

4 of 1977

29 OF 1976

No.

of 197

IN THE PRIVY COUNCIL

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 II

SOLICITORS FOR THE APPELLANT

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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

FIFTH DAY: TUESDAY, 21ST OCTOBER, 1975

MR. VOSS: There are some corrections to the transcript,  
if I may take your Honour to them?

\* On page 281, where Exhibit 51 is described just a  
little above the middle of the page, that should be 10  
"selling order of 24th June 1974".

HIS HONOUR: Curiously enough, I have noted "26th" -  
someone must have said "26th".

MR. HUGHES: I may have misdescribed it.

HIS HONOUR: I will amend that to "24th June 1974".

\*\* MR. VOSS: At page 249 ninth line from the top, the  
answer as recorded reads "I was not aware in fact of  
certain assets from Falkirk Properties Limited of which  
Mr. Adler was chairman." The word "leased" should ap- 20  
pear between "assets" and "from".

HIS HONOUR: Yes. I will make that amendment.

MR. VOSS: In the 4th question from the bottom of that  
page the answer is recorded as "I wanted to look at the  
minute book which was handed to me one hour and forty  
minutes before five o'clock on the day before I was due  
at the board." That should be "... before I was due to  
leave the board" and not "before I was due at the board".

MR. BAINTON: I have no recollection as to what was said.

HIS HONOUR: I think it is a proper correction.

(\* Original Transcript Page 174)

(\*\* Original Transcript Page 154)

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MR. VOSS: The next correction is in the answer above that. The last sentence in that answer is recorded as being "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..." After the word "discount" the words "bill facility" have been left out.

HIS HONOUR: I will make that alteration.

\* MR. VOSS: At page 250, the third question from the bottom, in the fourth line it is recorded as "offer and it is fair to say I was endeavouring to get the same offer.." The "and" should be deleted, and it should be a "A" for the answer. The question really finishes after the word "offer". 10

HIS HONOUR: Yes.

(Letter dated 20th October 1975 tendered by Mr. Hughes and admitted as Exhibit 53)

EDWARD GARNET BUNN  
Sworn and examined:

MR. VOSS: Q. Your full name is Edward Garnet Bunn? 20  
A. Yes.

Q. Where do you reside? A. 56 Gordon Street, Paddington.

Q. Are you credit manager employed by Australian Guarantee Corporation. A. I am.

Q. In July 1974 were you what is called an operations clerk employed on the floor of the Sydney Stock Exchange by the firm of Messrs. Mullens & Company? A. Yes, that is right.

Q. Did you receive buying and selling orders from the firm's office in respect of stocks for which you were personally responsible on the floor? A. I did. 30

Q. Was one of the stocks for which you were responsible - (Objection to leading)

Q. Cumberland Holdings Limited - was that your responsibility, or someone else's responsibility? A. It was my responsibility.

\*(Original Transcript Page 155.)

Q. Did Mullens & Co. have other operators on the floor?

A. Yes, they did.

Q. How many other operators did they have? A. Two.

Q. Were those other operators responsible for something? A. Other stocks, yes.

Q. Other stocks? A. Yes.

Q. Buying and selling other stocks? A. Yes.

Q. But, as you have told his Honour, you were responsible for Cumberland Holdings? A. That is true.

10

Q. On 16th July 1974 did you receive this "sell" order? Would you have a look at it, please? Did you receive that? A. Yes, I would have.

Q. Now, at the time that you first received it the "600" - was it there at that stage? A. Yes. The order, when originally received, would have read "600 Cumberland Holdings to be sold at \$1.25".

Q. What was the vendor's name? (Objected to; rejected)

Q. You received that order, and, as you have told his Honour just now, that was an order to sell 600 Cumberland Holdings shares at \$1.25? A. True.

20

Q. On 16th July how many of that 600, if any, were you able to place? A. 300.

Q. At what price? A. \$1.25 per share.

Q. Now, were there any buyers for the other 300 shares that you still had? A. At the time I would have operated on the order. I would have offered 600 to the market, and I was only able to sell 300.

Q. Did you thereafter do something from day to day when the Stock Exchange was open in relation to the order?

30

A. Yes. I would have remained a seller on the board with the price listed on the board and the numbers listed.

Q. For how many Cumberland units? A. 300.

Q. At what price? A. \$1.25.

Q. On 19th July did something happen? A. Yes.

Q. What happened on that day? A. On 19th July the selling price was amended to \$1.20 per share.

Q. Were there any buyers at \$1.20? A. No.

Q. For how long did you continue to endeavour to sell 300 at \$1.20? A. Until 18.9.74, when the order was cancelled.

10

Q. You were unable to sell the 300 up until 18th September, is that right? A. Yes, that is right.

Q. And on that date the order was cancelled, as you have told his Honour? A. Yes, that is right.

("Sell" order tendered; objected to; admitted and marked Exhibit 54)

Q. Would you look at the seller's record I now show you? Do you see that? A. Yes.

Q. You have seen that before? A. Yes.

Q. Are you able to say who the purchasing broker was in respect of the 300 that were purchased? A. It was Messara.

20

(Seller's record tendered; objected to; admitted and marked part of Exhibit 54)

MR. VOSS: I tender, from the documents produced on subpoena for production by J.M. Messara and Company a buying order dated 16th July 1974 and two attached buyer's records, one of which is a carbon copy of the seller's record that has just gone into evidence.

(Buying order dated 16th July 1974 and two buyer's records admitted and marked Exhibit 55)

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CROSS-EXAMINATION

MR. BAINTON: Q. How long, as an operations clerk on the floor, have you had Cumberland as one of the shares under your control? A. Cumberland would have been under my control from the day I became authorised as an operations clerk for Mullens & Co., which would have been approximately -

Q. Can you tell us when you started and when you finished? A. I started about Easter 1974.

Q. Until when? A. September 1974.

10

Q. During that time did you ever get a buying order for Cumberland shares? A. I could not recall offhand.

Q. Do you mean by that you can't recall having got one, or you can't recall whether or not you got one? A. I can't recall whether I got one or not.

(Witness retired)

\* MR. HUGHES: With your Honour's permission I would seek leave to call Mr. Donohoo on a matter which I overlooked on last Friday. At page 222 of the transcript Mr. Donohoo, in part of his answer to the third question on the page, said "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." Unfortunately I omitted to ask Mr. Donohoo some further questions in regard to that.

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GLEN LAWRENCE ALBERT DONOHOO

On former oath:

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

WITNESS: Yes, your Honour.

(\* Original Transcript Page 138)

E.G. Bunn, xx, ret'd.  
G.L.A. Donohoo, re-  
called, further x  
297.

\* MR. HUGHES: Q. Mr. Donohoo, you heard me read a moment ago from some evidence that you gave at page 222 of the transcript? A. I did.

Q. Would you please look at the consolidated accounts of FAI Insurances Limited and the accompanying annual report for the year ended 30th June 1974, being Exhibit 3. Is there anything in that document to which you would wish to refer in connection with the answer you gave and that I read from page 138 of the transcript? 10

A. In this report, to comply with the requirements of the New South Wales Companies Act, it is necessary for the directors in that report to state what contribution has been made to the consolidated group profit by all the members of that group.

\*\* Q. Would you refer his Honour to the page on which that information is set out? A. Mr. Hughes, it is Note 4 appearing on page 34.

Q. And that sets out the contribution to group profit - whether it be a plus or minus contribution - of every subsidiary company in the group, does it? A. It does. 20

\*\*\* MR. HUGHES: There is one other matter which, by leave, I would like to ask Mr. Donohoo some questions about. It refers to some evidence given under cross-examination at page 224.

Q. Do you remember being cross-examined about what you claimed to be misleading statements in Mr. Adler's circulars? Do you remember that? A. I do.

Q. Do you remember that one of the allegations in one of the circulars that you claimed to be misleading was the reference to Washington H. Soul being a prejudiced shareholder in Cumberland because of the loss of certain business? A. I do. 30

Q. And you pointed out in your evidence that before the arrangement whereby Souls supplied certain pharmaceuticals to nursing homes in the group was terminated,

(\* Original Transcript Page 138)

(\*\* Original Transcript Page 15)

(\*\*\* Original Transcript Page 139)

Souls had business only in relation to six out of the ten nursing homes in the group? A. Yes, that is right.

Q. Can you tell his Honour, based on your own personal investigations, anything as to the scale of such business as Souls had in the supply of pharmaceuticals to nursing homes in the Cumberland group? A. Yes I can.

Q. Compared with the overall scale of its activities?

A. I can.

10

Q. What is the position? A. First of all, taking the National Health Scheme, Washington H. Soul Pattinson & Co. Limited dispenses in excess of one million prescriptions per annum.

Q. Yes. A. In the year prior to the termination of the agreement to which we have referred Souls dispensed approximately 22,000 prescriptions in regard to Cumberland homes.

Q. Yes. A. Taking an average gross profit of 93 cents per prescription, the gross profit on these prescriptions works out at roughly \$20,000 per annum. Now assuming it takes one registered pharmacist to dispense the 22,000 prescriptions, his salary at that time was about \$180 per week, to which must be added the direct cost for long service leave, annual holiday pay, Public Holiday pay, workers' compensation and payroll tax.

20

Q. Yes. A. Now, that figure aggregates roughly \$70 per week, which takes up the total cost for the registered pharmacist to a figure in the order of \$250 a week. That, converted to an annual basis, comes out at \$12,500 per annum, thereby leaving a figure, shall I say of gross profit, before other expenses, of \$7,500 per annum. Now, to arrive, then, at the net profit after tax that we derived from that business I have deducted 33 and a third per cent of the balance figure of \$7,500, which is \$2,500, and arrived at a figure of \$5,000 per annum profit before tax from these prescriptions. Assuming, for the ease of calculation, a company tax rate of 40 cents in the dollar, that would give a tax charge against that profit of \$2,000, which leaves the net profit after tax of \$3,000 per annum.

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Q. Yes. A. To back up my calculations I can refer the court to the report prepared by Sir Walter Scott, eminent management consultant for the Australian Government, recently, where he highlighted the plight of the pharmacists dispensing under the National Health Scheme. I would like to relate that profit to the group profit of Souls. I have a draft of the 1975 accounts which have not yet gone to the stockholders, but the profits have been released by our board to the Sydney Stock Exchange. 10

Q. Yes. A. The profits shown for the group for the year ended 31st July 1975 are in excess of \$3,300,00 after tax. After deleting the contribution made to these profits by the Deposits and Investments group the profit for the Souls section comes out at \$2,400,000 after tax.

Q. Yes. A. Now, as I indicated to Mr. Bainton the other day, we have a very extensive investment portfolio, and our dividends coming from the portfolio total almost \$1,200,000, so we take that \$1,200,000 out of the previous \$2,400,000, and the balance figure of \$1,200,000 would be the profit after tax of the pharmaceutical division of Washington H. Soul Pattinson's activities. I would submit that the \$3,000 I have referred to is a very microscopic portion of our pharmaceutical activities. 20

Q. How did the 1974 results of the pharmaceutical activities compare with the 1975 results? A. They were not as high as the 1975 figures. The 1974 figures from memory - I have not taken them out, but I would estimate our pharmaceutical side contributed in the order of \$400,000 after tax. 30

I would just like to mention I have not taken out the figures or had the figures taken out in regard to what one might call other sales to the Cumberland group other than NHS. Our sales are in excess of 20 million per annum, and the figures I could not get out with any degree of accuracy, because they were confused with sales to the staff of Cumberland Nursing Homes, and I felt they could be inaccurate. But I certainly submit our profit after tax would not be in the order of anything more than \$3,000 after tax from that business, because in that sort of commercial business it is 40

customary for pharmacists to allow discount of 25 per cent, and that takes a very large percentage of the gross profit on these sales, so that the net profit would be very minor.

HIS HONOUR: Q. That \$3,000 is cumulative on the \$3,000 for prescriptions you were speaking of earlier? A. Yes, and that is a very conservative figure. I don't think it would be anything like \$3,000. But to be on the conservative side I would submit that figure of \$3,000. 10

CROSS-EXAMINATION

MR. BAINTON: Washington H. Soul spent about 26 thousand dollars taking out ordinary shares in Cumberland - 50,000 at 55 cents - and something over \$90,000 - I'm sorry, something over \$150,000 - taking out preference shares back in 1970/1971? I am giving you the figures out of the petition now? A. Yes.

Q. That must have seemed an awfully good investment, did it, to the Washington H. Soul portfolio? A. I don't quite follow what you mean. I don't follow you. 20

Q. I rather thought from what you were saying a moment ago you were endeavouring to explain that it certainly could not have been the prospect of profit you derived out of selling pharmaceuticals to the company. Is that what you were intending to convey? A. Could I have that again, please?

Q. I thought you were intending to convey to his Honour a moment ago that the profit to Souls from supplying pharmaceuticals to Cumberland Holdings was so slight that that could not have influenced the decision to take up the shares? A. I think that would be a correct assessment. 30

Q. So that they must have been taken up because Souls' board thought they were a very good investment? A. Well, at the time the geriatric industry was one which was expanding, and we felt the time was appropriate to take investments in that particular industry.

Q. Would you agree that each year since these shares were taken up the asset backing and the profits of



Cumberland have improved? A. Without reference to my papers I could not agree with that, because I thought there was a down-turn after allowing for extraordinary items in one of the intervening years.

Q. Excluding that possibility, if it is correct, they have been on the up and up since Souls came in?

A. Slowly, yes.

Q. Anything that was a good investment, then, you would agree, I take it, is even better now? A. Certainly not, in the circumstances that exist at this very moment in regard to listing. I could not agree to that.

10

(Witness retired)

(Buying order produced from the records of J.M. Messara & Company and two attached buyer's records tendered by Mr. Voss who stated that the buyer is in the name of Fire & All Risks Insurance and is dated 12th July 1974. Tender objected to; rejected)

MR. HUGHES: In order to avoid tendering a great mass of material we have asked our learned friends to make certain admissions which are set out on a piece of paper. They have not yet had an adequate opportunity of considering their attitude towards our request, but rather than go ahead and tender documents I seek, by arrangement, to defer these matters until my learned friends have been able to decide whether they can assist by making the admissions.

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(Register of directors' shareholdings from the records of FAI Insurances Limited tendered by Mr. Hughes and admitted as Exhibit 56)

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MR. HUGHES: I hand up notices of intention to appear by a number of shareholders and a list setting out in schedule form the names and addresses of the persons concerned and the extent and character of their shareholdings. I announce my appearance, with my learned friends, for those shareholders.

(Notification to licensee under s.29(3) (a) of the Workers' Compensation Act directed to Australian and International Insurances Limited, and

application by Registrar to the Commission dated 23rd June 1971 tendered by Mr. Hughes and admitted as Exhibit 57)

\* MR. HUGHES: The first thing I want to mention is, it is reported at page 281 of the transcript, just above Mr. Donohoo's re-examination "Agreed fact that the transactions mentioned in the answer to interrogatory A(1) took place on 12th July 1974". That stands but I omitted to say, and I think it is agreed, "To secure an admission that the transaction referred to in interrogatory A(2), that is to say the transaction involving sales by Falkirk, to FAI of Cumberland ordinary shares took place on the same day. I understand that is agreed to.

10

MR. BAINTON: That is correct.

MR. HUGHES: It can be recorded that the transaction mentioned in the answer to interrogatory A(2) took place on 12th July 1974.

I now tender a number of share transfers involving shares in FAI Insurance by various transferors, what I shall describe as people in the Adler Interests or of transfers depending on transactions effected prior to 3rd December 1974. That involved a transfer of 63,345 ordinary shares in Cumberland Holdings to what I shall describe as various persons in the Adler Interests. They are shares in FAI.

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HIS HONOUR: To them, not from them.

MR. HUGHES: Yes. Transfers pursuant to transactions effected prior to 3rd December of shares in FAI Insurance, various transferors to various Adlers or associated persons, Mr. Herman, Mr. Belfer and others.

30

(Mr. Bainton objected to the tender on the grounds of relevance. Mr. Hughes withdrew the tender. Share transfers in FAI shares m.f.i. 5)

(Directors' report of the company accounts of Fire and All Risks Insurance for the year ended 30th June 1974 tendered and without objection marked Exhibit 58)

(\* Original Transcript Page 174)

(Statement of agreed facts tendered and marked Exhibit 59)

(Annual Return of Lader Pty. Limited filed with the Corporate Affairs Commission to 20th December 1974 tendered and marked Exhibit 60)

(Annual return to 20th December 1974 of Midlands Corporation Pty. Limited tendered and marked Exhibit 61)

(Annual Return of Eagle Motors up to 20th December 1974 tendered and marked Exhibit 62)

10

(Annual Return of Eagle Corporation Pty. Limited to 20th December 1974 tendered and marked Exhibit 63)

(Annual Return of Midland Insurance Pty. Limited to 20th December 1974 tendered and marked Exhibit 64)

(Annual Return of Bellana Pty. Limited to the end of 1973 tendered and marked Exhibit 65)

MR. HUGHES: I tender a large bundle of documents in the form of consents by majority shareholders signed in connection with a meeting of 10th March 1975 and there is an accompanying list setting out the holdings of various shareholders and in relation to each one whether or not they are shareholders who have instructed me to appear for them and to show a large body of support amongst minority shareholders, larger than the notices already filed indicate.

20

(Above bundle of documents marked Exhibit 66)

MR. HUGHES: That is the plaintiff's case subject to an endeavour to reach agreement on the FAI share turnover which list would be tendered if your Honour thinks it is relevant plus the transfers which were m.f.i. 5.

30

I have been asked to make a public statement about this publication in the Australian. It is in no way relating to my friend's client. Your Honour may remember during the whole of last week there were no press reports of this litigation in the papers, however, in this morning's Australian there appears an article in a

somewhat striking headline which I will not repeat, because it reflects on someone for whom I do not appear.

It is apparently a report got together after some investigation or perusal of documents between Friday and Monday by some reporter. I say nothing about it beyond noticing it is not a contemporaneous report. The reporter, whoever he was, attributed to Mr. Donohoo words that were about as far removed from his evidence as they could be. The words attributed to him could contain a serious reflection on him. What is reported is that he said:

10

"I believe the proper course was to make a takeover offer to the minority shareholders on exactly the same terms as I received for my family company's interest."

That misquotation is in Mr. Donohoo's view unfortunate.

HIS HONOUR: I have known the Australian to make corrections.

MR. HUGHES: I do not know whether any reporters are present but I would hope some correction is made. I mention the matter because it is of some moment to my client.

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CASE FOR THE RESPONDENT

THOMAS ERIC ATKINSON

Sworn and examined:

MR. BAINTON: Q. Is your name Thomas Eric Atkinson and do you live at 12 Elvina Avenue, Newport? A. Yes.

Q. You are by occupation a solicitor? A. I am an admitted solicitor. I have not practised in England since 1945. I was an advocate and solicitor of the Supreme Court of Singapore and Malaysia where I practised until 1961.

30

Q. Since 1961 you have not in fact practised as a Solicitor? A. No.

Q. Your occupation is rather a company director and financial consultant and adviser to a number of people?  
A. Yes.

Q. Going back to cover a little of your experience in both these fields, you qualified as a solicitor with first class distinction in 1941? A. Yes.

Q. You then practised as such civilly before you joined the R.A.F.? A. For a very short period of a few months before I was due for military service.

Q. During the war years you were on the staff of the Judge Advocate General in India for a period? A. Yes.

Q. You subsequently became legal adviser to the Allied Air Commander in Chief, South East Asia? A. Yes. 10

Q. You were demobilised in Singapore? A. Yes.

Q. You joined the firm of Allen and Ledhil who were solicitors practising in Singapore? A. Yes.

Q. That was in 1946? A. Yes, the profession in both territories is that we were both solicitor and advocate.

Q. You ultimately became the senior partner in that firm? A. Yes.

Q. You worked both as a solicitor and advocate in Singapore and Malaysia? A. Yes. 20

Q. In fact you were a member of the Two Bar Associations, in both of those territories? A. Yes.

Q. Engaged actively for some 12 years? A. Yes.

Q. During this period your practice was mainly of a commercial nature? A. Yes, companies, trusts and taxation were the three main fields.

Q. During that period you became a director of a number of companies carrying on business in Singapore and Malaysia? A. Yes.

Q. You were also for a period adviser to the Malaysian Government relating to the formation and operation of the Malaysian Rubber Exchange and matters related to that exchange? A. Yes. 30

Q. As a result of your increasing commercial interests you ceased to practice as a solicitor or advocate in 1961 and returned to London? A. Yes.

Q. What occupation did you follow in England after you returned? A. I went back to England at the invitation of Lord Kissin, who was the chairman of a company called Guinness and Peat and I took up a full time executive directorship on the parent company board and various subsidiaries.

10

Q. What was the general nature of the various business activities carried on by that company and its subsidiaries and would you indicate those you were most closely connected with? A. Well, in the main it was a mixture of merchant banking business and an old established general trading business operating throughout the world in a great number of fields. It was what I would call the financial side of the business that I was concerned with principally. I was connected with what I might call the merchant banking side in effect as no. 2 for that firm directly under Lord Kissin.

20

Q. That company also had an insurance broking subsidiary? A. Yes, we floated a separately quoted subsidiary as insurance brokers with Lloyds in London.

Q. What was the name of that firm? A. The name of the firm was Fenchurch Insurance Holdings Limited. I did not sit on the board of it but in my capacity as primarily responsible for the merchant banking activities I undertook a lot of work in connection with numerous acquisitions and reconstructions from time to time.

30

It was a company constantly acquiring assets and one had to deal with takeover situations of various kinds throughout the years.

Q. Did you also both while in Singapore and London have any experience with the share broking business? A. Yes I should perhaps say when I went back to London it was agreed that I would retain responsibility for the overseas subsidiaries and the group had a large business in Malaysia and Singapore. This was when I first became associated with them. One of the companies in Kuala Lumpur was a share broking firm named Charles Bradburn

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and from 1960 until comparatively recently I took a very active part in that operation. I was also associated with the Singapore and Malaysian share stock exchange both in what I would call the legal side of the business and the actual operations. I took a very active part and in fact at one time I virtually had to become the manager for some weeks while we had staff problems. So in Malaysia and Singapore I obtained a very considerable knowledge of the workings of that industry.

10

Subsequently the parent company in England acquired an interest in a firm of Stock Brokers, in a London firm of Stock Brokers, Sandersons, and I was invited to maintain liaison between the parent board and that company on the London Stock Market. So on that basis I had quite a lot to do with some of the leading brokers and acquired a fair working knowledge of the London Stock Exchange. We had all sorts of business associates and had dealings with the New York firm of Bache and Co. and in my visits to New York I was always in contact with them and learned a little - I would not say a great deal - about the New York exchanges.

20

Subsequently when I came to Australia I agreed to act as financial adviser for a group of Sydney brokers and in that capacity from 1970 onwards I made it my business to make myself reasonably familiar with the workings of the Australian Exchange.

Q. When did you first begin to acquire interests in any stock in Australia? A. 1952, apart from little investments on the Stock Market which I carried out through the Singapore brokers. I began to acquire reasonable interests in partnership with one of my old Australian friends from 1952 and I have built them up steadily over the years.

30

Q. I think the time was reached when you thought your Australian activities should take precedence over your English activities and you came out here permanently? A. Yes, I had always intended to come back to Australia when I found myself reasonably free of other obligations and following a health breakdown in 1968 I felt that the time had come.

40

I came to Sydney for permanent residence in the middle of 1969 retaining my position as a non-executive director for some years at Lord Kissin's request my membership of the parent board and continuing my associations with the Singapore and Malaysian subsidiaries because they were nearest, geographically, to my new site of residence.

Q. You are still a member of the board of Directors of the Merchant Bankers subsidiary in Singapore and Malaysia? A. Yes, under the name of Lewis and Peat, Merchant Bankers.

10

Q. Since you have been permanently in Australia you have maintained or I should say managed a business consultants' firm - that is one of your activities? A. Yes.

Q. You of course looked after your own real estate and other interests? A. Yes.

Q. You have become a director and in some cases chairman of a number of public companies? A. Yes, I have done so over the years.

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Q. When did you first join the board of FAI Insurance? A. In January 1974.

Q. Would you tell us how you came to be a director of the company? A. It goes back to 1970 when the Fenchurch Insurance group decided to open a subsidiary in Australia and asked me to take charge of the opening-up operation and by chance we rented accommodation in Mr. Adler's then building in O'Connell Street. I was introduced to him both socially and in connection with the insurance business. I think the first time was in March 1970. Later on I gave up my directorship because permanent staff came out from England and in fact they moved away from the FAI building. By that time I had come to know Mr. Adler quite well and we maintained a mostly social and occasional business relationship after that. In the business premises from time to time he asked me to undertake on behalf of the FAI group various negotiations in connection with real estate projects and we set up at one stage a general division company in Perth for a building project and I investigated various development propositions for the group and various matters of that

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nature. But in the main it was, I should say, a two-thirds social relationship.

We would meet and have lunch every now and then and discuss the share market and the property market or matters of common interest. During that period I had been rather heavily involved in the Slater Walker subsidiaries as a consultant and as chairman of their mining group and deputy chairman of their property group.

Following the withdrawal of the Slater Walker group from Australia that arrangement came to something of an end. Towards the end of 1973 I think I mentioned this to Mr. Adler in passing, at my house I think it was and his reaction was "You will now have some spare time to yourself for a change and I think it would be very nice from my point of view if I could call on your services in a part-time capacity along the lines you have been acting for other people over the years". 10

In fact he eventually suggested I should join the board really as a part-time financial director or financial adviser with the idea of taking part in negotiations on all types of acquisitions, disposals, finance raising and the various things that financial institutions get involved in. 20

I was not prepared to take an active part in the insurance side which I did not profess to have been trained in but he was not really interested in that side which he thought was already under reasonable control.

MR. HUGHES: I did not hear that.

WITNESS: I said he felt the insurance side was already under reasonable control and he was not asking me to participate in that. 30

MR. BAINTON: Q. You accepted the invitation and became a member of the board in January 1974? A. Yes.

Q. At that stage did you either in your own name or through any family company acquire any shares in FAI Insurance? A. I took up through my family company, Tynedale Investments, in which I had virtually all my Australian property held directly or through subsidiaries,

10,000 shares, when I joined the board. They were not qualification shares.

I do not normally take on one of these consultancy directorship businesses unless I am prepared to put a little money into the operation myself to indicate interest and confidence in it. That was the basis of the investment.

Q. Since then that investment has been increased. By the middle of 1974 you had 22,003 shares and when I say you, I mean your company? A. By October 1974. There was a split issue in September which put it in the vicinity of 22,000. 10

Q. There were another 4,000 shares taken up not very long before Cyclone Tracy making a total of 26,003?  
A. Yes.

Q. What was the price at which you acquired the last 4,000 shares? A. We thought it a give-away one at the time but it turned out it was the wrong way, 40 cents. It was what was known as a distress parcel put on the market from London by a unit trust to get out of an obligation - there was some problem with it and we thought it was the buy of a lifetime. 20

Q. I think there were four members on the board of FAI. There were I suppose really in this group four executives who participated in making most of the business decisions and that comprised, Mr. Adler, Mr. Belfer, Professor Wilson and yourself? A. Yes.

Q. Do you remember an occasion when the question of the acquisition by a subsidiary of FAI, namely Fire and All Risks, of shares in Cumberland Holdings came up for discussion some time in July last year? A. Yes, I do. 30

MR. HUGHES: Do not lead from here on.

MR. BAINTON: Q. I would like you to tell us in the first place what the liquidity situation of the FAI Group was like in June and July 1974, and what investment policy was being pursued? A. Well, your Honour, partly as a result of the progress of the business and partly as a result of inflation, the premium income of the group,

which was its main source of revenue, was of course increasing all the time and by the middle of 1974 I should say that it was running at a rate somewhere between \$12,000,000 and \$15,000,000 a year; it did not always come in regularly from day to day, but by and large we could count on something like \$1,000,000 a month in terms of cash flow. Out of that of course naturally claims and other ordinary overheads had to be met, but at any given time we always had cash in quite large sums at that stage available for short-term application. Until the Stock Market began to go into slump conditions in 1973, most of this money, I should say, had been used in short-term share trading activities or short-term money market activities of some sort. (Objected to). 10

HIS HONOUR: I do not think you asked him about 1973; he volunteered that.

MR. BAINTON: Then I will ask him.

Q. Mr. Atkinson, when you were on the board did you make any inquiries as to what the group of companies to which you were then becoming a director had been doing before you joined the board? A. Oh yes, I should think for the first month or so - (objected to: pressed). 20

HIS HONOUR: I will admit it, subject to relevance, but it is left to you to establish relevance.

MR. BAINTON: Q. Do you recall how far you had got with that answer, Mr. Atkinson?

HIS HONOUR: You went back to the 1973 policy, and then the slump. 30

WITNESS: What I was trying to come to, your Honour, was that there was really always a distinction between the surplus cash that was on short-term call, so to speak, which was normally employed in short-term share dealings or money market operations of one sort or another; and what I would call our operating surplus, which was mainly our accumulating profit, which was what you might call our own money. Our own money, I would say, until towards the middle of 1974 would have been pretty evenly broken down between long-term share investment on 40

the Stock Exchange or through one or other of our subsidiaries, and real property, real estate transactions. We were building up a portfolio of real estate, principally in Adelaide and Sydney. Shortly after the last election when the Stock Exchange really began to go bad, we made a board decision - speaking from memory - about the end of May, perhaps early June 1974, that we would withdraw from the Stock Market and any surplus cash that was available we would put into money-lending activities, if we could call them that, mainly short-term bridging finance loans and some medium-term mortgage loans. 10

HIS HONOUR: Q. You have described both as surplus; to which surplus are you directing those remarks? A. Virtually everything then, your Honour, because this could be termed short-term money and it could easily be realised quite easily by taking your paper to the bank and discounting it. But then at the board meeting which we had I think on 12th July, we had a further discussion about the Stock Market and at that time there was quite a feeling going round the town that probably it had bottomed out and it could probably only go upwards; so we decided that we would go back on our previous thinking and we would allocate a sum - I think it was of \$400,000 - for additional stock market purchases, or securities purchased as stock market security notes at that time. 20

MR. BAINTON: Q. At that meeting there was a question of the acquisition of shares in Cumberland Holdings brought up for discussion? A. Yes, after -- 30

Q. If I could just interrupt you, before you tell us what happened, could you tell us what personally you knew about Cumberland Holdings? A. Well, basically, your Honour, what I had been told by my colleagues, and what I had seen in the published accounts of those books of the company. I had had no personal connection with the running of the business at all. It was, as I say, mostly what my colleagues had told me.

Q. Without going into too much detail, could you tell us the general substance of your knowledge concerning Cumberland Holdings at that time? A. Yes, well -- 40

Q. What it did, who held the shares and so forth?

A. Well, I knew its field of activity which was principally the geriatric and nursing homes and private hospitals; and that in spite of the unsatisfactory personal experience I had had of that field previously in the Slater Walker group, as we had two nursing homes that were hopelessly unsuccessful, the Cumberland Group seemed to be able to make reasonable profits and increasing profits out of them.

Q. Did you know who held shares in Cumberland Holdings, or more precisely, what percentage the FAI Group held? 10

A. Yes, I knew firstly that in FAI, or Fire and All Risks' name, which was the subsidiary concerned, there had at all times I think since about 1971 been something like a 72 per cent equity holding. I also knew that the holding company of FAI - that was Mr. Adler's family company, Lader Pty. Limited - held an additional block of shares, which I seem to remember was about four and a half per cent or so, in its name, giving an overall group base for the Lader/FAI Group of about 76½%. 20

Q. Can I interrupt you again - can you tell us what proportion of the equity capital of FAI was held at this stage by Lader Pty. Limited? A. In its own name?

Q. Well, either in its own name or through any nominee?

A. About 54%. So it had at all times been the holding company of FAI at all relevant times, the FAI Insurance Group itself; and then I knew in addition that various other members of the Adler family, or what I might call associated companies, also had shareholdings in their names. I had been told, your Honour, how most of these holdings came about, but whether I should tell you what I was told I -- 30

HIS HONOUR: I won't ask that at the moment.

MR. BAINTON: Q. You are about to be asked that, Mr. Atkinson. Would you tell us what you had been told as to how those acquisitions came about? (Objected to: pressed.)

HIS HONOUR: It seems to me that as far as his belief is concerned, it would be admissible; it does not prove the facts. 40

MR. BAINTON: That would be the only basis on which I would seek it.

Q. Would you tell us, Mr. Atkinson, how it was, going no doubt on what you had been told, that Lader Pty. Limited and these other companies and members of Mr. Adler's family had acquired their shareholdings in Cumberland Holdings? A. So far as Lader is concerned, I don't know whether the whole or only part of the holding was concerned this way, your Honour, but it had been related to me on a number of occasions by Mr. Adler that practically all these other holdings - with the exception I think of Falkirk Properties, which had a block, presumably acquired for other reasons - practically all these other family and associated holdings had repeated purchases of small lots of shares which, from 1971 onwards, Mr. Adler had taken up from the Stock Exchange in order to try and maintain a market for the shares. He told me that he had never been able to succeed in attracting any significant degree of interest from outside buyers, and accordingly, unless he was prepared to come forward himself and act as a buyer of last resort, there was just not any trading taking place. He also told me that his thinking all along had been that these shares should really be taken up by FAI itself, but that the auditors of the company had protested that the acquisition of small lots on odd days throughout the year was giving rise to ridiculous problems in terms of consolidation of group accounts at the end of the year; so to get over that he had put the shares in the names of one or other of the members of his family or various associated companies; and he had also told me on several occasions that sooner or later the sensible thing would obviously be for a cleaning up operation to take place and get the whole thing, all these odd little shareholdings, consolidated into the FAI name itself. That was the position as I understood it prior to the meeting of 12th July.

Q. Coming back again to what you knew of Cumberland, was the board of FAI supplied periodically with financial information relating to Cumberland and its assets? A. Yes, at most of our meetings some reference was made to either the previous month's return or a progress statement throughout the year.

Q. If I can interrupt you there, I think it was the

group policy to have monthly summaries made in respect of its various subsidiaries' financial positions? A. Yes.

Q. And one of them of course was Cumberland Holdings?  
A. Yes.

Q. Did you have any personal knowledge of how many shareholders, outside the FAI Group or Mr. Adler's own family companies or members - I have lost the start of the question; What I am trying to find out is if you knew how many other shareholders there were? A. Well from the books of the company and the information given by the secretary, yes, there were of course three classes of shares. So far as the ordinaries were concerned, prior to the July cleaning-up operation there must have been just around about 141 or 142; in prefs the numbers were very small; the non-redeemable, I think there were only eighteen shareholders, and the redeemables, if I remember rightly, in the order of 60 or so.

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Q. If I can come back to the meeting, which I think you said - I am not sure whether you gave a date - ? A. 12th; speaking from memory, I think the 12th.

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Q. I think you will find, Mr. Atkinson, it was actually the 11th; you told us there was a discussion at which the board had agreed in effect that \$400,000 be allocated to share lists? A. Yes.

Q. Was the question of the possible acquisition by the group of further shares in Cumberland brought up? A. Yes.

Q. Can you tell us who brought it up, and, to the best of your recollection, what discussion there was about it?  
A. It was brought up by Mr. Adler as chairman; he said, "Well, we have now taken this decision to go back into the purchase of stocks and shares again to the extent I mentioned." "You might think" - addressing us all - "that this might be a convenient opportunity to consider purchasing" - I can't remember how they were described, I will call it "Adler interests in the company"; I don't think he used those words, your Honour, but I think I knew what he meant, the blocks of shares of Adler and Lader and the children and the associated companies.

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Q. Just before you go on to recount what was said, you said he used words that you might think - who were the other people at the meeting? A. I beg your pardon - Mr. Belfer and Professor Wilson.

Q. Yourself and Mr. Adler? A. Yes.

Q. Having said that, did that call for any comment or did Mr. Adler have something else to say, and in particular would you tell us who brought up the question of price and what was said over that? A. Well, before getting on to price I remember he said, "As you can see from the accounts, the company has had a good year; it will be reporting increased profits, the latest asset revaluation obviously showing quite a healthy surplus on capital account for the year".

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Q. Which accounts are these you are talking about? A. The Cumberland accounts: "And provided there are no untoward politically adverse happenings, the future seems as bright as anything else one can see at the moment" - and when I say "at the moment" I am talking of course about July 1974. Then he said "Naturally, since I am interested in these transactions I will not be taking any part in the decision, which will be for you three gentlemen by yourselves, and I will leave you. But the various shares that I have mentioned will be available, if you want them, at the price of \$1.25 for the ordinary shares" - which I think were approximately 55,000 in all - "and 50 cents" - that is the par value - "for the blocks of preference shares", of which I think there were something like 130,000 or 140,000 altogether, for the two classes. He said, "That happens to be the" - "that" was referring to the \$1.25 for the ordinary shares - "Happens to be the buyer's quote, which is at present on the board of the Exchange, although of course as you will have realised, we put them on ourselves" - I will deal with that in a moment - "and it is also in line, as far as I can judge with the current net tangible asset value of the shares". I think we had previously discussed the near certainty that the year's dividend was going to be increased, so that we knew there was a further increase of dividend to take into account in that line and that was not mentioned again; and that that at that stage he said, "Well, I think it is better now if I leave the room and leave you to discuss amongst yourselves", and he did in

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fact get up from the boardroom table and go out into his own office next door and shut the door behind him.

Q. That left then, I take it, Professor Wilson, Mr. Belfer and yourself? A. Yes.

Q. And did you discuss the proposal that the FAI Group might consider acquiring these shares? A. Yes.

Q. Can you recollect what the discussion was among the three of you? A. Your Honour, I would not attempt to remember exact words, but I think it was Professor Wilson who said, "Well, of course we can disregard the Stock Exchange quote, because we all know that we have got to make that ourselves from time to time to keep the shares in line with what we think are reasonable values". This was an operation, I may say, that I think is usually referred to as "window dressing" -- 10

MR. HUGHES: Q. Who said that? A. No, I am making an observation on this, this was not part of the conversation - that took place at the end of financial years, and of course in the case of a subsidiary such as Cumberland Holdings, so long as asset value is not being exceeded, it has no effect on the consolidated accounts. Nevertheless, we knew how and why the quote for that figure happened to be on the board at the time. Professor Wilson having said that one should naturally disregard the Stock Exchange quote, we then got down to discussing the merits and possible demerits and any other possibilities in other companies that struck us as being either better or as good. 20

MR. BAINTON: Q. Would you just deal with those each one at a time? A. Yes. 30

Q. What were put forward as the merits, what were put forward as the demerits and what was put forward as something that should be considered as alternatives?  
A. Well, merits, one started from the fact that we knew at least what the company was about. (Objected to).

WITNESS: I knew.

HIS HONOUR: You were asked not so much about your mental processes at this stage, but about what was said

after Mr. Adler left the room - what was said, the effect.

MR. BAINTON: I would certainly be asking the other question, but it might be a little easier if Mr. Atkinson answers that first question; what his own opinions were on these three matters.

HIS HONOUR: We are in the middle of the conversation.

MR. BAINTON: Q. To the best of your recollection, the conversation first, Mr. Atkinson, and then tell us your own views on the questions. A. Mr. Belfer was I think enthusiastic - he said "Well, I know it is a well run business. It is very efficiently managed. Larry, who had been the chairman, gives it a great deal of his own personal time and attention and appears to be very successful in what he does. The general manager, Mr. Barrington, is an outstandingly capable manager and seems to have the staff and allied problems well under control. The assets are obviously there, and we know the business." I can't remember now whether he went on to say, "I can't think of anything better", but it was obvious that he was in favour of the proposition. 10 20

I think I said, "Well I am always worried about political possibilities. We are subsidised and kept afloat by the contributions by the Federal and State Governments, and if Government policy subsequently changes, this could be a problem for us - not just for Cumberland of course but for the whole of the nursing home industry." And I think Professor Wilson said, "Well, it seems to me that it would be political suicide for any government to risk the unpopularity that might result if they stopped footing the bills on a matter of this nature, so probably there is no more risk on that than on any other form of industry that is going today". I can't recall that any suggested alternative was put forward, your Honour, by any of us. I think we ended up very much reviewing it on its own merits. I had not very strong views, because as I have indicated, I had had an unfortunate experience with nursing homes previously and it was really a source of surprise to me that Cumberland was doing so well. But knowing that Mr. Belfer knew the business much better than I did, as a director, and also that the 30 40

chairman was obviously a great believer in the business, I was prepared to go along with the other members.

(Luncheon adjournment).

ON RESUMPTION:

MR. BAINTON: Q. Mr. Atkinson, was there any other discussion at the meeting of 11th July relating to the acquisition of the shares in Cumberland Holdings beyond what you told us of before lunch? A. Nothing more that I can recall, amongst the three of us. After that we informed Mr. Adler that we had reached our decision and he came back and joined the board and of course we told him that we had agreed with the proposed sales and from there we passed straight on to the next business of the day.

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Q. Did you have any view at all yourself as to whether or not the acquisition that you had just resolved upon would have any effect on the listing of Cumberland? A. I had a very clear view of the situation in my mind; I did not say anything at the time.

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Q. What was your personal opinion on the matter? A. Well, your Honour, ever since I began looking into the matter at the beginning of 1974, after I had joined the board, I came to the very clear view that it would be impossible for the Cumberland quote to be maintained for any length of time, under any circumstances that appeared likely to going to exist in the foreseeable future.

Q. What led you to form that view? A. Well, taking it first of all under the requirements of listings for new companies, which I believed would be the guideline that a listing committee would apply in considering the position of an existing listed company, it seemed to me quite clear that the company failed to comply with one single one of the requirements that would have had to be complied with by companies seeking a listing, and not only failed to comply with them, but failed to comply with them by miles; and indeed, I expressed this opinion from the very early stages of the piece to Mr. Alder and all the other members of the board. I remember going further in saying that, "I am amazed that this has lasted

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as long as it has, but in my view you must face up to the position that it cannot go on."

Q. Was the subject mentioned at all in the discussions on 11th July by anybody there? A. No.

Q. Would you have a look at this photocopy document, please, and tell me if it is a copy of the minutes of the meeting of FAI Insurance Limited on 11th July 1974? (Shown). A. Yes, it appears to be, your Honour. I notice I have not initialled, which I would normally do. I think that must have been because I was away from Sydney when the confirming minutes were read. 10

Q. Perhaps I had better look in the book and see if it is there and has been missed out on the photocopy. There seems to be some initial on the original, Mr. Atkinson - not yours, apparently? A. That must be Mr. Belfer and Professor Wilson. I accept them as the minutes.

Q. Do they correctly record the minutes of the meeting? A. To the best of my recollection and belief, your Honour, yes. 20

Q. I think the signature on the bottom is that of Mr. Adler? A. That is Mr. Adler's signature.

Q. The chairman of that meeting? A. Yes.

(Minutes of meeting of 11/7/74 tendered and marked Exhibit 67.)

WITNESS: Your Honour, there was one further piece of conversation I recollect when the three of us were meeting separately. Virtually everything that I told you before lunch of course was in relation to the ordinary shares; I remember so far as the prefs were concerned this was dealt with very shortly. We just said, "Well, it appears to be a case of buying cash for cash, and if this is part of the deal, we don't see anything in it. In the meantime there is a rebate-able income at a reasonable rate to be holding them." I can't remember now which of us said that. It was generally agreed to be the position. 30

Q. I think some of those preference shares were

redeemable preference shares? A. From memory, practically all of them, I think something over 100,000 of the total holding.

Q. May I have Exhibits 46 and 6. (shown to witness). Would you look first, Mr. Atkinson, at Exhibit 6, which is a letter from the Stock Exchange to Cumberland of 4th September, 1974? A. Yes.

Q. Can you tell us, please, when and in what circumstances you first became aware of that letter? A. I think it was at an FAI board meeting held a few days after the date of the letter - I could not now give you the date without referring to the minutes - and again I think that it was produced by the chairman, Mr. Adler, towards the end of that meeting. 10

Q. Would it help you if you had the FAI minutes to look at? A. Yes, I am sure it was referred to - No, it wasn't, I beg your pardon. I take it back. I remember now that it was not referred to.

Q. At the meeting? A. At the meeting, yes. It was referred to at the meeting, but not in the minutes. 20

Q. Do you remember what discussion then took place concerning that letter? A. Well, it was passed to me for my comments and I said, "Well, it really does seem to me that somebody in the Exchange has not yet understood the position about this company", because first of all, as I mentioned this morning, the position at all material times had been that 80% of the issued ordinary capital had been in the hands of the one connected group, and as I understood the position, your Honour, and I think Mr. Curran agreed with this, the Stock Exchange should treat that as one holder for the purpose of considering spreads of shareholders, in compliance with the requirements. So obviously it seemed to me that there must have been some lack of appreciation of the position at that point. The second point of course was that it seemed to me that they still did not realise in the Exchange the extent to which all the various requirements, not just the 75% requirements for one single holding, had been breached by the company for such a long period prior to the date of the letter. 30 40

Q. Who was present at this discussion, Mr. Atkinson?

A. It would certainly be the four directors that were present in the July meeting. I cannot now recall whether either of the other two board members - Oh, I beg your pardon, there are now four, four extra board members would be present. There would be four extra board members present - one resident in Singapore, who certainly would not be there, Alderman Watters from Perth, who I don't think was there.

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Q. Was she on the board in September 1974? A. Oh no, of course she was not - I am getting the year wrong, they came on the board in September 1975. I withdraw that your Honour, it would be a question of only whether Mr. Herman the secretary might have been present in addition, but I don't think he was.

Q. Did any of the other persons present have anything to say to your remark, or about the letter? A. Well, there was quite a bit of further discussion but of course by that time, your Honour, the time which had elapsed since July, we had been proved to be monumentally wrong in our assessment of the state of the Stock Exchange. By the beginning of September it was terribly in the doldrums; there was virtually no activity taking place over the board, and certainly none in the shares of Cumberland or companies of that nature; and I think we all took the view that there would be no way in which there would be any means of finding a home for the additional shares that were referred to through the mechanism of the Stock Market, and nobody else seemed to have any alternative suggestions; and I think on all those grounds it was just accepted immediately that there was no point in attempting to comply with the letter, or way in which it could be complied with.

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Q. Would you please look through Exhibit 46 that you have also got there; you will find that a number of the letters, part of that exhibit, are earlier in date than Exhibit 6. Would you just look through them and tell me if you were aware of the various matters set out in those letters at the time of this discussion relating to Exhibit 6? A. I think I had seen the letter of 23rd July from Mr. Adler to the Exchange.

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Q. I was not really so much wanting to know if you had

seen the actual letters, but if you knew the facts as set out in those letters which relate to numbers of shares and so forth, and percentages. I specifically have in mind for you to look mostly at the letter of 12th August, 1974? A. No, I had not seen or heard of this letter, sir, the reason being that I was in London and Europe during the whole of August, and in fact I think I only got back either one or two days prior to the September board meeting that I have just been referring to you. 10

Q. But did you know by then that Fire & All Risks held nearly 80% of the ordinary shares, about 3.1 of the cumulative preference shares, and something like 43% of the redeemable preference shares? A. Well, I had not worked out the arithmetic, but I would have assumed that it was somewhere in that sort of an area.

Q. Then the discussion having reached the point that the view was expressed that there would not have been any way of disposing of the 5% or thereabouts referred to by the Stock Exchange, was there further discussion on the same occasion as to what ought to be done? A. One of us - I think it would have been either Professor Wilson or me - said, "Well, perhaps in view of what has now happened, we should contemplate some form of an offer to the remaining shareholders to give them the chance of getting out of their holdings if they wanted to." 20

Q. Was that discussed among the people present? A. Yes, there was a discussion at the time.

Q. Could you tell us, to the best of your present recollection, what was said and by whom? A. I think it would almost certainly have been me, your Honour, who said the words to the effect, "As you know, I have been of the view for a long time that it is in the interests of FAI to increase its issued capital to a considerable extent beyond what it had when I first came to the board, and may be this would be an opportunity in which we could benefit all parties by offering a share exchange into FAI shares for the remaining Cumberland ones". I said, "On the basis of a share exchange, we don't have to upset ourselves about the very bad market conditions that are continuing, because all companies are more or less equally affected at the moment, and if FAI shares 30 40

have come down, so to speak, on market value, well, Cumberland will have done, too, so we will not be doing an injustice to either party by thinking of proceeding with some form of an exchange". Everybody seemed to agree with that, but no final decision was taken on what offer should be made. It was, however, agreed that since Cumberland had to notify shareholders of the Stock Exchange's letter of 4th September, they should be authorised to tell the shareholders that FAI had in contemplation some form of a take-out proposition which would be put forward at some later date. The group accounts of course were then in the course of being audited, and I said, "Well, obviously nothing can be done in terms of formulating or putting out any form of proposal to the minority shareholders until such time as the accounts have been finalised and the necessary further statutory requirements of the takeover sections of the Companies Act can be satisfied." So it was agreed that the auditors should be told to move ahead as rapidly as possible, and in the meantime I would take charge of what might be called some preliminary drafting of the Part A statement. 10 20

Q. Was this discussion a discussion among four people or was it at a board meeting, and if the latter, of what company? A. It was definitely FAI Insurance Limited. Could I refer to the minutes to see if reference was made? I have said before that it was not, but --

Q. Could the witness be shown the minute book of FAI and Fire and All Risks? (Shown). A. The date I can now say, your Honour, was 6th September and the matter was not minuted, so my recollection was right on that point, but my impression is that everything took place during the formal meeting, and I suppose the failure to minute it must have been an oversight on somebody's part, I also see now that there was in fact only the four of us present, and that neither of the two employee directors was in attendance. 30

Q. Were you on the board of Fire and All Risks at this stage, Mr. Atkinson? A. I would have to refresh my memory on that one, too, I am afraid, sir. We were not, let me say, very formal in our minutes of the subsidiaries, which were rather taken as read, once the parent company board had reached a decision. They were of course 100% owned subsidiaries, these ones, in the 40



insurance group. I may have gone on the board when I went on the main parent company board, but I cannot now remember.

Q. The practice had been, had it, for decisions to be made at the meetings of the parent company? A. Yes.

Q. You having been given the task of preparing the form to be drafted, what did you do? A. Prepared as much as possible, leaving the final paragraph setting out the consideration in blank.

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Q. Do you still have your initial draft? A. I handed over all the papers that I could find in this matter to our solicitor some weeks ago, and I cannot now say whether they are in their possession or whether they were destroyed at some earlier date.

Q. Do you recollect when it was that the auditors had completed the accounts of Cumberland Holdings for the year ended 30th June, 1974? A. No, I cannot say without referring to the date of the actual report. They would normally have been completed about a week or so before the reports were formally adopted by the board.

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Q. The directors' report is dated 4th September, 1974; would that assist you to say when, probably, they were written? A. It must obviously have been before our board meeting of 6th September, that is naturally so, but how far before I wouldn't know, sir, because as I say, I had been in Europe and I did not get back until early in September, I think it was.

Q. Was there a subsequent discussion, either at a formal board meeting of FAI or among its directors, as to what the terms of the offer would be, both as regards to consideration and otherwise? A. Formal meetings, no; there were several discussions amongst some two or more of the four - I don't like to call them active directors - directors who normally took part in the meetings; and I think that there was not a formal board meeting on the subject until the adoption was formally moved in compliance with the Companies Act provisions.

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Q. Would you tell us please when these informal discussions took place - who was present at them, and what was

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said on the subject of the terms of the offer? A. I certainly know for sure that Mr. Adler and I were discussing the matter; I can't now remember on how many occasions either Professor Wilson or Mr. Belfer may have joined in. Certainly all four had finally agreed on the subject some days before the formal board meeting was eventually held.

Q. I think you did have some views as to what the terms of the offer ought to be that you put to the others, did you not? A. By then, yes. Well, there were two elements involved, your Honour - first of all considering the actual 1974 consolidated accounts of the FAI Group when they were ready and I think that must have been towards the end of September or early October - 3rd October we were recorded as having approved the accounts so may be it was two or three days or three or four days before then. The other thing, by then I had been asking our accounts department to try and get out some form of estimates of how the business was actually progressing in the first three months of the then current financial year.

MR. HUGHES: Q. Which business is that? A. The general FAI Group and also of course the Cumberland Group.

Q. Do you recollect when that information became available? A. Towards the middle of October, I should say. Somewhere in the region of 10th to 15th October.

Q. Did you form a view yourself as to what the offer then under consideration should in fact be? A. Yes, I had taken a clear view at that stage. So far as "prefs" were concerned there seemed to be no doubt that a 1-for-1 exchange was fair and reasonable to all concerned. There was going to be an increased asset backing and dividend cover in the FAI shares, so in these respects the Cumberland shareholders were getting a somewhat better bargain than they had already and there was the added what I consider bull point in our proposal that we were going to make all the FAI shares redeemable preference shares, and in so far as there is stock market activity in preference shares these days it is usually the redeemable preference shares that attract the more favourable reaction from would-be buyers, so it seemed to me that was another point in favour of the

exchange offer so far as non-redeemable preference shareholders in Cumberland were concerned.

So far as ordinary shares were concerned, there was by then no reliable market on the stock exchange in existence in relation to which in my view you could judge the market value of either of the securities, and I therefore considered that, in accordance with the principles that I thought applicable, the correct course was to compare the estimated yields - earning yields - per share of the Cumberland side and of the FAI side itself.

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So far as the previous year was concerned - that was the year to 30th June 1974 - there had been a slight advantage in earnings yield on the FAI side as opposed to the Cumberland side. But from all the information that I could get from our accountants, and from my own personal involvement in the matter since I had returned from Europe, I was quite satisfied in my own mind that the FAI earnings per share were going ahead during the then current year far more rapidly than the Cumberland earnings were going ahead. Doing the arithmetic as best I could on the basis of the information then available, and the likely trends, I concluded that for the then current financial year Cumberland ordinary shares could anticipate an earning of about 14 cents per share, and that I would be very disappointed indeed if the FAI shares did not end up with an earning in the region of 20 cents per share. So from that basis, and on the assumption that one always favours the offeree to some extent, I came to the conclusion that a 1-for-1 share exchange would be very much in favour - or likely to be very much in favour - of the Cumberland shareholders in respect of the then current financial year. It is naturally difficult to try and forecast future trends beyond that sort of period, but it was my view that the FAI group was a very dynamic, rapidly expanding and go-ahead group, and that it could look forward to a much greater growth potential than a group operating solely, in my mind, in the rather limited field of geriatric nursing homes.

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I accordingly expressed the view quite early on - and I think my colleagues told me I expressed it quite definitely - that a 1-for-1 share exchange offer was being favourable - in fact, almost very favourable to the Cumberland ordinary stockholders.

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There was one aspect which I naturally did consider, and to a considerable extent discarded it at the end, and that was the question of the relative net tangible asset backing of the two shares. It was obvious that the Cumberland shares had a considerably higher net tangible asset backing. But when you are considering a share exchange offer you have to consider to what extent the two classes of companies are comparable, and, if they are not comparable, then the question of relative net tangible asset backing may not be of particular significance unless one has a possible winding up in contemplation of either of the companies - which there was not, of course, in this case. 10

Q. You had had some, at any rate, experience of how the market treated that sort of situation when you were on the board of the Guinness & Peak Group in London? A. Yes. During the 1960's insurance broking shares on the UK markets were very much in vogue, and nearly all had a common characteristic, and that was that they operated with very small net tangible assets and earned huge incomes from service operation, and had a tremendous earnings yield. 20

In the case of Fenchurch, when we floated these two shilling shares, I think over the six years I was looking at most we never had any net tangible backing of more than four pence or five pence per share, and the earnings were in the region of three shillings a year, and the market price over the period of years was in the £2 region, and I personally conducted numerous very large takeover operations on the basis of the shares having that type of value, so that it did not worry me unduly that on a net tangible asset basis the FAI shares would not compare on a 1-for-1 basis with the Cumberland shares. I had assumed that under normal stock exchange circumstances there would always be a very considerable goodwill premium which would be attracted to the type of share that FAI was, as opposed to what you might call the bricks and mortar type of share, which the Cumberland was. 30 40

Q. On 8th October 1974 FAI made a bonus issue? A. 8th October, yes.

Q. Is the calculation you gave us a moment ago of

earnings as you projected them of about 20 cents a share calculated before or after the bonus issue? A. After the bonus issue.

Q. To what extent did you discuss with any of your co-directors the views you have just expressed? A. At one stage or another over the period I think I must have put more or less the substance of what I have just said to, I should think, all of the directors. But, as I say, my recollection as to when any particular conversation took place, and with whom, I could not swear to. 10

Q. Can you recollect - dealing with them one at a time - what views Professor Wilson expressed? A. He agreed with me.

Q. Mr. Belfer? A. ~~Mr. Belfer I think possibly had not had quite the same amount of experience~~ (Objected to; by direction struck out as indicated)

Q. What did Mr. Belfer have to say on the subject?  
A. I don't recall him ever disagreeing with me.

Q. And Mr. Adler? A. Mr. Adler accepted what I had to say. 20

Q. Well then, when was the decision finally made in a formal manner to make a takeover offer offering the 1-for-1 exchange that you have just described? A. If you mean definitely, it would have been round about the third week in October some time. But actually the board meeting at which it was formalised for Companies Act purposes was on 1st November. There is always at least a week's printing problems to face up to with these things when you try to get them into printed form, and I would imagine that the printers were instructed probably some time at the beginning of the last week in October, or something like that. 30

Q. I think you have the minutes of the meeting of 1st November in front of you? A. Yes I have.

Q. Will you tell us who was present at that meeting? I think it was Mr. Adler in the chair, yourself, Mr. Belfer, Professor Wilson and Mr. Herman? A. Yes.

Q. Do the minutes you see in front of you now correctly record the business of that meeting? A. Yes, they do.

Q. And I think again they are signed by Mr. Adler, who was in the chair? A. Yes, that is so.

(Photocopy of minutes of 1st November tendered; admitted and marked Exhibit 68).

Q. I have asked you so far really only about how the price came to be fixed? A. Yes.

Q. Was there any discussion among any members of the Board of FAI relating to any of the other terms and conditions to be included in the proposed take-over offer? 10  
A. Not, I think, at the formal Board meeting. I did circularise copies of a final draft to all the other Board members some days before the 1st November, and my recollection is that one or two people rang me up or met me in the office when I was there and asked questions on various things that they did not understand. They were mostly technical matters arising out of compliance with the Act.

Q. Apart from such discussions may I take it that the draft document which was adopted at the meeting of FAI on 1st November was your document, in the sense that you had drawn it, and you had determined what would be the terms of the offer, apart from the price, which had been discussed amongst the other directors? A. I have omitted one step before I can say that. I had, of course - when it was in the final typed draft version - taken it around to our solicitors and I had a number of discussions with Mr. Sinclair about it, and eventually it was agreed that he would submit it as a draft for approval 20  
to the Commission for Corporate Affairs and to the companies manager of the Sydney Stock Exchange, and he did that, or he told me that he did it, and reported back to me before we held our formal board meeting. There may have been some alterations made as a result of those discussions. I think in fact the companies manager of the Stock Exchange wanted some amendments made to the auditors' report, - and there may have been - 30

HIS HONOUR: To the reference to the auditors' report? Not to the auditors' report? 40

WITNESS: One of the paragraphs in his report -

naturally nothing to do with the figures. But they disagreed with the wording he had used, and there was some discussion between them which resulted in the auditor eventually putting in an amended form.

MR. BAINTON: Q. We note in Exhibit 8, which is a letter of 21st October 1974 from Mr. Adler to Mr. Donohoo, that he was sent a number of takeover documents at that stage? A. Yes.

Q. Do you recollect whether there were any additions made to your draft, apart from any changes to the Part B statement, between the documents being sent to Mr. Donohoo and their approval on 1st November by the board of FAI? A. Not so far as I can recollect. It would in fact have been difficult, because they were then with the printers, of course - the preliminary proofs. 10

Q. The various steps that you told us of a moment ago had, may I take it, been carried out by 21st October or thereabouts? A. I doubt whether they would have gone to the Corporate Affairs Commission or the Stock Exchange by that date. 20

Q. You are right. (Exhibit 8 handed to witness) You might just look at that, Mr. Atkinson, particularly the timetable? A. Yes.

Q. I think that letter bears Mr. Adler's signature, doesn't it? A. Yes, it does.

Q. It was a letter that he drafted, or did you draft it for him? A. I think I drafted it. It may have been - I think this is my drafting.

Q. You did in fact draft a large number of letters that went out from either Cumberland or FAI, albeit under Mr. Adler's signature, relating to this matter? A. When the paper warfare started it became very much the thing that I would probably have done the first drafting but I think most things were altered by one or other of my colleagues somewhere down the line, and certainly by Mr. Adler himself at times, and at that stage, being the formal side of the proceedings, I think I was doing most of what I might call the paper work. 30

Q. It would appear from that letter that at that date the documents had not then been submitted to the Commission of Corporate Affairs or the Stock Exchange? A. Yes.

Q. That had been done, I take it, prior to 1st November? A. Yes, I am sure of that. We did not formally pass the resolutions until we had got a clearance.

Q. I think what you have told us already may well answer this question, but I would like you to say specifically whether in your opinion the offer that was set out in the document approved by the meeting of 1st November was an offer reasonable to the offeree? A. I believe it to be so, your Honour. 10

Q. Until the cyclone struck the coast of the Northern Territory how were the profits of the FAI Insurance Group in the second half of 1974 making out? A. Well, I never saw the formal accounts prepared up to that date but the reports that were coming from all the various branches and departments of the company did indeed indicate that profitability was being maintained at about the level that we had been anticipating. In some regards I should think it was better. We had a tremendous increase in interest rates on the money market as a result of the government's various credit squeezes and other moves, and we found that our lending activities were producing even more income than we had anticipated when we had been looking at things previously. 20

Q. What sort of interest rates were you getting on the market in the latter part of 1974? A. I can only say horrifying. The bridging finance - the highest one I saw was 40%. I saw numerous ones involving \$50,000 and \$100,000 going up to the 25% and 30% mark, with gratitude on the part of the borrowers. They were desperate for money. 30

Q. You referred a moment ago to the paper warfare. I take it that you mean the various letters and circulars going out? A. Yes.

Q. The offer is dated 20th November. We have been told it went out on that date, or perhaps the day after? A. Yes. 40



Q. Had you up to that stage ever met Mr. Donohoo? That is, up to 20th November? A. I do not recall having done so.

Q. Can you tell me when you saw the circular of 20th November - I'm sorry, 21st November - that Mr. Donohoo sent out, which is Exhibit 13? A. Your Honour, I think I must qualify my previous reply. I do believe now that I met Mr. Donohoo at an adjournment of a Cumberland board meeting that was held on 15th November when they were discussing, as I understand it, the draft Part B statement. I think I happened to go into the room for something while they were recessing, and my recollection would have been that I was introduced to him on that occasion.

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Q. Would you look at the circular of 21st, and tell me when it first came to your attention? A. I think some time on the following day. I think it had been sent to Mr. Adler, which he received the following day, and had copies circulated to the other members of the board.

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MR. BAINTON: Q. Well now, there was what was in effect a reply to that sent out on 22nd November, which is Exhibit 15. Would you mind just having a look at that? Who prepared it or who prepared the basic draft of it? A. I prepared the basic draft.

Q. Did that depart substantially from the document before you? A. It was amended in some respects.

MR. HUGHES: I would suggest that my learned friend lets the documents speak for themselves, if the drafts are in being.

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HIS HONOUR: Yes, if the drafts are available.

MR. HUGHES: It has not been said they are not.

MR. BAINTON: Yes, they are not.

HIS HONOUR: It was said if they did exist they would be with Mr. Sinclair.

MR. BAINTON: Mr. Hely has just been through that file.

MR. HUGHES: I accept that anything said by my learned friend is said upon instruction.

MR. BAINTON: Q. I think the bundle you are being handed now is a file of yours, is it not? (Not answered)

HIS HONOUR: Q. Is that right Mr. Atkinson? (Not answered)

MR. BAINTON: I should have asked you is it a file containing your documents and, I think, some of Mr. Sinclair's. A. No, there don't seem to have been any drafts of that letter left outstanding, your Honour.

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MR. HUGHES: Could the file be marked for identification and tied up in some sort of tape so that it is preserved in its present state of intactness?

HIS HONOUR: Yes. (Abovementioned file of documents m.f.i. 6)

MR. BAINTON: Mr. Atkinson, without taking a lot of time over any changes, if there were any, would you look at the circular of the 22nd November, Exhibit 8, and tell me if you saw it before it was despatched? A. I am sorry, that is the wrong one, isn't it? The 22nd?

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Q. 22nd November, 1974 (witness handed further document)  
A. I cannot now recall whether I actually saw it after it having been put on letter and having been typed in this form before it was despatched.

Q. Perhaps I should have asked if you saw it in that form or the form of the final draft. A. I would believe that to be the case.

HIS HONOUR: That you saw the form being a final draft which is similar to that? A. Yes.

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Q. Or, the same as that? A. Yes.

MR. BAINTON: Q. Was the sending of this the subject of any formal Board resolution of FAI? A. No.

Q. Was it discussed among the directors before it was sent out? A. Certainly by Professor Wilson, Mr. Adler and myself. I cannot now recollect whether Mr. Belfer was there.

Q. Did you personally approve of the sending of it?

A. Yes.

Q. Is there anything in it which in your opinion was misleading? A. I would not have thought so. I did not believe so at the time.

Q. There was a document circulated by the petitioner in this matter. It is dated 27th November. You might have a glance at that, would you? (Witness show Exhibit 17) Have you looked at that? A. Yes.

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Q. Can you recollect when that came to your notice?

A. It must have been that very day because I think our reply was dated the same day.

Q. Your reply was dated, I think, 27th. It is Exhibit 18. You might glance at that, too. (Witness show Exhibit 18) Did you play any part in the preparation of that document? A. I prepared a first draft again.

Q. Was that first draft in the file you have just looked at? A. No.

Q. Without troubling about too many drafts, was the sending out of this document the subject of a formal resolution of the board of FAI? A. No.

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Q. Was it discussed amongst any directors? A. On this occasion Mr. Belfer and certainly Professor Wilson joined in on the discussions. I cannot recollect now whether either of the other two was also present.

Q. Did those two persons and Mr. Adler and yourself approve of the sending out of the circular? A. Yes. It was quite substantially amended from my first draft. After discussion it was agreed by us that it should be sent out in the amended form.

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Q. Were there any statements in it which in your opinion were misleading? A. No.

Q. The takeover offer was withdrawn on 6th December? A. Yes.

Q. When was the decision to withdraw the offer made, do

you recollect? A. I think it was taken at a formal board meeting on that day, a board meeting of FAI Insurance.

Q. Prior to that day had there been discussions either at a formal board meeting or informally among the directors, relating to the attitude of the Stock Exchange.

A. I don't think at a formal board meeting.

Q. Had you seen correspondence passing between FAI and the Stock Exchange? A. Yes I had.

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Q. (Exhibit 50 shown to witness) Would you look at the letters in the Exhibit and tell me if they came to your notice around about the time they were received? A. Yes, they did.

Q. I think you played a part, did you not, in preparing the answers or the replies to the various letters from the Stock Exchange? A. Yes, in consultation with Mr. Sinclair.

Q. Was there a meeting of the board of FAI Insurance on 29th November, 1974 at which the correspondence with the Stock Exchange to that date was discussed? A. I recollect there was a meeting but I would have thought that it was discussed at that meeting.

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Q. I think you still have them there. A. Yes.

Q. Would you look at the minutes of the meeting of 29th November? A. I will accept from the first paragraph, your Honour, that my recollection must have been incorrect.

HIS HONOUR: In what respect? A. There was indeed reference to the intervention of the Sydney Stock Exchange in the proceedings.

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Q. I think that was a meeting chaired by Mr. Adler at which yourself, Professor Wilson and Mr. Belfer were present? A. Yes.

Q. Do the minutes that you have in front of you have the signature of Mr. Adler as chairman? A. They do.

Q. Do they correctly record the business of that meeting? A. I have initialled them so I must have been satisfied at the time that they did.

(Copy minutes dated 29th November tendered without objection and marked Exhibit 69)

Q. I think after that there was some further correspondence which is a bundle you had in front of you (witness shown Exhibit 50) A. Yes.

Q. I think that caused FAI to seek some advice from Phillip Street? A. That is so.

Q. Those letters and that advice were then discussed at a meeting of the FAI Insurances on 6th December, 1974. Again, I think you have the minutes there? A. Yes.

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Q. That was a meeting that Mr. Adler chaired and again the persons present were yourself, Professor Wilson, Mr. Belfer and Mr. Herman? A. Yes.

Q. I think those minutes are signed by Mr. Adler as chairman? A. Yes and I have again initialled them.

Q. Have they correctly recorded the business of that meeting? A. To the best of my recollection and belief, yes.

(Copy minutes dated 6th December 1974 tendered without objection and marked Exhibit 70)

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Q. I think, on the same day, a letter was written to Mr. Tilley who I think was then the chairman of the Stock Exchange. A. No, he was not the chairman, sir, he was the chairman of the Listing Committee.

Q. I think this is a photocopy of that letter and the enclosure and, I think, from the Exchange their carbon copy of their reply -

HIS HONOUR: What is the date of the letter?

MR. BAINTON: 6th December, 1974.

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WITNESS: The schedules referred to, and those annexures, don't appear to be against the copy you have handed in.

MR. BAINTON: Q. Well, apart from that, I think that is a copy of the letter that was sent? A. Yes.

Q. What is there with it is a copy of the letter sent to the Exchange that was proposed to be sent out to the shareholders? A. Yes.

MR. BAINTON: I tender that on the basis if we can get the schedules from the Stock Exchange, I will add them to it. (Tender objected to - admitted and marked Exhibit 71)

Q. It is just possible that these are the enclosed schedules. Would you have a look and tell me if they are, or at least, copies of them? A. I am sure these were the documents from which they were prepared but whether they actually went in this form or whether they would be retyped in some other form, I cannot now recollect. 10

Q. Apart from whether they were typewritten or hand written or in some other form, is that the information which was enclosed? A. Yes. It must have been.

(Schedule added as part of Exhibit 71)

Q. In the correspondence and circulars and so forth that were sent out by either Mr. Donohoo or the present petitioner, the suggestion was repeatedly put forth that it should be made by FAI, a cash offer of \$1.25 for the ordinary shares, 50 cents a share for the preference shares in Cumberland Holdings Limited? A. Yes. 20

Q. Was the desirability or practicability of the making of an offer of that nature considered by the board of FAI, either at a formal meeting or in discussions between the directors? A. I think this came up the first time right back at the first board meeting in September when the stock exchange letter to the Cumberland Holdings was being considered. 30

HIS HONOUR: Q. That was before Mr. Donohoo had written anything? A. Oh, yes, before I had even started on my preliminary drafting of the statement, but the suggestion was very quickly discarded, the point being that by then the Stock Exchange situation was looking quite dreadful and we had again withdrawn from the market and had made a very firm resolution this time. When I say resolution, I don't mean a form resolution. We had 40

resolved in our own minds that we would keep out of it in terms of any further investment until such time as there appeared to be any reasonable prospects of improvement.

Q. You are speaking of the general stock exchange market? A. Yes and in the meantime, as I said, this afternoon, the potentials of the short term lending business we had got engaged in had proved to be so much beyond our expectations that we decided all our available cash would be concentrated in that field until further notice, which basically was what was done between then and the happening of the Darwin cyclone which, of course, wrecked all the plans. 10

HIS HONOUR: I do not think you have given us a starting date when the board changed its mind on this. I do not know whether you can. A. Let me put it this way, by the time I came back from London, in the beginning of September, it had already changed its mind.

MR. BAINTON: Q. Was any further thought given to the question after Mr. Donohoo's circulars began to go out? A. Yes, the matter was discussed, I think, after the first circular was received - I think that was on 22nd November. 20

Q. Who participated in that discussion? A. Certainly Professor Wilson, Mr. Adler and myself. I still cannot recollect about Mr. Belfer on that occasion.

Q. Would you tell us to the best of your recollection the view those three people expressed on that question - (objected to). 30

Q. What was said on the occasion of that discussion by each of these people? A. I certainly expressed the view that there was no - that I saw nothing in Mr. Donohoo's letter to lead me to change my mind that a share exchange offer was a fair and reasonable proposition in the circumstances or to make me believe we should change either to a cash one altogether or a cash alternative.

Q. Did Professor Wilson have anything to say? A. I do not recollect either of the other two dissenting in 40

any way. I cannot now recollect the details of our full conversation.

Q. If anybody had moved it formally at a board meeting of FAI that it make a takeover bid of \$1.25 cash for the ordinary shares in Cumberland Holdings and 50 cents cash for the two classes of preference shares, would you have voted for that resolution or against it? A. Against it.

Q. Why? A. Firstly because I was still convinced that this was not the right time - or that this was not the right time to be outlaying large sums of money into any further share purchases of any description whether Cumberland Holdings or any other company. Secondly because the market situation - the Stock Market situation had changed so very much for the worse and the time which would elapse between July and November, that one could no longer take the same sort of figures as would have been reasonable at that time for the basis of some sort of an alternative cash bid in November.

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Q. Did you take a view whether or not it would be for the benefit of FAI to have made such an offer as Mr. Donohoo said should have been made? A. No, I could not have believed so for the minute.

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Q. On 12th December Allen, Allen & Hemsley wrote to Mr. Adler and Mr. Belfer, Exhibit 22, threatening to present a petition for the winding up of Cumberland Holdings and then certain things happened. Can you tell us when the receipt by Mr. Adler and Mr. Belfer of that letter came to your notice? A. I cannot recollect for certain but ~~I have the feeling it did not reach Mr. Adler's office for a number of days after 13th December~~ - (Objected to; struck out).

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Q. Can you tell us when it came to your knowledge that such a threat had been made by Soul Pattinson's? A. Either one or two days prior to our solicitor's reply to the firm which I see was dated 20th December.

Q. Would you look at the letter dated 17th December, 1974, which I show you? A. Yes.

Q. Did you have any part to play in the drafting of that document or forming the views expressed in it? A. I drafted the original.

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Q. Does the date it bears give you any help in telling us when you heard about the threat of the petition?

A. 17th December.

Q. Did the knowledge of the making of the threat cause there to be any discussion among any of the people who were directors of FAI - (Objected to; question to be re-framed).

Q. After you became aware of the threat to petition and before you drafted the document you are looking at, was there any discussion which included the subject matter of the threat of the winding-up petition? A. Yes.

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Q. That is to say a discussion among people who were directors of FAI? A. Yes, my recollection is Mr. Adler showed me his copy of the letter and he immediately on having read it I said it is obviously a matter for our solicitors and no doubt senior counsel. I said "Give me a copy and I will process the matter from there and we will get advice".

Q. Apart from that, was there some discussion that led to the drafting of the document of 17th December? A. Yes, I said at the same conversation with Mr. Adler that it appears to be unthinkable that Mr. Donohoo could continue to remain on the board of Cumberland Holdings in the face of the letter from his principal, Washington Souls, threatening a winding up of the company and I agreed I would go away and draft what I considered a suitable letter to be sent to Mr. Donohoo expressing those views.

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Q. Was that discussion with anybody other than Mr. Adler? A. After we drafted it and Mr. Adler having subsequently approved of it it was agreed that this would be submitted through Sinclairs to senior counsel for his view before any action was taken.

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Q. That letter was not in fact sent or anything like it? A. No.

(Above document m.f.i. 7)

Q. When was the question of Mr. Donohoo remaining on the board of Cumberland Holdings next discussed among

any of the people who were also directors of FAI? A. After Mr. Belfer - in January 1975 - reported back to Mr. Adler, Professor Wilson and me of a conversation which he had with Mr. Millner, the chairman of Soul Pattinsons.

Q. Confine yourself for the moment as to what discussion followed that rather than Mr. Belfer reporting back. What was discussed relating to Mr. Donohoo's tenure of office as a director of Cumberland Holdings? A. I think we all decided unanimously that in view of the imminence of the threatened legal proceedings for the winding up of the company, it was essential that we get the board situation of Cumberland Holdings firmly under what I might term, under FAI control, so to avoid any possibility of disruption occurring.

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I had pointed out to my other colleagues the terms of the articles of association of Cumberland Holdings provided for a quorum of three directors and I pointed out there were only three directors, including Mr. Donohoo on the board at the time and I expressed the view that it would be a very easy matter for the board proceedings to be disrupted if Mr. Donohoo decided that he was not going to co-operate by attending.

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It was accordingly agreed that Mr. Adler and Mr. Belfer should endeavour to have a meeting called upon and to appoint Professor Wilson and me as additional representatives on the board and at the same time express the view to Mr. Donohoo, informally to start with, that in view of the threatened proceedings he ought now to tender his resignation.

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Q. I think in fact both yourself and Professor Wilson were appointed to that board at the meeting of 22nd January, 1975, the minutes being Exhibit 29. Would you tell us what occurred at that meeting relating to the question of Mr. Donohoo's resignation. I mean to include in that question, at any adjournment of the meeting and during the progress of it? A. During the period of the adjournment, it was referred to in the last paragraph of the minutes - the chairman said "It is perfectly obvious that these arguments which are now becoming almost continuous about such matters as the drafting of the minutes, the form of them, indicate there has been a breakdown in the board's harmony and in the circumstances it

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is impossible to contemplate continuing" and he produced a draft or a signed letter to Mr. Donohoo indicating that he desired that he should leave the board.

Q. If I can interrupt you. Look at Exhibit 28 and tell me if that is the signed letter that was produced or at least a copy? A. To the best of my recollection and belief this is the letter.

Q. Would you tell us the rest of the discussion? A. Mr. Donohoo said words to the effect that he thought this was a terrible mistake that was being made and it was an appalling thing to be doing to someone who was trying, as he said, to protect the minority shareholders and then there was a further discussion as to the possibility maybe of opening up some form of dialogue between FAI and Soul Pattinsons with a view to trying to reach a settlement out of court and eventually it was agreed to what I think was called a moratorium. 10

Nobody would do anything on the letter until, I think, 29th January. We would formally resume the meeting formerly terminated and leave a week to intervene to see what had transpired. 20

Q. Was the letter now Exhibit 28 simply shown to Mr. Donohoo or actually given to him - after it was shown to him? A. To the best of my recollection he actually took the original copy away with him at the end of the meeting.

Q. Now you had just become I think on that day a director of Cumberland Holdings? A. Yes.

Q. Did you have any knowledge of what had been happening at the board meetings of Cumberland Holdings prior to that day? A. I had not been personally present at any of them therefore I only knew what I had either heard said to me or read in correspondence between Mr. Adler and Mr. Donohoo. 30

Q. I think there was one other matter brought up at that meeting which gave rise to some discussion between yourself and Mr. Donohoo, namely what reply should be made to the Stock Exchange to the letter I now show you. I do not think you will get any help from those minutes. 40

A. I recall this letter. The conversation I am still trying to recall, whether it took place at that meeting or the following week's meeting which we reconvened.

(Letter dated 10th January, 1975, referred to tendered and marked Exhibit 72)

Q. You may have noticed there is a date receipt stamp on that letter, 13th January, at least I think that was what it was? A. Yes.

Q. Was that the practice in FAI's office for the date receipt stamp to be put on incoming correspondence? 10

A. Yes, it seems to be so.

Q. I do not think you really answered the question. Was it the practice in the office of FAI to date stamp the receipt of letters? A. I must be terribly unobservant. I really cannot recall one way or the other at the moment. This one certainly is and that leads me to think it must be the practice.

HIS HONOUR: Q. You are not able to express an opinion or to state what the practice was? A. No. 20

MR. BAINTON: Q. Do you recall a discussion at the board meeting of FAI on 10th January, 1975, relating to the dispute with Soul Pattinsons over Cumberland Holdings? A. Yes.

Q. Would you have a look at this and tell me if this is a copy of the minutes of that meeting and whether it accurately records with the business of the meeting?

A. Yes, to the best of my recollection and belief these are the correct minutes of the meeting. I think in fact I initialled them. 30

(Minutes of meeting dated 10th January, 1975, at FAI, tendered and marked Exhibit 73)

Q. Can you tell us for the record when Cyclone Tracey hit Darwin? A. The evening of the 24th - morning of 25th December.

Q. Did the FAI Group have much insurance in Darwin?

A. Yes, we had a very large portfolio.

Q. What information was it possible to obtain by the time of that meeting of 10th January relating to the possible losses from the Darwin insurance? A. Very little indeed. No information really was getting through at all. Telecommunications I think had been restored by then, but so many people had left and were scattered throughout Australia that we could not begin to collate claims at that stage.

Q. Do you know even now the final extent of the Darwin tragedy? A. Yes, we are reasonably confident subject to legal disputes. 10

Q. When was it you first had any reasonable idea of what the extent of the claims might be likely to be? A. It would be early in March that we felt sufficient - I would not say confident but sufficient to be able to make the normal half-yearly profit statement but in this case it was a loss statement to the Stock Exchange. I think we disclosed a loss of \$3 million approximately for the half-year. 20

Q. Was the effect of Cyclone Tracey and the Stock Exchange letter I showed you a moment ago dated 10th January a matter that was brought up and discussed between yourself and Mr. Donohoo at one of the board meetings. \* He said at page 60 it was at the meeting of 22nd January. Does that assist you in any way? A. If his record shows that, I will accept it.

Q. Without at the moment troubling about the date, can you recall what the conversation was? A. I think it was Mr. Donohoo who himself brought up the possibility that some form of revised offer or invitation might eventually be made by FAI for the minority shareholdings in Cumberland Holdings which could perhaps avert the threatened proceedings in this Court. The chairman said words to the effect "You have made it very plain so far in all your correspondence that you would be only interested in a cash offer. Now let me tell you at this stage how we find ourselves as a result of the Darwin disaster" - and he proceeded to say really what we have just said. We were in a state of almost complete ignorance about the extent of the losses which would have been suffered by the group but we realised in view of the size of the portfolio we had, in the light of the disaster that it (\* Original Transcript Page 34) 30 40

was going to be a calamitous figure and it could conceivably be a figure that would wreck the company altogether.

I am giving the gist of it. I am not attempting to state the words. The chairman said "You appreciate from this there is no way whatever in which a cash offer in any form could be even suggested". Then a discussion took place as to how long it was likely to take before information was forthcoming about the real state of the company's involvement. Mr. Donohoo I think suggested perhaps in a few weeks it would be cleared up. At that stage we were very pessimistic indeed and the chairman I think said it could well be many months after that. Mr. Belfer said that in perhaps six months' time we could make a statement and we could look into the matter again. The chairman said "No, even six months might not be enough. We certainly could not give anything in the nature of firm undertakings at this stage." I said that in the meantime we have a problem and there was also the discussion about the need to preserve liquidity as another reason why we could not part with any cash in the foreseeable future. I then said "In the meantime we are faced with another problem in that the Stock Exchange are asking for a definite answer to the previous suggestion that a possible invitation would be made to Cumberland Stockholders. Obviously we have got to give a reply". I continued with words to the effect that it would be out of the question to think of issuing any reply that we might be looking at it in six months' time or any other time in the future because we could not at this stage give any explanation for the delay which would not involve disclosing our very worrying and frightening situation.

I said "Since we cannot even think of doing that and there is no other way of making a truthful statement we might just simply have to reply at this stage telling the Stock Exchange what has happened, meaning in terms of Allen, Allen & Hemsley's letter threatening proceedings unless we made a cash bid and our refusal to comply with it.

Q. Was a letter written to the Stock Exchange in relation to that? A. Yes.

T.E. Atkinson, x

Q. After that meeting? A. Yes.

Q. It is already an exhibit - I will endeavour to find it overnight. A. Yes.

(Witness stood down)

(Further hearing adjourned to 10 a.m. Wednesday, 22nd October, 1975.)

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348. T.E. Atkinson, x  
stood down.

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
EQUITY DIVISION

No.707 of 1975.

CORAM: BOWEN, C.J.  
in Equity

CUMBERLAND HOLDINGS LIMITED & COMPANIES ACT

SIXTH DAY: WEDNESDAY, 22ND OCTOBER, 1975

MR. HUGHES: Before Mr. Atkinson resumes his evidence may I have leave to call him to produce some documents to the Court on subpoena?

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HIS HONOUR: Yes.

THOMAS ERIC ATKINSON

On subpoena duces tecum

MR. HUGHES: Q. Your name is Thomas Eric Atkinson and you have given your address in the course of your evidence? A. Yes.

Q. Do you produce any documents to the Court in accordance with the subpoena issued yesterday?

A. I produce all the files I could find in my office.

HIS HONOUR: Q. These are the documents that answer the subpoena? A. They are all I have that I can produce. (Documents produced)

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MR. HUGHES: Q. You said they are all the documents you can produce. Are there any documents called for by the subpoena that have been in existence and are no longer in existence? A. Possibly there might be one or two diary entries but they would merely have been recording dates of meetings of one sort or another and I no longer have the diaries.

(Witness stood down)

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MR. HUGHES: There are subpoenas on Mr. Adler, Falkirk Properties, Lader, Eagle Corporation, Midland Corporation, Ethel Adler, Mr. William Martin Scane, Professor Wilson and the manager of FAI Insurance Limited. If I can indicate that I will call them later in the morning, it may save time at this stage.

THOMAS ERIC ATKINSON

On former oath:

HIS HONOUR: Q. You understand you are still on your former oath? A. Yes.

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MR. BAINTON: Q. I had been asking you about the discussion with Mr. Donohoo as to the reply that was to be made to the Stock Exchange and I think at the adjournment we were trying to find the reply that was made?  
A. Yes.

Q. It was the reply to the letter of 10th January that I was concerned with - I show you now Exhibit 31?  
A. Yes.

Q. I think that is a letter that was in fact sent out to the shareholders of Cumberland Holdings? A. Yes. 10

Q. Do you know whether a copy of that letter was sent to the Stock Exchange before it was sent out or at the time it was sent out? A. I cannot say of my own knowledge. That would be dealt with by the secretarial department, I assume.

Q. Can you say whether or not after your discussion with Mr. Donohoo a letter was written to the Stock Exchange? A. I believe it to have been. I cannot recall whether I ever saw a copy. 20

Q. I think there was one but I cannot locate it at the moment. We will continue our search. I have asked you so far about two of the things that took place at this meeting of Cumberland Holdings, the discussion you have mentioned about the reply to the Stock Exchange?  
A. Yes.

Q. And the letter that was given to Mr. Donohoo suggesting that he might resign. Were there other matters of business conducted at that particular meeting? A. I cannot now recall. Can I refer to the minute book? 30

HIS HONOUR: Yes.

(At this stage minute book handed to witness)

WITNESS: No your Honour, there were no further matters discussed.

MR. BAINTON: Q. What about the matter last referred to in that minute of the meeting of 22nd January? A. I think after the adjournment the meeting simply formally reconvened and was declared at an end.

Q. Was there some discussion relating to the minutes of the meeting of 15th November? A. I think that had taken place before the adjournment. 40

Q. I am not really concerned as to what stage it took place. A. That took place immediately after the appointment of Professor Wilson had been dealt with.

Q. I would like to deal with this - you had not been present at the meeting of 15th November? A. That is so.

Q. You were present during these discussions. Would you tell us to the best of your recollection what it was that Mr. Donohoo had to say about the prior minutes? 10

A. The minutes as previously drafted of that previous meeting had been very much in a narrative form and Mr. Donohoo had objected that part of the narrative which he considered relevant had been omitted and he had made quite a large number of suggestions where the incorporation of further statements of conversations - what you might call speeches, had taken place - Mr. Adler and I in the meantime had taken advice of counsel of how minutes ought to be dealt with in connection with directors' meetings and the advice we had received indicated that not only were Mr. Donohoo's further suggestions not in accordance with proper practice but that the original draft had been far too prolix and in narrative form. 20

Q. Who prepared what you have described as the original draft? A. I think a copy is in one of the files produced under subpoena this morning.

Q. I show you this document? A. No, it must be one of the white ones - this was the original draft (indicating). 30

Q. Who prepared it, do you recall? A. It had originally been drafted by, I think Mr. David Walker and had been seen also by Mr. Sinclair.

(Draft minutes of directors meeting of Cumberland Holdings dated 15th November, 1974, tendered and without objection marked Exhibit 74.)

Q. What was said at that meeting by Mr. Donohoo when he sought to have these various alterations made?

A. The chairman informed him that the original draft was being withdrawn and produced a new draft which was drafted in accordance with the advice received by counsel. Mr. Donohoo at first protested at being taken by surprise at this and said he would require time to study it. 40

Q. Is the draft available in your files? A. I think it is actually in the form which now appears as the form

of the minutes of the meeting of 15th November. No, I take that back. It cannot be so because subsequently at my suggestion it was in fact further amended. There does not appear to be a copy there of the draft actually produced at that meeting.

Q. How did the discussion proceed then? A. My recollection is Mr. Donohoo said that he would register a protest which he requested be noted. The advice I had been given was such a matter should simply be minuted in the form that Mr. Donohoo made a protest and if he so desired that the contents of it could be annexed in some form of appendix. He insisted that he was determined to put it down word for word for recording in the minutes. I had been asked to prepare the minutes of the meeting which were then taking place and I intimated I proposed to follow counsel's advice and would simply record him as protesting.

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Q. What happened then? A. It was agreed that he could then have the next week in which to consider the whole matter and formulate in extenso all the various amendments that he still said he wanted to make to the draft, and which would be along the lines of his previous request for a narrative form to be introduced.

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Q. How much time was taken up at this meeting discussing the minutes of 10th November (sic)? A. The meeting is recorded as having began at 9 a.m. and the appointment of the two directors would, I should say, have been concluded within ten minutes and the adjournment time is recorded - no, it is not recorded. I should say it was the best part of an hour that was taken in these discussions.

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Q. If I can pursue this question and ask you to go to the minutes of the meeting of 28th January, also part of Exhibit 29? A. Yes.

Q. You have the actual minute book? A. Yes.

Q. Using the minute to refresh your recollection to the extent you may need, would you tell us what occurred at the meeting of 28th January, 1974 relating to the minutes of the meeting of 15th November, 1974?

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A. The discussion took the form which Mr. Donohoo foreshadowed. He produced a very lengthy document setting out the various amendments he wanted to the revised draft. Professor Wilson and I said that since we had not attended the meeting of 15th January we would not take any part in any discussion on the matter.

Mr. Donohoo wanted to move one comprehensive motion that dealt with eight proposed separate amendments. I think I said I should take the view that it might be that one or other of the amendments would be acceptable but that others would not be acceptable to the majority of the board and therefore it would be appropriate to deal with them as eight separate motions. That was eventually agreed that was to be done and the minutes record that the matter was dealt with in that way.

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Q. The minutes record that all the motions were put and the fate of those motions? A. Yes.

Q. That meeting was recorded as having commenced at 10 o'clock and having concluded at 11.20? A. Yes.

Q. It also records on the final page that there was other business considered? A. Yes.

Q. Can you tell us how much of the one hour and twenty minutes was devoted to the question of what should be in the minutes? A. At least one hour.

20

Q. Had you personally, upon the conclusion of this letter of 18th January, formed any view as to how the board of Cumberland Holdings, of which Mr. Donohoo was a member, was likely to be able to function in the future? A. I felt very certain in my mind it could not go on. If there was one thing that spells disaster in the running of a business it is a split board which had acquired what I term personal dislikes amongst its members and never would I personally want to see such a situation continue for any length of time.

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Q. There has been a suggestion in the course of this case that for some reason it was the duty of FAI or FAR to make a cash takeover offer in respect of shares in Cumberland Holdings which FAR did not then own?

A. Yes.

Q. What are your views as a director of FAI or FAR as to whether there is any such obligation? A. I never believed there was any such obligation and I do not to this day.

Q. Did you ever, before this case commenced, hear anybody suggest there was such an obligation - that is before the petition in this matter was issued? A. It was repeatedly being said in the various circulars.

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Q. Apart from what was said in the circulars, have you ever heard anybody else suggest there was such a

duty or obligation, in the commercial community, either here in London or Singapore or Malaysia - (Objected to).

Q. Let me confine it to here in Australia.

A. Only if the Stock Exchange listing requirements had been breached in some way. That was the only suggestion that I gathered that members of the Stock Exchange committee might have in mind.

HIS HONOUR: Q. As an obligation to rectify a breach of the Stock Exchange listing regulations? A. Yes, if there had been a breach. 10

Q. There might be consequential knowledge? A. Yes.

Q. Is that what you mean? A. Yes, assuming there had been no breach of the Stock Exchange listing regulations, I never heard any suggestion made that there was an obligation to make a cash offer.

MR. BAINTON: Q. The minute book that you have is of Cumberland Holdings? A. Yes.

Q. I hand to you the FAI minute book? A. Yes. 20

Q. Would you look at the minutes of the meeting of the directors of 28th January, 1975? A. Yes, I have them.

Q. That meeting took place on the afternoon of the day on which the Cumberland Holdings meeting took place in which Mr. Donohoo moved the amendments you have described to the previous minutes? A. Yes.

Q. Was the meeting of FAI Insurance Limited convened for that afternoon as a result of the occurrences in that morning or was it a pre-convened meeting? A. No, it was convened as a result of the occurrences at the Cumberland meeting. 30

Q. Does it accurately record the business that was conducted at that meeting? A. To the best of my knowledge and belief, yes.

Q. Again it has been signed by Mr. Adler who was the chairman of the company? A. Yes, I have initialled it.

(Copy of minutes of directors meeting of FAI dated 28th January, 1975 tendered and marked Exhibit 75,)

Q. The resolution relating to Cumberland Holdings having been passed, a meeting of directors of Fire and 40

All Risks was then convened to implement that resolution, was it not? A. Would it be possible for me to refer to that minute book?

Q. Yes? A. There was a meeting of the board of directors held according to the minute book on 28th January at 4 p.m. at which the four, what I call ordinary, directors were present.

Q. Does that minute record the business of that meeting? A. Yes.

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Q. Again is it signed by Mr. Adler as chairman?  
A. Yes, and I have initialled it.

MR. BAINTON: I tender that document. I cannot locate a copy at the moment but perhaps if your Honour looks at it I will have it photocopied.

(Minutes of meeting of 28th January tendered and without objection marked Exhibit 76.)

Q. I think the accounts for Cumberland Holdings Limited for the twelve months ended 30th June, 1975 have now been approved by the board though not yet made public? A. A preliminary announcement has been made but the accounts are still with the printers. They have not been sent out to the shareholders yet.

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Q. Yesterday you obtained from the printers half a dozen copies of which this is one? A. Yes.

(Copy of annual accounts of Cumberland Holdings tendered and marked Exhibit 77.)

HIS HONOUR: There has been an asset revaluation and non-appropriated profits which build up the shareholders funds.

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MR. BAINTON: And also the acquisition of other properties.

Q. Would you explain how the various differences have come about from the consolidated accounts - apart from the asset revaluation described in note 1, there has been an increase in the amount of unappropriated profits. I think that simply represents profits for the period of trading less the amount declared by way of dividend? A. That must be so.

Q. Looking to liabilities for one moment, there has been a decrease in mortgage loans which is explained in note 5? A. Yes.

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Q. And an increase in the amount owing to the parent company? A. Yes.

Q. Would you tell us what the amount of the increase was used for? A. For the most part my recollection is it must have been in respect of the very extensive re-fitting and alterations to the recently acquired private hospital in Bellevue Hill, Buena Vista, I think it is called.

Q. That is referred to in the last part of note 1, is it not? A. Yes, Victoria Road. 10

Q. Is there anything else there that is not self-explanatory? (No answer).

HIS HONOUR: On the other side there is an advance under investments in subsidiary companies which has increased to some degree.

MR. BAINTON: Q. It represents the shares acquired in July 1974, does it not? A. I am not quite sure when they were acquired. It was in the previous year.

HIS HONOUR: Q. Shares acquired by Cumberland Holdings? A. Yes, they purchased a majority interest in a private company. 20

MR. BAINTON: I think my comment was quite wrong. I was looking at the wrong part.

Q. Would you finish off the explanation which I had interrupted? A. They purchased, I think in the year ended 30th June, 1974 a majority interest in a private company which owned and operated a nursing home. The name must be referred to somewhere in the notes. The hospital involved is the Bellevue Private Hospital which is referred to in the last page, but the name of the company escapes my memory at the moment and it does not seem to be referred to. 30

HIS HONOUR: Q. It talks about the consolidated accounts of the holding company and subsidiary company in the circular, but nowhere does the name of the subsidiary company appear to be stated? A. No, this appears to be a mistake.

MR. VOSS: I think it appears in the directors report on paragraph 1. 40

WITNESS: The Bellevue Private Hospital. There it is.

CROSS-EXAMINATION:

MR. HUGHES: Q. Do you claim to have a good memory for past events? A. Reasonable, sir.

Q. Do you remember being asked yesterday on page \* 334 when you first met Mr. Donohoo? A. Yes.

Q. You said you did not recall having met him before 20th November. That is what you said? A. Yes.

Q. You qualified that by saying you believed you had met Mr. Donohoo at the adjournment of Cumberland Holdings board meeting on 15th November. Do you remember saying that? A. Yes. 10

Q. Do you say that is the first time you ever met Mr. Donohoo? A. It is still the first time I ever recall having met him but do you wish me to say I may be wrong?

Q. You met him as long ago as 8th February, 1974, did you not? A. If that is so, it still escapes my memory.

Q. At a luncheon at FAI? A. We have regular luncheons at which a large number of people appear over the year. If you tell me that was so, I will accept it. 20

Q. Would you have a look at this invitation guest list? A. Yes.

Q. Do you agree you met him on 8th February, 1974 at a luncheon at the FAI office? A. I must have done so.

Q. Will you agree that FAI, having regard to the substantial holding of its subsidiary company, FARI, in Cumberland Holdings, and to the July transactions that increased that substantial holding by reason of transfers from Mr. Adler's companies and the members of his family to FARI of additional ordinary shares, was in fact the majority shareholder in Cumberland Holdings to the tune of 80 per cent, after the July transactions? A. Yes, I think they were the right figures. 30

Q. You agree with that proposition? A. Yes.

Q. Will you agree that a majority shareholder does owe some duty to minority shareholders in relation to the exercise of its powers as a majority shareholder? A. Some duty, yes.

Q. And would you agree that duty may be conveniently defined by saying it is the duty not to use its (\* Original Transcript Page 208) 40



majority power to discriminate against the minority to the advantage of the majority - (Objected to; question to be reframed).

Q. You have agreed, have you not, that FAI as an 80 per cent majority ordinary shareholder in Cumberland Holdings owed some duty to the minority shareholders of Cumberland Holdings. You have agreed with that?

A. Yes.

Q. Was it your belief in July 1974 and thereafter that that duty was a duty not to exercise majority power so as to discriminate adversely against the minority shareholders to the advantage of the majority shareholder? A. I find it impossible to answer yes or no. I have always felt it was a very difficult area of the law and practice in company matters. I accept there is an obligation to act in good faith but there are times when the interests of the majority shareholder are inevitably going to conflict with the interest of the minority and the extent to which the majority shareholder is obliged, either legally or morally, to refrain from acting in a way most advantageous to himself, simply because by doing so he is going to damage the interest of the minority shareholders, is, I have always found, and feel now, a very difficult question.

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Q. I will take you back to the question. Did it cross your mind at all in July 1974 and thereafter, during the takeover operation, that a majority shareholder should not exercise its power as such to discriminate adversely against the minority shareholders to the advantage of the majority? Did that cross your mind ever in that period of time? A. In the general sense that I answered the preceding question, of course.

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Q. You would claim to have a sound knowledge of the principles of company law? A. I doubt if that is for me to say.

Q. I want to know how you assess yourself? A. Perhaps better than most people.

Q. The Greenhalgh and Ardene Cinema litigation would have been within the range of your knowledge, would it not, during this period before July 1974 and onwards? A. These are the English cases?

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Q. Yes, on the principle of discriminatory use of majority power. Do you remember that line of cases? A. I think many years ago I read the judgments but they are not within my mind today.

Q. But you knew that they established a principle relating to the exercise by majority shareholders of their power in a discriminatory way at the expense of the minority. You knew that in a general way?

A. My recollection is that they related to the question of good faith or its absence.

Q. You would agree you have always regarded Mr. Adler as a very shrewd negotiator? A. A shrewd business man - a negotiator - perhaps lacking in some finesse.

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Q. Would you agree that that lacking of finesse is something that might in certain circumstances legitimately be taken advantage of in commercial negotiations in a perfectly honourable way? A. By the other party?

Q. Yes, I am not suggesting anything dishonourable. I am suggesting that lack of finesse is something that might legitimately be taken advantage of in a perfectly honourable way in commercial negotiations? A. I am not quite sure what you have in mind by "taken advantage of". What I had in mind is that he sometimes created difficulties in the relationships between the two parties.

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Q. Mr. Adler has rather a bull at the gate approach to situations? A. He could have.

Q. It was Mr. Adler who, on 11th July, proposed that the independent members of the FAI board, as you have described them yesterday, consider an offer by him on behalf of himself and his family, including his family companies, to sell their shares in Cumberland Holdings to FARI? A. Yes.

30

Q. The proposal emanated from him? A. Yes, I think the proposal to go back into the stock market altogether was his.

Q. How much money was involved in the purchase or purchases that ultimately took place and were effectuated by transfer pursuant to Mr. Adler's offer made on 11th July - how much money in round terms changed hands? A. My recollection is somewhere in the order of \$190,000.

Q. This offer you say was made in the context of a board decision promoted by Mr. Adler to move back into investment in listed companies. Is that right? A. I think they were all to be listed companies. I am not sure whether any offers were made to other companies pursuant to the resolution.

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Q. When was that policy decision made to move back into the stock market? A. It was formally resolved at that meeting. I think there had been some informal discussion, particularly with Professor Wilson whose views he was anxious to secure as to whether the market - - -

Q. Were you privy to those discussions. Were you present? A. I think there was one lunch where the three of us were together when a general discussion took place.

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Q. And the policy decision in substance was to return to the stock market and to make long term investments in reputable listed companies? A. Not all long term. There was the special situation where we had the Brookers Holdings situation takeover and we came in with a view to short term trading.

Q. But Cumberland Holdings was a long term proposition? A. For permanent holding, yes.

Q. At that meeting of 11th July in which the decision made pursuant to that policy, that was a decision to buy what I shall describe as Adler's family shares? A. Yes, for the remainder Mr. Adler normally dealt with the stock exchange investment operations himself and very rarely referred to them at board meetings. He was very definitely in charge of that side of the running of the business.

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Q. But of course he relied heavily upon you for advice and consultation? A. Not so much in connection with specific stock market investments. I think if anything he was more inclined to rely on the numerous brokers who were in constant touch with him.

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Q. Would it be correct to say when Mr. Adler offered these shares to FAI, there was no discussion as to whether some of this \$190,000 might be better spent in some other investment? A. That was one of the points I considered myself.

There was no discussion about that at the board meeting, was there? A. Not at the board meeting itself.

Q. Might I ask you this, you regard this case as a critically important one? A. In terms of personal reputations, naturally it is something that we cannot afford to ignore.

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Q. May his Honour take it in the light of that last answer that before you went into the witness box to

give evidence in chief, you gave the closest consideration to the evidence you were going to give?

A. I attempted to do so.

Q. You brought to bear upon that task your lawyer-like qualities, did you not? A. I suppose partly lawyer-like qualities.

Q. And partly your commercial qualities - I am not criticising you for that. A. Yes.

Q. Do you agree that was the mixture of qualities you brought to bear on this obviously very important task of giving your evidence in a situation where your reputation might be at stake? A. Yes, I would agree with that. 10

Q. Before you went into the witness box to give evidence you were in Court during the whole of the hearing time up to that time, were you not? A. Yes.

Q. You heard Mr. Curran give his evidence? A. I did.

Q. May we take it that in giving your account firstly of board conversations, conversations with your co-directors held on 11th July, 1974 you have not omitted to tell his Honour your account of the substance of any part of the conversation or those conversations you regarded as important or relevant? A. I have tried to do so. I do not claim to have an infallible memory. 20

Q. No, nobody would, but you have brought to bear on the task of giving evidence in this case close attention to detail? A. So far as my memory permits, yes.

Q. You heard Mr. Curran give his evidence of the conversation of 4th December? A. Yes. 30

Q. Your own Counsel asked you no questions to rebut any aspect of that conversation, as recounted by Mr. Curran? A. I do not recall any questions yesterday.

Q. May we take it you agree with the substance of what Mr. Curran said in his evidence as to the conversation on 4th December? A. I think that is too wide a proposition. My immediate reaction was that he had compressed the account of the conversation that took something over an hour, if my memory is right, into a very few sentences. I certainly could not accept it was a full and accurate account. 40

Q. But in so far as it did detail specific words,

you cannot quarrel with the substance of what he said?

A. One phrase I recall. I personally do not agree with, when he referred to Mr. Adler looking shocked and surprised at some allegation.

Q. But apart from that you agree with the substance of what he said, about that aspect of the conversation?

A. So far as I now recall, yes.

Q. You told his Honour when this proposal was put up by Mr. Adler in the discussion of the alternative proposition, relating to the acquisition of ordinary and preference shares, that offer by Mr. Adler was discussed at the board meeting. You said that. That is correct, is it not? A. Yes, as soon as he put the suggestion about Cumberland Holdings shares, he retired from the meeting and left the three of us.

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Q. How long did he stay out of the meeting?

A. I would think between 15 and 20 minutes.

Q. Of course in the situation then existing, namely that Mr. Adler was offering to the company of which he was the chairman and of which you were one of the co-directors, a substantial parcel of shares, you regarded yourself, did you not, as under a very heavy duty indeed in relation to the consideration of that proposal? A. Ironically it almost made my task easier because - - -

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Q. Can you answer the question? A. The answer would be "no".

Q. You did not regard yourself as under a heavy duty?

A. Not in that sense.

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Q. In what sense? A. You are asking because of the fact the chairman was offering shares to the company, that made me feel under a very heavy obligation?

Q. Yes? A. My reply is that it rather made my task easier, that it was the chairman's shares that were being offered, because that was one thing I was certain of in my mind, that was that Mr. Adler was not going to attempt to disadvantage his own company.

Q. So you approached the task on the basis that Mr. Adler would be demanding perhaps a fair but no less than a fair price. Is that right? A. Yes, I would accept that.

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Q. Do you claim that you as a director of FAI gave your own consideration to the question whether that

price of \$1.25 for the ordinary shares was fair?

A. It seemed to me to be so at the time.

Q. Were you of the belief that FAI had bought the shares at \$1.25, which in your mind might be described as a good deal? A. From a permanent investment point of view, yes.

Q. That was I think the point of view that was under consideration? A. Yes.

Q. So to be quite specific you thought at that price the shares representing the ordinary shares was a good deal for FAI? A. At that time and at that price. 10

Q. An advantageous deal? A. A deal that I was prepared to accept.

Q. As being advantageous to FAI? A. As being in its interests.

Q. Not as being advantageous? A. I hoped so, I hoped so, yes.

Q. Will you answer the question. What was your belief? Would you answer the question yes or no. Was it your belief at that time the ordinary shares at \$1.25 was an advantageous deal for FAI? A. Yes. 20

Q. That was an easy answer to give, was it not? A. Your Honour, it depends on the degree of detail that it is helpful to try and give to the Court, to explain my reasons and my mental processes.

Q. After some three attempts on my part to get you to agree you believe that the deal was advantageous. You said it was, did you not? A. I accept that.

Q. After three attempts to get you to answer a direct question to that effect. Would you agree? A. If there were three attempts, I must agree. 30

Q. Will you not agree that to give a direct answer to the question whether you thought the deal was advantageous to FAI was perfectly easy in view of the fact you would be breaching your duty, if you thought that the deal was not advantageous? A. I thought an explanation would be more appropriate.

Q. Will you not agree it would have been easy, forget about whether appropriate or not, it would have been easy to give a direct and simple answer to my question, whether the deal was in your belief 40

advantageous, having regard to the fact that if you did not believe it was advantageous you must have rejected it in your duty as a director?

A. I will accept that.

Q. Mr. Atkinson, Mr. Adler was a very dominant figure in this company, FAI, wasn't he? A. Yes, he was very much the leader of the company.

Q. The presiding genius, would you agree? A. Yes, he founded it - or he didn't found it - - -

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Q. But he relied, as geniuses often do, upon you very heavily for advice in relation to a number of matters relating to the companies, didn't he? A. I think so, your Honour, yes.

Q. Would you agree with this, that the very fact that Mr. Adler was such a dominant figure in the FAI group and was, as you have described him, in agreement with my question, the presiding genius, those very facts, will you agree, made it incumbent upon you to be fully satisfied that the deal that he offered was, as you have agreed it was, an advantageous deal, before you gave your consent to it? A. Yes.

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Q. Those circumstances that I have indicated to you - his power, the fact that he was the presiding genius - made your duty as a director on this occasion rather more heavy than in ordinary circumstances, would you agree? A. Well, he had no power over me, your Honour, so I am doubtful what difference that made to me personally.

Q. At all events, you regarded yourself, as a director of FAI in this negotiation, as dealing entirely at arm's length with Mr. Adler, did you not? A. In reaching my decision, yes.

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Q. Then may we take it that it follows that you regarded yourself as being entirely at arm's length from Mr. Adler in the conversations in the board room at which he made the offer? A. Yes, your Honour.

Q. Now it was commonly agreed, was it not, by the directors who were left in the board room after Mr. Adler's retirement, that the market price of Cumberland shares on the Stock Exchange was of no relevance whatsoever to the consideration of Mr. Adler's offer?

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A. That is so, your Honour.

Q. And that was so, was it not, because there was

never at any time any genuine market for the shares?

A. Yes, your Honour.

Q. And that situation continued after July, didn't it - that there was no genuine market for the shares on the Stock Exchange? A. Yes, the situation continued unchanged.

Q. And you thought it was quite proper, did you not - and I am not criticising you necessarily if you did - but you thought it was perfectly proper, in the exercise of your discretion, your fiduciary discretion as a director of FAI, to ignore altogether in your consideration of the suitability of Mr. Adler's proposal from the viewpoint of FAI, the market price of the shares, whatever it was? A. Yes, your Honour.

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Q. You referred yesterday in your evidence, Mr. Atkinson, to "window dressing"; do you remember that? A. I did, yes.

Q. And in referring to window dressing - on page \* 318 were you referring to a practice engaged in by Mr. Adler, within your knowledge, in relation to Cumberland shares, of putting on an order to buy the shares or sell the shares at a particular price, with a view to making it appear in the Stock Exchange records that Cumberland ostensibly had a market rating commensurate with the real worth of its assets?

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A. I am sorry, could I have the question again please? (Question read back) Not necessarily with the real worth of its assets, your Honour; the object of the exercise was to get a price established on the official quote at the end of the financial period which appeared to be a reasonable and fair price for the shares, viewed in all respects, when it was impossible to establish a market quote from an ordinary buyer and seller point of view.

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Q. But Mr. Atkinson, you know, don't you, that on 24th June Mr. Adler, in the name of Fire and All Risks Insurance Company Limited, put on a selling quote through Messara and Company, a selling order through Messara and Company, for one thousand ordinary shares in Cumberland Holdings at \$1.50; you know that, don't you? A. I didn't know at the time. I understand now that that is so.

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Q. When did that first come to your notice? A. Some months later.

(\* Original Transcript Page 197)



Q. How long - as best as you can tell us, when?

A. I would think in November.

Q. November last year? A. Yes.

Q. And when that fact came to your notice, were you shocked? A. No, sir. We had to go on the board as buyer and seller and be prepared to trade in either capacity.

Q. But just answer - you weren't shocked? A. No; I assumed that that was part of the normal end of year price establishment.

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Q. Window dressing? A. Yes.

Q. You thought it perfectly proper, did you, for a public company, for the reasons you have indicated, to engage in a little window dressing in relation to its shares by rigging the market? A. I don't accept that it is rigging the market, your Honour.

Q. And you stand by that statement? A. We are prepared to buy or sell at any price that they put on the board. I can't understand how that can be regarded as market rigging.

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Q. Of course you have told his Honour, haven't you, that in July the policy of the board was to regard Cumberland Holdings as a long term investment - a permanent investment, I think your words were, weren't they? A. Yes, in terms of a large overall majority holding.

Q. You knew at the time - in July, 1974 you knew contemporaneously with the events, did you not, that Mr. Adler was placing buying orders for ordinary stock units in Cumberland, at \$1.25? A. Yes.

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Q. And you regarded that as a perfectly proper practice, did you? A. Oh yes, some shares were in fact purchased.

Q. Yes; did you regard that as perfectly proper practice on Mr. Adler's part? A. Yes, your Honour.

Q. And you so regarded it in part because you thought that was a reasonable price for the shares? A. I did - at that time.

Q. And it was a price that to your knowledge at the time was almost exactly in line - with a variation of three cents above - the net tangible asset value of the

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shares, wasn't it? A. Yes, that is so. May I say, I didn't know to within three cents at the time, but it would appear that the account when they were eventually got out would establish that sort of a figure.

Q. Yes; and you thought in the light of that fact, namely, that the buying order was in line with what you understood at the time to be the net tangible asset value of the shares, it was a perfectly proper buying order to put on? A. Yes, your Honour.

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Q. So that in buying the shares in the market, or rather, to take your own position, in actively concurring in buying the shares in the market at that price, the criterion from your viewpoint was net tangible asset backing, wasn't it? A. That was one of the criteria.

Q. The other criteria was what - earnings yield?

A. No, the other criteria basically - I believe that having regard to the earnings yield that would have been the sort of price that we could have expected to have seen established if there had really been a market for the shares.

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(Short adjournment)

On resumption:

MR. HUGHES: Q. Mr. Atkinson, do you remember telling his Honour yesterday that when at the board meeting of 11th July Mr. Adler proposed the sale of his family shares to FAI, he said, amongst other things, "As you can see from the accounts, the company has had a good year" - do you remember saying that? A. Yes.

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\* Q. Page 317. May we take it therefore that that board meeting had before it the accounts of Cumberland for the year ended 30th June, 1974? A. No, no formal accounts had been produced. I have phrased my paraphrase of the conversation clumsily. We were having  
- - -

Q. Whether it was clumsy or not we will deal with in a moment; but is what you said there in the transcript accurate or not? A. No, that is not accurate.

Q. Well, did you have some documents indicating the financial results of the company for the year ended 30th June, 1974 before you at that meeting? A. Yes, I think the chairman had produced some summary of the

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(\* Original Transcript Page 197)

results as he saw them, or the secretary produced them. They were not formal accounts, though, in the sense of Companies' Act accounts.

Q. No; but at all events they were in line with the results ultimately published, weren't they? A. Yes.

Q. Do you remember Professor Wilson saying, "Well, of course we can disregard the Stock Exchange quote because we all know that we have got to make that ourselves from time to time to keep the shares in line with what we think are reasonable values"?

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A. Yes, words to that effect.

Q. And when he referred to "reasonable values", you understood that phrase, did you not, as a reference to net tangible asset value or backing? A. That, and the sort of value one would have assumed would have been on the boards if there had been a genuine market for the shares.

Q. Yes; based on net tangible asset backing?

A. One of the factors.

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Q. Yes; and earnings yield? A. Earnings yield would be another one, yes.

Q. Now do you say that to your own personal knowledge - based on what Mr. Adler has told you from time to time - that he, Mr. Adler, in relation to Cumberland shares always attempted to maintain quoted market prices on a fair and realistic basis in terms of asset value of the shares and earnings potential? A. Not always; that would have been the end of year criterion, your Honour. At other times I think a cardinal factor was an attempt to get a market going. He would try putting prices on the board even if he personally thought they were totally unrealistic.

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Q. Would you have a look at this document that comes out of the documents produced on subpoena this morning? It is a document of some 44 pages length foolscap, and I invite your attention - it is headed, "General Background". (shown) That document was prepared by yourself and Mr. Adler, wasn't it? A. There have been various versions of this, sir.

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Q. I don't care whether there were a thousand versions; that document was prepared by you and Mr. Adler, was it not? A. The original one was prepared by me and was then submitted to other members of the firm for correction of any errors which they saw in it, or amendments, any other directions.

Q. Well, may we take it that that document is the composite effort not only of yourself and Mr. Adler, but of the other members of the Board of FAI?

A. Some of them, yes. I cannot now recall whether everybody saw it.

Q. Very well, Mr. Atkinson; it will be sufficient for my purposes if you agree with me - and I ask you whether you do - that that document was prepared by yourself and Mr. Adler, in part? A. Yes, I accept that. 10

Q. And when I say, "In part", I am reserving the exception you just made, that there may have been other people who collaborated in the preparation of the document, do you understand? A. I do.

Q. When you prepared that document with Mr. Adler, did you intend to state the truth in it - don't look at it for the moment, please? A. The document was prepared - your Honour, for submission to our legal officers as a basis of instructions for the case; I am not sure in the circumstances whether it is privileged. 20

Q. Well, you can take it from me that it was produced on the subpoena this morning without any claim of privilege being made, and that it was amongst the documents produced on your subpoena which you answered this morning, do you understand? A. I produced all documents in my possession.

Q. And made no claim of privilege, did you, when you answered the subpoena - did you? A. No, I made no claim. 30

Q. Just take your eyes off the document for the moment while I ask you a few questions about it, if you please. Did you state the truth in that document? A. To the best of my knowledge and belief at the time it was prepared, yes.

Q. And was it, to the best of your knowledge and belief at the time you prepared it, the whole truth? A. I believed I had stated all relevant facts.

Q. Yes, and one of the matters you referred to in the document was the question of market dealings in Cumberland shares, wasn't it? A. Yes. 40

Q. And did you state the truth about that matter? A. So far as I now recall.

Q. Yes. By the way, did Mr. Adler closely collaborate with you in the preparation of this document?

A. No, I don't think so.

Q. Did you consult him about it? A. I think I left a copy with him and I can't recall whether it was discussed.

Q. Look, Mr. Atkinson, just to clear this matter up to the extent of the collaboration between yourself and Mr. Adler in the preparation of this document, would you have a look at this carbon copy from the documents produced by you on subpoena this morning, of a letter you wrote to Mr. Belfer, and I invite your attention to the first paragraph of it. Would you read it out to his Honour? A. "As arranged, I am enclosing a copy of the two Memoranda which Larry and I prepared for Counsel earlier in the year. These set out our explanation of the takeover operation last year and our answer to the various charges which have been made against us". 10

Q. Yes, one of the Memoranda in the paragraph you just read is the document which I asked you to identify a few moments ago, wasn't it? A. Yes. 20

Q. Was it prepared by Mr. Adler and yourself?  
(No answer).

Q. Wasn't it? A. I think it was really myself. I probably mentioned Mr. Adler's name in my letter to Mr. Belfer in order to let him know that Mr. Adler had seen it and presumably approved of it.

Q. Plain words have a distinct meaning to you, don't they? A. Yes, they do. 30

Q. And Mr. Belfer was, at the time you wrote that letter to him, of course a co-director, wasn't he?

A. He was, yes.

Q. And you wouldn't want to mislead him, would you?

A. No.

Q. And when you said that you and Mr. Adler had prepared that document headed "General Background", you meant what you said, didn't you - don't look at that document, just answer my question if you please?

A. Your Honour, my recollection is that I prepared it basically and a copy was given to Mr. Adler, and I can't now recall to what extent he made observations or amendments to it. 40

Q. Yes. Now in that document you were setting out

the background of this matter - that is, the matter that has given rise to litigation? A. Yes.

Q. From the beginning right through to the lodgement of the winding up petition, weren't you? A. I tried to, yes.

Q. That was your aim? A. I tried to, yes.

Q. That was your aim, I said? A. Yes.

Q. Would you have a look, please, at page 5 and read out the sentence which begins, "He always" - read it out to his Honour? A. "He always attempted to maintain quoted market prices on a fair and realistic basis in terms of asset value of the shares and earnings potential, and never attempted to establish a false market in regard to those criteria". 10

Q. Yes, when was that document prepared? A. Early in April.

Q. This year? A. 1975, yes.

Q. By November of 1974, you had become aware, had you not, that Mr. Adler had firstly on 7th August, 1974 placed a selling order in the name of Fire & All Risks for Cumberland ordinary shares, 10,000 of them, at 70 cents, through Messara; you knew that, didn't you? 20

A. No, I don't think I knew that at the time, sir.

Q. In November? A. I don't think so.

Q. When did you come to know about it? A. Very recently, my recollection is only two or three weeks before this hearing began.

Q. And did that shock you? A. I asked for an explanation. 30

Q. Did it shock you? A. No, I thought there must be an explanation.

Q. You thought - and from whom did you seek the explanation? A. I asked Mr. Adler.

Q. And is Mr. Adler still alive and well and living in Sydney? A. I would hope so.

Q. Did you see him this morning? A. I did.

Q. And I suppose you had a discussion with him this morning about the way the case was going? A. Yes.

Q. Did you have a discussion with him this morning about this selling order of 7th August, 1974?

A. Not this morning.

Q. Not this morning, when? A. Before the case began. I think it would be three weeks or so ago.

Q. In the light of what you now know - may I have that document marked for identification, your Honour?

HIS HONOUR: Yes.

(Abovementioned Memorandum m.f.i. 8)

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MR. HUGHES: Q. In the light of what you now know, that passage which you read out from page 5 referring to Mr. Adler's policy in relation to market operations, is a mockery of the truth, isn't it? A. It is not totally correct, your Honour.

Q. It is a mockery of the truth, isn't it? A. I would not accept that.

Q. Is it true? A. It is not totally correct.

Q. Is it true? A. If you mean totally true, no.

Q. It is partly untrue, isn't it? A. It would appear to be so.

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Q. And did you know it was partly untrue when you penned that document or drafted that document?

A. No, sir.

Q. And when you came to find out that it was partly untrue, you realised, didn't you, that it made a mockery - because of the selling order for 70 cents in August, 1974 - of the assertion that Mr. Adler always attempted to maintain quoted market prices on a fair and realistic basis in terms of asset value of the shares and earnings potential? A. Yes, I corrected the instructions he had given me ---

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Q. Your answer to me is that when it came to your notice it appeared to you quite clearly? A. Yes.

Q. That the information about that selling order made a mockery of that statement, in terms of truth?

A. That a selling order - and I think there may well be some others - - -

Q. Just answer my question? A. I was not

specifically thinking of that selling order only when I answered your previous questions.

Q. Just come to my questions - did you understand my last question? A. I thought I did, yes.

Q. And will you agree with me that the revelation to you, whenever it was, of the fact that Mr. Adler on 7th August, 1974 had placed a selling order through Messara for 10,000 ordinary Cumberland shares at 70 cents made a mockery of the truth of that passage? A. It made it incorrect.

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Q. Yes, when did you become aware that on 19th August - 12 days after the 7th - Mr. Adler, in the name of Fire & All Risks, had placed a buying order for 25,000 Cumberland stock at 50 cents? A. At I think about the same time as the other one - three weeks or so ago. I cannot be certain of it.

Q. And it was perfectly apparent to you, when that second order came to your notice in addition to the first - both orders forming part of Exhibit 51 - that the existence of those orders was quite out of line with any suggestion, quite contrary to any suggestion that Mr. Adler's consistent policy, always attempted, was to maintain quoted market prices on a fair and reasonable basis in terms of asset value and earnings potential? A. Yes.

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Q. I suppose it crossed your mind, did it, when these startling events came to your notice, that somebody might suggest that that conduct - the conduct of placing that selling and buying order - was reprehensible? A. It would obviously depend upon the circumstances.

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Q. Did it come to your mind that somebody might regard that conduct as reprehensible? A. If it was intended as market rigging or anything of that nature, then obviously, yes.

Q. The net tangible asset backing of Cumberland did not change downward, did it, between 11th July and the date when the takeover offer was made? A. No.

Q. And the earnings yield position of Cumberland, so far as you were aware, did not change downward between 11th July and the date when the takeover offer was made, did it? A. No.

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Q. And did those circumstances occur to your mind when this startling piece of information came to you



about Mr. Adler's operations on the stock market in relation to Cumberland shares in August, 1974? A. I naturally wanted to know whether there was an explanation, and if so, what it was.

Q. Yes, did Mr. Adler consult you about these two market operations, the selling order and the buying order to which I have referred, before entering upon them? A. No, your Honour. I was away from Sydney for most of August again this year, but as I said, normally he would not be consulting me on what he did on the stock market.

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Q. Now I will come to another matter; you were asked to express the opinion yesterday whether or not the various circulars that Mr. Adler sent out, any of them, were in any respect misleading - do you remember being asked that question, in substance? A. Yes, your Honour.

Q. And you said you did not think so, didn't you?

A. Yes, I said that was my belief.

Q. May I ask you this question, just to extend that enquiry a little further; first of all, have you in connection with this litigation anxiously considered the terms of all the circulars published by Mr. Adler in the course of what we have come to describe here as the "paper warfare"? A. Yes, I have given them much thought.

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Q. And you have given them much thought at least partly with a view, have you not, to expressing an opinion - as you did yesterday in response to your Counsel - whether or not any part of them was misleading? A. That was one of the points, yes your Honour.

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Q. And a point very much in your mind, would you agree? A. Yes.

Q. Just to extend the enquiry a little further - do you say that each of Mr. Adler's circulars is a model of frankness and candour? A. No, your Honour, this cannot be said.

Q. No; he might have done a little better in the candour stakes, mightn't he, than he did? A. He might have done better all round.

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Q. What you are saying then is that in some respects some of those circulars were neither frank nor candid? A. The way they were worded now, I feel they could have been done much better.

Q. I am sorry to persist, Mr. Atkinson, but I want a specific answer to that question. You agree, do you not, in the light of your last few answers, that some of those circulars are neither frank nor candid?

A. They could be attacked in those respects, as I now see, your Honour.

Q. They could be attacked as lacking frankness and as lacking candour, couldn't they? A. As not being sufficiently fully informative.

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Q. I will just come to my question - you agree that they could reasonably be attacked, do you not, as lacking in frankness? A. Attacked, yes, your Honour.

Q. And reasonably? A. That would be a matter for opinion.

Q. I am asking for yours? A. I still don't believe so.

Q. But you have said that in the light of reflection you can see that they are open to criticism - -?

A. Yes.

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Q. On the ground that they lack frankness and candour?

A. That they could be criticised, yes.

Q. So you don't wish his Honour to understand, do you, that those circulars that Mr. Adler put out are in all respects frank and candid, in your opinion?

A. Not fully, your Honour.

Q. No; and of course you were privy to the publication of these circulars, weren't you? A. Yes I was.

Q. So, what you are really telling his Honour is that you were privy, indeed a party, to the publication of circulars that were lacking in frankness and in candour?

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A. At the time they were prepared, your Honour, I believed them to be in order. I now believe that they could have been improved.

Q. You now believe, don't you, that in some respects those circulars are discreditable in their untruths?

A. No, I don't go to that extent, your Honour.

Q. I see, well, let me see if you go to this extent - you now agree that in those circulars there are statements that are plain untruths? A. Untruths, no. To the best of my knowledge I can't recall anything that is untrue.

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Q. You remember Lord Kylsant's case, don't you?

A. I am afraid not by name.

Q. Don't you - the shipping magnate who was charged at the Old Bailey for a false prospectus - don't you remember that? Or are your law school days too far away? A. They must be so.

Q. Don't you remember that was the case in which Lord Kylsant was convicted, he was convicted for publication of a prospectus falsely and fraudulently, because although the prospectus contained no express untruths, its general effect was untrue because of matters omitted? A. Your Honour, in a prospectus - -

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Q. Don't you remember that? A. I don't remember the case, but I remember the principle you are establishing.

Q. You are about to draw a distinction in terms of the standard of candour involved between a prospectus on the one hand and statements issued to shareholders in the course of a takeover struggle on the other; is that the distinction you want to draw? A. Well, may I put it this way - one is a legal document - -

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Q. Just answer the question first? A. Yes.

Q. You do want to draw a distinction? A. Yes.

Q. And you think there is more mileage, do you, for lack of frankness and lack of candour in a circular of the type that Mr. Adler put out many times in this case and a statement in a prospectus; is that what you want his Honour to understand? A. No, that is not the way I intended to try to explain it.

Q. You would agree, would you not, that in the formulation of these circulars that Mr. Adler put out, with your very considerable assistance and approval, there was a heavy duty of frankness and candour resting upon the shoulders of those responsible for their publication; would you agree with that? A. There was a duty, your Honour, yes.

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Q. A duty of which you were conscious at the time - was it? A. I believed I had a duty not to mislead consciously or deliberately.

Q. Then did you believe and advert to the fact at the time that you had a duty to see that the circulars were frank and candid so far as your powers would enable you to do so? A. Did you say, did I express that opinion to anybody?

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Q. That is not an answer to my question? A. I am sorry, in that case may I have it read back?

HIS HONOUR: I think he is trying to elucidate the question.

MR. HUGHES: Q. When you collaborated in the preparation of these paper warfare circulars put out by Mr. Adler, was it present in your mind that you had a duty, so far as you were able, to see that the circulars were both frank and candid in what they said? A. I believed I had a duty not to mislead.

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Q. And for whatever reason, that duty was not discharged, was it? A. Your Honour, it did not appear so at the time; I can see now that it could be argued.

Q. Reasonably argued? A. That I am still doubtful about. May I add one thing?

Q. Certainly? A. All these things, your Honour, being done in terms of pressure and time of course - time is very much of the element; one acts necessarily hastily. On reflection at later dates; when everything is being dealt with with the virtue of hindsight, things can appear in a different light.

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Q. Yes, but the facts concerning Fire & All Risks' market operations in July whereby it bought up about 2,800 ordinary shares in Cumberland were well known to you at the time you and Mr. Adler were composing these circulars, weren't they? A. Yes, indeed.

Q. And they were material facts, weren't they, in the evaluation of the takeover offer? A. This was a point that I still don't concede, sir.

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Q. Well, would you not agree that if the shareholders in Cumberland had been told by you and Mr. Adler that in July, 1974, as the result of a strictly arms length negotiation, Mr. Adler's family interests had sold at \$1.25 ordinary shares in Cumberland to FAI, the Cumberland Board considering that that was an advantageous deal if those facts had been disclosed to the minority of shareholders of Cumberland by Mr. Adler and yourself, they would have been facts that might have given them some assistance in the evaluation of the FAI takeover offer? A. If it had been a cash takeover offer, yes, your Honour, but this was the point that I was trying to make at the time - we were not talking about cash, we were talking about a share exchange.

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Q. But the fact was that at the time when you were

talking about a share exchange, there had, three months previously or four months previously, been an arms length sale, for cash, of Cumberland ordinary shares at \$1.25 by Mr. Adler's interests to the company of which he was chairman; that was an undoubted fact, wasn't it?

A. Yes, that was true.

Q. And you have told his Honour, have you not, that you, as a member of the Board of FAI, considered that that cash price was a fair price and advantageous to FAI? A. Yes, at that time.

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Q. And that price was fixed, at arms length, by the Board of which you were a member, in the absence of Mr. Adler, on the basis that it was justified by the net tangible asset backing of Cumberland shares, and justified by the earnings yield of those shares, wasn't it?

A. Yes, and of the general conditions prevailing.

Q. And in the meantime - that is, between July and November - the net tangible asset backing of Cumberland shares had not decreased, had it? A. No, that is so.

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Q. Nor had the earnings yield decreased? A. No.

Q. I just want to come back to another matter first; do you remember saying yesterday that you raised some doubt at the Board meeting as to a company like Cumberland operating in an area where it depended to some extent on Government assistance? A. Yes, your Honour.

Q. And Professor Wilson had very strong views on that, didn't he, which he expressed at the Board meeting?

A. Yes.

Q. And he expressed forcibly and succinctly?

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A. Yes.

Q. And as you said yesterday, he said it would be political suicide for a Government to withdraw Government aid to geriatric and nursing homes? A. Yes, that was the gist of his statement.

Q. What he was saying was that, like income tax, the perpetuation of aid to geriatric homes is inevitable in political terms, wasn't he? A. He said that, sir, but then the Minister said something different.

Q. Don't worry about what the Minister said; I will come to that later if need be. And, of course, the aid has continued, hasn't it? A. It has continued, yes.

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Q. You don't take notice of everything the Minister says do you?

HIS HONOUR: I do not know whether his answer would greatly assist me, Mr. Hughes.

WITNESS: I was sufficiently worried about it to note it away, your Honour, in my mind.

MR. HUGHES: Q. Yes, but at all events, Professor Wilson's view about that carried conviction to your mind, at the meeting? A. In July, yes.

Q. Now I come back to my line of questioning that I was previously pursuing; if the takeover offer had been made at the end of July - and not at the end of October or in November - it would have been most material to inform the minority shareholders of these, shall I call them, in house transactions, in Cumberland shares conducted, as you say, at arms length? A. It would have been a listing requirement.

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Q. And it would have been most material, wouldn't it?  
A. Yes.

Q. And if the takeover offer had been made at the end of August the disclosure of that information would have been most material, wouldn't it? A. Not so material.

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Q. It would have been material? A. It would have been material, yes.

Q. And if the takeover offer had been made at the end of September, the disclosure of that information would have been material, wouldn't it? A. I would have begun to doubt it by then, your Honour.

Q. And of course, it would have been very convenient, would it not, for your doubts to have carried the day?  
A. My doubts were - -

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Q. Would it have been convenient for your doubts to have carried the day? A. It might have been so.

Q. But even though you had doubts at the end of September, you still would have had a niggling instinct that told you that the disclosure of that information would have been material at that time, wouldn't you?  
A. If it had been a cash takeover, yes.

Q. But not, you say, if it had been a share exchange takeover? A. No, I wouldn't have thought so, your Honour.

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Q. But of course you knew, when this takeover offer was made, that in substance it was a proposal that

Cumberland shareholders, ordinary shareholders, should exchange shares with a net tangible asset backing of \$1.22 for FAI shares with a net asset backing of 52; you knew that, didn't you? A. Yes, I knew, approximately.

\* Q. And the question of the net asset backing of the respective shares - that is the offeror and the offeree shares - was referred to in Mr. Adler's circular letter forwarding the takeover offer and documents to shareholders, wasn't it? A. It was, yes. 10

Q. And will you agree with me that it was referred to in that letter - the letter dated 20th November, forming part of Exhibit 11, in terms that were quite misleading? A. Not that I recollect - -

Q. The frank thing to have been done, if a reference was to be made, as you said was made, to the relative net asset backing position of the two companies, would have been to set it out - Cumberland shares' net asset backing so much, FAI shares' net asset backing so much. That would have been the frank thing to do, wouldn't it? A. I don't think there was a reference to the relative net asset tangible values. 20

Q. You just said there was? A. There was a reference to net tangible on one side and net asset on the other, which is quite different in the case of companies such as FAI.

Q. Mr. Atkinson, do you recall that only a minute or two ago you agreed with me that in Mr. Adler's circular letter to the shareholders forwarding the takeover offer and takeover documents, associated documents, there was a reference to the net tangible asset backing position of each of the two companies involved? A. No - no, I don't agree with that. 30

(Question marked \* read back.)

Q. And that reference was intended to induce people to believe it was buying you net tangible asset backing of the shares, wasn't it? A. No.

Q. What, you want to draw a distinction, do you, between net asset backing and net tangible asset backing? A. In the two different classes of company involved, yes, I believe it must be done. 40

Q. I see - only because of that? A. The FAI type of company is a company which has a goodwill asset

value. I would not believe that that was so in the case of the Cumberland type of company. I don't believe you can compare chalk with cheese.

Q. Well, you were comparing chalk with cheese yesterday, weren't you, when you referred, amongst the vast range of your commercial experience, to the position of Fenchurch Holdings? A. Yes. I am sorry - chalk with cheese, I don't follow how I am referring to it. I was explaining why some companies with a very small net tangible asset backing, but of course a large net asset value in terms of goodwill, could command high market prices.

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Q. Yes. But of course, you were involving as an example Fenchurch Holdings, this London company, as a company that in this respect could be compared with FAI, weren't you? A. In some respects the operations are similar in nature, your Honour.

Q. Look FAI does not carry on business as an insurance broker, does it? A. No, it doesn't.

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Q. FAI carries on business, so far as its insurance activities are concerned, as an underwriter, doesn't it? A. Yes, that is correct.

Q. And Fenchurch Holdings, on your own description of it, was a broker, wasn't it? On your own description of it it was a broker? A. Principally a broker, yes.

Q. So that you were comparing chalk with cheese, weren't you, to use your own homely term? A. I don't agree that it is chalk and cheese. I think that there is sufficient similarity between them - between an underwriter and a broker. They are both service operations. I think there is sufficient similarity between them to justify my argument that there is goodwill to be attributed to the underwriting company.

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Q. The first point of dissimilarity, or a marked point of dissimilarity between an insurance broker and an insurance underwriter is that the broker does not actually carry any risk, does he? That is so, isn't it? The broker does not normally carry any risk, does he? A. Not normally.

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Q. Fenchurch didn't, did it? It was simply a broker? A. I would not swear to all of its operations, but basically you must be right.

Q. So that it was a non-risk-taking operation? It



was the operation of a middle man getting a commission for business placed. That is correct, isn't it?

A. To a large extent, yes.

Q. And that does not describe FAI, does it? Does it?

A. No, that is true.

Q. Will you agree that is a most marked dissimilarity to be taken into account in any comparison, if it is to be a useful comparison? That is a marked similarity to be taken into account in any comparison, if the comparison is to be a useful one? A. It is a dissimilarity.

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Q. It is like chalk and cheese, isn't it? A. I don't think so, quite.

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

Q. Just a little bit? A. A little bit.

Q. Let us come back to the end of September. You would have thought, albeit with doubt, that if the takeover offer had been made at the end of September it would have been material to disclose to the minority shareholders that FAI had been lucky enough to have secured this advantageous purchase at \$1.25 cash of Cumberland ordinary shares in July. That is right, isn't it? A. If it had been a cash takeover, yes.

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Q. If it had been a cash takeover? A. Yes, if it had been a cash takeover.

Q. Why do you make that reservation? a. Well, I would have thought, with respect, it was self-evident.

Q. We have not all had your enormous experience, so treat me as someone asking questions with a thirst for information? Will you treat me in that category, please? A. When you are comparing the two shares there are a large number of things that have to be taken into account, naturally. But the most important things really in ordinary cases would be earnings, and, to a lesser extent, depending on the nature of the company, the asset backing.

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Q. Yes. A. Beyond that, if there had been what I would call a genuine active market for shares over a period of time that could well be relevant.

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Q. I am sorry, would you please say that again?

A. If there had been an active market operation in regard to both companies that could be relevant - the

market price having prevailed over a period of time. Had that been the case, it could have been a relevant consideration to have been taken into account.

Q. Yes. A. In this case the latter point did not, and does not, strike me as being of any real relevance to the offer that was made.

Q. What point? To which point are you referring?

A. The question of the actual market transactions or sales of the shares in the companies. That does not strike me as having any real relevance in this particular case.

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Q. Because there had never been a real market for the shares? Is that what you are saying. A. Basically that is the position, yes.

Q. Either before July or after, is that right?

A. To a very large extent, yes.

Q. "Totally yes", is that right? A. After July, yes. I beg your pardon, with the exception of one transaction that has been mentioned.

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Q. With the exception of one transaction? A. Yes.

Q. That curious transaction which involved a selling quote and a buying quote? A. No. That is not the one to which I was referring. There was evidence that one parcel of shares apparently changed hands towards the end of August. There was evidence of one such transaction.

Q. The reason why, and the only reason why, net tangible asset backing and earnings yield were considered by you and your co-directors to be the relevant criteria for determining the propriety of buying these shares in July from Mr. Adler at \$1.25 was the lack of a real market for the shares. That is so, isn't it? That is the position, isn't it? A. I still added one third factor. You said that there were only two factors. I added one further factor. The further factor was under the conditions then prevailing.

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Q. And the conditions then prevailing - that is, in July - were that there was no real market for Cumberland shares? A. I'm sorry, I really meant the market climate generally. The general economic climate at the time. That is what I meant.

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Q. By, say, the end of September or the end of October the market generally you say was down? Is that what you

are saying? A. Yes, that is correct. The economy was infinitely worse.

Q. So that again there was no real market for the Cumberland shares, was there? A. No. By then, no.

Q. Just as there had been no real market for Cumberland shares before July? That is so, isn't it?

A. Yes, that is right.

Q. So that the market was the same, with this qualification, that the general state of the market was lower at the end of October or the end of September than it was in July? That is the position, isn't it? A. Yes, it was very bad.

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Q. That is the only distinction between the two situations of July and October? That is the only distinction, isn't it? A. And the general fall in the economy.

Q. I'm sorry? A. And the general fall in the economy.

Q. But Cumberland Holdings was still doing very nicely between July and October, was it not? A. It was progressing well.

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Q. Progressing well? A. Yes.

Q. It was an expanding and thriving business, wasn't it, between July and October? It was an expanding and thriving business during that period? A. To an extent, yes.

Q. To a very real extent, wasn't it? A. I would say a little, perhaps better than 10 per cent up on the previous year at the time.

Q. A very significant increase? A very significant increase, wasn't it? A. It was a good increase.

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Q. Its profitability between the end of June and the end of October was up by 10 per cent compared with the previous year, wasn't it? A. Round about that.

Q. About that? A. I am giving a very rough estimate. I can't recall now having seen the exact figures. I am now giving you a very rough estimate.

Q. And that information was within your knowledge at the time you drafted the take-over documents as a Director of FAI, wasn't it? That information was within your knowledge at that time? A. Yes. As I say, I have not seen the exact figures, but I have

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been told that the business was progressing satisfactorily.

Q. Were you consumed by desire to be fair to the minority shareholders? A. I wanted to be fair to them.

Q. That is not what I asked you. Were you consumed by desire to be fair, I was asking you? (Objected to; question withdrawn).

Q. You would agree, would you, that to be fair to the minority shareholders of Cumberland it would be most material to tell them that in the four months between the end of June and the end of October, when you drafted the take-over documents, the profitability of Cumberland was rising at about 10 per cent - had risen at the rate of about 10 per cent compared with the previous year's figures? That would have been fair, wouldn't it? You agree that that would have been fair? A. So far as I know, your Honour, I was following the requirements of the Act. I can't remember now whether that was a statement that had to be made, or not. 10 20

Q. You knew enough about Company Practice to know that the requirements in Schedule 10 of the Companies Act - that is, as to what has to go into take-over documents - were minimum requirements, and not designed or intended to restrict you, as a director of an offeror company, in putting forward any information available. You knew that, didn't you? A. Yes, I will accept that.

Q. Now, to you the information that you had when you drafted the take-over documents as to the increased profitability in the interim between the end of June and the end of October was material to the take-over situation, wasn't it? A. I'm sorry? 30

Q. The information that you had, when you drafted the take-over documents as to the increased profitability between the end of June and the end of October was material to the take-over situation, wasn't it? A. Yes, it would be material. I accept that now.

Q. You accept that now? A. Yes.

Q. And it was your state of mind at the time that it was material, wasn't it? A. My recollection is that - 40

Q. I did not ask you that. Was it your state of mind at the time? A. No, I don't really think I gave the matter specific thought at the time. I was attempting to prepare documents on the basis of the Act, and I don't think I really thought very much about additional

information beyond the requirements of the Act should go into the documents at that stage. It it comes to that, I don't think I said anything in the documents about FAI's increased profitability, which in my view was very much more so than the Cumberland increased profitability. I don't think I said anything in the documents about FAI's increased profitability, either.

Q. Of course, if in truth FAI's profitability had increased in the meantime - if in truth that was the position - that would have been a most material piece of information to give, wouldn't it, to the minority shareholders? A. Looking at it now, I would agree. If I was doing it again I would put it in. 10

Q. If you were doing it again you say you would put it in? A. Yes.

Q. So that you left out two most material pieces of information from these take-over documents, didn't you? That is Exhibit 11. You left out two most material pieces of information from that, didn't you? That is the position, isn't it? A. Yes, I suppose something should have been said on both sides. 20

Q. Now you mentioned in evidence yesterday - you know, don't you, that on 7th March 1975 - and I am now referring to Exhibit 40 - Cumberland, of which you were then a director, reported to the Stock Exchange a half-yearly result consisting in part of an increase in net profit after provision for tax for the period ended 31st December 1974 of 31 per cent in advance of the previous year's figures? A. I cannot recall the figure now. But if you are reading from the document I will accept it, yes. 30

Q. (Exhibit 40 handed to witness) Will you have a look at that? Do you recognise the document? A. Yes, I recognise the document now.

Q. That document went to the Stock Exchange with your full approval, as a director of Cumberland? That is correct, isn't it? A. Yes, I believe it to be accurate.

Q. And the results that were published in March in the letter, Exhibit 40, were the results of the order that were in your pre-vision, looking forward, at the end of October when you drafted the take-over documents, weren't they? A. Not at that time. May I direct attention to the last sentence of the first paragraph - "The large increase...partly owned." May I direct your attention to that? 40

Q. When were they purchased? A. One purchase was in the previous year. I cannot speak to dates of the additional purchase. But they only began to become - to use a horrible American expression - "on stream" towards the end of 1974. I think that one opened in November, and that one produced an enormous increase in profit for the month of November.

Q. November? A. Yes. I think that one of the others was being enlarged, or renovated and enlarged, at the time, and the increased income only began to flow over about the same period. I think that was the position. 10

Q. November? A. It was towards the end of the year. Certainly within the last three months. And that was the cause of what was a surprising increase in the monthly income.

Q. Now, having regard to the approximate times that you have given as to the times at which, to use your chosen expression, these two new nursing homes came "on stream" won't you agree that it was well within your knowledge, when you sat down to write out or draft out the take-over documents that are now Exhibit 11, that these two new ventures would, each of them, most likely make a very substantial contribution to the increased profitability in Cumberland for the year ended 30th June 1975. Won't you agree with that? A. I did not have in mind that the result would be anything like it turned out to be. 20

Q. That is not the answer to my question. A. Well, the answer must be "no" then. 30

Q. I will put the question to you again. I am not worried about percentage. Was it not in your mind, having regard to your knowledge, when drafting the take-over documents in October that these two new hospitals would be, to use your expression, coming "on stream" later in the year, and that they would contribute, in all likelihood, most substantially to increased profitability in Cumberland for the financial year that was then running? A. I was assuming an increase.

Q. You were assuming an increase? A. Yes, I was assuming an increase. 40

Q. Quite a substantial one? A. I can't remember now how the figures were arrived at. I took advice from the accountants and the secretary on this point, and when I said that my estimate was that on an all-in result the year would probably end up with earnings in the region of 14 cents per share, that is what I was

working on. When I said that, that was what I was working on.

Q. You had working papers, did you, for the purpose of making that calculation of 14 cents a share? You had working papers for that, did you? A. Working papers, no. I think I took the figures. I think -

Q. Don't slide away from that for the moment. I want to be specific. In seeking information you had papers - you had working papers? A. I had information given to me.

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Q. You had information given to you? A. Yes.

Q. By whom? By whom was the information given to you? A. It was given to me over the telephone, I think from Mr. Herman, and from Mr. Adler, certainly.

Q. From Mr. Adler? A. Yes.

Q. Information over the telephone? A. Yes. I certainly discussed it with Mr. Herman. When you asked me about working papers, I was about to explain to you that I had dislocated my arm, and I could not write at the time, and for a month I was very much at a disadvantage in anything connected with -

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Q. When was that? When did you dislocate your shoulder or your arm? When was that? A. That was round about the middle of September.

Q. The middle of September? A. Yes.

Q. How long did the malady persist? A. I think I had the plaster taken off round about the third week in October, and I was able to start writing again early in November.

Q. You regained your scribulous (sic) powers appropriately enough just in time to start the writing up of the take-over document? A. No, that was dictated.

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Q. That was dictated, was it? A. Yes.

Q. May we take it that you regarded the projection of the earnings yield for each of the companies about to be involved in the take-over scheme as being of importance - as being critical information for the consideration of shareholders? A. I did not take it as critical information for shareholders. I wanted to get the broad picture in my mind.

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Q. And you got a very good picture in your mind, did you, which was heartwarming? A. Yes.

Q. It was heartwarming? A. I am sorry?

Q. Heartwarming? A. I felt very satisfied.

Q. You felt very satisfied? A. Yes.

Q. And no doubt you felt that the minority shareholders in Cumberland, if you vouchsafed the information to them, would be very satisfied? A. I am sure now that that would have been so.

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Q. You are sure now that it would have been so?

A. Yes.

Q. But you didn't tell them, did you? You didn't tell them? A. No.

Q. That was misleading, wasn't it? A. Your Honour -

Q. That was misleading, wasn't it? A. It was not intended to be.

Q. I don't care whether it was intended to be, or not. It was. It was misleading wasn't it? A. If they were misled then it was misleading.

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Q. It was likely to mislead, wasn't it? - to omit that critical piece of information? That was likely to mislead, wasn't it? A. It did not so appear to me at the time.

Q. I don't care whether it so appeared at the time, or not. It was likely to mislead them if that critical piece of information was not vouchsafed to them, wasn't it? A. Mislead? I don't think so.

Q. You don't think so? A. It could have given them not sufficient information for the purposes they required.

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Q. And you don't think that is misleading? Is that what you are saying? A. "Misleading" I would assume was something that was incorrect.

Q. You know very well, don't you, that you can mislead somebody not only by an express statement, but by omitting material facts. You know that, don't you? Do you know it, or not? A. I must concede that it could happen.

Q. Why has it taken so long to get to that conclusion with you? A. Because -

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Q. The question is awkward, isn't it? A. The suggestion seems to be that something was done deliberately which was not being done deliberately. That seems to be the suggestion.

Q. And that is why you hedged and jibbed, is it, in answering those questions? That is why you hedged and jibbed? A. I hope that I am not hedging or jibbing.

Q. That is why you hesitated so distinctly in answering those questions? A. I am trying to frame answers which I would hope would be truthful and accurate. 10

Q. Is that why you hesitated so long before giving a distinct answer to a simple question? Is that why you hesitated so long? A. No.

Q. Well, what reason did you have for hedging?  
A. I don't believe that I was hedging.

\* Q. Now, you told us yesterday at Page 328 of the transcript, dealing with the situation at the time when you were considering the take-over offer, you said that "so far as ordinary shares were concerned there was by then no reliable market on the Stock Exchange in existence in relation to which in my view you could judge the market value of either of the securities"? A. Yes. 20

Q. Then you went on to say - you went on to refer to the principles that you thought applicable, and the principle you thought to be applicable was to compare the estimated yields - earning yields - per share of the Cumberland side and the FAI side? A. Yes.

Q. Of course, the net tangible asset backing was still relevant, wasn't it, as a material factor in the evaluation of the price which could be fairly offered? That was still a relevant consideration, wasn't it? A. I think I explained that to his Honour yesterday. 30

Q. I don't care whether you explained it to his Honour yesterday, or not. I am asking you the question.  
A. Let me repeat the answer I gave. It is a factor that can be of varying relevance in any particular circumstance.

Q. It can be? A. Yes.

Q. And it was, was it not? A. Yes. But in this case I did not believe so to any great extent. 40

(\* Original Transcript Page 205)

Q. But it was of some relevance, wasn't it? A. It would be of some relevance, yes.

Q. It was relevant when you decided whether to accept the chairman's shares, wasn't it, wasn't it? It was relevant when you decided that, wasn't it? A. It was. It was one of the factors which were taken into consideration. But that was a cash purchase.

Q. A cash purchase? A. Yes.

Q. What you are drawing attention to in that last answer is that there is one offer for the big man and another for the little shareholders? A. No, I am not. Your Honour, if I had been asked for a share exchange basis for Mr. Adler's operation in July I would have offered him 1-for-1 in the ordinaries. 10

Q. It did not occur to you, did it, in July to see whether Mr. Adler would come below his asking price? That did not occur to you? A. No. I assumed he had fixed his price.

Q. Really. And the price, anyway, was so manifestly advantageous that you did not think it worthwhile to endeavour to bargain, is that right? A. He said - 20

Q. Never mind that. Just answer the question that I ask you. You thought that the price was so manifestly advantageous to the company whose interests you were considering that it was not appropriate or worthwhile to attempt to bargain the price down? A. It was advantageous, and I accepted the price.

Q. Will you answer my question? You have not answered it so far. Will you answer it now? You thought that the offer made by Mr. Adler was so obviously advantageous to your company, FAI, that it was appropriate to accept that without attempting to see whether he would move the price down in the course of negotiations? A. Yes. 30

Q. And you will agree with me that that is a striking tribute to the advantageness of the offer? A. Well yes.

Q. Not only did it not occur to you to try and bargain the price down, but not one of your co-directors with whom you were consulting in Mr. Adler's absence even so much as whispered that that might be attempted? A. No one mentioned it, no. 40

\* Q. I come back to what you said at page 328 of the (\* Original Transcript Page 205)

T.E. Atkinson, xx

transcript yesterday. You said "So far as the previous year was concerned - that was the year to 30th June 1974 - there had been a slight advantage in earnings yield on the FAI side as opposed to the Cumberland side." You said that yesterday? A. Yes.

Q. Do you remember saying that yesterday? A. Yes.

Q. So that you looked at the previous year - the year ended 30th June 1974? A. I had done, yes.

Q. When did you do that? A. I did that after the accounts were finalised. 10

Q. After the accounts were finalised? A. Yes.

Q. And when was that? A. I think about the end of September.

Q. You based that statement that there had been a slight advantage in earnings yield on the FAI side on your study of the Cumberland accounts for the year just ended? A. Yes.

Q. That is, the year ended 30th June 1974? A. Yes.

Q. You had the FAI consolidated accounts for the year ended 30th June 1974, did you? A. Yes. 20

Q. And was that a personal study that you made?  
A. It was, yes.

Q. And did you make any calculations in writing?  
A. I think I just did it roughly in my head.

Q. Just did it roughly in your head? A. Yes. I don't think -

Q. Was this because you were still incommoded by your disability? A. Well, I was not attempting to get out exact figures. 30

Q. You were not attempting to get out exact figures?  
A. I wanted to get the picture in my mind.

Q. You were not attempting to get the exact figures on a point that you now concede was most material in connection with the take-over scheme? Is that what you are saying? A. I did not do so at the time to the best of my knowledge and belief.

Q. You did a sum or two in your head, did you? A. If you put it that way, yes.

(Luncheon adjournment)

At 2 p.m.

MR. HUGHES: Q. Mr. Atkinson, just before the luncheon adjournment I was asking you some questions about the calculations you did for the purpose of establishing the proposition to which you swore yesterday at page 328 of the transcript, namely that between 30th June 1974 and the time when you came to consider the formulation of the take-over document there had been a slight advantage in earnings yield on the FAI side as opposed to the Cumberland side. Do you remember I was asking you some questions in regard to that just before the luncheon adjournment? A. Yes. 10

Q. I want to pursue that line of inquiry? A. Yes.

Q. Now, did you receive from anybody, either Mr. Adler or any other director, or from the company's auditors, Gibbings & Webb, any documents upon which you based that view? A. This is in respect of the period after 1st July? 20

Q. Yes. A. No, certainly not from the auditors.

Q. From Mr. Adler? A. Documents? I would have seen, almost certainly, some form of monthly returns from branches and figures in relation to various other establishments and aspects of the company's business, but I could not readily identify them at this juncture. I would have seen some form of monthly returns and figures on various aspects of the company's business. 30

Q. I may have misled you unintentionally when I responded to your last question to me, which was a perfectly fair question to ask. I will come back to that in a moment. But I want to deal with these things in a chronological manner. You said, at page 328 of the transcript yesterday, that for the year ended 30th June 1974 there had been a slight advantage in earnings yield on the FAI side as opposed to the Cumberland side. Do you remember saying that yesterday? A. Yes, I remember saying that. 40

Q. I want to deal with the basis, if I may, upon which you formed that view? A. I was merely referring to the published accounts of the company.

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Q. (Exhibits 3 and 4 handed to witness) Will you look at those documents, please, Mr. Atkinson? I think that Exhibit 3 is the Cumberland report and financial statement? A. Yes.

Q. For the year ended 30th June 1974? A. Yes.

Q. And Exhibit 4 is the FAI report and financial statement? A. Yes, no, it is the other way round.

Q. I beg your pardon. Exhibit 3 is FAI, and Ex. 4 is Cumberland, is that right? A. Yes, that is right. 10

Q. Would you please go to the net profit figure in the Cumberland Holdings account? A. Yes.

Q. If I may, I will hand you up this piece of paper, and I suggest to you that this is a correct appreciation of the earnings yield for ordinary stock in Cumberland for the year ended 30th June 1974? A. Yes.

Q. Will you go to the net profit figure in the accounts of Cumberland and its subsidiaries? A. Yes.

Q. The consolidated net profit? A. Yes.

Q. That figure for 30th June 1974, as per the Exhibit, was \$122,920? A. Yes, it seems to be so, yes. 20

Q. For the purpose of establishing earnings yield of the ordinary shares you would have to deduct the preference dividend, wouldn't you. A. Yes, that is right.

Q. And the preference dividend as per the accounts, or recommended as per the report, was \$24,150, wasn't it? A. Yes.

Q. That left the net profit available to ordinary stockholders of \$98,770, didn't it? A. Yes, that is right. 30

Q. The number of ordinary stock units in Cumberland Holdings on issue at 30th June 1974 was 757,536 units, wasn't it? A. Yes.

Q. So to get the earnings yield per ordinary share the simple thing is to divide the net profit available to ordinary shareholders, namely \$98,770, by the number of ordinary stock units on issue at the relevant date, namely 757,536, is that right? A. Yes, I would accept that.

Q. That gives an earnings yield on ordinary shares of 13.04 cents per ordinary share? A. Yes.

Q. Yesterday you were asked - you said yesterday that the earnings yield for that year for FAI was better than that, didn't you? A. Yes.

Q. Do you adhere to that statement? A. I believe it to be so, yes.

Q. Did you make a careful check at the time you were preparing these take-over documents to ascertain the relative earnings yield of the two companies concerned? 10

A. I did not check the FAI one through with exactitude, because there had been, of course, a major capital reorganisation during the year. There had been a major capital reorganisation during the course of that year, so I did not check that one through with exactitude.

Q. Yes. A. The new capital, such of it as was issued for cash, only became paid up, I think, in the April. So I made an approximation of what I thought the result of that would be in terms of the capital effectively in issue throughout the year under consideration. 20

Q. What was the figure that you got in relation to FAI's earning yield by the ordinary shares? A. My recollection is that it was 14.

Q. I show you another piece of paper, and would you concentrate your attention, when I ask you this line of questions, on this piece of paper and on such material in the FAI report and accounts as you wish to consult. The operating profit of FAI Insurances Limited for the year ended 30th June 1974 as described in the accounts was \$421,052, is that correct? A. Yes, that is correct. 30

Q. And that operating profit did not include certain extraordinary items amount to \$102,305, being the profit on the sale of fixed assets and investments? A. Yes.

Q. And you would agree, wouldn't you, that it was proper to exclude those items from calculation in determining the earnings yield on FAI's ordinary shares for the period under review? A. I cannot recall now whether I actually did so either in whole or in part. I cannot recall that at this stage. 40

Q. Whether you did so in whole or in part, would you

agree that it would be proper to exclude the extraordinary items from calculation in determining the earnings yield of the shares for the year in question?

A. I would normally accept the auditor's views that they were extraordinary items.

Q. You would accept the auditor's views? A. Yes.

Q. And exclude them? A. And exclude them. But if I had a strong view on some particular point I may have decided I should take it into my own consideration.

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Q. Excluding the extraordinary items the operating profit was as is set out? A. Yes.

(Sheet of paper handed to witness in relation to Cumberland Holdings tendered and admitted as Exhibit 78)

Q. I will come back to the second sheet I have handed to you in conjunction with the FAI report and accounts. The number of ordinary shares in FAI Insurances is 4,300,000? A. That is true. As I said, there was this very large increase during the year. But in doing my calculations I did not work on the basis of the units that were actually in issue at the end of the year.

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Q. That is to say, after 30th June? A. At 30th June. What I did, if you would like me to try and describe it, was to take a figure between the previous year's issued capital, which was approximately - which was in fact 2,650,000 units, and adjust it upwards in reference to the additional units which had been issued for cash in, I think, April 1974.

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Q. Not all of which was payable? A. No, it was all paid in that lot. It was payable in full on application. There was in fact a premium, which I took in, too, and on the basis that approximately for a quarter of the year capital had been subscribed in respect of the additional issue I took approximately one quarter of the amount of the additional paid up shares as an addition to the 2,650,000. That was the line I was working on. I tried to make a further adjustment in respect of the premium. There was a premium of 50 cents payable on a 1-for-6 issue on the 2,650,000 shares, so that it became a rather complex calculation. I can't remember the figure that I finally got, but it was a rather complex calculation.

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Q. I just want to be clear about one thing. Didn't

you say a few minutes ago that you did remember that the result you got was a particular figure of about 14 cents? A. The final result I got was 14 cents.

Q. Is that written down anywhere on a piece of paper? A. No, certainly not.

Q. You did this in your head, did you? A. Yes.

Q. It was rather a complicated sum to do in your head, wasn't it? A. I may have tried to do some left hand writing in the course of it, but I am sure that I did not make a formal note of it.

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Q. Will you look at the piece of paper which is in front of you, headed "FAI Insurances Limited ...". It shows the ordinary shares on issue at 30th June as 4,300,000? A. Yes.

Q. So that the earnings for each of these ordinary shares on issue at 30th June 1974 works out at 9.8 cents? A. Had they been on issue throughout the whole year, yes.

Q. What you were seeking to do was to ascertain the earnings yield of the issued shares as at 30th June on the basis that they had been on issue throughout the year? Surely that was what you were seeking to do? A. No, because you would assume that if the extra capital had been received on 1st July 1974 it would have produced an additional income yield throughout the year. I don't know at what rate one could even have assumed that. But I did not attempt to make a calculation on that basis.

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Q. You did not attempt that? A. No.

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Q. Of course, the number of ordinary shares on issue at October 1974, after the bonus issue had been made, was 4,730,000? A. Yes, that is right, and I was taking that as the basis for my estimating for the year to 30th June 1975. But not on the 1974 figures, of course.

Q. If you apply the number of ordinary shares on issue following the bonus to the 1974 figures you would get an even lower sum, namely 8.9 cents, as the earnings yield? A. If you are working on the previous year's profits, yes. But I was not doing so.

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Q. You were in part, weren't you? According to what you said yesterday, you formed the view that the earnings yield of the two companies respectively for



the year ended 30th June 1974 was better in the case of FAI than it was in the case of Cumberland? That was according to the view you expressed yesterday?

A. I'm sorry, we seem to be talking about two different things. I was talking about the following year.

\* Q. Mr. Atkinson, may I remind you? Can I read from your evidence at page 328 of the transcript yesterday, and I will give you the fullest opportunity to correct it? A. I understand what you mean. I think that I have not explained myself properly.

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Q. Can I, in order to be clear about one thing, read from the transcript what you said yesterday? I would like to have this point perfectly clear. Can I read from yesterday's transcript? "So far as the previous year was concerned - that was the year to 30th 1974 - there had been a slight advantage in earnings yield on the FAI side"? A. Yes.

Q. Now that conclusion, if arrived at, must have been arrived at by applying to the relevant earnings - the relevant operating profit of FAI in the first place - to the number of shares - to the number of ordinary shares - on issue in FAI at 30th June 1974. Do you agree with that? A. No, I don't agree when they were issued during the course of the year. At that point of issue throughout the year, of course, I would have agreed.

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Q. Is this a simple calculation for you to make, because you did it in your head before? A. I would take it very roughly on the basis of 3,000,000 shares treated as being effectively in issue for the purposes of the calculation.

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Q. Three million shares? A. Yes, which would have given me approximately 14 cents per share.

Q. Well, is that how you did it? A. Approximately, yes. I can't remember, as I say, whether I took into account, in assessing the number of shares that were going to be treated as being effectively in issue, the effect of the premium issue on the rights issue. I can't remember that.

HIS HONOUR: Q. If you took a quarter you would have a slightly higher figure than 3,000,000? A. Yes. I did not attempt to put this through the computer, or anything like that. What I was doing - I was trying to form a picture in my mind's eye to get, what I called this morning, a broad view, and to the best of my recollection and belief that is the mathematical

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processes that I went through. I must have ended up with an estimate of approximately 3,000,000 effective shares in issue for purposes of the calculation.

MR. HUGHES: Q. Having regard to the importance of the task on which you were embarking, namely, the calculation of what would be a fair offer to make for the minority shareholders in Cumberland, that was a pretty rough and ready mode of calculation, wasn't it? Would you agree with that? A. Well, if the end result had come out to a very small figure I would have thought that probably I should pursue it further. But, as I said, the end result, by taking my rather rough and ready calculations, seemed to show a very decided swing for the following year, and, that being so, I was not particularly worried in terms of the place of decimals, or indeed even one cent, one way or the other.

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Q. On the calculations that you say you did the earnings yield each share - each of the respective shares - was within one cent of each other, wasn't it? That is correct, isn't it? A. Yes, that is right. So that that is why I said in my evidence that I thought there was a slight advantage.

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Q. It was practically line ball, wasn't it. A. Yes, it was pretty close.

Q. Now, let me come to the investigations that you say you made, or the calculations you say you made for the purpose of projecting your forecast of the earnings yield of the ordinary shares in each company for the year ended 30th June 1975. Let us come to that, if we may. First of all, did you commit anything to writing? A. No. Again the answer would be "no", unless I did some scribbling with my left hand.

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Q. Unless you did some scribbling with your left hand? A. Yes.

Q. And, if you did do such scribbling, that scribbling has long since disappeared, has it? A. I would think so, yes.

Q. You took a bullish view of the earnings yield prospect of FAI for the year ended 30th June 1975, did you, when you came to draft the take-over documents? A. Yes, I did.

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Q. Did you think that was justified? A. I believe it was at the time, until -

Q. That was in late October, wasn't it? A. No,

it must have been towards the middle of October, I think.

Q. Towards the middle of October? A. When we were really discussing the terms.

Q. You think it was towards the middle of October?  
A. Yes.

Q. And at that time you thought the outlook was decidedly bullish for FAI as an insurance company, did you? A. For the group as a whole, yes.

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Q. For the group as a whole? A. Yes.

Q. Including its insurance activities? A. Yes, including its insurance activities.

Q. You thought as insurance underwriters that FAI had a bullish outlook for 1975? A. On the information given to me, yes. I accepted the information given to me.

Q. Who gave you that information? A. It was conveyed to me by Mr. Adler.

Q. He was not talking to you gloomily? A. No. In fact, he was a very happy man that year.

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Q. That was in late October? A. That was in late October, yes.

Q. Did you happen to read the October publication of the FAI Reporter, the publication which is now Exhibit 43? A. Yes.

Q. I suppose that that casts some doubts? I suppose it caused a few clouds to loom in your mind, did it?  
A. Well, inflation -

Q. Just answer the question. Did it cause a few clouds to loom in your mind? A. Yes. There was a gloom over the whole economic situation, in my mind.

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Q. A gloom over the whole economic situation?  
A. Yes.

Q. Including the outlook for insurance underwriters?  
A. Yes, certainly.

Q. If you gave any thought at all to Mr. Adler's gloomy prognostications in that issue of the journal the outlook for the insurance industry or for any

insurance company was not bullish? A. No. I think he was referring to the middle and long-term view as inflation proceeded.

Q. Did you read his article? A. Yes, I did read the article.

Q. And having read it, that would cause you to feel anything but bullish about the prospects of FAI as an insurance underwriter, wouldn't it? It would cause you to feel anything but bullish, wouldn't it. A. If I had not known what was going on, yes, it would have done. 10

Q. But Mr. Adler was writing this, you assumed, on the basis that he knew what was going on? A. He was indicating, as I understood it, the industrial trends which could become a serious problem if inflation was not checked. That, as I understood it, was what Mr. Adler was indicating.

Q. Inflation was a serious problem at the time Mr. Adler was writing? A. Yes, it was. 20

Q. That was in mid-October? A. Yes, well, throughout that period.

Q. You did not take an active part in the insurance side of the business, did you? No, I did not take an active part in that.

Q. So that you would rely very heavily on what Mr. Adler had to say about the insurance side of the business? That would be right, wouldn't it? A. Well, I had seen returns from branches on a number of occasions, and they seemed to be bearing out what I was told. 30

Q. Bearing out what you were told by Mr. Adler in this article, which is Exhibit 43? A. No in regard to the progress of the business during the year under review.

Q. Did you regard what Mr. Adler was writing in the item which is Exhibit 43 as a lot of garbage, or did you rely on it as being truthful? A. No, I accepted it as I accepted Professor Friedman, and other leading authorities. 40

Q. He commented strongly on the trading outlook of an insurance underwriter? A. All forms of industry, including insurance underwriting. I do not myself know of any climate of industry that was not writing

some articles about the long-term ranges of hyper-inflation. I don't know of any industry that was not writing in those terms.

Q. It was headed "Inflation equals disaster for insurance industry"? A. Yes.

Q. At that time inflation was running wild, was it not? A. It had got very much higher than previously.

Q. It was running pretty wild in October last year, was it not? A. I can't recall what the rate was. 10

Q. About 16 percent per annum? A. I thought that was a little later in the year. It was somewhere between 15 per cent and 20 per cent.

Q. That will do me. Somewhere between 15 per cent and 20 per cent? A. Yes.

Q. And you were, in common with industry generally, in the grips of the inflationary problem when this article was written by Mr. Adler? A. Yes, that is right.

Q. And I suppose you read this article with mounting gloom? A. It bore out my general assessment of the outlook confronting the Western world. 20

Q. The outlook confronting the Western world?  
A. Yes.

Q. Including insurance underwriting? A. Yes.

Q. Insurance underwriting in Sydney? A. Yes, and elsewhere, too.

Q. Will you not agree - you say you accepted what Mr. Adler said in this article? A. Yes.

Q. Will you not agree that on that basis it would have been the wildest optimism to prognosticate at or about the time this article was written that the earnings per share of FAI were going to go ahead during the then current year, 1975, far more rapidly than Cumberland's earnings? A. No, I would not have thought so. If inflation was going to go on and get worse I would have expected Cumberland, too, to have suffered in the end. 30

Q. But Cumberland was a subsidised industry, wasn't it? A. Yes, it was a subsidised industry. 40

Q. And still is? A. But we did not know to what extent that would continue.

Q. While you may have had a question mark in your mind as to the future of Cumberland's subsidised position, you knew that FAI was particularly vulnerable to the inflationary spiral, didn't you? A. In reference to the insurance climate certainly it could be in a difficult position. But whether within the space of the next nine months or so was a much more arguable question. It not infrequently happens that an inflationary period can cause added prosperity, on a very temporary basis at some stage, and then the chickens come home to roost later on, and disaster follows.

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Q. The very matters that you have alluded to in your last answer would count heavily against forming a bullish assessment on the earning prospects of FAI during the then current year, wouldn't it? A. Not in the light of what had happened up to that time - everything up to that time for the FAI group up to that time. For the group up to that period of time there appeared to be no indication that these long-term problems were going to affect us during the year, and on the contrary, the results were extremely encouraging, as I have said.

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Q. You seriously tell his Honour, do you that you formed the view that FAI was going to go ahead faster in the 1975 year than Cumberland on an earnings basis, notwithstanding the prophecies of doom that Mr. Adler expressed in this article in his house magazine, Exhibit 43? A. I did think so because, like Cumberland, there were other parts of the FAI income-producing group which were going to come "on stream" or increase their profitability substantially during that particular year. For example, our properties. In regard to our properties, we had just completed our main property investments in Singapore, and at long last were getting them let out, so that as against the previous year there was going to be a very substantial rental income which had not been taken into account in the 1974 accounts.

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Q. You do not have the figures before you? You did not have the figures then, and do not have the figures now? A. The lettings were virtually all done then. I think there are only two or three came along later. It was certainly going to make a substantial difference. It was a matter of \$150,000 certainly, in addition to what had been let out over the previous few months. In addition to that, as I adumbrated

yesterday, there was a very large increase in income from the short-term money lending activities which had not been of very great significance in the previous year's accounts. There was a very large increase in this aspect. Our Adelaide properties - we had made some major "restat" arrangements which were coming in during the 1974-1975 period, and in these respects I could see very large increases accruing to FAI, unless, of course, the whole economy collapsed before the end of the year.

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Q. There was plenty of money available in July to pay \$190,000 for the chairman's shares, wasn't there?  
A. Yes there was. We were quite liquid. There were plenty of assets available.

Q. And there was plenty of money available between July and October to be lending out money on highly-risky loan propositions at rates of interest which yesterday you said horrified you? A. I agree with the word "horrified".

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Q. You know very well that the lending propositions - I suppose when you refer to this interest rate as horrifying, you really mean that they were usurious?  
A. Yes.

Q. And they revolted you, did they? A. I was shocked by them.

Q. You thought that they were commercially improper, did you? A. I did not think that they were commercially improper, but I was shocked to think they were prevailing.

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Q. One of the reasons why they were prevailing was because of the high risk that you might not get your money back. That is so, isn't it? A. Not on the ones I personally dealt with.

Q. I beg your pardon? A. Not on the ones that I personally dealt with.

Q. You knew that there was a high element of risk in any loans for usurious rates of interest - rates of interest up to 40 per cent? A. Not in the ones I was dealing with. These were mostly people who were building properties and were hopelessly committed, and suddenly found that their supply of finance was cut off, and what they were doing was giving us the profit that they had hoped to make on the transaction in order to get it completed, and the risk from our point of view was remarkably little.

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Q. And that all increased the available cash, didn't it? It increased the liquid cash? A. It would do so, yes.

Q. So that while in July 1974 it was quite all right, and indeed very pleasant, as I gather from your evidence, to pay \$190,000 for the chairman's shares, it became distasteful, because there was such more, even though horrifying, attractive investment-wise propositions available for the monies you might have used to buy out the minority shareholding at \$1.25?

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A. No, it was not only the minority shareholders.

Q. What is the answer? A. We did not want to have any further operations in shares or stock exchange matters at that time.

Q. You thought it was appropriate to enjoy the fruits of usury rather than pay to the minority shareholders what you had paid for the chairman's shares, is that right? A. Well, I would not have been paying that price at October 1974, in any case.

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Q. Just come to my question. I will take it in parts, if you like. You will agree that in exacting these enormous and horrifying rates of interest on loans you were engaging in usury? You have agreed with that, haven't you? (Objected to; rejected).

Q. You have agreed that during the period that the take-over offer was being formulated your company was lending money at usurious rates of interest. You have agreed with that, haven't you? A. Yes.

Q. Rates of such magnitude as to horrify you?  
A. Shocked me, yes.

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Q. Rates of such magnitude as to shock you? A. Yes.

Q. You used the word "horrify" yesterday? A. I said that they were horrifying rates of interest.

Q. Indeed, there was a lot of money coming - you had a lot of money coming in from these loans granted at usurious rates of interest, didn't you? A. I cannot now recall when the maturities were in fact fixed, but there would be some coming in, I have no doubt, fairly constantly.

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Q. There was plenty of money available - plenty of liquid money available to lend, wasn't there, quite apart from the interest you got? A. Yes, we had no liquidity problem. As I said before, we had no liquidity problem.



Q. You had no liquidity problem? A. No.

Q. So in effect what happened was this. I will come back to the question, and frame it perhaps less extravagantly than before. What happened was this, that your company, at the time of the take-over offer, preferred to enjoy the fruits of loans made at usurious rates of interest rather than pay to the minority shareholders for their ordinary shares what the company had agreed to pay to the chairman for his shares. Is not that what the position was? A. Yes.

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Q. And I suppose you would agree, would you not, that the minority shareholders had a fair claim to receive some justice at the hands of the controlling majority? (Objected to; question withdrawn)

Q. Just going back to Exhibit 43 for a moment, do you remember what Mr. Adler said in the last paragraph?

A. I'm sorry, Exhibit 43?

Q. Yes, Exhibit 43. That is the report by Mr. Adler, despite which you were bullish? A. Could I see it again? It is a considerable time since I saw it. I would like to see it again, if I may.

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Q. Here is the exhibit (handed to witness). A. Yes.

Q. Do you see the last paragraph? Do you remember that last paragraph? If not, remind yourself of it? "The solutions ... solution". Do you see that paragraph. A. Yes.

Q. Did you take that into account when you formed this bullish estimate of FAI's earning prospects for the then current year? A. Yes.

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Q. You discounted that as a piece of hyperbole on Mr. Adler's part? A. The key is "If inflation remains unchecked," and presumably that means over some considerable period of time. That is the key to it.

Q. Can we just get down to tintacks for the moment?  
A. Yes.

Q. Your belief at the time was that the country was in the grip of a vicious inflationary spiral, in common with the rest of the industrial world? A. It was in a bad condition, yes.

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Q. In a bad condition? A. Yes.

Q. Because of inflation? A. Mainly because of inflation, yes.

Q. And as things stood in October 1974 there seemed to be little real prospect of checking inflation within desirable limits. Would you agree with that?

A. Certainly not overnight.

Q. Or within the medium term? A. Well -

Q. Won't you agree? A. I would find that very difficult to forecast.

Q. Did you make any attempt, when you did this rather imprecise calculation in October 1974 about the earnings yield - at that time did you make any attempt to make a forecast? A. So far as the year was concerned, no. So far as the current year was what I was talking about when I gave my evidence.

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Q. You cannot recall one single piece of paper, can you, that was before you that would have given you cause to discard as inaccurate the prognosis of Mr. Adler that he published in Exhibit 43? A. Well, I did not read it as saying anything contrary to what I was at that time working on.

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Q. Let me come back to my question. You did not have before you a single piece of paper with writing on it or figures on it at the time when you made this calculation about future earnings yield which would have caused you to discard any part of Mr. Adler's article from your consideration? A. No.

Q. Or to discount any part of it, would you agree, over medium or long term? A. Yes.

Q. And of course, you were putting this share exchange forward as a medium or long term proposition for investors, weren't you? A. Well, assuming that they would wish to stay in the share market, yes.

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Q. You knew there would be some in that category, didn't you? A. I imagine so, yes.

Q. You imagined so at the time, didn't you?  
A. Yes.

Q. Do you think that one of the deficiencies of candour in the paper that was put out by Mr. Adler and yourself in the take-over documents and the subsequent circulars was that there was a scrupulous omission to make any reference to this article, Exhibit 43? A. No, I did not think so, your Honour.

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Q. And you don't think so? A. No.

Q. You are putting to his Honour, are you, that it was proper for you and Mr. Adler to put out the material relating to this take-over scheme that was put out, without making the slightest reference to Mr. Adler's prophesies of gloom as set out in Exhibit 43? Would you like time to consider that question carefully? A. No, I think I can answer, it, your Honour. If I had wanted to say anything about the dangers, of the long-term dangers of shares, it would have been of shares as a whole and I don't think I would have made any specific suggestion that the FAI shares would be worse than any other share that might exist in any form of enterprise in the western world. My view was and still is, if there is a collapse due to inflation it will not be just the insurance companies that will go down. It will be everything, in other words the cycle of Professor Friedman. So, if I had said anything in any documents, if I did, I would have conveyed that gloomy message.

Q. What you are putting to his Honour then is this, is it, that you thought it fair to minority shareholders that the written material was put out for this take-over without making any reference whatsoever to Mr. Adler's prediction that continuation of inflation would spell disaster for the insurance industry? A. Yes, or to the other dangers of inflation.

Q. Of course you were dealing with the situation where, however rosey the prospects of FAI for the then current year, Cumberland at least had its assets in brick and mortar, weren't you? A. That is true.

Q. Yes, and bricks and mortar, although they may not be very exciting, compared with the risky finance that insurances are providing, at least have the virtue first of stability in price if anything, increase in value consistent with and following the inflationary spiral? A. Well, that has not proved to be the case in other parts of the world. In the United Kingdom, for example, the real property market has suffered almost worst of all.

Q. We are not talking about the real property market in the United Kingdom? A. I have no reason to assume this country would be different.

Q. Have you yourself, or through your family companies, personal investments in land? A. I have, but not made recently.

(FAI Insurance sheet tendered without objection and marked part of Exhibit 78).

Q. I want to invite your attention to some aspects of Exhibit 15 which is the circular of the 27th November 1974? Would you have that in front of you please? (Witness shown Exhibit 15).

HIS HONOUR: It is a letter of the 22nd November 1974.

MR. HUGHES: Q. I do not know whether your pagination is the same as mine. Could I just have your exhibit for a moment? A. Yes.

Q. I want to ask you some questions about the first paragraph at the top of page 2 of your document, the actual exhibit, Exhibit 15. Before coming to the specific terms of that paragraph, may we take it that in view of the fact that you had drafted the take-over documents which constitute Exhibit L, you were well aware of the nature and terms of the conditions specified in the offer? A. Yes. 10

Q. And you had those conditions well in your mind at the time when you helped Mr. Adler to compose this circular which is Exhibit 15? A. Yes. 20

Q. And you personally approved the sending of that, didn't you? A. I did.

Q. Do you see the last sentence? A. Yes, I do.

Q. In the paragraph:

"Naturally we all hope that this would not come about but it is the sort of risk which undoubtedly exists and in fact the directors of FAI feel it so keenly" -

A. Yes.

Q. "that they have had to make their take-over offers on action such as the Minister has indicated not occurring during the period of the bid" 30

A. Yes.

Q. Do you see that? A. Yes.

Q. Will you agree with me that that sentence contains a plain misstatement of the effect of the conditions in the take-over offer? A. No.

Q. You don't? A. No.

Q. What you were telling the shareholders there was this, that if the risk materialised, that the Federal Government would not be able to increase its contributions to nursing homes - A. Yes.

Q. Then that was a fact which, if it occurred during the currency of the take-over bid, would enable the offeror to withdraw the bid? A. Yes.

Q. That is the plain meaning of the last sentence in that paragraph, is it not? A. And that is what it was intended to mean, yes. 10

Q. That is what what was intended to mean? A. The sentence.

Q. And any other interpretation of the sentence would be just nonsense, wouldn't it? A. Well, I certainly would not have intended it to be read any other way.

Q. I will invite your attention if I may to Exhibit 11, the take-over offer. Would you please point out to his Honour if you can the condition in the take-over offer that would enable FAI to withdraw its bid if, during the currency of that bid, the Minister for Social Services decided not to increase government contributions for nursing homes? A. Your Honour, I considered them and with respect I still do consider that paragraph 9(i)(b) of the offer was framed in a way which would include just such an event occurring. 20

Q. Do you know the plain meaning of words? (Not answered).

HIS HONOUR: I do not think you need ask that question, Mr. Hughes. (Question withdrawn). 30

WITNESS: I could not myself have thought of anything that would materially have prejudiced the future carrying on of Cumberland, of its future activity in the field of geriatric nursing homes and private hospitals more than the cutting off of the contributions or the cutting down of the contributions on which our success depended.

Q. Would you permit me to read to you, and you tell me if my reading is inaccurate, the substance of 9(i)(b), leaving our 9(i)(a). Do you follow? A. Yes. 40

Q. 9(i)(b) reads this way, doesn't it:

"The offer is subject to the following conditions, namely that between the date of this

offer and the date on which the offer has ceased to remain open for acceptance, (b) no events shall have occurred or appear to be likely to occur by reason of any voluntary act of FAI which would prevent or materially prejudice the future carrying on by Cumberland of its principal activity in the field of geriatric nursing homes and private hospitals".

That is what it reads, does it not? A. Yes.

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Q. And will you agree it is as plain as daylight, isn't it, that if the Government should decide during the currency of the take-over bid either to reduce or not to increase its financial support for nursing homes, that would not be an event that occurred by reason of any voluntary act of FAI? A. Of course not. If it had been by reason of a voluntary act of FAI then the conditions could not have applied in any event.

Q. You wrote this out, didn't you? That is your very own composition, isn't it? A. Yes, this is exactly what I am saying, if FAI had been responsible for the Minister's action then they could not plead the condition of the withdrawal from the date but if the Minister did it without any voluntary act of FAI then the condition, I believe, would have applied.

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Q. Would not apply? A. Would have applied.

Q. Would have applied? A. I am sorry.

Q. Mr. Atkinson, let us read it again? A. Yes.

Q. Before we do, would you not agree that if the Government, without any prompting from FAI, said, "No more help for nursing homes". A. Yes?

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Q. That would be an event that would materially prejudice the future carrying on by Cumberland of a nursing home business? A. Quite.

Q. But if that happened without any prompting or intervention by FAI it would not be an event that would occur by reason of any voluntary act of FAI, would it? A. Of course it would not and if it was not by reason of any voluntary act of FAI, FAI could not rely on the condition.

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Q. But the only events that came within this condition as it was drafted by you were events that occurred by reason of any voluntary act by FAI that

would materially prejudice the carrying on of nursing homes? A. Those were the only events ....

HIS HONOUR: Q. Could you repeat that? A. I am sorry, I said no events, not events which have occurred.

MR. HUGHES: Q. Look - A. I am sorry, we must be at some misunderstanding of the English language, sir. I still maintain I said exactly in this condition what would have come within the ambit and the sentence of the letter of the 22nd November.

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Q. What you were saying in the letter of the 22nd November was this, was it not, if the Government reduces subsidy to nursing homes during the currency of the offer - A. Yes.

Q. There is a condition in the offer inserted by the directors because of their grave concern for this eventuality which will enable the directors of the offeror to withdraw the offer? A. Yes.

Q. Well, do you suggest to his Honour that condition 9(i)(b) is aptly drawn to produce that result?  
A. Well your Honour, I say yes.

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HIS HONOUR: As this is a dispute only on interpretation, perhaps one matter might be cleared up. There are two antecedents by reason of any voluntary act of FAI. The witness may be reading it differently from you, Mr. Hughes, in that respect although it is not the way he has put it. He has put it, because there is a no event; the condition happens if there is an event. The condition is only drawn if there is no event so you are on different paths, it seems to me, and I wonder if you could clear the two points separately.

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MR. HUGHES: Perhaps we are so far apart it is difficult for me to appreciate where the middle ground may lie.

HIS HONOUR: Q. Mr. Atkinson, when you read (b) are you reading it so that the words "by reason of any voluntary act of FAI" are restricted only to events which appear likely to occur or do you read it as referring to the two antecedents, events which have occurred and events which appear likely to occur?  
A. Yes, it should have been relating to them both, your Honour.

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HIS HONOUR: That is probably the grammatical meaning,

and the way I think Mr. Hughes has put it.

MR. HUGHES: Yes.

HIS HONOUR : Q. Now, having got that out of the way, the second question is, on the interpretation, the offer is subject to the following condition and then in (b) that an event does not occur? A. That is right, that is right. If it occurred then the condition applied. That was what was intended.

Q. But if the events which must not occur are only events which have occurred or are likely to occur by reason of voluntary acts of FAI, it is a fairly narrow prohibition of events, is it not? A. It is your Honour, yes. 10

Q. The difficulty that Mr. Hughes is putting to you is that the intervention of the Government Minister changing policy could hardly be described as an event which occurred or appeared likely to occur by reason of any voluntary act of FAI. The words, he is simply putting to you, are inappropriate to cover a governmental intervention. What do you say to that? 20

A. The words were certainly intended to cover anything that did not occur by reason of any voluntary act of FAI, and a government intervention must with respect be one such event unless we deliberately instigated it.

Q. You appreciate Mr. Atkinson; I want you to be clear, he put to you that the only events which are prohibited which may bring the condition into operation, which events which arise by reason of voluntary act of FAI any government intervention could never therefore bring it into operation. Do you see what is being put? A. I see what is being put. I don't believe I put that. I think it disregards the words "No - " 30

Q. No, that regards the prohibition, no event in a specified time? A. If your Honour rules against me, I have made a mistake in drafting.

MR. HUGHES: Q. Well, at all events, whether your approach or the approach that I have suggested to you in my questioning is correct, whichever is correct, would you not agree on the assumption that the approach I have put to you that the interpretation of 9(i)(b) is correct, that the statement in the last sentence of that paragraph on page 2 of Exhibit 15 to which I have referred you is misleading, although I make it clear that I am not putting to you at the moment that it 40



was initially misleading; on the assumption that I put to you? A. If your assumption is correct, sir, then it must be misleading. I accept it.

Q. I want to go to another exhibit, Exhibit 18. Have you got Exhibit 18? A. Yes.

Q. Exhibit 18 was a circular which was prepared as a reply, was it not, to Washington Soul's circular of the same date, 27th November, Exhibit 17? A. Yes.

Q. One of the main matters of complaint in that circular was expressed - (witness handed Exhibit 17) 10  
One of the main complaints made in Washington Soul's circular, Exhibit 17, was that the Chairman's family and his family companies got a \$1.25 in cash without having been put to the shift that the minority shareholders were being put to at that stage to accept a one to one share exchange, is that right? A. Yes.

Q. Will you agree that Mr. Adler set out in the circular Exhibit 18 to justify the share offer made in the take-over bid, one for one exchange, in the light of the fact that the Chairman and his companies and his family had on the face of it done so very nicely at \$1.25 cash? A. I think we were more concerned to reply to the allegations. I don't think the question of justifying the offer was really - 20

Q. Well, you were concerned to justify the difference in substance between the offer that was being made to minority shareholders on the one hand and the cash price that Mr. Adler and his family had got on the other. That was in part what you were setting out to do? A. I did not see it that way at the time. I was more anxious to reply to the specific statements in the letter. 30

Q. Could you just put the letter away for a minute? If you were to refer to a stockmarket price of a share as a ruling market price, those words would convey the impression, would they not, that there was a real market? A. Looking at them, I can concede that that could be so.

Q. Looking at them now? Exhibit 18 was most carefully drafted by you, wasn't it? A. Within the limits of the time available, which was very short, sir. It was done in a considerable hurry. 40

Q. You did not have to get it out the same day, did you? A. Well they were always with respect tactics in these take-over situations, and delays can frequently mean that the reply has very little effect on the recipients.

Q. Well now, you say that tactics dictated that the reply which is Exhibit 18 should go out, to Exhibit 17, on the same day, namely the 27th November? A. Yes.

Q. What you were really doing then in so far as this circular Exhibit 18 contains any inaccurate statements, was to sacrifice accuracy on the altar of tactics, would you agree? A. At the time I did not believe we were doing so.

Q. That is in fact, in effect, what you were doing, isn't it, sacrificing accuracy on the altar of tactics? Do you agree? Whether you intended that or not, that is the effect of what you did, isn't it? A. It could be so, sir. 10

Q. It was so, wasn't it? (Not answered).

Q. It was so, wasn't it? A. I will accept it.

\* Q. Do you remember the evidence you gave yesterday about Exhibit 18? Let me read it to you (page 336 referred to). You were being asked by your own leading counsel about Exhibit 18, about halfway down the page, my learned friend Mr. Bainton asked you this question: 20

"Was it" - that is the circular of the 27th November, Exhibit 18 - "discussed amongst any directors? A. On this occasion Mr. Belfer and certainly Professor Wilson joined in on the discussions. I cannot recollect now whether either of the other two was also present."

Do you remember giving that answer? A. Yes, sir.

Q. My learned friend then went on to ask you: 30

"Did those two persons and Mr. Adler and yourself approve of the sending out of the circular?"

remember that question? A. Yes, I do.

Q. "A. Yes, it was quite substantially amended from my first draft. After discussion it was agreed by us that it should be sent out in the amended form."

Do you remember that answer? A. Yes, I do.

Q. "Q. Were there any statements in it which in your opinion were misleading?" 40

(\* Original Transcript Page 210)

Remember that question? A. Yes, I do.

Q. What was your answer? A. I said, "To the best of my belief at the time, no" I think.

Q. Well, did you? Let me read from the transcript. I will read the question again? A. Yes.

Q. "Q. Were there any statements in it which in your opinion were misleading? A. No."

Do you want to revise that answer that you gave yesterday afternoon to your own counsel in the light of the answer that you have just given to me to the effect that there was misleading material in that circular? A. Yes, your Honour, on further consideration I would like to revise that answer. 10

Q. But your explanation to me for the fact that this misleading statement appeared about a ruling market price was that it was all done in a terrible hurry. That is your explanation this afternoon, isn't it? A. It was all done certainly within the course of half a day. 20

Q. Half a day? A. Yes.

Q. And half a day's consideration was not enough to make you, as a trained lawyer and a trained commercial man with vast experience - on your account - to understand and appreciate the misleading nature of the suggestion conveyed in the use of the words "ruling price"? Is that what you are telling his Honour? A. At that time, your Honour, yes.

Q. Well, will you agree that quite apart from anything else, for you - with your experience - to have approved of the insertion of that misleading statement about ruling price in that circular was negligent? A. In the legal sense, your Honour, I would not know the answer. 30

Q. Careless? A. Careless, I will now accept.

Q. Grossly careless, would you agree with that, bearing in mind the vast range of commercial experience and legal experience that you took time to tell his Honour about yesterday? A. I can do no more except than accept that I was in error. 40

Q. That is not an answer to my question, is it? I asked you whether you will agree now that your accountancy of that grossly misleading statement

wrapped up in the use of the words "market price" was, having regard to the vast experience to which you deposed yesterday, grossly negligent on your part?

A. I would not have thought grossly, your Honour, but I suppose it is a matter of opinion.

Q. It was reckless, wasn't it? A. I would not have thought so, again.

Q. It was reckless, wasn't it, because as you have already agreed you were sacrificing accuracy on the altar of commercial tactics? What is your answer to that? A. I cannot see that that makes it reckless.

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Q. You have a pretty shrewd idea that it might, though, don't you? (Not answered).

Q. Don't you? A. I cannot say so, sir, no.

Q. Look, you were well aware at all times during 1974, that there was no ruling market for Cumberland shares, were you not? A. I would not say no ruling market in that sense.

Q. No real market? A. No real market, this is what I would accept.

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Q. And you have already accepted in that situation to talk about a ruling market for the shares in Cumberland was both inaccurate and misleading, you have agreed with that, haven't you? A. It was inaccurate.

Q. And misleading? A. I beg your pardon, no, I have got it the wrong way around. It could be misleading. It was technically accurate.

Q. Technically accurate, what, because Mr. Adler had been doing a bit of window dressing? Is that what you were saying? A. Because there were ruling prices.

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Q. Look, come to my question. You say it was technically accurate because of Mr. Adler's pretty little exercise in window dressing; is that what you were saying? A. There was a ruling stock exchange price in that sense.

Q. It was not a real price, was it? It was not a real price? A. It was real again to the extent that shares were bought at that price on the Stock Exchange.

Q. Initiated by selling quotes of Mr. Adler's in the first place and then by buying quotes by Mr. Adler in the second place? That is what you are referring to isn't it? A. I would accept that.

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Q. Wouldn't you agree that it is just a mockery of truth in that context to justify a cash payment to Mr. Adler's companies for their shares of \$1.25 on the basis that there was a ruling market price for the shares? A. I have to accept that it was misleading.

Q. And grossly so? You must agree with that musn't you? A. Certainly much more than I should wish to have been responsible for.

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Q. Do you understand my question? A. I do.

Q. Was it grossly misleading? A. In my opinion no but certainly much more misleading than I would have wished to be responsible for.

Q. Are you ashamed of your responsibility for that misleading statement? A. I regret it.

Q. Are you ashamed of it? A. I would only be ashamed, your Honour, if I had done something with the purpose and intention of being dishonest and dishonourable.

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Q. Look, the facts within your knowledge at the time when that circular was written screamed loudly to you that that statement about ruling price was a misleading statement, didn't they? A. They do now.

Q. Yes, and they did then, didn't they? A. They were not within my consideration the way we are now dealing with the matter, sir. Had they been, I would not have put it in this sense.

Q. Have you got your original draft of that circular anywhere in your possession? A. No.

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Q. You have torn it up? A. I have searched through the office. There are no drafts of any of the circulars.

Q. Was that statement in your original draft, about ruling price? A. I cannot now recollect, sir.

Q. If it was, that statement would have been misleading to your knowledge when you penned it, wouldn't it? A. It should have been.

Q. Will you deny that that statement about ruling price was in your circular as drafted in the first instance by you? A. I cannot recollect, sir.

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Q. Mr. Adler might be able to help us about that, mightn't he? A. He might.

Q. And Mr. Belfer might be able to help us, mightn't he? A. He might.

Q. And Professor Wilson might be able to help us, mightn't he? A. He might.

Q. And I suppose at this stage you may be feeling as if you need a bit of help? (Not answered).

HIS HONOUR: I do not think it is necessary to put that question, Mr. Hughes. 10

MR. HUGHES: Q. Going on with Exhibit 18, the next sentence reads:

"There had in fact been unsatisfied ordinary stock buyers at \$1.25 on the Stock Exchange for several days both before and after the date on which the sales referred to by Mr. Milner took place"

A. Yes.

Q. Did you draft that? A. Again, I cannot now recollect, your Honour. I do recollect there were considerable alterations made to this letter after my first draft but I cannot testify to what they were. 20

Q. But whatever alterations were made you ultimately approved of them, didn't you? A. I did, yes.

Q. Because this circular was regarded by you and your co-directors as of critical importance, wasn't it?

A. To the success or otherwise of the offer, no your Honour. It was regarded as being very right and proper to reply to allegations that had been made against members of the Board in the letter under reply. There was very little, with respect, about the offer in it. 30

Q. Mr. Atkinson, you have just said that it was considered right and proper to reply to the allegations made, didn't you? A. I did, yes.

Q. And may his Honour take it that you considered it right and proper to reply to the allegations made because of their gravity? A. That, and the fact that we believed there would be great publicity given to them. 40

Q. And those considerations that were in your mind at the time made it incumbent upon you to have a strict regard for truth unless you were to embark upon a fraudulent answer; will you agree? A. Yes.

\* Q. And you appreciated did you not at the time that unless you and your co-directors were to embark upon a fraudulent tricky answer it was imperative to be scrupulously careful to tell the truth? A. I believe we acted too hastily.

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Q. I beg your pardon? A. I believe we acted too hastily.

Q. Well, that is not an answer to my question. I think you know it is not an answer, don't you? You know that was not an answer to my question, don't you?  
A. Well, sir, I would at all times want to have strict regard to the truth.

Q. Let me come back to my question. Will you agree so far you have not answered it? A. Could I have it again please?

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Q. Yes, with his Honour's leave. (Question marked with \* read). A. Yes.

Q. And with that in your mind you were not scrupulously careful to tell the truth, were you? A. I believed at the time that we were doing so.

Q. That is not an answer to my question. A. Looking at it now, I can see that it could appear that we were not doing so.

Q. Will you not agree that the minority shareholders are entitled to complain of your conduct in departing from the truth in this circular, Exhibit 18? (Objected to).

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Q. I will withdraw the question. I will put it this way, if you were a minority shareholder and you found out that statement in which reference was made to the real market price was untrue, would not you feel indignant? A. Yes.

Q. And justly indignant in your view? A. Yes.

Q. And would not you feel, if you were a minority shareholder, and found out you had been the victim of that untruth, you would have no confidence in a board on which one or more of the members was the perpetrator of that untruth - (Objected to; pressed; question re-framed).

Q. If you were a minority shareholder and you found out that two of the directors of the company in which you were such a shareholder, had made you the recipient of this particular untruth, would not you feel entitled to take the view that these men had no place on the board of the company in which you were a minority shareholder? A. I would want an explanation from them, certainly.

Q. Therefore you had offered that information because you were in a hurry, sacrificing accuracy and truthfulness on the altar of tactics, that is so, is it not? A. And I have said that we were not viewing the words in the way in which they are now being put forward to us. 10

Q. You were viewing the words through the reference to the window dressing operation? A. And the knowledge that the quotes were there and the trading was being done.

Q. You knew why the quotes were there and how they came to be there? A. Yes. 20

Q. What you are saying is when you referred to the real market, you were referring to the activity of a window dressing character that made no real market at all, that is what you are saying? A. Referring to the initial quotation?

Q. Would you come back to the question. You used that phrase and you were using it referring to the window dressing operation that made no real market at all? A. I do not accept it made no real market at all. I have said that shares were traded on these figures, at the figure of \$1.25. 30

Q. Traded by the instigation of Mr. Adler, the seller in the first place, followed up by his activities as a buyer in the second place? A. Traded, yes, following these things; traded is a real trade.

Q. As a real trade in the market made by a selling quote placed by the ultimate buyer? A. Yes.

Q. That is a real trade to you? A. Provided that the buyer is prepared to buy at that price, it must be a real trade. 40

Q. Do not you think it is a sham? A. Not if the contract is carried out.

Q. I will come back to my hypothetical question,



that is as an indignant shareholder in Cumberland Holdings, a minority shareholder, you said if you had found out that you had been the recipient of that attempted untruth in Exhibit 18, you would have felt indignant and you would have demanded an explanation from such directors on the board of Cumberland Holdings as had lent their names to the assertion of that untruth. That is what you said? A. Yes.

Q. You would feel, would not you, duty bound to make that explanation as soon as the fact that the statement was an untruth had come to your notice? 10

A. As a director you mean?

Q. Yes, of Cumberland Holdings? A. If my attention had been drawn to it I would have done so.

Q. When was your attention first drawn to it? A. To tell you the truth I only really gave this serious consideration during the course of my time in the witness box.

Q. Do you mean to say in all the studies of the document since the case began, it never dawned on you that statement about the real price was a gross untruth? 20

A. No, I was prepared until then to accept this was a correct statement of the price on the board.

Q. However, you withdraw from that position now, don't you? A. I have done so and I have said I regret it.

Q. You told us of the amount of consultation, over half a day, that went into the final formulation of the document now Exhibit 18. A. I did not mean more than half a day. 30

Q. You told us the consultation that led to the final formulation of Exhibit 18 went on after about half a day? A. No, not the consultation itself. From the time I first attempted to get the preliminary draft out, until the matter was finally discussed, I should think that took place within the space of half a day.

Q. When did you last see the preliminary draft? A. I would have thought on my normal practice it would have been torn up when the final letter was settled and despatched. 40

Q. Did you give a copy of the preliminary draft to Mr. Adler? A. I probably only had one copy made.

Q. Surely you made a circular draft? A. Normally

it would go to him first and we would have a discussion and if he saw anything of immediate importance we would have a second draft which would go to the other two members. I cannot now say for certain whether that is what happened on this occasion.

Q. You went on in this letter, Exhibit 18, to say there had in fact been unsatisfied ordinary stock-buyers at \$1.25 on the Stock Exchange for several days both before and after the date on which the sales referred to by Mr. Milner took place. Was that a considered statement? A. I do not think at that stage that I myself had seen the records of all the transactions. I think it was information that was given to me.

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Q. By whom - Mr. Adler - it was Mr. Adler, was it not? A. No, I think it may have been one of our brokers, Mr. Messara.

Q. Was it Mr. Messara? A. I would not swear to it.

Q. You are not trying to shelter Mr. Adler from the witness box are you? A. Not to my knowledge.

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Q. You are not by your answers trying to shelter Mr. Adler from having to walk into the witness box? A. I think it would take more than anything I could do to dissuade Mr. Adler in such circumstances.

Q. I am very pleased to hear that. Did Mr. Adler before this sentence went into the final form of Exhibit 18, the one I have read, tell you in substance there had in fact been unsatisfied ordinary stock buyers at \$1.25 on the Stock Exchange for several days, both before and after the date on which the sales referred to by Mr. Milner took place? A. I am sure he would have done but I cannot remember if this was also conveyed to me by one of the brokers.

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Q. Did you take any steps yourself, independently, to check all the details of the transactions referred to by reference to the document? A. I think I had seen the various transfers that came through from the market.

Q. Would you agree with this, you regarded the statement "There had in fact been unsatisfied ordinary stock buyers at \$1.25 on the Stock Exchange for several days both before and after the date on which the sales referred to by Mr. Milner took place" as an important statement in the rebuttal of one of the charges contained in the circular that Exhibit 18 was answering?

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A. It seemed relevant. I did not really attempt to assess its importance.

Q. That statement was untrue, the statement in the sentence I have just read to you? A. Could I refer to the Stock Exchange transaction list?

Q. Yes, by all means? A. I cannot recall what the situation was.

Q. (approaching) I show you Exhibit 45, the page headed June 1954 (sic). Do you see the entries "buyer and seller" opposite 24th June. A. Yes. 10

Q. When you were composing the circular that has become Exhibit 18, you knew that Mr. Adler on 24th June had placed a selling order for 4,000 Cumberland ordinary shares at \$1.50 on behalf of Fire and All Risks? A. I did not know the details of the order. I knew an order had been placed.

Q. By Mr. Adler? A. Yes.

Q. It was a selling order? A. Yes.

Q. At \$1.50? A. I do not know. I knew it was before 30th June. 20

Q. You knew when composing that circular, Exhibit 18, the circular of the 27th November, that it was a selling order placed as you have said by Mr. Adler prior to 30th June at \$1.50? A. Yes.

Q. You knew at the time you came to compose that circular now Exhibit 18 that Mr. Adler had prior to 30th June placed that selling order with a view later to coming in with a buying order of \$1.25? A. I think in November I did not even know that the selling order had preceded the buying order. The only thing I recall being told up to that time was that buying and selling orders had been placed on the board before 30th June. The figures were quoted as \$1.50 and \$1.25. 30

Q. Have you had any difficulty in understanding in court the questions I have been putting to you over the last three or four minutes? A. No.

Q. Will you agree in answer to a quite distinct question by me, the meaning of which there could be no doubt, you told his Honour you knew when you composed the circular that Mr. Adler had prior to 30th June placed a selling order on behalf of Fire and All Risks at \$1.50? A. Yes. 40

Q. You do not want to qualify that answer in any way? A. No.

Q. You appreciated, did you not, having regard to the purpose of the so-called, charmingly called window dressing operation to which you referred yesterday, the operation in its nature required the placing of a selling order before the placing of a buying order? A. I would have thought that was for one's brokers to advise one on.

10

Q. The purpose of the operation was to create an apparent price for the shares in response to a selling quotation, was it not? A. Yes, it would certainly appear to be logical that the selling order precede the buying order.

Q. All I am putting to is this was apparent to you as a man of a business and commercial sense, presumably, when composing the circular of the 27th November, Exhibit 18? A. It must have been so.

Q. Going on from there will you agree that when you composed that circular, Exhibit 18, you were aware that following the placement of the selling order by Mr. Adler prior to 30th June, a sale had taken place at \$1.25 on the 2nd July or some date soon after 30th June? A. Yes, I think one or more did take place but the dates I certainly did not know.

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Q. Of course it follows from the answers you have given that you knew when you composed that circular that the sale eventually took place followed by other sales all triggered off - or triggered off by the initial selling quotation placed by Mr. Adler, \$1.50, prior to 30th June. You knew that when you composed the circular? A. I do not think that was the point I was thinking of, that I had in mind at all. The selling price being placed first was of course, as you say, for the purpose of establishing a market, a market quotation. Once that buyer had come in at \$1.25 it would presumably have been quite possible for the selling quote to be taken off the market.

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Q. That was hardly likely when the buyer was Mr. Adler himself, would not you agree? A. No. He has frequently bought, not frequently, but on occasions bought when stock has been coming out as a result of prices being placed but whether he bought when the seller's price had been put on first, I could not say.

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Q. You knew when you sat down to compose that circular of 27th November, now Exhibit 18, that

Mr. Adler's purpose in this market transaction, starting in late June and going to July, was to establish a market price on the shares as near as may be to the net asset backing, the net tangible asset backing?

A. Well, the net tangible asset backing and reasonable in the context of the conditions then prevailing.

Q. Will you not agree, having regard to the knowledge you say you had when you sat down with your co-directors to consider the formulation of this circular, you just must have realised that in composing the sentence that there had in fact been unsatisfied ordinary stock buyers at \$1.25 on the Stock Exchange for several days both before and after the date on which the sales referred to by Mr. Milner took place, that you were treading on very dangerous grounds? 10

A. No, I did not think that.

Q. Do you think you were treading on safe grounds, having regard to your over-riding duty to tell the truth? A. I believe that shares would have been sold at that price and would have been bought at that price and therefore that sentence was unexceptional. 20

Q. And the shares that were bought at \$1.25, following the placement by Mr. Adler of his selling quote at \$1.50 were bought by Fire and All Risks? A. I think some were originally bought in other names but were subsequently transferred.

Q. Bought by Falkirk? A. I believe they were but I would not swear to it.

Q. You knew at the time you composed the circular that shares that had been bought on the market, had been bought by Fire and All Risks or some company acting on its behalf? A. Basically that was what always happened. 30

Q. You knew at the time you composed the circular that the only buying quotes at \$1.25 that had been put on the market, were buying quotes of Fire and All Risks or someone on its behalf. You knew that? A. Or on behalf of one of the other associates. I cannot say. I think there were either two or three contracts which were originally taken up in other names and subsequently included in the list that were transferred over following the board resolution. 40

Q. You knew in whatever names the shares were bought, they were all bought in the interests of Fire and All Risks? A. Provided we accepted the purchases through Mr. Adler, yes.

Q. I am talking about the market purchases? A. Yes, I think two or three were included in the figures taken over as a result of the board's resolution. That is my recollection. I would not swear to it.

Q. Does it not follow from what you have said that you knew at the time you helped to compose that circular that on the market, that is on the Stock Exchange, there was only one buyer in effect for the shares?

A. Yes, I accept that. That has always been the case.

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Q. And therefore would you not agree in the light of that knowledge, it follows as night follows day that the statement that there were or had been unsatisfied ordinary stock buyers at \$1.25 on the Stock Exchange for several days both before and after the date on which the sales referred to by Mr. Milner took place, was just untrue? A. Not on the facts as I understood them at the time.

Q. On the facts as you understood them, you knew there was only one buyer on the market, on the Exchange? A. Yes, I have accepted that.

20

Q. That says there were buyers on the market?

A. I am sorry, one sometimes refers to a company as buyers.

Q. Is that your explanation for this statement that there were unsatisfied buyers on the market? A. I do not know how the phrase came to be used.

Q. That statement was to create the impression in the minds of the shareholders, reading it, that there were buyers other than Fire and All Risks in the market, not being able to get shares at the time when Fire and All Risks was a buyer in the market?

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A. Your Honour, I cannot say whether they might have interpreted it that way but I certainly did not intend to create any such impression.

Q. Will you agree that the words are capable of conveying that impression - reasonably? A. It could be read as reading more than one unsatisfied buyer.

Q. And could reasonably be read in that sense?

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A. Yes, I suspect it could be read reasonably either way, the way I have said previously and this way.

Q. Did you appreciate the ambiguity when you consented to the final formulation of that document?

A. I do not recall this particular point ever

T.E. Atkinson, xx

striking me or crossing my mind.

Q. Did you appreciate it was ambiguous? A. No, I do not think I did.

Q. But after reflection do you not think you should have? A. If I had been questioned as closely as I have been over the last day I would have done so, but things looked very different at the time.

Q. At the time you were intent upon the objective of winning the paper war? A. We were intent on replying to the charges.

Q. And very serious charges they were too? A. We felt them in that sense.

(Witness stood down)

(Further hearing adjourned to 10.00 a.m.  
Thursday, 23rd October, 1975)

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
EQUITY DIVISION

No. 707 of 1975.

CORAM: BOWEN, C.J.  
in Equity

CUMBERLAND HOLDINGS LIMITED & COMPANIES ACT

SEVENTH DAY: THURSDAY, 23RD OCTOBER, 1975.

THOMAS ERIC ATKINSON  
On former oath:

HIS HONOUR: You understand you are still on your former oath, Mr. Atkinson? 10

WITNESS: Yes.

MR. HUGHES: Q. Mr. Atkinson, had the take-over offer been made at the end of September and not, as it was, at the end of November or towards the end of November, would you have given particulars to the shareholders of Cumberland of the transactions involved in the sale in July of the chairman's shares? A. It would have been a Stock Exchange listing requirement, and I would have done so. 20

\* Q. You told us yesterday, at page 375 of the transcript, that from the point of view of candour in the take-over documents and the circulars you and Mr. Adler might have done better all round. Do you remember saying that, in effect? A. Yes, your Honour, looking at it now.

Q. And of course, at the time you were preparing these documents you were forcefully aware, in your own mind, were you not, of the need for candour? A. I always hope to be candid. 30

Q. That is not an answer to my question. Just answer my question, will you please? A. It must mean "Yes".

Q. Yes. And, with the need for candour in your mind, there was no reason not to be candid, was there?  
A. Not that I can think of.

Q. Would there ever be a reason for not being candid? A. I would hope not.

Q. Now, you will remember that yesterday I asked you

(\* Original Transcript Page 238)



about a number of points in some of the circulars. You remember Exhibit 18, where there were departures from accuracy or truth. I asked you particularly about Exhibit 18. Do you remember this line of questioning?

A. Yes, I do.

Q. I would like you to tell his Honour, if you would, if, apart from matters upon which I cross-examined you yesterday, there are any statements in either the take-over documents, Exhibit 11, or the various circulars that were sent out during the course of the paper war that were misleading? -

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HIS HONOUR: That would be Exhibits 11, 15 and 18?

MR. HUGHES: Yes.

HIS HONOUR: Perhaps the witness could have those documents?

MR. HUGHES: And of course there are others, but I will come to them later.

HIS HONOUR: I think the witness' mind ought to be directed to all of them.

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MR. HUGHES: I respectfully agree. Perhaps I can give the witness, or your Honour's associate can give the witness Exhibit 11, and Exhibits 15, 18, 19 and 31. (Exhibits handed to witness).

Q. Do you have all those? A. I have the take-over documents. Yes, I have them. The take-over document, so far as I can see as of now, complies with all the necessary requirements.

MR. HUGHES: Q. Complies with what? A. All necessary requirements, and I would not seek to alter it.

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Q. Or fault it in terms of candour? A. No, I would not seek to alter it.

Q. I will come to Exhibit 11 specifically. A. Yes.

Q. Including the letter that went out under Mr. Adler's signature. Is there anything in those documents -

HIS HONOUR: If he goes through them, after he has done that he had better answer your original question.

MR. HUGHES: I am directing specific questions to Mr. Atkinson in relation to Exhibit 11.

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HIS HONOUR: After he has answered your earlier question?

MR. HUGHES: I think it is too much, frankly, on reflection, to put to the witness a whole lot of documents and ask him if there is anything in any of them.

HIS HONOUR: It is narrowed down to Exhibit 11 at this moment, is it?

MR. HUGHES: Yes.

HIS HONOUR: Q. Mr. Atkinson, it is narrowed down to Exhibit 11 at this moment. Do you understand that? 10

A. Yes.

MR. HUGHES: Q. I want you to consider, to the extent you feel necessary, for the purposes of answering my question, Exhibit 11, and the question I am going to ask you is this: Is there anything in that document or those documents constituting Exhibit 11 that you now think was misleading or lacking in candour?

A. To the best of my belief, no.

Q. You have given the documents such consideration as you deem necessary for the purpose of answering that question, have you? A. Yes. 20

Q. Will you agree, Mr. Atkinson, that between the date of the sale of the chairman's shares on 12th July and the date of the take-over offer on 20th November the all ordinary index of Sydney Stock Exchange dropped by approximately 16 per cent? A. I have not checked the figures myself, but if they are put to me I would accept them on an overall basis.

Q. What? A. I would accept that on an overall basis of the index as a whole. 30

Q. And during that time, of course - that is, from 12th July to 20th November - there were virtually no market dealings - sales, that is - in Cumberland shares on the exchange, were there? A. That is true.

Q. The market was dead so far as sales of Cumberland shares were concerned during that period, wasn't it?

A. The market was dead for Cumberland shares and most other shares, too. This was the point I was trying to get across, that there was not any longer a market that one could rely on. I referred to it as the conditions on the exchange being abnormal and unrealistic during recent months. That is really all I was getting at. It was in fact almost a dead market. 40

Q. A dead market? A. Yes.

Q. Of course, the fact was so far as Cumberland shares were concerned that except for the July market transaction the Cumberland market always was dead, was it not, or virtually dead? A. It had been for several years.

Q. Several years? A. Yes.

Q. So that to refer to abnormal market conditions as a reason for not disclosing the July transactions or any share market transactions in Cumberland shares was misleading, wasn't it? Do you understand my question? A. I understand the question, but it was not what I was directing my attention to when I first drafted the letter.

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Q. I don't mind what you were directing your attention to. Will you agree, in the light of what you have just conceded in relation to what I shall describe as the deadness of the market in Cumberland shares before July and after July, that reference to abnormal conditions in the market as a reason for not dealing with the transactions on the Exchange in Cumberland shares was misleading? A. Well, it would always have been a reason in my view.

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Q. Did you understand my question? A. I do indeed.

Q. Well, what is your answer? A. As I understand it, what you mean is that a further reference should have been made to the fact that Cumberland had always been a stock with virtually no market existing.

Q. That may be one view. You regarded the July transactions on the market as justifiable, didn't you? A. Yes, we did.

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Q. And as establishing a real price for the shares? A. As establishing the real price at that time, yes.

Q. And your reference to "recent months" in this paragraph in Exhibit 11 was a phrase apt to include within its ambit the month of July, wasn't it? A. It may have done. It was not the point that I was certainly intending.

Q. I don't care what you were intending. You understand I am asking a question on whether particular statements were misleading? A. I concede that "recent months" is not an exact term.

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Q. And could include July reasonably. Do you agree with that? A. Some people certainly might take it back as far as that.

Q. That would be a fair view of the phrase? A. It would be a view. I am obviously thinking of my own opinion at the time when I say that it would be a view.

Q. Would be a fair view? A. It could be a fair view, yes.

Q. "Would be", not "could be". Would it be? A. It could be. I can't go beyond that, your Honour. It could be a fair view. 10

Q. What would you say to the suggestion that the phrase "recent months" was deliberately used for the purpose of creating ambiguity? What would you say as to that? A. That was certainly never my intention.

Q. Was that phrase "recent months" a phrase of your own drafting? A. From memory I should say yes.

Q. If there was a real price established for the Cumberland shares in the July transactions on the exchange the shareholders in Cumberland might have derived some useful information from that, might they not, had it been disclosed to them? A. Again in terms of a share exchange offer I would have said not. 20

Q. Is that your only justification for excluding any reference to the July transactions in the take-over documents? A. If it had been a cash take-over offer I think most certainly reference would have been made. Almost certainly reference would have been made.

Q. Almost certainly reference would have been made? A. Yes. 30

Q. Because it would have been quite improper not to make it, wouldn't it? A. Well normally speaking with a cash offer you would quote a high and low price for a period beforehand, which might be six months or 12 months. There is no established practice for it.

Q. I want you to deal with my specific question, and I put it to you again. Will you agree that if the take-over offer had been a cash offer it would have been quite improper to omit from the take-over documents a reference to July on-market transactions? A. Yes, I will accept that. 40

Q. And the only basis on which you say that it was

not improper to omit a reference to the July transactions in the take-over documents was the fact that the offer was a share offer and not a cash offer. Is that right? A. Yes, certainly the main reason.

Q. The main reason? A. Yes.

Q. You just tell his Honour, if you would, was there any other reason? A. Well again, the question of the abnormal market would have been another matter which I would have been taking into account.

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Q. Will you not agree that on what you have told his Honour as to the purpose of the July on-market transactions, the only point of time within recent months prior to November at which there had been a normal and proper market for the Cumberland shares was in July? A. Up to that time, that is so.

Q. So that the only time within the period preceding November in which there had been a proper market for the FAI (sic) shares was in July. A. Cumberland shares?

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Q. I'm sorry. Cumberland shares, was in July? A. That is true. But another point that in fact rather puzzled me - I would have imagined that after the preliminary indication was given by Cumberland Holdings in September that a take-over offer of some sort would in all probability be forthcoming that could well have tempted what I would call outside buyers to take an interest in the market. This is a thing that very frequently happens. When terms have not been disclosed it is quite common for what you might call professional operators -

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HIS HONOUR: Q. To have a bet on it? A. To enter into the market, hoping to pick up some shares at a price which will ultimately prove to be below the bid price in order to make a quick return on the deal. I was considerably surprised, in the case of Cumberland, that that did not in fact happen, even though, as I say, in previous years there had been no genuine market that we could possibly have.

MR. HUGHES: Q. Just let me recapitulate if you don't mind. You agree, don't you, that the only time within 12 months prior to 20th November when there was a genuine market on the exchange for Cumberland shares was in July, when the buying order of Fire & All Risks at \$1.25 was filled? A. I think that is going too far. I believe there were some other dealings - very few - maybe half a dozen or so - during the course of the

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six or nine months prior to July 1974, when Mr. Adler did purchase shares that came on offer.

Q. I accept, for the purposes of my question, that qualification. You have agreed, haven't you, that the July transaction on the market established a real price for the shares? A. Yes, at that time I accepted it.

Q. In other words, it was an exceptional situation, wasn't it? A. I would have said, with respect, the normal end of year situation.

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Q. The situation of establishing a real price for the shares was one that occurred only at the end of each financial year, was it? A. There may have been other times during the year when, for one reason or another, the chairman decided to try and put figures on the board. But certainly as the year ends, that would be what I would call a regular occurrence.

Q. You will maintain, do you, that the purpose of the July transactions was to establish a real price for the shares? A. For year end purposes, yes.

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Q. If that was the purpose of the transactions, and as they took place within what may be regarded as "recent months" back from November 20th, will you not now agree that it would have been relevant information for the shareholders in Cumberland to know that these transactions had taken place? A. I did not think so at the time.

Q. Do you think so now? A. I can now concede that if one wanted to expand the document that would have been one of the things to put in it.

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Q. Do you concede now that it would have been relevant information for the shareholders to know, when the take-over offer was made, about the July market transactions in Cumberland shares? A. I would still say not on a share exchange basis.

Q. That is the only basis upon which you refuse to agree with my proposition, is it? - the proposition that this information about the July transaction was relevant for the shareholders to know? That is the only basis upon which you refuse to agree with my proposition, is it? A. I have said previously on a cash basis certainly it would almost certainly have been included.

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Q. Will you agree with this, that when a share exchange take-over offer is made it is of critical

importance to calculate the equivalent in cash value of the relevant shares that are being offered in exchange? A. You are talking - you are referring to in terms of the available market price on the Stock Exchange? You are referring to that?

Q. Will you not agree that when a share exchange is being offered in a take-over offer it is most relevant to know what is the net tangible asset backing of the offeree shares and the net tangible asset backing of the offeror shares? A. I said previously, and I repeat, that is a factor of varying importance, depending on the nature of the two companies concerned.

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Q. Will you agree that in this case a comparison of the net tangible asset backing of the two shares involved in the proposed exchange was a piece of relevant information for the shareholders in the offeree company to know? A. I do not really consider it of critical importance.

Q. You do not consider it of critical importance?  
A. No.

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Q. You consider it, do you, of some importance?  
A. Yes. That is why there was some reference in the circular - in the letter - to the state of the two companies' finances.

Q. From the viewpoint of net tangible asset backing? Is that what you are referring to? A. I take the view that net tangible asset would be right for the Cumberland side, and net asset backing for our own side.

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Q. You don't draw that distinction in the circular, do you? A. I think it is stated in those terms.

Q. Is it? Just read out the piece you rely on?  
A. No, I'm sorry, it is not referred to. I refer to asset backing. I will take that back. I thought I had made a distinction, but I have not.

Q. It is involved in your last answer that the document lacks a piece of material information, isn't it?  
A. I would have preferred to have stated it specifically.

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Q. Does it lack a piece of material information?  
A. Your Honour, that could be so.

Q. It is so, isn't it? A. It depends how it was

accepted in the hands of the people who received it.  
I thought -

Q. I am just asking you to consider a shareholder who knows nothing except what he is told in the circular, you see - in the take-over documents. Will you consider such a person, please. A. Yes, I will do, and I would consider that to that person the information he was being given was the sort of information that he would understand.

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Q. Will you agree to such a person the circular lacked a piece of material information, on your own concession? A. No, I don't think so.

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

Q. Haven't you a few moments ago agreed - A. I -

Q. Just a minute, please. A few moments ago you agreed that that circular could be regarded as lacking a piece of material information, didn't you? A. That is true. It could be, but -

\* Q. And from what you said earlier in your evidence only a few moments ago you thought at the time when this circular, part of Exhibit 11 - the letter - was being prepared that it was relevant to draw a comparison between the asset backing of the two companies, didn't you? A. What I was thinking of was shareholders' funds.

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Q. Would you please answer my question? A. I am sorry, could I have it again?

(Question marked \* read by court reporter)

WITNESS: Asset backing, yes.

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Q. In your evidence earlier this morning you said you thought it appropriate to draw a distinction between, on the one hand, the net tangible asset backing of Cumberland, and the asset backing of FAI. You said that, didn't you? A. That is the comparison I wish to draw.

Q. And it is a comparison that you did not draw in your circular - in your letter, did you? It is a comparison that you did not draw in the letter?

A. Not in express words.

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Q. Not in express words, or even by implication. That is right, isn't it? A. My -



Q. Or even by implication? A. By implication I would say "yes".

Q. You appreciated at the time you drew this letter that the material information for shareholders in relation to this comparison, that you concede would have been one material to have been made, was figures? You would agree with that - figures? Comparative figures? Will you not agree with that? A. Yes, I will.

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Q. And you did not give comparative figures, did you? A. No I did not.

Q. And that was deliberate, was it not? A. I thought -

Q. Was that deliberate? Was that omission deliberate? A. It was not deliberate in the sense of trying to mislead them. I obviously drew the letter in a different form.

Q. Let me come to the question and, if you would pardon me saying so, just don't worry for the moment, in regard to this question, about the intention to mislead. I am asking you a question now which, I suggest, is capable of an answer yes or no? A. Yes.

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Q. And it is this. Did you, when you drew that circular - the letter forming part of Exhibit 11 - deliberately omit to give figures to establish the comparison between the net tangible asset backing of Cumberland shares and the asset backing of FAI shares? The answer to that question is either yes or no. Could you give an answer to that question? A. I did not deliberately omit it, because the implication there seems to be that I would ever have quoted these figures in that sense. If I had quoted figures I would have quoted the shareholders' funds figures in one company's accounts and the shareholders' funds figures in the other accounts.

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HIS HONOUR: Q. That would throw up net tangible assets? A. No.

Q. Except to one limited extent FAI do not have a figure in the accounts for goodwill? A. If you look at the FAI figures, the figures for shareholders' funds shown in that account show \$4,300,000.

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Q. You would not get an asset backing from the published accounts for FAI, would you? A. It depends on whether you regard goodwill as an asset.

Q. But you would have to construct fresh accounts. You would not get it from the published accounts?

A. I see what you mean. You would have to divide \$4,300,000 by the number of shares on issue and give a figure at the end of it.

Q. I want to get clear what you mean by saying "asset backing" as distinct from "net tangible asset backing" in the case of FAI. If you say the asset backing is shown by the published accounts - A. Yes.

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Q. If you look at the published accounts, does not that inevitably give you a figure for net tangible assets? Do you follow my problem? A. Well it does not, as the accounts are drawn.

Q. Have a look at the accounts? A. Yes.

Q. Perhaps you can explain to me how you can get the net asset backing out of these accounts, having regard to the position in relation to goodwill? A. You get the figure in the consolidated balance sheet, which is the first one which appears. You get a figure of \$4,285,000 as the shareholders' fund, which, in general terms, one would call the asset backing of the shares.

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Q. But if you add on a goodwill figure on the assets side those would be greater, wouldn't they? A. No, because goodwill is deducted on the liability side, or it is taken in on the assets side, I beg your pardon. To arrive at the net asset figure from those accounts you would have to deduct the item which appears under intangible assets from the items which total \$1,210,000, or something like that. You would deduct that from your shareholders' funds to reach a figure of net tangible assets. What I am saying is if I had included figures I would have included the figures for the shareholders' funds in each company, because I considered that that would be the relevant basis for comparison. In Cumberland's case I think you will find that the figures are almost identical. I believe there was a very small goodwill item.

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MR. HUGHES: Q. What you are saying is that if you had quoted in this letter, part of Exhibit 11, any figures in relation to the two companies you would have quoted the shareholders' funds figures? Is that what you are saying? A. That is right, yes.

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Q. May we take it that when you were drawing this circular you did some arithmetic to arrive at what the figures were? You did some arithmetic to arrive

at those figures? A. If I did I cannot now recollect what the figures came out to be. I would have to sit down and work them out for you again. I can't now recollect what the figures would be.

Q. In order to satisfy yourself with the sentence reading "In terms of asset backing...ordinary shares respectively", you would have had to have done some arithmetic? A. Elementary, naturally. One would take 4,300,000 shares, or whatever the correct figure was, and divide it up against \$4,477,000 shareholders' funds. It would obviously come out at a figure something in excess of \$1 per share. 10

Q. Did you do that arithmetic at the time you were drafting the circular, or about the time you were drafting the circular? That is what I want to know? A. I must have done that on numerous occasions when I had necessity to refer to accounts.

Q. Would it take you long to do the arithmetic now? Would you do the arithmetic for FAI, and tell us the figure you get? You may have a pencil and a piece of paper, if you wish. You might explain the process as you go through. You could tell us what figures you are taking, and what arithmetic you are doing. 20  
A. \$2,150,000 divided by -

Q. What is that? A. That is the number of - I beg your pardon. 4,300,000.

Q. Shareholders' funds? A. No, that is the number of shares on issue. You have to go to Note 1 to get that. The paid up capital is \$2,150,000 of 50 cent shares, which gives you 4,300,000 shares. That, divided into \$4,800,000 - I am rounding off the figure - that would be near enough. It comes to just under \$1.12 per share on that basis. 30

Q. Just under \$1.12? A. \$1.11 something.

Q. Is the excess of cost on investment in subsidiaries over net equity acquired taken into account? A. Yes.

Q. Have you taken off the minority interests in subsidiary companies? A. I beg your pardon. On that basis it is obviously virtually \$1 a share. 40

Q. \$1 a share? A. \$1 a share, yes.

Q. In drafting this circular were you really intent on giving the shareholders all the information you

regarded as relevant to enable them to consider the offer? Were you really intent on doing that?

A. I was not doing it in the sense of a financial journalist reporting to a sophisticated financial audience. I was not doing it in the way that he would be doing it. I was trying to get across what I might call an explanatory letter from a chairman to a number of persons who probably did not have a great deal of sophisticated knowledge of merchant banking techniques or anything of that nature.

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Q. Mr. Atkinson, I will take that answer for the moment, and I will come back to the question I asked. Were you really intent on giving the shareholder information that you regarded as material? A. In that context, yes.

Q. Were you intent on giving them all the information that you regarded as material to enable them to consider the offer? A. Of real materiality, yes.

Q. And of course you will agree that the clearest and indeed elementary way of conveying the message as to the disparity between the net tangible asset backing of Cumberland and the asset backing based on shareholders' funds of FAI would be to give the figures - the actual figures - so that the shareholders could see Cumberland at \$1.22, and FAI just under \$1? A. Yes. That would obviously have been the easiest way to do it.

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Q. It would have been the clearest way of conveying the relevant information, wouldn't it? A. Yes, that would have been the clearest way.

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Q. And you were intent, were you, on giving the clearest picture to shareholders on points that were of materiality? Were you of that intent? A. I was intent on giving them what I considered the clearest picture of the whole situation.

Q. And at the time, to give the figures on the basis that you have propounded, of the net tangible assets in Cumberland, and the asset backing based on shareholders' funds in FAI was the clearest way of doing it, wasn't it? A. It was certainly the clearest way of doing that, yes.

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Q. And it was, to your knowledge at the time you drew this circular, the clearest way, wasn't it?  
A. Well, it must have been obvious.

Q. It must have been obvious? A. Yes.

Q. Of course, there was a slight disadvantage from the viewpoint of the offeror in giving the actual figures, wasn't there? A. In these arithmetical terms, yes.

Q. Because the figures would, in terms of comparison, favour the Cumberland shares, wouldn't they? A. That is so, yes.

Q. And that was within your knowledge at the time you drafted this circular, wasn't it? A. There was obviously an increase of some nature between the Cumberland ones and the FAI ones. I had appreciated that from the word "go".

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Q. And at the time you drafted this circular?

A. Yes. But may I say again I had discarded the question in my own mind of the comparative net values as not being of the greatest relevance for the shareholders to consider in this case.

Q. But you referred to the comparison, didn't you, without giving figures? A. I made reference, yes.

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Q. Without giving figures? A. Yes.

Q. And the failure to give figures was a deliberate failure, wasn't it? A. It was because I did not feel it necessary.

Q. If you did not feel it necessary why did you feel it necessary to say this: "In terms of asset backing ...respectively". Why did you feel it necessary to say that? A. I thought that any shareholder would wish to know that the value of the shares was substantially above the par value, and that was the point I was trying to make in that statement.

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Q. You also knew, didn't you, that the shareholders would want to know in hard terms what the comparative figures were? You knew that, didn't you? You knew that? A. Some of them might have done.

Q. Some of them might have done? A. Yes.

Q. That is enough for me. You knew at the time you drafted this circular that some of the shareholders would want to know the comparative figures as figures, didn't you? A. I was not thinking of it at the time. But I agree now that it is quite probable that some of them would have wanted to know.

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Q. Don't you remember telling his Honour within the

last few minutes that you deliberately omitted to give the figures? A. Your Honour, I think what I said -

Q. Do you remember saying that? Don't you remember telling his Honour earlier - only a few minutes ago - that you regarded the comparative figures at the time you drew this circular as information that would be relevant for shareholders to know? Do you remember saying that? There is no protest from my learned friend now that you did not say it.

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HIS HONOUR: I would ask you to refrain from comment. It confuses the question.

MR. BAINTON: My failure to comment does not mean that I accept that that is what was said.

WITNESS: I don't know. I don't recall the exact words I did say to your Honour.

MR. HUGHES: Q. I will put it to you specifically now. Will you agree that when you drew this circular you adverted first of all to the fact that the comparative figures constituted information available as material information for the shareholders to know? You adverted to the fact that these figures constituted information material for the shareholders to know? A. I think I said it could be material information, yes.

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Q. Will you not agree that that was your state of mind at the time you drew the circular? A. Well, it cannot have been, or I would have included the figures.

Q. You see, in your statement - in the relevant sentence of the letter you left it up in the air, didn't you, what was, in the case of each company, the figure above par value of the relevant asset backing. You left that up in the air, didn't you. A. Yes.

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Q. And that was designed, wasn't it? A. No.

Q. That was designed? A. No. For the purposes of what I was saying I felt that the shareholders would be satisfied with knowing that the value of shares was substantially above par value. If I had been going into figures the whole document would have been totally different.

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Q. You see, you knew that this comparison that you had done by some figuring favoured the Cumberland shares, didn't you? A. I also discarded that.

Q. You knew that it was relevant for the shareholders in Cumberland to know what was the actual result of the comparison? You knew that, didn't you? A. I concede it as a relevant factor.

Q. And you will concede it, will you not, as a relevant factor in your mind at the time you drew the circular? A. In drafting the circular I obviously cannot have done, or I would have referred to it.

Q. There is an alternative possibility, isn't there, and that is that you adverted to the materiality of the comparisons in terms of figures, and deliberately omitted them. That is an alternative possibility, isn't it? A. I suppose I could have had some criminal intent, but it is my belief that I did not. 10

Q. Did Mr. Adler alter any part of that paragraph before the draft was finally approved? A. I can't recollect about this particular paragraph. There were a few suggestions, but I cannot now recollect.

Q. Who considered this draft letter apart from yourself, Mr. Adler - A. Myself, Mr. Adler, Professor Wilson and Mr. Belfer. 20

Q. Was it done at a Board meeting? A. I think I am right in saying it was done at the Board meeting when we approved the Part A statement. Although it was not part of the Part A statement, my recollection is that it was drafted at that time, and was subsequently dated 20th November. I could be wrong on this, but I think it was put up to them as an additional document at the time. It probably was not minuted. 30

Q. To your knowledge is there any draft of this circular letter, part of Exhibit 11, in existence?  
A. No, that would have been destroyed.

Q. It would have been destroyed? A. Yes.

Q. It would have been destroyed? A. Yes.

Q. By whom would it have been destroyed? A. Either by my secretary or Mr. Adler's secretary, I would imagine. In fact, it was the same secretary at the time.

Q. Will you agree with this, that information as to the figures produced by the comparison we have been talking about was, to your mind, to your mind at the time you drew the circular, of obvious materiality?  
A. Not in the way the circular was being presented and drafted. 40

Q. Did you think as a director of the offeror company, - a company which had two directors on the board of the offeree company - that it was important, in formulating the take-over documents, to point out to shareholders in the offeree company any comparison or matter of comparison that favoured the Cumberland shares as against the FAI shares in terms of value?

A. I don't think at the time I was going further than considering the FAI document on behalf of FAI.

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Q. It did not occur to you that by reason of the fact that there were common directors to both boards except for Mr. Donohoo - I will withdraw that - did it occur to you that the fact that there were two FAI directors out of three directors on the Board of Cumberland created a position of some conflict of interest? Did that occur to you? A. Conflict of interest? I am afraid I was so carried away with my view that this was for everybody's benefit that I did not see it as a conflict of interest. I rather thought it was a question of mutual interests. Subsequent events have indicated that my view was not shared by other people.

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Q. There was an obvious position of conflict of interest at the time this take-over offer was made, was there not, by reason of the fact that Mr. Adler and Mr. Belfer were directors of both Cumberland and FAI? A. Yes. Under Companies Act terms obviously this is so.

Q. And will you agree that your awareness of that conflict at the time when these take-over documents were being formulated accentuated the need for scrupulous fairness in formulation of the take-over documents? A. I am sure that must have been so, yes.

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Q. And fairness demanded, didn't it, in relation to the formulation of these take-over documents, that if there was any matter of comparison that would favour the value of the Cumberland shares against the FAI shares it should be disclosed? A. I can only repeat that if the offer had been made on the basis of the comparative values of the shares then quite obviously that was the thing that was relevant.

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Q. You were referring in this last sentence "In terms of asset backing...ordinary assets respectively" in Exhibit 11 to comparative values? A. I am sorry? Which one are you talking about?

Q. You were referring to comparative values.



A. No, I was merely saying that each had a value substantially above par value. That was the point I wanted to make to the shareholders.

Q. But you see, will you explain, if you wanted to make that point to the shareholders, why you did not go on to make the further obvious point as to what the comparative figures revealed as between the two shares?

A. If I was going to expound one subject I would probably have gone on and made a lot more explanation why, at the end of the day, I did not consider these matters were of real importance in the case, and we would have ended up with, not the sort of letter I was trying to draft, but a very long - if you will forgive me - semi-legal document, that I did not believe the ordinary shareholder would read or understand.

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Q. But it would have been a fairer document, wouldn't it? It would have been a fairer document, wouldn't it?

A. It would have been a fuller document.

Q. And fairer? A. It could also have been fairer.

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Q. Do you remember telling us yesterday how bullish, despite Mr. Adler's gloomy article in his house magazine, you were in October 1974 about the earnings growth prospects of FAI? A. Yes - for the current financial year, at any rate.

Q. The then financial year? A. Yes.

Q. Compared with your professed bullishness, the statement in this letter, "In the absence of any unforeseen eventualities during the current financial year, the directors of FAI anticipate that the same rate of dividend will be maintained this year on its ordinary capital as increased by the recently announced 1 for 10 bonus issue and the new shares to be issued in pursuance of the present offer", was rather conservative, wasn't it? A. Yes.

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Q. Hardly in line with your bullishness, was it?

A. May I explain why I left it on that basis?

Q. Did you leave it on that basis because you had some fears for the future? A. No, on the contrary. Your Honour, in discussions with my colleagues I had expressed the view that a dividend rate of around about twelve per cent per annum was about the right rate at which the company should want to operate over the years with a cover of somewhere between 1.5 and 2 times, and that in my view, as and when profits increased beyond the amount necessary for that sort

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of a dividend, we should continue capitalising reserves and making bonus issues to the shareholders. It was my view that an increased issued capital was very much in the interests of the company and that it would be very much better to go on paying an income not in excess of about twelve per cent a year on a constantly increasing capital, rather than getting the rate up to a figure which might become, let me say, politically embarrassing to us.

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Q. Yes; and you gave all those factors consideration when you drafted that sentence dealing with future dividends, did you? A. Well, I had it in mind, but if it was going to interfere with anybody, not to try to say it all, it was going to be the FAI interests.

Q. If you had given the same consideration to the last sentence of that paragraph as you apparently gave to the sentence about which I have just been asking you, you would have certainly included the comparative figures, wouldn't you? A. I still don't think so in this particular document, your Honour.

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Q. Will you not agree - let me put it quite bluntly to you - that to omit the comparative figures while referring to the comparison was quite misleading? A. No, because I would, if I had included figures, have had to go on, as I said before.

Q. Well, what is the reason for not going on - that you might bore the shareholders with relative information, is that what you are saying? A. No, mainly because this was not the kind of letter which I would wish to get out of hand and become a long financial document, which, from my experience in these matters in the past, your Honour, I have invariably found a large number of shareholders just don't understand.

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Q. Well, they would have understood hard figures, wouldn't they? A. But they would have got more than hard figures, if hard figures had been there.

Q. They would have got a figure just under a dollar for FAI and just under a dollar and a quarter for Cumberland, wouldn't they? A. Somewhere round about that, yes; and then they would have got an explanation as to why, in the views of the FAI directors, that was not the final material factor in the deal.

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Q. And you say, do you, on reflection, that the only reason why, first of all, you did not refer to the July on market transactions on the Exchange, the take-over documents, was that this was a share offer, not

a cash offer? A. Yes, that is so. Again, your Honour, if I may just add, had I referred to these transactions I would have had of course to go into several more paragraphs to explain the whole situation of the company's situation on the Stock Exchange and I feared that we were going to end up with a book instead of a one-page letter.

Q. Look, you did advert, did you not, to the question whether the sale of the chairman's shares should be revealed, when you were drafting the circular - you adverted to that? A. All the July transactions, yes. 10

Q. And you realised of course that those transactions were at least of possible materiality for the shareholders to know, didn't you? A. In terms of a share exchange at the time I did not consider the factor relevant.

Q. You are saying that the revelation of the July transactions would have been material had it been a cash offer, but was not material because this was a share offer - is that why you are saying? A. Yes. Your Honour, if - 20

Q. I don't want to deny you an opportunity -

HIS HONOUR: I would like to ask him a question about that to clarify one point.

Q. Mr. Atkinson, am I to take it that you are advancing the proposition that if it is a share that is offered, that would never be material for that reason, or am I to take it that your proposition is not that but is a proposition that, because of the goodwill factor in this particular insurance company it would not be relevant - do you understand? A. Yes I do, your Honour. 30

Q. You have referred to both at different times, and I am not quite sure whether you maintain the first proposition. A. I am sorry. The goodwill factor was only in relation to the comparative net asset values of the companies.

Q. You say that if it is an exchange of shares and not a cash offer, it is not relevant to refer - A. To the previous transactions, yes your Honour. In my view - and I still hold it - if you are going to ask any question about July, the relevant question is, "Well, what were the comparative real values of FAI and Cumberland shares as at July? How have those comparative values varied over the intervening period; 40

and at the time we are now talking about, are the comparative, what I am calling 'real values', more in favour of FAI or more in favour of Cumberland?". That would be the only basis upon which I would have, if I had been asked to make any comparison or any reference to July transactions, that would have been the only basis on which I would have done them. Putting it in its simplest terms -

Q. Mr. Atkinson, perhaps I could just highlight one thing you might like to clarify in relation to the proposition that it would be irrelevant on share offers. In the case of a cash offer I take it one is reducing the value to \$X with the cash that is reduced to currency. If one wants to make a comparison, one is comparing \$X with \$Y, Y being the cash and X being the other reduced to currency in terms of value? A. There is even more than X or Y, your Honour. The initial comparison, if there was a genuine market for the two classes of shares and the market was in reasonably normal circumstances, would be to look at the two market quotes. 10 20

Q. That would give you X and Y for practical purposes? A. That would give you X and Y; and then if for any reason you had to discard the market factors, then you would try and assess other considerations.

Q. Yes, but you are still trying to arrive at a money sum to compare the money sum? A. You would arrive at a money sum at the end of the day, yes.

Q. Even if you were comparing them with a money sum for a block of flats, you would still have to arrive at a money sum? A. You would reduce that, in other words, to cash. 30

Q. To cash; you have to compare currency to currency, haven't you? A. Yes, you have got to compare like with like.

Q. What troubles me about the first proposition is that if you have to convert a share when it is offered in exchange for a share, haven't you got to bring that to currency also, so that you are comparing currency with currency? A. Well, it is a constantly varying factor, your Honour, they go up and down. 40

Q. The answer you get may be, but isn't that what you have got to do - to get to dollars to compare with dollars - otherwise you cannot make a judgment? A. Yes, provided you have an adequate method of assessing the value. But it is not related to what I would call cash transactions on the market.

Q. Well, isn't the only consideration, when shares are offered, then, whether the dealing or the net tangible asset, whatever it may be, is a relevant factor in arriving at that currency figure that you have got to have to compare with what you are asked to give up? A. If both the shares were quoted on the market and they were normal shares -

Q. Then this simplifies the matter for you? A. Yes of course. But may I just say a little more - in an ordinary take-over bid for cash of course the ordinary relevant factor is the market value of the shares over a reasonable period, and the offeror usually makes an offer that is pitched just a little higher than the current price, perhaps a little higher than the high for the year or something like that, and you then get the offeree coming back and saying, "Oh, that is far below the net tangible asset value", and the reply to that usually is, "So what?", and the position develops after that. If you are offering share for share and there are two quoted shares with normal markets applicable, then the basis would be to refer back to the prices at which they had both been dealt in. But the fact that a price they were being dealt in six months ago is now lower of course could be of no relevance because they could have gone down equally over the period.

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Q. That might be a qualification you would have to put on it. I was just wondering what was involved in the proposition that you never, because it is a share swap, you don't consider the market dealing in some circumstances perhaps as a backing? A. Basically at the end of the day, the reason I endeavoured to give to you, I think it was two years ago I came to the conclusion that in this class earnings per share was likely to be the most relevant and determinant factor in the situation.

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HIS HONOUR: I understand that, yes. I am sorry for the length of my intervention, Mr. Hughes, but there seemed to be a couple of lines emerging, one at one time and one at another, and I wanted to clarify them if I could.

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MR. HUGHES: Q. Of course, part of what you told his Honour was that even in a share swap situation, market value of either share will be relevant if it is a guide to real value; you have said that, haven't you?

A. Well, I think the relevance would be, as I was saying before, sir, if there had been any change in the comparative values over the period. I cannot see otherwise how it is of relevance.

Q. Would you just answer my question; you have told his Honour, have you not, in substance, as part of what you said in answer to his Honour's questions, that in the case of a share swap the market value of either share is relevant information for the purpose of assessing the proposed swap, if the market value is a pointer to the real value of the share? A. It could be.

Q. It could be - yes; and of course in this case there were two significant sets of transactions that occurred in July, weren't there? A. Yes, there were the transactions in July. 10

Q. And one was a series of market transactions, which established the price at \$1.25? A. Yes.

Q. And you would maintain, would you not, to your dying breath, and those market transactions were perfectly proper? A. Yes.

Q. And there was another set of transactions that involved the sale of the chairman's shares, wasn't there? A. Yes. 20

Q. And you would maintain to your dying day that those transactions were perfectly proper, wouldn't you? A. Yes.

Q. Of course there was a market for FAI shares, was there, during August/September/October? A. Well, there was a theoretical market but it had virtually ceased to operate a considerable time before that.

Q. But you had to reveal in the Part A statement what the market in the FAI shares had been in the relevant period, didn't you? A. Yes, that was statutory information I had to give. 30

Q. And the other side of the coin in this connection was any real market value established within recent months for FAI shares, wasn't it? A. I think that is comprised in the statutory requirements, isn't it - paragraph 7 of the Part A statement.

Q. Yes, you set out the market value over the relevant period of FAI shares, is that right? A. Yes I did.

Q. And you knew, when you set that out, that the statutory requirement was directed towards enabling shareholders in the offeree company to make a comparison in terms of currency between the FAI shares and the offeree shares - you knew that, didn't you? 40

A. I have never been quite clear myself, your Honour, what the statutory requirement is directed at.

Q. Really? You know, don't you, that that requirement is directed to giving information to the shareholders of the offeree company as to the value in terms of market currency of the offeror shares?

A. Presumably it is thought that they will assess the value of the shares from this information.

Q. Yes; but you knew at the time you drafted this document that it would be of great assistance to the offeree shareholders to have information as to market value or value otherwise established by sales of shares in the offeree company so that they could make a comparison in terms of currency; you knew that at the time, didn't you? A. Well, sir, the statute does not require anything to be said about offeree shares, and I have always assumed that the reason was that the offerees were supposed to be given any information that was thought relevant in the Part B statement.

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Q. But you conceded very early I think in your cross-examination that the statutory requirements are minimum requirements, didn't you? A. Yes, they are minimum requirements.

Q. And the mere fact that the statutory requirements don't go beyond a certain distance does not discharge you from your duty of giving frank and candid information, does it? A. Your Honour, I try to follow the statute as strictly as possible in these cases.

Q. Of course you appreciated at the time you made a decision not to reveal in the take-over documents the sale of the chairman's shares and the July shares, you appreciated that the non-disclosure of those matters was advantageous from FAI's viewpoint, didn't you?

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A. If the full history of the matter had been explained, I would have said No. The whole history - by that I mean one would have had to have gone back over Cumberland's history over a period of years.

Q. You didn't know its history over a period of years, did you? A. I am talking in terms of the securities market.

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Q. Look, I will just come to my question again; did you not appreciate at the time you deliberately refrained from disclosing in the take-over documents the sales of the chairman's shares and the market transactions in July, the Cumberland shares, that

the non-disclosure of that information was advantageous to FAI? A. No sir.

Q. Did you think that the non-disclosure of the information was inimical to FAI's interests? A. I didn't think it was relevant on either side in connection with a share exchange offer.

Q. You thought that it was a piece of information, the effect of which was quite neutral, did you?  
A. Not relevant, yes.

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Q. But the disparity between the net tangible asset backing as revealed in the published accounts of the two companies, was a point that somewhat worried you when you were preparing these take-over documents, was it not? A. No sir.

Q. Did it worry you at all? A. No, because I had already decided that that was not the determinant factor.

\* Q. If you say that something does not worry you unduly, do you not mean by that that it worries you somewhat but not a great deal? (No answer).

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Q. Just answer that question, will you, if you understand it? Tell his Honour if you understand it?  
A. Could I have it again?

(Above question marked \* read)

WITNESS: Did I ever say it did not worry me unduly, your Honour?

MR. HUGHES: Q. What was your question? A. I am wondering if I ever said it did not worry me unduly; I don't recollect.

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Q. Just answer my question, without posing another one. A. If something does not worry me unduly, then it is obviously worrying me to some extent.

Q. Yes; and will you agree that the disparity between the net tangible asset backing of the two shares in question was something that worried you to some extent at the time you were considering the take-over documents? A. It was a factor I took into consideration, your Honour, but eventually, as I have said previously, I discarded it as being of no major relevance, and I considered that the appropriate test was the earnings basis; having got that far, I don't think

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the question worried me any further, but I don't think I -

Q. Or at all? A. I don't think I ever treated it after that date as being anything that I would not be afraid to explain to anybody who might raise the question and want further information or have it argued out. I was convinced that I could establish that, in other words, one of our own shares was better than a Cumberland share, on the merits of the matter.

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Q. Mr. Atkinson, I must come back to the question to which you have given a long response but not perhaps an answer; I put it to you quite specifically, in terms that will permit of an answer Yes or No, and I would invite you to answer it Yes or No. Did the disparity between the net tangible asset backing of the two shares in question ever worry you to some extent? A. No - ever. May I qualify that -

Q. Well, was that a considered answer? A. Your Honour, I have said that I considered the matter at the early stages and decided that it was not a matter that would worry me; after the first consideration, then certainly I did not worry further.

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Q. It never worried you at all, is that what you are saying? A. Yes, I could not use the word "worried".

Q. Do you remember giving evidence-in-chief on this point? A. I remember I gave evidence, yes.

Q. On this point? A. I think it was dealt with, yes.

Q. Of the effect on your mind of the disparity between the net tangible asset backing of the two shares; do you remember giving evidence on that point?

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A. Yes, I remember it was referred to.

Q. And was that evidence true? A. To the best of my belief, your Honour, yes.

Q. Do you want to change it? A. I cannot now recollect the statement that was made, your Honour, so -

Q. And if you said in your evidence-in-chief -  
\* page 330, that the disparity between the net tangible asset backing of the two shares did not worry you unduly, will you agree, having regard to your answers this morning, that you meant that it worried you to

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(\* Original Transcript Page 206)

some extent? A. I would withdraw the word "worry" if I were now giving that evidence-in-chief.

Q. Oh, would you? So you gave evidence that was untrue, did you? A. Not intentionally, sir.

Q. I don't care whether it was intentional or not; we will come to that in a minute.

MR. BAINTON: Could he perhaps be referred to what he said?

HIS HONOUR: Perhaps he should be shown a copy of the transcript. (Shown to witness) 10

MR. HUGHES: Q. I want you to read this carefully. First of all, before you start reading, Mr. Atkinson, will you take your eyes away from that piece of paper, please?

HIS HONOUR: Mr. Hughes, I do not think there is a necessity to use that tone with Mr. Atkinson in those circumstances.

MR. HUGHES: I apologise to the witness, your Honour; I quite agree. 20

Q. You told his Honour yesterday the labours and time you expended in getting ready to give evidence in this case, didn't you? A. I don't now recollect that either.

Q. Well, did you tell his Honour that you gave great consideration to the evidence you were to give, before you went into the box? A. I believe I did say something on those lines.

Q. So may we take it that the evidence you gave in answer to your counsel was given upon due consideration? 30  
A. I would hope so, yes.

Q. Well, was it? A. To the best of my belief, yes.

Q. And you knew, when you were giving evidence about the factors that you say operated in your mind in formulating the take-over offer, that one of the factors of importance was the impact on your mind of the disparity between the net tangible asset backing of the shares in the two companies, didn't you? A. Yes, I said that was a factor that I naturally looked at.

Q. And may I just ask you now to read the paragraph 40

\* on page 329 which starts, "In the case of Fenchurch" -  
you might read it aloud to his Honour.

MR. BAINTON: Do you think he might perhaps be allowed  
\*\* to go back a little earlier to the top of page 329.

HIS HONOUR: Yes, very well. Is it necessary to read  
it aloud, Mr. Hughes? Do you want it on the trans-  
cript?

MR. HUGHES: No your Honour.

HIS HONOUR: He could perhaps read it to himself - 10  
\*\* from the top of page 329 - Mr. Atkinson, to get the  
subject matter.

WITNESS: Yes, your Honour, I see that I did use the  
word "worry" in that.

MR. HUGHES: Q. You said, you used these words  
didn't you, "It did not worry me unduly that on a net  
tangible asset basis the FAI shares would not compare  
on a 1 for 1 basis with the Cumberland shares" - now  
that was a considered statement, wasn't it? A. Yes,  
that is true. 20

Q. Was it true or false? A. Your Honour, I don't  
think I used the most apt word, reading back on it  
now.

Q. Was it true or false? A. It was intended to be  
true.

Q. Was it true or false? A. It was intended to be  
true, your Honour, but I am now of the opinion that I  
might have used a better expression.

Q. Was that statement, "It did not worry me unduly  
that on a net tangible asset basis the FAI shares would  
not compare on a 1 for 1 basis with the Cumberland  
shares" a true statement or a false statement - which? 30  
A. I believe it now not to be correctly phrased.

Q. Will you agree that it was a false statement?  
A. Well, to that extent, yes your Honour, but -

Q. And you knew what you were saying when you were  
using the words, didn't you?

(\* Original Transcript Page 206)

(\*\* Original Transcript Page 205)

\* HIS HONOUR: Q. Mr. Hughes, I think perhaps the witness might be allowed to say - if you are going to substitute the words on reflection for that, Mr. Atkinson, perhaps you would prefer to express what you were saying in another way. Do you wish to put an alternative? I just offer you the opportunity, that is all. A. Yes. I would put it more in these terms, your Honour, "I discarded the materiality of the fact that on a net tangible asset basis".

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(Short adjournment)

ON RESUMPTION:

MR. HUGHES: I notice Mr. Adler is here, I might call on him to answer a subpoena for production.

(Lawrence James Adler appeared in response to subpoena)

MR. HUGHES: Q. What is your full name please?  
A. Lawrence James Adler.

Q. You are a company director by occupation?  
A. I am.

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Q. And you live where? A. At 10 Fitzwilliam Road, Vaucluse.

Q. Have you received a subpoena for production in this case? A. I have.

Q. Do you have a copy of the subpoena with you?  
A. I have.

Q. Do you produce any documents in answer to the subpoena? A. None whatsoever.

Q. Are any such documents in existence? A. None that I know of.

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Q. Have you made a search? A. No, I don't -

MR. BAINTON: I do not want to interrupt a call on subpoena, but I would take it by that answer that Mr. Adler cannot put in any documents other than those which he has already produced.

MR. HUGHES: Q. Do you mean to say that you produce no documents in response to the subpoena because, according to your understanding, all the documents covered by that subpoena directed to you have already

Q. How much time did you spend in the formulation of this document which is Exhibit 15? A. It was done pretty rapidly, sir, in I would think somewhere between quarter of an hour and half an hour.

Q. Really; it was a pretty weighty matter to be dealt with in such a short time, wasn't it? A. Yes, one always seems to be running on a bad time schedule in these situations, unfortunately.

Q. Apart from the matters that I asked you about yesterday afternoon which depended on the last sentence in one of the paragraphs - I think it was on page 2 - "Naturally we all hoped that this would not come about, but it is the sort of risk that undoubtedly exists and in fact the directors of FAI feel it so keenly that they have to make their take-over offers...not occurring during the currency of the bid". Apart from that statement, which I will leave on one side, will you direct your attention to the rest of the document and tell his Honour whether there is anything in it which in your view is misleading or lacking in candour? A. No, it does not so appear to me, your Honour.

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Q. It was your own view in November, was it not, that the business of Cumberland was thriving and expanding? A. Yes.

Q. And any statement to the contrary on your part on 22nd November would be plainly untrue, wouldn't it? A. At that time, yes.

Q. And from your conversations with Mr. Adler - I will give you the opportunity if you want it later to look at the document but could I just direct this question to you first before you do: Based on what Mr. Adler told you, was it your belief that in November he was of the view that the business of Cumberland was thriving and expanding? A. Yes.

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Q. That it was his view was clearly borne in upon you as a result of the discussion that took place that led to the sale of his family shares, would you not agree? A. Yes.

Q. So that you would under no circumstances, consistently with truth, have assented to the proposition that Cumberland's business was not thriving and expanding? A. No - at that time.

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Q. And you carefully read Mr. Donohoo's circular of 21st November, 1974, did you, Exhibit 13? A. Yes, I had done so.

Q. I do not want to put you at the disadvantage of not having that document in front of you. When you gave careful consideration to Mr. Donohoo's circular which is Exhibit 13, you read and considered that part of his circular which reads, "I do not consider it reasonable to ask stockholders in Cumberland, a thriving and expanding nursing home and surgical hospital group, to exchange their stock units in that group for shares in a company heavily involved in the insurance industry", did you? A. Yes.

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Q. And it was your belief, was it, that that statement required to be answered? A. Yes.

Q. And did Mr. Adler convey to you that it was his belief that the statement I have just read from Exhibit 13 required to be answered? A. I think he had said so before I started drafting, yes.

Q. May I take you back to Exhibit 15. A. Yes.

Q. Before I refer you to a specific passage, Mr. Adler had never stated, either repeatedly or at all, had he, that Cumberland's nursing home business was neither thriving nor expanding? A. No - not to me.

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Q. Not to your knowledge? A. Not in recent years, certainly.

Q. Not in recent years, because to have made that statement would have been a rank lie, wouldn't it, on the part of a man of Mr. Adler's position, with his knowledge - is that right? A. Yes.

Q. And for you to have assented to that statement or participated in making it, that Cumberland's business was neither thriving nor expanding would, if you said so, be a rank lie, wouldn't it? A. Yes, it would have been.

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Q. Now may I invite your attention to the paragraph which reads, "I wish I could share" - do you follow that? A. Yes. "I wish I could share Mr. Donohoo's view that the private nursing home business is a thriving and expanding business, profitable and risk-free at this time. Unfortunately, as I have repeatedly stated, this is not the case."

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Q. Were those words drafted by you? A. Yes, I believe so.

Q. They were drafted by you, were they not, in answer to Mr. Donohoo's assertion in his circular of

21st November, Exhibit 13, which reads, "I do not consider it reasonable to ask stockholders in Cumberland, a thriving and expanding nursing home and surgical hospital group, to exchange their stock units in that group for shares in a company heavily involved in the insurance industry"? A. Yes.

Q. On the statement that you have just made in your last answer, will you not agree that the reference to the private nursing home business was a reference to Cumberland's business? A. Yes. 10

Q. And you were saying with Mr. Adler in this circular in the words, "I wish I could share Mr. Donohoo's view that the private nursing business is a thriving and expanding business"? A. "Profitable and risk-free at this time" - yes.

Q. You were saying, weren't you, that Cumberland's business was not thriving and expanding? A. No, the paragraph was directed specifically at the "risk-free" part of the statement, as is plain from the rest of it. If you take the second sentence in isolation, I agree with you that it could be regarded as referring to everything; but the rest of the paragraph makes it plain that there is no attack on the words "thriving and expanding business" or even the word "profitable". 20

Q. Mr. Atkinson, you were answering Mr. Donohoo's assertion that Cumberland was a thriving and expanding nursing home and surgical hospital group, weren't you? A. It was not intended to answer that part of the statement, sir, what we were - 30

Q. Look, Mr. Atkinson, were you not, in the sentence, "I wish I could share Mr. Donohoo's view that the private nursing home business is a thriving and expanding business, profitable and risk-free at this time"? A. That was stated as an omnibus statement and it was denied, I agree, then, in general terms. But anybody who read the paragraph as a whole, I would with respect think that it was quite plain that what we were dealing with was the suggestion that one share was risk-free, and the insurance share was full of risk. This was really Mr. Donohoo's argument in the circular we were answering, and this was what indeed we were trying to answer. 40

Q. Mr. Donohoo in his circular of 21st November had used the very words "thriving and expanding" in relation to Cumberland's business? A. He had indeed.

Q. And you were at pains to deal with that allegation, weren't you? A. Not that allegation, no.

Q. But you did, whether you were at pains to or not, didn't you - because you denied in the sentence "Unfortunately as I have repeatedly stated, this is not the case", didn't you? A. And then we indicated what the denial was.

Q. Oh, really? Look, the relevant part of the text of this circular takes up Mr. Donohoo's assertion that Cumberland is a thriving and expanding business, doesn't it? A. "Thriving and expanding business, profitable and risk-free at this time". 10

Q. And all those propositions are denied in the sentence, "Unfortunately, as I have repeatedly stated, this is not the case"? A. They are, sir, and if I had stopped there I would have agreed with your proposition.

Q. If the sentence, "Unfortunately, as I have repeatedly stated, this is not the case" was intended as a denial of Mr. Donohoo's assertion that Cumberland was a "thriving and expanding business", that denial was a rank lie, wasn't it? A. It was not so intended. 20

Q. But if it had been so intended it would have been a rank lie? A. If it had been so intended it would have been untrue.

Q. And a rank lie? A. If there is a difference between "untrue" and "rank lie", I will accept "rank lie". 30

Q. Yes, you have been rather at pains in the course of your evidence - and I do not criticise you at this stage for it - to distinguish between something that is untrue and something that is deliberately untrue, haven't you? A. I think principally it has been misleading, I have not very much argument about -

Q. But you are conscious of the distinction about something being merely untrue on the one hand, and being untrue to the maker's knowledge on the other hand, aren't you? A. Well, "untrue" is usually used in relation to a deliberate lie, I would have thought, your Honour; but if the learned counsel is using it in another way, I don't know. 40

Q. Well, will you agree with me that the sentence, "Unfortunately, as I have repeatedly stated, this is



not the case", if not intended to deny the assertion that "Cumberland was a thriving and expanding business" was singularly unfortunately expressed? A. If nothing more had followed, I would have agreed entirely. But the whole of the rest of the paragraph talks of nothing else but political reasons and the effect of inflation.

Q. Yes; the rest of the paragraph in terms does not qualify the denial contained in the sentence, "Unfortunately, as I have repeatedly stated" and so on, that "Cumberland is a thriving and expanding business"?

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A. I am sorry, could I have that again?

Q. Nothing in the rest of the paragraph after the second sentence qualifies the denial that "Cumberland is a thriving and expanding business", does it?

A. No, not expressly.

Q. Will you not agree upon reflection that the sentence, unfortunately as I have repeatedly stated, this is not the case, might have been better omitted or expressed differently, from the viewpoint of truthfulness? A. I agree this would have been better expressed differently.

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Q. From the viewpoint of accuracy? A. From the point of view of pin-pointing the precise allegations one was taking issue on, but I believe that to the rest of the paragraph we have made that plain to any reasonable person reading the letter.

Q. You did not consider the possibility that one of these unsophisticated shareholders, to whom you referred earlier, might have taken Mr. Adler's word as an assertion that the Cumberland business was not thriving and expanding? A. I certainly did not consider any such possibility.

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Q. Did not you think that was at least a blind spot, your failure to consider that possibility? A. Not in the light of the rest of the paragraph. May I go back to the bottom of page 1 where in the last sentence we impliedly accepted the proposition that the Cumberland operation is an expanding and thriving one.

Q. You are impliedly accepting that with the qualification that if it is thriving and expanding, it is no fault of Cumberland Holdings but rather due to the infusion of funds by FAI? A. We formed the belief we had been responsible for its progress and success.

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Q. The implication in the sentence you have referred to is that if Cumberland Holdings is thriving and

expanding, it is not due so much to its own efforts but due to the infusion of funds by FAI? A. I would have thought both.

Q. Do not you attach any significance to the words "was only possible"? A. That still was not suggesting it had not happened.

Q. It suggested if it happened it was only because of the infusion of funds by FAI? A. That was the intention, yes. 10

Q. Was that altogether true, if it was successful it was due entirely to the infusion of funds by FAI - I mean true in the sense of accurate? A. I suppose any management has to play a part in the matter.

Q. So that was inaccurate to assert that? A. Yes.

Q. That the expanding the thriving nature of Cumberland's business, if it was such, was due entirely to FAI money. That was inaccurate was not it? A. Yes, I would rather have expanded it, looking at it now.

Q. That was apt to create a false impression? 20

A. Not on the expanding and thriving business.

Q. But the statement that FAI was solely responsible for such success as Cumberland Holdings had, that was apt to mislead - (objected to)

\* Q. The statement "I might perhaps be forgiven for commenting that the expanding and thriving was only possible by the active financial backing of loan funds available by FAI" - that was apt to mislead because it was inaccurate? A. It did not refer to management. But may I add that the management was also provided by FAI so really at the end of the day my explanation of it would only have been in terms that it was only possible by the active financial backing of loan funds being made available by FAI and by the management which FAI had provided. 30

Q. I am sorry to be persistent but I would ask you to answer the question and to assist, with his Honour's permission, could the question be read - (last

\* question read.) A. As it stood, yes.

Q. You are practised in the use of words in legal and commercial documents? A. Yes. 40

Q. You know the value of words in those situations?

A. Yes.

Q. Will you agree that notwithstanding the qualification that you say is contained after the words "unfortunately as I have previously stated that is not the case", notwithstanding that qualification as to the sentence on that paragraph in Exhibit 15, they were apt to mislead because they too were inaccurate? A. Taken alone, yes.

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Q. Would you consider this and in this connection take such time as you would like, as to whether there are any other statements in this document Exhibit 15, that in your view, considering the matter again, were inaccurate or misleading? A. To the best of my belief, no.

Q. That is a carefully considered answer? A. On reading it through, yes.

Q. Do you want to read it through again before you finally commit yourself to that? A. No, I will answer to the best of my belief your Honour.

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Q. You do not want to read it through again, read it if you wish to? A. No, to the best of my belief it is.

Q. Will you agree that on 22nd November the Stock market so far as Cumberland was concerned, was entirely dead. There were no bids during that month? A. As far as I know that is so.

Q. Was that within your knowledge at the time you wrote the circular now Exhibit 15? A. I cannot recall when I last inquired whether there was anything on the Board. I believe it to be so at the time.

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Q. You believed there was nothing on the Board at the time? A. Yes.

Q. In the light of that answer would not you agree that the statement on page 3, the paragraph which starts "Mr. Donohoo's second objection". Do you follow that?

A. Yes.

Q. Will you not agree, in the light of your agreement with the proposition that there were no bids on the stock market boards in November, in Cumberland shares, that the statement "Any stockholders who wished to obtain such a figure could therefore just as easily sell his stock through the market in the first place" - is inaccurate? A. If a selling order had been placed

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on the market there is no indication what would happen to it but so far as I know there were no orders of that description.

Q. You said when the circular was drafted there were neither buying nor selling orders? A. That is true, but if someone puts a selling order on there is no certainty what is going to happen to it.

Q. You do not concede there is any element of inaccuracy in that statement "any stockholder who wishes to obtain such a figure could just as easily sell his stock through the market in the first place"? A. Reading it again I would qualify "just as easily", the words "just as easily"; in the light of the point you are making, I can see that is probably overstating the position. 10

Q. You knew it was overstating the position at the time? A. It was not in my mind and indeed it was not in my mind 5 minutes ago when you asked the question.

Q. Did you draft these words "any stockholder who wishes to obtain such a figure could therefore just as easily sell his stock through the market in the first place"? A. I cannot recall now. 20

Q. You agreed with me earlier this morning there was, because of the fact that Mr. Adler and Mr. Belfer sat on the Boards of the offeror and offeree company a conflict of interest situation in relation to this take-over offer. You agreed with that? A. Yes, under the Companies Act terms.

Q. When you say "under the Companies Act terms" what do you mean? A. My honest belief at the time was there was no conflict because what was being offered was in the interests of both parties. 30

Q. You thought that the minority shareholders were being offered just as an advantageous a deal as the deal involving the sale of the shares? A. I really felt at that time that one FAI ordinary share had to be better than one Cumberland ordinary share. In terms of the preference shares I did not think there was anything to choose between them. 40

Q. You did not think there was anything to choose between them? A. Yes. That was really and truthfully why I did not see any conflict of interests.

Q. It was not long after the take-over bid was made that it was pointed out to you very forcefully by the

Australian Shareholders Association that they had a contrary view? A. Yes, they did.

Q. Did you take that view into account? A. I did and I disagreed with them.

Q. You disagreed with them? A. Yes.

Q. How could you disagree with them if the facts which they asserted as giving rise to a conflict of interest situation in fact existed? A. Because it seemed they had ignored the vital difference between what I would call a normal take-over where genuine offers are being made by the offeror to force even unwilling offeree shareholders to part with their stock and to acquire complete control of a company and to the case such as the present where the offeror was simply giving the offeree shareholders a chance to exchange their shares if they wished to do so.

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I felt the difference was so fundamental that I could not believe that the A.S.A. would be of the same view if they had been told of the actual facts of our case. In fact I proved to be wrong because they did come back and say they still agreed so there was disagreement between us at the end of the day, but my opinion at that time was that the A.S.A. was wrong.

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Q. Did you give consideration to the question before the take-over offer was published whether the offeror company should take independent advice as to its sufficiency? A. I must have considered it because I was clearly of the view that there was no necessity for this to be done.

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Q. When did you form that view? A. At an early stage.

Q. When was that? A. Some time in October.

Q. In this letter which is now Exhibit 15, a letter of 22nd November Mr. Donohoo's assertion that independent experts should be engaged to advise the minority stockholders regarding the bid was taken up? A. Yes.

Q. In the letter Exhibit 15 did you intend to express the totality of the reasons why you considered that would be a pointless exercise? A. Not the totality, no.

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Q. Did you intend to express the mainly relevant reasons? A. I intended to express reasons which we believed the shareholders would understand and follows.

Q. And the only reason you expressed was the reason that such advice would be a pointless exercise because Cumberland Holdings and FAI had been closely associated over a period of years? A. That was a reason expressed there.

Q. And the only reason? A. The second one was the main reason, was whether the shareholders were going to be better off by accepting the offer or continuing to hold shares in what would probably be an unlisted company.

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Q. That is an assertion? A. I regarded that as a reason because I went on to say it is not a question in which any merchant banker could really offer helpful advice.

Q. That was an assertion rather than a reason, that advice was unnecessary? A. I am sorry, I do not see the distinction between the two.

Q. If the real issue boiled down to the question whether shareholders are going to be better off in the long run by accepting the FAI offer, as against continuing to hold shares in what would probably be an unlisted company, if that were the real issue, independent advice as to the sufficiency of the offer could be helpful in the resolution of that issue? A. It did not really seem to me so.

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Q. I do not care about that. I am not directing my mind or your mind to what you thought at the time. I am asking you to agree with the proposition I put to you and I repeat the question again, the real issue boils down to the question whether the shareholders were going to be better off in the long run by accepting the FAI offer or by continuing to hold shares in what would probably be an unlisted company. On that issue independent expert advice could be helpful to the minority shareholders, could not it? A. I remain doubtful on that point.

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Q. Are you saying you won't even go so far as now to concede that if that were the main issue, independent advice could be helpful to the minority shareholders - (objected to)

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Q. You recall in Mr. Donohoo's circular, now Exhibit 13, he said this "At the Board meeting of Cumberland I moved that as there are two directors common to the Boards of the offeror and offeree companies, a merchant banker or a firm of chartered accountants be retained to prepare a report evaluating the take-over

offer for the guidance of the minority shareholders, stockholders. My motion was not carried". Do you recall in Exhibit 13, the circular dated 21st November 1974, Mr. Donohoo made this statement? A. I do now.

Q. Will you agree that when you drafted the paragraph in Exhibit 15 which starts off "Mr. Donohoo has further objected" - you were intending to take up that particular statement in Mr. Donohoo's circular, Exhibit 13, and answer it? A. I would assume so.

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Q. That was your intention? A. So far as I now recall.

Q. Could you have had any other intention? A. No, I think it must have been so.

Q. When you wrote the paragraph in Exhibit 15 you set out to answer Mr. Donohoo's statement about the need for independent advice from a merchant banker or a chartered accountant as convincingly as you could? A. That must be so.

Q. If the real issue boiled down to the question whether the shareholders are going to be better off in the long run by accepting the FAI offer or continuing to hold shares in what would probably be an unlisted company, then on that issue the independent advice of a merchant banker or a chartered accountant could be helpful to the minority shareholders, could not it? A. I still feel doubtful but it may be that some of them would have been of that opinion.

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Q. Will you agree that commercially and I am not talking about legally at the moment, will you agree that commercially it is vitally important either to avoid or if that be not practicable to mitigate the consequences or possible consequences of a conflict of interest situation? A. Yes, one always wishes to do so.

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Q. May his Honour take it that vitally important principle has always been as it were burnt into your mind during your legal and commercial career - (objected to)

Q. May we take it that that vitally important principle has always been in the forefront of your mind in the many dealings you have conducted during the long course of your commercial and legal career? A. Yes.

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Q. You were confronted with what as you describe in

the terms of the Companies Act was a conflict of interest situation here? A. Yes, in that sense.

Q. You regarded the Companies Act as unimportant in this case? A. This is a statutory one and my view of the importance of it would be of little consequence.

Q. The Companies Act provisions relating to conflict of interests adds legal vitality to what you have stated to be a vitally important commercial principle? A. Yes.

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Q. In the light of the answers you have readily given about the commercial and legal significance of avoiding or mitigating the effects of a conflict of interest situation, will you not agree that it is quite clear that if the real issue was as you stated it to be in the relevant paragraph of Exhibit 15, independent advice of the kind suggested by Mr. Donohoo could have been helpful to the minority shareholders? A. Could have been, yes.

Q. Will you now agree, and if you want to you can read the paragraph again before answering the question, but the only reason you advanced against Mr. Donohoo's suggestion was the reason that the two companies, Cumberland and FAI had been closely associated over a period of years? A. It was intended to refer to two but if as a matter of construction it is held there is only one reason, then the answer to the question would be yes, but I believe there were two.

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Q. There was a second reason you say in this paragraph? A. Yes, the second reason was it was not felt that an independent banker's advice on whether it was going to be better in the long run to accept the FAI offer or to continue holding shares in in what would probably be an unlisted company, was not one that could be helpful, that is by seeking advice from a merchant banker -

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Q. Or a chartered accountant? A. Yes.

Q. You have conceded that such advice could have been helpful? A. I said it could have been helpful but you are asking me to say that there was only one reason expressed in the paragraph. I believe there were two reasons.

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Q. You agree that that paragraph could be fairly and reasonably read as advancing one reason, by a reasonable person? A. I do not believe so, I could be wrong in grammar as in anything else.



Q. Did you advise Mr. Adler to write that letter, Exhibit 15, in two capacities? A. No, I do not recall having noticed the point until a very considerable time later.

Q. When did you first notice it? A. I think after these proceedings started. We had many things on our minds and that must have escaped my attention.

Q. Quite a number of things seem to have escaped your attention in the drafting of the various circulars. Do you agree? A. I am afraid that is one of the consequences of working in a hurry. We have now had the benefit of a year's hindsight and so many things would now be done differently.

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Q. Will you not agree with this general proposition that the circulars to which I have attracted your attention this morning contain a substantial number of material inaccuracies? A. I do not agree to a substantial number. In this particular one I have agreed that the second sentence on page 2 could be better expressed and that some of the wording of the third paragraph could also have been very much better phrased.

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Q. And some of the wording in the paragraph dealing with independent advice could have been better phrased? A. Yes, I think now I would have rewritten that paragraph altogether. It is no use -

Q. In the light of your advertence to the third paragraph, will you now agree taking this circular alone and considering the circular as a whole, Exhibit 15, there were a substantial number of material inaccuracies in it? A. Taking the circular as a whole I think "substantial" is exaggerating the fact.

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Q. The fact there are material inaccuracies in it is undoubted, is it not? A. One at least was a material matter.

Q. Of course the effect of such inaccuracies as you have conceded is that the shareholders were not given all the relevant information is not that so? A. Not in this circular. I do not think the inaccuracy in the third paragraph on page 2 was an inaccuracy which would have been relevant had there been a cash alternative offer; since there was not one, the practical effect on the shareholders was nil.

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Q. Will you agree having regard to the inaccuracies you have admitted to in evidence, that is to say the inaccuracies in the documents, it could not truly be

said that the shareholders in connection with this take-over offer were given all relevant information?

A. I am considering what all relevant information would mean.

Q. They would not know the fullest information on all relevant points? A. If information means the same thing as reasons, they obviously were not given all the reasons for the views which we held regarding the independent merchant bankers or the accountant; whether that is information, I do not know.

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Q. Could I ask you to take into account for the moment Exhibit 11, the failure to express in figures the asset backing for the two shares. Do you remember that cross-examination this morning? A. Yes.

Q. Will you agree in the light of the fact those figures were not given, it would not be correct to say that the fullest information was given to the shareholders on all relevant points? A. I believe I had covered all the relevant points but you have -

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Q. But not so as to give the fullest information on them. Would you not agree? A. Much more could have been said.

\* Q. And much more had to be said if the shareholders were to be given or were to have been given the fullest information on all relevant points. Will you not agree (objected to)

(At the request of counsel and with his Honour's permission the witness was stood down and left the courtroom. Counsel argued the admissibility of the question in the absence of the witness. Exhibit 14 was handed to his Honour and his Honour stated in the light of the letter Mr. Hughes was entitled to ask the question)

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(Luncheon adjournment)

THOMAS ERIC ATKINSON  
Recalled:

(Question marked with \* read)

WITNESS: Was that question in relation to any specific document or was it in general terms?

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T.E. Atkinson, xx  
Stood down,  
T.E. Atkinson,  
Recalled, xx

MR. HUGHES: Q. Perhaps I could rephrase it. You have in the course of your evidence agreed that there are certain inaccuracies in the circular set out in the course of the take-over? A. Yes.

Q. I now ask you in the light of the inaccuracies to which you have agreed, you do not say, do you, that the shareholders in Cumberland were given the fullest information on all relevant points? A. No. I do not think I can say that now. 10

Q. Did you collaborate with Mr. Adler in the preparation of the letter which is Exhibit 14 to the Chairman of the Australian Shareholders Association? A. Yes, I must have done. Some of the language looks like my own.

Q. Did you draft that letter? A. I cannot recall now who might have prepared the first draft but in any event it must have been discussed while it was still in the draft stage.

Q. You see in this paragraph "My colleagues and I consider the stockholders have been given all the fullest information on all relevant points? A. Yes, I do. 20

Q. Did the insertion of that statement have your approval? A. At that time it must have done.

Q. Will you agree it was inaccurate? A. In the light of the last two days, yes. I believed it at the time.

Q. In the light of your knowledge at the time the letter was written that statement was inaccurate? A. I am sorry, I do not follow. 30

Q. In the light of the things you knew at the time when the letter, Exhibit 14, was written, that letter was inaccurate in making that statement was it not? A. Not at that time. I thought all the relevant points had been covered.

Q. Do you remember me asking you yesterday about the letter you wrote to Mr. Belfer forwarding a copy of the statement of the general background which I showed you yesterday and which is m.f.i. 8. A. Yes. 40

\* Q. Do you remember saying yesterday, on page 373 that you first came to hear about Mr. Adler's placement

(\* Original Transcript Page 236)

of a selling order on 7th August and buying order on 19th August for ordinary Cumberland shares, two or three weeks before this hearing began? A. That is my recollection.

Q. Your letter to Mr. Belfer forwarding the document m.f.i. 8 which I mentioned - do you remember telling his Honour yesterday when you wrote to Mr. Belfer on 8th October forwarding to him the two documents, one of which was this document m.f.i. 8 - I show you a carbon copy to refresh your memory? A. Yes, that is the copy of the letter I wrote.

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Q. You observe from the date of that letter it was written within 6 days of the commencement of the hearing of these proceedings? A. Yes.

Q. May we take it you knew when you wrote that letter dated 8th October, forwarding the document m.f.i. 8 to Mr. Belfer, you were aware of the selling and buying quotations that Mr. Adler had placed for Cumberland shares in August 1974? A. I would have thought so. I could not be certain. I would have thought so. I remember the information came to me from some document that was being produced in the proceedings. I cannot remember which it was. I think our solicitors produced a copy of the document showing orders on the Board over a period of some months. This was the first time I had seen that document and the first time I had noticed these particular transactions.

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I do not know if anybody could identify the document and say when it was first made available to our solicitors.

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Q. What was the document that first brought to your notice the fact that Mr. Adler had issued in August 1974 to Messara & Company a selling order at 70 and a buying order at 50? A. It was some form of schedule.

Q. I show you Exhibit 37. There is a schedule and share transaction form which is part of Exhibit 37? A. I did see it. I do not think it was this one. What I may perhaps say is I see figures in this one which I have no recollection of having seen at a previous time.

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Q. Was this document that Mr. Adler had prepared that first of all brought it to your notice? A. No, my recollection is it was something that was being introduced or going to be introduced into the proceedings by the petitioners and had become available on discovery or something of that nature.

Q. Was it a copy of any of the documents included in Exhibit 51? A. It definitely was not that. It was a typewritten sheet.

MR. HUGHES: I call for that document if my friend can identify it. I can only rely on the description this witness has given.

MR. BAINTON: I have no idea what document you are calling for.

MR. HUGHES: The document which the witness has alluded to. 10

MR. BAINTON: I cannot identify any document from that.

MR. HUGHES: Q. Can you identify the document to which you have referred as being the document which first brought to your notice Mr. Adler's selling and buying orders in August with any greater particularity than you have? A. I am afraid not. I am trying to rack my brains on this. I seem to remember being told it was something that had been produced on discovery or had been made available for inspection or something of that nature. I cannot recall when discovery was made in this case. 20

Q. Do you remember agreeing yesterday that when it came to your notice this selling order and buying order had been placed by Mr. Adler in August, that fact rendered incorrect what you said in the document m.f.i. 8 at page 5? A. Yes, that the instructions to the solicitors.

Q. Whatever they are, you remember agreeing with me? A. Yes, it appeared to do so. 30

Q. Not only did it appear to do so, it did do so, did not it? A. Yes, indeed I would think so.

Q. And was to your mind a most important departure from the correctness of that statement that you agreed you wrote on page 5 of the document m.f.i. 8? A. Yes, I think I mentioned it to our solicitor either at the time I was shown it or shortly afterwards.

Q. Did you draw it to Mr. Belfer's attention? A. No I was merely conveying what I was asked to convey to him. I had been asked if I could arrange to get information available on three specific points and this letter was intended to deal with it. 40

Q. Can you return to me that document m.f.i. 8?

A. Yes. (Document returned to Mr. Hughes)

Q. You did not tell Mr. Belfer, did you, that anything in the document m.f.i. 8 needed to be revised in the light of the information that had come into your possession regarding Mr. Adler's buying order and his selling order in August? You did not say anything like that to Mr. Belfer, did you? A. No, I did not.

Q. It amounts to this, doesn't it, then, that insofar as you were telling Mr. Belfer by reason of what was on page 5 of the document "He" (Mr. Adler) "always attempted to maintain...criteria", you were telling Mr. Belfer something that was not wholly accurate. That is so, isn't it? A. Yes, I must have done so. 10

Q. It was a very important point of inaccuracy, wasn't it? A. I must admit I had totally overlooked it. I don't think I had read through the statement of facts for some considerable time. Perhaps I should have re-read it before I sent it to him.

Q. When did you prepare the document m.f.i. 8? When did you prepare that? A. At the very early stages just after the petition had been served on the company. 20

Q. Up to the point of time at which this information came to your notice concerning the placement by Mr. Adler in August of a buying order and a selling order in Cumberland shares at 50 cents and 70 cents respectively, had it always been your view that Mr. Adler's window dressing was designed, and only designed, to establish a real value for the shares? Up to that stage was it your view that that was the position? A. I think that still is my view. 30

Q. Still is? A. If you are talking in terms of the end of the year transactions.

Q. Of course, you would agree with this, wouldn't you, that the placement on 7th August of a selling order for 10,000 Cumberland shares at 70 cents could by no stretch of the imagination fall within the window dressing operations that you have described. You would agree with that, wouldn't you? A. Yes, I agree with that. 40

Q. And will you agree that one inference that could be drawn from the placement of that selling order at 70 cents, followed later by a buying order from the same source at 50 cents, was that it was an attempt

to drive down the market value of the shares? A. That could have been one inference, yes.

Q. And a very reasonable inference, wouldn't you agree, just looking at the transaction as it stands? As the transaction stands, would not you agree that that was a very reasonable inference to draw? A. With my other explanation, yes, indeed.

Q. What possible explanation is there that would take away the prima facie appearance that this was an operation constituted by the two orders to drive down the market price of the shares? A. Well, do you want me to give the explanation that I have received?

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Q. I am asking you what possible explanation could there be to remove the prima facie inference appearing from the transaction. What other possible explanation could there be? A. In regard to the buying order - the selling order -

HIS HONOUR: I think it ought to be clarified, Mr. Hughes, as to whether he is giving his own explanation. Yesterday, in answer to you, he said that he insisted on obtaining an explanation when he became aware of it. I think perhaps the distinction ought to be drawn as to which you are asking him about.

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MR. HUGHES: With respect, your Honour is perfectly right.

May I preface that approach by asking another question first?

HIS HONOUR: Yes.

MR. HUGHES: Q. When you discovered that these orders had been placed in August by Mr. Adler your first reaction was one of grave concern, wasn't it? A. It was surprise.

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Q. And concern? A. I did not for a moment assume that there had been any of what I would call fraudulent intent in it, and therefore I was not concerned in that sense. But I certainly wanted to know what I could be told about it.

Q. And what were you told about it? What were you told about it, and by whom? A. By Mr. Adler.

Q. And when were you told about it? A. It might have been the same day that I saw the document I mentioned, or possibly a day or so later. I can't

recall now exactly when it was. But it was within a short time.

Q. What did you say to Mr. Adler when you sought the explanation? What did you say to him? A. I think I showed him the page of the document in question, and said -

Q. What was said? What did you say to him? A. I said "Were these orders that you placed on the Board?".

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Q. What did he say? A. I think he said "Yes, I am sure they must have been", or words to that effect. I said "Can you recollect why you should have placed them at the time?", and he replied - I think he took a few minutes to think about it, because the first reply one usually gets to these questions is "I can't remember now. I would have to have a word.."

Q. Was that his first reply to you? A. Something like that, so far as I can remember.

Q. Yes. What happened then? What was said then?

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A. I think he said "I will get in touch with the brokers, and see whether this was on their advice or if they have any recollection of the facts." I think that was as far as it went at that stage. That was as far as it went then.

Q. Yes. What happened next? A. I next met him - I would not swear now whether it was the same day or a day or so afterwards. I said to him "Have you made any further headway in investigating these circumstances?" And he said "Yes. Now I do recall that when I came to put the selling prices on the board the share market had fallen very badly."

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Q. When he came to put what prices? A. The first selling order - the first buying order. I'm sorry, the first selling order.

Q. I think, in fairness to you, you should have the orders in front of you. They are part of Exhibit 51?

A. Yes, I have that Exhibit before me. The first selling order on 7th August.

Q. What did he say about that? A. He said "By this time the market had taken a most appalling toss, and everybody - "

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Q. Did he mention the market in Cumberland shares?

A. No, he did not specifically mention the market



in Cumberland shares. He was talking generally. He was talking about the Stock Exchange.

Q. Yes. What then took place. A. He said "It was obvious that shares were falling very much indeed, so I thought if we put orders on the board as sellers of Cumberland shares it might just be that, in spite of all our previous attempts to find interested buyers, someone might come forward and start showing an interest in the shares." He said "I still thought at that time that if we could get a market going in the shares I would do everything I could to try and keep the float going, even if it meant selling out a few thousand of our own FAI shares or FAR shares at a loss over the price that we had previously purchased." He said "I left the order on the board", and I think he always places them for a five day period, and following that period the brokers reported back that there had been no sign of interest of any sort in the market. At that stage he said he realised that the sale seemed quite hopeless - that it seemed quite hopeless to expect to attract buyers into Cumberland shares, and he gave up the attempt as such.

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He then said "Well, having gone that far I thought I must start trying to see any sorts of figures that could be established at all, and I agreed with the brokers to put a buying order on at a lower price, and leave it there for a longer period of time, to see whether eventually there were any sellers who were prepared to come down to it and make some sort of market." I am not sure whether they were his exact words, but that was the gist of the explanation that he gave me.

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Q. Was that the full extent of his explanation?

A. That is all that I can recall at the moment. Yes, I think it is the full one. I think that was the extent of the explanation.

Q. Before you sought this explanation from him did you point out to him the possible adverse significance of these buying and selling orders from the viewpoint of this litigation? Did you point that out to him?

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A. I don't think I had made reference to that at that time, because I wanted to get the explanation without having, perhaps subconsciously, caused him to be worried in his mind about it. By then, of course, he knew that he was being accused of market rigging and everything else, and I imagine the significance of it was still in his mind. It was not specifically discussed. I think at one stage at one of the meetings I said "I have not the slightest doubt that this will be a subject that will be canvassed at the hearing when it starts".

Q. I suppose you said to him "You will have to testify about it"? A. Yes, indeed.

Q. And did he say "I will"? A. Yes, indeed.

Q. Now, of course, the pattern of Mr. Adler's previous window dressing was that it was confined to the end of the year transactions - confined to the end of the financial year transactions, wasn't it? A. So far as I know, yes.

Q. So far as you know that had been his pattern?

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A. Yes.

Q. And this was a most egregious departure from that pattern, wasn't it? A. I don't know on what other occasions prices may have been put on the board, in mid year, so to speak, or otherwise than at the end of the year. I don't know what other times prices had been put on the board.

Q. So far as you are aware, prior to this little window dressing operation in August Mr. Adler had never conducted window dressing operations in Cumberland shares otherwise than at or about the end of the financial year, had he? So far as you are aware that is the position isn't it? A. That is true.

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Q. So that this was - the August orders were an egregious departure from a well settled pattern, weren't they? A. I'm sorry, I must be confused. I said before, and I repeat, I still don't know what sort of figures may have come on the board during mid year periods. I don't know whether this is the only time that he made a major divergence from the end of the year figures, or whether this had happened in the past. I just do not know.

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Q. Well now, did you ever inquire - you never inquired, is that what you are saying - you never inquired whether he had made previous divergences from his pattern of end of the year window dressing?

A. I did not pursue the matter further.

Q. I suppose you did not pursue it because you thought it might be rather a touchy subject, is that right? A. No. I just did not pursue it.

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Q. You must have had a reason for not pursuing it, musn't you? A. I did not feel it necessary to go further at the time.

Q. At the time you were making this inquiry of

Mr. Adler you were, as you have told his Honour, aware that an allegation of market rigging was going to be made in this litigation, weren't you? A. That is true. That was in respect of the June-July transactions.

HIS HONOUR: Q. In respect of what? A. That was in respect of the June-July transactions, your Honour. They were the ones that were principally in our mind.

MR. HUGHES: Q. At the time you sought this explanation from Mr. Adler it was well in your mind, was it not, that, added together with the July stock exchange transactions, and the August orders, it could give rise to an inference that Mr. Adler had rigged the market. That is so, isn't it? A. Had rigged the market in June-July, or was attempting to rig the market at a later stage? 10

Q. At both dates. What I am suggesting to you, it was in your mind at the time you sought this explanation from Mr. Adler that the accumulation of events - that is, these July transactions, the July on-market transaction, plus the August buying order and selling order - might lead to somebody seeking to draw the inference that there had been wrongful manipulation of the market, both in July and August, or in one month or the other? A. No, I was really only thinking of August, because I had always felt in my own mind quite happy about the June-July situation. I was only really thinking about the August position. 20

Q. Did you by any chance say to Mr. Adler, when he proffered this explanation to you, "I don't think that is going to stand up too well", or words to that effect? Did you say that to Mr. Adler at that time? A. No, I don't think I said anything of that sort. 30

Q. Did you not say anything to him which cast doubt on the sufficiency of the explanation? A. No, I did not.

Q. You see, it was a most remarkable explanation, having regard to the previous pattern of window dressing, wasn't it? A. Well, in the light of his constant desire to try and get a market going in the Cumberland shares it did not strike me as being out of the ordinary. He had tried for many years, or several years. 40

Q. So he told you? A. Yes, so he told me.

Q. You are relying on what he told you? A. And on

the evidence of such transactions as did go through. In those transactions he always appeared as a buyer when there was anything on offer.

Q. You see, Mr. Adler had sold his own shares or his family shares for a total consideration of about \$190,000 less than a month before 7th August - the date of the selling order - to FAI, for \$1.25 per share hadn't he? A. Yes, that is true.

Q. And the selling order at 70 cents placed on 7th August, within a month of the July transactions in relation to his family shares, was quite out of line with the market set by the family transaction and the contemporaneous market sales, wasn't it? A. That is true. But the major market collapse really began in the second half of July, and after that all across the board company shares were in terrible trouble.

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I was not in Sydney myself over the latter part of the period, but on the London market I saw shares falling by a much larger range than that in the course of 10 days in the early part of August.

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Q. Do you think this is really helpful to his Honour to tell him about the London market when we are dealing with questions concerning Mr. Adler's operations on the Sydney market in respect of his shares in Cumberland? Do you really think that that is helpful to his Honour? A. So far as I could see there seemed to be a very similar pattern going on in in not just London and Sydney, but most of the stock exchanges in the world, at that time.

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Q. Will you look, please, at Exhibit 37 again? I think it is in front of you, or near you. Will you look at that Exhibit again? A. Yes.

Q. Do you see that from 22nd July on down to 7th August the last sale of Cumberland ordinary stock units was \$1.20 on the market? A. Yes I do.

Q. Was that fact within your knowledge when you sought these explanations from Mr. Adler? A. I am not sure that those figures and facts were within all the documents that I was looking at.

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Q. That is not what I was asking you. I am asking was that fact within your knowledge when you sought an explanation from Mr. Adler? A. I knew there had been one sale at \$1.20, but -

Q. Did you try to test Mr. Adler's explanation to

satisfy yourself as to its sufficiency? A. No, I did not. It seemed to me to be an explanation that he could well put forward.

Q. But didn't you try to test whether it would stand up in court? A. No, your Honour. I trust people with whom I am associated daily in business. I do not regard them as potential criminals.

Q. Didn't you say to Mr. Adler "Look, why did you put the shares on at 70 cents - 10,000 of them at that - when the last sale, not long before 7th August, was \$1.20"? Didn't you say that to Mr. Adler? A. The last sale appears to have been on 22nd July.

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Q. That is not long before 7th August, is it?  
A. In terms of what was happening on the market I would have said that was a period that could have caused an enormous variance.

Q. Didn't you say to Mr. Adler "Look, there has been no sale of Cumberland shares since 22nd July. Why did you put them on as low as 70 cents?" Didn't you say anything to him like that? A. I think I have indicated he wanted to put on a figure so low that it may hopefully produce some buyers who were interested in the stock.

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Q. Of course, if hopefully he produced buyers interested in the stock below 70 cents that would be a very valuable weapon in the take-over armoury, wouldn't it? Wouldn't it? A. If a take-over operation had been in contemplation that certainly would have been a factor to consider.

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Q. Do you say that take-over operations for Cumberland - do you say that a take-over operation in respect of Cumberland was never in contemplation prior to September? A. During the period I was concerned with the FAI side I do not recall any suggestion of a take-over for ordinary shares. There had been discussions at the beginning of the year with two major preference shareholders about possible exchange of their preference shares in Cumberland, and I remember Mr. Adler - FAI, I am sorry - I remember Mr. Adler telling me around that time that if they had been prepared to agree with his suggestion he would, of course, have made an offer for the remaining preference shares on the same terms. These are the only conversations I recall during the course of the year until our Board meeting in September took place.

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Q. You say, do you, that never during 1974, either

at a Board meeting of FAI Insurance or outside a Board meeting of FAI Insurance, was there any discussion at which you were present of the possibility of a take-over of Cumberland Holdings Limited?

A. The possibility of a take-over of ordinary shares? To the best of my knowledge and belief, no, there was not, for the ordinary shares.

Q. The possible transaction that was discussed in relation to the preference shares was not a take-over transaction, was it? It was not a take-over of the company? A. No, it would have been a take-over of the two classes.

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Q. So that that proposal would not be accurately described as a take-over for Cumberland Holdings, would it? A. Well in my view not utterly, no.

Q. Don't you remember being present at a Board meeting of FAI Insurances Limited held on the 12th floor of the FAI Insurances building, 185 Macquarie Street, Sydney, on Wednesday, 3rd April 1975 (sic) at 11.30 a.m.? A. I could not recollect the date, but if there are documents to show that I was there, naturally I accept the fact that I was there.

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Q. I am suggesting to you quite specifically that prior to that date, 3rd April 1974 -

HIS HONOUR: You said "1975" before, Mr. Hughes.

MR. HUGHES: I am sorry. Do you remember being present at a meeting of FAI Insurances Limited directors, held on 3rd April 1974? Do you remember being present at such a meeting? A. Dates I do not specifically remember, but if it is put to me that I was there then I accept that.

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Q. I am putting it on the basis of a minute that is in front of me which I will proceed to show you?

A. I accept it in that case.

Q. You say quite unequivocally that prior to that date you had never taken part in any discussion or heard of any discussion involving a proposal for the take-over of Cumberland Holdings Limited? A. If that involves take-over of ordinaries, I would certainly say so, to the best of my knowledge and belief. I do remember when the discussion about preference shares took place saying to Mr. Adler - I am not sure whether it was to him alone, or to the meeting - "Well, what is happening about ordinaries?", and I got a reply something to the effect "Well, whatever your opinion about

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listing difficulties may be, I would like to keep the thing going as long as I can, and I would not want to do anything about that". The reason he gave for wanting to explore the possibilities in regard to the preference shares was that he wanted to try and replace the preference shares - the dividend on which was non-deductible for tax purposes - with some form of loan capital which could be claimed as a pre-tax expense, and he had something like that in mind, if he could get the Cumberland preference shares out of the way. That was a discussion that I recall led up to -

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Q. What he had in mind was getting rid of the preference shares for reasons which may have been perfectly commendable without affecting a total take-over of the company? A. Yes. He was always terribly anxious to try to keep the quote going, and whether he really took my views terribly serious when I was dogmatic in my opinion that there was no way in which it could be done, I am not sure.

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Q. Let me come back to the meeting of 3rd April 1974? A. Yes.

Q. (Approaching witness with document) Do you see these minutes? A. Yes, I see them.

Q. Is that one of your signatures down there? Are these initials yours? A. Yes, they are my initials.

Q. That is you? A. Yes, I accept that I was present.

Q. You were present, and you approved of the minutes? A. Surprisingly, I do not seem to have done so. This would have been Professor Wilson's signature, and that would be Mr. Belfer.

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Q. One of the resolutions - you were certainly there at the meeting? A. Yes, I was at the meeting. When the minutes were being approved I must have been away. I cannot recall my moves then. I did not approve these minutes. I can't remember when I first saw them.

Q. I was going to ask you that. Have you seen that minute in connection with the preparation of this case? A. I cannot recall that I have, no.

Q. One of the resolutions passed at that meeting was that the take-over of Cumberland Holdings Limited was again discussed, and it was resolved not to proceed? A. Well, the discussion took place along the lines that I have said. Whoever recorded the minutes apparently did not think there was any distinction between

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a partial take-over of two classes and a total take-over of the whole company. That is an assumption on my part, but I am quite clear in my own mind that the conversation was reporting back, as it were, on the negotiations which Mr. Adler had had with Mr. Millner and Mr. Geddes, the managing director of Mercantile Mutual Life Company, who was the other major shareholder in preference shares.

Q. Of course, the phrase "take-over of Cumberland Holdings" was, as you have already agreed, apt to describe the proposal that had been under consideration for acquiring, by take-over, all the ordinary shares in that company, wasn't it? A. It would have been apt, yes. 10

Q. Do you still say that there were no discussions of which you were aware in 1974 relating to such a proposal until September? A. That is the best of my recollection and belief, your Honour.

Q. Of course, if there had been such discussions - that is, discussions about the possibility of acquiring total control of the ordinary share capital of Cumberland earlier than September - before August - then this buying and this selling order of Mr. Adler's in August - those buying and selling orders of Mr. Adler's in August could assume a sinister appearance, couldn't they? A. The minute you have shown me says that the resolution was not to proceed. If that had been a false minute as well - if everything was being "cooked" - I suppose there is no limit to the possibilities. 20 30

Q. The fact that a decision was made not to proceed with the take-over of Cumberland Holdings means that a proposal had been in contemplation for such a take-over, doesn't it? A. Well I can only say, your Honour, so far as ordinary shares are concerned I have no recollection of such a thing happening. I remember quite clearly in regard to the preference issue, because I think there was a letter sent at one stage by Mr. Adler to Mr. Millner outlining his suggestions. I don't think there was a letter to Mr. Geddes, but I remember being told that there had been a meeting between them and Mr. Adler at which the same proposition had been put forward again. There was certainly no mention in the letter to Mr. Millner, if I recollect it correctly, of anything other than preference shares. 40

Q. Mr. Atkinson - the idea of selling 10,000 Cumberland shares at 70 cents in August - A. Yes.



Q. - was quite out of line with FAI's settled policy, according to which Cumberland was regarded as a long term investment, wasn't it? A. Yes. It was certainly out of line with the policy that had been discussed previously.

Q. Of course, there was this further element in the situation, do you not agree? As well as being out of line with the previously settled policy, it represented a sacrifice of 55 cents a share below the price that had been paid in July both on the market and to Mr. Adler's family companies? A. Yes I do remember putting that to him. I said "Do you mean to tell me we are going to take a loss so soon?" He said "well, it seemed to me there were only going to be a few thousand shares involved at best, and this was a way to re-establish market interest and of giving the company a chance of getting going on the Stock Exchange, so I thought it was the sort of thing we could fairly involve ourselves in".

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Q. Did you, from Mr. Adler's explanation, deduce that this departure from settled policy and this sacrifice of 55 cents a share were decided upon by Mr. Adler because he was consumed with a desire to see that the ordinary shareholders in Cumberland were fairly treated? A. I don't think the situation could have arisen at that stage.

Q. Really, you see, why should Mr. Adler be trying to make a market at 70 cents if it involved a sacrifice of 55 cents a share, and a departure from settled policy decided at Board level? Did you ask yourself that question? A. I knew that he had always been terribly anxious, not only to try and keep the Cumberland quote going, but to get a genuine outside interest attracted in the shares. That had been something that had been hammered home to me for months prior to that date and, as I say, my reaction was always very sceptical, and I don't think it carried very much weight.

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Q. Didn't it occur to you at the time Mr. Adler was offering this explanation that there was no need - unless he had some idea of making a take-over offer for the ordinary shares in Cumberland - there was no need to make a market in August? Didn't that cross your mind? A. If he had been trying to attract buyers in he was not going to cancel it out by making a take-over within a reasonably short time afterwards. That would have been a pointless exercise.

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Q. If he had a take-over in mind it would not have

been a pointless exercise, however wicked it might be to drive down the price of the shares on the Board by putting on a selling order of 70 cents, would it?

A. It might have helped, if that is what he wanted to do.

Q. That would have been a wicked, reprehensible thing to do? A. Well I certainly would have been surprised.

Q. It would have been wicked and reprehensible wouldn't it? A. Well, wicked? In commercial circles things are done which I know from time to time are not in accordance with what we would like in our private lives. But they are done, and I doubt if they are wicked in that sense.

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Q. Do you think if the fact was - and I am not at the moment asking you to agree with this - on the assumption that Mr. Adler put that selling quote on the board in August at 70 cents with a view to driving down the Board price of the shares, having a take-over offer for the ordinary capital of Cumberland in mind - on that assumption would you say that his conduct was wicked? I am not asking you to agree that that was his purpose. But if it was his purpose, would not that have been a wicked thing to do? A. I think I would call it sharp practice.

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Q. You would call it sharp practice? A. Yes.

Q. Sharp practice of such a magnitude, will you not agree, that no person engaged in it is fit to be on the Board of any public company in this city? A. I don't think I would necessarily go as far as that, your Honour.

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Q. You tolerate a certain amount of sharp practice in commercial dealings, do you. A. Well, I am afraid that it happens.

Q. I don't care whether it happens or not. I did not ask you that. I want to know, do you tolerate it? A. I accept that it happens. I try to keep away from it myself, of course.

Q. Do you accept that it happens in companies of which you are a director? A. Not to my knowledge, no.

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Q. If Mr. Adler put on that selling quote in August for the purpose of driving down the board price of the shares with a view to a possible take-over operation would you ever want to sit on the board of a public company with him again? A. No.

Q. Because such conduct would be monstrous sharp practice, wouldn't it? A. I don't know when sharp practice becomes monstrous.

Q. Let me use a simple word, if you don't like "monstrous" it would be serious sharp practice, wouldn't it? A. It would be pretty acute sharp practice, yes.

Q. You gave us what you say was Mr. Adler's explanation for putting on the board a buying quote of 50 cents. Do you remember that? A. Yes, I remember that. 10

Q. Now you gathered from his explanation, did you not, that at the time that he put on his buying quote of 50 cents the only ostensible seller in the market was himself. Well, FAR - the only one prepared to put anything on the board? A. Yes.

Q. So that to put a buying quote on in those circumstances was hardly consistent with trying to make a real market for the shares, was it? A. Well, my answer to that is that it would depend on what the plan of campaign was seen as being likely to involve. I could well envisage you might decide you have to start with a figure - whatever it is - and move the figure around; move it in one direction; maybe in the other direction - until eventually you find some sort of figure at which something will be done. 20

Q. If you wanted to make a market for the shares the appropriate thing to have done, with the interests of shareholders in mind, would be to put the buying quote on of 70 cents and a matching selling quote of 70 cents? A. Well, that would not have helped what he wanted. He might even then have got some buyers at 70 cents and would merely have made his overall possibility of keeping the company going even less than it was already, if that were possible. 30

Q. You have told us, haven't you, that according to Mr. Adler his purpose in placing those two orders on in August was to create the appearance of a real market in the shares? A. No. If I said that, I certainly did not intend to. The purpose of putting the selling order on was to try and find some real buyers - not to create any appearance; actually to find physical people who would come forward and buy Cumberland shares, and hopefully start doing something which would build up in a company with a real stock exchange existence. 40

Q. Mr. Adler's explanation did not really carry

conviction to you, did it. A. I was prepared to accept it.

Q. With some doubt? A. Yes, I think so.

Q. Did you accept it absolutely, without reservation?

A. The only reservation I would have on anything he was saying to me is in regard to his memory.

Q. His memory, in the first instance, was conveniently poor? A. Convenient or otherwise, there are a large number of questions one asks to which the reply always is "I can't remember", and sometimes I have known him to say "For this, that and the other purpose", and then he would come back and say, two or three days later, "I have thought about it again and maybe I was wrong, it may have been something else". In those terms I would always be a little nervous about having what counsel referred to as "no reservations", but in terms of honesty, my answer remains No.

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Q. You had no reservations? A. In terms of honesty, no.

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Q. Did Mr. Adler tell you he had consulted Mr. Messara with a view to obtaining an explanation of the purpose of the August selling and buying orders?

A. Yes, I think he told me John Messara cannot help me. He has no recollection of it.

Q. Mr. Messara is alive and living in Sydney, is he not? A. He is.

Q. In fact he has been in this court, or the precincts of this court? A. Yes.

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Q. As recently as yesterday? A. This morning.

Q. He was here yesterday too, wasn't he? A. Now my recollection is going.

Q. Did Mr. Adler tell you he spoke to anyone else, seeking an explanation of this curious set of orders?

A. No, I think it had been established that the orders were placed through Mr. Messara, as other brokers would not have been interested in that, presumably.

Q. Did you talk to Professor Wilson or Mr. Belfer about Mr. Adler's explanation to you about these curious orders? A. I really cannot now recollect,

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your Honour. I would have thought it likely I would have talked to Professor Wilson.

Q. When? A. I cannot now remember.

Q. Is Professor Wilson alive and living in Sydney?  
A. I hope so.

Q. I just want to know if we may expect to see him. Did you discuss this explanation of Mr. Adler's, of his curious orders, with Mr. Belfer? A. That I cannot remember. On matters affecting share transactions I would be more likely to talk to Professor Wilson than Mr. Belfer, who has very little connection with that side of the business.

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Q. Would you agree with me that until the letter came from the Stock Exchange, dated 4th September, which is Exhibit 6, threatening de-listing unless the majority shareholding was reduced down to 75 per cent within three months, there had been, to your knowledge, no threat from the Stock Exchange to take such action previously? A. So far as I am aware, yes, your Honour.

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Q. May we take it that if there had been such a threat prior to September you would, because of your lively interest, as you have described it, in the listing problem, have been aware of such a threat?  
A. I have no doubt I would have been told at any time after I came on the Board.

Q. At the meeting of 11th July, was the possibility that the acquisition of the \$190,000 worth of shares from Mr. Adler's family might precipitate a delisting risk activated in your mind? A. No, I don't think so, so far as I can recollect. Certainly I am sure that nothing was said about it at the meeting, and if I did think about it I must have thought it was not worthwhile mentioning to anybody.

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Q. If you did think about it, surely it would have occurred to you that the acquisition of the shares from Mr. Adler's family might well have caused the Stock Exchange to take action that would prejudice the minority shareholders. Wont't you agree with that?  
A. Well I believe that the certainty already existed, and I don't think that was really the reason why. I don't think I really gave it anymore consideration at that time. The other point of course, as I have said in my previous evidence, is that this was a case of shopping around shareholdings amongst a number of associated companies which in my experience were

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treated by listing committees as a single entity for the purpose of considering the listing regulations, and I do not think it would ever have struck me that they could regard it as being of any consequence whether shares were held in the name of Lader or Fire & All Risks, or of individual members of the Adler family.

Q. You had no belief, did you, that the Stock Exchange possessed information that Lader and the family companies were all tied up in the one bag, as it were, with FIA? - You had no belief, did you, that that was the Stock Exchange's information?

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A. I assumed it must have been available to them. I do not know how they keep their books.

Q. But you had no hard evidence that the Stock Exchange was of that belief, did you, when you were sitting down at the Board table on 11th July? A. I would have assumed that the contents of the substantial shareholder's register would be in the Stock Exchange's possession, and I naturally assumed that Lader would be recorded in that register as having a relevant interest in any shares held by either itself or by its subsidiary companies.

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Q. Notwithstanding that possibility, the fact was that the ordinary shares of Cumberland had been listed on the Exchange without any threat of delisting from about 1960? A. Yes, they had. I think for the first period the listing requirements of course were very very much slacker and taken much less seriously than they were in later years.

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Q. When did you understand they had been tightened up? A. Speaking from memory, I think in the early 1970's.

Q. Despite the tightening up of the listing requirements and your belief as to the possible availability to the Stock Exchange of information concerning the identity of the substantial shareholders in FAI? A. In Cumberland?

Q. In Cumberland things had bounced along quite nicely without the Stock Exchange lifting a finger? A. They had not done so and this is why I expressed surprise from time to time.

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Q. The fact that the Stock Exchange had been inactive gave you some hope for the future listing did it not? A. Over any substantial period of time, no your Honour, I could not believe that that

situation could go on being overlooked indefinitely, not just because of the size of the Lader and associated Adler interests, but because, as I said previously, as far as I could see, all the four listing requirements were not being complied with.

Q. Mr. Atkinson, when you sat down at the Board meeting on 11th July, was it in your mind that it was in the interests of the minority stockholders in Cumberland that the listing should be preserved for as long as possible? A. No, I really did not think it was making any difference to them in practice, one way or the other. There was no market except such as was at the mercy of Mr. Adler.

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Q. That is a good description, is it not? A. It happens to be the case. If you look at the transactions over the previous three or four years he had made the market, he had been the buyer, and without him the stockholders would have no hope of taking real advantage of what should have been the facilities of a listed company on the Stock Exchange.

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Q. Even though the stockholders were at the mercy of Mr. Adler, they were at least able to sell their stock on the market, weren't they, rather than having to scramble around and find a private buyer. A. In practice, provided he was prepared to buy it from them.

Q. But even on your view there was some marginal advantage to minority stockholders in Cumberland in having the listing preserved for as long as possible? A. As things were at the time, I do not believe there was an advantage.

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Q. On reflection, do you think that belief was a little wide of the mark? A. Well, it would have to be so marginal that the answer could still almost be totally unqualified.

Q. Just slightly qualified? A. As I said to counsel this morning, your Honour, when there was a chance for independent operators to show some sort of an interest in the market, after the prospective take-over bid had been announced, I would have thought that that was the very time, if there could conceivably be any interest in the shares, it would be shown, and in fact as far as we can say, not one single person was prepared to, if I may use a sporting phrase, take a punt on making some money out of the take-over operation.

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Q. Of course, did it perhaps cross your mind that

the reason why no punters came to the market may have been that they thought that FAI was intent upon screwing the Cumberland ordinary stockholders? A. I think by that time -

Q. Did that cross your mind? A. Not at the nominal price. The nominal price was below par.

Q. Can you establish that by reference to any document, that the market price of Cumberland ordinary shares before take-over was below par? A. If this list is correct - it is referred to as 8th October, up to February 1975. The last sale reported was 48 cents. 10

Q. Where is that? A. I am looking at page 2 of this Exhibit that you had handed to me before, Exhibit 37.

Q. You accept that as an accurate list, do you?  
A. I have no means of checking it.

Q. You have no reason to dispute its accuracy?  
A. I would assume it has been properly prepared.

Q. You are referring to a last sale at 48 cents, on 8th October? A. Yes. 20

Q. It does appear on page 2 of the list? A. I am beginning to wonder if that can be correct, your Honour. As far as I remember the last transfer that was ever registered in the books was sometime earlier than 8th October, so unless the scrip has been held by a buying broker or something of that nature, I would not know how that could have happened.

Q. Would you not agree that where a public company is a listed company, with a very large majority shareholding, and a minority shareholding of about 20% it is a matter that the directors should take into account in relation to any proposed transaction that the listing of the company might be jeopardised by that transaction? (Objected to; rephrased). 30

Q. I am asking you for your own views, as a commercial man, not a lawyer. Would you not agree that the directors of a public company, whose shares are listed, and where there is a large majority shareholding and 20% minority shareholding, where that company is considering further acquisition of shares by the majority shareholders as in the July transactions, ought to take into account the possible impact on that transaction on the company's listing. (Objected to; rephrased) 40



Q. In July, when you were considering this highly advantageous share purchase at \$1.25 -

HIS HONOUR: I do not think he said it was highly advantageous.

MR. HUGHES: Q. In July this advantageous share purchase at \$1.25 - did the thought cross your mind that if the purchase was carried through the Stock Exchange might activate itself into threatening the delisting of the company? A. If it did cross my mind I certainly dismissed it. I cannot say whether it did cross my mind. My views were so clearly fixed on this point that I doubt that I gave it any further thought at that time.

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Q. Would you not agree, whether or not you thought about it, that it was a commercially relevant consideration, when considering the July offer from Mr. Adler, for directors to consider whether the acceptance of that offer might precipitate delisting action? (Objected to; and withdrawn)

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Q. Could I take you back to that document, Exhibit 15, for a moment. There is a paragraph in that document, is there, that indicates - the second last paragraph of that document indicates, does it not, how important you and Mr. Adler thought the delisting of the company would be to an ordinary shareholder, a minority shareholder? A. This is what I believe the shareholder might think it would be.

Q. This second last paragraph reads as follows: "Speaking personally, I would never permit 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 might advise me to the contrary". A. That is so.

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Q. That was your statement, as well as Mr. Adler's? A. Yes, I accept that.

Q. Will you agree with me that that is a statement that indicates the importance in your mind, at the time when that statement was written, of the delisting of a company to a minority shareholder in that company? A. If it is a company which has a reasonable chance of maintaining its quote or even a small chance of maintaining its quote, I would agree that it would be of importance.

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Q. Taking up your last answer, nothing had happened prior to 4th September to indicate that the Stock

Exchange had any intention of de-listing Cumberland ordinary shares, had it? A. Not as far as I knew, no.

Q. So that as a betting man - if you are one - you would have said to yourself, being objective, in July, "Well, there is a chance that if things continue as they are, with the majority shareholding restricted to about seventy-two per cent, the Stock Exchange will not move to delist us, to delist Cumberland"?

A. No, I didn't believe there was a chance, your Honour. 10

Q. Really? A. Really, it was -

Q. The Stock Exchange had said nothing? A. Yes. To my mind it could at most only be a question of timing.

Q. But even time was valuable to a minority shareholder, wasn't it? A. If there had been a trading market on which he could have traded his shares.

Q. But the beneficent Mr. Adler might have come in to do a bit of his annual window dressing, mightn't he? A. If Mr. Adler wanted to come in he would come in on private offers equally with the public offer. He wouldn't have - let me say, if the company had been delisted of course he would no longer have been interested in the window dressing, which was purely in order to get a Stock Exchange figure; it had no effect on the accounts, your Honour, as I have commented previously. 20

Q. I know you were very concerned to maintain the propriety of this window dressing, but what I am putting to you is that the advantage to a minority shareholder of a continuation of the listing for as long as possible was twofold, wasn't it? First of all, Mr. Adler might sally into the market with his window dressing equipment; and secondly it might just happen that some minority Cumberland ordinary shares might be held by a deceased estate and might have to be sold. Those were two possibilities, weren't they? A. Taking the latter one first, sir, on all the previous evidence, if executors had tried to sell them, the only possibility would seem to be to find Mr. Adler as a buyer. 30 40

Q. But you see, one possible advantage in a continuation of the listing for a minority shareholder is that Mr. Adler, in his annual window dressing sally, might have come on to the market with a buying quote of \$1.50, for some purpose perfectly legitimate of

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his own; that is one possibility, isn't it? A. It is a possibility, sir.

Q. And another possibility was that Mr. Adler, for perfectly legitimate purposes of his own, might have sallied into the market with his window dressing equipment and ordered his broker to buy some shares in the name of a nominee company, whose connection with Mr. Adler would never be revealed, even by the intensive processes of examination of the Stock Exchange. That was another possibility, wasn't it? A. If an attempt were being made to hoodwink the Exchange, I suppose one might have got away with it, certainly for a while.

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Q. Well, you don't suggest, do you, that buying shares in the name of a nominee company is hoodwinking? A. No, but the suggestion here is that if we bought them in our own name the Stock Exchange would object. I don't think I really would want to go along with that sort of a proposition, your Honour.

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Q. That would be sharp practice to you, would it? A. I don't know whether it is sharp practice to hoodwink the Exchange, but I wouldn't want to do it.

Q. What I was putting to you was this: Is the purchase of shares in the name of a nominee company by a major shareholder in the company whose shares are being purchased to your mind a form of hoodwinking? A. Well, it would normally have to be reported on to the Exchange, in accordance with usual practice; whether you had taken the contract in your own name or through a nominee. If you wanted to hoodwink you would have to go further and just ignore the reporting requirements, too.

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Q. Could I come to another matter now, Mr. Atkinson. You have said more than once - I am sorry to have to refer to it again - that to your mind the critical factor to you in reaching the conclusion that the share exchange proposed in the take-over offer was the respective earnings yields of the two companies, is that right? A. I think, yes, that for one; I think I also said "and prospects".

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Q. And the prospects in terms of earnings to you? A. Yes, that is correct.

Q. Has it ever struck you that if that was the crucial consideration in your mind in predisposing you to think that this take-over offer was fair and reasonable, it is a very remarkable thing that the matter of

earnings yield, past or prospective, is not mentioned at all, either in the take-over documents, Exhibit 11, or in the subsequent circulars forming part of the paper war? A. On the former one, your Honour, I think I indicated that I was trying to keep it as simple as possible, as non-technical as possible, and really that goes for the circulars, too.

Q. So your search for stark simplicity led you, did it, to omit any reference in the take-over documents, Exhibit 11, or the subsequent circulars in the paper warfare, to the factor that was critical to your mind in concluding that this was a fair offer; is that what you say? A. Basically, yes. 10

Q. And will you not agree that that is a very curious feature of the documentation to which I have referred, if it was your belief that earnings yield was a crucial factor, that no mention was made of it? A. I didn't think so at the time, your Honour.

Q. If you are trying to put up a case, as a lawyer, do you omit to put to the Court your best point? A. If I am dealing with a Judge, I would assume that the Judge would be capable of understanding and appreciating it. 20

Q. What about if you are talking to a jury of unsophisticated minority shareholders?

MR. BAINTON: Your Honour -

HIS HONOUR: Yes, I was tempted to intervene on the last question; I do not think it is going to help me. Perhaps you could reconsider that question. 30

MR. HUGHES: Q. If you thought, if you really thought, that past and prospective earnings yield for the two companies was the prime point in favour of the take-over offer being accepted, would you not have been at pains to make the point to the shareholders in simple language that they could understand? A. I think in order to get it across, your Honour, I would have to have made something of the order of a formal forecast, which I think would have required verification by the auditors and added a great deal of extra, what I might call complexity, to the document. I carefully refrained as far as I could from making the forecast, beyond the very conservative one that the dividend looked all right. 40

Q. Well, you were confident about your forecast, weren't you - you were bullish? A. I felt very happy, yes.

Q. And it would have been a little too troublesome to get some documentation from the auditors, would it, to substantiate your bullish notions - would that have been too much trouble? A. I considered it at the time not necessary, your Honour.

Q. Not necessary - and also troublesome? A. Well, yes, of course it would have involved some trouble. If I had thought it was necessary, presumably the trouble would have had to be exerted.

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Q. Well, if to your mind it was the best point, didn't your duty to be fair necessitate that you disclose it? A. Your Honour, I thought I had made what I might call a case that would be intelligible and satisfactory to the ordinary man in the street who might be reading it, and of course in the light of what learned counsel is now saying, I think I would have amended one or other of the documents to include this as well, even if it had meant going further with additional accountancy researches.

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Q. Mr. Atkinson, subsequent reflection - some of it over a long course of cross-examination - has led you to conclude, has it not, that the case that you prepared for the consideration of the minority shareholders was in some respects neither intelligible nor accurate? A. Intelligibility, your Honour, I don't think I yet concede; we obviously disagree on one condition in the documents. Accuracy we have canvassed at length throughout the proceedings.

Q. When did you start to prepare the take-over documents that ultimately became Exhibit 11? A. Oh, it would be somewhere round about the middle of September; that is the bare bones of the Part A of course. One knew that something of course was going to have to go in, and you could get a format established.

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Q. The preparation of these documents took rather a long time? A. It did. Every time I thought I had got it completed, I managed to find another listing requirement or some other statutory requirement that had been overlooked, and there was an enormous amount of trouble taken.

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Q. Yes, but you were not a stranger to the preparation of take-over documents, were you? A. I think this was the first listed company document that I had done in this country, your Honour, to the best of my knowledge and belief. I did go part of the way for drafting another one two or three years ago, but it

was halted in its tracks before I had to get down to too much detail.

Q. When you started to prepare these take-over documents and continued with the preparation of them over a period of nearly two months - A. No, the documents were finished round about the third week in October, I would say. After that it was a case of leaving dates blank and filling them in when the final form was established.

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Q. So the preparation of the documents in draft form was completed five weeks approximately from the date of the announcement of the offer on 13th September, was it? A. I would have thought a little later, but I have no -

Q. Give or take a few days? A. Yes, give or take a few days; I think probably in the later direction.

Q. And of course during the time that elapsed from the announcement of the offer on 13th September to the final completion of the take-over documents, the question whether the Adler family company sales in July and the on-market transactions in July in Cumberland shares should be disclosed was present to your mind, wasn't it? A. I was not paying real regard to it, sir, because it seemed apparent that the accounting information could not be completed until a time which would be well outside, in my view, any conceivable listing requirements.

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Q. When was the accounting information ultimately supplied to you? A. I would say 18th-20th October, somewhere in that region. It was the last of the documents that I still had to wait for to get the Table A into a final draft form.

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Q. What I am asking you, however, is this - between 13th September when the offer was announced, and 18th October, the question was present in your mind, was it not, whether the sale of the chairman's shares and the on-market transactions in July should be disclosed to the shareholders in Cumberland - it was in your mind? A. I think I went back the other way; I looked at the Part A requirements and said, "Well, assuming we are working on a certain date, where does that take us back to?" and as I said, at the time when I really started doing that it was considerably after the July period, the relevant part of the July period. I don't think I had ever assumed that everything was going to be ready at a time when the July transactions would be relevant.

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Q. But look, the question whether you ought to disclose the July transactions did occur to your mind between 13th September and 18th October, didn't it?

A. What was occurring to my mind was all the various transactions that I might have to refer to -

Q. Yes, including those. A. If they were within the limitation, of course yes.

Q. And while this question of whether the July transaction should be disclosed was in your mind, it was also in your mind, was it not, that the longer the publication of the take-over offer was deferred, the better the case against the need for disclosing those July transactions became? A. No, I am sorry, I was not trying to spin the thing out so that I could get out of any particular disclosures. It was simply a fact that it was physically impossible, or impossible from the point of view of the accountancy requirements, to get the documents ready any earlier; I was pressing for them.

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Q. Mr. Atkinson, I want to come back if I may to the conversation down at the Exchange between Mr. Adler and Mr. Curran on 4th December. A. Yes.

Q. Do you remember Mr. Curran asking Mr. Adler how \$1.25 had been determined as an appropriate price for FAI to have purchased shares from interests associated with Mr. Adler? A. Yes, I do recall.

Q. Do you remember that? A. Yes.

Q. And if Mr. Adler had given an untruthful answer to that question, would you have felt in honour bound to reveal the truth to Mr. Curran? A. Of course, yes.

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Q. And Mr. Adler's reply to Mr. Curran's question was in substance this, was it not, "It was the market price. You should be happy with that, Mr. Curran; it was the market price"? A. I don't remember the words "You should be happy with that Mr. Curran". I think he did say it was the market price, yes.

Q. You were quite aware at that time, were you not, that the price had been determined without any consideration of the market price because of the knowledge of the board that the market price was a window-dressed price? A. Yes. I was aware of the fact.

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Q. So you were aware, when Mr. Curran was told by Mr. Adler that the price was determined on the basis



of market price, that that statement was untrue?

A. I think he said "It was the market price".

Q. Yes; and you have agreed with me that that answer was elicited by a question from Mr. Curran, "How was the price of \$1.25 a share determined?" A. Yes, I accept that.

Q. So that, putting the question and the answer together, Mr. Adler's answer was untrue, wasn't it?

A. It was not a full answer, your Honour.

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Q. It was not a true answer, was it? A. I didn't feel it was a correct answer.

\* Q. No; you didn't feel it was a correct answer, because you knew it to be untrue, didn't you?

A. I knew that it had been the market price and I also knew that that had not been the factor which influenced the board's acceptance.

Q. Yes. I will come back to my question, my very last question, which you have not yet answered. (Question marked \* read). I want that question answered Yes or No. A. I will answer it as Yes, your Honour.

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Q. And that answer involves this, that you stood silent and countenanced by your silence the perpetration of an untruth by Mr. Adler, didn't you? A. No, I did not, I did not stand silent.

Q. Did you raise your hand or intervene and say, "Mr. Curran, that is not right"? A. I intervened.

Q. You intervened, but you did not intervene to correct that untruth, did you? A. I intervened to give the true facts to Mr. Tilley and Mr. Curran.

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Q. I am talking about that meeting. A. At that particular meeting. That was why, when you asked me yesterday or the day before, whether Mr. Curran's account was a correct account, I said what he had said was correct but it was not a full account.

Q. Do you remember telling his Honour earlier this afternoon that when Mr. Adler made that answer, "It was the market price", you did not intervene - Do you remember telling his Honour that? A. I have no recollection of saying anything of the sort, because it would not have been in correspondence with the facts.

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Q. I thought you said that earlier? A. I don't think we have even touched on this.

HIS HONOUR: I do not recall that, Mr. Hughes. I do not recall your being on this Curran conversation.

MR. HUGHES: I was on the Curran conversation yesterday afternoon.

HIS HONOUR: Well, that should appear in the transcript.

MR. HUGHES: Q. You heard Mr. Adler tell what you knew to be a lie, didn't you? A. I heard him give an explanation which I felt was not capable of standing. 10

Q. Yes - because it was a lie? A. Because it was in effect misleading.

Q. And it was a lie, wasn't it? A. It was not a lie, in that he was saying that the market price was the price at which the transaction had been done.

Q. He was saying, wasn't he, that the market price had determined the price for the sale of Mr. Adler's shares; that is what he was saying, wasn't he? A. I think he was asked something about, "How did you fix the price, or how was the price fixed?" and he said, "It was the market price"; and then Mr. Curran said, as he correctly said in his evidence before this Court, words to the effect, "At a figure which you yourself had determined on the board", or words to that effect. 20

Q. Well, Mr. Curran pointed out the untruth, didn't he? A. Well, this was the next comment in the conversation, and at that stage I intervened.

Q. You realised, did you, that Mr. Adler had been caught out in a lie? A. No, I was quite satisfied in my mind that the committee should be put in possession of the full facts of what had happened. 30

Q. Mr. Adler apparently was not of that mind, was he, because he told an untruth, didn't he? Well, whether he would have continued further at that stage if I had not intervened, I cannot say; but I took over the conversation at that stage.

Q. And what did you say? A. I said, "In order to understand how and why Mr. Adler has to fix the prices on the Stock Exchange board, let me give you the facts", and I told them briefly the history of the absence of market in the Cumberland securities, the 40

impossibility of finding independent parties to go on the board, and I then went on to explain that in fact the independent members of the board knew full well of the way in which the price for \$1.25 had been put on the board, and that this was not the basis upon which the independent members of the board had agreed to make the purchase. This was a lengthy conversation, your Honour, which took up, I would say, the best part of an hour. It was extremely hostile, there were many interjections and obviously a lot of temper rising, but I eventually got across the points which I have just been stating to you; and in order to make sure that they were going to be understood, I determined that it would be desirable for a letter to be sent to Mr. Tilley, the chairman of the Exchange.

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Q. That was something you didn't mention at the meeting, wasn't it? A. No, I didn't mention it at the meeting.

Q. You know this question was to tell us what was said at the meeting? A. Yes, well, what was said at the meeting was as far as I have gone previously. There was then some remark from either Mr. Tilley or Mr. Curran, "Well, we think it is a very dangerous thing for chairmen to sell their shares to their own company at a Stock Exchange price when they know that there is not a genuine market existing from which a Stock Exchange price can be obtained".

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Q. Did you agree with that? A. I again tried to explain that that was not what had happened; but I could see that they were very hostile to the idea of the transaction that had taken place at all.

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Q. Did you have any discussion with Mr. Adler, before you went down to this meeting at the Exchange, as to what you would say together? A. No; we had hoped that we would be able to clear up what appeared to be rather acrimonious correspondence that was developing, and hoped that a face-to-face meeting might clear the air. Unfortunately, your Honour, the view I formed was that it did precisely the opposite.

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Q. Yes; and that led you to withdraw the take-over offer, didn't it? A. That was a very salient consideration in my mind. I expressed the view very strongly that the whole thing had got totally out of control; we didn't particularly want the shares anyhow; we seemed to have got involved in a frightful public warfare with Soul Pattinsons, and now we had the Stock Exchange up in arms as well, and I just wanted to get out of the whole situation just as soon as I possibly could.

T.E. Atkinson, xx

Q. And therefore the take-over offer was withdrawn,  
with those considerations in mind? A. Yes.

(Further hearing adjourned to 10 a.m. on  
Tuesday, 28th October, 1975)

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IN THE SUPREME COURT  
OF NEW SOUTH WALES  
EQUITY DIVISION

No. 707 of 1975

CORAM: BOWEN, C.J.  
in Equity

CUMBERLAND HOLDINGS LIMITED & COMPANIES ACT

EIGHTH DAY: TUESDAY, 28TH OCTOBER, 1975.

- MR. HUGHES: There is a mistake in the transcript at  
\* page 413, the third last line. The transcript records  
the portion of my question as "...I am not putting to  
you at the moment that it was initially misleading"  
that should be "intentionally misleading". 10
- MR. BAINTON: I think that is correct.
- \*\* MR. BAINTON: On page 306, the fifth question, it is  
recorded as "Q. You ultimately became a senior part-  
ner in that firm". That should be "...the senior  
partner in that firm".
- Three questions further down, the transcript  
records "Q. Engaged actively for some 12 months"  
that "12 months" should be "12 years". 20
- \*\*\* On page 308, in the middle of the page "Q. When  
did you first begin to acquire interests in any stock  
in Australia? A. 1972, apart from...". "1972"  
should have been "1952".
- ∅ At page 309 something appears to have gone wrong  
with the long answer at the top of the page, but I  
can't say what it is. The question is at the foot  
\*\*\* of page 309 "Q. Would you tell us how you came to  
be a director of the company? A. It goes back to  
1970 when the Fenchurch Insurance group...Perth." 30
- MR. HUGHES: I recall that at the time it was put that  
way. It did not mean much, but I recall it being put  
that way.
- (\* Original Transcript Page 264)
- (\*\* Original Transcript Page 190)
- (\*\*\* Original Transcript Page 191)
- (∅ Original Transcript Page 192)

MR. BAINTON: The second last question on that page, the answer ends by saying "There was a split issue in September which put it in the vicinity of 2,000". The "2,000" should be "22,000".

\* On page 315 of the transcript, the first question, it is recorded as "Q. At that meeting there was no question of the acquisition of shares in Cumberland Holdings when it was brought up for discussion." That should be "At that meeting there was a question of the acquisition of shares in Cumberland Holdings brought up for discussion." The "when it was" ought to be omitted. 10

\*\* At page 323, the third bottom line, the transcript records "...just accepted immediately that there was no either point...". I think the "either" should be "earthly".

HIS HONOUR: I don't remember him saying "no earthly".

MR. BAINTON: Perhaps the "no" and the "either" have been transposed.

\*\*\* On page 327 of the transcript "Well, there were two elements involved, your Honour - first of all considering the actual 1974 consolidated accounts of the FAI group when they were read..." the "read" should be "ready". Further on in the same question... "we were recorded as having approved the action", the word "action" should be "accounts". 20

♢ On page 345 of the transcript, the third question reads "Would you have a look at this and tell me if this is a copy of the minutes of that meeting and whether it actually agrees with the business of the meeting?" The words "actually agrees" should be "accurately accords". 30

≠ On page 351 of the transcript, the last question and answer "Q. Who prepared it, do you recall? A. It had originally been drafted, I think, by Mr. David Walker and had been signed also by Mr. Sinclair." The word "signed" should be "seen".

(\* Original Transcript Page 195)

(\*\* Original Transcript Page 200)

(\*\*\* Original Transcript Page 203) 40

(♢ Original Transcript Page 217)

(≠ Original Transcript Page 220)

\* At page 360 of the transcript, in the last question and answer, the answer reads "Not all long term. There was the special situation where we had the brokers holding situation take-over and we came in with a view to short term trading." "Brokers holding" should be "Brookers Holdings".

\*\* At page 404 of the transcript, in the answer to the third question it is recorded as "In regard to our properties, we had just completed our main properly investments in Singapore..." that "Singapore" should be "Sydney".

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MR. HUGHES: I remember him saying "Singapore".

HIS HONOUR: You can clear it up in evidence. It is not agreed.

\*\*\* MR. BAINTON: On page 477, the fifth question from the bottom "Q. And a very reasonable inference, wouldn't you agree, just looking at the transaction as it stands? As the transaction stands, would not you agree that that was a very reasonable inference to draw? A. With my other explanation, yes, indeed." That should be "With no other explanation, yes, indeed".

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MR. HUGHES: I think that is right.

HIS HONOUR: An agreed correction.

THOMAS ERIC ATKINSON  
On former oath:

HIS HONOUR: You understand you are on your former oath, Mr. Atkinson?

WITNESS: Yes Your Honour.

MR. HUGHES: Q. Mr. Atkinson, have you been reading the transcript of your evidence during the course of your testimony? That is to say during the adjournments. A. I did read it over the weekend.

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Q. You read it over the weekend? A. Yes.

Q. Did you show that transcript to Mr. Adler, or any part of it? A. I think he has seen it. I did not show it to him myself.

(\* Original Transcript Page 226)

(\*\* Original Transcript Page 257)

(\*\*\* Original Transcript Page 312)

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Q. You think he has seen the transcript? Do you mean the transcript of your cross-examination?

A. I think the whole proceedings, so far as I know.

Q. You realise, don't you, that an order was made in this case for witnesses to leave the court?

HIS HONOUR: I don't know that that applied to parties. In fact, it was raised at the time.

MR. HUGHES: Yes. I will withdraw that. I will not pursue that.

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Q. Mr. Atkinson, have you discussed at any time during adjournments while you have been under cross-examination any of the answers that you gave to me or any of the questions that I asked you with Mr. Adler?

A. I don't think any specific ones. I think when I have seen Mr. Adler he has probably said "How are you getting on," and I said "It seems to be long proceedings, and there are a lot - there seems to be a lot more coming," but we have not got down to any specific questions.

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Q. Now, I want to take you, if I may, to some evidence that you gave at page 479 of the transcript. If my friend would like it, I would like the witness to have access to a copy of the transcript at pages 479 and 479. (Transcript handed to witness).

Now, just if I might refresh your recollection, do you remember me asking you a number of questions on the last hearing day about the explanation that you elicited from Mr. Adler as to his conduct in placing a selling order at 70 cents on 7th August and the subsequent buying order for 50 cents on 19th August. Do you remember that subject matter being the subject of questions? A. Yes.

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Q. I would ask you to read that portion to yourself, so that you have ample opportunity of following the questions I am about to put to you. Commence, if you would, at the last answer at the bottom of page 479. Do you see that question? A. Yes. "Yes. What then took place"?

Q. From that question "Yes. What then took place..." down to the end of the second paragraph on page 479. Will you just - so that you may have in mind what I

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(\* Original Transcript Page 314)

(\*\* Original Transcript Page 313)



am going to ask you about - read that section of the transcript. Let me know when you have done so?

A. Yes.

Q. Have you taken that section of the transcript in? A. Yes.

Q. That was your account of the explanation that Mr. Adler gave you, wasn't it? A. Yes it was.

Q. Do you wish that account to stand as it appears?  
A. To the best of my recollection, yes.

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Q. Did you help Mr. Adler compose the letter to the Stock Exchange dated 6th December that forms part of Exhibit 71? So that you may answer that question, I would like you to see the front page of the letter. (Exhibit 71 handed to witness) A. That letter was drafted and settled by counsel.

Q. By counsel? A. Yes.

Q. On your instructions, in part? A. Yes, on instructions. I think we first started consulting about three weeks prior to that.

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Q. Was that a letter settled by counsel on instructions from you or from Mr. Adler or from both of you?

A. I think on some occasions we both saw counsel. On some occasions I probably went with Mr. Sinclair alone. I cannot now recollect.

Q. At all events, did you see that letter in final form before it was signed by Mr. Adler? A. I saw the draft of it from counsel. I don't think I saw it again until after it had been sent.

Q. Did the letter in its final form as it appears in the Exhibit accord with the draft settled by counsel? A. I don't recollect having noticed any alterations in it and it is now, of course, too long ago for me to swear on oath, but to the best of my knowledge and belief counsel's advice was followed implicitly from this time onwards.

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\* Q. Now, may I take you back to page 479 of the transcript for the moment? You might hand Exhibit 71 back to the associate. In substance will you agree what Mr. Adler told you in explanation for his action in placing the buying order at 50 cents was that he wanted to see whether any sellers would be prepared

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(\* Original Transcript Page 314)

to come down to that price and make some sort of market? A. Yes, I think that was...(answer not completed)

Q. So it was clear to you, was it not, that Mr. Adler was telling you that he had tried, by placing a buying order, to establish a market in the region of 50 cents? A. I gathered that he really wanted to see if there was any sort of reaction forthcoming at all on the selling side - whether he could attract anything at all on to the board.

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Q. At that price of 50 cents? A. I don't know that that was specifically said to me or that I considered it. I was regarding him as saying that he wanted to see if he could get any interest of any sort established.

Q. What he said to you was this - and I do invite you, if you want to, to look at the second paragraph on page 479 - what he said to you was "Well, having gone that far I thought I must start trying to see any sorts of figures that could be established at all, and I agreed with the brokers to put a buying order on at a lower price, and leave it there for a longer period of time, to see whether eventually there were any sellers who were prepared to come down to it..." Do you see that? A. Yes, I see what you mean.

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Q. So that the impression you gained from what he told you was that he put a buying order at 50 cents to see whether anyone would sell at 50 cents, or at about that price? A. Yes, well, I would assume that if a seller was interested he would start off, say, by putting 60 cents on the board, hoping that he could tempt a buyer to come up, and maybe they would meet somewhere in between, or possibly the buyer would be prepared to go the whole way to his figure.

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Q. It was clear to you from his explanation of the placement of the buying order that he was endeavouring to establish a market at about the price - at or about the price - of the buying order? A. To start off with, yes, obviously. He tried selling at 70 cents. That was getting nowhere, so he tried coming in at the other end. I thought I could understand the rationale of it. At that time there was, of course, so little activity on the market that the great worry amongst operators was that there was no floor of any sort being established, and I think that was one of

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(\* Original Transcript Page 314)

the things that was worrying the main what I would call professional operators most of all.

Q. In the light of the answer you have just given will you agree that it would be quite untrue to suggest that no step had been taken at any time to endeavour to establish a market for Cumberland shares at or about the price of 50 cents? A. Yes, it must be inaccurate.

Q. And untrue? A. I suppose so, yes.

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Q. You say, do you, that on 6th December 1974 you yourself were not personally aware of Mr. Adler's action in placing with the brokers a buying order for Cumberland shares at 50 cents subsequent to his placing the selling order at 70 cents? A. No. If I had known of it I would certainly have instructed the solicitor about it. I would not dream of attempting to suppress part of evidence of which I was aware.

Q. Mr. Adler himself must have known in December that it would be quite false to assert that no step had been taken at any time to endeavour to establish a market at or about the price of 50 cents, mustn't he? A. If he remembered it he must have done so.

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Q. Mr. Adler must have known in December - on 6th December 1974, must he not, that any assertion that FAI Insurances has not been willing to dispose of any of these shares in Cumberland Holdings was false, having regard to the fact that he placed a selling order on 7th August 1974? He must have known the falsity of any such assertion, must he not? A. Yes, unless he was drawing some distinction between what I would call a market operation and permanent divestment of investments. I don't know if such a thought was in his mind, but I can see that he may have been thinking that what I would call a short term operation on the market was not to be taken in the light of a permanent reduction in shareholding such as the Stock Exchange or the listing committee had been talking about.

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Q. That was no part of his explanation to you? A. No, that was not part of his explanation. That is an inference I am drawing. Of course, I don't know what was in his mind.

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Q. Did you carefully consider the final form of this letter, part of Exhibit 71 - the letter of 6th December 1974 to the Stock Exchange? Did you carefully consider the final form of that letter?

A. I would undoubtedly have read it through, and if I had noticed any what appeared to me to be mis-statements of fact I am sure I would have asked for them to be referred back to counsel.

Q. (Exhibit 71 handed to witness) You will agree with me, will you not, that in view of the suggestions against Mr. Adler's integrity that had been made at this meeting of the Stock Exchange on 4th December it was necessarily incumbent upon Mr. Adler to be strictly truthful in anything he wrote to the Stock Exchange in his letter of 6th December? A. Yes, I am sure he would have wanted to do so.

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Q. If you wish to read the letter as a whole, please do so before I proceed to question you. I can readily understand your wishing to do so. But if you are content for me to go to the particular part, I will do so. Which would you prefer? A. I would like to read it through first, if I may.

Q. Yes by all means. Have you read it? A. Yes.

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Q. Now, I want to come to the third paragraph on page 2: "Since July 1974..." did that paragraph have your approval before the letter was sent? A. I was not regarding myself as being required to approve anything, but I did not see that there was anything in it that constituted a mis-statement of facts.

Q. Of course you will agree no doubt that since July 1974 the market in shares generally has moved downwards? You agreed with that at that time, didn't you? A. Yes.

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Q. And the next sentence reads "The consideration in the take-over offer...market price" Would you agree with that as being an accurate statement before the letter was sent? A. Your Honour, I don't think it was really a view which I had taken myself, but I was not prepared to dissent from it when I saw the draft.

Q. Did you tell Mr. Adler "Look, this is a load of rubbish", or anything like that? A. I would not have said it was a load of rubbish.

Q. Did you say "I disagree"? A. I would not appear to disagree with it at the time. (sic)

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Q. Did you tell him you disagreed? A. I don't think we ever got down to a discussion to that degree. I have merely said "Here is the draft by counsel. I have been through it. I have no comments", or

something to that effect. I don't think we attempted to analyse it sentence by sentence.

Q. Really? A. At the outset I had given fairly definite instructions to counsel that I wanted something that I did not have to go any further with. I felt that my own drafting efforts had not had the success that I had been hoping for, and at that stage I was very content indeed to leave the ball in counsel's court.

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Q. Do you mean by that last answer that your own drafting efforts had not met with much success so far as Mr. Adler was concerned? A. I did not seem to have been able to communicate the views which I had attempted to express. That was my personal feeling, and I am always very self-critical of my own drafting efforts.

Q. Were you disquieted because Mr. Adler was making statements which you regarded as going too far?

A. No, I think I have already said that at that time I was prepared to believe, and did in fact believe, that what had been said was truthful and reasonable.

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Q. Of course, when you read that sentence - "The consideration in the take-over offer...market price", you read it as meaning that that statement represented the view of the Board of FAI, don't you? A. Yes, it was a letter written on behalf of the company.

Q. You were a member of the Board? A. That is true.

Q. And that statement, attributing that view to the Board, was, to your knowledge, incorrect, wasn't it, because you did not agree with it, for one? A. Well, it was not the approach I had been making to the whole take-over from the word "go". My view was always that what we were discussing was a share exchange, and the relevant point was not what the market price might have been at any time, but a comparison between the value of the two sets of shares.

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Q. I'm sorry, I shall have to go back to my question, and put something like it again, because I want a specific answer. When you read that sentence "The consideration in the take-over offer...market price", you read it as setting out or purporting to set out the collective view of the Board of FAI, didn't you? A. Yes. I would not dissent from it, but it was not in fact what I had been doing in my mind.

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Q. You knew, having regard to what you say was the state of your mind, that so far as that sentence attributed that particular view as the collective view of the Board of FAI that sentence was incorrect, didn't you? A. Well not necessarily, no.

Q. It did not represent your view, did it? A. It did not represent the reasoning that had gone through my mind.

Q. It did not represent your view, did it? A. I did not believe that it would be incorrect if I sat down and thought about it from this point of view. That is what I am trying to get at. 10

Q. The sentence in which Mr. Adler attributed to the Board the collective view that "The consideration in the take-over offer...market price" was not your view, was it? A. I would not dissent from it at the time.

Q. It was not your view, was it? A. It was not the basis on which I had done my own reasoning.

Q. It was not the basis on which you had fixed in your mind what was the proper consideration, was it? A. No. But if someone had said to me at that stage "Well now, tell me whether you are prepared to agree with this?" I would have said, I am sure, that "I will not dissent from it". 20

Q. At what stage are you speaking? A. I am speaking of at the time when I read the letter.

Q. There was no discussion of that sentence between you and Mr. Adler, was there? A. No.

Q. At the time when you approved the final draft? A. No. As I say, I don't think there was any detailed discussion of the letter at all. 30

Q. Will you not agree with the simple proposition that in so far as the sentence I have just been concentrating on represented the collective view of the Board as to the way in which the consideration had been fixed, the sentence was incorrect? A. If it was intended to represent the reasoning I had been actually carrying out it must have been incorrect.

Q. You knew at the time it was incorrect? A. It never crossed my mind. 40

Q. Another one of these inaccuracies that for some reason never crossed your mind, is that what you are

saying? A. I am not really saying that at all. What I am saying is that I had received a letter from counsel which he had obviously considered very carefully. I went through it, and did not see anything that struck me as being an inaccuracy at that time.

Q. It was a letter settled by senior counsel upon your instructions, wasn't it? A. Upon instructions which had been given largely by myself, I would say.

Q. So that that sentence reflected your instructions to counsel, did it? The sentence setting out how the consideration for the take-over offer had been fixed? A. I cannot now recall what, exactly, the instructions were at the time. I can't remember to what extent they may have been put in writing; to what extent they represented the result of long conferences which we had had on a number of occasions over the previous weeks.

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Q. Mr. Atkinson, did that sentence - you know the one I am talking about? You know the one I am asking you about? A. Yes.

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Q. Did that sentence conflict with your instructions to counsel? A. I may have thought -

Q. Did it or did it not? A. I don't recall considering the point in these terms at the time, but I can't have thought it sufficiently material to be necessary to refer back to him, because it was not in fact referred back to him.

Q. I take you to the next sentence "It is quite wrong...that price". A. "That price" presumably refers to our present view of a reasonable market price.

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Q. The take-over consideration - take-over offer consideration. That is what it refers to? A. I didn't read it that way.

Q. Will you not agree that if that remark was made, having regard to Mr. Adler's operations on the market in August, it would be a rank lie, wouldn't it?

A. I am prepared to agree that if someone is acting with criminal intent almost anything can be...(not completed).

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Q. I am putting to you that that statement, having regard to Mr. Adler's operations on the market in August, was untrue, wasn't it? A. Well, I am still not prepared to agree that "What is our present view of a reasonable market price" relates to any price

that Mr. Adler was instrumental in establishing or attempting to establish in August 1974. I don't know whether the price would be regarded as having gone below that by that time. In fact it must have, I suppose, because I see the last quote I think we established was 48 cents.

Q. "We established", you said? A. I'm sorry, I was referring to yourself and myself and the cross-examination on Thursday. I don't mean the FAI Board.

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Q. In the Part A statement it was suggested, was it not, that the last quoted market price of FAI shares prior to the despatch of the statement was 57 cents?

A. I think that was part of the contents of the statement, yes. That must have been a figure we obtained from our brokers.

Q. Will you agree that on the most charitable view of Mr. Adler's actions in placing a selling order at 70 cents and a subsequent buying order at 50 cents he was endeavouring to establish a market, by those orders, somewhere between 70 cents and 50 cents?

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A. He was endeavouring to establish a market at somewhere. No market appeared to be operating at the time.

Q. We know it was a dead market? A. It was a very dead market.

Q. Will you not agree on the most charitable view of Mr. Adler's conduct in placing the selling order at 70 cents and the buying order at 50 cents in August he was endeavouring to establish a market for Cumberland shares somewhere between 70 cents and 50 cents?

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A. He was endeavouring to establish a market. That was his first point. He tried to do it between the figure of 70 cents and 50 cents.

Q. So that in that situation - that was well known to you at the time this letter was written, wasn't it? A. No. I have told you in evidence last week that I only ever received or first appreciated the evidence of the fact that some market quotes had been put up in August 1974 about two or three weeks before this case commenced hearing. I repeat that evidence, your Honour.

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Q. Well, will you not agree with me that the last sentence in that particular paragraph starting "It is quite wrong..." would have been necessarily untrue to the knowledge of Mr. Adler at the time when that letter, Exhibit 71, was written, if Mr. Adler then recalled



what he had done in placing selling and buying orders in August? It would have been untrue to his knowledge on that assumption? It must have been untrue to his knowledge on that assumption, must it not?

A. This is on the assumption that I am right in assuming that the last sentence is intended to point in time to the middle of November, or so, when the offer was going out...(Not completed).

Q. Do you see the phrase "At any time" in the sentence? A. Yes. 10

Q. Doesn't that have some significance to you? It means "never", doesn't it? A. Yes, I suppose, viewed in that light, it could refer - it could be taken that way.

Q. Will you not agree that if when Mr. Adler wrote that letter he recalled what he had done in August he was, in that sentence, saying something that he must have known to be false? A. If he was analysing it as closely as we have done today, yes, that would be so. 20

Q. He must have known it to be false on the premise I put to you? A. With my added reservation, yes.

Q. Did you add that reservation in order to protect Mr. Adler? (Objected to; question rejected)

Q. Now, I will come to another matter. I think you have agreed with me that you were the author of the document which has become m.f.i. 8? A. Yes.

Q. Were you satisfied at the time when you sent that document to Mr. Belfer by your letter of 8th October that what you said in it represented the whole truth about the matters that you dealt with in the document? (Objected to; rejected) 30

Q. Did you believe that was a truthful document when you sent it to Mr. Belfer? A. I did. But may I add that I had not read it through for several weeks - I should say months - before I sent it, and I think we established last week that there were obviously some points in it which I had obviously forgotten and should have corrected. I have the view that the instructions were drafted very shortly after the petition was filed in March, and after that it was put on the bottom of a file, so to speak, and nobody, at any rate in our office, really had occasion to do anything further with it. 40

Q. That document was very carefully considered by yourself and Mr. Adler in conjunction, wasn't it?

A. I think I said last week - and I repeat - it was basically my document. I left it with Mr. Adler for any comments that he wished to make on it.

Q. And he made none? A. He did make some comments, mostly on matters of fact relating to the earlier stages of the company, where I was speaking from hearsay, of course. I think he assumed that anything that is in it in connection with the period from 1974 onwards I was capable of composing by myself.

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Q. Did you alter the document so as to bring it into line with Mr. Adler's suggestions concerning the earlier history of the company? A. I think there were a number of alterations made in that respect, and some also from suggestions made by the company secretary, who had the books of course.

Q. But subject to these alterations that were suggested by Mr. Adler and incorporated into the final draft of the document, m.f.i. 8, the contents of the document had Mr. Adler's express approval, did they?

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A. He did not say that he had any further comments to make, so I assume he was satisfied with it.

Q. May I invite your attention to the last paragraph on page 11 of the document? Will you just read that to yourself, and over to the middle of page 12, and I would ask you some questions. A. Yes.

Q. You refer in the document "Shortly after the sales of shares had taken place FAI's buying and selling prices were removed from the Stock Exchange board." Do you see that? A. Yes.

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Q. The reference to sales in that sentence was to the sales of Mr. Adler's shares and the family companies' shares, wasn't it? A. Yes, that is true.

Q. "No further sellers were coming forward and bids and offers were accordingly withdrawn as had been done on similar occasions in the past. Very shortly afterwards and by pure coincidence further very severe collapses now took place both on Australian exchanges and those in the other major financial centres throughout the world. These collapses proved far more severe than those which had previously taken place or could reasonably have been foreseen at the time, and in the result the nominal quoted prices for Cumberland shares collapsed along with the price of practically all other quoted securities, including FAI's own shares." A. Yes.

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Q. Do you follow that? A. Yes.

Q. May I ask you to note the words "in the result"?  
A. Yes.

Q. So that the suggestion there in this document that was approved by Mr. Adler was that the drop in the quoted prices of Cumberland shares in and after August was due solely to the general market collapse. Do you agree with that? A. Yes.

Q. I am not suggesting - please understand this - that when you wrote those words, including the phrase "in the result", you knew of Mr. Adler's selling and buying orders in August. Do you follow that? 10  
A. Yes.

Q. But of course, when that document was sent to wherever it was sent in final form Mr. Adler had made his explanation about the August buying and selling orders, hadn't he? A. No, I'm sorry, you are entirely mistaken. This document was sent out in early April. 20

Q. Early April? A. Yes. Has my previous evidence been at fault on that?

Q. No. I accept your answer. Will you not agree that if Mr. Adler remembered when he approved of these words that I have read that he had placed these selling and buying orders in August he must have known that it was untrue to assert that the downward trend in the price of Cumberland shares was due solely to the general market collapse, mustn't he? (Objected to; rejected) 30

Q. Will you agree that anyone who knew, when he approved of the words that I have read, that he placed a selling order at 70 cents and a buying order at 50 cents in August would necessarily have known that the suggestion contained in the words that I have read to you that the downward trend in the price of Cumberland shares was due solely to the market collapse - anyone in that position must have known that the statement was false? (Objected to; rejected)

Q. Was anyone else present when Mr. Adler gave you this explanation that you deposed to in your evidence as to why he placed the selling and buying orders in August? A. On the first occasion, I don't think so, no. 40

Q. And on the second occasion? What about on the

second occasion? A. On the second occasion I seem to recall that we had another discussion when Mr. Belfer was present.

Q. Mr. Belfer? A. I think Mr. Belfer was present.

Q. Do you tell his Honour that on the occasion when Mr. Adler, after an interval of time, gave you the explanation that is set out in the transcript at \* page 479, Mr. Belfer was present? A. On a second occasion, I think so. 10

Q. I want to be quite specific about this. I will \*\* take you back, if I may, to page 479 of the transcript, so that you won't have any doubt as to what I am alluding to. Do you still have the transcript there? A. No, I have not.

Q. (Transcript handed to witness) I will just go back, if I may - I will ask you to go back to page \*\*\*479? A. Yes.

Q. Have you had a look at that? A. Yes. That conversation I was referring to there - I am certain it was just Mr. Adler and myself present. 20

Q. Yes. A. I did have a second conversation - I had a subsequent conversation with Mr. Belfer. I am inclined to think it was about the time that the question of his having to give evidence or possibly having to give evidence had arisen. I think you have the date of my letter on that - 9th October, or something.

Q. 8th October? A. I think he came around to the office.

Q. Mr. Belfer? A. Mr. Belfer, after he had received my letter. 30

Q. Yes. A. I think now probably Mr. Adler was not present. We had a discussion in my own office.

Q. You had a discussion with Mr. Belfer about the explanation? A. No, about his evidence. But then I said "Another point has arisen. I wonder if you have any recollection of it yourself?".

(\* Original Transcript Pages 313, 314)

(\*\* Original Transcript Pages 313,314)

(\*\*\* Original Transcript Pages, 313, 314) 40

Q. Recollection of what? A. The buying and selling orders that I had discussed with Mr. Adler previously.

Q. And what did Mr. Belfer tell you? What did he say to you when you asked him that? A. My recollection is that he said he had no personal knowledge of the facts, and it had not been discussed with him, so it did not take me anywhere at all.

Q. Did you tell Mr. Belfer that Mr. Adler had in August placed a selling order at 70 cents followed by a buying order of 50 cents? A. Yes, I must have explained the situation to him.

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Q. And did Mr. Belfer express any shock? A. No. I gave him what Mr. Adler's explanation was, and he said "Well, I don't remember it being discussed with me", or words to that effect. "I did not know about the orders at the time".

Q. He did not say to you "Well, that looks fishy", or words to that effect? A. No, he did not say in fact - (Objected to; admitted). I was primarily discussing the points that I had been asked to obtain his instructions on.

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Q. Now you were buying - when I say "you", your family company was in the market buying FAI shares, wasn't it, within a day of the take-over offer?  
A. I don't think so at that time. I think it came later.

Q. Later? A. Let me say I was not in the market. When I heard of a situation I agreed to take some shares up. I had not instructed my brokers to buy, or anything like that.

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Q. Did Mr. Adler tell you at any time that on 20th November he had been approached with an offer to sell a parcel of more than 50,000 FAI shares? (Objected to)

(Witness retired from the court. Argument ensued on the admissibility of the question, at the conclusion of which his Honour stated that he would admit the line of questioning)

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MR. HUGHES: Your Honour, may I call Mr. Wilfred Marshall Johnson to produce some documents to the court on subpoena duces tecum?

HIS HONOUR: Yes.

WILFRED MARSHALL JOHNSON  
On subpoena duces tecum

MR. HUGHES: Q. Is your name Wilfred Marshall Johnson?  
A. Yes.

Q. Are you an investment adviser? A. Yes.

Q. Employed by Ian Potter and Partners, Stockbrokers,  
of 15 Bent Street, Sydney? A. Yes.

Q. That firm was formerly known as Ian Potter & Co.?  
A. Yes.

Q. What is your address? A. 5 Hobby Avenue, St. Ives. 10

Q. Do you produce to the court in response to the  
subpoena for production of documents served on that  
firm certain documents? A. Yes, I have the documents.

Q. Is that a copy of the subpoena? A. Yes.

(Documents produced. His Honour stated the  
party may have access to the documents.)

(Witness retired and excused)

THOMAS ERIC ATKINSON  
Re-called.

MR. HUGHES: Q. You told us that Tynedale, your fam- 20  
ily company, bought what you have described as a dis-  
tress parcel of shares at 40 cents? A. Yes.

Q. Was that purchase arranged through Ian Potter &  
Co.? A. Not by me but I was told later they were the  
firm that was handling the matter.

Q. Were you given that information by Mr. Adler?  
A. Yes.

Q. Did you allow Mr. Adler to handle the purchase  
for you, or your family company? A. Yes, he had  
been approached. I never discussed the matter with 30  
the broker themselves at all.

Q. Did he tell you, that is, Mr. Adler, that he had  
on 20th November been approached by the broker,  
namely, Potters, with an offer to sell a parcel of  
FAI shares in excess of 50,000? A. I do not recall  
the date being mentioned. I cannot recall the date  
on which the conversation with him took place. I  
would have thought the conversation took place some

days after the 20th, but I did not keep a note in any diary.

Q. Would you agree that the conversation took place prior to 3rd December? A. I think so.

Q. Will you have a look at this document?  
(Produced) A. Yes.

Q. Is that the transfer of what you have described as a distress parcel of shares in FAI to your family company about which you have earlier given evidence?  
A. It appears to be. At first I was misled because I thought it was somebody called TEA and that is my initials.

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Q. Nobody suggests that. I think it is the nominee company for Trustees Executors & Agency? A. Yes, I had nothing to do with that.

Q. The transferee is Tynedale? A. Yes, the family company.

Q. The number of shares was 4,000? A. Yes.

Q. The price was 40 cents? A. Yes.

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Q. I do not think it appears there. A. That certainly is a figure that stuck in my mind. I have not checked on my accountant's records since last week to see whether I was correct but it is certainly the figure I had in mind.

(Above transfer document of FAI shares to Tynedale tendered; objected to as not being relevant; m.f.i. 10)

Q. I now show you a copy of the document that has come from the broker's file which was produced this morning? A. Yes.

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Q. Have a look at that document. A. Yes.

Q. Do not comment on it. A. No.

Q. Just take in the details. A. Yes. I have seen it.

Q. Will you agree that first of all, Tynedale purchased 4,000 FAI shares at a price of 40 cents?  
A. Yes, I was right on that.

Q. Will you agree that the order for that purchase

was placed on 21st November 1974? A. According to this document, yes. I would not argue with that. I thought it was later.

Q. Will you now agree - A. Yes, I will accept that.

Q. - It was placed on 21st November 1974? A. Yes, I would accept this document.

(Original transfer plus document identified by this witness tendered; objected to as irrelevant; both documents were admitted and marked Exhibit 79)

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(Short adjournment)

Q. To recapitulate one point, you told his Honour your family company bought 4,000 FAI shares for 40 cents placing an order through Mr. Adler on 21st November. That is right, is it not? A. Yes.

Q. Did Mr. Adler tell you at the time you agreed with him to place that order through him, that his family interests were buying approximately 64,000 shares in FAI at the same price? - (Objected to; allowed).  
A. I do not recall any specific number being referred to and the matter did not in fact arise that way. I remember clearly how it arose. There was present at the time Mr. Belfer, Professor Watson and myself in Mr. Adler's room.

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Q. With Mr. Adler? A. Yes, we had been discussing some other matters and he said towards the end of our conversation "Let me tell you something that has recently developed or come along. I have been approached by a Melbourne brokers" - I think he said and that would be right because Ian Potter has a Melbourne office - "who have been instructed by a London unit Trust that they have to dispose of a parcel." I think he said something over 60,000 but I cannot remember now the exact words - "of shares and they have urgent instructions they have to dispose of them".

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Q. In FAI? A. Yes, and "I think I can get them all for 40 cents. Let me tell you straight away if none of you are interested I intend to take up the whole parcel that is offered, but if you are interested I am quite prepared and happy to see you come in and participate in the deal in as much numbers as you may want for your various companies".

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I think he said "I will naturally tell



Mr. Herman and Mr. Barrington as well so they can have the chance of participating if they want to." I think this was - in fact I am sure this was the lines on which the matter was conveyed to us. I think he went on and said "If you want to think about it, go away and get in touch with me later on, but I have to give definite instructions to the selling brokers" - I think he said - "within the next day I would like you to make up your minds in that sort of a period."

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Q. How long after that conversation did you tell Mr. Adler you would take up 4,000 of the parcel on offer at 40 cents? A. I think I made an on the spot decision. I did not bother leaving the room to go away and think about it. I think both Professor Wilson and Mr. Belfer said they wanted to take some and I think Professor Wilson said that he wanted to go away and presumably see how his finances stood. I believe Mr. Belfer did not give a decision on numbers across the table.

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Q. Your decision was communicated to Mr. Adler on the day he made you the offer, is that so? A. Yes, I am sure it was.

Q. Was that a day prior to the actual dispatch of the take-over offer, which is Exhibit 11? A. I cannot now recall but my impression was it happened about the end of the month. I have obviously been erroneous on that. I cannot say whether the offer had been dispatched or not when the conversation took place.

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Q. May I remind you of this that the letter accompanying the take-over offer was dated 20th November. Would you like to look at Exhibit 11? A. Yes, I recall that. You said the contract note was dated -

Q. 21st? A. Yes, it must have been on or about the time, yes.

Q. Will you agree in the light of the chronology, as you have given it, you took the offer of 4,000 shares at 40 cents before the take-over offer had in fact been dispatched? A. That could be so but I could not swear to it one way or the other.

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Q. Would there be any record in the office of FAI to indicate the actual date of despatch of the take-over offer? A. It would go out from the printing department in St. Leonards I think. I do not know whether they keep any record of any times of dispatch.

Q. If the letter accompanying the offer was dated the 20th, as we know, will you not agree it is highly likely that the letter was dispatched after the 20th - that the offer was dispatched after the 20th? A. I do not think so because everything had been prepared already. It was simply a case of putting the envelope in the post when the instructions were given. By that time I think probably it had been decided some two or three days before, maybe longer, that the letter would eventually be dated 20th November.

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Q. Although you have said you do not know exactly how many shares Mr. Adler would be taking up in FAI pursuant to the offer that he had communicated to you, you knew that he and the family interests were taking up a very large parcel pursuant to the offer, did not you? A. Certainly a sizeable parcel. He was at that time having very large operations on the share market and this was certainly not then in any way an unusual transaction for him to carry through in shares in one company or another.

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Q. Will you agree following the dispatch of the take-over offer to the shareholders of Cumberland Holdings it was well in your mind, when the paper warfare commenced and during the continuation, that you had almost contemporaneously with the date of the offer bought FAI shares for your family company at 40 cents? A. I do not think that it was. I do not think I thought over that at the time but I see now the point you are trying to make.

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Q. What do you think is the point I am trying to make? A. I imagine you are trying to make the point that it is something that could have been included in one or other of the circulars to the shareholders. It certainly never crossed my mind in that sense at that time.

Q. Will you not agree it ought to have crossed your mind? A. If it had been a cash offer, yes, or a cash alternative of some sort this could have been a relevant point but on a pure share exchange basis I am not sure I would have thought it was of real relevance.

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Q. Of real relevance. Do you think it was of some relevance? A. I was not thinking of the issue at the time as I said and I repeat that.

Q. Will you agree that the minority shareholders in Cumberland Holdings were, in view of the fact that this was a share swap over being made by FAI, entitled

to have any information that might have a bearing on the value of the offer - (Objected to; question to be re-phrased).

Q. Will you not agree that a shareholder in Cumberland Holdings, confronted with the decision whether to take the share swap over, made by FAI, could derive some advantage from knowing that shares in FAI had sold for 40 cents at or about the time of the takeover offer was made - (Objected to; allowed)? A. If from the information he could have derived any helpful basis for comparing the value with his own shares, then yes, he could have got help from it but I do not see even now how this could help him to compare the value. There was no market for his own shares which anyhow is established. Whatever markets were in existence were so freak and abnormal at the time and I would really have expected a shareholder to have much regard to the current market price.

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Q. Of either shares? A. Yes, virtually any share on the board at that time. I think even B.H.P. had gone down to \$5.70 which everybody in the country thought was quite absurd.

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Q. The Cumberland shareholder had to consider, did he not, what value if any he would be getting for the disposition of his Cumberland ordinary share? A. I would assume that he would want to consider whether he was getting as good or a better bargain than he had already. In that context what I might call the almost meaningless Stock Exchange prices - I would not have thought would have helped him. May I say I jumped at the offer to purchase FAI shares because I thought it was the best bargain I had heard of. I thought it was the bargain of a lifetime.

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I did not believe it had any relation to the true value on the market or any other type of value. I appreciated being a London unit Trust they wanted to have the benefit of an almost 100% dollar premium and in their books it was equivalent to an 80 cent price but so far as anyone in Australia was concerned I would have thought you would not have found a single seller to come forward with that sort of figure.

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Q. You are saying you regarded these transactions whereby members of the board of FAI, bought their own shares at 40 cents, were transactions that would have no impact on shareholders in Cumberland Holdings, if they were told about it? A. If they had been told all the facts as we now know them I am sure they would realise this was what I would call a freak transaction.

Q. What you call a freak transaction involved a very large parcel? A. Yes.

Q. Will you agree, to your knowledge at that time, it involved a parcel exceeding 60,000? A. I think it was about 60,000 at the time. I do not recall the exact figure.

Q. Do you know a Mr. T. Conchin? A. Yes.

Q. Is he one of Mr. Adler's associates? A. No, he is one of my associates. I employ him in Tynedale Investments on a part-time basis. He acts as a personal assistant to me.

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Q. Have a look at that group of documents. (shown)  
A. Yes.

Q. Will you agree now this parcel of shares did amount to approximately 68,000, including the 4,000 that you took? A. I have not totalled them but I would accept that.

(Above documents (brokers duplicates) tendered; objected to as irrelevant; admitted and marked Exhibit 8)

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Q. I want to show you some part of the official records of the Stock Exchange. A. Yes.

Q. (approaching). Have a look at this sheet. (Objected to; disallowed).

Q. I will ask you to look at the papers of this bulky book. Have a look at that page. (Objected to).

Q. Have a look at that page and I direct your attention to the item which I think has a number. I cannot read it. A. Yes, 21.

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Q. Can you identify it in your mind? A. Yes.

HIS HONOUR: Has it a folio number?

MR. HUGHES: No, it has a marker.

Q. Would you come over to this one on the page headed "Sydney Stock Exchange, Wednesday, 7th August 1974"? A. Yes.

Q. Would you look at item 21. Do you see the figure. A. Yes.

Q. My question is will you agree that the "All ordinaries index" on the Sydney Stock Exchange between 16th July 1974 and 7th August 1974, declined from 364.79 on the first-mentioned date to 318.19 on the second-mentioned date? (No answer)

MR. BAINTON: I object your Honour, if my friend produces it with some authentication from the Stock Exchange I will admit to it going in.

HIS HONOUR: I will allow the question.

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WITNESS: I have no personal knowledge of either figure. I have seen the two figures in the book and these are the correct figures.

HIS HONOUR: Q. You do not have to go beyond that.  
A. Thank you.

(Two sheets referred to by Mr. Hughes in the Sydney Stock Exchange book tendered; objected to; Stock Exchange book admitted and marked Exhibit 81)

MR. HUGHES: We will get a letter and seek your Honour's leave at a later stage to withdraw the Exhibit and substitute the letter.

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\* Q. I want to take you back to something you said on page 319, of the transcript, but before I ask you that, would it be correct to say that when this board meeting of FAI was held on 11th July, the policy decision that was made was in substance this, that FAI in view of the belief of the board that the market had then bottomed out, would move into the stock market with \$400,000 to spend, to take up investments that might be regarded reasonably as bargains? A. I think this was - there was a two-part investment policy, a permanent one where we were prepared to take the long term view and the quick bargain type which Mr. Adler dealt with on a day to day trading basis and when we fixed this figure of \$400,000 I think we were probably thinking of that figure on both types of investment, or the trading investments that he would make at the time - I do not think we tried to break it down.

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Q. The collective view of the board was that the time had come at which FAI could move into investments in listed companies offering what it regarded as keen prices for those investments? A. Yes with a view to a natural improvement over the long term or a short term.

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(\* Original Transcript Page 198)

Q. Was that the viewpoint from which members of the board at the meeting of 11th July, other than Mr. Adler, approached the consideration of the purchase of Mr. Adler's family shares in Cumberland.

Q. I think this was always assumed to be a permanent advantage to our holding in our subsidiary.

Q. But a permanent advantage at a keen price?

A. At a real price. I do not know that we were thinking of it as a keen price in this sense.

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Q. You were not thinking of winding up Cumberland Holdings at that stage, were you? A. Not specifically. I think on one occasion earlier in the year I had been expressing my views about the eventual de-listing of the company and I said "I suppose one of the things we may have to consider at that time is whether it would be just as easy to take over the assets and liquidate the company" but I do not think there was any consideration to that aspect being given at the board meeting.

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Q. Or at any time subsequent to the board meeting until this petition was filed? A. No, that is so.

Q. You have told us you decided to spend \$190,000 out of the \$400,000. You have not told us was any decision made at this meeting how to expend the balance of the \$400,00 left over after buying Mr. Adler's family shares? A. It was assumed, I am sure on all sides, and certainly by me that would be within Mr. Adler's day to day management of the share trading and portfolio activities. I virtually was never consulted on a day to day basis on these matters.

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Q. Was not the board consulted about these specific investments? A. Not usually. This was an aspect of the business of which Mr. Adler overall had been remarkably successful throughout the years and it was regarded as very much a part of his function in connection with the company.

Q. Was not this meeting of 11th July 1974 convened to your knowledge at the time for the sole purpose of discussing the investment policy in relation to listed stocks? A. I cannot recall now being told. We never circulated formal agendas.

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I do not recall the terms but normally speaking Mr. Adler gave me a ring or dropped into my office and said "I think we should have a board meeting on Thursday". I would say "All right" - provided I was not going out

of town and we seldom went beyond that. We were rather an informal group.

Q. At all events did it not become apparent to you when the directors met that the sole object of the meeting was to decide matters relating to investment policy? A. I do not know that we were told that at the time but it was certainly the first subject according to the minutes.

Q. Was that a meeting of the full board on 11th July? A. It was referred to as a board meeting but I am afraid it was one at which what I would call the two working executives would be engaged on their normal managerial duties unless some particular point either for a statutory or some other reason required their personal presence. 10

Q. Who are they? A. Mr. Herman and Mr. Barrington. Mr. Barrington was the general manager of Cumberland Holdings and Mr. Herman was the secretary and chief accountant for the group. 20

Q. Mr. Herman was there? A. I do not think so. May I refer to the minutes again? - my recollection is that he was not there. I do not think he was there. Without referring to the minutes I would trust my memory to that extent.

Q. You say after the decision was made to invest in Cumberland Holdings, no decision was made at that meeting about the investment of the balance of the \$400,000 that had been allocated for investment. A. There was a substantial allocation for Brookers Holdings. 30

Q. That was over and above \$400,000? A. Yes.

Q. I want to come to some of these documents now. Have a look at this document which will be marked for identification, the sheet on top of that group of foolscap sheets? A. Yes.

Q. It comes from the files produced by you on subpoena the other day? A. Yes.

Q. Have a look at all the documents in that bundle. A. Yes, I have seen them. 40

(Above documents m.f.i. 11)

Q. I show you the last page of that group of documents starting "(i) assuming FAI - " A. Yes.

Q. Was that page prepared by you? A. Yes, it was.

Q. Can you say when, approximately? A. What happened was after we had finished the meeting with the members of the Listing Committee as I mentioned in my last evidence I asked our solicitor to arrange for an early conference with senior counsel as I was much disturbed in my mind about various points.

I think I was told the meeting could not be held before some time the following day. I said to Mr. Adler, "I have to go back to Newport in any case because I was meeting some people at my house on that day. I will work on the questions which I would like advice from senior counsel about and I will also draft a letter which I think ought to be sent to Mr. Tilley so that this can be placed before senior counsel when we meet and in fact for part of the basis of his instructions for the conference".

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I did go back to Newport and the rather untidy looking document that emerged was typed by me on my own typewriter.

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Q. And amended by you in your own handwriting.  
A. I think all the amendments are made in my handwriting. Yes, they all appear to be mine. I brought it back to Sydney with me the following day and handed them to senior counsel when we met.

Q. Of course one of the points that concerned you as a result of your meeting at the Stock Exchange on 4th December, was the suggestion made at that meeting that in July FAI must have had the take-over offer in contemplation, was not it? A. Yes, by then I had read back through the listing manual and I could appreciate the significance that would have had on the situation.

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Q. You agree that part of your purpose in formulating the document which is the last page of the group of pages m.f.i. 11 was to prepare such answer as could be given to the suggestion that in July FAI had a take-over offer in contemplation? A. May I read it again?

Q. Yes. A. Yes, it was obviously one of the points I wanted advice on.

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Q. You dealt with that point specifically in the very last paragraph of the page I have referred to, didn't you? A. Yes.



Q. The paragraph commencing 5.10.D? A. That was the last of the various questions that I wanted decided.

Q. What you wrote was this, wasn't it, 5.10.D could only come in if on 13th July a bid for the remaining shares was "reasonably in contemplation"? A. Yes.

Q. "Since such a bid was at all times entirely a matter for us to decide on, who can say when it was reasonably within our contemplation." A. Yes.

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Q. "If the issue is in dispute, is it one which the committee is entitled to determine or would the Court do so?"? A. Yes.

Q. That was what you wrote? A. That was really the point that I wanted the advice on.

Q. And the significance in your mind at the time you wrote those words or typed those words on 13th July was three months off the date of the announcement of the proposed offer. Is that right? A. Assuming it was an announcement, yes, this was the point. I think I must have got it wrong. That should have been 13th of -

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Q. Yes, two months? A. Yes.

Q. The date that should have been in there was 13th June? A. You are correct. I have no doubt it was spotted by counsel when he examined but I seem to have got a month wrong somehow, your Honour. Probably, I regret to say, being done in a hurry.

Q. But would you agree that you probably typed "13/7" instead of "13/6"? A. Yes, I am sure.

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Q. Because your mind was fastened on the significance of the July sales? A. I was coming back from 13th September. That is what the point was and, obviously, I must have been counting to June instead of July as I have put it down because, if it was 13th July, then, of course, the July sales would have been outside in any case but I was assuming that they were in.

Q. You were coming back from 13th September, weren't you? A. Yes, so I was assuming the July sales.

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Q. So, you assumed 13th July and typed that date down because - A. No, I am sorry, you have got it wrong, sir. I wouldn't have been asking the question

if I had been assuming 13th July was the relevant date. The question only arose on the assumption that something before 13th July would have been the relevant date. I must have meant to type "13/6" and it must have been in mind that "13/6" was the relevant date and, when I came to pass the document on, I obviously failed to spot the error, but the whole purpose of asking the question was so that it would cover the period of the July sales, otherwise I would not have bothered to ask him.

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Q. You were revealing in that paragraph the train of your thinking, weren't you? A. I think I already had previous discussions with counsel on the whole subject, sir. I was probably repeating something that had been said to him in previous meetings. I am quite sure counsel understood or, at least, I feel quite sure that counsel understood what I was wanting him to consider.

Q. Part of what you were saying in those words that I have read in the document was, in effect, this: "Who can prove against us that we had a take-over offer in contemplation at any particular point of time?"

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A. "Which is the relevant body who would do it? Would the committee have the definitive answer on the subject or is it a matter that if the matter went before the courts the courts would determine themselves?". That is the point that I was thinking of, your Honour. I wanted to know whether in counsel's view if the committee once said they had made a finding the Court would refuse to review it or whether the Court would, if necessary, reconsider the matter on the evidence, so to speak, and make its own finding. This was the point that I was very worried about at the time because of the attitude which I felt that certain members of the committee had taken in the matter and, as you will see, the whole of the advice was really based on the question of how far we could if necessary get the matter into the courts.

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Q. May I invite your attention to paragraph 2 of that page which starts by saying, "So far as the actual specific rules are concerned, we see the position as follows: "and then there is (a)? A. Yes.

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Q. "Even if L.J.A. acted improperly in establishing an artificial market price for the shares in July and FAI acted improperly in agreeing to purchase the shares at that figure and both parties had known that the result of the transaction would have been that "Cumberland would have been de-listed, there is no way

that the C.C.A." - that is Corporate Affairs, is that right? A. Yes.

Q. The Corporate Affairs Commission, C.C.A.?  
A. Yes.

Q. "or the S.E." namely, meaning the Stock Exchange?  
A. Yes.

Q. "could have ordered us to make a take-over offer for the minority shareholders on the same or any other terms." That is what you wrote. A. Yes. I wanted every assumption that possibly could have been made against us to be made against us, so to speak, and I thought I had listed them all by putting it in that sense. 10

Q. Then you went on to say in 2(b), "If we do make an offer C.C.A. cannot in any event order any variation so long as it complies with the Companies Act and S.E. can only do so within the terms of one of the specific regulations of s.5 of the listing requirements." Is that right? A. Yes, that was my reading of the situation. 20

Q. But will you not agree, having regard to the way you phrased (b), "If we do make an offer," that that document must have been written before the decision was made to make the offer? A. No, it certainly was not intended in that case because I did not type the document until December 1974.

Q. But if you typed the document up in December 1974, that choice of words: "If we do make an offer" is quite inappropriate, isn't it. A. Yes, it is inappropriate. I was treating it as a sort of hypothetical remark. Naturally, everybody knew by then that we had made the offer so I don't think they would have been misled by it. 30

Q. Just on reflection and having regard to the particular words to which I have drawn your attention, would you not agree that that document was prepared by you prior to 13th September? A. Well, it wasn't, your Honour. That is all I can say. I have obviously typed a phrase which does not make sense in the context of the document. In that case, I apologise for bad drafting again. But, if it is suggested that I deliberately prepared this document and got advice on it before anything was done, that is totally untrue. I typed it on the afternoon of the day we met the members of the Listing Committee and I handed it to Mr. Sinclair I think the following morning. 40

Q. The following morning. Having regard to the words you used, "If we do make an offer" - A. Yes, I have made a mistake in putting it in those terms. I was treating the whole thing as, rather, a philosophical approach to the subject, your Honour, and I wasn't seriously considering that there could be anybody being misled by any particular words that I used.

Q. Could I just invite your attention to the last paragraph again? A. Yes.

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Q. You did not assert in that last paragraph that FAI did not have the take-over offer in contemplation on 13th July, did you? A. I had no reason to assert it. What I wanted was advice on what was going to happen if the issue became relevant at that time, in December 1974. I am sorry if you are suggesting that I falsified my evidence on this. I can just go on saying, No, your Honour, which was the truth.

Q. Look, I am not making any specific suggestion to you at the moment. A. Well, it appears to be.

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Q. I am asking you this, and I hope it is a plain question. The best basis upon which to get advice was a statement of the fact, if it was a fact, that in July FAI did not have a take-over operation in mind or contemplation, wasn't it? A. I will state definitely that counsel was specifically informed of the answer to that question by me on at least one occasion before he eventually gave the advice that I was asking for.

Q. See, what you were saying in the last paragraph was, in effect, this, wasn't it, "Who can prove that we had a take-over offer in contemplation in July?" That is what you were stating in effect wasn't it?

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A. "Who will be the competent person to prove it if the issue is now coming before either the committee or the courts?", your Honour. That is what I wanted to know.

(Last page of sheets typed by Mr. Atkinson, part of m.f.i. 11, tendered and admitted as Exhibit 82)

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Q. I want to show you the rest of the document m.f.i. 11. What I want to ask you is this. Was that draft typed by you after detailed consultation with Mr. Adler? A. No, I didn't see Mr. Adler from the time we parted after leaving the Stock Exchange until I met him, I think, either outside counsel's chambers

or in the office just prior to going round for our consultation.

Q. When was that? A. The following day I should think.

Q. It would be 5th December, would it? A. The meeting with the Stock Exchange was the 4th, was it?

Q. The 4th. A. Yes, then, it must have been the 5th, round about the midday period some time.

Q. Did you give Mr. Adler a copy of your typed draft which is the balance of the pages comprised in m.f.i. 11? A. I think he must have had one at some stage, your Honour, but whether it was before or after we had the meeting with counsel I don't know. I say that because I think I saw on one of the files I handed in some photostat copy or copies which appeared to have been made of the letter and I would presume that I had those prepared with a view to sending at least one to Mr. Adler and possibly copies to the other two active board members, but I can't recall that now for certain. I would think almost certainly I must have left a copy with Mr. Adler at some stage.

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Q. Did Mr. Adler ever discuss that draft with you?  
A. No, I don't think so, because by the next day, speaking from memory now, we had already received counsel's reply or suggested reply or settled reply - let me put it that way - and my original effort had obviously been virtually totally discarded by counsel, so the draft was obviously not considered as being of any further practical purpose.

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Q. At the time you drafted that document which is now m.f.i. 11, the draft letter to Mr. Tilley, had you questioned Mr. Adler as to the extent of his market operations in Cumberland shares from and including the month of June onwards? A. No, I don't think so, your Honour. I think the matter stopped, in my mind's eye, from the time of the share purchases in July. I don't think the matter was pursued at that time anywhere beyond that. We all sort of rather put a full stop at the period that was giving rise to the argument.

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Q. You said "We all rather put a full stop"?  
A. I will correct it. I rather put a full stop. I don't know whether anybody else mentally did the same.

Q. You wrote this document, this draft letter to

Mr. Tilley with a view to it being signed by Mr. Adler, did you? A. Yes, that is so, but only, as I said, if and to the extent that counsel regarded it as being a proper and satisfactory document.

Q. There is one thing in that document I would like to draw your attention to and that is on the fourth page. Would you just read from the commencement of the second paragraph down to the words "other members of my family" about fifteen lines down from the top of the second paragraph. Just read that to yourself, would you? A. Yes, how far down? 10

Q. Down to "other members of my family". A. To there? I am sorry, I started from there. Yes?

Q. Will you not agree, having read that, that at the board meeting of 11th July there was some discussion of investments that might be made other than investments in Brookers and Cumberland? A. Yes, the way it is written that would certainly have been the interpretation on it. I must have been, on reflection now - 20

Q. In another hurry? A. I am afraid so.

Q. You still maintain, do you, that the only investments discussed at that meeting of 11th July were Brookers and Cumberland? A. To the best of my recollection now, your Honour, yes.

Q. Do you remember saying in your evidence that the Stock Exchange's suggestion was considered at a meeting of the FAI board, the suggestion, that is, that the holding of FAI should be reduced below - A. Yes, I do. 30

Q. Eighty per cent? A. Yes.

MR. BAINTON: I think he said it was considered by the directors.

MR. HUGHES: Q. Was it considered at a meeting, formal or informal, of all the directors? A. No, I think there would only be the four - I am sorry to have to call them "active members", your Honour, but in terms of board attendance, the four active members present.

Q. When was that done? A. I think the evidence was it was early in September. Was it 6th September? 40

Q. 6th September. A. Shortly after my return from London.

Q. May I show you the minutes of the meeting of 6th September? A. Yes.

Q. (Approached) Of FAI? A. Yes. I think I have already said in evidence that the point I am mentioning was apparently omitted from the minutes.

Q. Doesn't that suggest to you that there was no discussion? A. Well, I know there was a discussion, sir. There is no point in saying that, sir. I recollect quite clearly that it was discussed and that was how I, most unfortunately as it transpires, suggested considering a share exchange offer. 10

Q. Have you seen these minutes of Cumberland Holdings, a directors meeting of 10th September, 1974? I am showing you a photostat. A. I see it. It doesn't make sense, does it?

Q. No, it doesn't, does it? A. Who prepared these?

Q. Well, who did keep the minutes? A. If the same procedure was followed with Cumberland as it was with FAI, what normally happened was that the chairman rang through to the secretary of the department later and dictated or told them the points that had transpired and asked for formal draft minutes to be prepared. 20

(Copy of minutes of directors meeting of Cumberland Holdings Limited held on 10th September, 1974, together with attachments, tendered and admitted as Exhibit 83?)

Q. The documents annexed are the letter from the Stock Exchange and the draft reply? A. Yes, it shows that the first paragraph of the relevant minute does not make sense as the matter obviously had been discussed with, well, either Fire & All Risks or FAI. 30

Q. Which was it - Fire & All Risks? A. Well, it would be FAI. As I say, the Fire & All Risks board meetings were taken rather for read when decisions had been arrived at by the parent board.

Q. If that minute happened to be the correct record of the proceedings of the Cumberland board of 10th September, it would indicate that the suggestion from the Stock Exchange about the reduction of FAI's shareholding received rather scant consideration, wouldn't it? A. I am sorry, I am not quite clear what the - 40

Q. If that minute happened to be a correct record of the proceedings of the Cumberland board on 10th

September, it would indicate that the Stock Exchange's suggestion about the reduction of FAI's shareholding interest in Cumberland received rather scant consideration by the FAI interests, wouldn't it? A. Unless the FAI discussions were supposed to have taken place between the periods of the first and second paragraphs, your Honour. I can't see how the letter makes sense anyhow. Then, presumably, the minutes would have said that there had been an adjournment so that FAI could be consulted and the answer brought back to the board, but I am quite clear in my mind that the discussion with the FAI board was at our meeting which I think the minutes show was at a date prior to this one and that, indeed, our decision should be communicated to the next Cumberland board meeting.

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(Luncheon adjournment)

RE-EXAMINATION:

MR. BAINTON: Q. After your perusal of the transcript of your evidence, there was, Mr. Atkinson, something you said and I think it is at pages 306 and 307 relating to your, as it were, sharebroking experience that was not completely accurate. What is the correct position? A. Your Honour, in my evidence I noticed I said that what was then the Guinness & Peat group had acquired an interest in a firm of London brokers called Sandersons. That is true, but my activities with London brokers were not, in fact, as I now remember, related to that firm but another firm called Astaires with whom we were engaged in a large volume of joint account and reciprocal trading arrangements regarding our Bradburns interests in Kuala Lumpur and their interests in the Far East markets in London and it was those interests that I now recollect I was primarily responsible for from the London end during the period I think from about 1963 to 1968/69. I apologise for the error.

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\*\* Q. Mr. Atkinson, at page 377 of the transcript you had been asked if you recollected Kylsant's case?

A. I am sorry, I haven't got the -

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Q. I am just trying to remind you of the context to save you reading it. Then your attention was drawn to the various circulars? A. Yes.

Q. That had been sent out. You were asked this question - it is just about the middle of the page -

(\* Original Transcript Pages 190, 191)

(\*\* Original Transcript Page 239)



I think perhaps on reflection if Mr. Atkinson could have a copy and read the question in its context. Perhaps if you would start at the second question from the top, Mr. Atkinson, and read down to the end of the question, "Would you agree with that?"? A. Yes.

Q. You were asked would you agree that in the formulation of the circulars, and I am abbreviating this a little, there was a duty of frankness and candour resting on the shoulders of those responsible for their publication. Your answer was, "There was a duty, your Honour, yes." A. Yes. 10

Q. Would you tell us what in your view or your belief that duty was that you were referring to there? (Objected to; allowed).

Q. You were asked that question and you should read the following question and answer as well. Perhaps could I put it this way. Was your answer to the question beginning "A duty of which you were conscious at the time" intended by you to be a full description of what you thought the duty was or, in your belief, were there other elements to it? A. Your Honour, if I had to try and conceive a possible list of all the things that could or could not come within the ambit of the previous question, I suppose I would write a tome on it, but the point that was principally concerning me were the ones to which I gave the second answer, "a duty not to mislead consciously or deliberately." If it is put that that is a statement of every possible duty that could exist, well then, the answer would be "No", I suppose. 20 30

\* Q. You have the transcript there. Would you mind turning over to page 378? A. Yes, I have it, sir.

Q. You were being asked towards the bottom of the page about the views Professor Wilson was expressing relating to government support for geriatric nursing homes? A. Yes.

Q. And you answered the question by a reference to the Minister saying something? A. Yes.

Q. Then you were told not to worry about what the Minister said, that Mr. Hughes would come back to that later if need be. Now, he didn't but would you tell us now please who made a statement about this matter, when it was made and what was said. A. What I read were newspaper reports, your Honour; assuming 40

(\*Original Transcript Page 240)

T.E. Atkinson, re-x.

them to have been correct, the statement that I had in mind was made by Mr. Hayden who was then, I think, the Minister for, I think they called it, Social Security and, to the best of my recollection and belief, it was somewhere round about the end of October.

I can't recall now whether it had been at a press conference that he had been giving or in reply to some question in the Parliament or elsewhere, but the report was to the effect that the costs of running these geriatric nursing homes had been escalating enormously over the previous months or so. This was a matter of grave concern because up to that time the government had been picking up the extra bill for the extra costs that were being loaded on the industry and he then was quoted as going on to say something to the effect that it would be quite wrong for people to assume that this state of affairs could go on indefinitely and, if there were further heavy increases in the costs of running these nursing homes, the government might well have to consider not subsidising or not fully subsidising any further cost increases involved.

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That is the gist of it, your Honour. I am quite sure I haven't got the exact words but that was the -

Q. Mr. Atkinson, assuming, which I would ask you to do for the moment, that the statement exhibited the degree of frankness and candour one would perhaps expect from a Minister and it was correct, what effect would it be likely to have on the business of Cumberland Holdings Limited? (Objected to).

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Q. What effect would such a change of policy, if it occurred, be likely to have had on the business of Cumberland Holdings Limited? A. Well, your Honour, as I said in my evidence at the time, the profitability of not just Cumberland Holdings but the industry as a whole, the nursing home industry, depended upon the government subsidies that were being received and maintained.

Many of the patients in many of our own homes, for instance, and I would imagine others as well, were elderly people with small means who could not conceivably have afforded to pay without government assistance the sort of charges that were being involved. Depending on the extent to which the government might opt out of the subsidy situation, the complete industry could have been, in my view, ruined.

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Q. Mr. Atkinson, the geriatric nursing home industry, if industry is the right word for it, has been

described several times and by yourself just a moment ago as subsidised. Who is the subsidy paid to? Does it go to the nursing home or does it go to the patient? A. I think part of each, your Honour. The bulk, as I understand it, is treated as a subsidy to the patients but I think arrangements administratively are made whereby it is received direct by the nursing home. I am speaking here of a field which I really have not very much personal knowledge of, your Honour.

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\* Q. Would you turn over please to page 379? The fifth question from the bottom is a question in which you were being asked about some figures. The question reads, "But of course you knew, when this take-over offer was made, that in substance it was a proposal that Cumberland shareholders, ordinary shareholders, should exchange shares with a net tangible asset backing of \$1.22 for FAI shares with a net asset backing of 52" - meaning 52¢. Is it correct that the net asset backing as distinguished from the net tangible asset backing of FAI shares is 52¢? A. No, your Honour. I think that was established later in the cross-examination. I think it worked out at approximately \$1, speaking from memory.

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Q. It is correct, though, is it -

HIS HONOUR: Q. Net asset backing as distinct from net tangible asset backing? A. Yes, shareholders funds as appearing in the accounts.

MR. BAINTON: Q. It would be correct, I think, would it not, or near enough to assert that for FAI shares the net tangible asset backing is 52¢? A. Yes. I think it was, in fact, a little more but near enough not to be arguing about, your Honour.

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Q. Had you appreciated when you were answering that question that you were being asked about the net tangible asset backing for one lot of shares and net asset backing for the other lot of shares? A. No, I hadn't, your Honour. When the point was canvassed at length later on, as you know, we got involved in a considerable discussion.

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\*\* Q. At page 397 you were being asked about the views you had expressed on the earnings yield of FAI shares and, specifically, about halfway down the page, about

(\* Original Transcript Page 241)

(\*\* Original Transcript Page 253)

the view you had expressed that there had been a marginal advantage to FAI during the year ended 30th June, 1974? A. Yes.

Q. You were asked, "What you were seeking to do was to ascertain the earnings yield of the issued shares as at 30th June on the basis that they had been on issue throughout the year? Surely that was what you were seeking to do?" and you answered, "No, because you would assume that if the extra capital had been received on 1st July, 1974, it would have produced an additional income yield throughout the year." And so on to the end of the answer. I don't know whether you said "1974" or not? A. If I did, it was obviously a mistake, sir. I was referring to the year ended 30th June, 1974, and I must obviously have meant to say "1st July, 1973" because I was talking about the full twelve-months yield on the extra capital.

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Q. You were asked a great number of questions about various things in various circulars that were said to be inaccuracies of one sort or another. You may recollect a number of questions over several pages relating to the statement in one of the circulars that the success of Cumberland was only possible because of the financial assistance of FAI. Do you recollect that? A. Yes, I do, sir.

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Q. I think, if your Honour wants to find where it is, it is mostly at page 463 and a little before and after. It was suggested to you that the management might have had something to do with it and I think you assented to that, did you not? A. Yes, sir.

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MR. HUGHES: I think it was his suggestion.

MR. BAINTON: Q. I want to put to you that to say the success was only possible because of the financial backing from FAI may well have misled some of the recipients of the circulars. Do you recollect the series of questions or would you like to look at them? A. I remember what you are saying. I don't seem to remember being asked whether it would have misled them; I remember being asked whether it was inaccurate. I beg your pardon, the question seems to have been withdrawn.

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HIS HONOUR: Q. Just a little over halfway down?  
A. Yes, at the bottom of the page. Yes, I am sorry, your Honour.

MR. BAINTON: Q. I suppose, Mr. Atkinson, you are

(\* Original Transcript Page 301)

generally speaking familiar with the game of cricket, are you? A. As a spectator, sir, yes.

Q. If somebody said to you, "It will only be possible to play this afternoon if you can get hold of a ball," would you think they were really asserting that they did not need a bat as well, as an ordinary recipient of that sort of statement? (Objected to; rejected).

Q. Do you have that part of the transcript there, 10  
\* Mr. Atkinson? A. Page 463?

\*\* Q. Would you turn to page 471 please? A. Yes.

Q. You were being asked there about Exhibit 15 and perhaps, Mr. Atkinson you might have Exhibit 15 for the purpose of the next question. You may need to  
\*\*\* read a fair part of page 471 to answer this question. Before you do, would you look please at the fifth question from the bottom. You were asked, "The fact that there are material inaccuracies in it is undoubted, is it not?" and your reply was, "One at least 20  
was a material matter." What I would like you to do is to tell us which was the one you were referring to by that answer? A. Oh, it was the second sentence of the first paragraph, your Honour, where I had put in what I called an omnibus denial of the whole of the previous sentence and then gone on to qualify it and the rest of the paragraph. I agree that if I had just been dealing with that second sentence as it stood it would have been a material inaccuracy.

Q. That is the second paragraph on page 2, is it not? A. The first paragraph, isn't it - "Unfortunately, as I have repeatedly stated, this is not the case." I think that is the one. 30

Q. You have just read the second sentence out of the paragraph you are referring to? A. Yes.

Q. I am afraid we all have different editions of the paragraph or, maybe, it is not the same page. The statement you had intended to refer to in the answer I have drawn attention to is "Unfortunately, as I have repeatedly stated, this is not the case." 40

(\* Original Transcript Page 301)

(\*\* Original Transcript Page 306)

(\*\*\* Original Transcript Page 306)

A. Yes, I did say that was the one I was referring to which could be better expressed.

Q. You were asked some questions relating to a minute appearing in the books of FAI and I think, if I recollect correctly, on 3rd April, 1974, and I am paraphrasing it, it was resolved, in effect, not to proceed with the take-over offer in respect of Cumberland? A. Yes.

Q. And you said that your recollection was that that referred to a proposal to acquire the two classes of preference shares which had originated from a proposition put by Mr. Adler to Mr. Millner?

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A. That's correct.

Q. You went on to say there had been some correspondence sent to Mr. Millner about it. Would you look at this copy letter and tell me whether that was what you had in mind when you referred to that correspondence? A. Yes, that was the letter I was referring to. I think it was later down on the page - not that page; another page.

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(Copy letter from Mr. Adler to Mr. Millner of 23rd January, 1974, tendered; objected to; marked for identification 12)

\* Q. At page 403 you were being asked questions relating to the increase in earnings of FAI during the quarter beginning on 1st July, 1974? A. Yes, sir.

MR. HUGHES: Cumberland.

MR. BAINTON: Q. No, FAI. In the third question you are recorded as saying towards the end of your answer, "In regard to our properties, we had just completed our main property investments in Singapore, and at long last were getting them let out," and so forth.

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A. Your Honour, if I said Singapore, it was a mistake. We have never owned any property investments in Singapore. The properties were, and are of course, in Sydney.

Q. (Witness shown Exhibit 71) Would you go to page 2, Mr. Atkinson, and the paragraph in the middle beginning "Since July 1974" which you were asked a number of questions on this morning? A. Yes, I have it.

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Q. I think, as you have told us many times, and as

(\* Original Transcript Page 257)

we have seen from the document, the take-over offer which was withdrawn contemporaneously with this letter of 6th December was a share exchange, wasn't it?

A. Yes.

Q. On the assumption which I would ask you to make that anybody knowing that would read the reference to a reasonable market price as a reference to what the Cumberland shareholder was going to get for his share, does the statement in the second sentence "The consideration of the take-over offer which has now been withdrawn was fixed on the basis that it represents our view of what in present circumstances represents a reasonable market price" in fact represent what your opinion was? A. On that assumption, yes.

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Q. Don't answer the next question for a moment - it may be objected to. Can you imagine anyone in Mr. Tilley's position, bearing in mind the discussions you have had with him on 4th December, reading that letter in any other way? (Objected to; allowed).

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HIS HONOUR: Q. You recall the question, do you?

A. I do indeed, yes. I can't say that I ever gave that particular aspect of the matter consideration at the time. If I was asked to consider it now in the light of what has been said, I would say that that would be so.

MR. BAINTON: Q. You were this morning asked about the document which became Exhibit 82 and some questions about the document which remains marked 11 for identification. Do you recollect? A. Yes, the draft letter submitted to counsel.

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Q. You said that but I would like you, if you would be so kind, to identify the counsel please? A. It was yourself, sir.

(Witness retired and excused)

MR. BAINTON: What I have to say I wish to be regarded as evidence.

MR. HUGHES: I cannot make that concession until I hear what my learned friend has to say.

MR. BAINTON: It relates, obviously to the cross-examination of Mr. Atkinson this morning relating to the suggestion that Exhibit 82 came into existence at a much earlier point of time than Mr. Atkinson says

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and it wasn't used for the purpose that he said it was used for.

What I wish to say is this: that I was consulted on 2nd December 1974 on behalf of FAI Insurance Company Limited in relation to some correspondence that had passed between that company and the Stock Exchange relating to the Cumberland take-over offer, and I was consulted again on 5th December for a period, if my fee book correctly records it, which I believe it to do, of two hours, beginning at one o'clock.

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On that occasion, the people present were Mr. Atkinson, Mr. Adler and Mr. Sinclair. I was given a Xerox copy of the document which is now Exhibit 82 and either the original or a copy - I do not now recollect which - of the document or the remaining part of the document now marked 11 for identification. I read them both.

I was told by both Mr. Atkinson and Mr. Adler that when Fire & All Risks acquired what has been described here as "the Adler parcel of shares" in July 1974, no take-over offer was then on contemplation.

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I was told that both Mr. Adler and Mr. Atkinson had come away from their discussion with Mr. Curran and Mr. Tilley with the impression that they, meaning Mr. Tilley and Mr. Curran, apparently had formed the impression that such a take-over offer may well have been in contemplation in July.

I was asked to advise FAI what, if any, rights it might have if the Stock Exchange determined to suspend or de-list.

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I was asked, first, to advise on who would initially determine that question and whether, if it was the Stock Exchange Listing Committee, there was any appeal or form of legal redress should the decision be adverse to FAI.

I expressed the opinion that that question had been decided in this Court by Street, J. in the case of Stirling Henry Limited v The Sydney Stock Exchange and that the decision had been that the listing was at the pleasure of the Stock Exchange and that there was no legal redress available to FAI should this listing be suspended or cancelled and I advised FAI to withdraw its take-over offer.

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I think that at that stage the contents of the letter to be sent to Mr. Tilley were discussed in the context of Mr. Atkinson's draft. The discussion took place with both Mr. Adler and Mr. Atkinson. It occupied



a fair amount of time and at the conclusion of it the letter which is now Exhibit 71 was drafted by me, to the best of my recollection, in the terms in which it now appears and I advised that a letter in the terms of the draft which I had prepared be sent to Mr. Tilley and that occurred on 5th December.

HIS HONOUR: I don't know whether you want to cross-examine on that, Mr. Hughes?

MR. HUGHES: No, your Honour.

HIS HONOUR: That will be on the record.

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MR. BAINTON: Are you taking it as evidence in the case?

HIS HONOUR: It is on the record and my practice is to accept statements from counsel -

MR. HUGHES : I don't ask you Honour not to.

HIS HONOUR: From the Bar table as evidence.

MR. BAINTON: If it is on that basis, I am content. I could add that when one looks at Exhibit 70 -

MR. HUGHES: I raise no objection whatsoever to that.

JAMES REUBEN WILSON  
Sworn and examined:

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MR. BAINTON: Q. Professor Wilson, is your full name James Reuben Wilson? A. Yes.

Q. You reside at 2 Woodbridge Avenue, North Epping?  
A. Yes.

Q. And I think you are the Associate Professor in Economics at Sydney University? A. That is correct.

Q. And have been since 1970? A. That is correct.

Q. I think you have the degree of Master of Economics from that university and have had the benefit of two years post-graduate studies at Cambridge? A. That is so.

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Q. Your specialty, I think, is matters monetary, banking and finance, if there is any difference between the first and last of those? A. Yes.

Q. I think you are also the Vice-President of the

New South Wales Branch of the Economic Association of Australia and New Zealand? A. The Economic Society.

Q. Society is the true title. I am sorry. And you are a member of the Executive Committee and the Research and Policy Committee and Management Committee of an organisation known as C.E.D.A.? A. That is correct.

Q. Which stands for? A. Committee for Economic Development of Australia.

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Q. How long has that been in existence and how long have you been associated with it? A. It has been in existence for ten years. It was started by Sir Douglas Copeland. I have been associated with it for six years.

Q. I think you are a member of the Medical Fees Tribunal and the National Population Inquiry which has given you, perhaps, a little more insight than some others may have into possible Government policies in some fields? A. That's correct.

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HIS HONOUR: Which of those two, Mr. Bainton?

MR. BAINTON: I think I will allow somebody else to ask that question, your Honour.

Q. Now, you are a Director of FAI Insurance Limited?  
A. That is so.

Q. When did you join the board of that company and in what circumstances? A. I joined the board in January 1972. I had been requested by Mr. Adler, through a common friend, to consider joining the board. I met with Mr. Adler on a number of occasions, discussed the nature of the business, and eventually agreed to join the board.

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Q. Had you met Mr. Adler prior to that request?  
A. Only casually as he was also a member of C.E.D.A.

Q. FAI is the only public company of which you are a director? A. Yes, except for the subsidiaries such as Falkirk Insurance and now, of course, Cumberland Holdings since January of this year.

Q. I think that when you originally went on the Board you took up a parcel of shares, did you not, in FAI? A. Yes, that is right.

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Q. Do you recollect the number of shares which you actually took up? A. I don't recollect. They were the number necessary to be acquired for a director's qualification.

Q. In the Part A statement with the take-over offer which was subsequently sent out in respect of Cumberland Holdings you were shown as having a beneficial interest in 3,031 shares in FAI. Would that have been checked at the time? A. I would presume the company secretary would have checked it, yes.

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Q. Would you tell us, if you can, on the average from the time you joined the Board up until perhaps say the commencement of the hearing of this case - how much time you would have spent as a director of FAI or any of its subsidiaries on the business of that company or the group? A. It would be very difficult to quantify. It came in fits and starts. I suppose roughly an average over the full period about one day a week. Maybe less.

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Q. What, generally speaking, has been the field in which you have contributed the benefit of knowledge and experience at Board meetings? A. In two particular areas. One is in terms of my evaluation of the economic situation from time to time - the financial situation - and secondly, as an independent outside person who is not involved in the day-to-day activities of the company, to cast a commonsense eye over the proposals.

Q. Well now, what was the position of FAI, considered together, for this purpose, with its 100 per cent owned subsidiary, FAR, so far as liquidity was concerned round about the middle of 1974? What was the position in regard to that at that stage?

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A. We were in a very strong liquidity position.

Q. How had this arisen? A. Primarily in terms of strong premium income - inflow; no substantial increase in claims - in fact, a fall in claims - and fairly rigorous control of overhead and operating expenses. The business had been expanding quite rapidly at the time.

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Q. You were not, at that time, on the Board of Cumberland Holdings? A. No, I was not on the Board at that time.

Q. Did you, however, have any knowledge of the business and affairs of that particular company.

A. Yes, I did.

Q. What did you know about its business and affairs?

A. We had regular reports from Mr. Adler, who was the chairman of both companies. We would have seen from time to time the detailed monthly statements of Cumberland's financial affairs, and from time to time I would run into Mr. Barrington, who was the general manager of Cumberland Holdings, in the FAI office.

Q. Did you know anything of who were the shareholders of the company? A. I do not recollect having any detailed knowledge. 10

Q. Did you know anything of the extent of the shareholding of the FAI group in the company? A. Yes.

Q. What, in your belief, was that in July 1974 - at the beginning of July 1974? What was your belief as to the extent of the shareholding of the FAI group at that time? A. So far as I was given to understand we had something round about 72 per cent. Something of that order.

Q. Does that apply to all acquisitions of shares, or to any particular class of share? A. That I do not recollect. 20

Q. Did you know whether or not it was listed on the Stock Exchange? A. I beg your pardon?

Q. Did you know whether Cumberland was listed on the Stock Exchange? A. Yes.

Q. You knew that it was, I take it? By that answer I take it that you knew it was? A. I knew that it was, yes.

Q. Did you know how many shareholders outside the FAI group Cumberland had in respect of its ordinary shares? A. I did not know precisely, but I know that they did not have a large number of shareholders. 30

Q. That they did not have a large number of shareholders? A. Yes.

Q. How did you come by that particular knowledge? A. I would have been told that by Mr. Adler, I presume, or Mr. Belfer.

Q. Well now, do you remember the question of the possible acquisition of further shares in Cumberland Holdings coming up for discussion? A. Yes, I do. 40

Q. Will you tell us when that occurred, who was

there, who brought it up, and what was said - in that order, if you can? A. I don't know whether I can fulfil all that Mr. Bainton. We would have been discussing the question of the preference shares some time early in 1974 - round about March or April, I would have thought. There was a proposal - I think it came from Mr. Adler to the best of my recollection - a proposal that we should acquire the redeemable and cumulative preference shares. There was some question about them being an untidy form of financing, and that they did not attract tax deductions.

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Q. I did not really intend to ask you about that, but about a transaction - perhaps the simplest way would be if I may ask you to look at Exhibit 67. Would you just look briefly at that, please? Does the transaction recorded in that document come to mind? It is that transaction that I was intending to refer to? A. Yes.

Q. Would you tell us how that transaction came up?  
A. Yes, certainly.

20

Q. And the progress of it? A. The matter was brought up by Mr. Adler, who said that he wished to dispose of his shareholdings and those of his family companies and his family. It was a consolidation exercise, because we were also acquiring some shares from Falkirk. He said that the price which he wished to receive was \$1.25 for the ordinaries and 50 cents for the preference shares, and he disclosed his substantial interest in the matter.

30

The Board then decided that we would consider the matter, and Mr. Adler left the room so that we could discuss it in his absence, and we discussed it for some 20 - 25 minutes to the best of my recollection.

Q. Who was present at that discussion? A. Mr. Atkinson, Mr. Belfer and myself.

Q. I would like you to give us what you can recollect of that conversation. If you can't recollect it in any sort of chronological order, perhaps deal with the subject matters. For instance, was the discussion about price for a start? A. Most certainly.

40

Q. What was said on that question? A. Well, the first issue was to establish whether we should be interested in taking these shares.

Q. Yes. A. The second matter was did we think that the price Mr. Adler was asking was fair and reasonable.

Q. Will you deal with the discussions in that order, please? A. Yes. We had previously considered our very liquid position. We had authorised Mr. Adler to spend up to \$400,000 on a share portfolio, it being our view that the share market had bottomed - probably a wrong conclusion as it turned out. We may have been misguided at the time, but that was our considered view, and we had looked at a number of potential investments. 10

I had myself prepared a list of companies at Mr. Adler's prior request for companies which we may consider taking a position in - a substantial position in, rather than a speculative position.

Mr. Adler also raised the question of taking a position in a company which is not on my list, which is Brooker Holdings. In other words, we were looking at the whole range of our investment portfolio. I was pushing - I had been strongly pushing for a shift of emphasis from real estate. We had gone extensively into real estate over the preceding 12 or 15 months, and it was my view that the portfolio might be getting some element of imbalance, so we were looking at the whole range of investment portfolio and looking at the various forms of assets in which we should invest. 20

Q. What views were expressed about Cumberland shares, and who expressed them? A. They fitted fairly neatly into the type of company in which we were considering taking a position. 30

Q. I'm sorry? A. Those shares fitted fairly neatly into the type of company in which we would be considering taking a position.

Q. For what reasons? A. On the ground that we knew its track record. We had had a long association with it. With a 70 per cent owned subsidiary, you get to know your own partial creatures. The prospects in my view seemed to be quite favourable. There was some divergence of views on that issue. 40

Q. Who had other views, and what were they?  
A. Mr. Atkinson was extremely sceptical about the desirability of investing in nursing homes at all on the ground that the wicked Government might take them away from you at any time.

Q. What was your view in regard to that? Did you have something to say on that question? A. Yes. I was somewhat forthright. I can't recall the exact words, but it was to the effect that I thought it would be political suicide for any Government to withdraw financial support from nursing homes or geriatric homes. Mr. Belfer was strongly in favour of us proceeding to enlarge our shareholding.

Q. Did he give any reasons for that? Did he give any reasons for that view? A. Only that he had been closely associated with Cumberland, and knew that it was a good going concern - he had full confidence in the management. In other words, it was a business which he knew well, and thought was a very good company in which to take further position. 10

Q. Were there any other pros or cons, as it were, brought up and discussed? A. Well, there was the question of how we established the price - whether it was a fair and reasonable price. Again I may have been a little forthright. I am not sure whether it was Mr. Atkinson or Mr. Belfer who said "Well, this looks as though it is round about the Stock market price". I rejected that out of hand. I rejected out of hand the notion of relying on a stock price quote - I rejected the notion of relying on a stock market price as the sole or fundamental basis of valuation. 20

Q. What did you say about that? A. Again I cannot recall the exact words, but it was to the effect that it was a price that we established ourselves from time to time, because the market was an extremely discontinuous one. The holders of the shares in the company had seemed to be content to hold these shares rather than to trade in them over long periods of time, therefore there had never been a continuous and independent market established. Therefore it seemed to me inappropriate to look at the price on the Board as a basis for valuation. 30

Q. Did you get down to discussing among yourselves what would be the appropriate basis on which to evaluate that parcel? A. We looked at a variety of things. Having quickly persuaded my fellow directors not to proceed with the stock market price, we looked at two other things. One was the asset backing of the shares, and again I was sceptical in putting too much reliance upon this, because in my view - and I hold it very firmly - asset backing is relevant only if you are thinking of breaking up a company and realising its assets. It is of little value for investment purposes if you are thinking of it as a going concern. 40

Therefore, it was my view, and I think it was shared by the other two directors, that the really important thing was what we would expect to be the income flow generated by the company as a going concern, and not as a wind up operation.

Q. Was that discussed amongst you? A. Yes, it was discussed quite fully.

Q. What was the discussion, so far as you now recollect? A. In what sense? 10

Q. Who said what about what? A. I am afraid I could not give you a clear recollection of that.

Q. As best you can? A. We had reached a consensus that, without being able to actually quantify the price we assigned to the share backing and how much to the income flow - we came to the conclusion that on all counts it seemed to us, in our judgment, that \$1.25 was a reasonable price for the ordinaries and 50 cents was a reasonable price for the preferences, but we did not put it through the computer or anything of that sort. 20

Q. What information did you have available to you to make that assessment? A. We would have had the monthly financial statements of Cumberland and we would have known of the building and extension plans for Cumberland. That would be the principal thing in assessing the value of Cumberland. We were primarily looking at what was its worth to FAI as a company, and therefore what it was worth to the FAI shareholders. 30

Q. Did you know at the time of these discussions whether or not anybody had a controlling interest in FAI itself? A. Yes, I knew that Mr. Adler was the majority shareholder, and his associated companies. That has been no secret ever since I first discussed the matter with him.

Q. Did you know whether or not, in the sense of himself and any companies he might have controlled, held more or less than 51 per cent of the voting shares? A. It was my understanding that he held more. 40

Q. So that you would have known, may I take it, that he could at any time have caused a resolution to be passed removing you from the Board of directors? A. That is perfectly correct.



Q. Did that have any influence at all on your consideration of the matters? A. None at all.

Q. Did you regard yourself as being under any pressure at all from Mr. Adler to favourably consider the acquisition of these shares? A. Quite the contrary.

Q. What conclusions were ultimately reached on the deliberations amongst the three of you? A. We agreed to accept Mr. Adler's offer, and called him back into the room and proceeded with the rest of the meeting. 10

Q. You told him so, I suppose? A. Yes, certainly. We told him.

Q. At that stage - and by that I mean when these discussions took place and that decision was made - did you have any belief as to whether or not the acquisition of the shares you were considering might have any effect at all on the continued listing of Cumberland Holdings? A. I do not recall that the matter was raised at that particular meeting. It was raised at subsequent meetings of the Board, and it was raised by Mr. Atkinson. 20

Q. I will come to subsequent meetings in a moment, if I may. Did you have any view at that meeting, either as the result of anything said there, or said earlier, or on your own appreciation of the situation, as to whether or not the acquisition of that parcel of shares would have any effect at all on the continuation of the listing of Cumberland Holdings Limited? A. No, not to my recollection. 30

Q. Was that the subject of any discussion at this meeting on 11th July? A. Not so far as I can recollect.

Q. When was it that that question was first raised with you? If you can't give us the date - A. No, I can't. It would have been, I presume, round about the beginning of September from recollection. It was round about that time. It would be about six weeks or so after - six or seven weeks after we had been discussing it earlier. 40

Q. Did something occur in the meantime to cause this subject to be brought up? A. I gather there was a letter sent by the Sydney Stock Exchange to Cumberland, pointing out the position with respect to the concentration of shareholdings.

Q. Did you see that letter at some stage after its receipt? A. I don't know whether I saw it or saw a photocopy, or whether I was merely told the contents of it.

Q. Will you kindly look at the Exhibit which is now being handed to you? (Document handed to witness) Did you either see that letter or get yourself informed of its contents? A. Certainly I was informed of its contents. Of that I am quite certain.

10

Q. By whom, do you recall? A. I beg your pardon?

Q. To your recollection who do you think it was that told you about that letter? A. Mr. Adler.

Q. Well then, what was done as a result of the contents of that letter? A. To the best of my recollection I suggested that we - that in response to this particular request by the Stock Exchange we should seriously consider making a take-over offer for the minority shareholders on the ground that many of them had been faithful supporters of the company for a long period of time, and we should give them the opportunity to get out of the company, if they so desired.

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Q. Who was that said to? A. That would have been said to the Board, from recollection.

Q. That was at a board meeting? A. So far as I can recollect.

Q. Do you recollect who was present? A. Mr. Belfer and Mr. Adler would have been. Whether Mr. Atkinson was there or not I am not sure, because that was the period when he had some injury to his arm, and he did have some time away.

30

Q. Apart from that suggestion from yourself was any other action taken or considered as a result of what the Stock Exchange had to say in that letter? A. I don't know, Mr. Bainton.

Q. Perhaps I should have said was any action taken either by you or in consultation with you? A. I would have taken no action, no.

Q. Would you have a look at the letter for a moment? A. Yes.

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Q. You will see it contains - perhaps "request" may not be the right word, but it will do - from the

Stock Exchange that FAR should reduce its shareholding to 75 per cent by 3rd December 1974? A. Yes.

Q. Was any consideration given as to whether or not that request should or should not be complied with?

A. Yes, there was some discussion on the matter, from recollection. We decided not to comply with the Stock Exchange request, but instead to proceed with preparation of the take-over offer. There was some question of financial accounts having to be ready before we could proceed with such a course of action.

10

Q. Did you concur in the decision not to comply with the request of the Exchange? A. Most certainly. I could see no useful purpose to be served by it, particularly as there had never been an active market in Cumberland shares. I could not see where we were going to find any buyers for our five per cent.

Q. Was this a board meeting of FAI? A. It was either a board meeting or a consultation. We run things fairly informally. I am fairly certain it did come up at a board meeting, but which particular one I could not tell you from recollection.

20

Q. Whose interests were you considering when you came to that conclusion? By that, I mean was it FAI, FAR, Cumberland, or perhaps someone else? A. I would reject any distinction between the interests of FAI and the interests of FAR in the first place. I could not rightly say what was in my mind at that particular moment. But I would certainly have had the interests of the minority shareholders in Cumberland in mind on the grounds that they had been fairly faithful adherents to the company over a long period of time.

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Q. I think you said a moment ago that was what motivated you to suggest that a take-over offer should be made? A. Yes. Apart from that, with the Stock Exchange request it seemed we should not be intransigent and trying to deal with a situation which they thought was a difficult situation, and perhaps not in breach of their conditions, but would raise problems for other companies.

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Q. Did you personally have anything to do with the preparing of the draft take-over documents? A. Not with the preparation of them. I did see, or did have read to me, various drafts of letters and things of that sort. But I had no part in the preparation of take-over documents. It is not my field.

Q. Did you have any part to play in the decision ultimately reached as to what offer should be made to the holders of Cumberland shares, both ordinary and preference? A. All board members had a part in that.

Q. Do you remember when that discussion took place, and who expressed what views on the question? A. I'm sorry, Mr. Bainton, not clearly.

Q. Was it at a formal board meeting that it was discussed? A. It was discussed at a formal board meeting, but there would have been informal discussions before then. We were in regular consultation. 10

Q. Did you personally have discussions, either formally or informally, with anybody else on that particular question? A. Not outside the board.

Q. Inside or outside? A. I would have had continuous and informal discussions both with Mr. Atkinson, Mr. Adler and Mr. Belfer.

Q. You, of course, are aware of what offers were ultimately made? A. Yes. 20

Q. Did you concur in the offer of one ordinary share in FAI for one ordinary share in Cumberland? A. Yes.

Q. And likewise with the preference shares? A. Yes.

Q. What led you to the view that that was a proper offer to make? A. We had before us some calculations by Mr. Atkinson. I did not find them by themselves overwhelmingly convincing, but I could not see anything wrong with them. 30

Q. What sort of calculations did you have before you? A. In terms of the expected income flow which would be generated by the two separate companies. From recollection, these showed that the FAI cashflow would be substantially in excess of the expected Cumberland cashflow. Per share, that is.

Q. What were the factors operating in your mind that led you to concur in the decision that was reached? A. First of all there was - I could see no conflict of interest between the two sets of shareholders. That is, the minority shareholders who accepted the FAR offer would become shareholders in FAI. That is right. It was the FAI shares that were being offered, because it was a listed public company. 40

Q. You were starting to tell us what, in your mind, led you to concur in the making of the offer that was made? A. Firstly, we had been very closely associated - the two companies had been very closely associated. We had provided a substantial amount of financial assistance or made available substantial funds to Cumberland Holdings. We had also supplied managerial expertise in the form of Mr. Barrington, the general manager, who is also a director of the FAI board.

10

Furthermore, the FAI preference shares which were being offered were all redeemable, whereas the Cumberland ones were a mixture of redeemable and non-redeemable.

So far as I could see there were some economies to be achieved by shifting the status of Cumberland Holdings from a partially-owned subsidiary to a wholly-owned subsidiary. They were most of the considerations I had in mind.

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Q. Did you at that stage consider the possibility of FAI making a cash offer for the Cumberland shares?

A. There was some desultory discussion on that. The reason why we did not spend very much time on it was because we thought we could use the money more beneficially in the interests of FAI shareholders in alternative forms of investment.

Q. What did you have in mind in that regard?

A. In bridging finance there were very high rates of interest on secured loans for the short term, so that it was a high return on a low risk form of investment.

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Q. Do you recollect when the decision, as such, as actually made to send out the take-over offer?

A. From memory - and my memory is somewhat fallible - it was some time in October. But it would be late in October, because we would not be in a position to have figures - our accounts would not have been available until almost the end of October, so that in that sense it could almost have been in November.

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Q. Did you look yourself at the documents intended to be sent out before the final decision was despatched? A. I did see a mass of documents waving past me in the breeze. I did not try to read through the full legal documents.

Q. Did you read any of them at all? A. No, not past the first page.

Q. Was there some reason for not proceeding to look past the first page? A. Well, it was quite clearly a highly specialised document which was beyond my field of expertise. I prefer to leave fields of expertise which are beyond my knowledge to other people. In any case we had been advised that Mr. Atkinson, who had considerable legal experience, and counsel had looked at the documents, and I thought that was a good enough basis to accept them as being in the right and proper form. 10

Q. The actual document was dated 20th November 1974. I think you know that after that a number of other pieces of paper dealing with the same subject matter came into existence? A. That is right. There was, shall we say, a snowstorm of documents.

Q. Did you have anything to do with the preparation of any of these? A. Not the actual preparation. If I was in the office I would have been asked to cast my eye over the draft, primarily for the purpose of seeing whether it was grammatical, more than in any terms of content. 20

Q. Did you do that at all, do you remember? A. I would have done it with one or two of the documents. I would not guarantee to have cast my eye over all of them, though.

Q. Do you recollect whether you made any changes to grammar or content? A. I am quite certain that I did. I am almost certain I did.

Q. Have you any recollection now what those changes were? A. None at all. 30

Q. Were you consulted before the decision was ultimately made to withdraw the take-over offer?  
A. Yes.

Q. When was that decision made? A. I think we came to that conclusion early in December.

Q. Was this at a board meeting? A. It was at a board meeting, yes.

Q. Of which company? A. That would have been FAI.

Q. Do you recollect who was there? If you would be assisted, in answering the question, by having the minutes, would you please say so? A. It would be of a good deal of assistance. 40

Q. (Minutes handed to witness) With the advantage of those minutes, will you tell us who was present, and whether you concurred in the decision to withdraw the offer? A. Mr. Adler, Mr. Atkinson, Mr. Belfer, Mr. Herman, Mr. Barrington and myself, and I concurred in the decision to withdraw the offer.

Q. Do these minutes, which I think became Exhibit 70, accurately record the decision made at that meeting, and the reason for it? A. To the best of my recollection, yes. 10

Q. We know that you were appointed to the board of Cumberland Holdings Limited at a meeting of that company held on 22nd January 1975. Do you recollect what it was, in your understanding, that led to the appointment of yourself and also that of Mr. Atkinson to the board of that company at that stage? A. Both Mr. Belfer and Mr. Adler had reported that the proceedings at meetings of the board of Cumberland Holdings had become increasingly acrimonious, and it was drawn to our attention by Mr. Atkinson that the Cumberland board had a quorum of three directors, there were only three directors, and therefore there was the possibility, if Mr. Donohoo absented himself, there would not be a quorum, and therefore the board could not function. 20

Q. Were these decisions at a meeting of FAI directors? A. Yes. It was the day before I went overseas, which would have been 10th January.

Q. Was a decision made at that stage that steps would be taken to put Mr. Atkinson and yourself on the board of the company? A. Yes. There had been, I understand, some seeking of counsel's opinion, and there had been some change of opinion by counsel as circumstances changed, and on the basis of the legal advice and of the possibility of a complete breakdown of the operations of Cumberland Holdings it was decided we should be nominated. 30

Q. Did you, as a director of FAI, concur in the course that was then embarked upon, namely, putting yourself and Mr. Atkinson on the board of Cumberland? Did you concur in that? A. I concurred, yes. Reluctantly, but I concurred. 40

Q. What led to the reluctance? A. It is just another chore.

Q. It was reluctance on your part, I take it?  
A. On my part, yes.

Q. To go on? A. I beg your pardon?

Q. Reluctance to go on? A. Yes. But I had a duty to the shareholders, so I agreed.

Q. Can you recollect, without the benefit of the Cumberland minute book, what was the first meeting you attended? A. It was some two or three days after I returned from overseas, which would be - I came back on the 25th. It would have been about 27th or 28th January.

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Q. You may take it, I think, there was a meeting on the 28th? A. Yes.

Q. And that you are recorded as having been present at that one? A. Yes.

Q. What was the main matter of business for discussion at that first meeting that you attended?

A. As I recall, it was taken up by Mr. Donohoo making a large number of queries about the wording of the minutes, and I think it can be best described as an interminable discussion on minor wording changes.

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Q. Did you personally form a view as to how the board of Cumberland Holdings, with Mr. Donohoo on it, was likely to function in the future? A. On that basis I could not see it functioning at all. There was obvious fundamental antagonism.

Q. Were steps taken thereafter to bring that state of affairs to an end? A. Yes. It was decided to seek an extraordinary general meeting to discuss the removal of Mr. Donohoo from the board.

Q. Did you participate in that decision? A. Yes.

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Q. Did you agree with it? A. Yes, I agreed with it. I saw no alternative course of action. There had been some discussions as to whether rapprochement could be reached. Mr. Belfer did try to undertake that. But he would be best able to testify in regard to that himself.

#### CROSS-EXAMINATION

MR. HUGHES: Q. Professor Wilson, when you came to discuss Mr. Adler's proposal that his family's shares should be sold to FAI at \$1.25 did you realise that it was your bounden duty to exercise a strictly independent judgment on that question? Most certainly, and I did so.

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Q. Do you say that any figures on paper were produced on that occasion to work out whether \$1.25 was a fair price? A. To the best of my recollection Mr. Atkinson made some rough calculations. We did not take them very seriously.

Q. You did not take them very seriously? A. No, on the grounds that they had not been fully researched. But they were an indication to us of the likely cash-flows from both companies.

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Q. From both companies. That was at the time you were considering the purchase of Mr. Adler's shares? A. Yes.

Q. Have you any recollection whatsoever of what those figures were? A. No.

Q. You are talking about the meeting of 11th July? A. Yes.

Q. You swear that Mr. Atkinson produced some figures? A. He did some figuring at this meeting to the best of my recollection.

20

Q. And some desultory consideration was given to his scribbled figures? A. I would not regard it as desultory but I did not regard them as being final and convincing evidence.

Q. What did you regard as final and convincing evidence in relation to the decision to pay \$1.25 for Mr. Adler's family shares? A. The balance of consideration in terms of the asset backing and the expected income flow.

Q. You go to the net tangible backing of Cumberland shares - in conjunction with the expected income flow.

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Q. How did you know that? A. We looked at the financial statement for Cumberland Holdings.

Q. You were impressed by the fact that the net tangible asset backing of Cumberland Holdings was very close to Mr. Adler's asking price? A. As I said, I did not rely on the net tangible asset backing because that is only relevant when you are talking about the breaking up of a company, but taken in conjunction with the expected income flow, those two things together convince me - I do not know about the rest - it was a fair and reasonable price.

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Q. It is implicit in what you have said that you

regarded the net tangible asset backing as a relevant but not the only relevant factor? A. Yes.

Q. You have regarded the net tangible asset backing of Cumberland shares as a relevant factor in determining to pay \$1.25 because the net asset backing of those shares was tied up in bricks and mortar, which were put to highly profitable use? A. Yes.

Q. You bore in mind when you decided \$1.25 was a fair price to pay for the chairman's shares in Cumberland Holdings, whatever the state of the market, that it was likely to go on making good profits? A. Only under the existing management. It was not a valuation of the bricks and mortar themselves but the fact they were being put to efficient and effective use.

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Q. Under good management? A. Yes.

Q. When deciding upon this question of whether to buy the chairman's shares for \$1.25 you had in mind that in future the assets of Cumberland Holdings would be put to an increasingly profitable use, under good management? A. Yes.

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Q. Would it be fair to say that your state of mind taking into account the considerations you mention, whatever the stock market did to the shares did not matter a fig? A. Yes. I would have been happy to see the stock market operating effectively for the shares.

Q. You knew at the time when you were at the board that considered the offer of Mr. Adler, there was no real market for the shares? A. Yes.

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Q. Is that right? A. Yes.

Q. There was no ruling market? A. No continuous market.

Q. Nothing that could be described as a ruling market for the shares? A. In terms of day to day activity, no.

Q. You knew in the future there was unlikely to be a real market for the shares? A. I never try to predict the future.

Q. Do not you as an economist? A. I leave that to the rest of my breed.

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Q. But you as a company director from time to time

have to make assessments of likely future trends?

A. I have to make allowances for contingencies but I do not have to forecast them.

Q. When you sat down with the persons present at the meeting of 11th July, after Mr. Adler left the room, did you not have in mind, if things continued as they had done in the past, there would never be, unless there was a dramatic change, a real market for Cumberland shares? A. Not an active market.

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Q. Not a real market? A. I would dispute that. Any market is a market.

Q. Even if made by window dressing? A. I do not know about that.

Q. Do you recoil from the phrase window dressing on the share market? A. No. It is a well established practice for banks, for banks to shift balances around before the end of the financial year in order to present a position of financial strength. It is a long established practice.

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Q. You knew that Mr. Atkinson had prior to the end of June 1974 done a little window dressing - I am sorry, on the occasion of that meeting of 11th July, that Mr. Adler had done some window dressing? A. I knew he had established a value on the stock market in terms of buying and selling.

Q. You regarded that as having no intrinsic worth?  
A. Yes.

Q. In itself? A. Yes.

Q. You discarded that altogether from your consideration? A. I did.

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Q. Did the thought cross your mind during the meeting, that if Mr. Adler was asking \$1.25 for the shares, he might be prepared to take a bit less than the asking price? A. Yes, that thought crossed my mind.

Q. Did you discuss it with your co-directors?  
A. Briefly.

Q. You discussed it briefly? A. Yes.

Q. Did Mr. Atkinson say anything about that?  
A. I cannot recall.

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Q. Did the rest of the other directors discuss it?  
A. Quite probably.

Q. Who raised that matter for discussion? A. Quite probably me. I was asking most of the awkward questions on it.

Q. You did not ask many? A. I asked enough to satisfy myself.

Q. Can his Honour take it from what you have said about the meeting that you were expressing yourself with some typical forthrightness? A. Yes. 10

Q. I suppose you said to the co-directors "If Larry - " is that how you refer to him? A. It depends.

Q. "If Larry is asking \$1.25, you can bet your boots he will take a bit less". Did you say something like that? A. No, not to the best of my recollection. I do not recall using that expression.

Q. You cannot? A. No.

Q. Did you say "If Larry is asking \$1.25, we had better try a bit lower"? A. I do not recall if I said that in that form. 20

Q. Tell us what you said to your co-directors.  
A. "I think we should look at the question of whether this was a fair and reasonable price, and that involves whether it had been over-valued or not."

Q. You told his Honour a few moments ago that you raised the question with your co-directors of making a counter offer? A. No, not making a counter offer, whether in your words he would take a lower price. That does not involve us making a counter offer. 30

Q. Now do you know whether he would take a lower price unless you summed up the courage and asked him?  
A. That is a good question.

Q. I would like an answer. A. We were pursuing an independent valuation exercise. That was us and to our minds we were satisfied it was a fair and reasonable price. We did not think that he had overstated the value of the shares. We were satisfied, therefore, there was no point in the exercise of asking for a lower price for the shares. 40

Q. May we take it your view was that Mr. Adler's

asking price of \$1.25 for the ordinary shares was so manifestly advantageous to FAI that it ought to be taken without any further bargaining? A. I would not use your phraseology, I would say it was a fair and reasonable price.

Q. Of course as a director of FAI you owed a duty to that company to get the shares, if you could, for a price that was less than fair and reasonable?

A. I think I knew Mr. Adler well enough to know that he would not allow himself to sell at a price which was in his view not fair and reasonable. 10

Q. May his Honour take it you regarded this proposed offer to you by Mr. Adler of his family shares as highly advantageous from the FAI point of view because of its obvious fairness and reasonableness?

A. I still would not accept your adjective.

Q. Which one do you not accept? A. Highly, I would say. It was a good investment, and that was all that we thought of. You may remember we were considering a wide range of varying investments. 20

Q. You were considering that at that meeting?

A. Yes.

Q. Did Mr. Atkinson have a list of possible investments? A. I had prepared one myself.

Q. Did you show it to the meeting? A. Yes.

Q. To Mr. Atkinson? A. If he was at the meeting he would have seen it.

Q. Have you got that list? A. No.

Q. What companies were on the list? A. I could not recall. 30

Q. Let us know some of the companies who were.

A. Gaddson.

Q. That is Gaddson-Hughes? A. Yes. Gollan Holdings. This was 15 months ago and some of the leading manufacturers. What had happened was -

Q. You were making a prediction about their future?

A. No, what had happened was I had gone through a list of public companies published in the Financial Review. Looked at them - these were companies I knew something of the people who operated them, their asset backing, the amount of cover and dividend - the whole range. 40

Q. You prepared a list for the consideration of your co-directors? A. Based on their past performance.

Q. On their track record? A. Yes.

Q. As best you could see, having regard to the quality of the management and their likely future prospects? A. Yes.

Q. These matters based on the production of your list were discussed at the meeting? A. Yes, there were a number of other considerations such as Brookers Holdings.

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Q. Do you remember at that meeting a resolution was passed that FAI invest \$400,000? A. No, we decided Mr. Adler should be authorised to invest up to \$400,000 in shares at his own discretion.

Q. At his own discretion? A. Yes.

Q. Did this discussion based on your list and the things that your co-directors refer to as to future prospects take place in Mr. Adler's presence?

A. Yes, certainly. It was - there was no decision made to invest in any of the specific ones I recommended, that I had listed, because it was thought we should check them out with other people.

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Q. Of the \$400,000 that was resolved at that meeting to be made available for the purchase of shares, part of that was decided to be made available for the purchase of the chairman's shares? A. No, that was not mentioned specifically. To the best of my recollection that was an entirely separate transaction.

Q. Do you say the decision to invest further, in Cumberland Holdings was a decision separate from the decision to authorise the chairman to invest \$400,000?

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A. Yes.

Q. When it came to your notice that Mr. Adler had by a window dressing operation, started at the end of June 1974, established a market price for Cumberland shares of \$1.25 early in July? A. I could not be sure. I think it was at that meeting of 11th July. He may have told me before. I am in fairly close telephone contact with him but formally that would have been the first time.

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Q. Did you regard that as a perfectly proper course of conduct on his part? A. It was in line with what he had been doing for many years, from time to time

trying to establish a market in the share of Cumberland Holdings.

Q. Did you regard that as a perfectly proper course of conduct on his part? A. Yes.

Q. You never found any criticism? A. No. I saw no reason to.

Q. May his Honour take it you regarded it as a perfectly proper course of conduct on his part to window dress the shares to the value of \$1.25 because that value was in your belief in line with the market price and was in line with the real value of the shares? A. Yes, and it was open to any stock holder who wished to sell his shares, to sell them on the market. We had Mr. Adler's assurance that was always open.

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Q. When was that given? A. On numerous occasions over the last 3 or 4 years.

Q. Would you agree in August the same factors as gave Cumberland shares in July, what you regarded as an enduring value of \$1.25, still obtained? A. Not to the same extent because there had been some movement down on the Stock Exchange. I would not have regarded it as to have gone right down by August. That was one month later but they had certainly gone below, as all shares have. What we had been discussing was there was also some increase in the qualifications in my original statement I could not see the government withdrawing funds for nursing and geriatric homes, there was the added complication in that delays in agreeing to increased fees or at least delays in increasing subsidy could imperil private nursing homes and it came a little clearer after the budget. That was the possibility that I had considered in July.

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Q. Would it be correct to say that you regarded the down the market movement in Cumberland shares as of no relevance to the real market? A. Bearing in mind the original assertion, yes.

Q. And that remained your view throughout? A. Yes.

Q. May we take it you would regard that as highly improper any attempt, if it had been made in August, to establish a market price for Cumberland shares substantially below \$1.00 - (Objected to) - by window dressing - (Question allowed). A. It is a decision with which I would not have agreed.

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Q. It is a decision that shocked you, had it been made? A. I do not know about shocked.

Q. Are not you easily shocked? A. Yes, I am still.

Q. Would not that have shocked you somewhat?  
A. No, it would have raised my ire.

Q. Your eyebrows? A. My ire.

Q. That is higher than your eyebrows. Would it not have shocked you if it came to your notice that somebody had in August, by window dressing means, sought to establish a market price for Cumberland ordinary shares at 50 cents - (Objected to; allowed). A. I would have thought it was a most unreal figure.

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Q. And a most improper activity? A. I do not think there is anything improper about anybody putting any price on a share on the market, unless he has full control of those shares. I do not know what your hypothetical question has as its foundation.

Q. You are saying if in August - A. It is open to anybody at any time to pass to his broker an offer for shares at any price. There is nothing improper about that.

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Q. It depends somewhat on motivation? A. Yes.

Q. Whether it was improper or proper? A. You are now asking me a hypothetical question about the motivation of a person whose identity I do not know.

Q. Yes - has it ever come to your notice, before you went into the witness box, that on 7th August 1974 Mr. Adler placed through the brokers an order to sell 10,000 ordinary shares in Cumberland Holdings at a price of 70 cents per share? A. Quite recently.

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Q. When it came to your notice were you shocked?  
A. I thought it was a rather ill-considered decision by Mr. Adler.

Q. Were you shocked? A. Not shocked. I just thought he had made a mistake, an error of judgment.

Q. Was your ire raised? A. My ire was raised temporarily.

Q. But not for long? A. What was done was done.



Q. What was done was done, - it was water under the bridge? A. Yes.

Q. Of course it was done within five weeks of the FAI announcement of its proposed take-over offer?

A. That is so.

Q. I suppose that was what raised your ire, if only temporarily? A. No, I would have objected under any circumstances.

Q. Would you have objected even more if that selling order had been placed within five weeks of the announcement of the proposed take-over offer?

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A. Yes, I would have.

Q. You would have objected even more on that score because you would have realised the sinister significance that could be drawn from the placing of a selling order of 70 cents within such a short time of the take-over offer being announced? A. I do not think I could accept "sinister". The language is far too strong.

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Q. It is not the sort of language that you are used to using in the hills of Aberdeen? That is correct.

Q. When did you come to hear of Mr. Adler's little sortie in the market place for the selling order of 70 cents? A. By reading the transcript.

Q. You never heard about it before? A. As far as I can recall, no.

Q. Are you sure? A. I am sure, to the best of my recollection.

Q. You were never present on any occasion when there was a discussion of the placing of this selling order between Mr. Adler and Mr. Atkinson, is that what you say? A. To the best of my recollection, no.

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Q. If there had been such a discussion within the last four or five weeks, at which you were present, you would not fail to recall it? A. I think it is most unlikely.

Q. Can I make a request to you before 4 o'clock that you do not read the transcript of Mr. Atkinson's evidence overnight? A. Yes, certainly.

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Q. Who gave you the transcript to read? A. I would have seen it in the FAI office.

Q. From day to day? A. I certainly saw it this morning.

Q. Have you read every day's transcript in this case? A. No.

Q. What days have you read? A. Tuesday, Wednesday and Thursday.

Q. Of last week? A. Yes.

Q. Who gave you the transcript to read? A. It was in the FAI office.

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Q. Who gave it to you? A. Mr. Adler

Q. Did he say to you - does he call you by your first name? A. Yes.

Q. Did he say to you "Jim, you'd better read this so you can be ready for cross-examination"? A. No, certainly not.

Q. Did he say why he wanted you to read it? A. He said that I may be interested as it affected the future of the company.

Q. Did you know you were going to give evidence when you read the transcript? A. I was given notice I may be called. There was no certainty.

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Q. Obviously you were sitting in the back of the court the other day and you left the court when Mr. Atkinson commenced to give evidence, is that not right? A. I was for two minutes because Mr. Sinclair asked me to come along in case I was going to be called.

Q. Were you not given to understand it would be advisable to leave, because if you were to be called, you should not be in court while other evidence was given? A. That was Mr. Sinclair's advice.

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Q. Notwithstanding that advice, you have read large portions of the transcript of the evidence that Mr. Sinclair suggested you should not hear orally? A. I did not think Mr. Sinclair put it that I should not hear the evidence. He said that I should wait outside.

Q. He told you you should wait outside. As far as I know, but he can tell you himself.

Q. You understood from what he told you that the

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reason why you were being asked to go outside was that it would be advisable for you not to hear the evidence that was being given by other witnesses called in the company's case? A. No. He gave me no reason and I asked no questions. I did as I was told.

Q. Did you see Mr. Adler reading the transcript?

A. No.

Q. In the FAI office? A. No.

Q. Did you discuss any of the transcript with Mr. Adler? A. No, with Mr. Atkinson when he came back in and gave a general impression of how he had gone but we have not discussed it in any detail at all.

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(Witness stood down)

(Further hearing adjourned to 10 a.m., Wednesday, 29th October, 1975).