Judgment 2 of 1978

IN THE PRIVY COUNCIL

No. 28 of 1977

ON APPEAL
FROM THE SUPREME COURT OF
NEW SOUTH WALES
EQUITY DIVISION

IN PROCEEDINGS 292 OF 1973

QUEENSLAND MINES LIMITED

Appellant (Plaintiff)

ERNEST ROY HUDSON,

SAVAGE IRON INVESTMENTS PTY. LIMITED

and

INDUSTRIAL AND MINING INVESTIGATIONS PTY. LIMITED

Respondents (Defendants)

TRANSCRIPT RECORD OF PROCEEDINGS

PART I

Volume III

SOLICITORS FOR THE APPELLANT

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INDEX OF REFERENCE

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No. 292 of 1973

CORAM: WOOTTEN, J.

WEDNESDAY, 6TH OCTOBER, 1976

QUEENSLAND MINES LIMITED v. HUDSON & ORS.

REASONS FOR JUDGMENT

HIS HONOUR: On 23rd February, 1961, the Government of the State of Tasmania issued two exploration licences with a view to the proving of certain iron ore deposits in the Savage River district of Tasmania and certain coal deposits suitable for use in connection with the development of a steel industry. From the exploitation of one of these licences, namely, EL4/61, there has, over the succeeding years, developed a very large industry which mines, pelletises and exports iron ore.

The licences were issued to Ernest Roy Hudson, the first defendant, and licence EL4/61 was subsequently transferred by him to the second defendant and later by it to the third defendant. Both the second and third defendants are companies directly or indirectly controlled by Mr. Hudson. At the time that the licences were issued to him Mr. Hudson was managing director of the plaintiff Queensland Mines Limited ("Queensland Mines"). On 22nd February, 1973, the plaintiff commenced the present proceeding in which it alleges that

the expenses of and incidental to the acquiring of the exploration licences and the exploration and development thereof in the years 1960 and 1961 were paid by it, and that Mr. Hudson utilised the position and knowledge possessed by him as a director of the plaintiff and as managing director of the plaintiff to gain for himself a profit in respect of the exploration licences. It further alleges that the second and third defendants held the exploration licence EL4/61 through the utilisation of the position and knowledge possessed by Mr. Hudson as director and managing director of the plaintiff, and imparted to the second and third defendants in his capacity as director and manager of each of the said companies. It also alleges that Mr. Hudson was able to obtain the exploration licences by reason of his position as director and managing director of the plaintiff. It alleges that at all material times the three defendants held the exploration licences and any mining leases issued in respect of the land in trust for the sole benefit of the plaintiff which has, at all material times, been the beneficial owner of the exploration licences and leases and the profits arising therefrom. It seeks declarations to that effect and that the defendants should account to the plaintiff for all moneys

received and profits gained and that the defendants and each of them should execute all such documents as may be necessary to vest in the plaintiff the two exploration licences, mining leases and benefits of all contracts or agreements relating thereto at present in the name or names of any or all of them or held in trust for them.

The defendants deny that the circumstances in which Mr. Hudson owned the exploration licences were such as to give the plaintiff any beneficial or other rights therein. They also say that the plaintiff on or about 20th March, 1962, assigned to Dubar Trading Pty. Ltd. for consideration all the interest, if any, which it then had in the subject matter of the suit and that by deed dated 15th October, 1974 (i.e., immediately before the commencement of this hearing) Dubar Trading Pty. Ltd. assigned that interest to the second and third defendants for consideration. The defendants further say that any profit gained or received by the first defendant was gained and received by him with the knowledge and assent of the plaintiff. They also rely on the plaintiff's laches, acquiescence and delay, and say that the action is Statute barred by lapse of time.

The facts relevant to characterising the

capacity in which Mr. Hudson obtained the two exploration leases in 1961 have proved to be complex and voluminous, and have been made more difficult to unravel by reason of the long lapse of time before hearing, which has meant both the death of material witnesses and the dimming of the memory of survivors, and by the fact that several material witnesses who were prominent in related company transactions at the time have, for reasons of their own, shown considerable reluctance to assist in the inquiry either by making statements to the parties or by returning to this country to give evidence. There has, moreover, been an inevitable imbalance of evidence due to the fact that the plaintiff was, at the relevant time, without any active officers at managerial level other than Mr. Hudson, and its case has, therefore, been largely based on documents. On the other hand, there has been a large amount of oral evidence from Mr. Hudson, and from witnesses whom he called who were associated with him in one way or another at the time.

Formation of Queensland Mines Limited

Mr. Hudson practised as a solicitor in Broken Hill for many years up to 1958, and during that period formed strong associations with mining enterprises. At the end of 1958 he was chairman and managing

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of his Honour,
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director of Australasian Oil Exploration Ltd. ("A.O.E."), a company almost wholly owned by Kathleen Investments Limited ("Kathleen Investments"), of which Mr. Hudson was also managing director. The latter company provided him with an office at 16 O'Connell Street, Sydney, which he used for the purposes of his own affairs, and those of other companies with which he was associated, as well as those of that company. A.O.E. had an option in respect of an area known as Anderson's Lode, which was known to contain uranium, but which the company did not have the resources to develop. A geologist, Mr. Ridgway, who had formerly worked for A.O.E., was then working for Dominion Mining No Liability, which was one of the "Korman" or "Stanhill" group of companies, (Stanhill Consolidated Limited ("Stanhill") being the principal holding company of the interests of Mr. Stanley Korman and his family). Following a conversation between Mr. Ridgway and Mr. Hudson, they went to Mr. Korman and had a discussion with him and other representatives of the Stanhill group. This led to the formation of Queensland Mines Limited as a company in which A.O.E. was to have a 49% interest, and a company called Factors Limited ("Factors") a 51% interest. Factors was a company in which Stanhill had a major shareholding which

enabled it to exercise control at board level. These two companies entered into an agreement to form a company to be known as Queensland Mines Limited with a nominal capital of £3,000,000 divided into 12,000,000 ordinary shares of 5/- each, with the object of mining Anderson's Lode and extracting uranium oxide from the ore. A.O.E. was to transfer to it all its interest in various mineral leases and in an agreement with the Anderson syndicate. The company was to be put in funds by Factors, which was to pay one penny a share on application for 1,020,000 ordinary shares of 5/- each, and to pay such calls on the shares from time to time as would enable the company to pay all the costs, charges and expenses which it incurred. The company was to carry out investigations to determine the full extent of the ore body within the area concerned and to exercise the option to purchase and to seek a contract or contracts for the sale of uranium oxide to a value of not less than £6,000,000. When such contracts were obtained Factors was to ensure the provision to the company of such funds, up to an amount of £1,000,000 as were necessary to bring into practical and economical production the uranium deposits on the area and the erection of a treatment plant and other ancillary activities. Clause 7

provided that all profits arising from the sale of uranium oxide should, unless A.O.E. consented otherwise, after making due allowance for repayment of loans, redemption of preferential shares, reasonable provision for reserves, replacements, taxation and sinking fund requirements, be distributed from year to year, and should not be utilised for the acquisition or carrying on of any other business or undertaking other than the search for and production, treatment and sale of uranium ore or uranium oxide. Mr. Hudson said that in the preliminary discussion it was agreed that the company was to be a "one purpose" company to develop Anderson's Lode. The agreement was executed on 20th January, 1959, Queensland Mines having been incorporated on 19th January, 1959. At the first meeting of the directors on 24th January, 1959, Mr. Hudson was appointed managing director for a period of six months, with remuneration to commence from 15th January, 1959, at £2,500 for the six months, plus hotel and travelling expenses. An arrangement was made whereby Queensland Mines paid Mary Kathleen £12 a week for the provision of an office, which was in fact Mr. Hudson's existing office. When Mr. Hudson's initial period of six months expired he was re-appointed as managing director at a salary of £7,500 per annum, commencing

from 1st July, 1959, with a right to reimbursement of out-of-pocket expenses for entertainment and accommodation up to £2,500 per annum.

Queensland Mines set about proving the lode and seeking a contract. It soon acquired another lease for uranium mining known as the Skal lease which was about 20 miles from Anderson's Lode. It was agreed to purchase this following discussions between Mr. Hudson and Mr. Burt, the chairman of directors of Factors, who was at first opposed to any extension of Queensland Mines' activities. It was finally arranged that, as the Skal lease was not included in the original contract for formation of the company, the cost of the lease and expenses of drilling should not be borne out of capital but from loans made to Queensland Mines by Factors. These loans were to bear interest at the rate of 10% per annum, the interest to be compounded, and the whole of the principal and interest to be satisfied by the issue of 10% redeemable cumulative preference shares three months after the mine came into production. Queensland Mines was to have the right to redeem the preference shares as and when it was in a position to do so.

However, the question of Queensland Mines taking an interest in other mining activities was not closed,

despite Mr. Burt's general opposition to any extension of its activities. What subsequently happened was against the background of a conversation between Mr. Burt and Mr. Hudson, of which I have only Mr. Hudson's evidence. This was to the effect that Mr. Burt's view was that Factors was an investment company which should not be interested in mining gambling, and that Queensland Mines should not do anything other than what it was originally formed for. Mr. Hudson expressed the view that this was unwise, as the company had an operation established, had two or three geologists, had the set-up of an exploration company in Mt. Isa, which was a mining area, and every day was getting prospectors coming in asking the company to look at various different mining propositions, not only uranium, but tin, gold and copper. Mr. Hudson said that he thought it would be very unwise when the company was in this position not to take advantage of the good reputation it had developed in Mt. Isa because of the work it was doing and the quick way it was undertaking it. He urged that the company should look at other propositions brought to it. Mr. Burt then said, "Well, I am prepared if you only look and you don't spend too much money. I don't mind you using the geologist's time but you are not to spend any money

on development. And if anything comes of these things we will just form a new company between Factors and A.O.E.". Queensland Mines looked at a number of mining prospects. One was a tin mine, one was a copper mine in the Gulf of Carpentaria, there were uranium mines further to the east, and a silver-lead prospect, but all of the proposals were turned down as they were no good. It did, however, acquire a small interest in blue metal in Queensland.

Mr. Hudson's Role and Credit

It is common ground that in carrying out these investigations Mr. Hudson was acting on behalf of Queensland Mines. However, he was also engaged in another series of activities which, in fact, led to the investigation of the prospects of an iron and steel industry at Savage River and which Mr. Hudson claims had nothing to do with Queensland Mines or with his position in that company. In order that these events may be understood, it is necessary to say a little more about Mr. Stanley Korman, who has already been mentioned. Mr. Korman was an entrepeneur who built a very considerable financial empire using a network of companies, an empire which finally collapsed in the aftermath of the 1961 credit squeeze. At the centre of Mr. Korman's empire was Stanhill, a company owned and controlled by Mr. Korman

and his family. Through the shareholdings of this company and of members of his family, Mr. Korman exercised control over a considerable number of other companies, one of which was Factors. This network of companies was variously referred to in evidence as the Korman or Stanhill group. By reason of his majority control at board level of Factors and that company's 51% holding in Queensland Mines, the latter company appears to have been regarded, at least by Mr. Korman, as part of the Korman or Stanhill group. Part of the difficulty in unravelling the facts in the present case flows from the fact that Mr. Korman regarded the various companies in the group not primarily as separate entities with their own interests to be considered but rather as so many instruments that he could deploy for his various purposes as occasion required. He was thus quite likely to develop a proposition for some enterprise to a fairly advanced stage without deciding, or at all events announcing, which of the various companies in the group would actually undertake the project. Mr. Hudson's association with Mr. Korman appears to have dated from the negotiations about the establishment of Queensland Mines. There were a number of discussions between them in Melbourne and finally a meeting on 22nd November 1958, at Surfers

Paradise at which the terms of the agreement to establish Queensland Mines were negotiated. This was Mr. Korman's first venture into the mining field and he did not have any relevant expertise in his own group, so at the meeting he asked Mr. Hudson to be managing director of Queensland Mines. Mr. Hudson was not at that time particularly anxious to take on further responsibilities but he did agree to look after the company for the first six months and, subsequently, became its managing director for that period.

Mr. Korman had previously formed an ambition to establish a steel industry to round out his industrial empire and had had Mr. Ridgway looking for iron ore in Queensland. Soon after he came to know Mr. Hudson he asked him if he knew of any deposits of iron ore. Mr. Hudson offered to speak to a friend of his, a Mr. Palmer, who was well informed on the matter, and Mr. Palmer advised that the best opportunity was in New Zealand. Mr. Korman asked Mr. Hudson to get Mr. Palmer to go to New Zealand and in the first half of 1959 Mr. Palmer went to New Zealand and undertook a feasibility study. Mr. Palmer presented a report in April, 1959. Various expenses connected with this investigation were paid from the funds of Queensland Mines.

Towards the middle of 1959 - Mr. Hudson says late April or early May - Mr. Korman rang Mr. Hudson. According to Mr. Hudson, Mr. Korman asked him to accept a position as adviser to him for Stanhill and offered him a salary of £10,000 a year. He said it would involve one or two days' work a week and Mr. Hudson could stay in Sydney. Mr. Hudson claims that he expressed the view that the salary was high for what was involved and that a few days later he rang Mr. Korman and said he would accept the position, but at £7,500. It was, Mr. Hudson claimed, pursuant to the arrangement then made between Mr. Hudson and Mr. Korman that Mr. Hudson did a great deal of work of an investigatory and negotiating nature relating to the possible establishment of a steel industry in New Zealand or Australia, work which finally led to the investigation of the Savage River deposits. Mr. Hudson claims that this arrangement was made with him personally by Mr. Korman as chairman of directors of Stanhill and that on neither side did it have anything to do with Queensland Mines.

I do not believe Mr. Hudson on this matter, or on a number of other important matters to which I shall refer later in the judgment. My disbelief of him is the result of an accumulation of instances in

which his evidence was unsatisfactory and rests partly on my observation of him in the witness box, and partly, and more importantly, on his inability to give a satisfactory explanation of a number of contemporary documents for which he was admittedly responsible. I will deal with some of these matters at various points as they arise. In relation to the alleged personal arrangement between him and Mr. Korman, that he advise Mr. Korman and Stanhill for a salary of £7,500, it is remarkable that not a single penny of any such salary was ever claimed or paid, although, as Mr. Hudson conceded in cross-examination, he did not regard Mr. Korman as a suitable object for charity. On the other hand, it is noteworthy that the conversation took place when Mr. Hudson's initial engagement to serve as managing director of Queensland Mines for six months was about to expire, and that Mr. Hudson was in fact soon afterwards appointed as managing director of Queensland Mines at a salary of £7,500 per annum as from 1st July, 1959. I am satisfied that the sum of £7,500 which Mr. Korman negotiated with Mr. Hudson was his annual salary to continue to act as managing director of Queensland Mines, in which position he would, in Mr. Korman's eyes, be part of the Korman or Stanhill group and be able to be called on to serve

the group. Not only is this view more consistent with the contemporary documentation, but it is more consonant with the evidence of Mr. Redpath, who was, at the relevant time, managing director of Stanhill, a director of Factors and chairman of directors of Queensland Mines. Mr. Redpath was called on behalf of Mr. Hudson, inter alia to corroborate the telephone conversation between Mr. Korman and Mr. Hudson in which an arrangement was made. Mr. Redpath recalled being present in Mr. Korman's office when he spoke by telephone to Mr. Hudson and offered to pay him £10,000 for an ensuing period "as a consultant to him and his group". Mr. Redpath understood this sum to be for work "for the group including Queensland Mines". Mr. Redpath was aware that Mr. Hudson was subsequently appointed managing director of Queensland Mines at a salary of £7,500 per annum, but apparently thought, having regard to the amount of work being done by Mr. Hudson and the reference to £10,000 on the telephone, that Mr. Hudson was receiving some additional sum from one of Mr. Korman's private companies. However, this was an erroneous belief and it is apparent that nothing in fact flowed from the conversation between Mr. Korman and Mr. Hudson by way of payment except Mr. Hudson's salary of £7,500 as managing director of Queensland Mines.

It may well be, as Mr. Hudson says, that he deliberately sought to cut down the figure from £10,000 to £7,500 in order that he would not feel unduly committed to Mr. Korman and his group. Be that as it may, the remuneration which Mr. Hudson received was in his capacity as managing director of Queensland Mines, and that was the only remuneration which he received for the various activities in connection with the development of a possible iron and steel industry to which I shall subsequently refer. As will appear later, there is other evidence that, contrary to his present assertion, Mr. Hudson then regarded these activities as being carried out in his capacity as managing director of Queensland Mines. I am satisfied that Mr. Korman's approach to Mr. Hudson towards the middle of 1959 was motivated by the fact that Mr. Hudson's existing term as managing director of Queensland Mines was running out, and that Mr. Korman was seeking to retain his services within the group.

In finding that the activities of Mr. Hudson, which I am about to describe, were carried out in his capacity as managing director of Queensland Mines, I am not finding that the activities were carried on with a view to the development of an iron and steel industry by Queensland Mines itself. The investigations

and negotiations concerning the establishment of an iron and steel industry were at the behest of Mr. Korman, on the basis that he desired to add an iron and steel industry to the activities of his group. There had probably been no firm decision at this stage as to what company structure would be used for the development of such an industry. It might conceivably have been established and conducted by an as yet unselected member of the group, but more probably it would have been the function of a new company established for the purpose within the group. To what extent Mr. Korman and his family and the various companies which were members of the group would have been shareholders in such a company was never worked out in detail, but I am satisfied that Mr. Hudson anticipated that because of the role which he was playing as managing director of Queensland Mines, that company would have some beneficial interest in what ultimately emerged. Because of his capacity to control the board decisions of Factors and, through it, those of Queensland Mines, Mr. Korman regarded the managing director of Queensland Mines as a person on whose expertise and assistance he was entitled to call and regarded the salary being paid to Mr. Hudson by Queensland Mines as having been fixed to take account of the

services so rendered by Mr. Hudson, Mr. Hudson accepted and acted on this view.

This finding is flatly contrary to the evidence of Mr. Hudson, which was directed to convincing me that all of these activities were carried out in a purely personal capacity pursuant to a personal arrangement between himself and Mr. Korman, or possibly himself and Stanhill. I have already indicated why I reject the basic proposition that there was such an arrangement and as I review the evidence I will, from time to time, indicate matters which have led me to adhere to my interpretation of events, notwithstanding Mr. Hudson's continued assertion to the contrary. It is convenient at this point, however, to mention one matter to which I have attached great weight. During cross-examination Mr. Hudson was confronted with a document dated 1st December, 1960, which appeared to be a copy of a letter written by him as managing director of Kathleen Investments to Sir John Northcott, who was then chairman of directors of that company. This document had been produced pursuant to a subpoena issued on behalf of Mr. Hudson, but on the application of counsel for the plaintiff (who produced it on behalf of the person subpoenaed) I declined to make it available to the plaintiff

until after Mr. Hudson had been cross-examined. I did this because the document, on the face of it, although apparently emanating from Mr. Hudson, was so inconsistent with the case which he had foreshadowed and supported in interrogatories, that the interests of justice would be best served by not making the document available to him before his cross-examination. It was clearly a most important document for the purpose of testing Mr. Hudson's evidence and it seemed to me highly desirable that, if I were to be able to elucidate the truth of this matter, I should hear Mr. Hudson's evidence before it could be suggested that it had been in any way tailored to take account of this apparently contradictory document of his own. The result was that the document, which clearly Mr. Hudson had either totally forgotten or believed to be no longer in existence, was placed before him in cross-examination. It appeared to be a carbon copy of a letter advising the board of Kathleen Investments in strong terms to accept an offer on behalf of Factors to sell its 51% interest in Queensland Mines for the sum of £500,000. In support of the advice that the price was reasonable it reviewed the present resources and prospects of Queensland Mines and contained these critical paragraphs:

"Q.M.L. will have some £20,000 - £25,000 in cash and the Company has, during the last year, carried out investigations in respect of both the establishment of a blue metal industry in Brisbane and a detailed investigation in regard to the establishment of a new Steel Industry, both in New Zealand and Australia.

It was my intention to put Q.M.L. onto an income-earning basis to maintain it until such time as Anderson's Lode could be brought into production, but in view of Factors' decision, I have decided to capitalise Q.M.L.'s interest in these two projects.

In regard to the blue metal industry in Queensland, I estimate Q.M.L. will receive a share issue somewhere between £30,000 - £34,000 (?£40,000) during the next four months and it is probable during next year, it will receive an interest equivalent to some £30,000 - £40,000 for its investigation into the steel industry."

Mr. Hudson agreed in cross-examination that he would have made a report to Sir John Northcott about the proposal of Factors, and when confronted with the document to which I have referred conceded that it was a report which he had drafted for the purpose of submitting to the chairman of the board, and that the last thing that he would have wished to do in drafting such a report for his chairman would have been to make any misleading or untrue statement. However, he maintained that the document was only a draft report and that the paragraphs referred to were not included in the report which went before the board. He maintained that the relevant statements were not true and that he knew them to be untrue when

he wrote them. Mr. Hudson's attempts to explain under cross-examination this extraordinary state of affairs were quite unconvincing. He first offered the view that he may have dictated the report in a hurry, later that he was filling the report up by puffing, and later that much of what was said was meaningless. None of these explanations is in the least degree plausible. Mr. Hudson is obviously a hard-headed businessman who thinks through carefully what he is doing, and the events about which he was writing were very fresh in his memory at the time. I cannot believe other than that he did at the time view the facts in the way in which he stated them in the report. Whether it was in fact a final report, or only a draft, makes little difference for present purposes, although it is relevant on another aspect of the case to ask why in the event Mr. Hudson did not communicate to the board the information in the draft. It is quite incredible that Mr. Hudson would have dictated the relevant paragraphs even for a draft report if he did not then understand the facts to be substantially as he stated them. It is true that in some respects it is difficult to be sure precisely what the report meant, but I have no doubt that it had a clear meaning to Mr. Hudson when he dictated it, and there is no ambiguity about the fact that he

asserted that during the previous year Queensland Mines had carried out a detailed examination in regard to the establishment of a new steel industry both in New Zealand and Australia. There is also no doubt that he believed that, as a result of this investigation, it was reasonable to expect that Queensland Mines would receive a substantial benefit which he then valued at some £30,000 to £40,000. The furthest Mr. Hudson would go in cross-examination was to concede that when the New Zealand venture was going ahead he was under the belief that if it was successful Stanhill would invite either A.O.E. or Queensland Mines, or both, to take up a participating interest in any company that was to be formed. It appears that he had a similar belief in relation to any of the Korman enterprises in which Mr. Hudson was active. However, he denied that this was due either to any contribution of Queensland Mines to the expenses of the investigation or to any participation of that company, but related it solely to what he alleged to be his personal activities pursuant to his personal agreement with Mr. Korman. I have no doubt that the truth is that Mr. Hudson saw the possibility of benefit flowing to Queensland Mines because it was in his capacity as managing director of Queensland Mines that Mr. Korman was using his services in

relation to the proposed ventures. This applies both to what was done during Mr. Hudson's first six months as managing director, and what was done subsequently after an arrangement had been made to put him on a salary of £7,500 per annum in that position.

The earlier iron and steel investigations

It is not necessary to go into great detail about the ventures prior to the specific interest in the Savage River area, but a general sketch is necessary to appreciate the background, and to illustrate the involvement of Queensland Mines. In February 1959, Mr. Hudson spoke to Mr. Palmer, his geologist friend, about Mr. Korman's desire to find iron ore and establish a small steel industry. Mr. Palmer expressed the view that the best opportunities were in the iron sands of New Zealand. Mr. Hudson relayed this to Mr. Korman who instructed him to get Mr. Palmer to go to New Zealand and investigate. In April 1959, Mr. Palmer presented a report which Mr. Hudson sent to Mr. Korman. Mr. Korman got in touch with his brother, Mr. Hilel Korman, who was managing a subsidiary of Stanhill in New Zealand and subsequently asked Mr. Hudson and Mr. Palmer to go over to New Zealand to attend a meeting with the Government together with his brother. Mr. Redpath and a Mr. Taft were also going over. This trip took place about July 1959, and resulted

in a number of discussions with representatives of the New Zealand Government. Mr. Hudson reported to Mr. Korman and went back to make further investigations in New Zealand some six weeks later. However, concern developed in New Zealand about overseas control of the proposed steel industry, and by about September, 1959, the prospects of achieving Mr. Korman's ambitions in New Zealand seemed remote.

Queensland Mines was neither the promoter of nor the proposed vehicle for the intended iron and steel industry. The vehicle would have been another company in which, no doubt, there would have had to be New Zealand Government and other outside interests, as well as an interest from within the Korman or Stanhill group. Mr. Palmer was not asked to do his investigations for Queensland Mines. Nevertheless, Queensland Mines was involved in a number of respects. The most important was that through its managing director it was providing (whether with or without the knowledge of its board as a whole) advice and expertise and participation in investigations and negotiations. It is also to be expected that some benefit would have been extracted from the fact that there was a mining company in the Korman or Stanhill group, and that its managing director was taking part in the negotiations on behalf of the group. In

addition, a significant amount of disbursements arising from the participation of Mr. Palmer and Mr. Hudson were paid from funds of Queensland Mines and were never reimbursed to that company. Mr. Hudson claims that he paid these amounts out of the Sydney imprest account of Queensland Mines on the instructions of Mr. Korman, on the basis that they would be reimbursed in Melbourne from the appropriate company in the group. This sort of accounting was not uncommon in the group, but for the proposition that there was a specific intention to reimburse Queensland Mines from one of the other companies in the group I have only the evidence of Mr. Hudson, and I do not accept it. The fact is that, along with other expenses of a like nature, they were never reimbursed, and remained in the relatively small accounts of Queensland Mines in a form which is unlikely to have escaped the notice of so acute a managing director as Mr. Hudson, who was the only managerial officer of the company. It is more likely that, just as Mr. Hudson's services, provided pursuant to the salary paid by Queensland Mines, were treated by him and Mr. Korman as a contribution from Queensland Mines which would ultimately be recognised in some way if the enterprise got off the ground, so were the various associated expenses regarded by Mr. Hudson and,

if he bothered to think about it, by Mr. Korman. When I come to examine in more detail the initiation of negotiations with the Tasmanian Department of Mines, it will be seen that Mr. Hudson commenced negotiations by claiming that Queensland Mines had recently carried out a survey of Australian iron ore deposits which could support a new Australian steel industry, and that he at least acquiesced in a statement by Mr. Korman that Queensland Mines had, under instructions from Stanhill, made an economic study of known iron and coal deposits in Australia and New Zealand at a cost approximating £100,000. I think that Mr. Hudson regarded these expenses which he caused to be paid from the funds of Queensland Mines as part of the contribution that was being made to the group investigations by Queensland Mines, mainly through his own efforts as managing director.

These remarks apply not only to the New Zealand investigations, but to other subsequent Korman proposals in which Mr. Hudson was involved. The most directly relevant was an investigation of Western Australian deposits by Mr. Palmer, which was arranged by Mr. Hudson and paid for by Queensland Mines. Others included a proposal to establish a pigment industry, a steel industry in Victoria, a galvanised pipe manufacturing plant in New Zealand, a spun pipe

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industry in Victoria, a foundry in Melbourne, a small steel-making plant using electric smelting and scrap as furnace feed, a reinforcing rod industry, iron ore deposits at Nowa Nowa in Victoria, and a number of commercial activities which had nothing to do with iron and steel. None of these came to anything and in most cases there do not appear to have been any particular expenses involved, apart from the normal incidents of Mr. Hudson carrying on his office and travelling within Australia. However, there was an account from Mr. Palmer relating to his Nowa Nowa investigations, and this was paid from Queensland Mines funds and not reimbursed from any source. In general these investigations took place before the final abandonment of any hope of establishing an industry in New Zealand, which occurred in May 1960. There is nothing in the minutes or elsewhere to suggest that Mr. Hudson reported on any of these matters to the board of Queensland Mines, or obtained any authorisation from it to carry out the investigations. The same comment may, however, be made about the investigations to which I have earlier referred which were admittedly made by him on behalf of Queensland Mines. In view of Mr. Burt's known antipathy to any further participation in the mining field or any expansion of the activities of Queensland Mines, it

would not have been surprising if Mr. Hudson remained reticent about his activities so far as the board of Queensland Mines was concerned.

The Mothballing of Queensland Mines

The final and most important of the ventures in which Mr. Korman utilised the services of Mr. Hudson was the investigation of a steel industry based on the Savage River deposits in Tasmania. In August 1960, Mr. Korman, having had no success in other areas, asked Mr. Hudson to investigate the Savage River deposits. Before going in detail to these events, however, it is convenient to note what was happening to Queensland Mines. The drilling of Anderson's Lode was completed in July 1960, and that of the Scal Lease a few months later. There was no possibility of a contract in sight for some years, and it was decided to "mothball" the company. This meant that its running costs were to be reduced to a minimum and that it was simply to be maintained ready to take advantage of any change in the availability of contracts. It was at this stage, that, as I have previously mentioned, Factors sought to sell its shares in Queensland Mines to Kathleen Investments or A.O.E., and Mr. Hudson drafted his letter to Sir John Northcott. However, the detailed decisions relating to the mothballing of the company

were not made by its board until March and April, 1961. Mr. Hudson ceased to be managing director on 15th March, 1961, and no successor was appointed. He remained a director and was appointed a consultant at a salary of £500 per annum from 1st April, 1961. Between 27th April, 1961, when the detailed mothballing decisions were made and 13th February, 1962, (by which time the Korman empire had collapsed and Factors was in the hands of a receiver) there were no meetings at all of the board of directors of Queensland Mines.

The Obtaining of the Tasmanian Exploration Licences

Following the collapse of the hopes of a New Zealand iron and steel industry, Mr. Korman's interest turned to Tasmania. At his request Mr. Hudson sent Mr. Palmer to Tasmania, authorising him to use the name of Queensland Mines if it would help his inquiries. Whether Mr. Palmer in fact did so is uncertain. Mr. Palmer was merely investigating and reporting. It was Mr. Hudson who initiated negotiations.

The files of the Department of Mines of Tasmania provide considerable documentation of the negotiations leading up to the granting of exploration licences to Mr. Hudson, and in addition I had evidence from Mr. Symons, the Director of Mines at the relevant time. I am satisfied that Mr. Symons was an honest

witness, but naturally his recollection of the details of such distant events was not always complete or accurate. His recollection of how things began is coloured by how they turned out, and how they have been conducted for so long. I place greater reliance on the contemporary written record, particularly as so much issued from Mr. Hudson himself. The first step was a letter from him to Mr. Symons dated 16th August, 1960. This letter was on the notepaper of Queensland Mines and purported to be a letter from Queensland Mines signed on its behalf by its managing director, Mr. Hudson. The letter was in these terms:

> "This Company, at the request of interested organisations, recently carried out a survey of Australian iron ore deposits which could support a new Australian Steel Industry.
>
> A recommendation has been made that, provided suitable arrangements can be made with your Government, investigation should be made as to the economics of the use of Tasmanian iron ore possibly in conjunction with Victorian brown coal at an estimated cost of approximately £500,000.
>
> Technical advice and assistance would be given by a major U.S. steel organisation, but overseas financial interest would be limited to 25% of the required capital.
>
> It is appreciated that capitalisation may be in the vicinity of £80/100 million.
>
> Mr. S. Korman of Stanhill Consolidated Ltd. Melbourne and the writer would like to interview you relative to the above at your convenience after the 26th of this month and would appreciate your granting an interview.

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> It is requested that this letter and any subsequent negotiations with your Government remain confidential for the time being."

Mr. Symons responded with a letter of 30th August, 1960, addressed to the Managing Director of Queensland Mines, indicating his willingness to enter into discussions. By letter dated 5th September, 1960, there was a reply from Queensland Mines, signed on its behalf by a member of Mr. Hudson's staff, stating that he had been called away inter-state for the next few days but would communicate with the Director of Mines on his return. Mr. Hudson then visited Tasmania and had a discussion with Mr. Symons about the Savage River ore deposits. He says that he gave Mr. Symons to understand that the principal involved was Stanhill. Subsequently he wrote to Mr. Symons on 23rd September, 1960, on plain paper, what purported to be "a personal note advising that I had a conference with Mr. Stanley Korman of Stanhill Consolidated Limited and Mr. Korman will be writing to you direct". On 26th September, 1960, there was a letter written to Mr. Symons as Director of Mines by Stanhill on its notepaper and signed on its behalf by Stanley Korman, Chairman. I set out a substantial portion of this letter:

> "I refer to Mr. E.R. Hudson's recent interview relative to the establishment of

a Steel Industry in Tasmania, based on the Savage River iron ore deposits.

Queensland Mines Limited, under instructions from this Company has, during the last 18 months, at a cost approximating £100,000, made an economic study of known iron and coal deposits throughout the Commonwealth of Australia and New Zealand, as a basis for the establishment of a Steel Industry and has recommended that such an industry could best be established in Tasmania using iron ore from the Savage River deposits, but that a detailed investigation of the various problems including methods of treatment associated with the establishment of such an industry should be first undertaken over a period of eighteen months to two years at an estimated cost of £750,000.

Queensland Mines Limited has arranged for the technical advice and assistance of a large overseas steel organisation during the initial stage of investigation, and subsequently for management and control during the early years of production.

I am anxious to take immediate steps to implement such recommendation and would appreciate your assistance in arranging a conference with your Premier and Minister for Mines, the Hon. E.E. Reece, to be attended by Mr. Hudson and myself.

My Company will accept responsibility for the formation of a Public Company, with a nominal capital of up to £100,000,000, if desirable, but with an initial issued capital of £750,000 with further issues of capital according to the requirements of the industry from time to time and will underwrite all capital requirements of the Company, both initially and subsequent.

Although technical and managerial assistance will be supplied by an overseas organisation, the Company will remain essentially an Australian entity with overseas capital contribution limited to 25% only of issued capital from time to time.

We would commence our investigation within fourteen days of receiving your Government's

approval and I will make £100,000 available on loan, prior to the formation of the Public Company, to establish base camps, lines of communication, transportation and roads and co-operate with your Department in additional drilling, in order to shorten the investigation period.

At such Conference, I would like to discuss Governmental assistance and co-operation in the following matters namely:-

Transportation, communications, port and harbour facilities, town construction, roads, water and power supply and more particularly at this stage, available technical advice and assistance during the period of investigation of appropriate Governmental Departments.

There would need to be a considerable expansion of electric power output to cope with such proposed industry and as this is a matter which will determine the date of commencement of production, it will require immediate investigation to enable constructional decisions to be made to coincide with the completion of our investigations.

Needless to say, all information obtained by this Company, technical and otherwise, will be made available to your Department and the closest co-operation maintained with it.

Proposed production rate is 1,000,000 tons per annum and estimated capital cost approximately £100,000,000.

It is noted that iron ore deposits have been excluded from the provisions of your Mining Act and you will appreciate it would be essential that a clear undertaking in writing be given by your Government that, on completion of our investigations, should we desire to proceed with establishing the industry, then the iron ore reserves at Savage River will be made available to the proposed Company and title given hereto.

We would also request that the present Governmental policy of refusing export of iron ore from Tasmania be continued and the proposed

Company be given permission to investigate and prove other possible iron ore deposits in Tasmania to increase ore reserves."

In view of the contents of the letter, the prior events, and their relative expertise, it is highly probable that Mr. Hudson at least assisted Mr. Korman in the drafting of the letter, and quite incredible that he was not aware of its terms before it was sent.

Two things are abundantly clear from the correspondence. One is that the approach to the Tasmanian Government was on the basis that the promoter was Mr. Korman or his company, Stanhill. The other is that Queensland Mines, and not Mr. Hudson in any personal capacity or capacity independent of that company, was held out as the principal investigator on behalf of Stanhill of iron deposits throughout Australia and New Zealand in the preceding period, and as the body responsible for technical advice and assistance. There can be no doubt that this was deliberately done, and that it would have been of importance in obtaining the confidence of the Tasmanian Government that an established mining company was involved in the venture. Indeed a memorandum to the Premier dated 8th November, 1960, and signed by the Under-Treasurer, the Commissioner of the Hydro-Electric Commission and the Director of Mines, which

appears to be in the nature of a brief for the Premier at the conference, noted "In the past Mr. Korman has not been associated with mining or steel manufacture, but we consider that he is in a position to obtain suitable specialists who are able to make such a suitable preliminary investigation in satisfactory manner". While both Mr. Hudson's letter and Mr. Korman's letter exaggerated the extent of the preparatory work that had been done, I can see no reason to doubt that both of them did in fact, as they represented to the Government of Tasmania, view the investigatory work as having been done by Queensland Mines, and did in fact view Mr. Hudson's contribution as having been made in his capacity of managing director of that company. Mr. Hudson expressed the view in evidence that his use of the letterhead of Queensland Mines was inappropriate, but said that the considerations he would have had in view were "that Queensland Mines was a subsidiary of Factors and had been financed by Factors, that Stanhill controlled Factors and generally I didn't see anything particularly wrong at that relevant time". Despite Mr. Hudson's attempt to suggest that the use of the letterhead, which he no doubt sees as damaging to his present case, was inappropriate, I can see no reason to doubt that its use correctly expressed the

position as Mr. Hudson saw it at the time. Nor, for reasons which I have already given, can I accept his present evidence that he knew the statement in Mr. Korman's letter that Queensland Mines had spent money on a study was wrong, although he no doubt knew that the amount was exaggerated.

In due course the interview with the Premier took place and Mr. Korman and Mr. Hudson were present, together with Sir John Macauley and a number of Tasmanian officials. It appears that Mr. Korman was anxious to get some security of title before he spent money, but the Premier was firm that he would only get an exploration licence until such time as he was able to submit to the Government a detailed proposition for the development of an integrated steel industry.

Although detailed negotiation was to follow between Mr. Hudson and Mr. Symons, it appears that following the discussion with the Premier the general outline of an arrangement acceptable to the Government of Tasmania was known, and that the major reason for further delay was that Rio Tinto Exploration (Australia) Limited, which had a large exploration area adjoining the Savage River area, had given the Government assistance in its investigations in the Savage River area which left the Government feeling

an obligation towards that company to give it first opportunity to proceed with the Savage River project, if it so desired. This problem and further questions relating to the draft conditions of a permit were discussed between Mr. Hudson and Mr. Symons early in December 1960, and, as a result of this discussion, the position was reached that no final decision would be made by the Government until 23rd January, 1961, when Mr. Hudson would go to Tasmania for a further interview with Mr. Symons, who was to be on leave until 20th January. In the meantime, the Rio Tinto company had been given until 21st December, 1960, to make a decision as to whether it wished to proceed with the Savage River area. At the meeting between Mr. Hudson and Mr. Symons in late January, Mr. Symons stated that the Rio Tinto company had indicated that it was not interested in proceeding with the Savage River area, and that the way was now open for Mr. Korman's application to proceed. A discussion followed about the detailed obligations to be undertaken by an applicant and, in particular, relating to the amount and rate of expenditure to be undertaken in exploration work. Mr. Hudson then returned to Melbourne and discussed the matter with Mr. Korman and an application was drafted. The basis of this application as worked out between Mr. Hudson and Mr. Korman was that a

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public company would be formed for the purpose of carrying out all investigations to enable a decision to be made as to the economics of establishing an integrated steel industry. The task was thus not to be undertaken by Stanhill or by any existing company in the Korman or Stanhill group, but by a new company to be formed within the group. It was thus necessary for somebody to obtain the issue of the relevant exploration licences as a basis for the promotion of the company. Mr. Hudson says that it was thought that there would be some formal application to be signed in Hobart and, therefore, Mr. Korman asked him, as he was going to Hobart, to sign the letter which they had drafted, which was intended to be attached to the formal application. The letter was on plain paper and in these terms:

" 16 O'Connell St.,
SYDNEY.
31st January, 1961.

The Director of Mines,
Mines Department,
HOBART.

Dear Sir,

In making the attached Application for an Exploration Licence, I confirm the purpose is to carry out, over a period of 2 years, developmental and technical investigation at an estimated cost of £1 million to ascertain if an integrated steel industry, at an approximate cost of £100/£150 million can be economically established in Tasmania.

Briefly, the manner in which investigations will be proceeded with are:-

a) Immediate steps will be taken to establish means of access and to commence a geological survey.

b) A Public Company to be known as Tasmania Steel Investigations Ltd., shall be incorporated in Victoria with a paid up capital of £1,000,000 being the estimated expense of carrying out all necessary geological, geophysical, aerial surveys and all other developmental work and technical investigations, as will enable a decision to be made as to the economics of the establishment of such a steel industry. Stanhill Consolidated Ltd., will contribute £500,000 to such Capital and will undertake the formation of the Company in Tasmania.

c) Drilling of the ore body will commence within a period of three months and will continue throughout the two year period at an estimated cost of £250,000 to £300,000.

d) Anticipated expenditure during the first three months is £50,000 and for the next three months £100,000. As the Company builds up a technical staff, both local and overseas, expenditure will increase and it is estimated expenditure, during the following three six-monthly periods will be approximately £250,000 each.

e) The Company will form an association with Overseas steel organisations whose technical staff will undertake investigations of the most economic method of treatment and provision has been made in the estimate for the erection of a Pilot Plant.

f) Overseas capital investment will be limited to 25% of capital and the project, if successful, will be predominantly Australian.

g) As the question of site is one of great importance, the Company will, with your

consent, drill all known iron ore deposits Tasmania.

Yours faithfully,

(Sgd.) E.R. Hudson."

Mr. Hudson took this document to Tasmania early in February 1961. The date stamp applied by the Records section of the Department of Mines shows the document as having been received on 9th February, but it is probable that it was in fact handed to Mr. Symons earlier than this as other evidence suggests that Mr. Hudson was not in Tasmania on that day. He attended a meeting of the board of directors of Kathleen Investments (Australia) Limited held in Sydney at 12 noon on that day, and a letter bearing that date and signed by him was sent from the Sydney office of Queensland Mines to Mr. Symons and appears to be a letter confirming something said by Mr. Hudson at a meeting with Mr. Symons that had already taken place. This letter related to the fact that the Mines Department had been drilling in the Savage River area and had, at that stage, drilled ten holes, and the drilling of a new hole was about to commence. This drilling had been carried out by Associated Diamond Drillers under contract to the Government and Mr. Symons apparently desired assurance that following the granting of the exploration licence no further liability would fall on the Government.

On 13th February, 1961, there was received in the Tasmanian Department of Mines a letter from Queensland Mines on the notepaper of that company, dated 9 February 1961 and signed on behalf of the company by Mr. Hudson as its managing director. It read:

> "I would like to confirm that this Company will accept full responsibility for all costs and expenses in connection with the new drill hole at the Savage River iron ore deposits.
>
> I would also like to extend my appreciation to your Geological staff assisting in arrangements whereby the drill, at present in the area, can be immediately utilised.
>
> I also appreciate your Department's offer to enable piping and other equipment belonging to your Department on the site to be purchased and would appreciate receiving an account at your convenience."

Mr. Hudson did not ever seek or obtain authority from the board of Queensland Mines to give such an undertaking on behalf of the company and, indeed, he had every reason to believe that neither the board of the company nor either of its two shareholding companies would have been willing to give such an undertaking. On the account that Mr. Hudson now seeks to have accepted of his dealings, one would have expected him to give the undertaking personally as the licensee in the expectation of it being taken over by the company to be formed or, if an undertaking was required from an existing company, on behalf of Stanhill, if he had or could obtain Mr. Korman's

authority. Mr. Hudson's evidence concerning this letter in the box was that, looking back, he saw that it should not have been written on the Queensland Mines letterhead. He thought the factors that were in his mind at the time would have been that Queensland Mines was a subsidiary of Factors and of the Korman group of companies, and that he had been told by Mr. Korman to charge any preliminary expenses through the imprest account which would be adjusted in Melbourne. He would also have had in mind that Mr. Korman was putting up £50,000 to be spent from the date of the licence until the company was formed within a period of three months. He had no reason to believe that this obligation would not be assumed by Stanhill and, in any event, it was unlikely that the bill for the drilling would come in for two or three months. Thus, he would have had no doubt that giving the undertaking would not have resulted in fact in any burden being placed on Queensland Mines.

This explanation does not reflect favourably on Mr. Hudson, either as managing director of Queensland Mines or as an applicant for the exploration licence. On the one hand, he was clearly at least exposing Queensland Mines to the risk of liability on the basis of his ostensible authority as Managing Director. On the other hand, he was deceiving the Tasmanian

Government by representing that Queensland Mines had authorised a guarantee which it had not in fact authorised. Whether in fact he discussed the need for the guarantee with Mr. Korman and found him unwilling to give the guarantee, either personally or through Stanhill, is a matter on which I can only speculate. As subsequent events showed, it must by this time have been very clearly present to Mr. Korman's mind that he had grave liquidity problems, and that he was in no position to undertake any further cash commitments, either on his own behalf or on behalf of Stanhill. Indeed, this may have already been apparent to him at the time of the drafting of the letter of application for exploration licences, and may have formed a reason for desiring the licences to be granted in the name of Mr. Hudson rather than in his own name or in that of one of his existing companies. Whatever may be the full story behind the writing of the letter of 9th February, 1961, one thing is clear, namely that Mr. Hudson was making use of his position as managing director of Queensland Mines and of the reputation of that company to assist in the obtaining of an exploration licence in his own name. To anticipate a little, it may be noted that no money was in fact paid by Queensland Mines pursuant to the guarantee as, by the time the account

came in in May, Mr. Hudson was already going his own way with the exploration licence, and had obtained a financial backer. However, in the meantime he had on 6th March, 1961, signed on behalf of Queensland Mines as its managing director a letter from that company to Associated Diamond Drillers Pty. Limited, which was carrying out the actual drilling, which contained these paragraphs:

> "I acknowledge receipt of your letter of the 3rd instant and confirm arrangements whereby this Company will be responsible for the Company's present drill at Savage River under the same terms and conditions as applied to the Mines Dept. of South Australia (sic) who took over responsibility from Rio Tinto.
>
> Mr. Ridgway, our Geologist, will supervise the present drill in place of Rio Tinto."

The comments which I have made about the writing of the letter of 9th February, 1961, apply in large measure to the writing of this letter, with the qualification that, by the time this letter was written, Mr. Hudson was under no illusions about the financial problems of Mr. Korman and Stanhill, and could no longer have had any confident belief that they were either willing to or in a position to stand behind him on any costs that may have been incurred, or to honour any understanding that Queensland Mines would have been indemnified.

Mr. Hudson concedes that no later than 19th

February, 1961, Mr. Korman told him that he had liquidity problems as a result of the credit squeeze and high interest rates, Mr. Korman's organisation having been built up substantially on loan funds. He told Mr. Hudson that he did not feel that he could proceed with the Savage River project. Mr. Hudson claims that he urged Mr. Korman to go ahead and that Mr. Korman said that he did not think he would be able to but would reconsider the position and give him a final answer.

On 23rd February, 1961, Mr. Hudson went to Hobart and was issued with exploration licences EL4/61 and EL5/61. EL4/61 was issued pursuant to the letter of application dated 30th January, 1961, for the Savage River area. EL5/61 related to a coal area which the Government had earmarked for possible use in conjunction with an iron and steel industry. Mr. Symons suggested to Mr. Hudson that he should make application for such an exploration licence to be issued contemporaneously with EL4/61. Mr. Hudson then and there wrote out an application in his hand-writing for this coal area and was thereupon issued with the two exploration licences. In view of subsequent developments, exploration licence EL5/61 has not yet been of any great importance, the developments which have taken place in fact having

flowed from EL4/61. The exploration licences were issued pursuant to s.15B of the Mining Act, 1929 (as amended) of Tasmania, and in the case of EL4/61 contained a number of onerous conditions reflecting what had previously been agreed. The licence was expressed to be issued to Ernest Roy Hudson of 16 O'Connell Street, Sydney and contained the following conditions:

"I. The licensee within seven days of the issue of this licence shall take steps to commence preliminary works necessary for investigation of the area.

II. The licensee shall commence drilling operations within a period of not less than three months and shall be continued during the term of this licence and all extensions thereof, a minimum of two plants capable of boring to at least 1000 feet to be employed and boring to be at the minimum rate of 10,000 feet in each period of six months.

III. The licensee shall within a period of three months from the issue of this licence satisfy the Minister that the requisite technical staff have been engaged or technical associations arranged to enable a complete geological, mining, metallurgical and engineering investigation of the area.

IV. The investigation of the area granted shall include such geological, geophysical surveys, metallurgical research investigations, diamond drilling and such other work as the Minister may direct or approve under the provisions of the Mining Act, 1929, as such may be necessary to determine the iron ore reserves of the area and their potential for the establishment of a steel industry in Tasmania.

V. The licensee undertakes to proceed with due expedition to incorporate in Victoria a Public Company to be known as Tasmania Steel Investigations Ltd. with a paid up capital of £1,000,000 being the estimated expense of carrying out all geological and geophysical surveys, metallurgical research investigations diamond drilling and such other investigations as will enable a decision to be made as to the economics of the establishment of a steel industry in Tasmania.

VI. In accordance with the terms of his application for this licence the licensee undertakes to expend in actual investigational work £50,000 during the first three months of the term of this licence and £100,000 during the next three months, and at the rate of £250,000 each period of six months which might hereafter be granted as extensions of the term of this licence.

VII. The licensee shall progressively furnish the Director of Mines, Hobart, complete records, plans and reports of all investigations undertaken within the terms of this licence. Such records, plans and reports shall be held for official purposes only during such time as the areas concerned are lawfully held by the licensee or unless otherwise agreed to. Results of diamond drilling boring operations shall be submitted as each drill hole is completed.

VIII. The licensee shall submit a monthly progress report of operations.

IX. Such report shall be accompanied by a Statement of Expenditure verified by statutory declaration."

At least by this time it must have been obvious to Mr. Hudson that it was highly unlikely that Mr. Korman and Stanhill would be either able or willing to undertake their proposed part in the venture.

Nevertheless, he accepted the licence, knowing, inter alia, that one of the matters that had been relied on by the Tasmanian Government for issuing it was his letter of 9th February, 1961, in which he had undertaken certain commitments on behalf of Queensland Mines. Just how he envisaged that the obligations could be fulfilled at this stage is not clear but, as I have said, we do know that on 6th March, 1961, he was giving further undertakings in the name of Queensland Mines directly to Associated Diamond Drillers Pty. Limited. Mr. Hudson says that at the meeting at which he received the licences from Mr. Symons he told him of his conversation with Mr. Korman and that Mr. Korman had indicated that he probably would not be able to proceed. He claims that he said to Mr. Symons that if he let the application proceed until he got a final answer from Mr. Korman then, if Mr. Korman did not proceed, he thought he might be able to get a company to take Stanhill's place to go ahead with the proposal. He said that he had no particular company in mind at that time. This evidence was not confirmed by Mr. Symons and I do not accept it. Given the importance that the Tasmanian Government had attached to getting appropriate assurances about the use of the licences, I think it highly improbable that had Mr. Symons

known of the difficulties he would have forthwith issued the licences without further considering the matter and perhaps referring it to his Minister. I find that the position was that Mr. Hudson simply went ahead on the basis of the enthusiastic reports he had received from the geologist, Mr. Ridgway, in the hope that if, as seemed likely, Mr. Korman was unable to provide financial backing, he would be able to obtain it elsewhere. I find that it was only subsequent to the issue of the exploration licences that Mr. Hudson revealed Mr. Korman's difficulties to Mr. Symons.

Events following the issue of the licences

In the event, Mr. Korman and Stanhill were unable to play their proposed role. On about 8th March, 1961, Mr. Korman told Mr. Hudson that there was no possibility of his proceeding with the setting-up of the proposed company or contributing the capital that he had undertaken, and that he was sorry, but he would just have to drop the project. Mr. Hudson claims to have said that he would try to find a company to take the place of Mr. Korman, and that if he could do this the plan, as envisaged, could be carried on, and that Mr. Korman said to him, "Roy, that would be the best thing you can do. It would save us all a lot of embarrassment". Mr. Redpath's version of events

was that after the issue of the licences Mr. Hudson was seeking assurances from Mr. Korman and himself, (he at that time being managing director of Stanhill), that the requirements stipulated in the licence agreement could be met and, if not, whether reasonable modifications could be put to the Government which would satisfy them. Mr. Korman delayed the decision and had negotiations with other institutions but it finally became apparent that Mr. Korman and Stanhill were unable to conform to the requirements of the licence. Mr. Hudson then said that he would have to do whatever he possibly could to keep faith with the arrangements he had made with the Tasmanian Government, even if it meant bringing in other people to carry them out, because he was personally involved in the negotiations. I have no reason to doubt Mr. Redpath's version.

Mr. Hudson's search for finance

On 21st March, 1961, Mr. Hudson saw Mr. Symons and told him that Mr. Korman was unable to go ahead with the project. He said that he was willing to look for someone else to take Mr. Korman's place and was prepared to pay the initial costs incurred in relation to drilling while he did so. He sought permission to carry on but at a reduced rate of work and expenditure. Although there does not appear to

have been any official approval to any variation in the conditions of the exploration licence, it seems probable that Mr. Symons, with the concurrence of his Minister, acquiesced in Mr. Hudson continuing on this basis. A letter of 15th March, 1961, in which he sought to arrange this interview, appears to have been the last written by Mr. Hudson to Mr. Symons on the notepaper of Queensland Mines. Weekly drilling reports were submitted on blank paper with a covering slip "With the Compliments of Queensland Mines Limited", but letters were on plain paper from Mr. Hudson personally until 30th May, 1961, when Mr. Hudson commenced to use the notepaper of Industrial and Mining Investigations Pty. Limited, as the second defendant was then called. Such a letter on that date contained a paragraph:

> "I have formed a Company - the name as shown above - which is being capitalised by myself and which will bear all expenses up to the date of the formation of the public company, including some drilling at Hampshire and the carrying out of tests of the Blythe River ore."

It appears from one exhibit that at least until 1st May, 1961, Mr. Hudson was conducting correspondence with overseas interests under the name of Queensland Mines, but from the end of May he used the name Industrial and Mining Investigations Pty. Limited generally. That company had been incorporated in

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New South Wales on 7th December, 1960. It was later to change its name to Tasmanian Investments Pty. Ltd. on 7th February, 1968, and to Savage Iron Investments Pty. Ltd. on 13th April, 1968. Mr. Hudson has at all material times been a director and the manager of the company and directly or indirectly held a majority of the shares and had the controlling interest. The third defendant, which now bears the name Industrial and Mining Investigations Pty. Ltd., was not incorporated until 22nd February, 1968, in the Australian Capital Territory. Mr. Hudson has at all times controlled it and between 23rd December, 1970 and 29th December, 1971, his shares in the second defendant were transferred to it.

After his meeting with Mr. Symons on 21st March, 1961, Mr. Hudson spent a great deal of time seeking to enlist support for the Savage River project from other companies and organisations. These included (to use names by which they are popularly recognised) C.R.A., North Broken Hill, South Broken Hill, and Kreisler International, all of which were approached immediately in Australia but without success. He also sought to interest financiers as well as public companies, and approached Sir Frank Packer and Sir Ian Potter. He also approached the Australian representatives of several American mining companies

and the representatives in Australia of two Japanese steel-making firms. Everyone turned the proposition down, a major problem being the high titanium content of the ore, which was then thought to make it unsuitable for steel-making. Although Mr. Hudson hoped to overcome this, he apparently did not succeed in convincing the interests he approached at that stage.

The Dubar transaction

In late April Mr. Hudson commenced discussions with Dubar Trading Pty. Limited ("Dubar"), a company owned by a businessman named Mr. Duval. These discussions originally concerned the exploitation of another iron ore deposit in Tasmania at the Blythe River. At some stage, perhaps shortly before the execution of an agreement which had already been drawn up and had to be amended, the discussions also extended to an interest in the Savage River deposits. Exactly what was intended appears to have been a matter of dispute at a later date between Mr. Hudson and Dubar. The agreement, which was signed on 12th May, 1961, recited Mr. Hudson's acquisition of the two exploration licences, and the fact that EL4/61 had been granted to Mr. Hudson in order to enable him to carry out further development and technical enquiry and subsequently form a company for the purpose of

carrying out more detailed investigations to determine the economics of the establishment of a new steel industry. It recited that it was anticipated that the preliminary investigations prior to the formation of the company would involve a period of three to four months, and that the Government of Tasmania had agreed to grant Mr. Hudson further exploration licences or leases over other areas which might contain iron ore in Tasmania to determine whether such deposits were suitable for the establishment of a steel industry in Tasmania or the development of an export trade in iron ore, and that Mr. Hudson had requested Dubar to provide certain finance for the purpose of exploring, prospecting and developing the areas "covered by the said Licences and other Licences, Leases or other Mining Rights that might be obtained", and that the company had agreed to do this on the terms and conditions set out in the deed. The deed provided that Mr. Hudson should continue to hold exploration licences EL4/61 and EL5/61 in his own right but should hold all further exploration licences, leases or other mining rights granted under the Mining Act of Tasmania to him or any other person during the course of the investigation in relation to the Savage River iron ore deposit and/or the export of iron ore from Tasmania in trust for himself and

the company in equal shares. It required that Mr. Hudson should at all times use his best endeavours to obtain licences, leases or other mineral rights on the areas covered by the exploration licences or elsewhere in Tasmania as he and/or Dubar should consider desirable. In return Dubar agreed to be responsible for the payment of all current and future expenses in connection with the exploration, development and technical investigation necessitated under the agreement up to a total of £30,000. All items of property thereafter purchased by Mr. Hudson for the purpose of the exploration, development and technical enquiries were to be the property of Dubar until such time as all moneys expended by it under the agreement had been repaid in full. Clauses 9 and 10 provided as follows:

> "9. All moneys, shares in companies or other benefits received from the sale or disposition of any Exploration Licences, Leases or Mining Rights now acquired or hereafter to be acquired by Hudson shall be charged in the first instance with repayment to the Company of such moneys as shall have been paid by it under the terms of this Deed and after payment of such moneys in full, shall be charged with repayment of expenses previously incurred by Queensland Mines Limited and/or Hudson and Stanhill Consolidated Limited. From such moneys, shares or other benefits Hudson shall be entitled to pay or satisfy such moneys or benefits by way of reward to persons who have assisted in regard to the exploration, development and enquiries as he shall think fit but not so as to include any benefit or payment to himself and PROVIDED that the total amount to be paid

otherwise than to the Company under this clause shall not exceed Thirty thousand pounds (£30,000).

10. After payment and the setting aside of all amounts or benefits as set out in the last clause hereof, all exploration Licences (including Exploration Licence EL4/61 and EL5/61), Leases, Mining Rights or property acquired in pursuance of this Deed shall be held by the person in whose name they shall then be for Hudson and the Company in equal shares."

The agreement as finally concluded incorporated a number of handwritten amendments, apparently made at the last moment, and some of the provisions are not easy to reconcile. It is not surprising that there was subsequent disputation about the respective rights of the parties.

Clause 9 contemplated the repayment of expenses previously incurred by Queensland Mines and/or Mr. Hudson and Stanhill. In evidence, Mr. Hudson said that his knowledge at that time was that the payments that had been made out of Queensland Mines' imprest account, which he stated were on behalf of Stanhill, had not been refunded by Stanhill, and he was informed by the Secretary that the total amount involved was £2,500. That was the reason for the inclusion of Clause 9. He felt that this sum should be refunded if Stanhill did not refund it. He felt that he had an obligation as far as A.O.E. was concerned to see that it was refunded. So far as Stanhill was concerned

the only expenses that they had incurred at that date would have been the cost of travelling down to Tasmania on the appointment to see the Premier.

In accordance with the agreement, an imprest account was opened which was funded by Dubar, and from it working expenses were paid for a period. These included payments totalling £6,180.4.10 between 16th May, 1961 and 7th September, 1961, for drilling and £36.0.0 for assay on 20th September, 1961. No payments for drilling or assays were made from the funds of Queensland Mines. Disputes occurred fairly quickly between Mr. Hudson and Dubar which led to negotiations for termination of the agreement. These had not been finalised by October 1961, when Mr. Hudson went abroad.

His trip was in connection with treatment of a sample of the Savage River ore by a certain process in America to see if the titanium content could be brought out in the slag, instead of remaining in the steel. While he was overseas he spent nearly three months travelling in America, England and Germany in an endeavour to find a company which would come into the project. The processing was successful in removing the titanium, but he was still unsuccessful in obtaining a financial partner. Mr. Ridgway, the geologist, also went to observe the processing test

and all of his expenses and Mr. Hudson's expenses were paid by Mr. Hudson. In the first 12 months of the licence Mr. Hudson incurred a total expenditure of about £50,000, including amounts initially provided by Dubar which he later refunded.

When he returned to Australia in December discussions resumed with Dubar against a background of renewed disputation. On 22nd March, 1962, Dubar sent a letter signed on its behalf by Mr. Barrell to Mr. Hudson in these terms:

> "As you know I telephoned your office yesterday in an endeavour to make an appointment but was informed that you would be unable to see Mr. Duval for some days.
>
> Mr. Duval will be leaving Australia again next week and it is therefore now urgent that we attempt to come to finality on the matter.
>
> We reiterate our view that we already hold a 50% interest in the various Tasmanian ventures - that is to say not only in the Blythe River but also in the Savage River. You have told us that you agree that we have a 50% interest in the Blythe River but you dispute our claim in relation to the Savage.
>
> We do not desire to have any legal disagreement on the matter and whatever the position may be Mr. Duval would very much prefer to conclude an amicable arrangement with you.
>
> To demonstrate our good faith in this regard we have obtained a release of the interests (if any) of Queensland Mines Limited, Factors Limited, and the Stanhill Group and have paid the sum of £2,500 for this release. A copy of the letter of release is herewith. You will no doubt say that these people had no interest to be released but you will

probably agree that it is a form of complication which is better removed. Certainly the Tasmanian authorities had notice from Stanhill of some alleged claim and it will clear the air so far as they are concerned.

We can assure you that Mr. Duval is in a position to make immediate arrangements for the detailed examination of the areas without further expense to you and that if those examinations prove satisfactory the overseas interests concerned can, from their own resources, provide for the total capitalisation required.

Basically that is the proposal we make, and if the programme goes through to the end result the consideration available to the vendors would be shared equally. That is, after recoupment of expenses, any share participation or royalty received would belong to you and us (or our respective nominees) in equal shares. The terms of any such deal would be as mutually decided when the time comes.

The details of how this is set up are open for discussion although it is our view that the best method would be to set up a small pilot company and that this company should hold the leases or other rights granted from time to time.

We are prepared to provide in any arrangement that if the proposition is rejected by the overseas interests the leases and other mining interests for both the Blythe and the Savage would be returned to you free of expense.

We feel certain that the suggested arrangements are to our mutual advantage and particularly point out that if we can solve our present problems the overseas investigation will commence almost immediately.

We do hope that you will give the proposals your most serious consideration, and we shall look forward to hearing from you in the next day or so."

The enclosure was in these terms:

20th March, 1962.

The Secretary,
Dubar Trading Pty. Ltd.,
66 Clarence Street,
SYDNEY. N.S.W.

Dear Sir,

This is to acknowledge receipt of the sum of Two Thousand Five Hundred Pounds in full settlement of all interest of this company and of Factors Limited and the Stanhill Group, in Iron Ore Deposits in Tasmania known as Savage River and Bligh River.

Yours faithfully,
QUEENSLAND MINES LIMITED
((Sgd.) W.D. Phillips)
W. D. PHILLIPS
SECRETARY. "

This came as a complete surprise to Mr. Hudson, although he was at the relevant time a director of Queensland Mines. What had happened has to be pieced together from other sources. Mr. Barrell gave evidence that he had come into possession of information which suggested the possibility of rights existing in some other companies. He believed that he had got this from two sources, public views expressed in the press and a Mr. Dickenson, who was employed by his company as a geologist. Through a Mr. Eric Feitz, a chartered accountant in Melbourne who was acting as financial expert for the Korman group, he arranged to meet with Mr. Korman, Sir William Bridgeford and Mr. Feitz. He could not be more specific about the

date than to say that it was in 1961. He asked them directly what rights, if any, they had in the Savage River projects and the Blythe River projects. Mr. Korman did the talking and made extravagant claims which Mr. Barrell attributed to the fact that Mr. Korman thought that he represented a group that had some money. There was talk about Stanhill, Factors, Queensland Mines and other companies throughout the group, but there was no specific claim made for any company. From Mr. Barrell's point of view the discussion was inconclusive. However, he then heard that a Mr. Gladstones, with whom he had previous professional association as an accountant, had received an appointment within the Stanhill group, and arranged to see him. This was late in 1961 or early in 1962. Mr. Gladstones was at that stage chairman of directors of Factors, a position to which he had been appointed in the course of some attempt to retrieve the financial situation of the company. Mr. Barrell told Mr. Gladstones of his conversation with Mr. Korman and, in response to an inquiry by Mr. Gladstones as to his interest, told him of the agreement between Mr. Hudson and Dubar. Mr. Gladstones told him that he was not au fait with the claim but would investigate it. Subsequently, but still early in 1962, Mr. Barrell had another meeting with Mr. Gladstones in Melbourne.

Mr. Barrell specifically asked what document or claims, if any, the Stanhill group and associated companies had, but he was not given any positive information. Mr. Barrell was endeavouring to find out what sort of document existed or what Dubar was actually buying in the way of an interest. No details could be extracted from Mr. Gladstones. Finally a price of £2,500 was agreed on for whatever the rights were. Later Mr. Barrell and other representatives of Dubar met Mr. Phillips, the Secretary of Factors and Queensland Mines, for the purpose of paying over the sum of £2,500 and getting a form of release suggested by Dubar's advisers. It would appear from the document that the date of this meeting was 20th March, 1962. Mr. Phillips also gave evidence, according to which Mr. Gladstones asked him to go and see Dubar and discuss some interest in iron in Tasmania. He said that when he saw Mr. Barrell he (Mr. Phillips) insisted that Queensland Mines and Factors had no interest whatever in the Savage River, but Mr. Barrell nevertheless insisted on giving him £2,500 for whatever interest the companies might have. This is a much less plausible account, and I am satisfied that Mr. Barrell's memory and understanding of the incident is much superior to that of Mr. Phillips. The cheque

received by Mr. Phillips was banked to Queensland Mines' credit and entered in the books as "Dubar Trading Company. Repayment of out-of-pocket expenses and purchase of interest, if any, in Tasmanian Iron & Steel".

The disputation between Mr. Hudson and Dubar continued for some time, but ultimately he reimbursed Dubar for the money paid in relation to Savage River and Dubar acquiesced in the view that its only interest was in the Blythe River.

Accepting Mr. Barrell's evidence that it was Mr. Gladstones who negotiated the sum of £2,500 for the sale of any interest which the various companies in the Stanhill group might have had in the Savage River, it is necessary to try to ascertain what happened leading up to this negotiation on his part. He is no longer alive but there are a number of documents and some oral evidence from other witnesses.

Mr. Gladstones had joined the Board of Directors of Factors on 5th July, 1961, and had been elected chairman on 24th July. During this period Factors was seeking to find a buyer for its shares in Queensland Mines, the board of directors of which did not meet between 27th April, 1961, and 13th February, 1962. The minutes of the Board of Factors, which met under the chairmanship of Mr. Gladstones, contain the

following series of entries under the heading

"Queensland Mines Limited":

"4th October 1961

Mr. Korman informed the meeting that some time ago Mr. Hudson obtained licences from the Tasmanian Government relative to Iron Ore Deposits in Tasmania.

These licences were obtained for and on behalf of Queensland Mines Limited. It now appeared that Mr. Hudson was endeavouring to promote a company to develop the deposits.

Mr. Korman was authorised to proceed to Tasmania to interview the Premier in an endeavour to clarify the position."

(It seems likely that Mr. Korman's raising of the matter was connected with his interview with Mr. Barrell.)

1st November 1961

"The Secretary read a letter written to Mr. Hudson and a reply thereto, and also a report on the discussion with the Premier of Tasmania. It was agreed that the matter should be deferred until the return of Mr. S. Korman from overseas."

(The letters and report referred to are not in evidence, probably because they are no longer in existence.)

6th December 1961

"It was agreed that outstanding matters relating to Queensland Mines Limited be deferred until a report is received from that Company. It was suggested that it would be necessary to hold a Directors' Meeting of Queensland Mines Limited to discuss the following matters:

1. Agreement with Tasmanian Government relative to permits for development of the Iron and Steel Industry in Tasmania.
2. Blue Metal Deposits.
3. Agreements with Factors Limited and Australian Oil Exploration Limited."

10th January 1962

"It was agreed that a meeting of Queensland Mines Limited Directors should be held at an early date to discuss outstanding items."

7th February 1962

"The Secretary advised that a meeting of Queensland Mines Limited, which was to have been held this day, now had to be postponed due to the inability of Mr. Hudson to attend.

The Secretary was instructed to endeavour to arrange the meeting for Tuesday next, 13th February."

A meeting of the board of directors of Queensland Mines was in fact held on 13th February, 1962, the first since 27th April, 1961. Mr. Gladstones attended and, following the resignation of Mr. Redpath as director and chairman, was elected a director and then chairman of directors. The minutes contain this entry under the heading "Tasmanian Iron Ore":

"Mr. Hudson gave a lengthy report on the negotiations that had taken place with the Tasmanian Government with regard to developing Iron Ore Deposits in Tasmania.

There was no question of any Promoter's Profits in the plan which envisaged the forming of a Company to develop the area.

It was agreed that in view of all the explanations and the large amount of cash that would be required to finance the project, nothing could be gained by pursuing the matter any further."

This meeting was the subject of a report to the board of directors of Factors on 7th March, 1962, the

minutes of that meeting containing this entry under the heading "Queensland Mines Limited":

> "The Secretary reported that a Meeting had been held with Mr. Hudson and that Mr. Gladstones was now Chairman of Directors following the resignation of Mr. Redpath.
>
> The Company was working on a very limited budget, and Mr. Hudson was endeavouring to dispose of the Assets.
>
> Mr. Hudson had reported on the Tasmanian Iron Ore negotiations and he had indicated that it did not seem likely that there would be any Promoter's Profit in the development."

The next relevant entry is in the minutes of the Factors board of 4th April, 1962, which, like the other meetings to which I have referred, was under the chairmanship of Mr. Gladstones. The minutes state, under the heading "Queensland Mines Limited":

> "The Chairman reported that on behalf of Queensland Mines Limited he had accepted an amount of £2,500 from Duval Holdings Ltd. as purchase of the interest of the Company in the Tasmanian Iron Ore Deposits.
>
> It was resolved that the action of the Chairman in relation to this matter be confirmed."

The transaction with Dubar was never reported to the board of Queensland Mines, or, so far as the evidence shows, to the other shareholder, A.O.E. Queensland Mines was still in mothballs and the meeting of the board of directors on 13th February, 1962, was the first for some 10 months. There were only three other brief meetings in 1962, and one in

1963. Mr. Hudson, although a director of Queensland Mines, acquired knowledge of the transaction only when notified by Dubar.

It is not possible for me to determine how much was revealed to the directors of Queensland Mines by Mr. Hudson's "lengthy report" referred to in the minutes of the meeting of 13th February, 1962. Mr. Redpath left after resigning and thereafter the only persons present with Mr. Hudson were Mr. Gladstones and Mr. David Korman. The latter, who was the son of Mr. Stanley Korman and closely associated with him in his business activities, would have known a great deal about the development of the Savage River project and would almost certainly have known of the approach of Dubar to his father. So far as Mr. Gladstones is concerned, he had been briefed to some extent by Mr. Redpath, his predecessor in the office of chairman. Mr. Redpath had a lengthy discussion with him about the various aspects of Factors and, in the course of this, had told him of Mr. Hudson's investigations in Tasmania. Mr. Gladstones had asked his opinion of it and he had said that there were very onerous conditions attaching to the project as far as he could see. There was a lot of money to be spent before any money could be made, and he suggested that Mr. Gladstones discuss the matter with Mr. Hudson.

He told him that Mr. Hudson had frequently asked if they were still able to come into the project in Tasmania and that they had consistently told him they could not. Mr. Gladstones had also had his first conversation with Mr. Barrell and knew of Mr. Hudson's arrangement with Dubar. However, he apparently did not reveal at the Queensland Mines board meeting that he was aware of this or was in negotiation with Dubar.

Mr. Phillips the Secretary of Queensland Mines, who prepared the minutes of the meeting of 13th February, 1962, clearly has no reliable detailed memory of what happened. He conceded that if he had been asked three months before he gave evidence whether he recalled any discussion between the directors of Queensland Mines about the Savage River iron ore deposits he would have said "No", but his attention had since been drawn to the minute of 13th February, 1962. He did not know anything about the Dubar transaction before he was asked by Mr. Gladstones to go to meet the Dubar representatives shortly prior to 20th March, 1962.

There remains Mr. Hudson's account of the meeting. He said that he made a lengthy statement at Mr. Gladstones' request, although Mr. Gladstones did not say why he was asking for it. He took it

that Mr. Gladstones was making general inquiries about the assets of Factors and the Korman group. He did not know whether Mr. Gladstones knew the history or not so he took him back through the history, including Mr. Korman's visit to the Premier and finally the application for the licences, the granting of the licences, and Mr. Korman's and Stanhill's retirement. He went on to describe the Savage River itself, what it was, and the difficulties attached to it. He said that he had been overseas and had seen about 19 companies and had been unable to interest anyone. He said that he had done the smelting test and that it was possible to produce satisfactory steel from the ore. He told of the terms and conditions of the licence and that he had told the Mines Department that he would carry on with it to see if he could get a company to replace Stanhill. He said that he was spending about £20,000 every six months and up-to-date had been unsuccessful in obtaining anyone but still thought the venture would be successful. He pointed out that the Government had reduced the expenditure required under the terms of the licence, and that in his view it was necessary to carry on for at least a while and further develop the area before it would be of interest to anybody. Apparently, he did not mention the Dubar agreement and the finance

he was receiving as a result of it although, unknown to him, this was known to the other two directors.

I do not have confidence in Mr. Hudson's evidence of this meeting, as he may well have tailored it to what he now believes will suit his case. However, one thing is clear from Mr. Hudson's evidence, namely that he does not claim that he informed Mr. Gladstones, or the board of Queensland Mines, that the exploration licences were obtained in part by the use of his office as managing director of Queensland Mines, and by the use of the name, reputation and resources of the company. There is accordingly no evidence that these facts, or the more detailed facts from which I have inferred them, were disclosed to Mr. Gladstones or the board.

Mr. Hudson's development of the Savage River Project

Mr. Gladstones ceased to be a director and chairman of Queensland Mines on 17th April, 1963. Sir John Northcott, who became a director on 22nd May, 1964, became chairman of directors on 23rd February, 1965, an office which he held until his death in 1966. Mr. Hudson was then chairman of directors from 1967 until his removal on 24th August, 1971. He was continually a director of the company from 24th June, 1959 to 21st December, 1971, and was managing director from 24th June, 1959 until

March 1961 and from 17th July, 1967, until 6th September, 1971. The question of the Tasmanian iron ore deposits was not again raised within Queensland Mines after the meeting of 13th February, 1962, until after Mr. Hudson ceased to be a director. Nor was it raised again in Factors after the board meeting of 4th April, 1962.

Meanwhile, Mr. Hudson, proceeded with the development of an industry on the basis of the exploration licences in his own name or the name of his own company, and without there being any reference to or assistance in any form from Queensland Mines or any of the companies in the Stanhill Group. It will be sufficient to paint the picture broadly, and it can be summarized by saying that by dint of enormous personal effort, persistence, business ability and risk-taking investment, Mr. Hudson succeeded in creating a viable industry out of a project for which for a long period he was able to find no backing at all, despite approaches to a very wide range of interests. I have already referred to his initial approaches to Australian companies and Australian representatives of overseas companies and to his trip overseas in search of backing late in 1961. I have also referred to Mr. Redpath's evidence that Mr. Hudson was continually expressing the hope that

there might be some possibility of the Stanhill group, or people connected with it, coming back into the enterprise as financial backers at some stage. Mr. Hudson, when giving evidence about the meeting of the board of directors of Queensland Mines on 13th February, 1962, claimed that in giving his lengthy explanation he had in mind the possibility of arousing the interest of Mr. Gladstones as an influential person in the business community in Melbourne, and this may well be true. Mr. Hudson was not keeping his project secret in any way but, on the contrary, was seeking a backer from any source, and I have no doubt that had there been any possibility of backing from Queensland Mines or from any of the companies associated with it, Mr. Hudson would have welcomed this with open arms. During 1961 he sought advice from brokers in Australia about the possibility of floating a company, but in view of his advice did not proceed with the proposal. He came to the conclusion that there was no company in Australia to take the place of Stanhill or Mr. Korman and thereafter he looked overseas for backing. He realised that he would have to solve the problem of the titanium content which, at that stage, was regarded as making the deposit unsuitable for steel-making. In collaboration with the Tasmanian Government, he pursued enquiries with

the Strategic Materials Corporation of New York into the use of the Strategic-Udy Universal Smelting Process. He sent 20 tons of ore sample from all over the mine, together with samples of Tasmanian coal, to the American plant where tests were carried out at the end of 1961. This demonstrated that good quality steel could be made from the Savage River ore in an electric furnace. The cost of this experimentation to Mr. Hudson and his companies was some £12,000. He undertook road and bridge making in the very difficult terrain around the Savage River. He carried out investigations into the limestone deposits which would be available for steel-making purposes. He employed Mr. Ridgway full time on geological work and the siting of drilling. Elaborate investigations were carried out into the possibility of developing a harbour at a convenient point on the west coast of Tasmania, and sites for a steel-making plant were also investigated. The expenses of all these activities were borne by Mr. Hudson or his companies.

Mr. Hudson worked hard to interest overseas steel-making companies, including Kaiser International, Armco Steel, Messama Transvaal, and other European and American companies. There is no point in going over these in detail, but it is fair to emphasise that the negotiations represented enormous effort,

enterprise and expense on the part of Mr. Hudson. Meanwhile, expenses of development continued. Drilling was going on all the time and consequentially assaying. Roads had to be maintained in difficult weather and terrain. Overseas experts were retained to carry out technical costing. Reports were prepared for presentation to companies which might possibly be interested. Late in 1962 representatives of an American company, Pickands Mather & Co. International, visited the Savage River with Mr. Hudson. He obtained from them a lot of information about pelletising iron ore, and about the possibility of transporting the ore in powder form mixed with water through a pipeline. Although the project involved the longest pipeline in the world, this method of transportation ultimately came to be recognised as the only feasible method. There was a fall of 1,000 feet from the mine to the coast which could be utilised in conjunction with a certain amount of pumping.

Mr. Hudson visited Japan on four occasions in an endeavour to interest Japanese iron interests, which were possible purchasers of pellets if the export of pellets was permitted. Kawasaki Steel became interested in establishing a pelletising industry and by early 1963 Mr. Hudson was negotiating about the possibility of establishing a pelletising

plant through a consortium including Pickands Mather, Cleveland Cliffs, Home State Mining and Kawasaki Steel. Meanwhile, there were problems about processing as the original concept of Strategic-Udy had failed when a plant was set up in Venezuela. Mr. Hudson then went to Germany to discuss a direct reduction process with a Germany company, Lurgi.

On 31st May, 1963, Mr. Hudson had transferred Exploration Licence EL4/61 to his company, Industrial and Mining Investigations Pty. Limited, as the second defendant was then known. Commencing in June, 1963, there was a series of agreements between that company and Pickands Mather & Co. and Pickands Mather & Co. International (which I shall refer to jointly or severally as "Pickands Mather", the distinction being unimportant for present purposes), whereby Pickands Mather was granted an option over the licences, the principal consideration being the payment of a royalty. The option agreements were renewed from time to time and finally the option was exercised late in 1966. During 1964 the second defendant applied for mining leases in respect of part of the land covered by the exploration licences. The rights under these applications were transferred first to Pickands Mather and on 3rd June, 1966, to North West Iron Co. Limited and Dahlia Mining Co.

Limited, which also acquired the interest of Pickands Mather in the option agreements as from that date and exercised them in 1966. I have not attempted to set out these and related transactions in any detail, but only to give a general picture of subsequent developments. Should the present case be decided in favour of the plaintiff, it would, of course, be necessary to investigate these dealings in detail to set out the rights to which it would be entitled. In fact, a large part of exploration licence EL4/61 and exploration licence EL5/61 are still held by the third defendant, to which they were transferred in May 1968.

Up to the time of the first option agreement with Pickands Mather in June 1963, Mr. Hudson had expended, either directly or through his companies, some £150,000 on the development of the project. Pickands Mather then spent approximately £2½-million on investigations for the industry which is now based on mining the central area of the exploration licence EL4/61. Mr. Hudson and his companies continued drilling on the balance of the area, at the expense of Pickands Mather until the option was exercised in 1966 and thereafter at their own expense. This continued until some time in 1974 with a view to establishing the possibility of a steel industry. Up to 30th June,

1974, the total expenditure of the three defendants on the project was $1,131,390. This figure does not include any allowance for Mr. Hudson's services, which have clearly been of enormous value.

As a result of the exercise of the option in 1966 a pelletising plant has been established on the central area of the original exploration licence, and pellets are being exported to Japan. No steel industry has yet eventuated, but Mr. Hudson and his companies have continued exploration and drilling in the balance of the area and have had negotiations and investigations with a view to establishing a steel industry. There are still technical problems about production processes which Mr. Hudson and his companies have been investigating.

Although until 8th March, 1962, Associated Diamond Drillers Pty. Limited rendered accounts for drilling in the name of Queensland Mines and thereafter rendered them in the name of Industrial and Mining Investigations Pty. Limited, they were at all times paid by Mr. Hudson or his companies. There is no contest that all expenses incurred after the acquisition of the licence by Mr. Hudson were paid by him or his companies and that Queensland Mines was not ~~debted~~ debited with any such expense. On 27th April, 1961, when a number of the major mothballing

decisions were made in relation to Queensland Mines and assets were being sold, Mr. Hudson arranged for the purchase from Queensland Mines of a jeep which it owned in Queensland for the purpose of use in Tasmania and he paid Queensland Mines for it. Mr. Hudson told his fellow directors, Mr. Redpath and Mr. Korman, what he was doing in Tasmania and what he required the jeep for.

Acquisition of Dubar's Interest by Mr. Hudson

An account had been given earlier of the circumstances in which Dubar entered into a transaction on 20th March, 1962, to acquire all the interests of Factors, Stanhill and Queensland Mines in the Savage River deposits. Ultimately the disputation between Dubar and Mr. Hudson came to an end on the basis that Dubar acquiesced in the proposition that it had no rights in respect of the Savage River deposits, but rights only in regard to the Blythe River. There the matter rested until a few days before the commencement of the present hearing. Then on 15th October, 1974, the second and third defendants, Mr. Hudson's companies, entered into a deed whereby they purchased from Dubar for $5,000 all its right, title and interest in and to the two exploration licences, and in particular but without limiting the generality of the foregoing all rights if any received by Dubar

under and pursuant to the transaction of 20th March, 1962.

Knowledge of Queensland Mines, its directors and shareholders of Mr. Hudson's activities

A considerable amount of evidence was tendered by Mr. Hudson to establish knowledge of other directors of Queensland Mines or of its shareholding companies of Mr. Hudson's activities over relevant periods in relation to the Savage River. The original shareholders of Queensland Mines were A.O.E. and Factors. A.O.E. was an almost wholly-owned subsidiary of Kathleen Investments and in May, 1964, Kathleen Investments bought the shares of Factors in Queensland Mines and thereafter controlled the whole of the shares, either directly or through its subsidiary, A.O.E. The composition of the board of directors of Queensland Mines from time to time reflected these events. Until the takeover by Kathleen Investments the board consisted of three people, two representing Factors and one representing A.O.E. The representative of A.O.E. was Mr. Hudson. Throughout the period Mr. David Korman was one of the representatives of Factors, the other was successively Mr. Redpath, Mr. Gladstones and Mr. Stanley Korman. Mr. Hudson, who was a director both of A.O.E. and of Kathleen Investments, remained on the board of Queensland Mines after the takeover and the other directors, numbering

at different times, two, three, four or five, were appointed by Kathleen Investments. Mr. Hudson gave detailed evidence about the knowledge of various of the directors over the period of his activities. Mr. Redpath himself gave evidence and there was evidence which I have already recounted which casts light on the knowledge of Mr. Gladstones and the Kormans. I do not propose to review all this evidence in detail but rather to state the conclusions to which I have come.

It is useful to classify the knowledge which might or might not have been possessed under three headings, viz.: (a) knowledge that Mr. Hudson had acquired the original exploration licences as trustee for a company to be formed by Stanhill and Mr. Korman; (b) knowledge that in the investigations and negotiations leading up to the application for these licences and the granting thereof use had been made of the name and prestige of Queensland Mines, of the services of its managing director, and of its funds; (c) knowledge that Mr. Hudson was using the exploration licences as a basis for seeking financial support and otherwise working towards the establishment of some sort of iron or steel industry in which he would have a beneficial interest.

I am satisfied that matters (a) and (c) were

quite generally known amongst persons interested in mining and mining investment and that, in particular, they were known to all the directors of Queensland Mines, at least up till 1971. They were also known to the directors of A.O.E. and Kathleen Investments during the same period, and were known to a significant number of the directors of Factors up to the time that it sold its shares in Queensland Mines to Kathleen Investments. I have no reason to doubt Mr. Hudson's evidence that he was continually seeking in Australia and abroad some other financial backer to step into the shoes of Stanhill, which had withdrawn leaving him holding the licences, and that he made this fact as widely known as possible amongst anyone who might conceivably have been in a position to promote an interest in the venture. I accept that the only reason he did not make formal proposals to Queensland Mines, Factors, A.O.E. or Kathleen Investments to promote the venture was that he knew that it would have been a complete waste of time, both because of the financial position of those companies and because of their general policy orientation. Certainly, the directors of those companies knew that the opportunity was there but were not interested. I accept that the general view was, as one such director expressed it to Mr. Hudson, that he was mad to go on

with a venture which Rio Tinto had deliberately declined. It is apparent from the evidence that the difficulties facing the establishment of an industry on the basis of the Savage River deposits were enormous, and that the economic circumstances in 1961 and 1962 were highly unfavourable to the venture, and that it was only extraordinary effort and persistence on Mr. Hudson's part that brought it to ultimate fruition.

Knowledge of the matters listed in (b) above, namely that in the obtaining of the exploration licences and the events leading up to and making possible the obtaining of those licences use had been made of the name and prestige of Queensland Mines, of the services of its managing director, and of its funds, stands in a quite different category. These facts were known, of course, to Mr. Hudson and, it is reasonable to infer to Stanley Korman and David Korman and to some extent Mr. Redpath. It is possible that they were discovered by Mr. Gladstones in his investigations but he played his cards so close to his chest that I cannot make any positive finding about his knowledge. Mr. Ridgway, the geologist, who was a director of Queensland Mines representing Kathleen Investments from 23rd May, 1964 to 17th August, 1967, may have known because of his close association with and employment by Mr. Hudson. For

the rest there is no evidence from which I could infer any relevant knowledge on the part of directors of A.O.E. or Kathleen Investments, or their nominees on the Board of Queensland Mines. As I have already found, there is no evidence of any relevant disclosure at the meeting of the board of Queensland Mines on 13th February, 1962.

Conclusions as to the acquisition of the licences

On 23rd February, 1961, Mr. Hudson acquired the legal title to two exploration licences which his company still holds, subject to the mining leases granted in respect of the central area of one. By reason of his exploitation of that central area he is, through his companies, now entitled to very large royalty payments. This state of affairs has been achieved only by tremendous enterprise, effort and expenditure on his part, which has turned what was a bare opportunity in 1961 into valuable assets.

In the investigations and negotiations which led up to the acquisition of the legal title in the exploration licences Mr. Hudson used his position as managing director of Queensland Mines, used the name, prestige and credit of Queensland Mines and expended the funds of Queensland Mines, all of which contributed in some degree to the ultimate granting of the licences.

However, Mr. Hudson did not at the time of obtaining the licences hold the beneficial interest therein as a constructive trustee for Queensland Mines. The reason for this is that he acquired the licences originally as a bare trustee, the trust being in favour of the company to be formed by Stanhill. Although at the time that he actually received the exploration licences Mr. Hudson must have had considerable doubts about the ability of Stanhill to establish the company in accordance with the conditions of the licence, it is nonetheless the case that he made the application on that basis and accepted the licences on that basis and was granted the licences on that basis by the Tasmanian Government. If, immediately after the granting of the licences, Stanhill had indicated its intention to proceed with the establishment of the company, Mr. Hudson would have had no answer to the claim that he held the licence as trustee for the company to be promoted.

However, Stanhill decided not to proceed with the formation of the contemplated company and itself disavowed any interest in the exploration licences. I say that Stanhill did this. It was done on its behalf by Mr. Stanley Korman. The only evidence I have is that in all the matters which have been dealt with in evidence in this case he spoke and

acted on behalf of Stanhill which was his family company, and his authority to do so was never put in issue.

Mr. Hudson was therefore left holding the legal title to certain property which he had originally acquired as a trustee for a company to be promoted by Stanhill. It became clear that that the company would never come into existence and that all interest in the licences was renounced by Stanhill. Prima facie, that left Mr. Hudson in the position that he was holding the legal estate in certain property in which nobody claimed a beneficial interest. The trust had not been for a charitable purpose and prima facie, therefore, Mr. Hudson's legal title made the licences his to do with as he wished. No doubt the Tasmanian Government could have revoked the licences once it became clear that Stanhill would not form the proposed company. However it acquiesced in the position that Mr. Hudson would hold the licences, and would endeavour to comply with the conditions to the extent that he was able without the participation of Stanhill or the formation of the proposed company.

The findings which I have made involve a rejection of the first submission of the plaintiff, namely that when Mr. Hudson originally acquired the exploration licences he acquired them by virtue of his position

as its managing director and as trustee for it. This is inconsistent with my finding that he acquired them as trustee for a company to be formed by Stanhill. However, the plaintiff makes the alternative submission that when Stanhill withdrew and Mr. Hudson was left holding the licences, without any claim to a beneficial interest from Stanhill, he was holding a benefit which he had obtained through his fiduciary office as director of Queensland Mines and by use of that office, and that he therefore then held the beneficial interest in the licences for it as a constructive trustee. This is the first issue of law which I have to decide in the light of my findings.

If I find that issue adversely to Mr. Hudson, so that following the withdrawal of Stanhill he is to be considered as holding the exploration licences as constructive trustee for Queensland Mines, a second issue arises, namely whether Queensland Mines at any stage abandoned its interest or consented to Mr. Hudson exploiting the licences as his own.

If I find that issue adversely to Mr. Hudson the question arises whether the sale to Dubar on 20th March, 1962, divested Queensland Mines of any interest which it had in the Savage River, and whether Mr. Hudson is now entitled to rely on this transaction as against Queensland Mines, having regard, inter alia,

to his recent purchase of any interest that Dubar acquired through that sale.

If I find adversely to Mr. Hudson on those issues, the question arises whether the plaintiff's action is barred by any statute of limitation.

Finally, if it is not so barred the question arises whether the action is defeated by the plaintiff's laches, acquiescence or delay.

The accountability of directors

Counsel for the defendant referred me to a wide range of material on the law relating to the accountability of directors to their companies for profits, including material from New Zealand, Canada and the United States. In deference to his argument, and in view of the large amounts at stake, I have considered and reviewed this material, although in the end I have concluded that it supplies no reason to think that there are any issues relevant to the facts of this case other than those authoritatively dealt with in recent English cases.

There is such recent and explicit authority at the level of the House of Lords concerning the fiduciary duties of a director that it is not necessary for me to trace its development through the earlier cases. That has been done elsewhere, e.g. Beck, "The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered", (1971) 49 Canadian Bar Review, 80 and

A.J. McClean, "The Theoretical Basis of the Trustee's Duty of Loyalty" (1969) 7 Alta. L.Rev.218. The case that is at the root of fiduciary duties is Keech v. Sandford (1726) Sel. Cas. Ch. 61, 25 E.R. 223, a decision which was "clearly prophylactic, directed to preventing the inevitable results of temptation" (Beck, op. cit. p.86). There constantly runs through the later cases the theme that Courts will not burden themselves with the difficult and multitudinous enquiries as to whether a person in a fiduciary position has, in all the circumstances, succumbed to temptation. They simply insist that such a person does not act in a way in which he is exposed to temptation.

Regal (Hastings) Ltd. v. Gulliver & Ors. was a decision of the House of Lords given in 1942, although it is reported at (1967) 2 A.C. 134, following the decision of the House in Phipps v. Boardman, (1967) 2 A.C. 46. In that case the directors of the plaintiff company desired, in the interests of the company and in complete good faith, to establish a subsidiary company for the acquisition of certain property. For this purpose it was necessary to raise £5,000 of capital but the company itself could not put in more than £2,000. In order that the transaction might go through a number of the directors each took up a

parcel of shares in his own name, in order to make up the total capital required. They did not refer the matter to the shareholders and reveal what was happening or obtain consent. On the completion of the transaction they sold their shares in the subsidiary at a profit which the company sued in the action to recover. In the Court of Appeal it was held that as the directors had acted in good faith and without fraud they were not liable to account, but this was reversed by the House of Lords. Viscount Sankey said that the respondents were in a fiduciary position, and their liability to account did not depend on proof of mala fides.

> "The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee he is bound to account for it to his cestui que trust. The earlier cases are concerned with trusts of specific property: Keech v. Sandford, (1726) Sel.Cas.Ch.61 per Lord King, L.C. The rule, however, applies to agents, as, for example, solicitors and directors, when acting in a fiduciary capacity." (pages 137, 138)

Later his Lordship referred to

> "the general rule that a solicitor or director, if acting in a fiduciary capacity, is liable to account for the profits made by him from knowledge acquired when so acting." (page 139)

He rejected the argument that it would have been impossible to carry the transaction through for the

benefit of the company without the directors themselves advancing the money which produced the profit, saying that this did not take them outside the general rule.

> "At all material times they were directors and in a fiduciary position, and they used and acted upon their exclusive knowledge acquired as such directors. They framed resolutions by which they made a profit for themselves, sought no authority from the company to do so, and, by reason of their position and actions, they made large profits for which, in my view, they are liable to account to the company." (page 139)

Lord Russell, with whose reasons Lord McMillan (page 153) and Lord Porter (page 157) agreed, indicated the width of the rule in this way:

> "The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of the profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account." (pages 144-45)

He cited Keech v. Sandford (supra) as an illustration of the strictness of the rule. There a trustee of a lease, having found it absolutely impossible to obtain a renewal on behalf of the cestui que trust, took a lease for his own benefit and was held liable to

assign it to the cestui que trust. Lord King, L.C. said (page 62):

> "This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that the rule should be strictly pursued, and not in the least relaxed ...." 10

Lord Russell posed as the test whether the directors who acquired these very profitable shares acquired them "by reason and in course of their office of directors of Regal" (page 145).

Lord McMillan said:

> "The sole ground on which it was sought to render them accountable was that, being directors of the plaintiff company and therefore in a fiduciary relation to it, they entered in the course of their management 20 into a transaction in which they utilised the position and knowledge possessed by them in virtue of their office as directors, and that the transaction resulted in a profit to themselves. The point was not whether the directors had a duty to acquire the shares in question for the company and failed in that duty. They had no such duty. We must take it that they entered into the transaction lawfully, in good faith and indeed avowedly in the interests of 30 the company. However, that does not absolve them from accountability for any profit which they made, if it was by reason and in virtue of their fiduciary offices as directors that they entered into the transaction." (page 153)

He referred to the equitable doctrine invoked as "one of the most deeply-rooted in our law" (page 153). He said that the plaintiff company had to establish two things:

> "(i) that what the directors did was so related 40 to the affairs of the company that it can properly be said to have been done in the

course of their management and in utilisation of their opportunities and special knowledge as directors; and (ii) that what they did resulted in a profit to themselves." (page 153)

Lord Wright said that the question in the case could be briefly stated to be:

"whether an agent, a director, a trustee or other person in an analogous fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position, and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person. (Emphasis supplied)"..... "The rule in such a case is compendiously expressed to be that an agent must account for net profit secretly (that is, without the knowledge of his principal) acquired by him in the course of his agency ... The Courts below have held that it does not apply in the present case, for the reason that the purchase of the shares by the respondents, though made for their own advantage, and though the knowledge and opportunity which enabled them to take the advantage came to them solely by reason of their being directors of the appellant company, was a purchase which, in the circumstances, the respondents were under no duty to the appellant to make, and was a purchase which it was beyond the appellant's ability to make, so that, if the respondents had not made it, the appellant would have been no better off by reason of the respondents abstaining from reaping the advantage for themselves. With the question so stated, it was said that any other decision than that of the Courts below would involve a dog in the manger policy. What the respondents did, it was said, caused no damage to the appellant and involved no neglect of the appellant's interest or similar breach of duty. However, I think the answer to this reasoning is that, both in law and equity, it has been held that, if a person in a fiduciary relationship makes a secret profit out of the relationship, the Court will not enquire whether the other person is damnified or has

> lost a profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship. Nor can the Court adequately investigate the matter in most cases. The facts are generally difficult to ascertain or are solely in the knowledge of the person who is being charged. They are matters of surmise; they are hypothetical because the enquiry is as to what would have been the position if that party had not acted as he did, or what he might have done if there had not been the temptation to seek his own advantage, if, in short, interest had not conflicted with duty." (page 154)

In reply to the suggestion that "it would have been mere quixotic folly for the four respondents to let such an occasion pass when the appellant company could not avail itself of it" Lord Wright referred to the statement in Keech v. Sandford which I have previously quoted and went on:

> "It is, however, not true that such a person is absolutely barred, because he could by obtaining the assent of the shareholders have secured his freedom to make a profit for himself. Failing that, the only course open is to let the opportunity pass." (pages 156-7)

Lord Porter said that it was plain that the shares were obtained by the defendants "by reason of their position as directors of Regal" (page 158). He said that the legal proposition might be broadly stated by saying

> "that one occupying a position of trust must not make a profit which he can acquire only by use of his fiduciary position, or, if he does, he must account for the profit so made". (page 158)

Later he said:

> "Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form. Their liability in this respect does not depend upon breach of duty but upon the proposition that a director must not make a profit out of property acquired by reason of his relationship to the company of which he is a director. It matters not that he could not have acquired the property for the company itself - the profit which he makes is the company's, even though the property by means of which he made it was not and could not have been acquired on its behalf." (page 159)

I have quoted at length from these judgments because they show how Draconian is the relevant English rule and how completely the House of Lords has insisted on applying it to directors of companies. Their Lordships were willing to acknowledge little in the way of exceptions or defences available to a director. Viscount Sankey said at page 139:

> "No doubt there may be exceptions to the general rule as, for example, where a purchase is entered into after the trustee has divested himself of his trust sufficiently long before the purchase to avoid the possibility of his making use of special information acquired by him as trustee .... or where he purchases with full knowledge and consent of the cestui que trust." (page 139)

The latter exception was acknowledged by all their Lordships and, in that case the solicitor, Garten, escaped liability on the ground that he had taken up the shares at the invitation of and with the knowledge of his client, the company, which for the purpose of its dealings with him was represented by its board of directors. So far as the directors were

concerned, however, the only consent which was suggested as possible protection for them was "a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting" (page 150), although no doubt it would be adequate to show the "assent of the shareholders" (page 157) by other means.

Regal (Hastings) Ltd. v. Gulliver was applied by the House of Lords in Phipps v. Boardman (1967) 2 A.C. 46, which, although not a case about directors, again illustrates the strict character of the liability of a fiduciary, and the unwillingness of the House of Lords to engraft exceptions or defences on to the rule. In that case a trust had a holding of 8,000 £1 shares in a company in which there were 30,000 of such shares. The defendants were the solicitor for the trust and one of the beneficiaries. They were dissatisfied with the company's accounts and attended its annual general meeting as proxies on behalf of the trust. As a result they obtained information about the affairs of the company which led them to make a personal take-over bid for the outstanding shares so as to obtain control, and by liquidation of assets make a repayment of capital to the shareholders. During the negotiations for the purchase of the shares they referred to their representative

capacity, and made use of the information which they had received at the annual general meeting as representatives of the trustees, and obtained further information during their negotiations on the basis of their representation of the shareholding of the trust. Although they made some disclosure to the plaintiff (one of the beneficiaries) and he expressed himself to be satisfied, the trial Judge held that the appellants could not rely by way of defence on his consent as he had not been given sufficient information as to the material facts. The take-over was completed and the assets realised and distributed to shareholders, all of whom, including the trust, made a substantial profit. The take-over had involved the undertaking of a considerable amount of work and travel, and the exercise of skill and the taking of risks by the defendants, but the House of Lords, by a majority of three to two, held that they were bound to account to the trust for the profit which they had made. However, having acted openly but mistakenly in a manner which was highly beneficial to the trust, they were entitled in the circumstances to payment on a liberal scale for their work and skill.

Lord Cohen in his judgment at page 95 noted that the trustees could not have made the take-over

bid themselves without the sanction of the Court, as the shares in question were not an authorised investment under the trust, and that one of the trustees had said that he would not agree to the trustees buying the shares under any circumstances. He also noted that it was clear that the plaintiffs had not acted as agents for or with the approval of the trustees (page 100). His Lordship said:

> "(I)t seems to me clear that the appellants throughout were obtaining information from the company for the purpose stated by Wilberforce, J. but it does not necessarily follow that the appellants were thereby debarred from acquiring shares in the company for themselves. They were bound to give the information to the trustees but they could not exclude it from their own minds. As Wilberforce, J. said, the mere use of any knowledge or opportunity which comes to the trustee or agent in the course of his trusteeship or agency does not necessarily make him liable to account. In the present case had the company been a public company and had the appellant bought the shares on the market, they would not, I think, have been accountable. But the company is a private company and not only the information but the opportunity to purchase these shares came to them through the introduction which Mr. Fox (one of the trustees) gave them to the board of the company and in the second phase when the discussions related to the proposed split-up of the company's undertaking it was solely on behalf of the trustees that Mr. Boardman was purporting to negotiate with with board of the company."

His Lordship rejected an argument that liability to account existed only when the information could have been used by the principal for the purpose for which it was used by the fiduciary agent. The

argument was that the information could never have been used by the trustees for the purpose of purchasing shares in the company; therefore, purchase of shares was outside the scope of the appellant agency and they were not accountable. He said:

> "This is an attractive argument, but it does not seem to me to give due weight to the fact that the appellants obtained both the information which satisfied them that the purchase of the shares would be a good investment and the opportunity of acquiring them as a result of acting for certain purposes on behalf of the trustees. Information, is, of course, not property in the strict sense of that word and, as I have already stated, it does not necessarily follow that because an agent acquired information and opportunity while acting in a fiduciary capacity he is accountable to his principals for any profit that comes his way as the result of the use he makes of that information and opportunity. His liability to account must depend on the facts of the case. In the present case much of the information came the appellant's way when Mr. Boardman was acting on behalf of the trustees on the instructions of Mr. Fox and the opportunity of bidding for the shares came because he purported for all purposes except for making the bid to be acting on behalf of the owners of the 8,000 shares in that company. In these circumstances it seems to me that the principle of the Regal case applies and that the Court below came to the right decision." (page 103)

His Lordship concluded that the integrity of the appellants was not in doubt:

> "they acted with complete honesty throughout and the respondent is a fortunate man in that the rigor of equity enables him to participate in the profits which have accrued as the result of the action taken by the appellants in March, 1959, in purchasing the shares at their own risk." (page 104)

Lord Hodson, at page 105, said:

"The proposition of law involved in this case is that no person standing in a fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any grounds save that he made profits with the knowledge and assent of the other person.

I take the above proposition from the opening words of the speech of Lord Wright in Regal (Hastings) Ltd. v. Gulliver, where he states the proposition in the form of a question which he answered as had all the members of Your Lordships' House in such a way as to affirm the proposition.

It is obviously of importance to maintain the proposition in all cases and to do nothing to whittle away its scope or the absolute responsibility which it imposes."

Later, after agreeing with the proposition that information as such is not necessarily property and that it is only trust property which is relevant, he went on to say:

"(B)ut it is nothing to the point to say that in these times corporate trustees, e.g., the Public Trustee and others, necessarily acquire a mass of information in their capacity of trustees for a particular trust and cannot be held liable to account if knowledge so acquired enables them to operate to their own advantage, or to that of other trusts. Each case must depend on its own facts and I dissent from the view that information is of its nature something which is not properly to be described as property. We are aware that what is called 'knowledge', in the commercial sense is property which may be very valuable as an asset. I agree with the learned Judge and with the Court of Appeal that the confidential information acquired in this case which was capable of being and was turned

> to account can be properly described as the property of the trust. It was obtained by Mr. Boardman by reason of the opportunity which he was given as a solicitor acting for the trustees in the negotiation with the chairman of the company, as the correspondence demonstrates. The end result was that out of the special position in which they were standing in the course of the negotiations the appellants got the opportunity to make a profit and the knowledge that it was there to be made." (page 107)

His Lordship went on to say that it was no answer to the respondent's claim that the trust itself was unable to purchase the shares or that there was no contract of agency or that the appellants were at all times acting for themselves without concealment and, indeed, with the encouragement of one of the trustees (page 109). Lord Guest relied on the decision in Regal (Hastings) Ltd. v. Gulliver and concluded (page 117):

> "The only defence available to a person in such a fiduciary position is that he made the profits with the knowledge and assent of the trustees."

He concluded by saying that he based his opinion on the ground that the defendants had placed themselves in the special position of a fiduciary character in relation to negotiations. Out of such special position and in the course of such negotiations they had obtained the opportunity to make a profit out of the shares and knowledge that the profit was there to be made. A profit was made and they were accountable accordingly. (page 118)

It is interesting to note the reasons of the two Lords who dissented. Viscount Dilhorne agreed that the defendants were in a fiduciary relationship to the trust, but said that on the facts of the case there was no conflict or possibility of a conflict between the personal interests of the appellants and those of the trust because of the opposition of one of the trustees to the trust buying any of the shares (page 88). His Lordship said that while it may be that some information and knowledge can properly be regarded as property, he did not think that the information supplied as to the affairs of the company was to be regarded as property of the trust in the same way as shares held by the trust were its property. Nor did he think that saying that they represented the trust without authority amounted to use by the defendants of the trust holding. He referred extensively to Aas v. Benham (1891) 2 Ch. 244 and particularly to the principle enunciated by Lindley, L.J., that if a partner avails himself of information for any purpose which is "within the scope of the partnership business" he must account to the firm for any benefit he may have derived from such information. He said that the same principle applied to other agents and to trustees and that whether or not there was a breach of duty by a

trustee in the use of information so obtained appeared to him to depend on whether the information could be used in relation to the trust in connection with which it was obtained, and, if it could, whether the use made of it was to the prejudice of that trust. He concluded that, on the facts of the case, the acquisition of the shares was outside the scope of the trust and outside the scope of the agency created by the employment of the appellants to act for the trust, and that the information obtained by the appellants was not of any value to the trust because the trust could not and did not want to buy the shares.

(pages 89-91)

Lord Upjohn, who also dissented, said:

> "The relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict." (page 123)

He distinguished Regal (Hastings) Ltd. v. Gulliver, saying:

> "This case, if I may emphasise it again, is one concerned not with trust property or with property which the persons to whom the fiduciary duty was owed were contemplating a purchase but in contrast to the facts in Regal with property which was not trust property nor property which was ever contemplated as the subject matter of a possible purchase by the trust." (page 125)

He rejected the view that information learned by a

trustee during the course of his duties is the property of the trust and cannot be used by him. He said:

> "The real rule is, in my view, that knowledge learned by a trustee in the course of his duties as such is not in the least property of the trust and in general may be used by him for his own benefit or for the benefit of the other trusts unless it is confidential information which is given to him (1) in circumstances which, regardless of his position as a trustee, would make it a breach of confidence for him to communicate to anyone for it has been given to him expressly or impliedly as confidential, or (2) in a fiduciary capacity, and its use would place him in a position where his duty and his interest might possibly conflict." (pages 128-129)

I have cited this case at length, not only because of its strong majority affirmation of the Regal (Hastings) doctrine in its full rigor, but also because on the facts of the case it bears a number of analogies to the present case and forecloses many of the arguments that might have otherwise been available to Mr. Hudson.

While the decision clarifies a number of relevant matters, I would respectfully agree with a commentator who writes:

> "It is unfortunate that the idea of information as property was introduced in Phipps to further tangle the problem of fiduciary obligations. It is unfortunate because it was unnecessary. The question is not whether the information acquired by the agent is the property of the trust, but is whether the agent used his position to make a profit without the informed consent of his principal .... One way, among many, in which the position of a

> fiduciary may be used to make a profit, is to turn to account information which was acquired while acting as such. The idea of the information being the property of the principal only serves to obscure the essential point that it is the use of the fiduciary position to make a profit that is forbidden." (Beck, op. cit. page 110).

These principles were recently applied in Industrial Development Consultants Ltd. v. Cooley (1972) 1 W.L.R. 443 by Roskill, J. His Honour commented on the remarkable fact that the plaintiff as a result of the case got the benefit of a contract made by the defendant which it was unable to obtain for itself because of the other party's objection to dealing with it. However, it was plain from the cases that the question of whether or not the benefit would have been obtained but for the breach of fiduciary duty had always been treated as irrelevant. For a discussion of this case contrasting it with North American authority see (1973) 89 L.Q.R.187.

In G.E. Smith, Limited v. Smith: Smith v. Solnik, (1952) N.Z.L.R. 470, Gresson, J. applied Regal (Hastings) Ltd. v. Gulliver, and at page 475 said:

> "In my view, Smith's liability does not really depend upon breach of duty so much as upon the proposition that a director must not make a profit out of property acquired by reason of his relationship to the company of which he was a director. It matters not that he could not have acquired the property for the company itself (if that be the case): per Lord Porter in Regal (Hastings) Ltd. v. Gulliver. Smith

> was too precipitous. He devoted himself to advancing his own interests at a time when his duty lay to the company, or, if the matter is regarded as one of partnership, to his partner."

I was referred by the defendants' counsel to a number of United States decisions. While they are not authoritative for me, I have considered them to see whether they suggest any lines of development of the law which are not foreclosed by decisions binding upon me. They were Zeckendorf v. Steinfeld, (1909) 100 P. 784, Carper v. Frost Oil Co. (1922) 211 page 370, Thilco Timber Co. v. Sawyer (1926) 210 N.W. 204, Colorado and Utah Coal Company v. Harris (1935) 49 P (2d) 429, and Blaustein v. Pan-American Petroleum and Transport Company (1944) 293 N.Y. 281. This line of authority is based on the view that the law is merely that a fiduciary may not purchase and hold, as his own, property which he is in duty bound to purchase and hold for another, and that his duty depends on whether the principal has an interest, actual or in expectancy, in the property, or whether the purchase of the property by the fiduciary may hinder or defeat the plans and purposes of the principal in the carrying-on or development of its legitimate sphere of business. This view of the law has been expressly rejected by the House of Lords in the cases which I have cited. It would appear also that the particular cases to which I was referred in

detail are by no means indicative of later developments in United States law. A note on "Corporate Opportunity" (1964) 71 Harv.L. Rev. 765, discusses the development of the notion of a fiduciary duty of loyalty which a director or officer owes to his corporation and which broadly forbids him to pursue his own interests in a manner injurious to the corporation. It points out that the early cases imposed a constructive trust on property or profits acquired by an executive only under relatively restricted circumstances. It suggests that the refusal of Courts to extend the doctrine further, leaving executives free to pursue their own interests in many situations of potentially great importance to their own corporations, may have resulted from the severity of the constructive trust remedy which sometimes permitted the corporation to recover all profits owned by the defendant, even if they were traceable solely to his initiative and skill and even though the risk of loss lay entirely on him. The note goes on to say that whatever the motive for this display of judicial caution, its strength has apparently diminished with the passage of time, and recent cases have substantially expanded the restrictions imposed on executive under the corporate opportunity doctrine. In Rosenblum v. Judson Eng'r Corp., (1954) 109 A 2d, 553 558, the Court

expressed the view that the earlier cases adopted too lax a conception of the requirements of fiduciary loyalty and stated that the issue to be determined was whether the opportunity appropriated by the defendant "was so closely associated with the existing and prospective activities of the corporation that the defendant should fairly have acquired that business for or made it available to the corporation". The criterion laid down in the Rosenblum case has come to be called the "line of business" test. The line of business opportunity apparently does not stop at the boundary of the corporation's current operations, but also embraces areas into which the corporation might naturally or easily expand (pages 768-9). Where an opportunity is within the corporation's line of business the executive is normally required to offer it for consideration by the board of directors and to await rejection - should it be forthcoming - before seeking it himself. There are, however, some exceptions to this disclosure requirement, all of which rest immediately on the proposition that the circumstances clearly evidence corporate inability or disinclination to seize the opportunity and hence render disclosure nugatory. Examples include legal prohibition or legal incapacity of the corporation to utilise the opportunity and the situation where the

corporation is insolvent and nearly defunct. The problem with this latter exception is the difficulty of its extension to cases where the corporation is in serious financial difficulty or lacks liquid assets but may still be a going concern. In neither case will it ordinarily be entirely clear that, given knowledge of the opportunity, the corporation will be unable to secure needed financing with reasonable rapidity; the very existence of the prospective profit-making venture may generate additional financial backing (pages 772-3). At least one Court has articulated the rule that the executive is precluded from appropriating the opportunity where the corporation is allegedly unable to obtain the required funds. Finally, the disclosure requirement is generally held inapplicable when the opportunity in question has previously been rejected by the corporation (page 773). It is suggested that two additional exceptions which have occasionally been recognised are less solidly grounded. These are the refusal of the third party to deal with the corporation and impediment in the by-laws of the corporation to the corporate action (pages 773-4). Apparently full disclosure to the board of directors has been considered sufficient (even if the interested directors constitute a majority so long, of course, as all act in good faith). (pages 774-5)

The note goes on to deal with circumstances in which the executive may be held liable even for the use of opportunities lying outside the corporate line of business. These include cases where the executive has utilised confidential information or records of the corporation to discover the opportunity, or where the opportunity arises from special research or investigation conducted by the corporation, or where the information was given to the executive in his executive capacity to be conveyed to the corporation (page 776). A constructive trust may also arise if an executive has developed an enterprise by use of corporate personnel or assets (page 777), or where an executive converts an otherwise proper personal transaction into a corporate opportunity by purporting to act for the corporation (page 778). See also for a general account of United States law Feuer, Personal Liability of Corporate Officers & Directors (2nd edn. 1974) Ch.6.

On the other hand, a case note in (1968) 43 N.Y.U.L. which deals critically with the decision in Burg v. Horne, 380 F 2d, 897, indicates that New York Courts have generally applied the "interest or tangible expectancy" test rather than the "line of business" test. In applying their test the New York Courts consider whether the corporation needs

or wants the property acquired by the director or whether a special duty requires him to acquire the property for the corporation. This depends on the examination of various factors such as the capacity in which the director acquired the information, the benefits of such property to the corporation, and the financial ability of the corporation to purchase the property (page 188). For a more recent statement see Maxwell v. Northwest Industries Inc. (1974) 339 N.Y.S. 2d 347.

In Canada the decision of the House of Lords in Regal (Hastings) Ltd. v. Gulliver has been the subject of consideration in a unanimous judgment of the Supreme Court of Canada, on which the defendant in this case sought to rely. In Peso Silver Mines (N.P.L.) v. Cropper, (1966) 58 D.L.R. (2d) 1, the Court considered a claim by a mining company that the defendant, a former director, held certain shares in other mining companies in trust for it. The shares in question were in a company formed by the defendant and others to take up certain mining claims which had previously been offered to the plaintiff. At the time of the offer the plaintiff company had already acquired a large number of claims and had strained its financial resources in doing so and had been advised by its engineers to spend substantial sums monthly

on the properties which it already had. The acquisition of additional claims would have involved increased expenditures and the company neither needed nor wanted any more ground at the time. It was, however, receiving two or three offers a week of new claims and one of these related to the claims which gave rise to the proceeding. They were offered to the plaintiff at the suggestion of a consulting geologist retained by the plaintiff and many other mining companies. The offer was considered by the full board of directors of the plaintiff and was rejected. It was not disputed that the decision rejecting the acquisition was an honest and considered decision of the plaintiff's board of directors as a whole, and that it was done in the best of faith and solely in the interest of the plaintiff and not from any personal or ulterior motive on the part of any director, including the defendant. Some time later the consulting geologist suggested to the plaintiff and others that they take up the claims. There was no knowledge of any special specific mineralisation on the claims and it was common ground that the purpose was a highly speculative venture. Later a company was formed to take over the claims and it was the defendant's shares in this company which were the subject of proceedings. Subsequently another

company took over the plaintiff company and following the take-over a claim was made on the defendant to transfer his shares in the company that had been formed to the plaintiff. The plaintiff founded its claims squarely on Regal (Hastings) Ltd. v. Gulliver, saying that the shares held by the respondent were property obtained by him as a result of his position as a director of the plaintiff without the approval of the plaintiff's share-holders, and that equity imposed upon him an obligation to account to the plaintiff for the property which was unaffected by the circumstances that he acted throughout in good faith, that the plaintiff had decided for sound business reasons not to acquire the property and had suffered no loss by reason of the defendant's actions.

The judgment of the Court quoted numerous passages from the speeches of the Lords in Regal (Hastings) Ltd. v. Gulliver, emphasising those passages which referred the liability to the making of a profit by reason and in course of the fiduciary relationship, or by use of the fiduciary position. The court said that it found it impossible to say that the respondent obtained the shares in dispute by reason of the fact that he was a director of the

plaintiff and in the course of the execution of that office. At page 8 the judgment proceeded:

> "When Dickson, at Dr. Aho's suggestion, offered his claims to the appellant it was the duty of the respondent as director to take part in the decision of the board as to whether that offer should be accepted or rejected. At that point he stood in a fiduciary relationship to the appellant. There are affirmative findings of fact that he and his co-directors acted in good faith, solely in the interests of the appellant and for sound business reasons in rejecting the offer. There is no suggestion in the evidence that the offer to the appellant was accompanied by any confidential information unavailable to any prospective purchaser or that the respondent as director had access to any such information by reason of his office. When, later, Dr. Aho approached the appellant it was not in his capacity as a director of the appellant, but as an individual member of the public whom Dr. Aho was seeking to interest as a co-adventurer."

The judgment referred to Lord Russell's reservation in regard to the hypothetical case postulated by Lord Greene, M.R., in the Court of Appeal, that a decision adverse to the directors in the Regal (Hastings) case involved the proposition that, if directors bona fide decided not to invest their company's funds in some proposed investment, a director who thereafter embarked his own money therein was accountable for any profits which he may derive therefrom. Lord Russell had commented that the facts of that hypothetical case bore but little resemblance to the story with which the House had had to deal. The Supreme Court of Canada expressed the view that

this reservation was intended to indicate that Lord Russell had no quarrel with the proposition enunciated by the Master of the Rolls. The Court held that the case before it was, in all material respects, identical with those in the hypothetical case stated by Lord Greene.

Several writers have criticised this decision, and have suggested that it is not in accord with English decisions. In a note by D.D. Prentice in (1967) 30 M.L.R. 450, the learned author suggests that the rejection of the opportunity by the company did not eliminate the conflict of interests problem as it was the very decision of the directors to reject the opportunity which opened the way for its taking up by one of their number. He says:

> "Where it would be illegal for the company to exploit the opportunity, then, of course, it could be plausibly argued that a conflict of interest arises. To make the directors disgorge merely because they had obtained a profit qua director would be too Draconian and would not result in any off-setting benefit to the company. Where, however, there is any other impediment to the company exploiting a business opportunity, such as financial inability, the doctrine of ultra vires, or a specific decision to reject the opportunity, it is submitted that a conflict of interest exists. These hurdles are surmountable and accordingly the director who makes use of the business opportunity in the above circumstances should be made to account in order to guarantee his disinterested advices."

He goes on to suggest that, as in Regal (Hastings) Ltd. v. Gulliver, the possession of majority control of

the company by directors does not eliminate the need for disclosure to a meeting of shareholders

> "Such procedure because of its publicity may have a salutary effect on the avariciousness of directors. Also, it will provide the minority shareholder with information as to what exactly is happening, and the fact that the majority vote their shares in their own favour may provide evidence of fraud on the minority." (page 455)

One may also comment that it is surely not to be assumed that the arguments adduced by a minority at a shareholders' meeting can have no effect on a view previously formed by the directors representing the majority.

Beck (supra) comments at page 103:

> "With respect, a more likely explanation for Lord Russell's comment was that he wanted to make it clear that the hypothetical was not the case that he was faced with and he did not want to be understood to be deciding that case. Complex corporate cases do not present themselves in the simplicity of Lord Greene's question, and it is highly unlikely that the House of Lords would want to decide such a difficult point outside of a concrete set of facts."

He suggests that there was ample evidence that Peso was in exactly the same position as the Regal company - it wanted the property but could not finance its purchase (page 101). He shows that the cases establish two independent rules: that a trustee or person in a fiduciary position is not entitled to make a profit from his position, and that such a person must not place himself in a position where his

interest and duty conflict. Equity set its face rigidly against possible conflict of interest and the profit rule grew out of the broader conflict rule. Liability may exist where there has been profit and no conflict and vice versa (pages 89-90). He suggests that the judgment of the Supreme Court of Canada dealt only with the profit rule and ignored the wider conflict rule (page 105). He also suggests that it lost sight of the width of the profit rule in asking whether the defendant obtained the interest he held "by reason of the fact that he was a director of the appellant and in the course of the execution of that office". The cases establish that a fiduciary must not use his position, and all that comes to him because of that position, for his personal advantage; he cannot appropriate to himself property or opportunities, the chance for which came to him because of the position he occupied (page 91).

Both the commentators whom I have quoted (Prentice and Beck) stress the basic policy disagreement which was made explicit in the Court of Appeal of British Columbia and express sympathy with the minority view of Norris, J.A. Bull, J.A. of the majority considered that the "complexities involved by interlocking subsidiary and associated corporations" are such that it would not be "enlightened to extend

the application of these principles (i.e., the fiduciary principles regulating the activities of directors) beyond their present limits". Norris, J.A., on the other hand, said that it seemed to him that the complexities of modern business were a very good reason why the rule should be enforced strictly in order that such complexities should not be used as a smokescreen or shield behind which fraud might be perpetrated. No great hardship would be imposed on directors by the enforcement of the rule and a very simple course (i.e., shareholders' consent on the basis of full disclosure) is available to them which they may follow.

A similar view is taken by McClean, op. cit. (supra) who treats the Peso Silver Mines case as one of a series of cases in which the Canadian Courts have applied a less stringent view of a fiduciary's obligations than the English Courts. The decision in Peso Silver Mines is also contrasted unfavourably with the relevant English decisions in a note on Industrial Development Consultants Limited v. Cooley by D.D. Prentice in (1972) 50 Can.Bar. Rev. 624.

No doubt this policy conflict may influence the development of the law by appellate tribunals in the future. For me in this case it does not seem to arise in any way in which I do not have authoritative

guidance from the House of Lords as the approach to follow.

Mr. Hudson's initial accountability

On behalf of Mr. Hudson the following contentions were advanced regarding the acquisition of the exploration licences. (1) In negotiating for the exploration licences Mr. Hudson was acting as personal agent for Mr. Korman or for Stanhill. Certainly, he was not acting as an agent for Queensland Mines. When he applied for licences in his own name at Mr. Korman's request he did so as Mr. Korman's nominee or as the nominee of Mr. Korman's companies and, at all events, not as a nominee for Queensland Mines. (2) Alternatively, if Mr. Hudson were not himself Mr. Korman's personal agent when carrying out negotiations but acted on behalf of Queensland Mines, which was the agent for Mr. Korman or Stanhill, nevertheless, there was no relevant fiduciary obligation on Mr. Hudson to Queensland Mines when he applied for the licences as agent for Mr. Korman or his companies. When Mr. Hudson applied for the licences he applied in his own name and not as Queensland Mines and he could only have been an individual agent for someone. Queensland Mines was not the person for whom he was agent. (3) In whatever capacity he acted, he was in fact acting in relation to a venture or undertaking

which was not part of the business of Queensland Mines. Queensland Mines' business, and with it Mr. Hudson's authority as managing director, had been expressly limited to areas which did not include the obtaining of the exploration licences. Nothing that he did beyond his authority could expand Queensland Mines' business. Hence, he was acting outside the area within which he had obligations to Queensland Mines. (4) There was no evidence of Mr. Hudson having obtained any profit, as distinct from property, by the use of his fiduciary position. The plaintiff's allegation was simply that he had obtained property by use of his position, namely the exploration licences, and it was entitled to these. For the reasons previously stated, he did not by his fiduciary position acquire any property of or to which Queensland Mines was entitled.

It will be plain from what I have previously said that I accept this analysis in part only. I agree that Mr. Hudson did not have authority from Queensland Mines, whether from its board of directors or its shareholders or by virtue of his office, to engage in investigations and negotiations for the obtaining of exploration licences with a view to the establishment of an iron and steel industry. The principal in these activities was Mr. Korman or

Stanhill, but Mr. Korman or Stanhill, because of their chain of shareholdings, regarded Queensland Mines as one of their group and Mr. Hudson, as the managing director of Queensland Mines, as a person appropriate to be called on to do work on behalf of the group. Mr. Korman did call on him in that capacity, relying on the salary which he received from Queensland Mines in that capacity as remunerating him for the work carried out. When Mr. Hudson applied for the exploration licences in his own name he did so on behalf of the company which Stanhill and Mr. Korman had undertaken to promote, but once again it was because he was managing director of Queensland Mines that he had this role. He used the name of Queensland Mines, his office in Queensland Mines, the reputation of Queensland Mines, the funds of Queensland Mines and the stationery of Queensland Mines, and pledged the credit of Queensland Mines in the course of carrying out the investigations and the negotiations which led up to the granting of the exploration licences. The fact that he had no authority from Queensland Mines to do any of these things does not diminish his fiduciary obligations, as Phipps v. Boardman makes clear. The fact remains that Mr. Hudson came into the position of holding the exploration licences by the use of his office of managing director of the company and of its resources,

albeit unauthorised use. In these circumstances equity will not allow him to make a personal profit, whether by the acquisition of specific property or otherwise. At the time that he obtained the exploration licences he held a bare legal title, being a trustee, either for Mr. Korman or for Stanhill or for the company yet to be formed, if that be a possible cestui que trust (Re Leeds & Hanley Theatres of Varieties Ltd. (1902) 2 Ch. 809 at 819; Ford, "Principles of Company Law" (1974), page 113). This bare legal title was something which he had acquired by virtue of his office as director and by use of the resources of Queensland Mines. When Mr. Korman, Stanhill and the foreshadowed company all dropped out of the picture, Mr. Hudson was left holding the exploration licences without any equitable claim from that quarter which would prevent him from taking advantage of the legal title vested in him. He thus acquired an opportunity to exploit the exploration licences. This was an opportunity which flowed from his office and the use of his office as director of Queensland Mines and which he could not turn to his private account except with the consent of Queensland Mines after full disclosure.

Although the investigation and promotion of iron ore deposits was not part of the business

in which the company was currently engaged or had expressed a wish to be engaged, it was business in which it could lawfully engage. It was free at any time to change its policy of mothballing itself or of confining itself to uranium. It was free to endeavour to raise new funds for new ventures if it wished. Even if it was not capable of raising the necessary funds this would not, on the authorities, have entitled Mr. Hudson to appropriate the exploration licences and the opportunities flowing from them to himself, secretly, i.e. without the informed consent of the company. (I am not concerned with a situation where, after full disclosure, the principal rejected the opportunity for itself, and so do not have to consider whether that would be a substitute for its consent).

It may have been unlikely in the extreme and, given the economic circumstances probably was most unlikely, that Queensland Mines would have reversed its existing policy and decided to endeavour to exploit the exploration licences. However, that was a decision that the company was entitled to make for itself, and not to have imposed on it at the time by Mr. Hudson or now by this Court. Indeed, it was entitled to have Mr. Hudson's disinterested advice on whether or not it should do anything with these licences and, given his special position as managing director of

the company, it would undoubtedly have looked to him for such advice. He was not entitled to place himself in a position of conflict by proceeding to appropriate the licences to himself without full disclosure to the company.

This case is to be distinguished from one in which an opportunity outside of the line of business of a company comes to a director in a personal capacity and not by virtue of his office. That situation presents its own problems which I do not need to discuss here. What I am dealing with is a situation in which I have found that exploration licences and the opportunity to exploit them came to Mr. Hudson as managing director of the plaintiff, and as a result of his use of its resources.

It is also to be distinguished from the situation where there is a legally defined area of operation of a business outside which the disputed action falls (cf. Aas v. Benham, as explained in Phipps v. Boardman by Lord Hodson at pages 107-110).

Counsel for Mr. Hudson placed considerable stress on the necessity of considering the actual nature of the relationship between Mr. Hudson and Queensland Mines. He referred to the decision of the Privy Council in New Zealand Netherlands Society Oranje Incorporated v. Kuys & Anor., (1973) 2 All

E.R., 1222. Lord Wilberforce, on behalf of the Board there said:

> "The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness .... Naturally it has different applications in different contexts. It applies in principle whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and agent, but the precise scope of it must be moulded according to the nature of the relationship." (page 1225)

His Lordship went on to refer to the facts of that case where the person concerned was only a part-time employee with other interests and said:

> "A person in his position may be in a fiduciary position quoad a part of his activities and not quoad other parts; each transaction, or group of transactions, must be looked at." (pages 1225-6)

He referred to the statement of Dixon, J. in Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd. (1929) 42 C.L.R. 384 at 408:

> "The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties .... but also from the course of dealing actually pursued by the firm."

Lord Wilberforce said that this was said in the context of partnership, but the principle must be of general application.

Mr. Hudson's employment as managing director of

Queensland Mines was, it is true, part time only, and he, to the knowledge of the company had other interests. However, this is not a case where the complaint is simply that Mr. Hudson failed to bring to the company, but used himself, an opportunity which came his way while a director. It is a case where he actively used his position as managing director and the known reputation, funds, credit and property of the company in the obtaining of something which was within the legal powers of the company to obtain. Counsel stressed the evidence relating to the concern of Mr. Burt, the chairman of Factors, the majority shareholder, that Queensland Mines should not engage in a wider range of activities, but even Mr. Burt (who was not in any event a director of Queensland Mines) had ultimately agreed with Mr. Hudson that Queensland Mines should not turn its back on opportunities that were presented to it, but should in appropriate cases, investigate them, although the view he had expressed was that if anything was to come of them it should be through a separate company. Pursuant to this understanding, Mr. Hudson had in fact investigated a large number of mining opportunities as managing director of Queensland Mines, so that it cannot be said that such activities were totally outside any possible range of the company's activities. Mr. Hudson's

draft letter to Sir John Northcott showed that he regarded them as at least potentially within its range. Even on the United States authorities it would appear that such an opportunity would not be held to be outside the company's line of business, and even if it were Mr. Hudson's use of his position and of the company's name and resources would make him accountable. (Feuer op. cit. supra at pages 88-89, and note (1964) 71 Harv. L. Rev. 765 at 776-8.)

Emphasis was also placed on the fact that Mr. Hudson's position as managing director of Queensland Mines came to an end in the beginning of March 1961, a few days after the granting of the licences. It was said that Queensland Mines from then on had no executive instrument other than its secretary and the board of directors, which met infrequently, and that from that point of time it was "rudderless". It does not appear to me that this lessened Mr. Hudson's obligations. In fact, he not only remained one of only three directors but was, on 27th April, 1961 appointed a consultant at a salary of £500 per annum from 1st April, 1961, for the very reason that there should be somebody who would pay attention to the possible re-activation of the company. It was not the situation that the company was put into moth-balls after an informed consideration and rejection

of the Savage River possibilities. While it is extremely likely that any consideration of these opportunities would have led to rejection, the company simply never had an opportunity to consider them because Mr. Hudson did not reveal the way in which he had used the company and his office in it in the obtaining of the licences. It hence did not know that it was already entitled to exploit the licences, if it could find a financial backer, and that it was not confined to being Mr. Hudson's financial backer.

I agree that the circumstances under which the exploration licences were initially obtained did not give Queensland Mines a legal right to any beneficial interest in them or in the company which was to be formed to exploit them. There was, however, I think, clearly what might be called a commercial expectation that it would be given an opportunity by Mr. Korman or Stanhill to participate in the venture and that the realisation of this opportunity would be something of considerable value. This much is explicit in Mr. Hudson's draft letter to Sir John Northcott of 1st December, 1960, even before it had been decided that the exploration licences should be in the name of Mr. Hudson who was its managing director. This expectation was not founded on any belief in the

disinterested generosity of Mr. Korman, but on the commercial realities known to Mr. Korman and Mr. Hudson at least, that it was, in considerable measure, due to the use of the services of the managing director of Queensland Mines for which he was rewarded by the salary paid by that company and the use of the name, reputation and funds of the company that the protracted endeavours to establish an iron and steel industry were bearing fruit. It may have been no more than a form of goodwill generated by its past services but, like goodwill, although there was no guarantee that it might not disappear overnight it was something of considerable value. There was a commercially reasonable expectation, although not a legally enforceable right, that Queensland Mines would have an opportunity to participate to its financial advantage in the venture. Mr. Hudson had, at all times, in the negotiations presented himself and been presented and recognised as the managing director of Queensland Mines, one of the Stanhill group of companies. When he was used as the applicant for the exploration licences he did not suddenly cease to act as managing director of Queensland Mines (although unauthorised in this as in all the previous negotiations). He was a suitable and presentable applicant for the licence precisely because of the position he held

and the role he had hitherto played in that position. Hence even if, in line with the more restrictive United States decisions, one were to look for a "tangible expectancy" in the principal, it could be found in this case. English law is however much simpler; it is enough that Mr. Hudson acquired the licences by the use of his office as managing director.

Counsel for Mr. Hudson argued that even if, when he took the bare legal title to the exploration licences, Mr. Hudson was acting as managing director of Queensland Mines, he was not so acting when he acquired the beneficial interest in it. I have already set out the evidence of the conversations in which Mr. Korman indicated that he and Stanhill would not be proceeding. Those conversations do not in any way portray a situation in which Mr. Korman was purporting to make a gift, on behalf of himself or of Stanhill, of their interest in the exploration licences. Clearly, the interest was not really being thought of at the time as a valuable thing. Had it been so thought of Mr. Korman would undoubtedly have sought to sell it to somebody. On the contrary, the exploration licences were regarded primarily as something which carried conditions which Mr. Korman and Stanhill could not fulfil, and which it would be extremely difficult to find anyone else to fulfil.

The situation is, in many ways, very similar to that which was considered by the Privy Council in Palmer v. Moore, (1900) A.C. 293, where one of the holders of a mining lease which was threatened with cancellation for non-observance of the conditions thereof said to the others "I am out of it" (page 296). The Privy Council posed the question to be decided in this form:

> "Did Lamrock abandon all his beneficial interest in the lease and licence Moore and Maguire to continue the venture, if they thought fit to do so, at their own risk and for their own profits?" (page 298)

In this case it seems to me that what Mr. Korman was doing was abandoning all his beneficial interest in the exploration licences and licensing Mr. Hudson to continue the venture if he thought fit to do so in any way he liked, so long as it did not involve risk or expense to Mr. Korman or Stanhill. The result was that Mr. Hudson was not in the position of a trustee who had been made a gift in his personal capacity of the beneficial interest in the trust property by his cestui que trust. When Mr. Korman and Stanhill withdrew and abandoned their interest, they left Mr. Hudson, who had acquired his position as a fiduciary of Queensland Mines, without any obligation to them, but still a fiduciary to Queensland Mines. Mr. Korman had no authority to release and did not purport to

release this fiduciary obligation. That obligation was twofold, namely that he should not make a profit or take a benefit through his position as fiduciary without the informed consent of his principal, and that he should not act in a way in which there was a possible conflict between his own interest and that of his principal. To proceed to exploit the exploration licences without reference to Queensland Mines involved a breach of both aspects of his duty. On the one hand, he was taking unto himself the possible benefit and profit, albeit highly speculative and accompanied by considerable risk, as in Phipps v. Boardman. On the other hand, he was creating a direct conflict between his own interests and those of Queensland Mines, in that he was taking himself the whole commercial expectation of possible profit to the exclusion of the expectation which, up to that point, Queensland Mines had had. It matters not that this expectation was known only to himself, its managing director, he having thought better of his original intention of revealing it to the chairman of directors as expressed in the draft of 1st December 1960.

Disclosure and consent

The facts thus come to fit the proposition of

law stated by Lord Hudson in Phipps v. Boardman at page 105, namely that:

> "No person standing in a fiduciary position when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any grounds save that he made a profit with the knowledge and assent of the other person."

This consent, according to Lord Russell, may be either antecedent or subsequent (page 150). Although in that case his Lordship referred toa resolution of the Regal shareholders in general meeting and Lord Wright referred to the "assent of the shareholders" (page 157), the case was one in which all the directors were involved and I do not think that the case can be treated as dealing with the question whether, in other circumstances, the consent of the company may be given by other means. The efficacy of consent by a board of directors where not all directors are interested has been considered in the United States (cf. (1961) 74 Harvard Law Review, 765 at 774). The question of consent is closely related to the question of rejection of the opportunity by the company itself, which was the basis of the decision in Peso Silver Mines, in which case the director was held protected by a prior rejection of the opportunity by the board of directors. I do not find it necessary

to resolve this problem on the facts of the present case. All the statements of the rule are couched in a form which places the onus of establishing the consent of the principal on the fiduciary who alleges it and, in my view, Mr. Hudson has not established any informed consent to his appropriation of the opportunity on the part of Queensland Mines, whether by directors, general meeting or shareholders, or any rejection of the opportunity which was not tainted by Mr. Hudson's non-disclosure to the company of relevant facts.

So far as the shareholders of Queensland Mines are concerned, they were in substance two - Factors and A.O.E. A.O.E. was in turn a subsidiary of Kathleen Investments. There is no evidence that anyone connected with A.O.E. or Kathleen Investments, other than Mr. Hudson himself, knew any relevant facts prior to his obtaining the exploration licences. In this respect it is highly significant that in his draft report to Sir John Northcott of 1st December, 1960, concerning the possible acquisition by Kathleen Investments of Factors' shares in Queensland Mines, Mr. Hudson set down for the information of Kathleen Investments board facts concerning the commercial expectation of Queensland Mines to valuable participation in the iron and steel venture.

Yet, according to his own evidence, the report which he ultimately sent made no mention of this and he did not disclose these facts at all. He would not have put them in the draft report if he did not believe them to be true and his subsequent failure to disclose them is consistent only with a deliberate intention to suppress them. It is possible to imagine more than one reason for the deliberate suppression, some of which do not imply a desire to deprive Queensland Mines of a valuable opportunity (see later), but whatever the reason, it is extremely telling against any suggestion that the activities of Queensland Mines through himself in relation to the iron and steel venture were ever revealed to Kathleen Investments or its subsidiary A.O.E.

It may well be that the facts were fairly adequately known to certain persons on the board of Factors, such as Mr. Korman and Mr. Redpath, but I do not think that this knowledge, which was acquired in a different capacity and was not shown to have been brought to the notice of the full board or the shareholders of Factors, could be treated as satisfying any duty of disclosure which Mr. Hudson had to Factors. In any event, it is not sufficient that there should be disclosure to one shareholder even if that shareholder may be a majority shareholder.

It is not to be assumed that a majority shareholder would be immune to arguments and considerations advanced by a minority shareholder if an issue came to be considered by the shareholders as a whole and, in any event, there are limits to the extent to which majority shareholders may impose their will on a minority.

So far as the board of directors of Queensland Mines is concerned, the directors up to the time at which Mr. Hudson acquired the exploration licences were himself, Mr. Redpath and Mr. David Korman. Even if there are circumstances in which consent by a majority of a board of directors would be sufficient, and even if consent could be given informally, it would be a minimum requirement that they properly applied their minds to the issue and made a bona fide decision in the interests of the company. The knowledge possessed by Mr. David Korman and Mr. Redpath came to them in a quite different capacity and, indeed, in some respects a conflicting capacity, namely as officers of Stanhill. There is not the slightest evidence that they ever applied their minds to the question of the interests of Queensland Mines in the activities of Mr. Hudson, or that they made any decision, bona fide or otherwise, concerning those interests.

Mr. Hudson relies heavily on the meeting of the board of directors of Queensland Mines on 13th February, 1962, as constituting either a consent by the company to his activities after full disclosure or a rejection of the opportunity by the company which left him free to take it up. The evidence does not establish sufficient disclosure by Mr. Hudson to enable me to regard the board's decision in this light, even if the decision of the board would, in such circumstances, be sufficient. The only substantial evidence of the meeting is that given by Mr. Hudson and, even accepting it at its face value, it certainly does not paint a picture of Mr. Hudson disclosing an activity requiring the consent of the board and seeking consent to it. (cf. Winthrop Investments Ltd. v. Winns Ltd. (1975) 2 N.S.W.L.R. 666 at 684-5, 706). On the contrary, he maintained at all times through his evidence that he at no time had anything to disclose. There is no evidence whatever that he revealed to the meeting any circumstances which would have led Mr. Gladstones to believe that the company was entitled to claim any interest in the exploration licences. Certainly, Mr. Barrell's evidence of his conversations with Mr. Gladstones leaves the impression that Mr. Gladstones was unaware of any basis on which Queensland Mines

could claim an interest in the venture, and the evidence of Mr. Phillips, the secretary, who was present at the board meeting is that he had had no such knowledge. Having regard to Mr. Hudson's own evidence, Mr. Phillips' evidence and the terms of the minutes of the meeting, I have come to the conclusion that the picture which Mr. Hudson conveyed to the board of Queensland Mines was that the company had no present interest in the venture, which was entirely his own, free of any claim at any stage on behalf of the company, and that the only way in which the company could acquire an interest was by finding "the large amount of cash that would be required to finance the project", to quote the minutes of the meeting. Mr. Hudson did not disclose to the board of directors the facts which would have given the company a basis for claiming an existing interest or the facts which would have revealed a conflict of interest between him and the company. In those circumstances, he cannot rely on the decision of the meeting not to pursue the matter further as absolving him from his fiduciary obligation. Nor can he rely on it as a considered and bona fide decision of the company to reject the opportunity to undertake the development of the project, which left him free to undertake it without conflict of interest. What

was involved at that stage was not the question whether the company wished to embark afresh on the project but the question whether the company wished to renounce a claim which it already had as principal as a result of its fiduciary's activities. It did not renounce this because it was not aware of it. The authorities show that the subsequent demonstration by the fiduciary that the principal would have been unwilling or unable to avail itself of the opportunity does not absolve him of his obligations to disclose.

The Dubar Assignment

A number of questions were raised in relation to the purported sale to Dubar on 20th March, 1962 of the interests of Queensland Mines, Factors and the Stanhill group in the Tasmanian iron ore deposits, and the recent sale of Dubar's interest to Mr. Hudson's companies.

I do not think that the matter is affected in the least by the purported sale by Dubar to Mr. Hudson's companies immediately prior to the commencement of the hearing of whatever it had purchased. Dubar had many years before acquiesced in Mr. Hudson's contention that he had the sole rights in relation to the Savage River deposits, had allowed him to refund the money it had advanced pursuant to the agreement in relation to those deposits, and had

left him to go his own way and develop them. If Dubar had any rights it had abandoned them to Mr. Hudson long before the hearing (Palmer v. Moore (supra) and was not in a position to assert any rights against him and had nothing to sell him. It seems to me, therefore that the transaction of 15th October, 1974 did not alter the situation. The question is whether Queensland Mines' interest was divested by the transaction of 20th March, 1962.

Queensland Mines says that its interest was not divested because, (a) the sale was totally without authority from the company; (b) Mr. Hudson cannot be heard to assert the validity of the sale to Dubar because he at the time elected against it and denied its validity; (c) the purported assignment was ineffective under s.23C(1)(c) of the Conveyancing Act as an attempted disposition of an equitable interest or trust subsisting at the time of the disposition which was not in writing signed by the person disposing of the same or by his agent thereunto lawfully authorised in writing.

On Mr. Hudson's behalf it was contended (i) that actual authority of Mr. Gladstones to carry out the transaction could be inferred; (ii) that, in any event, Mr. Gladstones had ostensible authority on which Dubar could rely; (iii) that Dubar acquired a

good title by estoppel, and that this may be relied on by the defendant companies which have now acquired Dubar's interest; (iv) that in any event, the receipt and retention of the purchase money by Queensland Mines amounted to actual ratification and not merely estoppel.

Queensland Mines, in reply, maintains (a) that Mr. Hudson and his companies could not acquire a title in reliance on the estoppel in favour of Dubar because he at all times knew the true facts; (b) that Mr. Hudson, as a director of Queensland Mines, could not himself have bought the interest purchased by Dubar without disclosing a great many facts which were not disclosed at the time of the Dubar purchase, and he cannot now get indirectly through Dubar what he could not take directly.

Authority to sell Queensland Mines' interest to Dubar

The sale was negotiated by Mr. Gladstones, the chairman of Factors and (during part of the relevant time) of Queensland Mines, and carried out ministerially by Mr. Phillips, the secretary at the time of Factors and of Queensland Mines, on Mr. Gladstones' instructions. The matter was not discussed at all at any board meeting of Queensland Mines nor at any meeting of shareholders, and there is no indication that the minority shareholder, A.O.E., ever learnt about

it, although the board of Factors did. Whatever authority Mr. Phillips had he derived solely from his instructions from Mr. Gladstones, and Mr. Gladstones had no specific express authority. If the sale was carried out with actual authority on behalf of Queensland Mines it can only be on the basis that that authority attached to Mr. Gladstones by virtue of his office as chairman of directors. He became chairman of directors only shortly before he carried out the transaction and it is not possible to infer any authority from any course of dealings. I was given no evidence about the authority normally attaching to a chairman of directors, whether in Melbourne in 1962 or at all, but I was asked to take note of the fact that chairman of directors have become much more important than they once were. It was also pointed out that Mr. Gladstones was chairman of directors at a time when there was no managing director. Gore-Browne on Companies, 42nd Ed., pages 67-68 states:

> "In the case of managing directors, most modern articles empower the board to delegate to them wide powers of management (under the general supervision of the board). In consequence, the Courts have held that a managing director's usual authority has a wide scope. It extends to the management of the ordinary business of the company. It will be seen that, when no managing director has been appointed despite a power to do so, the Courts will readily infer, on the basis of estoppel, that either a chairman

> of the board or another director, acting de facto as chief executive, has been held out by the company as managing director. (Freeman & Lockyer v. Buckhurst Park Properties Ltd. (1964) 2 Q.B. 480; Hely-Hutchinson v. Braehead (1968) 1 Q.B. 549). However, the better view is that a chairman, qua chairman, has no wider usual authority than a director. Individual directors, as such, have almost no usual authority beyond the power to execute documents to clothe a transaction with formal validity which has already been authorised by the board or the managing director. Where a director has a service agreement which requires him to perform a particular task, (e.g. sales manager) then, like any other management executive, he will possess the usual authority that this function requires. This is a matter of ordinary agency law but, in terms of general powers of management, directors must act collectively as a board, unless the articles give a power to delegate to individual directors. The company secretary, despite his importance in most companies, has almost no usual authority except in executing documents (usually together with one or more directors)".

Ford, Principles of Company Law, page 99, says of the chairman of the board:

> "His essential function is to preside at board meetings. There are dicta in cases to the effect that the chairman has no more authority to bind the company than any other director acting singly; e.g., Hely-Hutchinson v. Braehead Ltd. (supra). It may be wrong to take those statements as meaning more than that the act in question in the particular case was beyond the usual authority of a chairman. Chairman commonly receive more remuneration than other directors and there may well be some things which the chairman of a public company is impliedly authorised to do beyond those within the usual authority of a single director."

The act of Mr. Gladstones in this case was a somewhat unusual one, namely the purported assignment of whatever interest a group of companies had in

certain mining leases, it being far from clear what interest, if any, they had. I do not think it can be said that the appointment of a person as chairman of directors impliedly clothes him with authority to dispose of assets of this nature, even if there is no managing director. Still less would a secretary have such implied authority by virtue of his office, notwithstanding the greater importance attached to his position in recent times (Panorama Developments (Guildford) Ltd. v. Fidelis Furnishing Fabrics Limited (1971) 2 Q.B. 711; Donato v. Legion Cabs (Trading) Co-Operative Society Ltd. (1966) 85 W.N. Part I (N.S.W.) 242).

Authority by estoppel

Did Mr. Gladstones then, lacking actual authority express or implied, have ostensible authority so that Dubar, when dealing with him, was entitled to rely on his authority by way of estoppel? It is not a very satisfactory position to be attempting to determine an issue of estoppel between the alleged representor and a third party with the party alleged to have been estopped (in this case Dubar) neither interested nor participating in the proceedings. There was no course of dealings either by Mr. Gladstones or his predecessor as chairman of directors of Queensland Mines which was or could have been relied on by

Dubar as giving ostensible authority. Indeed, when Mr. Barrell started his investigations on behalf of Dubar he did not even know what company he ought to be dealing with, whether it was Queensland Mines, Factors or the Stanhill group in general, and his initial talk with Mr. Korman did not clarify his ideas. He later approached Mr. Gladstones because he knew him and heard that he had got some sort of appointment within the Stanhill group. He did not know what precise office Mr. Gladstones held, and certainly did not approach him as chairman of directors of Queensland Mines, for Mr. Gladstones did not at the time hold any office in Queensland Mines. The enquiry to him was to ask him what claims, if any, the Stanhill group and associated companies had in relation to the Tasmanian iron ore leases. When Mr. Gladstones referred Mr. Barrell to Mr. Phillips he regarded Mr. Phillips as being "of Factors" and he was in fact the secretary of that company. There was no clarification of what was being sold by Mr. Gladstones or on whose behalf. Obviously Mr. Gladstones was purporting to act on behalf of the Stanhill group as a whole. Mr. Gladstones did not in fact hold any office in Queensland Mines until 13th February, 1962, when, in the course of carrying out the investigations concerning the Tasmanian ore

industry, he went to a meeting of the board of Queensland Mines and was elected a director and chairman of directors. There is nothing to show that this fact ever came to the knowledge of Mr. Barrell or anyone in Dubar. Mr. Barrell dealt with Mr. Gladstones just on the basis of a general belief that he was a person of importance in the Stanhill group. The receipt which he obtained when he paid over his £2,500, although on the notepaper of Queensland Mines and signed by its secretary, did not purport to be a transaction with that company in particular but to be a transaction with Factors, Queensland Mines and the Stanhill group. Mr. Barrell does not seem to have concerned himself in the least with the question of authority, as he did not ask what authority Queensland Mines had to sell the rights of the other companies. It does not seem to me that, on the basis of this evidence, Dubar would be in a position to make out a case that Queensland Mines held Mr. Gladstones out as a person having authority to dispose of its assets. Doubtless Mr. Barrell was prepared to rely on his transaction with Mr. Gladstones because of his knowledge of Mr. Gladstones and Mr. Gladstones' standing in their common profession. No doubt Mr. Gladstones felt confident that he was in a position to make the transaction stick with

Queensland Mines or the other companies involved if any question arose, but the fact is that he had no authority, express or implied or ostensible, from Queensland Mines, and Mr. Barrell relied on no representation that he had such authority which can be sheeted home directly or indirectly to Queensland Mines.

Counsel for Mr. Hudson relied on the receipt and retention of the £2,500 paid by Dubar as ratification by Queensland Mines of the transaction. It would seem strange that, if Mr. Gladstones and Mr. Phillips were not in a position where their carrying out of the transaction gave rise to an estoppel, nevertheless the payment of the money into Queensland Mines' account by Mr. Phillips, without any report to the board or other officers of the company, should make the transaction binding on the company. Mr. Gladstones did, on 4th April, 1962, report to the board of Factors that he had accepted the sum of £2,500 on behalf of Queensland Mines, but there was no other director of Queensland Mines present at that meeting. However, counsel for Mr. Hudson maintained that the receipt and retention of the sum of £2,500 gave rise as a matter of law to an evidentiary inference of actual ratification of the transaction and relied on City Bank of Sydney v.

McLaughlin (1909) 9 C.L.R. 615 at 625-6; McLaughlin v. City Bank of Sydney (1912) 14 C.L.R. 684 at 691 and 695-6, both of which cases were approved by the Privy Council in McLaughlin v. The City Bank of Sydney (1914) 18 C.L.R. 598. I doubt that any question of law is involved, although certainly there are questions of the amount of evidence required to sustain inferences of fact. Thus in McLaughlin v. City Bank of Sydney (1912) 14 C.L.R. 684 at 691, Griffith, C.J. said:

> "When a man who, on his return from a long absence (whether physical or mental) finds that during his absence some friend, purporting to act on his behalf, has discharged his pressing debts, I think that very slight evidence of ratification of the agent's acts is sufficient, and I certainly think that, if he fails for a long time to communicate with the creditors whose claims against him have been satisfied, the inference of ratification is irresistible."

This, of course, assumes that the person on whose behalf some unauthorised act has been done finds out that it has been done. Certainly neither the board nor the shareholders of Queensland Mines were appraised of what had been done by Mr. Gladstones on their behalf, but counsel for Mr. Hudson invoked another alleged legal fiction, namely that the company must be taken to have known what was in its books. I do not think that the cases which he cited went sufficiently far to support his argument. In Evans v. Employers Mutual Insurance Association

Limited, (1936) 1 K.B. 505, the essence of the decision is stated by Greer, L.J. at page 515:

> "A limited company cannot know anything itself except through its agents or servants. The knowledge which is to be attributed to a company must be the knowledge of some agent or servant. If there be no evidence that the company has delegated the ascertainment of relevant facts to some officer of the company, it may well be that nothing short of knowledge by the Board of Directors will bind the company. But the knowledge of the directors is attributed to the company because they are agents of the company to whom the duty of knowing the particular facts in question has been delegated by the company. If it be established by evidence that the duty of investigating and ascertaining the facts has been delegated in the ordinary course of the company's business to a subordinate official, the company will in law be found by his knowledge for the same reason that it is affected by the knowledge of the board of directors."

In many ways this echoes a passage quoted in the same case by Roche, L.J. at page 522 from the judgment of Lord Dunedin in Houghton & Co. v. Nothard, Lowe & Wills Ltd. (1928) A.C.1 at 14:

> "The knowledge of the company can only be the knowledge of persons who are entitled to represent the company. It may be assumed that the knowledge of directors is, in ordinary circumstances, the knowledge of the company. The knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary's duties."

In this case "the thing of which knowledge is predicated" is the sale of the company's asset. This was not within the domain of anyone except the board of directors and it was not shown that the

board of directors had knowledge of the receipt of the money. Mr. Gladstones had knowledge of his own unauthorised act, and Mr. Hudson came to know through Dubar, but at what stage he came to know that the money received through the transaction was paid into Queensland Mines is not clear on the evidence. There is no evidence that Mr. David Korman ever knew of the fate of the money, he not having been at the Factors board meeting at which the matter was reported. I do not think that the other cases cited by counsel carry the matter any further. In H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd. (1957) 1 Q.B. 159 at 173, Denning, L.J., with whom the other members of the Court agreed, said:

> "So here, the intention of the company can be derived from the intention of the officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case."

The subsequent case of John Henshall (Quarries) Ltd. v. Harvey (1965) 2 Q.B. 233 at 240-1, essentially approved what Denning, L.J. had said in the case last cited at page 172, viz.:

> "A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent

> the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."

In the present case what one has to look for to establish a ratification is a knowledge, on the part of those who had power to sell the company's assets, that someone had purported to sell assets on behalf of the company, and received money for it. Here the knowledge is not shown to have existed beyond those who carried out the unauthorised act.

Counsel said that even now Queensland Mines had not moved to refund the £2,500 received from Dubar. I do not think that the failure to act during the currency of this case, during which it is obvious that the matter has come to the knowledge of those in authority in Queensland Mines, supplies anything from which an inference of ratification could be drawn. Obviously, Queensland Mines has been asserting its continued ownership of the assets in question and nobody could reasonably have drawn the inference that its failure in present circumstances to move to refund the money to Dubar showed that it was affirming the transaction.

<u>The availability of estoppel to Mr. Hudson</u>

If I am wrong in my conclusion that Queensland Mines was not estopped from denying the authority of

Mr. Gladstones or otherwise from denying the transaction as against Dubar, the question arises whether Mr. Hudson or his companies can rely on that estoppel. There is no doubt that Mr. Hudson would at all stages have known that Mr. Gladstones acted without authority and as the company defendants are his companies, his knowledge must be attributed to them. Counsel for Queensland Mines relied on the simple proposition that estoppel never avails to a person who knows the true facts and that, therefore, Mr. Hudson and his companies cannot rely on any estoppel. I was not referred to any authority on the question of the right of a transferee to rely on an estoppel available to his predecessor in title. The question was raised in Re London Celluloid Company (1888) 39 Ch. D. 190, where during the course of argument at page 197, Cotton, L.J. asked:

> "Does it follow that a transferee who knows all about the circumstances can avail himself of estoppel because his transferor could?"

And Bowen, L.J. said:

> "Can you support the proposition that a person who gets a good title by estoppel can transfer it to one who knows the true facts?"

Counsel replied to these questions by relying on the analogy with a purchaser with notice from a purchaser for value without notice and said that if a person once gets a good title he ought to be able to give the

good title to anyone else. In the event, the Court did not find it necessary to deal with the point in the judgment. Spencer Bower & Turner "Estoppel by Representation", 2nd ed., reject the view put by counsel in answer to these questions. At page 113 they state:

> "Where a representation is deemed to have been made, not only to the immediate representee, but impliedly to the class of possible transferees from him of the property or rights the subject of the representation, any such transferee can enforce the estoppel, even though his transferor (for reasons personal to himself, such as knowledge of the real facts sufficient to preclude him from saying that he was induced by the representation to act as he did) could not do so. The transferor's incapacity will not be visited upon the transferee as a presumption of law: the onus is on the representor to establish the representee's incapacity, as a fact, independently of, and in addition to, the transferor's personal incapacity. If this onus is not discharged, the transferee is entitled to the benefit of the estoppel; if it is, he is not so entitled. The converse case of a transferee whose transferor, not being subject to any disability of the nature in question, could have availed himself of estoppel, but who was himself disabled, would presumably be regulated by the same principle: that is to say, the transferee could not use to his own advantage the transferor's freedom from the objection."

While the conclusion of the learned authors may be the result of pushing an argument to its logical conclusion, it seems to me that it is a conclusion that should not commend itself to the Courts, which must have regard to the good sense and workability of a result as well as its abstract logic. It would

not be much use protecting the title of a person who acquired property in reliance on the truth of a representation if the representor could make his title valueless by making sure, by public advertisement or otherwise, that everyone who might purchase from the representee would be aware of the true facts. If, in a case such as this for example, Queensland Mines had been estopped in relation to Dubar from asserting the lack of authority, but then proceeded to make known throughout mining circles that the transaction had taken place without authority, Dubar would have had an asset which it could not dispose of to anyone except Queensland Mines, and the estoppel would have been a very flimsy shield indeed. As a practical matter, it seems to me that the courts would have to extend the protection of the estoppel to a person claiming through the person who was entitled to it. Precisely the same policy consideration arises as in relation to a buyer with notice from a purchaser for value without notice. In that area, Farwell, L.J. said that the authorities

> "rest upon the ground that, in justice to the owner of land who had no notice when he acquired the land, it would not be right to hamper his power of dealing with his own land, because certain persons, who possibly would be the only customers for the land likely to pay the best price, have such notice." (Wilkes v. Spooner (1911) 2 K.B. 473 at 487.)

In the same case Vaughan Williams, L.J. said at pages 483-4:

> "The only exception ... to the rule which protects a purchaser with notice taking from a purchaser without notice is that which prevents a trustee buying back trust property which he has sold, or a fraudulent man who has acquired property by fraud saying he sold it to a bona fide purchaser without notice and has got it back again. Those are cases to show that a person shall not take advantage of his own wrong."

To what extent there may have to be exceptions to the protection of a title acquired from a person who is able to maintain it only by way of an estoppel is a matter which may have to be worked out in the future. In the present case Mr. Hudson was not a person who either made the representation of authority on behalf of the company or who carried out the unauthorised act, so that he is not in an analogous position to a trustee buying back property which he has sold in breach of trust. However, there may be a basis on which he could be fixed with some equitable obligation to the company in respect of the property he acquired back from Dubar. It was undoubtedly his breach of fiduciary duty and his failure to disclose the facts to the company surrounding the use of his office in it, its name, etc., that led Mr. Gladstones to believe that there was not really anything to sell on behalf of the company, and accordingly to sell to Dubar at the price which he did. However, as I

do not find that there was an estoppel in favour of Dubar in any event, it is not necessary for me to reach a final conclusion on this point.

Alleged election by Mr. Hudson against Dubar transaction

It is also strictly unnecessary for me to deal with the plaintiff's submission that Mr. Hudson, by his conduct, elected against the validity of the transaction between Queensland Mines and Dubar and cannot now affirm the transaction and rely on it. I think that this is a rather confused submission and that no question of election arises. The evidence does not show that Mr. Hudson ever asserted the invalidity of the transaction or the lack of authority of those who purported to act on behalf of Queensland Mines. He merely maintained that they had no interest to sell and that, consequently, Dubar in buying whatever interest they had acquired nothing. It was not an election situation in which Mr. Hudson had to decide which of two mutually exclusive courses of action he would adopt, on pain of being held to affirm a transaction if he did not disaffirm it. He was simply in a position where he wished to defeat Dubar's claim and was free to use any argument he could against it, without thereby binding himself to continue on any particular course of action himself. He was not in a position where he had to make a choice,

but was legally free to take inconsistent attitudes at different times if he saw fit. There is no law of election which forbids people to change their mind in the absence of circumstances which impose a choice on them, or which put them at risk of creating an estoppel in favour of another party.

Requirement of writing in Dubar transaction

The plaintiff also relied on s.23C (1)(c) of the Conveyancing Act which provides that, subject to immaterial exceptions "a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same or by his will, or by his agent thereunto lawfully authorised in writing". This paragraph requires that the disposition must be in writing and not merely evidenced by writing and it applies to all trusts and not to those relating to land only. Sub-s. (2) provides that the section does not affect the creation or operation of resulting implied or constructive trusts.

In this case the document was signed by Mr. Phillips, the secretary of the company. There is no evidence that he was authorised in writing to do so and, in any event, he did not purport to sign as the agent of the company in the sense indicated by s.23C (Richardson v. Landecker (1950) 50 S.R. (N.S.W.)

250 at 259). The satisfaction of the section depends on showing that Mr. Phillips' signature was in fact the signature of the company (195 Crown Street v. Hoare (1969) 1 N.S.W.R. 193). Section 35(1)(b) of the Companies Act, 1961, provides:

> "A contract which if made between private persons would be by law required to be in writing signed by the parties to be charged therewith may be made by the company in writing signed by any person acting under its authority express or implied."

(The submission was made both as to the requirement of writing and the provisions of the Companies Act in terms of the legislation of New South Wales. No doubt the relevant law is either that of Victoria or Tasmania, but the law is in similar terms in each State.)

There was no evidence that Mr. Phillips had the authority of the company to sign the document, he having relied on the unauthorised instruction of the chairman of directors. If the transaction had been authorised by the directors it might have been appropriate for Mr. Phillips as secretary to give a receipt but he did not have any authority to dispose of the company's interest in the mines.

However, I think a short answer to this point is to be found in sub-s.(2) of s.23C. The application of the section is important in this case only if the transaction is otherwise valid. If it is otherwise

valid then the payment and receipt of the purchase price would create a constructive trust in favour of Dubar and s.23C would not affect it. (Gissing v. Gissing (1971) A.C. 886 at 904-5; Oughtred v. The Inland Revenue Commissioners (1960) A.C., 206 at 227-8, 229, 239-40 and 233; Olsson v. Dyson (1969) 120 C.L.R. 365 at 375-6 and 386).

Nevertheless, for the reasons I have given earlier, I do not think that the plaintiff is bound by the transaction in which Dubar was involved.

Statute of Limitations

Mr. Hudson submitted that the claim was barred by the statute of limitations. The first question is whether the current statute, the Limitation Act, 1969 applies. Section 6 provides, subject to certain immaterial exceptions, that nothing in the Act enables an action to be commenced or maintained which is barred at the commencement of the Act by an enactment or an Imperial enactment repealed or amended by the Act and, on the other hand, that nothing in the Act prevents the commencement and maintenance of an action within the time allowed by an enactment or an Imperial enactment repealed or amended by the Act on a cause of action which accrued before the commencement of the Act.

In determining which, if any, previous statute

was applicable, a question arises whether, on the facts as I have found them, Mr. Hudson's liability to Queensland Mines is simply on a debtor-creditor basis for any profit he has made (as the defendants maintain), or as a constructive trustee (as the plaintiff maintains). In the former case the limitation period would at the relevant time have been six years under s.3 of the Limitation Act 1623. In the latter case it would be necessary to consider s.69 of the Trustee Act 1925, but again, for reasons which I will state, the relevant time is in my view six years.

It is therefore not strictly necessary for me to determine which is the correct basis of liability. It would however be relevant to do so if I am wrong on the effect of the two statutes, and it would also be relevant in other respects, e.g. the appropriate orders to be made in favour of the plaintiff, if I am wrong in my overall conclusion on the case. I will therefore state shortly my reasons for rejecting the strongly pressed argument of the defendants that Mr. Hudson's liability, if any, is on a debtor/creditor basis only, to the exclusion of constructive trust. I say to the exclusion of constructive trust, because there is no reason why the same breach of duty may not give rise to both types of remedy. The same

act may expose a person to common law liability, for debt or conversion as well as to the congerie of remedies embraced in constructive trusteeship, which include personal remedies to account and pay as an equitable debt, and proprietary remedies including declarations of trust, charges and tracing orders. (cf. Black v. Freedman (1910) 12 C.L.R. 105, Creak v. Moore (1912) 15 C.L.R. 426, John v. Dadwell & Co. (1918) A.C. 563).

The modern law as to the fiduciary obligation of a director not to make a secret profit is, as the earlier citations from Regal (Hastings) Ltd. v. Gulliver and Phipps v. Boardman show, based squarely on the rule in Keech v. Sandford. That was a case of an actual trustee of property but the principle of the case has been extended to all persons in a fiduciary position, including company directors. The trustee in Keech v. Sandford was not held liable to the cestui que trust for his profits on a debtor/creditor basis. He was treated as holding the lease he had acquired on trust, and ordered to assign the lease to the cestui que trust as well as to account for the profits already made from it. One would expect that the extension of the Keech v. Sandford principle to other fiduciaries would expose them to the same remedy, viz. to be treated as constructive

trustees of what they had acquired in breach of their fiduciary obligations. This is exactly what happened in Phipps v. Boardman where persons who were not actual trustees, and had acquired property by investing their own money but at the same time making use of their fiduciary position, were declared constructive trustees of the plaintiff's share of so much of the acquired property as they still held, as well as ordered to account for his share of profits they had made (supra at pages 60, 99). This was the relief claimed and ordered by Wilberforce J. and its appropriateness does not appear to have been called in question in the Court of Appeal or House of Lords. If this be the correct view a fiduciary is open to the same remedies as an actual trustee, including a declaration of trust, an order to transfer property, an account of profits and an order for payment, or a tracing order, whichever may be the appropriate and useful remedy or remedies as the facts stand at the time of trial.

The only real obstacles to this straightforward and, it seems to me, salutary position, are the decisions of the Court of Appeal in Metropolitan Bank v. Heiron (1880) 5 Ex.D.319 and Lister & Co. v. Stubbs (1890) 45 Ch.D.1. Both were cases in which a principal sought to recover from his agent a bribe

received by the agent from a third party. In the former case the issue was whether the defendant was entitled to the benefit of the Statute of Limitations, and the Court held that he was. One would have thought that this was the correct decision for the reason that the defendant was not an actual trustee, but a constructive trustee who became liable to the obligations of a trustee only because of the transaction impugned, and such persons had long been considered entitled to the protection of the statute (Taylor v. Davies (1920) A.C. 636 at 651). However the Court of Appeal held that the defendant's liability was as an equitable debtor only. The only reference to authority was by Brett, L.J. who said at page 324:

> "In such a case, as I understand the ruling of Lord Redesdale, the money is to be considered as held adversely to the plaintiffs, the company, until the decree."

This was a reference to Lord Redesdale's classic judgment in Hovenden v. Lord Annesley (1806) 2 Sch. & Lef. 607 at 633-634, where the Lord Chancellor explained that time did not run against a cestui que trust in favour of an actual trustee who was in possession, because his possession was according to the title of the cestui que trust. He went on:

> "But the question of fraud is of a very different description: that is a case where a person who is in possession by virtue of that fraud, is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree

> of a court of equity, founded on the fraud; and his possession, in the meantime, is adverse to the person who impeaches the transaction, on the ground of fraud."

The Court in Metropolitan Bank Ltd. v. Heiron seems to have taken this as meaning that the person charged with fraud was in a debtor/creditor relationship until a decree was made against him, whereupon he became a trustee. This is far more than was said by Lord Redesdale, who was only explaining why equity treated the two situations differently for the purpose of the Statute of Limitations. Other decisions show that equity regarded the constructive trust as created by the breach of duty, not by the decree e.g. the statement of Lord Esher, M.R. in Soar v. Ashwell (1893) 2 Q.B. 390 at 393 quoted in Taylor v. Davies (supra) at page 652. As the latter case shows, the relevant distinction was not between a person who became a trustee under an actual trust and a person who became a trustee by court decree, but between "cases where a trust arose before the occurrence of the transaction impeached" and "cases where it arises only by reason of that transaction" (page 653).

In Lister & Co. v. Stubbs the Court of Appeal, in refusing an interlocutory injunction to restrain the defendant from dealing with property in which he had invested his bribes, followed Metropolitan Bank v. Heiron. In addition Lindley, L.J. was impressed

by what he regarded as the startling consequences of the plaintiff's submission, viz. that the plaintiff could claim the investments to the exclusion of other creditors in the event of the plaintiff's bankruptcy, and could claim profits made by the defendant from the investments. With respect, these consequences are not startling when one remembers that the money concerned was wrongfully obtained by the defendant as a result of abusing the plaintiff's confidence.

In short, these cases seem to have flowed from a misunderstanding of the reasons why equity allowed a constructive trustee the benefit of the Statute of Limitations, and not from the proper application of prior authority. The cases have been much criticised, e.g. Meagher on Equity at 128-9, Hanbury's Modern Equity 9th ed. 424, R.H. Maudsley Proprietary Remedies for Recovery of Money (1959) 75 L.Q.R. 234 at 244-5. They do not ride happily with Taylor v. Davies and Phipps v. Boardman. In the latter case Lord Guest said at page 114:

> "The question, and the only question before this House, is whether the appellants are constructive trustees of these shares."

It seems to me over subtle to suggest that that case is capable of explanation on the basis that the House was thinking of a constructive trust arising not from

the breach of the fiduciary relationship , but only by virtue of the Court's decree (cf. Meagher op. cit. page 129).

I have the authority of a majority of the Court of Appeal (Hardie and Hutley JJ.A.) for treating Lister & Co. v. Stubbs as a decision "which should not be extended beyond its own special facts" (D.P.C. Estates v. Grey and Consul Development (1974) 1 N.S.W.L.R. 443 at 471). Although in the result that judgment was reversed by the High Court (Consul Development v. D.P.C. Estates (1975) 49 A.L.J.R. 74), this part of the judgment did not fall for consideration, and Stephen, J. (with whom Barwick C.J. agreed, page 76) treated the case (which was based on a breach of fiduciary duty) as raising an issue of constructive trusteeship (pages 88, 89, 92).

The facts of this case bear no analogy to those of Lister v. Stubbs but considerable analogy to the facts of Phipps v. Boardman. Indeed the unusual facts of the present case create a stronger basis for a finding of an existing constructive trusteeship than the facts in Phipps v. Boardman. Everything claimed against Mr. Hudson flows from his acquisition of the original exploration licences and is a result of the use and ~~exploration~~ exploitation of those licences. He did not purport to acquire those licences originally for

himself but they came into his hands as a trustee for Mr. Korman or the Stanhill group or a company to be nominated by them. That position of trustee was a position which he acquired by virtue of his position as managing director of Queensland Mines and when, by a chain of unforeseen events, it became a beneficial interest, there is no difficulty in treating him as holding that beneficial interest as a constructive trustee for Queensland Mines. The situation is easily distinguishable from Lister v. Stubbs where the company's agent did not come into possession of a specific piece of property in his capacity as agent, but merely became entitled to receive a sum of money as a secret commission.

I hold that Mr. Hudson became a constructive trustee of the exploration licences for Queensland Mines. The balance of EL4/61 which has not been converted into a mining lease is held by the third defendant and EL5/61 is also held by it. In each case the licence remains impressed with the constructive trust as the company, which is Mr. Hudson's company in every sense, took the licences affected by the knowledge which he had, and hence took with his "transmitted fiduciary obligation" (John v. Dodwell & Co. (supra) at 569. The applications for mining leases made by the second defendant in 1964 in respect of part of the

land covered by EL4/61 were part of the use and exploitation of the licence and were impressed with the same constructive trust in the hands of the second defendant. However, the rights under these applications were transferred to other companies in 1966 and there is no suggestion that any of the present owners, (who are in any event not parties) took with notice of the constructive trust. In return for the transfer of the rights under these applications the second defendant obtained the benefit of a valuable agreement for royalties and the rights under this agreement were impressed with the same constructive trust in favour of Queensland Mines.

Treating the defendants as trustees within the meaning of the Trustee Act (cf. s.5) it is necessary to consider whether s.69 applies. Its operation is by sub-s.(1) excluded in two circumstances. The first is where the claim is founded on fraud or fraudulent breach of trust to which the trustee was party or privy. It is trite law that a party wishing to rely on fraud must allege it clearly and specifically. No such allegation was made in this case, and I turn to the second exception. The section does not apply if this is a proceeding to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted

to his use. In Taylor v. Davies (supra) the Privy Council construed a similar exception in a Canadian statute as applying only "where a trust arose before the occurrence of the transaction impeached and not to cases where it arose only by reason of that transaction" (page 653). Their Lordships said:

> "The expression 'trust property' and 'retained by the trustee' properly apply, not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession upon trust for and on behalf of others."

Their Lordships expressed the view (page 653) that the exception no doubt applied not only to an express trustee named in the instrument of trust, but also to persons who were to be treated as in a like position, i.e., persons who, though not originally trustees, took upon themselves the custody and administration of property on behalf of others. They were sometimes called constructive trustees but were really actual trustees (page 651). Such a person had never been able to avail himself of statutes of limitations, because his possession was treated as the possession of his cestuis que trustent, and time did not run in his favour against them (pages 650-651). Such a person was to be contrasted with a person who had taken possession in his own right, but was liable to be declared a trustee by the court by reason of a

breach of a legal relation. Such a person had always been given the benefit of the statutes by analogy (pages 651-652) and their Lordships could not construe the exception as placing him in a worse position than he was before the legislation.

The facts of Taylor v. Davies were that a person already in a fiduciary position acquired property from his principal without full disclosure, and it was held that an action to recover the property did not fall within the exception. The case was followed in Clarkson v. Davies (1923) A.C. 100.

It was conceded by the plaintiff that if the relevant limitation was s.69 of the Trustee Act, these two Privy Council decisions took Mr. Hudson outside of the exception, as he became a trustee by virtue only of the act complained of. I think that this concession was rightly made. The plaintiff's claim against the defendants can be established only on the basis that Mr. Hudson was, vis-a-vis the plaintiff, a constructive and not an actual trustee. It is true that, unlike the cases of constructive trusteeship instanced by the Privy Council, Mr. Hudson first took possession on behalf of others, not himself. But the plaintiff was not one of those others, and it can rely only on constructive trusteeship created by subsequent events. (The decision in Taylor v. Davies

does not apply in relation to the Limitation Act 1969 by reason of the expanded definition of "trust" in s.11).

Hence s.69 of the Trustee Act applied to the defendants, and its effect was to give them the benefit of the existing statutes of limitations to the same extent as if they had not been trustees, or if no existing statute applied, the protection available in an action for money had and received, i.e., six years.

If the plaintiff's action were to recover land within the meaning of the Real Property Limitation Act 1833 (Imp.), adopted by the Real Estate (Limitation of Actions) Act 1837, the period of limitation would be 20 years (s.2). Land is defined to include all corporeal hereditaments (s.1). As the exploration licences did not give a right of possession of the land over which they extended, they are not corporeal hereditaments.

The relevant period of limitation under s.69 of the Trustee Act was therefore six years, either directly under s.3 of the Statute of Limitations, 21 Jac. 1 c. 16 or indirectly by assimilation to an action for debt for money had and received under sub-s.(3) of s.69.

As the action was commenced on 22nd February,

1973, the plaintiff is limited to any cause of action arising since 22nd February, 1967. Mr. Hudson's breach of fiduciary duty was the taking to himself of the benefit of the exploration licences when Mr. Korman and Stanhill abandoned their interest. It may be difficult to fix a precise date for this, but it was some time in the first half of 1961, certainly far more than six years before the action was commenced.

No case was made by the plaintiff that the defendants were disentitled by fraud or otherwise from the benefit of the relevant limitation statute and no evidence was given as to when his breach of duty was discovered. However, it was submitted that even if the action against Mr. Hudson was out of time, the exploration licences were transferred to the third defendant in 1968, within the six-year period. It was submitted that the statute of limitations barred only the remedy and not the right, and that a person who takes property with notice of a constructive trust cannot take advantage of time already run, and will not be protected until the full time has run again. This proposition has startling consequences. If after several centuries a person acquired property which as a result of historical research was widely known to have been lost as a result of breach of trust, the successors in title of the wronged

cestui que trust could recover it. No authority was cited in support of it, but it was said to be logic. As in the cases of titles derived from a bona fide purchaser for value without notice, and titles protected by estoppel, common sense requires that a transferee must take the benefit of protection given to his transferor by a statute of limitations. (This result is expressly achieved by ss.63-68 of the Limitation Act, 1969 in relation to limitations fixed by or under that Act).

The conceptual answer to the proposition is that the plaintiff did not acquire a new cause of action when the property subject to the constructive trust came into the hands of the third defendant in 1968. Its one and only cause of action was Mr. Hudson's breach of fiduciary duty in 1961. It was this cause of action which, if made out, caused the licences to be impressed with a constructive trust. When the other defendants accepted transfer of the property from him with notice that it had been acquired by him in breach of fiduciary duty, they did not bring into existence a new cause of action. They merely became liable to have the constructive trust arising from the original cause of action enforced against the property in their hands to the same extent as it could be enforced against the property in the hands of the transferor.

For the same reason I reject the plaintiff's argument that it is entitled to an account of all profits (e.g. royalty payments) received by the defendants in the six years before action brought and thereafter. It was said that Re Flavelle (1969) 1 N.S.W.R. 361 showed that an account may be audited for six years before action brought although a claim in respect of an earlier period was barred. But that was a case of actual trustees who had failed to account over a long period. The cause of action against them was not that they had committed a breach of duty by becoming trustees, but that, being actual trustees, they had committed a series of breaches of duty, some within and some without the six year period on each occasion on which they had failed to apply moneys received in accordance with the trust. The cause of action against Mr. Hudson and his companies is not the failure to account for particular payments, but the breach of his fiduciary duty in taking the exploration licences as his own without the consent of the plaintiff. If that breach of duty can be established, the breach will by construction create a trust, the court will declare a constructive trust, and the remedy of account will be available (cf. the language of the passage from Soar v. Ashwell (supra) at 393, quoted in Taylor v.

Davies (supra) at page 652. See also the passage quoted at page 651 from Beckford v. Wade (1805) 17 Ves. 87 at 97). If a statute of limitations prevents the constructive trust being established, no basis for auditing the account exists. Whereas an actual trust is a substantive institution carrying duties breaches of which are causes of action, the constructive trust is essentially itself a remedy, the cause of action being the breach of duty which brings it into existence (cf. Jacobs Law of Trusts 3rd ed., pages 352-3).

Laches and acquiescence

In case I am wrong in my decision that the plaintiff's claim is statute barred, I will consider the defendants' alternative claim that it is barred by laches and acquiescence. Mere delay falling short of the relevant statutory period of limitation would not bar the claim (Archbold v. Sully (1861) H.L.C. 360, 11 E.R.769) but it is argued here that the plaintiff had, at least from the time of Mr. Gladstones' investigation leading to the Dubar transaction of 20th March, 1962, knowledge of the relevant facts, and that at a later stage Mr. Hudson's activities in the Savage River, and the royalties agreement which grew out of his dealings with Pickands Mather, were common knowledge in the mining industry. It is argued

that it should be inferred that Queensland Mines acquiesced in Mr. Hudson's denial of its interest, or that he was reasonably entitled to act, and did act, in reliance on the plaintiff's acceptance of his claim (Lindsay Petroleum Company v. Hurd (1874) L.R. 5 P.C. 22, Hourigan v. Trustees Executors & Agency Co. Ltd. (1934) 51 C.L.R. 621). Reliance was placed on decisions where courts have accorded special recognition to the speculative character of mining ventures, and to the importance of persons with claims in relation to such ventures asserting them quickly and not lying by until the other party's efforts had produced success (Rowe v. Oades (1905) 3 C.L.R. 73 at 78, 79-80, 81, Boyns v. Lackey (1958) S.R. 395).

In my view the defendants have not established this defence. I have earlier dealt with the defendants' allegations of the plaintiff's knowledge of Mr. Hudson's activities, and have given my reasons for refusing to attribute to the plaintiff knowledge critical to its claim, viz. knowledge that Mr. Hudson had acted in breach of fiduciary duty. Evidence as to how the plaintiff finally discovered these facts was not elicited, and all I know is that this action was instituted within a reasonable time after Mr. Hudson ceased to hold a position of authority in

the plaintiff company. It cannot be said that it has not been prosecuted with normal diligence (Lamshed v. Lamshed (1963) 109 C.L.R. 440). In these circumstances I cannot infer acquiescence on the part of the plaintiff in Mr. Hudson's breach of duty. Nor can I infer that it was reasonable for Mr. Hudson, who had the duty to disclose the facts to the plaintiff and had failed to do so, to act in reliance on a belief that the plaintiff had accepted his ownership of the Savage River venture.

Compensation to Mr. Hudson

If I am wrong in my conclusion that the plaintiff has no enforceable claim against the defendants, the question would arise as to compensation for the efforts of Mr. Hudson and his companies, the plaintiff being entitled only to the net benefit accruing to the defendants (per Lord Wright in Regal (Hastings) Ltd. v. Gulliver (supra) at page 154, Phipps v. Boardman (supra).) I do not think that Mr. Hudson's conduct is such as would disentitle him to compensation, if that question is relevant. It is significant that no allegation of fraud is made against him. Although he failed to disclose in any adequate way the facts which, in my view, made him a constructive trustee of the exploration licences for Queensland Mines, I am far from persuaded that he did this with

the object of depriving Queensland Mines of a benefit. There are other reasons - for example, the attitude of Mr. Burt, the Chairman of Factors - which would account for his failure to keep the board and shareholders of Queensland Mines apprised at the time of the activities of its managing director. It appears from the draft letter of 1st December, 1960, to Sir John Northcott that at one time Mr. Hudson entertained the intention of turning these concealed activities to the benefit of Queensland Mines. His abandonment of this idea may well have been because his increasing awareness of Mr. Korman's financial instability made the prospect of the venture coming to fruition as a Stanhill venture increasingly remote. He may well have concluded that there was no point in continuing with his intention to reveal matters which might only have embarrassed him without bringing advantage to Queensland Mines. At the time he elected to continue with personal responsibility for the exploration licences, they were, in the economic circumstances of the time, far from an attractive proposition, carrying as they did immediate onerous financial obligations and highly speculative and distant benefits. Had he revealed all the facts to Queensland Mines, it is extremely probable that the company would have hastened to disclaim any interest in the burdensome

licences. In all these circumstances it would seem to me equitable for Mr. Hudson to be properly compensated for his efforts.

This would involve an inquiry, and I make only this observation. It has been remarked that in some cases proper remuneration for what has been done by the fiduciary may allow him to keep most or all of the benefit he has acquired (McLean, op. cit. at page 220). This may be such a case. Mr. Hudson has indeed made a silk purse out of a sow's ear, and the value has been added by an extraordinary combination of astonishing effort, skill, business acumen, financial risk-taking and sheer persistence. Mr. Hudson's contribution has been one that no employer could normally expect from any employee, however highly remunerated. It is a case in which any realistic quantum meruit assessment would have to be closely related to the value of the achievement.

Indeed, although the statute of limitations is from one point of view a technical defence, it may well be that its application has indirectly produced substantial justice in this case.

Order and Costs

I dismiss the plaintiff's statement of claim.

As the defendants have succeeded on the defence of a statute of limitations, and as a large part

of the case was concerned with the litigation of issues on which the winning defendants were unsuccessful, I reserve costs for further argument.

I certify that this and the 178 preceding pages are a true copy of the reasons for judgment herein of his Honour Mr. Justice Wootten

(Signed) ASSOCIATE

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

292 of 1973

QUEENSLAND MINES LIMITED

Plaintiff

ERNEST ROY HUDSON
SAVAGE IRON INVESTMENTS PTY. LIMITED
INDUSTRIAL & MINING INVESTIGATIONS PTY. LIMITED

Defendants

O R D E R

THE COURT ORDERS that -

1. The Statement of Claim herein be dismissed.

2. The question of costs be reserved.

ORDERED 6 October 1976.

THE COURT ORDERS that -

3. Leave be granted to Queensland Mines Limited (hereinafter called "the appellant") to appeal to Her Majesty in Council from the judgment delivered herein on 6 October, 1976 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 payment of all such costs as become payable to Ernest Roy Hudson, Savage Iron Investments Pty. Limited and Industrial & Mining Investigations Pty. Limited ("the

Order dismissing suit and granting conditional leave to appeal

respondents"), in the event of its not obtaining an Order granting it final leave to appeal from the said judgment or the appeal being dismissed for 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 15 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.

4. The costs of all parties to this Application and of the preparation 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.

5. The Proper Officer of the Court do 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.

6. 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 so certified such costs 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.

7. 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 monies paid into Court as such security

Order dismissing suit
and granting conditional
leave to appeal

as aforesaid so far as the same shall extend and that after such payment out (if any) the balance (if any) of the said money be paid out of Court to the appellant.

8. All parties be at liberty to apply upon the giving of 2 days' notice.

THE COURT NOTES that the parties agree that - 10

9. The appeal will be prosecuted with all due diligence.

ORDERED 18 October, 1976, AND ENTERED 29 December 1976.

By the Court

Alyson Ashe (L.S.)

A.W. Ashe
SECOND DEPUTY REGISTRAR IN EQUITY

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

No. 292 of 1973

QUEENSLAND MINES LIMITED

Plaintiff (Appellant)

ERNEST ROY HUDSON
SAVAGE IRON INVESTMENTS PTY. LIMITED
INDUSTRIAL & MINING INVESTIGATIONS PTY. LIMITED

Defendant (Respondent)

O R D E R

THE COURT ORDERS that:-

1. Final leave to appeal to Her Majesty in Council from the Judgment of his Honour Mr. Justice Wootten given and made herein on 6th October, 1976 be granted to the plaintiff.

2. Upon payment by the plaintiff of the costs of preparation of the Transcript Record and despatch thereof to England the sum of $50.00 deposited in Court by the plaintiff as security for and towards the costs thereof be paid out-of-court to the plaintiff.

ORDERED 15th April, 1977 AND ENTERED

By the Court,

A.V. Ritchie,
Registrar in Equity.

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

292 of 1973

QUEENSLAND MINES LIMITED

Appellant (Plaintiff)

ERNEST ROY HUDSON
SAVAGE IRON INVESTMENTS PTY. LIMITED and
INDUSTRIAL AND MINING INVESTIGATIONS PTY. LIMITED

Respondents (Defendants)

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 subject to the errors set out in the annexed schedule the sheets contained in Volumes I to VIII inclusive of the Appeal Books herein being pages numbered 1 to 2,205 inclusive contain a true copy of all the documents relevant to the appeal by the Appellant Queensland Mines 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 Mr. Justice John Halden Wootten, of the Equity Division of the said Supreme Court on 6 October 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 are 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, Equity Division to be affixed this seventh day of September in the year of Our Lord One thousand nine hundred and seventy-seven.

A.V. Ritchie (L.S.)
REGISTRAR IN EQUITY
SUPREME COURT OF NEW SOUTH WALES

IN THE SUPREME COURT)
OF NEW SOUTH WALES) P.C. No. of 1977
EQUITY DIVISION) E.D. No. 292 of 1973

QUEENSLAND MINES LIMITED

Plaintiff (Appellant)

ERNEST ROY HUDSON,
SAVAGE IRON INVESTMENTS PTY. LIMITED, and
INDUSTRIAL AND MINING INVESTIGATIONS PTY. LIMITED

Defendants (Respondents)

SCHEDULE OF ERRORS

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Page	Line	Original	Appeal Book
24	17	E1/4/61 and E1/5/61	E14/61 and E15/61
35	11	"of"	"and"
35	22	"of"	"and"
54	12	"start it off"	"start off"
150	7	"ilimenite"	"Ilmanite"
193	11	"Exhibit 19"	"Exhibit 20"
214	6	"Burrell"	"Barrell"
214	18	"Burrell"	"Barrell"
215	5	"Burrell"	"Barrell"
215	9	"Burrell"	"Barrell"
222	20	"distrust"	"trust"
241	45	"of expenditure to to August, 1961 that is expenditure in connection"	"of expenditure in connection"
244	42	"and"	"an"
279	40	"yes"	"yea"

VOLUME III

614	9	"probable"	"probably"

Page	Line	Original	Appeal Book
624	31	"have been indemnified"	"have indemnified"
640	23	"what had happened has"	"what had happened had"
654	6	"consequential"	"consequentially"
657	28	"debited"	"debted"
659	24	"representatives"	"representative"
680	12	"appellants"	"appellant"
686	29	"558"	"553"
694	26	"there"	"tere"
703	29	"Kuys"	"Kuvs"
709	18	"conversations"	"donversations"
725	10	"important"	"impprtance"
745	28	"exploitation"	"exploration"
751	8	"abandoned"	"abondoned"

VOLUME VI

Exhibit A39 or Page 1496 - 2nd Page is missing.

ERRORS IN INDEXES

Volume	Page	Exhibit	Original	Appeal Book
I	Index D	B	"28 June 1974"	- blank -
I	Index D	C	"28 June 1974"	- blank -
I	Index K	A33	"with annexures"	- blank -
I	Index M	8	"undated"	"17 August, 1959"
I	Index P	50	(Indexed in certified copy as being in Vol. VI, but actually in Vol. VII at page 1601. In all other copies, correctly in Vol. VI at page 1601)	
V	Index B	8	"undated"	"17 August 1959"
V	Index C	90	"6 June 1959"	"6 May 1959"
V	Index D	94	"Queensland Mines"	"Queensland Mines Limited"
VI	Index C	A33	"with annexures"	- blank--
VIII	Index A	B	"28 June 1974"	- blank -
VIII	Index A	C	"28 June 1974"	- blank -

IN THE SUPREME COURT)
OF NEW SOUTH WALES) 292 of 1973
EQUITY DIVISION)

QUEENSLAND MINES LIMITED

Appellant (Plaintiff)

ERNEST ROY HUDSON
SAVAGE IRON INVESTMENTS PTY. LIMITED and
INDUSTRIAL AND MINING INVESTIGATIONS PTY. LIMITED

Respondents (Defendants)

CERTIFICATE OF CHIEF JUSTICE

I, the Honourable Sir Laurence Whistler Street, K.C.M.G. K. St. J. 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 Queensland Mines 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 eighth day of September in the year of Our Lord One thousand nine hundred and seventy-seven.

L.W. Street
CHIEF JUSTICE OF THE SUPREME COURT
OF NEW SOUTH WALES