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IN THE PRIVY COUNCIL

No. of 197

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

IN THE MATTER OF:-

CUMBERLAND HOLDINGS LIMITED

AND IN THE MATTER OF:-

THE COMPANIES ACT, 1961

TRANSCRIPT RECORD OF PROCEEDINGS

Volume IV

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PART I

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Index "A"

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

TWELFTH DAY: THURSDAY 27TH NOVEMBER, 1975.

(Letter of 14th November 1975 tendered by Mr. Hughes; admitted and added to Exhibit 2)

(Letter dated 30th October 1975 from the Stock Exchange tendered by Mr. Hughes; admitted and added to Exhibit 81).

MR. BAINTON: There are some corrections to the transcript. * At page 669, four questions from the top, the answer commences "Well, we were searching for a youthful activity to introduce into the company." The word "youthful" should be "fruitful".

** At page 740 the answer to the second question is recorded as "I don't recall the man's name. He identified himself as, I thought, Sir Ian Potter..". The word "from" has been omitted after the words "I thought".

*** At page 753 the seventh question, the answer is recorded as "No, it was not an intention that persisted in my mind at all times. When I started FAI, the reason for the purchases...". That should be "What I stated about FAI", and not "When I started FAI".

ϕ At page 766 four questions from the bottom, the answer is recorded as "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.." Mr. Adler thinks he said "November" and not "September". (Discussion ensued).

(* Original Transcript Page 445)

(** Original Transcript Page 492)

(*** Original Transcript Page 501)

(ϕ Original Transcript Page 509)

MR. HUGHES: If Mr. Adler wants to clear it up I would be happy for my friend to interrupt by cross-examination.

* MR. BAINTON: At page 776 the fifth question: "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'". The words "stock shares" should be "stock market".

** At page 782 the eighth question - the last two lines of the answer to that question are recorded as "I did not believe it was proper to enter into false dealing between colleagues on that level." The "false dealing" should be "horse dealing".

*** At page 783 the sixth question - the latter part of the answer is recorded as "I think the listing was in jeopardy continuously because of the continuously diminishing number of share orders, and that was a very real problem. The words "share orders" should be "shareholders".

ϕ At page 838 in the answer to the fourth question, it is recorded as "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." The words "reported copies" should be "Reporter copies".

ϕϕ MR. HUGHES: On page 843 - the last question on the page is recorded as "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 take-over offer." I do not know what that should be, but I am certain that I did not use the words "irrational decision" I would venture to suggest that it should be "...anything to do with arriving at the decision.."

HIS HONOUR: Yes. I will make that alteration.

(* Original Transcript Page 515)

(** Original Transcript Page 519)

(*** Original Transcript Page 520)

(ϕ Original Transcript Page 550)

(ϕϕ Original Transcript Page 553)

LAWRENCE JAMES ADLER
On former oath:

HIS HONOUR: Mr. Adler, you understand that you are on your former oath?

WITNESS: Yes your Honour.

MR. BAINTON: Q. Mr. Adler, I think that you have looked at the transcript of your evidence? A. Yes, I have.

Q. And you noticed some matters which you thought
* should be corrected, one of them being on page 766 of the transcript (Copy of transcript handed to witness) You might look at the fourth bottom question.
A. Yes.

Q. I think your personal recollection is that the answer you gave was "That would mean I have not participated..." and so forth, and that the month you mentioned was "November" and not "September"?
A. Yes.

Q. Whether you said that or not, is the answer, corrected that way, the answer you meant to give?
A. Yes.

Q. Putting in the "not" before "participated", and substituting "November" for "September"? A. Yes.

MR. HUGHES: Q. Mr. Adler, I want to ask you some questions about the document that is in evidence as Exhibit 87? A. Yes.

Q. I showed you this document on the last hearing date before it was put into evidence, and it sets out the profit figures for the various institutions owned or partly owned by Cumberland for July, August, September, October, November and December 1974, and you agreed with me, I think, that when you came to formulate the take-over offer you had the figures up to September, anyway? That is, July, August, September. I just want to ask you this question first of all. There are nine units or institutions on this list for the purpose of setting out their profit figures? A. Yes.

Q. Would it be correct to say that through July, August, September and October 1974 the Bellevue Nursing Home, which is number nine on the list, was owned by a company in which Cumberland had a majority interest - Cumberland had a two thirds majority

(* Original Transcript Page 509)

interest? A. Yes.

Q. So that there was an outstanding minority interest of 33 per cent? A. Yes. There still is.

Q. Would you agree with this, that the profit figures for July and the ensuing months set out on this list, Exhibit 87, for Bellevue are the profit figures referable to Cumberland's majority interest, and not the total profit figures? A. I cannot confirm that. There was some confusion. It was supposed to be only the Cumberland portion. I understand.... (balance of answer inaudible)

HIS HONOUR: Mr. Adler, you are looking down and you are turned away. You will have to speak audibly so that the evidence can be heard and recorded.

WITNESS: I'm sorry, your Honour.

It was supposed to be only the Cumberland portion of the total profit of that particular institution, but there was some confusion in the figures, and, if I recollect it correctly, the August profit included a portion of the minority shareholders, and it was adjusted in the September figure. The intention was that it should only be the two thirds interest of Cumberland.

MR. HUGHES: Q. It was with that intention in mind that Bellevue was shown separately? A. Yes, that is right.

Q. What you are saying to his Honour is that if, as you believe, a mistake was made in the striking of the August profit figure by including the profit for Bellevue referable to the majority and the minority interest combined, that mistake was adjusted in the statement of the next month's profit figure? A. Yes.

Q. Now, I want to take you back to some evidence that you gave on another aspect of the case, Mr. Adler. That is evidence which you gave at pages * 700 and 701 of the transcript. Do you remember telling his Honour - if I may remind you, it was in the course of your cross-examination of 30th October, the second last hearing date, that when Professor Wilson asked you why you had, on 7th August, placed this selling order for Cumberland shares at a price of 70 cents, you gave him the reason that you were

(* Original Transcript Pages 467 and 468)

anxious to maintain the listing of Cumberland. Do you remember saying that? A. Yes.

Q. May we take it that that anxiety persisted up to the time at which you received the letter from the Stock Exchange on 4th September? A. Yes.

Q. And when you received that letter did your anxiety to retain the listing persist? A. Yes.

Q. It did? A. Yes.

Q. And you had a very clear message from the Stock Exchange, didn't you, as to what they required or said they required in order that the listing might be retained? A. Yes.

Q. And when, in August, you decided to place a selling order for 10,000 shares at 70 cents your attitude was this, was it, that in the interests of the minority shareholders it was fair and reasonable that those shares should be sold substantially below their real value in order to protect the position of the minority stockholders from the viewpoint of listing? A. No, I don't think my consideration was only for the minority shareholders. I was considering the listing value for the company as a whole.

Q. Including the minority stockholders?
A. Including the minority stockholders.

Q. If your anxiety to maintain the listing persisted even after the letter of 4th September was received from the Stock Exchange there was every reason, was there not, for making some attempt to distribute out of the hands of the majority shareholder in Cumberland some of these shares so as to reduce the majority shareholder's holding to the level required by the Stock Exchange? A. Except that it was not in the interests of FAI to do so.

Q. It was in the interest of FAI to offer 10,000 shares in August? A. Yes.

Q. At a discount of 55 cents? A. That is correct.

Q. Below the purchase price, in the interests of maintaining the listing? A. That is right.

Q. Is that right? A. That is correct.

Q. And the letter from the Stock Exchange came

within a month - in less than a month from 7th August, didn't it? A. That is correct.

Q. And to comply with the Stock Exchange requirement of reducing the majority ordinary shareholding in Cumberland to 75 per cent would involve, would it not, the disposal of 38,000 shares? A. Probably. I don't know the figure.

Q. You don't know the figure? A. No.

Q. In round figures? A. Probably.

Q. Why, if it was in FAI's interest and in the interests of the shareholders as a whole of Cumberland to endeavour to maintain the listing position by discounting 10,000 shares to the extent of 55 cents in August, was it not in FAI's interest and Cumberland's interest to attempt, in September, to place, for instance, off the market to an institution 38,000 ordinary Cumberland shares at a figure roughly commensurate with what you knew to be their real worth? A. There are two reasons. First of all, we had already proved the month before that there was no possibility to sell even 10,000. Not even 5,000, not even 1,000. We could not sell a single share at that price. So it seemed a pointless exercise to try and sell 38,000 when we could not sell 10,000.

Q. That is your explanation, is it? A. That is my answer.

Q. I thought you said that you had two reasons. I may be wrong, but it seems you have only given one. Do you want to add a second reason? A. I'm sorry, that is the one.

Q. It is one reason? A. Yes. One reason.

Q. You took the view, did you, that having regard to the fact that you had established in August that there were no buyers for Cumberland shares even at 70 cents, it was pointless to endeavour to place the shares with an institution in September? A. That is my answer to your question. I can't tell you what was my reason in August last year.

Q. You cannot? A. No, I can't. I can only give you my answer to your question now.

Q. Can I ask you this? With the anxiety that was in your mind, as you told us, to maintain the listing of Cumberland shares even after the letter

from the Stock Exchange arrived, didn't the idea of placing a parcel of Cumberland shares held by FAI occur to you at the time as a possible way of overcoming the problem created by the Stock Exchange's letter? A. No, it didn't, Mr. Hughes.

Q. It didn't? A. No.

Q. May his Honour take it that in your very wide commercial experience you have become very familiar with the techniques of placing shares with institutions? A. Yes.

Q. That is something that you have done many times, isn't it? A. Yes, I have done it many times.

Q. And you have done it many times prior to the month of September 1974, haven't you? A. I have.

Q. Would you agree that the idea of placing a parcel of shares with an institution so as to overcome the Stock Exchange's problem as revealed in their letter of 4th September would have been an obvious idea to occur to the mind of somebody of your experience at the time? A. No, I don't believe so.

Q. You don't? A. No, I don't.

Q. Would the possible explanation for it not occurring to you at the time as an idea be this, that you regarded the receipt of the Stock Exchange's letter as a most convenient catalyst for putting in train a take-over scheme? A. No. The reason why I did not consider an institution would be the suitable answer would be that, according to what I thought the problem of Cumberland was, it did not have a sufficient number of shareholders, and by placing a parcel of shares with one shareholder would not have changed that situation to any degree.

Q. But the problem that the Stock Exchange brought to your attention in the letter of 4th September was not a problem as to the number of shareholders; it was a problem, was it not, as to the concentration of nearly 80 per cent of the ordinary shares in FAI?
A. That is right.

Q. And the Stock Exchange revealed to you, did it not, in the clearest possible terms by their letter that they wanted that holding reduced to 75 per cent?
A. That was the suggestion that they made.

Q. Look, do you remember saying only a few minutes

ago in substance this, that the reason why, if you were looking at the matter now, you would reject the idea of seeking to make a placement was that it would not have been in FAI's interest to do so? A. That is right.

Q. The answer you gave a couple of questions ago is a rather different one, isn't it? A. There are many factors that are taken into account in any decision. I am answering your questions as you specifically ask them.

Q. The answer you gave three or four questions ago was that to place a parcel of shares so as to reduce FAI's holding to 75 per cent would not have overcome the listing problem, because it would not have created, as it were, a sufficient number of shareholders? A. Yes.

Q. To maintain the listing? A. That is correct.

Q. That is quite a different reason from the reason that it was not in FAI's interest to unload the parcel of shares? A. You were talking about 38,000 shares - and I am going on to answer your question - (Objected to)

Q. Perhaps I should let you give your answer, Mr. Adler. A. If there had been 38 different purchasers of 1,000 shares each it may well have been in FAI's interest to sell that five per cent interest. But it would not be the same interest to sell them to one institution or shareholder.

Q. That means if you had applied your mind to the problem of overcoming the Stock Exchange's objection, and drawing on your experience, you would have thought to yourself "Well, I can tell a good story about Cumberland, and maybe I can find off-market a number of people who would take parcels of shares in the order of 1,000 each as long term investors"? A. Such discussions did take place prior to the Stock Exchange letter, but not after it.

Q. When? When did those discussions take place?
A. Well, in the preceding three or four months. I can't give you an exact date. But such discussions did in fact take place.

Q. With whom did these discussions take place?
A. Probably with a couple of stockbrokers. Again I have no specific recollection of dates. I have discussed it with John Messara certainly.

Q. The only discussion so far you have told us about with Messara was the discussion you say you had with him when you had it in mind to place the selling order at 70 cents? A. You are talking about a different time. I spoke to John Messara about this, and he indicated that he could not place them.

Q. You cannot place when that was? A. No.

Q. You cannot tell us even what year? A. Last year.

Q. Last year? A. Yes.

Q. Before or after the end of June? A. I think it would have been before.

Q. Before? A. Yes. Sometime in the first half of the year.

Q. Well, would you agree with me that your anxiety, even after the receipt of the Stock Exchange letter, to preserve the listing of this company could be fairly described as a burning anxiety? A. I cannot comment on that.

Q. You were definitely anxious, were you, to preserve the listing? A. I believed it was in the company's interest.

Q. What? A. I believed it was in the company's interest to maintain the listing.

Q. By seeking ways and means of complying with the Stock Exchange's requirement? By seeking ways and means to have the required number of shareholders.

Q. And you did not do anything to achieve that objective, did you? A. I did not succeed in doing anything, no.

Q. You didn't do anything after 4th September to achieve that objective, did you? A. Not after 4th September, no.

Q. And you will agree, won't you, that you understood exactly what the Stock Exchange's letter said when you got it? A. There is no doubt about it.

Q. And it said this, and this only, didn't it: "Reduce your shares of FAI Holding to 75 per cent, otherwise Cumberland is at risk of de-listing"? A. That is right.

Q. And that requirement had nothing to do with the number of shareholders did it? It had only to do with the aggregation of a particular percentage in the hands of FAI? A. That requirement, yes.

Q. And you cannot tell us now what thought process, if any, went through your mind at the time of the receipt or shortly after the receipt of the Stock Exchange letter of 4th September as to the steps that might be attempted to comply with the Stock Exchange's requisition? A. No.

Q. I want to take you to some evidence that you * gave at page 717 of the transcript. You may not remember it. This is a question I asked you: "Q. Between July and November" (meaning July and November 1974) "there was no real market on the Stock Exchange was there, for Cumberland shares?" Do you remember, from reading the transcript since, that that question was asked? A. Yes, I do.

Q. And your answer was "Not really"? A. There were several questions concerning the market and real market.

Q. Let me put to you the question and answer: "Q. Between July and November there was no real market on the Stock Exchange, was there, for Cumberland shares? A. Not really". A. Yes.

Q. The next question was "That is so, isn't it? A. Yes." The next question was "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?" and the answer was "Probably not". Do you remember giving that answer? A. Yes.

Q. That answer was true? A. Yes.

Q. Was the fact that market prices for Cumberland shares were probably not any guide to an evaluation of the worth of the share offer in your mind during the course of the paper warfare? A. The question is whether I recall what was in my mind at that time? I really cannot say.

Q. You cannot say? A. No, I cannot.

Q. But you were familiar during the course of the paper warfare, and right up to the meeting on 4th March at which Mr. Donohoo was removed, of the various activities that you had undertaken in the market

(* Original Transcript Page 478)

in relation to Cumberland shares, weren't you? A. I was aware of my own activities, yes.

Q. And you were aware generally of the condition of the market in Cumberland shares from the end of June? A. Yes, I was.

Q. Right through to the date of the take-over offer? A. I was.

Q. At the time you were engaging - and I don't mean this offensively - in the paper warfare? A. Yes.

Q. So that you must have been aware then that the market prices of Cumberland shares were probably no guide to an evaluation of the worth of the share offer, mustn't you, during the period of the paper warfare? A. Again what was in my mind I cannot say now, 12 months later. I just can't.

Q. Would it have been untrue to suggest at any time during the course of the paper warfare that the market price of the Cumberland shares at any time between the end of June and the date of the take-over offer afforded a guide to the real worth of the offer? Would that have been untrue? A. I don't think the Stock market as such can be described as a real guide to the value of the stock at any time.

Q. Therefore it cannot be used as a guide to the value of a share-for-share offer? A. It can be used as a guide, but it does not give an indication of real worth. I think there is a difference between the market, marketability, and real value, and all of these things are to some extent different.

Q. It was always your belief, was it not, during the course of this paper warfare that the market prices of the Cumberland shares were no guide to an evaluation of the worth of the shares? I will withdraw that question. Will you not agree that during the course of the paper warfare it was always clearly in your mind that the market prices of the Cumberland shares during the period from the end of June to the date of the take-over offer were no guide to an evaluation of the worth of the take-over offer? A. I cannot say what was in my mind at that time, Mr. Hughes. I must come back to that. I don't know.

Q. But will you agree with me that if, during the period of the paper warfare, starting on 21st November and going right through to March, you had applied your mind to the question whether the market price of the

Cumberland ordinary shares was a guide to an evaluation of the worth of the take-over offer your conclusion would have been unhesitatingly that it was not? A. Yes, I agree with that.

Q. I want to ask you some questions about Exhibit 35, and I think the fairest way to do that would be to let you see the document (Exhibit 35 handed to witness). Can I just look at the Exhibit for the moment, to see if the pagination is the same? A. Yes.

Q. I am quite happy for you to read the whole letter to get the setting, if you like to do that. Take your time, and I will fasten on the paragraph that I would like to explore? A. Yes.

Q. Let me know when you have finished reading it, will you? A. I shall.

Q. Have you read it? A. Yes, Mr. Hughes.

Q. I did cross-examine you the other day about another paragraph, but I would like to draw your specific attention to the paragraph on page 2 which commences "Mr. Donohoo's complaint..." do you see that? A. Yes.

Q. "Mr. Donohoo's complaint that FAI's November offer...in November." A. Yes.

Q. Clearly implicit in what you were saying to the shareholders in that paragraph was the proposition that the market price of Cumberland shares was some guide to an evaluation of the worth of the take-over offer, will you not agree? A. No, I don't think so, Mr. Hughes.

Q. That paragraph reads "Mr. Donohoo's complaint.." My question to you is - and I don't want to rush you or hurry you - it is clearly implicit in that paragraph, is it not, that in your view the market price of the Cumberland shares in November was some guide to the evaluation of your take-over offer? A. I don't think I am saying anything like it.

Q. Let me take it step by step, first of all I am sorry to have to trouble you. But taking my last question, your answer is "No," is it? I will put it to you again. A. Yes.

Q. Is it not clearly implicit in that paragraph that you were putting forward the proposition that the market price of the Cumberland shares in November

was some guide to the evaluation of the worth of FAI's take-over offer? A. No. What I am saying -

Q. Is your answer "no"? A. "No."

Q. I will go on to the next question. Perhaps it may be fairer to you to offer you the opportunity of saying what perhaps I interrupted you from saying.
A. Thank you. What I am saying is that - what I am saying here is that there was a different day, a different age, and the market not only the stock market but the financial market - had totally collapsed by November 1975, and that was what I was specifically referring to.

Q. But you were referring to it in a particular context? A. Not in the stock market context. In the totality of the economic position of the country.

Q. But, Mr. Adler, you were dealing in this part of your letter, were you not, with the complaint very clearly made by Mr. Donohoo that the share exchange take-over offer was quite incommensurate with the price paid to your family interests and the superannuation fund in July of $1.25. That was his complaint, wasn't it? A. That is right.

Q. And that was the complaint that you were answering in this part of your letter, wasn't it? A. That is right.

Q. And the first part of your answer is expressed at the bottom of the page, isn't it - the paragraph which begins "The fact is..." A. Yes.

Q. When FAI was paying $1.25 in July FAI had instructed its brokers to offer to buy ordinary stock in Cumberland on the open market at the same price?
A. It did.

Q. You went on to say "It was open...shares."
A. It was.

Q. That is what you were saying, anyway. A. Yes.

Q. Then you went on to say "Mr. Donohoo's complaint that FAI's...in November". Those were your words? A. That is right.

Q. The values to which you were referring were the values of the Cumberland ordinary shares, weren't they? A. The values I was referring to was $1.25

that I was willing to buy shares for in July. That was my offer.

Q. You were saying FAI gave real value in July? Proper value? A. FAI bought the shares.

Q. At a proper price? A. At a price suitable to itself.

Q. That is what you were saying? A. Yes.

Q. You were saying to the shareholders that the price FAI paid in July was perfectly proper? A. Yes.

Q. "But you cannot regard that price as a perfectly proper price in November because in the meantime the market value of the Cumberland shares has dropped"? A. I was not referring to the Cumberland shares in that context.

Q. You were necessarily referring to the Cumberland shares in that context, weren't you? A. No, I was not.

Q. Let me just take your own words. Did you say that the market value of Cumberland had not fallen between July and November? A. I don't recall saying that at all.

Q. I am just wondering. It had dropped, hadn't it? A. My recollection - I think there was one sale in August, or thereabouts.

Q. When you referred to the market prices which were prevailing in July you were referring, inter alia, to market prices for Cumberland shares prevailing in July, weren't you? A. I think I specifically referred to $1.25.

Q. I have to take it bit by bit, because of some of the answers you have given. When you were referring in the paragraph at the top of page 2 to the market prices which were prevailing in July you were referring, amongst other things, to the market prices prevailing in July for Cumberland ordinary shares? A. Amongst other things, yes.

Q. Amongst other things? A. Yes.

Q. And you were saying, were you not, therefore, that the market prices for, amongst other things, Cumberland shares that prevailed in July were no longer of any relevance in considering values of,

amongst other things, Cumberland shares in November. That is what you were saying, wasn't it? A. That could be right, yes.

Q. It is right, isn't it? A. Yes.

Q. So you were saying by plain inference, weren't you, that the latest market price prior to November for Cumberland ordinary shares was of some relevance, because the market had dropped, in evaluating the worth of the take-over offer? A. I was only referring here - and this was dated in February, to the best of my recollection - I was referring to the fact that there is no connection between July and November.

Q. The market value in July and the market value in November? A. Any values.

Q. You were referring specifically to the market in this paragraph - the market price or market value? A. No, I stated that there was no relevance to market value.

Q. For the purpose of considering whether the take-over offer was a reasonable one. That is right, isn't it? That is what you were saying? A. I don't think so.

Q. You see, you were telling the shareholders in this circular that because of the collapse in the market including the market in Cumberland shares, what had been paid in July for those shares was of no relevance to their value in November, weren't you? A. Not only because of the collapse of the market but because of the total collapse of the shares.

Q. I will come to it in a minute and I will give you every opportunity to say what you want to say but what I am concentrating your attention on, and I hope it is not impossible, is this paragraph in this letter and I am putting it to you that what you were telling the shareholders there in this paragraph was this, that because of the collapse in the market the prices paid in July for Cumberland shares were of no relevance to the value, the actual value of those shares in November? A. No, I am sorry, Mr. Hughes, I can't agree with that.

Q. You can't agree? A. No.

Q. Do you fully understand my question? A. I hope so.

Q. That is all right. As long as you do. A. I hope so.

Q. You don't want any explanation or further elucidation of it? A. No.

Q. When you referred to the consideration of values in November, were you not referring to the consideration and the value, amongst other things, of Cumberland shares in November at the time of the take-over offer? A. Where is the consideration of value? That is not in this paragraph.

Q. "In considering values in November" - those words, in that paragraph? A. Yes.

Q. What you were referring to in the last line of the paragraph was the consideration of the value of Cumberland shares in November, weren't you?
A. Just a moment. No, I am generalising here, Mr. Hughes.

Q. Generalising with reference to a specific situation, weren't you? A. No.

Q. Do you say that you were not endeavouring to tell the shareholders in this circular that if they wanted to consider the value of a Cumberland share in November at the time of the take-over offer there was no point in them considering the market price of that share in July? A. That was part of it but it was not relating to Cumberland specifically.

Q. Oh, but it was referring to Cumberland amongst others? A. Undoubtedly.

Q. Was part of your proposition to the shareholders that if they wanted to consider the value of a Cumberland share for the purposes of the take-over offer in November they should disregard the earlier market price in July? That's right, isn't it?
A. Not that they should regard; that they no longer -

Q. Disregard? A. It had no longer any relevance.

Q. And that, therefore, you were saying to them, by clear implication, they should disregard the market price of the share in July? A. I don't think that follows.

Q. If the market price in July has no relevance, aren't you, in effect, inviting the shareholders

you are circularising to disregard that market price as a basis for assessing a value for the share in November? A. Well, when that circular went out, the whole matter was -

Q. I don't care whether it was ten years afterwards, you were still endeavouring to persuade the shareholders to a certain viewpoint, weren't you?
A. No I wasn't.

Q. Weren't you. You were answering a pretty forthright set of allegations from Mr. Donohoo, weren't you? A. Yes, but I was no longer interested in persuading them of anything.

Q. Oh, I see. You had no persuasive intent in writing that document, Exhibit 35. Is that what you say? A. All I wanted to do was to set the record straight, put my viewpoint on paper.

Q. Put your viewpoint? A. That's right.

Q. And in expressing your viewpoint you were saying to these shareholders weren't you, that it is quite irrelevant to the task of putting a value on the Cumberland shares as at the date of the takeover offer for the purpose of evaluating their worth, quite irrelevant in that task to take into account the market price of the Cumberland shares in July?
A. Yes.

Q. And you were saying to them the reason why is that there has been a collapse in the market. That is what you were saying, wasn't it? A. There was a collapse in the market.

Q. And that is what you were saying was the reason? A. That was one of the reasons.

Q. Well, it was the reason you expressed?
A. That's right.

Q. Well, how do you - I must give you the opportunity of addressing your mind to this question in fairness to you. How do you reconcile that piece of advice expressed in the, or piece of argument expressed in the first complete paragraph on page 2 of Exhibit 35 with your earlier evidence to which I
* referred you this morning on page 717 of the transcript that the market price of Cumberland shares between July and November was probably no guide to

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an evaluation of the worth of the take-over offer? How do you reconcile that piece of advice with your earlier sworn evidence, and I want to give you - A. But that wasn't a piece of advice. That was already after the event.

Q. All right, I won't call it advice; I will call it argument. How do you reconcile that piece of argument with your sworn evidence that the market price of Cumberland shares between July and November was probably no guide to an evaluation of the worth of the take-over offer? A. Well, Mr. Hughes, in July there was an open order to purchase shares at $1.25. Therefore, to this extent, it was irrelevant. Had anybody wanted to at this stage they may have accepted it. At November there was no such offer.

Q. But you know, don't you, from having - have you read the evidence given by Mr. Bunn? A. Oh, that is the fellow from one of the brokers.

Q. From Mullens? A. I was here when he gave that evidence.

Q. Oh, you were here? A. Yes.

Q. And you remember the evidence he gave about his inability, I think, in July to complete a selling order of Cumberland shares? A. Yes.

Q. That piece of evidence, if it is accepted, rather detracts from the explanation you have just given doesn't it? A. Not at all. I think if you look at the date, by that time the offer was withdrawn.

Q. Which offer? A. The offer to purchase Cumberland shares was open for a certain period.

Q. That is your order? A. My order.

Q. Of course, your order was for a limited number? A. Yes.

Q. You described it a moment ago as an open order. It was never an open order, was it? A. An open order is an order that is not completed.

Q. Did you put your order on to sell - did you put on your order to buy at $1.25, your market order through your brokers at the same time as you formed the intention of endeavouring to sell the shares in Cumberland held by your interests to FAI? A. Oh, no.

Q. What? A. No.

Q. Did you form that intention before or after?
A. Which intention is that?

Q. The intention to endeavour to sell your family shares to FAI at $1.25? A. No, the orders were placed well before that.

Q. Well before? A. Yes.

Q. The placing of the selling order at the end of June was your guide, wasn't it, the selling order at $1.50? A. Yes, it was.

Q. And that was intended by you as part of a lead up to placing a buying order at $1.25 a little later?
A. I don't think there was any connection between the two.

Q. What do you say - it never crossed your mind when you instructed your broker to sell Cumberland shares at $1.50 that you might a little later on put a buying order on the market at $1.25? A. They were at entirely different times.

Q. I know they are at entirely different times but I am asking you, you see, about another matter. Did you not have it in mind when you placed the selling order of 24th or 25th June at $1.50 that you might later come in as a buyer placing a buying order at $1.25? A. No.

Q. The two events, the selling order and the buying order, were quite unconnected, were they?
A. Yes.

Q. You will agree with this, won't you, or will you agree with this: it was only four days after you arranged the sale of your family shares in Cumberland to FAI that a selling broker could not find a buyer for 300 Cumberland shares? A. I don't know the date of the event but, obviously, at that time there was no order. I don't know the date.

Q. Well now, have you said everything you want to say and I do want to give you every opportunity to say anything else you want to. Have you said everything you want to say for the purpose of reconciling what you said in the first paragraph on page 2 of Exhibit 35 of your sworn evidence that in your view the market price of Cumberland shares between July and November was probably not a guide to the

evaluation of the worth of the take-over offer and, if there is anything else you want to say, I want to give you the opportunity? A. I can't recall anything at the moment.

* Q. Now, do you remember saying at page 717 - it is the last half of the page, your Honour. You can
* take it from me it is on page 717 that you drew a distinction in giving your evidence, part of your evidence under cross-examination, between the state of the money market in July and its state in November. A. Yes.

Q. The distinction you drew was expressed in this way, wasn't it, "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 market for investment purposes."

HIS HONOUR: That was corrected to "money".

MR. HUGHES: Q. Yes, "plenty of money for investment purposes. By November that had disappeared to a very large extent." Do you remember saying that? A. Yes.

Q. Well, look, Mr. Adler, will you not agree that the position was rather the reverse, that money was very tight in July but had been freed up by November? A. Not to my knowledge.

Q. Really. Would you have a look at these documents. Just have a look at them where I have flagged them. I suppose, in common with many businessmen, you read daily John Fairfax's publication, The Financial Review? A. Yes, I do.

Q. I will give you an opportunity of considering the flagged ones? A. 9th July "interest rates jump". In July "underwriters wary after Kemptron issues $2.4 m. shortfall"; "That upturn didn't last long." "Record fall in trading bank deposits" - July. November "Savings bank deposits rise"; "Money flows in" in November, 5th November. "Shares rising fast"; "Government lets it rip". I wish they did.

Q. Well, that was about the time when Mr. Whitlam and his then treasurer were making some desperate

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effort to prime the economy, weren't they? A. Yes, Mr. Hughes, I have seen them.

Q. Have you seen all the flagged ones? A. Yes, I get the message you convey.

Q. Look, I only want to give you an opportunity of correcting your recollection in the light of -
A. No, our situation, our company situation was that we had ample funds in July and the funds were rapidly drying up, notwithstanding what one reads in the paper. I say it can't always be believed at face value.

Q. You wouldn't be the only one to make that suggestion. In November, of course, FAI had plenty of money to lend out at very high rates of interest on bridging finance? A. We still had money, yes. We had less than in July and June but we still had money.

Q. You still had money. You still had liquid assets? A. Yes.

Q. You still had enough liquid assets to finance a cash offer of greater value than the share offer that you made if you had wanted to? A. Yes.

Q. You still had assets, liquid assets, which could have enabled you to finance a cash offer for the Cumberland ordinary shares commensurate with the price that your family interests obtained in July?
A. Had we wanted to do this.

Q. Had you wanted to, yes? A. Yes.

(Short adjournment.)

* MR. HUGHES: Q. (Approached) (Witness shown page 718 of transcript) Mr. Adler before the adjournment I was asking you about an answer you gave concerning the changes in the economic situation between July and November and your answer was "One of them. The credit squeeze may have 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,

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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."
A. Yes.

Q. Well, in substance, what you were referring to was the tightening up of the money situation between July and November? A. Yes.

Q. Will you not agree, on reflection, having regard to the material I showed you from the Financial Review that the money situation was better in November than it had been in July? A. No, that is not my opinion, Mr. Hughes.

Q. Not your opinion? A. No.

Q. Won't you agree that in November the Australian Government was taking steps to prime the economy and make more money available? A. Yes, I think so but it takes time before that hits the circuits, as it were.

Q. Won't you agree that the rate on commercial bills had dropped between July and November? A. No, I will not.

Q. I would just like to invite your attention to this particular article and the graph for the purpose of getting you to reconsider that answer?
A. I can't reconsider it, Mr. Hughes, because it bears on our own financial experience and that is actual fact as we are concerned.

Q. You said that the reason why you could not make a larger offer in November was that the supply of money generally in the community had dropped?

MR. BAINTON: He did not say "couldn't" Mr. Hughes.

MR. HUGHES: I am sorry, you are quite right.

Q. In substance, what you have said is you would not make a larger offer in November for the Cumberland minority ordinary shares because the supply of money generally in the community had dropped between July and November? A. Yes. In our experience this is trading bank liquidity which is different from liquidity in the commercial sense. Banks frequently have money and, for reasons best known to themselves, they do not let it out. Right now the banks are flush with money but if you tried to borrow a shilling you couldn't today, although the money rates

are very low.

* Q. Do you remember at page 805 - I can't expect
* you to remember it was page 805 but I want to refer
** you to a question at page 807, of the transcript.
** At page 807 you said that you had written articles, apart from your article in the house journal in which you had expressed the view that the private nursing home business was not profitable or expanding or thriving? A. That's correct.

Q. Have you been able to find any articles which you wrote? A. These were interviews, Mr. Hughes. I was wrong. I used the expression "articles"; they were in fact interviews.

Q. So, you never wrote any articles? A. I have written a number but I haven't produced any. They were interviews I was specifically referring to wrongly.

Q. And those interviews were back in 1971, weren't they? A. I indicated too they were some time ago, in my testimony.

Q. I think you suggested at one stage 1973, didn't you? A. Yes, I indicated I did not know.

Q. You didn't know? A. I indicated I had not read them for some years.

Q. Yes, I know. The fact is any interviews you gave on this subject were back in 1971, weren't they? A. Yes.

Q. When compared with its scale of activity in 1974 Cumberland was very small beer? A. Yes.

Q. I just want to show you if I may Exhibit 87. I want you to look at, if you would, and I appreciate you may need to - I don't want to rush you - I want you to have a look at that sheet of paper. There are two sheets, I will take you to the first sheet in the first instance. By reference to the 1974 accounts of Cumberland, Exhibit 4, and this document, Exhibit 87,

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would you agree that the first page of the document reflects fairly as a conclusion the percentage increase in trading profit for the three months period from 1st July, 1974, of Cumberland, including the minority interest? A. First of all, I would like to say that I am not an accountant.

Q. No, but you are pretty good with figures, aren't you? A. Well, I would like to think so. I see no percentage figure here, Mr. Hughes.

Q. Look, I don't want to hurry you. Just take it in and then I will ask you some questions?
A. Whether these figures balance and multiply, I wouldn't be able to state without adding machines and all that. I wouldn't attempt to.

Q. All right. Well, I will deal with the matter on a hypothetical basis and that will solve the problem of computation. Will you agree that if the percentage increase in trading profit for the three months July, August and September, 1974, of Cumberland, including the interest in that profit of the minority shareholders in Cumberland, that is the minority interest in Cumberland, was 28.7 per cent up compared with the trading profit of Cumberland for an average three months period during the year ended 30th June, 1974, that was a very significant piece of information? (Objected to; question withdrawn).

Q. You knew at the time when you resolved upon making the take-over offer for the Cumberland ordinary shares that there had been a significant improvement in Cumberland's trading profit during the three months commencing on 1st July, 1974, didn't you?
A. The results were improving and that was a continuation of a previous transaction. There was no unusual improvement in the results of the company. In the preceding 12 months a graph has been established which was going up.

Q. But the trading profits for the three months from 1st July were larger than the trading profits for the three months that had preceded 1st July, weren't they? A. There was a percentage increase, Mr. Hughes.

Q. That is all I am desiring? A. Yes, there was a percentage increase.

Q. A percentage increase? A. From the previous corresponding period compared to that.

HIS HONOUR: He is referring to the previous corresponding period.

MR. HUGHES: Q. The previous corresponding period would be 1st July 1974? A. Yes.

Q. But will you not agree that the profits to your knowledge at the time you made the take-over offer for the three months commencing 1st July had increased percentage-wise compared with the profits for the immediately preceding three months? A. I couldn't tell you that, Mr. Hughes. It could well be so but I wouldn't know off hand.

Q. Will you not agree that it behooved you as chairman of Cumberland to tell the Cumberland shareholders for the purpose of enabling them to consider the take-over offer of any percentage increase in profitability that had occurred during the new financial year? A. I think that would have been clearly my duty had there been an unusual pattern of trading that has developed but there hasn't.

Q. But it wasn't. The position after 1st July and up to the date of the take-over offer was one of continuing and enlarging improvement, wasn't it?
A. Continuing is the word I would be using, yes.

Q. The percentage profitability was going up?
A. Well a trend has been maintained. There has been no deviation to that trend that I know of.

Q. And it behoved you to draw that fact clearly to the attention of the Cumberland shareholders, didn't it, for the purpose of enabling them to give full consideration to the take-over offer? A. No, I don't think we had figures which were sufficiently representative to be able to make a statement that would not create any misleading situation, Mr.Hughes.

Q. But you had these figures in Exhibit 87, didn't you? A. Yes, we had them every month but they are neither audited nor complete. They are only the individual results of individual hospitals and if you look at the last column which shows an adjustment figure they frequently had to be adjusted for all sorts of matters. Those figures apart from actual income figures, include estimated expenditure and estimated costs of all natures. They are certainly not suitable for the purposes of a disclosure.

Q. It was the best available information you had, that information, set out in Exhibit 87, wasn't it?

A. And according to me, the best wasn't good enough for a release.

Q. You were satisfied, were you not, as to the substantial accuracy of the figures set out in Exhibit 87 relating to July, August and September?
A. I would go along with I was satisfied with their reasonable accuracy, yes.

Q. Will you not agree, therefore, that it was material information to tell the shareholders in Cumberland about? A. No, because there has been no change in trading pattern.

Q. You never told them, did you, that another two nursing homes were about to come on strength?
A. Well, if I may correct that, they were hospitals, not nursing homes.

Q. I am sorry. You never told them? A. Well, they were not on stream. They turned into a substantial losing proposition. It would have been quite misleading had I done so, in fact.

Q. You never told them there were another two institutions coming on stream, did you? A. If I may just stop for a minute here, Mr. Hughes, and think. I rather think we did make full disclosure to the stock exchange when we bought these two institutions but I am not sure of the facts. In fact, I think you showed me a letter last Thursday or Friday.

Q. Longer ago than that? A. Well, last sitting day, when we announced the purchase of these places to the Stock Exchange.

Q. But you never adverted in your circulars to the shareholders in connection with the take-over offer - A. No, we didn't.

Q. That these additional institutions were about to commence operation? A. No, we did not.

Q. Mr. Adler, if you were satisfied in your own mind as to the accuracy of the figures for July, August and September set out in Exhibit 87 don't you concede it would be relevant to tell the shareholders in Cumberland that the profitability was continuing to improve? A. No, I don't think so, Mr. Hughes. Had there been an unusual trend up or down I would have considered it relevant to disclose it but, as long as you maintain an existing trend, no, I did not consider it relevant.

Q. But you were doing better than maintaining an existing trend, weren't you? A. I don't think so.

Q. Well, if you had been doing better than simply to maintain a pre-existing trend, that fact would have been relevant to disclose, wouldn't it?
A. Even there there are other factors I would consider. I would consider, Mr. Hughes, if I may -

Q. No, no, I am going to be troublesome and ask you to answer the question. If, in fact, there had been an improvement in July, August and September on the pre-existing trend of profitability, that would have been a relevant matter for the shareholders in Cumberland to know about, wouldn't it? A. If the increase was of a nature which was maintainable then I would say yes. That is the qualification I must put to it.

Q. And your view was that the increase was maintainable, wasn't it? Your view at the time you made the take-over offer? A. Again, I can't say what I thought at the time. Therefore, I can't answer this question to you now.

Q. You are extremely hazy as to what you thought at the time of making the take-over offer about anything, aren't you? A. I don't believe so, Mr. Hughes. These were matters of a fairly routine nature as far as I was concerned. There were other people involved in it and I gave it the type of attention that I considered appropriate.

Q. (Witness shown Exhibit 86) I want to put to you that in fact you never caused that letter, Exhibit 86, to be written or sent? A. I did.

Q. To Mr. Millner? A. I did.

RE-EXAMINATION:

MR. BAINTON: Q. Did you have a conversation with Mr. Millner on the day that that letter is dated? A. I don't recall the date of the conversation but based on this letter, yes.

Q. You refer to a conversation with him of that day?
A. Yes.

* Q. You were asked, and this is on page 694 of the transcript, about the explanation you gave Professor Wilson when he asked you why it was that a selling order for 70 cents had been placed in August and you gave an explanation which concluded,

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at the bottom of the page. The question Mr. Hughes put to you was this, "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?" and you answered, "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." I think you do have some knowledge of Stock Exchange procedure, do you not? A. Yes, I have.

Q. If there is, for instance, on the board a buying order at 50 cents and somebody else places with a broker a buying order for, say, 48 cents does that get on to the board while the earlier offer is still current? A. No, the earlier offer would be wiped off. At all times the highest - I beg your pardon. At all times, the highest buying order remains on the board, the lowest selling order and the highest buying order.

Q. I think you may have misunderstood the question. If there is a buying order unfulfilled at 50 cents and someone wants to place one at 48 cents, a lower buying order, does that get on the board? A. No, it does not.

Q. While the other one remains there unfulfilled?
A. Always the highest buying order remains on the board.

Q. Now, what benefit did you see in having an unfulfilled buying order for Cumberland shares on the Stock Exchange board? A. I considered it would be a detrimental situation to have the company's shares being bid for below the par value of the stock, the par value being 50 cents.

Q. You did go on to tell us just after that part of the evidence that people sometimes put orders on in the hope of snapping up bargains? A. Yes, silly orders. They are known as silly orders.

Q. Have you known that to happen? A. Yes, I do.

Q. What would have been the effect as you would have seen it on Cumberland if somebody had come along with one of those orders and managed to snap up a parcel of Cumberland shares? A. Well, I don't believe he would have got it for a start but, if you did get it, it wouldn't have been in the interests of Cumberland.

Q. In what way? A. I think your market standing in one way is judged by the value of your shares on the market. The lower the value the more second rate your company is deemed to be.

Q. And does this have any effect on its ability to raise money? A. Oh, undoubtedly.

Q. Can we take it that this order that you placed, even though unfulfilled, would stop anybody putting on a lower order? A. Yes. It is called, you know, to put a floor under the stock so that they can't fall below that.

Q. Is this something you have done on other occasions than this one you are being asked about? A. Oh, many times.

Q. You were also asked a series of questions about the operative information relating to the accounts, I think more accurately the balance sheet of FAI and of Cumberland. I think you had said at one stage that both were in the take-over offer documents? A. Yes.

Q. Your attention was drawn to the fact that those documents did not contain a balance sheet for Cumberland or an extract? A. Yes.

Q. Do you recollect the date of the annual general meeting of Cumberland? A. I am afraid I don't.

Q. Well, perhaps, may we take it it was held on the day mentioned in the notice of meeting set out in the accounts? A. Most assuredly.

Q. Would you take it from me that that was 16th October? A. Right.

Q. Would you tell us how long before that date that those Cumberland accounts would have been sent out to the Cumberland shareholders? A. I think the prescribed date would be 21 days before the annual general meeting. We would have two days margin of error on it so it would have been sent out 23 days before that I would think.

Q. Something of that order? A. Yes.

Q. So, they would have had them towards the end of September? A. Yes.

Q. That is to say for a period of something like

seven weeks before they got the take-over offer documents? A. Seven weeks.

Q. Can you recollect what is the annual listing fee that Cumberland pays to the Sydney Stock Exchange? A. It could be $1,000. I am not sure.

Q. Well, do you pay the figure that is demanded? A. We pay what is demanded of us.

Q. I think you can take it that the fee for a company with the capital of Cumberland is $1,000 and, if I am correct in that, that is what you pay, I take it? A. Yes.

Q. Have you ever worked out yourself how much that is per share transfer over the last couple of years? A. No, I am sorry, I have never worked that one out.

Q. You were asked and again this morning some questions about the circular of February which became Exhibit 35? A. I haven't got it, no.

Q. (Witness shown Exhibit 35) Do you recollect that on an earlier day you were asked a quite considerable length about the expression "my colleague and I" or "my colleagues and I" and the paragraph beginning with the number "2" in brackets against it? A. Yes.

Q. The sentence reading, "In point of fact my colleagues and I have realised for a long time previously that in view of the small number of stockholders in the company," and so forth. Do you recollect the question you were asked about that? A. Yes, I do.

Q. Suggesting you were not in fact of that view? A. Yes.

Q. This expression in that letter "my colleagues and I" would you like to count up how many times it appears in the circular? A. Six.

MR. HUGHES: I only counted four.

WITNESS: And I was afraid that I missed one.

MR. BAINTON: Q. I must say I only counted four. Perhaps you might underline them. There is the expression "my family and I" or "FAI and I". A. I left them out or I thought I did.

Q. Well, I find one in the first paragraph in the sentence, "His letter to you of 29th January last is so misleading and malicious that my colleagues and I can't leave it unchallenged." This expression "My colleagues and I" there, who was that intended to refer to? A. I am still counting, Mr. Bainton, I am sorry. I will give up counting. Can I have the question again?

Q. Yes, the expression "my colleagues and I" in the middle of the first paragraph that you were not proposing to leave something unchallenged, you had been writing, you see, about the meeting of Cumberland Holdings and there was a reference to Mr. Donohoo and so forth and you say "my colleagues and I" are not going to leave something unchallenged. Who did you intend to embrace by that expression? Would it assist if you had the circular of 29th January to look at at the same time?

MR. HUGHES: Not to answer that one.

WITNESS: I would have thought all the people who were involved in selling some shares. I am not quite sure actually without going back to the previous document.

MR. BAINTON: Q. (Witness shown Exhibit 32) Perhaps if you could have Exhibit 32? A. Looking at it now, Mr. Bainton, I would think it referred to all the companies and people involved in selling shares on 11th July.

Q. The next time you use it is in the paragraph which you were cross-examined about, the third one that I noticed, which was in the paragraph beginning "I have already commented on the allegation of deliberate jeopardy. The second point is also untrue. My colleagues and I made what was considered to be an eminently fair and reasonable offer." A. That would be the FAI board.

Q. That would be the FAI board there? A. Yes.

Q. And the next one that I have noted was in the third last paragraph. "Mr. Donohoo expresses concern that if he is removed from the Cumberland Board minority shareholders will have no voice in the affairs. My colleagues and I feel that so long as Souls threaten" and so forth. Who were you referring to there? A. It would be the Cumberland directors of the Cumberland board.

Q. The Cumberland board? A. At least the Cumberland board except for Mr. Donohoo.

Q. In paragraph 2, the number "2", the one you were cross-examined about, there is a reference to "my colleagues and I" having expressed a view about the profitability of the continuation of the listing of Cumberland. Who was intended to be embraced in the expression "my colleagues and I" there? A. It might be the FAI board or the sellers of these shares. I would have thought the FAI directors.

Q. Do you recollect at the moment who were the individual persons that you intended to be referred to by the expression in that paragraph "my colleagues and I"? A. No.

Q. While you have that in front of you, you were asked this morning if you could reconcile what appears in the paragraph immediately above that Mr. Donohoo's complaint that FAI is no longer offering" and so forth? A. Yes.

* Q. You have said in evidence at page 717 which was to the effect that market prices were no guide to evaluation of the worth of shares and no guide to an evaluation of the worth of the shares offered - your answer "probably not"? A. Yes.

Q. Well, it would assist me, Mr. Adler, in re-examining if you could point out to me any inconsistency between the statement in the schedule and the piece of evidence that is apparent to you? A. I can't.

Q. You can't either? A. No.

Q. I take it then if you can't see any inconsistency you cannot explain it. Your Honour, those are the matters I wanted to re-examine about. I noted there are three quite brief matters what I should have asked in chief which I didn't if I could have leave to ask them now.

HIS HONOUR: Very well. I will reserve Mr. Hughes' rights.

MR. BAINTON: Q. Mr. Adler, one of them was this. I think the company Lader Pty. Limited which you have told us you do control has for a long time itself been a substantial shareholder, and I am not

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using that in a technical sense but the holder of a large number of shares in FAI? A. Yes, it has.

Q. What approximately was the percentage of the capital of FAI that Lader held in June last year? A. Oh, in the region of 50 per cent. I would think.

* Q. Mr. Donohoo at page 22 gave this evidence, and he was referring to the annual general meeting of Cumberland on 16th October last year. He was asked, "Do you remember any discussion in which Mr. Adler took part at that meeting?" He said, "Yes. At the meeting was a stockholder called Malcolm Campbell. He said " - and it is this I want to ask you about - "He said 'A market such as this, where there is one major stockholder, is susceptible to market rigging, and is not a genuine market'." Did you make a statement in those words or to that effect to anybody at that annual general meeting? A. I don't recall the conversation, Mr. Bainton, but I would never use words of this nature.

Q. Is there any reason that you can think of now even with the aid of hindsight why you would have wanted to tell the shareholders at the meeting that the market in the company's shares was not a genuine market and subject to market rigging? A. I would never make such a statement, Mr. Bainton. It is conceivable, and I don't recall it that I would discuss with the shareholders that the market was fairly thin and that is quite consistent with the informal and easy-going meetings we have. We do not stand on formality to any extent, but I would never use words like rigging.

Q. Did anybody ask you a question to suggest that there was market rigging in Cumberland shares? A. No.

Q. Mr. Donohoo also said, speaking on this occasion of the meeting of directors of Cumberland Holdings on
** 18th December, at page 47-48, and just to give you the context, Mr. Donohoo said that at the start of the meeting he entered a protest and wanted it noted in the minutes and so forth. He said that was noted and minuted. Then he was asked if you or Mr. Belfer made any comment. Then he said this, "Mr. Adler said that the company was only continuing its usual policy in

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regard to minutes, they were not circulated to directors prior to the meeting; they were not circulated to directors prior to the meeting." and then Mr. Donohoo was asked "Had that been the usual policy?" and he answered "It had been but it had been agreed at the earlier meeting that we would have a copy of the minutes circulated afterwards." Then it was put to him, "Would you go on, please?" and he said, "At this stage Mr. Belfer said 'Can we not restore the harmony that existed in this board prior to a few months ago?' Mr. Adler very quickly responded 'You are either for me or agin me. If you are agin me I will go my hardest.' Mr. Belfer said 'Would it be possible to reach a compromise? Can I see Mr. Millner?'" and Mr. Donohoo goes on, "I said 'Check by all means because I feel Mr. Millner would also like to reach a satisfactory compromise.'" Did you say to Mr. Donohoo or anybody else at that meeting, "You are either for me or agin me and if you are agin me I will go my hardest" or anything to that effect. A. Definitely not, Mr. Bainton. Again, it is not the type of words I would be using.

* Q. I think, just to complete that, at page 53-54 Mr. Donohoo, clearly here at a subsequent meeting, a meeting of 22nd January 1975, in the context said there was some discussion when Mr. Atkinson's nomination came up about reducing the board of directors to two so that no additional director would be necessary and then this appears in the middle of the page, "When you said, as you have just recounted, that in your view if anyone else was to be appointed to the board it should be an independent person from outside, did you make that statement in the light of any particular knowledge you had as to Mr. Atkinson's position?" Mr. Donohoo answered, "Yes, of course."

> "Q. What was that? A. Because he was a director of FAI Insurances Limited.
>
> Q. Go on. After the motion was carried against your dissenting vote, was Mr. Atkinson admitted to the meeting? A. He was.
>
> Q. Before he came into the meeting did you say something to Mr. Adler? A. Yes. I said to Mr. Adler 'Is this a furtherance of your policy enunciated at the December meeting where you said you are either for me or agin me?' Mr. Adler said, 'That is a lie.'

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

Was there such a discussion to that effect at the directors' meeting of 22nd January? A. Yes, I believe there was.

Q. Is the fact that when Mr. Donohoo then accused you of making the remark, you agreed with what he said, that you had not done so? A. Yes, I did.

FURTHER CROSS-EXAMINATION

MR. HUGHES: Q. You have denied specifically several conversations in the further examination in chief. Were you in court when those conversations were given in evidence by Mr. Donohoo? A. I was in court during Mr. Donohoo's evidence, yes.

Q. You heard those conversations being given in evidence by Mr. Donohoo did you? A. I was in court. I heard all the evidence he gave, yes.

Q. And you listened to it attentively, didn't you? A. I listened to it.

Q. Attentively? A. I listened to it, Mr. Hughes.

Q. You jib at the word "attentively"? A. No, I don't recall the conversation being referred to right now. I was in court but I have no recollection of it so I couldn't have been all that attentive.

Q. You didn't come along here to be inattentive to the evidence that was being given, did you? A. No, I did not, Mr. Hughes.

Q. So may we take it you were being attentive, may we? A. I am unable to add to what I previously stated.

(Witness retired)

MR. HUGHES: I indicated some time ago that I proposed to seek leave to call Mr. Millner. I have cross-examined Mr. Adler on the conversation. I now call Mr. Millner if that is convenient to my friend that I do.

JAMES SINCLAIR MILLNER
Sworn and examined:

MR. HUGHES: Q. Mr. Millner is your name James Sinclair Millner? A. Yes.

Q. Where do you live? A. Farnell Avenue, Carlingford.

Q. Are you chairman and managing director of the petitioner, Washington H. Soul Pattinson & Co. Limited? A. I am.

Q. The first matter about which I want to ask you concerns a copy of a letter which is Exhibit 86. Would you have a look please at Exhibit 86 and read it (shown to the witness) When you have read it I will ask you a question. Did you ever receive from Mr. Adler a letter in those terms? A. No.

Q. The next matter I want to ask you about is did you have a conversation with Mr. Adler either on or about 23rd January 1974, the date of this copy letter? A. According to my diary for 1973, I had a conversation with Mr. Adler on 14th December.

Q. 14th December? A. Yes, 1973; 3 p.m.

Q. I will come to that in a moment, that conversation. What I want to ask you is did you have a conversation on or about 23rd January 1974, that is the date of the Exhibit 86? A. No.

Q. With Mr. Adler? A. No, and I have checked my diary for that year and I was elsewhere on that day.

Q. Where were you? A. I have forgotten but I wasn't in town.

Q. You said you had a conversation with Mr. Adler on 14th December 1973. How did that conversation come to take place? A. Mr. Adler rang me some few days beforehand and he said, "I have a matter of mutual interest I would like to discuss with you. When can we get together?" So I said, "I will come up and see you" and we fixed a time at 3 p.m. on 14th December.

Q. Did you go to his office in Macquarie Street?
A. In Macquarie Street, yes.

Q. On that date, the 14th? A. I did.

Q. Did a conversation then take place between you and Mr. Adler? A. It did.

Q. Were you alone or was there anyone else present? A. No, only Mr. Adler and myself.

Q. Would you tell his Honour the conversation? A. Yes. Mr. Adler said, "FAI Insurances is doing extremely well. Have you read my Chairman's address?" I said "No". He said, "Here is a copy. Would you please have a quick look at it now". So I read through the Chairman's address. Mr. Adler said that FAI Insurances has a very good future, a much better future than Cumberland Holdings. He then went on and said, "I am contemplating making a take-over bid - for FAI to make a take-over bid for all the shares in Cumberland Holdings on the basis of one FAI share for two Cumberland shares, that is the ordinary shares, and one FAI share for one Cumberland Preference share". He said, "As you know I own or control 72% of the ordinary shares in Cumberland Holdings and Soul Pattinson owns 7% of the preference shares". We then discussed the market price of the two shares at the time. Cumberland Holdings were around about 65 cents and FAI were around about $1.70 and Mr. Adler pointed out it was quite a good offer for Cumberland and I said, "Yes, on market prices it is."

I went on to say that Soul Pattinson was not at all anxious to exchange its shares in Cumberland for FAI and I didn't think that my colleagues would be interested. Mr. Adler pressed the point and wanted to know why. "Well", I said, "Quite frankly we prefer to have our investment in Cumberland rather than FAI". Mr. Adler was somewhat taken aback at this. He continued to press the point and finally when we parted I said, "Mr. Adler, I think it is most unlikely, Larry" - it was "Jim" and "Larry" - "I think it is most unlikely that we will accept this offer. In the event of us agreeing to accept it, which is unlikely, I will get in touch with you". I consulted my co-directors.

Q. That was the end of that? A. That was the end of that conversation.

Q. And you had some talks with your co-directors? A. I had some talks with my co-directors and nobody was at all enthusiastic about accepting this offer so I didn't ring Mr. Adler but some weeks later he did ring me.

Q. When was that approximately? A. I would say

approximately three to four weeks later. Might be just after Christmas perhaps, after the Christmas break.

Q. What conversation took place? A. He wanted to know if we were going to agree to the offer and I said, "No". "As I told you, Larry I said I would ring you if we were agreeable but we are not keen on exchanging our Cumberland shares for FAI shares".

Q. And thereafter was there any conversation between you and Mr. Adler relating to the take-over offer for the preference shares held by Washington H. Soul Pattinson in Cumberland? A. After that phone conversation?

Q. Yes. A. No.

Q. Mr. Adler has sworn that there were - * page 680, your Honour - there were two discussions between you and himself on the topic mentioned in this letter which you say you never got, Exhibit 86? A. No, I didn't receive that letter.

Q. Did you have any conversation, either one or two, with Mr. Adler about the subject matter referred to in that letter, whether you received the letter or not? A. No, the only conversation touching on the subject matter in that letter was on the meeting of 14th December and this was both the take-over of both the ordinary shares and the preference shares and the subsequent telephone conversation some weeks later.

CROSS-EXAMINATION

MR. BAINTON: Q. Have you brought either of the diaries that you referred to in court here with you today? A. No, but I could easily get them.

Q. You would be able to do that, I take it, during the lunch hour? A. Yes.

Q. I take it then you, as it were, volunteer to do it rather than on subpoena? A. Most certainly, yes.

Q. Some of this may have occurred to you while you were sitting in court. Other of it may not. But there have been a lot of questions asked in this case of a number of people regarding a situation

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described as one, if I may quote, of exquisite difficulty. I would like to get your views on it. I think you are a director of a quite substantial number of companies, aren't you? A. Well, I am a director of - well, not a substantial number of companies but some companies.

Q. Confining yourself to public companies and their subsidiaries would you hazard a guess at the number? A. Well, I am a director of Soul Pattinson, Brickworks, Kathleen Investments, Queensland Mines, Choiseul Plantations, Stock and Holdings. I think that is the sum total.

Q. Let me take you back to the second half of last year. Would you add to the number then?
A. In the second half of last year?

Q. Yes. A. I think at that time I was also a director of Patrick Corporation.

Q. And quite a number of subsidiaries? A. Naturally I have only mentioned groups. I would have been a director of quite a number of subsidiaries.

Q. In the case of most of those you mentioned, they had subsidiaries and you were on the Board of at least a number of the subsidiaries? A. On some of the subsidiaries.

Q. I don't suggest all. A. Not all.

Q. And you were on the Board of more than one company which had dealings with other companies of which you were on the Board? A. On odd occasions.

Q. Is that a fair description of the situation "odd occasions", Mr. Millner?

HIS HONOUR: I think Mr. Millner said "on occasions".

WITNESS: On odd occasions.

MR. BAINTON: Q. Do you think that is a fair description of the situation? A. Could we have your question again?

Q. My question was that Boards of which you were a director had dealings, frequent dealings, with other companies of which you were also a director?
A. I don't quite understand what you mean by "dealings".

Q. Transactions of any description at all?
A. No, this would only happen on very odd occasions.

Q. Were any of those odd occasions involving quite important matters as against perhaps incidental trading relationship? A. I think the only important matter where two companies of which I was a director occurred, was the take-over of Patrick Corporation by Castlereagh Securities. I think that was the only one where two companies with which I have been a director has been involved except, or going back to 1969, when Soul Pattinson took over Deposit Investment. I was a director of both companies at that time.

Q. Were you a director of Brickworks in 1969 too? A. I think I joined the Board of Brickworks in late 1969, yes.

Q. You were certainly there at the time of the mutual share placement? A. No, I wasn't. I didn't join the Board of Brickworks until after the share placement, some time after.

Q. Just dealing with some of those situations for the moment -

HIS HONOUR: He has said there are only two.

MR. BAINTON: Q. Did you find yourself able as a director of those two companies in your own view to discharge your duties to each of them? A. Could we be a bit more specific?

HIS HONOUR: I think you had better take them one at a time.

MR. BAINTON: Q. We will take the Patrick Corporation and Castlereagh take-over for a start, or merger or whatever you want to call it? A. Yes.

Q. You were on the Board of both of the companies involved? A. Yes.

Q. And a number of subsidiaries of what used to be Patrick Corporation? A. Yes.

Q. And you sat at meetings of the directors of those companies which discussed the proposals?
A. Could I have that question again?

Q. You sat on the Board of both Castlereagh as it

then was, and I use that short name, and Patrick as it then was, when the take-over or merger proposals between those two companies were considered? A. I was on the Board but in common, together with the other common directors, none of us took any part in the discussions re the take-over or merger; and not only did we not take part in the discussions, we didn't even attend the meetings.

Q. Why was that? A. Because we thought it was the right and proper thing to do.

Q. Just identify the persons so I am not under any misunderstanding, their names so I know what people you are referring to? A. Pardon?

Q. Would you just tell me the names of the people you refer to? A. Yes, certainly. There was myself, Mr. John Roberts, Mr. Dowling and I think we were the only common directors.

Q. Now do I take your answer to be then that you absented yourself from meetings of both of the companies? A. Of both companies when the offer was being considered.

Q. Who did that leave on the board of Castlereagh? A. It left Sir Tristan Antico, Sir Peter Abels and Mr. Robertson.

Q. And on the Board of Patricks? A. On the Board of Patricks there was Mr. Minter, Mr. Johnson and Mr. Coarse.

Q. You reason, and I am just asking you about your personal reasons, for absenting yourself, was that you thought it was proper to do so? A. Yes.

Q. Would you mind telling me why? A. We all thought it was proper to do it, not only me but my other directors.

Q. I am just asking for the moment about your own views? A. My own views are that it was the right and proper thing to do and we also sought legal advice and the legal advice was that this would be the wise course to take.

Q. I can understand perhaps for one moment you being given legal advice as to its wisdom, but what I want you to tell me is why you thought it was proper to do so? A. Why I thought it was proper to

absent myself from the meetings of both Boards while the take-over was being considered?

Q. Yes. A. Because I was a common director and it is very difficult to wear two hats and to give an unbiased decision with all the goodwill in the world.

Q. Do I take it then the reason was you thought you would personally have difficulty giving an unbiased decision? A. No, but I didn't want to put myself in the position of having any difficulty or of being criticised by shareholders either or putting myself in that position.

Q. That is the third possibility. Could you tell me which of the three it was or all were in the pot, as it were, actuating you? A. Could we have that question again?

Q. You have told me three quite different reasons why you thought it proper not to be at the meeting. I would like to know if you can tell me which of those three it was that caused you to stay away or whether, if it be the case, it was some combination of them?
A. Well, I believe strongly that directors should as far as possible avoid any conflict of interest, and something which comes up and which they had to deliberate or vote which affects two different entities, if it is at all possible they should abstain from voting and if possible even attending the meeting.

Q. That is coming back to what you told me earlier. I now would like to find out the reason for that view. When I asked you that a moment ago you gave me one and then another? A. A number of reasons.

Q. Could I have them again? A. Yes, I have told you that I don't think directors should put themselves in that position. Secondly I think it is difficult for people in that position with all the goodwill in the world to be completely unbiased, and secondly, perhaps to use a cliche, I think not only should justice be done but it should appear to be done too.

Q. The phrase you used a moment ago was that you think it was desirable to avoid any criticism?
A. I agree with that too but I think people who put themselves in that position are inviting criticism.

Q. Is that something different from what you just

said or just another way of expressing it? A. I said that earlier.

Q. You used the phrase a moment ago that justice should be seen to be done. Did you mean by that really what you have told us before, that you thought it was a good idea to avoid any possibility of criticism from shareholders? A. That is a factor but it is not the main factor, but it is also a factor.

Q. Is that what you meant when you said that justice ought to be seen to be done or did you mean something different? A. No, primarily that.

Q. Are there any other matters that you can think of? A. At the moment, no. They would be the main ones.

Q. Would you agree with the proposition that if shareholders put somebody on the Board of the company, they are entitled to expect that person's consideration of the company's problems as they come up? A. Certainly.

Q. A take-over situation would certainly fall within the description of the phrase I used a moment ago, "A company's problems"? A. Yes.

Q. So that you would want sound reason, wouldn't you, as a director to absent yourself from the discussion of those matters? A. Yes.

Q. Would you regard the possibility of a shareholder criticising you as being of itself a sufficiently sound reason? A. No.

Q. Which of the other factors that you mentioned to me a moment ago - I think we have now got them to four - would you regard them as sufficiently sound reasons? A. As I told you earlier I think that directors should not put themselves into that position if it was humanly possible.

Q. Let us just state the fact again. I want to know the reasons. One you gave me was that you thought there was difficulty, with all the goodwill in the world, in being unbiased? A. Yes.

Q. Would you regard that in itself as being a sufficient reason to remain away? A. As a sufficiently good reason to absent yourself from the meetings?

Q. Yes. A. Yes.

Q. The next one that you gave me, if I can perhaps get your phrase correctly - I am not quite sure there really is another except that you have described it in different words; the difficulty of being unbiased and the problem of subjecting yourself to criticism would really sum up all your reasons? A. Well, I don't think that you should place yourself in that position, No. 1; and secondly, I think as I said earlier with all the good will in the world it is difficult to be unbiased in such a situation.

Q. But, you see, when you are on the Board you sometimes get into that situation? A. Very occasionally, yes.

Q. One way of coping with it, I suppose, is to resign from one or both Boards? A. Yes, that is a possibility.

Q. Another way of coping with it is the one you have suggested, staying away from both meetings? A. Yes, depending on circumstances.

Q. And I suppose you would agree some people may take the view for some reasons they are capable of giving an unbiased view to the matter? A. I think you have put rather a narrow interpretation on my answer, if I might be so bold.

Q. If I have done that, please correct me. In what way do you suggest? A. I said initially in my answer to your first question that the common directors absented themselves from the meetings which considered the merits of the take-over offer and the non-common directors considered the merits of the take-over offer and they made certain recommendations.

Q. That is what I took you to mean and the questions I was asking you intended to refer to the common directors not to others. Having clarified that, do you think I have unduly narrowed your answer? A. No, I think with that clarification the answer is clear.

Q. Apart from looking, as it were, to one's own skin in the situation, your reason for suggesting it is proper to stay away is that you take the view that it would be difficult, with all the goodwill in the world, to give an unbiased decision? A. It can be difficult, yes.

Q. So that we are clear on it, is there any other reason than those we have just discussed? A. None I can think of at the moment.

Q. Would you think it encumbent upon the director who did form the opinion that he should stay away, to consider nonetheless in his own mind whether the proposal being discussed was for the benefit of the company or the companies of which he was a director? A. Certainly.

Q. And if he came to the conclusion for some reason it is not, to voice those opinions to his co-directors? A. Most certainly.

Q. And you would not think, would you, that a common director would be in any difficulty, assuming honesty on his part of course, in taking either of those steps? A. Could we have that question again?

Q. I am asking you to assume in all these questions, please let me make it clear, an honest man. The question was: would you think such a director would have any difficulty, though he absented himself from the meeting intended to discuss a proposal between the two companies of which he was a director, in acquainting himself with the details of the proposal and expressing his dissent from it if he thought it was not in the best interests of one or other of the companies? A. I am not quite clear of that question. Could we perhaps have it again?

Q. We are looking at the common director who fears that he cannot give an unbiased view and stays away from the meeting of both companies? A. Yes.

Q. A common director who nonetheless acquaints himself with the proposal? A. Yes.

Q. We will stop there. You would not see any difficulty facing the common director in doing that while he remains on both Boards? A. With the qualification that he only stays away from the meeting which actually evaluates the offer. This does not prevent him from expressing an opinion, certainly.

Q. Would you not regard it as his duty while he remains on the Board to acquaint himself? A. Of course he has got to be fully acquainted at all times. That is quite obvious. He has got to be fully acquainted at all times.

Q. Why shouldn't he be fully acquainted. He is

a director of both companies? A. I said he should be fully acquainted.

Q. I am suggesting to you if he was properly discharging his duties he would make sure that he was fully acquainted? A. Yes.

Q. With all the details of the proposals? A. Yes.

Q. And with the views that the other directors of both companies had upon it? A. Yes.

Q. You would regard him as required in the proper discharge of his duty, may I take it, to express dissent from the view other directors of either company might take if in fact he disagreed? A. Most certainly.

Q. And you can see no difficulty in the way of a director taking that course, can you? A. No, I think he is bound to take that course.

Q. Let me assume a slightly different situation and ask you if you have encountered this. A wholly owned subsidiary often has, as its directors, persons who are also directors of the parent company?
A. Yes.

Q. Sometimes not any other people at all? A. Yes.

Q. A very common commercial situation? A. Yes.

Q. In that situation it is very common for the decision of the parent to be accepted by the Board of Directors of the subsidiary? A. Yes.

Q. Either because it is the same people who made it or because they know very well if they don't accept it they will be replaced? A. No, I couldn't entirely agree with that. I think you are trying to make something that is not there, quite frankly, because a wholly owned subsidiary, let's face it, the parent company owns it.

Q. That is what I put to you? A. There is no conflict.

Q. No conflict? A. No.

(Luncheon adjournment)

UPON RESUMPTION:

MR. HUGHES: Before my learned friend resumes his cross-examination may I, with your Honour's leave and with his consent, have permission to ask one more question in chief about a document?

HIS HONOUR: Yes.

FURTHER EXAMINATION IN CHIEF

MR. HUGHES: Q. Mr. Millner, when I was asking you some questions this morning you produced a document I think which you described as a copy of Mr. Adler's report as chairman of FAI? A. Yes.

Q. Do you have that document with you now?
A. I do.

Q. Is that a photostat, with some writing of your own on it, of the document Mr. Adler gave you on 14th December? A. It is.

Q. And your writing is on the top right hand corner of the first page? A. Yes.

Q. When did you put that writing there? A. When I met Mr. Adler on 14th December.

(Document tendered; tender objected to on the grounds of relevance. Mr. Hughes pressed the tender, not the contents of the document but the note on the right hand corner of the document, under s.14B of the Evidence Act. Document admitted and marked Exhibit 89)

CONTINUATION OF CROSS-EXAMINATION

MR. BAINTON: Q. Mr. Millner, you were going to seek for a couple of diaries, by the way? A. Yes. (Produced).

MR. BAINTON: As I understand it, Mr. Millner was producing it as on subpoena.

MR. HUGHES: Yes, that is right.

MR. BAINTON: So without your Honour's leave I do not think I should look at them but I do ask for leave.

HIS HONOUR: Q. Is there any objection to counsel looking at them? A. No, your Honour.

HIS HONOUR: I will make an order that counsel may have access. They probably might be restricted to counsel.

MR. BAINTON: If Mr. Millner would prefer that.

WITNESS: They are purely business diaries, Mr. Bainton.

MR. BAINTON: Q. Mr. Millner, this document which just became Exhibit 89 appears to be entirely a photocopy including the handwritten bit? A. I am sorry - ?

Q. I had thought you said - perhaps I should have looked - that this was a document on which you had written something? A. No, I said a photostat of a document on which I had written.

Q. What has become of the original? A. I think I destroyed the original. When I got back to my office I had the original document photostated and circulated to my other directors.

Q. That then is all that is now available?
A. Pardon?

Q. The photocopies are all that are now available, are they? A. Yes.

Q. Before lunch, Mr. Millner, we were discussing the situation with a director of a wholly owned subsidiary, let us assume he is one of a Board of three? A. Yes.

Q. All of them being directors of the parent as well? A. Yes.

Q. I think you said you could see no situation of conflict there? A. No, not a one hundred percent owned subsidiary and there are no outside shareholders.

Q. And you say that no doubt because you would regard the subsidiary or the directors of the subsidiary as subserviant to the wishes of the directors of the parent company? A. They still have obligations as directors but on matters of policy, yes.

Q. But obligations which they must fit into the knowledge that with policy matters, if they do not carry out what the parent wishes, they will be removed? A. On a wholly owned subsidiary, yes.

Q. Let me turn to a subsidiary that is say 95% owned. Three directors again, all of them members of the Board of the parent company? A. Yes.

Q. Would you see them as being in the position of what has been described here so often as "exquisite difficulty"? A. I think they should be very careful to look after the interests of the outside shareholders.

Q. That is so, you see. But let me test that again. Assuming a situation arises in which the parent company wishes one course to be taken and the 5% minority wish it not to be taken? A. Yes.

Q. Would you regard that as a situation of conflict? A. Provided the 5% minority were not oppressed in any way, a normal commercial decision.

Q. I had thought I had made it clear that this was a question of policy? A. On a matter of policy, yes.

Q. You would regard that as a situation of conflict? A. No, I think we ought to be careful here; if it is a matter of policy and it is not going to adversely affect the outside shareholders or oppress the outside shareholders.

Q. Let me perhaps be a little more specific here. A question of policy not involving any question of oppression but on which different views are reasonably open so that a commercial decision has got to be made? A. I am not quite clear of the position these three directors find themselves in. Are they directors of the parent Board?

Q. Yes. A. They are directors of the parent Board?

Q. They are the three and only directors of the subsidiary and they are also on the Board of the parent company? A. Yes, and there are five outside shareholders.

Q. And there is a situation where the parent company wants the subsidiary to take one course and the 5% minority want to take another, not perhaps greatly dissimilar to the Patrick and Castlereagh situation? A. How would the three directors know that the 5% want to take another course if they didn't have any representative on the Board.

Q. Let us assume perhaps they have read a lot of circulars making their views crystal clear? A. Yes.

Q. Would you regard this as a situation of conflict? A. I think this is a very hypothetical question because I don't see how the 5% of a subsidiary would be in a position to know what was going on in the Board room as they didn't have a representative there.

Q. Let me assume that the parent announced publicly what it wanted to happen? A. Yes.

Q. So that everybody knows? A. Yes, and the 5% outside shareholders objected?

Q. Yes, bitterly opposed to it? A. Bitterly opposed to it?

Q. Yes. A. I would think that the three directors concerned should take great care in any decision which they arrive at.

Q. Do you think they should follow the advice that you mentioned a moment ago and absent themselves, thus leaving the parent without a Board at all?
A. No, I did qualify that answer, that I said that it depends on the circumstances.

Q. That would certainly not be a proper course?
A. No, but I was at pains to point out in my answer that there were a number of directors and the directors who did absent themselves still left a quorum there to run the business of the company.

Q. I am not going to suggest any answer you gave is inconsistent with any answer you gave earlier. What I am asking you now is would you say in the situation I have just put to you that these three directors of a subsidiary or any of them should properly absent themselves because of the difficulty with all the goodwill in the world of being unbiased? A. In that particular case they obviously could not absent themselves.

Q. It is not an uncommon situation in Sydney to find partly owned subsidiaries with a Board consisting of people who are also members of the parent company? A. Yes.

Q. So that the potential difficulty that I have just drawn to your attention could occur in many companies and many groups in Sydney? A. Possibly.

Q. In the situation I put to you would you, doing your best now to tell us what you would do if you were in the situation, regard yourself as having, as you said, to be careful but really having to do what the parent wanted, and I have again, as you did, assumed it is not a case of oppression? A. You are asking me what I would do if I was one of those three directors in the company in that position?

Q. With the benefit of many years' wide commercial experience that you have had yourself? A. I would like to be crystal clear on this question. I am a director, one of three directors?

Q. Let me repeat it. You are a director of company No. 1, the parent company? A. Yes.

Q. Which owns 95% of the capital of the subsidiary? A. Yes.

Q. There are three directors of the subsidiary? A. Yes.

Q. The other two are also directors of the parent? A. Yes.

Q. A question arises as to whether or not a certain course should be taken, not involving oppression? A. Yes.

Q. The 5% minority shareholders are bitterly and vocally opposed to it? A. Yes.

Q. And you know it? A. Yes.

Q. And your co-directors know it. That is the situation I put. The question was would you not yourself in that situation as a director vote in favour of the course that the parent company wanted to be taken? A. Not necessarily.

Q. You would not? A. Not necessarily.

Q. Supposing - A. It would depend entirely on the circumstances of the decision and the benefit or otherwise as I saw it to the company, having particular regard to the interests of the minority shareholders.

Q. Let me suppose that you have been one of the directors of the parent that resolves a decision which the parent wished to be taken. You would not have done that, may I take it, unless you had regarded it

as in the interests of the parent company to take it. That would almost go without saying, wouldn't it? A. Mr. Bainton, I am in such a position in such a company.

Q. I do not wish to embarrass you. A. Am I allowed to elaborate on this to explain the position?

Q. Can you answer the question on a hypothetical basis or do you wish to give an example? A. Well, unless I was absolutely certain beyond any doubt that the course of action was the right course of action for the advantage of all shareholders, I wouldn't vote in favour of the wishes of the parent company.

Q. That was not what I asked you. Let me put it again. I am coming a little, because of your comment, to an introductory question. I am asking you now to assume that when this course was considered by the parent company you voted in favour of it because you believed it was for the benefit of the parent company? A. It would have to be in favour of all shareholders. One sits on a Board of Directors. You have got to consider each and every shareholder. You can't vote for one particular group of shareholders.

Q. You may not have followed my question. I am asking you about your decision as a director of the parent company. I have said nothing about shareholders? A. My decision as a director of the parent company would have regard to the interests of the outside directors of the subsidiary.

Q. Outside shareholders? A. Outside shareholders of the subsidiary.

Q. Supposing you thought their interests and the parent's company's interests were diametrically opposed, what would you do? A. I would find such a position very hard to visualise.

Q. Doing your best to assume it could happen, what would you do? A. I am hard put at the moment to see how it could happen.

Q. Let me ask you to assume in this case, which I have used purely as an example, that it was very much in the interests of FAI to acquire the outstanding shares in Cumberland as cheaply as it could and very much in the interests of the minority shareholders that that should not happen. Would you accept that as an hypothesis? A. Could we have that again?

Q. Yes. Let me assume that you have got a parent company owning a substantial proportion of the shares in the subsidiary? A. Yes.

Q. Let me assume they are really worth say $2, which I take it makes the maths easy, and that it would be very much in the interests of the parent getting the outstanding shares for $1. It would be, wouldn't it, if they are worth $2. Do you follow that? A. Yes.

Q. Do you have any difficulty? A. What is the question?

Q. My next part is would you also assume it is very much in the interests of the outstanding shareholders that they should keep their $2 shares and not have to part with them for $1? A. It would be in the interests of the outside shareholders.

Q. Not to have to part with their shareholdings for $1? A. I think their interests must be safeguarded by the directors of the company.

Q. The parent company? A. Yes, of both companies.

Q. So you would take the view, do you say, that as a director of the parent company you should not take a course that is for the benefit of the parent company, if it leaves no oppression, because it would be contrary to the interests of other shareholders of the subsidiary? A. Certainly, if you are going to take this action through the subsidiary company.

Q. Why do you take that view? A. Because directors - all shareholders are equal. They all have equal rights.

Q. Who are the other shareholders of the parent company that you have in mind when you give that answer, Mr. Millner? A. Are you talking about the Board of the parent company making a decision?

Q. Yes, we certainly are. A. If the Board of the parent company makes a decision and the Board of the subsidiary company is to carry that out -

Q. Mr. Millner, we have only got to the Board of the parent company so far. I am just trying to test what you have said, what your attitude would be as a member of that Board? A. If I was on the Board of a parent company and I was making a decision

concerning a subsidiary which had 5% outside shareholders, I would be very cognisant of the rights of that 5% outside shareholding.

Q. I appreciate you would but if you found yourself in the position where those rights conflicted with the interests of the company in which you are sitting as a director, would you not regard it as your duty to prefer the interests of the company of which you are a director? A. No, you must treat all shareholders equally. You can't single out any particular group of shareholders and give them an advantage against any other group of shareholders, no matter how small the minority group is.

Q. The shareholders and the only shareholders of the company of which we are now speaking are those general members of the public, whoever they may be, who happen to be holding those shares? A. Certainly.

Q. Let me assume that none of them are among the 5% minority in the subsidiary company, so the shareholders of your company are not any of the shareholders of the subsidiary company? A. Yes.

Q. Now again do you say that it is your duty as a director of that parent company? A. Yes, am I also a director of the subsidiary company?

Q. No, you are not at the moment. A. I am just a director of the parent company?

Q. You are just a director of the parent company and you are sitting at a Board meeting of the parent company? A. Yes.

Q. Which has got to make a decision about this? A. Yes.

Q. Do you not regard it as your duty to prefer the interests of that company to the interests of the outside shareholders of the other company? A. I would have regard and due regard to the fiduciary duties of the directors of the subsidiary company and I would not direct them or do anything to influence them to do anything to the detriment of the outside shareholders.

Q. Having had that due regard and the parent company being in a position to ensure that this transaction goes through, if it wishes it to go through, would you not regard it as your duty to cause it to go through for the benefit of your company even

though somebody else may have to suffer? A. It is a very hypothetical question, Mr. Bainton, I hope I am never faced with such a decision in actual practice but I think my answer would still be the same. I would still have due regard to the rights of those outside shareholders and if I was on the parent Board and the Board of the subsidiary I would have a very firm duty. If I were on the parent Board only, certainly it would be a narrower duty but I think it would be most improper for a director on the parent board to instruct another director who is a director of the subsidiary to do something to the detriment of a minority shareholding group.

Q. Can we deal with both bits of the assumption? Take for a start that you are a director of the parent company only, and that the transaction cannot proceed - although beneficial to the company - without being harmful to the minority shareholders in the subsidiary. Take that position. How do you see your duty in that situation? A. How do I see my duty?

Q. Yes. How do you see your duty in that situation? A. One would have to have a lot more information as to the benefits to the parent company and the oppression to the minority shareholders. But my answer would still basically be the same. I would not be a party under any circumstances to causing oppression to a minority group of shareholders. I would not be a party to that in any circumstances.

Q. I will come back to what you mean by oppression. Do you, sitting as a director of Washington H. Soul Pattinson & Company Limited, when determining whether or not to enter into a contract, regard yourself as obliged - let me withdraw that. You, as a board - as a member of the Board of Washington H. Soul Pattinson & Company Limited are called upon to consider whether you should take steps to enforce a contract with a third party, as it were. That must happen quite often? A. To enforce a contract with a third party?

Q. You have a subsisting contract, and the other party wants out, and you have to decide whether you will enforce it or not? A. Could we have some more details of the contract? I would want to know some more details in regard to the contract.

Q. That would be a fairly common situation, commercially? That would be a fairly common

situation, wouldn't it? A. Well, could you be more specific, perhaps?

Q. Let me just add one further factor. Assuming that you know that the contract is most unprofitable to the other party, and profitable to your company, would you hesitate to enforce it? A. Well, if I -

Q. Could you answer that, please? Would you hesitate to enforce it? A. I'm sorry, could you put that again.

Q. Assuming you know that the contract is most unprofitable to the other party and profitable to your company would you hesitate to enforce it?
A. If the other party - was it a valid and binding contract?

Q. The contract was a valid and binding contract?
A. Naturally I would be interested in the company on the Board of which I was a member, and I would insist on the rights of the company of which I was a Board member.

Q. And when you are considering entering into a commercial contract you do the best you can for your own company, even if you know it means that the other party might make a loss? That is so, isn't it?
A. I don't think that is a very sound business principle. If you do that, you only do it once or twice. You don't do it consistently. If I can elaborate further, with any contract unless there is goodwill on both sides there is not a great deal of joy usually in pushing it to the letter of the law. There is not usually a great deal of joy in doing that.

Q. For you? A. For either party. There is not a great deal of joy for either party.

Q. Taking a long range view? A. For either party.

Q. You take that attitude - and I do not suggest it is not a proper one - because it is in the interests of your own company so to take it? A. It would depend entirely on the circumstances.

Q. Is not that the reason for the view you expressed - that you think you are better off?
A. It depends entirely on the circumstances.

Q. Are there any circumstances in which you take

that view that you have just espoused for any different reasons? Are there any such circumstances?
A. Yes, there are plenty of circumstances. If Washington H. Soul Pattinson had a contract with someone to supply something and the other firm was in difficulties you might get a short term advantage by pushing your contract to the letter of the law. But you may not get a long term advantage. You might get a short term advantage by pushing the contract to the letter of the law. But you might get a long term advantage.

Q. You may get a long term advantage if you don't? A. It depends entirely on the circumstances.

Q. Are you not saying that you take whatever you consider to be the best course in the circumstances for your company? Isn't that what you are saying?
A. Yes. Taking a broad view - not a narrow view.

Q. Would you take any different view if you thought the results for shareholders of the other company may or may not be beneficial? Would you take any different view then? Would you consider that at all? Would you consider the other shareholders?
A. Could I have that again?

Q. I am just asking you, in the light of the example you gave me a moment ago, whether the effect of your actions for the benefit of your company on the shareholder of the other company was something that you would take into account at all? A. Two completely unrelated companies? Are you referring to two completely unrelated companies.

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

Q. You would not at all? A. No, I would not.

Q. Let me come back to the example that we were discussing. Why, sitting solely as a director of the parent company, when determining what commercial step that company should take, do you regard yourself as required to take into account the interests of the minority shareholder in the other opposed party to the deal? A. Well, the minority shareholders in the subsidiary company are certainly to some extent the responsibility of the parent company. I asked you the question earlier. Am I sitting purely as a director of the parent company, or the subsidiary as well? Am I a director of both companies, or a director only of the parent company?

Q. Purely the parent company. You are a director of the parent company. A. I would still have regard to the minority shareholders in the subsidiary.

Q. You say you would still have regard to the minority shareholders in the subsidiary? A. Yes.

Q. If it was not a subsidiary, but quite unrelated you would have no regard? A. Well, if it was not a subsidiary and it was quite unrelated - if it was an unrelated company, presumably they would have representatives representing the outside shareholders.

Q. Would you have regard to the interests of the shareholders of the other company if your company held five per cent of the capital? A. If the parent company held five per cent of the capital of the subsidiary?

Q. It is not a subsidiary. A. If the parent company held five per cent, it would not be the parent company.

Q. The company of which you are a director. If the company of which you are a director held five per cent of the capital of the subsidiary. A. If the company of which I was a member of the Board had an investment in another company - we have an investment representing five per cent of the shareholding of another company, what is the position in which I find myself? Is that the question?

Q. You have to determine whether your company is going to enter into an arrangement with the other company that is beneficial to your company and which may have some adverse effect on the shareholders of the other company. What I put to you is that you would not even consider their position? A. Well, if I am not a director of the other? I am not a director of the other company?

Q. You are not. You are not a director of the other company. A. No, I would not say I would not consider them, because that is a very short term view to gain a short term smart advantage. But you don't remain in business very long if you do that.

Q. You would take the course you thought best for the company of which you were a director, even if it involved some detrimental effect on shareholders of the other company? A. It would depend entirely on the circumstances.

Q. What circumstances would lead you to take a different view? A. Well, if it was an honest, bona fide commercial action -

Q. I am asking you to assume that it is. Assume that it is an honest, bona fide commercial action. A. Well, if it was an honest commercial bona fide situation I would certainly go along with it.

Q. You would go along with it? A. Yes.

Q. Well then, if the company of which you are a director holds 51 per cent of the shares in the company. A. It is now a subsidiary?

Q. If the company of which you are a director holds 51 per cent of the shares in the company would you take a different view? A. Yes, I would take a different view. To begin with, I control that company.

Q. Yes. A. I would have to be ultra careful to preserve the interests of these minority shareholders.

Q. Why do you say that? A. Why do I say that? I would have to be very careful to make sure that any decision I made was for the benefit of all shareholders, and not just the 51 per cent who I represent through the parent company. I would have to make sure that any decision made was for the benefit of all shareholders.

Q. So is this your view? If you - and I use that to mean the Board of directors of the company - hold 49 per cent of the shares in some other company you don't have that duty? A. No.

Q. If you had 51 per cent, you do? A. It would depend on the shareholding and the Board representation. Apart from anything else, if you are sitting on the board of any company you have to consider all shareholders equally. There is no way around it. You must consider the interests of all shareholders equally.

Q. You are not on anything else but the parent company yet. Why, sitting on the board of what I call the parent company - which expression is partly inaccurate - why do you take a different view of your duties as a director of the company because your investment is 49 per cent from the view you take when your investment is 51 per cent? A. I did not say I would take a different view. I did not say that.

It would depend on the circumstances. With 49 per cent I would imagine that the parent company would have the majority holding, and you would still have to have regard to the minority, whatever percentage it had.

Q. When you say you would have to be careful, do you mean careful in dealings, or careful in how it votes as a shareholder? Or don't you distinguish? A. It has to be careful that any actions taken are not detrimental to any group of shareholders, or advantage one group and disadvantage another.

Q. I want to know what you mean by any action taken. Do you mean action taken in the capacity as a shareholder, or do you mean action taken commercially which does not depend upon your being a shareholder, or do you not distinguish between those two? A. There again that is a very hypothetical question. Commercial actions. Can we have some details of those? It is a very hypothetical question which you are putting and I would like some further details.

Q. Do you need an example to be able to follow the proposition? A. It would depend entirely on the circumstances. Where I am in difficulty is that I just cannot -

Q. I don't want to see you in difficulty. If you are in any difficulty, tell me. A. Well, can I elaborate?

Q. Yes. Please do. A. You have a so-called parent company which owns 49 per cent of Company B. You are asking me to imagine some hypothetical situation where there is a commercial deal between two companies which is going to benefit A, but that is going to be to the detriment of the other 51 per cent shareholding in company B. I find this hard to visualise.

Q. I did not ask you that. I asked you to assume that the other shareholders did not want it to happen because they thought it might be to their detriment. In other words, there is a disagreement between two classes of people as to what will happen. That is the illustration. A. Disagreement between two classes of shareholders?

Q. Disagreement between two groups of people. Those who hold - A. 49 per cent?

Q. In the second case, 49 per cent, and those who

hold 51 per cent. A. If there is disagreement between the two the 51 per cent would rule the day if they so desired, and the so-called parent company would not be able to do anything about it anyway.

Q. In the example I am trying to put to you now it is the so-called parent that has 51 per cent, so that it can do something about it. How do you regard your duty as a director of that company in those circumstances? I put it to you on a hypothetical basis, and the hypothetical basis was that I asked you to distinguish - I asked you did you distinguish between a situation where the parent company - where what the parent company was going to do depended on it exercising some powers as a shareholder, and the situation which did not depend upon it exercising powers as a shareholder. What I asked you is, do you not distinguish between the two situations?
A. I find that very difficult -

Q. If you find it difficult in dealing with it on a hypothetical basis would you like an example?
A. Yes, I think an example would be much easier.

Q. Assuming that the parent company is going to make a take-over offer in respect of the outstanding 49 per cent of capital. Will you make that assumption? A. Yes.

Q. It can do that irrespective of the fact that it has not a single share in the subsidiary. You don't have to be a shareholder to make a take-over offer? A. No, you don't have to be a shareholder to make a take-over offer.

Q. So whether or not you make the offer is quite independent of whether or not you are going to exercise your voting powers. Do you follow? Do you follow what I am putting to you? A. I am not quite clear on this.

Q. You are sitting around the table of the parent company at a meeting of its directors - a meeting of its Board of directors. A. Yes.

Q. The question on the agenda is "Do we make a take-over offer for the outstanding 49 per cent?"
A. Yes. Of the subsidiary?

Q. Of the subsidiary? A. Yes.

Q. To make such an offer you do not in fact need

to hold any shares in the other company. That is so, isn't it? A. Yes.

Q. To make such an offer does not involve the parent company in exercising any of its shareholding powers in the subsidiary. You would agree with that so far? A. It depends on the composition of the directorship of the subsidiary. Presumably the parent company -

Q. All I have got to so far is that you are going to make a decision whether or not to make a take-over offer. That is as far as I have got. A. Yes.

Q. You can do that with - A. One must have all the facts of the situation before you arrive at the decision. You must have all the facts before you can do that.

Q. Let me put mine first. Let me put what I want to put to you first. Take-over offers happen repeatedly, despite vigorous opposition from the offeree company. A. Yes.

Q. I am asking you to put yourself in the position of a director of what I call the parent company. The decision is "Do we make a take-over offer, or do we not?" A. For the shares?

Q. For the 49 per cent. A. Of the subsidiary company?

Q. You can make that decision and, if it is in favour, make the offer, without using any of your powers as a shareholder of the subsidiary, can't you? A. I would want to have all the facts before me. I want to know all the facts. This is all very hypothetical.

Q. What would you like to know? A. The composition of the Board of the subsidiary.

Q. You can make any assumptions you like about that. I don't care what it is. A. Can we assume that the Board of the subsidiary company is controlled by the parent company?

Q. You can make any assumption you like. Make any assumption at all that you like. Tell me what assumption you would like most in order to answer the question. A. I am quite happy to answer on any assumption, provided I know the full problem before me.

If I know the full problem, I am prepared to answer on any assumption.

Q. Let us assume for the start that there are no directors of the subsidiary who are also directors of your company. Can we start off on that assumption? A. Yes.

Q. Can you answer the question on that assumption? A. Yes.

Q. What is the answer? A. I'm sorry, what is the question again?

Q. The question was, could you not, as a Board of the parent company, make your take-over offer without having to exercise any of the voting power you have got in the subsidiary? I suggest to you that that question can be answered Yes. A. Yes, I would agree with that. You have no directors on the Board of the subsidiary?

Q. Let me assume all the directors of the subsidiary are also directors of the parent. Will you make that assumption, please? A. Yes.

Q. The answer to that question on that hypothesis still must be the same, mustn't it? A. I think that this comes back to the question of hats.

Q. I am not for the moment interested in how many hats are involved - how many hats you want to wear. A. In a particular case I would have two hats.

Q. The one you have got on for the purpose of answering that question is that of a director of the parent. That is the hat that you are wearing at the time. You are at a meeting of the Board of directors of that company - not anywhere else at the moment - on this hypothesis. A. Yes.

Q. You are at a meeting of the Board of directors of the parent company? A. Yes.

Q. That Board has this matter to decide, and the Board is capable of deciding to make an offer, and of making it, without ever using any of its voting powers in the subsidiary quite obviously, isn't it? A. No, because on the question you put to me the directors of the parent company are also directors of the subsidiary.

Q. That is the question I put to you.

A. Obviously if you are sitting as a member of the Board of directors of the parent company and making a decision and you are then going to receive that take-over offer as a director of the subsidiary company you have a direct conflict of interest.

Q. You say you have a direct conflict of interest?
A. Yes.

Q. Does that stop you from making the proper decision for the parent company? A. Well, it is quite obviously -

Q. Please, Mr. Millner. Could I have that question answered? Does that stop you making a proper decision for the parent company? A. For the parent company, no.

Q. Well now, the decision can only be that such an offer should be made if you think it commercially desirable, and proceeded, without having to use any of the parent's voting power in the subsidiary.
A. No, I thoroughly disagree with you, because you then receive the offer as a director of the subsidiary company, and you have to advise the shareholders what you consider are their best interests.

Q. Let me assume - you know very well when you take one hat off and put another one on you are going to advise against it. A. If you want my candid opinion, I think that is straight out dishonesty, what you are putting to me now.

Q. Do you? A. Yes.

Q. You cannot see a position where it is to the advantage of the parent company to take a course that is disadvantageous to the minority shareholders except one of dishonesty? A. With common directors?

Q. Yes. A. Of course you cannot do it.

Q. You cannot? A. No, it is absolutely dishonest.

Q. Whose dishonesty is it? A. The directors concerned.

Q. All of them? A. Yes.

Q. Why? A. Why? Well, if they take a decision in the parent company to take over the shares which

the parent company does not own in the subsidiary company, and there are common directors -

Q. To offer to take them over? A. They could certainly offer to make a take-over, but when sitting on the subsidiary they have to consider that offer and evaluate that offer and give an honest, commercial judgment, and advice to the shareholders of that subsidiary, to the best interests of the shareholders of that subsidiary, and if they do anything else they are palpably dishonest.

Q. I want you to assume that when the proposal got to the Board of the subsidiary they were prepared to say quite clearly and plainly that it was not to the advantage of the minority shareholders to accept? A. Yes.

Q. You would regard them as being dishonest for saying that, would you? Surely not? A. They receive this offer as directors of the subsidiary?

Q. They take one hat off and put another one on? A. I want to be quite clear. I am a director of the parent company.

Q. Yes. You are a director of the parent company. A. I have agreed?

Q. You have agreed to make an offer. A. I have agreed to make an offer. The same Board meets again in the subsidiary company and says "Here is an offer from the parent company. What are we going to do about it. We think it is not to the best advantage of all the shareholders of the subsidiary company. We recommend its rejection. It is the only course of action."

Q. I didn't get the last bit. I did not get the comment that you ended your answer with. Would you mind repeating it? Would you mind repeating the end of your answer? A. This hypothetical situation is that the group of mine are directors of the parent company?

Q. Yes. A. That they have decided that it is in the best interests of that company - in the best interests of the parent company?

Q. To make a take-over offer? A. For 49 per cent minority shareholding in the subsidiary company?

Q. Yes. A. They make that offer as directors of the parent company?

Q. Yes. A. Some time later they meet as directors of the subsidiary company to evaluate the offer?

Q. Yes. And they think it is not the best offer available, and therefore not in the best interests of the outstanding shareholders to take it, and they say so. A. They would have to say so. It would be a most extraordinary Board of directors otherwise, wouldn't it?

Q. It may be. But you would not regard that as a situation involving dishonesty, would you? A. No, not if they rejected it.

Q. It is just conceivable, I suppose you would agree, that the outstanding shareholders might have different views as to the desirability of the offer from those espoused by the directors of the subsidiary company, and make their own decision. A. Outside shareholders of the subsidiary? I think we have got to be very careful what we are doing again.

Q. Let me put it to you again. The parent company is going to make an offer. A. I thought we had made the offer.

Q. It has made it. A. Yes.

Q. Sent out the Part A statement? A. Yes.

Q. The subsidiary company says "It is not good enough. We recommend its rejection"? A. Yes.

Q. The offer goes out to the shareholders so that they are being told that it may not be in their best interests to take it. A. Yes.

Q. They may have different views. A. They may think that they should accept?

Q. Yes. A. Could we pause there?

Q. Let me ask the questions. Would you see anything dishonest in that situation at all? A. I would think -

Q. Could I have that answered first of all? Would you see anything dishonest in that situation at all? A. This is my point, that -

Q. I would like the question answered. A. You cannot answer something in too narrow a context. You have to have all the facts before you. You must have the facts before you before you can answer it.

Q. I would like you to tell me whether, on these facts, there is anything dishonest in the situation? A. The directors of the subsidiary said they didn't think the offer was in the best interests of the minority shareholders?

Q. Yes. A. They advised the shareholders not to accept the offer?

Q. Yes. A. And the minority shareholders turn around and accept the offer? Have they acted dishonestly? Is that what you are asking?

Q. Do you regard there as being any dishonesty in the situation where people decide to take a course because they think it is to their advantage, and then turn around and advise the other party that it is not in his best interests, leaving him free to choose for himself? Surely you don't suggest that there is any dishonesty in that, do you? A. I would certainly call it sharp practice. I think we have to be very careful of the definition of "dishonesty". Legal dishonesty, or sharp practice.

Q. Whatever you call it, let me ask you another question. Do you say that it is dishonesty or sharp practice for the parent company, in that situation, to make a take-over offer which involves no compulsion if it knows, or thinks - whichever you like - that it may not be in the best interests of the minority shareholders to accept? A. Yes, it is palpably dishonest. Even though your hypothetical directors are sitting on the Board of the parent company and are also directors of the subsidiary company, every moment of their life they are directors of both companies, and they cannot put themselves in a position where they are going to disadvantage the shareholders of either, whether they like it or not.

Q. Let us start off with this assumption. We will start with the assumption that there is no common director. Can we start with that assumption? A. Yes.

Q. Is it your view that it is dishonest or sharp practice - I don't care what name you give it - is it your view that it is dishonest, or sharp practice, for the company to make a take-over offer

if it believes or thinks it is not in the best interests of those to whom it is addressed? A. We have to have more facts. Are you still using the same example of the 51 per cent owned subsidiary? Are you still using that same example?

Q. If you like, 49 per cent outstanding in its 51 per cent owned subsidiary? A. We have non-common directors?

Q. Non-common directors. A. Yes?

Q. And I am doing no more than asking you about making the offer. I am not asking any more than about the making of the offer. A. I want to be clear about what I am answering. We have a Board of directors of the parent company, none of whom are directors of the subsidiary company?

Q. Yes. A. And they decide to make a take-over offer for the shares which the parent company does not own in the subsidiary company?

Q. Yes. A. Knowing that the take-over offer is to the disadvantage of these minority shareholders?

Q. Yes. You are asking me are they acting dishonestly?

Q. Yes. A. In my opinion, yes.

Q. Do you mind explaining that? Do you mind explaining to me why? A. Because the parent company still owns that subsidiary, and legally - I am giving you a commercial judgment here - now, legally this may not be so. I could not comment on it. In commercial ethics I would say that they are acting dishonestly.

Q. You say that, do you? A. Yes.

Q. Whether or not they make complete and full disclosure of the pros and cons of the transaction?
A. Knowing it to be to the disadvantage of the -

Q. And leaving it to the minority person to draw his own conclusion, letting him prefer his judgment to theirs? A. Well, I would not condone such action myself.

Q. Would you regard it as dishonesty or sharp practice? A. I would.

Q. Why? What is the reason? A. The reason being that even although the directors of the parent company are not directors of the subsidiary company, the fact that the parent company owns the subsidiary company, they still have a moral obligation to its shareholders.

The other remark I would like to make is that people who do this sort of thing do not last very long in business.

Q. There may possibly be two views on that. There may be two views open on that question? A. Maybe. I am only talking from my own limited experience.

Q. Assuming you are right, what you are really saying is that this person ought to take a long range view of what is for his own benefit, rather than a short range view? A. What I am saying -

Q. Is not that what you are saying? A. I am not saying that. I think that one's good name, whether as an individual, or an organisation, is of paramount importance, even in this rather extra-ordinary world we live in today.

Q. You regard on a long range view the preserving of your good name as perhaps requiring you to by-pass an occasional profit that might be available? A. Yes.

Q. Because you think that you will be better off in the long run? A. Not only better off in the long run, but if you take the short term sharp practice view you will not be there for the long run anyway.

Q. I am quite content to have the proposition fortified that way. You are not in the situation, though, of the other person? You are thinking of yourself? A. I am sorry?

Q. In that situation you are being purely selfish, and thinking of yourself? A. No.

Q. You are not? A. No.

Q. You would by-pass a good business deal because you thought the other person might suffer in it? A. I say again that you have to qualify these things when you have responsibilities to people.

Q. You have been very general? A. I have tried to be specific.

Q. May I take it from what you have told us you think a majority shareholder in a company has some sort of moral duty to the minority? A. Certainly.

Q. To do, or refrain from doing what? A. From doing anything that would be to the disadvantage of that minority shareholder compared with the other shareholders. All shareholders must be treated equally at all times.

Q. Let me assume that you carry on a pharmaceutical business, and that one of the minority shareholders just happens to be a chemist. Quite distinct from the shareholder situation, he happens to be a chemist. Do you follow what I am putting? A. Yes.

Q. Given that situation, do you think that would oblige you, if you were going to deal with him, to put him in a situation of advantage because he is a chemist? A. I think that is an extreme case.

Q. Maybe it is. But could I have it answered?
A. Here again, could we be specific? Could you put the position a little more specifically. It is a hypothetical situation. Could you be specific.

Q. In the example I put to you, the fact that he happens to be a minority shareholder in one of the subsidiaries has got no relationship whatever to the proposed deal, has it? A. I'm sorry?

Q. You are Washington H. Soul Pattinson and carry on business as a pharmaceutical wholesaler?
A. Yes.

Q. Let me assume that someone who holds five hundred shares in Cumberland happens to be a pharmaceutical chemist? A. Yes.

Q. Who has made an investment in shares in the company, or acquired them by descent, or somehow or other? A. Yes.

Q. Do you suggest because he is a minority shareholder - let me assume this example: do you suggest because he is a minority shareholder in your subsidiary you would deal with him in any way different from an outsider? A. On ordinary commercial business that has nothing to do with the conduct of the subsidiary?

Q. Yes. A. It is a straight out commercial matter, nothing to do with -

Q. I used your phrase. I accept your phrase - "nothing to do with the conduct of the subsidiary." A. I find my mind boggling a little bit. Could we perhaps make it a little bit separate? Let us say a subsidiary of Soul Pattinson in which a private chemist has a small shareholding enters into some commercial deal.

Q. No. Soul Pattinson is proposing - the chemist rings Soul Pattinson up, and orders some pharmaceuticals. Is he going to be treated in any way different from another customer just because he happens to be a minority shareholder in one of the subsidiaries? A. No.

Q. Simply because that has got nothing to do with the conduct of the subsidiary? A. It has got nothing to do with the shareholders, either. It has got nothing to do with the shareholders.

Q. It happens to be dealing with a person who is a shareholder? A. Yes.

Q. You distinguish, do you, that situation from making an offer to a shareholder to buy his shares rather than making an offer to sell him a pot of pills, or something? A. Certainly.

Q. Why? A. It is commonsense.

Q. I am afraid that does not enlighten me very much. Are you able to do it? Could you enlighten me in regard to it? A. We have this minority chemist shareholder in a subsidiary. As directors of the subsidiary we should not do anything to disadvantage him as a shareholder of that subsidiary.

Q. The directors of the subsidiary have not come into this? A. I'm sorry, Mr. Bainton - unless I have the facts before me I cannot give the hypothetical answers.

Q. If you don't understand any of the questions, please let me know, will you? A. Yes.

Q. Let me assume that Washington H. Soul Pattinson has a subsidiary company? A. Yes.

Q. Which has a few outside shareholders, and one of them happens to be a chemist? A. Yes.

Q. That chemist wishes to purchase pharmaceuticals from Washington H. Soul Pattinson? A. Yes.

Q. You would deal with him in a way that would have no relation - deal with him in a way that would have no regard whatever to the fact that he happens to hold shares in the subsidiary? A. Exactly.

Q. Why do you say you would deal with him any differently if you were offering to buy shares in that subsidiary, you being Washington H. Soul Pattinson? A. Because as a director of the subsidiary -

Q. I have not asked you to assume that you are. "You" I am putting to be Washington H. Soul Pattinson, acting by its Board of Directors? A. Yes. I am a director of the parent company on the one hand, and I am not a director of the subsidiary.

Q. I don't care whether you are or not. A. I think it is important to know.

Q. You can make both assumptions, and tell me your answer in each one. A. I am a director of the parent company and a director of the subsidiary. The difference between the company supplying this chemist with goods on an ordinary commercial basis and offering to take over his shares - on one case I am dealing with him as a representative - as a shareholder - and I have a moral and fiduciary duty to represent him as a shareholder to the best of my ability. On an ordinary commercial basis we are just selling him goods.

Q. Where do you get that from the example? A. Any director is obliged to do his best for all shareholders.

Q. This is because you are on the board of the subsidiary? A. Yes. I am on the board of the subsidiary now. You asked me to put it both ways. I am on the board of both.

Q. Although the subsidiary is not going to make any offer to him, you still take the same view? A. Yes, I still take the same view.

Q. Making the other assumption that you are not on the board of the subsidiary. A. I could not put any of my colleagues or any of the directors of the board of the subsidiary in a position where they would have to disadvantage any one shareholder to the advantage of others.

Q. So that the minority shareholder in the subsidiary company to that extent is much better off because the majority shareholder has to be a nursemaid to the minority shareholder in that situation? A. No, he has to be fair to all shareholders equally.

Q. Have you ever considered whether you have failed to take into account the duty that you may have as to how you should exercise your voting rights because you are a shareholder, and what you may do independently of the fact that you are a shareholder? Have you ever considered that? A. I am not clear on the question.

Q. Perhaps that is an answer. Let me see if I can make it clearer. Do you not distinguish between the situation where some person makes use of his shareholding power - his votes - to disadvantage someone else, and the situation where a person makes use of some other commercial or other power that he may have to disadvantage a third person. Do you see no difference? A. I would like a more specific question than that, Mr. Bainton. It is a very wide question. I don't know the context. I don't believe, as a matter of principle, he should disadvantage anyone if he can avoid it.

Q. It sometimes becomes a choice of advantaging yourself at the expense of someone else, or disadvantaging yourself? A. There again, I think one has to be more specific if one was going to comment on that sort of thing.

Q. Isn't Washington H. Soul Pattinson in business to make money? A. Certainly.

Q. I suppose that involves you making the best contractual arrangements you can in the long-term interests of the company. You would not suggest otherwise, would you? A. No.

Q. Sometimes that may involve purchases of shares? A. Purchasing shares as an investment.

Q. Yes, as an investment on the Stock Exchange? A. Yes.

Q. I suppose you would buy for the best price available? A. Yes.

Q. Particularly if you think you are getting a bargain? A. Yes, naturally.

Q. If you are getting a bargain somebody is being disadvantaged? A. If we were getting a bargain, yes, they may have sold at too low a price.

Q. Do you object to that principle? A. No. This is an open market price.

Q. Do you regard the situation different if you are making an offer to the public by way of a take-over offer to persons who already hold shares in a company in which you have 50% or more? A. There, as I have said repeatedly, I think you are getting on difficult ground because if you own 50% or more of the shares you have a controlling interest in that company.

Q. I still repeat the question. Do you regard it as your duty to your own companies being different to that situation? A. Do I regard this as a very different situation from going and buying shares on the Stock Exchange? Yes, I do.

Q. Tell me why? A. Because we own 50% of this company and we are offering to buy more shares from a minority of the shareholding and we have obligations to those minority shareholders.

Q. The obligation being, do you say, not to make an offer? A. Can we be more specific. If we own 50% of that company, to all intents and purposes we control that company. We control the board of directors.

Q. Let us take 60%. Do you say that in those circumstances the parent company owes some duty to the minority shareholders not to make them an offer? A. No.

Q. That would be an absurd proposition? A. That would be an absurd proposition.

Q. What duty do you say you have? A. The directors of that subsidiary company?

Q. No. The parent company? A. There again -

Q. I am only asking you about the parent company? A. The parent company certainly has a duty to see that all the shareholders of that subsidiary get fair and equal treatment.

Q. Do you say that involves not making an offer? You couldn't, could you? A. I did not say that.

It depends entirely on the circumstances. We have to have the circumstances of the offer.

Q. You would not for one moment suggest that the parent company should make itself an offer for its own shares? A. How could it?

Q. So the only offer it could make is to the minority shareholders? A. Yes.

Q. Tell me what you say its duty is in your belief? A. I am a director of that company which wishes to make an offer to the minority shareholders of the subsidiary of which we own 60%?

Q. Which is contemplating whether it should or should not make an offer? A. The parent company is contemplating whether it should or should not make an offer? Well, if the parent company makes an offer I think under those circumstances it should be a fair and reasonable offer and the directors of the subsidiary company should immediately call in a merchant banker or firm of outside accountants and completely independently evaluate the merits of that offer.

Q. Could we take it in stages. We are dealing at the moment only with the parent company. Can I make that clear? A. Yes.

Q. You do not suggest, I take it now, that it has got any duty to refrain from making any sort of offer? A. No. But I think it wants to be very careful what it does, that it is fair to everybody. With this qualification, yes, certainly it is empowered to make an offer.

Q. The person most concerned of course with that offer is the minority shareholder? A. Yes.

Q. With whom your decision to take or reject lies? A. Yes.

Q. The balance of your answer relates to what you think the directors of the subsidiary should do? A. Well, this comes back to what I said earlier, that the directors -

Q. The balance of the answer you gave a moment ago relates only to what you consider the subsidiary should do? A. And the directors of the parent too because both control the subsidiary. They certainly have a degree of control over the directors of the

subsidiary company. There is no getting round that - they do.

Q. So they should take one hat off and put that hat on and take those steps? A. This taking on and off of hats is not a very good idea. They usually end up without a hat at all.

Q. You can assume it is not my phrase but a phrase that has been used quite extensively in this case? A. Yes.

Q. Is it not correct that the balance of the answer you gave me relates only to what you think the subsidiary company should do? A. I still say that the directors of the parent company have certain obligations, and I have said that repeatedly all along in all these hypothetical cases.

Q. Would you as a director of the subsidiary company be a party to that company taking a course which required the parent company, or was designed to persuade the parent company to do something which you as a director of the parent had already determined you would not do? A. I am a director of both companies now, am I?

Q. Yes, you are back in the two-hat situation? A. Right.

Q. You have decided as a director of the parent company that you are going to take a course? A. Yes.

Q. A firm decision that may cause you to think it is your duty - can you see the point in a director of the subsidiary being persuaded not to do that? A. Can I see myself -? Could we have the second part of that question?

Q. Having made a decision as a director of the parent company to take a course for the benefit of the parent company, could you see any reason not to take that course as a director of the parent? A. Again you have put yourself in an impossible situation. I hope I would never find myself in that position. I would be silly to get myself in that position.

Q. If you did have yourself there would you say it would be rather futile to attempt to persuade yourself to make your own decision? A. Yes. I think the only course in that situation would be to resign from one or the other.

Q. I think you have been on the Board of a number of companies that made take-overs? A. No. I have only been on the Board of two companies that involved - or I have been on common boards, one was Deposit and Investment back in 1969 and the other one was Patrick Corporation. You might call it a take-over; but perhaps the word merger might be a better description.

Q. Have you been on the Board of companies that have been on the receiving end of take-overs? A. Yes. As a matter of fact, one company I forgot to mention I was also a director of, Australian Oil & Gas, I am also a director of that company and some years ago it received a take-over offer from Ampol Exploration.

Q. Apart from the scrutinies you have given those offers to be made and offers received you take a fairly general interest in what is going on in the city of Sydney commercial world? A. I endeavour to.

Q. The ordinary take-over battles that go on that you don't follow to some degree? A. Yes.

Q. Would you be familiar with the techniques? A. Yes.

Q. Offensive and defensive? A. Yes.

Q. I would like to get your advice on the situation as to how I would go about, if I owned 50% of the shares of a company, getting in the other 49% as cheaply as I could. Do you follow me? A. Yes.

Q. I am not asking you to agree you will do it. I want the benefit of your views as to how you go about it. For a start, controlling the dividends policy of this company as you would on that illustration would you think it best to declare good dividends or do you think it would be best to declare small dividends to build up the funds? I am assuming this is a listed company which happens to be a subsidiary? A. I want to acquire the other 49% shareholding.

Q. As cheaply as you possibly can? A. Are you suggesting that I should juggle the dividend policy of the company to help me achieve this?

Q. What I want you to assume is a situation that the holder of the 51% is going to take any step that he thinks, apart from doing something illegal, that

would be likely to get him the shares most cheaply, a deliberate course of conduct carefully planned and implemented over a period of time. Do you follow?
A. What am I supposed to answer?

Q. Do you follow the situation? A. Yes.

Q. The first thing I want to know is whether in that situation you would increase the dividend payout or keep it down as low as you possibly could?
A. I think you would pay what you considered the best dividend for all the shareholders and the long-term success of that subsidiary irrespective of your own sectional interest. I am quite firm on that.

Q. You appreciate I am asking you to assume you are embarking on a campaign to get in these shares as cheaply as you can and I am asking you the steps you would take in furtherance of that campaign. Do you follow that? A. I have decided to cast my scruples aside and acquire these shares as cheaply as I can.

Q. You have. Yes, make that assumption? A. I have no scruples; I own 51% and I want to get the other 49% as cheaply as I possibly can. How do I go about it?

Q. What sort of dividend policy would you see? Would you keep on increasing the dividend or keep it as low as possible? A. I think I own 51% of the shares. I think firstly I would declare a fairly hefty dividend and remit it to Brazil and before I proceeded any further I would make sure I had my escape route well and truly organised.

Q. Would you do that by way of a dividend or a sort of borrowing? A. I have no scruples whatsoever so that I presume that probably the company would pay my fare to Brazil.

Q. I ask you to assume you were not going to do anything illegal but you were going to do anything you could to get those shares as cheaply as you could?
A. I think you are still getting pretty close to being illegal. Obviously, if you are going to try and get those shares at the lowest possible price and not a fair price you are going to disadvantage the minority shareholders, and in my opinion that is definitely dishonest.

Q. Could we take an example and presume that is what you are setting out to do? A. Yes, but we are not doing anything illegal. I say we are doing

something illegal if we are setting out to do that.

Q. I am asking you to assume you are not going to take any step that involves the commission of an offence against the Companies Act or any other offence against any law? A. Well, if I am going to be commercially honest I can only acquire those minority shares at a fair and reasonable price.

Q. Let me assume that you are not going to be commercially honest? A. Yes.

Q. We are setting out in this campaign, and coming back to the question, what sort of dividend policy would you pursue in furtherance of that plan? Would you year by year increase the dividend or would you keep them down as low as possible? A. This is a listed share?

Q. Yes. A. If I increase the dividend I increase the yield which tends to put the price up. If I pay a very small dividend and plough the inappropriate profits back into the company I am going to increase the asset backing which is also going to put the price up. I would say an increase in asset backing would perhaps tend over the long period to give it a higher share value than a higher dividend yield.

Q. Would you agree those investing in shares on the Stock Exchange tend to do so by virtue of the income they can expect to receive? A. Yes, there are people who do, but some people also - I think there are both. There are also a number of people who look at the asset backing and dividend cover because if you buy shares in a company which is covering its dividends a number of times and does this for a number of years obviously that company is building up great internal strength and some day it must do something more beneficial to the shareholders or have a bonus issue.

Q. So if you are looking for a very long-range campaign it might be better to build the assets up, but if you have a short term campaign you keep the yield down? A. I think it is open. I do not think this is quite clear cut. If it is a highly profitable company and you are ploughing money back you are increasing your dividends and your earning power.

Q. So if I was consulting you on this question you would not feel able to give me advice as to which would be the better course to take? A. I think one would have to weigh that up very carefully.

Q. Supposing the opportunity came along to acquire another business asset you thought was going to add considerably to the profitability of your business. Would you let the subsidiary acquire it and build it up or would you acquire it somewhere else in your own organisation? A. I am still in the same position that I have no commercial honesty and I want to squeeze these outside shareholders out? With no commercial honesty or scruples I would buy it elsewhere than from the parent company.

Q. If you were in a position to control the management of that company in the sense that the manager was somebody who regarded himself as working for you, would you leave him there and encourage him to do his best to build this business up or would you take him away for a while and let it suffer a bit of a downturn? A. What would be the good of that. I would be suffering along with the other 49. The interests of the shareholders are the same.

Q. You are a man who takes the long-range view, not a short-range view on your commercial activities? A. What you are suggesting now is that I should deliberately depress the profits in that company and keep the share prices down?

Q. I am suggesting that would be a very good way to bring those share values down. Would you agree with that? A. It would certainly - yes, it would.

Q. Would you put out glowing reports and circulate them among your minority shareholders or would you be somewhat pessimistic? A. Can we have that again?

Q. Would you, as part of this plan that I am asking you to assume, circulate glowing reports about the business's future to your minority shareholders or would you rather tend to dampen down? Which would you do? A. I think I have already gone so far down the road I would be looking for the first available flight to Brazil. I have already gone a long way towards coming to a sticky end.

Q. Let us examine how you progress along this sticky road to the sticky end. You are a long way down the Primrose Path; what are you going to do about the reports? A. There again, you have other directors concerned. I gather we are all crooks.

Q. Yes, we have all got the same coats on and some distance down this path? A. What about the

auditors? I think I would be having a bit of trouble with them at this stage. Probably the last couple of book reports have been qualified, heavily qualified.

Q. That would not be a bad way of making this enterprise look not the best? A. Don't forget the auditors are there representing the shareholders, or are supposed to be.

Q. I am talking about circulars going out to the shareholders? A. Yes.

Q. Would you, in furtherance of this plan, tell them how good the business was progressing and how rosy its future looked or would you say that things looked pretty bad? A. We are assuming business is good, are we?

Q. We are assuming it is not too bad? A. Not too bad.

Q. And you have a choice of painting it, putting the emphasis one way or the other without actually describing it. Which way would you put the emphasis? A. I think I would be beating against the wind because it is facts and figures that count. If you put in a report to shareholders that is what counts; it is not the rosy words or otherwise of the directors.

Q. This sort of thing that goes out is usually a forecast as to the future, not a description of what has happened in the past. What I am asking you is, would you be rosy in your prognostications or tend to create the impression that the future was rather uncertain? A. I think it would depend to some extent on how long I was to stay in the country.

Q. I am asking you which of those courses would best further this plan? A. Of knocking the share prices?

Q. Yes. A. I would obviously tend to say that the future looked far from bright. That is quite obvious.

Q. There is a tendency in a lot of people to regard a qualification by an auditor as giving rise to some sort of suspicion that things are not perhaps as they ought to be? A. Qualifications of accountants?

Q. Yes. A. There are two types of qualifications of account.

Q. Would you not agree that there was a tendency among those perhaps less knowledgeable of accounting in the community to regard qualifications as some sort of black mark? A. I would agree with you, but this is the unsophisticated.

Q. But might it not be a good idea, in furtherance of this plan, to so conduct the business or make up the accounts with a few qualifications? A. I think if business was good and you sent a circular saying it was going to be very bad and you had no reason for it, I think that the auditors would be down to see the Corporate Affairs.

Q. We are on accounts. What I am looking at is finding out your views as to what can possibly be done in furtherance of a plan to squeeze the minority shareholders? A. We are juggling the accounts now, is this so?

Q. We are doing something to the accounts to leave them qualified in some way, some innocuous way perhaps? A. The accounts have to present a true and correct view of the company's affairs and results. Now, if they do not present a true and correct view of the company's affairs and results the auditors will say so and they will qualify them to present the true and correct view themselves.

Q. Of course, there are all sorts of qualifications these days by auditors: to say that they are not able to determine the value of this asset or the other asset; to say that they are unable to determine whether the particular debt can or cannot be recovered; to say that they cannot express an opinion on the exploration expenses; that they do not express a view on goodwill? A. What was the question?

Q. These sorts of things are very common qualifications? A. Well, not in the companies from which I - Soul Pattinsons own. I would say they are uncommon - in fact, very uncommon.

Q. Would you not agree that there are many such qualifications in accounts these days, quite often attracting Press comment? A. Not amongst good companies, no.

Q. Whether they are good or bad? A. I would say these qualifications which you have inferred would not be uncommon amongst a number of poor companies, and there are some poor companies listed on the Exchange.

Q. So, you might feel you plan a little more perhaps by so arranging your accounts that that sort of qualification is possible in getting yourself looked upon as virtually having black marks against your accounts? A. Yes, but if the figures are good and we have assumed this from the word go - the company is still making good profits - the auditors will make sure that those accounts are presented fairly to the shareholders and because there is a qualification on them it is not necessarily going to damn the company.

Q. Not necessarily? A. No, not necessarily at all.

Q. It never does it any good. Would you go that far? A. No, I wouldn't say that. There are some very very sound companies which have been qualified recently for tax effect accounting and they are some of the most soundest conservative companies in the land.

Q. You may have misunderstood me. I said it does not do a company any good, whether it does harm, to have its accounts qualified. A. Well, you are asking me my opinion on this. In my evaluation, if I see a company where the accounts are qualified, indicating that the directors have been ultra conservative, I regard that as a good mark for the company.

Q. If it indicates otherwise, a bad mark?
A. Yes, certainly.

Q. Well now, we will pass to the next step. Do you when you invest in shares in a stock exchange listed company regard yourself as having some inalienable or perpetual right to have those shares always listed. A. Yes.

Q. You do? A. I do. I would not buy the shares. I would not buy shares in a non-listed company except under very special circumstances.

Q. I am asking you to assume you bought them in a listed company? A. That is why I buy them in a listed company. I only buy them if they are listed.

Q. You then take the view it is your right to have that listing continue forever? A. Certainly.

Q. On what do you base that view? A. Otherwise the value of my investment is very seriously affected. If those shares are not listed, I have no market for them.

Q. Supposing for some reason they become suspended or de-listed, what are you going to do about that? A. Suspended or de-listed for a short period?

Q. Suspended for a short period or de-listed which is perpetual? A. De-listed due to -

Q. I ask you - A. Well, there are various reasons.

Q. I ask you to make no assumption about the reasons? A. Well, I would be very concerned if the shares were de-listed.

Q. I appreciate you would. Have you ever given any thought to what you would be able to do about it? A. It would depend entirely on the circumstances.

Q. You imagine some circumstances, whatever you like, and tell me what you would be able to do about it? A. You are asking me to imagine some circumstances?

Q. Well, you said it would depend on the circumstances? A. Yes. What action would I take?

Q. And I put to you the question, what would you do about it? A. What would I do about it?

Q. And I am content to have you answer that question I put to you on any circumstances you would care to formulate for yourself? A. Well, let's go back to the Cumberland situation and let's use that as an example where the shares were de-listed. There are other circumstances here as well. Of course, the minority shareholders were oppressed and we had to take a certain course of action and that is why I am sitting here now.

Q. So, one course you would take when you assert there is oppression is to wind up the company? A. Yes.

Q. Anything else? A. Well, I think in the circumstances we are talking about with Cumberland it was the only course open to us.

Q. Well, Mr. Millner, I will debate some of that with you a little later and I would like to have the question answered. The question was, is there any other course you would take in any other circumstance at all. A. Well, could I please have the parameters

of the situation. You asked me to visualise one and I did and you don't like me pursuing this one.

Q. No, I have taken your answer to that. I am asking you to go a bit further. What I asked you to do was to take shares of a company listed when you bought them and you saw them de-listed? A. And I saw them de-listed for what reason?

Q. You may supply any reason you like to answer the question and any other circumstances you think appropriate. My question is, what course do you consider you were entitled to take. You have told me one course in one set of circumstances, namely, a petition to wind up the company. My question is, is there any other course in any other circumstance that you would regard yourself as entitled to take?
A. If the de-listing was due to the actions of the directors of the company you could move to remove those directors and replace them with more competent directors. That is in one particular set of circumstances.

Q. Any others that you can bring to mind?
A. We have already covered the one where the de-listing took place through the parent company taking more than 75 per cent. of the shareholding and shares are -

Q. Well, I don't know - A. We have covered that one. Do you want to pursue that one further?

Q. I thought you were putting to me a case where you considered you had been oppressed and, therefore, you want to wind the company up? A. I think the very fact that you are de-listed through those circumstances is oppression.

Q. You regard that as oppression? A. I would regard that as oppression, yes, certainly.

Q. Accepting that for the moment, are there any other steps that you would envisage yourself as entitled to take in any circumstances? A. Well we have covered the removal of directors, we have covered going to the courts.

Q. We have covered oppression and misbehaviour of the directors? A. Yes, the question of misbehaviour of the directors. Well, there is a third alternative, of course, where if a take-over offer was made by another party and you do not accept that take-over and the percentage of shareholding

becomes so small that the share is de-listed - that doesn't happen very often because my experience has been that the Stock Exchange does its level best to keep that share listed while there are such people as the shareholders.

Q. If that happens, what do you consider is your remedy there? A. Well, your remedy there provided there has been no oppression or nothing dishonest done or no reprehensible actions of the directors - there is nothing much you can do.

Q. That is three situations we have covered.
A. Yes.

Q. Do you envisage any others? A. I can't bring any others to mind immediately.

Q. Mr. Millner, you would in general broad outline be familiar with the listing requirements of the Stock Exchange? A. Yes.

Q. One of them and an inflexible one is that shares must be fairly transferred? A. Yes.

Q. Shares in companies where the directors may refuse to sanction a transfer except in respect of partly paid shares or one in which they have a lien cannot be listed? A. Can we have that again?

Q. Yes. The Stock Exchange will not list a share which the directors had refused to transfer other than a partly paid share? A. Yes.

Q. Or a share in which the company has a lien of some sort? A. Yes.

Q. You are aware in general outline of the minimum listing requirements? A. Yes.

Q. It has been a matter of common knowledge in recent years that there have been raids on companies, people seeking to buy as many shares as they can get?
A. Yes.

Q. Where they succeed in buying they are always entitled to transfers? A. Yes.

Q. And this inevitably reduces the number of shareholders? A. Yes.

Q. And may well reduce it to below the minimum

number which the Stock Exchange will tolerate for a listed company? A. It happens very seldom, Mr. Bainton.

Q. I am not concerned - A. Very seldom. It can happen. In actual point of practice, it happens.

Q. And it can happen that one or more either allied or opposed shareholders collect between themselves more than 75 per cent? A. Well, there have been cases and I can recall one case. For example, Coffs Harbour Rutile where there were six per cent outside shareholders. Now, for many years until 12 months ago mainly due to the representations of the major shareholder the Stock Exchange continued to list that company and there were very very few sales. It was only 12 months ago that despite the representation of Kathleen Investments who own the 94 per cent holding it was de-listed, but the Stock Exchange did keep it listed for many years.

Now, you have another one, Newbold, at the moment where the raiders shareholding is over 75 per cent, to the best of my knowledge. I haven't looked in the last week or so but to the best of my knowledge Newbold is still listed.

Q. How many people hold the remaining 25 per cent? Have you any idea? A. Well, they are one of the remaining 20 odd, yes. Not that many.

Q. Not many? A. Not many.

Q. Well, would you concede perhaps that when you do invest in a company you must recognise that there is a possibility that for some reason or other it may ultimately be de-listed? A. It is a very remote possibility, very remote, and it happens very seldom.

Q. The degree of remoteness would depend I suppose on the size of the company, how many shareholders there are in it and quite a lot of factors? A. Oh, it can depend on a number of factors but it happens very seldom, Mr. Bainton.

Q. I want to come back to this plan of compaign that I have asked you, divorcing yourself from your scruples, to follow. Would you think it would be advantageous towards getting in these shares to get them de-listed? A. Certainly. That would be most advantageous.

Q. That would depress their price? A. Not only

that. It would put the minority shareholders in a very difficult position because they could see they could be locked in and have no market for the shares. This would be real oppression.

Q. And that you regard as oppression? A. Most certainly, and one of the worst types of oppression.

Q. Irrespective of how it comes about? A. Irrespective of how it comes about.

Q. It is just a situation that you think is inevitable no matter how bad the oppression? A. Most oppression is because you are denying these people a market place for their shares.

Q. When you say, to use your phrase, you are denying, I think you mean the Stock Exchange is denying? A. No, you are saying I am bringing this about.

Q. Yes. A. That I, without scruples, was working to have these shares de-listed in order to be able to pick them up more cheaply.

Q. You are bringing about a situation of the Stock Exchange de-listing? A. Yes.

Q. That can only help you to get them cheaper? A. Certainly.

Q. Do you think if you are going about that it might help to let the Stock Exchange know from time to time by whatever means the various aspects of their listing requirements are no longer complied with or would you keep that secret from the Stock Exchange? A. I am sorry?

Q. Do you think it would help to further the plan to make sure the Stock Exchange found out that you are not complying with the listing requirements or would you do your level best to conceal that from them? A. I want the shares de-listed.

Q. Yes. A. Well, obviously.

Q. You would lead them somehow or other to think that the company was no longer complying? A. Yes, well, within reason.

Q. Why do you say within reason? What is the qualification? A. There again, of course, if you deliberately take some of these courses of action, of course, you very soon find the Corporate Affairs

will be taking the matter up. There is all the difference in the world between having a company de-listed by having an unsatisfactory number of shareholders to meet Stock Exchange requirements and the directors' deliberate action or neglect in meeting Stock Exchange requirements and having the shares de-listed. They are very soon going to find they are going to have Corporate Affairs breathing down their neck.

Q. Do you think there is any point in informing the Stock Exchange from time to time as its requirements indicate you should do what is the state of your shareholding and so forth. A. I am sorry?

Q. The Stock Exchange expects to be kept informed as to whether a company does or does not meet its listing requirements, doesn't it? A. As to the shareholding?

Q. Yes. A. Yes.

Q. Do you suggest there is any impropriety in passing on that information? A. I think if you pass on that information -

Q. Do you suggest, Mr. Millner, that there is any impropriety in telling the Stock Exchange which, as one of its listing requirements stipulates it should be told, the truth about it? Do you have to hesitate to answer that question? A. I am sorry, I haven't quite got the question.

Q. The question was, do you assert that there is any impropriety in a director of a company telling the Stock Exchange those facts about the number of shareholders and so forth relevant to its listing requirement which the Stock Exchange expects to be informed of? A. No, I see no crime there, but I think it is reprehensible of directors to do anything to try and influence the Stock Exchange to de-list the shares. I think their actions should be to keep those shares listed for as long as possible.

Q. Even if that involves concealing the true facts from the Stock Exchange? A. No, I didn't say concealing the true facts.

Q. Even if it involves not informing them about facts which they should be informed of? A. No, I didn't say that. As I mentioned earlier to you, in another case the Stock Exchange is sympathetic to the needs of shareholders, particularly minority shareholders, and generally speaking if they can see

their way clear to keep a share listed they will do their utmost to do so.

Q. Let me come back to this nefarious plan as, no doubt, you have described it. Wouldn't you, if you were a director indulging in this course of conduct, let the Stock Exchange know that the company no longer complied with its listing requirements if that were a fact in the hope that they would strike it off?
A. Yes, I would do that very early in the piece. I would do that, certainly.

Q. You would do that as soon as you could?
A. Yes, most certainly.

Q. Make that statement? A. Yes.

Q. Let me ask you, if I may, on the same course, what stage in all these steps do you announce your intention to make a take-over offer, assuming you were going to do it. Would you like to give me the benefit of your views on that before I put one to you?
A. Right. Well, I have done my best to get the share prices down.

Q. You have done everything you think you can to get them down as far as you can? A. Well, we have followed a few courses of action.

Q. Well, Mr. Millner, if I have left any out that suggest themselves to you I would be delighted to know? A. I think some of the courses Mr. Adler took were most effective. You could restrict your share-holding amongst a few subsidiaries and sell them to one another at a decreasing price.

Q. Sorry, would you mind repeating that? A. Yes, you could sell shares on the Stock Exchange from one subsidiary to another and really get the price down this way. I think Mr. Adler was really effective in getting the price down from $1.20 to 55 cents. We have a very prime example of this here.

Q. Is it your belief that the things you have just described happened? A. I have seen certain share transactions -

Q. Is it your belief that the things you have just described happened in this case? A. Yes.

Q. You then would embark upon a course of action, would you, in furtherance of this plan with

transactions on the Stock Exchange at deflated prices.
A. Yes.

Q. Making sure, I suppose, that they got some publicity? A. Well, they get publicity.

Q. Would you do that once or twice or consistently over a period? A. This would depend, of course, on the volume of your shares that were normally traded. If they are normally fairly thinly traded you would do it within a fairly short space of time. If it was heavy trading with a big turnover it would take you much longer.

Q. Would you interspersed in the midst of that buying shares at twice the price? A. This would depend entirely on the circumstances.

Q. Would you do that, Mr. Millner? A. It would depend entirely on the circumstances.

Q. Do you think it would help to do that in any circumstances? A. Of course, what you would do - the classical way to put the price down is to put on a fairly low buying order and come in as a seller to meet that buying order and come in again continually reducing the price.

Q. Does it help - A. You have to have sales to get the price down. You would put in buying orders. You keep lowering your buying orders and the seller would keep meeting those.

Q. Would it assist in this aspect of the campaign to put on a buying order at about twice the price you wanted to bring the market down or would you think that would be a bit inconsistent and unhealthy? A. Could we have that again.

Q. We are entering on a campaign to get the price down so we are going to buy and sell orders continuously, as I take it, reducing the price over a period. Do you think it is going to help that campaign to put in a buying order and buy on the Stock Exchange with the publicity it gets at about twice the final price you are trying to achieve or do you think that might impede your plans? A. Not when you are engaged in this nefarious plan to try and artifically depress the price.

Q. It would be a silly thing to do?
A. It would be a silly thing to do while you

are trying to get the price down.

(Witness stood down)

(Further hearing adjourned to 10 a.m. on Friday, 28th November, 1975).

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES) No. 707 of 1975
)
EQUITY DIVISION)

CORAM: BOWEN, C.J. in Eq.

CUMBERLAND HOLDINGS LIMITED & COMPANIES ACT

THIRTEENTH DAY: FRIDAY, 28TH NOVEMBER, 1975

JAMES SINCLAIR MILLNER
On former oath:

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

WITNESS: Yes, your Honour.

MR. BAINTON: Q. Mr. Millner, I was asking you to tread a little further along what my learned friend described as the primrose path and I was about to ask you at what stage of this campaign - I was about to ask you what stage of the campaign would, in your view, be the best time in which to actually announce that you were going to make a takeover offer. A. I think we had got to the stage where we had to test the price of the shares and the market.

Q. We had done all the things I suggested to you, and one or two that you thought of and suggested to me. A. Yes.

Q. And, having gone through that, I would like the benefit of your views of the stage of the campaign at which it would be most beneficial to the offeror to announce that he is going to make his offer. What stage of the campaign would it be most beneficial to announce that he is going to make his offer? A. Having got the shares de-listed?

Q. Yes. A. And having depressed the market price as far as possible, that would undoubtedly be the ideal time for him to make the offer.

Q. You would not dream of letting anyone know you were going to make an offer until you had taken all of these

steps, would you? It would be just too silly, wouldn't it? A. I think you would want to keep it under your hat.

Q. Under all your hats? A. Under all my hats.

Q. And would you agree as well as all of these things that you would do there are quite a few things that you most certainly would not do, the first of them being to tell probably the biggest and most vocal of the minority shareholders what your campaign was? A. That would be very foolish.

Q. That would be very foolish, wouldn't it? A. Yes.

Q. Another thing you would not do would be to come on the market as a buyer of last resort and buy shares? A. In the narrow context of the exercise we have been examining, I agree. On the other hand, if you wished to dispose of your own shares at a higher price first that would be a slightly different exercise.

Q. If you are looking to get in the outstanding shares and not to dispose of any of your own you would not go on the market as a buyer, would you? A. Could I have that again?

Q. If your object was to get in the outstanding minority shares and not to dispose of your own you would not go on the market as a buyer, would you? A. Not dispose of your own? Yes, I agree.

Q. You want to acquire 100%. You want to acquire the whole of the shareholding? A. Yes.

Q. You would not go on to the market and buy? A. No, not unless you were disposing of your own shares.

Q. You would let the market wither of its own accord? A. Yes.

Q. And all of the things I have been putting to you are really quite obvious to anybody who has any commercial knowledge and experience? They are quite obvious to anyone with commercial knowledge and experience? A. Quite right. Of course, there is the time factor here, of course.

Q. You mean by that, of course, something might depend upon how anxious you are to get the shares in? A. If the object of the exercise was to purchase the shares as cheaply as possible you would not want to push the shares up, I agree, unless you have some other purpose in mind.

Q. You would not want to rush the exercise? A. Yes.

Q. If you knew that there had been virtually no independent market for 10 years or more - no, or virtually no outside buyers of the shares - just no general commercial interest in the stock - you would bide your time? A. Yes, that is right.

Q. There would not be any risk of anyone coming in that situation? A. You would possibly bide your time, depending, of course, on how badly you wanted them and how quickly you wanted them. It would depend on that, of course.

Q. If there was no great urgency about getting them and you just wanted to get them cheaply, you would bide your time? A. If there was no urgency, yes.

Q. The other question I put to you, which you have not answered yet, is that you would recognise that in this sort of situation there is no practical risk of someone else coming into the market and making an offer for these minority shares? A. That would depend entirely on the value of the offer. If the offer was well below the tangible asset backing of the shares I think there would be a grave danger of someone coming in, either as a market exercise - probably as a market exercise - because we have assumed that we have the majority of the shares.

Q. No one coming in looking to try to gain a minority interest with no possibility at all of getting control? A. Well, there are people, of course, who are known as corporate raiders, who do take positions in companies that appear to be undervalued.

Q. There are quite a number of these people in Sydney, aren't there? A. Yes, there are quite a number of these people.

Q. Who have been active for a number of years? A. Some of them, yes.

Q. And whose practice it is to make a careful scrutiny almost on a continuing basis of likely prospects? A. Yes.

Q. None of them have shown any interest in Cumberland Holdings? A. No, none of them have apparently shown any interest.

Q. It would not be an attractive prospect for any of these people, would it? A. Not round about the period we are discussing in this current case.

Q. Not at any time since Washington Souls have been shareholders? A. No, I disagree with that. I would think before Mr. Adler sold his shares there could certainly have been attractions for such people, because the market price for the shares was well below the asset backing.

Q. These people go into companies not because of the dividend they expect to get out of the investment, but because of the profit they expect to get if they resell? A. Yes, Corporate raiders as a rule.

Q. You would not expect anyone to go into that exercise without searching the share register, would you? You would not expect that, would you? A. No.

Q. And you would not expect anyone to go into that exercise without searching to find out who were the shareholders and directors of any major corporate shareholders? A. No.

Q. So that anyone doing that exercise would unquestionably have discovered the relationship between the large parcel of shares FAR (sic) held and the parcel that Lader held, and the other companies that Mr. Adler was a director of? A. Yes.

Q. And it would be a simple exercise to put two and two together and assume that they were all under the same control, wouldn't it? That would be a simple exercise, wouldn't it? A. Yes.

Q. So that the raider would recognise that something of the order of 80% of the capital assets of the company was under the one umbrella, as it were? A. Yes. 72%.

Q. 72% in the name of FAR (sic) plus the other Adler companies? A. I think Mr. Adler told me on 14th December that FAI and his family companies owned 72%. I did not check the register at that time. That is what he told me.

Q. I don't want to debate percentages with you. Anyone entertaining that exercise would have made inquiries which would enable him to add up FAR's shares and the Adler family company shares? A. Yes.

Q. And come to the figure which gave the true total under the Adler umbrella, if I may use that phrase? A. Yes.

Q. If that was of the order of 78-80%, the remaining 20% are quite attractive to a corporate raider. That is so, isn't it? A. Yes.

Q. And anyone with any experience would know that to be so? A. Yes.

Q. So that if one adds to the hypothesis that I was putting to you yesterday afternoon and this morning this factor, that the person contemplating making this offer already controls something close to 80%, he would not for one moment be concerned with the prospect of anyone else coming into the market and trying to mop up the outstanding 20%, would he? A. It would be remote.

Q. How many discussions altogether do you remember having with Mr. Adler in the last three years, let me say, relating to any possibility of Washington H. Soul exchanging any of its Cumberland shares of any description for shares in FAI? A. Only the one discussion on these lines, but there was one other discussion where Mr. Adler endeavoured to persuade Soul Pattinsons to take a position in FAI, and Mr. Adler was very insistent that I come along and attend a luncheon.

Q. Did that involve any share exchange? A. It did not involve any share exchange, no.

Q. Approximately when was that? A. I beg your pardon?

Q. Approximately when was that? When did that take place? A. This would be, I would say, some time early in 1973.

Q. I am not concerned with that at the moment. You say, do you, that there was only one discussion involving any question of share exchange? You say there was only one such discussion? A. Only one discussion involving any question of share exchange, yes.

Q. And you say, do you, that there simply could not have been any such discussion on 23rd January, because you were not in Sydney? A. I was out at Austral Brick, and I came into Sydney later in the day. I went from my home to Wallgrove to the Austral Brick Company, and came back into town for appointments about three o'clock. I had an appointment in Sydney with the Midland Bank about three o'clock.

Q. On the preceding day you appear to have been in Sydney all day? A. I'm sorry, I have not got my diary on me (diary handed to witness) this is the 22nd?

Q. Yes. On the 22nd you appear to have been in Sydney all day? A. On the 22nd I attended a board meeting which went all day.

Q. In Sydney? A. In Sydney.

Q. When you say "all day", do you mean from the crack of dawn until late? A. It started at 10 o'clock in the morning, and I would say it probably finished at 6.30 p.m.

Q. That was in Sydney? A. That was in Sydney, yes.

Q. On the 23rd you were certainly in Sydney - you were in the city from three o'clock onwards? A. Yes, that is correct.

Q. The diary entry for 14th December which has got "Adler 3 p.m." would certainly appear to have been added long after any of the other entries for that day were made. Would you agree with that? A. That could be the

case, because my procedure is, if you will see in the diary, a number of the board meetings are in the handwriting of my secretary, and I had a fairly crowded period in that particular week in December, and there are quite a number of - in fact, there was no room in the diary - you will see there were quite a number of appointments which had to be put in lower down. In fact, in that particular week there are three appointments where I did not have room to fit it in and I had to put it lower down, and put arrows up.

Q. I can see one to that effect, namely "Adler 3 p.m."? A. Yes. I can see two others, too. There is a Stocks and Holdings meeting on the Monday, and there is another meeting on the Wednesday, all of which come into that category.

Q. Is the one relating to Mr. Adler in your own handwriting? A. Yes, that is in my handwriting.

Q. Are you able to tell us when it was put there? A. I would say - I could not say with any degree of decision - I would say it would only be a day or so. When Mr. Adler rang me he wanted to talk urgently, and I fitted it in as soon as possible. Possibly the day before.

Q. That was a meeting in Mr. Adler's office? A. Yes, that was a meeting in his office.

Q. Was there ever a discussion with Mr. Adler in your office with regard to the exchange of company shares? A. No, there was not.

Q. Are you positive about that? A. Yes, I am.

Q. Did you regard the proposal that Mr. Adler put to you as being one that required some discussion with co-directors? A. I did.

Q. And you had such discussion, did you? A. I did.

Q. What did you see as the disadvantage of exchanging preference shares on the one-for-one basis? A. We much preferred to have the investment in Cumberland Holdings rather than FAI. We had grave doubts as to the financial stability of FAI, and we had looked at FAI before,

because Mr. Adler had tried very hard to get us to take some of the placement which he had some time earlier, so that we were quite familiar with FAI. We had looked at it in some detail earlier, and we were quite familiar with FAI.

Q. May I take it, then, if you were not interested in the exchange of preference shares, then the exchange of ordinary shares was quite out of the question? A. They were both out of the question.

Q. Both out of the question? A. They were both out of the question.

Q. Ordinaries much more so? A. I would not say more so - we were not interested in either. We were not interested in either the preference shares or the ordinaries.

Q. Exchanging preference shares would improve the net asset backing by a factor of between five and six? A. It could have done, but we had some doubts as to the true net asset backing of FAI. We had some grave doubts.

Q. If that be correct that, with or without doubts, an exchange of ordinary shares would be five or six times more risky than an exchange of preference shares? A. On the other hand, at face value the offer of two Cumberland for one FAI share at the market price of the two shares at the time, it appeared superficially to be a reasonably attractive offer, because FAI was $1.70 and Cumberland was 65 cents, so that you would have got an FAI share at $1.30 as against the market price of $1.70.

Q. You would be, I take it, familiar with the method of keeping minutes at Washington Soul Pattinson? A. Yes.

Q. They are fairly detailed, aren't they? A. Yes, they are fairly detailed.

Q. They record the investment policy of the company from time to time? A. Yes,

Q. And the decisions made? A. Yes.

Q. You will agree, I take it, that there is no reference

in its minute book to this proposal, or any discussion about it? You will agree with that, won't you? A. No, I don't think it even got to a board meeting, because when I got back to the office Mr. Adler's main selling document was his chairman's address, which he gave me, on my arrival at his office, and I had this photostated, and copies circulated to the other directors. I was not impressed with the offer and the other directors also said likewise, and I had already indicated to Mr. Adler that I thought the chance of the exchange was very very remote, and I would only get in touch with him if we decided in the affirmative, which was very unlikely.

Q. Is it your belief that Mr. Adler set about a deliberate campaign to get in the minority shareholding in Cumberland Holdings Limited at an undervalue? A. I'm sorry. Could I have that again?

Q. Do you believe that Mr. Adler set out on a campaign to get in the outstanding minority shares in Cumberland Holdings at an undervalue? A. Yes, I do.

Q. That is your belief? A. Yes.

Q. When did you form that thought? A. When Mr. Adler made his formal takeover offer. I had some grave reservations before that.

Q. I suppose you began to feel, to say the least, not particularly friendly when he broke off the supply arrangement with Washington Pattinson? A. There was nothing acrimonious about this. It was not done in an acrimonious manner.

Q. I don't suggest it was. The question I asked you was - A. It was a very odd thing for Mr. Adler to do, particularly in the circumstances surrounding it.

Q. Had you begun to think at that stage that he may have something else in mind? Had you begun to think that at that stage? A. Yes, I was seriously wondering what he was up to.

Q. When he made the takeover offer I suppose you thought that this must have been what he was up to? A. Yes.

Q. And I suppose you have thought that ever since, have you? A. Yes.

Q. And you would have thought then that he would have set about this plan of campaign not later than the time that he terminated the supply arrangement? A. Well, he obviously, of course, wanted to get rid of his own shares at a much higher price first. He did not want to accept 50 cents, or whatever the price was, for his own shares.

Q. That, I take it, would lead you to believe that the plan started before that date, would that be right? A. I would think so, yes.

Q. And that the letter of 1st July, which became Exhibit 41, which he wrote terminating the supply agreement, must have been part of the scheme? A. Prior to that letter two of the matrons rang up Mr. John Russell, who is our assistant general manager, and -

Q. I don't want to go into the merits or demerits of that. I am not interested in that. The question I asked you was whether you came to form the view that severing the supply arrangement was a part of the campaign? A. I formed the view prior to that letter of Mr. Adler's, because there had been other communications from Cumberland prior to that date.

Q. You formed that view even earlier than that date? A. Even earlier than that date, yes.

Q. Did the fact that he suggested a share exchange at an earlier date suggest itself to you as perhaps part of the campaign? A. I don't think so, really. I knew Mr. Adler for some time had been anxious to get Soul Pattinson as a shareholder of FAI. He had been very keen to do this for some time, and I don't think I linked this at the time with a possible takeover.

Q. When did you come to link it up? Later on? A. Most certainly.

Q. You did come to link it up later on? A. Yes.

Q. When was that? A. Well, during the brief period

in which the shares went up in price, of course, we became very suspicious, and when we found out - ?

Q. That was in July last year? A. Yes, and then they started to come down and we were not very surprised - not frightfully surprised - when the takeover offer finally arrived.

Q. That led you to think then, did it, that the plan had begun at the time you say the discussion between the two of you occurred on the share exchange? A. I could not comment on that. Probably Mr. Adler - I would imagine he would have cooked his plan up some months after that. But I could not give an opinion on that. I don't know. I can't read Mr. Adler's mind.

Q. You were called to give evidence in this matter to say that this discussion occurred in December 1973 relating to a proposal for FAI to make a takeover offer in respect of Cumberland ordinary shares? A. Yes.

Q. And I suppose you appreciated that you were called to give that evidence because it was thought to have some relevance? A. Yes.

Q. Did it occur to you that the relevance it was thought to have was to suggest that Mr. Adler had formed the intention of making a takeover offer back in 1973? A. Yes.

Q. May I take it you personally have come to form that belief? A. He was certainly contemplating a takeover offer in December 1973, because he told me.

Q. You have known since this case started that it may be quite important to the petitioner's case to establish that the intention to make a takeover offer was formulated long before the letter from the Stock Exchange threatening de-listing? A. Well, I have not attended very much of this hearing, as you are no doubt aware.

Q. But, Mr. Millner, you were, as chairman of the petitioner, aware of that? A. Could I have that again?

Q. What I asked you was, did you not appreciate the

purpose of your being called to give evidence in this case was to provide a basis for the suggestion that FAI had formed the intention of making a takeover offer for the outstanding shares in Cumberland prior to the threat in July, I think it was, last year from the Stock Exchange to de-list it? -

HIS HONOUR: September.

WITNESS: That is so, yes.

MR. BAINTON: Q. You have known, I take it, the relevance of that since the time the petition was issued in this case at least? A. I'm sorry? Could you repeat that?

Q. I take it you have known the relevance of that since at least the time the petition was issued in this case? A. I don't think - I might have been aware of that, but it did not strike me very forcefully.

Q. Before the hearing commenced, anyway? A. Yes, certainly.

Q. When did you first let it be known to anyone else connected with the case about this discussion taking place in 1973? A. Mr. Donohoo was well aware of it. He had a copy of Mr. Adler's address. And so did Mr. Dixon and Mr. Slatyer.

Q. How long did Mr. Donohoo have it? A. I think I probably sent it around to him on 15th December, or it might have been the afternoon of the 14th, when I came back from Mr. Adler.

Q. Have you discussed it with Mr. Donohoo prior to the commencement of the hearing of this case? A. I don't think that we have had specific discussions at all.

Q. Or with anyone else? A. Well, I can't remember specifically discussing it. Of course, we were both aware of what had happened, anyway.

Q. You have had detailed discussions on several aspects of this case, haven't you? A. I beg your pardon?

Q. You have had detailed discussions with your solicitors on a number of aspects of this case prior to the commencement of the hearing, haven't you? A. Yes, that is right.

Q. Indeed, you gave to them, I suggest to you, a long, detailed account of what you suggest were Mr. Adler's reasons for terminating the supply arrangement? A. Yes.

Q. And for the purpose of suggesting, I put to you, that it was done as a step in a pre-conceived campaign to get in the outstanding shares? A. Yes.

Q. It would have been very material, of course, to support that assertion, to say that there had been discussions with you some six or seven months earlier relating to a proposed takeover? A. May I have that again?

Q. Yes. It would have been of considerable assistance to the assertion that you were making, namely, that the supply arrangement was cancelled as part of the plan to get in the minority shares at an undervalue, to have said that some six or seven months earlier Mr. Adler, on behalf of FAI, had discussed with you the possibility of such a takeover offer being made? A. Not to have said it. As a fact.

Q. The question I put to you is this. Might I suggest that you gave a detailed account of a number of events leading up to the assertion that the supply arrangement had been cancelled as a step, in a then existing plan to make a takeover offer, to try and get in the shares at an undervalue? A. Yes.

Q. And may I suggest that in that account you put forward everything that you thought was relevant to reach that conclusion - in reaching that conclusion? A. I think you put this forward, Mr. Bainton. You have asked me questions, and I have answered the questions.

Q. You may have misunderstood me. I am asking about the proof you gave to your solicitors in this matter. You did give one, didn't you? (Objected to; admitted)

Q. It is a fact that you and Mr. Donohoo made a joint statement to your solicitors relating to the events

that I have just been mentioning? That is a fact, isn't it? A. Yes.

Q. It is also a fact that you jointly set out all of the matters that you thought were material leading up to the final assertion that you were making, that the termination of the supply arrangement was an early step in a then existent proposal to make a takeover offer? A. Yes.

Q. Did you mention in that document anything at all to suggest there had been earlier discussions between you and Mr. Adler in which he had suggested that he had an intention to make a takeover offer? (Objected to; rejected)

Q. Mr. Millner, will you read paragraph 18 which is the last paragraph of this document which is now handed to you? A. Paragraph 18?

Q. If you wish to look at any other part of it to become aware of what the document is I do not suggest you should not? A. Yes. I am familiar with this.

Q. You have read paragraph 18? A. Yes.

Q. That document came into existence before the hearing of this matter commenced? A. Yes, that is right.

Q. And it sets out your assertion, or your belief, rather, that the termination of the supply arrangement in July 1974 was part of a then existent plan which involved subsequently making a takeover offer in an endeavour to acquire the minority shares at what you regarded as an undervalue? A. Yes.

Q. Would you agree that a very material matter which would have considerably supported this sort of argument was to have said that there had been earlier discussions with you in which Mr. Adler did in fact say he was having thoughts of making a takeover offer? A. Yes.

Q. There is no mention at all - (Objected to)

Q. There is no mention anywhere in the document at all to Mr. Adler ever having mentioned to you prior to 1st

July 1974 that he had any thoughts of making a takeover offer? (Objected to; rejected)

(Document in which witness referred to paragraph 18 m.f.i. 13.)

Q. I think that this may also be objected to, Mr. Millner, so wait for a moment before you answer. Did you tell anybody before the hearing of this case commenced of this discussion you say you had with Mr. Adler in which he suggested to you he had an intention of making a takeover offer? (Objected to; objection withdrawn) A. Could I have the question again?

Q. Before the hearing of this case commenced did you tell anybody of this discussion you say you had with Mr. Adler in which he suggested to you he had an intention of making a takeover offer? A. Yes.

Q. Who did you have that discussion with? A. Mr. Donohoo, Mr. Dixon and Mr. Slatyer.

Q. They all being co-directors? A. All co-directors. And the solicitors.

Q. I would like you to give an exhaustive list of the people to whom you mentioned it prior to the commencement of the hearing of this case? A. Certainly those three. I discussed it with my co-directors of Souls, and it was also discussed with our solicitors.

Q. When? A. I think when we first sought legal opinion in this case. It would have been discussed on several occasions. At least several occasions.

Q. Anyone else? A. I can't think of anybody else. But I would have discussed it with my secretary, or rather my secretary would have been aware of it, because she would have photostated the document at the time. I can't think of anybody else who I would have discussed it with, but my secretary would have been aware of it.

Q. Would you like just a moment to think if there might be anybody else, or are you confident that you have told us of everybody? A. Those are the only people I can recall. But there was no secret about this. I may have

discussed it with other people, but they are the only people I can specifically recall having discussed it with. But there was no secret. Mr. Bergen, the secretary of Soul Pattinson, might have been aware of it.

Q. Did you personally compose any of the circulars that went out from Soul Pattinson? A. I had a hand in composing them.

Q. In any event, I suppose you saw them before they went out? A. Yes.

Q. The first one that went out under your name was pretty strong meat? You did not pull any punches, did you? A. No, I did not.

Q. And you took every point you thought could help you? A. Certainly.

Q. There is no mention in any of these, of course, that Mr. Adler discussed it with you some months earlier - the fact that he had in mind the making of a takeover offer? A. No.

Q. That would have been quite persuasive in the light of what you were saying about his own family company shares, wouldn't it, don't you think? A. It did not strike me so at the time.

Q. Think about it now. Does it strike you now that it would have been quite persuasive to have added that to your circular? A. I don't know that it would have been quite persuasive with shareholders. The trouble with a circular to shareholders is that, unless you keep it concise and simple, you confuse them.

Q. You left out the critical factor - telling? A. Telling, yes. The circular that went out to the shareholders was a fairly concise, simple circular relating to the takeover and the sale of Mr. Adler's shares. It did not go into previous discussions.

Q. You made what you thought were your best points to persuade people not to agree to the takeover? A. I don't think that that would have had much weight.

Q. You don't think it would have had any weight to tell the shareholders that Mr. Adler started this campaign in a circular sent out last year to say that he sold his family shares - that he discussed with you in December last year making a takeover offer and held off until he got rid of his own family shares at a high price, and now comes back to make a low offer. Don't you think that would have been a telling point? A. This may have been mentioned at a meeting of minority shareholders. If I can have the opportunity of turning up my notes on that I might be able to clarify that. It is quite possible it was mentioned at that meeting of minority shareholders.

Q. I am talking at the moment about circulars. A. To the best of my knowledge it was not in that circular.

Q. Would not you agree it would have been a telling point to put in the circulars? A. Not in these circulars, no.

RE-EXAMINATION

MR. HUGHES: Q. My learned friend took some time yesterday putting to you a number of hypothetical situations as to what you would do if you were a director on the board of an offeror and an offeree company, and what you would do in other circumstances if you were a director of the offeror company and the offeree company was wholly or partly owned by the offeror.

I want to come to the facts of this case, and get your view on it, which my learned friend refrained from doing.

I want you to assume that after getting $1.25 for his shares - his family shares - in July, shortly after or at about the same time as he had done some window dressing, as it has been described, on the stock market, Mr. Adler in August puts on a selling order for Cumberland shares of 70 cents - a discount of 55 cents - on 7th August, and follows that with a buying order at 50 cents on 19th August, and receives a letter from the stock exchange on 4th September threatening de-listing unless FAI's holding of ordinary shares is reduced by 8%, resolves that his FAI board - he being, with Mr. Belfer, a director, as well as of Cumberland - that no steps

will be taken to comply with the Stock Exchange request, and then proceeds to make an offer, in conjunction with his co-directors of FAI, of one ordinary Cumberland share - one ordinary FAI share for one ordinary Cumberland share, with a net respective tangible asset backing of the two shares being 53 cents FAI and $1.27 or $1.28 Cumberland at the time that the offer is made. I want you to take all those facts into consideration, and bear in mind that you are Mr. Adler, and you are a director of both the offeror and of the offeree company. First of all, would you have any views as to your own commercial probity if you had done that? (Objected to)

MR. HUGHES: Q. Well, Mr. Millner, I will start again and I won't make any reference to Mr. Adler. I will deal with the hypothetical situation.

I want you to take into consideration these assumed facts. Mr. A is the chairman and managing director of company X which, prior to 30th June, 1974, owned 72% of the issued ordinary share capital of company Y. Sitting with Mr. A on the board of company X is Mr. B, as one of the several directors of that company. Both Mr. A and Mr. B are as well directors of company Y, the 72% owned subsidiary.

In an off-market transaction effected shortly after 30th June Mr. A sells to company X his family shares in the ordinary capital of company Y, the subsidiary, at $1.25 a share, that sale being by Mr. A's family to company X.

At or about the same time as that transaction was effected, Mr. A, by means of placing a buying order on the stock market for the shares in company Y, effects a purchase on market of a number of those shares at $1.25, that is, the same price as the off-market transaction whereby Mr. A's family sold shares in company Y to company X.

In August, namely, on 7th August, Mr. A on behalf of company X places a selling order for 10,000 shares in company Y at 70 cents a share, a discount, that is, of 55 cents on the recent on-and off-market transactions.

On 19th August Mr. A on behalf of company X places a buying order for shares in company Y at a price of 50 cents. The effect of the transactions between Mr. A's family and company X resulted in an increase in the holding of the ordinary share capital in company X to 80%.

The next part of the assumed set of facts I want to put to you is this. On 4th September immediately following the placement of the selling and buying orders that I have just referred to company X and company Y receive notification from the Stock Exchange that unless company X's holding of ordinary shares in company Y is reduced from 80% to 75% the continued listing of company Y on the Stock Exchange is in jeopardy.

Following upon the receipt of that communication, no steps are taken either by the board of company X or by the board of company Y to explore the possibilities of reducing the holding of ordinary shares in company Y by company X to 75% of the total issued ordinary capital of company Y.

The board of company X, on receipt of information as to the attitude of the Stock Exchange as expressed in this letter of 4th September, resolved upon a course of making a share exchange takeover offer for the ordinary share capital of company Y outstanding in the hands of minority stockholders, company X to be the offeror company.

The consideration fixed upon for this takeover offer turns out to be one ordinary share in company X in exchange for one ordinary share in company Y.

No steps are at any time taken by company Y's board notwithstanding representations made at a board meeting by the director who could be taken to be the representative of the minority stockholders to obtain any independent evaluation of the appropriateness of the offer for submission to minority stockholders to whom the offer is made.

One day after the formal takeover offer is despatched to shareholders, having gone out on the 20th or thereabouts, Mr. A arranges for the purchase of 68,000

shares in company X in a market crossing transaction at 40 cents a share. They are ordinary shares in company X being one of the counters or token counters in the takeover offer at 40 cents.

At the time when the takeover offer is made the net tangible asset backing of the ordinary shares in company Y is approximately $1.25, some figure between $1.22 and $1.27. At the time of the takeover offer the net tangible asset backing of the shares in company X is about 53 cents.

Now, those are the facts I want you to assume. The question I ask you is this. Have you any view first of all as to the propriety of that offer? (Objected to; rejected; question withdrawn).

Q. On the basis of the same assumed facts, I will ask this question. If you were Mr. A and Mr. B acting so far as it is humanly possible to do so with your company Y hat on - do you follow me? A. Yes.

Q. In your view, based on your experience of commerce and as a director of public companies, are there any steps that could be taken to protect the interests of the minority shareholders in company Y in relation to the takeover offer? (Objected to; question pressed; allowed).

HIS HONOUR: I will give you leave to ask it and Mr. Bainton can ask further questions if he is so minded.

MR. HUGHES: Q. Have you got all those facts in your mind, and don't ask me to repeat them?

HIS HONOUR: They can be read again.

WITNESS: No, I only want the last part - what could director A do? Is that it?

MR. HUGHES: Q. I will re-frame the question because it does not quite come out clearly enough. On your view, based on your experience in commerce and as a director of public companies, are there any steps that could be taken by Mr. A in his capacity as a director of company Y to protect the interests of the minority

shareholders, ordinary shareholders, in company Y in relation to the takeover offer in the circumstances that I have postulated? A. Yes.

Q. There are. What in your view are those steps? A. Obtain an independent evaluation of the offer by an independent firm of accountants or merchant banker. ~~Secondly, Mr. A should not have voted or given any indication to the minority shareholders as to whether they should accept the offer or not. He should have left this to somebody completely independent.~~

Q. Anything else that occurs to you? A. Those are the main steps he should have taken in that particular issue.

MR. BAINTON: That is not an answer to the question. If the question had been "What should have been done?" it would have been objected to. The question was "What could be done?".

WITNESS: Both of these things could be done.

MR. BAINTON: The answer which I take to be an assertion that something should have been done I would seek to have struck out.

HIS HONOUR: Q. The answer is, you would say, it could be done as well? A. Yes. I would say it could be done.

HIS HONOUR: The answer that "It should be done" is not responsive to the question and should be struck out.

MR. HUGHES: Q. You said those were the main steps that could be taken by Mr. A in that situation wearing his Y hat? A. Mr. A in that situation has a strong obligation -- (Objected to).

Q. No, just what he could do? A. Yes.

Q. What he could do. Don't talk in terms of obligation. A. Right. Get this independent valuation by the accountants or merchant bankers and endeavour and use his best efforts to obtain the price recommended by these

outside experts for the minority shareholders. In addition, he should also --

Q. No, not "should"; he could? A. He could use his best endeavours to get company X to dispose of some of its shares so that the shares could be re-listed on the Stock Exchange.

Q. Now I want you to assume that in the situation that I have outlined there is this further ingredient and that is that in the letter accompanying the takeover documents written by Mr. A as chairman of the offeror company no mention is made of the fact that in July Mr. A's family received for their shares on a sale of them to the company X $1.25 a share. Is there anything that could have been done about that from the viewpoint of Mr. A as a director of the offeror company? A. Mr. A as a director of the offeror company?

Q. Yes, who does not make any mention of the family sales in the takeover documents. A. Are we considering Mr. A's position in the offeree company?

Q. No, in the offeror company first then I will come to his position in the offeree company. A. Yes. What could Mr. A have done? (Objected to; allowed).

Q. What could he have done? A. He could have insisted that the minority shareholders receive the same price for their shares as his family company received for theirs.

Q. With that knowledge of the sales by his family of their shares the previous July, what could he have done as a director of company Y with that knowledge from the viewpoint of protecting the interests of the shareholders in company Y in relation to the takeover offer? A. He could have informed his fellow directors of company Y and informed all shareholders of company Y of this fact.

Q. Don't answer this question until my friend has an opportunity of objecting. Have you a view as to the propriety or otherwise of a failure by Mr. A acting in his capacity as a director of company Y to tell the minority shareholders of company Y about the sale of his own family shares at $1.25?

MR. BAINTON: Assuming the answer is intended to elicit something more than Yes or No to whether he has a view.

MR. HUGHES: That was a preliminary question. I want him to answer Yes or No and then I will ask him what the view is.

MR. BAINTON: Whether he has a view is equally irrelevant, with respect. I will object to the question. (Question allowed).

MR. HUGHES: Q. Have you a view as to the propriety or otherwise of Mr. A failing to disclose in his capacity as a director of company Y to the minority stockholders in that company to whom the share exchange offer has been made the fact that in July his family in a sale arranged by himself got $1.25 for the ordinary shares in company Y on a sale to company X? A. Yes.

Q. Now, what is your view?

MR. BAINTON: I assume that question is covered by the objection?

HIS HONOUR: You are objecting to this? I will allow the question.

WITNESS: May I answer the question?

MR. HUGHES: Q. What is your view? Yes, the question is allowed. A. Mr. A acted in a highly reprehensible manner, in fact, in a disgraceful manner for any director to act.

Q. I want you to deal with the same topic, that is, the failure to disclose that family share transaction, looking at it from the viewpoint of Mr. A in his capacity as a director of the offeror company, that is, company X, he having omitted to disclose anywhere in the takeover documents sent out the fact that this sale of the family company's shares had taken place. (Objected to; allowed).

Q. Have you got the question in your mind? A. Yes.

Q. Well, what is your view? A. Mr. A acted most reprehensibly.

Q. Why? A. In failing to disclose this to his fellow directors in company X. Even further than that --

HIS HONOUR: But you were aksed, Mr. Millner, about the takeover documents and Mr. A's position in the offeror company now.

MR. HUGHES: Q. Do you follow me - what is your view as to the propriety of Mr. A's failure in the offer documents to advert to the sale of his family shares to company X, the offeror company, the previous July? A. Highly reprehensible. (Objected to).

Q. I want you to deal with this point only. Against the factual background that was marked out in my earlier question this morning when I started talking about A and B and X and Y, I want to direct a question to you just based on the hypothesis that I put earlier and it is based further on this fact or assumed fact that Mr. A acting in his capacity as the chairman of the offeror company did not tell the minority stockholders in company Y anywhere in the takeover documents about the sale at $1.25 in the previous July, the takeover documents having gone out in November, of his family shares at that price of $1.25. Add that further fact and my question to you is what is your view as to the propriety or otherwise of that failure to disclose? (Objected to; allowed) A. Highly reprehensible and disgraceful conduct.

(Short adjournment)

MR. HUGHES: Q. Mr. Millner, I want to go to another subject now. You were asked yesterday by my learned friend Mr. Bainton about your involvement in takeover situations and you mentioned two specifically. One was the Patrick Corporation/Castlereagh Securities situation and the other was the Washington H. Soul and Deposit & Investment situation. You told his Honour in relation to the first, that is the Castlereagh Securities/Patrick Corporation arrangements, that you as director on both boards did not attend meetings by the board at which the proposals were discussed and resolved upon. In that

case, was anything done in relation to advice, outside advice, as you recall? A. Yes.

Q. What? A. Hungerford, Spooner who are an independent reputable firm of accountants were commissioned to evaluate the offer.

Q. I want now to come to the Washington H. Soul/Deposit & Investment situation. Were you at that time a director on each of the boards? A. Yes,

Q. Did you take part in any of the deliberations on either board in relation to the takeover? A. I took part in the deliberation of the takeover as a director of Washington Soul's but I didn't take part in the evaluation of the offer as a director of Deposit & Investment.

Q. In that case was any outside advice sought? A. Yes, Mr. Raymond Moore was commissioned by Deposit & Investment to evaluate and advise the board of Deposit & Investment as to the value of the takeover offer.

Q. And Deposit & Investment was the offeree company? A. Yes.

(Witness retired and excused)

JAMES BERNARD THYNNE
sworn and examined:

MR. HUGHES: Q. What is your full name, Mr. Thynne? A. James Bernard Thynne.

Q. Are you a solicitor of the Supreme Court? A. I am.

Q. And where do you live? A. Flat 1/24 Mona Road, Darling Point.

Q. Are you a solicitor employed by Allen, Allen & Hemsley? A. I am.

Q. The solicitors for the petitioner in these proceedings. (Document m.f.i. 13 shown to witness) You are

looking at the document marked for identification? A. Marked 13.

Q. Did you take any part in the preparation of that document? A. I did.

Q. What part? A. Well, I prepared the document in its present form in its entirety.

Q. And when? A. My recollection is that it was on or about 10th October this year.

Q. Was that document prepared with any particular purpose in mind? A. It was. It was prepared with the particular purpose in mind of being forwarded to Mr. Millner. In other words, it was my understanding of the facts relating to one particular question which might or might not have been in issue in this case and that was the dismissal of Souls as a supplier to Cumberland Nursing Home. I had spoken to Mr. Donohoo on this question but not fully with Mr. Millner. Armed with the information that Mr. Donohoo had given me on the dismissal of Souls, I, using that information and some documents given to me by Mr. Donohoo, had prepared this statement with a view that Mr. Millner would look at it and inform me whether from his point of view it stated correctly all the facts that related to Soul's dismissal as a supplier.

Q. Were other proofs obtained in relation to other matters in the case at any stage? A. I don't quite understand.

Q. Were other proofs of evidence obtained by you? A. Yes, they were.

(Paragraph 18 of the proof of evidence previously m.f.i. 13 tendered and admitted as Exhibit 90)

CROSS-EXAMINATION

MR. BAINTON: Q. I gather you made up the document from what was told to you by Mr. Donohoo or Mr. Millner? A. That is correct.

Q. Did either of them mention to you that Mr. Adler had

discussed with Mr. Millner at any earlier stage than July last year any intention of making a takeover offer? A. At that stage, no.

Q. That stage I take it was - A. At the stage I prepared that document.

Q. Which was October? A. That is right.

RE-EXAMINATION

MR. HUGHES: Q. Did either of them at any subsequent stage? A. Yes.

Q. When? A. During the cross-examination of Mr. Adler - and my recollection is that it was on the Friday although I do not recall what the date was of the Friday - but Mr. Adler made reference in the course of his evidence to a discussion with Mr. Millner concerning the exchange of preference shares for preference shares. During the giving of evidence I, turned to Mr. Donohoo and asked him if he knew anything of this and at that stage he informed me there had been a conversation in December, and that was the first time I was aware that the conversation had taken place - the previous December, December 1973.

(Witness retired)

GLEN LAWRENCE ALBERT DONOHOO
On former oath:

MR. HUGHES: Q. Mr. Donohoo, I want you to cast your mind back to December 1973. During that month did Mr. Millner give you a document, or photostat document of any kind that you can recall? A. He did.

Q. Would you have a look at Exhibit 89. Have you seen that document before? A. I had.

Q. When I say "that document" I mean not necessarily that one but a facsimile in photostat form? A. I have.

Q. When did you first see it? A. I would say it was about 17th December 1973.

Q. Did you, as far as you can recall, have any conversation with Mr. Millner on the subject matter of that document? A. I did.

Q. What conversation took place? A. Mr. Millner stated he had met with Mr. Adler who had put this proposition about FAI making the takeover bid for the ordinary and preference shares that FAI did not own in Cumberland Holdings Limited.

Q. Did Mr. Millner make any request to you in relation to that matter? A. He did.

Q. What did he ask you to do? A. He asked me to prepare a screed as to what effect this would have on Soul Pattinsons' holdings in Cumberland Holdings.

Q. At the time when you first saw a facsimile of Exhibit 89 was the handwriting in existence? A. It was.

Q. On the top right hand corner? A. It was.

Q. Did you prepare a screed? A. I did.

Q. Did you then give it to Mr. Millner? A. I did.

Q. Is that document in your possession at the moment? A. Not at the moment, no.

Q. Have you sent for it? A. Yes.

Q. Have you any anticipation as to when it might arrive? A. I would expect it to be here in the next five minutes.

(Document showing details of supporting shareholders tendered; admitted without objection and marked Exhibit 91).

(Mr. Hughes sought and was granted leave to file in court a notice of intention to appear on the petition by Mr. David W.T. Carlin and also sought

and was granted leave to appear on behalf of Mr. Carlin.)

(Holding company share register tendered; together with summary; admitted without objection and marked Exhibit 92).

(Bundle of correspondence produced on subpoena by solicitors for the Workers' Compensation Commission tendered; admitted without objection and marked Exhibit 93.)

Q. You mentioned you prepared a screed. Would you have a look at that document. Is that the document you prepared at Mr. Millner's request in relation to Mr. Adler's takeover proposal? A. It is.

Q. It bears a date. Is that the date upon which you completed the preparation of the document? A. It was.

Q. 19th December 1973? A. Yes.

(Abovementioned document tendered; admitted without objection and marked Exhibit 94).

CROSS-EXAMINATION

MR. BAINTON: Q. There is one expression in that document "N/L". I take it it is "not listed"? A. Could I have a look at it (Witness peruses Exhibit 94.) Yes, I would agree with that.

Q. Would you think it would be a fair description of your habits so far as records of documents to describe them as meticulous? A. I think that would be a reasonable comment.

Q. You appear even to keep luncheon invitations? A. Occasionally.

Q. You keep filed away anything you regard of importance? A. Yes, I think that would be fair comment.

Q. This particular document Exhibit 94 came into existence because of a discussion you had with Mr. Millner, a request from him? A. Yes.

Q. The discussion must have been at least of some length to be reasonably specific for you to have prepared a four-page document? A. Mr. Millner explained to me the proposition that was put to him by Mr. Adler and it was my job then to prepare the necessary information in order to assess a proposition put by Mr. Adler.

Q. You certainly had more than that photocopy of Adler's report and the few words on top of it, the account from Mr. Millner of what the discussion was? A. I don't understand the question.

Q. We have been told Mr. Millner gave you a piece of paper and I think you still have it in front of you? A. Yes.

Q. Exhibit 91 or 90? A. 89.

Q. You could not have prepared Exhibit 94 if you knew no more than is on that piece of paper? A. Yes I could have.

Q. With the aid of Exhibit 89? A. Yes, because the terms of the proposed takeover offer by Mr. Adler are quoted up the top.

Q. No more than that? A. The terms of the takeover offer are written out by Mr. Millner.

Q. You say you could have prepared it with no more information than is on that piece of paper? A. In fact I did.

Q. Without the benefit of any expansion from Mr. Millner of those few words written in handwriting on the top of Exhibit 89? A. We had a general discussion. As long as I knew the terms of the takeover offer contemplated by Mr. Adler that was all I would need to assess the situation from Soul Pattinsons' point of view.

Q. There is a lot more in this document than an assessment on just those few words? A. I have not read the document for a long long time so I could not answer that.

Q. Do you recollect whether or not you did have a

discussion of any length at all with Mr. Millner? A. Mr. Millner certainly sent me a copy of this letter together with the details. He rang me and told me he had had a discussion with Mr. Adler and those are the terms of the takeover in contemplation at the time, and that is all I needed.

Q. He used words to that effect, it was a takeover in contemplation at that time? A. I have it in the document, Mr. Bainton.

Q. Give me the best of your present recollection? A. Without referring - well, he said they were proposing to make a takeover bid for the shares in Cumberland that they did not already own and that document has been prepared on that basis.

Q. Has it? A. Yes.

Q. When did you last look at the document Exhibit 94? A. I just looked at it a moment ago when Mr. Hughes asked me to identify it.

Q. When did you last read it? A. I would say some months ago.

MR. BAINTON: Q. You would have realised, at least since the conclusion of your cross-examination, I suggest, that it would have been most helpful to the petitioner's case to be able to establish that there was a plan to make a takeover offer for the minority shares in Cumberland formulated before the letter from the Stock Exchange in September. A. Could I have that again?

Q. You would have realised, from, atthe very latest, the conclusion of your cross-examination in this matter it would have considerably assisted the petitioner's case to be able to establish that there had been a takeover offer for the minority shares in Cumberland Holdings Limited by FAI or somebody associated with Mr. Adler, formulated before the letter from the Stock Exchange in September threatening de-listing? A. I do not think I had quite appreciated the significance of it until evidence was given during this case.

Q. When did the appreciation of the significance of that

come to you? A. When Mr. Adler was giving evidence during the course of this case.

Q. You have been in court when Mr. Thynne gave evidence a few moments ago? A. Yes.

Q. You heard what he said as to the account you gave? A. I did.

Q. That you ended up in the account by saying to him that it was your belief that the cessation of the supply agreement back on 1st July, 1974, was part of a plan to get control of the minority shares? A. I believe that to be the case.

Q. That is a view you had since some time, if Mr. Thynne's date is correct, in or before October this year? A. Yes.

Q. Did that not set you thinking at all as to whether the date might have been even earlier than 1st July? A. Yes.

Q. Didn't your discussion with Mr. Thynne which led to your statement that he has identified lead you to think that it might be beneficial to the petitioner's case at all to prove that the plan was formulated before 1st July, which is the date of the letter calling off the supply arrangement, or to be able to reinforce what you were saying in that document or some further evidence? A. I had not considered this matter of the takeover until the time Mr. Adler gave his evidence, and I was then asked by our counsel as to whether this in fact had taken place, and this was when I was able to produce these documents that I have now.

Q. Do you say you had forgotten about these earlier matters or do you say you regarded them as irrelevant? A. I would say I had overlooked it, yes.

Q. What file was this produced from this morning, do you know? Where did you have it? A. In my office.

Q. Presumably your filing system? A. I have many files in Cumberland Holdings.

Q. For instance, which was the file from which you were able to produce the invitation to have lunch with Mr. Adler? A. Actually I do not think that was kept in the Cumberland file. I think, as a matter of fact, it was kept in a special file so we could use it as a sample for that type of thing. It was not in the Cumberland file at the time.

Q. Was this document in the Cumberland file? A. It was.

Q. You say, do you, you did not personally look through your Cumberland files before you came to give evidence in this case? A. I did look through my files.

Q. You looked at this document? A. I probably would have gone through, yes. That would have been on my file, yes.

Q. It adverted to the fact that in that document dated 19th December, 1973, you have been asked to evaluate a share exchange offer? A. That document does avert to that, yes.

Q. It must have come to your notice when you looked at your file and saw it? A. Yes, but my files are quite voluminous - enormous in fact.

Q. You had to do no more than read the first six lines of this piece of paper for this subject matter to have been brought quite clearly to your attention? A. Yes.

Q. Would you like to look at it and tell me whether you agree with that? The first six lines include the heading and the date, and that is all I want you to read? A. Yes.

Q. Do you agree with my comment, that that is all you had to look at? A. Yes, but I didn't realise the significance of this letter at the time until, as I said, Mr. Adler's evidence started to come out and I was asked about these particular matters.

Q. You say that you just did not realise the significance? A. I had not produced it because my files were so voluminous that I couldn't bring everything out.

Q. Your reason for not producing it is that though you looked at it you did not think it had any significance or relevance? A. At the time I think that would be fair comment.

Q. Notwithstanding that you had had discussions with your solicitors in the course of which you took pains to assert, for a variety of reasons, that you thought that the cessation of the supply agreement with Washington H. Soul Pattinson was part of the plan to get the minority shareholding? A. I thought that was part of the plan, yes.

Q. Would you have a look at what is written on page 4, just to refresh your own recollection? A. Yes.

Q. Your company, of course, as you would have known at the time, had more than 10% of the minority shareholding, more than 10% of the ordinaries? A. I don't think so. I think we only had about 7% - 10% of the balance of the minority, not 10% of the total issued capital.

Q. More than 10% of the minority? A. Of what?

Q. Of those shares controlled by FAI, or companies associated with it? A. Let me get this clear: 10% of the remaining 28%?

Q. Yes. A. That would be 2.8 of the total capital, and we had in excess of that, yes.

Q. You have always known that? A. Yes. I have not - yes.

Q. So there was no possibility of any compulsory acquisition of those shares ever in your mind? It could not occur against your will? A. Could he not use - could not a person making a takeover offer use a separate vehicle altogether so that their own shares do not come into the calculation of the 90%?

Q. No. You would have known that, surely? Have you not examined the provisions of the takeover code in the last few years? A. Has that been changed in the last couple of years.

Q. Not, so far as my recollection goes, for five or six years? A. I would certainly be guided by what you say, Mr. Bainton.

Q. By "takeover code" I am talking about the provisions of the Companies Act? A. Yes, I follow.

Q. You would have known that, surely, that Washington H. Soul shares were never at risk of compulsory acquisition by the majority shareholder or anyone associated with it? A. No, that is not true. I must be in error, but I thought that it was possible for somebody who had an interest in a company to use another takeover vehicle which could be used to acquire their existing shares in that particular company that is being taken over.

Q. Have you always held that view? A. I have, yes. I have had no reason to look into it for quite some time.

Q. Did you think that there was some prospect of a compulsory acquisition of Soul's shares in the company? A. Could I have the question again?

Q. Did you, when you prepared the document which is now Exhibit 94, think there was some possibility of a compulsory acquisition of Soul's shares? A. Mr. Bainton, in view of the last paragraph in this screed, I must have thought that at the time.

Q. There is one other explanation, isn't there, I suggest to you, of the last paragraph, namely that what you had been asked to evaluate was an offer to Washington H. Soul only to exchange some of its ordinary shares for the shares in FAI? A. No, not at all, because I say here - may I read the paragraph - "If Adler wanted to, he could steam-roller a takeover through for the ordinary shares as our holding is only 6.6% of ordinary capital. In this case, he may not make an offer for the prefs. Adler's interest in Cumberland is through a subsidiary of FAI, thus ensuring the success of any offer".

Q. Meaning, I would suggest, that it passed through your mind that if your company would not exchange the shares as requested it could perhaps be compelled to do so by a general takeover offer? That is what you had

in mind? A. Yes, because of my belief on the provisions of the Companies Act.

Q. A general takeover offer that was not in contemplation at that stage but could come about if you knocked back the request? A. No, I would not. I did not take it that way. No.

Q. So that even though you had the view back in December, 1973, that a takeover offer for all the minority shares was in contemplation and that Mr. Adler might come and steam-roller it, to use your phrase, you completely forgot about it until you heard Mr. Adler giving evidence in the course of this case? A. Firstly might I say that the heading of my screed to Mr. Millner says "FAI Insurances Limited suggested takeover offer of Cumberland Holdings Limited" and I then go on to say "Mr. Adler has suggested to you that FAI make a takeover offer for Cumberland". If Mr. Adler were making an offer for a share exchange I would have put that in. My words are quite clear. They cannot be interpreted the way you are interpreting my words.

Q. You have a clear recollection of these events now, apart from the document, have you? A. When you say a clear recollection, my recollection of course is refreshed by reading this document that I prepared at the time.

Q. Your recollection with the benefit of that document is now rather different from what it was when you were being cross-examined, isn't it? A. I don't know. I could not answer that.

Q. I withdraw that. I think what I am looking at relates to a later point of time. May I take it you have no other explanation to offer for the failure to have this material brought forward earlier than that you forgot about it? A. That is quite correct, until my solicitors asked whether there was any such offer and I then produced these documents.

Q. Notwithstanding that you had, in preparing yourself for the case, come across that document and realised what it was about? A. It is only one of many thousands

of documents, and I was probably in error in not appreciating the significance of it.

Q. It would have, of course, no significance if it simply dealt with a proposal for exchange between FAI and Washington H. Soul Pattinson and no-one else? A. It is quite clear in its context. It says "Suggested takeover of Cumberland Holdings Limited".

Q. Was that written there because of what you understood Mr. Millner to be telling you, or are you using his words? A. What he conveyed to me. Mr. Bainton, if I could read this possibly my percentages I have worked out have been on the basis of the increased number of shares issued.

Q. If there is anything there that would help you, please do? A. It is too involved.

Q. I think you might find that those figures will support what I have been putting to you? A. No, I would disagree with you because where I say here on page 3, under paragraph 7, "Cost of Takeover", I have got "Issued shares of Cumberland" and that is a total issued share capital of Cumberland Holdings Limited, and I have got "Proposed takeover" and then I have the number of FAI shares that we have to be issued in regard to the whole share capital of Cumberland Holdings Limited.

Q. Including FAI's own shares? A. Yes I have.

Q. That is an odd calculation? A. If they used this other vehicle of which we spoke for their own shares it would have taken into account in the 90%, and obviously my impression of the provisions of the takeover is incorrect.

Q. You were trying there to determine what ultimately, if Soul's accepted the offer, would be its percentage in an enlarged FAI shareholding? A. I have not had a chance to exhaustively examine the document. I cannot comprehend it all in a matter of -

Q. I am not trying to test your recollection. I will let you have the document back? A. These figures make it perfectly clear that I had prepared this screed on

the basis that FAI was making a takeover bid for the whole of the capital of FAI, because I show a number of -

MR. HUGHES: You said "FAI".

WITNESS: I beg your pardon, I am sorry, Cumberland, because I show the number of FAI shares that would have to be issued in satisfaction of the whole of the issued capital - the whole of the ordinary issued capital of Cumberland, also the preference, and then added on the number of shares and I have calculated the number of shares to be issued. I then worked out the amount of the capital issued to acquire it and then take the present FAI issued capital and I then add on the total amount of capital issued for takeover and it is quite plain this is the basis of the full takeover of the ordinary and preference capital of Cumberland Holdings Limited.

Q. Would you explain to me how that calculation would be appropriate when FAI already, indirectly through its subsidiary, held 72% of the capital? A. I have been involved in a takeover earlier -

Q. Let me remind you of one other thing: your assumption of that calculation was not that some other vehicle was going to make a takeover offer, but that it was going to be by FAI? A. That is quite correct.

Q. How can it, would you explain to me, in making a takeover offer for the 72% it already has - A. Apparently I am in error in believing that FAI could form a new subsidiary as the takeover vehicle and then when it acquired the shares that that new subsidiary owned - the new subsidiary acquired from Fire and All Risks Insurance, I was under the impression that those shares would form part of the 90% required to enforce the compulsory acquisition provisions.

Q. You have not seen the point of what I am putting to you. Your calculations assume a share issue by FAI? A. Right.

Q. It therefore does not assume that some other vehicle is proposing to make a takeover bid? A. I appreciate that point.

Q. How, can you explain to me please, could you believe that FAI would be making a takeover offer for 72% of the capital it already has? A. I take the point. I am in error in the way in which this has been done, but it has been based on the whole of the issued capital.

Q. It seems to have contained some quite fundamental misconceptions? A. No, it is a mistake in interpretation on my part.

Q. That is much different to - A. It is certainly a mistake on my part.

Q. Do you think you might have made some more misconceptions as to what you were doing? A. No. After all, I am not a lawyer. It was my interpretation at the time.

Q. The error there is not a legal error, it is a fundamental accounting error, if what you have told me is correct? A. Yes, that could be so.

(Witness retired)

MR. HUGHES: That is all the oral evidence the petitioner proposes to call.

MR. BAINTON: Your Honour will recollect that Norton Smith were asked to evaluate the takeover offer from the legal point of view and that they were also brought into the construction of some minutes. There is some correspondence relating to that and I tender it.

(Letter from Cumberland Holdings Limited to Mr. Walker dated 4th November, 1974, letter from Norton Smith to Mr. Adler dated 13th November, 1974, another letter similarly addressed dated 18th November, 1974 with enclosure which is copy letter from Norton Smith to secretary of Cumberland Holdings Limited, dated 25th November, 1974, letter dated 19th December, 1974 and letter from Mr. Donohoo to chairman of directors of Cumberland Holdings Limited dated 19th December, 1974, tendered and marked Exhibit 95.)

(Letter from FAI to Cumberland Holdings Limited

dated 20th November, 1974 tendered and marked Exhibit 96.)

(Letter from Sinclairs to Mr. Donohoo dated 21st November, 1974, tendered and marked Exhibit 97.)

(Copy letter with enclosure dated 5th December, 1974, tendered and marked Exhibit 98.)

(Minutes of meeting of directors of Cumberland Holdings Limited 17th July, 1974 tendered and marked Exhibit 99.)

(Minutes of meeting of directors of Cumberland Holdings Limited, 14th August, 1974, tendered and marked Exhibit 100.)

(Minutes of meeting of directors of Cumberland Holdings Limited, 7th March, 1975 tendered and marked Exhibit 101.)

(Minutes of meeting of directors of FAI Insurance 18th November, 1974, tendered and marked Exhibit 102.)

HIS HONOUR: Mr. Atkinson's notes, you will remember he was cross-examined on two portions which have been admitted and there was some suggestion you wished to argue a case for their whole admission.

MR. BAINTON: I decided ultimately it did not justify the time. There is one other document and that is a Stock Exchange ordinaries index throughout the period.

HIS HONOUR: That can be added at any time.

(Luncheon adjournment.)

(Counsel addressed.)

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
No. 707 of 1975

CORAM: BOWEN, C.J. in Eq.

Tuesday, 4th May, 1976.

CUMBERLAND HOLDINGS LIMITED & COMPANIES ACT

JUDGMENT

THE PROCEEDINGS

HIS HONOUR: Washington H. Soul Pattinson & Co. Limited (hereafter called "Souls") on 2nd April 1975 presented a petition to wind up Cumberland Holdings Limited (hereafter called "Cumberland"). Cumberland was incorporated in New South Wales on 10th February 1960. Initially it carried on business as a finance company, but this business was discontinued. Since 1969 it has conducted nursing homes. In the latter part of 1974 it acquired two private surgical hospitals. It has an issued capital of 757,536 ordinary stock units of 50 cents each fully paid, 303,768 8% cumulative preference non-participating stock units of 50 cents each fully paid, and 300,000 8% cumulative redeemable preference non-participating stock units of 50 cents each fully paid. Its ordinary stock units are listed on the Sydney Stock Exchange.

Souls is a substantial holder of units in Cumberland. It acquired its holding during 1970-1971. On the presentation of the petition it held 46,000

ordinary stock units, 183,520 8% cumulative preference non-participating stock units and 118,000 8% cumulative redeemable preference non-participating stock units and was the beneficial owner of a further 4,000 ordinary stock units held by a Mr. Donohoo, a director of Souls, who was also a director of Cumberland. The other directors of Cumberland were Mr. Adler and Mr. Belfer.

The major holder of units in Cumberland is a company named Fire & All Risks Insurance Company Limited (hereafter called "Fire & All Risks") which is a wholly-owned subsidiary of FAI Insurances Limited (hereafter called "FAI"). Mr. Adler was chairman of directors of each of these companies. Mr. Belfer was a director of each. Both were the holders of shares in FAI. Prior to July 1974 Fire & All Risks was the holder in Cumberland of 545,748 ordinary stock units, but no preference shares of either class. In July 1974 it increased its holding to 603,298 ordinary stock units, 9,428 8% cumulative preference non-participating stock units and 128,700 8% cumulative redeemable preference non-participating stock units. The holding by Fire & All Risks of ordinary stock units in Cumberland was, by its July acquisition, increased from approximately

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72.04% to approximately 79.63%, thereby producing from the Sydney Stock Exchange a letter calling on Cumberland to show cause why it should not be de-listed. It is the circumstances surrounding the acquisition of these shares, the approach by the Exchange, and the subsequent making of a take-over offer by FAI to the minority stockholders of Cumberland that have given rise to the present petition.

Cumberland on 2nd April 1975 was solvent and trading profitably. The grounds on which the petition is based relate to the conduct of its affairs. They are:

(1) That Mr. Adler and Mr. Belfer, being directors of Cumberland, have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole;

(2) That they have acted in the affairs of Cumberland in other ways which are unfair or unjust to other members;

(3) That the affairs of Cumberland are being conducted in a manner oppressive to one or more of the members;

(4) That it is just and equitable that the company be wound up. Grounds (1) (2) and (4) are based on the provisions of s.222 of the Companies Act, 1961,

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as amended; ground (3) on s.186. As originally framed the relief sought was for an order for winding up or, alternatively, an order that Fire & All Risks purchase the units of the other members of the company at $1.25 for each ordinary stock unit and 50 cents for each of the units comprising the two classes of preference stock units.

On 4th December 1975 the petitioner obtained leave to amend. In lieu of the above order to purchase, the petitioner substituted a claim for an order that Cumberland, or, in the alternative, Fire & All Risks purchase the ordinary and preference units of the petitioner and of such other members of Cumberland as to the Court seems fit at the price of $1.70 (or at such other price as to the Court seems fit) for each ordinary stock unit and at the price of 50 cents for each of the units comprising the two classes of preference stock units, and an order that the capital of Cumberland be reduced accordingly. It added a claim regarding dividends, should an order be made for purchase.

When leave to amend was granted counsel for the respondent was addressing. The grounds on which an order for purchase by Cumberland is sought are similar to the grounds for an order that Fire & All

Risks purchase. However, no issue as to the capacity of Cumberland to purchase, or the advisability of its doing so, had been canvassed during the hearing. I did not hear argument on the suggested purchase by Cumberland but indicated that if, after I had given judgment, it appeared from my reasons that it was appropriate, the petitioner might seek to canvass that issue. I would then consider an application to allow Cumberland and, in turn, Souls, to call evidence on the issue, the costs relating to that matter to be dealt with separately. The costs of and occasioned by the amendment were ordered to be paid by the petitioner.

Notices of intention to appear at the hearing to support the petition were filed by 59 persons holding 48,640 ordinary stock units and 44 persons holding 139,400 preference stock units, joint owners of shares being treated as one person in arriving at these figures. Counsel for the petitioner announced his appearance for these stockholders. It was noted they appeared at their own risk as to costs.

THE FACTS

In December 1973 Mr. Adler formed the idea that it was desirable that FAI or Fire & All Risks acquire the minority stockholders' interests in

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Cumberland. He communicated with Mr. Millner, Chairman and Managing Director of Souls, and asked him to call and see him, which Mr. Millner did, at the offices of FAI on 14th December 1973. Mr. Adler then put to Mr. Millner a proposition which would have involved a take-over of the ordinary stock units of Souls in Cumberland on the basis of one FAI ordinary share for two Cumberland units, and the preference stock units on the basis of one 8% preference share in FAI in exchange for one Cumberland unit. At this meeting Mr. Adler gave to Mr. Millner a copy of his chairman's address to the shareholders of FAI dated 6th December 1973. Mr. Millner, when giving evidence, produced a copy of this document with his handwritten notation on it of the offer for the ordinary and the preference stock units. Mr. Millner said to Mr. Adler that he did not think his colleagues would be interested but in the event of Souls agreeing, which was unlikely, he would get in touch with him. On returning to his own office Mr. Millner asked Mr. Donohoo to let him have a report. Mr. Donohoo then set forth, in a document which found its way into evidence, the proposal, the reasons for and against it, and a recommendation against its acceptance. Mr. Millner discussed the proposal with his

co-directors but nobody was enthusiastic. He did not ring. Some weeks later Mr. Adler rang him and he then told Mr. Adler that Souls was not agreeable to the offer.

I have given this account of the transaction, because it appears to me from the evidence to be the way in which it occurred. I should mention that Mr. Adler in evidence gave a different account. He produced from his files a copy of a letter dated 23rd January 1974 addressed to Mr. Millner in which it is stated that he would like to confirm a conversation of even date, and in which he puts a proposal as follows:

> "I would very much appreciate your agreement to exchanging your 8 per cent preference shares in Cumberland Holdings Limited for the said FAI preference shares. The basis of the exchange would be one-for-one, and would involve you in no profit or loss."

Mr. Adler's evidence was that this letter was sent, and that not long after he had a telephone conversation with Mr. Millner about its contents, the effect of which was that Mr. Millner indicated a decision had not yet been reached and that he would be putting it to his next board meeting. Mr. Adler later spoke again to Mr. Millner on the telephone and Mr. Millner stated Souls was not interested.

Mr. Adler did not deny Mr. Millner came to his office in December 1973 but did deny the account given by Mr. Millner of what was said and the suggestion that he had made any take-over offer in respect of ordinary stock units. Mr. Millner denied having ever received the letter of 23rd January 1974. He said it could not be correct in referring to a conversation of "even date", as he was not in Sydney then. I think it is possible that this letter - as proved to be the case in another instance of a copy letter produced from the records of FAI - although it was prepared at the time, was not in fact sent. It may be that Mr. Adler, in recalling conversations with Mr. Millner, is confusing the conversations with those of which Mr. Millner has given his account. I find some support for this view in the terms of the minute passed by the Board of FAI on 3rd April 1974 in which it is recorded:

> "The take-over of Cumberland Holdings Limited was again discussed and it was resolved not to proceed."

If what was under discussion was only an exchange of preference stock units with Souls, one would have expected this minute to be differently worded. When this was put to Mr. Adler, he could only claim that it was an inaccurate minute.

In my view Mr. Adler had formed the idea in his mind as far back as December 1973 of taking over the minority stock holders in Cumberland. However, I accept that by April 1974 the taking of any active steps to achieve this was abandoned.

Fitting in with the pattern of acquiring outside stock holdings in Cumberland was the idea, consistently carried into effect, that Fire and All Risks would "mop-up" any small parcels of Cumberland units from time to time coming on to the market. It appears that at one time the auditors of FAI complained about the difficulties caused in the consolidation of the accounts of the parent company by the acquisition at different times during the year of small parcels of Cumberland units. It thereafter became the practice for Mr. Adler or members of his family or one of his family investment companies or some other company under his control to buy these small parcels of units as they came on the market. The intention was that at some convenient time the units so accumulated would be transferred to FAI or its subsidiary.

It appears that Mr. Adler formed the view that the convenient time to transfer these units had arrived at about the end of the financial year

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ending 30th June 1974. On 11th July 1974, at a meeting of the board of FAI following a decision to allocate funds to enable the company to re-enter the share market, Mr. Adler said words to the effect:

> "Well, we have now taken this decision to go back in to the purchase of stocks and shares again to the extent I mentioned. You might think that this might be a convenient opportunity to consider purchasing the Adler interests in Cumberland."

He indicated that the ordinary stock units would be available at $1.25 each and the preference stock units at 50 cents each. Upon the suggestion of either one of the other directors, or himself, it appears that Mr. Adler then left the meeting and the other directors discussed the proposal. Mr. Atkinson and Professor Wilson, two of the other directors, have given evidence that they arrived at the conclusion that these were fair prices from the point of view of FAI. They appear to have done so having regard to the earnings, asset-backing and prospects of Cumberland.

The Stock Exchange market for Cumberland ordinary stock units, which appears to have been supported mainly by Mr. Adler, had for some months before 11th July 1974 been thin. On 24th June 1974 Mr. Adler placed a selling order on behalf of Fire

& All Risks for 1,000 Cumberland ordinary stock units at $1.50 through the stock-brokers, Messara & Co. The last previous sale was on 6th May 1974 at 75 cents. On 28th June there was a buyer at $1.25. On 2nd July Mr. Adler placed, through Messara & Co., a buying order for Cumberland stock units at $1.25, and sales in fact took place on 2nd and 3rd July, and again on 11th, 12th and 16th July, at this figure. The purchases on 2nd, 3rd and 11th July 1974 were by Falkirk Properties Limited. This company has an issued capital of 2,295,000 ordinary shares of 50 cents each fully paid. Of these, 1,004,690 are held by FAI, 278,400 are held by two of Mr. Adler's family companies, 2,400 are held by Mr. Adler personally, and 12,000 are held by a family company of Mr. Belfer. Mr. Adler is chairman of directors. Falkirk was one of the sellers of Cumberland shares at the price of $1.25 to Fire & All Risks on 11th July 1974. The purchases on the 12th and 16th July were by FAI.

The fact that Mr. Adler's offer, conveyed to the Board of FAI on 11th July 1974, was identical with the current Exchange market for the ordinary stock units was the subject of comment at the Board meeting, but was quickly placed on one side by

Professor Wilson and Mr. Atkinson, who did not regard the market as a real one since the prices, to their knowledge, had been placed "on the board" by Mr. Adler. To this extent it may be said that Mr. Adler's activities did not mislead his own board of directors at FAI. However, by placing that figure for Cumberland ordinaries on the board Mr. Adler at least went some distance towards clearing the way for the directors of FAI to adopt this figure in the purchase from him and his family and his family investment companies. Furthermore, he made it possible, if later the acquisition by FAI of these shares were ever challenged, to refer to the Exchange market value at the time as being in line with what was paid to him. As events turned out, he did on more than one occasion seek to rely upon it.

Mr. Adler was aware at the time of this acquisition by Fire & All Risks on 11th July 1974 that the holding of Fire & All Risks, which previously stood at about 72% of the ordinary capital of Cumberland, would be increased to a holding of about 80%, and that this, being in excess of 75%, would be in breech of one of the Listing Requirements of the Australian Associated Stock Exchanges. On 23rd July 1974 a letter was written by FAI to the Exchange, informing

it of the acquisition of the additional units. There was some further correspondence between FAI and the Exchange relating to the shareholders' register and the break-down as between ordinary and preference units, and on 4th September 1974 the Exchange wrote a letter to Cumberland calling attention to the fact that, by reason of this recent acquisition of additional units by Fire & All Risks, bringing its holding of ordinary units to a figure in excess of 75%, Cumberland was now in breach of the Listing Requirements, and calling on them to have the holding reduced to 75% if they wished to continue to be listed. FAI directors met on 6th September 1974. They decided that the holding in Cumberland would not be reduced by Fire & All Risks. On 10th September 1974 the board of Cumberland met and decided to write to their stock holders. On 13th September 1974 Cumberland wrote to its stock holders stating that Fire & All Risks was not prepared to divest itself of any of its units, and that an offer would be made for the minority units.

It is not entirely clear who suggested the making of the take-over offer in respect of the minority stock units. Mr. Atkinson thinks that at the meeting of FAI directors he was almost certainly the one who

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raised the matter. Professor Wilson says that to the best of his recollection he suggested that they should seriously consider making a take-over offer for the minority stock holdings. Whoever made the suggestion, steps were taken to frame an offer. Mr. Atkinson, Professor Wilson and Mr. Adler took the view that until the FAI group accounts were available, they could not fix the price to be offered. These accounts did not become available until the latter part of September, some time before the directors of FAI signed their report which is dated 3rd October 1974.

Mr. Atkinson was aware of the Listing Requirements regarding the effect of acquisition of shares in a company the subject of a take-over offer by certain interested persons within a periol of three months prior to the announcement of the take-over offer. Section 5(10)(e) provides an offeror shall not make arrangements to purchase shares of the offeree when an offer is reasonably in contemplation if such arrangements to purchase have attached special favourable conditions which are not extended to all shareholders. Section 5(12) provides that if an "interested" person has dealt in the shares in the offeror and/or offeree during the period

commencing three months prior to the announcement of the offer and ending at the date of the Part A Statement, the details of the transactions, including dates and prices, must be stated in the offer document. However, Mr. Atkinson was not concerned with the question of disclosing the acquisition on 11th July, because in his view more than three months would have elapsed by the time the accounting information was available. In the event, the draft takeover documents, including the Part B Statement to be made by Cumberland, were forwarded to Mr. Donohoo from FAI under cover of a letter dated 21st October 1974 signed by Mr. Adler. The draft Part A Statement contained an assurance that "none of the directors of FAI or Cumberland or any person acting in concert with any of them had dealt in the shares of FAI or Cumberland during the period commencing 3 months prior to the announcement of the offer and ending as at the date of this Part A Statement delivered by FAI to Cumberland (that is, November 1, 1974)". On 1st November 1974 a Board meeting of FAI was held. The directors approved of the Part A Statement, and it was signed for delivery. On 4th November there was a Board meeting of Cumberland. The Part A Statement from FAI was tabled and

discussed. There was the question of the making of the Part B Statement, and the question of what recommendation, if any, the Board of Cumberland should make. Mr. Donohoo requested that Cumberland appoint a firm of merchant bankers or accountants to evaluate the offer. He formulated this as a resolution, but it was defeated by a vote of two to one. He then moved that Norton Smith Solicitors be appointed to advise on the legalities of the matter, and this was agreed to.

On 14th November 1974 Mr. Donohoo wrote to Cumberland, stating that the offer was, in his view, an unsatisfactory one, calling attention to the fact that the chairman and his interests had received $1.25 for their ordinary stock units and pressing again for independent advice to be made available to Cumberland minority shareholders. At a meeting of the board of Cumberland on 15th November 1975 the draft Part B Statement was considered. Paragraph 1 (a) of the draft forwarded by FAI stated that since two of the three members of the Board were also directors of the offeror corporation, the Board did not wish to make a recommendation to stockholders as to acceptance or otherwise. This paragraph was amended. In its final form it stated that two of the three

members of the Board, namely Messrs. Adler and Belfer, were also directors of the offeror corporation and were in favour of the take-over scheme. Mr. Donohoo was not in favour of the scheme on the grounds that he considered the scheme was not in the best interests of stockholders to whom the offers were being made. For the above different reasons the Board of Cumberland did not accordingly desire to make a recommendation to shareholders of acceptance of take-over offers made, or to be made, by FAI under the scheme. Paragraph 1(b) was adopted in the form submitted in the draft forwarded by FAI apart from a slight verbal alteration. It stated the Board considered it desirable to again draw the attention of stockholders to the fact that the Sydney Stock Exchange had already indicated that it would consider the delisting of Cumberland unless the FAI group reduced its stock holding (which FAI had indicated it was unwilling to do). Consequently if stockholders of Cumberland did not accept the offers and Cumberland was subsequently delisted, stockholders might find considerable difficulty in disposing of their holdings at a later date. At this Board meeting on the 15th November 1974 various motions were put by Mr. Donohoo but lapsed for want of a seconder.

One of these was that Mr. Walker, of the firm of Norton Smith, be instructed to advise FAI that an offer for minority shareholdings in Cumberland for less than the $1.25 for ordinaries and 50 cents for preference units paid recently was in contravention of the Listing Requirements, section 5(10)(e). Another was that a leading merchant banker or an independent firm of chartered accountants be retained to express an opinion on the adequacy or otherwise of the offer for the guidance of the minority stockholders. He had put forward a similar proposal on 4th November.

On 20th November 1974 the take-over document containing the Part A and Part B Statements and a letter of the same date signed by Mr. Adler, as chairman of FAI, commending the offer to stockholders, was duly despatched. On 21st November 1974 Mr. Donohoo sent a circular to ordinary and preference stockholders recommending to them that they do not accept the offer.

On 22nd November 1974 Mr. Adler signed a letter to the stockholders stating his capacity as chairman of FAI and also chairman of Cumberland, seeking to answer the criticism in Mr. Donohoo's circular, and supporting the offer.

On 27th November Souls sent a circular letter to the stockholders, also recommending that they do not accept the offer, and referring to the sale of the stock units of Mr. Adler and his family interests at $1.25 cash for the ordinary units and 50 cents cash for the preference units. Mr. Adler, in a circular dated 27th November 1974 signed by him as chairman of FAI, to the stockholders, sought to reply to this. Amongst other things he referred to the ruling Exchange prices when the sale of his family interests took place and to the fact that the Australian stock markets had taken a terrible "beating" since July. I shall have occasion later to comment upon these circulars.

Some interest had been taken in the offer by other persons than the stockholders of Cumberland, spurred to action perhaps by some activity of Souls. These persons included The Shareholders' Association and the Sydney Stock Exchange.

It is necessary to make some reference to the intervention of the Exchange. By letter from the Exchange to FAI on 27th November 1974 reference was made to the statement contained in the Part A Statement of FAI referring to the three months period and to Sections 5(10) and 5(11) of the Listing Manual.

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The Exchange claimed the three months period should run back from the first announcement on 13th September 1974. By letter of 28th November 1974 the company suggested it was a matter for their legal advisers. By letter of the same date Sinclairs, the solicitors for FAI, in a letter to the Exchange stated their advice to FAI and their view that the three months period ran backwards from 1st November 1974, this being the first point of time at which a price was fixed and the offer was announced at a board meeting of FAI.

On 4th December 1974 there was a meeting in the committee room of the Exchange, attended by Mr. Adler and Mr. Atkinson on the one hand, and Mr. Tilley and Mr. Curran, for the Exchange, on the other hand. It appears that at this meeting there was a long discussion about the acquisition of shares from Mr. Adler and his family interests and the relationship of this to the take-over offer. At one point Mr. Adler, when asked how the price of $1.25 for the ordinaries was determined, according to Mr. Curran, stated:

> "It was the market price. You should be happy with that, Mr. Curran. It was the market price."

to which Mr. Curran says that he replied:

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"Not if the party interested in the transaction had been actively involved in the market at that time."

Mr. Atkinson gave evidence that he recalled Mr. Adler, in response to a question as to how the price had been determined, saying that it was the market price. He did not recall his saying that Mr. Curran ought to be happy with that. He went on to say that he was concerned that what Mr. Adler had said was not a satisfactory answer. He said that he intervened to give the true facts to Mr. Tilley and Mr. Curran and explained to them that, although the market price was $1.25 at the time, the directors, aware of the way the prices had been placed on the board by Mr. Adler, had in fact arrived at the conclusion that $1.25 was a proper price to pay for the ordinary shares disregarding the Exchange figures.

After this meeting a letter dated 6th December 1974 was written by Cumberland to the Exchange. This appears to have been drafted by Mr. Atkinson and signed by Mr. Adler. It enclosed a copy of a letter in the course of being despatched to the shareholders in Cumberland withdrawing the take-over offer, and it discussed the way in which the price had been fixed for the purchase from Mr. Adler and his family interests, and sought to repel any suggestion that

Mr. Adler had been endeavouring to "rig" the market.

The enclosed letter, which was in fact sent out to stockholders on 6th December 1974, in addition to withdrawing the take-over offer, stated that FAI was exploring the possibility of replacing its take-over offer with an invitation to shareholders to sell.

On 13th December 1974 the solicitors for Souls wrote to Mr. Adler, as Chairman of FAI, stating Souls had been advised by senior counsel that it would be entitled to have Cumberland wound up under s.222(1)(f) of the Companies Act, 1961, as amended, and further stating unless they had a written undertaking within fourteen days that within a further twenty-eight days a cash offer to all Cumberland stockholders at prices of $1.25 for ordinary units and 50 cents for preference units proceedings by petition for winding up would be commenced. By letter of 20th December 1974 the solicitors for FAI replied indicating no cash offer would be made and that they would obtain instructions to accept service.

In fact, FAI did not proceed with any invitation to Cumberland stockholders as foreshadowed in its letter of 6th December 1974. On the night of 24th and the morning of 25th December 1974 cyclone "Tracy" devastated Darwin. FAI was heavily involved

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in insurance in Darwin. For some time, particularly in January 1975, FAI was unable to form any reliable assessment of the extent of its losses. By early March, however, the directors of FAI considered they had sufficient information to make the usual half-yearly profit or loss statement to the Stock Exchange. FAI disclosed a loss of approximately $3,000,000. For the time being a cash offer by FAI was regarded by the directors of FAI as being out of the question.

It is necessary now to return to some events which took place in August 1974. On 7th August 1974 Mr. Adler placed an order through Messara & Company to sell, on behalf of Fire & All Risks, 10,000 Cumberland ordinary stock units at 70 cents each. This produced no buyers. On 19th August 1974 Mr. Adler placed an order through Messara & Company to buy, on behalf of Fire & All Risks, 25,000 Cumberland ordinary stock units at 50 cents each. There was no response. These activities, following so soon after the sale of Mr. Adler's interests on 11th July 1974, had the effect of setting a price on the board for Cumberland ordinary units at a greatly reduced figure from the $1.25 which he had received. Indeed, Fire & All Risks had, less than one month before, paid $1.25 for the shares of which it was now offering

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to sell 10,000 at 70 cents. If a buyer had come forward, this would have resulted in substantial loss, while serving no apparent countervailing interest of that company. The share market generally had dropped in the meantime. The movement of the all ordinaries index from 12th July to 7th August was a movement from 371.16 to 318.19 - a drop of 14.27%. From 12th July to 20th November it seems the drop was approximately 16%. Up to the time of these dealings in August the market did not drop by anything like 44% (70 cents) or 60% (50 cents), so that any suggestion that these prices were placed on the board to bring the quoted prices for Cumberland units into line with the falling prices on the Exchange is untenable. The explanation offered by Mr. Adler was that the offer to sell was a genuine offer to sell, that is, that he was looking for and, having regard to the size of the offer presumably expecting some buyers, and that the offer to buy was a genuine offer to buy. While it may be that the offers were genuine to this extent, that had there been buyers or sellers they would have been accommodated, it is impossible to believe that in the circumstances as they then existed it was actually anticipated that there would be buyers

and sellers. There never had been to any significant extent in the past.

For the petitioner other reasons are suggested for the setting of these prices and the offer of these large amounts of shares. The case put against Mr. Adler may perhaps be summarised in the following way: it is suggested that he had in mind a take-over of the minority stockholding as far back as December 1973; that he decided to off-load his own units and those of his family and family companies towards the close of the financial year ending 30th June 1974; that he set a price of $1.25 for ordinary stock units on the Exchange in order to secure or to support a purchase at this price from himself; that he realised the acquisition by Fire & All Risks would place the Exchange listing in jeopardy; that he realised this would precipitate some confrontation with the minority stockholders, with the possibility of some question of a take-over offer arising, and that he therefore moved on the 7th and 19th August to ensure that the market was brought back to a price between 70 cents and 50 cents; that when the threat of delisting came he promptly made it clear that Fire & All Risks would not remove the threat by selling any units; that he did this notwithstanding

Fire & All Risks had recently offered to sell 10,000 units; that he then arranged a take-over offer which the stockholders would be obliged to consider with the threat of delisting over their heads; that he and Mr. Belfer were able to control the position on the board of Cumberland and deliver it bound hand and foot; that when the take-over offer was made the dealings with Mr. Adler and his family interests which occurred on 11th July 1974 were not disclosed; that the decision to make the take-over offer was communicated to the stockholders on 13th September, less than three months after the transactions on 11th July, so that unless the actual making of the offer was delayed there would be an obligation to disclose it; that delay occurred and the offer was communicated on 1st November, which was just three weeks outside the period of three months; that the requirements of the Companies Act and of the Exchange are minimum requirements and the transactions on 11th July should, because of their materiality for stockholders, have been disclosed.

As against this, it is said that even if Mr. Adler had a take-over offer in mind in December 1973, this idea was abandoned by April 1974; that in June and July 1974 if he had still been intending to

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make a take-over offer for the minority units, he would never have increased the price on the Exchange in the way that he did and would never have sold his own shares at $1.25 on 11th July; nor would he have been party to recommending the payment of an increased dividend by Cumberland as the directors did in their report dated 4th September 1974; that it was more likely that he would have been seeking to maintain or reduce the dividend and to decrease the price on the board of the Exchange if he were contemplating making a take-over offer at an inadequate price; that it was Mr. Atkinson and Professor Wilson who suggested the making of the take-over offer for the minority stock units after the letter from the Exchange of 4th September 1974 was received, and that this was suggested as a matter of fairness to the minority stockholders; that Mr. Adler went along with this suggestion for the same reasons; that the purchase of the Adler interests on 11th July at $1.25 for ordinary stock units was not disclosed because it was considered to be irrelevant, it being said that Mr. Adler would have realised it would become a matter of public knowledge and debate if he proceeded with the take-over offer, because Mr. Donohoo, as early as 14th November had written to Cumberland,

calling attention to the transaction, and at Cumberland Board meetings had obtained acceptance of the principle that he would be entitled to circularise stockholders; that the fact Mr. Adler proceeded with the take-over offer and did so without mentioning the transaction of 11th July showed his innocence or, as it may be said, his virtue rather than his virtuosity.

Each of the incidents, taken by itself, has an ambiguous aspect. If they are taken together they do not in my opinion, make out any firm case against Mr. Adler in the sense that they do not establish he maintained and carried out a plan throughout. The suggestion that he did, and that each move was in furtherance of having his own units acquired for a good price and then endeavouring to squeeze the minority stockholders with the threat of delisting and acquire their units at an inadequate price, is a serious allegation. It is a possible inference from the facts but I am not satisfied on the evidence before me to draw that inference. What I think occurred was that Mr. Adler, for various reasons, would like to have acquired for Fire & All Risks or FAI the majority stockholding in Cumberland, particularly in exchange for shares in FAI; that he was

prepared, when the turn of the wheel furnished him with the opportunity, to seize that opportunity and mould it to his own best advantage. I think that the decision to make the offer in September 1974 did arise directly from the threat of delisting received from the Exchange in its letter of 4th September, as Mr. Atkinson and Professor Wilson stated in evidence. However, I think Mr. Adler saw the advantage in this turn of the wheel, and appreciated the pressure which would then be placed upon the minority stockholders to sell. What I do not infer is that he was deliberately causing the wheel to turn. His actions in August 1974 were ambiguous. A statement is in evidence showing details of quotations on the Exchange of Cumberland units for the period 1st November 1973 onwards. This shows quotations were consistently placed on the board in every month. This activity was carried out by Mr. Adler who had, at all events previously, desired to maintain the listing of Cumberland. It is fair to say that if Mr. Adler had not placed prices on the board during August, he would have been departing from his normal practice. What troubles me about these transactions is that he had by his own actions at that time virtually made delisting inevitable, the large and

unprecedented size of the parcels offered, and the extent of the drop in his quoted prices from the "real" price of 11th July 1974. I think Mr. Adler took the steps he did in August as a firm action to depress the price of Cumberland ordinary stock units on the board, not in furtherance of a specific plan to make a subsequent take-over offer, but at least as a precautionary measure which later he no doubt thought had turned out to be a wise one. Indeed, having regard to the course of events, including the correspondence from 23rd July onwards with the Exchange, I infer he did so in the knowledge that a threat of delisting was virtually inevitable and that minority stockholders would be vulnerable thereafter to some approach to sell or exchange their holdings. Mr. Atkinson and Professor Wilson were both unaware at the time, of these August transactions.

The evidence reveals another instance where Mr. Adler took advantage of a turn of the wheel. On 20th November 1974, the date on which the printed take-over was despatched, the stockbroking firm of Ian Potter and Partners informed Mr. Adler that there was available a substantial parcel (approximately 68,000) of FAI shares held by a United Kingdom holder, who had to dispose of them quickly. This

was referred to in evidence as the "distress" parcel. Mr. Adler consulted his co-directors in case some of them would like to acquire some of these shares. Mr. Atkinson decided to take 4,000 in the name of a family company, Tynedale Pty. Limited. Mr. Adler himself decided to take 64,000. On 21st November the 68,000 FAI shares were acquired at a price of 40 cents each. This was well below the price quoted on the Sydney Stock Exchange for FAI shares, which then stood at 57 cents. Mr. Adler said he thought it was the bargain of the century. The explanation given in evidence as to why the English holder would sell for this figure was that due to the operation of certain United Kingdom legislation the price of 40 cents Australian was worth more to him than the price of 57 cents Australian to an Australian investor.

Mr. Adler and his co-directors were criticised for not disclosing this transaction, either by supplement to the take-over documents or in one of the circulars which followed, in which the merits of the FAI and Cumberland shares were discussed. It was said, too, that this was a secret transaction. Neither of these criticisms is wholly sound. The transaction was expressly entered into upon the basis it would be subject to crossing on the Melbourne

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Exchange. It occurred, although very close to the despatch of the take-over offer, after it had been sent out. It would have been somewhat confusing to shareholders to have proceeded to recount what had occurred, and to give an explanation of it. The general burden of what would have needed to be said was that the price of 40 cents paid in these circumstances to the United Kingdom holder was not disadvantageous to him if compared with the receipt of the current price on the Exchange by an Australian seller. While it might have been more candid if this virtually contemporaneous transaction of substantial size had been disclosed, I cannot feel that any severe criticism ought to be levelled against the directors for the omission to do so.

I turn now to other questions: first, whether the offer was a fair one; secondly, whether there was proper disclosure and whether the contents of the take-over documents and the circulars were misleading; thirdly, the question of conflict of interest; fourthly, the question of the removal of Mr. Donohoo from the Board of Cumberland and, fifthly, the question of the cancellation by Cumberland in July 1974 of an arrangement with Souls for the supply of pharmaceutical products.

A person making a take-over offer is, of course, not obliged to offer cash. He may offer shares in exchange for shares. Where this is done, to determine whether the offer is a fair one it is necessary to consider the value of the respective shares and to compare them. In the present case there is no expert valuation either of the Cumberland stock units or of the FAI shares offered in exchange for them.

So far as the ordinary stock units in Cumberland are concerned, it seems to be common ground that, having regard to earnings and to assets backing, their real value on 11th July 1974 was $1.25. It does not appear to have been in the interests of any of the parties to attack this figure. It also seems to be common ground that there was no real Exchange market for these units which could be relied on as a guide to their value, either in July 1974 or in November 1974. What, then, was their real value in November? In the absence of expert evidence and of detailed evidence of the company's accounts I am unable to arrive at any particular figure. However, the evidence shows that from July onwards the profit increased - indeed, up to the end of October it was up 10% on the corresponding period for the previous year; for the six months ended 30th December 1974,

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as it later appeared, it was up 31%. The assets backing also rose from about $1.22 per share in July to about $1.70 per share in November. As against this, it must be recognised that the stock units acquired in July 1974, while they did not give control to the purchaser - Fire & All Risks already had control - gave it the capacity to pass special resolutions. In contrast with this, the units for which the offer was made in November 1974 gave no form of additional power or control to the offeror, and in the meantime Cumberland had come under the threat of delisting. I do not think much weight should be given to this last consideration in assessing the value of the shares in the circumstances. In addition, there was an economic downturn, and some suggestion that Commonwealth Government assistance to nursing homes might be reviewed. My own opinion is that the Cumberland ordinary stock units held by the minority in November 1974 were worth something near the figure of $1.25.

As to the FAI ordinary shares, again I have no expert opinion to guide me, and very little except the company's published accounts to work from. However, in this case the Exchange dealings in the shares may be taken as some guide. No one has

suggested the transactions established a false or unreal market except in relation to the series of transactions relating to the "distress" parcel. In September 1974 the turnover in FAI shares was 3,500 shares, and the last sale price was 60 cents. In October 1974 the turnover was 1,381 shares, and the last sale price was 57 cents. In November the turnover was 11,367 shares, and the last sale price was 55 cents. In December 1974 the turnover was 73,528 shares, and the last sale price was 50 cents. In my opinion the FAI ordinary shares about the time of the making of the take-over offer were worth about 57 cents. Since the offer was an exchange of one-for-one, it follows that in my view it was at an undervalue.

The offerees, of course, were not obliged to accept the offer. Nor, having regard to the holding of Souls, who were opposing it from the beginning, did it seem practicable that there could be any compulsory acquisition. Furthermore, the price offered may be regarded as being sufficient to recoup the amount of their original investment so far as some holders were concerned. However, the fact remains that the consideration on either side was unequal.

I deal now with the question of disclosure and

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whether the documents put forth were misleading.

Mr. Atkinson in his evidence suggested that although where there was a cash offer one would place a money value on the share in order to compare it with the cash offer, where the offer was for an exchange of shares, one did not go through this process, but somehow just compared the two shares. This reasoning appears to have been the basis for the view which he expressed that whereas if it had been a cash offer for the Cumberland stock units it would have been material to disclose the 11th July transaction to stockholders - indeed, as he conceded, quite improper to omit reference to it - it was not material to disclose it and not improper to omit reference to it, where the offer was an exchange of shares. I do not follow this reasoning. If it be material to placing a value on a share to compare it with a cash offer, I would have thought it was equally material in placing a value on a share to compare it with a share offered in exchange. Indeed, I would have thought one's task would have been doubled, because one would have to place a value upon each of the shares in order to be able to compare them. If it would be material to disclose the 11th July transaction in order to assist in valuing a Cumberland

stock unit to compare it with a cash offer, I would have thought it would be no less material to disclose it to assist in valuing the same stock unit to compare it with the value of another share offered in exchange.

In my opinion, notwithstanding the transactions of 11th July 1974 took place over three months prior to the determination on 18th November 1974 of the offer to be made, it constituted material information and should have been disclosed to Cumberland stockholders to assist them in evaluating the worth of their ordinary stock units. I arrive at this conclusion notwithstanding I am of the view that the take-over offer which was ultimately made was not in contemplation on 11th July 1974 within the meaning of the Listing Requirements.

Turning to the circulars, the first is the letter written by Mr. Adler on behalf of FAI dated 20th November 1974 which accompanied the offer. The main criticism of this circular is directed at a sentence in which it states:

> "In terms of asset backing the latest published accounts of both Cumberland and 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."

This statement is more remarkable for what it does not say than for what it does say. It is not inaccurate as a broad statement. But it gives little assistance to a stockholder who would be interested to know the relative asset backing of the units and shares. This would have shown an advantage in favour of the Cumberland units. According to Mr. Atkinson the comparison of net tangible asset backing was $1.22 or more for Cumberland and 52 cents for FAI, or, if one took net asset backing including intangibles $1.00 for FAI.

Mr. Donohoo issued a circular dated 21st November 1974, recommending that stockholders do not accept the offer. Then followed a circular in reply signed by Mr. Adler in a dual capacity both as chairman of FAI and chairman of Cumberland. This circular has been attacked in a number of respects.

In his circular Mr. Donohoo had stated:

> "I do not consider it reasonable to ask stockholders in Cumberland, a thriving and expanding nursing home and surgical hospital group, to exchange their stock units in that group for shares in a company heavily involved in the insurance industry. The insurance industry appears to be going through a particularly difficult time and the outlook for the industry is uncertain."

In his circular of 22nd November Mr. Adler said:

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"In the second place, Mr. Donohoo argues that by offering its own shares to Cumberland stockholders in exchange for Cumberland stock units, FAI are inviting stockholders to give up stock in 'a thriving and expanding nursing home and surgical hospital group' in exchange for shares in the highly risky insurance industry. 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.

I wish I could share Mr. Donohoo's view that the private nursing home business is a thriving and expanding business, profitable and risk-free at this time. Unfortunately, as I have repeatedly stated, this is not the case. The nursing home business is at least as vulnerable to the effects of inflation as the insurance business is, and it shares similar political risks. Readers will probably have heard the Minister of Social Securities recent statement that if the costs of running nursing homes continue to rise rapidly (as they are bound to do under present conditions), the Federal Government may not be able to increase its contributions proportionately. Should this happen, companies such as Cumberland could be ruined overnight. Naturally we all hope that this would not come about, but it is the sort of risk which undoubtedly exists, and in fact the Directors of FAI feel it so keenly that they have had to make their take-over offers conditional on action such as the Minister has indicated not occurring during the period of the bid."

If a recipient of Mr. Adler's letter carefully studied it as a whole I think he would come to the view that Mr. Adler was really replying to something implicit in Mr. Donohoo's criticism directed to the risk aspect of insurance companies as compared with the sound position of the nursing home business of Cumberland.

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However, in the way in which Mr. Adler's reply is drafted it in fact literally denies that Cumberland is an expanding and thriving business which, if a stockholder took it at face value, would be a grossly misleading statement. I think that much greater care could, and should, have been taken in drafting the circular, which could well have been misleading to a stockholder receiving it.

This circular was also criticised because it stated that the directors of FAI made their offer conditional on action such as the Minister had indicated not occurring during the period of the bid. This statement appears to be erroneous. It is perhaps based upon a misinterpretation of some words used in the offer.

There followed a circular letter dated 27th November 1974 from Souls which did refer to the purchase of the Adler stock units and did refer to the relative assets backing of the units. In reply, Mr. Adler, writing for FAI in a circular dated 27th November 1974 referring to the sale of the Adler interests, said:

> "When those sales took place the ruling Stock Exchange prices for Cumberland stock units were $1.25 for the ordinary units and 50 cents for the preference units. There had, in fact, been unsatisfied ordinary stock buyers at

> $1.25 on the Stock Exchange for several days, both before and after the date on which the sales referred to by Mr. Millner took place.
>
> Consequently, any stockholders of Cumberland who had wished to sell their holdings on the market at that time could have obtained similar prices to those effected in the sales referred to by Mr. Millner, and there was no question at all of any members of my family receiving any favoured terms.
>
> Unfortunately, as I am sure you will all very well know, the Australian stock markets have taken a terrible 'beating' since July and the stock of Cumberland Holdings Limited has suffered just as badly as any others."

Later he said:

> "Naturally no company making a take-over offer can offer to pay more than the current market price just because at some previous time higher prices have prevailed."

These statements were, I think, calculated to lead anyone receiving the letter to look to the Exchange prices, to note the fall in those prices generally and note the prices on the board for Cumberland, and to draw the conclusion that the price paid for Mr. Adler's stock units was of little or no relevance. The fact is that Mr. Adler, Mr. Atkinson and Professor Wilson were all of opinion that the Exchange prices on the board for Cumberland were of no real significance. They were aware, therefore, when this circular was sent out, that it was misleading to speak of ruling Stock Exchange prices for

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Cumberland stock units.

Furthermore, the suggestion that any other stockholders who had wished to sell on the market at that time could have done so misrepresents the position. Having regard to the large size of the holdings of the minority stockholders and the smallness of the dealings whereby Mr. Adler established a price on the board of $1.25 on 11th July 1974, coupled with the fact that virtually all buyers and sellers were acting on the directions of Mr. Adler, I fail to see where the unsatisfied buyers would have been found. The initial order to sell lodged by Mr. Adler on 24th June 1974 was for 1,000 stock units. Falkirk was the buyer at $1.25 on 2nd, 3rd and 11th July 1974 when it bought 200, 400 and 500 stock units respectively. But Falkirk was not a genuine buyer. Indeed it was really a seller. On 11th July 1974 it sold its entire holding for $1.25 per unit to Fire & All Risks. There were purchases by FAI on the 12th and 16th July of 1,200 and 500 respectively. But these transactions appear to have been for the purpose of maintaining the price of $1.25 on the board for a brief period. FAI did not continue to be a buyer. In fact, on 16th July, a holder of stock units in Cumberland did place a selling order for

600 units through the stockbroker E.G. Bunn at $1.25. Of these 300 were sold on 16th July at $1.25, being apparently one of the parcels constituting the 500 purchased by FAI on that day. But the remaining 300 remained unsold; notwithstanding the seller on 19th July dropped his price to $1.20 and continued without success to try to sell them up to 18th September, when his selling order was cancelled.

Another matter of complaint was that Mr. Adler and Mr. Belfer failed to disclose that proceedings were on foot to have suspended or terminated FAI's licence to conduct workers' compensation business which represented about ten per cent of its insurance business.

An application had been made by the Registrar of the Workers' Compensation Commission as far back as 23rd June 1971 to have the licence of FAI (then called Australian and International Insurances Ltd.) suspended or cancelled. But in November 1974 this could hardly be described as a live application. Although pressed by the solicitors for FAI up to the latter part of 1973, the solicitors for the applicant had neglected to supply particulars. Since September 1973 there had been silence. On 7th March 1975, on the request of the Registrar, the

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application was dismissed, and costs on a solicitor and client basis were awarded against him.

In my opinion the petitioner has not made good its complaint based upon this ground.

It is argued that since the take-over offer was withdrawn, and the minority shareholders, including Souls, stand in the same position as they would have been if the offer had never been made and the circulars had never been sent, that even if it appears there was any non-disclosure or any misleading statements, no harm has been done. I will return to this later when I discuss the various grounds on which the petition is based.

When the take-over offer of 20th November was received by the Board of Cumberland the directors of that Board consisted of Mr. Adler, as chairman, Mr. Belfer and Mr. Donohoo. Mr. Adler and Mr. Belfer were, of course, directors of FAI and Fire & All Risks and shareholders of FAI. They were obviously in a position of conflict. It is possible that they could have appointed a sufficient number of disinterested directors, and could have either temporarily resigned or refrained from dealing with or voting on this particular matter. Had they done so the independent directors might have acted just as they did.

But they did not take this course. They attended and took an active and dominant part in dealing with the offer.

On a matter such as the decision what recommendation directors will make in a Part B Statement, stockholders are in general entitled to have applied to the question the collective wisdom of an independent board. This entitlement may be cut down by special provision in the Articles of Association, allowing interested directors to vote provided they disclose their interest. The Articles of Cumberland so provided. But where this is the position, two things should be borne in mind. First, interested directors must arrive at their decision on proper grounds. It is doubtful whether it would have been proper for the Board of Cumberland to have decided to say in their Part B Statement that they made no recommendation simply because of their conflict of interest, as proposed in the first draft. This would be to defeat the purpose of the Part B provisions. As it was, paragraph 1(a) of the statement in its final form fairly stated the conflict of view between Mr. Donohoo on the one hand and Mr. Adler and Mr. Belfer on the other hand, and the interest of the latter. It is difficult to see what more they

could have done in relation to the recommendation in paragraph 1(a), given that the article on interested directors was operative. However, paragraph 1(b), the effect of which has earlier been stated, should be compared with it. Paragraph 1(b) puts forward the threat of delisting as a strong reason in favour of acceptance. Then in his circular dated 22nd November 1974, signed as chairman of both FAI and Cumberland, Mr. Adler recommended acceptance of the offer in terms which were likely to reduce to relative insignificance the formal abstinence from recommendation in paragraph 1(a). Secondly, notwithstanding the presence of such an article, there remains a duty on the Board, including the interested directors, to act fairly. It is not that they lack the power to act, but that they must be careful not to abuse the power.

It is in this context that the question of furnishing the stockholders with advice from some independent source assumes importance. As has been noted, Mr. Donohoo at the Board meetings on the 4th and 15th November proposed without success that Cumberland should obtain an independent report. Evidence was given suggesting this was a usual practice where there existed a conflict of interest on

the Board of the offeree company. The circumstances of particular cases vary so greatly that I hesitate to rely upon this as a required practice. However, it would in my view be advisable, and would go some way towards removing the possibility of unfairness towards the stockholders, even if the directors when they received the report disagreed with it and said so (see Gething & Ors. v. Kilner & Ors. (1972) 1 W.L.R. 337).

Various reasons were given why such a report should not be obtained. The main reason advanced at the time when Mr. Donohoo raised the matter was that the expense would not be justified. However, this reason appears to have been based on estimates which envisaged a report which was much more wide-ranging and detailed than Mr. Donohoo had been suggesting, or than would in fact be necessary. Indeed, when the matter came to be referred to in the circulars this reason of expense was not advanced, but what was said was contained in a circular of 22nd November 1974, signed by Mr. Adler, which stated:

> "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. As Cumberland and FAI have been closely associated over a period of years, it was considered

> no useful purpose would be served, particularly as the real issue boils down to the question whether shareholders are going to be better off in the long run by accepting the FAI offer or by continuing to hold shares in what will probably be an unlisted company. That is not a question on which any merchant bank can really offer helpful advice. It is a matter which each stockholder must decide for himself.
>
> 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."

Insofar as it sets out to say why no independent report was obtained, this circular achieves a high level of obfuscation. The only message which seems to emerge is that the threat of delisting is so serious that nothing else matters.

An attempt was made to formulate a general answer to the criticism that there was a conflict on the Board of Cumberland along the lines that any director, whether independent or otherwise, could do nothing in response to the threat of delisting or the take-over offer which would advance the interests of the minority stockholders. Indeed, this appears to have been the view of Mr. Adler and Mr. Belfer at the time. A conclusion to this effect, however, is a poor staff to lean on for directors who find themselves in a conflict situation (see Scottish Co-operative Wholesale Society Ltd. v Meyer (1959

A.C. 324 at page 367). An independent director might well take a different view. In my view, it is by no means clear that nothing could have been done by an independent Board. The obtaining at reasonable cost of some form of independent assessment of the offer was one thing which could have been explored more realistically. Then again, an independent Board may have been able to advance reasons to the FAI Board or to the Exchange which would have affected the offer which was being made, or the threat of delisting. It is not for me to say what could have been done. I will only stress the importance, where a conflict arises, of directors either removing themselves from that situation or ensuring that both sets of people to whom they owe a duty have adequate care taken of their interests (see Ampol Petroleum Limited v. R.W. Miller Limited (1972) 2 N.S.W.L.R. 850 at page 884).

In the concluding stages Mr. Donohoo, at an extraordinary general meeting of Cumberland, requisitioned by Fire & All Risks and held on 3rd April 1975, was removed as a director of Cumberland. He had earlier, in a letter from Mr. Adler dated 22nd January 1975, been asked to resign, and had refused to do so. Also on 22nd January Mr. Atkinson and

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Professor Wilson, who were, of course, directors of FAI and Fire & All Risks, were appointed as additional directors to the Board of Cumberland. Reasons advanced for the removal of Mr. Donohoo varied from time to time. The main reason seems to have been that Souls had threatened to bring a winding up petition against the company, and he therefore would be in a conflict of duty situation in remaining on the Board. Mr. Donohoo himself said that once a petition was presented he intended to resign. The petition in the present case was presented on 2nd April 1975, which was about a month after his removal.

Another reason advanced was that the quorum for Board meetings under the Articles of Association of Cumberland was three, and the other directors feared that, by staying away, Mr. Donohoo could prevent effective meetings from being held. I am unable to place any weight on this reason. Mr. Donohoo had never stayed away, or threatened to stay away, and there was no reason to suppose that he would. Furthermore, by appointing the additional directors - as indeed they did - they could ensure that even if he did stay away a quorum could readily be arranged.

A third reason advanced which perhaps had some substance was that from about November onwards

Mr. Donohoo at Board meetings had become increasingly "difficult". He had been requiring minutes to be amended in various ways, and there had been a lack of harmony between him and the other directors. Mr. Adler and his other co-directors felt that this was no way for the Board to carry on its operations. When steps were finally taken to remove him, they were taken on the advice of senior counsel.

I turn now to the question of the cancellation by Cumberland in July 1974 of the arrangement which Souls had to supply pharmaceutical products to Cumberland's nursing homes.

Souls, in conjunction with its taking up of stock units in Cumberland, entered into an arrangement to supply pharmaceutical products to Cumberland's nursing homes. During 1974 Souls began to receive complaints from Cumberland. This culminated in a letter dated 1st July 1974 detailing various complaints. On 31st July 1974 Cumberland terminated the arrangement. Thereafter it obtained its supplies elsewhere.

In the proceedings before me, it was claimed on behalf of Souls that the complaints were unjustified and, indeed, were engineered as part of a plan to get rid of Souls as a stockholder in Cumberland.

It was claimed on behalf of Cumberland that the complaints were justified, and that the making of them was in no way connected with any plan to get rid of Souls as a stockholder. It was further suggested that the cancellation of the supply arrangement was the factor motivating Souls in seeking to dispose of its holding and in bringing the proceedings.

I was spared the task of hearing evidence about the complaints, and consequently am unable to say whether they were justified or not, or whether this was part of a plan to force Souls to dispose of its holding.

Some evidence was given to the effect that the net profit of Souls from the supply of pharmaceuticals to the nursing homes was so trifling (running into four figures) in comparison with the total profit of $1,200,000 from its pharmaceutical division, that it would furnish no significant motivation for any course of action.

I conclude that Souls, in the taking up of the shares originally and more recently in the steps it took in relation to the take-over offer and in presenting the winding up petition, was acting principally, if not entirely, on the basis of investment considerations rather than trading considerations.

The Court will be careful to see there is no abuse of its process. Generally speaking, however, a petitioner seeking a winding up order must be judged by the strength or weakness of the case which he makes rather than by any motive he may be shown to possess (see I.O.C. Australia Pty. Limited v. Mobil Oil Australia Limited (1975) 49 A.L.J.R. 176 at page 132).

THE LAW

Before I state my decision on the question whether the petitioner has made out its case under all or any of the grounds relied on in the petition it will be convenient to state what I understand to be the law in relation to these grounds.

The first two grounds are based on s.222(1)(f) of the Companies Act, 1961. This is in the following terms:

> "222.(1) The Court may order the winding up if - .....
>
> (f) directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members."

Upon the interpretation of this paragraph my view is as follows:

(1) When it refers to "directors" it does not limit

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its application to the case where the whole Board acts unanimously; it will be met where it is shown that the effective majority has acted in its own interests or in the interests of one or more of those Board members, or even where one director, by some means or other, has caused his will to be carried into effect by the Board with the result that his personal interest has been preferred.

(2) Likewise the word "directors" has what may be termed a distributive application in relation to the second limb of paragraph (f).

(3) The words "the affairs of the company" are as wide as one could well have. They are not limited to business or trade matters, but encompass capital structure, dividend policy, voting rights, consideration of take-over offers, and indeed, all matters which may come before the Board for consideration.

(4) Directors may be held to have acted in their "own interests" when they have acted in the interests of another company of which they are also directors and shareholders (see Re National Discounts Limited (1951) 52 S.R. (N.S.W.) 244).

(5) The words "the interests of the members as a whole" present some difficulty. From the discussion in cases such as Greenhalgh v. Ardene Cinemas Limited

((1951) 1 Ch. 286); Ngurli v. McCann (1953) 90 C.L.R. 425, and Australian Fixed Trusts Pty. Ltd. v. Union Insurance Society of Canton Limited (1959) S.R. (N.S.W.) 33, the concept of action taken for "the benefit of the company", that is for "the benefit of the corporators as a general body" is a familiar one. The difficulty with a concept such as "the interests of the members as a whole" arises when it has to be applied where the interests of members are diverse or conflicting. This may happen, for example, where there are different classes of members, or within one class of members where the interests of particular members differ. The present case furnishes an illustration in the conflict in relation to the take-over offer between the interests of the majority and the minority.

One possible interpretation is that the first limb of paragraph (f) applies only where the directors are shown to have preferred their own interests to the interests of the members as a whole, in the sense of the interests which are common to all the members.

Another possible interpretation is that the first limb of paragraph (f) applies where the directors are shown to have preferred their own interests to the interests of one or more or perhaps some significant section of the members. This argument depends upon

the proposition that the directors are then seen not to have been acting in the interests of all the members and cannot be said to have been acting in the interests of the members as a whole.

If the first interpretation be correct, the action of directors cannot be challenged under the first limb of paragraph (f) where what they have done coincides with the interests of a majority shareholder: If the second interpretation be correct, the action of directors may be open to challenge notwithstanding it coincides with the interests of the majority shareholder.

Having regard to the words used, and the context, including the second limb of paragraph (f) and s.186, it is my opinion that the second interpretation is the correct one.

(6) The second limb of s.222(1)(f), applies where it is shown that the directors have acted in the affairs of the company in any other manner whatsoever which appears to be unfair or unjust to other members. Not much weight can be placed on the word "appears", since conduct which, on its face, appeared to be unfair or unjust, but on further analysis was found not to be so, would hardly induce a court to make a winding up order. However, under the second limb the

conduct does not have to be shown to be unfair or unjust to the members as a whole; it is sufficient, it appears to me, if it is shown that the conduct is unfair or unjust at least to any significant body of other members, and perhaps to any other member. The nature of the injustice or unfairness, and the extent to which this operates to the detriment of any other member or members, will no doubt be material for consideration by the court in exercising its discretion whether or not to make a winding up order (see Re Weedmans Limited (1974) Qd.R. 377

The third ground is based on s.186, the relevant portion of which is as follows:

> "186.(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to one or more of the members (including himself) may, or, following on a report by an inspector under this Act, the Minister may apply to the Court for an order under this section.
>
> (2) If the Court is of the opinion that the company's affairs are being so conducted the Court may, with a view to bringing to an end the matters complained of -
>
> (a) except where paragraph (b) of this subsection applies, make an order that the company be wound up."

I will deal with s.186(2)(b) later.

The words "the affairs of the company" in this provision have the same wide application as they have

in s.222. The word "oppressive" in its context here means "burdensome, harsh and wrongful". It refers to action which adversely and unfairly affects one or more members in a proprietary sense in their capacity as members and is commonly found where there is shown some lack of probity in the conduct of the company's affairs (see Scottish Co-Operative Wholesale Society Ltd. v. Meyer (1959) A.C. 324; Re H.R. Harmer (1959) 1 W.L.R. 62; Re Jermyn Street Turkish Baths Ltd. (1971) 1 W.L.R. 1042; Re Broadcasting Station 2GB Pty. Limited (1964/5) N.S.W.R. 1648; Re Tivoli Freeholds Ltd. (1972) V.R. 445). The case where directors of a company are also directors of another company which is a subsidiary requires special mention. It is clear that unfair or unjust action (or, for that matter, inaction) taken in the interests of the parent and against the interests of the subsidiary and its other shareholders in relation to its trade and business operations may fall within this section. In Scottish Co-Operative Wholesale Society Ltd. v. Meyer (supra) Viscount Simonds at pages 342-343 said:

> "After much consideration of this question, I do not think that my own views could be stated better than in the late Lord President Cooper's words on the first hearing of this case. 'In my view' he said, 'the section warrants the court in looking at the business realities of a situation and does not confine them to a

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narrow legalistic view. The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary'. At the opposite pole to this standard may be put the conduct of a parent company which says: 'Our subsidiary company has served its purpose, which is our purpose. Therefore let it die', and, having thus pronounced sentence, is able to enforce it and does enforce it not only by attack from without but also by support from within. If this section is inept to cover such a case, it will be a dead letter indeed."

Is the case different where what is involved is not the trading or business operations of the company, but the general company affairs such as matters relating to its capital structure, its dividend policy, the voting rights of its members, its response to a take-over offer and the like? I think not. It appears to me that the directors of the subsidiary must in these respects also act fairly and justly towards the shareholders of the subsidiary. If any shareholder can show they have not done so then he may establish a case within the provisions of s.186 (cf. Re Broadcasting Station 2GB Pty. Limited, supra).

The fourth ground is based upon s.222(1)(h), which is as follows:

"222(1) The Court may order the winding up if - .....

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(h) the Court is of opinion that it is just and equitable that the company be wound up."

The cases on this provision are numerous and well known. There is no need for me to review them. The categories which the court may hold to be within this provision are not closed (Loch v. John Blackwood Ltd. (1924) A.C. 783; D. Davis & Co. Ltd. v. Brunswick (Australia) Ltd. (1936) S.R. (N.S.W.) 215; Ebrahimi v. Westbourne Galleries Ltd. & Ors (1973) A.C. 360).

One type of case was described in Loch v. John Blackwood Ltd. (supra) at page 788 as follows:

> "It is undoubtedly true that at the foundation of applications for winding up, on the 'just and equitable' rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up."

Althought their Lordships were there referring to a case where the conduct in question related to the business of a company in the sense of its trade and business operations, the principle applies also

to conduct of the type referred to in relation to questions affecting capital structure, dividend policy, voting rights, response to take-over offers, and indeed all the affairs of the company which may come before its Board of directors (see Ebrahimi v. Westbourne Galleries Limited (supra))

THE CONCLUSIONS

I turn now to applying these principles to the facts as I have found them.

Ground 1.

In my view Mr. Adler and Mr. Belfer acted in the relevant affairs of Cumberland in the interests of Fire & All Risks and FAI, and in their own interests, which were similar, rather than in the interests of the members as a whole, including the minority stockholders. I hold this ground has been established.

Ground 2.

In my view, Mr. Adler and Mr. Belfer acted in the relevant affairs of Cumberland in a manner which appears to be unfair or unjust to other members, in the sense that it was unfair or unjust to the minority stockholders. Part of this unfairness or injustice related to the way in which the take-over offer was dealt with and to the misleading aspects of the circulars. The fact that the offer was

withdrawn, and to this extent that the stockholders were restored to the position they would have been in if it had not been made, does not appear to me to erase entirely these actions and their effect upon a minority stockholder. Nor does it furnish much assurance for a fair and even-handed approach for the future. The appointment by Mr. Adler and Mr. Belfer of Mr. Atkinson and Professor Wilson as additional directors of Cumberland in January 1975, while it may well have strengthened the capacity of the Board to deal with the day-to-day business affairs of the company, ensured the complete dominance of the point of view and interests of the majority stockholders and of Mr. Adler in the conduct of its affairs. This was compounded by the removal of Mr. Donohoo from the Board, effected at the extraordinary general meeting held on 4th March 1975. This is not to say that a majority stockholder may not exercise the powers which he has under the Memorandum and Articles of Association generally in his own interests as he sees them. Nor does it detract from the proposition that a stockholder who takes up shares as a minority holder in a company does so knowing that the Memorandum and Articles of Association confer various powers which the majority shareholder may exercise. The use or

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abuse of acknowledged power is relevant to the question whether there is unfairness or injustice to some members. The point that is here involved is whether actions which are unfair or unjust to other stockholders have occurred, and whether, having occurred, minority stockholders can have any confidence that they are unlikely to occur again.

I conclude that there have been actions by Mr. Adler and Mr. Belfer which were unfair and unjust to other stockholders, and that there is no assurance in the circumstances that this type of action may not occur again. In my view the likelihood is that the affairs of Cumberland will continue to be conducted in the same fashion.

There is some overlap between matters to be considered in relation to oppression and those which have to be considered in determining whether directors have acted in a manner which is unfair or unjust. If oppression is shown even as regards one or more members (including the petitioner) it is sufficient to bring the case within s.186(1). A further feature of s.186(1) is that it refers to the case where the affairs of the company "are being conducted in a manner oppressive". This is generally regarded as requiring that a petitioner upon this ground will be

required to show that the oppressive conduct is continuing up to the time of the presentation of the petition. The withdrawal of the offer, therefore, takes on particular significance in relation to this ground. The argument that at the end of the day the minority stockholders have not been adversely affected because they are no worse off than they would have been if the offer had never been made and the circulars had never been sent requires particular consideration. Apart from the threat of delisting, the value of their stock units does not appear to have been adversely affected. The company is well managed. Have they been adversely or unfairly affected in their capacity as members? They are now members of a company which is not only under threat of delisting but in which the Board of directors is so constituted that it is in a position to pay regard to the interests of the majority stockholder and to disregard the interests of the minority stockholders and in which the Board has, by the course of conduct which it has followed, demonstrated that it will in fact act in the interests of the majority holder and without proper regard to the interests of the minority. They are now members of a company in which the chairman, who is the dominant member of the Board, has

failed to observe the standards of fair and honest dealing with them which they are entitled to expect.

The actions of Mr. Adler, and of Mr. Belfer so far as he combined with him, lead me to the conclusion that the affairs of Cumberland were, on the presentation of the petition in the present case, being conducted in a manner oppressive to the complaining stockholders in their capacity as members.

The consequence of this is that the court may make an order that the company be wound up "with a view to bringing to an end the matters complained of". There is, however, a qualification upon this power contained in s.186(2)(b), which is as follows:

> "186(2) If the Court is of opinion that the company's affairs are being so conducted the Court may, with a view to bringing to an end the matters complained of - .....
>
> (b) where the Court is of opinion that to wind up the company would unfairly prejudice the member or the members referred to in subsection (1) of this section, but otherwise the facts would justify the making of a winding up order on the grounds that it is just and equitable that the company be wound up, or that, for any other reason it is just and equitable to make an order (other than a winding up order) under this section, make such order as it thinks fit whether for regulating the conduct of the company's affairs in future or for the purchase of the shares of any members by other members or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

It is perhaps premature to discuss further the operation of this provision until such time as I have expressed my view on the fourth ground taken, namely, the just and equitable ground. Under one part of s.186(2)(b) it is only if an affirmative finding is made in relation to that ground that the power of the court to make the order referred to in s.186(2)(b) arises.

Ground 4.

The question here is whether, in the circumstances, I am of opinion that it is just and equitable that the company be wound up. The case against the directors of Cumberland, particularly Mr. Adler, has not been established in its widest form. That is to say, I have not held that he had some plan which he followed through from December 1973 onwards, manipulating the market, and his colleagues, along the way.

However, I have held that he has, at each turn of the wheel, taken advantage of the situation and, in doing so, has in some respects overstepped what I think was justifiable conduct on the part of a director of a company. I have in mind in particular his maintenance of control of the Board of Cumberland, notwithstanding the position of conflict; his conduct

of the affairs of Cumberland in such a way that stockholders were not provided with either the collective wisdom of an independent Board or at least independent guidance of some kind in relation to the takeover offer; the way in which his circulars in point of frankness and accuracy fell short of the standard which stockholders were entitled to expect; and, his persistence in furthering the interests of FAI and its subsidiary Fire & All Risks and thereby his own interests without due regard to the interests of some of the stockholders of Cumberland in appointing Mr. Atkinson and Professor Wilson as additional directors, coupled with the removal by Fire & All Risks at his instigation - whether for good or bad reasons - of the only "independent" director, Mr. Donohoo, without replacing him with any other independent director.

In the circumstances it appears to me that the complaining stockholders are justified in their complaint and in having a lack of confidence in the future conduct of the affairs of the company of which they are members. It falls, I think, within the principles laid down in relation to winding up on just and equitable grounds. I hold that this ground has been established.

THE ORDERS.

Having regard to the grounds which I have held to be established, I have power to order that Cumberland be wound up. Alternatively, I may make an order pursuant to s.182(2)(b) for the purchase of the shares of any members by other members or by the company, provided I am of opinion either that to wind up would unfairly prejudice the members who have been oppressed or that for any other reason it is just and equitable to make such an order.

Dealing with the question of compulsory purchase, it does not appear to me from the evidence that a winding up order would unfairly prejudice the minority stockholders. Is it for any other reason just and equitable to make an order for purchase? Fire & All Risks has not been represented in these proceedings. In its absence I am not prepared in the circumstances of this case to order that that company purchase the shares of the minority stockholders or any of them. Cumberland has, of course, been represented but its position has been reserved to the limited extent stated earlier. The minority stockholdings are substantial, and the amount of money required to effect a compulsory purchase, having regard to the prices canvassed in evidence,

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would be considerable. The accounts of Cumberland which are in evidence do not suggest it could readily find the money.

In the result, I consider that I should indicate I propose to make an order for winding up. I am prepared to defer this for twenty-eight days to enable the persons concerned to explore the possibility of making some mutually satisfactory arrangements for the acquisition of the shares of the complaining minority.

I will stand the matter over for twenty-eight days. On the adjourned date, if no satisfactory arrangements have in the meantime been made, I propose to make an order for the winding up of the company and an order that the costs of the petitioner, including reserved costs, be paid out of the assets of the company. I do not propose to make any order regarding the costs of the supporting stockholders who have appeared.

I certify that this and the preceding 68 pages are a true copy of the Reasons for Judgment of his Honour, Mr. Justice Bowen.

S. Dale
Associate.

4th May, 1976.

IN THE SUPREME COURT)
OF NEW SOUTH WALES) 707 of 1975.
EQUITY DIVISION)

IN THE MATTER of CUMBERLAND HOLDINGS LIMITED

AND IN THE MATTER of the Companies Act, 1961.

O R D E R

THE COURT ORDERS that -

1. The abovenamed company be wound up under the provisions of the Companies Act, 1961.

2. The abovenamed company by its Counsel undertaking to the Petitioner to prosecute any appeal with expedition and upon the said company by its Counsel undertaking to the Court that it will not during the period referred to in (a) dispose of any of its assets otherwise than in the ordinary course of carrying on its ordinary business without the prior leave of the Court then -

(a) The operation and implementation of orders 1 and 3 be stayed for a period of 28 days from the date hereof and if any appeal is lodged by the said company from orders 1 and 3 or leave to appeal granted within that period until the determination of the said appeal, or further Order.

(b) The said company be permitted during the period referred to in (a) to carry on its ordinary business and to do such acts as are incidental to the carrying on of that business including

the operation of any now existing bank account without transactions entered into in the course of carrying on its ordinary business being void.

3. The Petitioner's costs of the petition including all reserved costs be paid out of the assets of the said company.

4. Pursuant to Section 366 (4) of the Companies Act, 1961 all times for doing any act limited by the Companies Act, 1961 or any rules thereunder consequent upon the making of a winding up order be enlarged until the dismissal by a final Court of Appeal of any appeal from the order winding up the said company or further order.

5. There be liberty to the parties to apply on 3 days notice, including liberty to apply with respect to the appointment of a liquidator.

ORDERED 31 May 1976 AND ENTERED 26 July 1976

By the Court

(A.V. Ritchie) (L.S.)
REGISTRAR IN EQUITY.

C1

NOTE: It will be the duty of such of the persons who are liable to make out or to concur in making out a statement of affairs as the Liquidator may require to attend on the Liquidator at such time and place as the Liquidator may appoint and give him all information he may require.

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

No. 707 of 1975

IN THE MATTER of CUMBERLAND HOLDINGS LIMITED

AND IN THE MATTER of the Companies Act, 1961.

ORDER

THE COURT ORDERS that -

1. Leave be granted to the abovenamed Company (hereinafter called the Appellant) to appeal to Her Majesty in Council from the Order made herein this day for the winding up of the Appellant upon the following conditions:

(a) That the Appellant do within 3 months of the date hereof give security to the satisfaction of the Registrar in Equity in the amount of $1,000.00 for the due prosecution of the said appeal and the payment of all such costs as may become payable to the Respondent Washington H. Soul Pattinson and Company Limited (the petitioner in these proceedings) in the event of its not obtaining an order granting it final leave to appeal from the said order or the appeal being dismissed from non prosecution or of Her Majesty in Council ordering it to pay the Respondent's costs of the said appeal as the case may be.

(b) That the Appellant do within 14 days from the date hereof deposit with the Registrar in Equity

the sum of $50.00 as security for and towards the costs of the preparation of the transcript record for the purposes of the said appeal.

(c) That the Appellant do within 3 months of the date hereof take out and proceed upon all such appointments and taken all such other steps as may be necessary for the purpose of settling the Index to said transcript record and enabling the Registrar in Equity to certify that the said Index has been settled and that the conditions hereinbefore referred to have been duly performed.

(d) That it obtains a final order of the Court granting it leave to appeal as aforesaid.

2. The costs of all parties to this application and of the preparation of the said transcript record and of all other proceedings hereunder and of the said final order do follow the decision of Her Majesty's Privy Council with respect to the costs of the said appeal or do abide the result of the said appeal in case the same shall stand or be dismissed for non prosecution or be deemed so to be subject however to any orders that may be made by the Court up to and including the said final order or under Rules 16, 17, 20 and 21 of the Rules of 2 April, 1909 regulating appeals from the Court to Her Majesty in Council.

3. The proper officer of the Court to tax and certify

the costs incurred in New South Wales payable under the terms hereof or under any order of the Privy Council by any party or parties to these proceedings to any other party or parties thereto or otherwise.

4. The said costs when so taxed and certified as aforesaid be paid by the party or parties by whom to the party or parties to whom the same shall be certified to be payable within 14 days after service upon the first-mentioned party or parties of an office copy of the certificate of such taxation or be otherwise paid as may be ordered.

5. So much of the said costs as become payable by the Appellant under this order or any subsequent order of the Court or any order made by Her Majesty in Council in relation to the said appeal may be paid out of any moneys paid into Court as such security as aforesaid so far as the same shall extend and that after such payment out (if any) the balance (if any) of the said moneys be paid out of Court to the Appellant.

6. Exhibits A and B remain with the papers.

ORDERED 31 May 1976 AND ENTERED 26 JUL 1976.

By the Court

(A.V. Ritchie) (L.S.)

REGISTRAR IN EQUITY.

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

707 of 1975

IN THE MATTER of CUMBERLAND HOLDINGS LIMITED

AND IN THE MATTER of the Companies Act, 1961

ORDER

THE COURT BY CONSENT ORDERS that -

1. Final leave be granted to the appellant Cumberland Holdings Limited to appeal to Her Majesty in Council from the judgment and order of the Supreme Court of New South Wales given and made herein on 31 May, 1976.

2. Upon payment by the appellant of the costs of preparation of the Transcript Record for the purposes of the said appeal and dispatch thereof to England the sum of $50.00 deposited in Court by the appellant as security for and towards such costs be paid out of Court to the appellant.

ORDERED 6 September 1976 AND ENTERED 16 September 1976.

By the Court

(A.V. Ritchie) L.S.
REGISTRAR IN EQUITY

Order granting Final Leave to Appeal to Privy Council

1050.

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

707 of 1975

IN THE MATTER of CUMBERLAND HOLDINGS LIMITED

AND IN THE MATTER of the Companies Act, 1961

CERTIFICATE OF REGISTRAR IN EQUITY VERIFYING TRANSCRIPT RECORD

I, ALAN VICKERY RITCHIE of the City of Sydney in the State of New South Wales, Commonwealth of Australia, Registrar in Equity of the Supreme Court of the said State do hereby certify that the sheets contained in Volumes I to VI inclusive of the Appeal Books herein being pages numbered 1 to 1051A inclusive and 1052 to 1475 inclusive contain a true copy of all the documents relevant to the appeal by the Appellant Cumberland Holdings Limited to Her Majesty in Her Majesty's Privy Council from the Judgment and Order given and made in the abovementioned proceedings by the Honourable Sir Nigel Hubert Bowen K.B.E. Chief Judge in Equity of the said Supreme Court on 31 May 1976 and that the said sheets so far as the same have relation to the matters of the said appeal together with the reasons for the said Judgment given by the said Judge and an Index of all the papers documents and exhibits in the said Suit included in the said Transcript Record which true copy is remitted to the Privy Council pursuant to the Order

of His Majesty in Council on the Second day of May in the year of Our Lord One thousand nine hundred and twenty-five.

IN FAITH AND TESTIMONY whereof I have hereunto set my hand and caused the seal of the said Supreme Court in its Equitable Division to be affixed this Seventeenth day of September in the year of Our Lord one thousand nine hundred and seventy-six. 10

A.V. Ritchie

A.V. Ritchie (L.S.)

REGISTRAR IN EQUITY
SUPREME COURT OF NEW SOUTH WALES

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

707 of 1975

IN THE MATTER of CUMBERLAND HOLDINGS LIMITED

AND IN THE MATTER of the Companies Act, 1961

CERTIFICATE OF CHIEF JUSTICE

I, the Honourable Sir Laurence Whistler Street K.C.M.G. Chief Justice of the Supreme Court of New South Wales DO HEREBY CERTIFY that Alan Vickery Ritchie who has signed the Certificate verifying the Transcript Record relating to the appeal by Cumberland Holdings Limited to Her Majesty in Her Majesty's Privy Council in the proceedings therein is the Registrar in Equity of the said Supreme Court and that he has the custody of the records of the Equity Division of the said Supreme Court.

IN FAITH AND TESTIMONY whereof I have hereunto set my hand and caused the seal of the said Supreme Court to be affixed this twenty first day of September in the year of Our Lord one thousand nine hundred and seventy-six.

L.W. Street C.J.

L.W. Street

(L.S.) CHIEF JUSTICE OF THE SUPREME COURT OF NEW SOUTH WALES