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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 III

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IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

CORAM: BOWEN, C.J.
in Equity

CUMBERLAND HOLDINGS LIMITED & COMPANIES ACT

NINTH DAY: WEDNESDAY, 29TH OCTOBER, 1975.

MR. HUGHES: There are some corrections in the transcript, on page 572, the second-last question reads "you never found any criticism". That should be "you never voiced any criticism."

10

** On page 572 the third question reads, "Would it be correct..." It should read, "regarded the downward market movement."

*** At page 574, there is a reference to the "Hills of Aberdeen", it should read the "Halls of Academy".

ø On page 567, the fourth last question, "Would it be fair to say..." The word should be, "fig".

≠ On page 562, the second last question reads, "Do you recall when the decision as such" - that should read, "was actually made."

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øø On page 569, the sixth question reads, "Now do you know whether" - that should read "How do you know whether."

≠≠ On page 572, the fifth last question should read, "Do you remember when it came to your notice."

øøø MR. BAINTON: On page 549, the sixth paragraph from the bottom, it appears as though I was interrogating your Honour. The remark was addressed to my friend and it should read, "Are you accepting it as evidence in the case."

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JAMES REUBEN WILSON

On former oath:

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

MR. HUGHES: Q. May his Honour take it before you entered the witness box to give your evidence you gave very careful attention to composing your recollection of the various events in relation to this take-over and leading up to the take-over in which you were engaged? A. Yes.

10

Q. We may take it that your evidence given yesterday both in chief and in cross-examination is the product of careful thought and careful recollection? A. Yes.

Q. Do you remember my learned friend Mr. Bainton * asking you this question at the bottom of page 562:

"Q. Did you look yourself at the documents intended to be sent out before the final decision was despatched?"

Do you remember that question? A. Yes.

20

Q. You answered:

"I did see a mass of documents waving past me in the breeze. I did not try to read through the full legal documents."

Do you remember saying that? A. Yes.

Q. You were referring to the take-over documents themselves? A. Yes.

Q. In that answer? A. Yes.

Q. That is the take-over and the associated documents? A. I understand they are the Part A and Part B statements.

30

Q. You have a look at Exhibit 11. Look at it taking such time as you wish to refamiliarise yourself, or familiarise yourself with the document. A. Yes.

Q. Is Exhibit 11 the document to which you were referring in the answer you gave at the bottom of ** page 562 that I have just read to you? A. It is one of the documents.

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(** Original Transcript Page 371)

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* Q. Do you remember, on page 562, my friend asked you the next following question:

"Q. Did you read any of them at all."

Do you remember that? A. Yes.

Q. Do you remember the answer you gave was, "No, not past the first page." A. That is correct.

Q. That was your answer? A. That is correct.

Q. It was a true answer? A. In terms of reading but I did glance through the rest of the documents but I did not attempt to read them. 10

Q. That observation applies to Exhibit 11?
A. Yes.

Q. May we take it when you said in relation to Exhibit 11 - of course your answer embraced Exhibit 11, which you have just agreed, you did not read past the first page, you meant by your answer to indicate you did not read past the page which constituted Mr. Adler's letter to the stockholders of Cumberland Holdings?
A. As far as I can recall, that is so. 20

Q. That answer is the product of a careful recollection? A. It is the product of the best recollection I can make.

Q. We may take it you read that letter of Mr. Adler's dated 20th November to the stockholders? A. Yes.

Q. Did you read it carefully? A. As far as I can recall, yes.

Q. And critically? A. Yes, I would have seen several drafts of that beforehand to my memory.

** MR. BAINTON: That last question on page 562 should read: "Did you look yourself at the documents intended to be set out before the final document was despatched." 30

MR. HUGHES: And not "decision".

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

Q. Final document rather than final decision?
A. Yes.

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(** Original Transcript Page 371)

Q. The answers you have given this morning stand in relation to the question as so altered? A. Yes.

Q. The next matter I want to ask you about concerns * some evidence you gave at page 567. You remember telling me in substance that you at no time regarded the market price of the Cumberland shares as having any relevance to the real value because of the absence of a real market? A. Yes, in the absence of a continuous market.

10

Q. Then do you remember I asked you questions about this practice that has been given the description of window dressing? A. Yes.

Q. Do you remember me asking you, "Do you recoil from the phrase window dressing on the share market?" Do you remember that? A. I have a recollection of it.

Q. My question was:-

"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."

20

A. That is correct.

Q. Was that a considered answer? A. It is a considered answer on the basis of historical knowledge.

Q. Do not think I am criticising you on this score but will you agree that window dressing of the sort you refer to on the part of banks is not really what I was asking you about, namely window dressing on the share market. A. I can see a distinction.

30

Q. It is a very real distinction? A. I assume so.

Q. Can you, so I can explore the extent of the distinction, tell his Honour what is the practice you say is engaged in by banks, described by you as window dressing? A. Banks?

Q. Banks, yes. A. That relates to claims which are outstanding, the postponement of payments until after the end of the financial year. In some cases

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where different banks have different balancing dates you may have funds loaned from one bank to another. The essential difference does depend upon different banks having different balancing dates. It is a normal practice in Australia.

Q. Of course any liability owed by one bank with a balancing date X, to a bank with a balancing date Y, still has to be shown? A. Yes, it is the composition of assets relating primarily to the liquidity of the bank rather than the total assets.

10

Q. That was the sort of thing you were referring to? A. Yes.

Q. To that alone? A. Yes.

Q. Your answer, will you agree on reflection, bears no relationship to the practice of window dressing in securities listed on the Stock Exchange? A. I have not actually come across the use of window dressing on the Stock Exchange. I was accustomed to using that phrase in respect of banks.

20

Q. So until you became a director of FAI you had no knowledge of any practice whereby a public company with shares listed on the stock market, might make a market for those shares, just before or just about the time of its annual balancing date? A. No, I do not think I could agree to that. I would have read reports of such practices in the financial press over a long period of time.

Q. Can you name one company to illustrate that last observation? A. Not offhand.

30

Q. Can you give the matter some thought and I will come back to it later? A. Yes, it would have occurred with some of the companies who have gone into liquidation. Perhaps we could come back to it if you would allow me?

Q. Yes. Have you in mind, when referring to that practice on the part of public companies - are you referring to the practice of companies, the reputation of which is somewhat low? A. Not merely those.

Q. Mainly? A. I would think so. They were the ones who would have had the most publicity.

40

Q. And in the context in which you have seen reports, which you cannot recall to mind, these have come to your notice insofar as this practice of window

... dressing shares is engaged in, has been engaged in by companies, whose directors enjoy a somewhat low reputation in the commercial world? A. It would include -

Q. It would mainly include? A. I do not know that I would go as far as that.

Q. Can you name one reputable public company of whom you can say its directors have, as reported to you, engaged in the practice of making a market on the Exchange of the shares of that company at any time? A. It depends on what you mean by making a market. Many of the take-over battles have in the past, for instance Tatra would have been involved in making a market for shares in my view. 10

Q. Who was involved? A. I do not recall who.

Q. I am talking about the directors? A. No. I could not nominate any directors.

Q. You could not nominate them? A. No.

Q. The director of any one reputable public company in this city? A. Not without doing some research into the matter, no. 20

Q. At all events coming back to the operations described in this case as window dressing operations carried out in June and July, your view, right or wrong, has been that was a justifiable operation or an excusable operation? A. Yes.

Q. Because what happened in fact was that the market price that was made for the shares by Mr. Adler's activities accorded with their net tangible asset backing? A. It was in line with that. 30

Q. Therefore you thought that particular operation was not harmful? A. No, I did not regard that as a harmful exercise.

Q. And the critical factor in your deciding it was not harmful was the correlation between the net tangible asset backing of the shares and the price that Mr. Adler made in June and July? A. No, as I said yesterday, the net tangible asset backing was only one of a number of factors which we took into account in determining that the share market price and the price paid by Mr. Adler were fair and reasonable. 40

Q. We may be at cross-purposes. A. It was not the critical factor. It was one of the factors.

Q. The other factor was the earning yield? A. Yes.

Q. And the prospects of the company in relation to earnings? A. As a going concern.

Q. Those prospects remained no worse and in fact became better as the month of July, August, September and October wore on? A. No, if you remember yesterday I expressed some qualifications which reduced my optimism about the long-term income of nursing homes and that was whilst I did not say that the government would withdraw -

10

Q. You thought there may be a failure to increase? A. Or a delay in payment and that would affect profitability.

Q. They were the only factors you had in mind? A. As far as I can recall they were the major factors.

Q. Can you recall any others? A. Not offhand.

20

Q. Do not think I am critical on the point of verbage, but your approach to the task of giving evidence has been anything but offhand. A. That is correct.

Q. Do you remember me asking you yesterday when it was that you became aware for the first time that on 7th August Mr. Adler had placed through the brokers a selling order for 10,000 Cumberland ordinary shares at 70 cents? A. I do.

Q. Do you still say you first became aware of that transaction when you came to read the transcript of Mr. Atkinson's evidence? A. That is still to the best of my recollection correct. I do not presume to have a perfect memory.

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Q. You have a well-guarded and well-culled memory because of the work you have done in order to get ready to give evidence? A. Yes.

Q. You said yesterday that when that transaction came to your notice it raised your ire? A. That is so.

Q. May I ask you this, upon whom, if anyone, did you give vent to your ire? A. To the chairman.

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Q. Was anyone else present when you did so? A. I cannot recollect.

Q. When was it you gave vent to your ire on the chairman? A. It would have been last week.

Q. Only the two of you were together at the time?
A. I could not be certain of that.

Q. Was Mr. Atkinson there? A. He could have been because he is in and out of the building all the time.

Q. Was Mr. Belfer there? A. No. Mr. Belfer, I have not seen him. 10

Q. Can you tell us to the best of your recollection what date it was last week you gave vent to your ire in a conversation with the chairman and what time approximately? A. Can I refresh my memory by looking at the diary to see where I was. It would have been Thursday or Friday.

Q. Yes, I do not mind you looking at your diary.
A. It would have been Thursday and it would have been late afternoon. 20

Q. You gave vent to your ire, did you not, because you regarded the placement of that selling order by Mr. Adler, when you read about it, as improper.
A. Not improper.

Q. Not improper? A. No.

Q. Did the thought cross your mind, when you read about this selling order in the transcript that it could be regarded as an improper transaction on Mr. Adler's part? A. It would be possible for anybody to take any decision they wished. 30

Q. Did the thought cross your mind when you read it in the transcript that it was improper? A. No.

Q. You thought it perfectly proper? A. No, but I did not think it was improper. I thought it was unnecessary. It is not something I would have advised if I had been consulted.

Q. Your sense of propriety would not allow you to do that yourself? A. I would not have done so.

Q. Your own sense of propriety would not have allowed you to do what you found out Mr. Adler had done? A. I would have to agree with that. 40

Q. So according to your standards Mr. Adler's action was improper, was it not? A. I do not attempt to apply my standards to other people.

Q. I am not asking you to. According to your standards Mr. Adler's conduct in placing that selling order for 10,000 Cumberland shares at 70 cents on 7th August was improper? A. No. I say it was ill-advised.

Q. Do you remember telling me your own sense of propriety would not have allowed you to do what Mr. Adler did? A. That is correct. 10

Q. Does not it follow from that, according to your own standards of propriety, what Mr. Adler did was not proper? A. It was something I would not have done myself.

Q. I am going to persist in this even though it may be unpleasant for both of us. (No answer).

Q. (Previous question read). A. According to my standards, yes.

Q. When you on the Thursday or Friday, whichever it was, gave vent to your ire in a conversation with Mr. Adler, may we take it you gave him a piece of your tongue to use a colloquialism? A. Colloquially perhaps. 20

Q. You were angry with him and said so? A. I asked for an explanation.

Q. Did you not tell him you would under no circumstances have done what you had just discovered that he had done? A. I do not recall putting it exactly that way. 30

Q. In substance did you convey that impression?
A. I may have done. I do not recall.

Q. Tell me, what did you say to him when you gave vent to your ire? A. I asked for an explanation why it had been done.

Q. You were satisfied with the explanation?
A. Yes.

Q. What did he say? A. He told me that he had placed the buying order.

Q. I was only asking you about the selling order. 40
A. You did not indicate that.

Q. If it is easier for you I will deal with the buying order and cover the whole transaction. When you discovered at the same time as you discovered the selling order, that within a fortnight of having placed a selling order at 70 cents, Mr. Adler had placed a buying order at 50 cents, did that too raise your ire?
A. I thought that the 50 cents was an unreal figure and therefore I could see no point in the exercise.

Q. Unreal in terms of value? A. In terms of expecting anybody to sell. 10

Q. And in terms of the real value of the shares?
A. On my view of the real value, yes.

Q. When you discovered that Mr. Adler had not only placed a selling order, but had in addition placed a buying order at a 20 cent lower price within a fortnight, did you regard the latter part of the transaction, that is the placing of the buying order, as improper? A. No.

Q. Was it a transaction, that is the placing of the buying order, that did not accord with your own standards of propriety? A. With my own standards of the valuation of the asset. 20

Q. Do you remember telling his Honour when you made the discovery about the selling order your view was that Mr. Adler's conduct did not accord with your own standards of propriety. Do you remember? A. Yes.

Q. Did the same view apply in your mind in relation to the buying order? A. No.

Q. It did not? A. No, because it was in the best interests of the shareholders to acquire assets at the best price you could, but it is not in the best interests of the shareholders to sell assets at a price lower. 30

Q. The thought did not escape you in the light of the history, which included the fact there had never been a continuous market for the shares, and included the transactions involving the chairman's shares in July at a price of \$1.25 - the thought did not escape you in the light of that history, Mr. Adler's conduct in placing those orders might be construed as an attempt to drive down the market price of the shares in advance of a take-over scheme? A. It might be so construed but the question of a take-over was not formulated at that time in August. 40

Q. It had been discussed before? A. For some part of the shares, for preference shares.

Q. Was it not within your knowledge that in December 1973 there was a discussion between Mr. Adler and a representative of Washington Soul in which the suggestion was made that FAI might acquire Soul's interest and the other minority shareholders' interest in Cumberland shares? A. I was not present at such a meeting.

10

Q. Did you come to know of it? A. I would almost certainly have been advised of it.

Q. That was the proposal for the take-over that was dealt with at the meeting of 3rd April 1974 of the FAI directors? A. If you put it to me I will accept it but I do not recall.

Q. I will show you the minute. I think this was in evidence. I show you the minutes of the meeting of the directors of FAI held on 3rd April 1974. You see the item "Take-over of Cumberland Holdings was again discussed and it was resolved not to proceed."

20

The idea was shelved? A. Yes. To the best of my recollection it related to preference shares.

Q. At the time that meeting was held in April, did you not believe that in December 1973 Mr. Adler had made a suggestion to a representative of Souls that FAI might acquire the minority ordinary shares in Cumberland? A. I would not be able to answer Yes to the question of ordinary shares. I know that the question with respect to preference shares was discussed but my recollection does not stretch to the question of ordinary shares.

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(Minutes of the meeting of the Cumberland Board dated 3rd April 1974 tendered and marked Exhibit 85.)

Q. When it came to your notice that Mr. Adler had done these transactions, selling order and buying order in August, the thought did not escape you, did it, in the light of the history these transactions might be regarded as an attempt on his part to drive down the market price of the shares in anticipation or in advance of a take-over he had in mind? A. I cannot testify what was in his mind.

40

Q. Did you ask him? A. Yes, I only found out

about this transaction quite recently. It is all hindsight.

Q. What explanation did he give you for these various selling orders and buying orders? A. His explanation was that he thought it was appropriate to try and re-establish a market as has been his practice in the past.

Q. You understood from your own experience on the board of FAI and its subsidiaries, such subsidiaries as you were on the board, this practice of establishing a market was confined to the end of the financial year's operations? A. Not entirely but that was when it was most normally done.

10

Q. Did you ask him what was the last selling price of the shares at the time he put the selling order on at 70 cents? A. You mean when I was discussing it?

Q. Yes, the other day? A. Yes.

Q. What did he say? A. I think it was now something close to \$1.25.

20

Q. I suppose you said to him words to the effect, "You made a very big discount in making the selling order on the price you got for your own shares"? A. Something to that effect, not those precise words.

Q. In this conversation you referred, did you not, to the fact that the chairman had sold his shares at \$1.25 within a month of the placement of this selling order and the placement of the buying order in August? A. Can I have that question again?

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Q. In this conversation when you were giving vent to your anger you referred Mr. Adler to the fact that this selling order of 70 cents had been placed on the market by him within a month of the time in which he had sold his family shares at \$1.25? A. Yes.

Q. Your purpose in referring to that fact was to bring to his mind the striking contrast between the sale of his interest at \$1.25 and a sale by FAI or a proposed sale by FAI at 70 cents. A. My purpose was to understand why he was proposing to give away shareholders money and his answer was that he thought that the small cost involved - it was a parcel of 10,000, was worth it in order to establish a market for the Cumberland shares.

40

Q. Did he tell you why he wanted to establish a market at that time? A. No.

Q. This would have been a very pertinent question for you to ask? A. No, because he has been persistently attempting to create a genuine market for Cumberland shares ever since I have known him.

Q. This attempt to create a market in August stood in striking contrast with what you understood to be the case in his previous attempts? A. A striking contrast - I would have to look at the details. 10

Q. Have you not said in your evidence that you regarded those other price-making operations that I mentioned which were engaged in by Mr. Adler as excusable? A. Yes.

Q. Because the price that was made accorded with what you thought was the real value of the shares? A. That was in respect to the ones in June and July.

Q. And otherwise? A. I would not have looked at those in detail. 20

Q. You did not have to because the other price-making operations that he had engaged in in relation to Cumberland were operations designed to establish a price within the real value of the shares? A. Not as far as I am aware. I had no evidence one way or the other.

Q. That troubled you grievously when you heard about the selling order of 70 cents, as you put it succinctly, it appeared to you that was an attempt to throw away shareholders money? A. To give away shareholders money, yes. 30

Q. Did you tax him heavily with that? A. In what sense?

Q. Questioned him? A. Yes.

Q. Heavily? A. I questioned him closely.

Q. Would you tell us what questions you asked him? A. I simply asked him to explain what was his motivation for so doing and he gave me the explanation that the 75 was intended - 40

Q. It is 70 cents. A. The 70 cents was intended to see if anybody was prepared to buy at that price.

Q. Did he tell you why he wanted to find out?

A. Nothing other than he wanted to establish a market.

Q. Did he tell you or did you ask him why he wanted to establish a market at that time? A. No. I assumed this was in line with his previous attempts for many years.

10

Q. Did you not assume it was in line with his intention to make a take-over offer? A. I had no knowledge as to whether he wished a take-over. There was no take-over in my mind in August at all.

Q. It was a very relevant fact to know whether he had at the time you questioned him? A. It may have been to you. Presumably it would be relevant, yes.

Q. You went into this meeting with Mr. Adler, the two of you together, determined to make a searching inquiry? A. I wanted a satisfactory answer.

20

Q. At the time you made this inquiry you knew of course that within five weeks, give or take a day, of the 7th August when the selling order was placed, that the board of FAI announced its intention to make a take-over offer to Cumberland? A. Yes.

Q. That was a most pertinent situation in your mind at the time of this conversation with Mr. Adler?

A. What was?

Q. The fact that within five weeks of the selling order being placed on the 7th August, FAI had made a take-over offer for the ordinary shares in Cumberland?

30

A. That could be connected.

Q. You did connect that? A. I took it into consideration.

Q. Was the fact that you took that situation into consideration the reason why you asked Mr. Adler why he had decided to endeavour to make a market value for Cumberland shares by means of the placing of the selling order? A. No, the reason was I inquired why he was giving the shareholders money away.

40

Q. That was something you had an objection to whatever the motivation? A. Yes.

Q. Did you tell him that? A. Yes.

Q. Did you press him in this conversation as to why he wanted to make a market? A. Yes.

Q. For Cumberland shares? A. Yes.

Q. What did he tell you? A. My recollection does not run to that. I had the conversation.

Q. Professor, you have detailed a careful account as to the substance of the conversation that took place as long ago as 11th July last year. A. But I cannot recount every word. I could give you the substance. 10

Q. Would you tell his Honour the substance of everything that Mr. Adler said to you when you pressed him as to why he wanted to make a market for the ordinary shares of Cumberland in August? A. To the best of my recollection he said he was establishing - he wished to establish a market in the shares. He did not say why at the time but it was following on the sale to FAI of his own shares. In fact the attempt was unsuccessful. Nobody bought at that price and nobody sold at that price. 20

Furthermore, he said that whilst he agreed it was the shareholders money, that the sum was sufficiently small for him to think it worthwhile if he could by so doing put a market into being and to the best of my recollection that was the substance of his conversation. It was a fairly brief conversation.

Q. Did that explanation, the substance of which you have given, satisfy you? A. Yes. 30

Q. Your purpose in seeking that explanation was to find the answer as to why Mr. Adler had in August tried to establish a market for the shares? A. Yes.

Q. That purpose was uppermost in your mind at the time you had this conversation? A. It was in my mind.

Q. Will you agree with me that your second-last answer there in the witness box as to the substance of what Mr. Adler told you in answer to your inquiry as to the purpose for which he wanted to establish a market in August, that throws no light on that question at all? A. No. I would not agree. It satisfied me. 40

Q. It satisfied you? A. Yes.

Q. Now I want to ask you some rather close questions about that and I think it would be fair if your answer was read. A. Yes.

* (The witness' answer marked with an X on page 591 was read)

Q. Do you remember, Professor, in the first part of your answer you told his Honour that Mr. Adler did not tell you why he had tried to establish a market for the shares in August? A. At that time? 10

Q. Yes, that was August. A. Yes.

Q. Do you want to add to your answer at all as to the substance of Mr. Adler's explanation? A. Perhaps I could make a clarification. He did not tell me why he intended to make a market in August.

Q. That was what you wanted to know? A. I wanted to know why the transaction took place in August following the sale of his shares in July at a different price. 20

Q. He did not tell you why? A. Yes.

Q. What did he tell you that indicated the reason why he had tried to establish a market for the shares in August? A. That he wished to get a market going.

Q. He did not tell you why he wished to get a market going? A. No.

Q. And that was what you wanted to know? A. It was one of the things.

Q. It was one of the things? A. Yes.

Q. He did not tell you the reason? A. Not that I can recall. 30

Q. Would you like to take stock of your recollection before I go on? A. Yes.

Q. Have you taken stock of it? A. I am ready.

Q. Have you told his Honour everything you can recall of the substance of what Mr. Adler told you in that conversation? A. Yes.

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Q. You do not want to add to that account? A. No.

Q. Will you agree now that Mr. Adler never told you in this conversation why he wanted to make a market for the shares in August? A. In that sense, no.

Q. He did not answer one of the questions you wanted an answer to? A. I was satisfied with the explanation.

Q. He did not answer one of the questions you wanted him to answer, did he? A. Because I did not ask him the questions. 10

Q. Is that what you say? A. That is what I am saying.

Q. You remember saying yesterday that you were rather forthright in expressing your views at board meetings? A. Yes.

Q. You are not a man to mince words? A. No.

Q. You did not mince words in this case in the conversation with Mr. Adler? A. No, but I would not be rude. 20

Q. There is a difference being rude and not mincing words? A. Yes.

Q. You were determined when you went into that conversation with Mr. Adler to get an answer to the questions in your mind, namely why did he try to make a market for the shares in July - in August? A. It was a question I wanted an answer to.

Q. You agree that he did not answer it? A. Because I did not ask it.

Q. What, you forgot? - although that was one of the questions you wanted answered - why he had tried to make a market for the shares in July - in August - you did not ask him why? A. No. 30

Q. So the only person now who can tell his Honour why would be Mr. Adler himself; sitting where you are sitting? A. That is correct.

* Q. I will come to another matter now on page 568
A. Yes.

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* Q. At page 568 of the transcript you were asked a question by me which was apropos to the meeting on 11th July when you were discussing the acquisition or possible acquisition of the chairman's shares:

"Q. Did the thought cross your mind during that 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?" Do you remember being asked that question? A. Yes, I remember it.

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Q. And the answer you gave was "Yes, that thought crossed my mind"? A. Yes.

Q. You were asked "Did you discuss it with your co-directors?" and your answers was "Briefly"? A. Yes.

Q. You were asked "Did Mr. Atkinson say anything about that?" and you answered "I can't recall"? A. Yes.

Q. You were asked "Did the rest of the other directors discuss it?" and you answered "Quite probably". You were then asked "Who raised the matter for discussion?" and you answered "Quite probably me. I was asking most of the awkward questions on it." Do you remember that group of questions and answers? A. Yes.

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Q. I just want you, if you would, please to tell his Honour what was the substance of that discussion on that point? A. The discussion as to whether Mr. Adler would be prepared to take a lower price?

Q. Yes. And as to whether it was worth trying for a lower price? A. I can only give you the substance, Mr. Hughes. I raised the question, and I think it was Mr. Belfer, although I could not be certain on this, who said "If Larry has put a price on these shares then he is not likely to bargain about the issue." There was some very brief questioning as to whether this was the case, and I think I was convinced that there would be no point in pursuing the matter.

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Q. You were convinced by the strength of Mr. Belfer's assertion? A. Not merely that. There was some supporting conversation, the substance of which I do not recall at the moment, but it reinforced Mr. Belfer's statement.

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Q. Who reinforced Mr. Belfer's statement?

A. Probably Mr. Atkinson, from recollection. It was we three who were discussing the matter.

Q. Yes. I appreciate that. Well, if Mr. Belfer merely said "It is not likely that he will take less" - referring to Mr. Adler - that to your mind at the time still left open the possibility that there was the likelihood that he still might? A. Not really.

Q. Not with Mr. Adler? A. No.

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Q. You knew your man well enough? A. I think so, yes.

* Q. By the way, at page 561, I think it is - I will come to the page in a moment - twice in your evidence yesterday will you agree you referred to the faithfulness of the minority shareholders of the company of Cumberland? A. Yes.

Q. Over a long period of time? A. Yes.

Q. And it was your view, was it, that the minority shareholders were in the main - the minority ordinary shareholders were in the main people who had remained faithful to the company by holding their shares over a long period of time? A. It was my understanding, based on what I had been told by Mr. Adler over a course of years.

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Q. I am not suggesting your understanding was wrong. Please understand that? A. Yes.

Q. Was it your understanding based on your belief - I'm sorry, was it your belief, based on what Mr. Adler had told you about the minority shareholders and the history of the company, that there were a lot of minority shareholders who had stuck with the company through thin times? A. I understood there were a number. The size of the number I would not know. I certainly think from recollection it was under 200. But there was a body of shareholders who had been with Cumberland Holdings for a very long period of time.

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Q. Through thin times? A. Yes.

Q. When the letter from the Stock Exchange threatening de-listing received the attention of yourself and

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your co-directors together, or some of your co-directors together, did it weigh in your mind that the retention of stock exchange listing was of advantage to these minority shareholders? A. I regarded it as being of very limited advantage.

Q. As being of very limited advantage? A. Yes.

Q. But of some advantage? A. In a theoretical sense, yes. But in effect Mr. Adler had been the buyer, or one of the companies associated with FAI had been the buyer of the shares that had been sold over the years.

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Q. Yes. I appreciate that. A. Therefore there would be no change in the situation.

Q. It was your belief that at the time when this threat of de-listing was considered that even if retention of listing might not be of great advantage to the minority shareholders it would be of some advantage? A. Minor advantage, yes.

Q. I suppose - and I say this without any disrespect to Mr. Adler, but just as a hypothetical thought that occurred to you at the time - I suppose it occurred to you at the time that if a particular person or group was the buyer of last resort for the shares the mechanism of the stock market might at least keep that person or group honest? A. I don't know.

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Q. And prevent them from, as it were, screwing the minority shareholders? A. If there was no other buyer in the market I don't see that the stock market was any restraining influence.

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Q. At least on the stock market there is a degree of supervision? A. I am not sure how effective that supervision is.

Q. At any rate an attempt at supervision of fairness of dealing? A. I don't know that the stock exchange attempts to supervise the fairness of dealings.

Q. Well it did in this case when it came to the take-over, didn't it? A. In what sense? As I understood, Cumberland Holdings had been in breach in terms of not having 300 shareholders for some considerable period of time, and the stock exchange had taken no action, which indicates to me that their degree of supervision is somewhat lax.

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Q. It may be in that respect you are right. I don't want to quarrel with that. The fact is listing had continued? A. Yes.

Q. And there were very clear indications that if one condition was satisfied - namely, the reduction of majority shareholding to 75% from 80%, the listing would not be discontinued? (Objected to; question withdrawn).

Q. Was it not your belief at the time you considered this letter from the Stock Exchange that the listing of Cumberland on the Exchange would most probably not be discontinued so long as the majority shareholding was reduced from 80% to 75%? A. I don't know whether I can agree with that statement in that form, Mr. Hughes. I had the impression that they were giving us an alternative, but without any guarantee that at some future date the listing would not be withdrawn because of the breach of the 300 shareholder provision. There was no guarantee in that letter that the listing would continue forever and a day even if we did get the shareholding up to 300. 10 20

Q. What the letter was saying, to your mind, was "Unless you do one particular thing you will be de-listed"? A. Perhaps I can refresh my memory?

Q. I want your belief at the time? A. I don't think that I got the impression it was absolutely inevitable.

Q. That is what I want to know. You did not get the impression from the letter that de-listing of the company was absolutely inevitable, did you? A. No. 30

Q. Whatever happened? A. No.

Q. You got from the letter the impression that provided the majority shareholding was reduced to 75% listing of the company might well be continued? A. "Might well be".

Q. Is that a good expression? A. I beg your pardon?

Q. That is an expression you will accept? A. Yes. "Might well be". 40

Q. And in the context of that belief you held the belief that the minority shareholders who had gone through thick and thin with this company - or thin to thick - were, because of their faithfulness,

deserving, in all fairness, of some consideration?

A. Yes.

Q. Is that right? A. Yes.

Q. And you believed, did you not, that from their viewpoint, even though the advantage was, as you say, only minor, their interests would be served by continuation of the listing? A. I don't think I gave any weight at all to the listing - to the continuation of the listing - in the sense that my suggestion was that we should perhaps consider making a bid to the minority shareholders in view of the Stock Exchange letter. That is my recollection, and that was the course of action which I thought would best serve the interests of the minority shareholders.

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Q. To whom did you voice that view? A. It would be to the other members of the Board. From recollection, it would be the board meeting after the receipt of the Stock Exchange letter. It would have arisen out of discussions of the Stock Exchange letter.

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Q. I suppose when you put that suggestion to the board what you had in mind as a fair offer to the minority shareholders was a price somewhere around what the chairman had got for his shares? A. I had nothing concrete in mind.

Q. But you had that as a factor in your mind, that a fair offer to the minority shareholders would be something near what the chairman got for his shares?

A. It would depend on the form of the offer. If it were a cash offer that would have to be taken into account.

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Q. As a most relevant consideration? A. As a relevant consideration.

Q. As a critical consideration? A. As a relevant consideration.

Q. If it had been a cash offer? A. I don't know what price we would have pitched quite frankly.

Q. In pitching a price you would have taken that into consideration, would you not? A. Yes, most certainly.

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Q. Because not taking it into consideration would be quite unfair, wouldn't it? A. Yes.

Q. Of course the only difference, will you not

agree, between a cash offer and a share exchange offer is that in the former case the offeree shareholders have a currency unit - namely, "X" dollars - by reference to which they can evaluate the worth of the offer to them, and in the case of the second position, where the consideration offered is other than cash, or partly shares and partly cash, or solely shares, what the shareholder has to do in the offeree company is to reduce both shares - that is offeror and offeree shares - to terms of currency? A. If he or she is rational that is what they would do.

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Q. That is obvious, isn't it? A. It is the rational thing to do.

Q. And you would not go so far as to say all the minority shareholders in Cumberland were irrational, would you? A. No.

Q. So that won't you agree in the light of that answer that to your mind the price paid for the chairman's shares in July was a relevant factor - and I put it no higher than that - a relevant factor to be borne in mind by the directors of the offeror company and the directors of the offeree company, if the take-over offer was a share exchange? A. Yes, it is a relevant factor.

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Q. And at this discussion when the threat of de-listing was discussed all you did - I am not criticising you for this - was to say, in effect, that if the company is going to be de-listed then we ought to make an offer to the minority shareholders?

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A. That is correct.

Q. And there was no discussion, was there, at that meeting as to what the quantum of the offer should be?

A. Not to my recollection. The executive directors went away to do some sums.

Q. Did you ever give your own consideration, independently of the views of your co-directors of FAI, to what would be a fair offer, in Cumberland shares? A. In terms of reducing it to "X" dollars, no.

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Q. You did not give that any thought at all?

A. No, well I gave it thought, but I did not do the exercise.

Q. You did not do the exercise? A. No.

Q. You said yesterday when you gave the matter

thought, although you did not do any exercise, I suppose there was still in your mind as a relevant fact the price that the chairman had got for his shares in July? A. Yes, qualified by the changes in circumstances since that date.

Q. And the changes in circumstances were what?

A. Relating to the greater uncertainty of the hospital business.

Q. Caused by what you understood the Minister had said? A. Yes, and by the improving financial position of FAI status.

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Q. But you were not making any prediction in your mind yourself about the future of FAI, were you?

A. No.

Q. Because you don't make these predictions? A. I don't make predictions. I make allowances for contingencies.

Q. I suppose one allowance for contingencies was that FAI might suffer a disaster as a result of some of the underwriting business? A. I regret to say "No".

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Q. FAI sustained a most monumental loss for the year ended 30th June 1975, didn't it? A. I understand so.

Q. How much? A. It was published in the papers.

Q. You are a director? A. I do not have the annual reports with me.

Q. Surely you were a member of the board meeting that approved the accounts of FAI for the year ended 30th June 1975? You were a member of the board meeting that approved the published accounts? A. That is true.

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Q. Tell us what in your opinion the figures were for the loss of FAI for that year - tell us in round figures what was the loss for that year? A. Over \$2 million.

Q. Over \$2 million? A. \$2.2 million. The underwriting loss on Darwin was over \$4 million.

Q. You did not do any figuring for yourself, did you, at the time when the quantum of the take-over offer was under consideration? A. No.

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Q. For the purpose of determining in your own mind what was the fair value in currency for FAI shares?

A. For a share offer I did not think it was necessary.

Q. You did not think it was necessary? A. No.

Q. You did no independent exercise yourself, did you? A. No.

Q. Do you remember saying yesterday that when the question came up for discussion between yourself and such of your co-directors of FAI as were present as to what should be offered to Cumberland shareholders for their ordinary shares and their preference shares the discussion was desultory? Do you remember saying that? A. I don't know if I used that particular word, but if it is in the transcript then I would accept it.

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Q. As the truth? A. Yes.

Q. And "desultory" means, to your mind, "brief"?
A. Brief.

Q. And somewhat languid? A. Yes.

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Q. It is a word that is apt to convey that there really was not much discussion at all, wasn't it?
A. We would have spent about 15 minutes on it, I think.

* HIS HONOUR: Mr. Hughes, at page 566 of the transcript, about halfway down? Before you continue perhaps you should read what took place.

MR. HUGHES : I am sorry.

Q. I just want to ask you now was the discussion that extended over 15 minutes as to the consideration that should be offered to the Cumberland shareholders desultory? A. Perhaps we can use a different word. It was brief. We did not conduct a searching inquiry in the form in which the cross-examination would extend to a searching inquiry.

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Q. It was brief? A. And to the point.

Q. Languid? A. No, we are never languid at board meetings.

Q. It was all cut and dried, I suppose? A. I saw

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no reason to take issue with the facts which were put before me.

Q. By whom were the facts put before you? A. By both Mr. Adler and Mr. Atkinson.

Q. By Mr. Adler and Mr. Atkinson? A. They were the men most concerned with the preparation of it.

Q. Did either of them come armed with a piece of paper with the figures on it? A. I can't recall. There were figures presented at the meeting. Whether they came armed with pieces of paper or whether they did them on the spot, I could not at this moment recollect. 10

Q. You cannot recollect whether they came - whether either Mr. Adler or Mr. Atkinson came armed with figures or whether they did a bit of desultory scribbling at the meeting? A. The word is yours this time.

Q. Leave out the word. It was yours twice yesterday - once at page 562, and again at page 566. Let me ask you this. At page 562 of the transcript - and this is what I was searching for, not page 566 - do you remember being asked this question: "Q. Did you at that stage consider the possibility of FAI making a cash offer for the Cumberland shares?" Do you remember being asked that question? A. I do not at the present time. Can you refresh my memory? We did in fact consider - 20

Q. - making a cash offer? A. Whether we should make a cash offer or not, and we decided we could use the money far more beneficially for shareholders' interests in other ways. 30

* Q. I read you this question from page 562: "Q. Did you at that stage consider the possibility of FAI making a cash offer for the Cumberland shares?" and may I add, "that stage" was when you were considering the form that the offer should take in terms of consideration. Do you understand? A. Yes.

Q. "Did you at that stage consider the possibility of FAI making a cash offer for the Cumberland shares?" A. Yes. 40

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(** Original Transcript Page 371)

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Q. And the answer was, "There was some desultory discussion on that". Do you remember giving that answer? A. If it is in the transcript I accept it.

Q. And you went on to say, "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"? A. That is perfectly correct.

Q. So what I want to ask you is, is that answer
* that I have read from the transcript at page 562 a substantially truthful description of the discussion that took place as to whether a cash offer should be made? A. It is to my recollection. 10

Q. So that the discussion was desultory - that is, brief - languid and conclusive, is that right?

A. It was brief and conclusive.

Q. Brief and conclusive? A. Yes.

Q. It was conclusive because the directors of FAI regarded as immensely advantageous to FAI the revenue that was being produced by loans to necessitous commercial people at extraordinary high rates of interest? A. Yes. 20

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

Q. Indeed, the interest rates were really usurious, weren't they - the interest rates? A. I would not use that word.

Q. Don't you regard 40 per cent as usurious? A. Not when the rate of inflation is 20 per cent. I regard it as a measure of Government mismanagement of the economy. 30

(Short adjournment)

Q. Now throughout the discussion that took place between yourself and the co-directors of FAI in relation to the fixing of consideration for the take-over offer did it continue to be a relevant matter in your mind that the chairman had got \$1.25 for his shares in July? A. It was one of a number of relevant matters, but of diminishing importance, especially as we moved to a share offer position. 40

Q. A share offer? A. Yes.

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* Q. And do you remember saying yesterday, at page 561 of the transcript: "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." Do you remember that question and answer? First of all, do you remember being asked the question? A. Yes.

Q. And do you remember your answer "We had before us some calculations by Mr. Atkinson," and you went on to say something else which I will read again in a moment. You said, "We had before us some calculations by Mr. Atkinson"? A. Yes. 10

Q. They were not calculations on paper, were they?
A. I presume they would have been.

Q. Can you remember? A. Not really. But he would almost certainly have put them on a pad if he did not have them on a sheet of paper.

Q. Did he give you a copy of his calculations? 20
A. No.

Q. Wasn't it not important, in your view, to see what his calculations were in hard print? A. I trusted him to do an accurate assessment. He was a man of considerable judgement and, I understood, substantial experience in take-overs.

Q. You relied very heavily on his views, did you?
A. In this instance, yes.

Q. In fact would it be fair to say - and I do not mean this disrespectfully, that in relation to the fixing of the take-over consideration Mr. Adler and Mr. Atkinson were the leaders and you and the other directors were the followers? A. That is perfectly correct. 30

Q. Perfectly correct? A. Yes.

Q. You subordinated your own views to theirs?
A. No, I would not accept that.

Q. You paid more weight to their views than to yours? A. I had no firm views which were in conflict to theirs. 40

Q. Your state of mind was one of neutrality, was it? A. That is right.

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Q. That is why you said, is it, that you did not find Mr. Atkinson's calculations by themselves as overwhelmingly convincing? A. That is right, because they related purely and simply to his expectations of future cash flows.

Q. In FAI? A. And also in Cumberland, to my recollection. He had done some exercises which compared the expected cash flows for both companies.

HIS HONOUR: Q. May I just pause there? You have used the expression "cash flow" this morning, and you used it yesterday. Could you just indicate to me what you intend to convey by "cash flow". It is ordinarily used in a company in a different sense from the sense in which you seem to be using it at the present time? 10
A. Yes. I am sorry. I have used cash flow in the sense of moneys available to the company for use to earn income.

Q. So that it is, as it were, yield to the shareholders? A. It is not yield to the shareholders I have in mind. The moneys that were available to the company would earn profits, which would then be available for distribution to the shareholders, or be used to build up the assets of the company itself. 20

Q. More closely related to net maintainable profit, or something of that order? A. I was not even going to the profit calculation. It is income which is received - gross income which is received in the company which is available after expenses are met for investment purposes, so that in that sense it would be gross profit. 30

MR. HUGHES: Q. Are these figures Mr. Atkinson discussed with you and your co-directors? A. To the best of my recollection.

Q. He did not discuss with you, and the co-directors in your presence, the comparative earnings of the two companies? A. I don't have any recollection of that. He may have. I have no certainty about it.

Q. If he had discussed it surely that would have remained in your mind wouldn't it? A. I don't think that the yield to shareholders would, to my mind, have been a relevant consideration in terms of the board making a decision on behalf of FAI shareholders. What we would be most concerned with is what effective use we could make of the resources that were at our disposal. 40

Q. You say, do you, that you have no recollection of Mr. Atkinson talking at any of these meetings at which consideration of the take-over offer was being discussed of the respective earnings yield of the two companies - the offeror and the offeree? A. No, I don't think I can make that statement.

Q. You don't think he mentioned that topic at all?

A. At that particular meeting I don't recollect whether he did or not. But I do have a recollection that the yield to the shareholders had been mentioned some time between the time we first started the take-over consideration and the time it was completed.

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Q. You mean the time - A. The time we decided to make the take-over offer.

Q. But you have no clear recollection of any finite figures being discussed in relation to earnings yield?

A. No. I would have to answer "No".

Q. As you understood it, Mr. Atkinson was saying - Mr. Atkinson was concentrating on the gross maintainable profits, or the cash flow? A. Yes. That is what I was interested in, any way.

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Q. Did he discuss in your presence only the gross maintainable profits for FAI or did he also discuss the gross maintainable profits of Cumberland? A. To my recollection he discussed both.

Q. To your recollection he discussed both? A. Yes.

Q. Of course, at the time these discussions took place it was within your knowledge as a director of FAI, wasn't it, that Cumberland's business between 1st July and the time in October when the ultimate price or consideration was fixed on for the take-over Cumberland's profitability was on an up-trend? A. I had that impression, yes.

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Q. Two new homes had been to your knowledge opened up for business? A. I understood so, yes. Something like that.

Q. And will you agree that to your knowledge as a director of FAI at the time in October when the consideration for the take-over was fixed it was your belief, they said on information given to you, that Cumberland's profitability for the first three or four months of the new financial year compared favourably with its profitability for the financial year that had

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ended on 30th June 1974? A. I had that impression.

Q. Was it your belief that the improvement was in the order of ten per cent? A. I could not recollect the magnitude of the improvement, but it had improved. I do recollect that.

Q. At all events, Mr. Atkinson's statements about the figures did not carry conviction with you, but you were prepared to accept them, is that right? A. That is right. There were additional advantages which were taken into consideration.

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Q. You dealt with those yesterday, didn't you?
A. Yes, some of them I did.

Q. At the time when the FAI board was considering the consideration of the offer to the Cumberland shareholders in the take-over offer was it in your mind as a relevant fact that Mr. Adler and Mr. Belfer were members of the board of both the offeror company and the offeree company? A. Yes, I was aware of that fact.

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Q. You were aware of that? A. Yes, I was aware of it.

Q. And was it in your mind that that fact created a conflict of interest situation? A. I could see that a conflict of interest may arise, but it did not to my knowledge constitute a conflict of interest as it was, but I could see that, dependent on who was involved, there could possibly arise a conflict of interest.

Q. You had two directors common to each board, didn't you? A. That is right, yes.

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Q. And you believed, didn't you, that the factors that would have to be taken into account by Mr. Adler and Mr. Belfer as FAI directors were different from the factors that they would have to take into account in the interests of all the shareholders of Cumberland? A. In a sense, yes.

Q. In a very real sense? A. In the sense that it would be their bounden duty to get the best price for Cumberland shareholders, just as it was their bounden duty to get the best price for the FAI shareholders.

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Q. That was an inevitable conflict, wasn't it?
A. I would think so, yes.

Q. And you knew that at the time? A. Yes.

Q. And was that a matter that weighed heavily in your mind, prompted by considerations of fairness?

A. It was a matter which I wondered about, yes. I wondered about it.

Q. You wondered about it? A. Yes, but in view of the calibre of the people involved I did not think they would act otherwise than fairly and reasonably.

Q. Even though they had to wear two hats? A. We all have to make compromises.

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Q. You hoped they would act fairly, even though they were wearing two conflicting hats? A. Yes.

Q. You say you said you wondered about this conflict of interest situation. Did you give voice to your wonder at the meetings, or any of them? A. I have a recollection of asking whether they saw that a conflict of interest would arise, and they assured me that no serious problem - that in their view no serious problem would arise.

Q. No serious problem? A. Yes.

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Q. But a problem? A. There could have been, yes.

Q. They said "There is a problem, but it is not a serious one"? A. That is right.

Q. And I suppose it was very much present to your mind when you came to play a subordinate role, as you very accurately or fairly said, in this discussion about the fixing of the take-over consideration that the minority shareholders in Cumberland were, by reason of the threatened de-listing of their shares, in a vulnerable situation in relation to the take-over offer? A. That would be so, yes.

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Q. That was clear, wasn't it? A. Yes.

Q. And the vulnerability of their situation consisted of this, did it not, that, faced with a threat of de-listing, they might, in relation to a take-over offer and the background of that threat, be between the devil and the deep blue sea? A. I could not put myself in the minds of the minority shareholders. But on a hypothetical basis, yes.

Q. In other words, you took into account, did you, that because of the threat of de-listing the Cumberland shareholders were being exposed to the risk of having to make a choice between remaining the owners

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of unlisted shares, on the one hand, or accepting an inadequate take-over offer on the other? A. I would not have described the take-over offer as inadequate. But if that is a hypothetical question, "yes".

Q. That was in your mind as a risk that they were exposed to? A. Yes.

Q. And with that in your mind, did you regard yourself as being under a duty, in your consideration of the fixing of the price, to ensure that the minority shareholders in Cumberland were treated fairly? (Objected to; admitted)

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Q. With that in mind, did you regard yourself as being under a duty, in your consideration of the fixing of the price, to ensure that the minority shareholders in Cumberland were treated fairly?

A. At all times would I take the position that they should be treated fairly - that you should treat people fairly and reasonably - so that the answer to that question would have to be "Yes".

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Q. And the need for careful consideration of considerations of fairness were accentuated by the possibility that these minority shareholders could be put in a position of having to make a choice between two unattractive alternatives - that is, de-listing, or acceptance of an unsatisfactory offer? A. I had already satisfied myself in my own mind that the offer was fair and reasonable.

Q. And that was satisfaction you say you achieved on the basis of figures that Mr. Atkinson trotted out for you? A. On the basis of lengthy discussions in which the figures were presented as one part.

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Q. As the principal element? A. As one part of it.

Q. And as a substantial element in the discussion?
A. As an element in the discussion.

Q. As substantial element? A. No, I don't think I could even accept "substantial".

Q. You mean they were minor - of minor importance?
A. They were of equal importance with a number of other issues.

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Q. Are these the issues that you set out in your evidence yesterday in answer to Mr. Bainton? A. I presume so. I don't recollect them in detail.

Q. Did you ask Mr. Atkinson any question - searching or otherwise - about his figures? A. I don't know whether I asked him or someone else asked him, but there was some discussion on the basis on which he prepared them. The details of his answers I could not recall at the moment but he was asked about them.

Q. By you? A. By Mr. Belfer or myself. Which one I do not recall.

Q. You see, you rather stressed the point - and I do not suggest for one moment incorrectly or improperly, yesterday, that you were an independent member of this board? A. That is right. 10

Q. A non-executive director? A. Yes.

Q. Did you always regard yourself as having the right to exercise an independent rather than a subordinate role? A. Yes.

Q. In the deliberations of the board? A. In the deliberations of the board, yes.

Q. And that need was accentuated, was it not, on this occasion by the fact that the interests of minority shareholders was at stake? A. My first duty was to the shareholders of FAI, of which I was a director. 20

Q. The need for independence of judgment - A. I was fully conscious of the need for independence of judgment, and I exercised it.

Q. You were fully conscious of the need to be independent rather than to play a subordinate role on the question of fixing the price for the shares? A. Subordinate only in relation to the preparation of evidence. But in the evaluation of the evidence which was presented I exercised full independence. 30

Q. Can you tell his Honour one question that you put to Mr. Atkinson about these figures that you say did not carry conviction to you? Just one question? A. Yes.

Q. I want you to tell his Honour if you can one question that you put to Mr. Atkinson for the purpose of throwing light on these figures produced by him, figures that yesterday you said did not by themselves overwhelmingly convince you, figures which you said today did not carry conviction with you; one question, please, that you put to Mr. Atkinson? A. One 40

question was, Did he believe that these projections that he was making were sustainable and he said "Yes".

Q. Was there any other question? A. There were a number of other questions, I am sure, Mr. Hughes, but you asked me for one question.

Q. Well, tell me any others. A. Oh, dear.

Q. Well, you say "Oh, dear". I am being allowed to ask these questions by his Honour because they have relevance or may be thought to have relevance and that is not a case for "Oh dear". A. If I may just recollect my thoughts for a moment.

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Q. Yes, certainly. A. Another question that I asked was did he think that there would be any substantial change in the profitability of nursing homes. On that, he said he saw no reason to believe that they would not continue to be profitable.

Q. Did he tell you that he saw every reason to believe that the profitability of the nursing homes would increase having regard to the results for the last three or four months? A. I can't recollect that he said that, Mr. Hughes.

20

Q. Well, you had that in mind, didn't you? A. I never take anything for granted in respect of nursing homes, Mr. Hughes, because of increases in wage bills and things of this sort which are completely unpredictable.

Q. Well, was there any other question or questions that you asked Mr. Atkinson? A. I can't recall any others specifically at this moment.

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Q. You say that those are all the questions you asked him, in substance? A. No, I do not.

Q. Are they all the important questions you asked him? A. They are the only ones I recollect specifically at this present time.

Q. So, the two questions were, in substance, these, that you can recollect: "Do you think that your figures are sustainable?" - right, that was the first? A. Yes.

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Q. Figures that were not on paper before you?
A. That, I do not know, whether they were printed or not but they would have been figures, I presume,

on a pad or something of this sort, but I don't recollect.

Q. You don't recollect having them before you, do you? A. I don't recollect having them in printed form, no.

Q. Or written form? A. I am not sure about that.

Q. The other question that you can remember asking him was, "What is your view about the continued profitability of Cumberland?" A. That's correct.

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HIS HONOUR: "of nursing homes".

MR. HUGHES: Q. "Of nursing homes", yes. A. There would have been a great deal more to-ing and fro-ing in conversation but I don't recollect any specific questions.

Q. There wouldn't have been that much to-ing and fro-ing in view of the fact that you said this conversation took fifteen minutes? A. Well, we talked rather fast.

Q. Although this conversation took only fifteen minutes, according to your evidence, you can't remember any other questions you asked? A. Not at the moment, no.

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Q. At the time of this meeting, had you read the chairman's article in his house magazine, the FAI house magazine? A. I had read that before it was published, yes.

Q. Did you agree with it? A. Yes.

Q. Did you take part in its composition? A. I took part in making some suggestions for alterations but not in its composition.

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Q. (Witness shown Exhibit 43) You saw that article before it was published, did you, in Exhibit 43?
A. Yes.

Q. And you approved of every line of it, did you?
A. I wouldn't go as far as to say that but I certainly approved of the substance.

Q. The substance? A. Yes, of the argument.

Q. And you agreed with the headline, did you?
A. Yes. I still do.

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Q. "Inflation = Disaster for Insurance Industry"?

A. Yes.

Q. Your view was the insurance industry, the underwriting industry, was particularly vulnerable to inflation, wasn't it? A. Most certainly.

Q. And will you agree that no one whose mind was in accordance with the views expressed in that article could in October, the very month the article was written, predict or foresee a rosy future from the viewpoint of profitability of a group whose main source of profits was from insurance underwriting? A. In the absence of effective government action, no. 10

Q. That was your view? A. Yes.

Q. And in that situation you were not bullish? Do you know the expression "bullish"? A. I do indeed.

Q. In October 1974, were you, about the prospects of FAI from the viewpoint of profitability? A. I would separate out the prospects of FAI from the prospects of insurance in general so that my view was and still is that we had a better than average chance of containing the dangers inherent in continued inflation because of the fairly tight management and close financial control. 20

Q. But there were risks there to your mind in October which prevented you from being bullish about the profitability prospects of FAI, weren't there?

A. Being over-bullish.

Q. Yes. A. I was optimistic.

Q. But very cautiously? A. Cautiously, but that is my general nature, Mr. Hughes. 30

Q. It makes for a happy life until disaster strikes?

A. Yes, that's right.

Q. Mr. Atkinson at these discussions wasn't bullish, was he, about the prospects of FAI? A. I recollect that he was rather more optimistic than I.

Q. But still not bullish? A. It all depends on how you define bullish, Mr. Hughes. He expected the profitability to continue. He thought that we, as a company, could contain the inflationary pressures to a very large extent. 40

Q. But not entirely? A. Not entirely.

Q. No. A. Nobody can contain twenty per cent inflation, completely.

Q. Now I want to come to some evidence you gave
* which is recorded on page 362 of the transcript. I
think it would be fair to the witness if he were
allowed to review the evidence silently to himself.
* It is page 361/2 your Honour, and I will ask the wit-
ness to read from and including the fourth question
from the top of the page down to the question that
ends with the phrase "I had in mind."

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Would you take such time as you wish, Professor
Wilson, to take that material on board, as it were,
and then I will ask you a question. A. Yes,
Mr. Hughes.

Q. Have you read that? A. Yes.

Q. Now that you have read those questions and
answers, my next question to you is this. Do those
answers express all the factors that operated in your
mind to induce you to approve of the consideration
that was to be offered to the shareholders in Cumber-
land? A. They are all the considerations that I can
recollect having influenced me in concurring.

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Q. And may we take it that you have, in the course
of your careful preparation for the witness-box, con-
sulted your recollection carefully? A. I have.

Q. Is there anything that you now can add as a
factor or as factors beyond what you set out in those
questions and answers as factors that operated in your
mind to lead you to concur in the decision that was
reached about the take-over consideration? A. I
don't think so, Mr. Hughes.

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Q. You don't think so. I want to go through them
with you one by one, if I may. A. Right.

Q. May I direct your attention, invite your atten-
tion to the question, "What were the factors operat-
ing in your mind that led you to concur in the
decision that was reached?" and your answer was
"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

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right. It was the FAI shares that were being offered, because it was a listed public company." That was the first factor. A. Yes.

Q. That operated in your mind, and, in substance, it was that you could see no conflict of interest between the two sets of shareholders? A. That's correct.

Q. And the two sets of shareholders that you had in mind were the shareholders in FAI - right - on the one hand? A. Yes. 10

Q. And the minority shareholders in Cumberland on the other? A. The minority shareholders who accepted the offer. Of course, they would then become shareholders in FAI and not be discriminated against in comparison with any other shareholder in FAI. That is all I had in mind, Mr. Hughes.

Q. You had in mind that if - A. If they accepted -

Q. A minority shareholder accepted? A. Yes, he would then become an FAI shareholder and, therefore, there would be no conflict of interest. 20

Q. But that thought completely begs the question, does it not, whether in relation to the consideration of the take-over offer there was a conflict of interest between the two sets of shareholders? A. It is a different question.

Q. And a question you did not take into account? A. I did take into account the position of the minority shareholders, yes.

Q. And the way you took it into account was to realize that they were in a position of great vulnerability? A. Those are your words. They could be at some risk. 30

Q. Yes, if they were not fairly treated. A. If they were not fairly treated.

Q. Of course, the inevitable conflict of interest between the two sets of shareholders, that is, the FAI shareholders, and the minority shareholders in Cumberland, is the conflict that always arises between a seller and a buyer when price is in consideration? A. That is possible. 40

Q. That is obvious, isn't it? A. Yes.

Q. And that is not the conflict you say that you were inferring in that answer you have just had read to you? A. No, it was my estimation that if they accepted the take-over they would become just like any other FAI shareholder.

Q. But that consideration left out of account the question whether the consideration being offered was adequate, didn't it? A. Well, it did not embrace that.

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Q. Yes, that is what I want to know - it didn't embrace it. Then the question was put to you, "You were starting to tell us what, in your mind, led you to concur in the making of the offer that was made?". Do you see that? A. Yes.

Q. "Firstly, we had been very closely associated - the two companies had been very closely associated." I know you went on to expand that answer but was that a factor that operated in your mind as a relevant factor to induce you to agree to the take-over consideration that was being offered? A. Yes. I could see economies benefiting -

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Q. No, that is not that answer; that comes later. See, let me - I don't want to hustle you - A. I take your point.

Q. My question is this: You took into account, as a relevant factor that induced you to concur in the offer to minority shareholders of the consideration in fact offered, the fact that the two companies had been very closely associated, did you? A. Yes, and that bore on the fact that it was a company which we knew very well and one of which we could make a fair assessment.

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Q. Of its future profitability? A. Of its future profitability.

Q. And the fair assessment was that its future profitability was reasonably bright? A. Yes.

Q. Whereas - what I am putting to you is that the mere fact of the close association between the two companies is not a fact that could relevantly induce anyone to agree to a particular price. What do you say to that? A. The close association enabled us to assess the company over a long period of time.

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Q. Assess Cumberland? A. Yes.

Q. You went on to say, "We had provided a substantial amount of financial assistance or made available substantial funds to Cumberland Holdings." Well, as far as you understood, they were loans on interest, weren't they? A. Yes.

Q. Loans on commercial rates of interest? A. I wouldn't have the details.

Q. Did you ever inquire? A. On specific propositions I would, yes, with respect, say, to the financing, purchasing of particular hospitals, but I wouldn't carry those details in my mind. 10

Q. No, but would you agree that broadly Cumberland paid commercially proper rates of interest for the loan funds advanced by its parent company? A. I have a recollection that some of the loans were below the commercial rate but I could not pinpoint which specific ones.

Q. But generally speaking? A. Generally speaking they would be in the vicinity of the commercial rate or slightly below it. 20

Q. "We had also supplied managerial expertise in the form of Mr. Barrington, the general manager, who is also a director of the FAI board." A. Yes.

Q. To your knowledge, how long had Mr. Barrington been general manager of Cumberland? That is a question I never asked but it was long before I joined the FAI board.

Q. He was there like the pyramids? A. Something like that. 30

Q. Occupying a dual role as a director of FAI and the general manager of the offeree company? A. His principal activity was in the offeree company.

Q. We know he may not have done very much as a director of FAI but that is beside the point. The fact is that he occupied a dual role, didn't he?
A. Yes.

Q. Another case of the conflict of interest?
A. A potential conflict of interest. 40

HIS HONOUR: Q. Before you go on, Mr. Hughes, Professor Wilson, when you mentioned you selected

those two things to mention that FAI had supplied finance and had supplied management? A. Yes.

Q. Were you intending to suggest or imply that the shareholders of Cumberland owed something to FAI as a result of that and, therefore, an offer would be fair whether the marketplace might consider it financially fair or not? A. I don't know, your Honour, whether I would go so far as to say they owed FAI something but their success was, in part, due -

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Q. Due? A. To the assistance we had given them over the years.

Q. I understand that is what you are putting but I want to get the reason you are putting it. Is the inference to be drawn from that to your thinking that, therefore, the shareholders of Cumberland really were in some way under obligation or indebted to FAI?

A. In this sense, your Honour, that if the managerial expertise had been withdrawn and if we had not supplied funds which were readily available -

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Q. You could have destroyed them perhaps? A. We could have substantially destroyed them, yes. Therefore, there was a substantial advantage or, I re-phrase that, there was an advantage to Cumberland shareholders to continue the association with FAI.

HIS HONOUR: I follow, yes.

MR. HUGHES: Q. Well, could I just explore that a little bit further? A. If you wish.

Q. What you are saying then is that in truth the minority shareholders of Cumberland were caught potentially in a three-way squeeze, one, de-listing; two, the possibility that the take-over offer might be inadequate? A. Yes.

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Q. And, three, the possibility that if they did not take the take-over offer Cumberland could be destroyed by FAI? A. They could be but we never at any moment contemplated that. We have always regarded the continued operation of the Cumberland group as an essential fact of life.

Q. An essential fact of life because of its great commercial advantage to have it continually operating, even in a context where FAI is only an eighty per cent shareholder? A. Certainly it is in the interests of our shareholders.

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Q. Well then, what you are telling his Honour, would you agree, really, in that last answer is that nothing was further from your mind at the time when you were considering whether or not you ought to concur in this price than possibility of the threat that Cumberland could be closed up to the detriment of the minority shareholders by withdrawing the funds and the expertise? Nothing was further from your mind, I suggest? A. I don't think I could accept nothing was further from my mind. There would be many other things further from my mind.

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Q. But it wasn't present to your mind? A. It wasn't consciously present to my mind.

Q. So that really, when you boil it down, that answer which starts with "Firstly" and goes down to * "FAI board" on page 562 refers to factors that on analysis have no weight at all in considering whether the price was a proper price to offer? A. I wouldn't accept that, Mr. Hughes.

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Q. You would not? A. No.

Q. Well, let me take it bit by bit. You had in your mind no thought when you sat down with your co-directors to discuss this take-over price, consideration, that you would, by withdrawing funds and managerial expertise, shut Cumberland down? A. We did not contemplate that but it was always a possibility.

Q. But not a possibility present to your mind if the management of Cumberland continued as it had been continuing? A. That's right.

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Q. The next factor you took into account - by the way, may I just ask you this - may we take it that Mr. Barrington's salary as general manager and all the staff salaries of Cumberland were, in the ordinary course, invariably paid out of the funds of Cumberland? A. As far as I am aware.

Q. Were you aware when you took into account the matters that you say you did take into account in concurring with the take-over consideration how much money was on loan at that time to Cumberland by FAI? A. I do not recollect whether we had precise figures.

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Q. Did you have any general idea? A. We would have had some general idea from time to time.

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Q. I am sorry, could I just ask you to confine your evidence to yourself? A. I see, yes. I was using it collectively.

Q. You see, may I suggest to you you do not incur the risk of speaking always for Mr. Atkinson or Mr. Adler. They can speak for themselves. I am just asking about you. Now, did you have in mind when you were considering the appropriateness of this take-over consideration in general terms what amount was outstanding by Cumberland on loan? A. No.

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Q. The next matter you took into account was that the FAI preference shares which were being offered were all redeemable whereas the Cumberland ones were a mixture of redeemable and non-redeemable? A. Yes.

Q. That was a factor which applied only to the offer to the preference shareholders? A. That's correct.

Q. And only to those preference shareholders in Cumberland who had non-redeemable shares? A. I regarded it as a tidying-up exercise.

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Q. A which? A. A tidying-up exercise.

Q. Would you have a look at the Cumberland Holdings balance sheet of 30th June, 1974, if I may ask you to. It is Exhibit 4. Would you have a look at that for a minute - Exhibit 4. Can I invite your attention to the consolidated balance sheet of Cumberland Holdings Limited for that year and you see the long-term liabilities - amount owing to parent company?

A. Whereabouts, Mr. Hughes?

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Q. (Approached) \$41,501? A. Yes.

Q. It appears that that was the extent of Cumberland's liability on loan account to FAI, doesn't it?

A. Well, I wouldn't know whether loans secured would also be that.

Q. But if it was owed to a parent company it would have to be stated as such? A. It should be.

Q. You are not suggesting that the Cumberland accounts are wrong? A. I am not in a position to pass any judgement.

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Q. You have been on the board since January 1972, haven't you? A. Yes, but these were prepared before I joined the board and, therefore, I would have no

knowledge of them whatsoever.

Q. Mr. Bainton has made a most useful suggestion which I readily adopt and that is that you might look at the Cumberland Holdings figures, that is, the unconsolidated balance sheet for the year ended 30th June, 1974, and, on the right-hand page, the amount owing to the parent company is stated to be \$41,502 as compared with \$231,349 in the previous year?

A. Yes.

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Q. So, it looks as if the extent of Cumberland's indebtedness at the time you were sitting down to consider this take-over offer had been reduced by about \$190,000 in the recent past? A. Yes, but that had been offset by an almost equal increase in mortgage loans which were secured.

Q. Yes, but you are in no position to claim that those mortgage loans were by FAI to Cumberland?

A. I have no information on that.

Q. And you had no information when you were considering this question of the take-over price with your co-directors? A. That would be true, yes.

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Q. Who told you that Cumberland had received substantial loan funds from FAI? A. Mr. Adler.

Q. Did he ever tell you how much? A. On specific propositions, yes. See, it was like a revolving fund. Funds would be made available for specific projects, then they would be repaid, so that at any one time the outstanding balance could vary from that outstanding at any other time by a substantial amount.

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* Q. Now, the next matter which you say you considered and I think it is the last on page 562 is that "some economies to be achieved by shifting the status of Cumberland Holdings from a partially owned subsidiary to a wholly owned subsidiary." A. Yes.

Q. Of course, that is not a factor, is it, really, that bears upon the question that the Cumberland minority shareholders had to ask themselves, namely, is an FAI share a fair exchange for a Cumberland share?

A. I wasn't a Cumberland minority shareholder, Mr. Hughes. I was a member of the FAI board trying to decide what was a fair and reasonable price and, because of that, the consideration would, in fact, be slightly more generous.

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Q. Slightly more generous? A. Yes, in my estimation of what was fair and reasonable because we would have some advantage from it in the future.

Q. You were in a position of looking at it from the viewpoint of FAI and FAI was in the face of the threat of de-listing and in the face of the risks which -

MR. BAINTON: I don't think that that is so. I don't know of any suggestion that FAI was being faced with being de-listed.

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MR. HUGHES: I didn't say so either.

MR. BAINTON: I think you did.

MR. HUGHES: I don't think I did, because you didn't let me finish the question. I will re-phrase the question.

Q. You saw a need for generous treatment, did you, of the Cumberland minority shareholders? A. Fair and reasonable.

Q. Fair and reasonable? A. Yes.

Q. Erring on the side of generosity? A. It would have been my inclination.

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Q. That was your inclination? A. Yes. I can't answer for anybody else.

Q. No. And you were not altogether happy in your heart, were you, or in your mind about the take-over offer you concurred in? A. I was satisfied.

Q. You were not entirely satisfied, were you?
A. I was satisfied to concur with the decision. I can't win all battles, Mr. Hughes.

Q. You can't win all battles, no, and do you mean by that that you, and please don't think I am criticising you for this - do you mean by that that you in that board room did urge that something more should be offered to the minority shareholders?

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A. Not specifically, no.

Q. What? A. Not specifically.

Q. No, but in substance? A. No.

Q. Well, why did you say not specifically? A. In the sense that I never at any time suggested an

alternative figure to the board or any alternative share offer.

Q. But you did suggest, did you not, that in fairness a cash offer ought to be made? A. No, I did not; at no time.

Q. Didn't you? A. No. We did discuss the matter of whether a cash offer or a share offer should be considered in the early stages of the preparation and we decided, as I have said several times, that we could use the money to more effect for the benefit of our shareholders. 10

Q. Look, while you concur, you were not, in your own mind, very happy in concurring with the take-over offer price, were you? A. I think I am the only one who can answer that, Mr. Hughes.

Q. And the answer is? A. I was sufficiently happy to concur.

Q. But doubtful; you had doubts, didn't you, as to the appropriateness of the take-over consideration? A. I had doubts at the beginning of the discussion. I would have had the hope that those doubts would be resolved by the end of the discussion. 20

Q. Although the figures added nothing to carry the conviction to you? A. By themselves.

Q. By themselves? A. Yes.

Q. Now look, I am asking you this. Did you at that meeting, by any statement that you made, or at the discussions that took place between yourself and your co-directors, suggest that the offer should be somewhat more advantageous to the Cumberland minority shareholders? A. No, I never made the suggestion in that form. 30

Q. Well, in what form did you make such a suggestion? A. I did not make such a suggestion, Mr. Hughes.

Q. You said you did not make that suggestion in that form. Will you not agree that that necessarily implies that you made some such suggestion in some form? A. It could possibly be interpreted that way.

Q. Yes. Now, what did you say to your co-directors on that point? I want to know, if I may? A. It is a matter of my recollection, Mr. Hughes. 40

Q. Yes. Would it be convenient if you went away and consulted your recollection as well as had your lunch? A. Yes.

Q. Because I think his Honour wants to rise now.

(Luncheon adjournment)

MR. HUGHES: Q. Professor Wilson, do you remember that at the meeting of directors of FAI held on 11th July at which the decision, amongst other decisions, was made to buy the chairman's shares at \$1.25, other business was transacted? A. That is correct. 10

Q. The other business concerned, firstly, the authority to the chairman to invest \$400,000 in Stock Exchange securities at his discretion? A. Yes.

Q. And, secondly, the decision to take up a position in Brooker Holdings? A. Correct.

Q. Thirdly, there was a resolution concerning the installation of tape recording equipment in the board room? A. That's correct.

Q. And that decision was accompanied by a policy decision as to the way in which that equipment was to be utilised? A. That is correct. 20

Q. And thereafter at all meetings of FAI directors was the discussion in the board room tape recorded? A. No.

Q. Was it sometimes? A. No, the equipment did not operate effectively.

Q. What? A. The equipment did not operate effectively.

Q. Was it operated effectively or no? A. No. 30

Q. Ever? A. Not to my knowledge.

Q. What was the policy agreed upon as to the use of the tape recording equipment? A. It was a new toy which it was thought should be experimented with and the experiment was a failure in the sense that the equipment did not work properly, so we just abandoned it. It is just lying there as a costly experiment.

Q. A monument to - A. Your phrase, Mr. Hughes.

Q. Well, you didn't allow me to finish did you.

A. No.

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Q. No, you were going to jump in first. I will accept the check. Now, Professor Wilson, the last matter we left up in the air, as it were, before the luncheon adjournment was that you were going to go away and check your recollection. Have you done so?

A. I have done the best I can with it, yes.

Q. And do you remember I asked you this question, "Did you at that meeting" - that is the meeting at which the take-over consideration was fixed - "by any statement that you made, or at the discussions that took place between yourself and your co-directors, suggest that the offer should be somewhat more advantageous to the Cumberland minority shareholders?" and your answer was, "No, I never made the suggestion in that form."? A. That's correct.

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Q. "Q. Well, in what form did you make such a suggestion? A. I did not make such a suggestion, Mr. Hughes."

"Q. You said you did not make that suggestion in that form. Will you not agree that that necessarily implies that you made some such suggestion in some form? A. It could possibly be interpreted that way.

20

Q. Yes. Now, what did you say to your co-directors on that point? I want to know, if I may? A. It is a matter of my recollection, Mr. Hughes."

I asked you then would you go away and consult your recollection as well as have your lunch. A. That is so.

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Q. What is your recollection? A. My recollection, and I have worked on it trying to re-visualise the meeting, is that my only contribution in that respect was the question whether the one for one was the best we could do for the shareholders and my recollection is that I was convinced after some discussion, informed discussion, that a one for one was an appropriate exchange, appropriate offer.

Q. But to begin with you had grave doubts as to the appropriateness? A. I had doubts, Mr. Hughes.

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Q. You had doubts? A. Yes, but they were resolved by the discussion.

Q. And the discussion is the discussion that you have already described? A. Yes.

Q. Did you say to Mr. Adler and Mr. Atkinson and Mr. Belfer words to this effect: "I think we ought to do better than make a one for one share exchange offer"? A. No, I would not have put it in that way, those words.

Q. Did you say, "Don't you think we could do better"? A. No, I wouldn't even put it that way. I said "Can we do better?".

Q. "Can we do better"? A. "and should we?". 10

Q. "and should we?", yes. And you said before lunch, didn't you, when I put to you that you had doubts about the appropriateness of the take-over offer, "I had doubts at the beginning of the discussion. I would have had the hope that those doubts would be resolved by the end of the discussion."

A. No, I have a clear recollection that I said those doubts were resolved by the end of the meeting.

Q. I am reading from what has been given to me as a copy of the transcript and I will show it to you. There is a difference between the two statements, isn't there? A. There is a very substantial difference. 20

Q. What I have done, if I may just explain to the witness so he won't be unfairly mystified is that we have consulted with the shorthandwriter and these questions will form part of the transcript, those ones followed by those - do you follow? So, that is the picture. You have to read one of my junior's legible handwriting - oh, that is the shorthandwriter's handwriting - do you remember the question, "Look, while you confer, you were not, in your own mind, very happy in concurring with the take-over offer price, were you?" and your answer "I think I am the only one who can answer that, Mr. Hughes." A. Yes. 30

Q. "Q. And the answer is? A. I was sufficiently happy to concur." My next question was "But doubtful; you had doubts, didn't you?". A. Correct.

Q. "I had doubts at the beginning of the discussion. I would have had the hope that those doubts would be resolved by the end of the discussion." A. I wouldn't accept that that is what I said, Mr. Hughes, because I have a very clear recollection that I said that those doubts were resolved by the end of the discussion and it was on that basis that I concurred. 40

Q. Are you saying you did not say what is recorded there? A. I am.

(Court reporter requested to check shorthand notes)

Q. You have heard that? A. Yes.

Q. Do you want to withdraw that evidence? A. Yes, because it is not what my recollection was. My recollection is clear and unequivocal that my doubts were resolved by the end of that meeting.

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Q. I am not asking what your recollection is. I am asking you about what you said before lunch. Do you deny that you said before lunch these words "I had doubts at the beginning of the discussion. I would have had the hope that those doubts would be resolved by the end of the discussion"? A. Yes, I would maintain that I did not say those words.

Q. You did not say those words? A. Yes.

Q. You appreciate the significance of those words, if you said them, don't you? A. I do indeed.

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Q. Because the significance of those words, if you said them, is that they clearly mean that your doubts were not resolved? A. That's correct, but my doubts were resolved and that is why I am clear about the matter.

Q. And you realise, don't you, the critical importance of that answer from the viewpoint of this case?
A. I do.

Q. Now, when you questioned - if there is anything in the question I am going to put to you which you think does not accurately distil what you said, please let me know - when at this meeting you questioned whether something better than a one for one share exchange could be offered to the minority shareholders of Cumberland, did you have in mind the July transaction relating to the chairman's shares? A. Not consciously but it would have been one of a number of factors.

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Q. That influence you to make the question?
A. Yes.

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Q. Is that right? A. Yes.

Q. Did you remind your co-directors that only three

months before in July the chairman had got \$1.25 cash for his ordinary shares? A. I don't know if I myself reminded them of it but it had been discussed.

Q. After July? A. After July.

Q. And had it been discussed after July in the context of discussion of a take-over proposal? A. It was one of the matters which we considered in the take-over, yes.

Q. And that matter, that is to say, the sale of the chairman's shares in relation to the take-over proposal received consideration, did it? A. Yes. 10

Q. During August? A. I don't know about August, Mr. Hughes.

Q. But certainly in September? A. Certainly in September.

Q. Will you deny that that sort of discussion took place in August before the letter from the Stock Exchange arrived? A. I have no recollection of it whatsoever. 20

Q. You have no recollection of it whatsoever?
A. No.

Q. To put it bluntly but I hope fairly, and you tell me if it is not fair, from your viewpoint the making of a take-over offer to the minority shareholders of one share in FAI for one share in Cumberland was, in the light of the previous transaction relating to the chairman's shares, a rather touchy point in your mind, wasn't it? A. It was a matter which concerned me, yes. 30

Q. And do you say you voiced that concern at the meeting at which the offer consideration was finally determined? A. We would have had a series of meetings, formal and informal.

Q. Yes, I appreciate that. A. It wasn't something which was done just on the spur of the moment. That is why the final discussion was relatively brief because we had been over the matter in substantial detail in the preceding months.

Q. Would it be correct to say that the transaction relating to the chairman's shares was a touchy point in your mind? A. Perhaps not touchy, Mr. Hughes. 40

Q. You did agree with me, didn't you? A. Yes.

Q. You want to withdraw that? A. I will qualify it.

Q. Qualify it? A. It was a matter of concern.

Q. Really, those words do me just as well as the other ones. It was a matter of concern to you, this previous dealing in the chairman's shares at \$1.25, because bringing your common sense to bear, you thought that if there were minority shareholders who objected that the proposed share exchange was inadequate, they would most likely use as part of their argument the deal that the chairman got for his shares? A. That matter was considered, yes.

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Q. And considered at a meeting of Mr. Adler and Mr. Atkinson and yourself? A. I am fairly certain there was some discussion of it. In fact, I am certain there was some discussion of it, yes.

Q. I suppose you said words to this effect, didn't you, "Look, it is going to be difficult perhaps to justify a straight share swap in relation to the ordinary shares having regard to what the chairman got for his shares only a short time ago"? A. No.

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Q. Didn't you say anything like that? A. No. If, in fact, we had been proceeding with the cash offer, then the offer that had been made to the chairman would have been of vital importance.

Q. Vital importance? A. I would think so.

Q. It was still a matter of vital importance even if it was a matter of a share swap offer, wasn't it? A. No, because the question of valuation raised a much greater degree of ambiguity than the question of an actual cash offer.

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Q. But, Professor, don't you remember telling me in substance before lunch, some time before lunch - this morning - that when it comes to a question of evaluating the adequacy or otherwise of a share exchange offer in a take-over situation it is necessary by some process or other to reduce both shares to currency for the purpose of comparison? A. I agreed with your proposition.

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Q. Yes. And - A. So far as the stockholder was concerned.

Q. Yes, precisely. You were prospectively dealing with stockholders in this take-over situation, weren't you? A. Yes.

Q. Now, if it was necessary for a stockholder to be able with the best information available to reduce both shares in the proposed share exchange to currency? A. Yes.

Q. It was your belief that the chairman's transactions in July would help the minority stockholder to make the comparison, wasn't it? A. Yes. 10

Q. When, after the transaction relating to the chairman's shares, was the possibility of making a take-over offer to the minority shareholders in Cumberland discussed with you by either Mr. Adler or Mr. Atkinson? A. To the best of my recollection, after the receipt of the Stock Exchange letter which was in September. As far as I recollect it was a meeting in, I think it was, the first week of September.

Q. You have agreed or you have said that you appreciated at the time of these discussions about the fixing of the take-over consideration that you had it in mind that a stockholder in Cumberland would find the information about the chairman's shares useful for the purpose of evaluating the offer? A. Yes. 20

Q. May we take it, therefore, that with your concern for the faithful minority shareholders who had hung on through thin times as well as good times, you told Mr. Adler and Mr. Atkinson that you thought that there should be a reference in the information sent out to the shareholders of Cumberland to that dealing in the chairman's shares? A. As I remember, I didn't say there should be a reference in the circular but we did discuss how much information should be in the circular and I think Mr. Atkinson put the view that if he put in all the information that could be regarded as even marginally important then we would have a very lengthy document indeed which most shareholders wouldn't bother to read and, therefore, they would be in a worse state than if we put a short succinct statement to them which they could understand. 30 40

Q. You did not want them to be confused with too many facts? A. Facts which they may not be able to -

Q. Understand? A. Yes.

Q. But, of course, you would agree that one fact which they could very readily understand would be

that the chairman got \$1.25 cash for his ordinary shares a few months before? A. They could, I understand there was no legal requirement -

Q. Leave out the legal requirement because you know - A. That would be a pertinent fact.

Q. It would be a most pertinent fact, wouldn't it, for a stockholder? A. If there was a legal requirement -

Q. Leave out the legal requirement. The significance of a legal requirement, if there was a legal requirement, is a matter for his Honour. A. Right. 10

Q. You appreciated, at the time of this discussion when the take-over consideration was fixed that to a minority stockholder in Cumberland the revelation that within a few months prior to September, in July, the chairman had got \$1.25 in cash for his ordinary shares was a most pertinent piece of information? A. If he were making a cash offer.

Q. Or at all? A. No, if we were making a cash offer. 20

Q. Look, I am sorry to have to go round the bush again with you but I am going to suggest to you, I hope not impolitely, that the qualification you have just expressed is quite at odds with some answers you gave me only a few minutes ago and I will remind you of them. Don't you remember telling his Honour both this morning and this afternoon that when you are considering the adequacy or when a stockholder is considering the adequacy of a consideration that consisted of a share exchange it is pertinent to reduce the value of both shares, that is, the offeror shares and the offeree shares, to currency? A. Yes. 30

Q. Yes. And you remember agreeing with me this afternoon that a most helpful piece of information what would assist towards that end of reducing both shares to currency was the fact that within a few months before the chairman got \$1.25 for his shares in cash? A. Yes.

Q. Yes. So, will you not agree that the revelation to the minority stockholders in Cumberland of the price that the chairman had got for his shares in July was a most pertinent piece of information for the purpose of evaluating the offer that was made? A. From the point of view of the minority stockholder, but we were members of the board of FAI and our primary 40

responsibility was to the shareholders of FAI.

Q. You did not regard it as a responsibility on your part to assist the shareholders of Cumberland, the minority shareholders, with information that you regarded as most pertinent to the evaluation of the offer?

A. I have already said that I have in mind the interests of the minority shareholders in a favourable way.

Q. But you did not allow that interest to carry you to the extent of trying to insist, trying to insist that the minority shareholders should be told what the chairman had got for his shares, is that correct?

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A. That's right.

Q. You thought the line had to be drawn somewhere?

A. That's correct, Mr. Hughes.

Q. And you drew it there because you did not want them to know, did you? A. That is not true, Mr. Hughes.

Q. Well, did you want them to know? A. I had no strong views about the matter but it wasn't that I did not want them to know.

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Q. Well, did you want them to know what the chairman got for his shares because you regarded it as very pertinent information? A. At this point of time I couldn't recollect what my state of mind was on that issue but there had already been a buying offer posted on the Stock Exchange.

Q. When? A. In June.

Q. Yes? A. Which was of that order and, therefore, if minority stockholders were assessing whether this was a fair and reasonable offer, they would surely have had recourse to see what sort of prices had been posted on the Stock Exchange and, to my mind, the revelation or the information that the chairman sold his shares at that price added nothing further to the information on which the minority stockholders would make a decision.

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Q. Professor Wilson, do you think on reflection that there is a basic flaw in that argument you have just put? A. I can't see it at the moment, Mr. Hughes. It is quite possible.

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Q. May I remind you, and please don't think I am being rude? A. No.

Q. Could I remind you that you have already agreed that the price of \$1.25 on the board was a window-dressed price? A. Yes.

Q. No, you have agreed with that, haven't you?
A. Yes.

Q. And you have agreed to your knowledge that price was not part of a real market operation but part of an operation mounted by the chairman. A. It wasn't part of a real market operation because shareholders did not take advantage of it. 10

Q. Just leaving that out of account, you knew, did you not, that there was no real market for the shares in June and July on the Exchange? A. There was an opportunity for any shareholder who wished to sell his shares to sell them at the price which was posted on the board and, if they did not take advantage of that offer, then that was their decision.

Q. You know, don't you, that very few shares changed hands on the market in July? A. Yes. 20

Q. How many did you think had changed hands on the market in July? A. I have no idea.

Q. No idea. Did you have any idea at the time you were considering whether the shareholder in Cumberland should be told about the chairman's deal? A. Yes, I had an idea there was a very small response.

Q. Yes, a very small amount of shares available for sale? A. Yes.

Q. So, it is perfectly ridiculous, isn't it - I withdraw that because it is rude. It is erroneous, is it not, to suggest, having regard to the lightness of the market in July, that any shareholder in Cumberland who wanted \$1.25 for his shares could have got it? 30

A. No, it was still twenty per cent of the total shareholding in hands outside our control and nobody saw fit to accept \$1.25. That seems to be a pertinent fact.

Q. You know there were sales at \$1.25? A. Very few.

Q. Very few. That is the point I am making. The market was light, wasn't it? A. Yes, but the opportunity was there for any minority stockholder who thought \$1.25 was a fair price to sell his shares. 40

Q. If he could find a seller? A. If he could find a buyer.

Q. If he could find a buyer, yes. And the only buyer who put his name on the board, as it were, was Mr. Adler? A. Yes.

Q. Is that right? A. As far as I know.

Q. And you knew that he did that for the purposes of window dressing? A. Yes, but he has been always ready to buy any shares which were offered. That is his purpose. 10

Q. You knew that Mr. Adler had put that price on the board for the purpose of window dressing? A. But he would also buy shares which were offered.

Q. And you knew that this market had never been a real market at all in June and July? A. Because holders of shares were not dissipated.

Q. Look, I don't care if you knew the man in the moon was going to land on earth. You knew that there was no real market for shares in June and July? 20
A. Yes.

Q. You knew, therefore, that because there was no real market for the shares in June and July the truth of the matter was whatever the shareholder looking at the prices might have thought, that the truth of the matter was that the mere fact those prices were on the board was not indicative of the real market or a real market? A. There could be if shareholders had taken advantage of the offers.

Q. What offers? A. Of the prices posted on the board of the Stock Exchange and, therefore, because there was no real market, it was an indication of the fact that the stockholders should hold on to their stock. 30

Q. Professor Wilson, you are making those statements not knowing how many sellers there were in the market or for how many shares, aren't you? A. In specifics, yes, but I was told there was a small response.

Q. Who told you that? A. Mr. Adler. 40

Q. Did he tell you this when he told you he had been window dressing and that the market price for the shares was no real indication of their worth?

A. He did not say they were no real indication of their worth.

Q. But you told me that, didn't you? A. I said in evidence that the stock market price was in my view not in itself an indication of the real value.

Q. A stockholder knowing the true facts of the situation would probably form the same view as you formed, wouldn't he? A. I have no idea what a stockholder would think.

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Q. I am just asking you to cast your mind into that of a stockholder in Cumberland? A. As I have no shares, I cannot deal with that situation.

Q. You cannot deal with that situation hypothetically? A. Yes, I can deal with the situation hypothetically.

Q. Supposing you were a stockholder in Cumberland - not in any of its subsidiaries - just a minority stockholder in Cumberland. He would be likely to look at the board price and say "Well, is that the real indication of the worth of the share?", wouldn't he? A. Well, if he were rational, he may think it is some indication but, bearing in mind the fact that there has been no continuous market in the shares, I don't know whether I can answer your hypothetical question.

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Q. If you were a stockholder in Cumberland and you knew that that market price was on the board just because the chairman of FAI had decided to window dress, you would be very interested to know whether there was any justification for the window dressing, wouldn't you? A. But, as a minority stockholder, how would I know?

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Q. No, but I am asking you to assume that you were a minority stockholder in Cumberland? A. And I have knowledge of what the chairman of FAI was doing?

Q. Yes. What he was doing was window dressing and I am asking you to assume that as a minority stockholder in Cumberland you knew that the market price was no real indication of the value of the shares. Would you make that assumption? A. No, I don't think I could.

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Q. Look, supposing by some miracle despite non-disclosure - do you understand? A. I am not quite sure what you mean by non-disclosure.

Q. Supposing that even though there was no disclosure in fact prior to the take-over offer or in the take-over offer of the price that the chairman obtained for his shares? A. Yes, had been paid.

Q. Yes, but supposing you are a minority shareholder in Cumberland and by some miracle you knew that the chairman had window-dressed the shares on the market in circumstances such that the market price gave no indication of the real value of the shares?
A. Yes.

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Q. In that situation, you, as a stockholder in Cumberland, having that knowledge would be most concerned to know any information that was pertinent to establishing the real value of the shares, wouldn't you? (Objected to; allowed).

HIS HONOUR: Q. Can you answer that question, Professor? A. Indirectly, I can, your Honour. In the first place, I don't accept Mr. Hughes's concept of window dressing. I have maintained continuously throughout this hearing that it was an attempt by Mr. Adler to establish a market rather than to window dress. The second point is that if I were a minority stockholder and I had been the beneficial recipient of this miracle I would be immediately on the telephone to Mr. Adler in his role as chairman of Cumberland Holdings to elicit an explanation from him.

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MR. HUGHES: Q. Yes. And if Mr. Adler were to act honestly, he would have had to say to you, wouldn't he, "Oh, look, that is a fair price because I got that for my shares." A. I don't know whether he would have to give any explanation so long as he said "I think that is a fair price." That would be sufficient.

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Q. And supposing the stockholder said - you, the inquisitive stockholder, said, "Well, why do you say that is a fair price?" A. I have never known an inquisitive stockholder of that sort, but, presumably they do exist.

Q. Supposing you, with your capacity for straight speaking, had been inquisitive as well? A. Yes.

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Q. And you said to Mr. Adler "Why do you say that is a fair price?", in honesty, he would have to tell you that that was a fair price because that was what his own company paid for his shares, wouldn't he?
A. Your Honour, I don't know whether I can answer that.

Q. I am just asking you to answer that having regard to your own standards of propriety? A. If I were chairman, I would.

Q. Yes, you would, because you would think it improper not to? A. I don't think that is relevant.

Q. His Honour is the judge of that. You would give that information about the price you got for selling your own shares to the company of which you were chairman because you would have thought it was proper to do so, wouldn't you? A. That is my personal standard, yes.

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Q. And your personal standard is that in that situation it would have been improper not to do so?

A. No, it would not be relevant.

Q. Not be relevant? A. If I could provide additional information which justified my assessment of it as fair and reasonable, I would say there was no obligation for me to mention I had been engaged in such a transaction.

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Q. I am sorry, you said something about being engaged in some transaction? A. No, I think I said that I would not accept there was an obligation to disclose that I had been involved in such a transaction.

Q. I see. Although you would think it proper to give the information? A. Precisely.

Q. Proper to give it but not improper not to give it. Is that what you say? A. That is correct. There is a lot of information which can have bearing on a question which adds nothing to other information. It is a question of relevance on the principle of Occam's Razor.

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Q. You thought when the discussion took place for the fixing of the consideration of the take-over offer that to disclose the price the chairman had got for his shares was relevant information, didn't you?

A. Yes, but I was not convinced it was of such overwhelming importance that it had to be included in the circular to minority stockholders in Cumberland Holdings.

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Q. You thought, did you, that unless a piece of information that would be helpful to the minority stockholders was, in your own words, of overwhelming importance they could be left in the dark about it? Is that what you thought? A. Not left in the dark.

Q. Well, you thought that unless the information which might be of assistance to the minority stockholders of Cumberland was, to use your phrase, of overwhelming importance, there was no need to disclose it? A. On the basis of having a short and succinct statement which could be understood and bearing in mind that there had been a price of that order, a buying order posted on the Stock Exchange of that sort of vintage so that the disclosure would have added nothing in my view to the evaluation by the minority stockholder of the valuation of his shares.

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Q. If, in July, it had been necessary to disclose to shareholders - I am asking you to assume this - if, in July, it had been necessary to disclose to shareholders - A. Of?

Q. Of FAI, that the chairman in a dealing with FAI had sold his own shares to that company at \$1.25, you would have been, in your own view, would you not, bound to tell the shareholders that they must have no regard to the market price that had been fixed on the board of the Stock Exchange? A. Can I have a definition of what you mean by "if it had been necessary", Mr. Hughes?

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Q. Yes, I am asking you to assume - A. Legally necessary or what?

Q. I will put the assumption to you and if you want any point of clarification I would be very happy to try to oblige. I am asking you to assume that the July transaction off market had required the approval of a meeting of the shareholders of FAI? A. Yes.

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Q. Before it could be finalised? A. Yes.

Q. Do you follow that? A. Yes.

Q. Before it could become a legally binding contract? A. Yes.

Q. In that situation, you, as a director of FAI, would have been bound to tell the shareholders what you said to the board on 11th July, wouldn't you?

A. Yes.

Q. And you would have been bound therefore, to tell the shareholders that they must pay no regard -

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A. That is not accurate, Mr. Hughes.

Q. Really? A. What I said was it was not by itself an accurate reflection of the value of the shares.

* Q. Didn't you say at this meeting - page 318, your Honour - "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." That is what you said? A. Yes, but that doesn't say that it is not a reflection of real market value.

Q. Oh, yes, but you would have had to tell the shareholders that they must disregard in the type of hypothetical situation I am putting to you, the Stock Exchange quote? A. No. 10

Q. That is what you told your own board, didn't you, on 11th July? A. My advice to the board was not to rely on the Stock Exchange quote as the sole source of evaluating. I myself placed little credence on it as, standing by itself, an indication of the real market value.

Q. Will you agree you said to the board of FAI or those members of the board of FAI who considered the proposal by the chairman on 11th July words to this effect: "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" A. That implies to me or it means to me the market value that would be placed on the shares was in line with what we considered to be a reasonable value for the shares. 20

Q. Not because it was on the market? A. No, I think there were some transactions at that price. You could not regard it as a market value. 30

Q. If you had to get the approval of the meeting of shareholders for the transaction of the chairman's shares, would not you have told them the same piece of information as you gave to the board, expressed in the words I have read? A. Expressed in the words you have read, yes.

Q. And if you had to tell the FAI shareholders those circumstances, why not tell the Cumberland shareholders? A. That is why I asked you whether you meant by the answer, if this was an answer as a legal answer, then as a director of FAI I would have been enjoined to give this information but I was not a member of the board of Cumberland. 40

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Q. But you know that two of your co-directors on FAI were. A. That was their problem, not mine.

Q. The two gentlemen wearing the two hats. These are the gentlemen I am referring to? A. Yes.

Q. Did you say to them at this discussion when the take-over consideration was fixed, "Look, I will go along with non-disclosure of the transaction relating to the chairman's shares but I think those of you who are directors of Cumberland have to take some action to disclose the matter." A. No, I did not say anything of that sort. It was not my function. I had no standing with regard to the board of Cumberland and what the board of Cumberland did was their concern.

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Q. But you were concerned about these matters?
A. Personally I was, but that gave me no status.

Q. At any of those discussions at which the take-over offer consideration was fixed, did either Mr. Adler or Mr. Belfer make the slightest attempt to get the FAI board to lift the offer above or better than the one-for-one share exchange? A. Not that I recall.

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Q. Are you sure of that? A. I am sure as far as I can recall here. Yes, as far as I can recall.

Q. So we have this rather remarkable conjunction of events, neither in July nor in October was any attempt made to raise the price of the value of the offers, beyond what was first proposed? A. Made by who?

Q. Anyone at the board meeting? A. I think I had already testified that I raised the question of whether we should look at a different ratio.

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Q. What was the ratio you suggested? A. I did not suggest a specific ratio. I suggested we should look at the material we had before us and I asked I think Mr. Atkinson or Mr. Adler - I could not be sure who - whether we ought to consider it and they said on the evidence we had before us it was a fair and reasonable offer.

Q. Mr. Adler said that? A. I am not sure whether it was Mr. Adler or Mr. Atkinson.

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Q. Was there any attempt by Mr. Adler to persuade Mr. Atkinson to a contrary view? A. No, I understood they had a fairly long detailed discussion on the issue before it came to the board.

Q. There was no suggestion on the part of Mr. Adler or Mr. Belfer they should leave the meeting? A. To the best of my recollection, no.

Q. So that would allow the FAI directors who did not wear two hats to discuss the matter themselves?

A. That would have left it with two directors.

Q. Was Mr. Barrington about? A. I do not recall.

Q. Could he have been there? A. I do not know. That is a matter for himself.

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Q. You knew he was a director of FAI at this time?

A. Yes.

Q. Did he attend board meetings? A. Yes.

Q. This was a board meeting at which the consideration was fixed and where a matter of great significance was being discussed? A. Yes.

Q. Do you mean to say Mr. Barrington was not there?

A. It depends on which board meeting you are referring to.

Q. At which the consideration was fixed, was he there? A. Which one are you referring to?

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Q. To any one. The trouble is we do not seem to have the minutes of these interesting discussions - I am referring to any meeting. A. Mr. Barrington and Mr. Herman were present at some of the discussions.

Q. Were they present at the discussion when the ultimate take-over consideration was fixed? A. I cannot recall. I would have to refresh my recollection by looking at the minutes.

Q. I will invite you to do so. You can have the minute book. Before that, have you kept a file of documents relating to this take-over? A. No. I have a long-standing policy to reduce the paper warfare. So far as my storage is concerned I do not take away any papers from FAI at all.

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Q. You neither bring them nor take them away?

A. If I bring them I leave them there.

Q. Who with? A. The chairman.

Q. Did you leave any papers of your own preparation with the chairman in relation to this take-over offer?

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A. Not in relation to the take-over, no.

Q. Would you please go ahead and look at the minutes? A. I see from the minutes of the 1st November that Mr. Adler, Mr. Atkinson, Mr. Belfer and Mr. Herman and myself were present and Mr. Barrington was unavoidably absent on the company's business in Adelaide. There was a problem with the hotel.

Q. I think you said that the take-over offer was fixed by the FAI board or such members of the board as were able to attend the meeting in October. You may go back to the minutes for October and see whether Mr. Barrington was there? A. Mr. Barrington was present at the meeting of 25th October. 10

Q. Was that a meeting at which, according to the minutes, any discussion took place about the fixing of the take-over consideration? A. It does not appear from the minutes. It relates primarily to the question of making due inquiry in relation to the interval from 30th June to a date not less than 14 days before delivery of the Part A statement to Cumberland Holdings. 20

Q. I want you to use the minutes insofar as they can be used for the purpose of answering my question whether Mr. Barrington was present at any meeting of the directors of FAI at which this take-over consideration was discussed or fixed? A. It appears there was no discussion at that meeting. I know that Mr. Barrington was continuously consulted by Mr. Adler and Mr. Atkinson.

Q. But you are only relying on what Mr. Adler and Mr. Atkinson told you? A. Yes. 30

Q. To say that? A. Yes.

Q. That is not admissible. Mr. Adler can say that in this witness box if he likes. A. Yes.

Q. Can you say from your recollection one discussion you had with Mr. Barrington about the sufficiency of this take-over consideration? A. No, I had no recollection of discussing details.

Q. Can you remember one that he had on the subject in your presence? A. No. 40

Q. So far as you were concerned, you on the basis of some information including figures, which by themselves did not carry conviction to you, you went along with Mr. Adler and Mr. Atkinson without seeking

any information or any view from Mr. Barrington?

A. From Mr. Barrington, yes, but we did have -

Q. That is all I want to know. You have answered the question. You knew that Mr. Barrington had an unequal knowledge of the mechanics of running the Cumberland business? A. Yes.

Q. May we take it it was present in your mind that he might be able to, as a director of FAI, give you some advice or overcome those doubts you had about the sufficiency of the take-over price? A. Not in terms of the value of the business. Mr. Barrington is excellent at running nursing homes but he is not informed in the process of valuation of businesses. It is not his line.

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Q. Nor was Mr. Atkinson to your knowledge informed of the process of valuing businesses? A. I had the impression, a very strong impression which had been reinforced by a number of people that he had a considerable experience.

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Q. Even despite his considerable experience you still had doubts about what he said when you went to the meeting at which the price was ultimately fixed?

A. In terms of being sufficient to satisfy me, not in terms of its accuracy.

Q. You said that the figures did not carry conviction? A. Yes.

Q. You went along with them because you could not prove them wrong? A. Yes, that is correct.

Q. You acted in a subordinate role? A. No, I had no reason to doubt the accuracy.

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Q. You relied on the ipse dixit of Mr. Atkinson? A. Would you translate that?

Q. Do not you know Latin - I am not criticising you - Mr. Atkinson says it. It does not carry conviction, but it will do me. A. No. I remember saying in this court that I did look at other matters in addition.

Q. You analysed them this morning? A. Yes.

Q. What about Mr. Herman, did you hear him utter a syllable by way of expressing a view as to whether this was a proper price to offer the Cumberland shareholders? A. No.

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- Q. He was a member of the board of FAI? A. Yes.
- Q. He was never invited by Mr. Adler, Mr. Atkinson or yourself to express his view? A. He did not need an invitation. If he feels he has anything to say, he says it.
- Q. It is difficult to say things at a discussion at which you are not present. A. Yes.
- Q. I am asking you whether you troubled to go to Mr. Herman and ask for his views as to the appropriateness of this take-over consideration? A. No, I relied on the figures Mr. Herman presented. I did not doubt his veracity. I received the figures. I relied upon Mr. Barrington's information with respect to Cumberland Holdings. Again I had no reason to doubt these were accurate figures. On this basis it seemed to me neither of them had any significant to add to the material they had made in terms of information. 10
- Q. You have told us you had no information from Mr. Herman? A. It was available. 20
- Q. Did you seek any information from Mr. Barrington? A. No, it was available at the meetings.
- Q. At the meetings? A. Yes.
- Q. You have told his Honour at the meeting when the price was fixed, when the consideration was fixed, Mr. Atkinson was in charge of the figuring and he produced, you have said, no figures in writing? A. I did not say that.
- Q. Did he produce any figures? A. To my recollection he produced some figures whether verbally or in writing I do not recall. 30
- Q. Did Mr. Herman ever produce any figures in writing on the take-over consideration? A. No, but on the financial position of FAI, he did.
- Q. Did he do so in relation to the final consideration of the take-over offer? A. We had these figures continuously.
- Q. They were figures that waved in the breeze? A. No, figures I looked at carefully.
- Q. They did not wave in the breeze? A. No. 40
- Q. Whether you got the figures from Mr. Herman or

Mr. Barrington from time to time in the course of the general board's consideration of FAI affairs, the fact is you did not trouble to go to either Mr. Barrington or Mr. Herman and say, "What do you think about the adequacy of the offer?" A. That is correct. It was not my duty as an individual board members. My duty was to satisfy myself.

Q. Did not you think it was your duty to satisfy yourself as to the views of those two board members?

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A. I would think that would be more the chairman's function than a member's function.

Q. Do not you know in the absence of appropriate excuses board matters are supposed, as a matter of practice, to be considered by the board as a whole?

A. That is correct - (Objected to; question withdrawn).

Q. Now coming to another matter, did you sign any documents in connection with the take-over offer?

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A. I presume I must have. I do not recall. But if it was my legal duty, I would have done so.

Q. Do you remember this morning saying that the only page of Exhibit 11 you read before the take-over offer -

A. Read carefully.

Q. Read? A. Carefully.

Q. Carefully, that was the first page? A. Yes.

Q. Do you remember me asking you this morning about an answer you gave on page 562, page 563? A. I do not have the transcript with me.

Q. Let me remind you:

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"Q. Did you look yourself at the documents intended to be sent out before the final document was despatched?"

Meaning the take-over offer and the accompanying documents. Do you remember that question? A. Yes.

Q. Do you remember saying, "I did see a mass of documents waving past me in the breeze"? A. Yes.

Q. Do you regret that expression? A. Most certainly, it is not precise.

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Q. It is substantially true? A. So far as the final document. I had seen various draft documents in the process of preparation.

Q. "I did not try to read through the full legal documents"? A. That is correct.

Q. Is that still true? A. Yes.

Q. That was referring to the take-over documents?
A. Yes.

Q. Exhibit 11, is that right? A. If I could see it. 10

Q. That is the document you looked at this morning?
A. Yes.

Q. "Did you read any of them at all? A. No, not past the first page." Do you remember that question?
A. Yes.

Q. Was that a considered answer? A. For this document, yes. But I did glance through the rest of the papers.

Q. If you were to commit your name as a director of FAI to any statement in a take-over document, you would need to read it? A. Yes. 20

Q. You signed one page of that document? A. As far as I can recall.

Q. You signed it without reading it, did not you?
A. May I refresh my memory. I would have signed it.

Q. Did you sign without reading it - (Objected to)

Q. That is a reproduction of something you signed?
A. Yes, I would have read anything I signed. 30

Q. You did so? A. I am certain of that.

Q. You did not read that appendix in Exhibit 11 before it went out? A. I would have glanced at it. I would not have read it.

Q. Did you read carefully Mr. Adler's letter to the shareholders of Cumberland? A. Yes.

Q. Did you think that was a model of frankness and

candour when you read it? A. I thought it was over-long to be honest.

Q. That is your observation. Do you think it was a model of frankness and candour - (Objected to).

Q. Do you think it was frank and candid? A. Yes, but if you are asking me whether it was a model -

Q. My friend does not like that phrase. I have withdrawn it.

Q. You say that was frank and candid, do you?

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A. Yes.

Q. There is nothing in it you want to criticise in terms of being untruthful and misleading? A. Before I answer that I would have to re-read it.

Q. You may do so with his Honour's permission.

A. Yes.

Q. Do you think it was frank and candid in all respects? A. It is frank and candid.

Q. Do you think it is misleading at all? A. No, I do not think so.

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Q. Do you think it is misleading because it omits material things which had they been given would have cast light on information given in the document?

A. Could you be more specific?

Q. No. I am asking you for your view. A. No, I think it has everything that was relevant. It seems to be in excess of what might be regarded as minimal information.

Q. You do not agree with the view that it would not serve any useful purpose to comment on such dealings as had taken place on the two securities during recent months, do you? A. Yes, we were discussing this earlier, from my point of view in terms of it being matters involving minority stockholders, discussions on transactions in the shares which are described on the Exchange as abnormal and unrealistic. That was a view I most certainly shared and it would certainly reinforce my view that share transactions could be very misleading. There were transactions and details of share transactions could be misleading as a basis on which minority stockholders could pass judgment.

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Q. Mr. Adler said something more than that, that it would be not useful to comment on dealings on the Exchange. He also said it would not serve any useful purpose to comment on such dealings as had taken place in the two securities during recent months?

A. During that time.

Q. That applies to on and off market transactions?

A. I presume so.

Q. It was your view at the meeting when the consideration was fixed that it would serve a useful purpose for shareholders to be told what the chairman had paid for his shares. You have said that? A. It was one item.

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Q. You could not have agreed with that statement, the one I have directed your mind to, as being true?

A. I could have once my doubts were resolved.

Q. Even though your doubts were resolved about the adequacy of the valuation you still thought it would have served a useful purpose to tell the minority stockholders in Cumberland what the chairman paid for his shares in July? A. My own personal view, yes.

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Q. You could not agree with what Mr. Adler wrote in that sentence? A. In terms of what I myself would write - this was being written by the chairman.

Q. With your approval? A. With my agreement.

Q. With your agreement? A. Yes.

Q. Did you say to the chairman "Look, I do not think this is correct when you say no useful purpose would be served by revealing the dealings in the two securities which had taken place in recent months" Did you think of saying anything like that? A. Not in those words.

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Q. That is when you were mulling over this document for the purpose of recording your agreement? A. When reading it I most certainly raised that doubt.

Q. Because it worried you? A. Yes.

Q. Because you thought not to reveal it would be lacking in frankness? A. No.

Q. You thought not to reveal it would be unfair to the minority stockholders? A. No, I had some doubt about that matter when the discussion started but

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that was resolved by the time the discussion was completed.

Q. What discussion - when you went through this document with Mr. Adler? A. Yes.

Q. It bears what date? A. November I presume.

Q. You, by your agreement, endorsed that statement that it would not serve any useful purpose to be told that such dealings had taken place in the two securities during recent months? A. Yes.

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Q. You knew you were endorsing that statement?
A. Yes, that was my considered view after discussion about whether matters would help minority stockholders.

Q. Do you remember telling his Honour when you read this document you were of the view it would serve a useful purpose to tell the minority stockholders in Cumberland about the two dealings in the chairman's shares, off market? A. When I started to read it, yes.

Q. Mr. Adler overcome your scruples in the discussion? A. He satisfied my doubts.

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Q. What did he tell you? A. I cannot recall at the moment but substantially it would have been to the effect this added no further information to that which is already available to the minority stockholders who looked at what was happening on the Stock Exchange.

Q. I suppose you said words to the effect, "Look, you know at that meeting of 11th July when I agreed to the purchase of your shares as a director of FAI, I told my co-directors that we cannot pay any regard to the stock market price." A. We could not rely upon that.

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Q. Did you tell Mr. Adler that when he suggested to you there was no need - A. We had discussed the fact whether they were artificial prices or not.

Q. You said they were? A. Artificial prices, yes. They were artificial prices in the sense there was no market transaction.

Q. You said there was one transaction - did you call him Larry? A. I would not on this occasion.

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Q. Because you were upset with him over this statement? A. No. I do not recall. We did have a

difference of opinion.

Q. You quarrelled over it, did not you? A. No, we don't quarrel, we discuss.

Q. He always wins? A. No.

Q. He won on this occasion? A. He must have.

Q. You reminded him when he sought to justify that statement on the first page of Exhibit 11 that at the meeting of 11th July when the purchase of his shares at \$1.25 was decided upon, that you rejected the stock market price out of hand? A. He was not present at that time. He had no knowledge of that. 10

Q. So he needed reminding? A. He needed to be informed.

Q. Did you remind him of the stand you had taken at the meeting of 11th July? A. To the best of my recollection. 20

Q. Did you express your grave concern to Mr. Adler at his statement that he proposed to send out to minority stockholders that it would serve no useful purpose to include such dealings as had taken place in the two securities during that time? A. I did not express grave concern. I expressed concern but I was satisfied with his explanation.

Q. What was his explanation? A. I have already told you that.

Q. Would you tell it again because sometimes accounts differ? A. The explanation was as in terms I have given that we establish a market on what one regarded as a reasonable value. I have always maintained and continue to that stock market prices by themselves are not sufficient. 30

Q. You may have mixed up what Mr. Adler said. Would you give his Honour your best recollection of what Mr. Adler said when you expressed concern about the propriety of this statement? A. To the best of my recollection he said that the stock market price that had been established in July was a fair and reasonable price. 40

Q. That is a different account of the explanation from that which you gave in the last five minutes, isn't it? Isn't it? A. I don't recollect any difference.

Q. Was not the substance of the explanation you gave in the last five minutes that Mr. Adler said - I will come back to that when I have checked the transcript through my learned junior - would you agree that although you may have a particular view about the importance of the piece of information I am going to ask you about you, at the time when this letter was sent out by Mr. Adler, regarded, as relevant information for the minority stockholders in Cumberland, a comparison in terms of money of the net tangible assets of Cumberland shares on one hand, and the net tangible assets backing of FAI shares on the other hand? 10

A. Holding a particular view in isolation - which I have expressed several times I would not - I would not have strong views or any strong feeling towards something which was done in isolation.

Q. But this was a relevant piece of information, was it not? A. There are a large number of relevant pieces of information. The question is, where do you draw the line? 20

Q. That information, relevant as you would agree, was very much in favour of Cumberland shares as against the FAI shares, taking that information by itself?

A. On a break-up basis, if both companies ceased operation. But only in that sense. And it was not contemplated that either of them would cease operation.

Q. Would you read the sentence that starts in the sixth paragraph? A. In which document?

Q. In Mr. Adler's letter of 20th November, part of Exhibit L. It commences "In terms of asset backing... shares respectively"? A. Yes. 30

Q. Did that sentence have any meaning to you when you read it? A. Only in this sense, that the asset backing was greater than par value. But then again I am not - as I said before - I am not terribly concerned about asset backing by itself. Asset backing by itself does not terribly concern me.

Q. You regarded the net tangible asset backing of Cumberland shares as a relevant factor in determining to pay \$1.25 for the chairman's shares because the net asset backing of those shares was tied up in bricks and mortar, which were being put to profitable use, didn't you? A. Yes. Put to profitable use. 40

Q. And that was still the situation in November, wasn't it? A. Yes, that is right.

Q. So in November you regarded the net tangible asset backing of Cumberland shares as a relevant factor in determining the appropriate price for them, didn't you? A. Yes. One of many considerations.

Q. One of many considerations? A. Yes.

Q. But relevant? A. Yes.

Q. Now, what did that sentence that I have invited you to read and consider mean to you - "In terms of asset backing...share respectively". What did that mean to you? A. It meant to me exactly what it says. That is to say, that the asset backing of both companies was higher than the par value of the shares.

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Q. Did you take that to mean the net tangible asset backing of both companies? A. I did not feel compelled to enquire about that in my mind, to the best of my recollection. "asset backing" is used in a very loose way sometimes.

Q. This is the net tangible asset backing?

A. That is normal if the company does not have a substantial goodwill element, but there is a difference here, because the goodwill element in Cumberland Holdings is negligible, whereas there is a substantial goodwill in any insurance company on the basis of connection with brokers, re-insurance people, and with clients and people of that sort which does not exist to any marked extent in the nursing home and geriatric nursing business.

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Q. Did you ever try and fix a value for the FAI goodwill? A. There is a figure fixed in the annual accounts.

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Q. That is only the excess of costs of acquiring subsidiaries over assets? A. Yes. Goodwill is an exceptionally difficult thing to quantify.

Q. Goodwill - the figure you have just referred to in the FAI consolidated balance sheet is not a figure for the sort of goodwill you are talking about, is it? A. No, it is not.

Q. I want to ask you this. That sentence "In terms of asset backing..." and so on is a reference to the net tangible asset backing in the shares of each company? A. To the best of my recollection, no.

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Q. Well, what did you take it as meaning? A. The asset backing, including intangibles as well as tangibles.

Q. And of course, that statement did not tell shareholders in Cumberland very much, did it? A. No, it does not seem to me to tell them much, except that both companies were fairly strong in terms of assets.

Q. The defect in that statement is that it does not say how much the asset backing of Cumberland is above par, and how much the asset backing of FAI is above par? A. That is perfectly correct. But that is information which is readily available by reference to share lists and to the share price list in the Financial Review. 10

Q. Are you serious? A. They do give a figure for asset backing, Mr. Hughes.

Q. Not in the daily lists? A. I have a recollection of seeing it there, yes.

Q. You are suggesting, are you, that when the shareholder gets this piece of paper from Mr. Adler he should immediately start looking up back numbers of the Financial Review? A. No, he would not have to do that. He would only have to look at the current one. 20

Q. Did not you think, when you read that sentence, that it lacked information which was readily available? A. I don't know what I felt at the time, but my reaction to it at present is that it serves, from my point of view, no useful purpose.

Q. It is a piece of padding, isn't it? A. It would be our reaction at the present time.

Q. It is a piece of padding - a piece of puffing and padding? A. I don't know about puffing, but it does not seem to add any useful information other than both companies were strong. 30

Q. It is a singularly useless piece of information, isn't it? A. It gives no basis for comparison, if that is what you mean.

Q. It lacks one piece of information which may be useful. A. Which is?

Q. A comparison. It lacks a comparison? A. Yes, it lacks that. 40

Q. And did you say to Mr. Adler, "That is a piece of padding. Why won't you give the comparative

figures?" Did you say that to Mr. Adler? A. No, I don't recall saying that to him.

Q. Did you say anything like that? A. I don't recollect saying it. I may well have done so. We had interminable discussions about a whole range of issues.

Q. How long did the discussion over the letter take place between you and Mr. Adler? How long was that discussion? A. About as long as it would have taken me to read it, and about five minutes after.

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Q. It was a pretty short discussion? A. We don't waste time.

Q. Did you have a discussion with Mr. Atkinson about this matter? A. He may not have been present.

Q. Can't you remember? A. He drifts in and out of the office.

Q. Waving past in the breeze? A. I think he does more than that.

Q. I want to take you to another sentence in this document: "As regards the ordinary stock in Cumberland ...present offer". A. Yes.

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Q. Did you read that sentence? A. Yes I did.

Q. Well, what Mr. Adler was really saying there was that there was no eventuality you ought to take into account on the gloomy side? A. In a sense, yes.

Q. You knew that there were plenty of eventualities to be taken into account on the gloomy side in the light of the chairman's article in which you concurred, which is Exhibit 43? A. As affecting the insurance industry in general. But I had strong faith in our ability to do better than the average.

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Q. By exercising strict controls and tightening up on the payment of claims? A. By exercising strict controls. We have never tightened up on the payment of claims.

Q. Did Mr. Atkinson tell you that he had read Exhibit 43 - the chairman's gloomy prognostications? A. I don't know whether he told me or not. But I would presume that he would read it.

Q. There are just a few more questions. You read the circular from Mr. Donohoo dated 21st November 1974,

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which is Exhibit 13? You read that circular, didn't you? A. I would have seen it, yes.

Q. You would have seen it? A. Yes.

Q. Did you read it? A. I would have read it. I don't recall the contents of it.

Q. Do you remember he said in it - and you may take it I am reading from a copy of it - "At a board meeting of Cumberland...carried". Had it come to your notice prior to reading that paragraph in his circular of 21st November, which is Exhibit 13, that such an attempt had been made by him? That is, to get the board of which he was a director - Cumberland board - to agree to an independent evaluation of the worth of the offer? A. I am sorry?

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Q. We are at cross-purposes. Had it come to your notice prior to reading this circular from which I have just read - Exhibit 13? A. The answer is, "To the best of my recollection, no".

Q. Did you have a discussion with Mr. Adler or Mr. Atkinson or any of your co-directors about Mr. Donohoo's circular, Exhibit 13? Did you have a discussion with any of them in regard to it? A. Yes.

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Q. Who was present at the discussion? A. That I could not recall. As I pointed out, we have a large number of informal discussions - sometimes by phone, and sometimes in the office - in addition to the normal board meetings and I do not recollect on which occasion it was that we discussed it.

Q. When you read that paragraph of Mr. Donohoo's circular, Exhibit 13, that struck you, didn't it, as a pretty fair point? A. Not particularly.

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Q. Did it strike you as being fair? A. It was fair for Mr. Donohoo to make the proposition.

Q. It was fair in your view because of the conflict of interest between Mr. Adler and Mr. Belfer as directors of Cumberland on the one hand - the offeree company - and their position as directors of FAI on the other hand - the offeror company? A. I don't think that was what led me to a feeling that it was fair for Mr. Donohoo to make that request. What led me - to the best of my recollection again - to think it was fair that I hold the view that in any takeover affair it is the bounden duty of those who are being offered to be taken over to do everything they

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possibly can in the interests of their shareholders, and there is no doubt Mr. Donohoo has attempted to do that.

Q. Of course, that duty was a duty, with respect, equally on Mr. Donohoo, Mr. Adler and Mr. Belfer, as directors of Cumberland, wasn't it? A. That is correct.

Q. So that if in your view it was fair and proper, as you have said, for Mr. Donohoo to take that attitude you will agree it was fair and proper for Mr. Adler and Mr. Belfer, as directors of Cumberland, to join in that attitude? A. Not necessarily. 10

Q. Not necessarily? A. No. It depends on whether they thought it would add any value over and above their assessment of what they thought was a fair and reasonable value, and if they were satisfied in their own minds that it was a fair and reasonable value I can see they were perfectly justified in not accepting Mr. Donohoo's suggestion to spend money on having a merchant banker put up a valuation. 20

Q. Have you ever heard the expression, "Justice not only should be done but should be seen to be done"?

A. I have indeed, Mr. Hughes.

Q. You thought Mr. Donohoo's proposition was fair?

A. From his point of view.

Q. From his point of view? A. Yes.

Q. From the point of view of the minority shareholders? A. From the point of view of Washington H. Soul, who was one of the minority shareholders. It was not incumbent on the board to accept the view of any particular director. 30

Q. The board of Cumberland was in an exquisitely difficult situation with two of its directors being also directors of the offeror company? It was in an exquisitely difficult situation, that two of its directors were also directors of the offeror company?

A. Yes.

Q. So didn't you think, on consideration of Mr. Donohoo's point, that in view of that exquisitely difficult situation it would be a good idea, objectively speaking, to comply with Mr. Donohoo's suggestion for an independent investigation? A. With respect to merchant banking the limited acquaintance I have had with their valuations they are so varied - 40

they vary so widely, from merchant bank to merchant bank, that therefore I would not think that any great faith could be placed on a valuation they arrived at. I would not think that it would be a truer and fairer assessment of the value of the company, bearing in mind the very special nature of Cumberland Holdings' operations which is in a highly specialised field. I would doubt very much if anyone in the world of merchant banking knows anything about the nursing home industry. That is my view. I could be perfectly wrong, if you produce someone who does know. But to the best of my knowledge it is not an area where they have been active.

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Q. Did you make any enquiries with a view to ascertaining whether there was a merchant banker beyond whose capacity the task of providing a report on Cumberland would be? A. No.

Q. Did you discuss this suggestion of Mr. Donohoo's with either Mr. Adler or Mr. Atkinson? Did you discuss it with either of them? A. Yes. I think Mr. Adler himself specifically raised the issue.

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Q. When? A. At one of our meetings.

Q. I suppose you put a view to Mr. Adler that supported Mr. Donohoo's view? A. I merely asked the question whether it was worthwhile.

Q. Did you say to Mr. Adler, "You may be running into trouble, because you are wearing two hats". Did you say that to Mr. Adler? A. I may have done so, but I don't recall.

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Q. If you did say that, he may have pooh-poohed it? A. He is not accustomed to pooh-poohing my suggestions. He may have persuaded me that my view was wrong.

Q. Did he persuade you that your view was wrong? A. Yes.

Q. How did he persuade you? A. That I cannot recollect at the moment, except for the substantial element that I can recall - first of all, that it would be rather a costly exercise.

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Q. Did he say how much it would cost? A. I don't recall that.

Q. The figure was not such as to shock you, was it, if you can't recollect how much it was? A. I

don't know. I sometimes try to repress things that shock me.

Q. Bearing in mind that you cannot recollect, was the figure such as to shock you with its extravagance?

A. I don't recall that, Mr. Hughes.

Q. What else did he say in the exercise of his powerful arts of persuasion to convince you that Mr. Donohoo's suggestion was not valid? What else did Mr. Adler say to you in the exercise of his persuasive powers? A. He had already convinced me that they had used their best endeavours to assess a fair and reasonable value.

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Q. You thought it would be too much trouble, in the case where there were two common directors of the offeree and offeror companies, to call in, in aid of the minority stockholders of Cumberland, an independent merchant banker or chartered accountant? A. Not too much trouble. I could not see that it would serve any useful purpose.

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Q. You could not see that it would serve any useful purpose? A. No.

Q. Because you had blind faith in Mr. Adler's capacity to wear two conflicting hats at the same time and be totally just? A. I did not have blind faith, but I had a substantial degree of faith.

Q. You think he is a man of such remarkable capacity that he can juggle two hats - put one on one minute and another the next - and retain complete balance? Is that what you say? A. I don't know about complete balance, but I have certainly seen him appearing in diverse operations, and he can switch from one to another and maintain impartiality.

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Q. He is a good hat juggler, is he? A. To my knowledge he does not even wear a hat.

Q. You know the metaphor don't you, Professor?

A. Yes, I know the metaphor.

Q. Here was a man in respect of whom you had such touching confidence making a statement in his report - one which you regarded as useless padding. Do you remember agreeing with me that it was padding?

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A. Yes, I agreed with you that it was padding, but not puffing.

Q. You agreed with "useless", didn't you? A. Yes.

Q. And here was a man who, in his letter, was trying to persuade stockholders in Cumberland to come along with the FAI offer? A. Yes.

Q. Who not only made a statement that was a piece of useless padding but who, according to what you said earlier, in effect suppressed material information from these stockholders. That is the sort of man we are dealing with? A. I have never said he suppressed material evidence. I have never said that.

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Q. He failed to include in that letter material information? A. Relevant information. That is perfectly correct.

Q. A whole range of relevant information? A. Yes.

Q. And he failed to include in that letter information that you submitted was relevant, didn't he?
A. You are talking now about the share price?

Q. He was deliberately omitting to include in that letter information that you admit you thought was material? A. He did not include it. Whether he deliberately omitted it - well, that is a matter for Mr. Adler himself.

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Q. Could it have been anything but deliberate, in light of the fact that you have told us that you counselled him to include the information? Could it have been anything but deliberate in the light of that fact? A. In that sense, yes. It is a considered -

Q. - and deliberate omission? A. A considered omission.

Q. And therefore deliberate? A. In the sense that any considered -

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Q. - decision is deliberate, yes. A. Yes.

Q. So that it was a case of suppressing information that you thought was material, and told him you thought was material? A. A considered omission. I stick at that.

Q. You tried to draw a line between a considered omission and a suppression, do you? Do you?
A. Yes.

Q. Did you come to read the Souls circular of 27th November, in which the cat was let out of the

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bag about the sale of the chairman's shares in July?

A. When did I?

Q. Did you come to read it? A. Yes.

Q. Did you say to Mr. Adler, "Well, the cat is out of the bag now", or words to that effect? A. I may have used a phrase which is not the same colloquialism, Mr. Hughes.

Q. But to the same effect? A. It depends upon what the effect is.

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Q. Having the same substantial meaning? A. I think I may have said, that "this is a matter of public knowledge".

Q. Did you say to him words to this effect: "It would have been a good idea if you had taken my advice in the first place and told the shareholders about the sale of your shares". Did you say that?

A. It is quite possible. I am human enough that I may not have resisted the opportunity to say something like that. I don't recollect it, but it is quite possible.

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Q. It is quite probable, isn't it? A. Yes.

Q. What did he say? A. As I don't recollect I actually did say it, I can't recall what he said.

Q. I suppose he gave a chairman's disapproving frown? A. Yes. That is quite possible. But it has no effect.

Q. He seems to have affected you - he seems to have had an effect on you in some ways, doesn't he? A. Yes.

Q. He seems to have overruled thoughts in your mind of genuine concern? A. He may not always take my advice, if that is what you mean.

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Q. Tell me, did he express to you grave concern that Souls, in their circular of 27th November, had let the cat out of the bag, so to speak? A. No. He took the view that there was nothing improper about the transaction and it was a fair and proper transaction. Therefore the answer to your question is "No".

Q. That was not quite the point. The very point that the transaction was fair and proper accentuated the need for its disclosure, didn't it? A. You asked me did he show grave concern. The answer is "No".

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Q. Did he show grave concern that the cat had been let out of the bag? A. No.

Q. You had always taken the view that the very fact that the July transactions were fair and reasonable accentuated the need for their disclosure to the public? A. I thought it would have been useful to disclose.

Q. Useful, and honest? A. Useful.

Q. And honest? A. Any action is honest if you give full disclosure. I strongly hold the view that the fullest possible disclosure should always be made. 10

Q. The fullest possible disclosure should always be made? A. Yes.

Q. And it was not in this case, was it? A. Some relevant available information - some relevant information was not made available. That is perfectly correct.

Q. You always had feelings of disquiet about that, didn't you? A. To some extent, yes. 20

Q. And you did your best to bring your feelings to the chairman's notice? A. Yes.

Q. You did your best to bring your feelings to Mr. Atkinson's notice? A. I presume so.

Q. I am not criticising you, A. I just don't recollect. If I did recollect, I would say "Yes".

Q. You brought to Mr. Adler's notice on more than one occasion matters of omission that were causing you grave disquiet? A. Not grave disquiet.

Q. Well, disquiet. A. Yes, or concern. 30

Q. Or concern. A. Yes.

Q. And on no occasion were you successful in persuading Mr. Adler to accept your view, were you?
A. On this particular issue?

Q. On any issue as to non-disclosure? A. With respect to this particular take-over?

Q. Yes. A. I was not able to persuade him to publish details prior to the Washington's deal. Then I dropped that issue after we decided to put it in the

formal take-over offer, after I had been convinced by his explanation.

Q. On reflection you do not really think his explanation carried much weight, do you? A. Well, it convinced me at the time, and that is all I can testify to.

Q. On reflection you now realise there were many holes in his explanation? A. If I were going through the same exercise again today I probably would be rather more searching. 10

Q. More searching, and more insistent? A. Yes.

Q. Because the net result of what has happened here is that the probity of Mr. Adler and Mr. Atkinson and the companies of which they are directors has been called into question by reason of matters of omission and mis-statement to which you drew at least Mr. Adler's attention at the time? A. The fact that we have this protracted case is an indication that it has been called in question, yes. Whether justifiably so is a matter for his Honour. 20

Q. And the failure to take your advice on these matters of omission and mis-statement has led to consequences, the possibility of which you foresaw at the time, and warned Mr. Adler about at the time, isn't that right? A. You give me a warm glow, Mr. Hughes.

Q. Whether it is a warm glow or not? A. I don't think that if he had heeded my advice - I don't think that by not heeding my advice that was the only factor which has led to this situation. 30

Q. Let us look at the things you took up. Don't get the idea that everything you did was perfect. That is a matter for comment later. You warned him about the sufficiency of the take-over offer, didn't you? A. Yes, on the question on whether it was sufficient.

Q. You warned him about the inaccuracy and the non-disclosure of certain matters in his persuasive letter to the shareholders of Cumberland? A. I questioned it. 40

Q. And you warned him of the consequences of not taking your advice, didn't you? A. I don't know if I went quite as far as that.

Q. You gave him a critical opinion of the consequences of not heeding your advice? A. Of the possibilities, yes.

Q. And you warned him that he really ought to tell the shareholders in Cumberland what he had got for his shares in July? A. Again, Mr. Hughes I questioned him.

Q. You questioned him? A. Yes.

Q. And he rubbished all these suggestions, didn't he? A. I could not say that he rubbished them. 10

Q. He discarded them? A. He did not accept them.

Q. He discarded them, didn't he? A. I said he did not accept them.

Q. So did Mr. Atkinson, insofar as you were privy to any discussions with him on this point? A. I cannot speak for Mr. Atkinson.

Q. You and he were operating on different levels, were you? A. He is there very regularly, and I am there very irregularly. 20

Q. So that you would say, I suppose, would you, if you were asked, that, whatever happens to other people's reputations, at least on some points, you did your best to see - unsuccessfully - that the minority shareholders in Cumberland had some protection?

A. I would not seek to evade the responsibility which is my lot as a director of FAI. It is a question of responsibility.

Q. Of course, in this case it was not treated on a corporate basis, because there was no board meeting at which Mr. Barrington or Mr. Herman were present at discussions of the take-over? A. At discussions of the final form of the take-over? 30

Q. Yes. A. No.

Q. Including consideration of the offer? A. The final offer price?

Q. Yes. A. It may be that my recollection is faulty, but my answer is that -

Q. This take-over proposal in its final form was brought into being by a junta of directors. You took in some respects what steps you could to see 40

that more frankness was used? A. If you mean by that I was a devil's advocate the answer is "yes".

Q. You were the devil's advocate on this junta of directors? A. I don't think I would like to be described as part of a junta. It has unpleasant connotations.

RE-EXAMINATION:

MR. BAINTON: Q. You were asked earlier this morning about "window dressing transactions", and you were asked your views as to the propriety of directors of a company indulging in such transactions. Do you recall the questions earlier this morning? A. Yes.

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Q. Did you understand you were being asked about a director participating in transactions in relation to the shares in his own company, or participating in transactions in shares in a subsidiary company, or participating in transactions in shares in some other sort of company and, if there are any other possibilities I have overlooked - A. I think I understood it in terms of the second of your propositions.

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Q. You were next asked about a selling order of 70 cents that had been placed in August 1974 and you said that you would not have done it yourself, and you acceded to the proposition that it was not proper by your standards. I think you may have told us later what you thought was improper about it, but would you tell us now? A. Well, so far as I was concerned, I was wondering, and I was a little disturbed as to why we should be giving away shareholders' money by selling an asset at 70 cents for which we paid \$1.25.

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Q. You also used this morning the expression that minority shareholders had been faithful to the company in Cumberland? A. That was hearsay.

Q. Yesterday I think your expression was, "fairly faithful". Which ever one of those you would like to use, what did you mean by that expression? A. Merely that they had held their shares for a long period of time and that, so far as I had been made aware, they had not complained too vocally about the low dividends in earlier years, and the fact that they seemed to be looking on it as more or less a permanent investment rather than a trading investment.

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Q. Would you apply the descriptions "faithful" and "fairly faithful" to a shareholder because he had his shares for a long time in circumstances where he

could not sell them as well as in circumstances where he had not tried to sell them? A. No. The fact that they had an opportunity to sell them and did not take the price would be the basis of saying they had been fairly faithful to the company.

Q. You were asked also about the amount of the loans between Cumberland Holdings and its parent. You had a look at the figures as at 30th June 1974, and the comparative figures as at 30th June 1973. Will you look now at a copy of Exhibit 77, which are the comparative figures for 30th June 1975, where the amount had gone up to \$367,179. Are you able to tell us in what part of the year ended 30th June 1975 that increase occurred? A. No, I am not.

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Q. You were asked after lunch a number of questions as to the reliance that could be placed on the stock market transactions. For a start, would you draw any distinction between the reliance that may be placed on the mere posting of a buying or selling advice with no transactions and transactions, occurring otherwise than between related parties, at which selling took place? A. Yes, I make a clear distinction, because the fact that the transaction had taken place would indicate that there was a willing buyer and a willing seller; therefore a market value had been determined. With the posted price you have no indication.

20

Q. Was there any way known to you under which someone considering the purchase of stocks could ascertain the identity of someone who has posted a buying order? Is there any way known to you under which that information can be ascertained? A. Not to my knowledge. I presume it is possible, if you find a broker and, by a miracle, he told you the truth.

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Q. Short of that sort of miracle the identity of the parties are just not available? A. So far as I am aware.

Q. The last matter I would like to ask you is this. You were asked some questions about a comparison of the asset backing of FAI and of Cumberland? A. Yes.

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Q. And your attention was directed to the goodwill factor? A. Yes.

Q. In the books, or in the consolidated accounts of FAI? A. Yes.

Q. And I think you acceded to the proposition that that represented the excess of the price paid for

shares in the subsidiaries over the net tangible assets? A. The net cost of acquisition.

Q. Is there any real difference between "the price paid for the shares" and "the cost of acquisition"?

A. No. It is just that that was the precise wording in the document.

Q. In the case of FAI, the insurance company, with a goodwill factor - which I take it you consider it does have - that goodwill is not shown in the accounts at all? A. That is perfectly correct.

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Q. It is an additional consideration? A. It is an additional consideration, yes.

Q. Without going into what you describe as a difficult situation or a difficult question of how you can evaluate that factor, would the profitability of the business as one aspect, and its profitability compared with other like businesses, have a bearing on the valuation of the goodwill? A. Yes.

(Witness retired)

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(Further hearing adjourned to 10 a.m. on Thursday, 30th October, 1975)

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

CORAM: BOWEN, C.J. in Eq.

CUMBERLAND HOLDINGS LIMITED & COMPANIES ACT

TENTH DAY: THURSDAY, 30TH OCTOBER, 1975

(Document previously m.f.i. 8 tendered;
objected to; rejected)

HIS HONOUR: Are there any corrections to yesterday's transcript? 10

* MR. VOSS: At page 587, your Honour, the third question should read:

"Q. At the time that meeting was held in April, did you not believe that in December, 1973 Mr. Adler had made a suggestion to a representative of Souls that FAI might acquire the minority ordinary shares in Cumberland?"

The third question from the bottom should read:

"I suppose you said to him words to the effect, 'You had a very big discount in making the selling order on the price you got for your own shares'?" 20

LAWRENCE JAMES ADLER

Sworn and examined:

MR. BAINTON: Q. Mr. Adler, is your full name Lawrence James Adler? A. It is.

Q. Do you live at 10 Fitzwilliam Road, Vaucluse?

A. I do.

Q. I think you are the Chairman of Directors of the company we have been calling FAI? A. Correct. 30

Q. Which is FAI Insurances Limited? A. Correct.

Q. And also of Cumberland Holdings Limited?

A. I am.

Q. I would like you to tell us a little bit about the past history of Cumberland Holdings, Mr. Adler,

(* Original Transcript Page 388)

if you would. Do you mind if I lead on some of this?

MR. HUGHES: No, you lead until I ask you not to.

MR. BAINTON: Q. It was incorporated back in 1960, Mr. Adler, was it not? A. It was.

Q. And initially it carried on a business as a finance company? A. Yes.

Q. I think it was listed on the Stock Exchange?
A. Yes.

Q. For some time shortly after it commenced to carry on business? A. Yes. 10

Q. In the initial subscription of shares, did you and members of your family or companies which you or your family controlled take up parcels of shares?
A. It did.

Q. Approximately what proportion of the ordinary shares were taken up? A. I think about 25%.

Q. For how long did it carry on a finance business?
A. Well, the credit squeeze came in November 1960, the one that Mr. Harold Holt introduced, and the obtaining of mortgage funds by the company to rediscount its paper became rather expensive. We decided to stop lending around 1962 and then only ran off whatever business was on the books. 20

Q. Was it actively carrying on any business to any extent at all from 1962 until it started to invest in nursing homes? A. No, it was a dormant company.

Q. When was the decision reached to branch, as it were, into the field of nursing homes? A. Well, we were searching for a fruitful activity to introduce into the company. We investigated private hotels; we investigated nursing homes and rejected it in the first instance; we investigated licenced hotels; we investigated retail shops. This took some two or three years. In the end, in 1968, we decided to look at nursing homes again, and on that occasion, we decided to go in for it. 30

Q. When was the first nursing home acquired?
A. I think in 1969.

Q. Up till 1969 then, had Cumberland Holdings remained listed? A. Yes. 40

Q. Was there during that period at any time much activity in Cumberland Holdings' shares on the market?

A. No, the company's shares were always very sparsely traded.

Q. During that period did you and your family and companies you controlled build up the number of shares?

A. Continuously.

Q. Which you had. How did that come about?

A. Well, there were no buyers on the board and, rather than to allow the shares to go right down to what could be far too low a price from our point of view, we decided that we will purchase shares if and when they become available.

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Q. When did FAI first acquire a parcel of shares in Cumberland? A. Under FAI - I take it you are referring to the parent company which was previously Australian International?

Q. Yes. A. That would be probably around 1970. I am not sure of the date. The first major shareholding in the company would have been purchased through Fire & All Risks Insurance Company which was, at that time, the parent company of the group.

20

Q. That was the original 25% A. No, that came later because at the time Cumberland was incorporated Fire & All Risks was not in existence yet.

Q. The 25% you mentioned a while ago, who held those? A. I could not tell you specifically; members of my family, directly and indirectly.

Q. Who, during the period up till 1969, was acquiring the shares that did come on to the market?

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A. Fire & All Risks Insurance Company.

Q. Fire & All Risks? A. Fire & All Risks, yes.

Q. Well now, what became the policy of Cumberland after the acquisition of the first nursing home? What business activities did it then carry on? A. It concentrated and specialised in nursing home ownership and much later we acquired a couple of private surgical hospitals.

Q. How many nursing homes has it operated itself?

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A. At what point of time?

Q. At any point of time? A. Well, right now we have seven.

Q. I think there was a brief period when you owned more than seven, having acquired, I think, three?

A. In 1973 we acquired - let me correct that. When I say "we acquired", there was another public listed company which owned three nursing homes called Convalescent Services Limited. That company was not faring well and we, we being FAI, looked at their share structure and considered whether it was suitable for a take-over. We rejected that at that time because it did not seem advantageous from anybody's point of view, and looked at the three nursing homes separately.

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One of them was of sufficiently high quality to become a member of our group; one was doubtful, and one we did not want to have at all. These three transactions were completed in June 1973. We bought the three.

Q. By that do you mean you had to take the three to get the one you wanted? A. That's right.

Q. What was done with them? A. We put one of them straight into Cumberland because it belonged to them, and the other two were held by FAI for resale. One was sold, I think, in a number of days and the other had to be held for three or four months until it was eventually sold.

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Q. So, Cumberland itself, by that, built its number up to seven? A. Yes.

Q. How many of those, let me ask you, have been dealing with Washington H. Soul? A. I understand six.

Q. You mentioned the two hospitals a moment ago?
A. Yes.

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Q. When were they acquired? A. Well, in one of them we acquired a sixty six and two-thirds interest in it only and that would have been about 18 months ago approximately, and the other one we acquired probably also around that time, but that required extensive rebuilding and, in fact, it was reopened last Thursday.

Q. The present position is that there are seven homes and two hospitals? A. That is correct.

Q. All now operating? A. That is correct.

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Q. Coming back again to the period between the commencement of this new field of Cumberland and the

middle of last year, again, the company remained listed on the Stock Exchange, of course? A. Yes.

Q. To what extent were its shares traded at any time? A. At all times very lightly.

Q. Well now, so far as you are aware, was that because there was an absence of buyers or an absence of sellers or both? A. I would think an absence of both. There was one buyer at all times and that was originally the Fire & All Risks Insurance Company and that was later on replaced by what is now referred to as the Adler family companies which, of course, if I may add, were not really Adler family companies entirely; some of them were the staff superannuation fund.

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Q. I will come back to that in a moment. There had been a period during which Fire & All Risks had been buying on the market? A. Yes.

Q. That stopped and what has been described as your family companies commenced to buy? A. Yes.

Q. Why was that change made? A. Well, acquiring a small parcel of shares during the year from month to month presented the company's accountant and auditors with quite insurmountable problems of consolidation and I was requested to stop buying these shares unless I could buy them in large blocks, and this made good sense, so, I decided to buy them in the Adler family company.

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Q. As far as you know, were there any purchases at all for shares in Cumberland from, say, the end of 1969 up to the middle of 1974, other than Fire & All Risks and what has been described as the Adler companies? A. I wouldn't be prepared to say that there were none other but I can't recollect any. If so, there could have been one or two.

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(Extract from share transfer journal tendered; admitted and added to Exhibit 12)

Q. Mr. Adler, during the period virtually since its first quotation, the number of shareholders of Cumberland has become less and less each year? A. Yes, they have.

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Q. Now, in 1969 there was an issue of cumulative preference shares? A. Yes.

Q. I think 303,768 were issued and Fire & All Risks took up 111,600 of those? A. Yes.

Q. And resold 100,000 to Mercantile Mutual Life Assurance in November 1969? A. Yes.

Q. Then, in 1969, later in the year, there was a rights issue in respect of the ordinary shares and in 1970 a placement through a firm of stockbrokers of 150,000 ordinary shares and 150,000 redeemable preference shares? A. Yes.

10

Q. Washington H. Soul Pattinson took up a number of both of the ordinary and redeemable preference shares from that placement? A. The placement was made to Constable & Bain, at that time known as Rudd, Bain and McDonald, members of the Sydney Stock Exchange. They, in turn, placed some of it with Washington H. Soul Pattinson.

Q. In the following year, 1971, Washington H. Soul acquired a further parcel of preference shares by buying 24,100 from Fire & All Risks and 157,370 from FAI? A. Correct.

20

Q. I think there have been some few purchases on the market by Washington H. Soul, have there not? A. I am not aware of that.

Q. Was there some discussion when those shares were acquired by Washington H. Soul Pattinson & Co. whether that firm should have somebody on the board of Cumberland? A. There was a discussion organised by Mr. Bain who was the senior partner of Rudd, Bain and McDonald at the time, and a meeting took place between Mr. Jim Millner and myself. I took Mr. Millner out to inspect our hospitals or nursing homes and, in the car on the way out, some discussion took place concerning an invitation to Mr. Millner to join the board of the company.

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Q. Was that before he had taken up the shares or after? A. That is why I was so long answering, Mr. Bainton. I am not sure.

Q. It was the broker that arranged this inspection?
A. Yes.

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Q. I think Mr. Millner remained on the board until he resigned at his own request and then Mr. Donohoo went on? A. Yes.

Q. There have been a number of references in

evidence in this matter, Mr. Adler, to nursing homes being subsidised. Is it, in fact, correct that nursing homes are subsidised? A. No, it is not. Nursing homes are not subsidised, regrettably. The patients receive a subsidy from the Government but that is not a subsidy to the hospital as such. Indeed, it could be described that the nursing home is a price controlled industry; the Government sets the fees, the maximum fees that we may charge, and the patient has to find the money, whether he finds it by applying to the Government or subsidy, pension payments or private assets.

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Q. Is there, in fact, any arrangement under which the patient can have the money that he is to get from the Government paid directly to the hospital?

A. Yes. When the patient checks into the hospital he completes a form under which the Commonwealth pays the amount of money straight to the nursing home, yes.

Q. Can you tell us approximately when it was that FAR became the holder of more than 50% of the capital of Cumberland? A. As far as the date is concerned, no, Mr. Bainton, I don't know the date.

20

Q. Approximately? A. Probably in the 70's, early 70's.

Q. So that was a little time after the venture into the nursing home field? A. Yes.

Q. I think, since then, it has at all times held more than 50%? A. Yes, it has.

Q. The percentage it has now is something over 70%? A. Correct.

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Q. To the time the accountants or auditors said that was giving trouble and purchases began to be made by what has been described as your family company?

A. Yes.

Q. I think the companies which did acquire them or persons and companies were yourself, your wife, your children? A. Yes.

Q. Midland Corporation which I think is a company you do control? A. It is a family company, yes.

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Q. And Eagle Corporation Pty. Limited? A. That is the FAI staff superannuation fund.

Q. I think the company - A. Is a trustee and buys on behalf of.

Q. It is correct to say that you control the company as such? A. I am a trustee of the superannuation fund and I carry out all share purchases, yes.

Q. The shares that Eagle Corporation have taken up were, in fact, FAI superannuation fund shares?
A. Yes.

Q. Falkirk - would you mind telling me the rest of its name, please? A. Falkirk Properties and Falkirk Insurance. There are two Falkirk companies. 10

Q. I think Falkirk Properties had also acquired some shares in Cumberland? A. Yes, Falkirk is a public investment listed company.

Q. When did it acquire its shares in Cumberland?
A. During that period of time between 1971 and 1974.

Q. Were they acquired by purchases on the market?
A. Yes.

Q. Before I move off the business of Cumberland, we have heard quite a deal in this case about at least the first page of a thing called the "FAI Reporter"?
A. Yes. 20

Q. I think that is something that goes out monthly, is it not? A. No, it is either two or three monthly, not quite regular. It is either two or three monthly.

Q. Who is it sent to? A. It is sent to all shareholders of FAI Insurances Limited; it is sent to all shareholders of Cumberland Holdings Limited, it is sent to major insurance brokers and agents and major clients of the company. 30

Q. Now, the one we have heard so much of is dated October 1974. When would that have gone out?
A. Around that time, probably the latter part of November, but I wouldn't know the exact date.

Q. So, all of the shareholders in Cumberland Holdings Limited would have had that document by the time -

MR. HUGHES: Don't lead please.

MR. BAINTON: Q. Well, it had been sent, had it, to all the shareholders - (Objected to) 40

Q. Can you recollect whether it was despatched before the take-over offer in respect of the Cumberland Holdings shares? A. No, I cannot, but the date can be established from the company's mailing register without any difficulty.

Q. Do you recollect the date on which the take-over documents went out? A. Yes, on 21st November I believe.

Q. And there would be some records that would indicate when the October 1974 Reporter went out? 10

A. Indubitably.

Q. Did Mr. Donohoo get an advance copy of the FAI Reporter or would he have got his through the mail?

A. He would not have received an advance copy but he would have received his copy through the mail, yes.

Q. How far in advance of the mailing could he have got one? (Objected to)

Q. How far in advance of the despatch through the mail to the people you have described could anybody have got an advance copy? A. I am in some difficulty, Mr. Bainton. I don't understand the question. I thought I just said that Mr. Donohoo did not get an advance copy. 20

Q. I am sorry, I thought you said he did.

HIS HONOUR: Q. I thought you did? A. No, I am sorry, I said he did not get an advance copy.

MR. BAINTON: Q. In July 1974 you offered to FAR the parcel of shares in Cumberland, both ordinary and preference, that you, your wife and children, Midland Corporation, the superannuation fund and Falkirk Properties had? A. Yes. 30

MR. HUGHES: And Lader.

MR. BAINTON: Q. I am sorry, and Lader, which again is a company you control? A. Yes.

Q. At the stage of that offer had you in contemplation making any take-over offer for any of the other shares in Cumberland Holdings Limited? A. No.

Q. When, after July 1974, did the question of making such a take-over offer arise? A. After we had received the letter from the Sydney Stock Exchange asking FAI to reduce its holding in the company. 40

Q. Who was it that raised the question of whether or not such an offer would be made? Do you recollect?

A. Whilst I don't specifically recall it, it would have been me I should think.

Q. With whom was it discussed, to the best of your recollection? A. The letter of the Stock Exchange was tabled at the FAI meeting and was fully discussed between the FAI directors.

Q. Well now, did the board of FAI consider whether or not shares in Cumberland should be sold to bring the holdings below 75%? A. We considered the matter and decided against it. 10

Q. I am sorry. A. And decided against it. We considered the matter and decided against it.

Q. It was at that stage, was it, that the question of making an offer to the other shareholders came up for discussion? A. Yes.

Q. At that stage was any decision made as to whether an offer would be made or to what its terms would be? A. It was decided that FAI will not reduce its holdings. Therefore, we felt that we were obliged to make an offer and such a decision was in fact reached. 20

Q. At that stage, had a decision been made as to what the terms of the offer would be? A. No.

Q. You are aware of what the terms of the offer subsequently made in fact are? A. Yes.

Q. Can you tell us when they were finally determined? A. Putting a date on it, no, I cannot.

Q. In relation to an event? A. After the FAI accounts and figures were made available to us. 30

Q. We have seen those accounts and my recollection is they are dated 3rd October? A. Yes.

Q. Would you have had them before that date or was that the date of receipt of them? A. If that is the date on the accounts, we certainly would have had them a few days before that, Mr. Bainton.

Q. Can you recollect how long after the first receipt of those accounts the final terms of the takeover offer were resolved upon? A. The formal offer was at a board meeting which is recorded and dated. 40

Leading up to that there were several discussions between various people and, specifically, the FAI directors.

Q. May we take it the formal meeting records the consensus that the directors reached beforehand?

A. That is correct.

Q. Are you able to place the time in relation to some event - A. Not without checking the minute.

Q. When the directors finally got together? A. No, I am not. 10

MR. HUGHES: I think he said "not without checking the minute".

MR. BAINTON: I don't think he did.

WITNESS: In the first place, I said I could check the date of the minute. Mr. Bainton's question then was whether I could put some event to work and I said "No".

MR. BAINTON: Q. In case there is any want of clarity about it, I was wanting to know if you could tell us how long before the formal resolution of the board to send the offer out the directors had agreed among themselves what its terms would be? A. A number of days, Mr. Bainton, but I can't put a date on it. 20

Q. Did you at the time that agreement was reached, whether formally or informally, to make the offer that was made, consider it to be a fair and reasonable offer? A. Yes.

Q. Would you tell us what led you to that view: what were the factors you considered? A. I find some difficulty to refer to it really as individual facts. In aggregate, I was of the opinion that an FAI share was considerably more valuable than a Cumberland share, taking into consideration all matters in aggregate but not separately. 30

Q. At the stage when you yourself came to the view that it was an offer which should be made, would you, as a director of FAI, have agreed to the making of any higher offer to the shareholders in Cumberland? A. No, I would not. 40

Q. Would you, at that stage, have agreed as a director of FAI to the making of any cash offer to the shareholders of Cumberland? A. No, I would not.

Q. The offer was withdrawn by a letter dated 6th December, 1974. I think the terms of the offer required the acceptances to be sent to the company's auditors, did it not? A. That is correct.

Q. And you have obtained from the auditors a list of the people who, prior to the withdrawal, had sent to them acceptances and I think that is the list you obtained or, at least, it is a photocopy of it.

A. This letter is dated 10th October, Mr. Bainton, so this was not obtained at that time. 10

Q. No, I did not suggest it was. A. I haven't seen it before. This is the first time I have seen it.

Q. I think you did give instructions to the auditors to prepare a list of acceptances? A. I didn't do so personally.

Q. Oh, you didn't personally? A. I am sorry.

HIS HONOUR: October which year though?

MR. BAINTON: This year.

WITNESS: 1975, yes. 20

(List of acceptances contained in letter from Gibbings and Webb dated 10th October, 1975 tendered and admitted as Exhibit 85)

MR. BAINTON: Q. Mr. Adler, when the take-over offer was withdrawn, these people were told that they might withdraw their acceptances if they wished to do so?

A. That's correct.

Q. And all but one of them in fact did withdraw the acceptances? A. That's correct.

Q. One refused to withdraw it, I think? A. That's correct. 30

Q. And, rather than have FAI Insurances make a special issue of, I think, 800 shares to him, it was arranged that somebody would transfer a parcel of 800 shares to him and take his Cumberland shares in exchange? A. That is correct.

Q. Would you look at the document which has been marked 12 for identification and I want to know if the original of that letter was sent, on or about the date it bears, to Mr. Millner. Mr. Adler, is 40

that copy of a letter which you, at least dictated?

A. Yes, it is.

Q. Did you sign the original? A. I did.

Q. What was done with the original after you signed it? A. To the best of my knowledge, it was mailed. (Objected to)

Q. After you had signed it, what did you do with it? A. I had given it back to my secretary with the rest of the day's mail.

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Q. Is there some system in your office under which documents of that description when given to your secretary are dealt with in some way? A. They are despatched.

HIS HONOUR: Q. What is the system? The secretary does not go out and post them, Mr. Adler. I suppose, in turn it goes down the line. What is the system?

A. I think the system is my personal mail is mailed by my secretary because I usually stay much later. The mail closes at four o' clock and I don't usually deal with my mail until after four, so, the actual physical posting is done by my secretary.

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Q. She does the posting as well? A. Everything.

MR. BAINTON: Q. Does that concur with the date on that document? A. Yes.

Q. That date is? A. 23rd January, 1974.

Q. After that date did you have any discussion with Mr. Millner relating to the contents of the letter?

A. I did.

Q. Did he have anything to say?

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HIS HONOUR: Could we identify when this was? You have said "subsequently".

MR. BAINTON: Q. How long after? A. A fortnight or three weeks. I cannot pinpoint it.

HIS HONOUR: Q. Not precisely? A. I can't.

MR. BAINTON: Was there any discussion between you about the subject matter? A. Yes.

MR. HUGHES: This is Mr. Millner.

MR. BAINTON: Q. Yes. A. There were two discussions on this subject. I rang him and I asked him whether he reached a decision about the contents of the letter and he said "No, not yet;" he is putting it up to his next board meeting and he will get in touch with me subsequently. He did do so.

Q. What did he say? A. Again, I can't put a date on it, and he said No, Washington H. Soul is not interested in doing what I was suggesting.

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(Copy letter from L.J. Adler to J.S. Millner dated 23rd January, 1974 tendered and admitted as Exhibit 86)

Q. Mr. Adler, I think throughout 1974 anyway, there were six directors of FAI? A. Yes.

Q. Was it the practice for directors' meetings always to be meetings of all six or was there a sub-committee? A. No, the majority of the meetings took place between the three outside directors and myself.

Q. The three outside directors being? A. Being Professor Wilson, Mr. Eric Atkinson and Mr. Jack Belfer, and I made up the fourth. The two additional directors are Mr. Barrington who was general manager of Cumberland Holdings Limited and Mr. Herman who was the company secretary.

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Q. Was there some reason why that practice had been adopted? A. Yes, I preferred them to work.

Q. You preferred them to be executives, did you?

A. Yes, unless it was some legal matter involved which required their specific attendance. Otherwise, I preferred them not to be there.

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CROSS - EXAMINATION:

MR. HUGHES: Q. Mr. Adler, you engaged in the practice of window dressing the market price of Cumberland shares from time to time, did you? A. I don't know what you mean by window dressing. I have at all times been a buyer or a seller of the stock.

Q. I will come back to window dressing in a moment. May we take it that before going into the witness box for the purpose of giving evidence in this case you have exercised great care in consulting your recollection of all the events relating to the take-over offer and the history leading up to it? A. Yes.

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Q. Have you from day to day during the hearing of these proceedings read the transcript of evidence?

A. No, I have not, I have attended the court during Mr. Donohoo's evidence. I have read the subsequent ones with the exception of the last day.

Q. Except? A. Yesterday's, I think. Was it yesterday? Yesterday.

Q. May his Honour take it that you have read the whole of the transcript of Mr. Atkinson's evidence?

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A. Yes, I have.

Q. You were advised to leave the court when Mr. Atkinson commenced giving evidence? A. It was suggested it might be better if I did not hear but I was advised that I was permitted to stay if I desired to.

Q. On the basis of that advice you left the court?

A. That is correct.

Q. You knew when you left the court the basis of the advice which you accepted was that it would be better for you not to be in court in view of the fact that you were a possible witness while other witnesses were giving evidence about events in which you were implicated. You knew that? A. I know I was specifically advised. I was also advised that it was left to my discretion.

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Q. You exercised your discretion to leave on the basis that it would be better if you were not present to hear the evidence of witnesses who were implicated in the events and conversations of which you were also a party? A. No. I decided not to stay because I could ill afford the time.

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Q. But you could afford the time to read the transcript of other witnesses' evidence? A. I could.

Q. You read Mr. Atkinson's evidence with loving care? A. Loving care would not be my expression. I read it.

Q. Carefully? A. I read it.

Q. You read it with a view to getting yourself ready for the witness box, did you not? A. I read it and obviously -

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Q. With a view to getting yourself ready for the witness box? A. No, I do not think so. I read it

because of my continued interest in the welfare of the company. I wanted to know how my co-director was faring.

Q. You knew you might well be going in to the witness box? A. I was not sure at that stage.

Q. We know there was a delay. You were aware you might be going in to the witness box and you read the transcript of Mr. Atkinson's evidence? A. Yes. Indeed, there was every possibility -

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Q. Well known to you? A. A possibility.

Q. Do you remember me asking you questions about reading Mr. Atkinson's evidence in the transcript with a view to getting yourself ready to go into the witness box? A. Yes.

Q. Would you not agree that you hesitated significantly in point of time before answering that question? A. I was thinking.

Q. Will you not agree you hesitated significantly in point of time before answering that question? A. I do not know whether thinking is hesitating. I was certainly thinking.

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Q. You delayed before commencing the answer? A. I was thinking.

Q. You delayed before commencing the answer? A. I was thinking.

Q. Will you answer my question? A. I do not think I can go beyond saying I was thinking.

MR. HUGHES: Your Honour, the witness has not answered the question, subject to your Honour, I want to insist upon an answer.

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HIS HONOUR: It may depend on what connotation is carried on the word "delay", whether it involved some wilful element.

MR. HUGHES: Q. You paused significantly, did you not? A. Yes, I did.

Q. Before answering a very simple question? A. I did not consider it a simple question.

Q. When you read the transcript of Mr. Atkinson's evidence, did you have in mind that it might help you

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to do so, so you would be ready for certain questions, when you went into the witness box to know what Mr. Atkinson had been saying? A. No, I do not think so. Mr. Atkinson was apparently asked more on the legal drafting of the documents, as far as I can recall.

Q. You know very well he was not only asked questions on that subject? A. I thought I said mainly.

Q. You know very well his cross-examination was by no means confined to the subject you have just mentioned? A. I thought I said that it was confined mainly to that. 10

Q. When you read the transcript, did you have in mind that the reading of it might help you to prepare yourself for cross-examination? A. No, I do not think so. I rather think the reading of the transcript can confuse you even more.

Q. Did you think it would not help you to get ready for cross-examination? A. I did not think that either. No, I did not think that either. 20

Q. Whilst reading the transcript of Mr. Atkinson's evidence, did you ever discuss from day to day with Mr. Atkinson, while he was in the witness box, his evidence? A. I did.

Q. When did you tell any one of your co-directors of FAI for the first time your action in placing a selling order for Cumberland ordinary shares at 70 cents on 7th August, 1974? A. I do not recall the date. It would have been some time ago, a considerable time ago. 30

Q. To whom did you first reveal the information?
A. It was not information or a revelation. It was my normal practice to buy and sell Cumberland shares, therefore there was nothing special about this. I do not recall when I mentioned it to the individual members of the board. I do know Professor Wilson did not know anything about it according to what he told me last Thursday. I do not recall specifically when I mentioned it to the others or whether I did so or not. 40

Q. When did you first tell Mr. Atkinson about it - that you had placed a selling order for Cumberland ordinary shares at 70 cents? A. I have no special recollection of the date.

Q. Was it this year? A. I would think so,

Q. This month? A. I have no recollection of the date.

Q. I am asking you to indicate as best you can approximately when it was you first told Mr. Atkinson that you had on 7th August, 1974 placed a selling order for Cumberland ordinary shares, 10,000 at 70 cents? A. I am unable to put a date on it or even an approximate date.

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Q. How long before the case started was it, in terms of an approximate number of weeks or days? A. I am sorry, I do not know.

Q. You do not know? A. No.

Q. Can you say when you first told Mr. Atkinson you had placed, on 19th August, 1974, a buying order for 25,000 Cumberland shares at 50 cents? A. My answer and reply is the transactions were very much treated as of no concern.

Q. Of no concern - by you? A. Yes.

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Q. Did you treat these transactions as of no concern at all? A. Yes.

Q. Of no relevance? A. No orders were executed against them. I considered them as of no relevance.

Q. At the time you placed them? A. Both at the time I placed them and subsequently.

Q. You did not think at the time you placed the order there was any purpose in placing them? A. I did not even remember the whole order until we got the records back from the brokers.

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Q. You say you had no purpose in mind in placing those orders? A. Not at all. I did not mean that at all. I had a purpose.

Q. You did not reveal your purpose to any of your co-directors at the time? A. No.

Q. Will you not agree you did not reveal the fact of placing the orders or the purpose of placing them - and I am talking of the August orders - to Professor Wilson until he came to you a few days ago, last week? A. That is correct.

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Q. He told you when he came to you that he had discovered this information from some other source?

A. Yes.

Q. Professor Wilson, when he came to you last week and told you that he had found out in August of last year you had placed a selling order for 10,000 ordinary shares in Cumberland at 70 cents and in the same month, some days later, a selling order for 25,000 - a buying order for 25,000 at 50 cents, was angry was he not? A. I am pausing again.

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Q. So I notice? A. No, I would not call him angry.

Q. He was not angry? A. No, I don't think so.

Q. Did he give vent in what he said to you to any ire? A. It is a matter of interpretation. He certainly indicated that he wanted to know what it was all about. I gave him that information which I believe to the best of my knowledge he accepted as being fair and reasonable.

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Q. I want to come back now to June 1974. Would you agree that on 24th June, 1974 you placed through Messara and Company a selling order for Cumberland ordinary shares at a price of \$1.50? A. The date I won't confirm without reference to documents, but in principle I did place such an order.

Q. Have you and Mr. Atkinson discussed the subject of window dressing in relation to share prices since this case started? A. Yes, we have.

Q. When? A. Not the word "window dressing". We discussed the nature of the transactions entered into which later on has been described, as I understand, as window dressing.

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Q. You discussed that matter, that is the nature of the transactions entered into on the stock market with Mr. Atkinson? A. Yes.

Q. During the progress of the case? A. That is correct.

Q. You discussed that matter with him, did you not, when it came to your notice as a result of reading the transcript, that he had used the word "window dressing" to describe the nature of the stock market activities in which you had engaged in relation to the Cumberland shares? A. Certainly that must have

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been so because the word "window dressing" would not have occurred to me otherwise.

Q. You read Mr. Atkinson's reference in the transcript to "window dressing"? A. Yes.

Q. You discussed that part of his evidence with him? A. Yes.

Q. Do you remember telling his Honour rather early in the cross-examination that you had not discussed with Mr. Atkinson his evidence? Do you remember telling his Honour that? A. No, on the contrary. I remember I said I discussed it with him. 10

Q. If you said you did not discuss his evidence with him, that would be untrue? A. Yes, it would be.

Q. Untrue to your knowledge at the time you said it, if you said it? A. Yes, but I did not say it.

Q. When you discovered by reason of reading the transcript - when you discovered Mr. Atkinson's use of the word "window dressing" to describe your market activities in Cumberland shares you were displeased with the use of that word. A. I disagreed with him, yes. 20

Q. Were you displeased? A. It does not pay to be displeased with your fellow directors. I disagreed.

Q. You indicated that very strongly to him? A. No.

Q. Did you indicate to him you disagreed with the use of that phrase? A. I would have said that I would not have used that word. That was as far as I would have gone.

Q. At the time you placed the selling order at \$1.50 at the end of June - you have not agreed that is the precise date but you agree it is in the general area? A. Yes. 30

Q. You knew that there had never been a sale of Cumberland shares on the exchange as high as that price? A. I do not believe there had been.

Q. That was your belief at the time? A. Yes.

Q. Did you, at the time you placed that selling order at \$1.50 recognise if you were to place such an order - you being a director of the company in question, namely Cumberland, it was encumbent upon 40

you to act with complete probity in relation to that matter? A. I am not aware that the placement of an order or any order comes under probity.

Q. I do not think you understood the question. Did you recognise at the time you placed the order of \$1.50 it was necessary for you to act in relation to the matter of placing the order with complete probity because of your position as a director of Cumberland and as Chairman of FAI? I am having difficulty in answering. I am not aware that the placement of an order even involves my probity in any shape or form.

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Q. Probity? A. Yes, therefore I am unable to answer the question.

X Q. You recognised at the time you placed the order it would be quite improper for you, by reason of your position as a director of two companies, FAI and Cumberland, to rig the market at false prices?

A. I am not aware I was rigging the market.

Q. I am not suggesting that at the moment - all things come in seasons. A. Yes.

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(Previous question read)

WITNESS: My answer was I am not aware I rigged the market.

MR. HUGHES: Q. That is not an answer. I want an answer to that question. It is not implicit in the question that you did rig the market. I am asking you what you recognised at the time to be the standard of propriety in the situation which then existed - with that in mind could you go back to the question and please answer it. Perhaps the question might be read again. A. Yes.

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(Above question marked X read)

WITNESS: I am very sorry for taking so much time. If I can understand correctly and I would like to answer it properly the question is would it be proper to rig the market - to simplify the question - is that the question? I do not understand the question.

MR. HUGHES: Q. What is the part you find difficulty in understanding? A. Translating it into a simple form. If the question is, is it proper to rig the market?

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Q. At a false price? A. Rigging the market, it

seems to indicate false prices, does it not?

Q. I am asking you at the time you placed the selling order did you recognise it would be highly improper to make a market for the shares at a false price? A. There is no such thing as a false price if you are willing to sell at the price. I do not understand false prices.

Q. I mean a price that to your knowledge, as a director of Cumberland and FAI, which has no real relationship to the value of the share. Do you understand that? A. I thoroughly disagree with it. 10

Q. With what? A. That there is such a thing on the stock exchange as a proper price as such.

Q. When you placed the selling order of \$1.50, you then intended later to place a buying order at \$1.25, did you not? A. Whether I intended to or not, I did so.

Q. I am asking you this, when you placed that selling order for - I withdraw that question. I show you Exhibit 51. A. Yes. 20

Q. Have a look at the top right hand corner of the selling order on Exhibit 51? A. Yes.

Q. Will you agree now you placed the selling order for Cumberland ordinary shares at \$1.50 on 24th June. Do not look at the other documents for the moment.
A. This is the first time I have seen this document. I cannot agree with it because it does not represent anything to me but I had previously confirmed I had placed such an order. 30

Q. On or about 24th June? A. Yes.

Q. I show you the Cumberland statement, Exhibit 47?
A. Yes.

Q. Would you read that please? A. Yes.

Q. Your first on market buying order for Cumberland shares after 30th June seems to be on the 2nd July, will you agree with that? A. Yes.

Q. You had within a week or so before that placed a selling order at \$1.50? A. Yes.

Q. That was for 1,000 shares in Cumberland ordinaries? A. The figure is not known to me offhand - 40

no argument.

Q. Have a look at that document again? A. Yes, 1,000.

Q. And the date you placed that selling order was 24th June? A. Yes, as previously stated I cannot confirm it. It seems correct.

Q. When you placed that selling order at \$1.50 on or about 24th June, it was your intention at that time, was it not, to place buying orders for the same shares - that is Cumberland ordinary shares, some days later. A. I cannot confirm that. I can confirm that at all times I was both willing to buy at a pre-determined figure and sell at a pre-determined figure. I cannot relate the two events.

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Q. The two events seem to be in a space of eight or so days? A. Yes.

Q. Will you not agree now that in all likelihood it was your intention at the time you placed that selling order to go back to your brokers, some days later, within a very short space of time and place a buying order, or buying orders, at \$1.25? A. No I think the two events are unrelated.

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Q. Totally unrelated? A. Totally unrelated. I think you will find that the pattern of my buying shares over the years is buyer or seller. You are rotating.

(Short adjournment)

MR. HUGHES: Q. When did the thought of making the take-over offer for the ordinary shares in Cumberland first occur to you? A. It was after the receipt of the letter from the Sydney Stock Exchange.

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Q. That was the very first time ever that the thought occurred to you of making a take-over offer for the ordinary shares of Cumberland? A. I cannot say it would have been the first time ever. It may have been there a year or two prior - there may have been some thought in my mind but I do not recall any such event.

Q. You appreciate the significance from the point of view of your case in these proceedings of it being established that the thought of making a take-over offer for the ordinary shares of Cumberland first

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occurred to you only after the receipt of the letter from the Stock Exchange? A. Yes, I do.

Q. In fact you appreciate if it were found you had such a thought in mind at any earlier point of time that could carry certain consequences legally?

A. Possibly, yes.

Q. Do you remember having a conversation with Mr. Millner of Washington Soul's? A. I do.

Q. James Millner? A. Yes.

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Q. Late in 1973? A. It was some weeks after the despatch of the letter we discussed earlier, the date I do not recall.

Q. Did you have a conversation in your office with Mr. Millner in December 1973? A. I cannot say.

Q. You cannot say? A. No.

Q. I want to try to give you the circumstances so you can consider answering this question. Do you remember in 1973, in December, you telephoned Mr. Millner and said you would like to see him to discuss a matter with him? A. That is correct.

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Q. Is that right? A. Yes.

Q. Mr. Millner, in response to that telephone conversation, came to your office? A. That is correct.

Q. And a conversation took place between you in which you said "FAI is thinking of making a take-over offer for Cumberland." A. That is not correct.

Q. You deny that? A. I do.

Q. Was anything like that said at that time?

A. We were discussing with Mr. Millner the question of preference shares and this is the only matter I recall discussing with him for quite some time.

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Q. You appreciate, don't you, if in this conversation which took place in your office in December 1973 you said to Mr. Millner "FAI is thinking of making a take-over offer for the ordinary shares of Cumberland", that could carry consequences from the viewpoint of this litigation? A. That is untrue.

Q. I appreciate that. I accept for the time being your assertion that it is untrue, but I am asking you

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a different question. I am asking you whether now you appreciate if such a conversation as I have put to you took place in December 1973, that could carry consequences in relation to this litigation? A. Possibly so.

Q. I want to put to you a version, an account, on my instructions of the substance of this conversation. Do you follow? A. I do.

Q. Did you not say to Mr. Millner words to the effect "FAI is considering making a take-over offer for Cumberland"? A. No, I did not. 10

Q. Or anything like it? A. No, I did not.

Q. Did you say to him "We are thinking of offering one FAI share, ordinary share, for two Cumberland ordinary shares"? A. I did not.

Q. You say you said nothing like that at all?
A. Nothing like that at all.

Q. Nothing like that? A. No.

Q. Did you say to him in that conversation that you were, that is FAI was thinking of offering one FAI preference share for each Cumberland preference share? A. That was discussed between Mr. Millner and myself. 20

Q. On this occasion? A. I cannot say.

Q. Did you in this conversation ask Mr. Millner for his reaction to the proposal that you put to him, whatever that proposal was? A. Yes.

Q. Will you agree in this conversation reference was made to the then market value of FAI ordinary shares? A. Not that I recall.

Q. Will you deny such a reference was made? A. Not that I recall. 30

Q. Will you deny it was said? A. I cannot go beyond that, I do not recall it.

Q. In fairness to you, you are drawing a distinction between a failure to recollect whether something was said or not said and an outright denial it was said? A. One assumes I have a recollection and the other one does not. I have no such recollection. If I may add, in discussing preference shares it could be naturally part of the discussion that ordinary 40

market stock would be discussed but I have no such recollection.

Q. Does your recollection enable you to say, at the time of the conversation, the current market price on the Stock Exchange for FAI ordinary shares was \$1.70?

A. I do not recall the time of the conversation, therefore I cannot recall the market but that would be a matter of record.

Q. Does your recollection enable you to say at the time of the conversation the last quoted sale on the Stock Exchange for Cumberland, that is December 1973, was 65 cents - that is August? A. I have no such recollection. It is a matter of record.

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Q. When you asked Mr. Millner for his reaction in this conversation to your proposal - I appreciate you say it was a proposal for preference shares - did he say words to this effect "I do not think we will be interested but I will go away and think about it"?

A. Yes.

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Q. Did he, some days later, telephone you and in fact confirm that Souls was not interested in the proposal? A. My recollection is I telephoned him but the substance of the conversation is undoubted.

Q. The proposal that you should sell what has been described here for the sake of abbreviation and convenience, your family shares in Cumberland, at \$1.25 for ordinaries, that was made to a board meeting of FAI on 11th July? A. Yes.

Q. Would you have a look at Exhibit 47? A. Yes.

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Q. When did you first form the intention of offering your family shares in Cumberland to FAI at \$1.25 for ordinary shares? A. Either that morning or the night before the board meeting. Probably the night before. I have no specific recollection of the time.

Q. Might it not be correct to say you had that intention in mind of offering the Cumberland ordinary shares held by your family interest to FAI prior to 30th June? A. No, I definitely did not.

Q. You did not? A. No.

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Q. Did you not have it in mind to offer your family interest's ordinary shares to FAI at the time you placed that selling order for the Cumberland ordinary shares at \$1.50? A. I did not.

Q. You did not? A. No.

Q. You say the decision was first formed in your mind either on 11th July or the night before?

A. That would be correct.

Q. Of course looking at Exhibit 49, will you not agree you were placing buying orders for Cumberland ordinary shares on the stock market contemporaneously with the formulation in your mind of that decision, that is the decision to offer your family's ordinary shares in Cumberland at \$1.25 to FAI? A. The orders were placed beforehand. They were the executed dates but the orders were placed some time before that. I do not recall the date but it would have been some time before.

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Q. Have you consulted Mr. Messara in relation to the July buying orders? A. I have spoken to him about them.

Q. There was a purchase of 400 shares in Cumberland ordinary stock on 12th July. A. Yes.

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Q. Do you tell his Honour at the time you placed the order for that purchase you had not formed the intention of offering your family's ordinary shares in Cumberland to FAI at \$1.25? A. That was the offer - when was the order placed?

Q. I am asking you? A. I do not know.

Q. You do not know? A. The records have been produced to get the dates.

Q. Have you read any part of the transcript of Professor Wilson's evidence? A. I have not read yesterday's. I think there was a bit the day before. I have read that.

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Q. You have agreed I think earlier in cross-examination that last week, about Thursday, Professor Wilson came to you and asked for an explanation from you as to why you had placed the selling order and the buying order in August 1974 for Cumberland ordinary shares? A. That is correct.

Q. What did you tell him? A. I told him my reasons.

Q. What did you tell him? A. I told him at all times it was my intention to maintain a Cumberland listing and if there were no sellers, nobody could buy

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the stock and there would be no way for the listing to be maintained and I placed a selling order.

Q. At 70 cents? A. Yes, and Professor Wilson asked "Why 70 cents?" I said I thought it would make it so attractive to prospective shareholders that they just might come in and buy some. He asked me about the buying order and the reason for that, to which I replied it was simply to establish a floor below which they could not fall because I would consider it an embarrassment to have stock selling below par.

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Q. You pitched the buying order right on par?
A. I did.

Q. If you pitched the buying order right on par, it was at least in your contemplation that there might be a purchase at that price? A. No, I was worried that some people in the habit of putting in quite ridiculous buying prices way below par values for the simple purpose of snatching a bargain - and this is a well-established custom, and lots of people do it -

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Q. My question is, when you placed the buying order at 50 cents, it was within your contemplation that someone might sell to you at that price, was it not?

A. It certainly was a buying bid and someone would be entitled to come and sell at that price. I did not believe anybody would accept it for one minute.

Q. Was it within your contemplation someone might accept it? A. Yes, certainly.

Q. Will you agree that when you offered your family shares in July 1974 to the company of which you were chairman, you were in a conflict of interest situation?

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A. No, I will not.

Q. You won't? A. No.

Q. You had an interest representing the prospective vendors of these shares? A. Yes.

Q. To get the best price you could for them?

A. Yes.

Q. Did you pursue that interest? A. I believe so.

Q. You had an interest, did you not, as Chairman of Directors of the prospective purchaser to see those shares were purchased at the lowest price

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available? A. Not necessarily at the lowest price; at a fair price.

Q. Do you not agree as a director of FAI you owed a duty to that company to get the best possible bargain for the shares that they were to buy? A. I do not agree. Can I say something -

Q. No, I will continue to ask the questions. You are saying your only duty to FAI in relation to the proposed sale of your family shares was to see that FAI obtained a fair price? A. That is correct. 10

Q. You say you were not in the situation of a conflict of interest in relation to the proposed transaction? A. I do not believe so.

Q. You do not believe so? A. No.

Q. That being so there was no reason why you should not have stayed at the meeting while the matter was discussed by the directors of FAI? A. I did leave because it was suggested by my co-directors as a proper procedure and I was agreeable. 20

Q. Was it suggested to you because a conflict of interest had existed? A. No, propriety may be.

Q. Propriety I suggest, stemming from the fact there was at least a potential conflict of interest? A. I do not believe there was a conflict of interest.

Q. Did you say to your co-directors, "I do not see why I should leave the board room. There is no conflict of interest." A. No, I did not. I left the room.

Q. Do you say you left the room in response to a suggestion by one of your co-directors? A. That is correct. 30

Q. It would be untrue to say you initiated the suggestion you should leave the room while they discussed the offer? A. Not to my recollection, no.

Q. Do you deny when you proposed that FAI at this board meeting should consider the purchase of your family shares at \$1.25 for ordinary shares, you said, having made the proposal "Well, I think it is better now that I leave the room and you can discuss the matter amongst yourselves"? A. To my recollection, no. It is possible but not to my recollection. 40

Q. Do you deny you said that? A. Not to my recollection.

Q. Words to that effect? A. Not to my recollection.

Q. Do you deny you said words to that effect?
A. I cannot go beyond my recollection.

Q. You may have said it? A. I may have.

Q. And the reason why you left the room was you thought it was better to do so, so that the matter in which you had an interest as vendor, could be discussed in your absence? A. That is correct. 10

Q. Is not that tantamount to saying there was a conflict of interest in relation to this transaction?
A. I do not believe so.

Q. When you came back in to the room there was further discussion? A. Yes.

Q. And in the course of that discussion was it not made plain to you by Professor Wilson that the market value, the market price of the Cumberland ordinary shares was of no relevance having regard to the situation in which the market had been established? A. That was discussed either before or after. 20

Q. It was discussed? A. Yes.

Q. It was agreed by all hands that the market price for Cumberland ordinary shares at or about this time had no bearing on the question whether \$1.25 was a fair price? A. That is correct.

Q. You agreed with that proposition because you knew, having regard to the fact that you had made the market price, that it was not a real market? A. That is correct. 30

Q. Did you satisfy yourself, when wearing your hat as a director of FAI, that it was perfectly proper from the viewpoint of the FAI interest to offer the Cumberland ordinary shares at that time, July, to FAI at \$1.25? A. Yes.

Q. You formed the opinion that the price was a proper price by reference to what you understood to be the net tangible asset backing of Cumberland ordinary shares? A. That was one of the considerations that I had in my mind. 40

Q. It was one of the considerations that did enter into your mind? A. Yes, it was one of them.

Q. Was the other consideration that entered into your mind, in substance, you saw Cumberland as an expanding and thriving business with a good potential for improved earnings? A. I was certainly hopeful that the company would make a good progress, yes.

Q. And the picture had been one of good progress, had it not? A. It certainly is.

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Q. At that time of course you knew that Cumberland was going to expand its activities by opening up new nursing homes? A. We have not opened up a single nursing home since then, no.

Q. July 1974 I am asking you about? A. We have not opened a single nursing home since then. Private hospitals I think you may mean.

Q. I take your point. You knew in July Cumberland's business profitability was likely to expand by reason of the projected opening up of new hospitals? A. I certainly was hopeful of this. We had no experience in the private hospital field and therefore whether it would be as successful as we hoped, I could not say. I was certainly hoping for it.

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Q. The hopes were in fact realised in the result?
A. My word they were.

Q. What I am asking you is you referred to the net tangible asset backing of Cumberland ordinary shares as being one of the factors you took into account in deciding \$1.25 was in July 1974 a fair price? A. Yes.

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Q. Was the other factor that you were hopeful, on what you regarded as sound grounds, that the Cumberland profitability was going to improve? A. Are you referring to FAI as the buyer or seller?

Q. That is where we get into the situation of exquisite difficulty? A. Not if you make it clear what you are referring to.

Q. Can you transfer yourself back - I know it is difficult to separate motivation and activities when you wear two hats, but can I ask you to undertake this exercise. You say that as a director of FAI you considered in that capacity whether \$1.25 was a fair price for FAI to accept? A. Yes, to acquire.

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Q. Keep that hat on for the moment. A. Yes.

Q. If you would answer this question, apart from the net tangible asset backing of Cumberland ordinary shares, which you say you took into account, did you also take into account, exercising the capacity I have just described, that Cumberland's future profitability seemed at the time to you to be likely to improve? A. Yes.

Q. And you agree, do you not, that that prediction or that hope was proved correct by subsequent events in relation to Cumberland's profitability? You agree with that, do you not? A. Most certainly. 10

Q. Will you agree that the trading profit of Cumberland for the several months from 30th June 1974 through to the end of October 1974 improved by about 29 per cent compared with the results of the year ended 30th June 1974? Will you agree with that?

A. I could not confirm that here now, Mr. Hughes. I have not got the facts and figures available to me now, and I could not confirm it. 20

Q. As chairman of Cumberland you were supplied, were you not, with monthly figures indicating the progress of that company? That is so, isn't it? A. Yes, that is right.

Q. And you studied them, did you not? You studied those monthly figures that were supplied to you?

A. Very carefully.

Q. Very carefully? A. Yes.

Q. Each month as they came to you? A. Each month. 30

Q. So that by the time you embarked upon the task of preparing the take-over documents, including the fixing of the price or consideration to be paid or offered for the Cumberland ordinary shares you had taken into account the monthly reports for July, August and at least September, indicating the trend of Cumberland's profitability. That is so, isn't it?

A. Are you referring now to the take-over offer made for the Cumberland shares? Is that what you are referring to now? 40

Q. Yes. I am referring to the take-over offer for the Cumberland shares? A. In November?

Q. Yes. A. We certainly would have taken into

consideration all relevant factors, this being one of them.

Q. This being one of them? A. Yes. We would have taken into consideration all relevant factors.

Q. Would you have looked at these documents I now show you? (Approaching witness) At the time you fixed the consideration for the proposed take-over of Cumberland ordinary shares had you received and studied a document in the form, so far as typescript is concerned, of the first of this bundle of documents? Had you received that at the time you fixed the consideration for the proposed take-over of Cumberland ordinary shares? A. You are referring to this page (indicating)? yes, I had. 10

Q. The figures you studied, as you say, would have cut out in October, wouldn't they? A. Probably September. They would have probably cut out in September.

Q. They would probably have cut out in September? 20
A. Yes. I cannot help you there.

(Summary of monthly figures of Cumberland tendered; objected to)

Q. Those are the figures at least up to the end of September that you studied prior to fixing the consideration for the Cumberland take-over offer? Those are the figures that you studied, are they not?
A. Yes, I would think so, yes.

(Summary of monthly figures of Cumberland admitted and marked Exhibit 87) 30

HIS HONOUR: Q. Mr. Adler, you have restricted your answer to figures up to and including the September figures, is that so? A. Yes, that is correct, your Honour.

MR. HUGHES: Q. I just want to ask you a question about the October figures, if I may. Would you have a look at the figures on that document, Exhibit 87, for the month of October? A. Yes.

Q. Have you had a look at them? A. Yes.

Q. Do those figures reflect the result of the trading activities of Cumberland for that month of October 1974? A. Without the original document I could not 40

say positively, but to the best of my recollection, yes.

Q. I want to come back to the conversation you had last week with Professor Wilson, when he asked you for an explanation of your August selling and buying orders. You know the conversation I am referring to?

A. Yes.

Q. Did he say to you in that conversation - did he refer in that conversation to the fact that the selling order of 70 cents had been placed on the market by you within a month of the time in which you had sold your company's family shares at - your family company's shares at \$1.25? Did he refer to that fact in that conversation? A. Mr. Hughes, I am not too sure that he specifically referred to that. The \$1.25 transactions were mentioned. Whether he referred to the Stock market sales or my family sales I am not sure. But the subject was discussed.

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Q. Will you agree that, having regard to the fact - having regard to the common consent that the stock market price in July was of no relevance, what he referred to was the difference between the price obtained in the sale of the family company shares and the price of 70 cents that you put on in August? That was what he referred to, wasn't it? A. I rather think that his main complaint was that we were going to give away shares which were obviously worth a lot more than I was willing to sell them for. He was rather distressed about that.

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Q. He was rather distressed about that? A. Yes.

Q. You thought with some justification, no doubt?

A. No. I gave him my reason, and I think he accepted it.

Q. You say you gave him your reason. What was your reason, again? A. My reason was that we were anxious to maintain the listing of Cumberland and to encourage people to buy stock we obviously had to make it particularly attractive, and we attempted to do this by testing the market.

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Q. By testing the market? A. Yes.

Q. Testing the market at 55 cents lower than what you had got for your family shares five weeks before?

A. Obviously we did not go down low enough, because no one came, even at that price. Obviously we did not go down low enough.

Q. But that was what you were doing? A. Yes, that is right.

Q. And you say you did not have a take-over for Cumberland in mind then? You say that you did not have that in mind then? A. No I did not, Mr. Hughes.

Q. Did you think that 70 cents, that you placed on the selling order, represented anything like the real worth, in terms of the net tangible asset backing of the shares? Did you think it represented anything like the real worth of the shares, in terms of net tangible asset backing? A. I did not. 10

Q. You did not? A. No.

Q. Did you think that the price, or the proposed price of 70 cents bore any relation to the improving profitability and the past results in the previous financial year of the company? A. It did not.

Q. It did not? A. No, it did not.

Q. May his Honour take it from some of the answers you have given that you were anxious at all costs to preserve the listing of Cumberland on the Stock Exchange? A. I won't say at all costs. At a reasonable cost. 20

Q. At a reasonable cost? A. Yes.

Q. You were anxious to preserve the listing of Cumberland on the Stock Exchange? A. Yes, that is right, Mr. Hughes.

Q. And in forming that view you bore in mind, did you, the interests of the minority stockholders in having an available public market for their shares? You bore that in mind, did you? A. That was one of the considerations. 30

Q. That was one of the considerations? A. Yes.

Q. It was in your view at all times important, wasn't it, in the interests of the minority shareholders, to have a public market available on which their shares could be traded - disposed of - That was at all times important, in your view, wasn't it? A. Yes.

Q. The listing of the company was something that was worth keeping, wasn't it? A. In my opinion it was. 40

Q. And was that thought in your mind when, in September, you rejected the proposal made by the Stock Exchange, or did you forget it? A. I did not forget it.

Q. You did not forget it? A. No, I did not forget it, Mr. Hughes.

Q. You made no attempt, did you, to see whether it would be feasible to comply with the Stock Exchange's requirement as to reduction of the FAI interest to 75 per cent? You made no attempt to see whether that was feasible, did you? A. I did not consider it in the the company's interest to do so. 10

Q. Why? Because Cumberland was such a good stock?
A. That was not -

Q. Was not that a factor? A. Certainly it would have been a factor, yes.

Q. In September you saw Cumberland as an improving company, didn't you? A. As an improving company? I always considered it to be an improving company. 20

Q. You always considered it to be an improving company? A. Yes.

Q. And when you decided in September not to take any step to comply with the Stock Exchange's requirement you had in mind the markedly improved results of trading in Cumberland between July and September, didn't you? Didn't you? A. I had in mind that I was not aware why the shareholder could be reasonably expected to give away or sell any one of his shares, and I saw no reason to do so. 30

Q. That is not an answer to my question. Will you hear the question again and answer it, rather than going off on some little frolic of your own?
A. Could I have the question again?

Q. When you decided in September not to take any step to comply with the Stock Exchange's requirement you had in mind the markedly improved results of trading in Cumberland between July and September, didn't you? A. That was certainly one of the matters in my mind, yes. 40

* Q. And when, in September, you made the decision not to comply or to attempt to comply with the Stock Exchange's requirement as to the reduction of FAI's holding in Cumberland you had it in mind, did you not,

that the interests of the minority stockholders in Cumberland could be prejudiced by de-listing?

A. Again, of course, I would have to classify which hat you are referring to.

Q. I know that difficulty recurs constantly during this case? A. No it does not.

Q. I am always glad when you remind me of it.

A. Notwithstanding that, could you clarify that for me. You want me to understand the question, do you? 10

Q. As the major shareholder - as representing the major shareholder - no, I want you to answer my question please. Perhaps my question can be read, because it admits of an answer.

(Question marked * read by court reporter)

WITNESS: You are quite right. It is clearly clarified that you are referring to FAI, because only FAI could reduce its shareholding. Yes, I did consider it.

Q. You did consider it at the time? A. Yes, I did. 20

Q. And you, as a director - we are changing hats now - you, as a director of Cumberland, gave no consideration to the making of a request by the Board of that company to the Board of FAI to take steps to see whether a reduction of the holding of FAI in Cumberland could be affected, did you? A. When the FAI Board considered that matter obviously it considered it from that point of view.

Q. You had a meeting at which at one point of time you had one hat on, and you took that hat off and put the other hat on, and considered the matter as a director of Cumberland, did you? Is that the position? 30
A. No, not in those terms, but that is the effect of it.

Q. That is the effect of it? A. Yes.

Q. That is the substance of what you are saying?
A. Certainly.

Q. A very difficult juggling act, wasn't it?
A. I don't believe so. I don't believe so.

Q. Don't you? A. No. 40

Q. Let us get the plain fact. There was no meeting

of Cumberland directors held at which consideration was given to the question whether it would be appropriate for that Board - that is, for the Cumberland Board - to make a request to the FAI Board that the Stock Exchange requirement be complied with? That is so, isn't it? There was no such meeting of Cumberland directors at which consideration was given to that question? A. That would have been an exercise in futility.

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Q. Precisely. Because notwithstanding the potential prejudice, as you agree, to the minority stockholders that a de-listing would cause, the FAI Board, and you and Mr. Belfer, as directors of Cumberland, were rock firm in the view that nothing would be done to reduce the FAI shareholding? (Objected to; question rejected)

Q. Let me just get the fact. You, as a director of Cumberland, never considered the idea of making a request to the FAI Board to explore possibilities of complying with the Stock Exchange requirement, did you? That is right, isn't it? As a director of Cumberland you never considered the idea of making a request to the FAI Board to explore the possibilities of complying with the Stock Exchange requirement?

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A. I, as a Cumberland director, have debated the matter with myself, if you care to put it that way. The FAI Board sat officially and made a decision. That decision was they would not - and I concurred with the decision, so I am not trying to avoid that issue - the FAI Board decided firmly that we were not going to reduce our shareholdings. The Board firmly decided that. Once that decision was reached the rest would have been pure farce.

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Q. Pure farce? A. Pure farce.

Q. So that the Cumberland shareholders were, will you not agree, prejudiced in that matter by reason of the fact that there were two FAI directors on its Board? (Objected to; allowed)

Q. The Cumberland shareholders were prejudiced in that matter by reason of the fact that there were two FAI directors on its Board - I'm sorry, on the Board of Cumberland there were two FAI directors? As a result of that, the Cumberland shareholders were prejudiced, by reason of the fact that there were two FAI directors on the Board of Cumberland? A. I cannot see that, Mr. Hughes.

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Q. You cannot? A. No, I cannot. The FAI Board

had reached a decision, irrespective of whether there were Cumberland directors present or not. Therefore, seeing it was a subsidiary company in the first place, I can't see how they would have been prejudiced irrespective of whether they had FAI directors, or not.

Q. It was not a wholly-owned subsidiary? A. No, it was not.

Q. There was a 20 per cent minority stockholding, wasn't there? A. Yes, that is right.

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Q. There were 20 per cent minority stockholders, whose interests could have been served if there had been Cumberland directors who were prepared to march to the FAI Board independently and say "Please do something about this threat of de-listing"? A. Possibly so. But once the FAI Board had reached a decision that decision could not be changed, irrespective of who marched where and when.

Q. You are saying that the decision of the FAI Board as such was so firm that it would not have yielded to any argument? A. The Board reached a proper decision after carefully considering it, and that is it.

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Q. You are saying that, having reached that decision, the FAI Board would not in any circumstances have yielded to arguments put by independent Cumberland directors, had there been any apart from Mr. Donohoo? A. I don't believe the FAI directors would have been interested in allowing outside Cumberland directors to affect FAI policy, and that is what you are referring to.

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Q. The decision to make a take-over offer, leaving for the future the formulation of its terms, was arrived at at the very meeting when this decision was taken to reject the Stock Exchange's request, wasn't it? That is right, isn't it? A. Possibly so. I would have to check the records. But that could well be so.

Q. Was this meeting of the FAI directors at which this decision was made to reject the Stock Exchange's request made on a formal occasion of which minutes were kept? Was it a formal meeting, of which minutes were kept? A. I have no recollection. I would have to check the minute book.

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Q. You may take it from me that there is no minute

that we have been able to discover. A. Well in that case, the answer is "No".

Q. The answer is "No".? A. Yes, the answer is "No".

Q. By the way, do you remember that on 11th July 1974 a decision was made at an FAI Board meeting to install tape recording equipment in the Board room? Do you remember that? A. Whether it was on 11th July, I don't know. But such a decision was reached, yes. 10

Q. A decision was reached for the installation of tape recording equipment? A. Yes.

Q. Was that decision carried out? A. Yes, it was.

Q. And tapes were kept? A. I beg your pardon?

Q. Tapes were kept? A. They have never been recorded.

Q. What? A. They have never been used.

Q. They have never been used? A. It does not work properly. 20

Q. I will come to another matter now. I want to come to another matter. When do you say that the directors of FAI finally fixed the consideration to be offered to the Cumberland ordinary shareholders? A. Formally at the time when it is there minuted. There was several discussions prior to that, leading up to the eventual decision. There were several discussions before the final decision was made.

Q. Professor Wilson took part in these discussions, didn't he? A. Yes, he did. 30

Q. Who proposed the consideration that was in fact offered? A. I have no idea. When you have a fairly closely-knit Board things are kicked around and tossed around until you come to a final conclusion. Who came up with it originally I don't know. We all contributed towards it.

Q. Did you? A. I contributed towards it. Everybody did. Everyone contributed towards it.

Q. Who came forward with the bright suggestion that the Cumberland ordinary shareholders should be offered one share? A. As I said, it was a Board 40

decision as a result of several discussions. It could not be sheeted home to any particular person.

Q. When that suggestion was proposed - namely one for one in relation to the ordinaries in Cumberland - Professor Wilson expressed some disquiet, didn't he?

A. There were discussions -

Q. Will you answer my question, please? Did he express some disquiet? Did Professor Wilson express some disquiet when that proposition was put forward. That is my question? A. It is a question of terminology. There were discussions. He could have expressed disquiet. There was quite a lot of discussion. There were quite a few discussions on the various offers that one might be able to make or should make.

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Q. He said words to the effect "Can we do better?" - that is, better for the Cumberland ordinary shareholders? A. If he said so - one usually recalls one's own statements far better than someone else's statements.

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Q. I am not asking you to tell us exactly what he said. I am asking you for the effect of what he said. Was not that the effect of what he said? A. I have no such recollection.

Q. You have no such recollection? A. No.

Q. But you have a strong recollection that he expressed doubts as to the sufficiency, from the viewpoint of the Cumberland shareholders, of the proposed offer, in terms of consideration? A. No, I cannot agree with that.

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Q. You cannot agree with that? A. No, I cannot agree with that.

Q. Do you say that when the proposed consideration of one for one in relation to the ordinary shares was first discussed between you and Professor Wilson he expressed himself from the beginning as being content with that offer as a fair one? Do you say that?

A. I cannot tell you at the beginning, but at the end it was a unanimous decision.

Q. I am not asking about at the end. I am asking about at the beginning. Do you understand that? I am asking you about at the beginning? A. I understand quite clearly. But I cannot tell you about the beginning.

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Q. You cannot? A. No, I am sorry, I cannot.

Q. But you say, do you, that at no time during the discussion did Professor Wilson express any doubt or disquiet about the sufficiency, from the point of view of the Cumberland shareholders, of the offer. You say that, do you? A. I have not said that either, Mr. Hughes.

Q. What do you say? A. I said I have no recollection of the beginning. At the end, it was a unanimous decision. 10

Q. Did anybody - when the consideration of the offer to the Cumberland shareholders was proposed at one for one in relation to the ordinaries did anyone produce any paper with figures on it? A. Yes, there were some figures available, yes.

Q. Were they kept? A. I beg your pardon?

Q. You say there were some figures available. Were those figures kept? A. I should not think so.

Q. Did you keep a copy? A. We never circulate matters. Documents that are discussed are tabled, if there are documents, and then, if they are capable of being attached to the minutes, that is done. Otherwise, if they are working papers we do not circulate them, and I do not get a copy. 20

Q. Who produced the figures, if any were produced? A. There would have been several sets of papers, Mr. Hughes. There were some produced by the company secretary, Mr. Herman. There were some working papers produced by Eric Atkinson, and I think Professor Wilson was scribbling frantically on pieces of paper. 30

Q. You saw Mr. Atkinson's working papers? A. I saw them all.

Q. Did you keep them? A. No, I did not keep them.

Q. What happened to them, so far as you know? A. Presumably they threw them away.

Q. What? A. Presumably they were thrown away.

Q. They were thrown away? A. Presumably, yes.

Q. Did you read in the Board room Mr. Atkinson's figures contained in what you have described as his working papers? Did you read those? A. I think 40

that everybody recited the figures that they had. Mr. Atkinson read out his figures. Whether I took it up, I have no recollection. I probably did.

Q. What is your recollection of the figures that were recited when the question was being considered of what the Cumberland ordinary shareholders should be offered? What is your recollection of the figures recited then? A. By this time I think we were all in reasonable agreement of one for one.

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Q. I'm sorry, I don't want to interrupt you unnecessarily, but that was not my question. The question that I asked you is one which demands an answer, and you have not really answered it. A. I was going to sort of lead into it, but if you would like a straightforward answer, I think the figures that Eric Atkinson produced were earning figures.

Q. Which? A. Earning figures, if I recall correctly.

Q. Earnings yield? A. Earnings per share.

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Q. Not cash flow figures? A. No, earnings per share.

Q. Or gross profit figures? A. Earnings per share. At this point of time, as I said before, everyone was writing - everyone had different figures. It was what you would consider a working Board meeting. Eric Atkinson's figures were earnings per share figures and - I am going on memory - I think he was talking about 20 cents for the FAI shares.

Q. For the past year? A. For the past - I think you should let me recollect it for a moment. I would have to sort of work it out to get to it.

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Q. Don't be hustled by me. Take your time.
A. Then you will tell me I am thinking too long. No, I would prefer not to quote figures. I am not sure of them, and it would be misleading if I did quote them.

Q. But these were very significant figures, were they not, if they were produced? A. Let me assure you that they were produced, and I did not consider them significant. And I don't consider them significant even now.

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Q. You did not pay regard to Mr. Atkinson's figures in making your decision? A. I did not say -

Q. You did not consider Mr. Atkinson's figures significant in the context of fixing a price or consideration for the Cumberland ordinary shares, did you? A. No, I did not.

Q. You did not? A. No.

Q. Does that mean that you regarded them as irrelevant to the issue of fixing the consideration to be offered to the ordinary shareholders? A. No. It means that everyone arrives at figures in his own way. Eric had a way of working out his figures; I had a different way of working out mine. Everyone arrives at figures in his own individual way.

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Q. Did you write your figures down on a piece of paper? A. No, I did not. I never do.

Q. You never do? A. No.

Q. What were your figures? A. I thought a one for one share was fair and reasonable to the Cumberland shareholders.

Q. I am asking you what were your figures?

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A. There were no figures for the share exchange.

Q. No figures? A. No.

Q. You did not give any consideration to a comparison of net tangible asset backing in fixing a one for one exchange? A. No, I did not.

Q. Didn't you? A. No.

Q. You have departed in that regard rather remarkably from your approach to the fixing of the price at which your family shares were sold in July? A. One was a cash sale, and the other a share exchange.

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Q. Is that the criteria of distinction? A. That is one of them.

Q. Is that the criteria on this occasion? A. On this occasion.

Q. And the only one? A. Yes.

Q. That is the only distinction? A. On this occasion.

Q. You knew, didn't you, at the time when you proposed or agreed to making a one for one exchange offer

in relation to Cumberland ordinary shares that the net tangible asset backing of those shares remained as it had been in July at least? A. Or even increased, probably.

Q. Or even increased? A. Probably so.

Q. By how much do you think that that net tangible asset backing increased in the intervening four months, or three and a half months? A. Probably five or six cents.

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Q. Five or six cents? A. Probably.

Q. So that we are now up to \$1.28 or \$1.27?
A. Possibly.

Q. And you regarded that fact, did you, as an entirely irrelevant consideration to the decision as to what to offer the Cumberland ordinary shareholders? You regarded that as an entirely irrelevant consideration to that decision? A. In making the offer I did, yes.

Q. You did? A. Yes.

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Q. But you bore it in mind that that was in fact a net tangible asset backing of about \$1.27 or \$1.28 for each Cumberland share? A. I could not tell you what I bore in mind. I thought then, and I do now - I am sorry.

Q. I will come to another matter. What you told his Honour this morning in the course of your evidence in chief in part was that you were of the view that a one for one share exchange offer for the Cumberland shares - ordinary shares - was fair and reasonable for an aggregate of reasons which you could not separate out and define. That is the effect of your evidence, isn't it? A. Possibly so.

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Q. But there must have been reasons in your mind, if you were exercising a fair judgment, why you thought this share exchange offer for the ordinary shares was fair and reasonable, mustn't there? A. Yes.

Q. But you cannot give his Honour the reasons, can you - the individual reasons? You cannot do that, can you? A. No, Mr. Hughes. I think -

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Q. Can you give the individual reasons? A. No I can't.

Q. You can't? A. No,

Q. Why can't you? Because you have forgotten them, or because you never had any? A. No, I don't think either of those two propositions would be the right one.

Q. Did you formulate in your mind at the time when you say you formed the conclusion that a one for one share exchange for ordinaries was fair and reasonable the individual reasons for reaching that conclusion? 10

A. I cannot say with any certainty. All I can say is we formed the opinion, and I cannot break it up into component parts.

Q. And never could? A. I cannot comment on that.

Q. Supposing this litigation had taken place in December 1974 and I had asked you that question you would not have been able to formulate individual reasons for considering the share offer reasonable then, would you? A. I have no idea.

Q. You have no idea? A. No, I have no idea. 20

Q. So far as the formulation of reasons for your judgment - for doing what you did do - was concerned, your mind is like a bare slate? A. Beautifully put but incorrect.

Q. Incorrect? A. Yes.

Q. If it is incorrect, why can't you give the individual reasons that led to your judgment? Why can't you give the individual reasons that led to your decision? A. Because it is difficult to break a whole down to its component parts. 30

Q. That is what you say, is it? A. That is what I say.

Q. And you are not prepared to offer his Honour a single specific reason for the conclusion that you say you drew and eventually that was to be the offer to the Cumberland ordinary shareholders? A. A single one?

Q. Yes. A. One that I would put up today would be the most important consideration I would think in any investment proposition. That would be the future of the company, and the future of its earnings. 40
That would be a foremost thing.

Q. That is what you would think if you were considering the matter today? A. I must assume that that was what I was thinking at that time.

Q. You have no recollection? A. I can't tell you what was in my mind 15 months ago.

Q. It is not 15 months ago, is it? - unless you had the idea back in July and August of making the take-over offer? A. No, I am referring to 11th July. That is 15 months ago.

10

Q. You knew when you made that last answer it was being given in a context of asking you what was in your mind at the time you fixed the take-over consideration, didn't you? A. Definitely not.

Q. Didn't you? A. Definitely not.

Q. Why did you say "15 months" when I was asking you about factors that operated in your mind in fixing the take-over consideration for the ordinary shareholders? Why did you go back to 15 months ago?

A. I was going back to 11th July, which is what most of your questions concentrated on.

20

Q. You know very well that for the last 10 minutes I have been questioning you on the state of your mind in October 1974, don't you? A. Notwithstanding that, my answer referred to the 11th July transaction.

Q. And that was not a share transaction, was it?
A. No, it was not.

Q. And that was a price of \$1.25, wasn't it?
A. That is correct.

Q. You were going back 15 months because it was about 15 months ago that you decided to proceed on a course designed to effect a take-over? That is right, isn't it? A. Definitely not.

30

Q. Your only explanation to me or to his Honour for going back 15 months specifically in answering a question designed to establish your state of mind in October 1974 was that you thought I was asking you about your state of mind in July 1974. Is that the only reason? A. That is correct.

Q. That is the only reason? A. Yes.

40

Q. That is a singularly odd reason, isn't it?
A. True, though, nevertheless.

Q. What? A. It is true.

Q. It is a singularly odd reason, isn't it? A. I don't believe so.

Q. Don't you? A. No.

Q. You knew when I was asking you a question designed to elicit what was your state of mind that I was asking you a question designed to elicit the state of your mind when you formed the judgment that a one for one share exchange was fair. You knew that, didn't you? A. That was your question.

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Q. You knew that was the context of the question?

A. That was the context of the question.

Q. That was the context of the question to your knowledge at the time you were answering it? A. I told you I was referring to 11th July.

Q. Haven't you got a better explanation than that, or is that the only one? A. The true one is the only one I can supply, I am sorry.

(Luncheon adjournment)

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AT 2 P.M.

HIS HONOUR: You understand you are on your former oath, Mr. Adler?

WITNESS: Yes, your Honour.

MR. HUGHES: Q. Mr. Adler, will you agree that if shareholders of a company for whose shares a take-over offer is made are offered a share transfer - that is to say, offered shares in the offeror company for shares in their company - it would be relevant for those shareholders to have any information that would enable them to reduce the two shares - that is, the offeror's shares and the offeree's shares - to terms of money, for the purpose of assessing the value of the offer? A. It could be.

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Q. It would be, wouldn't it? A. It could be.

Q. It could be? A. Yes.

Q. And generally speaking it would be, wouldn't it?

A. Yes, I would think so.

Q. Was that thought in your mind at the time you

took part in the formulation of the take-over documents?

A. Not really.

Q. Not really? A. Not really.

Q. Not at all? A. No, I don't think so.

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

Q. When you took part in the formulation of the take-over offer documents it was clearly in your mind, wasn't it, that you had sold your family shares - ordinary shares in Cumberland to FAI in the previous July for \$1.25 in cash? That was clearly in your mind at that time, wasn't it? A. When we were formulating the take-over documents I was thinking of the take-over documents.

10

Q. But at that time the thought did not escape you, did it, that in the previous July you had sold your family shares to FAI - that is, ordinary shares in Cumberland - for \$1.25 in cash? A. I don't think during the formulation of the take-over documents that would have been in my mind at all.

20

Q. Was it in your mind during the discussions that took place with your co-directors when you were fixing the terms of the take-over offer? A. I was aware of it, yes.

Q. Professor Wilson in fact specifically drew the matter to your attention, didn't he? A. I don't recall him doing so.

Q. You don't recall him doing so? A. No.

Q. Do you remember that Professor Wilson and yourself discussed together the contents of your letter to the Cumberland shareholders dated 20th November which formed part of the take-over documents? A. Which letter are you talking about?

30

Q. That is a very fair question. I am talking about Exhibit 11, which I now show you, and I invite your attention to your printed letter to Cumberland stockholders dated 20th November. It is the first inside page of that document? A. Yes. Right.

Q. Professor Wilson and you discussed that letter together, didn't you? A. I certainly could not say.

40

Q. You could not say? A. This letter and the whole take-over documents have been discussed on a

number of occasions, have been drafted by a colleague of mine; have been approved by the company's legal advisers, and there were lots of conversations took place. I cannot identify it to state that -

Q. Didn't Professor Wilson say to you during the discussions that took place in the formulation of the take-over documents that it would be useful for the Cumberland shareholders to know what you had received or what your family companies had received in July for the sale of the ordinary stock units in Cumberland to FAI? A. No, I do not recall him saying so.

10

Q. Will you deny that he said anything like that?
A. No, Mr. Hughes. I do not recall him saying so.

Q. Supposing he had made that suggestion to you, what answer would you have given? A. I would be opposed to it.

Q. You would be opposed to it? A. Yes, I would.

Q. You do not suggest, do you, that it would not be useful - would not have been useful - information for Cumberland stockholders, to whom the take-over offer was being made, to know what you had received or your family companies had received in July from FAI for the Cumberland shares sold? A. I certainly would see no relevance in it.

20

Q. No relevance in it? A. None whatsoever.

Q. But don't you agree it would have had this relevance, that it would have served as a guide in the task of reducing the take-over offer in fact made to currency terms? A. No, I don't believe so.

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

Q. Why not? A. Well, the cash sale of the Adler shares was on a different basis.

Q. Yes. A. The other take-over offer was arrived at on a share exchange basis. I don't see the relevance between the two.

Q. But you have already agreed with me, haven't you, this afternoon, in answer to my first question following the adjournment, that where a shareholder, for whose shares an offer is being made in terms of a share exchange, sets about evaluating the worth of the offer, he has to reduce the two counters to terms of

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currency for the purpose of making an evaluation?

A. That is so.

Q. That is right, isn't it? A. Yes, that is right.

Q. And in July you had in effect reduced the value of Cumberland ordinary shares to a currency figure - namely, the price of \$1.25 - hadn't you? A. That is right.

Q. And you would maintain, wouldn't you, to your dying day, if you had to, that that price was a fair price - a fair price for FAI to pay? A. It was. 10

Q. And everything that had happened in the meantime in the course of Cumberland Holdings' business had operated only to increase the net tangible asset backing of Cumberland shares and of the profitability of that company, would you not agree? A. I do.

Q. You agree with that, do you? A. Yes, I do.

Q. Well, in those circumstances will you not agree that the disclosure to Cumberland shareholders of the price received by your family interests in July would have been a useful guide to them in evaluating the worth of the take-over offer that was in fact made in November? A. I don't believe so. 20

Q. You don't believe so? A. No, I don't.

Q. Between July and November there was no real market on the Stock Exchange, was there, for Cumberland shares? A. Not really.

Q. That is so, isn't it? A. Yes.

Q. So market prices were no guide to an evaluation of the worth of the shares? No guide to an evaluation of the worth of the share offer? A. Probably not. 30

Q. So that, the market being no guide to the evaluation of the take-over offer, and the company shares having changed hands in a fair transaction in July, and the profitability of the company having increased in the meantime, will you not agree, on reflection, that the disclosure of the price received by your Company - by your family companies - in July for your Cumberland ordinary shares would have been useful information to Cumberland shareholders in evaluation of the offer? A. No, I am afraid not, 40

Q. Why not? A. First of all, there are several

reasons. Let us start at the beginning. First of all, there has been a considerable change in the financial position of businesses in general in Australia - and I am not only referring to the stock market values; I am referring to the value of money, for instance.

Q. Inflation? A. Not only inflation.

Q. That is one of the changes? A. One of them. The credit squeeze may be another one. The wilful interference by the Government in restricting the flow of money is another. By November the rates of interest obtainable even on bank bills had risen to something like 24 per cent, or thereabouts, whilst in July there was plenty of money for investment purposes. By November that had disappeared to a very large extent. Therefore it would be utterly useless, in my opinion, to relate these two periods and say that, because of values obtainable on that day, some other future day demands the same type of price. 10 20

Q. Mr. Adler, you recognized at the time of receipt of the letter from the Stock Exchange, did you not, that because of the threat of de-listing the Cumberland minority stockholders were in a vulnerable position? You recognized that, didn't you? A. They were in a vulnerable position, yes.

Q. And you set about exploiting their vulnerability? A. Most assuredly not, Mr. Hughes.

Q. Their vulnerability arose from this state of facts or circumstances, did it not? First of all, their shares were under the threat of de-listing. That is right, isn't it? A. Yes, that is right. 30

Q. They were therefore faced with the option of remaining shareholders in an unlisted company - A. Yes.

Q. - or accepting in a take-over offer whatever offer might be made? A. Yes.

Q. Is that right? A. With the exception that the fact of de-listing was no more than a threat. Apart from that, I agree with you. 40

Q. But you regarded it as a very real threat, didn't you? A. I did.

Q. And you believed, didn't you, when you considered what to do or what not to do about the Stock

Exchange's letter, that if the requirement set out in the letter was not complied with that it was virtually certain that de-listing would occur? A. It was a very real possibility.

Q. A very real probability? A. Even a probability.

Q. Almost amounting to certainty, won't you agree?
A. I cannot speak for the Stock Exchange, Mr. Hughes.

Q. Did you discuss that probability, or possibility, or whatever you call it, with Mr. Atkinson at any time? A. That, again, has been discussed with all the members of the FAI Board. 10

Q. And you recognised in these discussions, did you not, that if the Stock Exchange requirement as to the reduction of FAI's holding was not complied with it was strongly probable that de-listing would take place? A. Yes.

Q. And the realisation of that probability brought to your mind the fact, didn't it, that the Cumberland minority stockholders were in a vulnerable position? A. It brought to our mind - 20

Q. It is your mind I am asking about. A. It brought to my mind that it would be proper to make an offer to the Cumberland minority shareholders.

Q. And did you recognise that in that situation the offer ought to be pitched in terms that were fair to the minority stockholders in Cumberland?
A. Definitely.

Q. Did it occur to you that if the particular offered consideration was to be chosen - selected - then it ought to be by you carefully thought out and capable of detailed justification? A. I don't know whether I considered that it would require detailed consideration or detailed justification. The offer had to be eminently fair, and I believe it was. 30

Q. Do you remember reading the Washington H. Soul circular of 27th November - Exhibit 17, your Honour, if I could just have that - (Exhibit 17 shown to witness) in which the family share sales in July were brought to the light of day for the first time?
A. That is incorrect. 40

Q. What is incorrect? A. That this is the first time that this had been brought to the day of light or the light of day, as you put it.

Q. You are referring to the fact that the sales were reported to the Stock Exchange? A. That's correct.

Q. But they were never reported to the shareholders, were they, in Cumberland? A. The Stock Exchange is meant to be the proper place to report all matters pertaining to company affairs.

Q. You will agree that until that circular of 27th November 1974, was published to stockholders in Cumberland, nothing had been done by you to inform them about the price your family companies received in July? A. Definitely not. 10

Q. That is right, isn't it? A. That is right.

Q. What? A. That is right.

Q. Yes. Do you remember having a conversation with Professor Wilson after the receipt of that circular?
A. After this one?

Q. Yes. About the contents of the circular?
A. Not particularly, no. 20

Q. Do you not remember that Professor Wilson said to you apropos the disclosure in Exhibit 17 of the sale price received by your family companies in July words which had the effect of "Well, I told you so."?
A. No, I can't say that he did.

Q. Did he say anything like that? A. A lengthy discussion took place concerning the circular sent out by Washingtons and our reply thereto.

Q. What? A. Lengthy discussions took place concerning the Washington Pattinson's circular and also our reply thereto. Considerable discussions took place. I can't recall who said what. 30

Q. Do you tell his Honour that your replies to the various circulars issued by Mr. Donohoo and in one case Washington Souls were always carefully considered before they were sent? A. I signed them and I can assure you I certainly carefully considered it and no circular went out without full approval of Mr. Atkinson and Professor Wilson and they were also shown to other directors. 40

Q. What you are saying to his Honour then is your various circulars in what has come to be described in this case as the "paper warfare" were the product

of careful and detailed consideration? Is that what you are telling his Honour? A. Certainly.

Q. What? A. Yes, I do.

Q. You mentioned a few minutes ago that the sales of your family shares in July to FAI were reported to the Stock Exchange? A. Yes.

Q. You are not suggesting, are you, that in reporting the sales to the Stock Exchange any information was given to the Stock Exchange as to the price? 10

A. I don't know what was the information that was given but what was required under the listing requirement has, in fact, been given.

* Q. See, were you not referring to the fact that the sales were reported to the Stock Exchange for the purpose of conveying the impression that somebody knew about the price? A. I was answering the question, if I recall correctly, that proper disclosures to the bodies that required that information have in fact been made and, in fact, they have. 20

Q. That is not an answer to my question, I am afraid, and I must insist on an answer to it? A. May I have the question again?

(Question marked * read.)

I don't know specifically what is the Stock Exchange requirement but, whatever it was, and I do believe it includes the prices, the information has been given to the Stock Exchange.

Q. Then were you referring earlier to the fact that the sales of the family company shares had been reported to the Stock Exchange for the purpose of conveying the impression that, even if the Cumberland ordinary stockholders were not advised about the price, somebody was? A. Yes, I was. 30

Q. You know very well, don't you, that the price paid by FAI for your family shares was not reported to the Stock Exchange? A. No, I don't believe that to be correct, Mr. Hughes.

Q. You don't believe it to be correct? A. No, I don't. 40

Q. And will you not agree that when the shares, the sales of the shares held by the family companies in Cumberland, were reported to the Stock Exchange, no

indication was given in that report as to the identity of the vendors? A. I don't think that is a proper requirement - that is not a requirement. I am sure it wasn't reported as such.

Q. You have said that you believed that the price was reported to the Stock Exchange. Did you believe at the time you say you reported the price that it ought to be reported? A. No, Mr. Hughes. What I specifically said was, whatever the requirement of the Exchange was, we have complied with or the company secretary has complied with. I do believe that the price was part of that but I did not do that work myself. 10

Q. You signed the letter, didn't you, reporting the matter to the Exchange? A. Did I do that?

Q. I am asking you whether you did? A. Well, I have no such recollection.

Q. Don't you? A. No.

Q. Well, I will come back to the question which, if I may say so, you have not yet answered. A. Which is? 20

Q. Did you believe that in the circumstances of those sales you had a duty to report the price to the Stock Exchange? A. No, I don't believe it was a specific requirement of the Exchange.

Q. But you say, nevertheless, you did report it, namely, the price? A. I stated, Mr. Hughes, that, whatever is the requirement, we have complied with it.

Q. I won't mince words any more. I will just ask you to identify the letter. (Approached) That is the letter in which you reported the sales of the family company's shares to the Stock Exchange, isn't it? 30

A. I rather think, Mr. Hughes, that there was another letter, apart from this. This is certainly a letter which I have written, but I don't believe that this letter served the purpose of notifying the Stock Exchange of the sale. This was just a general letter advising them of a number of investment matters. I believe there was another letter, or there should have been, by the company secretary. 40

Q. When did you last see that letter or a copy of it? A. I don't recall seeing it at all.

Q. Then, you have no idea whether such a letter was sent, do you? A. I believe that to be so.

(Further letter or copy of it called for)

HIS HONOUR: About what date would that be?

MR. HUGHES: 27th July, your Honour.

HIS HONOUR: Q. Mr. Adler, the other letter would be round about that date, you think, would it? A. It should be within fourteen days of 11th or 12th July.

Q. Within fourteen days of 11th July?

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MR. HUGHES: Yes.

Q. That letter, Exhibit 46, was dictated by you, wasn't it? A. Yes, it was.

Q. "L.J.A." - with your initials at the top?

A. I am not doubting the authenticity of this letter, Mr. Hughes.

Q. And that was the only letter, was it not, that was sent to the Stock Exchange containing any advice about the acquisition in July of the shares from your family companies? A. I don't believe so, Mr. Hughes.

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Q. Would that letter, if there is another one, be in the possession of your legal advisors? A. I should think it would be in the possession of the Bar table at the moment, if it exists.

MR. HUGHES: I call for a copy of it.

WITNESS: And if it does not, then may I turn these letters over?

MR. HUGHES: Q. By all means. A. That one directly underneath dated 31st July 1974, might this be the one? Might I read it?

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Q. Yes, do. A. Well, there is a letter of 31st July which sheds some more light on the subject signed by the company secretary. It does not quote the purchase price.

Q. It does not report a purchase price and it does not report the names of vendors, does it, or their connection with you? A. No, it does not.

Q. Well, that does not get us ahead very far in

the search for this missing letter? A. No, it establishes that there was a letter from the company's secretary to the Stock Exchange on the approximate date I suggested there was a letter.

MR. HUGHES: My learned friend is in a position to answer that call?

MR. BAINTON: No.

MR. HUGHES: Q. I will go on to another matter while that call is being answered, if it is. I want to come back and I ask you to consult your recollection again, to the suggestion I made to you that after the sales at \$1.25 of your family company's shares in July had been revealed to the ordinary stockholders in Cumberland by Washington Souls in their circular of 27th November, you and Professor Wilson had a conversation in which he reminded you of advice that he had given you that those sales ought to be disclosed? A. I have no such recollection, Mr. Hughes. 10

Q. Do you say that your letter which is the letter dated 20th November 1974, was a frank and candid letter? A. It was a proper letter. 20

Q. Was it frank? A. I believe so.

Q. You think so? A. Yes.

Q. Did you have any misgivings about that statement? A. Well, I think in a take-over document the legality is what one mainly has to worry about. Our main concern was to spell out to the various bodies like the Stock Exchange and Corporate Affairs, to have approval of the contents. Whether it is frank, I wouldn't know specifically. 30

Q. Didn't you think when you composed this letter with the assistance of Mr. Atkinson and the collaboration of, perhaps, other directors, that you were under some obligation to be frank in what you said to the offeree shareholders? A. I was under an obligation to comply with the provisions of the take-over, of the Companies Act take-over provisions, and I think I have discharged that duty properly.

Q. Mr. Adler, that letter to the Cumberland Stockholders was not written in pursuance of any specific obligation under the Companies Act, was it? A. No. 40

Q. You know that, don't you? Don't you? You know that, don't you? A. Would you mind if I

answer - if I look before I answer?

Q. Yes. A. Thank you.

Q. I thought you might be sufficiently familiar with it? A. No. I don't believe it was part of the Companies Act, no.

Q. Then, did you believe when you composed that letter that you were under an obligation to be frank in your statements? A. To be honest, Mr. Hughes, would be the word that I would be using. 10

Q. To be honest? A. That's right.

Q. And not misleading? A. And not misleading.

Q. Did you think you were under an obligation not to state anything that you knew to be false? A. Oh, most assuredly.

Q. And did you think you were under an obligation not to omit any fact that would put a different complexion on some statement you made in your letter? A. In my opinion, yes, certainly.

Q. Yes. That was your view of your duty? A. Certainly. 20

Q. I want to invite your attention, if I may, Mr. Adler, to a few passages in that letter and the first one I ask you to go to is in the sixth paragraph? A. Yes.

Q. It is the last sentence in the sixth paragraph. It reads: "In terms of asset backing the latest published accounts of both Cumberland FAI reveal that the equity capital in each company has a value substantially above the par value of their issued ordinary stock and ordinary shares respectively."? A. Yes. 30

Q. Do you follow that sentence? A. I do.

Q. That sentence was a piece of useless padding, wasn't it? A. True, though, nonetheless.

Q. What? A. True.

Q. But it was a piece of useless padding? A. I wouldn't know about that. It was a true statement.

Q. I am wanting your view on this. I want your

view. Was that statement that you have just read, me having directed your attention to it, a piece of use-
less padding? A. No, Mr. Hughes. I didn't consider
it so, otherwise I would not have put it in.

Q. It conveyed no useful information to the share-
holders at all, did it? A. I disagree with that.
I think it did.

Q. You did? A. Yes.

Q. Well, we will examine that proposition? You 10
refer to asset backing. Do you see that? A. I do.

Q. Did you mean net tangible asset backing? A. Did
I say net tangible asset backing?

Q. Did you mean it? A. I meant asset backing.

Q. Asset backing? A. Asset backing.

Q. It was within your knowledge at the time you
wrote that sentence that the asset backing of the
Cumberland shares was higher, more above par, than
the asset backing of the FAI shares, wasn't it?
A. I think they might have been, yes. 20

Q. Yes. You know they were? A. No, I don't. I
can check it easily enough.

Q. Well, did you have any belief at the time that
the asset backing of the FAI shares was less per
share than the asset backing of the Cumberland shares?
A. I would have to check that. It is easily
available.

Q. Would you like to do it? A. Certainly.

Q. May we take it you did the exercise at the time?
A. I am not sure whether I did it or not but I can 30
do it for you now.

Q. You cannot say whether you did the exercise at
the time? A. No, the statement here does not convey
that I have done it. All it states is that both com-
panies' asset backing was above par value and it was,
and that is a true statement.

Q. Look, I am not saying that these are the actual
figures but just suppose this situation. Suppose
that the asset backing of the FAI shares was 90 cents?
A. Yes. 40

Q. And suppose that the asset backing of the Cumberland shares was \$1.22. I am talking about asset backing. Do you understand? A. Yes, I do.

Q. The disclosure of those figures by way of comparison would have been a relevant piece of information for the offeree shareholders to have, wouldn't it? A. Not necessarily. No, Mr. Hughes.

Q. Not necessarily? A. No.

Q. Won't you agree quite probably? A. No, I don't. 10
I don't agree at all.

Q. You are telling his Honour, are you, that it would not be material for the Cumberland shareholders who had been offered one FAI share for one Cumberland share to know that on an asset backing basis the Cumberland share was more valuable than the FAI share? Is that what you are telling his Honour? A. That's right.

Q. And that is a considered and serious statement, is it? A. It is a considered opinion, Mr. Hughes. 20

Q. Suppose that the asset backing of the FAI share had been 50 cents and the asset backing of the Cumberland share had been \$3. Just suppose that. Wouldn't you consider that that would be a material piece of information for the Cumberland shareholders to know about for the purpose of considering and evaluating your offer? A. Not by itself, Mr. Hughes, no.

Q. But it would be relevant as part of the picture, wouldn't it? A. Not by itself, no.

Q. I am not asking you whether it was relevant by itself and I think you know that, sir. I am asking you whether, if that had been the situation, the comparative situation, such information would have been relevant as part of a picture? A. It might have been relevant. 30

Q. Might have been? A. Might have been.

Q. I see. Now, look, you were very well aware, were you not, at the time you composed this circular letter to shareholders that, in fact, the asset backing of the FAI share was less, in terms per share, than the asset backing of the Cumberland ordinary share, weren't you? A. Yes. I was. 40

Q. And you deliberately elected not to convey that piece of knowledge to the Cumberland shareholders, didn't you? A. I did not consider it relevant, Mr. Hughes.

Q. That is not an answer to my question and I think you know it. You deliberately omitted did you not, to convey that piece of information to the Cumberland shareholders, although you did it in your mind? A. No, I don't believe that is a correct statement, Mr. Hughes.

Q. Did you have the information in your mind?

A. I had the knowledge in my mind.

Q. And you gave some thought, didn't you, to the composition of this sentence about which I am cross-examining you? A. I gave a lot of thought to the letter, not only to that particular paragraph. 10

Q. You knew that that sentence left up in the air any real basis of comparison between the two shares on an asset backing footing, didn't you? A. It was not a statement about comparative values.

Q. You knew that that statement left untouched a piece of information, namely, a figure comparison of assets backing in each company that a shareholder might find useful? A. I already stated, Mr. Hughes, I did not consider it relevant. 20

Q. That is not an answer to my question. A. Well, with respect -

Q. You knew, whatever your view of its relevance was or was not, that a figure, a comparison in terms of figures of the asset backing in each share might be useful to a Cumberland shareholder confronted with this offer, didn't you? A. I did not give that any consideration.

Q. None at all? A. None at all. 30

Q. I suggest to you, so that you will be perfectly clear what I am about, that that statement in the sentence that is under consideration now was deliberately tricky. What do you say? A. I say that is a lie.

Q. That is a lie? A. That is right.

Q. Can you give any reason why - why you decided that comparative information in terms of figures as to the relative asset backing of each share was not relevant for the shareholders in Cumberland to know?

A. In considering the value of a share, asset backing is not the criterion or not all the criteria. It could be one of them. 40

Q. It was one of them in July, wasn't it? A. It certainly was in July, that's right.

Q. Yes. If it was in July, why wasn't it in November? A. Because it was a share exchange offer. I thought I told you.

Q. Oh, you come back to that reason all the time?
A. You come back to the question.

Q. You come back to that reason all the time. You don't want to add to it, do you? A. No, I don't.

Q. And you have already agreed with me, haven't you, that if a share exchange offer is made, the shareholder in the offeree company has to reduce the counter on each side to money values. You have agreed with that, haven't you? A. I said that was one of the considerations. 10

Q. And a relevant one? A. I don't consider it was relevant, no, and I stated it previously.

Q. It is one of the considerations? A. It could be one of them.

Q. Reasonable for a Cumberland shareholder to take into account? A. Cumberland shareholders - any shareholders in receipt of an offer are at liberty to take whatever information they care to. The information was publicly available at all times. 20

Q. You know that not all shareholders have resort when they are considering an offer to all the information publicly available, don't you? Don't you?
A. I think, you know, the take-over document says "Please consult your stock broker or banker" or something to that effect.

Q. You meant that letter to be an inducement to Cumberland shareholders favourably to consider FAI's offer, didn't you? A. I have expressed my own opinion. 30

Q. You have expressed your opinion? A. May I continue.

Q. If it is an answer and, if it is not, I will come back to it? A. I have in this letter pointed out what I considered was the offer, the advantages of the offer from the Cumberland shareholders' point of view. If in fact, they were of the opinion that they should accept it, it was open to them to do so. I did not, in my opinion, urge them to do so. 40

Q. I was not asking you about that. A. And I

did not try to dissuade them to accept the offer either. I put the facts as I saw them at that time to the best of my ability.

Q. Neutral - is that what you say? A. To the best of my ability.

Q. Neutral - is that what you say? A. It is an interesting word. May I think about that?

Q. Yes, please do. Take as long as you like.

A. No, I don't think so, Mr. Hughes. I think I form opinions and I state them. I don't believe that I could be called neutral. 10

Q. No. Well then, would you agree - I will come back to my question which you have not yet answered. The question is this : will you agree that you wrote that letter as an inducement to Cumberland shareholders favourably to consider the FAI take-over offer? Didn't you? A. No, Mr. Hughes, I stated the matters as I have seen them and I stated my opinion firmly.

Q. Did you hope that by reading that letter a shareholder in Cumberland might be persuaded to give favourable consideration to your offer? A. Yes, I suppose, Mr. Hughes, I will answer "Yes" to that question. 20

Q. Yes. So, you meant the letter to be an inducement to them favourably to consider the take-over offer, didn't you? A. I meant the letter to explain my -

Q. Can you answer that question yes or no? I think you can. A. No, I can't do that. I prefer to answer it with an explanation, if I may. 30

Q. Is it yes or no first and then you may give your explanation? A. It is yes.

Q. It is yes? A. It is yes.

Q. What is the explanation? We got to the point of establishing that you meant the letter to be an inducement to the shareholders to give favourable consideration to your offer. Now, what is your explanation?

A. I was of the opinion, as I expressed in a subsequent letter, that the choice of them being locked up in an unlisted company was not particularly appetising. I have indicated to them, if you prefer to put it that way, formally, that this was an alternative 40

and it was, in my opinion, a favourable alternative for them to take. That is it.

Q. Now, I want to come back to something that has not been quite completed in my cross-examination and it is this. Why, if, as you have agreed, a Cumberland shareholder confronted with this offer might well want information that enabled him to reduce the counter on each side to a money value, did you make no reference in terms on each side to a money value, did you make no reference in terms of figures to the comparative asset backing of each company; I want you to give your explanation, if you have one? A. Your question started "Why, if a Cumberland shareholder would want to do that"? 10

Q. Why, if he would want to do it? A. The figures for both companies, balance sheets and all relevant information, are encompassed in the take-over offer and he can for himself get it out himself with the greatest of ease. The information was, in fact, disclosed.

Q. Assuming he could read a balance sheet? A. I don't believe that shareholders are all stupid. 20

Q. Some of the might have been? A. Let them go to the stock broker, share broker, banker, lawyer, or whoever they consider appropriate.

Q. So, you thought it was all right to omit what might be useful information, because, if the shareholder was confused or left up in the air by what you said in your letter, he could rush off to his stock broker, banker, solicitor or accountant? Is that what you are saying? A. I am not saying that my letter left anything unsaid. I am answering the question put by you. 30

Q. It left one thing unsaid? A. It was irrelevant.

Q. It was unsaid, wasn't it? A. I stated it was irrelevant, in my opinion.

Q. Now, you made another statement in this. By the way, before I go on to ask you about another matter connected with this letter, is there, in reflection, anything you would have said differently or anything that you would have said additional to what is in this letter were you

writing it now? A. I would have to read it extremely carefully. On the first glance, no, Mr. Hughes, I don't believe so, but I would have to read it again in great detail and slowly.

Q. When did you last read it in detail? A. Some months ago, Mr. Hughes.

Q. Some months ago? A. Yes.

Q. If you like, read it now, and then I will go on to ask you some questions. I don't want you to be under any disadvantage. (Witness appears to read letter)

10

A. Yes, Mr. Hughes.

Q. Would you alter anything now or add anything now?

A. I don't think I would.

Q. You don't think you would? A. No, sir.

Q. Do you remember this passage - it is the seventh paragraph - "Although both the ordinary stock in Cumberland.....during that time."? A. That's correct.

Q. Recent months, of course, would include July, wouldn't it? A. Probably.

20

Q. Certainly? A. Yes.

Q. And you were saying in the sentence that I have just read that no useful purpose would be served by revealing particulars of any dealings in Cumberland shares, including dealings that have taken place in July, weren't you?

A. That is correct.

Q. And including your family company dealings? A. That is correct.

Q. May we take it that when you wrote those words you made a conscious decision not to tell the Cumberland shareholders about the \$1.25 that your family companies had received in July? A. I think the conscious decision you make about the matters you disclose, the conscious decision was to send this letter; not about the negative.

30

But you knew when you wrote those words that in the recent month of July your companies, your family companies, had received a fair price for their Cumberland ordinary shares, didn't you? A. That is correct.

Q. Your mind adverted to that when you wrote those words, didn't it? A. I don't believe so.

Q. You don't believe it? A. No.

Q. You knew the facts but your mind did not advert to them. Is that what you say? A. I did not consider them relevant. 10

Q. I see. You did not consider them relevant? A. No, sir.

Q. And the reason you advanced in this letter for not disclosing them was the abnormality of conditions on the Stock Exchange, wasn't it? A. One of the reasons; probably the main one.

Q. Is there any other reason advanced in this paragraph of the letter about which I am asking you? A. No, there is not. 20

Q. To be certain - I don't want to trick you -- read it again. You don't want to? A. I recall the sentence.

Q. You will agree, won't you, that the only reason you advanced in this letter, in effect, for not disclosing the July dealings involving your family companies in Cumberland shares at the price of \$1.25 is that conditions on the Stock market had been abnormal? A. No, I don't think that is putting it correctly, Mr. Hughes, either if I can put it that way. Under Stock Exchange requirements, the transaction is required to be completed I think within 90 days. The transaction fell outside that 90 day limit of the Sydney Stock Exchange. 30

Q. 90 days from when? A. I believe from the date of the takeover.

Q. The date of the announcement of the offer? A. It could well be.

Q. And that is 13th September, isn't it? A. I don't know the date.

Q. The offer was announced on 13th September, wasn't it, by letter sent out by FAI? A. I don't recall the date.

Q. Have a look at Exhibit 7, will you. Do you see the date of it? A. Yes, it is 13th September, Mr. Hughes.

Q. The announcement of the offer was made on 13th September, wasn't it? A. No, I don't believe so, no, Mr. Hughes.

10

Q. That letter was intended to announce that an offer would be made, wasn't it? A. I don't believe so, no.

Q. Really? A. Really.

Q. May I have it back? A. May I read it first? Do you mind if I read it?

Q. Mr. Adler, must you not have read it to give the answer you have just given? A. Not really. I read the paragraph which told me that answer but may I read it or may I not?

20

Q. Please do. I want you to have every opportunity to do as much justice to yourself as you can. (Witness appears to read Exhibit 7) A. Yes, Mr. Hughes.

Q. That letter was the announcement of the offer, wasn't it? A. No, this was a letter, if I recall correctly, consequent on a requirement of the Sydney Stock Exchange that any time you receive a letter containing the listing or the requirement of the listing, you are obliged to inform shareholders within X number of days. This letter was a direct consequence of that.

30

Q. May I just have it. I may have, by mistake, shown you the wrong letter and, if so, I apologise. Do you see the last paragraph? A. Yes, I do.

Q. "Fire & All Risks Insurance.....as soon as practicable." Is that right? A. That's right.

Q. In fact, you made such an announcement - FAI did - on the same date, didn't you? A. Not that I recall.

Q. Would you have a look at - I think you have got Exhibit 11 still in front of you? A. The takeover offer?

Q. Yes. A. Yes, I have.

Q. Would you have a look at the Part A statement, the second page of it? A. Yes.

Q. Paragraph 7:3. A. Yes.

Q. Do you see those words "The latest available marketwas 60 cents"? A. Yes. 10

Q. Now, this is the letter, isn't it - Exhibit 47 - referred to in that paragraph? A. That is a letter that Cumberland sent to its shareholders.

Q. Yes, that is the letter referred to in that paragraph? A. That is not the letter referred to in that paragraph.

Q. It is the announcement of the takeover offer? A. No, Cumberland can't make an announcement of the takeover offer. 20

Q. Did FAI write to Cumberland advising of its intention to make a takeover offer at or about 13th September? A. Whether they wrote or whether they verbally advised, I don't know, but they certainly made some advice.

MR. HUGHES: I am sorry, that was Exhibit 7.

Q. You know, don't you, that FAI, on or about 13th September, wrote to Cumberland saying, "We propose to make a takeover offer"? A. No, I am not aware of it at all.

Q. It had to, didn't it? A. In fact if I may add to this, we have been specifically advised that the date of the takeover offer was not 13th September. 30

Q. Oh, 20th November? A. I believe so.

Q. And you thought that gave you grounds for omitting

to disclose the family company sales in July, did you?

A. It gave us grounds to comply with the requirements of both the --

Q. I am not going to take your so-called answer; I am going to ask for an answer to my question. When you got that advice, that the 90 days ran back from 20th November, you used that as a ground for omitting to disclose the sales by your family companies to FAI in July, didn't you? A. When we got that advice, it made it clear what was the relevant information that we were obliged to put into our takeover documents, which we have promptly done.

10

Q. You know, do you not, that in preparing takeover documents, you are not obliged to stick to the minimum statutory requirements, don't you? A. No, but you are well advised to do so.

Q. Oh, well advised to do so, but also well advised, would you not agree, to disclose any other relevant information, even though it is not required to be disclosed under the Act? A. Assuming you consider it relevant, which I did not.

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Q. All I am putting to you - you have not answered it, and it is capable of an answer yes or no - when you got the advice that the three months period or the 90 day period ran from 20th November, did you, on the basis of that advice, decide to omit any disclosure in the takeover documents of the family company sales? A. The technical completion of Part A and Part B statements was done by accountants and lawyers, not me, and whatever has been put in was in strict compliance with the laws. In the letter attached to the Part A statement, I was responsible for the draft thereof and I decided what I put into it.

30

Q. Yes. Well, I will come back to my question and I will put it again to you specifically. Did you rely upon the advice that you had received to the effect that the 90 day period ran back from 20th November, to found your decision not to make any reference to the family company sales in July in that letter of 20th November? (Objected to, pressed, allowed).

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WITNESS: I did not consider that relevant, your Honour.

MR. HUGHES: I am sorry, your Honour, I do not want to be tedious, but that is not an answer to my question.

HIS HONOUR: No; Mr. Hughes is asking you whether the receipt of that advice you got about the 90 day period was the basis of your omitting that information? A. No, because I don't believe I would have got that advice myself; that would have been handled by my accountants and my solicitors.

MR. HUGHES: Q. But you have sworn on your oath that that was the advice you received, didn't you? A. And subsequently I have been told that by my company solicitors and lawyers, and the document does not refer to it. 10

Q. The document hardly would. That advice came to your notice before you wrote that letter of 20th November, didn't it? A. I don't believe so.

Q. Are you serious? A. Yes, I am.

Q. So you have been telling his Honour about some advice that you believe was received by somebody else, is that so? A. I was stating very specifically that the documents in Part A and Part B statements have been complied, to the best of my knowledge, with all requirements of the Companies Act and the Sydney Stock Exchange. You see, you put to me that the takeover date was 13th September; I said I did not believe that to be so. 20

Q. Look, that is all very interesting, but I am going to again insist on an answer to my question. You told his Honour, did you not, about some advice that had been received, and you specified what the advice was, didn't you? A. That is correct. 30

Q. You were telling his Honour, were you, about advice not received by you but in your belief by somebody else? A. That is so.

Q. You are a very experienced litigant, aren't you? A. I don't believe that to be so.

Q. Or the companies, over which you preside, are very experienced litigants? A. I don't believe that to be so.

Q. You know very well that you are not supposed to give evidence of matters - unless you are asked - not within your personal knowledge, don't you? A. I have been fully informed.

Q. Yes; and you were giving evidence to his Honour about some advice that, according to you, was not given to you but to somebody else? A. That somebody else passed it on to me.

Q. Who was the somebody else? A. I believe it was Mr. Sinclair and Mr. Atkinson, the company solicitor. 10

Q. So you won't answer yes or no, is this the position, to the question whether you relied upon this advice that you got, second hand, in making your decision not to tell the shareholders of Cumberland about the price that the family got for their shares? A. Mr. Hughes, I could not have relied upon something that I considered immaterial. I did not believe that this was relevant information.

Q. Why did you seek the advice, if you did not think it might be relevant information? A. I did not seek it. 20

Q. You did not seek the information? A. No.

Q. Did you instruct anyone to seek the advice? A. No, I didn't.

Q. So you didn't know whether the information was relevant or not, did you? A. In my opinion it was not relevant.

Q. And it was also very convenient not to disclose it, relevant or not, wasn't it? A. I don't believe that to be true. 30

Q. Wouldn't it have been inconvenient for you to have revealed to the shareholders in Cumberland that the chairman had got \$1.25 for his shares in July in a perfectly fair transaction, when these shareholders were being offered one for one share exchange? A. I didn't think so, Mr. Hughes.

Q. The thought did not cross your mind that that might have been a piece of information that might have run counter to your intended inducement? A. Would you mind translating that into English?

Q. You don't understand the question? A. No, I don't.

Q. You didn't think that the revelation of the price that the chairman's shares gained in July might run counter to the inducement intended by your letter of 20th November? A. Might run counter - no, I did not think so. 10

Q. Is there one thing in that letter of 20th November, Mr. Adler, that argues against the acceptance by Cumberland shareholders of FAI's offer? A. I don't believe so.

Q. No; the argument is all in favour, isn't it? A. I was in favour of it.

Q. And once you agree - look, you know that was not an answer to the question, you might think it very clever - you know that all the argument in that letter is in favour of acceptance, don't you? A. I have clearly stated that yes it was. 20

Q. And you will admit, won't you, that if you told the shareholders, whether it was relevant or not, that the chairman got \$1.25 for his shares in July, that might have been an argument against acceptance? A. I don't believe so.

Q. You don't believe so? A. No, I don't.

Q. If you didn't think so, why didn't you tell them? A. Because I didn't think it was relevant. 30

Q. And you didn't think it was relevant, because this was a share exchange offer, is that what you still say? A. That is correct, and also the other reasons that I have stated.

Q. You said this morning that this letter and the take-over documents, Exhibit 11, went out on 21st November, is that right? A. I believe so.

Q. And that was the very day, wasn't it, that you and persons interested with you bought about 60,000 FAI shares in a market transaction at forty cents? A. Possibly.

Q. You know that to be the case, don't you, Mr. Adler?
A. I don't know the exact date; it was around that time.

Q. May the witness be shown Exhibit 81? (Shown)
A. I don't know what these are supposed to be.

Q. You can take it that they are buying slips concerning purchases of shares made on 21st November, admitted into evidence without objection. A. One of them is a cancellation advice. 10

Q. Having looked at those documents, will you not agree that you gave instructions on 21st November for the purchase of a large parcel of FAI ordinary shares at a price of 40 cents? A. We have received around that date - I am not arguing, I am not sure of the date, but assuming it is 21st - we had received an offer from Sir Ian Potter that he had a parcel which was, as he termed it, a desperation -- 20

Q. Look, Sir Ian Potter had no part in it, did he?
A. Yes.

Q. Look, you had no conversation with Sir Ian Potter?
A. With his firm.

Q. Would you name his firm? A. The same, Ian Potter.

Q. That is not the name of his firm, is it? A. Yes it is.

Q. It is Ian Potter & Partners? A. Is it?

Q. You had a conversation with a man called Johnson of Ian Potter & Partners, didn't you, on 20th November? 30
A. I don't recall the man's name. He identified himself as, I thought from Sir Ian Potter could be Ian Potter & Partners.

Q. And on 20th November this man, an employee of Ian Potter & Partners, rang you and said, "I have a pretty

substantial parcel of FAI to sell, more than 50,000 to sell", didn't he? A. I think he said he had 60,000 to sell.

Q. Did he ask you, "Would you know of anyone who would be interested?" A. A conversation took place in which he offered me shares for sale. Whether they were these shares or not, I do not recall.

Q. And did you say to him, "I will think about it"?

A. Probably.

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Q. And on 21st November did you ring that man back, to convey your decision? A. That I would buy those shares?

Q. Yes. A. Yes.

Q. And you said to him, "I can make a bid of 40 cents per share"? A. That would be right.

Q. And he said to you, did he not, "Is that the best you can do?" A. I don't recall the conversation; that sounds as if it could well be right.

Q. Did you say, "Yes, that is my bid", or words to that effect? A. Words to that effect, yes.

20

Q. Did he say, "I will have to go to my seller and submit that bid to him"? A. Yes.

Q. Did he say, "If my seller does accept it, it would be subject to crossing in the market"? A. I think he specifically referred to the Melbourne market.

Q. I don't care whether it was the market in Timbuktu, did he say that if the bid was accepted, it would have to be subject to crossing in the market? A. Yes, it was subject to crossing in the Melbourne market.

Q. That will do me; and you replied "Yes, of course", is that right? A. Probably.

30

Q. And on the same day did this man, from Potters, ring you back and say, "I accept your bid of 40 cents, subject to crossing"? A. Words to that effect.

Q. And you said, "Right"? A. Yes.

Q. And it was by that transaction that on the very day that the takeover documents were sent out, you and your associated family interests and business associates picked up 68,000 FAI shares at 40 cents? A. Correct.

Q. And in the takeover documents you were implying, were you not, or stating expressly that the latest available price for FAI shares was 57 cents, weren't you? A. I am sure that was correct at the time. May I have a look? 10

Q. Yes, certainly. The Part A statement was dated on 1st November. The transaction whereby you picked up 68,000 FAI shares for 40 cents was a transaction that was conducted on the market, wasn't it? A. It was.

Q. And of course a most important piece of information for any Cumberland shareholder to have, in evaluating the takeover offer, would be the information as to the market price of FAI shares which were being offered as the counter? A. The market price of FAI shares and Cumberland share market were published in every newspaper across the land, Mr. Hughes. 20

Q. And that is your justification, is it, for never telling anyone of the Cumberland shareholders about this pick-up of 68,000 FAI shares for 40 cents on the market? A. Mr. Hughes, this document has to be printed, it has to be prepared, it has to be signed. It has been prepared properly. Subsequently the share transactions took place. I don't know quite what was wrong with that. 30

Q. Look, the preparation and the ultimate sending out of this takeover offer and the accompanying documentation took quite some time didn't it? A. Yes, it did.

Q. It took from early September through to 21st November? A. No, it did not.

Q. Well, it was sent out on 21st, wasn't it? A. It was.

Q. The decision to make the takeover offer was made

early in September, wasn't it, after the receipt of the letter from the Stock Exchange? A. Yes, but before the offer itself could be formal we had to make the preparation of the FAI accounts. The actual preparation of the takeover offer itself did not take anything of that length at all.

Q. There would have been nothing to prevent you, before sending out the takeover offer of 21st November, to put in a slip amongst the takeover documentation, a sort of stop press, saying, "FAI shares have just changed hands in the market at 40 cents", would there? Nothing to prevent that, would there be? A. In fact I think if you want to be historically correct, I think our acceptance of the offer by Potters came after the takeover documents went out. I think these things had been executed on the 22nd, and these went out on the 21st. 10

Q. Mr. Adler, you have already agreed with me that you were approached with this offer on 20th, haven't you? A. I stated I did not recall the date exactly. All I am suggesting is that according to this document that you produced, this was apparently given effect to on the 22nd. 20

Q. Do you see the date on the top right hand corner, 21st? A. 22nd.

Q. Let me see the document? A. Certainly.

Q. You have agreed with me in your evidence this afternoon, haven't you -- A. No, I think I made the reservation half a dozen times that, you know, I cannot vouch for dates. 30

Q. Have a look at the date of the buyer order in the documents that are Exhibit 81 (shown) - 21st, isn't it? A. The buyer order, yes. The 22nd could be when Potters accepted. I can't say, Mr. Hughes --

Q. You have just told his Honour in answer to specific questions about conversations you have had with this man from Potters, haven't you? A. I keep repeating, I can't be sure of the date.

Q. And I showed you the date, 21st November?

A. And I show you the date 22nd November on the same document.

Q. And it appears it was the 21st was the date of the buying order, doesn't it? A. I have no doubt --

Q. Read it? A. "Time taken, 4 o'clock; date 21st November, 1974". That could well be the time when Mr. Johnson, I believe the name was, stated that he has to get instructions from his client. This could well be the date of the offer, and the 22nd could well be the date of acceptance; I do not know. 10

Q. Well, assuming that the deal was closed on 21st, you see, with the market crossing on that date, there would have been nothing to stop you putting a stop press slip, as it were, in the takeover documents saying, "The chairman and his friends and associates have just bought 68,000 FAI shares for forty cents", would it? A. Nothing to stop me from doing it, no; no obligation for me to do so, no.

Q. No, but didn't you think it might have been candid to do so? A. No, I don't believe so, Mr. Hughes. 20

Q. Do you think it was candid not to do so? A. No, it was not.

Q. No, and even if the sale had been completed on 22nd, there would have been nothing to stop you advising the Cumberland shareholders of the fact, would it? A. Absolutely nothing, but there was no need for me to do so.

Q. But it would have been candid to do so, wouldn't it? A. Well, Mr. Hughes, once you send out takeover documents, every time there is a sale on the market I could send out another notification. 30

Q. This was not just a sale on the market, it was a very big parcel, wasn't it? A. It was a big parcel.

Q. By the chairman, involving the chairman and his friends and associates? A. The last I heard, Mr. Hughes, the chairman is not prohibited from buying shares on the open stock market and making whatever bid he thinks appropriate.

Q. Nobody suggested otherwise, but the fact that the chairman buys shares at 40 cents when these shares are being offered in exchange for another share is a fact of some relevance, isn't it? A. If it falls within the prescribed period, yes; outside it, it is not.

Q. You see, there was this conjunction of historical facts at or about the time the takeover documents were sent out, wasn't there; the chairman, his family and business associates or companies associated with him had received \$1.25, thank you very much, for their Cumberland shares in July - that was the first historical fact, wasn't it? A. It was a fact.

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Q. And then the second historical fact was that on or about 21st November, give or take a day, the Chairman and his friends and associates had mopped up on the market the 68,000 FAI shares for 40 cents a share, that is right, isn't it? A. That is not, because that expression "mopped up" --

Q. Well, I will take away the words "mopped up" - had acquired? A. Yes.

20

Q. And there is a bit of disparity between \$1.25 and 40 cents, isn't there? A. Different shares.

Q. I don't care whether that is so or not - of course they were. One share was being offered in exchange for another, wasn't it? A. At a different period of time.

Q. One share in this takeover offer was being offered in exchange for the other, wasn't it? A. That is correct, at a different point of time.

Q. And \$1.25 was a very fair price, wasn't it, in July, for the chairman and his friends and family to get? A. I am glad you agree it was a fair price.

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Q. And presumably you thought that 40 cents was a fair price to pay? A. I thought it was the bargain of the century.

Q. Yes, and very advantageous? A. Delightful.

Q. And you knew at the time you took this bargain that

if those 50,000 FAI shares had been put on the Exchange for sale in the ordinary course - that is to say, otherwise than by crossing - it would have had a most marked depressing effect on the market, wouldn't it? A. That defeats the argument you are putting to me.

Q. I don't care whether it defeats the argument or not, I am not concerned as to your evaluation of my argument, I am concerned at getting the answer to my question, and you will please answer it? A. I think you are confusing your companies. 10

Q. You knew - look, you can assume that I am as confused as you like to think I am, but I am going to ask you questions and I am going to get answers eventually, do you understand? A. If you specify the companies.

Q. You knew that if the 68,000 FAI shares that you bought on or about 21st November had been placed on the open market - that is to say, otherwise than in a crossing transaction - as shares for sale, that placement on the market, a selling order for that number, would have had a markedly depressing effect on the price of the FAI shares, wouldn't it? A. Undoubtedly. 20

MR. HUGHES: Q. Notwithstanding those facts within your knowledge on or about 21st November, you never told the Cumberland shareholders about the acquisition of 68,000 at 40 cents? A. No, I did not.

Q. You never told the Cumberland board about it - I mean the individual member of the Cumberland board? A. Most certainly not. We never told him of any other transactions FAI had entered into. 30

Q. I want to come to a piece of literature you put out in the course of the paper warfare, Exhibit 15. A. Yes.

Q. Do you see that? (produced) A. Yes.

Q. Was that prepared by you in collaboration with Mr. Atkinson? A. It would be, yes.

Q. Did anybody else help? A. All the directors have signed it and approved of it.

Q. May I have it back? A. Yes. (witness complies)

Q. Have you read that document recently? A. No.

Q. Would you agree if you make a reference to the ruling market price for shares for a particular company you are by necessary implication saying there is a real market for those shares on the Stock Exchange? A. No, I would not say that. I would not say that.

Q. You say if you talk about a ruling market price for shares listed on the Stock Exchange you are not implying there is a real market for those shares? A. There may be and there may not be. The mere fact you are quoting a market price does not imply whether there is unlimited buying or selling. 10

Q. You refer to the ruling market price - - ? A. It does not imply there is a continuous market.

Q. It does imply there is a real market? A. There is a market.

Q. And a real one? A. I do not know the distinction. There is a market. 20

Q. Of course there never was a market for Cumberland shares between July and November? A. I think there was.

Q. Not a real one? A. There was a market.

Q. But you knew it was a market in so far as it was one created by your own operations? A. Yes, created by me. That does not change it. It is still a market.

Q. The fact it is created by you is a relevant fact in considering the weight to be attached to market prices from time to time? A. Not necessarily. A market is a market irrespective of who makes it. 30

Q. Even if it is a manipulated market, you say it is still a market? A. I think the word "manipulated" may not be correct.

Q. In so far as there was any market for Cumberland

shares between June and November, it was a market that you made? A. If ever there was a market from 1969, probably I made that market to a large extent.

Q. You and no one else? A. I cannot say that.

Q. Principally? A. Very likely.

Q. And to refer to such a market as a real market without saying at the same time that you, the chairman of Cumberland and the chairman of FAI were making that market would be misleading? A. There is a market. I do not think one has to disclose who is the operator in that market.

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✕ Q. I will come back to the question and insist on an answer as politely as I can. A. Yes.

(Question marked above with ✕ read)

WITNESS: No, it would not be.

MR. HUGHES: Q. It would be perfectly candid? A. Perfectly true.

Q. And candid? A. True.

Q. And candid? Do you know the meaning of candour?
A. Yes, but in the legal context I believe truthfulness over-rules the necessity for candour.

20

Q. You do not equate the two things? A. Not necessarily.

Q. That is an interesting observation. (No answer)

(Witness stood down)

(Further hearing adjourned to 10.00 a.m. Friday, 31st October, 1975)

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

No. 707 of 1975.

CORAM: BOWEN, C.J. in Eq.

CUMBERLAND HOLDINGS LIMITED & COMPANIES ACT

ELEVENTH DAY: FRIDAY, 31ST OCTOBER, 1975

MR. VOSS: There are some corrections to the transcript.

- * On page 213 of the transcript, first question, the question and answer is recorded as follows: "Q. You pointed to the one you have just dealt with. Did you form the belief that there was any other untrue statement? A. I believe there are half truths because of the lack of admission." "Admission" should be "information".

10

MR. BAINTON: I have no recollection, but I would accept that.

HIS HONOUR: I will make that correction.

- ** MR. VOSS: At page 649 eight questions from the bottom: "Q. Do you remember telling his Honour when you read this document you were of the view it would serve a useful purpose to tell the minority stockholders in Cumberland about the two dealings in the chairman's shares, off market." I don't think the "two" should be there.

20

MR. BAINTON: I think the transcript is correct, if you go back two questions.

HIS HONOUR: I don't think it makes much difference but I think we should delete the "two", Mr. Bainton.

- *** MR. VOSS: At page 692 of the transcript, at the top of the page: "Q. Does your recollection enable you to say at the time of the conversation the last quoted sale on the Stock Exchange for Cumberland, that is December 1973, was 65 cents - that is August?" The words "that is August" should not be there.

30

(* Original Transcript Page 132)
(** Original Transcript Page 431)
(*** Original Transcript Page 461)

HIS HONOUR: That does not seem to fit in. Those words will be deleted.

* MR. VOSS: Page 712 of the transcript, the seventh question "Q. So far as the formulation of reasons for your judgment - for doing what you did do - was concerned, your mind is like a bare hat", the "hat" should be "slate".

** MR. VOSS: At page 716, the last line, the transcript shows "To reduce the two counters in terms of currency.." I think that it should be "To terms of currency." My learned leader has used that expression on each other occasion. 10

*** At page 718, the first question "Q. That is one of the changes? A. One of them. The credit squeeze may be another one. The wilful interference by the Government in restricting the flow of money is another. By November the rates of interest obtainable even on bank bills had risen to something like 24%, or thereabouts, whilst in July there was plenty of market for investment purposes." That should be "money for investment purposes" and not "market for investment purposes." 20

∅ At page 728, the eighth question: "Q. I suggest you, so that you will be perfectly clear what I am about, that that statement in the sentence that is under consideration now was deliberately treated." The word "treated" should be "tricky".

∅∅ At page 736, just above the middle of the page "You know, do you not, that propounding takeover documents, you are not obliged to stick to the minimum statutory requirements, don't you." The "that propounding" should be "in preparing". 30

MR. BAINTON: At page 681 of the transcript, the seventh question - the answer to that question is recorded as "No. I decided to stay because I could ill afford the time". The negative has been left out. It should be "I decided not to stay because I could ill afford the time".

(* Original Transcript page 475)

(** Original Transcript page 477)

(*** Original Transcript page 478)

(∅ Original Transcript page 485)

(∅∅ Original Transcript page 489)

(≠ Original Transcript page 454)

HIS HONOUR: Agreed correction.

* MR. BAINTON: At page 738, six questions from the bottom "Q. Why did you seek the advice, if you did not think it might be relevant information" the answer is recorded as "I don't know" I think the answer was "I did not seek it".

HIS HONOUR: Yes, I think the next question makes it clear. Agreed correction.

** MR. BAINTON: On page 745, the third question from the top, in the answer, and also in the question, the words "mocked up" should be "mopped up". 10

HIS HONOUR: Agreed correction.

*** MR. BAINTON: At page 744, five questions from the top "Q. Do you think it was candid not to do so" the answer is recorded as "No, it was not." I understand Mr. Adler says that he said "No, it was not relevant." I have no recollection myself.

MR. HUGHES: I must say I observed that answer this morning and discussed it with my juniors. My recollection is that was the answer given, but I am quite prepared to give Mr. Adler an opportunity of reconsidering that answer, because it may have been an answer given in some confusion because of the preceding question. I should perhaps give him an opportunity for considering that. 20
HIS HONOUR: I think that is the better way. My personal recollection is that that was what was said.

MR. BAINTON: I could not say whether it is correct or not, myself, but Mr. Adler says it is not what he meant to say.

MR. HUGHES: If it is not what he meant to say I will give him an opportunity to correct it. 30

LAWRENCE JAMES ADLER

On former oath:

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

(* Original Transcript Page 490)

(** Original Transcript Page 494)

(*** Original Transcript Page 494)

WITNESS: Yes.

(Stock Exchange quotations for FAI shares tendered
by consent and admitted as Exhibit 88)

MR. HUGHES: Q. Mr. Adler, I want to take up at the
point that was mentioned by your leading counsel in re-
* lation to page 744 of the transcript. Do you remember
I had been cross-examining you as to why you did not
reveal to the Cumberland shareholders the market trans-
action whereby FAI - I'm sorry, whereby you, your
friends and associates had just bought 68,000 FAI shares
at 40 cents? A. Yes. 10

Q. I put to you this question: "Q. No, but didn't you
think it might have been candid to do so?" That is
candid to reveal the transaction to the Cumberland
shareholders. Your answer was "No, I don't believe so,
Mr. Hughes." That is to say, you were saying you did
not believe it may have been candid. The question was
"Q. No, but didn't you think it might have been candid
to do so," and you answered "No, I don't believe so, Mr. 20
Hughes." The next question was "Q. Do you think it
was candid not to do so?" and your answer was "No, it
was not." Do you wish to correct that answer, and in
the course of doing so give me the reason for the error,
if there is one? A. My recollection is that my answer
was that I did not think it was relevant, and that is
my considered opinion now.

Q. What you are saying is that is what you meant to
say? A. Yes.

Q. Very well. Is there anything else you want to add? 30
A. No.

Q. In explanation of that particular point? A. No.

Q. Now, long before 30th June 1974 you had the inten-
tion, did you not, of one day transferring all the
Cumberland shares held by you and your family and your
family companies, Falkirk Properties, Lader and Eagle,
to FAI? A. Yes.

(* Original Transcript 494)

Q. That was an intention that persisted in your mind at all times up to 30th June, wasn't it? A. No, it was not an intention that persisted in my mind at all times. When I started FAI, the reason for the purchases which I think I mentioned yesterday was that we have been requested by the accountant and auditors of FAI not to increase FAI's holding for consolidation purposes. At that time when I started buying them in my own and family companies' names the intention was that one day they would be transferred to FAI.

10

*Q. That is what you are saying, is it? That the intention was in your mind prior to 30th June 1974? That is right, isn't it? That intention was in your mind prior to 30th June 1974, wasn't it? *A. What I am trying to say is that it was not an intention that was continuously in my mind.

Q. It was something that was in your mind? A. No thought was given to it.

Q. How could something be in your mind if no thought was given to it? Can you explain that conundrum to his Honour?

20

MR. BAINTON: My friend has misconstrued the witness' answers. He has missed the negative.

(Question marked * read by court reporter)

Q. Was it an intention that was in your mind at some time prior to 30th June 1974? A. Yes it was.

Q. You told Mr. Atkinson, did you not, that it had been your thinking - it was your thinking all along that these shares should really be taken up by FAI itself?

30

A. In what context? I don't get the question.

Q. In the context of discussing the ultimate disposition to FAI of the shares in Cumberland Holdings by all your family companies and family interests? A. I probably would have mentioned that to Mr. Atkinson.

Q. And you told Mr. Atkinson to get over the problem raised by the auditors relating to consolidation of the accounts you had put the shares in the names of one or

other of the members of your family or various associated companies? A. I would have.

Q. And you also told Mr. Adler - I'm sorry, Mr. Atkinson - 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 parcels of shares held by your family companies, and so on - consolidated in the FAI name itself?

A. I don't recall that I said it on several occasions. 10
I might have said it to him.

Q. You said it to him? A. I might have.

Q. Shortly before 30th June? A. No, I would not agree with that, no.

Q. Anyhow, such an operation was in your mind shortly before 30th June, wasn't it? A. No it was not.

Q. The intention was in your mind before 30th June 1974, wasn't it? A. No it was not.

Q. Are you sure? A. Positive.

Q. It was always in your mind as something you would do at the appropriate time, wasn't it? A. I think I answered that question just a few minutes ago. No, it was not. I had decided to do it some years previously, and it was not specifically in my mind at any time. 20

Q. It was a decision from which you had never departed? A. That is right. I have not.

Q. You never, as it were, revoked the decision in your mind? A. No, I have not.

Q. In that sense the decision was still something operating in your mind shortly prior to 30th June, wasn't it? A. I certainly was not thinking of it, Mr. Hughes. 30

Q. Were not you thinking of it when you placed a selling order at \$1.50 round about 24th June for Cumberland shares? A. I was not.

Q. You were not? A. No.

Q. You were not? A. No.

Q. You will agree with me there is a remarkable conjunction of events, isn't there, between placing of the selling order on or about 24th June and the buying orders placed shortly thereafter? A. No.

Q. And the family company sales on 11th July. Won't you agree that is a most remarkable conjunction of events? A. No, I will not.

Q. You don't? A. No.

10

Q. You say, do you, that it is just a coincidence that you placed a selling order for Cumberland shares on the Exchange at \$1.50 within three weeks of the sales of these family company shares in Cumberland to FAI? A. Yes, Mr. Hughes.

Q. Pure coincidence? A. Pure coincidence.

Q. Is that what you say? A. Yes.

Q. One of the most remarkable coincidences you must have struck for a long time, isn't it? A. I cannot comment on it.

20

Q. What do you think? It is a most remarkable coincidence, isn't it? A. No, it is not.

Q. Of course, would you say that if your real view was that the Cumberland shares at the end of June 1974 were worth \$1.25 - really worth \$1.25 - there would be nothing improper in you putting a selling order on at \$1.50 on the Exchange at a time when you had it in mind - if you did have it in mind - to sell your family shares to FAI at \$1.25? A. There was nothing improper.

Q. Would there have been anything improper in putting on the selling order at \$1.50 on or about 24th June if, contrary to what you say, you did have it in mind at that time that shortly afterwards you were going to sell your family shares to FAI at \$1.25? A. No, I don't think there would be anything improper.

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Q. Nothing improper? A. No.

Q. That is your view, is it? A. That is my view.

Q. It was your view, was it not, implicit in the placing of the selling order, that \$1.50 was a fair price to ask for the sale of Cumberland shares? A. I don't think when you place an order on the Stock Exchange you are particularly concerned whether the price at which you are willing to buy or sell is a fair one, or not.

Q. Did you think \$1.50 was a fair price? A. I don't think I gave it any thought.

10

Q. Don't you? A. No.

Q. You must have exercised some judgment in deciding what price to ask for? A. I must have.

Q. And you will agree, won't you, that part of that judgment would have consisted of an evaluation of what would be a reasonable price to ask for the shares? A. "Reasonable" might be different from "fair".

Q. You draw a distinction between "fair" and "reasonable", do you? A. Most assuredly.

Q. What is the distinction? A. "Reasonableness" could be justified on a consideration of a number of facts. "Fairness" would be a matter where you owed a duty of being fair to some person or persons.

20

Q. But "reasonable" has to be judged objectively, doesn't it? A. That is what I said.

Q. And you were a person with inside knowledge, weren't you? When you placed this selling order of \$1.50 you were a person with inside knowledge of both Cumberland's affairs and FAI's affairs? A. I was the chairman of both companies.

30

Q. That is not what I asked you. You were a person with inside knowledge? A. I was chairman of both companies. I would be - (interrupted).

Q. You have heard of "insider" trade? A. Yes.

Q. You know when a person with inside knowledge tries

to get a price it behoves him to be fair when he is putting his shares on the Exchange? A. Are you suggesting I was engaged in insider trading?

Q. Just answer my question. A. Will you elaborate on it?

Q. You appreciated at the time when you put the selling order on that you were a person with inside knowledge, and that it therefore behoved you to be fair when you were placing a selling order for the shares with respect to which you had that inside knowledge, didn't you? 10

A. No, I don't think in that context I would be a person with insider knowledge.

Q. Really? A. Really.

*Q. Didn't you think if it came to the light of day that the chairman of both Cumberland and FAI had put on the market a selling order for Cumberland shares at \$1.50 that might be taken quite reasonably by persons to whose notice it came that the chairman thought the shares were worth that much? A. All relevant information has been disclosed to the public at all times. There was no information that I was privy to that was not available to everybody else in quite specific documents. 20

Q. That is not an answer to the question that I have asked you, you know. We will just have to go through the very laborious process, with his Honour's permission, of having the question read, so that you may answer it.

(Question marked * above read by court reporter)

WITNESS: I cannot comment, Mr. Hughes, on what other people might think of it. The order was placed openly with a member of the Stock Exchange. There was nothing clandestine about it. The order was placed quite openly, and there was no reason to assume that they would not make public my action. 30

Q. You know very well that the placing of selling orders is not publicised to the world in terms that indicate the identity of the would-be seller? You know that, don't you? A. If you actually purchase, and the

share transfer is sent to you, the seller's name is shown on the transfer document.

Q. But it is not disclosed to the public? A. It is disclosed to the purchaser, and he is the only one who would have that knowledge.

Q. It is not disclosed to the public? A. It is not disclosed to the public to my knowledge.

Q. You have not answered my question. I will have to come back to it, unless you want to answer it with "no comment"? A. I think I have commented quite a great deal.

10

Q. Perhaps. But you have not answered the question yet.

(Question marked * on page 757 of transcript read by court reporter)

That is a question that admits of an answer of yes or no, isn't it? Will you please try and answer it yes or no? A. May I have my answer? I think I have already answered it.

20

Q. Try again. Leave it to his Honour to evaluate whether or not you have answered it. A. Could I have the answer read? I think I have already answered it.

MR. HUGHES: I prefer that not be done.

HIS HONOUR: I think you ought to be able to answer it, Mr. Adler.

WITNESS: My answer is still that I believe that there was no suggestion that the matter would be a clandestine one, and I am unable to comment on what other people might think of it.

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MR. HUGHES: Q. You expressly decline, do you, to answer that question yes or no? A. Yes I do.

Q. And you are expressly declining to do so because it is a rather awkward task for you? A. Not at all.

Q. Will you please answer it? A. I believe I have.

Q. Will you answer it yes or no? I will have to take his Honour's direction and abide by it, but I am insisting on your answering, unless his Honour directs to the contrary.

HIS HONOUR: I think he has given his answer twice, and that is as far as it can go, Mr. Hughes.

MR. HUGHES: Q. Now, do you remember giving some evidence yesterday afternoon as to the receipt of advice concerning the time from which the 90 day period ran? Do you remember that? A. Yes, Mr. Hughes.

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Q. When did you get that advice? A. The exact date is not known to me. It would be the latter part of October, I think.

Q. The latter part of October? A. Probably, yes.

Q. And that was advice, was it, to the effect that for purposes of determining what share transactions in FAI shares ought to be disclosed to the shareholders in the offeree company the 90 day period would run back from the date upon which the takeover offer was published? A. That was part of the advice.

20

Q. That was the substance of the advice on this particular point? A. That is so.

Q. You swear, do you, that you received that advice when? A. About October, I think.

Q. What part of October? A. I think the latter part.

Q. The latter part of October? A. I think so.

Q. Do you remember me asking you some questions about the receipt of that advice yesterday afternoon? A. I do.

30

Q. Were your answers to my questions true? A. I believe them to be so.

* Q. At page 737 of the transcript his Honour said "Mr. Hughes is asking you whether the receipt of that advice you got about the 90 day period was the basis of your omitting that information?" and you answered "No, because I don't believe I would have got that advice myself; that would have been handled by my accountants and my solicitors." Do you remember giving that answer?
A. I do.

Q. And then I asked you "But you have sworn on your oath that that was the advice you received, didn't you?" and you answered "And subsequently I have been told that by my solicitors and lawyers, and the document does not refer to it." What document were you referring to in that answer? A. To the Part A statement and accompanying documents. 10

Q. You were still there referring to advice you got prior to the takeover documents? A. That would be right.

Q. Then I asked you "That advice came to your notice before you wrote that letter of 20th November, didn't it?" Do you remember me asking that question? A. Yes, it did (sic). 20

Q. It did? A. Yes.

Q. Did you say that yesterday? A. I believe so.

Q. Would it surprise you to know that your answer was "I don't believe so"? A. It would surprise me.

Q. Have a look at the transcript? (Relevant portion of transcript shown to witness) Was that a considered answer? A. It was. 30

Q. So that if it was inaccurate it was consciously untrue, wasn't it? A. No, it would be an error.

Q. An error? A. If it was untrue.

Q. But it was a considered answer? A. It was.

(* Original Transcript Page 489)

Q. I will read the question again, and show you the answer in a minute. A. Thank you.

Q. I think I have signalled it to you, but I want to show it to you in the transcript: "Q. That advice came to your notice before you wrote that letter of 20th November, didn't it? A. I don't believe so".

"Q. Are you serious? A. Yes I am." Do you remember that? A. No, I don't.

Q. I will show it to you. I want you to see it in cold type? A. Thank you. 10

Q. That question is the one I have read. Read it as carefully as you like. A. Can I go back a bit further?

Q. You have taken that in? A. Yes.

Q. And the question on the top of the next page?
A. Yes.

Q. "Are you serious? A. Yes, I am." You knew, didn't you -

MR. BAINTON: Do you think he could read down to about the middle of the page? 20

MR. HUGHES: He can in due course, when he comes to re-examination.

Q. That answer you gave yesterday, "I don't believe so" in respect of my question that the advice came to your notice before you wrote that letter of 20th November, was inaccurate, wasn't it? A. It must be.

Q. Untrue? A. It must be.

* MR. BAINTON: I object to this. If one looks down to what appears in the middle of page 738, the cross-examiner must have misunderstood it. 30

HIS HONOUR: I will look at that, Mr. Bainton. I don't think you need say any more.

(* Original Transcript Page 490)

I will permit Mr. Hughes to follow the line of cross-examination. He has put it fairly.

MR. HUGHES: Q. When I asked you the question: "Q. That advice came to your notice before you wrote that letter of 20th November, didn't it?" and you answered "I don't believe so", that answer, as you have already said, was a considered answer, wasn't it? A. Yes it was.

Q. And I gave you the opportunity in my next question to reconsider the answer, didn't I? A. Yes. 10

Q. And will you agree it was a fair opportunity? A. You did not permit me to make an explanation.

Q. The question I asked you was "Are you serious?" and you answered "Yes I am"? A. Yes.

Q. That was a clear message to you that I was asking you to reconsider your answer, wasn't it? A. That is correct.

Q. So that you gave what is an untrue answer to a question that you had two opportunities of considering, didn't you? A. No, Mr. Hughes, I don't believe I could have given that answer. 20

Q. You are suggesting that the transcript is wrong, are you? A. I don't know. It might have been misunderstood.

Q. Is that the extent of your explanation? A. No, it is not.

Q. You have already agreed this morning that you gave that answer - "I don't believe so"? A. I believe my statement was that I don't doubt the authenticity of your records, but I also stated that I would like to make an explanation. 30

Q. You have already agreed this morning that you gave the answer "I don't believe so", haven't you? A. I think my answer was at all times, Mr. Hughes, that if it is in the record I don't doubt it. I don't recall it. I don't deny it. If I gave it, I also stated it was obviously untrue.

Q. Wrong, notwithstanding two opportunities to consider it? A. I am still saying I should have given a different answer.

Q. Is that the best explanation you can offer? A. You are not permitting me to make an explanation.

Q. Is that the best explanation you can offer, or do you want to go on and add something else, because I do not propose to deny you the opportunity? A. I have asked for that opportunity already.

10

Q. What? A. I have asked for the opportunity already.

Q. You have what? A. I have asked for the opportunity of making an explanation.

Q. You want to make an explanation for the untrue answer "I don't think so"? A. I want to make an explanation for the questions you are asking me.

Q. It is not for you to explain my questions. It is for you to explain your answers, and I want you - I am now inviting you to give his Honour any explanation you wish to offer for having made an untrue answer to my question "Q. That advice came to your notice before you wrote that letter of 20th November, didn't it"? A. My explanation is that it is not conceivable that that advice should have come to me after the despatch of the takeover offer. Obviously the legal advice that we have received must have come before the date of the takeover offer, and in this respect my answer cannot conceivably be correctly recorded.

20

Q. Have a look at this piece of paper, Exhibit 82?
A. Yes.

30

Q. That piece of paper has been seen by you before?
A. No, I don't think so.

Q. Do not you recognise it as being of Mr. Atkinson's composition? A. No, I have not seen that document before.

X Q. You and Mr. Atkinson went to consult Mr. Bainton, my learned friend, your leading counsel, on the day

after your visit to the Stock Exchange, did not you?
A. Mr. Atkinson certainly has. I do not think I have.
I do not think I attended that meeting.

Q. It may be quicker if I am allowed to read from a statement that was given by your own counsel from the bar table of this court during your absence for the purpose of refreshing your recollection? A. Thank you.

* Q. On page 549 Mr. Bainton said this:

"I was consulted on 2nd December, 1974, on behalf of FAI Insurance Company Limited in relation to some correspondence that passed between that company and the Sydney Stock Exchange relating to the Cumberland takeover offer, and I was consulted again on 5th December for a period, if my field book correctly records it, which I believe it to do, of two hours beginning at 1 o'clock. 10

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 recall which - of the document or the remaining part of the document now marked 11 for identification." 20

Exhibit 82 is the document in front of you? A. Yes.

Q. I have read that to you to assist your recollection?
A. Yes.

Q. Will you agree you did on 5th December consult Mr. Bainton in company with Mr. Atkinson and Mr. Sinclair?
A. Mr. Hughes, your question was "Did you consult Mr. Bainton two days after the receipt of the Stock Exchange letter early in December." Now you are talking about September. 30

Q. If you think that, then you are utterly confused?
A. That is possibly so, you could be right.

(* Original Transcript Page 362)

Q. You can read it from the transcript - (approaching)
A. I am wrong.

Q. Then it is you who is confused and not I? A. I did not suggest you were. You are quite right.

HIS HONOUR: You had been talking about September.

MR. HUGHES: I won't make anything out of that.

Q. You agree Exhibit 82 was produced at that conference? A. I will accept that.

Q. Will you agree that was the first occasion upon which you received any advice as to the time from which the 90 day period ran backwards (Objected to). 10

(At this stage on Mr. Bainton's request the witness left the court and a discussion ensued on the line of Mr. Hughes' questions.)

(At this stage the witness returned to the witness box.)

MR. HUGHES: Q. I show you Exhibit 82? A. Yes.

Q. I only want to give you that as a convenient point of reference? A. Yes. 20

Q. My question to you is did you for the first time receive, in December, after your visit to the Stock Exchange, advice from your advisers as to the question when the particular 90 day period, or the three months' period mentioned in the listing requirements of the Stock Exchange, started and ended? A. As far as the exact date, I am unable to put the exact date on it. Seeing that the information has not been disclosed prior to the 90 days in the Part A and Part B statement I would only assume I have received advice prior to that date but I cannot give a date specifically when I received such advice. 30

HIS HONOUR: Q. That answer to the 90 days or three months is for the listing requirements? A. Yes.

MR. HUGHES: Q. You say you received advice concerning

the question from when to when the three months' period mentioned in one of the listing requirements ran at some date you cannot fix, but prior to the takeover offer being sent out or after? A. I must have been prior to the takeover being sent out.

Q. Are you making that assertion - I know it is complex because it concerns the listing requirements and I am not going to blame you if you take time to answer. In giving that answer about this advice, about the effect of the listing requirements in relation to the 90 day period, or the three month period prior to the sending out of the takeover offer, were you, as it were assuming that to be the position because the takeover documents, the Part A statement, the formal parts of the takeover documents, do not make any reference to dealings in Cumberland shares? A. I am making this assumption on the basis I did not personally draft the Part A statement but I did participate in a number of discussions with the solicitor at one stage and Mr. Atkinson at another. I sat in on a number of them, by no means all. During one of the conferences I recall a discussion did take place concerning the ninety day period. I did not pay particular attention to it. I was not, as far as I know, involved in the drafting of the documents and I did not consider it a point I should be involved in.

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Q. May we take it then you did not omit from your letter of 20th November sent out with the takeover documents, a reference to the sales of the family shares in July, because you had been advised by your lawyers you did not have to reveal those transactions? A. I cannot answer that now as I do not know what were the factors I would have considered fifteen months ago, or twelve months ago.

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Q. May his Honour take it from that, you cannot remember one way or another whether you were advised by your lawyers or anyone prior to 20th November that you did not have to refer in any documents you put your name to to the fact of the sales of the family shares in July? A. No that would mean I have participated in the discussions when it was suggested it was not relevant. The 90 days started later - end of September and there was no need to make any such disclosure but I am not aware

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whether that was a particular matter I considered in my drafting of the letter or not.

Q. You said fifteen months ago again? A. I corrected it to twelve in one breath.

Q. You see fifteen months ago is July, 1974? A. Yes.

Q. It still is today and it seems to be a very significant month in your mind? A. There is no doubt that the events of the proceedings really can be sheeted home to the 11th July. In my mind that is a rather relevant date. 10

Q. What happened on 11th July has always been seen by you to be rather relevant in the context of the takeover offer that was made on 20th November? A. No.

Q. I want to clear up now some loose points before I ask you further questions. Prior to the end of November you assert you received advice that no reference need be made to the family's sales of Cumberland Shares in July because the listing requirements did not necessitate you doing so? A. Not only the family company but I believe all the other sales that took place on the exchange at or around that time. 20

HIS HONOUR: Q. There are two requirements with the three months or the 90 day period, there is one under the Companies Act relating to disclosure by the offeror company and one under the listing requirements of the Stock Exchange relating to the offeree company having to disclose certain information. Therefore you should direct your mind to the fact there are two requirements when answering questions. If you could say I was given advice about the Companies Act or the listing requirements. I do not know whether you are drawing a distinction, but there should be a distinction drawn. Do you understand? A. Yes. 30

Q. There are two separate requirements? A. Yes.

Q. When you say you received advice, I want to be clear whether you are saying you received advice and the nature of the advice you received. At the moment I take it you say you received advice that the relevant period

of 90 days or three months went backwards from the date of the takeover offer of 20th November? A. Yes.

Q. That is the way you are putting it? A. Yes.

Q. I draw your attention to the fact that there are two requirements and you have not drawn any distinction so I do not want you to be referring to one and meaning another? A. Thank you.

MR. HUGHES: Q. In the light of his Honour's observations is there anything you want to add to the answers you have given? A. I was not aware there were separate Companies Act requirements as opposed from the Stock Exchange but the point I would like to emphasise is that the drafting of the takeover was a legal matter and my own participation was fairly limited. 10

Q. I think you have made that point? A. Yes, for that reason I never differentiated whether advice was given under the Companies Act or the Stock Exchange operations. I was told in the meetings there was no need to refer to the share transactions both the Adler family or the Exchange transactions and they were not referred to. 20

Q. Who told you that? A. I think Mr. Sinclair at the meeting.

Q. At a meeting prior to 20th November? A. Yes, there were several meetings while the documents were drafted before they were submitted to Corporate Affairs, before submitted to the Stock Exchange and during one of those conversations I was told the relevant date was the date of the offer.

Q. When you were given that advice it did not fail to occur to you that the longer the postponement of the making of the offer from the dates in July the various transactions took place, the more advantageous for you? A. I do not see why. 30

Q. Because the longer the sending out of the takeover documents were postponed the more the chance you would not be caught by the 90 day or three months limit of time imposed by the listing requirements. You knew that? A. As far as I know the takeover offer was

pursued as vigorously as possible and it was not delayed for any reason whatever.

Q. You appreciated the requirements imposed by the Stock Exchange listing rules and the Companies Act were only minimal requirements? A. They were requirements.

Q. Minimal requirements? A. I do not know. They were the requirements.

Q. At the time you were having these discussions with your solicitor or any other adviser before the takeover offer was sent out, you were anxious in your own mind to avoid, if you could, any disclosure of the family share transactions? A. Not at all. 10

Q. Were you keen to disclose them? A. Not at all.

Q. You were neither anxious to disclose them nor anxious not to disclose them? A. That is what I am saying.

Q. Did it not occur to you if you did not disclose these Stock Exchange transactions in Cumberland shares in July and the off market transactions in July, the shareholders of Cumberland might not have a piece of information, which had it been given to them, would have been of some use to them in evaluating the takeover offer? A. I did not consider it relevant information. 20

Q. You exercised your own judgment on that? A. I did.

Q. Were you at all times conscious during the takeover events that you owed a duty as chairman of Cumberland to the minority shareholders in that company? A. I was aware at all times I owed a duty to all the shareholders.

Q. Were you conscious of that duty at all times from the moment you placed that selling order at \$1.50 on or about 24th June right through to 20th November when the takeover offer went out? A. I was conscious at all times. 30

Q. And that duty, as chairman of Cumberland, included this element, did it not, that you should disclose to all the Cumberland shareholders any information in your possession that could give these shareholders a guide

to the evaluation of the takeover offer - (objected to - question to be rephrased).

Q. In your view when were you wearing your Cumberland chairman's hat were you under a duty to the shareholders of Cumberland to give them all or any relevant information that would possibly guide them in an evaluation of the takeover offer that was being made to them? A. What I considered relevant, yes.

Q. You were to be the sole judge of relevance? A. In addition to the Stock Exchange requirements and the Companies Act, yes. 10

Q. You knew and you knew well as chairman of Cumberland that the minority stockholders in Cumberland could be guided in the evaluation of your FAI takeover offer by knowing family company sale and the chairman's sale at \$1.25, did not you? A. I did not consider it relevant.

Q. You did not consider it relevant. Do you think on reflection you were wrong? A. No.

Q. You still maintain that? A. Yes. 20

Q. That was a perfect piece of judgment on your part? A. Yes.

Q. You do not want to criticize it or resile from it for one inch? A. That is right.

Q. You think it was honourable and honest? A. Yes.

Q. As chairman of Cumberland to conceal from the Cumberland shareholders when they were considering the takeover offer that you and your family and business associates, and your family companies, had got \$1.25 for the ordinary shares that you under your FAI hat were offering to minority shareholders in Cumberland on a share exchange basis. That was honest and honourable? A. I am confused. I think there are several questions in that. Could I have them read. 30

HIS HONOUR: I think you should rephrase the question Mr. Hughes and substitute the word omit for conceal.

MR. HUGHES: Q. Do you assert you acted honestly and honourably in concealing - I withdraw that - do you assert that as chairman of Cumberland you acted honestly and honourably in failing to disclose to the Cumberland shareholders when they were called upon to consider the takeover, the fact that you and your family had got and your family had companies had got \$1.25 for the shares in Cumberland in July? A. I certainly do.

Q. May we take it that you would never have lost or failed to take advantage of any opportunity that you had if it was suggested that you had acted improperly in that failure to answer the allegation. A. May I have that again? 10

Q. If anybody had ever suggested to you that you had acted improperly in failing to disclose the sale of your chairman's shares in July, you would readily answer it on the spot? A. I certainly would.

Q. Even against opposition, even against noisy opposition? A. Most assuredly. 20

Q. It was very plain to you at this meeting held on 4th March this year, the meeting of Cumberland, at which Mr. Donohoo was removed from the Board, that such allegations were being made on the floor of the meeting? A. Yes.

Q. You never answered them, did you? A. I attempted to.

Q. You did not answer? A. I attempted to.

Q. You did not answer them? A. I was shouted down.

Q. You remember telling me a moment ago that if these allegations had been made you would have answered them against opposition? A. That is right. 30

Q. You were shouted down? A. Yes.

Q. The noise was so loud you could not make your voice heard? A. That would be right.

Q. You quailed under the onslaught? A. Not in the least. I took wise counsel and sat down.

Q. And left the allegation unanswered? A. At that time.

Q. Did it occur to you if the opposition was so strong, they may have a point? A. Not in the least.

Q. The great opposition that was expressed at that meeting never enabled you to think you could have been wrong in terms of honesty or propriety in your takeover activities? A. I considered it and I considered that I did not do anything wrong.

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HIS HONOUR: Q. When the decision was made on the takeover offer, I understood that was in September but the price was not fixed at that time? A. That is so.

Q. Had the offer then been made and the price fixed, it would have been within the three months requirements whether under the Companies Act or the listing requirements to disclose the earlier transactions. Do you understand? A. Yes.

Q. Those requirements provided in those circumstances within three months, dealings within three months, for the material to be conveyed to the shareholders?
A. Yes.

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Q. At the time when the offer was actually made on 20th November and the price was fixed, the three months had expired. I want to know whether there was any connection between the lapse of time and the expiry of the three months period on the making of the offer or whether it just happened? A. No, we were unable to proceed with the takeover offer until the annual accounts of both FAI and Cumberland were ready and prepared and the actual quantum of the offer and the nature of the offer - the share exchange and the relevant facts were decided after the accounts were prepared.

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MR. HUGHES: Q. The Cumberland accounts for 1974 are dated 5th September? A. Yes.

Q. The FAI consolidated accounts are dated 3rd October?
A. That is correct.

Q. You well know that the FAI accounts were available in draft form sometime before 3rd October? A. Yes.

Q. How many weeks before? A. It would be a number of days.

Q. How many days? A. I could not tell you, a few days.

Q. They were available before the end of September in draft form? A. What was the date here - before the end of September, probably. I cannot say - probably.

Q. Would the draft accounts be available with the covering letter from the auditors in the FAI file? A. They were dated 3rd October. There would be a letter dated -- 10

Q. You must have received in the FAI office draft accounts with a covering letter from the auditors? A. No, the draft accounts are prepared and submitted by the company secretary. He prepares them, not the auditors.

Q. They come from the auditors finally before being considered by the board? A. No. The board considers them after the auditors have audited them. The company's chief accounting officer prepares them. The auditor audits them and they are taken to the board for approval.

Q. The takeover consideration was not fixed until the third week in October or later? A. Something like that. 20

Q. The fixing of the takeover terms, having regard to the fact that the accounts for Cumberland and the draft accounts of FAI were available about the end of September, was rather a leisurely process? A. No, not at all. It is quite an extensive amount of work to go in to takeover documents.

Q. With a lot of people working it still takes three weeks or more? A. More.

Q. You are not suggesting you were working full time on them? A. They were not the only things we were doing. 30

Q. It was very convenient to have a little delay so that the three month period could be going further away? A. Not at all.

Q. That thought never occurred to you? A. No, it did not.

Q. Do you remember when I was asking you yesterday some questions about what sort of information that the Cumberland shareholders might want - I asked you this on page 731:

"Q. I want to come back to something that has not been quite completed in my cross-examination and it is this. Why, if, as you have agreed, a Cumberland shareholder confronted with this offer might well want information that enabled him to reduce the counter on each side to a money value, did you make no reference in terms of figures to the comparative asset backing of each company: I want you to give your explanation if you have one".

Your answer was a question. I am not criticising you for that. Your response to the question was in this way, "Your question started 'why, if a Cumberland shareholder would want to do that?'".

I went on and I asked you "Why, if he would want to do it?" Your answer was :

"The figures for both companies balance sheets and all relevant information are encompassed in the takeover offer and he can for himself, get it out himself, with the greatest of ease".

Do you remember that? A. Yes, that is correct. That was the answer.

Q. You stick by that? A. I believe so.

Q. You were saying in that answer the balance sheets of both companies, FAI and Cumberland were in the takeover documents? A. Did not we say the relevant financial information.

Q. Let me read it to you again. I want you to have every opportunity to understand what you said. I will show you the transcript (approaching and indicating)
A. Yes.

Q. "The figures for both companies balance sheets and

(* Original Transcript Page 486)

all relevant information are encompassed in the takeover offer"? A. That is correct.

Q. You know very well that the balance sheet of Cumberland is not encompassed in the takeover offer documents?

A. No, I do not know that. I assumed that the takeover document - it was a prescribed document and it would encompass all the relevant information. I confirm that I gave that answer.

Q. That was wrong? A. Obviously. I have not read it here. If the takeover document does not contain that --

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Q. (Shown document) A. No, it only contains FAI.

Q. How long before you went into the witness box yesterday to give evidence was it since you last looked at Exhibit 11? A. A week before.

Q. You knew very well when you gave that answer that the takeover document, Exhibit 11, did not encompass the balance sheet of Cumberland Holdings? A. No, I did not.

Q. That was a pretty loose answer? A. It was an incorrect one.

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Q. Incorrect? A. Yes.

Q. Do you remember telling his Honour yesterday that you were the initiator of the suggestion that you should retire from the board room when the discussion about the family shares was brought up. Do you remember saying that? A. No.

Q. Did not you? A. No, on the contrary I think it was one of my colleagues who said it and I think I so testified.

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Q. Is it right that you initiated the suggestion or one of your colleagues? A. I think my answer was --

Q. Or nobody did? A. I think my answer to the best of my recollection was it was one of my colleagues. That was my answer yesterday and I believe it is today.

Q. That was your answer in chief? A. I believe so.

Q. Do you agree with this account of the conversation that you said "We have now taken this decision to go back into the position of stock shares again to the extent I have mentioned"? A. I could not confirm that.

Q. Or words to that effect? A. Possibly.

Q. Cannot you go higher than "possibly"? A. No, words to that effect, no.

Q. You were not the only person who had to be a party to the decision to sell your family company shares, your own shares, and the shares of the Superannuation Fund to the FAI? A. I was the officer operating the share purchase and sales, yes. 10

Q. We know you were the officer operating the share purchases and sales of shares sold but the shares sold to FAI were owned by a large group of companies and individuals? A. Yes, I was authorised to act on their behalf.

Q. You did not have to talk to anyone else before you took the matter to the board? A. No. 20

Q. You did not talk to anyone else? A. I do not think so.

Q. Do you still say you made this decision to offer the family shares to the board of FAI the night before the board meeting? A. Yes, or the morning - that is correct.

Q. It was a spontaneous off-the-cuff decision? A. Sort of.

Q. It must have been, must not it? A. Off-the-cuff implies you do not give it consideration. Consideration does not have to have any particular length of time. I considered it. 30

Q. You had it under consideration for a long time?
A. I did not.

Q. You had it under consideration prior to 30th June because it was always in your mind that one day this would be done? A. I already testified to that.

Q. That is so, you had it in mind prior to 30th June?
A. No.

Q. - one day this transaction that was effected on 11th July would take place? A. Several years ago, yes.

Q. That state of mind did not alter? A. No, it did not.

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Q. Do you remember me asking you yesterday that you left the room in response to a suggestion by one of your co-directors on 11th July? A. Yes.

Q. You said that is correct, you remember that? A. Yes.

Q. So it would not be correct to say - I withdraw that? A. I said exactly the same in direct examination.

Q. I am not suggesting otherwise. I want to put something else to you. You saw no need to leave the room?
A. No, I did not.

Q. Because although you were wearing a couple of hats, you did not think that made any difference in the context? A. I did not think my presence in the board room would have been prejudicial.

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Q. You knew you were wearing a couple of hats at the time? A. I always do.

Q. You always do? A. Yes.

Q. It is no problem as far as you are concerned? A. I think a conflict of interest applies to anybody who takes part in several organisations at the same time.

Q. However problems can become quite serious? A. If you cannot cope with them.

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Q. Do you agree with this on reflection - did not you say after saying you proposed that transaction as to the sale of the family shares to the board for its

consideration - did not you say "Naturally since I am interested in this transaction, I will not be taking any part in the decision"? A. I may have said something to that effect, but it is a very long time ago.

Q. I will take it piece by piece so I will not confuse you? A. I appreciate that.

MR. HUGHES: Q. Did you use these words or anything like them, "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."? Or anything like that? A. I don't recall it.

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Q. You don't recall it? A. No.

Q. Did you go on to say or did you say, "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 and 50 cents for the blocks of preference shares". Did you say anything like that? A. Yes.

Q. And did you say "that happens to be" - that is the \$1.25 - "happens to be both 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"? A. The exact words I can't agree to but, in substance, something like that.

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Q. And did you go on to say, "That figure" - \$1.25 - "is also in line, as far as I can judge, with the current net tangible asset value of the shares". Did you say that? A. Something like that, yes.

Q. Prior to that statement had you discussed with your co-directors the near certainty that the year's dividend for Cumberland was going to be increased? A. I don't think so.

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Q. Really! Had you not in discussion with your co-directors of FAI at or prior to this meeting of 11th July said words to the effect that it was a near certainty that Cumberland's dividend was going to be increased? A. I can't say, Mr. Hughes, we discussed monthly the figures of Cumberland and they were

satisfactory. It might have been discussed at one meeting or another. I have no such recollection.

Q. And did you say, "Well, I think it is better now if I leave the room and leave you to discuss amongst yourselves". A. I have no such recollection.

Q. I suppose when you left the room the thought flitted across your mind that these co-directors of yours of FAI, exercising a sturdy, independent judgment, might say to you when you came back, "We will offer you a bit less than \$1.25. We will offer you \$1.10 or some such price". A. No, I don't think so. 10

Q. You smiled when I asked you that question. Did it amuse you? A. No, it did not.

Q. Were you expecting your co-directors of FAI to exercise a sturdy independent judgment in considering your offer? A. I did.

Q. And when you came back it was very readily agreed to, wasn't it? A. It was agreed to.

Q. Very readily? A. A decision was conveyed to me. 20

Q. In terms that indicated that they were very ready to snap up the shares at your asking price? A. The decision was conveyed to me, Mr. Hughes, that they were proceeding with the transaction. Readily or otherwise is not known to me.

Q. Did you when you offered these shares, the Cumberland shares, to the sturdily independent co-directors of yours, say "Look, this is not all that is available. After all, there are other attractive investment opportunities open at the present time in listed securities". Did you say anything like that? A. At that meeting we discussed a number of other stocks that we were going to purchase, yes. 30

Q. Oh, that you had already decided to purchase? A. No, I had not decided - that we were discussing to purchase. Some we have - I don't even know whether we have or not, but we certainly made future plans for investment.

Q. Did you bring in to the meeting a list of stocks that might be considered for purchase? A. As a matter of fact, I did, yes.

Q. You did? A. Yes.

Q. And they were the stocks you had in mind for investing the figure of \$400,000? A. Yes.

Q. The proposed investment in Cumberland was additional to that \$400,000, was it? A. Yes.

Q. Well, what I am asking you is this. You had \$400,000 available for investment in stocks that you proposed - is that right- that you proposed at the meeting? A. Actually, I didn't propose at the meeting. It was a list I produced but I did not propose them. It was a list prepared by Professor Wilson. 10

Q. Was there any discussion at the meeting about the pros and cons of taking a position in the stocks that Professor Wilson mentioned on his list? A. I believe so.

Q. Was any decision made about those stocks, or any of them? A. Yes. 20

Q. What was the decision? A. We bought some.

Q. What? A. We bought some.

Q. What did you buy, and for how much? How much did you spend? A. I couldn't tell you that off the top of my head. I can establish it if you wish. I think we bought Mercantile Mutual Insurance.

Q. Was that a decision of the full board? A. It was a decision.

Q. Of the full board except the persons whom, as you put it delightfully yesterday, you preferred to be working? A. The decision was a principle one. The actual investment was left up to me. They had given me guidance for what we decided and what we did not decide. There were two or three stocks specifically that 30

I recommended in addition to Professor Wilson's list, and we decided not to proceed with them specifically.

Q. And then you made a decision about Brookers Holdings? A. I am not sure when Brookers Holdings took place, whether it was at the meeting or whether we ratified the previous verbal discussion on that, but Brookers Holdings was purchased around about the same time as well.

Q. Was there a discussion at this meeting before you left the room of the amount of money that would have to be paid by FAI if it was to take up the offer to sell your family shares at \$1.25 for the ordinaries and 50 cents for the preferences? A. I think the total amount involved was made available. 10

Q. What? A. The total amount involved was made available.

Q. No, was there a discussion at the board meeting before you left the room as to the amount that would have to be paid if your offer were accepted by the FAI board? A. That is what I was answering. The amount that it was going to cost FAI was made available. It was worked out and the amount was stated before I went out. 20

Q. Before you went out? A. Yes.

Q. It was, in round terms, \$190,000? A. Something like that.

Q. And there was no discussion at the board meeting as to alternative investments for that figure in round terms of \$190,000, was there? A. The decision to make stock market investments was made at the same time and we did not know what share we are going to succeed in getting. What we decided, if we were going to buy a number of shares and there was no specific arrangement made, what happens if we get it or we don't get it. 30

Q. Yes, but I think I may not have made myself quite clear. You did not discuss with your co-directors the possibility of employing this sum, in round figures of \$190,000 in some investment other than your shares in Cumberland, did you? A. This would presuppose that

there was such a specific sum with a little tag on it that this was earmarked for that purpose. There was no such discussion, Mr. Hughes.

Q. No such discussion? A. No, Mr. Hughes.

Q. In fixing your price at \$1.25 you did not add a margin, as it were, on the basis that they might come back with a counter-offer, did you? A. No, I did not.

Q. Had they made a counter-offer, you would have stood rock-firm on \$1.25, wouldn't you? A. Yes, I would have. 10

Q. Because your view would have been that any less than \$1.25 would not have been a fair price from your viewpoint, having regard to the intrinsic worth of the shares? A. No, I had given that consideration before I put a price on, Mr. Hughes, and, had they come back with a counter-offer, I would not have sold at all because I did not believe it was proper to enter into false dealing between colleagues on that level.

Q. I see. So, it was your price or nothing. A. That is correct. 20

Q. There is a rather curious irony about that, though, isn't there? A. I don't believe so.

Q. You said your thought process was, if they won't take it at \$1.25, your family companies will keep the shares? A. That is correct.

Q. I suppose the thought occurred to you "if the family companies do keep the shares it won't matter very much to me"? A. No, it would not have.

Q. Or to my family interest? A. It would not have. 30

Q. And I suppose the thought occurred to you at the time you formulated this decision that it was \$1.25 or no deal that, if it became no deal, one side advantage, as it were, would be that the listing of Cumberland shares on the Exchange would not be jeopardised? A. That did not enter into my mind at that time.

Q. Didn't it? A. No, Mr. Hughes.

Q. Didn't it enter into your mind at the time you proposed this share sale that the aggregation of 80% as opposed to the previous 72% of the ordinary share capital in FAI, in the hands of FAI, might prompt the Stock Exchange to query the listing of the shares? A. No, it did not, Mr. Hughes.

Q. You were fairly familiar, weren't you, with the substance of the listing requirements? A. That section of it, yes. 10

Q. What? A. That section of it, yes.

Q. The section dealing with spread of capital? A. Yes.

Q. And you knew, therefore, didn't you, that there was at least danger that if this share sale that you were proposing was accepted by the FAI board and it came to the notice of the Stock Exchange that the Stock Exchange might be moved to consider the de-listing of the company? A. I did not believe so.

Q. You didn't believe so? A. No, sir. 20

Q. What, was it your view prior to 11th July that the listing of the Cumberland shares was not in jeopardy? A. No, it wasn't in jeopardy because of the acquisition of these additional shares. I think the listing was in jeopardy continuously because of the continuously diminishing number of share orders, and that was a very real problem.

Q. A great problem? A. A very real problem.

Q. Did you take the view prior to 11th July that the de-listing of the company at some future point of time was inevitable? A. I was trying to prevent it. 30

Q. That is not an answer to my question, is it, and I think you know it. A. All right, no, I don't think it was inevitable.

Q. What? A. I don't think it was inevitable.

Q. Did you, prior to 11th July, think that the de-listing of Cumberland in the future was probable?

A. No, I did not. I had discussions about this with Mr. Atkinson, and I disagreed. He was of the opinion that the listing will be lost and I was of the opinion that it probably will not be.

Q. Oh really! And you made that quite clear to Mr. Atkinson, did you? A. We had discussions about it.

Q. Did you make your view clear to Mr. Atkinson? A. I don't know whether I did or not. We had a discussion.

Q. But that is what you told him? A. We had a discussion about that. 10

Q. Is that what you told him? A. As I said, we had a discussion about that.

Q. Did you tell him your view? A. I did tell him my view.

Q. That in your opinion the listing would probably not be lost? A. That the listing probably would not be lost, yes.

Q. Can you fix the time of that discussion? A. No, I cannot. 20

Q. Was it in 1974, before July? A. Much before that.

Q. It must have been in 1974, must it not, because, Mr. Adler, did not come on to the board of FAI until the end of 1973 - I am sorry, Mr. Atkinson - I withdraw that question. This conversation in which you expressed this view to Mr. Atkinson must have happened during 1974, must it not? A. No, it might have been even before he joined the board. I am not sure.

Q. You are not sure? A. No.

Q. That remained your view, did it, right up to the time when you received the letter from the Stock Exchange? A. More or less, yes. 30

Q. Do you still say you told the truth in all these circulars? A. I do.

Q. You are quite certain about that? A. I am.

Q. And everything you said in the circulars that passed in the course of this takeover battle was carefully considered by you, wasn't it? A. It was.

Q. Yes. Do you remember writing a circular on 4th February 1975? A. I do.

Q. Was that a truthful circular? A. I am sure it was.

Q. Do you remember discussing the question of - do you remember making some statements about the question of Stock Exchange listing in that circular, Exhibit 35?

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A. No, I don't remember.

Q. Well, let me read it to you. A. Thank you.

Q. "FAI and I are said to have arranged the share transactions in Cumberland shares in July with the deliberate intention of jeopardising the Stock Exchange listing of Cumberland shares". Do you remember saying that?

A. Yes.

Q. You do? A. I do.

Q. "This is untrue" - you went on to say? A. It is.

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Q. "in point of fact my colleagues and I had realised for a long time previously that in view of the small number of stockholders in the company and the absence of an independent market for its shares its continued listing was highly improbable, whatever we might do to defend it." That is what you wrote, isn't it? A. That is correct.

Q. And you have told his Honour, have you not, within the last few minutes - A. That is correct.

Q. - on your oath? A. I have.

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Q. That your view was that the Cumberland shares would probably not be de-listed? A. That is correct.

Q. Yet, in this letter you said - by the way, "My colleagues" - that would include Mr. Atkinson? A. It

includes Professor Wilson, Mr. Atkinson, Mr. Belfer and, in this context also, the two other directors.

Q. And yourself? A. And myself.

Q. By reference to the word "I"? A. That is correct.

Q. So, you were saying in this letter that, quite apart from your colleagues, you yourself had realised for a long time previously that Cumberland's continued listing was highly improbable? A. That is correct.

Q. And, if his Honour is to believe what you have said on oath within the last few minutes, that statement that you had realised for a long time previously that Cumberland's continued listing was highly improbable was an untrue statement? A. Yes, Mr. Hughes, it appears so. 10

Q. It appears so. It is untrue, isn't it? A. No, it isn't. May I give an explanation?

Q. Is it true? A. The way it was --

Q. Is it true? A. The way it was framed, yes.

Q. The way it was framed. A. Yes. 20

Q. Oh, I see. Now, let us look at the way it was framed. Now, you are saying that that statement, "I had realised for a long time previously that in view of the small number of stockholders in the company and the absence of an independent market for its shares, its continued listing was highly improbable whatever we might try to do to defend it." was not only true, but the whole truth. Is that what you are saying? A. I am saying the intention expressed there, Mr. Hughes, was that the majority -- 30

Q. Look, I will just have you answer my question unless his Honour rules otherwise. Do you say that that statement I have just read - would you agree that I read it fairly from the letter? A. No, you didn't. You left out the word "colleagues".

Q. I see. You would like me to read it with the words

"my colleagues" in, would you? A. You read it correctly.

Q. Well, I will read it again. I don't care how long this rather agonising process takes, because I am going to get the point. Do you say now, on your oath, in the witness box, bearing in mind the evidence you earlier gave this morning, some minutes ago, that this statement is the whole truth: "My colleagues and I had realised for a long time previously that in view of the small number of stockholders in the company and the absence of an independent market for its shares, its continued listing was highly improbable whatever we might try to do to defend it" - now, was that the whole truth or not? A. In the context that it has been written, Mr. Hughes, it was correct. The way it does appear now, it was not. I confirm my testimony as I gave it this morning.

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Q. You still haven't answered my question, Mr. Adler.
A. Yes I have.

Q. And I am going to persist. First of all, will you agree that I have read from the letter fairly? A. I presume so.

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Q. Yes. Well, - A. I have no reason to doubt it.

Q. Have a look at it if you like because I am going to insist on you answering my question and I want you to have every opportunity to take counsel of yourself. Have a look at it. (Exhibit 35 shown to witness)
A. Which paragraph is it?

Q. I Will show you. (Approaches) Paragraph 2 on page 2.
A. Yes Mr. Hughes.

30

Q. Was that sentence that I read to you, and that you have just read for yourself, the whole truth? A. No, Mr. Hughes.

Q. Was it a lie so far as it attributed a view to yourself? A. It wasn't intended to be, but so it appears.

Q. So it appears. A. Yes, Mr. Hughes.

Q. Will you agree that there is no escape at all from

that appearance; that it is a lie? A. No, I don't agree with that.

Q. What? A. I do not agree.

Q. It appears like a lie, doesn't it? A. It does.

Q. Yes. Because you did not have the view that you expressed as yours in that sentence of the letter. That is the reason, isn't it? A. That is the reason, yes.

Q. That is the reason. And you knew, didn't you, when you wrote that letter after careful consideration, as you have agreed, that the view that you attributed to yourself in that sentence of the letter was not your real view. You knew that, didn't you? A. I tried to convey a majority opinion but --

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Q. Oh really. A. That, obviously, I did not succeed in doing.

Q. Mr. Adler, again I will come back to my question, and I will ask it for as long as it is needed to be asked to get an answer. You knew when you wrote that sentence that you were attributing to yourself a view that you did not yourself in fact hold? A. Correct.

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Q. Correct. So, you knew when you wrote that sentence that you were telling an untruth, didn't you? A. Whilst I signed the letter, Mr. Hughes, I accept full responsibility for it. I didn't pick up the word "I" in it. I signed it. It is my responsibility, but the letter wasn't written by me.

Q. Give me back the letter, please. A. It is signed by me.

Q. Who wrote the letter? A. The letter was written by Mr. Atkinson in the first place.

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Q. And read carefully by you before you signed it?
A. Yes, Mr. Hughes, yes.

Q. And you read that sentence, didn't you? A. I did.

Q. Yes. Well, I will come back to my question which,

you see, you still haven't answered and it is this: You knew, didn't you, when you read that sentence that you were saying something that was untrue? A. I stated, Mr. Hughes, I didn't write it but when I signed it it was untrue.

Q. And you knew it when you signed it to be untrue?

A. I didn't pick it up, Mr. Hughes.

Q. Oh, you didn't pick it up? A. No, I didn't.

Q. You are rather careful with words, aren't you?

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A. I believe so.

Q. You read it and you saw the phrase "my colleagues and I"? A. I read it; I must have seen it.

Q. You must have seen it. A. Yes.

Q. So, you picked it up, didn't you? A. I did not.

Q. Look, I will put it to you again that you knew when you signed that letter that in that sentence starting, "In point of fact, my colleagues and I" you were signing your name to something that was untrue? A. Yes, I didn't pick it up.

20

Q. What? A. I didn't realise it, but that is the fact of it.

Q. So, you were signing your name to a lie, weren't you? A. Inadvertently, but, yes.

Q. What? A. Inadvertently, but, yes.

Q. Lies cannot be inadvertent, can they? If it wasn't a lie it was one of the grossest pieces of negligence that you as a company director could imagine, isn't it? A. No, sir, I know many bigger ones.

Q. Do you? A. Yes.

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Q. That opens up many interesting prospects. This is what you said yesterday, isn't it, at page 720 "Do you

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tell his Honour that your replies to the various circulars issued by Mr. Donohoo and, in one case, Washington Souls, were always carefully considered before they were sent? A. I signed them and I can assure you I certainly carefully considered it and no circular went out without full approval of Mr. Atkinson and Professor Wilson and they were also shown to other directors". Q. You gave that answer? A. I did.

Q. Was that answer the truth? A. I believe it to be. 10

Q. The whole truth? A. I believe it to be.

Q. And I went on to ask you this question, didn't I - *and I am reading from page 720 of the transcript - "What you are saying to his Honour then is your various circulars in what has come to be described in this case as the 'paper warfare' were the product of careful and detailed consideration? Is that what you are telling his Honour?" A. That is correct.

Q. And you answered with the word "Certainly"? A. That is correct. 20

Q. Now, in the light of those last two answers, will you not agree that that sentence about which I have been asking you questions and to which you attributed a particular view to yourself about the probability of de-listing was a lie? A. No, Mr. Hughes.

Q. If you considered that circular carefully, as you said you did, how could that statement be otherwise than a lie? A. I did not pick up the word "I" in the body of the letter, which obviously I should have.

Q. Well, of course, what you are saying then is that you thought that the sentence read "in point of fact, my colleagues had realised"? A. Yes, even that, Mr. Hughes, if I may add, was -- 30

Q. I am sorry --

HIS HONOUR: I think you should let him answer that, Mr. Hughes.

Q. Say what you were going to say, Mr. Adler. A. I *(Original Transcript page 479.)

did not pick up the connotation of the word "I" in that letter. I can't pick out which words I did pick up and which ones I didn't. I didn't pick up the meaning of that sentence.

MR. HUGHES: Q. But you considered this letter in draft form before it was sent, didn't you? A. I did.

Q. You can't remember who drafted it? A. No, I am not sure.

Q. Do you think you drafted it yourself? A. No, I did not.

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Q. But you considered a draft? A. I did.

Q. And you considered it carefully? A. I believe so.

Q. And you considered the final typescript of the letter before you appended your signature to it? A. I did.

Q. And did the draft contain these words, "my colleagues and I"? A. It must have.

Q. What you are telling his Honour is this, is it, that you failed to pick what you have described as the connotation of the sentence on two separate occasions? Is that what you are telling his Honour? A. Not the word "connotation", Mr. Hughes. I failed to pick out the relevant word "I".

20

Q. Despite two careful and separate considerations of the words. A. Yes, Mr. Hughes.

Q. What did you miss out - the word "I"? A. It looks like it at the moment.

Q. Well, I don't want you to be under any difficulty. I want you to read the sentence again, and I am going to ask you some questions on what you missed out? A. Yes, Mr. Hughes. (Witness appears to read Exhibit 35)

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Q. You just tell his Honour what were the words you missed out on these two occasions when you were carefully checking the letter? A. The word "I".

Q. The word "I"? So, you read the sentence as reading, "In point of fact, my colleagues and" or "in point of fact, my colleagues"? A. "My colleagues".

Q. Now, that suggested explanation would lead, would it not, to a rather curious result, namely, that you, as the chairman of the company, having a different view from your colleagues, omitted to say so? A. Yes, Mr. Hughes.

Q. Yes. And you do not ask his Honour, do you, to think that such a curious result is real in terms of truthfulness? A. Mr. Hughes, mistakes will be made many times and this is one of them. 10

Q. This is one of them. Are there any others in these circulars? A. I can't think of any. I have no doubt you shall point out any there are.

Q. Oh, well, I am glad you are pessimistic. Of course, if you disagreed with your colleagues and thought that the de-listing of Cumberland was not probable, you really ought to have said so in this letter, ought you not? A. The question of the degree to what extent was one satisfied that it could be defended - there was a point of view in the boardroom which we have testified to before or which I have testified to before -- 20

Q. "We have testified to before". A. "I have testified to before". I corrected that. There was a disagreement on that point, a minor one. I tried to defend it. I tried to maintain the listing, because I believed there was considerable value attached to the listing.

Q. While you thought that de-listing was improbable your attitude was always one of concern to preserve it, was it? A. Yes, Mr. Hughes. 30

Q. And you were alive to any possibility that might cause difficulty in relation to - I am sorry, that is not a clear question. You were alive at all times to the possibility that a particular transaction could cause a difficulty in relation to listing or you do not understand it. I will come back to it later; it falls into another part of the pattern.

Well now, I am going to travel through some circulars with you apart from Exhibit 35. I will go back, if I may, to Exhibit 15, but, before I do, what proportion of FAI's business, that is to say FAI Insurances in relation to its underwriting activities - what proportion of its underwriting business was approximately tied up in workers' compensation business? A. Probably 10%.

Q. 10%? A. Probably.

Q. So, would it be correct to say, and I don't want to tie you to more than an approximation - please understand that and if it is more or less I won't criticise you because the figures are not in front of you - would it be, broadly speaking, correct to say that approximately 10% - A. Yes. 10

Q. - of FAI's premium income was last year derived from Workers' Compensation premiums? A. Yes, the year before last.

Q. Sorry, the year before last, 30th June 1974. A. Yes, that is the one I answered.

Q. And what about this year? A. It might be a bit less. I am not sure. 20

Q. A bit less? A. It could be a bit less.

Q. But at the time of the takeover offer it was running at about 10%? A. That is correct.

Q. (Witness shown Exhibit 15) Just have the document in front of you, and I will invite your attention to specific parts of it. At 22nd November 1974 Cumberland's business was expanding and thriving, wasn't it? A. Yes.

Q. And profitable? A. Yes. 30

Q. And had it previously, under the management provided as a result of Cumberland being a member of the Group, been expanding and thriving for some period of time? A. Yes, it had.

Q. You remember, don't you, that when you came to write that circular which is Exhibit 15, you were answering

Mr. Donohoo's first broadside in the paper warfare, his circular of 21st November? A. Yes.

Q. And you remember, don't you, that one of the statements he made in that letter was that he did 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, and part of your purpose in publishing the circular which is Exhibit 15 was to deal with that allegation or suggestion? A. That is correct. 10

Q. Did you deal with that allegation truthfully?
A. I believe so.

Q. Were you frank in dealing with it? A. I believe so.

Q. It would be quite untrue, wouldn't it, in any circumstances, to have asserted on 22nd November 1974 that Cumberland's business was not then thriving or expanding or profitable? A. Cumberland's business itself, no. 20

Q. No. (Witness shown Exhibit 13). Now, I invite your attention to page 1 of Exhibit 13 which is Mr. Donohoo's first circular, the sentence, "I do not consider it reasonable", or the paragraph commencing, "I do not consider it reasonable" on the first page. Would you look at that? A. Yes. Just that one paragraph?

Q. Just that paragraph for the time being. Now, in your circular in reply, you set about answering those specific allegations didn't you? A. I believe so.

Q. Could I just have Exhibit 15 for a moment because I have a different typescript of it from yours. You set about answering those specific allegations in Mr. Donohoo's circular to which I have just invited your attention in the last paragraph on the first page of Exhibit 15 and in the first paragraph on the second page of the same Exhibit. Would you just read those two paragraphs and tell me whether you agree with my suggestions? A. Yes, Mr. Hughes. 30

Q. Is the answer to my question, Yes? A. I am sorry, what is the question?

Q. I have invited your attention to two paragraphs in Exhibit 15, the last paragraph on page 1 and the first paragraph on page 2. A. Yes.

Q. I have also invited your attention to a particular paragraph on page 1 of Mr. Donohoo's circular, Exhibit 13. A. Yes.

Q. My question to you is this: Do the two paragraphs in Exhibit 15 to which I have invited your attention constitute your answer to the specific allegations made in the paragraph on page 1 of Mr. Donohoo's circular?

A. It is our answer to the whole of the circular. In particular, to that paragraph, yes.

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Q. In particular to that paragraph? A. Yes.

Q. You were taking up the assertions that he made in that paragraph and answering them as you saw they ought to be answered? A. Yes. I don't know whether there is any other reference anywhere else in the body of the letters but, apart from that, yes.

Q. I don't mind you reading Exhibit 15 to clear up -
A. Both of them?

Q. You may read both of them and then I will ask you some questions, if that is a course which does not trouble your Honour. I think it may be the fairest.

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HIS HONOUR: That is all right.

MR. HUGHES: Q. You let me know when you have had sufficient time to read them? A. Thank you, Mr. Hughes. Yes.

Q. Now, would you agree that the last sentence, sorry, the last paragraph on page 1 and the first paragraph on page 2 of your circular, Exhibit 15, were intended as a specific reply to Mr. Donohoo's assertions that he did not consider it reasonable to ask stockholders in Cumberland, a thriving and expanding nursing home and surgical group, to exchange their stock units in that group for shares in a company heavily involved in the insurance industry? A. That is so.

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Q. Now, you said in Exhibit 15, "I might perhaps be forgiven for commenting that the 'expanding and thriving' was only possible by the active financial backing and

loan funds being made available by FAI". Do you see that? A. That is correct, yes.

Q. So, what you are saying there, is, though you contingently asked for forgiveness for saying it is, that the past expanding and thriving nature of Cumberland's business was only possible because FAI gave it active financial backing and loan funds. Is that right? A. That is correct.

Q. Was that the truth? A. I believe it to be. 10

Q. Did you check any figures for the purpose of ascertaining whether that was the truth before you wrote the letter? A. I knew the figures.

Q. What was your belief at the time you wrote the letter as to the amount owing by Cumberland to FAI according to the last available financial accounts? A. I don't think it referred to the last accounts, Mr. Hughes, Cumberland had at all times when it wanted to buy a nursing home or do anything else - its funds were always supplied by FAI. I think the highest figure was at one stage \$400,000. 20

Q. But the money was lent at interest, wasn't it?
A. It was.

Q. What rate - what band of rates? A. Yes, I can tell you that. At the moment, and over a period of the credit squeeze, it was 15%, and prior to that it was 10%.

Q. And how much, as a matter of interest, does Cumberland owe FAI at the moment? Look, I withdraw that question because it is not really relevant. You cannot tell his Honour how much Cumberland owed FAI at the time you wrote this letter? A. That letter would have been November 1974. 30

Q. Would you like the balance sheet? A. That would tell us on 30th June. It was about \$40,000-odd at that date.

Q. On 30th June? A. Yes.

Q. That was the totality of the indebtedness? A. On 30th June, yes.

Q. Had it gone up? A. Yes.

Q. How much - approximately? A. As at that date - I would have to determine when we bought the last private hospital for which we had to pay. It might have gone up by something like \$100,000-odd but I am not sure of the date. I prefer not to answer this question.

Q. Without looking at the document? A. Yes.

Q. Very well. I respect that. You say, do you, that Cumberland owed its past success solely to the active financial backing and loan funds being made available by FAI? (Objected to) 10

Q. You say that that sentence "I might perhaps be forgiven for commenting that the 'expanding and thriving' was only possible by the active financial backing and loan funds being made available by FAI" was wholly true? A. Yes, it was.

Q. Then you went on to say something that was quite untrue, didn't you, in the next sentence? I will read it: "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 is completely true. 20

Q. Completely true? A. Yes, Mr. Hughes.

Q. You were suggesting there that Mr. Donohoo's statement that Cumberland's business was, amongst other things, thriving, expanding and profitable, was untrue, weren't you? A. No, I did not say that. (Objected to; question pressed; allowed)

Q. You were suggesting there, weren't you, that the view expressed by Mr. Donohoo in his circular that Cumberland's business was then, in November 1974, a thriving, expanding and profitable business, was untrue? That is what you were suggesting by those words, wasn't it? A. Not at all, Mr. Hughes. 30

Q. Not at all? A. I was referring to the industry.

Q. Oh, you were referring to the industry? A. That is correct.

Q. But, of course, did it escape your notice that Mr. Donohoo had not referred to the industry but to Cumberland's business? A. In the second part of his sentence he referred to the insurance industry as such.

Q. Oh, yes. A. Therefore, I dealt with it on the basis of the industry, the impression gained or given in this letter, that I have at all times stated that the insurance industry was non-profitable and facing all sorts of problems whilst the nursing home industry was buoyant. But the industry wasn't; our company was. 10

Q. Just go back to Mr. Donohoo's letter, if you would be so kind. A. Yes.

Q. And point to one sentence or phrase in it which suggests that the nursing home industry, as opposed to Cumberland's business, was profitable, expanding and thriving? A. No, I clearly stated that I was referring to the industry. That the private nursing home business is not thriving - it is not.

Q. Mr. Adler, the point has not escaped you, has it, that Mr. Donohoo did not make any allegation in his circular, Exhibit 13, that the nursing home industry was profitable, thriving and expanding? A. No, but I made the point. 20

Q. You made the point? A. Yes.

Q. And you made the point by falsely attributing to Mr. Donohoo a view that he never expressed, didn't you? That is right, isn't it? (Witness appears to read Exhibit 15 again) A. No, Mr. Hughes.

Q. You point out to his Honour if you will, or if you can, one statement, any statement, by Mr. Donohoo in his circular, Exhibit 13, to the effect that the private nursing home industry is profitable, thriving and expanding? A. No, Mr. Hughes, I think you are quoting -- 30

Q. Just point out one sentence or any sentence in Mr. Donohoo's circular that contains that assertion if you please? A. I think the implication is very clear.

Q. Would you please comply with my invitation. A. I cannot do that.

Q. You can't do that? A. No, I can't.

Q. You can't? A. No.

Q. You agree then that there is not one sentence or one phrase in Mr. Donohoo's circular, Exhibit 13, in which he states that the private nursing home business or industry is thriving or expanding or profitable? A. No, Mr. Hughes. The whole paragraph has to be read in its full entirety and my reply in its full entirety, and, reading it again, I do consider it very proper, full and truthful.

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Q. Totally honest? A. Totally honest.

Q. And you would reject as a most baseless assertion, would you, the suggestion that you attributed to Mr. Donohoo a view about the particular industry that he never expressed? A. I would, yes.

Q. And this is a fair example, is it, of your concepts of candour and frankness?

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HIS HONOUR: Well, I don't think the answer to that will assist me, Mr. Hughes.

(Luncheon adjournment)

MR. HUGHES: Q. I want to come back to Exhibit 15 and Exhibit 13. Will you agree, Mr. Adler, that nowhere in his circular, Exhibit 13 of 21st November 1974 did Mr. Donohoo assert that the private nursing home business or industry was then thriving or expanding or profitable or risk-free? A. That is correct.

Q. And when you said "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 that time you were attributing to Mr. Donohoo, therefore, weren't you, a view that he had not expressed? A. No, I don't think I was.

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Q. Do you remember telling his Honour that nowhere in

that circular is there any assertion by Mr. Donohoo - that is, his circular exhibit 13 - any assertion that the private nursing home business or industry was then thriving or expanding or profitable or risk-free? A. Yes.

Q. Yes. Yet, your very words are, "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 is correct. 10

Q. Isn't that attributing to Mr. Donohoo a view as having been expressed in his circular? A. I don't think --

Q. Just a minute. A. I beg your pardon?

Q. That the private nursing home business or industry was then thriving and expanding, profitable and risk-free? A. I believe my --

Q. No, just answer that question yes or no. A. No.

Q. You say Mr. Donohoo has expressed a view, don't you? A. That is correct. 20

Q. And you are saying, are you not, that the view he has expressed is that the private nursing home industry or business is thriving and expanding, profitable and risk-free? That is what you are saying, isn't it? A. That is correct.

Q. So, you are attributing to him a particular view which you described in the sentence that I am now examining, don't you? A. Mr. Hughes --

Q. Don't you? A. No, I am not. I am answering the full paragraph with a full paragraph and I believe my answer is correct. 30

Q. I am just concentrating at the moment, and you may find it displeasing but I am going to continue, on one sentence. Then I will go on to deal with something else. Will you agree that quite plainly you were there, in the first sentence of this paragraph of the letter that I am asking you about, attributing to Mr. Donohoo

a view that the private nursing home industry was, at the time of his circular, in his view thriving, expanding, profitable and risk-free? A. That is the inference, yes.

Q. The plain meaning, isn't it, that you were attributing to him that view that you described in that sentence?
A. Yes.

Q. And you have agreed with me that in his circular he had never expressed that view. You have agreed with that, haven't you? A. In the sentence you are referring to, no. In the paragraph, yes. 10

Q. Look, I am talking to you about Mr. Donohoo's circular, not your circular. A. Yes, I am talking about Mr. Donohoo.

Q. Now, you tell me - you point out to his Honour, if you would, any words, and I gave you this opportunity before lunch and you were not able to point to any words but I will give you another opportunity, you see - point out to me any words in Mr. Donohoo's circular, Exhibit 13, which express the view that the private nursing home industry is thriving, expanding, profitable and risk-free. A. Mr. Hughes, I must decline again on the grounds that the whole paragraph, the whole section, has to be taken. 20

Q. Which whole section? A. In Exhibit 13, the last two paragraphs you put to me. You have suggested that I was replying to those two paragraphs in my first paragraph.

Q. Yes, and you agreed with that. A. I did. 30

Q. I thought you were replying to only one paragraph. You were replying to the paragraph, were you not, in Mr. Donohoo's circular, "I do not consider", down to "uncertain"? A. I think you put it to me - the last, I think, you put to me - I might be wrong.

Q. Well, you are wrong. A. I beg your pardon.

Q. I thought we had defined the battleground very clearly before lunch and you agreed with me - don't you

remember - that in the paragraphs which are the bottom paragraph on page 1 and the top paragraph on page 2 of Exhibit 15, you were replying to that particular, and only to that particular, paragraph in Mr. Donohoo's circular which commenced, "I do not consider", down to "Uncertain". You have agreed with that, haven't you? A. I thought it was both of them, but even that one covers the field that I am referring to.

Q. Covers the field. A. It does.

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Q. You tell his Honour if you would, if you can or if you would, any - I withdraw that. You point out to his Honour, if you would, any sentence in that particular paragraph of Mr. Donohoo's circular, any sentence in that particular paragraph of Mr. Donohoo's circular, Exhibit 13, or any words in that paragraph that contain an assertion that the private nursing home industry is thriving, expanding, profitable and risk-free. Take your time and read out the words, if there are any, that contain such an assertion on Mr. Donohoo's part.

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A. There is a meaning to the paragraph, Mr. Hughes, that I am referring to and the meaning is quite clear, at least to me.

Q. Let me take the paragraph first and what is the meaning of the paragraph to you? A. The meaning is that Mr. Donohoo refers to a company and after to an industry. Therefore, the two are joined together.

Q. Oh. I see, He talks about - A. A company --

Q. Just a minute. He talks about specifically the Cumberland business doesn't he? A. Yes.

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Q. That is right, isn't it? A. Yes, he is referring to it.

Q. And he says "I do not consider it reasonable to ask shareholders 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". That is what he says, in part? A. That is correct.

Q. Now, will you agree that there is nothing in those

words that amounts to an assertion that the private nursing home industry as a whole is thriving or expanding or profitable or risk-free? A. My reading of that paragraph, Mr. Hughes, included the last sentence there, and he is referring to a company and an industry, and I coupled the two together.

Q. Oh, did you. A. Yes, I did.

Q. It was very convenient for you to do that, wasn't it? A. I believe it was correct.

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Q. Correct? A. Yes.

Q. Mr. Adler, do words mean anything really to you or, like Humpty Dumpty in Alice in Wonderland, do they mean precisely what you want them to mean, nothing more and nothing less? A. I suppose it is fair to say that words mean lots of different things to different people. To me they mean exactly what they are supposed to be.

Q. I see. You will agree, won't you, that in that paragraph Mr. Donohoo was comparing the specific business of Cumberland with a company heavily engaged in the insurance industry? A. He was referring to an industry in general terms.

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Q. He is not referring to any industry in general other than the insurance industry, is he? A. He is referring to the insurance industry in general.

Q. Generally. A. That is right.

Q. And he is not referring to the private nursing home industry in general, is he? A. I took the two to be coupled.

Q. What two to be coupled? A. That whole paragraph, Mr. Hughes, appears to be covering --

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Q. Covering what? A. Covering the insurance industry and covering the nursing home industry.

Q. Although he makes no reference whatsoever, does he, to the nursing home industry in general? A. No, he does not.

Q. Won't you agree, on reflection, in the light of your last answer, that you were in the sentence of Exhibit 15 which says, "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" attributing to him a statement about the condition of the private nursing home industry generally that Mr. Donohoo did not make? A. I took it that he did, Mr. Hughes.

Q. Oh, really. A. Yes, I did.

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Q. And, of course, if your conclusion is wrong in terms of plain meaning, what you said in that 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", that was most misleading, wasn't it? A. If I was wrong.

Q. If you were wrong. A. Yes.

Q. Then you could not but agree, could you, with any statement that Cumberland's business was thriving and expanding? A. Certainly.

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HIS HONOUR: Q. What was that? A. Certainly I do agree with that.

MR. HUGHES: Q. Yes. And he did not, in fact, say that it was profitable, did he, unless that meaning is included in the words, "thriving and expanding"? A. I would certainly consider "thriving" to include "profitable".

Q. And he didn't say, did he, in his circular, that Cumberland's business was risk-free? A. Again, if you read the whole of the circular, I think that conclusion is inevitable.

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Q. Really? A. Yes.

Q. He did not say it in terms, did he? A. He said it in his circular.

*Q. By what words? A. By comparing the ostensibly thriving and expanding nursing home and surgical hospital business with the insurance industry "which remains... disastrous consequences", etc. etc.

Q. Where are you reading that from? You were quoting your words? A. No, Mr. Donohoo quoting my words, that is right.

Q. Look, you have already agreed, despite that you have just said in the last answer by the use of the word "ostensibly", that Cumberland's business was actually and not just ostensibly, thriving, expanding and profitable? A. I don't recall using the word "ostensible".

Q. You don't recall using the word "ostensible"? A. No, 10
I don't actually.

Q. We will have it read back. If you said that, that would be false, wouldn't it? A. I don't think, first of all, I said it. I don't remember saying it. First of all, I don't remember saying it, but, if I said it, in the last few days --

(Question marked with asterisk read)

WITNESS: I was using the word "ostensibly" when I was reading out Mr. Donohoo's circular but, even there --

MR. HUGHES: Q. The word "ostensibly" is not in Mr. 20
Donohoo's circular, is it? A. No, but "thriving and expanding" is, and I added the meaning "profitable" to it at your invitation.

Q. Yes, but why did you use the word "ostensibly" when Mr. Donohoo had not used it and when the business of Cumberland was in fact thriving, expanding and profitable? A. Because we were enlarging the meaning of "thriving and expanding" and, therefore, it was ostensibly profitable.

Q. You have given the totality of your explanation, 30
have you, for attributing to Mr. Donohoo the expression of a view in his circular that the private nursing home industry was thriving, expanding and profitable and risk-free, or is there anything else you want to add, because I want you to have the fullest opportunity to explain? A. What is the specific question?

Q. Is there anything you want to add to the explanation you have attempted to offer his Honour for attributing

to Mr. Donohoo a view about the private nursing home industry that you agree he did not in fact express? A. I gave the answer before and I give it again. The meaning of Mr. Donohoo's memo gives this inescapable conclusion, that he was, in fact, referring to an industry.

Q. Did you, when you were carefully reading it prior to signing it in its final form, think that people who read the sentence "I wish I could share Mr. Donohoo's view" might take it that you were saying that Cumberland was not at the present time, although it had been in the past, profitable? A. No, I can't say that. 10

Q. Well, you see, you went on to say "Unfortunately as I have repeatedly stated, this is not the case", didn't you? A. That is correct.

Q. And you were, in effect saying, were you not, "Cumberland is not now profitable"? A. Not at all. (Objected to: allowed)

Q. Just take the sentence "Unfortunately, as I have repeatedly stated, this is not the case." This of that for a minute will you, and then I will ask you a question. Won't you agree that a reader of the two circulars, Mr. Donohoo's of 21st November and yours of 22nd November, could take the view, firstly, that Mr. Donohoo in the paragraph of his circular that we have looked at this afternoon was saying, "Cumberland has a thriving and expanding business"? A. Yes. 20

Q. And will you not agree that a person who read your circular in the context of Mr. Donohoo's circular, and in the context that it was in answer to Mr. Donohoo's circular, could well take the view that you were challenging in your words "Unfortunately, as I have repeatedly stated, this is not the case", Mr. Donohoo's assertion that Cumberland was a thriving and expanding business at that time? A. Sorry, Mr. Hughes, a circular has to be read in its entirety. You can't just pick out one line and try to put a meaning to that one. There can be no doubt that my reply is, according to me, a proper reply to what I consider the point in Mr. Donohoo's circular. 30

Q. You say it was a model of clarity, candour and frankness, do you? A. I don't know whether it was a model or not but it was frank and honest. 40

Q. Frank and honest without a trace of misleading material in it? A. I don't think so.

Q. You had not repeatedly stated, had you, that the nursing home business of Cumberland was unprofitable or not thriving? A. I have never stated that Cumberland's business was not profitable.

Q. And you had not repeatedly stated that the nursing home business was not profitable, not expanding and not thriving? A. I have indeed, many times.

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Q. Did you tell Mr. Atkinson that? A. Mr. Atkinson read the articles I have written on the subject, and there are many.

Q. So, he was well acquainted with your view that the nursing home business was a risky one? A. I believe so.

Q. When did you tell him that this was your view? A. As I said, I have written several articles on the subject which have been read by Mr. Atkinson, Mr. Donohoo and many other people.

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Q. In what publications were these articles? A. I think the Sydney Morning Herald, the Financial Review and some others.

Q. What? And what? A. Some others.

Q. Well, when did you write the article for the Sydney Morning Herald? A. The date escapes me.

Q. Have you got a copy of it? A. Certainly.

Q. Have you got a copy of the article in the Financial Review? A. Certainly.

Q. And what are the other publications in which you expressed the view that the private nursing home business was not profitable or expanding or thriving? A. It could have been one of the afternoon papers, Mr. Hughes. I am not sure.

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Q. We know it could have been any paper but I am asking

you. A. Well, I don't recall the publication but they can be produced easily enough.

Q. Where are they? A. They would certainly be in our files.

Q. Have you seen them recently? A. No.

Q. Did you have a look at them at the time you wrote this circular, Exhibit 15? A. No.

Q. How recent was the latest of these publications, the precise details of which seem to escape you? A. The details don't escape me, just the date of publication in the publications. Probably '73.

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Q. Well, I would ask for those documents to be produced if the rather vague description given by the witness is any help to identify the. A. It is.

Q. It is. Well, it may be more help to you than to me. Would you make it your business, if his Honour allows me to ask you to do so, to get those articles over the adjournment? A. By all means.

Q. Because you will still be in the witness box when we resume. A. I imagine so.

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Q. I want to take you to another sentence. Before I do so, did you make yourself thoroughly familiar, before the takeover documents were sent out, with the terms of the Part A statement and what was in it? A. I don't think so.

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

Q. Now, I invite your attention to the sentence beginning "Naturally we all hoped.....". That is in Exhibit 15? A. Which page is that on?

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Q. It is on page 2 of mine; it is probably on page 2 of yours. It is the sentence beginning "Naturally we all hoped...period of the bid."? A. Yes.

Q. Did you draft that? A. No, I did not draft it.

Q. Well, who did draft it? A. Mr. Atkinson.

Q. Mr. Atkinson drafted it? A. Yes.

Q. And you relied on him, did you, for the authenticity of that statement? A. The authenticity was the Minister for Social Securities, who made statements in that regard.

Q. You relied on him, Mr. Atkinson, as authenticating the accuracy of the statement that the "Directors of FAI felt..takeover offer"? A. Mr. Atkinson could not authenticate the Minister for Social Securities. I relied on him for the drafting. 10

Q. You relied on Mr. Atkinson for the drafting? A. Yes.

Q. Did you know, when you signed the letter, whether or not there was a condition in the takeover offer relating to ministerial action not occurring during the period of the takeover bid? Did you know, when you signed the letter, whether there was such a condition? A. Yes.

Q. Did you satisfy yourself that the takeover contained such a condition, or did you rely entirely on Mr. Atkinson? A. I saw it. 20

Q. You saw it? A. Yes.

Q. Did you read it carefully? A. I read it.

Q. Did you read it carefully before it was sent out?
A. Mr. Hughes, when you employ a number of -

Q. Did you read it carefully before you sent the circular, Exhibit 15, out? A. When you employ solicitors you rely on them. I read it carefully. I read it. You rely on your solicitors to read it carefully. I also read it. 30

Q. You read it? A. Yes.

Q. You wore two hats when you signed this letter, didn't you? A. Yes, I did.

Q. Was that deliberate? A. Yes.

Q. Did you instruct your solicitors to make the take-over offer conditional upon no ministerial action occurring during the period that the offer was open? A. No. The bid was not made by the solicitors. They drafted the documents. That was the decision of the FAI board.

Q. Could we expect to find that decision minuted? A. Not necessarily.

Q. Not necessarily? A. No.

Q. Board minutes in FAI were kept in a most informal way, were they not? A. I don't know. 10

Q. Very often minutes of meetings of directors were not taken? Meetings of directors were not minuted at all very often, is that right? A. I think the only time you minute directors' meetings is if formal resolutions take place.

Q. Would you please answer the question I asked you? Very often minutes of directors' meetings were not kept at all, were they? A. If I may answer this, we have been specifically advised that the only time you have to keep minutes is if there are formal resolutions taking place. 20

Q. Who gave you that advice? A. Mr. Bainton.

Q. Mr. Bainton? A. Yes.

Q. But that was late in 1974, wasn't it? When you went to him in December? A. That advice was given by Mr. Bainton round about that time. I don't know the date.

Q. But it was round about that time? A. Yes.

Q. So that that advice had no effect on your previous conduct up to that point of time, had it? A. No, but it confirmed the propriety of it. 30

Q. What was that? A. It confirmed the propriety of what we had done.

Q. Was there ever a meeting of directors at which a resolution was made - a meeting of directors of FAI at

which a resolution was made, and passed, not to proceed with the takeover of Cumberland Holdings Limited? A. There could have been one concerning the preference shares. There should not have been one for the ordinary shares.

Q. If you were to speak in terms of the takeover offer for Cumberland Holdings you would be meaning to refer, wouldn't you, to a takeover offer for the ordinary shares? That would be so, wouldn't it? A. In the ordinary course of business, yes. 10

Q. In the ordinary course of business? A. Yes.

Q. Was there ever a meeting prior to the occasion upon which your board - your FAI board - resolved not to proceed with the takeover offer made in November last year - was there ever a meeting of the directors of FAI, or any of the directors of FAI, at which a resolution was passed not to proceed with the takeover offer of Cumberland Holdings? A. Only in respect of preference shares, where negotiations were in fact taking place. 20

Q. And when was that meeting held? A. I'm sorry?

Q. When was that meeting held? A. I have no idea.

Q. No idea? A. No, I have no idea.

Q. Was it held at all? A. If you tell me that it was -

Q. I am asking you, was it held at all? A. As I said, I have no recollection of it.

Q. We should not assume, should we, that just because a minute of a purported meeting is in existence, that that meeting took place? We should not assume that, should we? A. You most certainly should. 30

Q. We should? A. Certainly you should.

Q. It would not be the case by any chance, would it, that the minutes were drawn up purporting to record

meetings that were in fact never held? That would not be the case, by any chance? A. No, Mr. Hughes.

Q. (Approaching witness) Do you remember seeing that minute before, being Exhibit 84? Do you remember seeing that before? A. It has got my signature on it.

Q. It has your signature on it? A. Yes.

Q. And a resolution was passed not to proceed with the takeover of Cumberland Holdings, wasn't it? A. That is correct.

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Q. That is right, isn't it? A. Yes.

Q. And that did not just refer to preference shares, did it? A. The minute you show me does not.

Q. And the minute records the substance of what was decided, does it? A. I have clearly referred to preference shares.

Q. Does the minute record the substance of what was decided? A. Obviously not.

Q. I beg your pardon? A. No, obviously not.

Q. It is a false minute? A. No, it is not.

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Q. It is an inaccurate minute? A. It is.

Q. Who prepared that minute? A. Probably me.

Q. Probably you? A. Yes, probably me.

Q. That was a remarkable piece of carelessness, wasn't it, to prepare the minute in that form? A. Obviously.

Q. It was either a remarkable piece of carelessness, or alternatively a minute brought into being for the purpose of making it appear that a takeover offer that was in fact in your contemplation, was not. That is an alternative possible explanation, isn't it? A. It is an alternative one, yes.

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Q. Do you reject that alternative? A. Completely.

Q. Completely? A. Yes, Mr. Hughes, I reject it completely.

Q. I will turn back, if I may, to Exhibit 15. You wrote an article, did you not, in your house magazine?
A. Yes, I did.

Q. In which you pointed out the grave risks to which the insurance industry was exposed by risks of inflation? A. I did write such an article.

Q. And did Mr. Donohoo, in his circular, which is Exhibit 13, accurately quote from the article? He accurately quoted from it, didn't he? A. He quoted from it, and, I think, accurately. 10

Q. The views expressed in the article cast a very heavy cloud over the prospects of the insurance industry, didn't they? A. Yes, they did.

Q. Because, will you agree, the matters to which you referred in the article affected the future profitability - affected adversely the future profitability of any company engaged in that industry - engaged in the insurance industry? A. Not necessarily any company, but the industry in general. 20

Q. Of which FAI was one? A. Yes, of which FAI was one.

Q. And the views that you expressed in that article led you to have real fears about the future prospects of FAI, didn't they? A. No, Mr. Hughes.

Q. Didn't they? A. No.

Q. You took the view that FAI was a shining exception, did you? A. I certainly did.

Q. Exposed to none of the risks of which you spoke in this article? A. It was exposed to the risks, but I was confident that we had the ability to counteract these risks. 30

Q. Which? A. That we had the ability to counteract them.

Q. Did you say "political"? A. No. I said that I had confidence that we had the ability to counteract them.

Q. You had the ability to counteract them? A. Yes.

Q. That is not what you said in the article? A. No. That was a general article; not a specific one.

Q. If your company was, in your mind, a shining exception to this ominous picture that you painted, wouldn't it have behoved you to say so? A. I had written an article in general terms on the industry and I considered it proper. I still do. 10

Q. And the views you expressed in this article would necessarily have to be reflected in any assessment of FAI's profitability, wouldn't they? A. I cannot see how a general article concerning an industry would have application to a specific company engaged in that industry.

Q. FAI was exposed to the risks of inflation to which you pointed in this article? A. The article specifically referred to problems that would arise if inflation went unchecked; I specifically wrote the article with that specific point in mind. 20

Q. Inflation was showing signs of going unchecked, wasn't it? A. Yes, it was.

Q. Signs of your article being proved right by events, will you not agree? A. I do.

Q. And also signs that have actually been proved right by events. Will you not agree with that? A. I do.

Q. And all of this was in your foresight at the time you wrote that article, wasn't it? A. Certainly it was. 30

Q. And Mr. Donohoo, will you agree, quoted with absolute accuracy from the terms of your article? A. There was hardly any need for it. Every Cumberland shareholder already had a copy of it from me.

Q. You know that is not an answer to my question. A. It is a true statement.

Q. I don't care whether it is a true statement or not. It is not an answer to my question. A. He quoted one paragraph. He had left out -

Q. What had he left out which is material? A. Approximately there were 500 words in the article, which he has just paraphrased. There must have been some materiality in it.

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Q. What is the 500 words you are speaking of? A. The article.

Q. Exhibit 43? A. Yes.

Q. But there was nothing in that article which qualified the words that Mr. Donohoo quoted from it, was there? A. Not qualified, no.

Q. I want to go back to Exhibit 15? A. Yes.

Q. Mr. Donohoo's second objection is that "FAI...preference shares". A. Yes.

Q. Do you remember that? A. Yes.

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Q. Do you remember writing that? A. Yes I do.

Q. Did you give very careful consideration to those words when you wrote them? A. Again -

Q. Did you give very careful consideration to those words when you wrote them? A. May I correct the statement you made? I did not write it. I signed it.

Q. You signed it? A. Yes.

Q. Did you give very careful consideration to those words before you signed the letter? A. I believe so.

Q. You believe so? A. Yes.

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Q. No doubt about it? Do you have any doubt about it? A. No.

Q. The cash offer that you and your family and family companies got for your shares in July was not based on current market value, was it? A. No, it was not.

Q. Or on current market price? It was not based on current market prices? A. No, it was not.

Q. And it didn't have to be, did it? A. In July?

Q. Yes. It didn't have to be? A. No.

Q. Why, if the cash offer, which is what you got and accepted in July, did not then have to be made at the current market price of Cumberland shares, did they have to be based on the current market price of Cumberland shares in November? Why do you find that hard to answer? Do you know, or do you find that hard to answer? A. I don't find it hard to answer, I would like to understand the question. May I have it again please?

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Q. Yes, certainly. Why, if the cash offer that you made and that was accepted by the FAI board in July was not, as you agreed, based on current market price, did a cash offer to minority shareholders in November have to be, as you have asserted here, based on the current market price? A. Well, there is a difference between a cash offer where the shareholder retains no continuing interest in the stock whatsoever, and a share exchange offer. FAI in that offer of November was willing only to offer a share exchange offer. Therefore any other offer would have to be made on the basis of what was the market value at that time of the FAI share - not of the Cumberland shares - because the offer was one FAI share against one Cumberland share.

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Q. But what Mr. Donohoo was saying was this, wasn't it - what you were answering in this part of the letter, Exhibit 15, was the suggestion that it would be fairer to make a cash offer to Cumberland shareholders rather than a share for share exchange? A. Which offer FAI declined to make.

Q. That rather begs the question whether it would have been fair to make it, doesn't it? A. No, it does not. I think it is a question that if one does not want to make an offer one does not make an offer. The company

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considered it, and declined to make a cash offer, and made a share exchange offer.

Q. And, in considering that, FAI directors took into account - the FAI directors, including yourself, took into account that, in view of the threat of delisting, the Cumberland minority stockholders were in a vulnerable position? The FAI directors took that into account, didn't they? A. That is the reason why we made the offer.

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Q. That is the reason why you made the offer? A. Yes.

Q. And that is the reason why you made it a share for share offer rather than a cash offer, is it? A. Not at all. It was not in our interests to make a cash offer when this offer was made.

Q. It was not in your interests to make a cash offer? You had plenty of money to make it, didn't you? A. That is beside the point.

Q. I don't care whether it is beside three points. You will have to answer the question. You had plenty of money, didn't you? You had plenty of money? A. Of course.

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Q. You were flush with liquid funds then, weren't you? A. We had liquid funds.

Q. Which could have been used - which could have been used to finance a cash offer? A. It could have been.

Q. Could have been used to finance a cash offer equal to the offer that you took for the chairman's shares? A. It could have been used to make a much higher offer, if that had been in the interests of the offeror company.

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Q. It was well within your competence to give the minority shareholders in November the same treatment as what the sturdily independent co-directors of Cumberland had given you and your family in July, wasn't it? A. Certainly.

Q. But, to put it bluntly, you decided, didn't you,

that because of the vulnerability of the minority stockholders in November, that, as a result of the threat of delisting, you would screw them commercially by giving them a share for share offer? A. Certainly not.

Q. You will agree, won't you, that the facts might wear that complexion to another person? (Objected to; question withdrawn)

Q. Of course it was well in your mind, was it not, when you wrote this circular, which is Exhibit 15, that in November there was no real market for Cumberland shares? That was well in your mind wasn't it? A. There was a market.

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Q. Do you remember saying yesterday - don't you remember saying yesterday that between July and November there was no real market for Cumberland shares? Don't you remember saying that yesterday? A. I think what I stated was that for several years past there was no real market for them - no real market on the share market.

Q. Do you deny having said yesterday that between July and November 1974 there was no real market for Cumberland shares? Do you deny saying that yesterday? A. I can neither deny it or confirm it. I don't know if I used the word "real" or not.

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Q. If you said it yesterday, that there was no real market in Cumberland shares between July and November, would that have been true or untrue? Would it have been true or untrue, yes or no. Would it have been true or untrue? A. It would be true.

Q. It would have been true, if you said that yesterday?
A. Yes.

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Q. So that is true today, is it? A. It would be.

Q. So in that situation it would be quite misleading to suggest, would it not, that Cumberland's ordinary stockholders could have gone onto the market in large numbers and got a price for their shares, unless you moved into the market as a buyer? A. No, I don't believe that would be true, either.

Q. Don't you remember saying that from 1969 onwards it was you, and you alone, who kept going such market in the shares as there was? Don't you remember saying that? A. Yes, that is correct.

Q. Well, is that correct, or is it not correct? A. Could I have the question again?

Q. I am putting it - A. Could I have the question again?

Q. No. A. Then I can't answer.

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Q. I will put to you a question that you may be able to answer, and it will alleviate the tedious process of reading things back. Is it true that from 1969 onwards such market as there was in Cumberland depended entirely on you? Is that true? A. No, that is not correct.

Q. Is it true that from 1969 onwards such market as there was in Cumberland shares depended virtually entirely on you. Is that true? A. Yes, that would be correct.

Q. So that if you were not in the market as a buyer when Cumberland shareholders wanted to sell their shares the prospects were that they would not be able to obtain a sale. That is correct, is it? A. It depends on the price, Mr. Hughes. If they were willing to sell at an unreasonable price I am sure someone would have bought them.

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Q. When you say "unreasonable price" do you mean unreasonably low? A. Unreasonably low.

Q. Unreasonably low in relation to the net tangible assets and the earning potential? A. In any way you like to put it.

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Q. But including that way? A. Including that way.

Q. So that you knew, when you read circular Exhibit 15, that if a shareholder went onto the market - if a shareholder of Cumberland went onto the market - and asked even for 70 cents for his shares, he was not going to get it? A. In November, probably not.

Q. Because you would not have been there to oblige him, would you? A. Someone else may have.

Q. You would not have been there, would you? A. I was not, no.

Q. And you would not have been there to oblige him even at 52 cents, would you? A. In November?

Q. Yes. A. No. I was not a buyer of Cumberland shares in November.

Q. You wanted to get for one FAI share, worth 52 cents of net tangible assets at that time, one Cumberland share having a net tangible asset of about \$1.27? A. Yes. 10

Q. You thought that was a very clever operation, didn't you, from FAI's point of view? A. No, not in the least.

Q. Did you think it was clever? A. No.

Q. Did you think that it was really fair to the Cumberland shareholders, who were locked in? A. One for one I felt was extremely fair.

Q. You felt that one for one was extremely fair? A. Yes, I did. 20

Q. Mr. Donohoo, at the board meeting - I might take one other little statement of yours in that letter, Exhibit 15. Do you remember saying "I asked him" (meaning Mr. Donohoo) "whether his own group...stockholders." Do you remember saying that? A. Yes, I do remember saying that.

Q. That statement was untrue, wasn't it? A. No, it was not untrue.

Q. Who was present when you made that request to Mr. Donohoo, if anyone else was present? A. That would have been at a Cumberland board meeting round about that time. Mr. Belfer. 30

Q. Mr. Belfer? A. Yes.

Q. Is Mr. Belfer still in Sydney? A. Yes. And well.

Q. And well? A. Yes.

Q. Good. We might hope to see him soon. At which Cumberland board meeting do you say it was that you told Mr. Donohoo - that you asked Mr. Donohoo whether his own group would be prepared to make a cash offer for the Cumberland shares? Which board meeting was that? A. The date I don't know. It was late October or early November.

Q. Late October or early November? A. Yes.

Q. Could we expect to find that recorded in the minutes?
A. Not necessarily.

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Q. Not necessarily? A. In fact, definitely not.

Q. Definitely not? A. No, definitely not.

Q. You cannot fix the date of the board meeting? A. No, I'm sorry, I can't fix the date of it offhand.

Q. You can't? A. No, not at this stage I can't.

Q. And what did Mr. Donohoo say? A. He just said "No, not interested," or words to that effect.

Q. And Mr. Belfer was there, was he? A. Yes, Mr. Belfer was there.

Q. Was Mr. Herman there? A. No, Mr. Herman was not there.

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Q. Anyone else? A. Mr. Belfer.

Q. I mean other than Mr. Belfer? A. No, no one else.

Q. No one there taking notes? A. No one else. There was no one else there.

Q. And was an attempt made to tape record that meeting?
A. No there was not.

Q. Now, I want to be quite - I want you to be quite clear about what I am putting to you, and I have to put this to you: That statement that you asked Mr. Donohoo whether his own group would be prepared to make a cash offer is a lie? A. It is not.

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Q. Is it wholly true? A. Completely. It is completely true.

Q. You might not just be misinterpreting what was said, by any chance? A. I don't believe so.

Q. Would you agree that what was said was that you asked Mr. Donohoo whether Washington Souls would underwrite, in terms of cash, the FAI shares that were to be offered or were on offer under the takeover scheme to the Cumberland shareholders? A. I certainly did not put that meaning to it.

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Q. You did not put that? A. No.

Q. Let me put this to you. Didn't Mr. Donohoo receive a telephone call from you, on or about 20th November, in which you said "I have been in touch with Jackson, Graham, Moore and Partners, and they are not prepared to underwrite a cash value for FAI shares in this climate." A. With the exception of the date, which I cannot confirm, that was said.

Q. It was said? A. Yes.

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Q. Did you go on to add "Jackson, Graham say this is not a reflection on FAI"? A. Yes I did.

Q. That conversation between Mr. Donohoo and yourself was preceded, was it not, by a conversation in which you said - I'm sorry, in which he said that he thought there should be a cash alternative in the takeover offer? A. Yes, it was.

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

Q. Did he say "In view of the thinness of the market that exists for FAI shares you should have that price - that is, the cash price - of the FAI shares underwritten by a member of the Sydney Stock Exchange"? A. Words to that effect. In general terms he did say that, yes.

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Q. Did you in that conversation say to Mr. Donohoo you would be prepared to do so? Did you tell him in that conversation that you would be prepared to do so? A. I did not.

Q. You did not? A. No. I did not. Nor did Mr. Donohoo -

Q. Did he say that Washington Souls would not? A. Seeing I did not put this to him, he could not say it.

Q. I take your point. But when a clear issue arises on two sides I have to put to you my version. A. I beg your pardon. No.

Q. So you say there was never - I'm sorry. Did you say "I will see what I can do about getting a cash price of the FAI shares underwritten"? A. That was part of a sentence, and then I continued.

10

Q. And then you had a subsequent conversation with Mr. Donohoo, which you have agreed to, in which you said "I cannot. The brokers, Jackson, Graham, Moore & Partners, are not prepared to underwrite FAI's shares"? A. That is right.

Q. Will you, on reflection, not agree - and I am only putting this to you to give you an opportunity of reflecting and agreeing or disagreeing - will you not, on reflection, agree that there was no conversation in which you invited Mr. Donohoo or his group to make a cash offer for the Cumberland shares? A. No, I would not agree.

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Q. Just to have it quite clear, you do not suggest, do you, that the conversation - to parts of which you have agreed - the conversation, to parts of which you have agreed, constitutes the events which you say were an invitation by you to Mr. Donohoo or his group to make a cash offer? A. No, there were two separate conversations.

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Q. You say there were two separate conversations? A. Yes.

Q. You told us before that as a director of Cumberland, and indeed as chairman of directors of Cumberland, you, in your view, had a duty to discharge to the Cumberland shareholders in relation to this takeover offer that had been made by FAI? A. Yes, that is correct.

Q. And was it your view that an element of that duty was that you ought to be frank? A. Yes.

Q. And not misleading? A. Certainly.

Q. In anything you said? A. Yes.

Q. And you have agreed with me that you deliberately decided to sign the document, Exhibit 15, in a dual capacity? A. Yes.

Q. Was that your decision? A. I think so. I think so.

10

Q. Did you discuss it with Mr. Atkinson beforehand?
A. I don't recollect. I don't recollect whether or not I discussed it with him.

Q. So you deliberately decided, did you not, to lend the weight of your authority, as well as chairman of Cumberland, as well as the weight of your authority as chairman of FAI, to writing a letter to Cumberland shareholders designed to acquaint them with the advantages of accepting the FAI offer? A. I decided -

Q. Did you understand my question? Did you understand the question? A. Yes, I did.

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Q. Would you answer it, please, with a yes or no? It is a question which will permit of a yes or no answer. Would you like it read again? A. No, I think the question was quite clear, but I don't think it is capable of just a straight out yes or no answer.

Q. One might be pardoned for thinking that it is. You decided deliberately to lend weight - I will withdraw that question, and clear up the assumptions. This letter, Exhibit 15, was designed to answer Mr. Donohoo's allegations to acquaint Cumberland shareholders with what you regarded as the advantages of accepting the FAI offer, wasn't it? A. The letter was intended to answer charges made by Mr. Donohoo. It was not intended to do anything else other than that.

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Q. Really? A. Really.

Q. Were not there certain words in it - in that letter - that were designed by you to draw the attention of Cumberland shareholders to the advantage of taking - to the advantage, in your view, of accepting the FAI offer?

A. I thought it stated the facts with a degree of clarity, and to avoid any possible misunderstanding I thought it proper to put both companies' names on it.

Q. This letter, Exhibit 15, was in its total effect, wasn't it, a recommendation to the Cumberland shareholders to accept the FAI offer? That is so, isn't it? 10

A. Well, when you call it a recommendation, it contained my views fully.

Q. And you will agree with me, won't you, that your views, as expressed, amounted to a recommendation to the Cumberland shareholders to take the FAI offer? You will agree with that, won't you? A. I think in the takeover document I clearly said that I did not wish to make any recommendation as such.

Q. You have not listened to my question, but you have referred to another document about which I have not asked you. Would you do your level best to concentrate on the question I ask you, and to answer it, without going off on a frolic of your own? Do you want the question read again? A. No, I remember the question. I do not consider this a letter of recommendation. I consider it as an answer to a circular sent out by Mr. Donohoo, and I attempted to answer the circular to the best of my ability. 20

Q. Will you not agree that what you wrote in that letter, Exhibit 15, was designed to overcome Mr. Donohoo's arguments, and thereby induce Cumberland shareholders to take the FAI offer? Won't you agree that that is what that letter was designed to do? A. No, I do not agree with that. 30

Q. It was not a neutral letter, was it? A. I would be quite happy to leave it to the individual stockholders to make up their minds.

Q. You said much more than that? A. I said a good deal. 40

Q. You left it to the individual stockholders to make up their minds, in the light of your arguments? A. Not arguments. Beliefs.

Q. Not beliefs. Arguments. A. I don't have arguments. I did not put forth any arguments.

Q. The pleas that you have expressed were, in their expression by you, calculated to induce Cumberland shareholders to accept the FAI offer, weren't they? A. No, they were designed to reply to the circular sent out by Mr. Donohoo. 10

Q. And therefore, by means of that reply, to induce Cumberland shareholders favourably to consider the FAI offer, will you not agree? A. I will not agree.

Q. You will not agree? A. No.

Q. In this letter, Exhibit 15, did you express a single argument against the acceptance of the offer? Did you express one single argument against the acceptance of the offer? A. I don't think so.

Q. Will you not agree all the argument in the letter, Exhibit 15, is an argument - whether by way of expression of belief or statement of fact, or both - in favour of acceptance? A. That was my point of view; therefore that is what it contained. 20

Q. And you wrote that circular, hoping that the expression of your point of view would persuade Cumberland shareholders favourably to consider the offer, didn't you? A. No, Mr. Hughes. We were not really concerned. I have given you this - I have made this point many times.

Q. In its context, which hat was being worn? A. It was the FAI board, clearly. 30

Q. But you were writing this letter as chairman of Cumberland, too? A. Yes.

Q. Didn't that put you, in your view, in a position of some exquisite difficulty? A. I believed -

Q. In your view, at the time, did the adoption of dual

roles put you in a position of exquisite difficulty?

A. No, quite the contrary.

Q. You thought it was a simple situation? A. I made it crystal clear that I had a dual capacity. I thought if there was any possibility of a misunderstanding I would state that I was in a dual capacity.

Q. And in that dual capacity you tried to persuade Cumberland shareholders by arguments? A. No.

Q. And expressions of belief? A. No.

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Q. That thought was not anywhere in your mind at the time you signed the document? A. No, it was not.

Q. You are serious, are you? A. I am quite serious.

Q. Quite serious? A. Yes.

Q. Was that thought in your mind - the thought that what you wrote might happen to persuade Cumberland shareholders to take the FAI offer, when you wrote these words "Speaking personally, I would never dream of allowing myself to be in the position of a minority shareholder in an unlisted company even if every merchant banker in the country should advise me to the contrary"? A. That was, and is, my opinion.

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Q. I would like an answer to the question. Was that thought in your mind - the thought that what you wrote might happen to persuade Cumberland shareholders to take the FAI offer, when you wrote the words "Speaking personally, I would never dream of allowing myself to be put in the position of a minority shareholder in an unlisted company even if every merchant banker in the country should advise me to the contrary"? A. No, it was not.

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Q. You thought that was a highly unpersuasive piece of verbage, did you? A. It was my opinion.

Q. Did you think it was unpersuasive? A. I don't know whether it was unpersuasive or not. It was my opinion.

Q. Was it intended to persuade? A. No, it was not.

Q. Was it intended to dissuade them from taking the offer? A. No it was not.

Q. These words amounted to a piece of intimidation didn't they - "Speaking personally, I would not want to be locked into an unlisted company"? A. I would not.

Q. They were a bald threat, weren't they? A. No, they were not.

Q. You were speaking those words as chairman of Cumberland, weren't you? A. I was speaking in an apparently dual capacity. 10

Q. Dual capacity? A. Yes.

Q. A matter that does not seem to trouble you very much? A. No.

Q. When you wrote that letter you hoped, didn't you, that the Cumberland shareholders would accept the FAI offer? A. I did not.

Q. Didn't you? A. No.

Q. You had gone to a great deal of trouble to make the offer, hadn't you? A. A deal of trouble. 20

Q. You knew that if they did not take the offer they were likely to become the owners of unlisted shares, didn't you? A. Assuming that the stock would be delisted.

Q. You knew when you wrote the letter that if they did not take the offer the shares were likely to be delisted, didn't you? A. That was the threat of the Sydney Stock Exchange.

Q. You knew when you wrote Exhibit 15 that if the Cumberland stockholders did not accept the offer they would be likely to become the owner of unlisted Cumberland stock? A. It was a possibility. 30

Q. And a probability? A. So the Stock Exchange informed us.

Q. I am asking you for your state of mind. At the time you wrote the letter, Exhibit 15, on 22nd November 1974, what was your state of mind? You knew, did you not, at the time you wrote that document in your dual capacities that if the Cumberland minority stockholders did not accept the FAI offer they were likely to find themselves the owners of unlisted stock? A. I did not know that, no.

Q. But you knew it was a probability, didn't you?

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A. Possibility.

Q. A possibility? A. Yes.

Q. It was a probability, wasn't it? A. We are playing on words.

Q. You know the difference between a possibility and a probability? A. Yes I do.

Q. It is not a play on words - the distinction between possibility and probability? A. I cannot tell you now whether it was a possibility or a probability. I don't know.

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Q. You know that it is not a play on words to draw a distinction between a probability and a possibility?

A. If you go back for that length of time -

Q. I am not asking you to go back that length of time. I am reminding you that a moment ago you used the expression that I was making a play on words. You know very well, don't you, that there is a distinction to be drawn between possibility and probability? A. There certainly is. But in relation to this one, the answer is not known to me.

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Q. Now I suppose that when Mr. Donohoo proposed at the Cumberland board meeting that met to discuss the takeover offer, that it would be appropriate in the circumstances to retain the services of a merchant banker or a chartered accountant to advise on the FAI offer, you thought in your heart - you thought that there was, in fairness, something to be said for that point of view? A. No, I did not.

Q. Did you think it was an unfair suggestion? A. No, it was not.

Q. Did you think it was a reasonable suggestion?

A. Well a reasonable suggestion, yes.

*Q. And it was a reasonable suggestion, wasn't it, because of the duality of roles that Mr. Belfer and yourself were playing as directors of the offeror company and as directors of the offeree company? A. It could have been reasonable for a variety of reasons. There could have been all sorts of reasons.

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Q. Again you have not answered the question. A. I think I have.

Q. I will get the question read, and I will get it answered specifically.

(Question marked * read by court reporter)

WITNESS: I'm sorry, Mr. Hughes, the answer to that question is much wider than yes or no, because the reasonable request by Mr. Donohoo -

MR. HUGHES: Q. You have agreed with that? A. Yes.

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Q. It was reasonable, wasn't it, because of the duality of roles being played by Mr. Belfer and yourself as directors of FAI on the one hand, and as directors of Cumberland on the other? A. My answer was that that would not be the only reason why it could be considered reasonable. There could be a number of reasons.

Q. Thank you very much. I would like you to agree, if you can, that that was one reason? A. Certainly.

Q. You go on, and I will give you as much scope as you like, to give us the other considerations that made it reasonable. Take as long as you like to tell us. You said there were other reasons. Outline them. A. From Mr. Donohoo's point of view he could say "I would like to know on behalf of other shareholders. I would like to know much more about the offeror company." That could be one reason. I said there could be others.

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Q. That would be a perfectly sensible reason? A. Yes.

Q. What other considerations made Mr. Donohoo's request for independent advice reasonable? A. I cannot think of any others, but there could be others.

Q. I am most intrigued to explore them. You have given two powerful reasons to date. A. I have given two reasons.

Q. Powerful reasons? A. They are reasons.

Q. Powerful reasons? A. I don't know what you mean by "powerful". 10

Q. Cogent reasons? A. Yes.

Q. Can you think of any other reasons why Mr. Donohoo's request was reasonable? A. It might be put by Mr. Donohoo to get a better offer.

Q. In a perfectly fair way? A. Yes, perfectly.

Q. In your view he did have a duty which perhaps took into account, in its discharge, less conflicting considerations than the duties you had to discharge? A. I would call it a vested interest, really. 20

Q. A vested interest? A. Yes.

Q. He had one interest, and that was to the shareholders of Cumberland, including minority shareholders. You and Mr. Belfer had two interests, didn't you? A. I think Mr. Donohoo had Washington also, and Cumberland, if you consider that is a conflict. We had Cumberland and FAI.

Q. You rubbished Mr. Donohoo's suggestion - his perfectly reasonable suggestion - that independent consultants should be retained, didn't you? A. I certainly did not. 30

Q. You decided against it, didn't you? A. I did.

Q. And will you agree that to retain independent consultants would at least serve to create an impression that fairness was being administered to the minority

shareholders in Cumberland? A. At a price, which I considered at that time exorbitant for the exercise.

Q. The price to be paid for fairness was too heavy?

A. No, for a merchant banker.

Q. For a merchant banker? A. Yes, that is right.

Q. When you came to write the circulars in this paper warfare you advanced all the reasons that occurred to your mind for rejecting Mr. Donohoo's suggestion, didn't you. A. We have advanced a number of reasons.

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Q. Didn't you, in writing your circulars, advance all the reasons that then occurred to you for rejecting Mr. Donohoo's suggestion of retaining independent experts?

A. I have advanced the reasons which led me to the conclusion that the price was not worth what we were getting, yes.

Q. And expense was not mentioned by you in the circular at all, was it? A. No. As I mentioned -

Q. Expense was not mentioned in your circular as a reason for rejecting Mr. Donohoo's suggestion, was it?

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A. No, apparently not.

Q. It was not, was it? A. No.

Q. Well then, it may look, then, as if expense was really no ground at all for the rejection of Mr. Donohoo's request? A. Yes it was.

Q. If it had been, would not you have told the shareholders? A. No.

Q. Why not? A. Because there were a number of reasons, and we have advanced the reasons we considered were important.

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Q. But would not expense have been a cogent reason, if it was a reason? A. Well it was a reason, and it was a cogent reason.

Q. Would not it have been a cogent reason, was the question. A. It was a cogent reason.

Q. And you didn't mention it, did you? A. I did not.

Q. Why not? A. Because if I put in every conceivable cogent and other reason I would have had to send out a 500 page memorandum.

Q. You are serious, are you? A. Yes.

Q. A 500 page memorandum? A. Unlimited.

Q. You want his Honour to accept that literally, do you? A. 500, or 400, or not. But if you wish to put in every component part of every decision you make there is no end to the length of the document. That is what I am specifically stating. 10

Q. Did you have one reason, or more than one reason, for rejecting Mr. Donohoo's suggestion that there be independent advice? A. Many reasons.

Q. Many reasons. You have agreed expense was a cogent one? A. Yes, certainly.

Q. Was it the most cogent one? A. No.

Q. Did you express the most cogent one in the document, Exhibit 15? A. May I have a look at it? 20

Q. I would like your recollection first? A. I don't even remember.

Q. You read that document in the witness box, didn't you? A. Well, I would prefer to read it before I answer.

Q. What was the most cogent reason in your view for rejecting Mr. Donohoo's suggestion that independent experts be retained to advise on the offer? A. The magnitude of the takeover of Cumberland did not warrant the interruptions, inconvenience and expense to have a complete merchant banking investigation of FAI, which operates not only in Australia, but in many other parts of the world as well. It seemed totally impracticable and unreasonable as well from the offeror's point of view. 30

Q. That is the most cogent reason? A. There are other reasons.

Q. Did you express that as the most cogent reason in the document, Exhibit 15? A. I don't know what is in it. I expressed several reasons.

Q. You don't know what is in it? A. No, not specifically.

Q. You have read it today? A. Yes.

Q. And you took some minutes to read it? A. I did indeed. 10

Q. You can't tell us now from memory whether you expressed the reason you mentioned as being the most cogent reason for rejecting it? A. No, I cannot. There are other reasons, and no doubt they will be covered in due course.

Q. So that you will go on inventing reasons in the hope that one might hit the mark? A. If you are seeking what was in my mind 12 months ago then obviously I have to make them up as I go along. 20

Q. And do a little bit of imagining, is that right?
A. If you want to know what was specifically in my mind 12 months ago when I sent the memorandum? Yes.

MR. HUGHES: Q. You said a few minutes ago that FAI operated, and you were talking about 1974, in many other parts of the world? A. Yes.

Q. Whereabouts? A. England, Belgium, Italy and France to some small extent.

Q. To some small extent? A. Yes.

Q. How many people do you have employed in London or England - or did you have in November, 1974? A. The actual number I would not know, about a dozen. 30

Q. How many in France? A. One part time agent.

Q. Working for a bit of commission? A. Yes.

Q. How many in Belgium? A. About six.

Q. Working on commission? A. No, salary.

Q. Were they employees of FAI in Belgium? A. Yes.

Q. In London were they employees of FAI? A. Fire and all Risks.

Q. Of course the operations in the United Kingdom are all taken up, as in the operations in France, Belgium and Italy, in the consolidated accounts of FAI? A. Yes.

Q. And in the matter of Fire and All Risks, in the Sydney Office? A. It is taken up by FAI, yes. 10

Q. All the documentation is in Sydney? A. All the forms relevant --

Q. All the accounting information is sent back to the head office? A. All the accounting information.

Q. You have no overseas subsidiaries - you must know whether you have? A. You want a true answer --

Q. You are the chairman of the group of companies?
A. Yes.

Q. Cannot you say whether you have overseas subsidiaries? 20
A. No I cannot. I think in November, 1974, we probably had two dormant ones. I do not know on that particular date, but we did have two.

Q. You had two dormant subsidiaries overseas - what are their names? A. Falkirk and Sterling Share Assurance Society Limited.

Q. They were dormant in November, 1974? A. They have been dormant for some time. We wrote them out from the consolidated balance sheets.

Q. They returned neither profit nor loss in 1973 or 1974? A. They were dormant. 30

Q. That would not have caused an independent consultant any trouble to investigate - (Objected to; withdrawn).

Q. Such operations as you carried on in overseas countries were reflected in the accounts in head office?

A. The result of the operations, yes.

Q. You are not suggesting that the independent consultant, had you deigned to agree to their appointment, would have to chase every operation in Paris and Rome, are you? A. I do indeed. If a proper job of assessing something of this nature is to be carried out, obviously the trading result of the company, the losses et cetara, would have to be seen at these places otherwise all you are referring to is a copy of the consolidated accounts which had been made available at all times.

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Q. I suppose the problems involved in getting an independent consultant to travel overseas to investigate the manifold activities of the FAI group was of such enormous significance in your mind that it would have been the best argument to present to the shareholders for the purpose of discarding of Mr. Donohoo's suggestion?

A. Not at all.

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Q. You have told his Honour that the inconvenience, dislocation and expenditure and the ramifications and width of the investigation were such that it is a factor or a most cogent reason for rejecting Mr. Donohoo's suggestion? A. I said they were cogent. I do not think they were the most cogent.

Q. The transcript will tell us when we meet next. What was the most cogent reason for rejecting the suggestion by Mr. Donohoo? A. I think I have also answered that, on the basis there were a number of reasons and one cannot break them down to what was the most cogent. There were many reasons and a decision was made by me not to accept it and I did not proceed with it.

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Q. You are avoiding answering my question? A. No.

Q. When you came to write the letter, Exhibit 15, did you express what you regarded as the most cogent reason for rejecting Mr. Donohoo's reasonable suggestion as to the employment of an independent consultant? A. We have stated the reasons for rejecting it.

Q. You would be concerned in writing the letter Exhibit 15 to express the best reasons? A. Reasons.

Q. You would be concerned to express the best reasons?
A. I do not know whether there is such a thing as the best reasons.

Q. The most cogent reasons? A. I cannot answer that.

Q. Cannot you? A. No. On the basis that the reasons are different at different times, I cannot recall the reason I would have specifically stated at the board meeting to Mr. Donohoo a month or three months later.

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Q. You gave very careful thought to the letter Exhibit 15? A. Yes.

Q. That necessarily involved, when you were answering Mr. Donohoo's suggestions that an independent consultant be employed, you would want to state your case in its most persuasive way on that point? A. I would consider it proper to bring forth one or more reasons. It would not have to be the totality.

Q. You have not answered the question - (question read). A. The answer is no.

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Q. That was a rather odd attitude? A. I do not think so.

Q. You had decided to reject the suggestion made by Mr. Donohoo to you which you regarded as a reasonable suggestion? A. I think the previous question was --

Q. I do not care what you think it was - you had decided? A. I think I was misquoted.

Q. You know if I am that you have a very good watchdog here? A. Notwithstanding that I agreed to the reasonableness of the request - you said it was reasonable for Mr. Donohoo to ask for a merchant banker - I said it was but that is not making the request reasonable for me - it was reasonable for Mr. Donohoo to ask that question, and I say it was.

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Q. Won't you agree earlier this afternoon you said that

Mr. Donohoo's request was a reasonable one? A. Yes, and I confirm it again.

Q. You knew when you sat down and turned your mind to the task of answering the allegations in his circular, when he made the request for independent advice, and it had been refused, you turned your mind to the necessity of giving the best possible answer to what you regarded as a reasonable suggestion from him, did not you? A. I cannot recall what my substantial reason was at the time. I gave a reason and there were other reasons as well.

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Q. The reasons were very clear in your mind at that time? A. They must have been.

Q. Let us look at the letter you wrote, it says, "Mr. Donohoo has further objected to the fact that independent merchant bankers were not engaged to advise stockholders regarding the bid. This seemed to be a pointless exercise in the circumstances which existed". Pausing there, the circumstances that existed were Mr. Donohoo had drawn your attention to the fact that you and Mr. Belfer occupied conflicting roles? A. Under the circumstances I was referring to the fact Cumberland shareholders had known FAI for many years, had known the management and had been receiving reported copies from FAI. These were the circumstances I was referring to.

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Q. You were not adverting to the situation that you and Mr. Belfer were wearing two hats? A. No, I was not.

Q. That was a matter of no importance to you? A. It was important but of no relevance.

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Q. You did not think the minority shareholder might be comforted to have an independent evaluation of the takeover having regard to the fact that you and Mr. Belfer were occupying two different roles? A. That may be, but the offeror company was not prepared to undertake such a task.

Q. You know that such a practice is adopted in takeover circumstances, that is of seeking independent advice? A. It has been done.

Q. And very properly done? A. I suppose it depends on the size of the transaction, whether it warrants the expense. It also depends on the relationship of the companies' concern. There is nothing improper about it.

Q. Are you suggesting because the Cumberland shareholders had been recipients of FAI literature over a period of years, that was a factor that should give them a rosy feeling of comfort about your integrity and the integrity of your operations? A. I think that also --

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Q. Would you answer the question? A. That was one of the things.

Q. You were asking them to take you at face value?

A. No, they had known me.

Q. How many shareholders do you know or did you know when you went to that rather dreadful meeting when Mr. Donohoo's execution party was organized? A. I think he is still alive and kicking.

Q. I mean his execution as a director - how many shareholders of Cumberland did you know? A. I think when you refer to the --

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Q. I will reframe my question, how many shareholders of Cumberland had you met prior to going to the meeting at which they rather disapproved of you? A. A handful. On the previous statement I made, they had known me I think in the commercial sense and you have the confidence of the shareholders of Cumberland - I have been the chairman of Cumberland for a considerable number of years. Mr. Belfer has been a director for a considerable number of years. Mr. Barrington has been the general manager of the company for a considerable number of years and in that sense they have known who we were.

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Q. Now would this sum up your state of mind, or part of it, in relation to Mr. Donohoo's request for the retaining of an independent consultant to advise on the takeover, that you thought that the shareholders of Cumberland should reasonably regard you as avuncular, benevolent, and a totally honest figure upon whose word they could rely without question even in a situation

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where you were wearing two conflicting hats? A. I do not think you are entitled to assume "benevolent".

Q. We would agree with that. What about the quality of avuncular? A. I do not even know the meaning of the word.

Q. Really? A. Yes, I am sorry. That is why I have a dictionary.

Q. Was it your view that the shareholders of Cumberland were entitled, notwithstanding the hat generating problem referred to, to regard you with a rosy warm glow of confidence? A. They were certainly entitled to regard me as an honest and capable chairman. 10

Q. They may not have been entitled to regard you so, having regard to the apparent lie you admitted to this morning? A. You are referring to a mistake.

Q. They may not be entitled to regard you in that light by reason of the apparent lie you admitted to this morning? A. I am of the opinion they are most certainly entitled to regard me in that light. 20

Q. You would not go and tell every shareholder the apparent lie which you confessed this morning and ask them to vote you in as chairman of the company? A. I think confessed - if confession is the right word - an inadvertent error.

Q. This morning you described it as an apparent lie?
A. Inadvertent, probably.

Q. This morning you described it as an apparent lie?
(Objected to - question to be reframed).

Q. May I put this to you, whether it was a lie or not, you admitted this morning that it was penning an untruth in the circular of 4th February? A. Inadvertently. 30

Q. Do you feel having rejected the reasonable suggestion by Mr. Donohoo that independent advice should be sought, that the shareholders of Cumberland ought to treat you as a totally honest person, a totally frank

person upon whose published word they could rely without any qualifications? A. Yes.

Q. That was the basis upon which you decided to reject Mr. Donohoo's suggestion for independent advice? A. No.

Q. It was part of the basis? A. It was one of them.

Q. You have no intention under any circumstances of resigning as a director of Cumberland, have you? A. No.

Q. Or as chairman? A. No, I have not.

Q. If this company continues, without being wound up, you think do you, in the light of your conduct in relation to the takeover battle that the minority shareholders of Cumberland have their interests in good hands - in the hands of a man of probity, if you continue as chairman - (Objected to; allowed; question read) A. Yes. 10

Q. You think you will come out of this case without a scar on your probity? A. I hope so.

Q. You said in Exhibit 15 "As the companies have been closely associated over a number of years it was considered no useful purpose would be served particularly as the real issue boiled down to the question whether the shareholders are going to be better off in the long-run by accepting FAI's offer or by continuing to hold shares in what would probably be an unlisted company". That is what you said or part of it? I am looking for that section - yes. 20

Q. Do you see that? A. Yes.

Q. Did that represent your real belief? A. It is one of them.

Q. Was it a real belief? A. Certainly. 30

Q. The reference to the close association between the two companies expresses two things, firstly the fact that Cumberland was a subsidiary of FAI. Is that right? A. Yes.

Q. Secondly the fact that there were directors common

to both boards? A. Thirdly substantial financial assistance.

Q. Do you think that created some sort of a debt of gratitude by Cumberland shareholders to FAI? A. Not a debt of gratitude.

Q. Or any sort of a debt? A. Till it was repaid, yes.

Q. Do you think the substantial financial assistance you allege had been granted, was a matter that was relevant to the pitching of the takeover situation? A. Not to the takeover consideration, no. 10

Q. Why mention it at all? A. Because it was a relevant fact.

Q. To what? A. To the issue that was being debated in correspondence.

Q. What issue? A. The non-appointment of the merchant bankers.

Q. What relevance is the fact that Cumberland may have owed FAI some money, in the present or past, to the issue of whether independent advice should be sought? A. It went to the closeness of the association between the two corporations. 20

Q. We know the corporations were close but what relevance is the closeness of the association of the two corporations, when there is a substantial major shareholding in conflict with the minority and common directors of offeree or offeror company? A. I lost the beginning of the question.

Q. As to the relevance of whether an independent consultant should be employed? A. As we stated we were of the opinion that the real issue was what we stated in the circular. 30

Q. What you believed was that the FAI board had the Cumberland minority shareholders at their mercy. That is what you believed? A. No, I did not.

Q. They were locked in between the devil of a probable

Stock Exchange delisting and the deep blue sea of accepting your takeover? A. Devil or otherwise, this could be the two possibilities.

Q. They were the only two possibilities in November?

A. No, it could be that the stock would not be delisted. That is a third one.

Q. I do not want to play with words or to do what you think is playing with words but you have agreed with me more than once that it was in your mind, if the majority stockholding was not reduced below 80 to 75%, delisting was probable. You have agreed with that? A. Possibility or probability, we have argued about that, but even possible, I accept.

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Q. That risk of being locked in as a minority shareholder in a delisted company was graphically pointed out by you in your letter Exhibit 15? A. Yes.

Q. You intended that description to be graphic? A. I intended to describe the reason they were --

Q. In the most pointed way you could? A. I cannot comment on that.

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Q. You can comment on it unless you are shy about it?

A. No, I am not shy but I cannot tell you what was in my mind twelve months ago in drafting a particular phraseology.

Q. Was the fact that the two companies had a close association anything to do with the irrational decision as to whether independent expert advice should be retained in relation to the takeover offer? A. I really cannot say by now.

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(Witness stood down)

(Further hearing adjourned to a date to be fixed.)