75%? A. It came to my understanding that that was the case.

Q. These listing requirements according to the procedures of your organisation are dealt with in the first

instance by the Listing Committee? A. In the very first instance by the executives of the stock exchange, and then by the Listing Sub-committee.

Q. The Listing sub-committee which is a sub-committee consisting of members of the Committee of the Exchange?

A. Yes.

Q. Following the receipt of advice to the effect that the majority shareholder would not reduce its equity interest below its then level held in September of last year down to 75%, has the company remained listed? A. Yes, it has. 10

Q. What is the present position with regard to the further consideration, if there is to be any further consideration, of the situation arising out of the majority shareholders refusal to reduce its holding? (Objected to, allowed).

Q. You are allowed to answer it? A. It is in a state of limbo essentially awaiting the outcome of this case. That is the fact of the matter. 20

Q. There is one other matter in relation to listing about which I want to ask you a question and that is this. Cumberland would be described as being in the scale of companies a small company with a very short list of shareholders and not a great number comparatively speaking, of issued shares. Is that right? A. Well, that is my understanding of it.

Q. In the case of a company like Cumberland falling into that category, does the committee, and I ask you to invoke your experience here, regard the thinness of trading in a stock of that particular type of company as being in itself a ground for delisting or is there some other relevant ground that is the ground of delisting action? A. The relevant issue there is the spread of shareholdings. 30

Q. The spread of shareholdings? A. Which is set out in the listing.

Q. Is the figure 75% in the administration of listing requirements a figure of any significance? A. Yes, it

is. That is the figure that covers the bulk of companies of average size.

Q. That is the cut-off point, as it were? A. Yes.

HIS HONOUR: Q. But by "spread of shareholding", you mean something different from that, don't you, Mr. Curran? A. I mean, your Honour, that 25% must be in the hands of the public so it does certainly go beyond just a mere 75% test, yes.

Q. And that is what you meant when you referred to "spread"? A. Yes. By "spread" essentially I suppose I meant that 25% must be in the hands of the public and, in that regard we have a look at the largest shareholders and ensure that there are no close associations between the apparent top shareholders to ensure that there is that 25% in the hands of the public. 10

CROSS-EXAMINATION

MR. BAINTON: Q. Would you be kind enough, Mr. Curran, to tell us which is the provision in the listing manual that you have in mind when you refer to 25%? A. Yes, it is in section 1 on page 15, A4,A.1(4) little "a". 20

Q. I am sorry, do you mean s.1 capital A? A. Yes, I am sorry. Section 1 capital A and it is A1(4) (a).

Q. So it is the provision that a company seeking quotation may be considered for admission if, inter alia, in the case of a company having a paid-up share capital of 200,000 but not exceeding 2 million, at least \$70,000 or 25% of such capital of the one class paid up value is held by members of the public? A. That is correct.

Q. So that you say that if a company whose shares have been admitted for quotation ceases to comply with that requirement the exchange will consider whether it should delist it? A. Yes. 30

Q. Does the same practice apply with regard to the other requirements in 1.A.1, 1,2,3,4 (b)? A. Yes, it does.

Q. So that, for instance, if the total number of

shareholders drops below 300 in the class of shares quoted the same action would be taken? A. Yes, it may be taken.

Q. Well, by "would be taken" I mean the question of de-listing would be considered? A. Yes, it would.

Q. Do any of these particular matters carry any more weight than any of the others? A. Yes.

Q. Which is regarded as carrying the most weight of those in 1.A.1 - there is altogether 6 if you take the subdivisions? A. The amount of capital in the hands of the public, if I could express it loosely in that way. 10

Q. Is that three or four? A. Well, it is three and four.

Q. Three and four? A. Three and four, really, yes. I wonder if I could amplify my first answer by referring you to listing requirement 3H18 which is on page 90 and the first sentence of that listing requirement says, "The company will at all times maintain a spread of shareholders and option holdings which in the opinion of the exchange is sufficient." In the exercise of its power under that listing requirement, we are guided by the spread requirements that apply to new listings which is coming back to 1A. 20

Q. 1A, 1,2,3,4? A. Yes.

Q. What is the current listing fee that a company like Cumberland pays? A. I would have thought about \$700 or \$800, but I am hazarding a guess there.

Q. Is it not the same for all companies? A. No, it does depend upon the size and there is a section of the listing requirement which establishes that. 30

Q. The nominal value of the shares quoted, is it?
A. Yes, it is.

Q. Not related in any way to turnover? A. No, it is not. That would be s.7 if you wish to make reference to it.

Q. Would a company with only about 170 shareholders in all be listed in any circumstances? A. As a new listing?

Q. Yes? A. I would say no.

Q. Would it in any circumstances be kept on the list if the shareholders having been at one time more than three hundred dropped to 160 or 170? A. It may be.

Q. Assuming, of course, the exchange knows of it?

A. Oh, the exchange has a method of, has a procedure of knowing of those things.

10

Q. I was assuming that you would assume in my question the exchange would know? A. Yes.

Q. What are the circumstances in which it would be --

MR. HUGHES: Would be what?

MR. BAINTON: Q. Would continue to be listed when the share holding dropped to something around that figure?

A. When the number of shareholders had dropped?

Q. Yes? A. I suppose I can only speak of the way I would exercise my judgment in that matter if it came before me.

20

Q. Has the question arisen for consideration when you have been on the committee? A. Yes, it arises in specific instances where a set of facts comes forward and should we or should we not.

Q. Does the exchange have a practice in those circumstances? A. Yes, it does. It ---

Q. Would you please tell us what the practice is?

A. Yes, it examines the amount of capital that is in the hands of the public as a relevant issue. It often gives a notice under that listing requirement. 3H18 which I refer to, which is to rectify the situation within three months, and there are occasions where special representations are made as to why listing should be retained which may vary according to the circumstances.

30

WITNESS: It has regard to the general policy of the listing requirements in this area.

MR. BAINTON: Q. What is that? A. To ensure that there are sufficient shares held by the public, and sufficiently widely held by the public, for there to justify a proper market in these securities, but one which would not be liable to the abuse of market manipulation which is possible in a thinly traded stock. That is it.

Q. Has Cumberland Holdings been examined by the listing committee with a view to looking at those questions as they apply to that company prior, at any rate, to the discussion that you spoke of with Mr. Adler? Had the situation in regard to that company been examined by the listing committee prior to that? A. Yes. It was this sort of consideration that gave rise to our letter of 4th September which is exhibited before me, which was a notice to show cause, if you like. 10

Q. Prior to that had Cumberland Holdings been examined from that point of view? A. I could not answer that question. I would have to make reference to the file in order to be able to answer that question. 20

Q. When you were describing what you meant by a member of the public a moment ago you were explaining, if I understood you correctly, that that was to exclude the major shareholder, and people or companies closely associated with major shareholders? A. Yes. It is not a scientific approach; it is a loose look to see if, from our examination of it, there seems to be a sufficient number of disinterested or non-connected people. 30

Q. You would regard as connected a wholly-owned subsidiary, for a start, of a major shareholder? A. Yes.

Q. You would regard it as connected to the parent company in the technical company sense of the major shareholder? A. Yes.

Q. And I suppose you would regard another subsidiary of the parent, being an associated company in the technical sense, as related? A. Yes, I would.

Q. For the reason, I take it, that ultimately they are under the same control? A. Yes.

Q. Would you regard as associated companies controlled by the same person - and I use that in the individual corporate sense - as the major shareholder? A. Yes. If we had knowledge of that.

Q. Would you regard a transfer of shares, for instance, from the parent of the major shareholder to the major shareholder as having any real relevance as to whether or not there should be de-listing? A. Is it from a subsidiary to a parent? 10

Q. You have got the parent. We have a controlling shareholder of a listed company? A. Yes.

Q. We have the parent of that controlling shareholder holding some shares, and we have the parent transferring them to its subsidiary, being the controlling shareholder of the listed company. Is that transfer anything you would regard as relevant to the question of the company maintaining its listing? A. It certainly would not improve the position as to how much - 20

Q. Does it make it any worse? A. If we had knowledge of these actions it would not make it substantially worse, but it certainly would not improve it. It might highlight it.

Q. And again would you answer in the same way if there had been a transfer from an associated company of the controlling shareholder to the controlling shareholder? A. I would give exactly the same answer.

Q. I suppose the third situation I put a while ago - if there were a transfer from an entity controlled by the same person who controls the controlling shareholding it makes no difference? It does not improve the situation but it does not make it any worse so far as listing is concerned? A. It does not improve the situation. It is really the same answer I gave before. It does not improve it, but it does not have a significantly worsening effect if we know about it, except highlighting it. 30

Q. Possibly highlighting it? A. Yes.

(Witness retired)

(Photostat copy letter of 27th November 1974, copy letter of 28th November 1974, letter of 28th November 1974 from Messrs. Sinclair to the Stock Exchange, copy letter of 28th November 1974 from the Stock Exchange to Messrs. Sinclair, letter of 29th November 1974 from Messrs. Sinclair to the Stock Exchange, letter of 29th November 1974 from the Stock Exchange to Messrs. Sinclair and a letter of 2nd December 1974 from Messrs. Sinclair to the Stock Exchange tendered and admitted as Exhibit 50)

10

(Selling order of 26th June 1974, selling order of 7th August 1974 and buying order of 19th August 1974 tendered; objected to; admitted and marked Exhibit 51)

HIS HONOUR: Agreed fact that the transactions mentioned in the answer to interrogatory A(1) took place on 12th July 1974.

20

GLEN LAWRENCE ALBERT DONOHOO

On former oath:

RE-EXAMINATION

MR. HUGHES: Q. Mr. Donohoo, there are a number of questions I want to put to you in re-examination. You were asked some questions this morning before the luncheon adjournment by my learned friend as to whether it might be considered reasonable on the part of Mr. Adler and Mr. Belfer, your co-directors on the board of Cumberland up to 22nd January, when there were additional appointments made, to take the view that as you were in conflict with them on matters of vital principle it might be reasonable for them to arrange for the appointment of additional directors in case you might absent yourself from board meetings, thereby frustrating or stultifying consideration of the company's business at board level. Do you remember that line of questions

30

being put to you by Mr. Bainton this morning? A. Yes, I do remember that line of questioning.

Q. Did either Mr. Adler or Mr. Belfer ever ask you whether you had any such intention in your mind? A. No, they did not.

Q. Did you ever have any such intention in your mind? A. No, I did not.

Q. Did you ever say anything to either of them that would indicate such an intention? A. No, I did not. 10

Q. Now, you were asked whether you had at any time said to anyone - that is, anyone in the opposite camp - that it was your intention to withdraw or resign from the board of Cumberland when Souls - should they do so - filed a winding up petition. Do you remember being asked questions along those lines by my learned friend? A. Yes, I do.

Q. You were asked - I think you said you could not remember whether you had or not? A. Yes, that is right.

Q. (Exhibit 38 handed to witness) Would you have a look at page 2 of that document, please, Mr. Donohoo, It is in the first half of that page. Do you see a passage there that brings anything back to your mind? A. Yes, I do. 20

Q. Does that bring anything back to your mind, as to when, if at all, you advised your intention to leave the board of Cumberland when the winding up petition should be filed? It is clear as to what you said at the meeting. At the time of that meeting the winding up petition had not been filed? A. That is right. 30

Q. The next matter I want to ask you about is this. It was put to you that this was a meeting - it was put to you that this meeting was a very rowdy meeting, and Mr. Adler was in effect shouted down and prevented from making any answer to you by the din of the disorder. Was there any truth in that suggestion? A. None whatsoever, from my recollection of the meeting.

Q. Was that distinguished member of the Bar of New

South Wales, Mr. Hely, present in a professional capacity at that meeting? A. Yes, he was Mr. Hughes.

Q. Did he look discomforted or embarrassed by what was going on? A. No.

Q. After you had made your defence, or perhaps your defence and attack, in your speech, did Mr. Adler speak at all at the end of the meeting? A. After the resolutions and motions had been put to the meeting? Is that what you are saying?

10

Q. Yes. A. Yes, he did.

Q. And did he discuss the substance of your remarks at all? A. No. Not really, no.

Q. You were asked a number of questions about the Cyclone Tracy disaster in Darwin, and conversations that took place on that subject between yourself on the one hand and Mr. Adler and Mr. Atkinson (sic) on the other, and you were asked more than once whether it was not made perfectly apparent to you that by reason of the disastrous events that had happened in Darwin Mr. Adler made it perfectly plain to you that FAI was in no position to make a cash offer.

20

At that time did you have any belief as to the truth or otherwise of Mr. Adler's statement of the position of FAI in relation to a possible cash or impossible cash offer? At that time did you have any belief as to the truthfulness or otherwise of his remarks? Do you follow what I mean? A. No, I don't quite follow you, Mr. Hughes.

Q. These statements were made to you about the impossibility - the alleged impossibility of FAI making a cash offer? A. Yes.

30

Q. And a reason was assigned. Do you remember being asked questions in regard to that matter this morning? A. Yes, I do.

Q. Did you believe those statements as being true, or did you have another view, or did you have an open mind as to their truth? A. Well, I had no basis upon which

I could make any assumption as to whether they were true or false. I had nothing upon which I could make an assumption as to that.

Q. At that stage were you prepared to accept anything that Mr. Adler told you? A. Not really.

Q. You were asked a lot of questions - I think not yesterday, but perhaps the day before - about what you would have done in various hypothetical situations, one of the hypothetical situations being if there were common directors of a parent and a subsidiary company and the minority stockholders in the subsidiary company being 25%, and another of the hypotheses was that you were a director of the parent alone. Do you remember that series of questions being put to you. A. I do, yes.

10

Q. I want to come to the specific case - namely, the present case, and I want you to tell his Honour, all of these other questions having been put to you about hypothetical situations, what you would, as a man experienced in the field of company administration, have deemed it proper to do had you been in the very position that Mr. Adler was in this case. (Objected to; rejected)

20

Q. I want to put to you a description for the purpose of enabling you to consider an answer to the question of Mr. Adler's position. I am asking you to bear in mind that in July 1974 he was active in relation to arranging the share transfers from his family companies to Fire & All Risks Insurance Limited, the latter company being a company to which he owed a fiduciary duty. Will you bear that in mind? A. Yes.

30

Q. We will call that hat No. 1? A. Yes.

Q. I want you to bear in mind that he owed fiduciary duties as a director of FAI Insurance Limited which subsequently, in September and thereafter, became the prospective offeror in the takeover scheme, and ultimately the offeror. That is hat No. 2, do you understand? A. Yes.

Q. I ask you to bear in mind that he also was a director - chairman of directors - of Cumberland Holdings Limited, a company which, as a result of the transactions in July, became 80% owned as to its ordinary stock by

40

Fire & All Risks Insurance Limited. Do you follow me?

A. Yes.

Q. And that is hat No. 3? A. Yes.

Q. Just picture yourself in Mr. Adler's situation with this trio of hats to wear. Do you understand? A. Yes, Mr. Hughes, I understand.

Q. What I am asking you - and I am asking it in the light of some of the questions put to you in cross-examination - what would you have done in that situation had you been - had you had the wardrobe with Mr. Adler's three hats in it? (Objected to) 10

Q. As a director of Cumberland Holdings what would you have done in relation to the takeover scheme? (Objected to)

Q. Would you, as a director of Cumberland Holdings Limited, have acted as Mr. Adler acted? (Objected to)

Q. If not, in what respects would you have acted differently? (Objected to)

Q. I will split the question up, rather than making it general. Do you follow? A. Yes. 20

Q. Had you been in the tripartite position or positions that Mr. Adler occupied, what would you have done as a director of Cumberland Holdings when the announcement was made to you by the Stock Exchange that unless the major shareholding was reduced from 80% to 75% de-listing was likely? (Objected to)

MR. HUGHES: Q. I show you Exhibit 6. I want you to assume you were in Mr. Adler's shoes, that you received that letter from the Stock Exchange on or about the date it bears - shortly after the date it bears? 30
A. Yes.

Q. What would you have done in relation to the warning contained in that letter at board meeting of Cumberland Holdings (Objected to)

Q. You received that letter at a board meeting of

Cumberland Holdings and you were the chairman of Cumberland Holdings. What would you have done at that meeting of Cumberland Holdings, as chairman of Cumberland Holdings? A. I would have said to my co-directors "I believe the proper course we should now follow should be to make a takeover offer to the minority stockholders representing 20% of the issued capital on exactly the same terms as I receive for my family company's interest".

Q. From the point of view of your practice would you have regarded any alternative course of action as reputable? A. I certainly would not have. 10

Q. Would you make this further assumption that as well as gaining through his family company a substantial price, namely \$1.25 for the ordinary shares held by these family companies, and sold to Fire & All Risks in July, make the further assumption, that you as Mr. Adler, during August, put a selling order on the Stock Exchange on behalf of FIA for those shares in Cumberland Holdings at 70 cents, making that assumption, and making the further assumption a few days later in August 1974, F.I.A., through your agency, there was a decision that it put on a buying order those shares at 50 cents. Do you follow the chain of events? A. Yes. 20

Q. Had you been Mr. Adler at that board meeting, in Mr. Adler's position at that board meeting of Cumberland Holdings in which that letter, Exhibit 6, was tabled for discussion, what would you have done in relation to the previous conduct what we have asked you to assume - (objected to; allowed subject to a further application from Mr. Bainton for further cross-examination) 30

MR. HUGHES: Q. Do you follow the question? A. Yes. Despite the buying and selling orders I would have had as Mr. Adler, placed on the exchange, I would still nevertheless feel it was the only honourable thing to do, that would be to offer the locked-in minority stockholders the same price as I had received for my family interests.

Q. I ask you this, if you had been Mr. Adler and arranged the transfers in your family companies, in a company to which you owed fiduciary duties of shares at \$1.25, would you have considered it reputable to put 40

successive selling orders at 70 cents and following buying orders at 50 cents not long before a takeover scheme was announced (objected to; admitted subject to relevance)

A. I would consider that such action would be most disreputable and also reprehensible.

Q. I want you to come back to this board meeting of Cumberland Holdings at which you were in fact present as Mr. Donohoo, on the occasion when the letter Exhibit 6, from the Exchange was tabled. You said that had you been in Mr. Adler's shoes as the Chairman of Cumberland Holdings you would have proposed a cash offer of \$1.25 be made to the minority shareholders. Do you remember?

10

A. Yes, I did.

Q. If you were in Mr. Adler's shoes and encumbered as well with the fiduciary duty that you owed to the shareholders of F.I.A. Insurance, a fiduciary duty owed to Fire & All Risk Insurance as well as the fiduciary duty to the minority of the shareholders in Cumberland Holdings, what would you have done in relation to the warning in Exhibit 6? A. I would have complied with the request of the Sydney Stock Exchange. I would have advised the stockholders of the situation and at the same time I would advise them that Fire & All Risk Insurance Limited or F.I.A. Insurance would be making a takeover bid for these shares at the same figures as Mr. Adler received for his family companies' interest.

20

Q. There was some reference by you earlier this morning to a company called Mosvart? A. Yes.

Q. Were you invoking that reference to that company for the purpose of fixing some time or period in relation to the availability or otherwise of a cash offer? A. Yes, in the way Mr. Bainton was putting it, he was asking whether they had the cash. I mention this allotment of shares was made, I think 5 million shares allotted at par and they were paid up upon the application of an allotment of 15 cents, with the rest of the obligations to meet the balance in a matter of months.

30

HIS HONOUR: Allotted by whom? A. F.I.A. Insurance Limited.

40

MR. HUGHES: Q. That was a situation within your knowledge? A. Yes.

Q. Do you remember when that happened? A. I think the newspaper clippings I have are dated 6th March 1975.

Q. You were asked about some newspaper articles and my friend asked if they said that? A. Yes.

Q. Are these the articles to which you referred in the course of your cross-examination? A. Yes.

(Above newspaper clippings tendered; objected to; tender withdrawn)

Q. It was put to you yesterday that the sole reason why you sought to insist that a takeover offer should be made to the minority shareholders for a cash consideration of \$1.25, for the ordinary stock and 50 cents for the preference stock, the sole reason was that the controlling shareholder had got that price four or five months before -- 10

MR. BAINTON: That was not suggested as the sole reason - that was the sole reason why he suggested the price for them.

MR. HUGHES: Q. It was suggested to you yesterday in cross-examination that the sole reason for you suggesting that the price for Cumberland ordinary stock should be fixed at \$1.25, was that the controlling shareholder had paid that price for the ordinary stock four months earlier. Do you remember? A. Yes. 20

Q. You demurred? A. Yes.

Q. What if any was the other reason or reasons? A. I determined that was the sole reason.

Q. You said it was not the sole reason. Did you have any other reason for suggesting that price should be fixed in that way, at a figure of \$1.25? A. No. I cannot recall any other reason. 30

Q. You remember you made some comparison of the respective net tangible asset backing? A. Yes, it was so close, one was \$1.22 and the other was \$1.25. I thought that \$1.25 was a fair figure based on the two estimates and Mr. Adler had got a net tangible asset backing of \$1.22 - \$1.22, yes, of course.

HIS HONOUR: Mr. Bainton, arising out of those matters, do you wish to ask anything in relation to the selling and buying orders.

MR. BAINTON: No your Honour.

(Witness retired)

IAN RAINY LANCE HARPER

Sworn and examined:

MR. HUGHES: Q. Is your name Ian Rainy Lance Harper and are you a solicitor of the Supreme Court and a partner in the firm of Allen Allen & Hemsley, solicitors in this city? A. That is correct. 10

Q. Where do you live? A. 54 Treatt Road, Lindfield.

Q. In November 1974, were you acting in any way for Mr. Donohoo or Souls or both of them in relation to this takeover proposal? A. I considered that I was acting for both of them in certain areas in different capacities, by which I mean that Mr. Millner was clearly there as a representative of Souls whereas Mr. Donohoo was there as a director of Cumberland Holdings but nevertheless the nominated director by Souls. 20

Q. Do you recall early in November 1974 Mr. Donohoo asked you to advise him on a draft circular proposed to be issued by him as a director of Cumberland Holdings to the ordinary stock holders of that company? A. Yes, between the end of October and 15th November I recall there were a number of conferences culminating in such a draft.

Q. Would you have a look at this document? A. Yes, in fact there are two drafts, one to the ordinary stockholders and the others to the preference stockholders. 30

Q. That is a draft of the circular proposed for issue to the ordinary stockholders? A. Yes.

Q. May I invite your attention to some material on

page 2 and 3 relating to the price of \$1.25 per ordinary stock unit. Do you see that? A. I do.

Q. That is crossed out? A. Yes, by me.

Q. By you? A. Yes.

Q. Did you have discussions with Mr. Donohoo as to the reason or reasons that led you to advise him to strike that piece out? A. My records indicate that it was on the date that the draft bears, the 15th, that I spoke to Mr. Donohoo at length about this circular and in particular the inclusion of this material. 10

(Above draft circular tendered and marked Exhibit 52)

Q. Would you tell his Honour the substance of the oral advice you gave to Mr. Donohoo relating to your proposal that the reference to the price received by other purchasers should be omitted? A. It is the material on page 3. I said to Mr. Donohoo I was somewhat concerned with his position in that he was not in my view a free agent as a director of Cumberland Holdings and that he would be subject in anything he said in a circular such as that to the laws of libel. Furthermore, I was not at all confident of the extent to which he could obtain indemnity from Souls or Cumberland Holdings for that matter to protect him from such an action, from such a liability, in particular in view of the Companies Act provision, I think Number 133, which avoids indemnity in certain circumstances. He was very anxious I recall and said so that reference should be made in his circular to these transactions, private transactions, if I could call them that but I said to him, and I recollect it was on the 19th that I ultimately came to the conclusion and this appears from my office records that the matter would be excised and only included in a circular which would be, I was aware, issued by Souls. 20 30

CROSS-EXAMINATION

MR. BAINTON: Q. The circular issued by Souls is dated 27th November 1974. Do you need to look at it to answer the questions or have you looked at a copy recently? A. I have, but I would prefer to look at it. 30

Q. Particularly the second page? A. Yes.

Q. Are you able to say when that was drafted? A. That was drafted, I recall, between the 19th November and prior to 26th November when it was submitted to counsel for his view on whether it was libelous or not.

Q. Having had that advice it was sent out? A. Yes, it was sent out.

Q. It is quite specific as to prices and reasonably specific as to vendors of those earlier shares in the sense that it says Mr. Adler and his family? A. Yes, it is reasonably specific. 10

Q. There was no reference in the earlier documents that you have looked at, namely the draft, which I take it Mr. Donohoo prepared to anything other than the fact there had been transactions at a price? A. I was struggling with a very guarded version of this.

Q. Did you come to the conclusion that the matters on the third page of that document, that were struck out, might possibly be defamatory of someone? A. I came to the conclusion there was a danger that an inference of reprehensible conduct could arise. 20

Q. When considering this question did you ponder on whom the statement you crossed out could be taken to be defamatory by someone who read the document in that form? A. Yes, I did.

Q. Who? A. Obviously Mr. Adler and his interests.

Q. There is no reference to him or his interests in the draft that you were considering? A. As one obviously who has advice on libel you would be aware you do not have to name the person libelled. Only a matter of deduction is needed. 30

Q. You would have to know an awful lot about Cumberland Holdings and Mr. Adler and his dealings to be able to identify him from those remarks? A. Possibly.

Q. Indeed it would be fair to say you would have to know all about the transactions before you could infer

that this portion you crossed out referred to Mr. Adler? A. I did.

Q. But you were not one of the intended recipients of the circular. It was to go to the public? A. Yes.

Q. Having that in mind, nobody could have identified those passages as a reference to Mr. Adler unless he already knew all about it? A. I would not be prepared to make those assumptions in the heat of a battle, if I could call it, such as this one has become.

10

Q. When you gave that advice the takeover documents had not gone out? A. We had copies of them.

Q. You were foreseeing the battle coming on? A. It was not an unreasonable assumption to make.

(Witness retired and excused)

(Further hearing adjourned to Tuesday, 21st
October, 1975)