

2/87
No. 57 of 1982

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

IN PROCEEDINGS 116 of 1981

B E T W E E N :

MAYNEGRAIN PTY. LIMITED

Appellant
(Defendant)

- and -

COMPAFINA BANK

Respondent
(Plaintiff)

RECORD OF PROCEEDINGS

VOLUME I

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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Appellant
(Defendant)

- and -

COMPAFINA BANK

Respondent
(Plaintiff)

RECORD OF PROCEEDINGS

VOLUME I

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

IN PROCEEDINGS 116 of 1981

BETWEEN :

MAYNEGRAIN PTY. LIMITED Appellant
(Defendant)

10 - and -

COMPAFINA BANK Respondent
(Plaintiff)

RECORD OF PROCEEDINGS
VOLUME I

No.1

AMENDED STATEMENT
OF CLAIM

In the Supreme
Court

No.1
Amended
Statement
of Claim
23rd February
1981

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION

COMMERCIAL LIST 13520 of 1978

20

COMPAFINA BANK Plaintiff

- and -

BULK TERMINALS AND First
EXPORTERS PTY.LTD. Defendant

- and -

MAYNEGRAIN PTY.LTD. Second
Defendant

No.1
Amended
Statement
of Claim
23rd February
1981

(continued)

1. The Plaintiff and the Defendants are each corporations duly incorporated and able to sue and liable to be sued in their respective corporate names.
2. The Plaintiff is a bank carrying on business at, amongst other places, Geneva, Switzerland.
3. The Second Defendant has at all material times operated a grain storage terminal at the Port of Brisbane, Queensland. 10
4. In or about the months of September, October and November 1976 it was agreed between the Plaintiff and the First Defendant that -
 - (a) The Plaintiff would from time to time lend sums of money to the First Defendant to finance the purchase of quantities of barley in Australia.
 - (b) In respect of each quantity of barley so purchased the Plaintiff would lend to the Defendant a sum representing eighty per cent of the purchase price thereof. 20
 - (c) Upon the purchase of each quantity of barley title to it would pass to the Plaintiff.
 - (d) Upon the purchase of each quantity of barley, it would be held by the Second Defendant at its said grain storage terminal on behalf of the Plaintiff and the First Defendant would procure the issue of a warehouse receipt in respect of each such quantity by the Second Defendant to that effect. 30
 - (e) The First Defendant would pay to the Plaintiff
 - (i) Its customary banking charges in respect of the loan transactions as aforesaid.
 - (ii) A commission or an initial instalment of interest at the rate of one half of one per cent of the moneys lent.
 - (iii) Interest on the moneys lent at the rate per annum arrived at by adding two per cent to the London Inter-Bank Offered Rate (Eurodollar) for a period of three months from time 40

to time, for so long as the moneys lent remained unpaid.

In the
Supreme Court

(f) The moneys lent and interest and charges in respect thereof as aforesaid would be paid by the First Defendant to the Plaintiff upon the sale of the barley.

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1981

(g) The First Defendant would immediately take steps to arrange a sale or sales of the barley to persons and on terms to be approved by the Plaintiff with the intention that it would be sold within a few weeks of purchase.

(continued)

(h) The First Defendant would effect adequate insurance in respect of the barley so purchased to cover all usual risks.

(i) Upon arrangement of a sale or sales of the barley to persons and on terms approved by the Plaintiff, the Plaintiff would release the barley for delivery to the purchaser or purchasers thereof against payment to the Plaintiff of the moneys lent in respect thereof together with interest and charges as aforesaid.

PARTICULARS

The agreement was made orally between Pierre Boulmer and Emile Ferrasse on behalf of the Plaintiff and Alexander Jamieson on behalf of the First Defendant at meetings in Geneva, Switzerland and Sydney, Australia.

5. Pursuant to the said agreement -

(a) Between 1st January 1977 and 22nd March 1977 the Plaintiff lent to the First Defendant sums totalling US\$2,562,326 to finance the purchase of 28,034 metric tonnes of barley (hereinafter called "the barley").

(b) Upon purchase of the barley the Plaintiff became the owner thereof or, alternatively, the legal owner thereof subject to an equity of redemption in the First Defendant, and was entitled to immediate possession thereof.

(c) The barley was delivered into the care and custody of the Second Defendant at its said grain storage terminal.

(d) The Second Defendant issued warehouse receipts

In the
Supreme Court

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23rd February
1981

(continued)

acknowledging that it held the said
barley on account of Australia & New
Zealand Banking Group Limited who at
all material times was acting as agent
for and on behalf of the Plaintiff.

6. In or about August 1977 the barley was sold
and the said moneys lent to the First Defendant
and interest and charges in respect thereof
became payable to the Plaintiff.

7. Following the sale of the barley and up to 10
31st March 1978 the Plaintiff has received the
sum of US\$2,380,000.00 only.

8. The First Defendant has failed to pay to the
Plaintiff the balance of the said moneys lent and
interest and charges in respect thereof which as
at 31st March 1978 amounted to US\$506,883.63.

PARTICULARS
(as at 31st March 1978)

Loans to First Defendant	\$2,562,326.00		20
Interest to 31st March 1978	297,250.07		
Bank commission and charges	<u>38,854.35</u>	\$2,898,430.42	
Received in respect of barley sold	2,380,000.00		
Credits in respect of sorghum financing	<u>11,546.79</u>	<u>2,391,546.79</u>	30
		US\$ 506,883.63	

8A. In the alternative to paragraphs 4, 5 and 8
above, the Plaintiff says that -

(a) In or about the months of September, October
and November 1976, it was agreed between the
Plaintiff and Alexander Jamieson on behalf
of both the First Defendant and Penmas Inc.
that -

(i) The Plaintiff would from time to time 40
lend sums of money to Penmas Inc. to
be made available to the First Defendant
in Australia, to finance the purchase
of quantities of barley in Australia;

- | | | |
|----|---|---|
| | (ii) In respect of each quantity of barley so purchased, the Plaintiff would lend Penmas Inc. and so make available to the First Defendant a sum representing eighty per cent of the purchase price thereof; | In the
<u>Supreme Court</u> |
| | (iii) The Plaintiff repeats paragraphs 4(c), (d), (g), (h) and (i) above; | No.1
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of Claim
23rd February
1981 |
| | (iv) Penmas Inc. would pay to the Plaintiff- | (continued) |
| 10 | a. Its customary banking charges in respect of the loan transactions as aforesaid. | |
| | b. A commission or an initial instalment of interest at the rate of one half of one per cent of the moneys lent. | |
| 20 | c. Interest on the moneys lent at the rate per annum arrived at by adding two per cent to the Long Inter-Bank Offered Rate (Eurodollar) for a period of three months from time to time, for so long as the moneys lent remained unpaid. | |
| | (v) The moneys lent and interest charges in respect thereof as aforesaid would be paid by Penmas Inc. to the Plaintiff upon the sale of the barley. | |

PARTICULARS

- 30 The agreement was made orally between Pierre Boulmer and Emile Ferrasse on behalf of the Plaintiff and Alexander Jamieson on behalf of the First Defendant and Penmas Inc. at meetings in Geneva, Switzerland and Sydney, Australia.
- (b) Pursuant to the said agreement -
- 40 (i) Between 1st January 1977 and 22nd March 1977 the Plaintiff lent to Penmas Inc. and made available to the First Defendant in Australia sums totalling US\$2,562,326.00 to finance the purchase of 28,034 metric tonnes of barley.
- (ii) The Plaintiff repeats paragraphs 5(b) and (c) and (d) above.
- (c) Neither Penmas Inc. nor the First Defendant has paid to the Plaintiff the balance of the said

In the
Supreme Court

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1981

(continued)

moneys lent and interest and charges
in respect thereof which as at 31st
March 1978 amounted to US\$506,883.63.

PARTICULARS

The Plaintiff repeats the particulars set
forth in paragraph 8 above.

9. In breach of the said agreement the First
Defendant -
- (a) Arranged for the sale of the barley
without the authority of the Plaintiff
and to persons and on terms of which the
Plaintiff was unaware and did not approve. 10
- (b) In or about August 1977 took delivery of
the barley from the Second Defendant or,
alternatively, directed the delivery of
the barley by the Second Defendant for
the purpose of its shipment to Kuwait
on the vessel "Bellnes".
- (c) Failed to effect any or any adequate
insurance in respect of the barley to
cover all usual risks. 20
10. As the result of the said breaches of the
agreement the Plaintiff was compelled to incur
further expense in order to recover any moneys
from the sale of the barley, a substantial
portion of the barley was lost, and the
Plaintiff suffered loss and damage.
11. Further or in the alternative, in the
circumstances aforesaid, the First Defendant
converted the barley to its own use and
wrongfully deprived the Plaintiff thereof, by
reason whereof the Plaintiff has suffered loss
and damage. 30
12. The Plaintiff, by its agent Australia &
New Zealand Banking Group Limited, has demanded
of the Second Defendant that it deliver up the
barley to the Plaintiff but the Second Defendant
has failed to deliver it, by reason whereof
the Plaintiff has been deprived of the barley
and has suffered loss and damage. 40
13. Further or in the alternative, in or
about August 1977 the Second Defendant delivered
the barley to a person or persons other than
the Plaintiff without the authority of the
Plaintiff and it was subsequently shipped to
Kuwait on the vessel "Bellnes".

14. The Second Defendant thereby converted the barley to its own use and wrongfully deprived the Plaintiff thereof by reason whereof the Plaintiff has suffered loss and damage.

In the
Supreme Court

No.1
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Statement
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1981

(continued)

15. Further or in the alternative, the Plaintiff says that, in the circumstances set forth in the preceding paragraphs of this Amended Statement of Claim, the Second Defendant owed a duty of care to the Plaintiff or its agent the ANZ Banking Group Limited to take reasonable care to avoid loss of or damage to the interest of the Plaintiff in the barley.

16. In breach of its said duty, in or about August 1977, the Second Defendant negligently delivered the barley to a person or persons other than the Plaintiff, or its agent the ANZ Banking Group Limited, for its shipment to Kuwait.

PARTICULARS OF NEGLIGENCE

The Second Defendant, having acknowledged that it held the barley on account of the ANZ Banking Group Limited, delivered the barley for the purpose of its loading on board the vessel "Bellnes" and its shipment, as the Second Defendant was well aware, to Kuwait, without seeking the approval of or informing the Plaintiff or its said agent that it proposed to so deliver the barley, and without ensuring that the Plaintiff or its said agent was aware that it so proposed to deliver the barley.

17. By reason of the Second Defendant's said breach of duty, the Plaintiff was deprived of its interest in the barley, and has suffered loss and damage.

PARTICULARS OF DAMAGE
(as at 31st March 1978)

The Plaintiff furnishes the following particulars of damage in respect of the matters alleged in paragraphs 10, 11, 12, 14 and 17 above:

Loans to First Defendant	\$2,562,326.00	
Interest to 31st March 1978	297,250.07	
Bank commission and charges	<u>38,854.35</u>	\$2,898,430.42

In the
Supreme Court

B/fwd

\$2,898,430.42

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of Claim
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1981

Received in respect
of barley sold 2,380,000.00
Credits in
respect of sorghum
financing 11,546.79 2,391,546.79
US\$ 506,883.63

(continued)

Paid for
freight in
respect of
shipment of
barley to
Kuwait 550,000.00
Paid for demur-
rage at Kuwait 19,919.71 569,919.71
US\$1,076,803.34

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The Plaintiff claims :

1. As against the First Defendant -
 - (a) Judgment in the sum of A\$435,729.07
 - (b) Alternatively, judgment in an amount 20
being the equivalent in Australian
currency of US\$506,883.63 as at
the date of entry of judgment.
 - (c) Interest at the rate calculated in
accordance with paragraph 4(e) above
from 31st March 1978.
 - (d) Damages.
 - (e) Costs.
2. As against the Second Defendant -
 - (a) Damages 30
 - (b) Costs.

TO the First Defendant, Bulk Terminals and
Exporters Pty.Ltd. of Cnr Campbell and Vines
Streets, Pittsworth, Queensland 4356

AND TO the Second Defendant, Maynegrain Pty.Ltd.
of 901 Kingsford Smith Drive, Eagle Farm,
Queensland 4007

1. You are liable to suffer judgment or an order against you unless the prescribed form of Notice of your appearance is received in the Registry within two months after service of this Statement of Claim upon you and you comply with the Rules of Court relating to your Defence.

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Statement
of Claim
23rd February
1981

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2. You may within two months after service of this Statement of Claim upon you pay to the Plaintiff or its Solicitors the amount claimed together with interest thereon at the rate of ten per cent per annum from the date of filing this Statement of Claim until payment and also \$162.00 costs. Further proceedings against you will be stayed when you also file a prescribed form of Notice of Payment.

(continued)

NOTICE

20

Your Appearance to this Statement of Claim must give an address at some place within ten kilometres of the office of the Supreme Court of New South Wales at Queen's Square, Sydney at which address proceedings and notices for you may be left.

Plaintiff: Compafina Bank of Rue du
Conseil-General 9,
1205 Geneva, Switzerland.

30

Plaintiff's Address for Service: In care of Messrs. Sly &
Russell, Solicitors,
60 Margaret Street,
Sydney Tel. 2 0535
DX 368

Address of Registry: Supreme Court Building,
Queen's Square, Sydney

FILED:

.....
Solicitor for the Plaintiff

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SLY & RUSSELL
Solicitors
60 Margaret Street
SYDNEY 2000
Tel. 2 0535
DX 368

In the
Supreme Court

No. 2

No.2
Further Amended
Defence of
Second
Defendant
25th February
1981

FURTHER AMENDED DEFENCE
OF SECOND DEFENDANT

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW DIVISION

COMMERCIAL LIST

1350 of 1978

COMPAFINA BANK

Plaintiff

- and -

BULK TERMINALS AND
EXPORTERS PTY.
LIMITED

First
Defendant

10

- and -

MAYNEGRAIN PTY.LTD.

Second
Defendant

FURTHER AMENDED DEFENCE OF
SECOND DEFENDANT

1. The second defendant does not know and cannot plead to the allegation made in paragraphs 2, 7, 8, 9, 10 and 11 of the Statement of Claim. 20

1A. The second defendant does not admit the allegations contained in paragraphs 4 and 5 of the Statement of Claim.

2. In answer to paragraph 6 of the Statement of Claim, the second defendant says that on 22nd July, 1977 it received telex confirmation from the first defendant as to the proposed shipment of the first defendant's stock of barley approximating 27,500 metric tonnes on M.V. Bellnes. Save as aforesaid, the second defendant does not know and cannot plead to the allegations made in the said paragraph. 30

3. In answer to paragraph 12 of the Statement of Claim the second defendant admits that by letter dated 20th June 1978 the A.N.Z. Banking Group Limited made formal demand for the delivery to it of 28,034 metric tonnes (sic) of barley but the second defendant does not admit that the A.N.Z. Banking Group Limited 40

was the plaintiff's agent at that or any other time.

In the
Supreme Court

10 4. In further answer to paragraph 12 of the Statement of Claim, the second defendant denies that either the plaintiff or the A.N.Z. Banking Group limited was entitled to demand delivery of the barley or that the barley was the property of the Plaintiff or the A.N.Z. Banking Group Limited or that the plaintiff suffered loss or damage.

No.2
Further
Amended
Defence of
Second
Defendant
25th February
1981

5. In answer to paragraph 13 of the Statement of Claim the second defendant admits that during July/August 1977 the barley was loaded at the request of the first defendant on the vessel "Bellnes" for shipment to Kuwait. Save as aforesaid, the second defendant denies the allegations in the said paragraph.

(continued)

20 6. In answer to paragraph 14 of the Statement of Claim the second defendant denies that the barley was the property of the plaintiff or that the plaintiff suffered loss or damage.

30 7. Alternatively to paragraphs 5 and 6, the second defendant says that the plaintiff is estopped and precluded from saying in this action that the barley is its property because the plaintiff at all times allowed the first defendant to deal with the barley as principal and at no stage prior to the acts complained of notified the second defendant of its interest in the barley.

8. Alternatively to paragraphs 5, 6 and 7 hereof, if it is held that the barley was the property of the plaintiff (which is denied) the second defendant says that the first defendant was at all material times in its dealings with the second defendant acting with the ostensible authority of the plaintiff and further says that the acts of the second defendant did not amount to conversion of the plaintiff's property.

40 9. Alternatively to paragraph 8 hereof, if it is held that the barley was the property of the plaintiff (which is denied), the second defendant denies that the plaintiff suffered any loss or damage as a result of the acts of the second defendant.

10. Further and in the alternative, if (which is denied) the delivery of the barley to the first defendant was wrongful, the plaintiff by receiving and retaining the purchase price payable

In the
Supreme Court

No.2
Further Amended
Defence of
Second
Defendant
25th February
1981

(continued)

by the Kuwait purchaser to the first defendant, by paying for freight to ship the barley to Kuwait and by paying demurrage at Kuwait, has waived its rights against the second defendant.

11. Alternatively, if (which is denied) the barley was the property of the plaintiff and the A.N.Z. Bank Limited was at relevant times the agent of the plaintiff, the second defendant loaded the barley onto the "Bellnes" on or about 15th August, 1977 with the knowledge and approval of the plaintiff by its agent A.N.Z. Bank Limited. 10

12. In further answer to the whole of the Statement of Claim the second defendant says that if (which is denied) the barley was the property of the plaintiff, it was stored with the second defendant with the knowledge and approval of the plaintiff, on the terms of an agreement made 22nd February, 1974 between the first defendant and the second defendant (therein called Meral (QLD) Pty. Limited) one term of which was 20

16. It is expressly agreed that should there be any rejection and/or shortage and/or surplus of any commodity received by Meral then the same shall be shared equitably by all users of the storage facilities on a pro rata basis for each commodity and will be spread over the total net weight of each commodity then stored by Meral. Meral agrees that shortages of commodities will not exceed 0.5% of commodities received on final out turn. 30

The second defendant says that by reason of the said Clause 16 the maximum damages to which it can be liable is damages attributable to 99.5% of the amount of barley deposited with it by the first defendant. 40

13. The second defendant does not admit paragraphs 8A, 15, 16 or 17 of the Amended Statement of Claim or any allegation therein.

14. In further answer to the whole of the Statement of Claim, the second defendant says that if (which is not admitted) the plaintiff had any interest in the barley arising from the agreements referred to in paragraphs 4 and/or 8A of the Amended Statement of Claim, 50

- (a) the agreement whereby it acquired the said interest was a charge granted by the first defendant within the meaning of s.100 Companies Act, 1961 (QLD);
- (b) the said agreement was at no time registered under the provisions of the Companies Act 1961 (QLD);
- (c) the second defendant was at all material times a creditor of the first defendant by reason whereof the said agreement is void as against the second defendant pursuant to s.100 of the Companies Act (QLD).

In the
Supreme Court

No.2
Further
Amended
Defence of
Second
Defendant
25th February
1981

(continued)

J.F. McDARRA
Solicitors for the Second
Defendant

(Sgd) J. McDarra

DATED: 25 February 1981

FURTHER AMENDED DEFENCE
OF SECOND DEFENDANT

No.3
Further
Amended
Defence of
Second
Defendant
6th March
1981

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW DIVISION

COMMERCIAL LIST

1350 of 1978

COMPAFINA BANK Plaintiff

- and -

BULK TERMINALS AND EXPORTERS PTY.
LIMITED First Defendant 10

- and -

MAYNEGRAIN PTY.LTD. Second Defendant

FURTHER AMENDED DEFENCE
OF SECOND DEFENDANT

Filed pursuant to leave granted by Rogers J.
on 6 March, 1981

1. The second defendant does not know and cannot plead to the allegation made in paragraphs 2, 7, 8, 9, 10 and 11 of the Statement of Claim. 20

1A. The second defendant does not admit the allegations contained in paragraphs 4 and 5 of the Statement of Claim.

2. In answer to paragraph 6 of the Statement of Claim, the second defendant says that on 22nd July, 1977 it received telex confirmation from the first defendant as to the proposed shipment of the first defendant's stock of barley approximating 27,500 metric tonnes on M.V. Bellnes. Save as aforesaid, the second defendant does not know and cannot plead to the allegations made in the said paragraph. 30

3. In answer to paragraph 12 of the Statement

of Claim, the second defendant admits that by letter dated 20th June 1978 the A.N.Z. Banking Group Limited made formal demand for the delivery to it of 28,034 metric tonnes (sic) of barley but the second defendant does not admit that the A.N.Z. Banking Group Limited was the plaintiff's agent at that or any other time.

In the
Supreme Court

No.3
Further
Amended
Defence of
Second Defendant
6th March 1981

10 4. In further answer to paragraph 12 of the Statement of Claim, the second defendant denies that either the plaintiff or the A.N.Z. Banking Group Limited or that the plaintiff suffered loss or damage. (continued)

20 5. In answer to paragraph 13 of the Statement of Claim, the second defendant admits that during July/August 1977 the barley was loaded at the request of the first defendant on the vessel "Bellnes" for shipment to Kuwait. Save as aforesaid, the second defendant denies the allegations in the said paragraph.

6. In answer to paragraph 14 of the Statement of Claim, the second defendant denies that the barley was the property of the plaintiff or that the plaintiff suffered loss or damage.

30 7. Alternatively to paragraphs 5 and 6, the second defendant says that the plaintiff is estopped and precluded from saying in this action that the barley is its property because the plaintiff at all times allowed the first defendant to deal with the barley as principal and at no stage prior to the acts complained of notified the second defendant of its interest in the barley.

40 8. Alternatively to paragraphs 5, 6 and 7 hereof, if it is held that the barley was the property of the plaintiff (which is denied) the second defendant says that the first defendant was at all material times in its dealings with the second defendant acting with the ostensible authority of the plaintiff and further says that the acts of the second defendant did not amount to conversion of the plaintiff's property.

9. Alternatively to paragraph 8 hereof, if it is held that the barley was the property of the plaintiff (which is denied), the second defendant denies that the plaintiff suffered any loss or damage as a result of the acts of the second defendant.

10. Further and in the alternative, if (which

In the
Supreme Court

No.3
Further
Amended
Defence of
Second
Defendant
6th March
1981

(continued)

is denied) the delivery of the barley to the first defendant was wrongful, the plaintiff by receiving and retaining the purchase price payable by the Kuwait purchaser to the first defendant, by paying for freight to ship the barley to Kuwait and by paying demurrage at Kuwait, has waived its rights against the second defendant.

11. Alternatively, if (which is denied) the barley was the property of the plaintiff and the A.N.Z. Bank Limited was at relevant times the agent of the plaintiff, the second defendant loaded the barley onto the "Bellnes" on or about 15th August, 1977 with the knowledge and approval of the plaintiff by its agent A.N.Z. Bank Limited. 10

12. In further answer to the whole of the Statement of Claim the second defendant says that if (which is denied) the barley was the property of the plaintiff, it was stored with the second defendant with the knowledge and approval of the plaintiff, on the terms of an agreement made 22nd February, 1974 between the first defendant and the second defendant (therein called Meral (QLD) Pty. Limited) one term of which was 20

16. It is expressly agreed that should there be any rejection and/or shortage and/or surplus of any commodity received by Meral then the same shall be shared equitably by all users of the storage facilities on a pro rata basis for each commodity and will be spread over the total net weight of each commodity then stored by Meral. Meral agrees that shortages of commodities will not exceed 0.5% of commodities received on final out turn. 30

The second defendant says that by reason of the said Clause 16 the maximum damages to which it can be liable is damages attributable to 99.5% of the amount of barley deposited with it by the first defendant. 40

13. The second defendant does not admit paragraphs 8A, 15, 16 or 17 of the Amended Statement of Claim or any allegation therein.

14. In further answer to the whole of the Statement of Claim, the second defendant says that if (which is not admitted) the plaintiff had any interest in the barley arising from the

agreements referred to in paragraphs 4 and/or 8A of the Amended Statement Claim:

In the
Supreme
Court

No.3
Further
Amended
Defence of
Second
Defendant
6th March
1981

(continued)

- 10 (a) the first defendant from time to time gave to the plaintiff documents whereby it acknowledged that certain particular stocks of barley then situated in the State of Queensland, were held on behalf of the plaintiff. The said documents were letters from the first defendant to the plaintiff, or the first defendant to A.N.Z. Bank dated 1.12.76 (p.26 & 27 of Exhibit A herein), 6.12.76 (p.28), 7.12.76 (p.29), 13.12.76 (p.31), 15.12.76 (p.32), 20.12.76 (p.34), 29.12.76 (p.36), 30.12.76 (p.37), 5.1.77 (p.38), 14.1.77 (p.39), 4.2.77 (p.41), 11.2.77 (p.42), 18.2.77 (p.44), 28.2.77 (p.46), 7.3.77 (p.48) and 21.3.77 (p.50).
- 20 (b) those documents and each of them were part of the process whereby the plaintiff gained its security interest in those particular goods, being the first appropriation by the first defendant of those goods to the said agreement.
- (c) the second defendant charges that the said documents were, and each of them was thereby
- 30 (i) an assignment or transfer of chattels,
- (ii) alternatively, an assurance of chattels,
- (iii) alternatively, a declaration of trust of chattels, without transfer,
- (iv) alternatively, an authority or licence to take possession of chattels as security for a debt, or
- (v) alternatively, an agreement by which a legal or equitable right to chattels or to any charge or security thereover is conferred
- and thus constituted a bill of sale (within the meaning of the Bills of Sale and Other Instruments Act of 1955 (QLD)).
- 40 (d) the second defendant further charges that the said documents and each of them were thereby documents which created or evidenced a charge or assignment.
- (e) the second defendant further charges that by reason of paragraphs (c) and (d), the said

In the
Supreme Court

No.3
Further
Amended
Defence of
Second
Defendant
6th March
1981

(continued)

documents were, and each of them was
a charge within the meaning of s.100
of the Companies Act (Qld).

- (f) each of the said documents has at no
time been registered under the provisions
of s.100 of the Companies Act (Qld). 10
- (g) the second defendant, in relation to
each parcel of barley referred to in
the documents specified in paragraph
(a) hereof, had accepted the said barley
for storage at its terminal at Pinkenba,
Queensland, prior to the date of the
document in which that parcel of barley
was referred to. In relation to each
such parcel of barley, the second
defendant continued to store it from the
time it was accepted until August 1977.
The said storage was for reward to the
second defendant from the first defendant. 20
The first defendant had not, at any time
after receipt by the second defendant of
any particular parcel of barley, paid
to the second defendant the whole of the
charges then due to the second defendant
with respect to that parcel. ~~by reason
whereof the second defendant was a creditor
of the first defendant, within the meaning
of s. 100 of the Companies Act (Qld).~~
- by reason whereof any security interest 30
conferred on the plaintiff in the said goods
is void as against the second defendant pursuant
to s. 100 of the Companies Act (Qld.).

J.F. McDARRA
By his partner

Sgd. Peter Johnston

Solicitor for the
Second Defendant

DATED: 6 March 1981

AMENDED REPLY TO FURTHER
AMENDED DEFENCE OF SECOND
DEFENDANT

No.4
Amended Reply
to Further
Amended
Defence of
Second
Defendant
6th March 1981

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION

COMMERCIAL LIST

13520 of 1978

COMPAFINA BANK Plaintiff

- and -

10

BULK TERMINALS AND First
EXPORTERS PTY.LTD. Defendant

- and -

MAYNEGRAIN PTY.LTD. Second
Defendant

AMENDED REPLY TO FURTHER
AMENDED DEFENCE OF SECOND
DEFENDANT

20

1. Except insofar as paragraphs 1 to 6 inclusive and paragraph 9 of the Defence contain admissions, the Plaintiff joins issue with the Second Defendant upon the allegations made therein.

2. The Plaintiff denies each of the allegations made in paragraphs 7, 8, 10, 11 and 12 of the Amended Defence.

3. In reply to paragraph 13 14 of the Defence, the Plaintiff -

30

(a) Admits that the documents referred to in sub-paragraph (a) of the said paragraph have not been registered under the provisions of Section 100 of the Companies Act (Queensland);

(b) Admits that the Second Defendant accepted the barley for storage at its terminal at Pinkenba, Queensland, and continued to store it until August 1977;

In the
Supreme Court

No.4
Amended Reply
to Further
Amended
Defence of
Second
Defendant
6th March
1981

(continued)

(c) Otherwise denies each of the allegations made in the said paragraph;

(d) Says that, insofar as the said paragraph contains allegations of fact, such facts if proved do not give rise to any defence to the Plaintiff's claim.

4. In further reply to paragraphs 4, 5, 6, 7 and ~~13~~ 14 of the Amended Defence, the Plaintiff says that - 10

(a) In making the advances referred to in paragraph 5(a) (or paragraph 8A (b) (i)) of the Amended Statement of Claim, the Plaintiff and its agent the ANZ Banking Group Limited relied upon the warehouse receipts issued by the Second Defendant acknowledging that it held the barley on account of ANZ Banking Group Limited as referred to in paragraph 5(d) of the Amended Statement of Claim. 20

(b) The Second Defendant is estopped from denying that the Plaintiff, through its said agent, had title to the barley and/or was entitled to demand delivery thereof.

FILED:

Sgd. G.E.Underwood
Solicitor for the Plaintiff 30

by Geoffry Edward Underwood
a Solicitor in his employ

FURTHER AMENDED STATEMENT
OF CLAIM

No.5
Further
Amended
Statement of
Claim
10th March
1981

IN THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION
COMMERCIAL LIST 13520 of 1978

COMPAFINA BANK Plaintiff

- and -

10

BULK TERMINALS AND First
EXPORTERS PTY.LTD. Defendant

- and-

MAYNEGRAIN PTY.LTD. Second
Defendant

FURTHER AMENDED STATEMENT
OF CLAIM

1. The Plaintiff and the Defendants are each corporations duly incorporated and able to sue and liable to be sued in their respective corporate names.
- 20 2. The Plaintiff is a bank carrying on business at, amongst other places, Geneva, Switzerland.
3. The Second Defendant has at all material times operated a grain storage terminal at the Port of Brisbane, Queensland.
4. In or about the months of September, October and November 1976 it was agreed between the Plaintiff and the First Defendant that -
 - 30 (a) The Plaintiff would from time to time lend sums of money to the First Defendant to finance the purchase of quantities of barley in Australia.
 - (b) In respect of each quantity of barley so purchased the Plaintiff would lend to the Defendant a sum representing eighty per cent of the purchase price thereof.

In the
Supreme Court

No.5
Further
Amended
Statement
of Claim
10th March
1981

(continued)

- (c) Upon the purchase of each quantity of barley title to it would pass to the Plaintiff.
- (d) Upon the purchase of each quantity of barley, it would be held by the Second defendant at its said grain storage terminal on behalf of the Plaintiff and the First Defendant would procure the issue of a warehouse receipt in respect of each such quantity by the Second Defendant to that effect. 10
- (e) The First Defendant would pay to the Plaintiff -
- (i) Its customary banking charges in respect of the loan transactions as aforesaid.
- (ii) A commission or an initial instalment of interest at the rate of one half of one per cent of the moneys lent.
- (iii) Interest on the moneys lent at the rate per annum arrived at by adding two per cent to the London Inter-Bank Offered Rate (Eurodollar) for a period of three months from time to time, for so long as the moneys lent remained unpaid. 20
- (f) The moneys lent and interest and charges in respect thereof as aforesaid would be paid by the First Defendant to the Plaintiff upon the sale of the barley. 30
- (g) The First Defendant would immediately take steps to arrange a sale or sales of the barley to persons and on terms to be approved by the Plaintiff with the intention that it would be sold within a few weeks of purchase.
- (h) The First Defendant would effect adequate insurance in respect of the barley so purchased to cover all usual risks.
- (i) Upon arrangement of a sale or sales of the barley to persons and on terms approved by the Plaintiff, the Plaintiff would release the barley for delivery to the purchaser or purchasers thereof against payment to the Plaintiff of the moneys lent in respect thereof together with interest and charges as aforesaid 40

PARTICULARS

In the
Supreme Cour

The agreement was made orally between Pierre Boulmer and Emile Ferrasse on behalf of the Plaintiff and Alexander Jamieson on behalf of the First Defendant at meetings in Geneva, Switzerland and Sydney, Australia.

No.5
Further
Amended
Statement
of Claim
10th March
1981

5. Pursuant to the said agreement -

10

(a) Between 1st January 1977 and 22nd March 1977 the Plaintiff lent to the First Defendant sums totalling US\$2,562,326 to finance the purchase of 28,034 metric tonnes of barley (hereinafter called "the barley")

(continued)

20

(b) Upon purchase of the barley the Plaintiff became the owner thereof or, alternatively, the legal owner thereof subject to an equity of redemption in the First Defendant, and was entitled to immediate possession thereof.

(c) The barley was delivered into the care and custody of the Second Defendant at its said grain storage terminal.

(d) The Second Defendant issued warehouse receipts acknowledging that it held the said barley on account of Australia & New Zealand Banking Group Limited who at all material times was acting as agent for and on behalf of the Plaintiff.

30

6. In or about August 1977 the barley was sold and the said moneys lent to the First Defendant and interest and charges in respect thereof became payable to the Plaintiff.

7. Following the sale of the barley and up to 31st March 1978 the Plaintiff has received the sum of US\$2,380,000.00 only.

40

8. The First Defendant has failed to pay to the Plaintiff the balance of the said moneys lent and interest and charges in respect thereof which as at 31st March 1978 amounted to US\$506,883.63.

PARTICULARS

(as at 31st March 1978)

Loans to First Defendant	\$2,562,326.00	
Interest to 31st March		
1978	297,250.07	
Bank Commission and charges	<u>38,854.35</u>	\$2,898,430.42

In the
Supreme Court

B/fwd \$2,898,430.42

No.5
Further
Amended
Statement
of Claim
10th March
1981

Received in respect of barley sold	2,380,000.00	
Credits in respect of sorghum financing	<u>11,546.79</u>	<u>2,391,546.79</u>
	US\$	<u>506,883.63</u>

(continued)

8A. In the alternative to paragraphs 4, 5 and 8 above, the Plaintiff says that -

(a) In or about the months of September, October and November 1976, it was agreed between the Plaintiff and Alexander Jamieson on behalf of both the First Defendant and Penmas Inc. that - 10

(i) The Plaintiff would from time to time lend sums of money to Penmas Inc. to be made available to the First Defendant in Australia, to finance the purchase of quantities of barley in Australia; 20

(ii) In respect of each quantity of barley so purchased, the Plaintiff would lend Penmas Inc. and so make available to the First Defendant a sum representing eighty per cent of the purchase price thereof;

(iii) The Plaintiff repeats paragraphs 4(c), (d), (g), (h) and (i) above;

(iv) Penmas Inc. would pay to the Plaintiff-

a. Its customary banking charges in respect of the loan transaction as aforesaid. 30

b. A commission or an initial instalment of interest at the rate of one half of one per cent of the moneys lent.

c. Interest on the moneys lent at the rate per annum arrived at by adding two per cent to the Long Inter-Bank Offered Rate (Eurodollar) for a period of three months from time to time, for so long as the moneys lent remained unpaid. 40

(v) The moneys lent and interest charges in respect thereof as aforesaid would be paid by Penmas Inc. to the Plaintiff upon the sale of the barley.

In the
Supreme Court

No.5
Further
Amended
Statement
of Claim
10th March
1981

PARTICULARS

The agreement was made orally between Pierre Boulmer and Emile Ferrasse on behalf of the Plaintiff and Alexander Jamieson on behalf of the First Defendant and Penmas Inc. at meetings in Geneva, Switzerland and Sydney, Australia.

(continued)

(b) Pursuant to the said agreement -

(i) Between 1st January 1977 and 22nd March 1977 the Plaintiff lent to Penmas Inc. and made available to the First Defendant in Australia sums totalling US\$2,562,326.00 to finance the purchase of 28,034 metric tonnes of barley.

(ii) The Plaintiff repeats paragraphs 5(b) and (c) and (d) above.

(c) Neither Penmas Inc. nor the First Defendant has paid to the Plaintiff the balance of the said moneys lent and interest and charges in respect thereof which as at 31st March 1978 amounted to US\$506,883.63.

PARTICULARS

The Plaintiff repeats the particulars set forth in paragraph 8 above.

9. In breach of the said agreement the First Defendant -

(a) Arranged for the sale of the barley without the authority of the Plaintiff and to persons and on terms of which the Plaintiff was unaware and did not approve.

(b) In or about August 1977 took delivery of the barley from the Second Defendant or, alternatively, directed the delivery of the barley by the Second Defendant for the purpose of its shipment to Kuwait on the vessel "Bellnes".

(c) Failed to effect any or any adequate insurance in respect of the barley to cover all usual risks.

In the
Supreme Court

No.5
Further
Amended
Statement
of Claim
10th March
1981

(continued)

10. As a result of the said breaches of agreement the Plaintiff was compelled to incur further expense in order to recover any moneys from the sale of the barley, a substantial portion of the barley was lost, and the Plaintiff suffered loss and damage.

11. Further or in the alternative, in the circumstances aforesaid, the First Defendant converted the barley to its own use and wrongfully deprived the Plaintiff thereof, by reason whereof the Plaintiff has suffered loss and damage.

10

12. The Plaintiff, by its agent Australia & New Zealand Banking Group Limited, has demanded of the Second Defendant that it deliver up the barley to the Plaintiff but the Second Defendant has failed to deliver it, by reason whereof the Plaintiff has been deprived of the barley and has suffered loss and damage.

13. Further or in the alternative, in or about August 1977 the Second Defendant delivered the barley to a person or persons other than the Plaintiff without the authority of the Plaintiff and it was subsequently shipped to Kuwait on the vessel "Bellnes".

20

14. The Second Defendant thereby converted the barley to its own use and wrongfully deprived the Plaintiff thereof by reason whereof the Plaintiff has suffered loss and damage.

15. Further or in the alternative, the Plaintiff says that, in the circumstances set forth in the preceding paragraphs of this Amended Statement of Claim, the Second Defendant owed a duty of care to the Plaintiff or its agent the ANZ Banking Group Limited to take reasonable care to avoid loss of or damage to the interest of the Plaintiff in the barley.

30

16. In breach of its said duty, in or about August 1977, the Second Defendant negligently delivered the barley to a person or persons other than the Plaintiff, or its agent the ANZ Banking Group Limited, for its shipment to Kuwait.

40

PARTICULARS OF NEGLIGENCE

The Second Defendant, having acknowledged that it held the barley on account of the ANZ Banking Group Limited, delivered the barley for the purpose of its loading on board the vessel "Bellnes" and its shipment

as the Second Defendant was well aware, to Kuwait without seeking the approval of or informing the Plaintiff or its said agent that it proposed to so deliver the barley, and without ensuring that the Plaintiff or its said agent was aware that it so proposed to deliver the barley.

In the Supreme Court

No.5
Further
Amended
Statement
of Claim
10th March
1981

10 17. By reason of the Second Defendant's said breach of duty, the Plaintiff was deprived of its interest in the barley, and has suffered loss and damage.

(continued)

PARTICULARS OF DAMAGE
(as at 31st March 1978)

The Plaintiff furnishes the following particulars of damage in respect of the matters alleged in paragraphs 10, 11, 12, 14 and 17 above :

20	Loans to First Defendant	\$2,562,326.00	
	Interest to 31st March 1978	297,250.07	
	Bank commission and charges	<u>38,854.35</u>	\$2,898,430.42
	Received in respect of barley sold	2,380,000.00	
	Credits in respect of sorghum financing	<u>11,546.79</u>	<u>2,391,546.79</u>
			US\$ 506,883.63
30	Paid for freight in respect of shipment of barley to Kuwait	550,000.00	
	Paid for demurrage at Kuwait	<u>19,919.71</u>	<u>569,919.71</u>
			US\$ <u>1,076,803.34</u>

The Plaintiff claims :

1. As against the First Defendant -
 - (a) Judgment in the sum of A\$435,729.07
 - 40 (b) Alternatively, judgment in an amount being the equivalent in Australian currency of US\$506,883.63 as at the date of entry of judgment.

In the
Supreme Court

No.5
Further
Amended
Statement
of Claim
10th March
1981

(continued)

- (c) Interest at the rate calculated
in accordance with paragraph 4(e)
above from 31st March 1978.
- (d) Damages.
- (e) Costs.
2. As against the Second Defendant -
- (a) Damages
- (b) Costs.
- (c) Interest.
- TO the First Defendant, Bulk Terminals and Exporters Pty.Ltd. of Cnr Campbell and Vines Streets, Pittsworth, Queensland 4356 10
- AND TO the Second Defendant, Maynegrain Pty.Ltd. of 901 Kingsford Smith Drive, Eagle Farm, Queensland 4007
1. You are liable to suffer judgment or an order against you unless the prescribed form of Notice of your Appearance is received in the Registry within two months after service of this Further Amended Statement of Claim upon you and you comply with the Rules of Court relating to your Defence. 20
2. You may within two months after service of this Statement of Claim upon you pay to the Plaintiff or its Solicitors the amount claimed together with interest thereon at the rate of ten per cent per annum from the date of filing this Statement of Claim until payment and also \$162.00 costs. Further proceedings against you will be stayed when you also file a prescribed form of Notice of Payment. 30

NOTICE

Your Appearance to this Further Amended Statement of Claim must give an address at some place within ten kilometres of the office of the Supreme Court of New South Wales at Queen's Square, Sydney at which address proceedings and notices for you may be left. 40

Plaintiff: Compafina Bank of Rue du
Conseil-General 9, 1205
Geneva, Switzerland

Plaintiff's Address In care of Messrs. Sly &
for Service: Russell, Solicitors,
60 Margaret Street,
Sydney Tel. 2 0535
DX 368

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Supreme Court

No.5
Further
Amended
Statement
of Claim
10th March
1981

Address of Registry: Supreme Court Building,
Queen's Square, Sydney

FILED:

(continued)

Sgd. (Illegible)

10

Solicitor for the Plaintiff
By his Partner

No. 6

TRANSCRIPT OF ORAL EVIDENCE
TAKEN BEFORE HIS HONOUR
MR. JUSTICE ROGERS

No.6
Transcript
of Evidence
before Mr.
Justice
Rogers
20th February
1981

IN THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION
COMMERCIAL LIST

No.13528/78

CORAM: ROGERS, J.

20,

FRIDAY, 20TH FEBRUARY, 1981

COMPAFINA BANK v. BULK TERMINALS & EXPORTERS
PTY. LTD. & ANOTHER

MR. GYLES Q.C. appeared with MR. CALDWELL
appeared for the plaintiff

MR. RAYMENT appeared for the first defendant

MR. COLEFAX, Solicitor, appeared for the second
defendant.

30

MR. GYLES: For reasons that your Honour would not
be oblivious to, I am not really in a position to
give your Honour a full opening on the facts.
However, I can usefully outline to your Honour the
way we put the case. A useful focus for that will
be some amendments which we are seeking to the
statement of claim. My friends have had verbal
notice of the substance of the amendments on Wednesday

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(continued)

and they had the document yesterday.

HIS HONOUR: Does this affect Mr. Campbell's client as well?

MR. GYLES: Yes, it does, and I am not asking at the moment for any consent or otherwise. If they do consent without further difficulty that perhaps may be taken, but I don't know his position.

HIS HONOUR: Mr. Rayment, what is the situation so far as you are concerned? 10

MR. RAYMENT: I understood the amendments to be an alternative claim against my client, the primary claim being that it was the borrower from Compafina, the secondary claim now being that it and Penmax were the borrowers from Compafina. If that is the only amendment, we would not be prejudiced by having that allegation made against us, because our case is that it was Penmax and not us, and always has been.

HIS HONOUR: Mr. Rayment's understanding is correct? 20

MR. GYLES: Yes.

HIS HONOUR: Have you had a chance to talk to Mr. Campbell?

MR. COLEFAX: No, I expect to do so later this afternoon.

HIS HONOUR: We will look at that on Monday. What is the nature of the amendment against Mr. Campbell?

MR. GYLES: It pleads a common law negligence count in circumstances that I will outline in a moment. We hope to bring it out of Botany Bay and up to Brisbane. The statement claim as amended - 30

HIS HONOUR: I will look at it, Mr. Colefax, but that is without prejudice to your client.

MR. GYLES: The first amendment is 8A. May I explain the case as we see it, simply. Mr. Jamieson represented both Penmax Inc. and BTE in negotiations with Compafina in which it was arranged that Compafina would advance moneys up to 80% of value of some barley, which was acquired - I think it had been acquired by then or in the course of being acquired - by BTE from Australian Growers. It was stored at a grain 40

terminal in Brisbane under the control of the second defendant. It was being accumulated there for an accumulated parcel for export.

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Mr. Jamieson claimed that it was so that he had an arrangement with the ANZ Bank that they would give some accommodation to the group in the acquisition, initially of the grain.

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10 The arrangement that was come to was that Compafina would advance the moneys to the ANZ Bank for transmission to BTE when, amongst other things, a warehouse receipt issued by MayneGrain was received by the ANZ Bank on behalf of Compafina. Penmax was to play no active part in these matters at all, it was purely there - I think the term has been used already - as a matter of convenience, it being a Panimanian company.

(continued)

20 That arrangement is capable of a number of legal constructions. One is that Penmax was really not a party in truth at all, it was just a sham party and BTE was the true party. It will be seen that as the transaction unfolded BTE and Compafina and the BTE and the ANZ Bank and BTE and MayneGrain were directly communicating on the footing that the agreement was between Compafina and BTE. So that is one view of it. If that be the right view then, first
30 directly and had itself mortgaged or pledged the grain to secure those borrowings. I will come back to that point in a moment.

40 Another way of looking at it is that Penmax was the borrower it being part of the arrangement that Penmax would lend onwards to BTE and that whilst BTE did not undertake a primary obligation to pay as a debtor it was responsible for payment of the debt and to support that obligation it mortgaged or pledged its grain. In a sense, in the events which happened, it may not matter who the direct borrower was for the purposes of having an action for money lent, because if we are correct in suggesting that there was, in any event, a mortgage or pledge of the grain by BTE to Compafina to secure the borrowings then, as I say, in the events which happened that is the appropriate course of action because whether it be a mortgage or whether it be a pledge the lender has title to sue in conversion or detinue.

50 What happened in the course of the transactions was that grain was accumulated, MayneGrain issued

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the warehouse receipt directed to the ANZ it having been told by BTE that it, BTE, was borrowing from an overseas company, a Geneva company, and as part of that transaction or in order to obtain those borrowings it was necessary that there be presented to the ANZ Bank the documents indicating that the grain was held to the order of the ANZ Bank. Pursuant to this arrangement Maynegrain did issue to the ANZ Bank what I will call in this case warehouse receipts stating that they were to leave the grain, listing quantities and so on to the account of the ANZ. There would be a request for the funds to be drawn down, as the jargon now is and the moneys would be forwarded by Compafina once it received confirmation from ANZ that the appropriate documentation had been received by them. 10

MR. GYLES: In the events which happened B.T.E. instructed Maynegrain, without the consent of Compafina or the A.N.Z. Bank, to release the grain for shipment and indeed it was shipped without, as I say, any consent and indeed without knowledge on the part of Compafina. At that point the causes of action crystallised. There, that act was an act of conversion on the part of Maynegrain and on the part of B.T.E., because the right to possession of that grain lay in Compafina by its agent ANZ. In dealing with it contrary to that possession, each of those parties was guilty of that conversion. 20 30

At that point they become liable to Compafina for the full value of the grain, although we may be limited by special reasons, or reasons peculiar to pledges of this sort, to the value of the advances together with any consequential loss; in other words, it may be that a mortgagee or pledgee cannot recover the whole value of the grain. In any event, the grain value did exceed the amount of the advances, and we do not anticipate there will be any real point arising in this case about that. 40

In addition to the act of conversion which took place, Maynegrain breached its duties as bailee, it being a bailee of ourselves, and it was also, we suggest, guilty of negligence. Because it knew that a Swiss bank was financing the arrangements through the A.N.Z. Bank. It knew that the issue of the warehouse receipts was for the purpose of securing that advance and it knew that it was important that the person 50

who advanced the moneys and who held whatever interest it held was entitled to notice of the proposed movement so it could take steps to protect its interest. That, we would suggest, gives rise to a duty of care and to let this grain go without consulting A.N.Z. was completely inexplicable and clearly negligible.

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10 HIS HONOUR: Why was not Maynegrain entitled to assume that was always being done properly and regularly and that presumably B.T.E. or whoever had repaid the Swiss Bank?

(continued)

MR. GYLES: The warehouse receipts acknowledged that the grain was held not for B.T.E. but for the other parties. Nothing had changed as far as they were concerned; they got no order from anybody to say that was at an end, they simply got an instruction from one of the employees of B.T.E.

20 After the shipment left, we were advised about that, and of course the horse had well and truly left the stable at that stage. But nonetheless, the plaintiff stepped in to do what it could to salvage its situation. It was unable to do so in a way which restored to it the value of the grain which it should have held as security. Those steps involved some aspect of complexity and so on. Really, we only come into this case in the sense that we got credit for what we got; we do not seek to hold what we
30 salvaged to get a full verdict in that.

There is indeed a defence put on which raises this sequence of events. So it may be necessary to go into it, although as we see the case we do not get involved with that. We acknowledge we have received moneys the proceeds of the grain, and we give credit for it in our pleading.

40 That is the way we see the case and propose to put the case. It was thus desirable to make the amendments that have been made, and although they rely upon the same factual material they do more directly deal with the alternative cases.

Your Honour will appreciate that if we are correct that that was a mortgage or a pledge, then it is indeed a simple case from our point of view. (Referred to Crossley Vaynes On Personal Property, 4th Ed., p.411 and Milnes Holden's Law of the Practice of Banking, 6th Ed. Vol.2, pp.289-290.)

(Further hearing adjourned to Monday, 23rd
February 1981 at 10 a.m.)

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COMMERCIAL LIST

No.13528/78

CORAM: ROGERS J.

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EXPORTERS PTY. LIMITED & ANOR.

SECOND DAY: MONDAY, 23rd FEBRUARY, 1981

(continued)

HIS HONOUR: What is the situation with regard to the application to amend the statement of claim?

10

MR. RAYMENT: I have no opposition to it, your Honour.

MR. CAMPBELL: Your Honour, subject to it being confirmed that the discovery that has been given goes to the wider issues, I would have no opposition to it either. Depending on how long it takes for the evidence to be run, there is a certain amount of research to be done and I may need a little time if the evidence runs through quickly.

20

HIS HONOUR: Well, you are going to get some time tomorrow, I presume.

MR. GYLES: Yes your Honour.

HIS HONOUR: What about the discovery point that Mr. Campbell raised?

MR. GYLES: I do not know that we have particularly directed our minds to it, but I cannot imagine that there would be any - -

HIS HONOUR: Well, Mr. Warburton had better direct his mind to it.

30

MR. CAMPBELL: What I particularly had in mind was that a count of negligence raises issues of causation of damage. The count as previously pleaded raises precise details of the circumstances in which the grain was unloaded in Kuwait and the circumstances in which the plaintiff was delayed in its payment and payment was dribbled away, were not particularly relevant. They are most relevant on the negligence count. There are certain documents which do give some clues on what happened at Kuwait. I am most concerned, though, that all the documents which the plaintiff has on that should be made available to us.

40

HIS HONOUR: Very well. By consent I grant leave to the plaintiff to amend its statement of claim in accordance with the document initialled by me and placed with the papers. I order that each of the defendants file such amended defence as it may be advised, by filing and serving same in Court by noon on Wednesday.

10 MR. GYLES: Could I also mention that we last week gave to my learned friends notice of an amendment to the reply, which I did not raise on Friday, which we will have to deal with when they do raise the defence, but I had overlooked it. It really raises the warehouse receipt point and a reply of further precaution. If there is no problem about it, I would not take time now.

20 HIS HONOUR: All right, pass it on to the others and they can think about it. Whilst I think about it, though, is the amendment to the statement of claim going to affect your cross-claim, Mr. Campbell?

MR. CAMPBELL: Only consequentially, I would say, your Honour.

30 HIS HONOUR: All right. I had better give you leave to amend your cross-claim in such manner as you may be advised, but arising out of the amendment to the statement of claim, by filing and serving any amended cross-claim by noon on Thursday. Yes Mr. Gyles?

MR. GYLES: Does your Honour have the agreed bundle of documents? I thought I would tender a number of these documents now, before calling Mr. Ferrasse.

HIS HONOUR: Very well.

MR. GYLES: I will take the course of tendering all the documents in the bundle that can be tendered by the plaintiff during the course of the hearing.

40 HIS HONOUR: That means you are tendering every document in the agreed bundle of documents, up to and including p.128. Any objection to that, Mr. Rayment?

MR. RAYMENT: There will perhaps be, your Honour. Could I just start at the first one. There was a call in the other matter last week for the original of Document 1.

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HIS HONOUR: I am going to proceed on the basis that I disregard the other matter completely, otherwise this becomes unmanageable.

MR. RAYMENT: Yes, I could not suggest anything to the contrary of that; but there are two original documents, which we have seen on discovery. One is the French version of the 29th September, 1976, document, and that is an original typescript on a certain kind of paper; the other is the English version, which is Document 1; this is just a translation, and Mr. Ferrasse gave evidence that this document was prepared later than the other document.

10

HIS HONOUR: I do not want to take time on this if I can avoid it. Is this something you could usefully discuss with Mr. Gyles at morning tea, so that we can get on with the evidence.

20

MR. GYLES: If what my friend is saying is that he wants the French document tendered - -

MR. RAYMENT: I want both the original documents.

MR. GYLES: We will do that.

HIS HONOUR: I think that is reasonable. I will note an undertaking by counsel for the plaintiff to tender the original in French of the document at p.1 of the agreed bundle of documents, together with the original English translation at some convenient point of time. I think the quickest way of doing this would be, Mr. Rayment, if you made a note of anything to which you object, and Mr. Campbell likewise, and give it to Mr. Gyles and we will sort it out after morning tea.

30

MR. GYLES: There are some documents I was going to direct your Honour's attention to.

HIS HONOUR: All right. Let us do that.

MR. GYLES: The first three - Documents numbered 5, 14 and 15 - I will invite your Honour to read now.

40

HIS HONOUR: Then what I will do is that Ex.A will be the documents headed "Plaintiff's Documents in the Agreed Bundle of Documents", with such exceptions, if any, as I am

indicated after counsel have had an opportunity of considering the matter further. I will read these documents now.

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MR. RAYMENT: I would object to the third document being used, unless my learned friend undertakes to call the evidence. We do not know who the author of that is; if my learned friend is calling the author, I have no objection at all.

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10 HIS HONOUR: He does not have to call the author, as long as it is shown to be part of the business records of Compafina; Mr. Ferrasse will be giving evidence, and I daresay Mr. Gyles can satisfy that.

(continued)

MR. GYLES: Will be calling both Mr. Ferrasse and Mrs. Lenos.

20 HIS HONOUR: Then what I will do for your protection, Mr. Rayment, is that I will have it noted that in relation to the third document in Ex.A, Mr. Rayment objects on the basis that there is at the present time no evidence that the document constitutes part of the business records of Compafina Bank. On the undertaking by counsel for the plaintiff to call Mr.Ferrasse and Mrs. Lenos to give the necessary evidence, the document will be included in Ex.A.

30 MR. GYLES: Then Documents 26 through to 74 constitute a number of telexes dealing with the situation after shipment of the grain - and I do not ask your Honour to read those at the moment, they more logically come later, and the detail of them is probably not terribly important for present purposes. The document at p.66 will have more significance, we think, in due course.

40 Then the next group of documents, from 80 through to 105 inclusive, deal with the machinery of the arrangement. There is a series of them which constitute what are said to be warehouse receipts from Bulk Terminals & Exporters and Inland Satellite Terminals and there is a series of those documents which go right through. But from p.152 onwards, that is Document 118, through to Document 139, which is at p.172, there is a bundle of documents which relate to the drawdowns, as they are called. Then Documents 142 and 143 are a letter from us to the A.N.Z. Bank, and their reply.

50 MR. RAYMENT: I should say I object to them; these are documents passing between non parties, in which

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a number of allegations are made, and this might look as if they were going in as evidence of the truth of the allegations.

HIS HONOUR: Is the basis of the tender business records?

MR. GYLES: Yes your Honour. I also point out that the relationship between A.N.Z. and us is that they are agents; it is picked up in other documents, but these documents assist, in our submission.

10

(Mr. Rayment addressed his Honour)

HIS HONOUR: I would not think it is going to get Mr. Gyles any further forward in proving the truth of those allegations, but he is seeking to rely on it as evidence of agency, apparently, as well. Of course you are entitled to say that there is no evidence that that is part of the business records of the A.N.Z. Bank, except I am entitled to look at whatever appears on the document, in determining whether or not that is so. But I agree with you, Mr. Rayment, that it could be a rather ludicrous situation in which, just because somebody makes a complaint in a document which becomes part of the business records, that you can prove the truth of the matters complained of. But I think as a strict matter of admissibility, I will admit them.

20

MR. GYLES: I would invite your Honour to read those two documents.

30

HIS HONOUR: But I hope what I have said is taken in broad as to the weight which is given to these matters.

MR. GYLES: Quite so, your Honour.

HIS HONOUR: Mr. Rayment, is there any dispute that the barley which was stored with Mr. Campbell's client was to be pledged to Compafina Bank?

MR. RAYMENT: It was to be the subject of a warehouse receipt, whatever the legal effect of those documents would be. There was no document other than a warehouse receipt which we undertook to give.

40

HIS HONOUR: It is agreed between the parties that drawdowns from Compafina Bank were made from time to time as the result of the

production to the A.N.Z. Bank of warehouse receipts - right?

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MR. RAYMENT: Yes.

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10 MR. CAMPBELL: With respect, I think that that may be getting the transaction the wrong way around, in that a request for drawdown was made in relation to grain that had not yet been paid for, and it may well be that the warehouse receipts were to finance the purchase of grain once a drawdown had been received, and to establish that in fact the moneys had been used for that purpose.

(continued)

HIS HONOUR: Mr. Rayment, you had better tell you ally in some respects what the true position is. But just so I can get on with it, there is no dispute, is there, that grain which was the subject of these warehouse receipts, was shipped off to Kuwait and sold from time to time?

20 MR. RAYMENT: Well, was the subject of one prior contract of sale dated 9th July?

HIS HONOUR: Is there any dispute that when such grain was sold, no corresponding payment was made to Compafina Bank?

MR. RAYMENT: They got certain documents and they got certain payments from the purchase of the grain, or rather from his banker. They did not get it before it was shipped.

30 HIS HONOUR: I realise that. But let us take a hypothetical 1,000 tons of barley. A warehouse receipt is issued; a drawdown had been made in respect of that 1,000 tons of barley. Do you say that in every instance whenever that 1,000 tons of barley was sold in Kuwait, a payment was made to Compafina Bank?

MR. RAYMENT: No.

40 HIS HONOUR: So that there will be instances where it will be uncontested that although grain the subject of warehouse receipts, which had been produced to the A.N.Z. Bank as agent for Compafina Bank, was sold in Kuwait, no corresponding repayment was effected to Compafina Bank?

MR. RAYMENT: No payment has yet been made by the purchaser to Compafina, as to part of the cargo.

HIS HONOUR: And you say that in so far as that

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occurred, that was done with the consent
of the Compafina Bank?

MR. RAYMENT: They opposed it, as basically
they wanted to be paid in full, but that was
something between them and the buyer. What
we say is that they knew the shipment was
going and they knew it was going to this
purchaser.

HIS HONOUR: You say in some shape or form
the buyer in Kuwait was supposed to pay the
bank? 10

MR. RAYMENT: Well, Compafina got the bills
of lading, and it was within their control
what happened to the moneys thereafter.

HIS HONOUR: Are you saying that your obliga-
tion to the bank was discharged by giving
them the bills of lading?

MR. RAYMENT: They were armed by us with the
means of obtaining payment, which was all
we could give them. 20

HIS HONOUR: So that I understand it, you say
that this was a situation in which the borrower
from the bank said, "I am not going to
discharge my liability to you, but I am going
to give you the bills of lading, whereby you
can get a discharge of my liability to you from
the purchaser of the wheat"?

MR. RAYMENT: The borrower was Penmas, as
we construe the matter.

HIS HONOUR: All right, let us assume that. 30

MR. RAYMENT: And Penmas may or may not have
cross-claims, but would seek to - -

HIS HONOUR: But Penmas was not the purchaser
of the grain, was it?

MR. RAYMENT: Well, it was, from B.T.E.

MR. GYLES: I had proposed, after taking your
Honour through the documents which had been
tendered, to just outline very succinctly what
happened; it may be more helpful to do it now.

HIS HONOUR: No, I will follow your course. But 40
I thought there may have been some shortcut,
which apparently there is not. Well, I have
read those two documents.

MR. GYLES: Then the next group of documents are correspondence between ourselves and the A.N.Z. Bank, asking them to make demand or to forward our demand upon the defendant, and those documents take in pp.75-81 of the bundle. Then starting at p.81 and running right through to p.96 are the warehouse receipts. I do not think your Honour need be troubled by the detail of them, except that they do comply with the form which was laid out in that letter of 6th January which your Honour has seen. Then the next document is the bill of lading at p.97; I just draw your Honour's attention to the volume of it, and your Honour has some appreciation of what that bulk of barley would be; it is a rather enormous bulk of grain. Jebsons are the shipowners and Bulk Terminals & Exporters the shippers. The next document on p.99 is demurrage above the guarantee from Compafina Bank, and the circumstances surrounding this will be given in evidence, but what it does is to guarantee the payment of any demurrage, and that is by Compafina. Then there is a letter from Jebsons, concerning actual payment of demurrage. The two following telexes relate to that topic. Then there is a bundle of documents, starting at p.104 and ending at p.121, which deal with insurance, and I do not think your Honour will be troubled by the detail of that, except that the last page of that contains some statements which we will be placing some reliance on - the last full paragraph. There was no insurance premium paid, as these documents will show, notwithstanding many requests by brokers, the brokers Mr. Jamieson had approached, for payment of that premium; and the brokers claimed that, the premium not having been paid, the risk never came into force. The insurers took the same stand, and said that even if it had been in force it would have been avoided for certain reasons. At p.121 it is reported that Mr. Jamieson admitted the facts and stated that he had never been able to afford the premium.

The next document, p.122, is a record of some movements of barley; it is a record from the first defendant. Then the document at p.123 is a document of special importance, and we would invite your Honour's attention to that document; it is a document from the second defendant's documents and it is there No.1 and it is at p.123 of the bundle. Your Honour will see that it is our contention that that plainly gives to Maynegrain notice of the interest of our client, and also makes it clear that it is B.T.E. who are the borrowers.

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(continued)

The following two documents, pp.124 and 125, are telexes concerning shipment. 53 is the letter from the A.N.Z. Bank to Maynegrain, and the document at p.128 shows the date of loading of the grain - 8th, 12th and 13th August, 1977. May I also seek to tender some documents which are in the bundle at the request of the defendant.

HIS HONOUR: Well, perhaps, just to make sure I have got it delineated correctly, Ex.A is the plaintiff's document in agreed bundle pp.1-128, subject to any objections that may be made after morning tea being successful.

10

(Documents from defendants' agreed bundle of documents, pp.129 and 130, tendered without objection and marked Ex.B)

(Documents pp.142 and 143 of defendants' agreed bundle of documents, tendered without objection and added to Ex.B)

20

(Document at p.154 of defendants' agreed bundle of documents, tendered without objection and added to Ex.B)

(Documents at pp.155-159 of defendants' agreed bundle of documents, tendered without objection and added to Ex.B)

MR. GYLES: The letter of credit is dated 10th July, 1977; the beneficiary is Sheik Hamad in Kuwait, and it is the Commercial Bank of Kuwait that has issued the letter of credit, by order of the account of the Kuwait Supply Company, \$US 4.4 million. Your Honour will see that there are some special conditions, 1, 2 and 5; they are amended by the document at p.157, so that cl.2 provides now, "The following documents must be provided for payment.....from Australian port to Kuwait within forty-five days." Then (d) and (e) of the original are deleted and substituted by "(d) Certificate issued... of sale". So your Honour sees it is a sale of bagged barley, shipped in bulk from Australia, but the contract of sale of course was for bagged barley. The other clause is consequential I think upon that.

30

40

HIS HONOUR: The letter of credit is in payment for 25,000 metric tons of barley; how much was that ship carrying?

MR. GYLES: Plus ten per cent more or less. So

I think it was 27,000 which was on the ship, so it is within the margin which was comprised in the letter of credit.

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HIS HONOUR: And we are as concerned as Sheik Hamad Sabah Al was with the Kuwait Supply Company.

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MR. GYLES: Well, your Honour will have to know how the transaction worked out.

10 HIS HONOUR: Is the purchaser supposed to be the Kuwait Supply Company?

(continued)

MR. GYLES: That is right.

(Documents at pp.160 and 161 tendered without objection, and added to Ex.B)

(Pages 162 and 163 tendered without objection and added to Ex.B)

(Page 171 tendered without objection and added to Ex.B)

20 HIS HONOUR: I take it in the fullness of time the ship arrived in Kuwait, and the Kuwait Bank did not pay you?

MR. GYLES: It paid us part. That is what it amounts to.

(Pages 180-184 tendered without objection and added to Ex.B)

HIS HONOUR: What is the B.P.C.I. in Basle?

MR. GYLES: That is another banking company, your Honour.

(Pages 185 and 186 tendered without objection and added to Ex.B)

30 They are the documents within the agreed bundle that I wish to tender. There will be a supplementary tender which my learned friend Mr. Caldwell is preparing from the discovered documents, but I will not trouble you at the moment.

40 The story at and post shipment, in outline: The grain was shipped without notice of the particular shipment to ourselves, and there was no request for consent from any of the other parties. There had been, prior to that time, negotiations between Mr. Jamieson and ourselves, reflected in part by the documents lastly tendered; in which it was indicated that he was negotiating with Kuwaiti interests for the purchase of grain

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(continued)

on a bagged basis. Initially, Compafina would not agree to that, to the sale on a bagged basis, because as your Honour appreciates, it would leave Australia in bulk and it was to be bagged on arrival in Kuwait and paid for on an as-bagged basis. That obviously involved risks to the bank, which it was unprepared to run.

Then shortly afterwards, Mr. Jamieson's agent, Mr. Barki, proposed that the sale on a bagged basis be approved, provided that the letter of credit - I will put it this way, the sale was at \$4.4 million on a bagged basis; that the letter of credit from the purchaser would be for the full \$4.4 million, and as is put, notified by Compafina Bank - that is, they were the collecting bank, if you like - and enabled to receive the whole amount, on the footing that they would issue a performance guarantee to the purchaser of ten per cent - that is \$440,000 - to secure the satisfactory completion of the bagging operation. That was agreed. 10 20

HIS HONOUR: That was Mr. Barki's proposal?

MR. GYLES: And that was agreed. There were, as your Honour may have seen, some indications in the documents of shipping goods found, but your Honour will observe that the letter of credit issued in July bears no relationship to that arrangement. It was on 24th August, 1977, that Mr. Jamieson came to the bank, said that the vessel with the barley had been loaded and was on its way to Kuwait; that the letter of credit had been issued by the Commercial Bank, not in Compafina's favour but in favour of Sheik Hamad. Furthermore, that the shipping documents were held by Mr. Peterson of Jebsens, and that he would only release the shipping documents upon payment of freight charges and a demurrage guarantee. The freight charge was \$US 550,000. 30 40

Your Honour can take it that the officers of the bank who were present protested vigorously at the position they were then placed in, but having met that day with Mr. Peterson, agreed to make the payment of freight and give the demurrage guarantee, and your Honour will appreciate the reasons for that, otherwise the ship would be like a "Flying Dutchman", floating around the world with a cargo of barley on it.

In any event, Jamieson was asked to confirm the insurance position, and he said he had taken out an all-risks cover, and he would send 50

the insurance policy on. Jamieson said that he had made arrangements for the purchase of bagging equipment and was going to undertake the bagging task.

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10 What happened thereafter was that Compafina sought to use its bargaining position, namely the holding of the bill of lading, with Sheik Hamad and the Kuwait Supply Company, to obtain the sort of letter of credit they wanted, but, not holding all the cards, they came to an arrangement whereby a letter of credit would be transferred to them for a total amount of \$3.3 million on a pro rata basis. Ultimately, only \$US 2.38 million was received from the Commercial Bank in Kuwait. There were several difficulties. First of all, rain damaged part of the barley; payments were made to Jamieson apparently for the bagging machinery, and payments were made to the A.N.Z. Bank. The insurers never met their claim, denying liability for non payment of the premium; leaving a considerable shortfall, and the detailed calculations we hope not to trouble your Honour with, but it may be necessary to do so.

20

(continued)

I think that gives your Honour an outline of the position.

EMILE FERRASSE,
sworn and examined:

Plaintiff's
Evidence

30 MR. GYLES: Q. Is your name Emile Ferrasse?
A. That is right.

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Q. Where do you live? A. In France, in Habere Lullen.

Q. I think you are the manager of Compafina Bank, the plaintiff in this case? A. That is right, I am.

Q. I think that you, in the course of your duties with the bank in 1976, had dealings with Mr. Jamieson, is that correct? A. Yes.

40 Q. Concerning, amongst other things, financing of sorghum purchases? A. That is right, yes.

Q. And you did some business with Mr. Jamieson or his companies in the course of that sorghum business? A. Yes I did.

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(continued)

Q. I do not want to go into all the details of the sorghum business, but in your discussions with Mr. Jamieson concerning the topic, did he say something about the entities - the company or companies - that he represented?

A. Yes, he said he was representing B.T.E., Bulk Terminal Exporters, which was a company purchasing the grain.

Q. And was there reference to a company called Penmas Inc.? A. Yes, Penmas was said to be his Panamanian Company, and he wanted all the advances made in respect of financing the shares of sorghum or grain to be recorded to his account, and the account was in the bank in the name of Penmas Inc. 10

Q. And did he tell you why he made that request? A. No, he said for convenience purposes; that is all, I can't say.

Q. Was there discussion as to whom the money would in truth be transferred? A. Yes, to B.T.E. 20

Q. You I think are the author of an internal note made on 22nd September, 1976, concerning a meeting of 21st September, 1976, is that correct? A. If I can see the note, I can answer. (Handed to witness) Yes, I can remember; I made this note.

MR. RAYMENT: Could it be noted that the witness had the bundle of documents before him?

HIS HONOUR: Well, he had a look at p.1 of Ex.A.

MR. GYLES: Q. And did that note correctly summarise the substance of your conversation with Mr. Jamieson on the topic of barley? A. Yes, that is right, it did. 30

Q. Following that conversation, what was the next thing that you learned on the barley topic?

HIS HONOUR: Mr. Gyles, you are just going to lead it on the basis set out in the note in the last paragraph beginning with the words "Owing to", are you?

MR. GYLES: Yes your Honour. 40

HIS HONOUR: It is a matter of some importance.

(The usual order was made for witnesses to leave the Court.)

	MR. GYLES: Q. I will ask you, if you would not mind, to cast your mind back to that meeting on 21st September and tell his Honour what you can recall of what was said between you and Mr. Jamieson on that day concerning barley? A. I insisted on the fact that we should have a charge, a regular charge on the barley, before we can agree to finance, because it was, I think, something like 30,000 tons of barley which was considered to be purchased, and it was involving a large amount of money. Then I said, "We want a regular charge on the barley", and Mr. Jamieson answered that it was easy to meet our requirement, because the barley was to be warehoused with Maynegrain in Brisbane and we could have warehouse receipts issued by Maynegrain.	In the <u>Supreme Court</u> Plaintiff's Evidence No.6 Evidence of Emile Ferrasse Examination 23rd February 1981 (continued)
10		
20	Q. Now was the term "warehouse receipt" known to you? A. No, the term was not known to me.	
	Q. Did you ask him what it meant or what he meant by it? A. We know what is a warehouse receipt. (Objected to by Mr. Rayment, allowed).	
	Q. Had you previously had dealings with warehouse receipts? A. Oh yes, we are dealing with them, I should say, every day in the banking business.	
30	Q. I would like you to cast your mind back to September 1976; had you had previous dealings with warehouse receipts? A. You mean in respect to my dealings with Mr. Jamieson?	
	Q. No. A. Yes, we had to deal with warehouse receipts on many occasions.	
	Q. Did Compafina Bank advance moneys for the purchase of commodities? A. Against warehouse receipts - yes.	
40	Q. No, was that part of its business, or was it then a part of its business? A. Yes, that was and still is a large part of Compafina's business.	
	Q. And does it carry on that business in relation to the acquisition of commodities in various countries in the world? (Objected to by Mr. Rayment as to relevance; allowed) A. Yes, in many countries.	
	Q. Before joining Compafina Bank, which was when - when did you join that Bank? A. It was in May 1976.	

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(continued)

Q. Before that, what had been your occupation? A. I was also a member of the management of United Overseas Bank in Geneva, since 1970.

Q. Was that company involved in the financing of the purchase of commodities?

A. Yes, they were also involved.

Q. And in the course of your dealings in that bank, did you become familiar with warehouse receipts? A. Yes, I was.

10

Q. And would you tell his Honour what part warehouse receipts played in commodity financing? (Objected to by Mr. Rayment as to relevance; allowed) A. Yes, the warehouse receipt is an essential document on which many commercial contracts are based. For instance, a buyer can buy and pay for goods against the warehouse receipt in his name; and the banks are also financing a lot of commodities against warehouse receipts issued by the warehouse-keeper in their name, warehouse receipts for goods warehoused in Amsterdam and in many other places around the world.

20

Q. And did Compafina Bank also finance commodities on that basis? A. Yes.

Q. And could you explain to his Honour, when you say you financed it against a warehouse receipt, what precisely do you mean by that? A. Yes, a customer of the bank can approach the bank and say, "I have got such quantity of commodities in, let us say, in Antwerp for instance, warehouse, with such company in Antwerp, and are you agreeable to finance part of the price of the commodities of the cargo against the warehouse receipt issued in your name?" and we say "Yes".

30

Q. What do you do, what physically happens? A. Then the customer brings to us the warehouse receipt in the name of Compafina, and against this document we finance.

40

Q. Is there communication between the warehousekeeper and the bank, or the financier? A. No.

Q. Apart from the issue of the document?

A. Yes. No, no communication with them.

HIS HONOUR: Q. Is there some accepted or usual form of words for the warehouse receipts? A. Not really, your Honour.

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MR. GYLES: Q. At the meeting, Mr. Jamieson indicated that he could provide warehouse receipts from Maynegrain; did he say anything about Maynegrain? A. Yes, he said it was a subsidiary of Mayne Nickless, and we know, we heard that Mayne Nickless was a big company in Australia, and often quoted on the Stock Exchange market.

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10

(continued)

Q. Did you make any arrangement or agreement with him as to the extent of the financing you would be prepared to undertake on that basis? A. Yes, it was in the vicinity of \$2,500,000 or something like that.

Q. And how much - the whole purchase price? A. We said we will advance eighty per cent of the purchase price.

20

Q. And was there discussion between you as to the mechanics of getting the money? A. Yes, it was explained that B.T.E. will ask, will inform A.N.Z. Bank of the quantity purchased and warehoused with Maynegrain, and request the Compafina Bank to send the money, to transfer the money to them. And it worked like that; A.N.Z. Bank was conveying to us a request from B.T.E., and Maynegrain confirmed that warehouse receipts were held by them.

30

Q. What was the A.N.Z. Bank to do? A. Just to check that they had the warehouse receipts in their hands, before paying B.T.E.

Q. When you say "they", who do you mean, you said that the A.N.Z. Bank had checked that they had the warehouse receipt? A. We got the telex from A.N.Z. that B.T.E. was requesting some loan facility and that they were informed that the warehouse receipt had been made to them, and then when we transferred the money we stipulated on the transfer that the money was to be released to B.T.E. once they got the warehouse receipts.

40

Q. They, A.N.Z.? A. They, A.N.Z., yes.

HIS HONOUR: Q. So that you were to transfer the money to B.T.E. C/- the A.N.Z. Bank, but your books were to debit Penmas, were they? A. Yes your Honour.

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MR. GYLES: Q. Was there discussion between you as to the ancillary matters, such as charges, commission, interest and the like?
A. Yes.

Q. Would you tell us what was discussed about that? A. I can't remember exactly the commission, I should think something like --

Q. You do your best to recall it. A. I think it was, interest will be calculated on the three months L.I.B.O.R. basis.

10

Q. That is the London Inter-Bank Offering Rate? A. Yes.

Q. In Eurodollars? A. Yes, in Eurodollars; and plus commission, but I can't remember exactly what was the rate of the commission.

Q. And banking charges? A. Banking charges, and the commission.

Q. Did you give Mr. Jamieson an answer on the spot about that? A. I think, yes, we did.

Q. Was it affirmative? A. Yes, it was an affirmative answer.

20

Q. What was the arrangement about insurance in the meantime - was there any? A. Yes, of course the barley should be insured when warehoused in Brisbane.

Q. Was there any discussion as to the terms upon which the bank would give directions to the warehouseman to release the grain? A. No, I don't think; nothing specific was told in this respect.

30

MR. GYLES: I think the documents will show that the first request for a drawdown for this purpose was on 23rd November, 1976, and there were various remittances from then on, which are in the documents, and a schedule can be made of them if necessary.

HIS HONOUR: When did you say the request for the drawdown was made?

MR. GYLES: 23rd November, 1976.

HIS HONOUR: That is before the arrangements were finalised?

40

MR. GYLES: No.

HIS HONOUR: Well, I am looking at p.5, which is a meeting on 14th January, 1977, which is still setting up procedures.

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MR. GYLES: Confirming, is it not? Well, in any event, the fact was it was on 23rd November, 1976.

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10 Q. When was it next do you recollect speaking to Mr. Jamieson about this arrangement? A. It is very difficult to say. Maybe in December, maybe in January 1977, I can't remember exactly.

(continued)

Q. Do you recollect receiving from him a letter of 6th January, 1977, dealing, amongst other things - - A. I can't say the date, but I received a letter early in January from Mr. Jamieson, yes, and I think this letter was in the name of B.T.E.

20 Q. Might the witness be shown that? (Witness shown p.2 and subsequent pages of Ex.A) Is that the letter of which you speak? A. Yes, that is the one.

Q. If you would just turn over to the next document, which starts on p.15, were you the author of that document? A. No, I was not and I am not.

Q. Do you recall seeing it at or about the time it bears date, namely 14th January, or not? A. I can't say. No your Honour, I can't answer.

30 Q. Whilst I am on that topic, may I revert to the previous document. Mr. Ferrasse, you will recall that I drew your attention to an internal note of 22nd September. Do you identify the document I have just handed to you as the original of the English translation? A. I think it is not the original. That should be the English translation.

Q. Is that the original of the English translation? A. I think so, yes.

40 Q. And would you look at the document I show you; is that a photostat copy of the French original? A. Yes it is.

(Photocopy of French version of minute of 22nd September, 1976, together with English translation, m.f.i. 1)

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Q. Would you look at the document I now show you. Do you recognise that as being the original of the document on p.5 of the bundle that you have just looked at?

A. Yes, it is.

Q. Do you recognise the form of the document - is there anything about it that you recognise? A. No, really, I can't say.

(Original minutes of meeting of
January 1977, m.f.i. 2)

10

(Short adjournment)

ON RESUMPTION

MR. GYLES: Q. I think I was asking Mr.Ferrasse about the January document. Mr. Ferrasse, could you tell his Honour what you can recall about any discussion you had involving Mr. Jamieson in either late 1976 or January 1977? A. No, I can't remember.

Q. Do you recall receiving the telex which I show you? A. Yes, I remember.

20

(Telex from Mr. Jamieson to Mr.Ferrasse
dated 24.5.77, tendered without
objection and marked Ex.C)

Q. Do you recollect having a conversation with Mr. Jamieson after receiving that telex? A. Yes. I can't remember - I had I think some 'phone calls from Mr. Jamieson some time later, I can't say exactly when, but I think that he was not intending to execute the sale contract, and he was trying to find another buyer.

30

Q. I take it you heard nothing further about any detailed shipping arrangements in relation to that sale? A. Yes, he said that it was normal, the sale was to be made to a company named Maecom S.A. in Geneva, this company being a subsidiary of Cook Inv. in Memphis in the United States.

Q. And I think you did not in fact go to Kuwait, is that right? A. Not at that time.

40

Q. Do you recollect a discussion in which the sale of barley was again discussed? A. Yes, I think it was some time in June 1977.

Q. And was this a face-to-face meeting, or was it telephone or - - A. No, I received a visit from Mr. Jamieson, and Mr. Barki was attending the meeting, too.

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Q. Which Mr. Barki? A. Mr. Gerard Barki, the son.

10 Q. Do you recall anybody else being present on your side? A. No. Mrs. Lenos was present. I can't say if Mr. Boulmer was present, but Mrs. Lenos was present at that meeting. I would say some time in June, maybe in July, I can't remember exactly the date.

(continued)

Q. Was barley the sole topic of that discussion, or were there other matters discussed? A. I can't say now, but mainly it was for barley.

20 Q. Could you do your best to recall what was said by each of you on that topic? A. Mr. Jamieson and Mr. Barki explained that they were on the way to sign a contract with a big company in Kuwait named Kuwait Supply Company, in Kuwait, and he said that the contract will be for payment by the buyer on deliveries of barley in bags, and they explained, both Mr. Jamieson and Mr. Barki, that the barley would be shipped in bulk and bagged in Kuwait, as Mr. Barki was able to provide Mr. Jamieson with the bagging equipment and with the bags, too.

30 Q. What did you say? A. I said categorically No.

Q. Did you say why? A. Yes, I explained why, because - -

Q. Would you tell his Honour what you said? A. I said there was too much risk involved in such a deal, and we were not agreeable to accept to release the barley for such a sale contract.

Q. Did you say any more about the risks involved, or not? A. I can't remember now, I can't say.

40 Q. Did Mr. Jamieson see you alone shortly after that? A. Yes, shortly after. I don't know if it is on the same day or the day after, but Mr. Jamieson told me that he wanted to see me alone.

Q. Can you tell his Honour what was said between you on that occasion, please? A. Mr. Jamieson said that he had the impression on the first

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(continued)

meeting that it was Mrs. Lenos and not me who was reluctant to the deal proposed, and he thought I was myself not opposed to this transaction, and I answered he was wrong, and it was not Mrs. Lenos but myself who decided not to authorise this deal.

Q. What did you say, can you recall what you said to him? A. Yes, I said, "No, it is not Mrs. Lenos. I can tell you frankly that I am myself opposed to the release of the barley for such a contract".

10

Q. Was there any discussion, in either of those two meetings, concerning what would happen to the grain, as to where it was at that time, and so on? A. I don't think anything was said at the meeting.

Q. Was there any discussion at that meeting about the release of the barley? A. Yes, we said, "No, we won't authorise Maynegrain to release the barley for such a transaction of this kind".

20

Q. I think that you later had a conversation with Mrs. Lenos, did you, in which she - - (Objected to by Mr. Rayment).

Q. Did you have a discussion with Mrs. Lenos on the topic of a proposal which had been received from Mr. Jamieson? A. Yes.

Q. And did you give Mrs. Lenos certain instructions? A. No, I don't think so.

HIS HONOUR: Q. As I understand it, the initial arrangement was that the grain would be held by Maynegrain and you would get receipts deposited with the A.N.Z. Bank, issued by Maynegrain? A. Yes your Honour.

30

Q. In point of fact, as the documents in Ex.A reveal, you were getting warehouse receipts or documents which said they were warehouse receipts, from B.T.E., is that right? A. No, from Maynegrain, your Honour.

MR. GYLES: Well, both, your Honour, I think.

40

HIS HONOUR: Q. Well, look at this one, for example, p.49 of Ex.A. A. That could be for the sorghum, not for the barley.

Q. I see; well, that has not been clear to

me. You got quite a lost of documents which said they were warehouse receipts, in something like the form of the document which is shown to you? A. No, this one is really for the barley, and not for the sorghum; but this is not what we call the warehouse receipt. The warehouse receipt was the one issued by Maynegrain.

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10 HIS HONOUR: Then Mr. Gyles, could you tell me what the relevance is of all these documents?

MR. GYLES: I think your Honour will find that in each case there is a matching warehouse receipt from Maynegrain, which is the operative document. These documents are acknowledgements or admissions by B.T.E., the defendant, of their participation in the transaction.

(continued)

HIS HONOUR: Although they call them warehouse receipts, I should not so read them.

20 MR. GYLES: Q. Can we tell me who signed that document? A. Myself and Mr. Pfeiffer, the chairman of the bank.

Q. That document refers to a prior arrangement is that so? A. It referred to the second arrangement referred to us.

Q. That is not an arrangement that you came to with Mr. Jamieson? A. No. (Objected to as leading: question withdrawn).

30 (Photocopy letter from plaintiff to first defendant dated 3rd August, 1977, tendered without objection and marked Ex.D)

HIS HONOUR: I will have it noted in the transcript that pp.26 to 51 inclusive of Ex.A are not relied upon as warehouse receipts in themselves.

MR. GYLES: Q. You will see that that document refers to a documentary credit, a letter of credit covering barley in bulk for \$(US)2,800,000, do you see that? A. Yes.

Q. Had you had previous discussions with Mr. Jamieson on that topic? A. No.

40 (Copy telex plaintiff to Mr.Jamieson of 16th August, 1977, tendered without objection and marked Ex.E)

Q. Would you look at the document that has just been marked. (Ex.E shown) Were you responsible for sending that telex? A. Sorry, what is the question?

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(continued)

Q. Were you responsible for sending that telex? A. I think I was, yes.

Q. Then did Mr. Jamieson come to the bank? A. When?

Q. Did Mr. Jamieson come to the bank concerning the barley transaction? A. He came, yes, to the bank. I can't say when but I can say I was not - I was away from Geneva when he came again about the barley transactions.

10

Q. When was the next time you saw Mr. Jamieson concerning the barley? A. It was by the end of August, I think it was 24th August when the barley was shipped.

Q. Did Mr. Jamieson come to the bank? A. Yes, he came to the bank.

Q. Who did he see? A. Sorry?

Q. Who did he see on your side, who was present on your side? A. Mr. Boulmer, myself and Mrs. Lenos.

20

Q. Had Mr. Jamieson made an appointment or did he just come in? A. I think he just came in.

Q. Would you cast your mind back and tell his Honour, as best as you can recollect, what Mr. Jamieson said to you and what you or anybody else said to him on that day? A. Yes, Mr. Jamieson came on that day to inform the bank that the barley had been shipped on a vessel named MV Bellnes a few days ago and that the vessel was not long to reach Kuwait, the port of destination.

30

Q. What did you or anybody else from your side say? A. We said that we were very much surprised because, first of all, we had received no letter of credit from any bank in Kuwait covering the purchase for the barley and we had never given authority to Maynegrain to release the barley.

Q. What did he say? A. He say still, it was like that and nothing can be changed.

40

Q. Did he say anything about the letter of credit? A. He said, yes, the letter of credit, there was a letter of credit issued but it had been issued in favour of Sheik Hamad.

	Q. Did he give an explanation for that?	In the
	A. Not really, I can't remember if he gave an explanation.	<u>Supreme Court</u>
	Q. Did he show you any document? A. He showed a letter of credit, photocopy of letter of credit.	Plaintiff's Evidence No.6 Evidence of Emile Ferrasse Examination 23rd February 1981
10	Q. (Witness shown pp.155 to 159 inclusive) Do you recognise those pages as being similar to the photostats you saw on that day? A. That's right, yes.	(continued)
	Q. Did you look at the documents on that day in detail? A. Yes, I look into it.	
	Q. Having looked at them, did you say anything to Mr. Jamieson? A. Yes, first of all, that the letter of credit was issued not in favour of Penmas and notify Compafina Bank, but in favour of Sheik Hamad and that the letter of credit was tonnes of barley in bags.	
20	Q. What did he say? A. It was like that.	
	Q. Did Mrs. Lenos say anything, or Mr. Boulmer? A. I suppose so, yes, but I can't tell what exactly, I can't remember now.	
30	Q. Did Mr. Jamieson say anything about Maynegrain? A. I asked him, Mr. Jamieson, how he could manage to have obtained the shipment of the barley and release of the barley without our consent, but he couldn't give any explanation about that. He say they did, they accept it, that's all, and I mention that I had to send a letter to Maynegrain to draw their attention for their responsibility in doing so and he insisted that no letter to be sent to Maynegrain in that respect, but I said " We have to and we will".	
40	Q. Was there any discussion about the shipping arrangements and shipping documents? A. Yes, Mr. Jamieson said that he was in Geneva, that one of the representatives of the shipping company, I think it is Jebsen, something like that.	
	Q. Did he mention the name of the representative? A. Yes, Mr. Peterson.	
	Q. What did he say about the shipping position? A. That Mr. Peterson was with him and was asking for the payment of the freight before he could release the bill of lading.	
	Q. Did he want anything else? A. Appointment was	

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(continued)

made, I think, for the afternoon.

Q. Was Mr. Jamieson with you? A. Mr. Jamieson and Mr. Peterson.

Q. When he first mentioned this did anybody say anything about the freight not having been paid? A. I don't think there was, no mention was made about that. We waited to see Mr. Peterson.

Q. Could you tell his Honour what happened at the meeting with Mr. Peterson? A. Mr. Peterson confirmed that barley had been shipped on MV Bellnes and that he will not be agreeable to deliver the bill of lading until he has got payment for the freight and the freight was, I think, \$(US)550,000 and also to get a guarantee, a bank guarantee for the deliverage and we had no alternative but to accept that.

10

Q. During the course of these discussions on the 24th was there any question of insurance? A. Yes, we asked also Mr. Jamieson if, at least, the barley was insured and he confirmed that it was insured from warehouse Brisbane to warehouse Kuwait, but he could't tell me the name of the insurance company or the insurance brokers and he said the policy was not with him but he said when he is back in Kuwait he will give all the details about that.

20

Q. Was there any discussion about the bagging operation? A. He said he was confident that he will succeed for the bagging operation Kuwait.

30

Q. What did he tell you about that? A. He had got from Mr. Barki three bagging units and the bags also through Mr. Barki.

(Letter Jebbens to the plaintiff dated 29th August, 1977, tendered without objection and marked Ex.F)

Q. (Witness shown p.154) Would you please read that telex? A. Yes.

Q. Were you the person in Compafina was responsible for that telex? A. No, I think it is Mr. Boulmer.

40

Q. Then there was some corespondence with the Kuwaiti purchaser, is that correct? A. I am sorry?

Q. Put that away, the bundle. After those meetings on 24th August was there correspondence with the Kuwaiti purchaser of the grain? A. No, I don't think so.

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10 Q. I will show you three telexes, one of 7th September, 1977, the next of 9th September, 1977, and the third of the same day. The first is from Gulf Fisheries and the second is to Gulf Fisheries, have you read those? A. Yes.

Q. Were you the person responsible for those telexes? A. Yes, I was.

(continued)

(Photocopy telex plaintiff to Gulf Fisheries, Kuwait of 7th September, 1977, and 9th September 1977, together with telex from Gulf Fisheries Co. to plaintiff of 9th September, 1977, tendered without objection and marked Ex.G.)

20 (Original letter from plaintiff to Gulf Fisheries 9th September, 1977, called for.)

(Letter from plaintiff to Gulf Fisheries of 9th September, 1977, tendered without objection and added to Ex.G.)

HIS HONOUR: There will be added to Ex.G a correction to the telex from Gulf Fisheries to plaintiff of 9th September, 1977, also of that date.

30 MR. GYLES: Q. You used a phrase in the course of your evidence about the letter of credit, you said it was in favour of Penmas and to be notified by Compafina? A. Yes.

Q. Would you explain to his Honour what you mean by that? A. Yes, letter of credit notified by Compafina would mean that Compafina would be the only bank to be able or authorised to receive the documents and to pay on behalf of the opening bank

40 Q. Pay what and to whom? A. Pay the amount of the letter of credit and to get reimbursement from the opening bank.

HIS HONOUR: Could you resolve a slight problem that I have. In Ex.A p.96 the last warehouse receipt from Maynegrain that you have is for 2,523.48 metric tonnes of feed barley and 25,510.98 metric tonnes of malting barley. In the bill of

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lading there is an acknowledgement of the shipment in bulk of 27,495 long tonnes of feed barley, is that the same as 2,523 metric tonnes?

MR. GYLES: I don't know, but I am more concerned about the description.

Q. The documents I have just tendered, show that bills of lading were forwarded to Gulf Fisheries to be held for your accounts?

A. That's right.

10

Q. Did you subsequently go to Kuwait?

A. Yes, should be the second half of September.

Q. Did you meet, amongst other people, Sheik Hamad? A. I met Sheik Hamad, yes.

Q. Did you obtain from him a copy of a letter from John Jamieson? A. Yes, copy of a letter from Mr. John Jamieson to Sheik Hamad.

(Photostat copy letter Gulf Fisheries Co. to Commercial Bank of Kuwait dated 3rd July, 1977, together with annexure tendered without objection and marked Ex.H.)

20

Q. Did you have negotiations with Sheik Hamad as to transfer of the letter of credit?

A. Yes, this was not easy to obtain from him, the transfer of the letter of credit.

Q. Was he willing to transfer it completely to you? A. No, it was difficult for him to accept that the amount due to Compafina Bank was so large, was three million three hundred, he thought it was less than that.

30

Q. Did he say whether he would be willing to transfer the whole 4.4 million? A. No, never. He said he would never do that.

Q. Did you obtain from him ultimately the document a copy of which I show you dated 25th September? A. Yes, that letter I got from him.

Q. What did you do with that? A. I took the letter to Commercial Bank of Kuwait to ask them to confirm the transfer of the credit was for this amount.

40

(Photocopy letter from Sheik Hamad to the Commercial Bank of Kuwait dated 25th September, 1977, tendered without objection and marked Ex.J.)

Q. Did you receive from the Commercial Bank of Kuwait the document I now show you?
A. Yes, I did.

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(Photocopy telex from Commercial Bank of Kuwait to plaintiff dated 28th September, 1977, tendered without objection and marked Ex.K.)

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10 Q. Look at the document I show you. Is that a copy letter, the original of which you gave to Sheik Hamad? A. Yes, I had it typed when I was in Kuwait.

(continued)

(Photocopy letter from plaintiff to Sheik Hamad dated 26th September, 1977, tendered without objection and marked Ex.L.)

20 Q. Would you tell his Honour why you accepted an arrangement whereby you received only payment on a bagged delivered basis? A. In fact, I didn't accept it, but I had no alternative but to say yes.

Q. Why was that? A. There was no other solution, the barley was already shipped, was on the way, on the high seas. It was about to reach Kuwait in a few days later and there was nothing else we could do, no time to find another buyer and to pay second freight from Kuwait to the place of the new buyer. It was not possible, there was no other solution.

30 Q. Has Compafina ever obtained any moneys from any insurer in relation to damaged barley?
A. Have we received money? No, we haven't not a penny.

Q. It was your understanding that rain had damaged part of the barley, is that right?
A. Yes.

Q. That is after unloading? A. Yes, after unloading on the quay, when the barley was on the quay.

40 Q. I think that the total amount received from the Commercial Bank of Kuwait was \$2.38 million?
A. That's right, \$(US)2,380,000.

CROSS-EXAMINATION

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MR. RAYMENT: Q. The only bank account which was opened to which any debit was made for the sums of money specified in the warehouse receipts for barley was the account of Penmas?
A. That's right.

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Q. And there never was an account opened in the name of Bulk Terminals and Exporters Pty. Limited? A. That's right.

Q. And there were statements addressed to Penmas, never to Bulk Terminals and Exporters, prepared by your bank? A. Statements were not address to Penmas, they were put in the bank according to the instructions of Mr. Jamieson at the disposal of the customer.

Q. And the statements were addressed to Penmas? A. Not addressed, kept in the bank - in the name of Penmas, that's right.

10

Q. You also took a personal guarantee referring to debts between your bank and Penmas and Amerapco? A. That's right.

Q. From Mr. Jamieson? A. That's right.

Q. You never took such a document or any such document referring to any debts owed by Bulk Terminals and Exporters? A. That's right.

Q. And that document, the guarantee document, was received by your company during December 1976, was it not? A. I answered to this question. The document was received either late in '76 or very early in January 1977 - late in December '76 or early in January 1977.

20

Q. From Penmas you took an account opening form which Mr. Jamieson signed? A. Yes.

Q. You say, do you not, that general conditions were signed by Mr. Jamieson on behalf of Penmas Inc. of Panama on 13th July 1976? A. I said so, yes.

30

Q. Although you say the name was typed on after Mr. Jamieson signed the document? A. That's right.

(General conditions dated 13th July, 1976, bearing the name Penmas Inc. in type tendered without objection and marked Ex.R1.)

(Request to open account in name of Penmas Inc. signed by Mr. Jamieson dated 13th July, 1976, tendered without objection and marked Ex.R2.)

40

(Pledge by Penmas Inc. signed by Mr. Jamieson dated 13th July, 1976, tendered without objection and marked Ex.R3.)

(Guarantee by Alexander Jamieson bearing date 19th December, 1976, tendered without objection and marked Ex.R4.)

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10 Q. It is true, is it not, that Mr. Jamieson was never asked to sign any guarantee of any debts to you by Bulk Terminals and Exporters to your company? A. No, Mr. Jamieson has never been asked for such a guarantee in favour of B.T.E.

Q. There was, however, a document prepared by English lawyers signed by Amerapco Inc. guaranteeing certain debts of Penmas, was there not? A. Can I have a look at the document?

(continued)

Q. Yes, do you recognise that document, a photostat of a document discovered by your company in the other proceedings? A. Yes.

20 (Photocopy guarantee by Amerapco Inc. to plaintiff bearing date 30th August, 1977, tendered without objection and marked Ex.R5.)

MR. RAYMENT: Your Honour might recall that that document is a guarantee for the \$1.2 million loan and not for any other transaction on the face of it.

30 Q. I show you a copy of a telex which has been discovered by your bank in these proceedings. Did you cause that telex to be sent to Mr. Jamieson? A. Yes.

Q. May we take it that you read the terms of the Amerapco guarantee prior to sending the telex, the Amerapco guarantee that you have just been shown a moment ago? A. Yes, but I can't understand your question.

Q. Had you consulted that guarantee before sending the telex which you have just identified? A. I don't think this has anything to do with the guarantee.

40 Q. Perhaps I will just draw your attention to the paragraph of the telex asking Mr. Jamieson for good order sake(read) (Witness continued to read paragraph). A. Yes, good

Q. You had noticed, had you not, that the Amerapco guarantee did not extend beyond the \$1.2 million loan to Penmas which is referred to in the recitals to the guarantee? A. That's right.

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Q. And you wanted Amerapco's confirmation that shortfall arising from the barley transaction would be covered by the guarantee, is that right? A. Yes.

Q. You nowhere suggest, do you, that anybody other than Penmas Inc. owed the bank money because of any shortfall in the barley transaction, that's right, isn't it. A. No.

Q. The barley transaction which you were referring to in that telex was the transaction about which you had been giving evidence this morning? A. Yes, that's right.

10

(Copy telex from plaintiff to Mr. Jamieson of 10th November, 1977, tendered without objection and marked Ex.R6.)

Q. You understood, did you not, in early 1977 that if your bank lent money to Bulk Terminals and Exporters at that time in Australia 25 per cent. of the funds would have necessarily been kept by the Reserve Bank in Australia and unavailable to the borrower, you understood that, didn't you? A. No, I was not aware of that.

20

Q. You made inquiries about the variable deposit requirements of the Reserve Bank, didn't you? A. No.

Q. In 1977? A. No, I didn't.

Q. You made no effort to satisfy yourself that any Reserve Bank approval was obtained by Bulk Terminals and Exporters if it was going to borrow from your company? A. In fact, we considered only that all the money will be transferred to ANZ Bank in Australia, an Australian bank, and if there was any requirements from the Reserve Bank ANZ Bank either will tell us or we do what was requested to do.

30

Q. You knew of no Reserve Bank approval to any transaction to which B.T.E. was a party, did you? A. No.

40

HIS HONOUR: I will have it noted in the transcript that in the documents tendered in Ex.A the handwriting is no part of the tender unless specifically indicated.

(Luncheon adjournment)

MR. RAYMENT: Q. You said that you were away from Geneva for some time when Mr. Jamieson came to talk about the barley. When was that that you went away? A. When Mr. Jamieson came for the second time, I think it was some time in June I was away from Geneva.

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10 Q. Do you have any notes from which the dates on which you were absent can be ascertained? A. No.

Q. You just recall, can you? A. I remember that from what I heard when I was back in Geneva from Mrs. Lenos and from Mr. Boulmer, that's all.

(continued)

Q. Are you unable to help us with the dates of your absence in June and July? A. No, I'm sorry, I can't.

Q. Was it definitely in June and not July? A. I think it was in June.

20 Q. Were you away at the end of June, on 27th June? A. I can't say exactly, I am sorry.

Q. Did you meet with Mr. Barki during June about the Barley? A. I met with Mr. Barki on the first meeting between Mr. Jamieson.

Q. Just try and answer my question, if you would. Did you meet him during June? A. It might be, I can't say exactly.

30 Q. Did you ever speak to Mr. Barki about the barley during June or July without Mr. Jamieson being present? A. No, never in June or July. I never spoke to Mr. Barki in the absence of Mr. Jamieson.

Q. I suggest to you that during July you met Mr. Jamieson on the three occasions in your offices, on 20th, 22nd and 29th July, is that consistent with your recollection? A. I can't answer, I don't know.

Q. It may be, so far as your recollection goes? A. Maybe, yes.

40 Q. I suggest to you that each of those meetings concerned the barley, what do you say about that? A. I can't remember.

Q. I suggest to you also that at each of those three meetings Mr. Boulmer was present and that at least one of them if not two of them Mrs. Lenos

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was also present? A. I can't answer.

Q. I suggest to you that at each of the three meetings that I put to you the main topic of discussion was the sale of barley to Kuwait? A. I can't remember. From my memory I can't say if I had meetings with Mr. Jamieson in July on the dates you told me.

Q. I suggest to you that in addition to the meeting on 24th August at which Mr. Boulmer and Mrs. Lenos and Mr. Jamieson and Mr. Peterson were present, there was a meeting the previous day between you, Mr. Boulmer and Mrs. Lenos with Mr. Jamieson, that is 23rd August? A. I can't say. I know there was a first meeting with Mr. Jamieson and Mr. Boulmer, Mrs. Lenos and myself and after that a second meeting in the presence of Mr. Peterson, but I can't say if it was on the 23rd, on the 22nd, I don't know, I can't remember.

10

Q. Then I suggest to you that there was a telephone call to you from Mr. Jamieson on 17th August when Mr. Jamieson called for you when he was not in Geneva? A. I don't know, I don't remember.

20

Q. I suggest to you that during July, in addition to the meetings which I mentioned a moment ago, the three meetings which I suggest you were present at, there were two other meetings between Mr. Jamieson and Mr. Boulmer alone on 19th and 21st July, is that consistent with your recollection? A. No, I can't remember.

30

Q. Do you think that you had a conversation with Mr. Jamieson and Mr. Barki during June or some other month? A. Mr. Barki, Mr. Jamieson should be I think early in June, it was, I think.

Q. What, in the first week or two of June? A. Yes, something like that.

Q. You gave some evidence about a meeting at which you expressed opposition to the bagging of grain. Do you say that was the meeting in early June? A. Yes, early in June.

40

Q. I would ask you to assume that Mr. Jamieson was not in Geneva from 13th January, 1977, until 18th July, 1977, just assume that was the case, if you would. If that be so, do you still think that you had a conversation with Mr. Barki and Mr. Jamieson after 18th July

in which he said - A. After 18th July?

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Q. Yes. A. I didn't say I had meeting with Mr. Jamieson after July, I said I don't remember in July.

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Q. It would be inconsistent with your recollection, would it, if you were told that Mr. Jamieson didn't go to Geneva until 18th July and was not there in June or otherwise earlier in July? A. No, I think the meeting I had with Mr. Jamieson and Mr. Barki, I think, took place early in June. That is all I can say, and the second time I remember it was on 24th August. In the meantime, I can't tell you, I have not recollection of that.

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Q. Prior to the end of July, you yourself knew of a sale of approximately 27,000 tonnes of barley to the Kuwait supply company, did you not, you yourself? A. Sorry?

20

Q. You yourself, prior to the end of July 1977, knew of the existence of a sale to the Kuwait supply company of about 27,000 tonnes of barley? A. No, I was aware that Mr. Jamieson was considering to sign a contract, but I did not know the contract had been signed already.

Q. You say you didn't know of any existing sale to the Kuwait supply company? A. Yes.

Q. Had you heard the name Kuwait supply company yourself? A. Yes, we heard of that.

30

Q. When did you first hear of that? A. At the first proposal by Mr. Jamieson early in June that the buyer should be Kuwait Supply Company.

Q. But Mr. Jamieson didn't know the name of his buyer in Kuwait, did he, when the proposal was mentioned to you? A. I can't say.

40

Q. You first heard of this proposal at a time when Mr. Jamieson told you that he didn't know the name of his buyer, did you not? A. No, I think we were given the name of the buyer at that time.

Q. Were you not given the name of a broker in Kuwait whose name was Juma, as the broker acting for the purchaser at the time you first heard of the transaction? A. I have no recollection I heard this name before.

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Q. You had heard it before? A. No, I have no recollection I heard this name before.

Q. During July were you not informed of the progress of obtaining bagging equipment and jute bags for the Kuwait delivery? A. I was informed, yes.

Q. Was that during July? A. I think it was during July.

Q. You knew, did you not, of negotiations to which Mr. Barki and Mr. Jamieson were a party which were taking place in Trieste and Frankfurt about bagging equipment and jute bags? A. No, I can't remember. 10

Q. But you were told that the arrangements for the bagging equipment were proceeding during July? A. Yes.

Q. You knew that the purpose of those bagging arrangements was so that the Kuwaiti purchaser could have delivered to him in Kuwait bagged barley? A. Yes, but I should say that when I was back from my business trip or my holiday I was informed by Mrs. Lenos that the new offer had been made to us. According to this new arrangement between the Kuwaiti buyer and Mr. Jamieson the Kuwaiti buyer will have a letter of credit issued in favour of Penmas notified to Compafina Bank for payment against shipping documents evidencing the shipment in bulk in Brisbane for the full amount of the price, which was \$(US)4,400,000 and then was said that we, Compafina Bank, upon receipt of the aid letter of credit, we would have to issue the performance bond in favour of the opening bank in Kuwait and we have in favour of the Kuwaiti buyer to guarantee the completion of the bagging operation in Kuwait up to \$(US)440,000, which is ten per cent. of the full contract. 20 30

Q. That is something that you say you were told by Mrs. Lenos? A. Yes. 40

Q. Whenever it was that you came back from your trip or your holiday? A. Yes, because I was not in the bank when this offer was made to us.

Q. Have you spoken recently to Mrs. Lenos about this matter? A. No.

Q. That is just your recollection, is it, of what she told you in 1977? A. Yes, I can remember that because that was very important, because it is normal in this case that we have agreement.

Q. You have not spoken to Mrs. Lenos about it this year, though? A. About this?

Q. That matter? A. This matter, no.

10 Q. And you have not spoken to her this year about any of the matters to do with this case, have you? A. Yes, we discuss about some matters.

Q. Have you discussed with her the terms of conversations at which Mr. Jamieson was present? A. No.

Q. This year, no discussion at all? A. About what?

Q. Any discussions that she and you had with Mr. Jamieson this year? A. We discuss about the full case.

20 Q. Have you discussed this year with Mrs. Lenos the terms, what you both said to Mr. Jamieson and what he said to you at any discussions which took place with Mr. Jamieson in 1976 or 1977? A. Sorry, I can't understand your question.

HIS HONOUR: Q. Have you, this year, talked to Mrs. Lenos about these conversations that you had with Mr. Jamieson in either 1976 or 1977? A. Not about this point, no.

30 Q. Do you remember, in answer to Mr. Gyles, you told us about a conversation or a proposal that Mr. Barki would supply bagging equipment in Kuwait? A. Yes, that's right.

Q. When do you say that conversation occurred? A. It took place at the first meeting early in June, I think.

Q. This conversation with Mrs. Lenos after you returned from your holiday or business trip was after that? A. Was after that, yes.

40 Q. So that the sequence was some time early in June Barki told you that he was on his way to sign with the Kuwait Supply Co.? A. And Mr. Jamieson said so, too.

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Q. And that he, Barki would be able to provide bagging equipment? A. Equipment and the bags, too.

Q. You told Mr. Rayment that during July you were told of the progress of the arrangements for the purchase of bagging equipment and jute bags? A. Yes, I was not told, but I was informed by Mrs. Lenos of the progress made in this respect.

Q. Because when you left to go on your holidays there was no agreement as to the bagging in Kuwait, was there? A. No agreement on our side, but there was - it seems that there was some agreement between Mr. Jamieson and Mr. Barki only.

10

Q. But as far as the bank was concerned? A. No agreement was given, we refused.

MR. RAYMENT: Q. But do you say that Mrs. Lenos was told about the progress of the arrangements about the bagging equipment and not you? A. Not me.

20

Q. So you were not told, you say, at any meeting with Mr. Jamieson anything about bagging equipment, or by Mr. Barki, that is to say, the progress of the arrangements? A. Mrs. Lenos told me the progress made and the new arrangement about the sale.

Q. When was that? A. Some time in July, I can't say exactly when.

Q. Early July? A. I can't say.

30

(Original MFI 1 called for: not produced at that stage.)

Q. ML are the initials of Mrs. Lenos? A. Yes, that's right.

Q. Was she a person who did some typing for you? A. No.

Q. What would you understand the reference EF/ml to indicate? A. If you show me, I can tell you.

Q. (MFL.1 shown to witness) At the foot of the 40 page of that document you see EF/ml? A. Yes, that is my initials. ML is not Mrs. Lenos, this one.

Q. Who was that? A. It was a typist in the bank, Mrs. Lomberti, something like that, I can't remember. She has left the bank, she was shorthand typist.

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Q. The document I have just shown you, when was that document prepared the original of that document? I think you are looking at the other one, I am not asking you about the French one, I am asking you about the English one? A. Yes.

Q. When was that prepared? A. On the date that is indicated.

(continued)

Q. It was prepared on 22nd September, 1976, the English version? A. Should be, yes.

Q. The English version? A. The French one.

20

Q. You are looking at the English version, are you not, that is the document in front of you? A. I can't say for the English translation because I don't take any document in English in the bank, we take only in French.

Q. Did you prepare that translation? A. I can't remember. I was about to prepare, but I don't know if I prepared or asked someone to do it for me.

Q. When was the English translation prepared, do you know? A. I can't say.

30

Q. I put it to you that the name of Kuwait Supply Company as the purchaser was not known early in June 1977 but was first known to Mr. Jamieson and Penmas and Gulf Fisheries on 29th June, 1977. (Question rejected).

Q. I suggest to you that the first reference to Kuwait Supply Co. was on 29th June, 1977, so far as your bank was concerned? A. I can't answer this question. It seems to me that, in fact, I knew the name of this company, I was given the name of this company at the first meeting early in June.

40

Q. But you might be mistaken about that? A. I might be, yes.

MR. RAYMENT: Q: You recall being shown the telex to Jebsons of which your bank provided a reference concerning Penmas. Do you remember being shown that telex this morning? A telex in which your bank gave a reference? A. Yes, yes, I did see it this morning.

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Q. Were you aware of the existence of that telex during 1977? A. I don't know. If you show me the date maybe I will - it will come to me.

Q. It is a telex of 14th July, 1977. I show you a copy of it. You see that telex has a reference ML/LT, is that Mrs. Lenos? A. One is Mrs. Lenos.

Q. Who is LT? An officer in the bank.

HIS HONOUR: I will have it noted that document is part of Ex.B P.171.

10

MR. RAYMENT: Q. Were you aware of the existence of that telex during 1977? A. I cannot answer now if I was aware when the telex was sent or later.

Q. You see in the first line it refers to a telex which would perhaps have been sent at 12.55 hours on 14th July, 1977, a telex from Jebbens to the bank. Do you see that?

A. It says that in the telex, yes.

20

Q. Have you been able to find that telex? A. I can't answer. It should be a telex, yes.

Q. Have you looked for it? A. No.

Q. You may take it it has not been discovered. Were you aware of a telex coming in from Jebbens asking for a reference? A. I can't remember the telex received from Jebbens and I can't remember this telex. I think maybe it might be that I have been informed later on of this telex because it means nothing to me. I can't remember I asked for this telex to be sent.

30

Q. You see, at the end of the telex that is in front of you, "This group can be recommended for a business relationship"? A. Yes, I can see.

Q. You were aware that Jebbens were the ship owners who were to supply a vessel for the carriage of cargo, barley, from Brisbane to Kuwait? A. I should say so, yes.

40

Q. I show you a copy of another telex which has the number 433 on it which is a telex in reply to the one in front of you. Have you seen that before? A. No.

Q. Are you aware of the existence of any reply to the telex you now look at? A. No, I wasn't aware. If I was at the bank at that time I should have been shown the telex. It should have been submitted to me.

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Q. Is your initial on it? A. No, not initial of me.

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10 Q. Do you recognise any initial on it?
A. Yes, initial Mr. Garard, initial Mrs. Lenos, initial by Mr. Boulmer who is a sub-manager in the bank, but no one else.

(continued)

Q. You are not aware of the existence of any telexes in Australia other than those that have been made available on discovery?
A. No.

(Photocopy telex from Jepsens to the plaintiff dated 15th July, 1977
tendered; admitted and marked Ex.R7.)

20 Q. Did you yourself have any contact with Jepsens about Penmas or about shipment prior to meeting Mr. Peterson prior to 24th August?
A. Not one contact.

Q. Did you yourself have any communication with the Gulf Bank prior to 24th August, 1977 about any letter of credit? A. I can't remember.

30 Q. Apart from this transaction of barley with which we are concerned to Kuwait there were two other categories of commodity trading in which B.T.E. was involved which also involved the issuing of those warehouse receipts in Australia. One was, I suggest to you, domestic sales of commodities by B.T.E. and the other was transactions of sale to Tradax, is that right? A. No, it is not quite correct. We agreed to finance stores of sorghum but only for export and sale to Tradax. We were also by Mr. Jamieson requested to agree to the finance also sorghum for the sale on the domestic market. We were first offered and there was a note from
40 Mr. Jamieson that the sale of sorghum on the market would be administered on our behalf by A.N.Z. Bank, the debt I remember the terms, he said the debt would be administered on your behalf by A.N.Z. Bank. We sent a telex to A.N.Z. Bank asking them if they were prepared to administer the business and they answered No, we are not prepared, and I remember also the sending telex because it was too onerous of them.

Q. You say the only other transactions were

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transactions with Tradax? A. Yes.

Q. You had an arrangement with Tradax in the Compafina Bank office? A. They confirmed and they confirmed in writing too.

Q. What was done about the issue of letters of credit in the case of Tradax? A. There was no letter of credit issued. There was only an agreement from Tradax that they will pay Compafina Bank on receipt of the shipping document.

10

Q. You did not give any specific authority directly to Maynegrain to release cereals? A. No, but in respect of sorghum you mean?

Q. Sorghum or barley? A. No, it was not. It was by Maynegrain.

Q. Barley? A. Barley, we never sent any for barley but for the sorghum it was not with Maynegrain, it was only under the responsibility of B.T.E.

Q. To them you gave no particular authority for any particular release of grain? A. From sorghum?

20

Q. Yes. A. Yes, we did. We sent a telex to A.N.Z. Bank authorising them to, answering them to authorise B.T.E. to release shipping documents to Tradax because we had got the permission from Tradax in Geneva.

Q. When was that telex sent? A. There are several telexes.

Q. Authorising, you say, the release of grains? A. We said we authorise - we answer A.N.Z. Bank. We confirm A.N.Z. Bank that we have got payments for the sorghum by Tradax and they could authorise B.T.E. to release the shipping documents to Tradax.

30

Q. You say there are a number of such telexes? A. Yes.

Q. You are clear you say there were no domestic sales in respect of which any finance was provided by Compafina? A. No, I said we remember agree (sic) for financing purchase of sorghum for domestic sales. I did not say there was not one. Unfortunately I think there has been, I think two. We were told by Mr. Jamieson that some sorghum was not exported and was sold on the local market because the

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price was better in the local market than for export and Mr. Jamieson asked us for the permission to use the proceeds of the sale of the sorghum on the local market for buying barley, purchasing barley, and putting the barley in the warehouse, Maynegrain. In other words, our advance against sorghum was converted into advance against barley.

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10 Q. You gave that permission? A. Yes, for that we gave the permission.

Q. I think you told Mr. Gyles that you were not involved in the specification of \$2.8 million as the amount of a documentary credit which was referred to in a letter that you and Mr. Pfeiffer signed on 3rd August, 1977. That is right, isn't it? You told Mr. Gyles that? A. Could you repeat that? (Objected to by Mr. Gyles).

(continued)

20 Q. I show you Ex.D. I think you said that was a letter signed by yourself and Mr. Pfeiffer? A. That is right.

Q. Did you not say that you were yourself not concerned in discussions about a \$2.8 million documentary credit with Mr. Jamieson. They were not discussions that you yourself had had? A. I'm sorry, I can't understand the question.

30 Q. Did you have discussions with Mr. Jamieson about the \$2.8 million documentary credit referred to in that letter before 3rd August? A. No, I think the letter is a bit misunderstood by you.

HIS HONOUR: Q: Just answer the question, please. The question was did you have a discussion on the topic of the letter of credit and you said No, right? A. Yes, we no discussion about the letter of credit.

MR. RAYMENT: Q. Mrs. Lenos' reference is on that letter? A. Yes.

40 Q. You see, it refers in the opening paragraph to, "Our recent discussions on the matter". Were they discussions to which you were a party? A. Yes, I can see.

Q. Were they discussions to which you were a party? A. No.

Q. Who were they? A. It should be Mrs. Lenos from what I can heard from when I was back.

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Q. Were you back at the beginning of July? A. I can't say unfortunately when I was back exactly.

Q. You signed the letter with Mr. Pfeiffer?

A. Yes, that's right.

Q. May we take it that you and Mr. Pfeiffer discussed the matter on 3rd August? A. No, the letter was submitted to me for signature as usual and it happens many time and I could see nothing wrong in the letter and I accepted to sign and I asked Mrs. Lenos to ask Mr. Pfeiffer to sign the letter.

10

Q. The persons in the bank who were concerned with the barley transaction and Mr. Jamieson during June, July and August were Mr. Boulmer, you and Mrs. Lenos? A. That's right.

Q. May we take it you had discussions with both of them, Boulmer and Lenos about what was occurring? A. Yes.

Q. When you were away - A. Yes, I had discussion with them when I was back.

20

Q. Is that your passport? A. Yes, I am looking if I can find a date to answer your question when I left Geneva and when I came back to Geneva, but unfortunately I can't find it.

Q. Is your passport usually stamped on arrival in Switzerland? A. No.

Q. Or on departure? A. No.

HIS HONOUR: Q. Where did you go to? A. I can't remember now. Maybe I was on holiday or I went to some country but I can't see.

30

MR. RAYMENT: Q. You told me that during July you knew that Jebsens were the ship owners supplying the vessel to be used for the carriage of the shipment from Brisbane to Kuwait? A. I could deduct that from the telex you showed me.

Q. Originally there was to be another vessel, the "Port Victoria" supplied by Jebsens? A. Another vessel?

40

Q. Yes, originally. A. I don't know.

Q. And shortly after 14th July I suggest to

you the "Bellness" was substituted as the proposed vessel. Were you aware of that? A. I can't say. I did not pay attention to that, was not involved on 14th.

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Q. When you say that Barki and Jamieson called on you to tell you they were about to sign a contract in Kuwait - A. I said all right, I think it was early in June.

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Q. Whenever it was, first of all I suggest to you that whenever that contract was signed - were you aware of the date that contract was signed? Did you see it subsequently? A. No, never.

(continued)

Q. Had you not seen it in the discovery documents here? A. Which document?

Q. A document of 9th July, 1977. A. If you show me the document I can tell you. I can't remember the document dated 9th July.

20

Q. Have you seen that document before? (shown) A. No, only when I was in Sydney.

Q. Here now? A. Yes, now. Never before.

Q. You met Sheik Hamad in September 1977? A. In September, yes.

Q. Had you had any dealings yourself with the Gulf Bank prior to meeting Sheik Hamad? A. No, not one.

30

Q. You had been shown some documents in September 1976 about a proposed company called Marine Falcon? A. Yes, I remember that.

Q. Indeed, there are some documents of 21st September, 1976 one of which is a proposal for a loan to Marine Falcon and another a proposal for a loan to Amerapco? A. Yes.

Q. All relating to a tug operation in Kuwait? A. That's right.

Q. Did you subsequently become aware that the company Marine Falcon was never formed as a separate company in Kuwait? A. No.

40

Q. Did you subsequently become aware that the business which was supposed to be transacted under the name Marine Falcon was carried on under the name Gulf Fisheries Marine Division?

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A. I heard of that, but I didn't pay attention to that because we were told it was Amerapco who will run the business in Kuwait.

Q. Were you aware that Mr. John Jamieson principally was carrying on the business of Gulf Fisheries Marine Division? A. No, I can't remember that. I knew that there was some agreement between Amerapco and Gulf Fisheries about running of this business in Kuwait, but exactly what the arrangement was I never knew. 10

Q. Were you aware that Gulf Fisheries was a company owned by the family of Sheik Hamad and his father, Sheik Sabah? A. When I knew that Gulf Fisheries was a company owned by Sheik Hamad a long time ago even before I met Mr. Jamieson.

Q. You had dealings with Shek Hamad? A. I can't say I had dealings with him but I had heard of this company. I had heard of Sheik Hamad. 20

Q. Did you see documents both from Penmas and from Gulf Fisheries Marine Division making offers for the sale of this barley to Kuwait during 1977, such documentation? A. Correspondence from Gulf Fisheries?

Q. From Gulf Fisheries and Penmas offering to sell this barley? A. No, I don't remember. I don't think so. 30

Q. When you first heard of the proposal to sell bag barley to the company in Kuwait, the Kuwait Supply Company, when you first heard of that were you told a price per ton? A. I said it was, as I told you, early in June.

HIS HONOUR: Q: He is asking you whether you were told how much it was proposed to sell it per ton? A. I can't remember that, your Honour.

MR. RAYMENT: Q. Were you told then that it was to be carried on the "Bellness"? A. Not at that time. 40

Q. Were you? A. Not at that time. I did not hear of the name of the "Bellness" at that time.

Q. You were subsequently told by Mrs. Lenos

that she had heard of the progress of the hire of the bagging equipment by Mr. Boulmer? A. That is right.

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Q. You took it from that that the arrangements in Kuwait were going ahead for the sale of bag barley? A. Sorry?

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10 Q. You took it from that that the arrangements of the sale in Kuwait of bag barley were going ahead? A. Yes, but a new arrangement, not the previous one. The new arrangement agreed to which a letter of credit will be issued and paid against the shipment in bulk of the barley which is not the same thing for us.

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20 Q. Was Mrs. Lenos principally handling this barley transaction, not you? A. I can't answer this question. I am the manager of the bank. Of course we have got assistance. We deal with the customers when the matter is very important and when I am available I enter myself to the meeting.

30 Q. Mrs. Lenos' reference appears on the documents emanating from the bank, all of them, in June, July, August 1977 about this transaction. May we take it that she was principally dealing with it? A. I can't say so. She did a lot of work about the deal, but I can't say she was principally involving. I can't say so. Let us say the bank, Compafina, was involved.

Q. You are the manager of that Bank and you were at the time? A. Yes.

Q. She was a sub-manager, responsible to you? A. Yes.

Q. And Mr. Boulmer was a director of the bank? A. That is right.

Q. Who was also an executive director? A. Yes.

Q. Working full-time for the bank? A. Not full-time, let us say half the time.

40 Q. You only occasionally prepared notes of meetings which you had with Mr. Jamieson. You did not always prepare notes of those meetings? A. Occasionally.

Q. You have no record whatsoever of any meetings which you participated in yourself during July or August 1977, none at all? A. I don't think so. There was - should be among

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the documents discovered.

Q. You say that you yourself were unaware that the "Bellness" was leaving Sydney until about 24th August? A. Yes, I am positive about that.

Q. But you knew that some arrangements had been made with the Kuwait Supply Company for the purchase by that organisation of the barley?

A. No, I was still waiting for the letter of credit to be opened and notified for Compafina in favour of Penmas for the barley to be shipped in bulk. 10

Q. I want you to tell me whose handwriting this is written in. First of all the words in the top right-hand corner in the document. Tell me who wrote it? A. Should be Mrs. Lenos. I'm not sure, should be Mrs. Lenos.

Q. Do you recognise this similar writing "101..."? Who wrote that? A. I think Mrs. Lenos. 20

Q. What about the words starting, "pre-f.o.b." Who wrote that? A. Should be Mrs. Lenos too.

Q. The next piece at the bottom commencing, "alternative possible" It is not you? A. No, it is not me.

Q. You say, do you not, that there was no agreement to advance the freight by your bank until 25th August, is that right? A. I can't remember I said so. 30

Q. It would follow from that that the note commencing, "pre-f.o.b." as you understand that note - A. Yes.

Q. Was written prior to 24th August? A. I can't see.

Q. It would follow from that? A. Should be.

Q. I will ask you to firstly translate what those words mean? A. "Pre-f.o.b., f.o.b. prices will be increased consequentially if you advance the freight plus \$20 which is \$145". 40

Q. Per ton? A. Yes.

	Q. First of all, are you able to read the writing that follows in French yourself? You understand this to be a form of guarantee proposed for signature by the Gulf Bank of Kuwait addressed to the Compafina Bank in Geneva. Someone has written in the right-hand corner in French "Found unacceptable by Gulf Bank", is that right? A. That is right.	In the <u>Supreme Court</u> Plaintiff's Evidence No.6 Evidence of Emile Ferrasse Cross- Examination 23rd February 1981
10	Q. It is a draft form of guarantee for signature by the Gulf Bank? A. Yes.	
	Q. And someone has written in the right-hand corner, "Found unacceptable by Gulf Bank" in French? A. I am sorry, this is the first time I can see the document.	(continued)
	Q. You did not prepare that document? A. No, I didn't prepare that.	
	Q. You have already translated for us the first remark? A. Yes.	
20	Q. I show you illegible that is in different handwriting from that which is below it - A. O.K.	
	Q. Are you able to decipher what is written below that? A. Yes.	
	Q. Would you mind translating slowly? A. "Other possible solution participation in risk and cash for 50% of the Gulf Bank or performance bond from the Gulf Bank by order or Gulf Fisheries under their full responsibility covering an amount maximum of U.S.\$600,000. This performance bank bond will reduce our involvement and that could be acceptable since we should keep our pledge on the goods and recourse against Gulf Fisheries", but I was not aware of this proposal guarantee from Gulf Fisheries. I had never been aware of that from the Gulf Bank, sorry.	
30		
	Q. You do not know what communications took place between your bank and the Gulf Bank? A. I don't know . (Objected to by Mr. Gyles; rejected; answer struck out at his Honour's direction.)	
40		
	Q. If the expression, "Found unacceptable by Gulf Bank" relates to a communication by the Gulf Bank to the Compafina Bank you do not know when that communication took place? A. I don't know.	

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(Document tendered; objected to
by Mr. Gyles; m.f.i. 3)

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MR. RAYMENT: Q. Mrs. Lenos did not tell you of any discussions she had had with the Gulf Bank; when did Mr. Boulmer tell you of any discussions he had had prior to 24th August? A. I can't remember that.

Q. You don't remember any such discussions?
A. No.

Q. When you say that you were told by Mr. Barki and Mr. Jamieson about the contract they were about to sign with Kuwait Supply Company, I think you have already said that you don't remember a price which was mentioned to you, but do you remember whether there was a price mentioned to you at that time?
A. I think there was a price mentioned to me, yes, should be, but I can't remember what it was.

10

Q. So you took it, did you, that after the conversation with you, the contract would not be signed? A. After?

20

Q. The conversation that you had with him, that the contract would not be signed?
A. I didn't know if the contract was signed or not. We said that we are not agreeable about the contract and we would not authorise the release of the barley.

Q. Well, you took it that no contract would be signed, is that right?

30

HIS HONOUR: What he is saying to you is, he did not care whether the contract was going to be signed; he was not going to release the barley.

MR. RAYMENT: Q. Any further knowledge that you had about this, prior to 24th August, you say came to you from Mrs. Lenos, is that right? A. Yes.

Q. You had no conversation with Mr. Jamieson, from early June to 24th August, is that right?
A. I don't say I have not. I say I have no recollection of any further meetings until 24th August.

40

Q. Do you not remember having meetings with Mr. Boulmer and Mrs. Lenos, about the barley,

prior to 24th August - and Mr. Jamieson?
A. I have no recollection of that.

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Q. And do you not recollect having meetings with just you and Mr. Boulmer and Mr. Jamieson about the barley, before 24th August? A. I have no recollection of that.

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Q. And if you did, you have entirely forgotten any such discussion now, is that right? (Objected to by Mr. Gyles).

10 HIS HONOUR: I think the answer is fairly obvious.

(continued)

MR. RAYMENT: Q. I think you said that you sent a telex to Mr. Jamieson in August, you were responsible for sending a telex to Mr. Jamieson. Could I please have Ex.E? I think you said you were responsible for this telex, is that right? (Shown) A. Yes, I think I was.

20 Q. And I suggest to you that shortly after its date on 17th August Mr. Jamieson telephoned you about that telex? A. I am sorry, I can't remember.

Q. And I suggest he said to you that he was bringing documents from Kuwait with him to Geneva, and he would be seeing you shortly about them? A. I have no recollection of this 'phone call.

Q. Well, do you have any recollection of following up that telex? A. No, not one.

30 Q. It has Mrs. Lenos's initials on it, does it not? A. On what?

Q. On the telex (shown). A. Yes there is.

Q. What, you say that you remember arranging for that, do you? A. Yes, I said I was responsible for this telex.

40 Q. It is correct to say, is it not, that the bank was hopeful of obtaining a letter of credit from a Kuwaiti bank in its own favour for \$2.8 million at the time of that telex? A. I can't say for \$2.8 million. I say we were very interested to know if the letter of credit will be open or not in favour of Penmas to Compafina Bank.

Q. You talk in the telex, do you not, of a letter of credit from Kuwait covering bulk barley? A. Bulk barley, yes.

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Q. And there had been a computation done inside the bank, had there not, as early as June, of the moneys which the bank wished to obtain for bulk barley by reason of this shipment? A. I do not fully appreciate, I am sorry.

Q. The bank had calculated its position in relation to barley, and wanted about \$2.8 million? A. Minimum, yes, that is so.

Q. Now have you seen some notes of Mr. Faltin's of 6th June calculating the bank's position as at that date, as at \$2.75 million approximately? A. I can't say. If you show me it, I will let you know. 10

Q. I call for document dated 6th June, 1977, discovered by the plaintiff, with a cheque. (Produced). (Approaches witness) I suggest to you that first of all the copy document which I show you is a copy of Mr. Faltin's calculations? A. Yes, I can see his initials, H.F., that is right. That is my writing; it is filed. 20

Q. And as at 6th June, 1977, Mr. Faltin has calculated the money which the bank ought to receive from Penmas, at \$2,725,792.97? A. That is right.

Q. And he has calculated, has he not, that the amount paid for the barley itself was \$2,043,814? A. That is right.

Q. And that the balance from another transaction, local sales of barley, is \$518,512? A. Yes, the sorghum has been converted to barley. 30

Q. What is the translation of the passage on the document, underneath those two figures? A. "To be fully covered, we should receive in addition, on top of the purchase price for these goods, an amount of equal to six per cent of the purchase price" - it is difficult to read - "of their price of purchase".

MR. RAYMENT: I will tender those two documents. 40

HIS HONOUR: You are tendering both the document that he identified, and the other one?

MR. RAYMENT: Q. Would you look at the other document. It is also dated the same date, I suggest, and it is some calculations of Mr. Faltin, as to the bank's position, is that right? A. Yes it is.

(Copy calculations made by Mr. Faltin, dated 6.6.77, tendered without objection and marked Ex.R.8)

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10 Q. I suggest to you that those calculations were made by Mr. Faltin after the bank had been advised, in a telex from Mr. Jamieson of 3rd June, of a proposed sale of this barley. I call for a telex of 3rd June, 1977.

10 MR. GYLES: My friend called for discovery document 20, and I have produced 19 and 20.

MR. RAYMENT: My friend produces another one. I do not mind it going in too.

(continued)

Q. I show you a document dated 3rd June, 1977, which is the top of the two documents. I suggest to you that it was following receipt of that telex that the bank calculated its position, anticipating a sale of this barley?
A. I am sorry, would you repeat the question, please?

20 Q. I suggest to you it was after the bank received that telex that it requested Mr. Faltin, that Mr. Faltin prepared the figures of 6th June? A. Yes, but I think the calculation of the figure, Mr. Faltin has nothing to do with these two telexes.

Q. You see in the telex Mr. Jamieson says "Barley sale will satisfy obligations under this transaction", do you see that? A. Yes.

30 Q. And three days later Mr. Faltin has prepared a summary of the amounts which should come from the barley sale, has he not?
A. I can't say if the sale of the barley was referred to by Mr. Jamieson in this telex on 3rd June, 1977, was the sale to Kuwait, because I think we received the telex, I can't remember when, but it was in May, telling that the barley has been sold to Iran for late shipment in July.

40 (Photocopy telex from Mr. Jamieson to the plaintiff dated 3.6.77, and from plaintiff to Mr. Jamieson dated 27.5.77, tendered without objection and marked Ex. R.9)

Q. You mentioned a proposal in respect to the Iran cargo, Maecom. Were you aware of a penalty being paid to that company for cancellation of its contract for the purchase of this barley at the same time as arrangements were made with

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the Kuwait Supply Company? A. I have a vague recollection of that, but I am not sure exactly. It seems, yes, that some penalty had to be paid.

Q. You said that Mr. Jamieson said at some stage that he was representing B.T.E.; when did he say that? A. About the barley business?

Q. When was it he said that - any business?

A. I think it was in several meetings he said it. 10

Q. When were those meetings? A. I don't remember now. There have been plenty of meetings since the first meeting in May 1976; plenty of meetings took place. I can't exactly answer the question.

Q. And did he say he was representing I.S.T., too? A. Yes.

Q. What about B.T.E. (N.S.W), did he say he was representing that? A. I can't say for B.T.E. (N.S.W). 20

Q. Meral (Queensland)? A. I can't say.

Q. I show you a document which I suggest to you is in the handwriting of Mr. Boulmer. (Approaches witness) I suggest to you that the front page of the document is wholly Mr. Boulmer's handwriting? A. I don't think so. I can't recognise the handwriting of Mr. Boulmer.

Q. What about what is on these - -
A. The same. 30

Q. I do not suggest to you that the reverse of the front page is Mr. Boulmer's handwriting, but I suggest to you that the next page, which in fact would be p.3, is in Mr. Boulmer's handwriting? A. It does not look like the handwriting of Mr. Boulmer.

Q. And p.5 I suggest to you is in his handwriting? A. No, I don't think so.

Q. But you cannot identify his handwriting?
A. No I don't. 40

Q. And I suggest to you that the final page which would, if one were numbering the document, be p.8, is in Mr. Boulmer's handwriting, except for the figures at the foot? A. It is not like Mr. Boulmer's handwriting.

Q. The paper on which it is written is notepaper in use in Switzerland, is it not? A. Oh yes, you can find this paper in Switzerland, and France as well.

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(Abovementioned document m.f.i. 4)

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Q. You recall the presence, at Compafina's offices, on 24th August, 1977, of a gentleman from a company known as Toepner, who I suggest to you was a ship's broker?
A. I am sorry, I can't understand.

Q. Do you recall, when Mr. Peterson and Mr. Jamieson were there in Compafina's offices on 24th August, that a gentleman from a company known as Toepner was also there? A. No, I can't remember that.

(continued)

Q. A ship's broker, do you remember a ship's broker being there? A. No, I can't remember.

20

Q. That day you received the three bills of lading, did you not, from Mr. Peterson? A. I am not sure it was on this date. I think we received the bill of lading later on.

Q. On the following day, was it? A. Maybe on the following day - later on, I think, by mail. I don't know that Mr. Peterson had the bill of lading with him; I am not sure, but I don't think so.

Q. The payment of \$550,000 was made on that day? A. Was made on the day.

30

Q. And before Mr. Peterson came on 24th August - indeed before 24th August - you knew that Jepsens were the relevant shipowner, didn't you? A. Yes, we were told by Mr. Jamieson.

Q. And do you say you did not know the amount of freight, or the approximate amount for the freight, prior to 24th August? A. Mr. Jamieson told us the amount of the freight to be paid.

Q. Prior to the 24th? A. I don't think so, but I am not sure.

40

Q. I suggest to you that during July you were present at discussions at which Mr. Jamieson told you and Mr. Boulmer of the progress of negotiations in Kuwait, so far as the sale of the bagged barley was concerned? A. I was told by Mrs. Lenos or by Mr. Boulmer.

Q. No, I suggest to you that you were present at

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this meeting? A. No, I don't think I was present at this meeting.

Q. I suggest to you that you were told by Mr. Jamieson that attempts were being made to arrange for the Gulf Bank to involve itself in the letter of credit opened by the purchase, as a bank which could issue a document to your bank? A. I have no recollection of that.

Q. And I suggest to you that you were aware, by 20th July, that the letter of credit which had been opened in Kuwait was opened in favour of Sheik Hamad? A. I didn't know that, I am positive I didn't know that before 24th August, 1977.

10

Q. And I suggest to you that you were aware that Sheik Hamad had asked the bank which issued the letter of credit to de-restrict it so that it could be negotiated with the Gulf Bank? A. No, I didn't hear of that, never.

Q. And I suggest that Mr. Jamieson was asked, in the meeting at the end of July, to try to arrange for the Gulf Bank, if that became a bank which could deal with a letter of credit, to issue a letter of credit to the Compafina Bank for \$2.8 million? A. Sorry, what is exactly the question?

20

Q. I am suggesting to you that at a meeting at which you were present on 29th July - -
A. I can't remember.

Q. Mr. Jamieson was asked to attempt to arrange for a \$2.8 million letter of credit to be opened by the Gulf Bank in favour of the Compafina Bank, if the Gulf Bank became a bank which could negotiate the letter of credit? A. I don't exactly understand, I am sorry. I heard the words, but I can't understand the question.

30

HIS HONOUR: Q. Well, the question is, were you told that by Mr. Jamieson, that he would ask that? A. I can't remember that, your Honour.

40

MR. RAYMENT: Q. And I suggest to you that later during August the Gulf Bank refused to involve itself in the transaction at all, so that one was left with the bank which had issued the letter of credit, in Kuwait? A. Yes, I can say yes, according to the document I have seen a few minutes ago.

HIS HONOUR: Q. But do not go on the document

you have seen. Have you ever had any personal knowledge that during August the Gulf Bank refused to become involved in the transaction?

A. I have no knowledge of that, your Honour.

MR. RAYMENT: Q. Now the Compafina Bank, having found that so far, by 24th August, it had not obtained any letter of credit in its own favour, then required that the bills of lading be issued to it, did it not? It wished to obtain possession of the bills of lading?

A. That is right.

HIS HONOUR: Just a moment. I do not know that that is entirely a fair way of putting it, if the witness's evidence be accepted. It is not a question of by the 24th August; he says he was told certain things by 24th August. I think it may be fairer to put it in another way.

MR. RAYMENT: Yes your Honour.

Q. I suggest to you that the decision to obtain the bills of lading from the shipowner was made when early efforts to obtain a letter of credit in favour of the bank failed.

MR. GYLES: Your Honour, there is a difficulty inherent in that question.

HIS HONOUR: Yes, I do not think the witness understands. If you would not mind putting it in another way.

MR. RAYMENT: I will withdraw it, your Honour.

HIS HONOUR: I will have it noted for the transcript that there is a real language difficulty there, and I do not think the witness understood that question. I am quite happy for you to put it in some other way.

MR. RAYMENT: No, your Honour.

Q. When you got to Kuwait in September, did you say that the barley had not yet arrived, is that right? A. Yes, I think the vessel was waiting for a berth in Kuwait.

Q. And indeed there was really a succession of disasters, was there not, in Kuwait, with respect to the barley cargo; there were delays, I suggest to you, in the bagging of the barley on the waterfront? A. I suppose, yes.

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Q. There were disputes with the waterfront authorities, about who required the vessel to depart - - (Objected to by Mr. Gyles)

Q. How long were you in Kuwait? A. One week, ten days, something like that.

Q. Did you leave, when you procured the document signed by Sheik Hamad, addressed to the Commercial Bank? A. Yes, I think I was not long to leave after that. Maybe I stayed one or two days more.

10

(continued)

Q. And that was 25th September, was it not, that you took that document to the Commercial Bank of Kuwait? A. Yes.

Q. And indeed your bank threatened legal proceedings to the Commercial Bank of Kuwait, with respect to its failure to provide \$3.3 million because of these documents, did it not? A. We started proceedings against the Commercial Bank of Kuwait, but not because we didn't get the \$3.3 million; because some amount has been disbursed by them, over to A.N.Z. Bank, instead of being paid to Compafina Bank. We complained the Commercial Bank of Kuwait was responsible for the damage.

20

Q. Was there a complaint against them that they sent the \$600,000 to the A.N.Z. Bank? A. We started proceedings in Kuwait against the Commercial Bank for sending \$600,000 to the A.N.Z. Bank, yes.

HIS HONOUR: Q. What has happened to that case? A. We wait, your Honour, we are still waiting.

30

MR. RAYMENT: Q. You are waiting for a hearing of the case? A. Yes.

Q. When was that case commenced? A. I can't say now, but a long time ago.

Q. And is it a legal proceeding, or some sort of an arbitration, or what? A. It is a legal proceeding.

Q. In the Kuwaiti courts? A. Yes, that is right.

40

Q. The Kuwait Supply Company has been communicated with directly by your bank, has it not, for payment of the balance of purchase price of the goods, is that right? A. We have never communicated with the Kuwait Supply Company.

	Q. Are you aware of the existence of a dispute by the Kuwait Supply Company as to how much they still owe in respect to those goods? A. No, I am not aware of that.	In the <u>Supreme Court</u>
	Q. What, you had taken it no further than leaving it to the Commercial Bank of Kuwait to pay you whatever it does, under the instruction of 25th September; you have not taken any step against any person in Kuwait? A. No, against the Commercial Bank of Kuwait only.	Plaintiff's Evidence No.6 Evidence of Emile Ferrasse Cross- Examination 23rd February 1981
10	Q. I think you gave some evidence in chief about rain damage to cargo; when the vessel could no longer remain in the port, the balance of the barley was dumped, was it not, on the flat top of the quay of the wharf? MR. GYLES: I think that is a double question, your Honour, for a start. HIS HONOUR: I reject the question in that form.	(continued)
20	MR. RAYMENT: You have mentioned in chief some rain damage to the cargo. How did that occur? A. I can't answer that, I do not understand.	
	Q. What rain damage occurred to the cargo? A. I am sorry, I do not understand the question.	
	Q. Well, after a certain point of time was reached, the bagging operation had not been completed, as you understand the matter, had it, in Kuwait? A. Yes.	
30	Q. And there was barley which was still not put in the bags? (Objected to by Mr. Gyles). HIS HONOUR: The only reason I did not interrupt was that it referred to some evidence that was given in chief. It is almost 4 o'clock. We can check the transcript overnight on that.	
	MR. RAYMENT: Q. Mr. Ferrasse, you said before that you were informed by Mr. Jamieson of some sorghum which had been sold on the domestic market? A. Yes.	
40	Q. When were you informed about that? A. I can't remember now, but should be some time in January 1977, something like that.	
	Q. And is that sorghum which was the subject of a warehouse receipt from Maynegrain? A. The sorghum?	
	Q. Yes. A. No, it was not subject to a warehouse	

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(continued)

receipt from Maynegrain, the sorghum.

Q. But it was sorghum which was the
subject of a warehouse receipt from B.T.E.,
was it? A. Yes.

Q. And you say you did not know of any
domestic sale of sorghum, with your consent,
in 1977, is that so? A. Yes, I think so.

(Witness stood down)

(Further hearing adjourned to Tuesday,
25th February, 1981.)

10

No.6
Formal dis-
cussion
regarding
questioning
Mrs.Lenos
24th February
1981

IN THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION
COMMERCIAL LIST

No. 13528/78

CORAM: ROGERS J.

COMPAFINA BANK v. BULK TERMINALS &
EXPORTERS PTY. LIMITED & ANOR.

THIRD DAY; TUESDAY, 24TH FEBBUARY, 1981

MR. GYLES: It is agreed that Mr. Rayment and
Mr. Sheller will each have separate cross-
examinations of Mrs. Lenos, but I would be
happy if both sets of cross-examination were
taken in both cases.

20

HIS HONOUR: What is your attitude .to that,
Mr. Sheller?

MR. SHELLER: Your Honour, I can see there is
a lot to be said, in terms of convenience,
for dealing with Mrs. Lenos today. I under-
stand what your Honour says about any problems
that may arise if the evidence is mingled,
and I should perhaps make it plain that so far
as mingling of evidence is concerned, while I
am content that Mrs. Lenos be dealt with as
it were in both cases at once, from that point
on I would expect that either one or other
case proceeds, and from what your Honour said
last week, I would assume that it would be the
Jamieson case that would proceed.

30

MR. GYLES: Yes, we are happy with that, your
Honour.

10 MR. SHELLER: As long as it is plain that I have a right to cross-examine Mrs. Lenos in the Jamieson matter, I understand that Mr. Rayment would wish to cross-examine her in the B.T.E. matter. It may be convenient for her just to give her evidence in chief and then proceed to cross examination, and I do not oppose that. But if your Honour feels that there may be inconvenience in terms of separating them out if there should be an appeal I can see the force of that.

In the Supreme Court Plaintiff's Evidence No.6 Formal discussion regarding questioning Mrs. Lenos 24th February 1981

HIS HONOUR: Well, even without an appeal there may be difficulties in separating it out, just to pick out what is evidence in one and what is evidence in the other.

(continued)

20 MR. SHELLER: I can understand what your Honour says, and I really have no answer to that. What I have said is said simply as a matter of convenience from the point of view of the witness.

MR. GYLES: We are in the difficulty, your Honour, if we take the evidence in chief consecutively, of knowing where one ends and the other begins.. And that is a middle course which does not suffer from the vice your Honour refers to.

30 HIS HONOUR: I will think about it while Mr. Ferrasse is concluded. Mr. Sheller, if you like, I will send you a message when he is finished. I did not intend to be discourteous to you, Mr. Rayment, or to you, Mr. Campbell, but I assume that your attitude is the same as Mr. Sheller's, or am I wrong in that?

MR. RAYMENT: Yes, it is the same, your Honour.

MR. CAMPBELL: I have got no submissions to make on it, your Honour.

EMILE FERRASSE,
on former oath,
CROSS-EXAMINATION (Cont'd):

Evidence of Emile Ferrasse Cross-Examination 24th February 1981

40 HIS HONOUR: Mr. Ferrasse, you are bound by the oath you took yesterday.

MR. GYLES: There are a couple of corrections to the transcript. On p.26, fourth answer, "In fact, we considered only that all the money will be transferred to A.N.Z. Bank of Australia, in Australian Bank"; That should be "an Australian Bank". On p.31, last answer, it describes

(continued)

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(continued)

Mr. Boulmer as a "sub-manager"; that is
not correct.

HIS HONOUR: All right, we will alter that.
Is there anything you want, Mr. Rayment, Mr.
Campbell? (No corrections). Yes, Mr. Rayment?

MR. RAYMENT: Your Honour, I had called three
or four times yesterday for two original
documents. Could I just renew the call?

MR. GYLES: I am instructed we have produced
the documents that my friend has called for,
in so far as they were discovered. The original
of the French document, we simply do not have.

10

MR. RAYMENT: I cannot at the moment take this
cross-examination any further. I propose to
have my instructing solicitor at the moment
take the matter up with my friend's instructing
solicitors first, before I do anything further
about the matter.

HIS HONOUR: Well, you have got no further
cross-examination at the moment. I will
proceed with Mr. Campbell's cross-examination,
and your solicitor had better take it up with
the other side, because I want Mr. Ferrasse
to be finished with. Then I will note that you
wish your instructing solicitor to conduct
some further discussions with the other side,
and subject to any production of the original
French document of which m.f.i. 1 in any part
is a copy - -

20

MR. RAYMENT: The French and English.

30

HIS HONOUR: All right. That is your cross-
examination; if no document comes to light,
then that is that?

MR. RAYMENT: Yes your Honour.

MR. CAMPBELL: Q. Mr. Ferrasse if I could take
you first to the conversations that you had
concerning the terms on which you would be
granting accommodation to B.T.E. or Penmas or
precisely who the borrower was, you gave evidence
yesterday that in September of 1976 there was a
meeting which was summarised in a note dated
22nd September, 1976, which has gone into
evidence. Do you recollect that note? A. Yes,
I remember.

40

Q. The question of some sort of security over
the barley was raised in that conversation,
according to your evidence yesterday. Are you

able to tell his Honour the words that were used when that topic was raised between you and Mr. Jamieson? A. I can't exactly remember the words I used, but I remember the meaning of what I said, and I said that we wanted to have a regular charge or pledge - I don't know, I don't remember the word that we used; normally it should be "pledge" - a regular pledge on the barley; and then I was told by Mr. Jamieson that the barley would be warehoused with Maynegrain, and that we could be able to have a warehouse receipt in our favour, issued by Maynegrain.

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(continued)

10 Q. Prior to that discussion about some sort of security over the barley, what had you and he been talking about so far as the financial accommodation to be provided by the bank was concerned? A. We were told that B.T.E. will need the money to purchase the
20 barley, and then we will have to transfer the money to B.T.E.; and it was agreed that B.T.E. will request, through A.N.Z. Bank, an order on the facility granted.

Q. Was there any discussion between you and Mr. Jamieson about precisely what sums of money were going to be secured by this pledge or charge? A. Eighty per cent of the cost price of about 30,000 tons of barley, which is between \$US ½-million and \$US3-million.

30 Q. At this meeting was there any discussion between you and Mr. Jamieson about the mechanics by which you would get that \$US2.5 million to \$US3 million to Australia to purchase the barley? A. Just act upon the request of the A.N.Z. Bank and transfer the money when B.T.E. request the money to be transferred to them.

40 Q. And at any time was there any discussion between you and Mr. Jamieson that suggested that any sum other than eighty per cent of the purchase price of this barley should be secured by the pledge? A. No, it was only eighty per cent of the barley, and Mr. Jamieson said that he will arrange to put the twenty per cent himself.

Q. When your company takes a pledge over goods, does it generally use some sort of documentation? A. No, it is covered by the general letter of pledge.

Q. I am sorry, what is the general letter of pledge? A. The document signed for the opening of the account in the name of Penmas.

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Q. And is that the same document that
has been referred to as the general conditions?
A. Not the general conditions. There are two
documents: one is the general conditions,
general terms; and the second one is the letter
of pledge.

HIS HONOUR: Show Ex.R.3 to Mr. Campbell.

MR. CAMPBELL: Q. Do you recall Ex.R.3,
tendered yesterday? (Shown) A. Yes, that is
the document.

10

(continued)

Q. That is the only documentary pledge that
you obtained in connection with this barley?
A. That is right.

MR. GYLES: Your Honour, I take it that is not
directed to a question of law.

HIS HONOUR: No, it obviously cannot be.

MR. GYLES: No, but I do not want to be stuck
with that answer later.

HIS HONOUR: Well, he cannot make any admission
of law; all he can say is that it is his
understanding.

20

MR. CAMPBELL: Q. When, in August of 1978, you
discovered that the barley had been shipped
and you had the meeting around 24th August that
you gave evidence about yesterday, in which
you agreed to advance the amount of freight
and give the demurrage guarantee? A. That is
right, but may I correct something? It was
not 24th August, 1978, but 1977.

Q. I am sorry, you are quite right, yes.
At that meeting was there any discussion between
you and Mr. Jamieson about a pledge in connection
with freight and in connection with amounts
payable under the demurrage bank guarantee?
A. No, I can't remember that. For me, it makes
no difference; we had already the pledge on the
barley and the pledge to secure all the money
lent to the borrower.

30

Q. Was there ever any discussion in which it
was said between you and Mr. Jamieson that
the pledge on the barley would secure all moneys
lent to the borrower? A. I don't know if there
was any discussion about that, but that is
normal, when you have a pledge on some goods,
on some assets - -

40

HIS HONOUR: Mr. Ferrasse, I do not want to interrupt you, but the question you were asked was whether there was a discussion, and you said, "I don't know that there was any discussion". That is all you have to say. Just answer the question.

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WITNESS: Yes your Honour. In fact, I don't remember there had been any discussion about that.

10 MR. CAMPBELL: Q. At one stage your bank had advanced some money to someone associated with Mr. Jamieson, to enable sorghum to be purchased in Australia, at the end of 1976, roughly. Do you recall that? A. Yes, we advanced money in respect of sorghum, too.

(continued)

Q. So far as that money advance for sorghum was concerned, that was advanced through the A.N.Z. Bank, was it not? A. Yes it was, through A.N.Z. Bank.

20 Q. And the purchase price for those two amounts of sorghum was one amount of \$US152,512 and one of \$US366,000, do you recall that? A. I can't remember now.

Q. If I could show you this document (shown). A. Yes, I recognise the document.

Q. Does that assist you in recollecting whether the two figures that I gave you earlier were correct? A. The two figures - the ones I can see on the telex, yes, they were correct.

30 Q. And the ones that you can see on the telex are what? A. I can't remember now, from my memory I cannot say.

MR. CAMPBELL: I tender that telex, which is plaintiff's Document No.116. (Objected to by Mr. Gyles as to relevance).

40 HIS HONOUR: Whilst Mr. Rayment is looking at it, on p.11 of the transcript, speaking of Ex.A, I said, "Exhibit A is the plaintiff's document in agreed bundle pp.1-128", not to "28" as appears in the transcript.

MR. RAYMENT: I do not object to the document.

HIS HONOUR: I cannot see the relevance of it at the moment, but I suppose it can be argued later.

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(Photostat copy of telex from
plaintiff to A.N.Z. Bank, dated
30.9.76, tendered and marked Ex.C.1)

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(continued)

MR. CAMPBELL: Q. That money that your bank sent for the purchase of sorghum and that is referred to in that telex, was it ever paid back to the bank? A. Most of the money that was advanced by the bank in respect of the sorghum has been paid back to the bank by Tradex; and I can't exactly state the right figure, but I think there was something like \$500,000 in respect of sorghum which we have not been paid by Tradex.

10

Q. In relation to the amounts that were not repaid by Tradex to the bank, did you have any discussion with Mr. Jamieson concerning what was going to happen to them? A. Yes.

Q. When? A. He said, I can't remember exactly when, but Mr. Jamieson offered us to use the proceeds of the sale on the domestic market to buy more barley and to warehouse the barley with Maynegrain.

20

Q. When did this conversation occur? A. I can't remember exactly when, but it was, I think it was confirmed by Mr. Jamieson later, early in January 1977.

Q. Where did Mr. Jamieson confirm it, in January of 1977? A. He sent a letter to Compafina Bank, I think. I am not sure, but I think.

30

Q. No note was made of that confirmation? A. When there is a letter written by your customer, no note is made.

Q. Which letter are you referring to? A. I can't remember the exact date. Should be early in January 1977, maybe by the 6th, 7th, or something like that.

MR. GYLES: It is p.3 of the bundle.

MR. CAMPBELL: Q. In relation to the insurance of the grain when it was on its way to Kuwait, had you at any time discussed with Mr. Jamieson the need to insure any cargo of grain when it was in transit on the seas? A. We asked, on 24th August, 1976, when we heard that the barley had been shipped, we asked Mr. Jamieson about the insurance.

40

Q. And what did he tell you? A. He told me that he had covered the risk from warehouse, Brisbane to warehouse, Kuwait.

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Q. And what did you understand by that expression, warehouse to warehouse? A. It means that from the warehouse in Brisbane with Maynegrain, to the warehouse of the buyer in Kuwait, all the risks were covered.

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10 Q. In your experience in international grain trading, is that a usual type of insurance to be effected? A. I can't say that. Maybe sometimes it is not warehouse to warehouse. It depends on which basis the sale had been made.

(continued)

Q. What, on occasions a lesser range of risks is covered, is that so? A. Sorry - will you repeat, please?

20 Q. It means a lesser range of risks than a warehouse-to-warehouse cover is provided in international grain trading, is it? A. Yes, sometimes, yes.

Q. So that by having a warehouse-to-warehouse cover, you thought you were getting an ordinary or better than ordinary cover? A. I thought we were covered in the best way.

30 Q. And in accordance with your understanding of a warehouse-to-warehouse policy that you thought you had, would damage by rain to barley on the quay be covered by that policy? A. I can't say. That depends on the statement made by the defendant to the insurance company, to explain exactly how the unloading and the bagging will be done.

Q. Did your belief that the cargo was insured play any part in any decisions that you made subsequently about allowing the letter of credit to be made over to you in the sum of 3.3 million? A. I am sorry, I can't understand the question.

40 Q. When you were deciding to allow the letter of credit to be assigned to you in the sum of \$3.3 million rather than for the full \$4.4 million, did the fact that there was insurance play any part in that decision? A. Not one, not at all.

Q. It didn't make any difference to you whatsoever, whether the grain was insured or not? A. I don't say so.

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(continued)

HIS HONOUR: Just a moment - are you still addressing yourself to the question of the transfer?

MR. CAMPBELL: That decision, yes your Honour.

HIS HONOUR: What he is asking you is, when you took a transfer for \$3.3 million, you were not influenced at all by the fact of insurance? A. Not - I was not, your Honour.

MR. CAMPBELL: Q. What was it that did influence you to accept the transfer to \$3.3 million? A. Because unfortunately we had nothing else to do. I asked the maximum I could ask for Sheik Hamad, and his maximum was the amount just to cover the indebtedness of the defendant in respect to the barley.

10

Q. At the time that you agreed to the letter of credit being transferred for \$3.3 million, it seemed to you that that ought to be just sufficient to cover the liability to the bank? A. Just sufficient, yes.

20

Q. The amount that the Commercial Bank of Kuwait failed to remit to you under the letter of credit, and which you claimed to be entitled to receive is some \$480,000, is it not? A. They should have remitted, yes, this amount.

Q. And at one stage you agreed to an amount of \$40,000 being paid from the proceeds of the sale of grain for certain wages of boat crews, did you not? A. I have a vague recollection of that, but if you can show me some documents I will tell you exactly.

30

Q. There was a problem, was there not, about the crew of a ship that Amerapco had in Kuwait not having received their wages; do you recall that? A. Yes, I think, yes.

Q. If I could show you this document?
A. Yes.

Q. On 11th February, 1978, you had a conversation with an officer of the Commercial Bank of Kuwait, did you not? A. I can't say. I had discussions with people in the Commercial Bank of Kuwait, but I can't say at that date.

40

Q. And you authorised the Commercial Bank of Kuwait to release \$40,000 from the moneys due

to come to you to pay the wages of the Thai boat crew, did you not? A. From the proceeds of the sale of the damaged barley, that is right.

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Q. By the way, what is the total amount which you have received of the barley proceeds?
A. \$US2,380,000.

10 HIS HONOUR: Q. That is including the damaged barley, is it? A. I can't say now, I am sorry, your Honour. I have to look at the account, maybe I will - -

(continued)

MR. CAMPBELL: Q. Mr. Ferrasse, if I could show you first this document, does that assist you to remember that as at December 1977 you had received \$US2,380,000?
A. That is right, yes.

20 Q. If I could show you another document, I suggest to you that in May 1978 you received an additional \$67,509? A. Yes, that is right, I can remember now.

Q. And that was something or other to do with the proceeds of damaged barley, was it not? A. Yes it was.

Q. Of the total amount of the proceeds of the sale of barley, Mr. Jamieson ended up having \$400,000, did he not? A. I am sorry, would you please repeat the question.

30 Q. Of the proceeds of the sale of the barley, Mr. Jamieson ended up having \$400,000, did he not? A. I am sorry. If you can use other words; I cannot understand.

HIS HONOUR: Q. Did Mr. Jamieson get \$400,000 out of this \$2,380,000? A. I was told so by the Commercial Bank of Kuwait.

40 MR. CAMPBELL: Q. That was not the question I was putting. Out of the total proceeds that the Sheik paid or that the Kuwait Supply Company paid, Mr. Jamieson received \$400,000, did he not? A. I was told so by the Commercial Bank of Kuwait, yes.

Q. And the A.N.Z. Bank received \$600,000, did it not? A. I was told so.

Q. Well, in fact you believe it to be so, don't you? A. I believe it, yes.

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(continued)

Q. The Gulf Bank received some \$399,000,
did it not? A. The Gulf Bank?

Q. Yes. A. I don't know.

Q. Could I show you this document again?
A. Yes, it seems so.

Q. Do you know how the Gulf Bank came to get
that sum of money? (Objected to by Mr.Gyles;
allowed).

Q. Do you recognise the document in front of
you, Mr. Ferrasse? A. Yes. 10

Q. What is it? A. It is a document prepared
according to the information we had got from
the Commercial Bank of Kuwait.

Q. And that is the best information that
Compafina Bank has about what happened to the
proceeds of the sale of the barley, is it?
A. Yes, it is.

Q. And you understand, do you not, that
\$399,000 of the proceeds of sale of the barley
went to the Gulf Bank? A. We were told so 20
by the Commercial Bank of Kuwait.

Q. And what is your understanding of how it
got there? A. I don't know.

Q. Has your bank considered starting any
litigation to seek to recover that \$399,000?
A. No.

HIS HONOUR: Q. Well, did you ever inquire why
the Gulf Bank got \$399,000? A. I can explain.
The letter of credit, the validity of the
letter of credit had expired at a certain time, 30
and Mr. Jamieson asked us to authorise the
Commercial Bank of Kuwait not to pay anything
to the bank on the delivery of the 4,000 tons.
It was the fourth delivery; because Sheik Hamad
will never ask the buyer to extend the validity
of the letter of credit if we don't authorise
him to get the full amount for this delivery.

Q. I am terribly sorry, Mr. Ferrasse, you
have lost me. I understand you so far: you
say the letter of credit had expired? A. Yes, 40
your Honour.

Q. And Mr. Jamieson asked that you do what?
A. We authorise the Commercial Bank of Kuwait
not to pay Compafina Bank anything from the

proceeds of the delivery of 4,000 tons to the buyer; and by doing so, we were told by Mr. Jamieson that it was the only way to obtain from Sheik Hamad his request to the buyer to agree for the extension of the letter of credit.

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MR. CAMPBELL: Q. When you had been told that by Mr. Jamieson, did you agree or not agree to the proposal? A. We agreed.

10 Q. Do you remember when this proposal was put to you? A. I can't tell you exactly the date.

Q. Roughly? A. No, I can't remember, but I think there should be some document about that.

Q. The letter of credit was extended not once, but two or three times, was it not? A. I can't say, I am sorry.

20 Q. If you could return to the document in front of you, of the proceeds of sale of the barley, is it your understanding that Sheik Hamad at the end of the business had \$61,000, is that right? A. I could not say from the document.

Q. Well, is it your understanding that it is so, or not? A. I can't say that. We just asked for the transfer, the assignment of the letter of credit, up to \$3.3 million. What was to be done with the balance, I don't know that.

30 Q. So far as the payment of \$600,000 to the A.N.Z. is concerned, your bank still maintains that it is entitled to get that money back, does it not? A. Yes, it still maintains that.

Q. You have some reason to believe that there may have been some discrepancies in the weighing of the barley in Kuwait, have you not? A. I can't say that.

(Plaintiff's summary of information from Commercial Bank of Kuwait, tendered without objection and marked Ex .C.2)

40 Q. Did you go to Kuwait in April of 1978? A. I think it should be at that time, yes.

Q. Could I show you a 3-page document which is 371-373 in the plaintiff's list. Do you recognise that document? A. Yes, I recognise the document.

Q. Is it a document which you wrote? A. No.

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Q. Who wrote it? A. I think it should be Mr. Jamieson.

Q. What was the purpose of your trip to Kuwait in April 1978? A. Just to check if there was anything to be recovered from the barley, and to ask Commercial Bank of Kuwait also for the payment of the \$US480,000 not paid to us out of the first delivery.

Q. There was a problem, was there not, concerning precisely how much damaged barley was in the Sheik's warehouse in the period from February to April of 1978? A. I can't remember now, but I was told that all the barley which could be delivered to the buyer had been delivered already, and the balance was damaged barley. 10

Q. And so far as the damaged barley was concerned, you were asked to consent to the sale of that barley at a particular price, were you not? A. I think so, yes. I can't remember exactly the quantity and the price, but yes. 20

Q. Would it be fair to say that there is still an unresolved question in your mind as to how much barley was in the sheik's warehouse in a damaged condition? A. I can't answer that, I am sorry.

Q. Could I show you this document, which is plaintiff's Document 364? A. Yes.

Q. After reading that document, can I ask you again, is there an unresolved question in your mind as to just how much barley ought to have been in the sheik's warehouse during that period from February to April 1978? A. It seems so. 30

Q. And according to the amount which on your calculations ought to have been there, you ought to have received a final payment of \$US119-and something thousand for the damaged barley, should you not? A. I can't speak about the amount, but I think that - I can't remember the price the damaged barley was to be sold at. If you can show me some documents - - 40

Q. If I could show you this document, it is plaintiff's Document 362? A. Yes, I remember.

Q. (Approaches witness) This is a telex which your bank sent to Gulf Fisheries, is it not,

on 3rd May? A. That is right.

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Q. It refers at one stage to a certain amount which, according to the survey report, ought to be in the sheik's hands, as being valued at \$130,702 and then talks about a "deduction made of the counter-value". Could you explain that term "counter-value"?

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10

A. Yes, counter-value means the same amount, expressed in U.S. dollars. That is counter-value.

Q. This counter-value was the U.S. dollar equivalent of the amount of certain expenses which were said to have been incurred in connection with the grain in Kuwait, is that right? A. That is right.

(continued)

Q. Do you know what those expenses were?
A. I am sorry, I can't say.

20

Q. Have you made any inquiries what they were? A. I think Sheik Hamad said that in fact, as he has been the sponsor of the defendant in Kuwait, he was responsible for some money to be paid - wages, everything, he was responsible for that - and maybe that was, too, for the costs of the salvage of the barley.

Q. Did you ever ask for an accounting of what those expenses were? A. I think I asked the defendant for some accounting, yes.

Q. And did you get it? A. I can't remember now.

30

Q. Even after these expenses had been deducted, you thought you ought to receive approximately \$US75,000 from the sale of the barley in the warehouse? A. Yes, it says so in the telex.

Q. And did you receive that amount? A. We received some amount; I can't tell you exactly if it is exactly this amount or something less, I don't know, but we received some amount.

Q. And you received, I think, you told me earlier in evidence, \$US67,509? A. Maybe that.

40

Q. Did you ever seek to find out the explanation for the difference between the \$75,000 that you thought you ought to receive, and the \$67½-thousand that you in fact received? A. I can't say now.

Q. There has been put into evidence certain correspondence with the people who you thought were

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the insurers of the cargo on its way to Kuwait. Do you recall seeing those documents? A. I don't understand, sorry.

Q. Do you recollect seeing documents which have been put into evidence, which is correspondence with the insurers who you thought were insuring the cargo on its way to Kuwait?

HIS HONOUR: Seeing them now, or at the time, or when?

10

MR. CAMPBELL: Q. At any time? A. Yes, I think we had. I had the occasion to see some documents.

Q. Have you had occasion to consider the amounts that have been claimed from the insurers in those documents? A. I should say so, yes; I think yes.

Q. And a claim has been lodged by your bank for \$US596-odd-thousand, do you recollect that? A. If you show me the document, I can tell you. Now I can't remember the amount.

20

Q. Pages 117 and 118 in Ex.A (shown). A. Yes.

Q. And that still seems to you to be the appropriate amount to have been payable by the insurers in relation to this cargo if there had been any enforceable insurance? A. I should say so, yes.

Q. In November of 1977 the bank agreed to the sheik receiving \$600,000 of the proceeds of the barley sale in preference to the bank, did it not? A. That is right.

30

Q. What led to that agreement being reached? A. Sorry - what?

Q. What led to that agreement being reached?

HIS HONOUR: Why did you agree to it? A. I agreed, just to obtain the extension of the letter of credit.

MR. CAMPBELL: Q. So when I was asking you earlier about the \$390-odd-thousand which Gulf Bank ended up with and which you said arose from an agreement to extend the letter of credit, is that the same agreement that led to your agreeing to the sheik receiving priority for \$600,000, or a different agreement?

40

A. I think it is the same agreement. I was never told that we have to advise the Commercial Bank of Kuwait not to pay anything to the bank on this delivery for payment to give priority to the Gulf Bank. I was told only that Sheik Hamad wanted only for the Compafina Bank to give him priority on the proceeds of this delivery.

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10 Q. In your experience, Mr. Ferrasse, is that a usual request to be made? A. Sorry?

Q. In your experience, is that a usual request to encounter in international commerce?

(continued)

HIS HONOUR: Well, let us assume it is unusual; so what?

MR. CAMPBELL: It might go to foreseeability, your Honour.

20 HIS HONOUR: Well, foreseeability I would have thought would depend on whether that is the sort of thing you expect to happen if you export to Kuwait. It might not be usual in England or the United States; it may happen every day in Kuwait for aught I know. Isn't that right?

MR. CAMPBELL: Not altogether.

HIS HONOUR: Well, the question asked was not objected to, so I suppose you can have it answered; but you see the point I am making.

MR. CAMPBELL: I see your point, your Honour.

(Question marked read back)

30 WITNESS: No, it is not usual, but nothing was usual in this case.

MR. CAMPBELL: Q. Have you had any experience in dealing with financing international trade to Kuwait before this case? A. No, not one.

Q. Do you regard yourself as a banker who has a wide experience in international trade? A. Yes, I think so.

40 Q. Had you heard, in the course of talking with contacts in the banking world, that this was the kind of thing that might go on in Kuwait? A. I was not told so; I did not inquire about that. I think it is a matter of common sense, that is all.

Q. I am sorry, what do you think is a matter of

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Common sense? A. That we could foresee many difficulties and many risks in signing such a sale contract to Kuwait, on these conditions.

Q. In December 1977 your company complained to the A.N.Z. Bank, did it not, that it had left at Mr. Jamieson's disposal the proceeds of some 5,250 tons of sorghum?

A. Might be.

Q. And that amount that the proceeds referred to was an amount of \$518,000, was it not? A. If you show me the document, I will be able to answer. 10

Q. If I could show you plaintiff Documents 142 through to 145. (Approaches witness)

First of all, do you recognise those telexes?

A. I can't say I recognise, but I have no reason to doubt it was not sent by the bank. It was sent by the bank, yes.

Q. If you could read through all the documents. A. Yes. 20

Q. As at December 1977, your bank was asserting to the A.N.Z. Bank that it was entitled to be repaid that sum of \$US518,000 resulting from local sorghum sales, wasn't it? A. That is right.

MR. GYLES: Your Honour, those telexes are in Ex.A.

MR. CAMPBELL: Q. Is that a claim that your company still maintains? A. I can't answer the question now. 30

Q. Who would be in a better position than you, if anyone, to answer the question?

HIS HONOUR: I think it is a matter of he is saying he did not understand the question. If you could just go back to it.

MR. CAMPBELL: I am sorry, I thought he said he could not answer the question now.

Q. The question was, does your bank still maintain that it is entitled to be repaid by the A.N.Z. Bank \$518,000 which were the proceeds of local sorghum sales? A. I would have to consider this question, because that is a question of the case of proceedings 40

against A.N.Z., and I can't tell you now if I would maintain this request or not.

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Q. Now that is the same proceeds of local sorghum sales which were ultimately used to purchase some of the barley that this case is about, isn't it? A. I am sorry, I don't understand the question. If you could repeat it, please.

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10 Q. The \$518,000 proceeds of local sorghum sales that are referred to in the documents that we have just been discussing is the same as the proceeds of local sorghum sales which was used for purchase of barley, that this case is about, is it not? A. It should be, but I can't answer this question. I have to consider all the accounts for that.

(continued)

20 Q. If we can go back for a moment to Kuwait, there was considerable delay in the ship, the "Bellnes", being unloaded, was there not?
A. I forget if there has been some delay.

Q. The ship was waiting for a month or thereabouts at the port after it arrived, to get a berth, was it not?

MR. GYLES: I object to the question in that form. It is apparent Mr. Ferrasse was not there and cannot answer it from his own knowledge, nor can he really be asked to make admissions about it.

HIS HONOUR: Yes.

30 MR. CAMPBELL: Q. You went to Kuwait for the first time in connection with this transaction at some stage in September 1977, did you not?
A. Yes, that is right.

Q. Do you remember when in September it was?
A. I can't remember, it was by the end of September 1977.

40 Q. If we could go back to the earlier sorghum transaction, the A.N.Z. Bank held certain warehouse receipts on your behalf, did it not? A. About the sorghum?

Q. Yes. A. Yes, but warehouse receipts issued by B.T.E., not by Maynegrain.

Q. Yes. Was the A.N.Z. Bank ever notified by you that it had to approve the release of the grain pursuant to the warehouse receipts that it held? (Objected to by Mr. Gyles; rejected).

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Q. Are you aware whether any of the sorghum in relation to which warehouse receipts had been issued by B.T.E. was in fact held by Maynegrain? A. No, I didn't notice so.

(Short adjournment)

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MR. RAYMENT: Q. Have you read the documents discovered by the plaintiff bank in these proceedings, your bank in these proceedings? A. Yes.

Q. Had you seen them here in Sydney, the originals of them? A. No, not in Sydney. Maybe a few of them, but not all of them. 10

Q. Did you see them before they left Geneva to come to Sydney? A. Yes, I did.

Q. And that is when you have read them, is it, when they were in Geneva before they came to Sydney? A. Yes, but I can't say all of the, part of them.

Q. You saw all of them, did you, before they came to Sydney? A. Not all of them. 20

Q. Does the same apply to the proceedings against Mr. Jamieson, the other case, did you read all the discovered documents in that case?

HIS HONOUR: He said he didn't read them all.

MR. RAYMENT: Q. Did you read some of the documents in that case, some or all of the documents in that case? A. Yes.

Q. Did you read them in Geneva before they were sent to Sydney by the bank? A. Yes.

Q. Among the documents which you read, did you see English translation of French documents which were themselves - that is, the translation discovered by the bank? A. Maybe, if you show me. 30

Q. I will show you one, for example, did you see that one? A. No, I am sorry, I didn't have a look at this one.

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Q. But did you see translations typed like that in English of French documents produced by the bank? A. Would you please repeat the question?

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10 Q. Did you see documents typed like that one, being English translations of French documents produced by the bank? A. I am not sure, but I think so, yes - some.

(continued)

Q. Were those translations prepared all by one person, so far as you are aware, or were they prepared by a number of people? A. I don't know, I did not ask myself for any translation, so I can't say.

Q. You were aware that somebody wanted a translation in Sydney of the documents, were you not? A. Yes.

20 Q. And someone in the bank made arrangements for that to be done, either inside the bank or outside the bank? A. Yes, I should say inside the bank, normally.

Q. Did you notice that all, or almost all of the translations were typed on a typewriter similar to the type face I have just shown you on the document in front of you? A. No, I can't say I took notice of that.

30 Q. I will show you some more. Have a look at these documents which I show you. Those appear, do they not, to be translations typed on the same typewriter as the document I first showed you, translations of the bank's documents in French? A. No, I can't say. I did not have a look at these documents before.

Q. But the typewriter looks to be the same to you, doesn't it? A. Maybe, but I can't say if it was typed in the bank. If it was done by the bank, I can't say.

40 Q. No, it may have been done inside or outside the bank, but I think you said before that you thought it was done inside the bank? A. Normally it should be, but I can't recognise the type face.

Q. Did you bring with you when you came to Sydney any copies of the documents which have been discovered by the bank in either these

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proceedings or the proceedings against
Mr. Jamieson? A. I think I brought some,
yes.

Q. Did you bring any copy of the French
version of the 22nd September, 1976 minute?

A. I can't say, but I was asked to bring
with me the original of the documents
discovered by us.

Q. They were in Geneva when you came to
Sydney? A. Yes.

10

Q. And you brought them with you? A. Yes.

Q. All of them, did you? A. All the
originals we could find.

Q. Did the bank keep photostats of those
documents? A. Before I brought the original
here, yes.

Q. Did you bring any photostats with you?
A. No.

Q. Was that the first time the original
documents had been brought to Australia, or
had they been here before? A. Should be
the first time.

20

Q. I show you what has been produced by
your solicitors, the original French version
of the 22nd September, 1976, internal note.
Did you place any writing on that document?
A. Just I initialled it, that's all.

Q. No other writing on that document is
yours? A. No.

Q. That is the initial at the foot of the
page? A. That is right.

30

Q. Do you recognise the writing in the left
hand column? A. Here?

Q. Yes. A. Yes, that is Mr. Boulmer's
initial.

Q. And you recognise his initials, do you?
A. Yes.

Q. At the top of the document there are two
initials? A. Yes, Mr. Pfeiff the Chairman,
and Mr. Boulmer, the second one.

40

Q. I think PB is there above the initials

you have identified as Mr. Boulmer's?

A. Yes, that is right.

Q. And Mr. Pfeiffer's initials? A. JP.

Q. Are handwritten. Did you write those initials? A. No, is not my writing.

Q. Have a look, if you would, at the next document I show you, which is the original of the discovered translation of the document you have just seen. First of all, it appears to be typed on the same typewriter, does it not? A. Yes, it looks so.

Q. And on the same paper? A. It looks so.

Q. It is a translation which was prepared for the purposes of this case, is it not?

A. I should say so, yes.

Q. And there is no writing on that document itself? A. Not one.

Q. Look if you would, at m.f.i.l, which you identified yesterday as being a photostat of the French version of the note and I think you identified it yesterday as the original of the English version. Do you see any differences between the French note interne, which is photostated there, and the original French note which has writing on it? A. Would you repeat the question?

Q. Do you see any difference between the top document in m.f.i.l and the French version of the note? A. Yes.

Q. What are the differences? A. There is no initial on the photo copy.

Q. Do you recall being asked yesterday by Mr. Gyles "Is that the original of the English translation" and you were then, I think, shown the bottom document in m.f.i.l. Just turn that over, if you would. You were then, I think, shown the document which you now see, the lower document, and you said "I think so". Then you were asked to look at the top document, if you turn it back, and you were asked "Is that a photostat of the French original" and you said "Yes, it is" and then these documents were marked for identification one. The copy of the French version of the minute, you will agree, has no handwriting on the left hand margin? A. That is right.

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Q. And has no initials at the top? A.
That's right.

Q. And has no initials of yours on it?
A. That is right.

Q. So that the photostat was taken before
those marks were made upon the French
version of the note (Objected to: rejected).

Q. You would understand, would you not,
that if you were correct in identifying the
French note as a copy of the original French
note interne that was a photostat taken
before the writing was put upon the original
of the French note (Objected to: rejected).

10

HIS HONOUR: Q. Was the photostat of the
French document which you said was a photostat
of the original taken of the other document
that you have in front of you? A. Yes, I
can answer the question. Every time you make
internal notes you made copies or photocopies
at the same time. The photostat copies of
the copies are filed and the original one
typed is initialled and submitted to the
members of the management or the committee,
the loan committee.

20

MR. RAYMENT: Q. Have a look, again, if you
would, at m.f.i.l. The French version has
the No.75 written at the top, does it not?
A. Sorry?

Q. The photostat of the French note has
the number 75 at the top of it, does it not?
A. Yes.

30

Q. And that is the discovery number of the
original French document, is it not, also
written in pencil? A. there is 75.

Q. Who wrote the number 75 on the top of
m.f.i.l.? A. I don't know.

Q. The two original documents which are
before you there were prepared by you at the
same time, were they not, and typed by the
same typist? A. What do you mean by the
two original -

40

Q. The French original and the translation?
A. Yes, I can't say that. I don't think the
translation was prepared at the same time as
the original, I don't think so.

Q. If the translation was prepared at the same time as the original, the French original was prepared well beyond the date of 22nd September, 1976 which it bears, wasn't it? (Objected to: rejected).

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Q. There was no occasion to prepare any English translation of any document on 22nd September 1976 was there? A. No, no reason.

10 Q. And that occasion only arose after proceedings were commenced in 1978? A. Sorry?

HIS HONOUR: Q. The need for preparing the English translation only came about when this case was started? A. I should think so, yes.

(continued)

MR. RAYMENT: Q. When did Mr. Boulmer leave the bank? A. I cannot say exactly.

20 Q. Approximately? A. Approximately should be some time early in '79, something like that, or about the end of '78. I can't tell you exactly.

Q. Were you present when he initialled the notes, the French version of the note? A. I was at the bank but I was not present when he initialled.

Q. And you can't tell us when it was that he initialled that document? A. May be the same day or the day after.

30 (Original of note of 22nd September, 1976 in the French language tendered without objection and marked Exhibit R10)

(Original of note of 22nd September, 1976 in English tendered without objection and marked Ex.R11)

(Photostat document of note of 22nd September 1976 in French language (formerly part of m.f.i.l.) tendered without objection and marked Ex.R12)

40 (Photostat of note of 22nd September, 1976 in English (formerly part of m.f.i.l.) tendered without objection and marked Ex.R13)

Q. Is your understanding, is it not, that a note of the 22nd September meeting is of importance in this case? A. Yes, I realise that.

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Q. With your initials on it dated 22nd September, 1976 the document appears, on its face, to be a contemporaneous note of 22nd September 1976, does it not?
A. To be?

Q. It appears on its face to be a document which came into existence on 22nd September 1976? A. that is right.

Q. You agree with me, do you not, that the English version of the document did not come into existence on 22nd September, 1976? A. I should think so, yes.

10

Q. Do you now think that the two documents may, in fact, have come into existence together, the English version and the French version of the note of 22nd September, 1976? (Objected to).

HIS HONOUR: Q. Initially, you said that you thought the English translation was prepared later than the French original?
A. Yes.

20

Q. Do you now wish to say that it may have been prepared at the same time or do you adhere to what you said earlier, that it was prepared later? A. No, I think that the translation in English was prepared later.

MR. RAYMENT: Q. But you are not sure? A. I should think so - I am not sure, but I should think so.

30

Q. So it is possible, is it, that the two documents came into existence at the same time? A. No, absolutely not.

Q. On 1st September, 1977 you, as the manager of the bank, gave a favourable recommendation for this cereal loan, this barley loan to be made to Mr. Jamieson, did you not? A. I can't understand the question, I am sorry?

Q. On the 1st September 1977 you made a favourable recommendation concerning the advance of money required for the barley sold to the Kuwait Supply Company, that is so, isn't it?

40

(His Honour indicated he did not understand the question and after discussion question was withdrawn)

Q. Would you be so good as to translate the heading of that document first? A. Yes, it is request for new accommodation, for accommodation and amendment.

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Q. The document dated 1st September, 1977 in the top right hand corner? A. That is right, yes.

10 Q. The advance in question was confirmation of the \$1.2 million advance, was it not? Perhaps you better tell his Honour what is the subject matter of that request? A. Just because it refers that there was a loan in the name of Penmas of \$1,200,000.00 that was for the financing of the purchase by Penmas of the I.S.T. shares and the second thing was the advance on barley, the second which is 1,750,000.00. It was operation of Compafina in the risk because it was syndicate, London.

(continued)

20 Q. So it relates to Compafina's own portion of the total \$3.3 million expenditure of Compafina in relation to the barley as at 1st September, is that right? A. Yes, that is right.

Q. You have made a recommendation under the heading which, translated, means "Management recommendations", had you not? A. What do you mean by recommendation?

30 Q. You have written something beside your initials, have you not? A. Yes.

Q. Would you be so good as to translate what you have written? A. Yes, favourable - this is the sequence of our grain business of which the issue, the outcome should not last a long time since the goods are being sold to Kuwait.

Q. There were other favourable recommendations from management, were there not, noted there? A. That's right.

40 Q. And, finally, the committee of credit met and approved the transaction? A. Yes.

Q. There is no suggestion at all in that note of yours, is there, that there is any disappointment with what may have happened concerning the cargo in its shipment to Kuwait? A. Are you asking me a question?

Q. Yes. A. I can't answer.

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Q. There is nothing shown on the face of that document to indicate any disappointment with the shipment of this cargo to Kuwait? A. You are raising some -

HIS HONOUR: Q. Just answer the question, there is nothing in the document? A. Nothing in the document.

MR. RAYMENT: Q. I show you another document. Do you recognise this as Mr. Boulmer's internal note of 29th August, 1977, that is a general report about Mr. Jamieson and I.S.T. is it not, prepared by Mr. Boulmer on that date? A. Sorry, what is your question now.

10

Q. You agree, do you, that that is a contemporaneous note of Mr. Boulmer's of 29th August, 1977? A. Yes.

Q. Concerning Mr. Jamieson's affairs?
A. Yes.

Q. And it contains a discussion on transactions which he was trying to effect, a sale of the I.S.T. facilities at that time?
A. I can read that, yes.

20

Q. And it says nothing of any disappointment expressed by the bank concerning the shipment of this cargo to Kuwait, that is so, isn't it? A. I am not surprised at that.

Q. That is so, isn't it?

HIS HONOUR: Q. There is nothing in the note?
A. Nothing in the note to show, yes.

30

MR. RAYMENT: Q. That is the fact, isn't it, that there was no disappointment expressed to Mr. Jamieson concerning the shipment of this cargo of barley to Kuwait? A. That is not quite - the disappointment was stated when we spoke to Mr. Jamieson.

Q. You say, on 25th August? A. That's right.

(Document headed Note Interne, dated 29th August, 1977 tendered without objection and marked Ex.R.14)

40

(Note headed Demande D'Anenagenent dated 1st September, 1977 tendered without objection and marked Ex.R.15)

RE-EXAMINATION

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MR. GYLES: Q. (Witness shown Ex.R.15) I would like to ask you about the system of obtaining approval for the disposition of money within the bank at that time - and I mean by that time 1977. Is the form of that document a common form, or is it a standard form, I should say? A. That is a standard form, yes.

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10 Q. Under the headings "Amount" and "nature of loan", each of those two headings, is it customary to include in the material loans already approved as part of the history? A. Yes, it is.

(continued)

20 Q. So far as the present matter is concerned, are you able to recall one way or another whether any part of these amounts had already been approved? A. I think, yes, it was approved before - it had been approved before.

Q. Was there anything new to record in a document of this sort, can you recollect?
A. Yes, that we had to advance more \$550,000 for the freight and also to issue the guarantee, the performance bond in the lighterage, that was the new credit we had to add to the previous one, that was the reason for this application to the Board.

30 Q. I show you another document. Do you recognise that document? A. Yes, I do.

Q. No.2 in that document, does that refer to the barley loan? A. That is right.

(Original demande d'augmentation dated 1st March 1977 tendered: Objected to by Mr. Rayment: admitted subject to relevance and marked Ex.N)

Q. (Witness shown Ex.N) I would like to ask you the meaning of the word "Montant"?
A. Amount.

40 Q. Under the heading 2, does that read US\$1,000,000.00 unchanged? A. Unchanged.

Q. Then No.3 is US\$1,000,000.00 new credit or new borrowing? A. That is right.

Q. The heading "nature of loan" is that the third heading there? A. Yes, nature of the loan.

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(continued)

Q. Would you tell his Honour what you see written beside the figure 2?

A. Financing for 80% of purchase of grains - warehoused in Brisbane, Australia, held by Mayne Nickless.

Q. I don't think you need trouble with the words in brackets? A. I can't translate the words in brackets.

Q. What does the word guarantees mean? How would you translate that? A. Securities. 10

Q. What is under No.2? A. Warehouse receipts issued in our name and held for our account by A.N.Z. in Sydney.

Q. You were asked some questions about your inquiries about doing business in Kuwait of the type here concerned, that is the sale of barley to be bagged and you said it was a matter of common sense. To what were you referring? A. I can explain. I considered first there was a big port congestion in Kuwait, which means that vessels are not authorised to stay a long time at berth and they have to unload the cargo in a very quick way, a very short time. Then I considered also the huge volume that 27,000 tonnes of grain presented. I don't know exactly what the density of the grain, of the barley is, there should be something like between 0.6 or 0.7, the density. It means that 27,000 tonnes of barley presents a volume of something like 40,000 cubic metres, that is a huge volume. It represents a big building already, such a volume, and I was afraid to see the barley unloaded on the quay, lying on the quay, in the open sky - I don't know if it is a good expression, open sky. 20 30

Q. The open air? A. Open air exposed, maybe not to the rain, I was not really thinking of rain because it is not raining as much as in Sydney, but because of the wind, mainly because of the wind. There was no protection for the barley, but it was a very risky venture. 40

Q. The questions you were asked about the request made of you to agree to not receiving payment for one delivery in return for which the sheik's agreement to extend the letter of credit was given. What was the alternative that presented itself to you at that time? A. Not one.

Q. Was the bagging operation complete by then? A. Not completely.

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Q. By the time the letter of credit was due to expire there had been no delivery of the goods under it completed, is that not right? A. Not the full quantity.

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Q. Wouldn't the vendor of the goods have been entitled to not pay under the letter of credit? A. Yes, that is right.

10

Q. The purchaser, I should have said, the purchaser could have refused to pay? A. Refused to pay.

(continued)

Q. You were asked about the recovery of some damaged grain. Did that amount come in according to the documents you have seen after this case started? A. No, before the case started, I think. It was something April or May of 1978, something like that, I can't remember exactly.

20

Q. In any event, after the initial instructions came to Sly and Russell? A. I think so, yes, after.

Q. You were asked this question - I can't give you the precise wording of it, but it was something like this: Were you influenced by insurance when you agreed to a transfer of the letter of credit? A. I was not influenced.

30

Q. No, you said you weren't. Did you have a belief as to whether the goods were insured or not? A. They were insured - I had the strong belief that they were insured.

Q. If you had known they had not been insured, would that have influenced you? A. I am afraid there is nothing I could do then but to accept and try to get as much money as possible from the sale.

40

Q. You were asked some questions about sorghum, the financing of sorghum transactions of Tradax. You were asked whether there was any issue of letters of credit in the case of Tradax? A. There weren't.

Q. You said there were not, there was an agreement from Tradax that they were paid on receipt of the shipping document? A. That is right.

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(continued)

Q. Why did you adopt that modus operandi in the case of Tradax and sorghum and another in relation to the barley? A. Because Tradax is a very big company, well known company, and they are most reluctant to spend money to have letters of credit issued. They think their undertaking is enough.

Q. Whereabouts is their head office? A. I think the head office - Tradax is Swiss company and I think head office should be in the States, it is a very big concern. 10

Q. You were asked some questions about a reference, as it were, that your bank gave to Jebesen's. Did you have any cause to doubt Mr. Jamieson prior to 24th August, 1977? A. Sorry?

Q. Did you have any cause to doubt Mr. Jamieson's integrity before 24th August, 1977? A. No, no reason to doubt. 20

Q. (By leave) I omitted to have the witness translate or speak of some handwriting on the document p.327 Ex.G. The writing is a little indistinct, but is that your handwriting? A. It is mine, yes.

Q. What does it say? A. Let me read the letter, first. We authorise delivery of the bagged barley according to the stipulations of the letter of credit issued by Commercial Bank of Kuwait, dated Kuwait 27th September, Compafina Bank, Ferrasse. 30

(Witness retired)

(His Honour, by consent, ordered that the evidence of Mrs. Lenos should be evidence in this matter and Compafina Bank v. Jamieson. For judgment see separate transcript.)

(For evidence of Mrs. Lenos see transcript Compafina Bank v. Jamieson, p.98)

(The following evidence is taken in oath)

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Compafina Bank v. Jamieson and
Compafina Bank v. Bulk Terminals and
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MARINA MIREILLE LENOS
Sworn and examined:

10 MR. CALDWELL: Q. Mrs. Lenos, can you please state your full name and address? A. Marina Mireille Lenos. My address in France?

(continued)

Q. Yes. A. Alley 11 de la Bediere, Gaillard, France.

Q. I think you are employed as an assistant manager of the Compafina Bank? A. Yes.

Q. When did you first commence employment with the bank? A. In August 1976.

Q. Do you remember having a number of meetings along with other officers of the bank with Mr. Alexander Jamieson in 1976? A. I do.

20 Q. Do you recall a particular meeting taking place on or about 21st September 1976? A. I do.

Q. Can you recall who was present at that meeting on behalf of the bank? A. If my recollection is correct Mr. Ferrasse, Mr. Boulmer, Mr. Jamieson and myself.

Q. During the course of that meeting was a letter of application produced by Mr. Jamieson? A. Yes.

30 (Witness shown the bundle of documents in the Jamieson matter, in particular part of Exhibit D, the document at page 6.)

Q. Do you have any recollection as to when that was received by the bank? A. I believe on the same date.

Q. Do you recall any conversation taking place concerning the securing of the Amerapco loan application between Mr. Ferrasse and Mr. Jamieson? A. Yes.

Q. On that day? A. Yes, I do.

40 Q. Was there any discussion concerning a personal

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guarantee - - (Objected to; question
withdrawn)

Q. Doing the best you can, can you recall what was said concerning the securing that loan to Amerapco? A. Yes, I remember we asked for first preferred mortgages as security and moreover for Mr. Jamieson's personal guarantee.

Q. Can you remember Mr. Ferrasse saying anything about that guarantee? A. Yes, I do. I remember Mr. Ferrasse saying that the bank would obviously request the personal guarantee to be executed in Sydney and enforceable under Australian law because this is where Mr. Jamieson had his assets.

10

Q. Did Mr. Jamieson say anything in response to that? A. He must have said something - (Objected to).

Q. If I could leave that meeting for the time being, could you turn to page 22 of Exhibit D in the Jamieson matter which is now before you; you see there a form of guarantee? A. Yes.

20

Q. Can you say when you first saw the original of that document? A. I first had a glance of it when Mr. Boulmer had it typed at the bank before he left on his trip some time in November 1976 to the Philippines and Australia.

Q. When you saw it on that occasion can you recall whether the typing which presently appears on it was complete? A. Yes, it was.

30

Q. Was there any handwriting on it? A. No.

Q. After that occasion when did you next see the original of that document? A. My recollection is not absolutely accurate; it must have been either some time end December or early January.

Q. Did you say "Some time end December or early January"? A. Yes, end December or early January.

40

Q. In what circumstances did you see it? A. When Mr. Jamieson brought it back signed to us.

Q. When you say us of whom do you speak? A. Of the bank, meaning he handed it over to

Mr. Ferrasse and myself.

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Q. Whereabouts? A. In Mr. Ferrasse's office in Geneva.

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Q. When you and Mr. Ferrasse received the document, did you look at it? A. I did.

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Q. At that time what did you notice about the document? A. I noticed it was marked executed in Sydney as had been requested.

10 Q. Could you return that bundle of documents to his Honour's Associate. Could I come back to the meeting of 21st September 1976 which you have already referred to. During the meeting whilst you were present was the question of a loan for the purchase of barley discussed? A. Yes, it was.

(continued)

20 Q. What can you remember being said about the persons present at the meeting regarding barley? A. I remember Mr. Jamieson wanting us to advance a more substantial quantity of barley than we had done before.

Q. Was a quantity of barley mentioned? A. Yes, approximately 30,000 tons.

Q. Was a figure for a loan mentioned? A. Yes, approximately \$3,000,000.

Q. Was there discussion about the portion of moneys to be spent on the purchase of barley to be lent by Compafina? A. Yes, Compafina - Mr. Ferrasse stated that Compafina would eventually consider lending 80% of the value of the barley.

30 Q. Was there any discussion that you can recall as to the manner in which that loan was to be secured? A. Yes, Mr. Ferrasse said that Compafina Bank had to have the barley pledged to it, pledged to the bank.

40 Q. Was there anything further said as to the mechanics of the arrangement of that pledge? A. Yes, Mr. Jamieson suggested himself that the barley would be held by a third party and the name Mayne Nickless - he named Mayne Nickless at the time. Mr. Ferrasse said he would get information on the storekeeper and if we were satisfied with the information obtained we would eventually consider it.

Q. Was there anything further said about the proposed arrangement with Mayne Nickless? A. Yes,

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(continued)

Mayne Nickless was to deliver warehouse receipts which would be held by the A.N.Z. Bank on our behalf and the draw downs would be made through the A.N.Z. Bank.

Q. Was anything said about the release of the barley by Mayne Nickless? A. Yes, Mr. Ferrasse said at that stage the barley could only be released upon the bank's instructions.

Q. Was the subject of insurance discussed at that meeting? A. Yes, Mr. Jamieson assuring 10 that the insurance would be taken care of.

Q. Could I then leave that meeting and go to a later meeting. Were you present at a meeting with Mr. Jamieson around the middle of 1977? A. I was.

(Witness shown the agreed bundle of documents being exhibit B.T.E. section at page 5)

Q. There is a note at the top of page 5, 14th January 1977; I think that note was prepared by you? A. Yes, it was. 20

Q. Was it prepared some time after 14th January 1977 in response to a request by Sly and Russell? A. It was.

Q. Was it prepared in its original form in English? A. No, not at all. I am sorry, I am not sure I got your question there.

Q. Was this document prepared in its original form in English? A. It was prepared in English intentionally for Sly & Russell. 30

HIS HONOUR: Q. I am still not quite sure. When you first had it typed the very first time was it in English or in French? A. It was in English but it is a contemporary document, it was not written at the time of its date.

MR. CALDWELL: Q. Can you recall the discussion with Mr. Jamieson that took place on 14th January? A. Yes.

Q. Who was present? A. Mr. Ferrasse and myself.

Q. Was Mr. Boulmer present or not? A. I don't 40 recollect whether he was present or not.

Q. Can you remember what was said regarding the barley at that discussion? A. Yes, we had

noticed that upon checking our figures that we were financing 100% of the barley purchases instead of the 80% agreed upon and I remember that we showed our figures to Mr. Jamieson. We then agreed that he would put at the bank's disposal without any further disbursements on the bank's part the quantity needed to help us fall back on our feet and revert to the original 80% financing.

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10 Q. Was there any further discussion about the arrangements by which the loan was to be secured or was being secured? A. You mean for the barley?

(continued)

Q. Yes. A. Well, everyting had been said on the subject; the barley was pledged to us; there was no further discussion on the security of that barley.

20 Q. Subsequently in 1977 did you attend a number of meetings at which the possible sale of the barley was discussed? A. Yes.

Q. Did Mr. Jamieson attend at any of those meetings? A. Yes, some of them.

Q. Can you state as accurately as you can what was the date of the first meeting at which Mr. Jamieson attended? A. If my recollection is correct it must have been some time end of May.

Q. Who was present at that discussion? A. I think Mr. Barki came along, Mr. Ferrasse, Mr. Boulmer and myself.

30 HIS HONOUR: Which Mr. Barki? A. The son.

MR. CALDWELL: Q. What is his name? A. Gerard Barki.

40 Q. Can you say what was said during the course of that discussion? A. I remember Mr. Jamieson saying that he had cancelled the previous contract or previous sale that he had made to one of the big grain dealers - Cook, I think - because he did not think that the price was right and he thought he was going to sell his barley for a better price for another destination.

Q. Did he say to which country that first sale was proposed? A. I believe it was Iran.

Q. Did he discuss the details of the replacement sale? A. He did. He said he was hopeful to sell

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his barley to Kuwait.

Q. Did he mention the terms on which that sale was proposed? A. I am not sure he did on that particular day, but he must have done so either on that day or some time later.

Q. Can you recall a later meeting? A. Some time in June probably.

Q. At that meeting can you recall who was present? A. The same persons again, Mr. Barki, Mr. Jamieson, Mr. Boulmer, Mr. Ferrasse and myself. 10

Q. At that meeting was there further discussion about the proposed terms of sale? A. Yes, Mr. Jamieson said that the sale to Kuwait at an interesting price was conditioned to the fact that the barley was to be sold in bags.

Q. Was anything said in relation to that by Mr. Boulmer or Mr. Ferrasse? A. Mr. Ferrasse objected that the bagging would cause serious problems.

Q. Was anything further said as to that? A. Yes, the bank demanded that before the grain could be released we were to receive a letter of credit in Mr. Jamieson's favour lodged with our bank or at least notified through our bank. 20

MR. CALDWELL: Q. Was there any discussion at that time as to the terms of the letter of credit? A. Yes, the letter of credit was to be negotiable against usual shipping documents for barley in bulk. 30

Q. Subsequent to that were there any later meetings concerning sale of the barley with Mr. Jamieson himself? A. No, Mr. Jamieson was represented subsequently by Mr. Barki.

HIS HONOUR: Q. The same Mr. Barki? A. The same Mr. Barki, your Honour.

MR. CALDWELL: Q. Towards the end of June was there a meeting with that Mr. Barki? A. I think there was.

Q. What was the date of that meeting as best you can recall? A. I am afraid I do not recall a precise date. 40

Q. I hand you a document. Is that a document prepared by you? A. Yes.

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Q. Was it prepared at the time of the date it bears? A. It was.

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(Document tendered in the B.T.E. matter;
objected to by Mr. Sheller)

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HIS HONOUR: There is no objection to the tender of the document in the action against B.T.E. and accordingly it will be admitted as against that company. The objection is taken to its admissibility on the ground of relevance in the action against Mr. Jamieson. Having regard to the order I made by consent that evidence in one action will be evidence in the other I propose to admit the document. The document will be marked as Ex.N in the B.T.E. matter. The document in French will be Ex.N1 and for the moment the French translation will be marked Ex.N2 and if desired may be replaced by a mutually agreed document.

(continued)

20

MR. CALDWELL: Q. Can you now recall the date of the conversation which took place with Mr. Barki late in June 1977? A. Yes, 29th of June.

Q. Who as present at that conversation?
A. Mr. Boulmer and myself.

Q. Can you remember where Mr. Ferrasse was at that time, whether he was there or away?
A. He was away at the time.

30

Q. Can you remember what was said in the course of that discussion? A. Yes, the letter of credit to be received was discussed and the issue of a performance bank -

Q. Did you say performance bond? A. Performance bond, I meant bond, in favour of the buyer in Kuwait as discussed.

Q. Was there any discussion as to the price of the barley at which the letter of credit would be opened? A. Yes, the price of \$160 per metric ton was advanced.

40

Q. Subsequent to that meeting did Compafina receive an enquiry by telex from Jepsens Shipping Company regarding Mr. Jamieson? A. Yes.

Q. (Witness shown p.171, part of Ex.B in the B.T.E. matter). Is that a telex which you recognise? A. I do.

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Q. Were you responsible for its despatch?

A. Yes, I was.

Q. At the time of the sending of that telex had there been any changes to the arrangements which were discussed regarding the letter of credit that you have referred to as taking place at the meeting of 29th June, 1977? A. No change to what was said.

Q. (Witness shown Exs.D and E in the B.T.E. matter). Could you first look at Ex.D which is the letter dated 3rd August, 1977. Is that a letter which you sent on behalf of the bank? A. I did. 10

Q. Would you then look at Ex.E, the telex of 16th August, 1977. Is that a telex which you sent on behalf of the bank? A. I did.

Q. At the dates of those communications had there been a change in the arrangement regarding the letter of credit which you have described as taking place on 29th June? A. No change. 20

Q. Subsequently in August 1977 did you go on holiday? A. I did have a few days, yes.

Q. Do you remember the approximate date of your return from holiday? A. Sometime after the 25th.

Q. Of August? A. Of August.

Q. On your return were you told certain things by other officers of the bank regarding the shipment of barley? A. Yes. 30

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CROSS-EXAMINATION

MR. SHELLER: Q. At the present time you are employed by the Compafina Bank? A. Yes.

Q. Are you employed at the present time in Geneva? A. Yes.

Q. When were you first asked to recall what had happened at the meeting on 21st September, 1976? A. I'm not sure I got your question right.

HIS HONOUR: Q. When was the first time you were asked to remember the events of 21st September? A. I think in the course of the 40

interrogatories or sent to us by Sly & Russell probably.

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MR. SHELLER: Q. Was it last year or this year or sometime before last year? A. I can imagine last year.

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Q. Was it before last year? A. Could have been. I can't recall the exact date.

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Q. Could it be right back in 1979 you were asked to recall what had happened on 21st September, 1976? A. It could have been, I don't remember.

(continued)

Q. Was any record kept of what occurred at that meeting? A. Well, I had the letters that were written at the time.

Q. Was there any other record, do you remember? A. I do not remember.

Q. (Exhibit 9 shown). You will see in front of you two documents, one in French and one in English. Do you see that? A. Yes.

20

Q. Have you seen either of those documents before? A. Yes.

Q. When did you first see those? A. When they were typed and on the date mentioned on the documents.

Q. That is the French document you are looking at? A. Yes.

Q. Is that when you first saw that? A. Yes.

Q. On 22nd September, 1976? A. Yes.

30

Q. What about the English one? When did you first see that? A. When it was required by Sly & Russell.

Q. When was that? A. Maybe last year.

Q. Or the year before? A. Or the year before

Q. You just do not remember? A. No.

Q. Who prepared the document in French? A. Mr. Ferrasse.

Q. And you saw it after he prepared it? A. Yes.

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Q. Is it an accurate account of what occurred at the meeting? A. Yes.

Q. Would you look at it carefully please. Read it carefully? A. Yes.

Q. You have read the note in French? A. Yes.

Q. And is that an accurate record of what occurred at the meeting on 21st September, 1976? A. Yes.

Q. Were you present on 21st September, 1976 throughout the time on that date that Mr. Jamieson was meeting with officers of the Compafina Bank? A. Yes, I believe I was.

10

Q. Would it be correct to say that there was more than one meeting on that day? A. There could have been.

Q. What is your recollection? A. That there was more than one meeting.

Q. Is that document that you have been looking at an accurate record of what occurred at all the meetings on that date? A. I remember that Mr. Jamieson was asking for more than the 2.5 or 3 million mentioned in that lot.

20

Q. Anything else? A. Not that I can remember.

Q. At the bottom left-hand side of the note in French there appears to be a sort of initial in ink, do you see that? A. Yes.

Q. Do you recognise that initial? A. "E.F." you mean?

Q. It could be E.F. Whatever it is it is over the typing, "E.F./M.L."? A. Yes.

30

Q. Do you recognise that initial? A. It was the typist initials.

Q. It is not Mr. Ferrasse initial? A. Oh, the first one, yes.

Q. The ink writing over the top? A. The ink writing is Mr. Ferrasse's.

HIS HONOUR: Q. I want to be quite sure that we understand each other. What Mr. Sheller was asking you was was there anything else that

40

occurred at the meeting not just in relation to barley transaction but in relation to any transaction that Mr. Jamieson was discussing with the bank at the meeting or meetings of 21st September? A. I think that note covers about everything that was said.

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MR. SHELLER: Q. Would you look at the document Ex.O, and tell me if you have ever seen that before? A. Yes.

10 Q. When was the occasion that you first saw that document? A. Probably on or about the date it was signed.

(continued)

Q. What date was it signed? A. It reads 27th September.

Q. It reads - I did not hear you, I'm sorry?
A. 27th September.

20 HIS HONOUR: Q. The question was when was it signed. You say it reads 27th September. Am I to understand by that that you think it was signed on 27th September, or what? A. I cannot recollect whether it was signed on the 27th September.

Q. Do you recall when it was signed? A. No.

Q. You have no idea? A. Probably sometime in September.

Q. Were you present when it was signed by Mr. Jamieson? A. I'm sorry can you repeat?

Q. Were you present when it was signed by Mr. Jamieson? A. I do not specifically recall having been present.

30 Q. Do you remember being present at any discussions about an application by a company called Marine Falcon? A. Yes.

Q. When were they? A. Must have been either in August or September.

Q. You have no better recollection than that?
A. No.

Q. Do you recall at those discussions anything being said about this document that you have in front of you, Ex.O? A. Yes.

40 Q. What do you recall being said and by whom?
A. I remember Mr. Ferrasse asking for Mr. Jamieson's personal guarantee and I remember Mr. Jamieson accepting to give it.

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(continued)

Q. Is that all you recall being said about this document? A. I recall that it was asked by Mr. Ferrasse that it should be executed in Sydney; that it was to be on a printed form that was not a Swiss printed form and therefore a French one was chosen to this effect.

Q. Anything else? A. I remember Mr. Ferrasse saying that obviously it would have to be enforceable under Australian law? 10

Q. That is what he said about this document, was it? A. Yes.

Q. Anything else? A. I do not think so.

Q. What happened then? A. The Marine Falcon project did not materialise.

Q. What happened about the document?
A. Nothing happened about the document since the money in Falcon project had no - was not pursued.

Q. Was the document signed by Mr. Jamieson? 20
A. Yes, it was.

HIS HONOUR: Q. We are at the point of time where you say you three are present and Mr. Ferrasse hands it over to Mr. Jamieson and says to him it will have to be executed in Sydney and it will have to be enforceable under Australian law, right? A. Right.

Q. When did you next see it? A. I cannot remember whether he signed it immediately or whether he brought it back. 30

Q. He was asked to have it executed in Sydney you say? A. Yes.

Q. You think he may have signed it then and there? A. He may.

MR. SHELLER: Q. What is your recollection of that? Did he or not? A. I cannot remember whether I saw him actually sign it but I remember that it was the intention of the parties that it be executed in Sydney.

Q. It was not executed in Sydney, was it?
A. No, but the intention was that -

	Q. It was not executed in Sydney, was it?	In the
	A. I have not seen him sign it.	<u>Supreme Court</u>
	Q. Do you not know one way or another whether it was executed in Sydney? A. No, I do not know.	Plaintiff's Evidence No.6
	Q. Do you remember Mr. Ferrasse saying anything about it being executed there and then and the word "Sydney" written in? A. I remember Mr. Ferrasse asking that it should be marked "Sydney" and I remember Mr. Jamieson agreeing to it.	Evidence of Marina Mireille Lenos Cross-Examination 24th February 1981
10		
	Q. Do you remember anything being said about the date? A. No.	(continued)
	Q. Nothing at all? A. Nothing at all.	
	Q. When was it decided not to go on with the Marine Falcon project? A. Very shortly after.	
	Q. When was that? A. Sometime in November maybe.	
20		
	Q. In November 1976? A. I think so.	
	Q. Is that your best recollection? A. Of Marine Falcon, yes.	
	Q. You recall you have given some evidence about 21st September, 1976 and the meetings that were held on that day? A. Yes.	
	Q. Had the Marine Falcon project been dropped prior to these meetings taking place? A. I am not sure, no, probably not.	
30		
	Q. You have given a precise account in evidence about what occurred at the meeting of 21st September, 1976, that is correct, is it not? A. To the best of my recollection, yes.	
	Q. You have also given an account of what occurred at a number of other meetings? A. Yes.	
	Q. But you say to the best of your recollection the Marine Falcon project continued until November, 1976 (Objected to by Mr. Caldwell; withdrawn).	
40.		
	Q. To the best of your recollection the Marine Falcon project was not dropped until November 1976? A. I am not sure of that date.	
	Q. What is your best recollection? A. That the	

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Marine Falcon project was dropped soon
enough after that document was signed but
I cannot say exactly when.

Q. Was the Marine Falcon project discussed
on 21st September, 1976? A. We discussed
tugs and barges and lighterage problems
in Kuwait but whether it was under Marine
Falcon or any other name was immaterial.

Q. How much was the loan that Marine
Falcon sought? A. I remember it was \$4
million.

10

(continued)

Q. Was that application for a loan by
Marine Falcon discussed on 21st September,
1976? A. As I said, a loan of \$4 million
was discussed but whether under the heading
of Marine Falcon or any other heading was
not very important.

Q. Why do you say it was not very important?
A. Because Mr. Jamieson had not decided
which company he was going to use.

20

Q. When did he say that to you? A. That
was said in the course of conversations.

Q. When? A. Probably on the 21st September.

Q. You just do not remember one way or
another? A. No.

Q. You do not remember one way or another
whether the application for a loan by Marine
Falcon was discussed on that date? A. A
loan of \$4 million was certainly discussed.

Q. Was that discussed at the beginning of
the first meeting on 21st September?
A. Could have been, I do not remember precisely.

30

Q. What happened on that day about that
application? A. The figure was found too
high by Mr. Ferrasse and in the course of a
second meeting was brought down to 2.8.

Q. When was the second meeting on that day,
do you remember? A. Could have been in
the afternoon.

Q. Would it be correct to say that there
were two meetings, one in the morning when
the \$4 million application was discussed and
then one in the afternoon when the amount was
brought down? A. Could have been.

40

Q. What to the best of your recollection was said during the course of the discussion about the \$4 million in the morning? A. Mr. Boulmer was more inclined than Mr. Ferrasse to grant the \$4 million. Mr. Ferrasse felt that the figure was too high.

Q. Do you recall anything else being said during that meeting? A. The need for first preferred mortgages, of course.

10 Q. What was said about that? A. That the bank would have to have first preferred mortgages registered in their favour.

MR. SHELLER: Q. Was anything else said during that meeting in the morning? A. The question of the personal guarantee was discussed.

Q. What was said about that in the morning? A. That Mr. Jamieson was to give us his personal guarantee as further security.

Q. For that? A. For this loan.

20 Q. Which loan? A. The \$4 million.

Q. Was anything else said about that? A. The Penmas deal was talked about.

Q. Was anything said about the personal guarantee in the morning? A. That it was to be enforceable under Australian law.

Q. That was all said in the morning, was it? A. I think so.

Q. Including the discussion about the \$4 million? A. Yes.

30 Q. Are you sure about that? A. No, I can't be sure.

Q. Were any documents produced? A. No document produced, except I remember Mr. Jamieson signing opening forms for an account.

Q. That took place in the morning, did it? A. It was either in the morning or in the afternoon.

Q. Was the document you have in front of you, Exhibit O, produced during that morning meeting? A. The printed form was shown, yes.

40 Q. During the morning meeting? A. Yes, probably.

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(continued)

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Q. What is your recollection? A. It could have been. It could have been produced earlier, I can't be sure.

Q. You said there was some discussion during that morning about personal guarantee subject to Australian law? A. Yes.

Q. Do you say that this document that you have in front of you, Exhibit O, which is a guarantee in French, was produced during that discussion? A. It could have been. 10

(continued)

HIS HONOUR: Q. This is a matter of some importance. I know it is difficult to remember but this is not going to help me very much to know that it could have been. If you need a few minutes to think about it, then take your time, but I would like to know one way or the other what your best recollection is? A. I think it was.

MR. SHELLER: Q. Produced during that morning during the discussion about there being a personal guarantee subject to Australian law? A. Yes. 20

Q. Enforceable under Australian law?
A. Yes.

Q. Do you recall what was said at the time this document was produced on that morning?
A. Mr. Ferrasse asked Mr. Jamieson to have it signed Sydney and Mr. Jamieson agreed to it. 30

Q. This all related to the discussion about the application for a loan for \$4 million?
A. Yes.

Q. You will observe that the name Marine Falcon appears on the fact of that document?
A. Yes.

Q. Do you recall anything else being said at the meeting on 21st September 1976 during the morning? A. The subject of the barley financing was also discussed. 40

Q. Anything else? A. I don't think so.

Q. The meeting adjourned for a time, did it? A. Yes.

Q. And resumed in the afternoon? A. Yes.

	Q. Were you present in the afternoon?	In the
	A. Yes.	<u>Supreme Court</u>
	Q. Who else was present in the afternoon?	Plaintiff's
	A. Mr. Boulmer and Mr. Ferrasse.	Evidence
	Q. And Mr. Jamieson? A. Yes.	No.6
	Q. Anyone else? A. I don't remember if	Evidence of
	Mr. Barki was there or not.	Marina Mireille
	Q. What was said during the afternoon?	Lenos
10	A. That the loan of \$4 million was considered	Cross-
	too high by the bank and that it should be	Examination
	reduced to 2.8.	24th February
		1981
		(continued)
	Q. Anything else said? A. No.	
	Q. Were any documents produced during the	
	afternoon, do you recall?	
	HIS HONOUR: Q. By anyone? A. Mr. Jamieson had	
	another letter typed calling for 2.8 instead	
	of 4.	
	MR. SHELLER: Q. When was that produced? A. In	
	the afternoon.	
20	Q. Anything else? A. Well, he signed opening	
	forms for an account.	
	Q. Anything else? A. No.	
	Q. Then the meeting concluded, did it? A. Yes.	
	Q. Were there any further meetings on that	
	day, 21st September 1976? A. No.	
	HIS HONOUR: Q. Your best recollection is that	
	the printed form Ex.O, was produced during the	
	morning meeting? A. I think so, yes.	
	Q. Is that your best recollection? A. Yes, it is.	
30	Q. Mr. Ferrasse asked that that document should	
	be signed in Sydney? A. Yes. (Objected to by Mr.	
	Caldwell).	
	WITNESS: Marked, yes.	
	HIS HONOUR: Q. To the best of your recollection,	
	did Mr. Jamieson sign the document then and there	
	or did he take it again? A. To the best of my	
	recollection he probably took it again.	

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(continued)

Q. When did you next see it? A. I am not sure whether he brought it back on that same day or whether he brought it back later, I can't remember.

MR. SHELLER: Q. (Witness shown Ex.F) When do you say that you first saw that document?
A. Before Mr. Boulmer left for Australia.

Q. When did Mr. Boulmer leave for Australia?
A. He left early November for a trip to the Philippines first and Australia after. 10

Q. You were a sub-manager of the bank at that time? A. No, I had no official title.

Q. What were you employed to do in the Compafina bank in 1976? A. I was assisting the management.

Q. In what way? A. Assisting Mr. Boulmer and Mr. Ferrasse.

Q. In what particular way were you employed to assist them? A. Follow up the files, the customers. 20

Q. Mr. Boulmer was then a director of the bank. Is that right? A. Yes.

Q. Where was it that you first saw this document precisely? A. When Mr. Boulmer gave it to be typed.

Q. "Gave it to be typed"? A. Yes.

Q. What do you mean by that? A. He had a model from the B.N.P. and asked the typist to retype the same document and put Compafina Bank instead of B.N.P. 30

Q. Were you present when this took place?
A. I heard it and I saw it.

Q. You actually heard this being said and you saw it happening, did you? A. Yes.

Q. Did you look at the model? A. I had a quick glance at it.

Q. Why? A. Because Mr. Boulmer was to take it along with him.

Q. Why did you look at it? A. Because I was in charge of that file. 40

	Q. Mr. Boulmer showed it to you, did he?	In the
	A. He did.	<u>Supreme Court</u>
	Q. Did he ask you to express some opinion about it? A. No.	Plaintiff's Evidence No.6
	Q. For what purpose did he show it to you?	Evidence of Marina Mireill Lenos
	A. Because that was the document that had been discussed and that he was supposed to take with him to have it signed by Mr.Jamieson.	Cross-Examination
10	Q. When had that document been discussed?	24th February 1981
	A. During the previous meeting with Mr.Jamieson.	
	Q. When were they? A. One of them was 21st September.	(continued)
	* Q. Were there any others? A. There probably was, but I can't recollect the exact dates.	
	* Q. When you say there probably was, do you recall any other discussions at which you were present about this model document that you were being shown? A. Could you please repeat the question?	
20	(Questions marked with asterisk read by court reporter)	
	WITNESS: No, the discussion was not about the model. The discussion was only about the giving of the guarantee.	
	MR. SHELLER: Q. I asked you about 21st September?	
	A. Yes.	
	Q. You told me what occurred in the morning and the discussion there about a guarantee. You recall that? A. Yes.	
30	Q. You recall saying that during that meeting the French guarantee which you had in front of you was produced? A. Yes.	
	Q. Your recollection is that it was taken away by Mr. Jamieson? A. Yes.	
	Q. I take it it was taken away to your recollection to be executed? A. Yes.	
	Q. That was the only guarantee that was discussed at that meeting, was it not? (Objected to by Mr. Caldwell).	
40	Q. That was the only guarantee that was discussed at the morning meeting on 21st September 1976,	

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(continued)

wasn't it? A. We had this French printed form because we had nothing else -

Q. Would you please answer my question. The only guarantee which was discussed at the morning meeting was the French guarantee, Ex.O, which you were looking at a moment ago. That is right, isn't it? A. Yes.

Q. Mr. Jamieson took that away with him, didn't he? A. Yes.

Q. That is your recollection of it anyway? 10
A. Yes.

Q. There was no other discussion about guarantees on 21st September, 1976, was there? A. This personal guarantee that Mr. Jamieson had agreed with us was intended to be subsequently replaced by an Australian form guarantee.

Q. (Witness shown Ex.O) Is this what you are saying, that the guarantee Ex.O was intended to be replaced by something else? 20
A. Yes, ultimately when the discussions went on and the Marine Falcon project no longer was to take place, obviously the question of a personal guarantee under another heading was discussed.

Q. When were these further discussions?
A. Probably after 21st September.

Q. What is your best recollection? A. I don't remember the dates.

Q. But at any rate your recollection is 30
that they were dates subsequent to 21st September 1976? A. Yes.

Q. Who was present at those discussions?
A. Mr. Boulmer, Mr. Ferrasse.

Q. And yourself? A. And myself.

Q. On how many occasions did they occur?
A. I can't remember the dates.

Q. Was it one, two, ten - what is your best recollection? A. Maybe one.

Q. Do you say that on that occasion there 40
was some discussion about this model guarantee?
A. No, there was no discussion.

	Q. Where did this discussion take place?	In the
	A. There was no discussion since the whole thing was agreed upon, since we knew Mr. Boulmer was leaving for the Far East, that he would be going to Australia and he would be asking, there and then, Mr. Jamieson to sign it.	<u>Supreme Court</u>
		Plaintiff's Evidence No. 6 Evidence of Marina Mireilk Lenos Cross- Examination 24th February 1981
10	Q. As I understood you, you told me that there had been discussions about the personal guarantee after 21st September 1976. Is that right? A. Well, he already obtained this first personal guarantee, but apparently it -	
	Q. After 21st September 1976 were there further discussions about the personal guarantee? A. Yes, there was.	(continued)
	Q. You say Mr. Ferrasse was present. Is that right? A. Yes.	
	Q. And Mr. Boulmer? A. Yes.	
	Q. And yourself? A. And myself.	
20	Q. Anybody else? A. Not that I can remember.	
	Q. Was Mr. Jamieson present at any of these discussions? A. I am not sure he was.	
	Q. To the best of your recollection, these were discussions that took place amongst bank officers? A. Yes.	
30	Q. Isn't it correct to say that when the guarantee, Ex.O, that you have in front of you was produced to Mr. Jamieson by Mr. Ferrasse, Mr. Ferrasse said that he wanted it to be subject to French law? A. There is a difference between "subject to French law" - -	
	Q. But didn't Mr. Ferrasse say that he wanted the guarantee to be subject to French law? A. How can it be subject to French law and still -	
	HIS HONOUR: Q. Did he say that or not? A. Yes.	
	MR. SHELLER: Q. (Witness shown Ex.F) After Mr. Boulmer returned from Australia, when was the first occasion that you saw that document Ex.F? A. Only when Mr. Jamieson handed it back to us.	
40	Q. When do you say that was? A. Either some time end of December or around the 12th or 13th or 14th January.	

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(continued)

Q. Why do you say either one or the other?
A. Because I can't remember whether it was
end of December or early January.

Q. Do you have something in mind that
gives you doubt as to whether it was the
end of December or early January? A. What
I know is that Mr. Boulmer did not bring
it back with him when he returned.

Q. Is your recollection about the matter
based upon your knowledge that Mr. Boulmer
did not bring it back when he returned?
Is that what you are saying? A. Yes, and
Mr. Jamieson being in our offices on 21st
September since he signed opening forms
for a new account, it could have occurred on
that day.

10

Q. Were you present on 21st December 1976
when Mr. Jamieson attended and signed the
documents opening the Amerapco account?
A. Yes.

20

Q. Who was present on that occasion?
A. Mr. Boulmer and Mr. Ferrasse.

Q. Do you recall that that was 21st December
1976? A. Yes.

Q. Is there any record of that in the bank?
A. No, except that the documents show that
date.

Q. To the best of your recollection, what
occurred on 21st December 1976 when Mr.
Jamieson attended at the bank? A. He just
signed the opening forms of his new account.

30

Q. Was anything said? A. Amerapco was
probably again discussed.

Q. Had documents been prepared in the bank
for Mr. Jamieson to sign? A. The opening forms.

Q. Anything else? A. We asked for the
guarantee back.

Q. What was said about that? A. I think
Mr. Jamieson mentioned that he did not have
it with him, but that he would bring it back.

40

Q. Who asked about that? A. Mr. Boulmer.

Q. You remember him asking about it do you?
A. I remember him asking, yes.

	Q. Do you remember what he said? A. He reminded Mr. Jamieson that he had promised to bring a guarantee back.	In the <u>Supreme Court</u>
	Q. Was Mr. Ferrasse present when that was said? A. Yes.	Plaintiff's Evidence No.6
	Q. That document for the opening of the Amerapco account was produced? A. Yes.	Evidence of Marina Mireill Lenos
	Q It was signed by Mr. Jamieson there, was it? A. Yes.	Cross- Examination 24th February 1981
10	Q. Do you recall whether any other documents were signed? A. No.	(continued)
	Q. (Witness shown Ex.D) Do you recognise that document? A. Yes.	
	Q. Is that a document that was signed by Mr. Jamieson on 21st December 1976? A. Yes.	
	Q. Do you recognise the handwriting? A. I recognise his signature and the date written by him.	
20	Q. What about the other handwriting? A. This was a clerk who wrote it.	
	Q. A clerk? A. Yes.	
	Q. Are you sure of that? A. Yes.	
	HIS HONOUR: Q. You will remember Mr. Sheller started asking you some questions about Ex.O, that is, the guarantee in French? A. Yes.	
30	Q. At first you could not remember when the discussion took place, you thought it was in August or September, about Marine Falcon and that Mr. Ferrasse asked for a personal guarantee? A. Yes.	
40	Q. I would be much obliged to you if you could tell me whenever it was that Mr. Ferrasse first asked for that personal guarantee in the French form what was said. He said he wanted a personal guarantee and what was said after that? A. That in order to have it enforceable under Australian law he would not use a Swiss printed form because he did not want it applicable under Swiss law and, therefore, he suggested to use a French form so as not to have to comply to the Swiss regulations as far as personal guarantees are concerned, meaning having them signed and executed in front of a notary, having the wife's	

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approval and so on, and that was agreed upon, so Mr. Ferrasse said, "Would you please have it marked Sydney" to which Mr. Jamieson agreed, since the intention of the two parties was that it should be enforceable under Australian law not under Swiss law.

Q. You said later on in answer to a question by Mr. Sheller that Mr. Ferrasse said he wanted the guarantee to be subject to French law? A. Well, it is not exactly subject to French law. 10

(continued)

Q. What did he say? Did he say that?
A. He was saying that as opposed to Swiss law and therefore, he was using a French formula which did not require its being executed in front of a notary.

Q. Are you saying that he said he wanted it to be subject to French law and enforceable under Australian law? A. Right. 20

(Witness stood down)

(Further hearing adjourned to 10 am.
Wednesday, 25th February 1981)

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IN THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION
COMMERCIAL LIST No.13528/78

CORAM: ROGERS, J.

COMPAFINA BANK v. BULK TERMINALS &
EXPORTERS PTY. LIMITED & ANOR.

FOURTH DAY: WEDNESDAY, 25TH FEBRUARY 1981 30

MARINA MIREILLE LENOS
On former oath:

CROSS-EXAMINATION:

(For examination-in-chief of Mrs. Lenos,
please see transcript in Compafina Bank
v. Alexander Jamieson)

MR. RAYMENT: Q. Mrs. Lenos, would you be so good as to have a look at the document which the officer shows you. Have you seen that before, or the original of it? A. Yes. 40

	Q. There is some writing in the top right hand corner, do you recognise it?	In the
	A. It is my own.	<u>Supreme Court</u>
	Q. And there is some writing in two places at the lower part of the document, one commencing with the words "Prix Fob"; do you recognise that handwriting? A. My own.	Plaintiff's Evidence No.6 Evidence of Marina Mireille Lenos Cross-Examination 25th February 1981
10	Q. And then underneath it there is a rather more faintly reproduced handwriting; do you recognise that handwriting? A. It is my own.	
	MR. RAYMENT: That is m.f.i.3, your Honour, in the B.T.E. proceedings.	(continued)
	HIS HONOUR: Perhaps you might follow the same procedure as Mr. Sheller indicated, that unless otherwise indicated, you are referring to documents in the B.T.E. matter.	
	MR. RAYMENT: Yes your Honour.	
20	Q. Mrs. Lenos, you had a meeting, did you not, with Mr. Barki on both 27th June 1977 and 29th June 1977, about the Barley to Kuwait? A. Yes.	
	Q. And I suggest to you that Mr. Barki was the only person present at those discussions, other than anybody else from the bank? A. No, I was not alone.	
30	Q. You were not alone, perhaps, but Mr. Barki was not accompanied by Mr. Jamieson or any other person at those discussions? A. As far as I remember, yes.	
	Q. Were you alone at either of the two meetings I just referred to? A. No, Mr. Boulmer was also present.	
	Q. At both of them, was he? A. Yes, if my recollection is correct, yes.	
40	Q. Now it is correct to say, isn't it, that during June 1977 you had no meeting at which Mr. Jamieson was present? A. Look, I would like to make it clear that I remember a telex was sent empowering Mr. Barki to represent Mr. Jamieson, and therefore, by deduction, Mr. Barki must have been alone. This is what I can say.	
	Q. Do you have any diary that you keep in	

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(continued)

Compafina Bank? A. No, we are not accustomed to keep diaries.

Q. Do you keep a diary, I am asking you that? A. I do not.

Q. And there is no record, is there, after an appointment has been kept inside the bank, that it was made or that it was attended?
A. No, except that an internal note is issued, and it is not issued after every meeting.

Q. By the way, were those internal notes, in the case of the barley from Kuwait, all put into a certain file of the bank's?
A. Yes, in the corresponding file, of course.

10

Q. Under what heading was that file kept inside the bank? A. Under what heading?

HIS HONOUR: Q. Did you have a special file for the correspondence relating to individual topics? A. Yes, I think it was called "grain business" - in French of course.

MR. RAYMENT: Q. Yes. There was an internal note of 29th June 1977 which you identified yesterday? A. Yes.

20

Q. Did you bring that to Sydney with you, when you came here? A. No, I brought no papers along with me. I was on a vacation before I came as a witness. I had no papers.

Q. You are not aware why that may not have been made available on discovery in this case before two days ago? A. I am sorry, I have no idea.

30

Q. It was with the other papers, was it, kept by the bank, as part of its records, as far as you are aware? A. Oh yes.

Q. You I think said that you saw - could the witness please have the bundle of documents, Exhibit E; I show you page 180 and would you also please look at the next page, which is a note of 2nd January 1977 I think with your initials on it. Did you prepare that note? A. Yes, I did.

40

Q. Does the note at the foot of the next page indicate who typed it? A. No, not at all.

Q. But the "M.L." in capitals refers to you? A. Yes of course. The second one is

the typist's, usually.

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Q. Just have a look, if you would, at that document and read it through?

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A. Right, I read it.

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Q. You see the second last paragraph on the first page, which says in French in effect that "Penmas will be the vendor, so far as concerns sales, and that that will permit moneys to be remitted to Switzerland"? A. This is what it says.

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10

Q. Have a look if you would, at page 201 of the bundle? A. Yes.

(continued)

Q. Do you see that is a telex of the previous day, 5th January 1977. May I suggest to you that the "Cotsa" reference at the top of the telex is the reference for Transcot, Mr. Barki's company? A. Right.

20

Q. Would you have a look at that document, please. It really continues for some three and a half more pages? A. Yes.

(Short adjournment)

MR. RAYMENT: Q. Did you have a look at that telex? A. Yes, I did.

Q. Had you either seen it or heard of it when you wrote the note of 7th January 1977? A. Not at all, this was only seen upon discovery of documents.

30

Q. But you were told, at any rate, prior to 7th January 1977 that Penmas would be the vendor of goods sold through export from Australia? A. Yes, this is said in the note.

Q. That remained your understanding, did it not, that Penmas would be the vendor of goods sold outside Australia? A. Yes.

Q. Which would entail the transaction under which Penmas purchased from B.T.E. as you understood it? A. Yes, more or less, yes.

40

Q. Would you have a look at p.129. Is that a document in the same category as the note of 14th January, 1977 which you told Mr.Caldwell was prepared for Sly and Russell? A. Yes, the only thing I would like to ask, was there any French internal note, is that a translation?

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Q. No. A. Then it is in the same category.

Q. The following page, p.130, is that in the same category, prepared by you for Sly & Russell? A. Here again, was there any French original.

Q. No. A. Then, it is.

(Document 5 at p.15, part of Ex.A, and documents 1 and 2 at p.129 and 130, part of Ex.B, were withdrawn from tender. For judgment see separate transcript.)

10

Q. Would you be good enough to have a look at p.185 in the bundle, which is a note with your initials on it of 27th June, 1977. Would you just direct your attention to the top portion of that note, which deals with 27th June, 1977? A. Yes.

Q. It has, I think, your initials on it? A. Yes.

Q. The note deals, does it not, with a conversation to which you were a party and Mr. Garard Barki was a party? A. Yes.

20

Q. And it commences with a reference to the fact that Mr. Barki was acting as the agent of Mr. Jamieson when speaking to you? A. Yes.

Q. Do you think that that document relates to a conversation that Mr. Boulmer was also present at, is that right? A. Yes, as far as I remember Mr. Boulmer was there to.

30

Q. What about Mr. Ferrasse? A. No, I don't think Mr. Ferrasse was there at the time.

Q. You think he was away on holidays? A. Yes, on holiday or maybe business trip, I don't know.

Q. So you think that at the end of June Mr. Ferrasse was absent from Geneva? A. Yes.

Q. Do you think he came back during July? A. Look, I can't say for sure, but probably less.

Q. And was there by the end of July? A. I think so.

40

Q. That note refers to a discussion in which Mr. Barki told you of a firm offer for the whole of the Barley which was in Brisbane?
A. Yes.

Q. At a price above \$US160? A. Yes.

Q. But for bagged product? A. Right.

Q. Was that conversation with Mr. Barki the first time you had heard of the possibility of sale of the barley in bags? A. Yes.

10 Q. And you think Mr. Ferrasse was not present at "that reference but Mr. Baulmer was present, is that right? A. Let me point out that Mr. Barki, who was in Geneva, did pop in and out of our office and, therefore, I don't think that that was the only opportunity when Mr. Barki was talking to us of bagged shipment and I do remember perfectly having told Mr. Barki in Mr. Ferrasse's office and Mr. Ferrasse's presence.

20 Q. Are we speaking about 27th June?

HIS HONOUR: No, just a moment, you had asked the witness whether that was the first suggestion that she had of the barley being in bags and that is what I understand her to be addressing herself to.

Q. You go on? A. Therefore, in Mr. Ferrasse's present the subject was discussed; therefore, not particularly on 27th June, but sometime before or after.

30 MR. RAYMENT: Q. Either before or after it was discussed in Mr. Ferrasse's presence? A. Yes.

Q. Do you think it was before or after?
A. I can't be sure.

Q. Mr. Barki was, as you say, popping into your office from time to time? A. Yes.

Q. Keeping you informed of developments in relation to the barley, was he not? A. Yes.

Q. And that was during June and July?
A. And August, yes.

40 Q. And you knew from him of the progress he was making about obtaining bagging equipment and bags?

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HIS HONOUR: How does she know whether she knew what progress he was making?

MR. RAYMENT: Q. You were told by him of events as they occurred in relation to bagging and obtaining bagging equipment?

HIS HONOUR: That is my precise point.

MR. RAYMENT: Q. You were told by him that he had done certain things in relation to bagging equipment from time to time? A. From time to time, but this does not prevent the fact that we did not agree to everything he was saying. 10

Q. But he told you that he was taking certain steps to obtain bagging equipment?
A. Yes, but let me say that we had put conditions.

HIS HONOUR: Mrs. Lenos, this is not a fencing match. If you answer his questions your barrister will have an opportunity of clearing up anything later. All you have to do is answer questions and we will clear up any problems later. 20

MR. RAYMENT: Q. Loo, if you would, at this note of 27th June. The second paragraph is to the effect that your bank - and is that you gave your agreement to whatever is necessary? A. Provided -

Q. For the purchase of bags to be imported from Pakistan, as well as the bagging of the cargo, and also pay the freight? A. Provided that a follow-up - (Object to: rejected.) 30

Q. Is the second paragraph to the effect as follows: We give our agreement to do what is necessary for the advance of funds for the purchase of bags to be imported from Pakistan by Mr. Barki as well as the advance in respect of bagging and freight on condition that the letter of credit to be opened by Kuwait being lodged with us? A. Right. 40

Q. That is a correct translation, is it? And that is what you conveyed to Mr. Barki, is it, on 27th June? A. Yes.

Q. And after 27th June you heard from Mr. Barki during June, did you not, or during

June and early July of steps that he was taking in relation to obtaining bagging equipment and purchasing bags? A. Yes, but I would like to mention that there is a follow-up to the note on 28th June.

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Q. We will come to that in a moment.
A. All right.

10 Q. You also noted, did you not, in the last paragraph that Mr. Jamieson was to delay 48 hours before accepting the Kuwait offer, being in negotiation with another buyer who would purchase in bulk? A. Right.

(continued)

Q. So that the 29th June was regarded by you on 27th June as a date on which a contract might be made? A. I'm sorry, I did not get the question.

20 Q. On 27th June you regarded the 29th June as a date on which a contract might have been made? A. Right, yes.

Q. On the following day, you had a telephone call from Mr. Jamieston then in Australia, did you not? A. Yes.

Q. Did you speak to him? A. I think so - maybe I did, maybe Mr. Boulmer did, I can't say.

Q. Either you or Mr. Boulmer? A. Yes.

Q. He said that he then intended to be in Geneva during July? A. Yes.

30 Q. In approximately a week? A. Yes.

Q. That he was hoping to sell to a Kuwait interest on the following day, having received an interesting counter-offer, is that right? A. Right.

Q. And that he was giving power to Mr. Garard Barki to act on behalf of Penmas? A. Yes.

40 Q. At both those dates I suggest to you you did not know the name of the Kuwait Supply Company as a person on behalf of whom negotiations were taking place in Kuwait, is that correct? A. I suppose so, yes.

Q. Indeed, it was not until the following day,

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29th June, that you first heard that name? A. Right.

Q. From Mr. Barki? A. Yes.

Q. And had you been told by Mr. Barki on the 27th and 28th June that Penmas did not yet know the name of the buyer because they were negotiating through a broker who had not disclosed his principal? A. Can you repeat that?

Q. Were you told by Mr. Barki on 27th June that Penmas did not yet know the name of the purchaser because it was negotiating through a broker? (Object to - question withdrawn).

10

Q. Were you told by Mr. Barki on 27th June that Penmas did not know the name of its Kuwaiti purchaser? A. Yes.

Q. And that they were dealing through a broker? A. I can't remember the word broker having been mentioned. I don't know whether a broker existed or not, I can't remember, but anyway, as you can see from the last paragraph of the note of the 27th, there was still at this particular point a possibility of having Kuwait accept the barley in bulk, which would have solved absolutely the problem, so you can see the things we were evaluating from one day to the other.

20

Q. On 29th June you were told by Mr. Barki for the first time, were you not, the name of the Kuwaiti supply company as the buyer? A. Could I possibly have a look at the note of 29th June?

30

Q. Have a look at the French version, Ex.N1, that is your own note following a discussion with Mr. Barki, is it not? A. Yes.

Q. Was it a discussion at which Mr. Boulmer was present? A. Yes.

Q. Then you were told by Mr. Barki the name of the Kuwait Supply Company were you not, on that day? A. On that day, yes.

40

Q. You were given a price of \$160 per metric tonne by Mr. Barki? A. Yes.

Q. You were told that there was to be delivery effected in Kuwait at that price for bagged

goods? A. Yes.

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Q. There was discussion with you on a performance bond of five to ten per cent of the amount of the purchase price, is that right? A. Yes.

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10 Q. You were asked to issue a performance bond in favour of the purchaser guaranteeing both the delivery on board at Brisbane of the barley in bulk? A. Yes.

(continued)

Q. And ultimately, the bagging either on board the ship or on the quay? A. At discharge, yes.

20 Q. You were asked to send a telex to the Al Ahli Bank about that performance bond, were you not? A. No, this was considered, we were not asked to send a telex to the Al Ahli Bank. This was considered at the time we were talking.

Q. But you did send such a telex that day to the Al Ahli Bank, did you not? A. I don't remember I did.

Q. Have a look if you would, please? A. I think it was the Gulf Bank (witness shown p.154). Yes.

Q. You caused that telex - it has your initial on it, does it not? A. Yes.

30 Q. To be sent that same day, 29th June?
A. Right.

Q. To the Al Ahli Bank? A. Right.

Q. Was it explained to you that the Al Ahli Bank was the bank of the broker for the Kuwait Supply Company? A. I don't remember that.

Q. You have made that telex, you see, on p.154 for the attention of a particular person. Was that person known to you? A. Not at all.

40 Q. Was his name given to you by Mr. Barki?
A. Certainly.

Q. You describe a performance bond in that document which the bank was prepared to issue and

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you ask Al Ahli Bank to tell Kuwait Supply
Company that you were prepared to do so?
A. Right.

Q. In the last paragraph you observe
that the performance bond would only come
into force after receipt of an irrevocable
letter of credit lodged with and confirmed
by the Compafina? A. Yes.

Q. You were responsible for that telex
in the sense that you drafted it, did you? 10
A. Yes.

(continued)

Q. Did you get any reply to it? A. I
really do not recollect. Can I have a look
at a reply, if there has been one?

Q. I cannot show you one. Do you recollect
any communication at all after that telex
with the Al Ahli Bank about the matter of the
performance bond? A. No, I do not.

Q. You may take it that no telex in reply 20
has been discovered by the bank in these
proceedings? A. As far as I remember, no.

Q. You don't remember whether you took
any steps to pursue the matter with the Al
Ahli Bank after sending that telex? A. No,
because the only thing we had to do was
wait for the letter of credit to be opened.

Q. Don't worry about why, you didn't in
fact, is that right? A. I'm sorry?

Q. You did not, in fact, is that right? 30
A. We did not.

Q. Do I correctly understand the effect
of your evidence given yesterday to be that
after 29th June and until you came back
from a holiday on 25th August you knew of
no change from the position discussed on 29th
June? A. Right.

Q. And do you say that because you have
some affirmative recollection that there 40
were no meetings between the parties after
that date? A. I have a recollection that I
did send cables or telexes during the month
of June calling for that letter of credit
which had still not arrived.

Q. Would those telexes not be kept by your
bank in its files? A. In the files. I am
almost sure they were discovered.

Q. You think there are telexes to which bank? A. Not to the bank, but to Mr. Jamieson asking whether this letter of credit was going to be opened and when.

Q. During June, you think? A. No, I said August.

Q. Is that right, though, is it, that from 29th June to 25th August there was no change in the arrangements discussed between you and Mr. Barki that day at all that came to your notice, that is what you told Mr. Caldwell yesterday, is it not? A. Yes.

Q. Did you know of no events occurring in Kuwait which would make the matter different from what was discussed between you and Mr. Barki between 29th June and 25th August? A. Not that I can think of.

Q. So was the matter from your point of view just quiescent, you were just waiting for further steps to occur involving the lodgment with your bank of a letter of credit, is that right? A. Yes.

Q. And you believe nothing had happened to the cargo or was happening to the cargo? A. No.

Q. You believe that no ship owner was involved in the transaction? A. I am not saying that no ship owner was involved in the transaction, since we replied to a request from Jebesen, therefore I knew that arrangements were being made to charter a vessel, but this had nothing to do with the fact that we were waiting for a letter of credit.

30 Q. You knew that there was this development at any rate, that there was a ship which had been chartered? A. Arrangement were made to charter a vessel.

Q. There are some notes, are there not, on the left-hand side of the 29th June document which you have there? A. Yes.

Q. In whose handwriting are those notes? A. Mr. Boulmer's.

40 Q. Did you take those notes to be instructions to you by Mr. Boulmer did you? A. To me - not to me alone, but yes, among others, yes, to me.

Q. Would you be so good as to tell us what the second note on the lefthand column means? A. You mean the last paragraph?

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(continued)

Q. Yes, opposite the last paragraph?

A. It says to be obtained nevertheless and this refers to the commercial contract.

Q. Did you do that? A. No, we did not.

Q. Why not? A. Because we could not obtain it.

Q. Whom did you ask for it? A. Obviously, Mr. Jamieson.

Q. When did you ask him for it? A. Probably at this time or very soon after.

10

Q. Are you able to tell me that you personally asked him, personally either by phone or in person? A. Myself or Mr. Boulmer or Mr. Ferrasse any one of us would be talking to him.

Q. You have no recollection of talking to him yourself? A. I might have done so.

Q. But you aren't sure? A. I can't be precisely correct.

Q. Was there any person in the bank who was in charge of looking after this transaction on 29th June, were you in charge of it? A. I was mainly in charge of it.

20

Q. So if something was asked to be done like that, that is obtain a copy of the commercial contract, did you make it your business to follow through an instruction like that? A. Certainly. I did not always succeed.

Q. If steps had to be taken to make sure that the document was obtained, were you the person who was concerned in doing so? A. Yes.

30

Q. You attended a meeting in late July, did you not, with Mr. Jamieson? A. Is there any note related to that meeting and could I have a look at it?

Q. I am not asking you at the moment about notes, I am asking you about meetings. Did you attend a meeting in late July with Mr. Jamieson? A. I can't precisely recollect of any meeting at the end of July, but may be a note would freshen up my memory.

40

Q. I suggest to you that on 22nd July you

and Mr. Ferrasse and Mr. Boulmer met Mr. Jamieson in Compafina's offices? A. Could be, I cannot remember.

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10 Q. Did you see Mr. Jamieson in the offices of Compafina seeing Mr. Boulmer or Mr. Boulmer and Ferrasse on several occasions in late July? A. I do not particularly remember of any meetings at this time. I am not saying that could not have happened, I do not remember.

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Q. At one of the meetings in late July, at any rate, you became aware that a Kuwait bank held a letter of credit for \$4.4 million didn't you? A. I don't think so, at that particular time. I don't remember that it was already in July.

(continued)

20 Q. Were you not present at discussions with Mr. Jamieson in which he was then asked to obtain from a reputable Kuwait Bank another letter of credit in favour of Compafina for \$2.8 million? A. In his favour you mean?

Q. For Compafina? A. With Compafina.

Q. Yes, were you not present at such a discussion? A. I can't say whether it happened in July or whether it happened later. I had a feeling it must have happened later than July.

30 Q. At some stage do you recollect being present at discussions with Mr. Jamieson when the existence of a letter of credit held by a Kuwait bank for \$4.4 million was discussed? A. Not in July.

Q. At some stage? A. At some stage, at a much later stage.

Q. How much later? A. I don't absolutely agree with what you have just said, that a letter of credit in his favour was being held by the Kuwait Bank, is that what you said?

40 Q. No, held by a Kuwait bank for \$4.4 million, the Compafina was not a party? A. In whose favour?

Q. In favour of the purchaser.

HIS HONOUR: I think we are getting very confused now. Could you put the question again.

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MR. RAYMENT: Q. Do you recollect being present at a discussion with Mr. Jamieson in which Mr. Jamieson was asked to arrange for a Kuwait bank to provide a letter of credit which Compafina could use for \$2.8 million? A. Which Compafina could use means that this letter of credit was opened in his favour.

Q. Either in his favour or Compafina's favour? A. But that was part of the discussions all the time. But I still repeat 10 in his favour which is quite different.

Q. For \$2.8 million? A. For \$2.8 million.

Q. You were informed, were you not, in the course of discussions which you attended in late July that there was in existence and not in favour of Mr. Jamieson or Penmas a letter of credit for \$4.4 million which was issued by a Kuwait Bank? A. This was brought up after - if my recollection is correct, after the barley had already been shipped and 20 not before.

Q. Was Mr. Jamieson not asked to obtain from a Kuwait Bank a letter of credit for \$2.8 million in late July? A. In his favour, certainly.

Q. Was that not because a larger letter of credit for \$4.4 million was held in Kuwait not in favour of Mr. Jamieson? A. No, I don't think so (Objected to: rejected in that form). 30

Q. Was Mr. Jamieson not asked to obtain from a Kuwait bank a letter of credit for \$2.8 million at a time when it was realised that there was a \$4.4 million letter of credit not in favour of Mr. Jamieson or Penmas held in Kuwait? (Objected to: allowed) A. No.

Q. When you had your discussions with Mr. Barki on 29th June was there any reference then to a letter of credit for \$2.8 million? Have a look at your note, if you would like? 40 A. No, I don't think so, since we are talking of 10 per cent of 4.4. I don't remember that at this particular stage 2.8 was mentioned. It must have been mentioned at some time later.

Q. The 2.8 suggestion was a change, was it not, from the arrangement that you discussed with Mr. Barki on 29th June? A. Various

possibilities were discussed, and this was one of them.

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10 Q. But you understood on 29th June the contract which you had heard of on 27th June to have finally been made between the parties, did you not? You understood that there was a sale agreed upon on 29th June at \$4.4 million? A. I am sorry, but the note says the possibility of sale. Therefore, that was not already a sale that had been effected.

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Q. You understood agreement to have been reached on the terms at \$4.4 million, at any rate, didn't you? A. Yes.

(continued)

Q. And for bagged barley? A. Yes.

20 Q. What you wanted to ensure on 29th June was that the Compafina Bank would be fully involved in the transaction, it would be a bank able to obtain payment of the whole of the \$4.4 million? A. For goods shipped in bulk. This is what it says, the credit was to be negotiable against shipping documents for goods in bulk. It is only the performance bond which speaks about bagging.

30 Q. When the suggestion that Mr. Jamieson tried to procure a \$2.8 million letter of credit which your bank could use arose, that suggestion was made at a time when it was known to the bank that there was a letter of credit of \$4.4 million held in Kuwait not in favour of Mr. Jamieson? (Object to: rejected).

Q. You have already agreed, have you not, that Mr. Jamieson was asked to get a letter of credit for \$2.8 million from Kuwait, that is so is it not? A. For goods in bulk.

Q. He was asked to obtain a letter of credit for \$2.8 million from Kuwait, was he not?

HIS HONOUR: Then she says Yes, for barley in bulk.

40 MR. RAYMENT: Q. That is so though, is it?
A. Shall I repeat?

HIS HONOUR: Q. Now, Mrs. Lenos, we will never finish if we go on like this. You agree that he

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was to get a letter of credit for \$2.8 million for barley in bulk? A. Yes.

Q. MR. RAYMENT: And he was to get that from Kuwait, was he not? A. Yes.

Q. And he was to get it from a bank able to negotiate a larger letter of credit for \$4.4 million, was he not? A. Not necessarily.

Q. Was the Gulf Bank not mentioned to you in the course of discussions in late July 1977? A. Yes, I have a recollection of the Gulf Bank having been mentioned.

10

Q. Were you not told in discussions in late July 1977 that the Gulf Bank was Sheik Hamad Sabah's bank? A. I don't remember that particular point of whose bank it was.

Q. Were you not told that the letter of credit for \$4.4 million was opened in favour of Sheik Hamad? A. At the much, much later stage, only when the barley was already shipped.

20

Q. Were you ever told the amount of the freight that would be payable to Jebesen's? A. Only - and this I was not present, let me remind you - only when Mr. Jamieson came with the shipping owner in our bank was the amount of the freight known.

Q. There was no idea held by the bank prior to 24th August so far as you are aware as to the amount of the freight payable to the shipping owner? A. I don't think I said 24th August.

30

Q. Whenever Mr. Jamieson came to the bank with the shipping owner, that was the first time the bank knew the amount of the freight, or the approximate amount of the freight, so far as you are aware? A. I don't really remember.

Q. You certainly didn't know the amount of the freight or the approximate amount of the freight until you were told about what had happened with Mr. Jamieson arriving with Jebesen's representative? A. Correct.

40

Q. The decision to pay that freight was, of course, taken while you were on holidays in August? A. Yes.

	Q. The payment was made on the spot, was it not? A. Yes.	In the Supreme Court
	Q. I think you told my learned friend that you arrived back from holidays on about 25th August? A. Yes, something like that.	Plaintiff's Evidence No.6 Evidence of Marina Mireille Lenos
10	Q. Did you not also tell him that you were absent from Geneva from about 16th August - how long were those holidays? A. If my recollection is correct, a few days, maybe a week. I can't remember precisely.	Cross- Examination 25th February 1981
	Q. In any event, it was days before 24th August when you went on your holidays? A. I'm sorry, but what makes you say that?	(continued)
	Q. Did you not tell my learned friend Mr. Caldwell that you returned on about 25th August? A. More or less, I can't say exactly. I remember it was shortly after the freight was paid.	
20	Q. Within a day or two? A. Probably.	
	Q. And you were absent when the freight was paid? A. I did not see the ship owner.	
	Q. Have a look, if you would, at m.f.i.3, which I think has some handwriting on it which you said is your own. Would you be so good as to translate for his Honour what you have written at the foot of that note? A. Performance bond from Gulf Bank upon order of Gulf Fisheries and under their entire responsibility covering an approximate amount of \$600,000.	
30		
	Q. At the foot of the note there are some other words, are there not, which you wrote? A. Oh, I see. Yes, to be increased if we advance the freight last \$20, all right.	
	Q. That note was written by you prior to freight being advanced, obviously, was it not? A. Yes.	
40	Q. Because it was no longer a possibility when the freight had been paid, so that note was written by you before you went away for your holiday prior to 25th August? A. I don't think that means that we were considering to pay the freight or there was a possibility because the	

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word "if" exists there, if we advance
the freight.

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Q. So clearly it had not already been
paid when you wrote that note? A. No,
obviously not.

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Q. So you wrote it before you went away
prior to 25th August? A. Yes and so?

Q. And you have added a \$20 figure to
the per tonne amount, have you not, on
account of freight? A. Yes.

10

(continued)

Q. It was correct, was it not, if one
multiplies the number of tonnes involved
in the freight ultimately paid? A. I'm
sorry, I can't see -

Q. \$20 per tonne was the amount of the
freight payable to the shipowner, was it
not? A. That was part of the things that
were considered, if we had received the
letter of credit and if we were willing to
pay the freight.

20

Q. When you wrote that note you knew what
amount of freight would be payable to the
ship owner, didn't you? A. Yes, what amount
of freight could be paid if we decided.

HIS HONOUR: Q. Was payable by somebody?
A. Right, I appreciate your Honour.

MR. RAYMENT: Q. And that was before you went
away for your holidays in August, is that
right? A. Yes, although this is not -

Q. So you had had some communication in
which you learned the amount of the freight?
A. Yes.

30

Q. Which communication was that? A. With
Mr. Barki, I presume.

Q. Do you not agree that you had had some
meetings with Mr. Jamieson in late July?
A. I can't remember. If a note says so,
then this will freshen up my memory.

Q. Did you not prepare a letter to be
sent to Mr. Jamieson on 3rd August 1977? A.
A letter?

40

Q. To Mr. Jamieson on 3rd August, 1977?

	A. Can I be shown the document (Ex.D shown to witness) Did you not prepare that letter? A. I certainly did.	In the <u>Supreme Court</u>
	Q. In that letter you refer, do you not, to recent discussions had with Mr. Jamieson? A. Yes, but it doesn't say whether they were oral discussions or telephone discussions. I can't say.	Plaintiff's Evidence No.6 Evidence of Marina Mireille Lenos
10	Q. You had had some discussions yourself with Mr. Jamieson in late July, had you not? A. Yes.	Cross- Examination 25th February 1981
	Q. Do you remember now the full detail of what Mr. Jamieson told you in late July? A. We were still -	(continued)
	Q. Do you remember the full detail? A. No, I would probably not be able to quote what was said, but I remember the intention and the meaning.	
20	Q. In the course of those discussions were you asked to advance freight to Jebsons? A. Not at that particular point, but may I add something?	
30	Q. Mr. Gyles will ask you any other questions. When you wrote a note envisaging the possibility that the bank will advance the freight at the foot of the document you had been looking at a moment, was the bank considering that possibility because of a request that it had received for the freight to be advanced? A. The bank would certainly have considered advancing the freight because in the bank's opinion -	
	Q. Was it because of a request, is my question? A. Because of the request, yes, provided the conditions had been complied with, meaning if we had received the letter of credit. Does that answer it?	
	Q. When had you received a request for payment of the freight? A. Sometime during the discussions, probably.	
40	Q. You see your letter of August makes a reference to the Gulf Bank? A. Yes, and it says if this is the one involved, meaning it could be any other.	
	Q. Have a look, if you would, at m.f.i.3, that is a draft guarantee from the Gulf Bank is it not?	

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(continued)

A. Did you say from the Gulf Bank?

Q. A draft guarantee to be signed by the Gulf Bank? A. This is a draft that we made out.

Q. To be signed by the Gulf Bank? A. Yes.

Q. Did you cause that document to be prepared? A. I'm sorry?

Q. Did you arrange for the preparation of that document? A. Can I have just a second look at it?

10

(Luncheon adjournment)

HIS HONOUR: In the matter of Compafina Bank the Bulk Terminals and Exporters Pty. Limited and Anor, No.13520 of 1978, I grant leave to the first defendant to amend its statement of defence in accordance with the document initialled by me and placed with the papers.

MR. RAYMENT: Q. I hand you m.f.i.3 again. Are you aware who prepared the draft of that document? A. Can I just have a look?

20

Q. Yes, have a look by all means? A. I can't quite remember by whom, but I presume by Mr. Boulmer.

Q. You have previously agreed with me, I think, that your note which appears in the darker ink at the foot of the page was written on that document some time before there was an actual payment of freight by Compafina, because it was written at a time when there was a decision still being taken as to whether Compafina would pay the freight? A. Yes, this not being dated I don't quite remember when it was typed. It was part of the discussions.

30

(Photostat copy of draft guarantee to be obtained from Gulf Bank, Kuwait to the plaintiff (formerly m.f.i.3) tendered: objected to by Mr.Gyles: admitted and marked Ex.R.16)

Q. (Witness shown Ex.R.16) You said, I think, that you think that Mr. Boulmer prepared that document. Is that because you remember discussing the matter with Mr. Boulmer or for what reason? A. Because it rings a bell that

it was Mr. Boulmer. I can't be more explicit.

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Q. Did you yourself have any contact with the Gulf Bank during August? A. No.

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Q. When you wrote what is written at the top right-hand corner of the document, that is, it had been found unacceptable by the Gulf Bank, were you writing down what someone had told you? A. Mr. Barki.

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10 Q. Do you think Mr. Barki told you that after you wrote your note at the foot dealing with a possible increase from \$US125 to \$US145? A. No, I can't tell you, I can't remember.

(continued)

20 Q. If it was the document that the Gulf Bank had indicated it would not sign, there was no reason, was there, for you to propose amendments to it so as to increase the amount of the guarantee? A. What I can say about it is it was part of various discussions considering alternatives and various possibilities. Therefore, I can't tell you exactly when the remark was made. There is no date on it, even.

Q. Did you give this document to Mr. Barki? A. Yes.

Q. You have no note from which you can tell us when? A. Not really.

30 Q. When you gave it to Mr. Barki did it have the amendment you proposed in brackets at the foot of it? A. I'm sorry, but I don't remember.

Q. Did you ask Mr. Barki to have the Gulf Bank sign such a document? A. Not sign, but accept it.

HIS HONOUR: Q. I'm sorry, I don't quite know what the distinction is that you are drawing. You say not sign, but accept it - accept in what sense? A. The text that we were suggesting.

40 Q. To sign a document in that form? A. Yes, but I don't see very well how a bank in Kuwait could sign it. I mean, they had to say whether they accepted it or not - I'm sorry.

MR. RAYMENT: Q. Those words "ten per cent more

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(continued)

or less" are written by Mr. Boulmer,
are they not? A. No, this is my hand-
writing.

Q. It was changed from \$4,400,000 to
\$4,000,000 and the words "ten per cent
more or less" inserted, is that right?
A. Yes.

Q. Did you see that document shortly
after 3rd August when the letter which
you have seen before lunch, which you drafted, 10
to Mr. Jamieson was dated? A. I can't say,
I don't remember exactly the date of the
document that I have in front of me.

Q. I show you a copy of document 149 in
the agreed bundle. Was that one of the
documents which was attached to Ex.D or a
copy of it? A. Yes, but I wouldn't know
which of the two.

Q. (Ex.N1 shown to witness) The document
in front of you, was that the document
attached to Ex.N1, or one of the two
documents attached to Ex.N1? A. I think
so, yes.

20

(Page 149 from the agreed bundle of
documents tendered without objection
and marked Ex.R17).

Q. You see in Ex.N1, which is still in
front of you, it is said that there are
two documents attached, one of them you
have just identified? A. Yes.

Q. Do you know where the other one is?
A. Would you mind if I took a minute to
read it again?

30

Q. No. A. Wasn't it the telex that you
showed me before lunch addressed to the bank
Al Ahli, I think this is the one.

Q. The telex of 29th June to the Al Ahli
Bank? A. Right.

Q. If I may take you back to the document
which is now R16, the draft guarantee from
the Gulf Bank, Kuwait, did you discuss the
proposal which appears in that document with
any officer of the bank? The proposal that
they sign that document? A. As I said, it
was probably drawn by Mr.Boulmer. Mr.Boulmer

40

has probably discussed it with me.

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Q. But you don't remember now? A. Not really, because it did not take effect, it was only a draft among other propositions, so there was no point in long discussions about it.

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10 Q. It was a draft prepared at a time when you knew there was in existence in Kuwait a letter of credit in the sum of \$4.4 million was it not? A. Not necessarily.

Q. But that is your recollection, is it not? A. Not really, since it is not dated I cannot say exactly when it was drawn. (continued)

20 Q. Just have a look at it again. You don't have any doubt, do you, that when that document was prepared you knew of the existence of a \$4.4 million letter of credit? A. Not necessarily, since the 4.4 apparently was corrected into four. I don't know whether we knew precisely that such a letter of credit existed.

Q. Do you say that, the draughtman of that document, as you understand it, didn't believe that there was in existence in Kuwait a \$4.4 million letter of credit? (Objected to - rejected).

30 Q. When you wrote upon the document you believe there was in existence in Kuwait a \$4.4 million letter of credit, did you not? A. Not necessarily, it was one of the possibilities considered at the time. It did not necessarily exist.

Q. Have a look, if you would, at Ex.D. Do you see there that you refer to communications directly between the Compafina Bank and the Gulf Bank? A. It says we believe you will have no objection to our inquiring towards the Gulf Bank, but it does not mean that did happen.

40 Q. Do you have any recollection, one way or the other, whether it did happen or not? A. I don't remember that it happened, since no letter of credit was finally opened.

Q. But if you were looking after the interests of Compafina properly it would have occurred to you to have that contact, would it not? A. Not until I was told that this was the one involved

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(continued)

and I was not told that it was, so I could not possibly approach them.

Q. When you were told by Mr. Barki that the form of document was found unacceptable by the Gulf Bank did you not take it that that bank was involved? A. Not at all, since they refused it.

Q. I suggest to you that you attended at least one and possibly two meetings in late July 1977 at which Mr. Jamieson was present for discussions concerning the barley project? A. I don't see any notes saying so, therefore I do not remember.

10

Q. And you don't remember at all from your own recollection whether you saw it in July? A. No, I do not.

Q. You handled at least one telex communication with Jebsens during July, did you not? A. I replied to his request for information.

20

Q. Do you know where the telex to which you replied now is? A. I would think among the documents.

Q. You may take it the bank has not discovered any telex to which your telex is a reply. Have you yourself looked for any such telex? A. Not really.

Q. Your telex commences "We have just received your telex related to a cargo of barley from Brisbane to Kuwait for account of Penmas Inc. Panama". You are not able to say what information you got from that telex, are you, if you don't have it before you? A. Look, my telex was replying, obviously, to their request for information. That is all I remember and my reply is sufficiently clear, I think.

30

Q. Did you speak to anyone from Jebsens? A. No, I did not.

Q. Jebsens were known to you as a substantial ship owner? A. They were not known to us in particular.

40

Q. Not known to you? A. No.

Q. Were you not informed yourself that the Port Victoria was proposed to be used by

Jebsens for this shipment of barley?
A. I am sorry, I did not hear the beginning. In the Supreme Court

Q. Were you not informed yourself during July that it was proposed to use a Jebsens vessel to transport this cargo from Brisbane to Kuwait? A. Not until we received their telex. Plaintiff's Evidence No.6 Evidence of Marina Mireille Lenos

10 Q. You say the first information you got, was from Jebsens itself? A. Yes, I understood from their telex that negotiations were only for chartering a vessel. I didn't know whether they would lead to something or not. Cross- Examination 25th February 1981
(continued)

20 Q. Did you not have a further telex communication from Jebsens in which they asked you in order to make their final decision in the matter to provide the name of Mr. Alexander Jamieson's brother? A. I remember it was part of the text. I don't remember having replied to it. I couldn't see what his brother had to do with it so I do not remember any reply on the subject.

Q. Does the word "repondu" written at the top of the telex suggest to you that there was a reply to it? (Object to: allowed)
A. Yes, probably, but may be to part of it and not to all of it, I don't know. I think this telex is asking two things, isn't it?

30 Q. I show you a copy of the telex of 15th July 1977 and I would ask you, first of all, just to identify the handwriting in relation to the word "repondu" at the top? A. That is not my handwriting, that is all I can say.

Q. Do you recognise it? A. No.

Q. The other writing, which starts with the words "Bateau"? A. This is Mr. Boulmer and his initials.

40 Q. Would you mind translating that into English? A. It says that the vessel is waiting for three months, is waiting or waits, not very clear. Therefore, reflection means think about it. I don't know what the exact word is, give it a thought, then underneath it says, demurrage \$3,000 per day.

Q. Those words which you have translated into English follow an arrow directed from the words "Jebsen Hamburg" do they not? (Rejected).

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(continued)

Q. Did Mr. Boulmer tell you that he had been speaking to Jebsens? A. I don't recall.

(Photocopy telex from Jebsen to Plaintiff dated 15th July 1977 tendered and added to Ex.R7 as R7B.)

Q. Do you know where the reply to that telex is, if any? A. I thought it was among the documents. Now if you say it isn't, then I don't know.

10

Q. Mr. Boulmer, so far as you are aware, is presently in Paris? A. Actually, you mean?

Q. Yes, so far as you are aware? A. So far as I am aware, yes.

Q. So far as you are aware, he is willing to give evidence in these proceedings for the plaintiff? A. Yes, in Paris.

MR. CAMPBELL: Q. Could I take you back to the meeting of 21st September, 1976. In the course of the meeting or meetings held on that day, about how long was spent discussing the barley campaign? A. Did I get you well, about how long during the meeting meaning do I have to say whether it was 15 minutes or 35 minutes?

20

Q. Yes.

HIS HONOUR: Q. Well, give an estimate? A. I could give you any rough guess, maybe 40 minutes, I don't know.

30

MR. CAMPBELL: Q. In the course of that discussion you said in the course of evidence yesterday (p.99) that "Mr. Jamieson suggested eventually consider it". Do you remember giving that evidence? A. Yes.

Q. Does that still accord with your best recollection of what was said at that meeting about Mayne Nickless? A. I remember more or less that it was presented to us as being a first class storekeeper, if I may call them so.

40

Q. As well as that presentation do you still recall Mr. Ferrasse saying, in effect,

"Well, we'll find out whether they are any good and if they are that good we'll consider what you are putting up" (Objected to: rejected).

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10 Q. Do you remember Mr. Ferrasse saying that he would need to find out about Mayne Nickless? A. Whether it was Mr. Ferrasse or Mr. Boulmer somebody must have said it because this is just routine and it is usually done, so somebody must have said it. I can't absolutely say it was Mr. Ferrasse, maybe it was.

20 MR. CAMPBELL: Q. But it is your recollection that at the conclusion of the meeting there had been nothing definite agreed concerning whether Mayne Nickless was an acceptable person to store the grain or not, is that right? A. Yes, in principle it was considered acceptable unless we found out something contrary to that.

(continued)

Q. What was said at that meeting concerning the involvement of Mayne Nickless in this barley transaction? A. They were considered as the third party we would be storing the goods for our account.

30 Q. There was a particular problem, was there not, in making sure that you, the bank, did not pay too much to Mr. Jamieson's company for purchase of grain in that you needed to check that he had really purchased a certain amount of grain before you were making an advance? A. Certainly. This is why we had it done through the A.N.Z.

Q. And the particular concern that you had was to quantify the amount of the drawdowns that were to be made? A. Yes.

40 Q. Are you able to tell his Honour what was said concerning the notion of a pledge of this barley? A. Certainly, because this is the usual commercial transaction when the bank finances a commodity.

* Q. Could you tell his Honour what was said about pledging barley, not what is usual? A. I am not asked to recall the words, am I, but the meaning behind them?

Q. As best you can? A. That the barley we were financing was representing our pledge.

Q. That was all that was said concerning that

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particular pledge, namely that the
barley would be a pledge? (Question marked
asterisk read by court reporter).

(At his Honour's direction the witness
wrote down her answer in French and
English which was shown to counsel).

HIS HONOUR: It is agreed by counsel that
the answer which was proffered by the
witness to the question is, "The barley we
were financing was considered pledged to
us".

10

(continued)

MR. CAMPBELL: Q. Was there any mention of
how that pledge was to be effected? A. Of
course, by the warehouse receipts held in
our name, to our order by the A.N.Z. Bank.

HIS HONOUR: Q. Naturally you spoke in
English with Mr. Jamieson? A. Obviously.

Q. Was the word "pledge" used? A. It
must have been because it is exactly that.
I mean, there is no other word for it.

20

MR. CAMPBELL: Q. Yesterday in evidence at
p.99 you were asked, "Was anything said
about the release of the barley by Mayne
Nickless"? and you said, "Yes, Mr.Ferrasse
said at that stage that the barley could
only be released upon the bank's
instructions do you remember that evidence?
A. Yes, certainly.

Q. At what stage of the meeting did that
particular statement occur? A. Well, you
asked me how long the meeting lasted or how
long was the discussion?

30

Q. Was it towards the end of the discussion
about the barley? A. It could have been
in the middle of the discussion, I cannot
really say.

Q. Do you have any precise recollection
of the words that were used when that was
said? A. The word "warehouse receipt"
was used; the word "pledge" was used, the
word "barley" was used; I think the words
we are saying now were used.

40

Q. You think there were used but they may
well not have been? A. Well, I cannot see
what other words, what alternatives to
these words. Maybe "security" could be one

of them but it comes to the same thing.

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Q. What, you regard a statement that a security was to be given in relation to the barley as being equivalent to saying that the barley would only be released upon the banks instructions, do you? A. I am not sure I got you there. Can you repeat please?

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10

Q. If it were said that a security was to be given over the barley would you regard that as being equivalent to saying that the barley could only be released on the bank's instructions? A. I still don't understand. Can you formulate it in another way?

(continued)

20

Q. I will try. Do you see any difference that matter between saying the bank is to have a security over the barley and saying the barley can only be released on the bank's instructions? A. I'm sorry, I still don't get it. I do not know what you are getting at. I don't understand.

30

HIS HONOUR: Q. There might be two ways of saying something; one way of saying it is the bank is to have some security, the other one is the barley is only to be released on the bank's instructions. What he is asking you is is that just two ways of saying the same thing or is there a difference between those two things in your understanding? A. In my understanding there is a difference because releasing the barley is something else. I mean, the barley was our property, let me put it in my words, and therefore could not be released unless instructed by us. This is what I want to say and this is what was said and nothing else.

40

MR. CAMPBELL: Q. When you said "this is what was said", what was it that was said? A. Exactly that, that the barley was our property since the warehouse receipts attested so and therefore it was to be understood that the barley could not be released unless instructed by us.

Q. In your last answer when you said "and therefore" are you telling his Honour that the words "and therefore" and following were ones that were actually said or that that was something that you regarded as implicit in what was said? A. Look, I cannot quote the words but the words have not two meanings, I mean, the meaning and

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the intention was exactly what I have
just been saying.

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Q. In relation to the bank's instructions
in connection with release, I take it that
nothing was said about to whom those
instructions need be given? A. Well
obviously to the storekeeper. To the store-
keeper.

Q. I am asking you what was said? A. This is
so obvious in commercial transactions that 10
even if it is not said to whom -

(continued)

HIS HONOUR: Q. Was anything said or not?
A. Well, I do not remember.

MR. CAMPBELL: Q. (Ex.N1 shown) Could you look
at the second paragraph there where originally
it said in typewriting, and roughly translating,
that the indebtedness of the bank amounts to
\$US3,043,814, that was the form in which
you originally caused the document to be
typed, is that so? A. Yes. 20

Q. Who is it who has crossed out that money
figure and put that higher figure of 2.7-odd
million above it? A. I did.

Q. When did you do that? A. Probably the
same day it was typed upon checking my
figures.

Q. Do you recal where you got your higher
figure from? A. Probably from the accounts
I was holding or the statements of the bank.

Q. (Ex.A shown) Do you recognise that 30
as a letter you caused to be written? A. Yes.

Q. In September 1977 and again there it is
stated that you have financed barley for
an amount of \$2,043,814? A. Yes.

Q. That was a document which was intended
to go to Mayne Nickless of course? A. Yes,
certainly.

Q. And the figures contained in that letter
were derived from the records of the bank,
were they? A. Yes, certainly. 40

Q. Could we move now to a meeting in
January of 1977. You recall a meeting that

you attended with Mr. Jamieson in mid-January 1977 together with other officers of the bank?
A. Yes but could I possibly be shown the notes that relates to the meeting?

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10

Q. Well, I would like to find out what you can remember about it unassisted by the notes for the moment, Mrs. Lenos. Was there any discussion at that meeting about amounts which had originally been lent for Sorghum dealings by Mr. Jamieson or one of his companies being made available for the purpose of barley campaign? A. Not that I can recall. I do not recall that Sorghum was mentioned in that discussion. I think it was not but it could have happened, I do not remember.

(continued)

20

Q. Do you recollect anything being said at any time about amounts which the bank had made available for Sorghum being swapped over to barley? A. I have a very faint recollection of the sorghum deal. I will try to help but my recollection is really faint.

30

Q. You were the person who was in charge of the file in relation to the day to day running of this particular transaction, weren't you? A. Yes but don't forget you have clerks and assistants and accountants and many other people involved. I was not particularly involved in the accounting.

40

Q. But if an amount of half a million or thereabouts was to be made available for the barley transaction from some other transactions you ought to know about it oughtn't you? A. If I remember well the half a million you are talking about was on the sorghum business and this happened before I joined the bank.

Q. When did you join the bank again? A. In August 1976.

Q. Are you in a position to know whether the bank has begun any litigation against Penmas to recover the amounts that are sought to be recovered from B.T.E. in these proceedings? A. Not that I know of.

Q. Would it be the sort of thing that you would expect to know if that was the fact? A. Yes.

Q. You have never caused anything to be registered in the State of Queensland that puts on public

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(continued)

register any pledge that B.T.E. has
given to your bank concerning the barley,
have you? (Objected to by Mr.Caldwell;
allowed on the basis it will be struck out
by his Honour if the proposed amendment by
the second defendant is not permitted).
A. I do not think so.

Q. Ordinarily would it be your responsi-
bility to ensure that anything that needed
to be done to perfect any securities that
the bank had taken was done? (Objected to;
disallowed).

10

(Witness stood down)

(Hereafter the hearing of Compafina
Bank v. Jamieson continued - see
separate transcript)

(No re-examination of Mrs.Lenos who
was retired and excused)

(Further hearing adjourned to Thursday,
26th February, 1981)

20

KG:BB:6

Leave for
Maynegrain to
file Further
Amended
Defence
2nd March 1981

IN THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION
COMMERCIAL LIST No.13528 of 1978

CORAM: ROGERS, J.

COMPAFINA BANK v. BULK TERMINALS AND
EXPORTERS PTY. LIMITED & ANOR.

FIFTH DAY: MONDAY, 2ND MARCH, 1981

HIS HONOUR: I give leave to the second
defendant to file a further amended defence
in the form initialled by me and placed
with the papers. I grant leave to the cross-
claimant to file an amended cross-claim,
also, in the form initialled by me and
placed with the papers.

30

(Mr.Rayment indicated he had not yet
had an opportunity to examine the
amended cross-claim, although it had
been served on his solicitor last week,
and sought to reserve any comments
until later in the day.

40

Mr. Gyles indicated he was in a similar position regarding the amended defence.

His Honour indicated that any further defence to the cross-claim should be filed by four p.m. on 3rd March, 1981)

(Further hearing stood over till date to be fixed).

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(continued)

10 IN THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION
COMMERCIAL LIST No. 13528 of 1978

CORAM: ROGERS, J.

COMPAFINA BANQUE v. BULK TERMINALS &
EXPORTERS PTY.LIMITED & ANOR.

SIXTH DAY: TUESDAY, 3RD MARCH, 1981

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Alan David
Rector
Examination
3rd March 1981

ALAN DAVID RECTOR
Sworn and examined:

MR. GYLES: Q. Is your name Alan David Rector?
A. Yes.

20 Q. You live at 39 Grevillia Avenue, St.Ives?
A. That's correct.

Q. You are the chief executive of Meggitt
Limited? A. That's correct.

Q. And that company is involved in the crushing
of oil seeds? A. That's correct.

Q. And purchases a considerable volume of oil
seeds each year? A. That's correct.

30 Q. Have you occupied your present position for
approximately two years? A. Yes - eighteen months
would be more correct.

Q. Before that you have been involved in
commodity trading in Australia for ten years?
A. Approximately.

Q. Including grain? A. Yes.

Q. And you were, prior to that, involved for

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(continued)

some years in commodity trading in Canada?

A. That's correct.

Q. Are you familiar with the term "warehouse receipt"? A. Yes, I am.

Q. When used in the grain trade? A. Yes.

Q. Would you tell his Honour what you understand by that term? (Objected to by Mr. Rayment and Mr. Campbell: rejected).

Q. In the course of your participating in the grain trade over the years, have you come across something called a warehouse receipt? 10
A. Yes.

Q. Would you describe it, please? A. It is a document, not necessarily on a standard format because it does vary from location to location and warehouse to warehouse. It simply says that they hold -

Q. Who is "they"? A. The warehouse holds on behalf of another party a quantity of goods stated generally, describing the commodity and 20 the tonnage held.

Q. On whose account might the warehouse receipt be made out, in your experience? (Objected to by Mr. Rayment and Mr. Campbell).

(After discussion as to the relevance of the last question the witness was stood down and asked to leave the court in order that Mr. Gyles could inform Mr. Rayment of the evidence expected to be given by the witness.) 30

(Short adjournment.)

MR. GYLES: The evidence which Mr. Rector will give, or the conclusion from it will be that a warehouse receipt carries with it the obligation upon the warehouse man not to deal with the grain without the express approval or direction of the person on whose behalf they say they are holding it in the warehouse receipt. It would also, we expect, lead to the conclusion that the use of 40 warehouse receipts as security for advances is a wellknown phenomena in the grain trade.

(His Honour indicated he was satisfied as to relevance and admitted the evidence.)

(Witness returns to court)

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(Last question read by court reporter.)

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WITNESS: Made out on account of the owner of the goods, the purchaser of the goods. It could be made out to a bank.

10 MR. GYLES: Q. So far as the latter is concerned, do I take it from that the warehouse receipt might be issued to what might be called a third party, that is a party other than the vendor or owner or purchaser of the grain? A. That's right. It is not unusual for a warehouse receipt to be issued directly to a financier, for example. In fact, the terms could agree to that. It can be done.

(continued)

MR. GYLES: Q. Have you known cases of warehouse receipts being used as security for the raising of finance on grain stored in a warehouse? A. Yes.

20 Q. And is that common or uncommon? A. Very common.

Q. What is the understanding as to the obligations of the warehouse man having issued a receipt in the name of another person? (Objected to by Mr.Rayment).

30 Q. I think I can accommodate that. Assuming the case of a warehouse receipt actually issued in the name of or to the account of the financier; I will ask you a question on that footing. What is the understanding as to the obligation of the warehouse man towards the financier in those circumstances? (Objected to by Mr.Rayment).

HIS HONOUR: Q. In the situation where a warehouse receipt is issued to a financier, is there in the trade an understanding as to some common situation which follows from that? A. Yes your Honour.

40 Q. That common understanding is accommodated to the particular form of the receipt, if it happens to say something specific on the topic, but otherwise there is a general situation which obtains? A. That is correct.

Q. Now assume that the particular warehouse receipt says nothing as to the terms on which the grain is to be held, what is the common

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understanding in the trade in those circumstances? A. That the grain would be held until such time as the person to whom the receipt had been given authorised its movement.

CROSS-EXAMINATION

MR. RAYMENT: Q. Do you have any forms of warehouse receipt, which you had in mind when you gave that last piece of evidence, with you? A. No, I don't.

10

Q. Do you have any such forms available to you? A. We have any number of general forms of warehouse receipt available to us, but I obviously don't have them with me at this stage.

Q. They are receipts issued, in the case of grain, by persons who store the grain in silos or some other form of container, is that so? A. That is correct.

Q. And it would be normal, would it not, for such a person issuing a warehouse receipt, to include in its exemption clauses dealing with the liability of the person storing the grains, when sued by persons having a claim in respect of the grains; that is so in Australia, is it not? A. Not necessarily, because warehouse receipts don't necessarily, in all cases, limit liability. They may, but they may not.

20

Q. They may, and I suppose it is a question which you cannot answer if I ask what percentage of warehouse receipts you have come across containing exclusion clauses?

30

HIS HONOUR: May I suggest this, Mr. Rayment -

Q. Is it more common for warehouse receipts in your experience, issued in Australia, to contain exclusion clauses than not? A. I would suggest that the bulk of receipts that I have seen have not included any exclusions; they have simply stated that the grain was being held on behalf of a particular party, and that was it.

40

MR. RAYMENT: Q. When grain is left with a person in the possession of a warehouse man, it is normally done, is it not, pursuant to the terms of a written agreement under which

storage charters are agreed and the like; is that not so? A. This may be a written agreement or it may be a verbal agreement, because often storage for grain must be found quickly. It is not necessarily a formal contract drawn at the time the grain is stored; there may be general agreement.

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10 Q. Yes; now if it is a written document issued to the person who leaves his grain in storage, is that the document that you have described as a warehouse receipt?
A. No.

Q. So a warehouse receipt might be issued, in your experience, in addition to a contract for storage of the grain - a written contract for storage of the grain? A. Yes.

(continued)

20 Q. Have you got available in your office a document, a sample of warehouse receipts which have been issued in the last three years, a number of them? A. Oh, certainly samples of the warehouse receipts that our particular company would be dealing with, yes.

Q. And has your company dealt with these as a financier or as an owner? A. As an owner.

Q. And would you be able to find them, in your office now, or would you be able to have someone find them? (Objected to by Mr.Gyles)

30 HIS HONOUR: I am not going to impose some obligation on the witness to go and search for a document.

MR. RAYMENT: I have not asked your Honour to.

HIS HONOUR: In that case, it does not go to any relevant matter.

MR. RAYMENT: Q. Do you know the term "grain warrant"? A. It is not familiar.

Q. Have you never heard the expression "grain warrant"? A. No, I have not.

40 Q. Does your company itself trade internationally in grain? A. No, we are trading domestically.

Q. And have you yourself got Australian experience with international grain sales? A. Yes.

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Q. Is that something that happened in the last ten years? A. It happened in the last 18 months - it is within the last year that I have been involved, from an Australian base, in the export of commodities.

Q. Not, in other words, for your present employer? A. Yes, for my present employer.

Q. So your present employer does deal in international grain transactions? A. Related to oil seeds. 10

Q. For the purpose of those transactions, have you ever seen any warehouse receipt issued by any person? A. Oh yes.

Q. By which warehouse men have such certificates been issued that you have seen? A. By the various State Wheat Boards and by various warehouses, storages, in both New South Wales, Queensland and Victoria.

Q. And are those warehouse receipts in favour of your company that you are speaking of, or in favour of some third party? A. It has been both cases, but primarily in favour of ourselves. 20

* Q. At whose instructions the warehouse man who issues a warehouse receipt will deal with the grain or will move it, is a matter, as you understand it, is it not, to be determined by negotiations between the person who deposits the grain and the warehouse man? 30
(Objected to by Mr. Gyles).

HIS HONOUR: Q. Do you understand the question? A. I believe I understand the question; if you will just give it to me again.

(Question marked * read back).

WITNESS: Not necessarily. It can be on behalf of the person who deposits the grain or on behalf of the person to whom a warehouse receipt has been issued- there are two situations. 40

HIS HONOUR: Q. Then two situations then arise; either there is express agreement between the parties as to whose instructions are required to move the grain, or alternatively there is a common practice? A. Yes.

Q. And the common practice is? A. That the grain would only move on behalf of the person to whom the warehouse had warranty for holding the goods.

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MR. RAYMENT: Q. Unless the warehouse receipt says differently? A. Well, I would concede that point.

10 Q. Now in what language have the warehouse receipts to which you have been referring in your evidence, been used? What is your recollection of the forms of warehouse receipt that you have seen? A. Well, the form can be a pre-printed form, it can be a letter; they take many different forms.

(continued)

HIS HONOUR: Q. I think he means, what is the general nature of the language used? A. Well, it is commercial language.

20 Q. Well, what does it say, what is the form of it? A. It says, it identifies the location of the warehouse; it identifies the quantity of grain concerned; it identifies on whose behalf it is being held; and it is signed by the warehouse man, the terminal.

MR. RAYMENT: Q. And it might or might not be accompanied by a written contract as to the terms on which the grain is stored?

HIS HONOUR: Well, I think "accompanied" is a confusing expression.

30 MR. RAYMENT: Q. There might also be at the same time, might there not, a written contract dealing with the precise terms on which the grain is stored? A. That is possible.

MR. CAMPBELL: Q. Mr. Rector, you have told us that you have come across some grain warrants in Australia? (Objected to by Mr. Gyles, withdrawn).

40 Q. You have told us that you have come across some warehouse receipts in Australia, and you said that they had been primarily issued in favour of you - meaning Meggitt. Are you able to recall any example of a warehouse receipt that you seen issued in Australia, that has been issued in favour of someone who was not the person who originally deposited the grain in the warehouse? (Objected to by Mr. Gyles).

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HIS HONOUR: What you really want him to say is, has he ever seen a warehouse receipt issued to a person other than the person who originally deposited it?

WITNESS: Yes.

MR. CAMPBELL: Q. Are you able to recall such a one to mind? A. Yes.

Q. Would you tell us about it, please?

A. It was involving purchase of grain from - oil seed - from a party who had previously put the grain into a particular storage. We purchased it from them and asked for a warehouse receipt for those goods. There were two receipts. There was a receipt issued to the owner in the first place and a secondary receipt issued to ourselves. 10

HIS HONOUR: Q. When you say "a secondary", a subsequent one? A. A subsequent receipt.

MR. CAMPBELL: Q. And have you ever seen any warehouse receipts that have been issued in Australia to someone other than the person who deposited the grain, in circumstances where financing of the grain has occurred? A. We do it ourselves. 20

Q. Could you explain what you mean by that?

A. Well, it is a common practice. We finance the purchase of our oil seeds through the use of warehouse receipts. Our bankers require us to submit the warehouse receipts to them on behalf of those goods; and I have seen instances, although I admit it would not be normal. Normally we would have warehouse receipts issued to ourselves and we would subsequently assign that to the bank ourselves. And I have seen instances of purchases in our own company where that warehouse receipt went directly to the bank. 30

Q. But the more common practice, in your experience in Australia, is for the warehouse receipt that has been issued to you to be simply physically handed over to the bank? A. That is correct, that is the practice. 40

Q. In circumstances where there is financing of grain after it has gone into the terminal, is it in accordance with your understanding of the practice, for the financier to get a document expressed to be a warehouse receipt

from the mortgagor of the grain, as well as a document expressed to be a warehouse receipt from the person who has got possession of the grain? A. Normally the warehouse receipt would be issued by the owner of the grain - or sorry, to the bank; from the owner to the bank. You are using the term "mortgagor" as the lender of funds?

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MR. CAMPBELL: No.

10 HIS HONOUR: Q. As the borrower? A. Sorry - okay. the mortgagor would pass it over, yes.

(continued)

MR. CAMPBELL: Q. I am sorry, I am not sure that we have understood each other. Would it be usual, when a person had grain in store and wanted to borrow money on the security of that grain, to himself issue a document expressed to be a warehouse receipt, to the person to whom he was borrowing the money? A. No.

20

Q. Can I take it from that that it is not in accordance with your understanding of the practice concerning warehouse receipts, for someone who lends money on the security of grain to receive both - a document expressed to be a warehouse receipt from the borrower, together with a document expressed to be a warehouse receipt from the person who has got possession of the grain? (Objected to by Mr. Gyles).

30

HIS HONOUR: Do you mean together with, or as well as?

MR. CAMPBELL: As well as.

HIS HONOUR: Do you still object?

MR. GYLES: I do, your Honour, on the basis that he is not a banker.

HIS HONOUR: No, I will allow it.

Q. Do you follow the question? A. Yes I do, and I would say, sir, that both are possible; it is not necessarily the practice.

40

MR. CAMPBELL: Q. But it is not usual or in accordance with the practice for a lender of money to receipt both such documents in relation to the one transaction, is it? A. Not normal.

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Q. Is there any practice, in the grain trade within Australia, so far as you are aware, whereby financing of grain occurs and the grain is collected at a place where the financier is not able to himself send out the agent to check how much grain is being collected? A. That I find happens.

Q. And in such circumstances, is there any practice whereby the financier asks for some sort of certification as to how much grain is being accumulated from time to time? A. That is often the practice.

10

Q. And when such certification is given, does it take any particular form? A. It takes the form of a warehouse receipt.

Q. To make sure that I understand that answer, are you saying that a warehouse receipt is capable of being a certificate as to how much grain is stored at a particular place? A. Yes - on behalf of the specific party, yes.

20

Q. Is it within your experience of the grain trade in Australia for there to be a document, which does not call itself a warehouse receipt, to ever be issued by a person who has got possession of a silo where grain is being accumulated, simply telling a financier how much grain is accumulating there from time to time? A. Yes, I think you have to look at how such a communication is worded, to determine on whose behalf he is holding it - how does he word that? For example, we write our own bankers a general letter that says, "We have in storage X tons of grain for which you are holding warehouse receipts". We could word the communication quite differently; we could say, "We are holding on your behalf so much grain", in which case the latter is a form of a warehouse receipt.

30

40

Q. Is Meggitts a company which is itself engaged in the export trade concerning grain? A. Oil seeds and oil seed products.

Q. Is oil seeds regarded as being a different market to the grain market in Australia? A. Not really. Grains and oil seeds are generally classified together. If you look at the main mechanism for pricing and trading grain - which is the Chicago Board of Trade -

the four major commodities trading on that floor are wheat, corn, soya bean oil and soya beans; so the terminology used in the trade is common.

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Q. Is there any distinction, in your experience, between a trade in grain in Australia for export and a domestic grain trade? A. Well, not particularly, not on the basis of the trade.

10 Q. Is it in accordance with your experience for a financier who has been given a warehouse receipt, to on occasions authorise the borrower to tell the person storing the grain that it is okay to let it go? A. That would be reasonable.

(continued)

Q. And that happens, well, not infrequently, doesn't it? A. Well, it does happen frequently; it usually happens after you have paid for it.

20 HIS HONOUR: Q. Might I, Mr. Rector, just ask something: you used the term "We assign the receipt" - that is, the warehouse receipt - "to the bank from time to time". What actually do you do? Is there a form of assignment on the back? A. No. In our particular case we receive warehouse receipts from the various storage locations, and we add them up and send them to the bank and say, "This is our receipt".
30 The bank says to us, "We will lend you 90 percent of the value of that commodity".

Q. And how does the warehouse man know that they are now holding it for the bank? A. There may be a requirement that that be the case; there may not be. We for example have nominated with our bankers where we are storing the goods, and that is normal, the bank wants to know where they are, and it is common practice. As long as the bank knows where you are, you have issued a warehouse receipt to the bank to obtain
40 finance for those goods, it is commercial practice, that those goods in essence have a lien on them.

Q. I understand that, but the condition that you put in there is that the warehouse receipt is issued to the bank. Now the hypothetical situation, as I understand it, is that there is some grain - oil seed, if you wish - at the Australian Wheat Board silo in Brisbane. They issued you with the warehouse receipt because

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.they are holding it for you. You want to borrow some money from the bank, so you say to the bank, "I want to borrow some money against this warehouse receipt". Does anybody ever tell the Australian Wheat Board that you have used your warehouse receipt as some sort of security and therefore the wheat or oil seed should only be released on the bank's instructions, and not yours? A. Not necessarily.

10

HIS HONOUR: Anything arising from that?

MR. GYLES: Yes your Honour. When you say "not necessarily", I take it you mean that if the bank gave notice to the Wheat Board that it held the warehouse receipts, then the situation would be different? A. I think the bank would have to go one step further than that; or may be the parties involved would go one step further. There would be an instruction, maybe by the owner, you know, "Send the warehouse receipts to the bank", and he may have told the bank, "This is what I am going to do, and I won't move the goods until they are paid for". That is what the bank is looking for - "Where are those goods?" - and they don't move until I have got my money.

20

Q. In the situation his Honour was asking you about - that is, where there is no direct issue to the bank but there is a transfer of the document itself - does that indicate that the warehouse will generally not accept an instruction to move without seeing the actual warehouse receipt? A. Oh, in that situation the warehouse man would be, he would not even know where warehouse receipts had been issued to a third party. He would move the goods on the instructions of the owner.

30

Q. To whom he had issued the receipt? A. To whom he had issued the receipt.

40

(Witness retired and excused)

HIS HONOUR: I am just looking at 4I in your statement of claim; isn't that unduly restrictive?

MR. GYLES: Yes your Honour. The obvious has been said in (d), "To be held on behalf of the plaintiff". That is really the essential

allegation, and 4I is a gloss upon that, arising out of the particular circumstances of this transaction.

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HIS HONOUR: What you are saying in effect is that you can live without 4I?

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MR. GYLES: Yes, quite; and the early ones are a factor in the conversion claim and so on.

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10

(Interrogatories tendered without objection and marked Ex.O).

(Bundle of telexes exchanged between parties, tendered without objection and marked Ex.P).

(continued)

20

MR. GYLES: I will return to the A.N.Z. documents after lunch, if I may. There will I think be agreement as to the value of the barley in store in Brisbane. We are just waiting on final word on that at the moment. Your Honour may have noticed in the evidence reference to a thing called a "L.I.B.O.R.", and we should have at lunch time, from one of the banks, a list of the L.I.B.O.R. rate at the various times.

30

Also there is a schedule of quantum which has been discussed between the parties, which we have not quite reached agreement on, or disagreement as the case may be, and we wish to hand that up after lunch. So I think really most of the loose ends I will need to deal with at 2 o'clock. There will be no more oral evidence on my side. I did wish to have Madame Lenos sign that 14th January document.

40

HIS HONOUR: All right. There are three matters; one is the pleadings which we will turn to; then we can deal with that document. You might just tell me the answer to this: what is the currency of this contract, and in which currency am I going to award damages if any - in US dollars or in Australian dollars - having regard to the House of Lords decision?

MR. GYLES: As far as the claims in conversion are concerned, they would be Australian dollars, less whatever is an appropriate credit to be given. First of all we value the grain, and that is an upper limit; then we take off whatever is appropriate.

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HIS HONOUR: Well, you say that notwith-
standing that the loan was in US dollars,
because this is really a tortious claim,
the verdict is in the currency of the
country?

MR. GYLES: Yes.

HIS HONOUR: Are you agreed to that?

MR. RAYMENT: Your Honour, there are really
three claims I think. There are two contractual
claims: one that B.T.E. was the sole borrower, 10
and another that B.T.E. was a joint borrower;
and so far as that question arises, it is all
in US dollars as we understand it.

HIS HONOUR: Do you say that the verdict has
to be given in US dollars and then it translates
into whatever was the rate of exchange at the
time?

MR. RAYMENT: Yes your Honour. Then when one
looks at conversion, my learned friend put
his case of being conversion that was effected 20
when the barley went on board the vessel.

HIS HONOUR: I do not want you to argue the
point now. I just want to know whether there
is going to be any dispute about this. At
the moment you say that any verdict on the
contract found should be in US currency. So
far as you are concerned, Mr. Campbell, you
are in Australian dollars?

MR. CAMPBELL: Yes your Honour.

MR. GYLES: I think Mr. Rayment is right, your 30
Honour; if we establish a simple contractual
claim, it would have to be in US dollars.

HIS HONOUR: Be that as it may, it looks as
though there will be no dispute about that,
and you will be able to tell me how many US
dollars you think you are entitled to.

MR. GYLES: Yes.

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HIS HONOUR: Then let us deal with the pleadings
next. There is Mr. Campbell's amended defence,
which I gave leave to file yesterday, subject 40
to any argument which you may seek to put, and
I gather there is something you wish to put on
that.

MR. GYLES. Very shortly, your Honour, yes.

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HIS HONOUR: We can postpone that until 2 o'clock. You say it is neutrally bad, that it should not be allowed - that is the s.100 point?

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MR. GYLES: Yes.

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HIS HONOUR: Mr. Rayment, you want to object to the amended cross-claim?

MR. RAYMENT: No, I do not want to object to it.

(continued)

HIS HONOUR: All right then, I made some order for you to file your amended defence on that, yesterday.

MR. GYLES: Your Honour, I suppose we can take this course in relation to the amended defence. We can consent to it, provided it is understood on all hands that we object to the form of it, and if my friend is content to take his chances --

HIS HONOUR: Well, is the objection as to form or is the objection that really he cannot rely on s.100?

MR. GYLES: Both, your Honour, but we do say it is badly pleaded.

HIS HONOUR: As to form, what do you say?

MR. GYLES: It just does not raise the section, it does not plead the elements which are necessary to bring the section into play.

MR. CAMPBELL: Your Honour, if it is a question of form --

HIS HONOUR: Well, he says it is both, but you had better rectify the form if there is some defect. Mr. Gyles, we will leave it on this basis, that Mr. Campbell will try to attend to the objections as to form, and you will have to deal with the matter on the basis that at some stage he is going to get it right in form, and if need be, I will give him further leave to sort that out.

MR. GYLES: I am not taken by surprise, your Honour, nor do we have any application for adjournment if leave is granted.

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HIS HONOUR: Then the only other thing we need to deal with before lunch is this admissibility point. You have some things for me to look at, have you?

MR. RAYMENT: Yes your Honour.

HIS HONOUR: In relation to Mrs. Lenos' document, as I understand it, Mr. Rayment, there are two problems: one is that it is not in fact by her in writing, and secondly, even if she now puts her initials on it, is she a person interested? 10

MR. RAYMENT: Yes, at the moment we take our stand on subsection (4).

MR. GYLES: Your Honour will find the document in the bundle at p.5.

HIS HONOUR: Has there been any evidence given as to this document?

MR. RAYMENT: Only that it was prepared for Sly and Russell some time after these proceedings were commenced- we have not got a date - and Mrs. Lenos dictated the typed form of it. We think this is an additional factor, that the witness was asked in chief what happened at the meeting and gave her present recollection about it. 20

HIS HONOUR: Your submission is that it is excluded by 14B(3); that it is excluded at the moment by s.14B(4), subject to her doing anything to recognise the document?

MR. RAYMENT: Certainly that, yes, and it has to be recognised in writing. When it is, I submit that it is a document made then, because sub-s.(4) provides that it shall not be deemed to have been made by a person unless, inter alia, it has been recognised in writing. Now if that be so, I submit Mrs. Lenos is clearly now an interested person, in that her credit has been put directly in issue in these proceedings, under sub-s(3). So that for that reason alone we would submit -- 30 40

HIS HONOUR: What do the authorities say on a person interested?

MR. RAYMENT: Could I answer that question by referring your Honour to three cases, the

base of which I will submit is Sholl, J.'s decision. But there is a Court of Appeal decision in England, Beerman's Limited v. Metropolitan Police District Receiver, (1961) 1 A.E.R. 384. It says, "Section 1 of the Evidence Act of 1938 provided.....notwithstanding that the original document is not produced". (Reads sub-ss.(4) and (3).) Lord Justice Sellers referred to the fact that he had been taken through all the cases decided in England since the section was first enacted.

HIS HONOUR: And he said that no general rule can be laid down.

MR. RAYMENT: That is so, and he also said that the best guide was the section. But he did establish some negative things, or he summarised some negative things which had been established (p.388). He referred to the fact that this Lordship Justice Morton had to decide once whether a shareholder was a person interested (reads).

So that one has no financial interest, we submit, necessary in order that a person may be an interested person - no proprietary interest necessary - and it is then depending on the facts of the case, whether a person is an interested person, even if he does not have those characteristics.

May I go next to the decision of Sholl, J. in Tobias v. Allan, (1957) V.R.221. Halfway down p.222, "Dr. Cockle has argued....likely to affect the impartiality of the person making the statement." Then his Honour goes to the facts of the case. At p.224 his Honour makes the point that the statement must be otherwise admissible - that is, it must be in admissible form. "What is intended by the section..... of an expert". That merely comes down to the terms of the document. I put my submissions more generally. I certainly would submit that Mrs. Lenos was a person interested at the time when she dictated this statement, but the relevant test, in my submission, if one looks at sub-s.(4), is, when did she recognise it as one for the accuracy of which she is responsible, and if that is established, she is now a person who is interested in these proceedings, in that her credit has been the subject of an attack. And that would be so, for example, if Mr.Jamieson were to sign a document today, or Mr.Ferrasse.

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When of course the document was made, she and other officers of this bank were also persons whose conduct were likely to be called into question, in that they had acted for the bank in connection with the lending of this money. Let us assume that Bulk Terminals was a borrower from the bank; their conduct in failing to obtain as much as a document from Baulk Terminals, for example, would be conduct which would seriously reflect as upon their ability as bank officers. (Addressed his Honour).

10

Of course the intent of sub-s.(3) is to keep out documents which might have arisen because of the proceedings, in order to be of assistance in the proceedings themselves, and that is what this document is; it was prepared for the solicitors.

HIS HONOUR: Do you readily have to hand the reference to this document in the transcript?

20

MR. GYLES: It was very early in Mrs.Lenos' examination in chief - p.100, point 2.

(Luncheon adjournment)

ON RESUMPTION

HIS HONOUR: Yes, Mr. Rayment?

MR. RAYMENT: Your Honour, as to the transcript reference, at p.100 your Honour sees at the third line the witness was shown this document (reads) and her own evidence about the discussion is half way down the page - "Can you remember what was said.....we showed our figures to Mr. Jamieson".

30

HIS HONOUR: But the authorities say that if I am satisfied that the requirements of s.14B are fulfilled, then I have got no discretion, I have got to admit the document.

MR. RAYMENT: Yes. I do not think it is really necessary to take your Honour to the earlier decision of Sholl, J. in Shepherd v. Shepherd.

40

HIS HONOUR: Anything you want to say, Mr. Campbell?

MR. CAMPBELL: No your Honour.

HIS HONOUR: Mr. Gyles?

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10 MR. GYLES: Yes your Honour, very shortly
if I may. Firstly I submit that the
authorities are clear that an employee is
not a person interested, except perhaps in
very special circumstances. The
authorities referred to in Cross sufficiently
establish that it has got to be more than
a situation where an employee's conduct
is in issue; there has got to be genuine
risk in some ways. In this case, Madame
Lenos is not in that position at all.

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HIS HONOUR: What is the position in Cross (continued)
that you have got in mind?

MR. GYLES: Under the heading, "Substantial
Material Interest."

20 HIS HONOUR: What about this passage on the
next page, in the second last line, "Examples
are provided by statements which relate to
accidents in which the competence of the
foreman or other servant is in issue"? That
is sufficient to exclude it. Why isn't her
competence in issue?

30 MR. GYLES: Because it is not in issue. It
may be one thing to say, "The employer is
being sued under the vicarious liability", in
the circumstances in which the employer is
himself negligent, where the issue is, "Is
that person negligent"? but there is no
authority which establishes that a person whose
conduct is part of the evidence is in such a
situation. The examples given in the footnote
51 - we had to recently argue all this before
Sheppard, J. in the Allied Mills case, in which
his Honour had to look at Sholl, J.'s decision
and the others. This precise point did not
arise, I think, because by and large they
were statements of people who were not employees
of the defendants. As your Honour sees, there
40 is reference to Monfrey's case (reads).

HIS HONOUR: That is rather a different point.

MR. GYLES: Yes. There was the case about the
nurse, I recall, or babysitter.

HIS HONOUR: That is over the page, that is Evans
v. Evans. But that is on one view wrongly
decided.

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MR. GYLES: I would submit that the position is best summed-up in the statement at the end of that paragraph, "There must be a clear personal interest in the outcome of the proceedings". May I just examine for a moment what Madame Lenos' position is in this litigation: she is a witness called on behalf of her employer to give evidence as to certain conversations at which either she says she was present, or others say she was present. There is no claim made against her or against her employer based upon her actions; and indeed her actions are not the subject of any issue before your Honour, and your Honour may have to decide credibility, your Honour may have to decide whether things happened as she says they did, but that does not mean that her conduct is in issue in this case. She has no stake in the outcome of this case one way or the other. 10 20

HIS HONOUR: If one wants to really take a long range view, let us assume for the sake of argument that the law of Switzerland is the same as here. I suppose she could be exposed to an action for negligence by her employer, supposing she did not take the necessary steps to obtain security.

MR. GYLES: I would submit not. I would submit it is not the law here - I do not know whether it is the law of Switzerland, but it is certainly not the law here. 30

HIS HONOUR: So those cases where employees have been joined as third parties are all misconceived?

MR. GYLES: No, they are based on the statute.

HIS HONOUR: On what statute?

MR. GYLES: Because they are each liable to be sued. I do not know of any case in which an employer has joined a servant, basing it on a negligence case against the servant. There is no duty of care upon an employee in tort, to an employer to take a step which avoids economic loss. 40

HIS HONOUR: What about in contract?

MR. GYLES: Contract is a different matter.

HIS HONOUR: But is it not an implied term in

the man's contract of employment, that one is going to act with reasonable care in the discharge of one's duties?

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MR. GYLES: I suppose it may be; it depends on the nature of the employment contract. I have never known of a case against an employee based on a contract.

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10 HIS HONOUR: I am not readily capturing one, because employer-employee relations are not such that you would bring an action like that. But by the same token, I do not know why you should not. Let us assume for the sake of argument that there may be such proceedings: doesn't that make her a person interested in this, in order to avoid that?

(continued)

20 MR. GYLES: No your Honour, because this is not a case, there is no issue in this case as to whether she acted properly or improperly, and indeed there is just not the material on which that could be based.

30 HIS HONOUR: Let us assume that there was no discussion whatsoever - which is the Jamieson case or the B.T.E. case - that really this bank and, more particularly for present purposes, its officers, just shut their eyes and gaily went ahead and lent money to B.T.E. without ensuring that they got any sort of security at all; are not those persons then capable of being interested in these proceedings, to avoid that result, so as to avoid any consequential claim upon them by the bank?

MR. GYLES: Let us examine the document in question, because that would focus attention on it.

HIS HONOUR: Well, it does; this document seeks to assert that they did make arrangements for the obtaining of security.

40 MR. GYLES: That is not denied, your Honour, by anybody. Mr. Jamieson said it yesterday, which should be good enough, with respect.

HIS HONOUR: You see, this is one of the great problems. What he said yesterday I do not know about for present purposes; it might have been heard by another Judge.

MR. GYLES: This is B.T.E. of course. Can I just compartmentalise myself for a moment. Well, his

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letter says it, and his telex to Maynegrain says it. Forget the fact that the document is signed today, assume that it was not contemporaneous but that it was written at a time when - it could have been truly contemporaneous, but it would mean in every case where a person is liable to be called as a witness to a set of circumstances, it would be almost impossible to say they were interested, assuming they are 10 employees.

HIS HONOUR: No, that is not right, because he is called as a witness to depose to his own conduct which, if not carried out on one view renders him or her liable to some criticism and/or demand by the employer.

MR. GYLES: Well, I still put to your Honour that a consequence of that would be that if you call a witness to speak of something he has done in the way of his employment, then that consequence would follow; which would be taking the principle a long way. I think to deal more with the question as to what is a person's interest or who is a person interested in this document, one would have to go right through all those cases. 20

HIS HONOUR: Mr. Gyles, my personal inclination is to reject it, but if you wish, I will certainly go through those cases with you and make sure that I am right in my preliminary 30 impression. I cannot help feeling that it would be the safer course to take, for a variety of reasons, to reject it anyway.

MR. GYLES: Yes. Well, I do not really at this stage want to take up your Honour's time by doing it.

HIS HONOUR: Well, my time is yours. All right; Mr. Gyles, I propose to reject it. Do you want to give reasons?

MR. GYLES: No your Honour. 40

HIS HONOUR: Very well. The document which is at p.5 in the agreed bundle of documents is tendered by Mr. Gyles and I reject it. Counsel has agreed that it is unnecessary to deliver detailed reasons.

MR. GYLES: Would your Honour please note that the parties are agreed that the value of barley

in Brisbane F.O.B. to Kuwait in August of 1977 ranged between \$100 Australian per metric tonne and \$104 Australian per metric tonne.

HIS HONOUR: Well, to make that meaningful for present purposes, what rate of exchange are you using?

MR. GYLES: That is Australian.

10 HIS HONOUR: Yes, but one has to measure that as against what you got, don't you?

MR. GYLES: Oh, quite. I have not done that piece of mathematics, but it is necessary. It may help if we gave your Honour what we believe to be the quotations as at 12th August, 1977, for US dollars. It is 1 to 1.1060 buyer, and 1 to 1.1012 seller. Today of course it is very different; we believe today's rates to be 1.1514 buyer, and 1.1466 seller.

20 The L.I.B.O.R. rate - apparently we must get that from the Reserve Bank. We thought the Commercial banks had it available, but they are unprepared to do so, and that will be obtained at a variety of dates and I would seek to reopen to clarify that when it arrives. There was a bundle of A.N.Z. documents which I have asked my friends to look through, which I now tender.

30 (Bundle of documents from Australian New Zealand Banking Group Limited tendered without objection and marked Ex.Q)

MR. GYLES: Could I hand up to your Honour in the Jamieson case the amended reply?

HIS HONOUR: Whilst I look through Ex.Q, have you had any discussions with Mr. Rayment and Mr. Campbell as to utilising Mr. Jamieson's evidence in the other case?

40 MR. GYLES: I have not had any discussions with them.

HIS HONOUR: Well, why don't you have a talk to them whilst I look through these.

HIS HONOUR: Mr. Rayment, in spite of the admissions that were made this morning I still

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feel very troubled about Mr.Jamieson's position. I was not really very much advanced by that doctor's evidence yesterday and I would just draw your attention to the entry under 15th July 1977, line 4 - that is on the second page, I will hand it down to you.

MR. RAYMENT: I should have said to your Honour yesterday we certainly had in mind to pursue it directly.

10

(Bundle of ANZ documents admitted and marked Ex.Q)

MR. GYLES: Your Honour, there were some documents which formed part of Ex.E in the Jamieson matter which I wish to retender in this matter, if I may. The only copies I have at the moment bear my marking on them and might I therefore identify the documents in Ex.Q and I will take copies of those in due course.

20

(Referring to Ex.Q, Mr. Gyles retendered the following :

Document dated 21st January 1977, which is p.27;

Document dated 15th February 1977, which is p.28;

Document dated 17th February 1977, headed "funds approval request" which is p.84;

Document dated 22nd February 1977 which is p.85;

30

Memo dated 11th July 1977 headed "memo State Manager to the senior manager Corporate Accounts which is p.96

Mr.Rayment indicated that he had no objection to the tender

Mr.Gyles gave Mr.Campbell his marked copies of the document to peruse)

MR. GYLES: Whilst Mr.Campbell is looking at that your Honour, we were given a supplementary discovery in the folder - I indicated to my learned friend there are a number of those documents I wish to tender - I wish to tender the whole of that bundle.

40

(Mr.Rayment requested a copy of the minutes to check through)

HIS HONOUR: I will note that you are tendering those supplementary documents.

MR. GYLES: They are described as first defendant's supplementary documents.

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HIS HONOUR: What I suggest is, you give them to Mr. Rayment and Mr. Campbell overnight and I will deal with it tomorrow morning.

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MR. CAMPBELL: I do not object to them your Honour.

10 HIS HONOUR: Those documents extracted from Ex.Q in the other case will become Ex.R in this case and they are received as a notional tender and you will supply copies to my Associate?

(continued)

MR. GYLES: We will have copies taken.

20 HIS HONOUR: And the first defendant's supplementary documents will become Ex.S and I give liberty to both the first and second defendants to apply for the deletion of all or any of those documents from the exhibit as they may be advised tomorrow morning.

MR. GYLES: I seek leave to withdraw from tender documents in the bundle, pp.26 to 51 inclusive.

HIS HONOUR: I take it they are the so-called B.T.E. receipts?

MR. GYLES: Yes.

30 MR. RAYMENT: It may be that Mr. Campbell and I are in a different position about these documents.

HIS HONOUR: Do you consent or not?

MR. RAYMENT: At the moment I think I do.

MR. CAMPBELL: I do not consent to the withdrawal.

HIS HONOUR: I refuse the application for leave to withdraw the documents enumerated by Mr.Gyles from Ex.A.

40 MR. GYLES: We may yet have an opportunity, your Honour - I believe my friend still wishes to pursue an amendment. It might be an appropriate time to argue his amendment to the defence and the price of that may be consent to what I have

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just applied for and his retendering the
same documents.

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HIS HONOUR: You worry about his going into
evidence?

MR. GYLES: I do not know your Honour, I
am not worrying about the particulars - we
are not concerned to rely upon these as part
of our case. Does your Honour have s.100 of
the Companies Act?

(His Honour's Associate left the court 10
in order to obtain a copy of the
above Act)

(continued)

HIS HONOUR: Is that the whole of your evidence
subject to them telling me whether they
object to Ex.S?

MR. GYLES: Yes your Honour, and the L.I.B.O.R.
rate.

(Close of plaintiff's case)

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HIS HONOUR: Mr. Campbell, you apply for leave
to sustain your amended defence? 20

MR. CAMPBELL: Yes your Honour.

HIS HONOUR: Mr. Gyles, you oppose it on the
basis that it is deficient in form.

MR. GYLES: Yes.

HIS HONOUR: Have you had discussions as to
form?

MR. GYLES: No, your Honour, we did have
this morning but I am not sure whether my
learned friend wishes to pursue it in the
present form or not. 30

HIS HONOUR: He was going to think about
that further.

MR. GYLES: He has given us no indication
of any --

HIS HONOUR: Apparently he was having a lot
of trouble over lunch, doing something or
other, I do not want to press him if he is
not ready to argue it.

MR. GYLES: I am not wishing to do that either.

MR. CAMPBELL: I am in a position where I can put to your Honour the substance of the argument I wish to put. It may emerge from that that the pleading does not adequately cater for the substance of argument I wish to put, in which case any such defects of form can be cured.

HIS HONOUR: Do you wish to do that?

MR. CAMPBELL: Yes I can your Honour.

10 The argument that I wish to put is that, on the basis of the agreement that has been cleared in paras.4 and 8A the plaintiff was to get a security interest in certain quantities of barley. The security interest is of a kind that your Honour will have to decide about later. It might have been a pledge; it might have been something different - and when I say "pledge" I mean
20 pledge in the technical sense in which that words is understood in our law, as an essential part of being able to get security over any particular parcels of grain, it was necessary for those parcels of grain to be identified as the parcels that the agreement applied to.

30 The general pattern, your Honour, of the documents which appear at pages - or not all of them, but all the documents I am referring to, appear between pp.26 and, I think it is 51, of the agreed bundle, is that first of all B.T.E. says that it holds a certain quantity of barley on behalf of Bank Compafina indeed it sometimes refers to the document in which it acknowledged that as its warehouse receipt.

 There is another strand of documents that requests drawdown in relation to barley that is held.

40 It would be my submission to your Honour that from the pattern that emerges from the documents, that a drawdown was not requested until the barley was held. I therefore say to your Honour that the letters whereby B.T.E. acknowledged that it held certain barley on behalf of Bank Compafina were an essential part of the process whereby Bank Compafina acquired whatever security interest it might or might not have had in that grain and because they were an essential part of the process whereby the

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security interest was acquired, if indeed there was one, they are within the provisions of s.100.

The relevant parts of s.100, your Honour, and here I am relying on the N.S.W. Act because I was not able to get the Queensland Act over the lunch hour but the extent to which the N.S.W. Act is the uniform Act in the other States, the N.S.W. Act is a guide to what happens there. The relevant provision is, first of all, s.100(1) which requires there to be alleged within 30 days of creation of a charge, a statement of the prescribed particulars, an instrument if any objective charge is created or evidence and a copy with a statutory declaration. It says that the penalty for failure to do that is voidness against the liquidator and any creditor of the company. 10

Now clearly there is no liquidator involved here but we say and it is pleaded in par.14(c) of the document that we were, at all relevant times, a creditor. We were a creditor in relation to this grain because we were storing it and charges were accruing from day to day. 20

If one then turns over to s.100(3), it identifies the charges to which the section applies and amongst those is, "A charge or an assignment created or evidenced by an instrument as a bill of sale". 30

Your Honour, the Queensland Bills of Sale Act is a 1955 Act which they have obligingly not included in their reprinted statute so it is necessary to go back to the original volume. It contains a definition of bill of sale which is substantially the same as the one with which your Honour will be familiar in the N.S.W. Act and if, your Honour, I could now take you to a case which provides some authority for the proposition that these documents that B.T.E. has issued are a bill of sale within the meaning of the Companies Act. That case is Dublin City Distillery Ltd. v. Doherty 1940 Appeal cases beginning at p.823. It concerns a case where some liquor which was still in the store of the distillery that had produced it and still in bond was the subject of certain documents that were on the warrants which said that certain particular quantities 40

of liquor were deliverable to the addressee of the warrant.

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The form of the warrant is set out at p.826 and that warrant was delivered pursuant to an agreement to give a pledge.

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10 It was held that the warrants could be invalidated under the section corresponding to s.100 and the fullest discussion of why is found in Lord Barker's judgment beginning at p.853. About one-third of the way down his Lordship said "The real question is as to the effect of the warrant" having talked about the nature of the warrant and set out the provisions of the Companies Act in the last line his Honour goes on "Save.....bills of sale."

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20 He then talks about how they would have been invalid for lack of formality under the relevant Irish legislation and halfway down the page he says: "They could not therefore require a registration.....warrants in question are bills of sale at all".

I hand your Honour a copy of the Queensland Act. It has been amended in 1971 but not in any relevant respect. Your Honour will find that the definition of Bills of Sale is in about s.5, two or 3 pages over.

HIS HONOUR: I take it you say it comes within A?

MR. CAMPBELL: Yes, your Honour.

30 HIS HONOUR: That s.5 - definition of bills of sale?

MR. CAMPBELL: Section 6 your Honour. Your Honour, in the Dublin City Distillery case he referred to principles in ex parte Hubbard Chapworth and Mills and said, "I do not think that....constitute a bill of sale".

40 HIS HONOUR: Can I just interrupt you for a second? There was that case in the High Court about some uranium mining company where the pleader alleged something in relation to a company in the terms of the relevant Act and, if I recollect correctly, the court said you cannot do that, you have got some ingredient facts which ground it. I do not know whether Mr.Gyles

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point is that here - you just say it is a charge granted within the meaning of the Act?

MR. GYLES: Yes, that is the point.

HIS HONOUR: Well I think that is a good point so I think you will have to go the long way about it and say, because of what the alleged fact is - A,B,C,D and E and then you say, that makes it a charge.

MR. GYLES: And identify the document too. 10

HIS HONOUR: Well I think that is a point that is well taken.

MR. CAMPBELL: If that be necessary, then the amendment I seek to make is:

That the first defendant from time to time gave to the plaintiff documents whereby it acknowledged that certain stocks of barley were held on behalf of the plaintiff. Those documents were part of the process whereby the plaintiff gained its security interests in the goods; neither those documents nor the said agreements were registered - and so on 20

HIS HONOUR: I think that Mr. Gyles is entitled to see that and what I will do is, I will defer the further hearing of the motion to amend the defence of the second defendant so far as par.14 is concerned until tomorrow morning and you had better supply Mr. Gyles with the text of what it is you want. That is the plaintiff's case, subject to those things. Have you had a chance to discuss what you are going to do about Mr. Jamieson's evidence? 30

MR. RAYMENT: Yes your Honour. I think both with respect to Mr. Jamieson, and so far as the plaintiff is concerned, with respect to Mr. Ferrasse, what we would desire to do is this: The evidence of those witnesses in the Jamieson litigation should, as to matters affecting the credit of witnesses, be read in both matters. In other words, the whole of the transcript would go in but just in order to avoid embarrassment to your Honour in forming a view as to the credit of one lot of evidence and not of another, but your 40

	Honour on matters going to issues we would not wish that transcript to be read.	In the <u>Supreme Court</u>
	HIS HONOUR: What do you say as to that?	Plaintiff's Evidence
	MR. CAMPBELL: I would agree with that course your Honour.	No.6 Evidence of Alan David Rector
10	HIS HONOUR: By consent of all parties the evidence of Mr. Ferrasse and of Mr. Jamieson given in the matter of Compafina Bank v. Jamieson will be taken as evidence in the present action insofar as it goes to the credit of those witnesses.	Discussion on Amended Defence 3rd March 1981
	It is expressly agreed between the parties that no evidence given in the other action which might otherwise bear on an issue in this case is to be taken as included in the evidence so admitted.	(continued)
	Are you going to call Mr. Jamieson in this case?	
20	MR. RAYMENT: Yes your Honour. (Short adjournment)	
	HIS HONOUR: That decision, Mr. Campbell, I think was the sale of some shares to the Atomic Energy Commission in Mary Kathleen Uranium or Queensland Mines?	
	MR. CAMPBELL: Yes your Honour, 2 or 3 years ago.	
	ALEXANDER JAMIESON Sworn and examined:	First Defendant's <u>Evidence</u>
30	HIS HONOUR: Q. Mr. Jamieson, do you feel up to going on? A. I will be I think, all right thank you.	No.6 Evidence of Alexander Jamieson
	MR. RAYMENT: Q. Your full name is Alexander Jamieson? A. Yes.	Examination 3rd March 1981
	Q. And your residential address please? A. 160 Eastern Road Wahroongah.	(continued)
	Q. And you are, I think, the Governing Director of the first defendant, Bulk Terminals and Exports Pty.Ltd.? A. Yes.	
40	Q. Mr. Jamieson, extending over a period of months from May 1976 and during 1977,	

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did you, in Geneva, have discussions with representatives of the plaintiff bank, the Compafina Bank, concerning requests for borrowings? A. Yes.

Q. And were the persons to whom you spoke Messrs.Boulmer and Ferrasse and Mrs.Lenos, principally from the bank? A. Yes.

Q. Were there discussions commencing in May 1976 about the question of financing grain purchases? A. Yes.

10

Q. Did you tell the bank officers to whom you spoke in May, which company wished to make a borrowing in respect to grain? A. Yes.

Q. Which company was that (Mr. Gyles objected; question not allowed)

Q. I think your first discussions with the bank officers at all were about 17th May 1976? A. Yes.

Q. And with whom was that discussion on behalf of the bank? A. With Mr.Boulmer and Mr. Ferrasse.

20

Q. When you met those gentlemen did you tell them for which companies you were - which companies you were representing? A. Yes.

Q. Which companies did you refer to?
A. Penmas.

Q. Is that Penmas Inc. a Panamanian Company?
A. Yes.

Q. And did you have a power of attorney from that company? A. I did.

30

Q. Which I think you showed the bank officers? A. Yes.

Q. In those early discussions of May or in that first discussion of May, was there any reference to grain trading financing? A. Yes.

Q. Who made that reference, so far as you recall (Mr. Gyles objected as to relevance; question allowed; question read by court reporter)

Q. That is, the reference to grain financing?
A. I made the reference. 40

Q. And what did you say? A. I said that I was involved in the grain industry in Australia, in the purchase and sale of grain and the clients that we were serving were the multi national grain traders.

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WITNESS: (continued) of whom there are about seven.

MR. RAYMENT: Q. What else did you say?

10

A. I said that we were interested - that is, Penmas was interested in acquiring a borrowing to on-lend to the Australian interests for the pre-shipment financing of sorghum.

(continued)

Q. Was there at that time any standing arrangement or any sale between any party and Tradax? A. There was a contract between the Australian interest and Tradax on an F.O.B. delivery basis.

20

Q. For which payment at that time was made where? A. The payment of that shipment had not been finalised.

Q. It was a proposed shipment? A. It was a proposed shipment.

30

Q. What else was said about this matter, the sorghum transaction? A. Mr. Boulmer and Mr. Ferrasse both expressed a keen interest in being connected to the grain traders who at that time, it was indicated, were not clients of the bank. I was requested to facilitate an introduction of Tradax to the bank and if possible to have Tradax develop a commercial relationship with the bank.

40

Q. Was there anything else said about Tradax, Penmas and sorghum? A. It was agreed then that the bank would pre-shipment finance the accumulation of the Tradax cargo on certain conditions and those conditions involved the introduction of Tradax to Banque Compafina which I arranged, and then there were certain procedures in Australia to follow, which I was to arrange on behalf of the borrower.

Q. These procedures were the subject of discussions in May, were they? A. They were.

Q. What procedure was discussed? A. The procedure would be that Penmas would borrow the funds and on-lend to I.S.T. and B.T.E., whichever,

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(continued)

B.T.E. was the accumulator, I.S.T. was the storer - on certain conditions and those conditions including the pledging or the mortgaging of Amerapco assets as a security for the borrowing and also the drawdowns that would be required by Penmas would be a - the mechanics of it would be for the Australian group to provide a warehouse receipt with the tonnage and value accumulated, but not yet paid for, to the A.N.Z. bank, who would onforward that information to Penmas' bank.

10

Q. Payment was to be made how? A. Payment would be made by telegraphic transfer to the Australian entity and Penmas account would be debited.

Q. The Penmas account was opened, was it not, in July 1976? A. Yes, it was.

Q. At which time you signed some general conditions which, for this purpose, relative to this case, you were told would be altered by having the name Penmas Inc. typed into them? A. I beg your pardon?

20

Q. You signed some general conditions on 13th July 1976 for the purpose of the opening of the Penmas account? A. Yes.

Q. Did you ever ask for any account to be opened in the name of the first defendant, Bulk Terminals and Exporters Pty. Limited? A. No.

30

Q. Has any document been submitted to the first defendant, through you, by the plaintiff, to be signed by the first defendant, any document at all? A. I'm sorry?

Q. Has any document ever been submitted by the plaintiff, through you, to the present first defendant, B.T.E., to be signed by that company? A. No.

Q. After the procedures to which you have referred were discussed, did you speak to anybody employed by the first defendant, B.T.E., about the matter? A. Yes, I did.

40

Q. Whom did you speak to? A. I spoke then to the group general manager, Mr. Behn.

Q. When you say the group general manager, which group was that? A. I.S.T. and B.T.E.

Q. What did you say to him? (Objected to.)

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HIS HONOUR: I don't think the discussion is admissible, but nonetheless I will admit it and I will discard it from consideration at the conclusion of the evidence if that appears to me to be a proper course, just to ensure that there is no mistrial.

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10 MR. RAYMENT: Q. What did you say to Mr. Behn?
A. I told him that an arrangement had been made with a banking group in Switzerland whereby it would be possible to facilitate a borrowing for the ultimate use of - in the pre-shipment financing of grain and while B.T.E. would not be the direct borrower the moneys would go directly from the bank to B.T.E.'s bank to facilitate the mechanics and the requirement from B.T.E. would be to provide a warehouse receipt indicating the quantity and the - that is, the tonnage and the price
20 of grain accumulated and for which payment was required, that information to be given to the A.N.Z. Bank, who would telex it to Compafina bank, who would remit the funds on receipt of that telex advice.

(continued)

Q. Did you identify the direct borrower in those discussions? A. I beg your pardon?

30 Q. Did you identify the direct borrower?
A. I told him that there was a Panamanian company that was interposed between the bank and Penmas and B.T.E.

Q. Did you identify it at that stage? A. Yes, Penmas.

Q. Thereafter were there some discussions with Tradax representatives that you were present at? A. Yes.

Q. There were funds then debited to the account of Penmas by the plaintiff for the amount of moneys remitted to the A.N.Z. Bank in Australia for the accumulation of sorghum? A. Yes.

40 Q. In late 1976 you executed a personal guarantee in respect of the debts of Penmas and Amerapco to the plaintiff bank, did you not? A. I did.

Q. Have you ever been asked to execute any personal guarantee in respect of any debt owned by Bulk Terminals and Exporters Pty. Limited to the Bank? A. No.

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(continued)

Q. Later in 1976 were there any discussions between you and officers of the Compafina Bank about a barley shipment?
A. Yes.

Q. Do you recall when those discussions began? A. It was - the barley season normally is in November and it was prior to November and I believe in the period - the definitive and final discussions were in the August/September time, the period.

10

Q. Who was present for the bank at those discussions? A. Mr.Boulmer and Mr.Ferrasse.

Q. Do your best to tell us what you remember of the conversation with Mr.Boulmer and Mr. Ferrasse about the barley shipment?
A. There were conversation earlier than that time in respect of the accumulation of barley, but it depended on how the season would emerge and there was also a domestic sorghum

20

Q. I am not asking you about domestic sorghum. We will come back to domestic sorghum if that be relevant? A. Then the -

HIS HONOUR: I think if you stop for a moment and if you recall the question to him.

MR. RAYMENT: Q. Would you be good enough to tell his Honour what you recollect of the first main discussion with Mr.Boulmer and Mr. Ferrasse about the barley shipment. I think you have identified that as having taken place in August/September 1976?
A. Yes, well, up until that time the bank were - (Objected to).

30

HIS HONOUR: Q. You are being asked to tell us what the conversation was. Now, could you kindly, please, concentrate on that and tell us. A. Then the barley would be coming onto harvest in November and that we required and were interested in the pre-shipment financing of a barley cargo and Mr.Boulmer and Mr. Ferrasse expressed interest in providing the pre-financing and I believe that there was a figure of up to \$3 million that was indicated and this would be up to 30,000 tons of barley.

40

MR. RAYMENT: Q. Do you remember anything else in that discussion? A. And that the arrangements

for the financing would follow the same patterns had been used in respect of the sorghum.

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Q. Is there anything else you recollect about the discussion? A. I indicated that the period of accumulation would be over the barley season, which began in November and generally terminated about February.

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10 January would be the most that had accumulated and into February at the latest. I don't -

Q. Was anything said about percentages about purchase price that might be financed? A. There was an agreement to finance 80 per cent of the purchase price.

(continued)

20 Q. Just so we can have the background, was B.T.E. purchasing from suppliers and growers of barley and storing barley purchased in Queensland silos of Inland Satellite Terminals Pty. Limited, in the first instance? A. They were purchasing from growers and suppliers. However, that was not going to Inland Satellite Terminals, that went direct to the court facility.

Q. Always, did it, went directly there? A. In the New South Wales barley, direct to the Mayne Grain facility.

30 Q. In the case of the sorghum, warehouse receipts had been issued by B.T.E. had they? (Objected to as irrelevant: question withdrawn).

Q. Was anything said about warehouse receipts in the case of the barley arrangements? A. Yes.

Q. What was said about that? A. There would be a confirmation of the quantity and the price to be paid for the barley accumulated and that information was to be covered in a warehouse receipt, which would be given to the A.N.Z. Bank.

40 HIS HONOUR: Q. I am afraid I will have to ask you to be a bit more particular about that. What you are doing is giving a summary of what you understood the arrangement to be. Could you please tell me, as near as you can remember, what you said and what Mr. Ferrasse and anybody else who was present said on this subject? How did it all come up? A. It came up in the

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(continued)

consideration of what was the most practical to expedite whatever was to be done, the pre-shipment financing of the barley. That is how it came up.

Q. So somebody said, "What is the most expedient way of doing that" and then who answered that? A. I answered.

Q. And what did you say? A. I said that the call for a drawdown would originate with B.T.E. and it would be supported with a warehouse receipt giving the tonnage and the amount to be paid for the barley and that information then would be given to the A.N.Z. Bank, who would telex it to Banque Compafina. Banque Compafina, on receipt of that telex then would remit that amount to the account of B.T.E. in Sydney and debit the Penmas account with the Bank.

10

MR. RAYMENT: Q. What was said by anybody about Maynegrain? A. That Maynegrain were the Seaboard Terminal Operators and it would be held in their silos until time of shipment.

20

Q. What was said as to who should issue warehouse receipts? (Objected to).

HIS HONOUR: Q. Give us the entirety of the conversation, if you would be kind enough. You got to a certain point. How did the conversation proceed from there? A. That Maynegrain would be the custodians of the grain, they would hold the grain and do what was necessary like fumigation, they would weigh it in and they would hold it in storage until shipment was required, whenever that was nominated. And there was some exchange in relation to those - the conversation in relation to that and it was agreed upon by Mr. Ferrasse by Mr. Boulmer - ~~it was much the same as had been done with the sorghum.~~ (Struck out on direction of his Honour).

30

MR. RAYMENT: Q. Do you remember anything else of those discussions? A. It doesn't come to mind.

40

Q. What was said as to who should issue the warehouse receipt? A. Mayne Nickless. Let me -

HIS HONOUR: Q. Was there any discussion as to who the receipts should be addressed to, who

it should be in favour of? A. I don't know whether it was the A.N.Z. Bank or Banque Compafina, but it was one of the banks. I don't recall.

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Q. Was there any discussion as to what the purpose of providing a warehouse receipt made out to one or other of the banks was?

A. That was as security for the cargo, for the barley.

10 Q. Could you please tell us what was said about that? A. That the warehouse receipt would be security for the grain accumulated and the bank accepted that.

(continued)

20 MR. RAYMENT: Q. I want to first of all get some persons in Kuwait identified. I am about to go to some of the documents, all of which my learned friend has tendered, so there is no contest between us, as I understand it, that the documents should be in that I wish to refer to. Can I just get these persons clear with you. There is, first of all, Sheik Hamad, was he a Kuwait resident who was the son of Sheik Sabah? A. Yes.

Q. Was Sheik Sabah and Sheik Hamad, were both those Sheiks part of the ruling family in Kuwait? A. Yes, father and son.

Q. And was the father the foreign minister of Kuwait? A. Yes.

30 Q. Was a company called Gulf Fisheries Co. W.L.L. the family company of Sheik Sabah? A. Yes.

Q. In which Sheik Hamad also had an interest? A. Yes.

Q. I think W.L.L. stands for "With Limited Liability" is that right? A. Yes.

Q. Was there a gentleman called Husain Makki al Juma, who is a resident of Kuwait? A. Yes.

Q. Was he, amongst other things, a grain broker acting for the Kuwait Supply Company? A. Yes.

40 Q. Among the banks in Kuwait were there three, first of all the Gulf Bank? A. Yes.

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(continued)

Q. Secondly, the Al Al Hia Bank and
thirdly, the Commercial Bank of Kuwait?
A. Yes.

Q. Was the Gulf Bank Sheik Hamad's bank?
A. Yes.

Q. Was the Al Al Hia Bank a bank owned
by Husain Makki al Juma, the broker for
the Kuwait Supply Company? A. Yes.

Q. Was the Commercial Bank of Kuwait the
banker for, amongst other parties, the
Kuwait Supply Company? A. Yes. 10

Q. Was there an entity known as the Gulf
Fisheries Co. W.L.L., Marine Division?
A. Yes.

Q. Were the persons authorised to use that
name in business transactions you and your
brother? A. Yes.

Q. There was once to be formed, was there
not, a company to be named by a name
including the words "Marine Falcon"? 20
A. Initially, yes.

Q. And that entity was never ultimately
formed? A. It was not.

Q. It was to be, was it not, a joint
venture company owned by Gulf Fisheries Co.
W.L.L. and Amerapco Inc? A. It was.

Q. Instead of the formation of that company
was the entity known as Gulf Fisheries Co.
W.L.L. Marine Division used for the same
purpose? A. Yes. 30

HIS HONOUR: Mr. Rayment, like everything
you do, you have me completely engrossed and
I am now much better informed as to the
affairs of Kuwait, but perhaps you might just
help me in this regard. I rather understood
from what had gone on before that you were
contesting the proposition that these warehouse
receipts were to represent some sort of
security or charge. Did I misunderstand you
in that regard? Is that conceded. 40

MR. RAYMENT: Their existence is not denied.

HIS HONOUR: I realise that, but is it denied

that they were brought into existence for the purpose of constituting a security or charge of some description?

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MR. RAYMENT: Does your Honour mean the ones from Maynegrain in respect of the barley?

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HIS HONOUR: Yes.

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MR. RAYMENT: There is no doubt on the evidence the witness just gave that Penmas explained their purpose in connection with the security.

10 HIS HONOUR: Am I to understand that any issue in that regard has now disappeared from the case?

(continued)

MR. RAYMENT: Their legal effect as documents presumably affects principally Mr. Campbell's client and there is a cross-claim against me by Mr. Campbell's client. Any issues that Mr. Campbell leaves open I must therefore leave open in the cross-claim.

20 HIS HONOUR: You can leave it open if you like, but as I understand the witness's evidence, he said the arrangement was that they should be some sort of security.

MR. RAYMENT: Indeed.

30 HIS HONOUR: Accepting for the purpose of the exercise his evidence on that score, between you and the plaintiff is that the only issue that is left, as to whether the transaction was between B.T.E. and Compafina or between Penmas and Compafina, number one, and number two, whether there was some sort of consent to the shipment of the barley?

MR. RAYMENT: What we say about each of the two alternative claims made in paras. 4 and 8 is that there was never an arrangement under which B.T.E. borrowed anything from this bank.

HIS HONOUR: Well, somebody did, so it was either Penmas or B.T.E.

MR. RAYMENT: Yes, and it was Penmas, we say.

40 HIS HONOUR: That is why I say that is the first issue. The only other issue in the case is whether or not shipping this out of Maynegrain store was with the consent of Compafina or not?

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(continued)

MR. RAYMENT: No, with respect to the conversion claim a multitude of issues arise, in my submission. See, they had immediately before the vessel sailed cargo worth what has now been agreed at between a range of 100 to \$104 per metric tonne. On 25th August they got the bills of lading to that cargo when the vessel was still on the water and it has been part of the arrangement between us that it is agreed that the value of the cargo had not dropped, so they had title back. In other words, let's assume there was a conversion, for a moment. They had title back six days later and the value of it was the same. They didn't need to satisfy any pre-existing contract for the sale of that barley. They could have done as they wished with it, so that any conversion - we say there is no conversion because there is no damage, apart from any other matter. No one suggests that the barley was in any way damaged, it had the same value when they got title.

10

20

HIS HONOUR: I follow what you say.

MR. RAYMENT: We further say that the vessel went to sea with the knowledge of the Compafina Bank and without its disapproval. Whether it amounts to express approval or not is perhaps a different question.

HIS HONOUR: I follow that to.

30

MR. RAYMENT: So that there was no intention to deprive it of its chattels, they knew where they were and it was desirous of being paid from a sale which at that stage it knew of and it knew the purchaser and the sale price and the conditions of the sale, including that it should be bagged. So that we take a more general stance in relation to the conversion claim. In all that, so far as I am concerned, the warehouse receipts don't feature. If the warehouse receipts are used in some way against me, in a way that I do not presently understand, then I would wish to look at how it is put.

40

HIS HONOUR: What prompted my question was that I did not quite understand what I am going to do with the vast benefit which you are conferring on me of knowing whose bank is which and what sort of companies are engaged in business in Kuwait.

40

10 MR. RAYMENT: I was doing that so your Honour could understand some documents which are going in by consent between me and the plaintiff about the Kuwait position. Your Honour will see who negotiated with whom. Then I am going to ask Mr. Jamieson in connection with that what was said to the Compafina Bank, but your Honour has to know what the facts were before your Honour understands what he told them. They are not exhibits which are objected to, as I understand the matter. I was not meaning to limit myself by what I put to your Honour, I was trying to answer frankly.

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(continued)

HIS HONOUR :I was just trying to work out why you were doing this, but you have explained it.

20 (In reply to Mr. Rayment, Mr. Campbell indicated that he had not considered all the defendant's supplementary documents for the purpose of tender and that matter was deferred.)

(Further hearing adjourned till 10 a.m. Wednesday, 4th March, 1981)

IN THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION
COMMERCIAL LIST

No.13528 of 1978

4th March
1981

CORAM: ROGERS, J.

30 COMPAFINA BANK v. BULK TERMINALS AND EXPORTERS
PTY. LIMITED & ANOR.

SEVENTH DAY: WEDNESDAY, 4TH MARCH 1981

(For Mr. Rayment's application to increase security for costs in this matter and Compafina Bank v. Jamieson, please see transcript in last mentioned matter.)

HIS HONOUR: What is the situation with regard to security in the B.T.E. action?

MR. RAYMENT: It was a joint security, they were both matters, \$10,000 each.

40 HIS HONOUR: Do you want to say anything about

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(continued)

increasing the security in the Bulk
Terminals or do you want some time to
consider it?

MR. GYLES: I would.

HIS HONOUR: I stand over the application to
increase the security in the action against
Bulk Terminals and I will hear further
argument on that at 2 o'clock.

MR. GYLES: On reflection, having looked at
that bundle of documents the supplementary
bundle for which Exhibit S was reserved, I
do not wish to pursue that tender. 10

HIS HONOUR: The tender of the documents
proposed to constitute Exhibit S is withdrawn.

MR. RAYMENT: My learned friend is not quite
right in what he said about the exhibit
being reserved for it. It was given an
exhibit number and liberty was reserved to
Mr. Campbell and me to have anything deleted
from it. I make no application for anything
to be deleted from it and would oppose the
withdrawing of the exhibit. 20

HIS HONOUR: I think what he says is right,
you have tendered it, I admitted it subject
to his opportunity to object to it.

MR. GYLES: There is clearly a discretion to
permit the withdrawal from tender, if that
be necessary. Your Honour has not seen the
documents. They have not been, indeed,
handed up to your Honour at all. They are
documents which, on reflection, go into
matters which I will be contending are
irrelevant and my learned friends may wish to
renew the tender themselves and that can be
argued. I would respectfully submit that
the circumstances are quite different from
the circumstances which arise in relation to
the other document yesterday. 30

MR. CAMPBELL: I would oppose their withdrawal
from tender also. 40

HIS HONOUR: In so far as leave is required
to withdraw documents from tender, I grant
such leave.

(Mr. Gyles called for letter 9th August
1977 from Gulf Fisheries Co. WLL to
Kuwait Supply Company: produced.)

(Mr. Gyles called for letter 29th June 1977 from Gulf Fisheries Co. to Hussain Makki Aljuma: produced.)

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(Copy letter from Gulf Fisheries Co. WLL to Kuwait Supply Co. of 9th August 1977 tendered without objection and marked Exhibit S.)

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10

(Copy letter from Gulf Fisheries Co. WLL to Hussain Makki Aljuma of 29th June 1977 tendered without objection and marked Exhibit T.)

(continued)

ALEXANDER JAMIESON
On former oath:

MR. RAYMENT: Q. I just want to take you through the sequence of events concerning the negotiations for sale and ultimate sale of the barley in Kuwait. (Objected to: allowed.)

20

MR. GYLES: Would your Honour consider an application after the evidence has been led to argue that it is irrelevant, if it is not linked up?

HIS HONOUR: Yes.

MR. RAYMENT: I show you a letter of 6th June 1977 on the letterhead of Penmas Inc. addressed to Hussain Makki Aljuma. First of all, that was signed by you, I think, was it not? A. Yes.

30

Q. On the date of it, 6th June 1977, were you in Kuwait? A. Yes.

Q. Is that the first written document which passed between Penmas and Mr. Aljuma with respect to the proposed sale of this barley? A. Yes, to my knowledge it is.

MR. GYLES: My objection is a general one to relevance, I will not repeat it each time.

(Copy letter from Penmas Inc. to Hussain Makki Aljuma dated 6th June 1977 tendered: admitted and marked Exhibit R18)

40

HIS HONOUR: This document is admitted subject to leave to Mr. Gyles to argue relevance at the conclusion of the evidence relating to the transaction between Penmas and Aljuma.

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(continued)

MR. RAYMENT: Q. Was the time limit of 9th June 1977 specified in that letter extended from time to time during June? A. Yes.

Q. I show you two letters of 26th June 1977, one from Gulf Fisheries Co. WLL, another from Edmonton Company Limited, both to the same person, Hussain Makki Aljuma, extending the time to 29th June 1977. Are those copy letters which have the initials of your brother at the foot of them? A. Yes, 10 they do.

Q. Prior to 29th June 1977 did you know who the client of Hussain Makki Aljuma was in Kuwait? A. No.

Q. On 29th June was the name of that purchaser disclosed to be Kuwait Supply Company? A. Yes.

(Copy letters from Edmonton Company Limited to Aljuma dated 26th June 1977 and from Gulf Fisheries Co. WLL to Aljuma of 26th June 1977 tendered: admitted and marked Exhibit R19 on the same basis as Exhibit R18) 20

Q. Did you leave Kuwait on 21st June? A. 21st June? May I refer -

Q. You don't recollect? A. I believe about that time.

Q. You don't recollect dates on which you departed without reference to your diary? A. Yes, to the affirmative, but I know it was after the middle of June. 30

HIS HONOUR: You may refer to your diary.

MR. RAYMENT: Q. Take out your diary, if you would, for 1977. Did you leave Kuwait on 21st June? A. Yes, I did.

Q. Were you in Australia until 10th July? A. Yes.

Q. And were you in London thereafter until 18th July? A. Yes.

Q. From 18th July to 28th July were you in Geneva? A. I believe I was in Geneva until 31st July. 40

	Q. Did you go to Trieste from Geneva on the 28th July? A. I beg your pardon, yes.	In the <u>Supreme Court</u>
	Q. And return the same day? A. Yes.	First Defendant's Evidence
	Q. Did you on 29th July visit Frankfurt and return the same day? A. Yes, I did.	No.6 Evidence of Alexander Jamieson Examination
	MR. GYLES: I take it this is all from the document the witness has before him?	4th March 1981
	MR. RAYMENT: Q Is that right? A. Yes, I did.	(continued)
10	Q. Does that appear in your diary? A. Yes.	
	Q. Did you leave Geneva on 31st July? A.Yes.	
	Q. Did you travel to Kuwait passing through London, is that right? A. I beg your pardon?	
	Q. Did you travel to Kuwait - (Objected to as leading: his Honour indicated counsel could approach the witness).	
	HIS HONOUR: Show Mr. Gyles where you are getting this information from as Mr. Rayment asks you.	
20	MR. RAYMENT: Q. Did you leave Geneva on 31st July? A. Yes, I did.	
	Q. Is there a Swissair - A. Swissair 840 at 8.50.	
	Q. Were you in London on the following day , 1st August? A. Yes.	
	Q. From what does that appear? A. I left London on Kuwait Airways 893A 1900.	
	Q. Did you go to Kuwait and were you there on 2nd August? A. Yes.	
30	Q. From what does that appear? A. I was there and I left on 3rd August.	
	Q. You were thereafter in Australia from 3rd August to 18th August? A. Yes.	
	Q. You dealtwith Belnes during that period of time? A. Yes.	

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(continued)

Q. Were you in Kuwait from 18th August?
Can you find a reference there on 18th
August? A. I arrived on the 19th.

Q. Did you arrive in Kuwait on 19th August?
A. Yes.

Q. When did you leave Kuwait? A. I left
Kuwait on the 21st and went to Geneva via
Frankfurt on Kuwait Airways 171.

Q. Were you in Geneva until 29th August?
A. Yes, left on Swissair 812. 10

Q. 19th August, were you then in Kuwait
or were you elsewhere? A. I was in Kuwait.

Q. I show you two letters of 2nd July 1977,
carbon copies from Gulf Fisheries Co. WLL,
Marine Division, to Kuwait Supply Company.
Are those documents initialled by your brother
and, apparently, sent on those dates?
A. Yes, they are.

(Copy letter from Penmas Inc. to Kuwait
Supply Company dated 2nd July 1977 20
and from Gulf Fisheries Co.WLL to
Kuwait Supply Company KSC, also dated
2nd July 1977 tendered: admitted and
marked Exhibit R20 on the same basis
as Exhibit R18).

Q. I next show you a copy of a performance
bond dated 4th July 1977. Is that a
document from the records of Penmas and Gulf
Fisheries Co., Marine Division? A. Yes.

(Performance bond from Gulf Bank dated 30
4th July 1977 tendered: admitted and
marked Exhibit R21 on the same basis
as Exhibit R18).

Q. I next show you a copy of an agreement
dated 9th July 1977 between Gulf Fisheries,
Marine Division, and Kuwait Supply Company.
Can you recognise that document? A. Yes.

Q. As a carbon of the contract for the sale
of the barley? A. It is. 40

(Copy agreement bearing dated 9th July
1977 between Gulf Fisheries Co. WLL and
Kuwait Supply Company tendered: admitted
and marked Exhibit R22 on the same basis
as Exhibit R18)

	Q. (Witness shown agreed bundle of documents) Would you turn to page 164 of that bundle, a copy charter party, do you recognise that as a charter party issued for the Belnes on 22nd July 1977? A. Yes, but it was actually signed on 24th August 1977.	In the <u>Supreme Court</u>
	Q. Did you first see it then? A. Yes.	First Defendant's Evidence
	Q. In Bank Compafina's offices? A. Yes.	No.6 Evidence of Alexander Jamieson Examination 4th March 1981
10	(Documents at page 164 to 169 of the agreed bundle of documents tendered: objected to: admitted as part of Exhibit R23.)	(continued)
20	(Mr. Gyles indicated that during the discussion in relation to the admission of Exhibit R23 he understood that Mr. Rayment had inferred that the issue of consent was no longer a live one. After some discussion, some in the absence of the witness, his Honour indicated that he understood Mr. Rayment's case to be a twin-headed one, consent until 12th August, followed by power of disposal.)	
	Q. (Witness shown agreed bundle of documents page 201). Is that a copy of a telex from Bulk Terminals and Exporters Pty.Limited which went to Transcott's premises on 5th January 1977? A. Yes.	
30	Q. Was that sent at a time when Penmas was looking for a buyer for the barley that we now speak of? A. Yes.	
	Q. Was there any subsequent document of which you are aware passing between B.T.E. and Penmas relating to the sale of this barley? A. No.	
	(Mr. Rayment called for plaintiff's discovery document 343: produced.)	
40	(Pages 201 to 202 of the agreed bundle of the documents tendered; objected to as irrelevant; rejected.)	
	Q. I show you a document produced by the plaintiff and discovery. Would you look at the back of it please, with some handwriting on it. Have you	

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written the name "Bulk Terminals and
Exporters Pty. Limited" and signed it there?
A. Yes.

Q. Do you remember when you did that?
A. I do.

Q. When was it? A. In Geneva on 24th August.

Q. What did you do with the document, having
done that? A. It was given to Mr. Boulmer.

(Photocopy of the bill of lading dated
24th August 1977 tendered and admitted 10
as Exhibit R24 on the same basis as
Exhibit R18)

Q. I want to come back to your meetings in
Geneva with Bank Compafina officers. Do you
remember, without reference to your diary, any
dates in July on which you had meetings with
anybody from Bank Compafina without reference
to your diaries? A. Yes, I had a meeting,
I believe, on the 14th - you are speaking about
July? 20

Q. July, yes. A. Yes, 14th July.

Q. Let me suggest this to you: I think on
14th July - (Objected to:)

Q. Is there any other date that you recall
in July of a meeting without reference to your
diary? A. I can't be precise.

MR. RAYMENT: May I take the witness to the
diary?

HIS HONOUR: Yes.

MR. RAYMENT: Q. Just stopping on 14th July, 30
I think you were in London - (Objected to:
rejected).

Q. Do you recall whether you met any bank
officers during July, Compafina Bank officers
in their offices in Geneva? A. I was there
on the 13th - I beg your pardon.

Q. Just answer my question, if you would.
Do you recall whether in July you were in
Geneva seeing any bank officers? A. Yes.

Q. Whom did you see in July? A. Mr. Boulmer 40
and Mr. Ferrasse. Mr. Ferrasse would leave a

meeting and Mr. Boulmer would leave a meeting, but I would be with one or the other.

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Q. Did you see anybody else from the bank?
A. I believe I saw Mrs. Lenos.

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10

Q. Without reference to your diary, are you able to tell His Honour on what dates you saw any of those persons in July, without reference to your diary? A. I saw Mr. Ferrasse on the Friday, which I believe was the last Friday in the month.

Q. Anything else that you can tell his Honour about dates of meeting before I go to your diary, dates and persons present, I should say? A. I know the sequence - I can't be specific about the dates. I know the sequence of the meetings. I was out of Geneva to Italy on one day and to Frankfurt on another day, but I saw them almost daily and certainly spoke with them daily in that period.

(continued)

20

Q. May I ask you to go to your diary for the month of July 1977 - (Objected to: rejected).

Q. You say you remember the sequence of events in Geneva, Who do you remember seeing first from the bank, or were they all there on the first occasion? A. Mr. Boulmer and Mr. Ferrasse, I believe, were there on the first occasion.

Q. Was there more than one occasion? A. There were.

30

Q. When was it that you saw Mr. Boulmer and Mr. Ferrasse on that first occasion, what date in July? A. What date in July?

O. Yes. A. In the last week of July and I believe the Friday was the 29th of July. I believe I saw Mr. Boulmer and Mr. Ferrasse on that day. I saw them on the - I believe I saw them on the Wednesday. I believe I saw them on the Thursday of that week and the Monday of that week. The previous week I am not so sure on which days.

40

Q. Would you have a look at your diary and tell us when the first meeting you have noted during July was? A. I spoke to Mr. Boulmer from London the 15th and I saw Mr. Boulmer on the 19th and on the 20th.

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Q. On the 19th and the 20th? A. Yes, on the 19th and on the 20th at 2.30 and on the 21st at 3 o'clock and on the 22nd, and Mrs. Lenos was at that meeting.

Q. On the 22nd? A. On the 22nd.

Q. You say at each of those meetings, I think, Mr. Boulmer was present? A. Yes.

Q. Mrs. Lenos was present on the 22nd?
A. Yes.

Q. Do you have any note indicating that Mr. Ferrasse was present at any of those meetings? A. I don't think - 10

Q. Do you have any note indicating whether Mr. Ferrasse was present, one way or the other? A. No.

Q. Is there anything else later in July concerning meetings or telephone calls noted?
A. Mr. Ferrasse on the 27th and I was in Trieste on the 28th and on the 29th I saw Mr. Ferrasse, Mr. Boulmer and on the 30th I spoke to Mr. Ferrasse. 20

Q. Can we go now to 19th July. You had, I think, last been in Kuwait on 21st June. Had you been in touch with Kuwait thereafter?
A. Which date?

Q. You were last in Kuwait on 21st June. Had you been in touch with your brother in Kuwait?

MR. GYLES: Does the witness assent to that?

MR. RAYMENT: It is his evidence before. 30

HIS HONOUR: Yes, I think he did say that.

MR. RAYMENT: Q. You were last in Kuwait on 21st June as at 19th July? A. Yes.

Q. Had you been in touch with Kuwait with your brother thereafter? A. Between then and July?

Q. Yes. A. I would have been.

Q. 19th July is the day after you arrived in Geneva and you have got Mr. Boulmer's name there. Was that a conversation at which Mr. Boulmer alone was present? A. Yes. 40

Q. Do you remember what was said between you and he? A. I said that the contract in Kuwait had been finalised with Kuwait Supply Company and the letter of credit in favour of Sheik Hamad was established. I am not certain whether it was established or whether it was being established, I don't know. I don't recall on precisely what day the letter of credit was established.

10 Q. What else did you say? A. And that the contract was on the basis of barley being loaded in bulk and being bagged at destination and that the equipment that was required for bagging was to be sourced from Germany and from Italy and that we were in the process of arranging that and Mr. Barki has undertaken to do it and also to arrange the bags that were required and for the consignment by road to go through from Europe to Kuwait.

20 Q. Anything else? A. I recall speaking about the sale being on the basis of feed barley, whereas we had been purchasing on the basis of malt barley and feed, a mix, and that the sale was on the basis of feed barley.

Q. What did you say about that, do you remember? A. That the barley retained in store had developed an infestation of weevil and moth and that there could be a deterioration in the quality of the grain, as was already evidenced in us having to

30 sell the cargo as feed barley rather than malt, which was - normally attracted a higher price.

Q. Do you recall anything else of your conversation with Mr. Boulmer that day? A. Yes, there was mention made of an arrangement.

Q. Who mentioned this arrangement? A. I mentioned this.

Q. What did you say? A. I mentioned that there was an arrangement being discussed with Kuwait Supply to provide a payment before the F.O.B. value

40 of the cargo and that those discussions were proceeding.

Q. What did Mr. Boulmer say about that? A. He said that if it were at all possible that the bank would wish to have an F.O.B. credit and to use my best endeavours to ensure that that was done. I also mentioned that we were restricted - we were limited because of this credit being controlled by Sheik Hamad and we had limited authority in respect

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of the credits.

Q. Was there anything else said about that? A. I don't recall whether it was at that meeting or a subsequent meeting that Mr. Boulmer drafted a letter - a draft of a telex to both Kuwait Supply Company - at least, Sheik Hamad and the Commercial Bank of Kuwait, although I believe that that may have been in the August meeting.

* Q. Anything else that you can remember of the initial discussion in July? A. That we would proceed with the loading. Mr. Boulmer had confirmed when I spoke to him from London that the bank had been in contact with Jebesen - (Objected to: allowed). 10

Q. You said something about a telephone call from London -

MR. GYLES: Would it be asking too much to complete what was said at this first meeting with Mr. Boulmer without going to some other meeting in the middle of it? 20

HIS HONOUR: I don't think that you are really making sufficient allowance for the witness' evident difficulty, but you are entitled to have that.

Q. What you are being asked to do is to recount the conversation at this meeting without going in for side excursions. If there is something else that needs to be said your counsel will cover it. I will have read to you what you last said as to the conversation which was occurring and then I will get you to continue from there. (Question marked * read by court reporter). 30

A. We would proceed with the loading and Mr. Boulmer said that the bank had been - or he had been in communication with the ship owners in respect of the vessel and that there was no difficulty - and I am not certain whether it was at that first meeting or the meeting on the 22nd, but either that or the 22nd when Mr. Boulmer spoke to Mr. Peterson in Hamburg of the shipowners and that was a reconfirmation that the vessel - 40

MR. RAYMENT: Q. Did he speak on the telephone in your presence, did he? A. Yes, he spoke to the shipowners.

10 Q. What did he say? A. He said that the people or the person that was responsible for the loading of the cargo in Brisbane was with him and, apparently, there was a question as to who would be receiving - to Mr. Boulmer, who would be receiving the cargo in - responsible for the cargo on arrival in Kuwait and my brother's name was given to Mr. Peterson at that time and that it was a general conversation that there were no impediments to the loading of the barley and its shipment to Kuwait.

(Short adjournment)

ON RESUMPTION:

20 MR. RAYMENT: Q. Mr. Jamieson, you were telling us about the 19th July meeting, and the last thing you told us was that either on that day or on the 22nd, Mr. Boulmer spoke to Mr. Peterson in Hamburg from Jebsens, in your presence. Is there anything else you now recall about Mr. Boulmer on the first meeting in July, on the 19th? A. I believe I have referred to the bagging plant and the equipment and the bags.

Q. Right, yes? A. And to the possibility of the letter of credit, the negotiations and discussions with the Kuwait Supply Co., I think I have referred to that.

30 Q. Yes. Who was dealing with Jebsens on the question of the vessels, was that you or somebody else? A. It was somebody else.

Q. Who was it? A. It was a ship broker in Italy.

Q. And? A. And Mr. Barki.

40 Q. Did you have any conversation - when did you first know that the "Bellnes" was to carry the cargo? A. I believe that it was in a phone conversation from London; before I arrived in Kuwait I spoke to Mr. Boulmer, and that was about the middle of July, before I arrived in Geneva.

Q. Yes, I think you said "Before I arrived in Kuwait"; did you mean "In Geneva"? A. In Geneva, I beg your pardon, from London. I spoke to Mr. Boulmer from London in Geneva.

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Q. What did you say to him in that conversation? A. He said that he had been in communication with the ship owner the previous day, and that the "Bellnes" had been the vessel that was nominated.
(Objected to by Mr. Gyles, pressed, allowed)

Q. Yes, and what else did he say, and what did you say? A. That the arrival of the vessel would be in the early days of August, in Australia. But I believe that conversation, if I may correct that, that conversation was on the 22nd, when I was in their office; that is when it was indicated the vessel would be the early days of August. 10

Q. 22nd July? A. July, rather.

Q. Yes. You have made reference earlier to an earlier telephone conversation, that is before 19th July, when you were in London, and I think you said you spoke to Mr. Boulmer. Do you remember what was said in that discussion? A. This was the conversation I am speaking about now, when I called him from London. That would be 19th July, and that I spoke to him - that is the conversation I have just referred to, and that he had been in communication with the ship owner in Hamburg and that they had satisfied the ship owner about the chartering. 20

Q. I think you have said that there were other meetings in July, on 20th, 21st, 22nd, 27th and 29th, with bank officers; were any of those discussions one which was a lengthy discussion? A. The 22nd was quite a lengthy time spent with the bank, and Mrs. Lenos was present on that occasion. 30

O. Mr. Boulmer was there? A. Yes.

O. And was anybody else there? A. I believe Mr. Barki was there.

Q. And anybody else? A. And I am not sure about Mr. Ferrasse; he was - I am not sure about him. He was in and out of meetings. 40

Q. What do you recollect of that discussion; please? A. Are you speaking about the 22nd?

Q. Yes, the one that you have just spoken about? A. Well, that was at the meeting ---

HIS HONOUR: Could you keep your voice up a bit please?

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WITNESS: ~~That was at the meeting when all of the details were understood.~~

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HIS HONOUR: That will be struck out.

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MR. RAYMENT: Q. Just tell us what you remember being said, please, Mr. Jamieson?

10 A. That the bagging plant, the hoppers, that the bins, the bags, and the transport, had all been arranged.

HIS HONOUR: Q. Well, who said that? A. I said that.

(continued)

Q. Is it too much to ask you, would you kindly tell us who said what? A. I said that the bins, the bags, the bagging plant and the transport had all been finalised and that they would be in Kuwait before the vessel arrived, and that the insurance had also been arranged - I said that.

20 MR. RAYMENT: Q. Yes. Can you recall anything said by Mr. Boulmer or Mrs. Lenos? What else was said at this meeting, please, and could you identify who said it? A. Mr. Boulmer inquired as to, he said that "With the equipment arriving, there should be no difficulty about the bagging operation", and I confirmed that there would be no difficulty, but I said that there was adequate labour and that the vessel would enjoy a priority berth,
30 it would not be subject to the normal delays, and that there should not be any delay in the bagging operation and the discharge of the vessel.

Q. Anything else that you recall being said in that discussion, please? A. There is nothing else comes to mind.

40 Q. Was anything said about a letter of credit in that discussion? A. I believe it was in the earlier discussion; the last day that I was with Mr. Ferrasse, yes, there was - that is on the 29th.

MR. RAYMENT: We will come back to that.

HIS HONOUR: Q. Well, the answer is that nothing was said about the letter of credit on the 22nd? A. Nothing.

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(continued)

MR. RAYMENT: Q. Anything said about the vessel? A. No more than I have said.

Q. You have just mentioned the last day that you were in Geneva, I think, and the conversation with Mr. Ferrasse. I think you have said that there was a meeting with Mr. Ferrasse on 27th and 29th July and a telephone discussion on 30th July; which of those was the one in which the letter of credit was referred to do you know? A. On the Friday, on the 29th.

10

Q. What was said by Mr. Ferrasse on that topic then? A. That the bank -- (Objected to by Mr. Gyles)

HIS HONOUR: Q. Well, tell us what was said during the conversation on the 29th between you and Mr. Ferrasse, indicating as to who the speaker was? A. I am sorry, I did not hear that.

Q. Could you tell us what was the conversation on the 29th, and you might tell us what you said and what Mr. Ferrasse said, and anyone else who was present? A. Mr. Ferrasse said that the bank would like to have a letter of credit for the F.O.B. value of the cargo, and if I could use my best endeavours in Kuwait to have a credit established in their favour for, and I believe it was \$2.8 million; although the head credit was for bulk barley - I beg your pardon, I will withdraw that. The head credit was for bagged barley, and it was being shipped in bulk; if it could be arranged, I was to use my best endeavours to have that done.

20

30

MR. RAYMENT: Q. What did you say about that? A. I said that I would do that, and that my brother in Kuwait would follow the request, because I would only be there for one day, as the arrival of the vessel in Brisbane was two days late, on 1st August, and I would be going directly to Australia with a one day stop-over in Kuwait; and Mr. Ferrasse said that he hoped that the operation would proceed without difficulties; and that was the end of the discussion. I told him I would call him the following day, before I left Geneva, with any changes that may have come in.

40

Q. Did you call him the following day? A. Yes I did.

Q. What did you say to him? A. It was a greeting, a farewell, and I had nothing further to add from the previous day.

Q. Did you then go to Kuwait and did you do anything about that question of the letter of credit in Kuwait? A. I discussed it with my brother.

Q. Did you come to Australia? A. I came to Australia.

10 Q. And were you, for some of the time when you were in Australia, in Brisbane?
A. I was.

Q. And did you observe the loading of the "Bellnes"? A. I did.

Q. While you were in Australia, do you remember whether you spoke to any officer of the plaintiff by telephone? A. Yes.

20 Q. Without reference to your diary, do you have any recollection of when that was?
A. That was about the middle of the month. I had a meeting in Sydney, and it was from Sydney I made the call.

Q. To whom did you speak? A. I spoke to Mr. Boulmer.

30 Q. What did you say to him? A. I told him that the "Bellnes" was held off for some days to ensure that the equipment would arrive in Kuwait before the vessel and that it was at that time - and I believe it was 14th or 15th, in that order, of August - that it was half loaded; I believe it was 16,000 tons at that time.

40 HIS HONOUR: Q. Mr. Jamieson, you are doing your case a tremendous amount of harm and making it impossible for me to follow, if you intersperse accounts of conversation with these side notes. Could we stick to the conversation. You said to Boulmer, "'The Bellnes' has been held off, to ensure that the equipment will arrive before the ship". Now how did the conversation continue - or did you say all these things to him that you have just recounted? A. I gave him the reason why the vessel was held off.

Q. I follow; very well, yes? A. And that the

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loading would resume in several days and should be completed in about another week.

MR. RAYMENT: Q. What did he say then?
A. He said that to visit with the bank, to visit Geneva, as soon as, after the vessel had been loaded, and to bring the documents with me.

Q. What documents? A. There were the invoices and the various certificate, health certificates, applicable to the cargo, and weight receipts that are normal, the shipping documents normal to the cargo.

10

Q. And did you do that? A. I did.

Q. When did you do that? A. I left Sydney immediately after I had the documents certified by the Egyptian Consulate as qualifying for import to an Arab country.

Q. The certificate that they had not come from Israel? A. That is right, and that it was not subject to the Arab buycott list.

20

Q. Would you please look at your diary entry (Objected to by Mr. Gyles, allowed) Would you please open your diary for 10th August 1977. ~~There-are-some-words-there, "Beulmer7-half-loaded".--Is-that-in-your handwriting?--A7-Yes7-it-is.~~ (Words in handwriting objected to by Mr. Gyles - his Honour directed that that be struck out)

Q. Is there any handwriting on the entries for 10th August 1977 which is your handwriting? A. Yes.

30

Q. When was that put upon the document that is in front of you? A. On that day.

(Mr. Rayment tendered document dated 10.8.77; objected to by Mr. Gyles who stated that there was no statement made by him in document that states a fact, direct oral evidence of which would be admissible; counsel addressed)

HIS HONOUR: The evidence shows that in August 1977 a ship, the "Bellnes", was being loaded with wheat to be shipped to Kuwait, Mr. Rayment tendered an extract from the diary of Mr. Jamieson for 10th August, which

40

reads, "Boulmer, half loaded" Mr. Boulmer has been identified in the evidence as a director, at the time, of the plaintiff. The document is propounded as evidentiary material pursuant to the provisions of s.14B. Under sub-s.(5) I am entitled to, indeed required to, draw any reasonable inference from, inter alia, the contents of the document. The inference which I draw is what was half loaded was the ship "Bellnes", and accordingly I consider the material to be relevant and I will admit it as Ex. R.25.

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MR. GYLES: I did not address your Honour on the word "Boulmer" and I submit that the ruling your Honour has given is related to the "half loaded" and not related to the "Boulmer".

(continued)

HIS HONOUR: Yes, that is right, but I am drawing an inference from the word "Boulmer".

MR. GYLES: Well, your Honour has not said that inference, nor has your Honour heard me on that inference. I submit that the "half loaded" is one thing, but "Boulmer" is another.

HIS HONOUR: Well, what I have said will just have to be supported by its own half weight.

MR. RAYMENT: Q. Mr. Jamieson, did you have any conversation during July with any officer of the bank, in which you told them the amount of the freight payable in respect of this vessel? A. Yes.

Q. When was that? A. It was on 29th July.

Q. What did you say? A. I said that the freight was on the basis of lump sums and calculated at \$20 a tonne, but not less than 27,000 tons.

Q. Was anything said to you about the release of the barley by Maynegrain, during July? A. No.

Q. Was anything said to you about the release of the barley by Maynegrain on 24th August itself? A. No.

Q. Was anything said to you to the effect that--

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(continued)

MR. GYLES: Your Honour, I do not think we have had the 24th August yet.

MR. RAYMENT: No, we have not, not in this witness' evidence.

MR. GYLES: Your Honour, I submit we should have that before my friend leaves the question.

HIS HONOUR: I think what Mr. Gyles is saying is true, that you are required to lead the conversation and then --

MR. RAYMENT: Your Honour, I was not proposing 10
- we will be here a long time --

HIS HONOUR: I know, it does not thrill me one little bit, but I suppose if we are going to adhere to the rules of evidence, that is true.

MR. RAYMENT: Can I just withdraw the question and put it another way because as I understand it, on everything that happened on 24th August there is no issue between the parties and there is no cross-examination of any evidence from 20
the plaintiff about that.

HIS HONOUR: I assume Mr. Gyles is taking the objection for some reason.

MR. GYLES: Well, if my learned friend tells me that he does not propose to make any submissions about what happened on 24th August other than of course evidence given by my witnesses, I am not troubled by it. What I am troubled about is that he is now seeking to lead part of the conversation without leading 30
the whole.

HIS HONOUR: Well, he is not leading part of the conversation, he is saying it is negative.

MR. GYLES: Well, on the footing he has made clear now, I think I can safely withdraw my objection.

MR. RAYMENT: There is one thing which occurred on 24th August which is not common ground, so I had better deal with that.

Q. Mr. Jamieson, was anything said to you, 40
prior to the sailing of the "Bellnes" from
Australia, to the effect that the bank would

not permit the release of the cargo by Maynegrain until a letter of credit in any form had been obtained? A. No.

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Q. There are some documents in evidence dated 24th August 1977; did you give to the plaintiff, on 24th August 1977, a number of signed documents? A. Yes.

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10 Q. And were there discussions which took place on that day in the premises at the bank, about those documents and otherwise? A. Yes.

(continued)

Q. Who was in attendance at the bank on 24th August? A. Mr. Boulmer and Mr. Ferrasse.

Q. Did anybody else attend at the offices of the bank on that day? A. Mr. Peterson.

Q. Was he there on the whole day, or any part of the day? A. Only part of the day, and then later in the day, Mr - I don't recall his name, a broker from Toepner.

20 Q. He was also there, was he? A. He came, yes.

Q. Was anything said on that day to the effect that the vessel should not have been allowed to sail? A. No.

CROSS-EXAMINATION

Cross-
Examination

HIS HONOUR: Mr. Campbell I would normally follow the course of saying "friends first", but you are also a partial enemy; so what course do you wish to follow?

30 MR. CAMPBELL: Your Honour, my cross-examination of Mr. Jamieson would be very brief. I am content to go now.

HIS HONOUR: All right.

MR. CAMPBELL: Q. Mr. Jamieson, are you aware of whether Mr. Barki was able to obtain any payment from Kuwait in connection with this shipment of barley? A. May the question be repeated, sir?

40 Q. Are you aware of whether Mr. Barki obtained any payment from Kuwait in connection with this shipment of barley? A. Yes, he did.

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(continued)

* Q. Are you aware of how much he obtained?
A. There was - yes; I may not be aware
of it all. There was \$399,000 and --
(objected to by Mr. Gyles on relevance, on
the ground that he would not know, himself;
allowed)

(Question marked * read back)

WITNESS: U.S.\$399,000 under a letter of credit.

Q. Are you aware of who paid it to him?
A. It was paid through the Grindlay Ottoman
Bank, by the Gulf Bank.

10

Q. Are you aware of where the Gulf Bank
obtained that \$399,000 from? A. From Sheik
Hamad.

Q. And are you aware of whether that \$399,000
was itself part of the amount that Sheik Hamad
was obliged to pay for the barley? (Objected
to by Mr. Gyles, allowed) A. Yes.

Q. When you say "Yes", do you mean yes you
are aware, or yes it was? A. May I have the
question repeated, please?

20

Q. Yes. Are you aware of whether that
\$399,000 was part of the amount which Sheik
Hamad was obliged to pay for the barley?
A. Yes.

HIS HONOUR: Q. Just to remind myself, is this
what happened, that part of the payment for
the goods was by means of a letter of credit
drawn with the Grindlay Ottoman Bank, and it
was intended for the supply of bagging plant
and so on, and Barki kept some of the money
himself? A. Yes.

30

Q. That is the \$399,000? A. Yes, part of it,
yes. I don't know what the proportion is that
was kept by Barki and the amount that was paid
for the bagging plant.

Q. Just a moment - you said Barki got
\$399,000 under the letter of credit. Some of
it he spent in the way that he was entitled to
do, in relation to the supply of bagging plant
and bins and bags, did he? A. Yes - not the
bags, your Honour, the bags were under a
separate credit.

40

	Q. All right - bagging plant and bins? A. Yes.	In the <u>Supreme Court</u>
	Q. And it was only some portion of it that was diverted to him? A. Yes.	First Defendant's Evidence
	MR. CAMPBELL: Q. Are you aware of what that proportion was? A. I am not.	No.6 Evidence of Alexander
10	Q. It is the fact, is it not, Mr. Jamieson, that the barley in the Maynegrain silos was reclassified as feed barley in about April of 1977? A. Yes.	Jamieson Cross- Examination 4th March 1981
	Q. And a Mr. Fuhrmann, who was either an employee or an ex-employee of Continental Grain, carried out that reclassification, did he? A. Yes.	(continued)
	HIS HONOUR: Q. Well, could you explain to me what the effect of that is, if you reclassify in the manner described? Does that mean that it is not worth the same amount of money? A. Yes.	
20	MR. CAMPBELL: Q. Mr. Jamieson, was there at any state, after the barley had arrived at Kuwait, any problem concerning the weights of barley that had actually been delivered to the Sheik? A. No.	
	Q. I will come back to that in a moment. There has been some evidence given about an amount of \$40,000 being used to pay the wages of certain Thai boat crew in Kuwait. Do you know anything of that topic? A. Yes.	
30	Q. Could you tell his Honour the circumstances that led to that payment of \$40,000 being made? (Objected to by Mr. Gyles)	
	HIS HONOUR: This will be admissible as against Mr. Rayment; I do not see how it is going to be admissible as against the plaintiff.	
	MR. CAMPBELL: Your Honour, the way in which I would seek to use it against the plaintiff concerns again this question of causation of damage.	
40	HIS HONOUR: I can see its relevance, but it is the sheerest hearsay as I would apprehend.	
	MR. CAMPBELL: Q. Mr. Jamieson, did you have any personal involvement in the circumstances which	

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(continued)

led to the payment of that \$40,000?
A. Yes.

HIS HONOUR: Q. What was your involvement?
A. It was the crew of the tugs --

Q. What did you have to do with it?
A. Everything, completely.

HIS HONOUR: Perhaps if you lead that first.

MR. CAMPBELL: Q. Yes. What was the first thing
that you had to do concerning the payment of that
\$40,000 (Objected to by Mr. Gyles; counsel 10
addressed)

(Luncheon adjournment)

(Witness stood down)

ON RESUMPTION:

MR. CAMPBELL: Could I, at this stage and
with my friend's consent, interpose a witness.
(No objection by counsel)

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GRAEME BERNARD FOOTE
Sworn and examined:

MR. CAMPBELL: Q. Is your full name Graeme 20
Bernard Foote? A. That is correct.

Q. Could you tell the court your residential
address? A. 28 Glanmyre Road, Baulkham Hills.

Q. You were employed for 5½ years as the
Assistant Marketing Manager of the Queensland
Grain Growers Association, is that right?
A. Yes - one verification, in the Coarse Grains
Division.

Q. What are the coarse grains? A. In that 30
particular function, sorghum and corn.

Q. Your present position is with Continental
Grain is it? A. Continental Grain (Australia)
Pty. Ltd.

Q. You have been with them for 8 months?
A. Correct.

Q. What is your present position with them?
A. Grain merchandiser with the Queensland
Grain Growers Association.

Q. What were your functions there? A. I was in charge of the domestic accumulation and handling, accumulation for export, of sorghum and corn; basically on the logistics side and also on the marketing side.

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10 Q. In your present position with Continental, what are your functions? A. I am responsible for the company's Australian position in coarse grain, with one extension, namely, the grains that I handled at the Queensland Grain Growers Association, and I am also responsible for barley.

Q. Would you be able to give his Honour an indication of whether Continental Grain is a large company, in the Australian context, in the grain business? A. Continental is one of 5 multi-national American grain companies. In the context of the Australian Agricultural scene, I imagine they would be no.1.

(continued)

20 Q. And so far as the Queensland Grain Growers Association is concerned, was the sort of enterprise it was engaged in that you were in charge of, the accumulation and marketing of grains, were those activities significant in the Australian context? A. In terms of coarse grains, the Association exported approximately 40 to 60% of Australia's sorghum exports, dependent upon seasonal conditions, and about 40 to 70% of Australia's corn exports.

30 Q. When you were with Queensland Grain, what silo operators did you have dealings with? A. The State Wheat Board, the statutory authority, and the private enterprise operation, Maynegrain.

40 Q. Were there any other silo operations that operated on a commercial basis in Queensland? A. Up until I believe 2½ years ago there was internal free enterprise operation known as I think Bulk Terminals and Exporters. They were bought out I believe about 2 years ago by the State Wheat Board. So effectively there is one silo handling authority in the country and two handling authorities at Port.

Q. And in your time with Continental Grain, what silo operators did you have contact with? A. State Wheat Board in Queensland, Maynegrain in Queensland.

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(continued)

Q. Have you had contact with anyone
outside Queensland? A. No.

Q. Did Queensland Grain Growers Association
ever have cause to borrow money against
grain? A. Yes.

Q. What did it do to so borrow money?
(Objected to by Mr. Gyles as to relevance,
allowed) A. It used commodities in storage,
such as coarse grains and oil seeds, as
collateral, to take to either a bank,
merchant bank or finance company, and have
the merchant bank or finance company or bank
advance funds against those physical stocks
held in storage.

10

Q. Are you familiar with the term "warehouse
receipt"? A. Yes.

Q. What do you understand it to mean?
A. Well, warehouse receipt, on my understand-
ing, basically would be issued by someone
such as an Elevator Authority, a silo
authority, stating that at a particular point
in time an individual or group of individuals
has a certain tonnage of grain held in store,
either in country or at port, as at that
particular point in time, and they would
verify a tonnage which was held at that point
in time.

20

Q. Did warehouse receipts play any role in
the mechanism whereby Queensland Grain Growers
borrowed money against grain? A. Not a
major role in itself, but when the Association
wished to borrow funds they would take along
a certificate from the State Wheat Board
which said that "At this particular point of
time we are holding X thousand tons of a
particular commodity in certain storages in
the country or at port or on account of the
Queensland Grain Growers".

30

Q. And used the financier to require issue
of any document by the person who had the
wheat in store, directly in favour of the
financier? (Objected to by Mr. Gyles as
to relevance, allowed). A. I can't state
directly that it was a requirement of the
financier. However, in my experience with
the Q.G.G.A. they would take along that
warehouse receipt as evidence to the financier
that the grain was actually stored.

40

Q. When you say "that warehouse receipt", what do you actually mean? A. Well, that that was received from the State Wheat Board saying that there were so many thousands of tonnes of grain it had in storage at a particular time.

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Q. And who was that warehouse receipt addressed to?

10 HIS HONOUR: Q. Well, assuming it was addressed to anyone - was it addressed to anyone? A. It was either addressed in two ways: To the chairman of the committee, the relevant committee which controlled the particular commodity that the warehouse receipt was being issued to; or it was issued on the basis of "To whom it may concern".

(continued)

20 MR. CAMPBELL: Q. In your experience with Continental, has Continental followed any practice involving borrowing against grain? A. As far as the Australian side of the operation as to date, I am not totally au fait with what the company does in all aspects, but from what I understand, we do have warehouse receipts issued.

Q. Who are they issued to? (Objected to by Mr. Gyles, rejected).

30 Q. Are you aware, from your experience of the trade, of any circumstances in which warehouse receipts are issued direct to a finance company by a storage company? A. No.

Q. Is it something that you have ever heard of happening? (Objected to by Mr. Gyles, allowed). A. In my knowledge in the State of Queensland, as far as the operations in which I was involved, no.

40 Q. Do you have any understanding, as a member of the trade, as to what would be conveyed to you by the notion of a warehouse receipt issued direct to a finance company? (Objected to by Mr. Gyles, rejected).

CROSS-EXAMINATION

Cross-
Examination

MR. RAYMENT: Q. In your employment, both by the Queensland authority to which you refer and by Continental, have you been concerned with the negotiation of export sales of coarse grains? A. I was responsible for it, yes.

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(continued)

Q. In both employers? A. Yes.

Q. And would that include negotiations of prices of export sales? A. Yes.

Q. So were you familiar with fluctuations in the market, insofar as it affected grain under your control? A. Yes.

Q. Does that include the period in 1977? A. Yes.

Q. Were there, to your experience, any sales negotiated while goods were on the water, at sea, between a port in Australia and a port in a foreign country? (Objected to by Mr. Gyles)

10

Q. I want the witness to answer the following question really - assuming that the barley had a certain value, before loading in Brisbane, for a FOB sale to Kuwait, and assuming that 12 days later it was on the vessel and not deteriorated in any way, would it be worth the same amount of money, assuming the market had stayed constant?

20

HIS HONOUR: I assume Mr. Gyles would not argue with that, would he, if the market had stayed the same. There is no contest about that in those terms, is there?

MR. GYLES: There is no contest that the admission is framed at August 1977, so it picks up both dates. I would object to the question as asked. The admission is that in Brisbane it was a certain value.

30

HIS HONOUR: Yes, but there is no dispute between you that if it was worth One Million dollars in Brisbane on 1st August, then assume the market stayed constant, it was worth One Million dollars on the water on 12th August.

MR. GYLES: No, your Honour, we are not agreed on that. We are agreed that as between those 12 days there was no relevant change in the market.

40

MR. GYLES: I object to the question because this witness' qualifications do not enable him to answer the question. It is not a matter of expert evidence in general.

MR. RAYMENT: Q. Have you known of cases, in your own direct experience in which grain on board a vessel from Australia to a foreign country has been sold in transit? A. Yes.

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Q. Have you yourself been concerned with such transactions? A. Yes.

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10 Q. I want to describe to you a hypothetical set of facts, which I will ask you to assume, that we know the following things: We are concerned with a large shipment of barley, about 27,000 metric tons. We know on about 12th August the F.O.B. value in Brisbane of that cargo for sale to Kuwait is within a range of \$100 to \$104 per metric ton? A. Can I ask you a question?

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Q. Yes? A. You are assuming it has been sold and then --

(continued)

20 Q. No, it is just a question of value. We assume no sale in any of this. The value for an F.O.B. sale to Kuwait is assumed to be \$100 to \$104 per metric ton, and the cargo is in fact loaded on the vessel and sails towards Kuwait; and we assume that we are looking not at the point of time immediately before loading but at a point of time 12 days later when the vessel is on her way to Kuwait - about halfway there, let us assume. We assume also that there has been no deterioration in the condition of the cargo and no relevant change in the market, in the 12 days in Brisbane, for the F.O.B. sale. 30 In those circumstances, would you have any reason to think that if one valued it at a point of time 12 days later, there would be any difference in the value at the two points of time? (Objected to by Mr. Gyles, rejected).

40 HIS HONOUR: Q. Have you ever had occasion to consider a situation in which grain carries a price of X dollars at the wharf in Brisbane and there is an actual sale some week or so later whilst in transit at sea? A. Yes.

Q. How many times has that occurred? A. In my own personal experience on one occasion.

HIS HONOUR: Yes, I will not allow the question.

Q. From your experience, can you think of any reason - assuming the market for the grain stays constant, for a F.O.B. price - why there

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should be a difference in the price at
sea and the price at the wharf?

MR. GYLES: I object to the question.
In my respectful submission it is not a
matter of expert evidence in that sense.

HIS HONOUR: I think there is a difference
between saying "Look, this would be the
situation, it would be the same"; that
is one thing and I have rejected that
question. On the other hand, I think there 10
is room for saying, "Well, look, I
cannot, being concerned in the price of
grain, think of any earthly reason why,
assuming the market in Brisbane stays the
same, there should be any difference in
the price at sea".

MR. GYLES: I would wish to argue it, but
it may be too time-consuming to do that.

HIS HONOUR: Well, you are protected by
the objection. Do you follow the question, 20
Mr. Foote? I had better put it to you
again: Assuming the situation that the
price on 1st August, F.O.B. Brisbane is
\$100 a tonne, assume that on 12th August
the price is still the same in Brisbane.
Is there any reason to think that the price
of that same sort of grain on board a ship
would be any different on 12th August from
what it would be at the jetty in Brisbane?
A. Well, in my commercial experience and 30
in what I have seen in transactions with
similar types of shipments out of the United
States, there is every possibility that
there could be a variation, a significant
variation, between the two prices on the
two days.

MR. RAYMENT: Q. For what reason, sir? A.
Firstly, if the cargo is in a situation
where it is on the high seas and it has
been destined for a particular destination 40
- as you have said, Kuwait - and the
Kuwaitis were not aware at that time that
it was loaded, and then they became aware 12
days later, it could be regarded as being
a cargo in a distress situation, and any
trade would attempt to try and make a
commercial advantage out of it by picking
it up for the best price he could, and that
could be substantially below \$100 F.O.B..

10 Q. Yes. Anything else? A. If the person who has loaded the grain on ship is the same person as the person who has chartered the ship, and they have chartered it, for example, on a time charter basis where they must deliver the vessel at some other port at a certain point in time, and they have to get the grain discharged in the shortest time possible, then they may be forced to try and find a home for that particular cargo as soon as possible, otherwise they could be up for substantial costs if they are not delivering the vessel back to the owner at the agreed time.

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Q. I should ask you to assume that there is a market in Kuwait for the product - in other words that the F.O.B. value in Brisbane is fixed for a Kuwait sale at a particular price? A. With a Kuwaiti buyer?

(continued)

20 Q. With a Kuwaiti buyer - a buyer in Kuwait who seeks to receive the cargo. Is there any reason then to think of a difference between the loading price and the price on the water? (Objected to by Mr. Gyles, rejected).

HIS HONOUR: I think there is a substantial difference, Mr. Rayment, between asking him as to whether there would be any reason and he has given some, and trying to draw a positive conclusion.

30 MR. RAYMENT: Yes your Honour.

MR. GYLES: May I also indicate, your Honour, my objection to it principally is that it is an irrelevant question.

HIS HONOUR: Anyway, I have rejected it.

40 MR. RAYMENT: Q. If I ask you to assume that Kuwait was aware that it was loaded on the vessel - I think you said in your first example of why there might be a price difference with the cargo on the high seas and destined for Kuwait, and Kuwait was not aware that it was loaded, the cargo might be treated as a distress cargo. Let us assume Kuwait was not aware that it was loaded (Objected to by Mr. Gyles, rejected).

MR. GYLES: Q. Can I just ask you to consider your experience with Queensland for a moment. Were you concerned with the financing of the acquisition of grain in the course of your employment?
A. Directly, no.

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(continued)

Q. It is something that you heard about in the course of your work but it was not your responsibility, is that as I understand it? A. Not so much heard about it, but had an indirect involvement, in that whatever cost was attributed to a particular type of grain from a financing point of view, I had to take that cost into consideration as to what the selling price would be and the resulting price back to the grower. So in fact we had to know what was going on at all times. 10

Q. Certainly. But you were not the one who had the negotiations with the banks or the financiers? A. No.

Q. And it was not you that arranged the warehouse receipts which were to be supplied to the bank, is that correct, or the financier? A. Right.

Q. And you don't know what arrangements or negotiations there may have been between the financiers and the warehouse man? 20
A. ~~There-would-be-no-arrangements-between-the-financier-and-the-warehouse-man.~~

HIS HONOUR: Would you answer the question, please. I will have that answer struck out.

(Last question read back)

HIS HONOUR: Q. What he is asking you is, you not having done the negotiations, you do not from your own personal experience put yourself in the position where you can say one way or the other? A. Yes. 30

Re-
Examination

RE-EXAMINATION

MR. CAMPBELL: Q. If I can ask this question, following on from the cross-examination of Mr. Rayment: If there was a cargo of barley which had a value FOB Brisbane of \$100 and it was bound for Kuwait and one were to consider a situation where the Kuwaitis knew that a particular cargo was coming, both at the time it left Brisbane and also 12 days later when it is on the high seas, and the cargo was to be disposed of pursuant to the same contract of sale at both of those points in time, does your experience in the grain trade lead you to think that there would be any difference between the value of the grain 40

at port and its value at sea, assuming the Brisbane market remained steady? (Objected to by Mr. Gyles, rejected)

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(Witness retired & excused)

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HIS HONOUR: Now what about this question of security, Mr. Gyles?

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10

MR. GYLES: Your Honour, we oppose it. I would personally prefer your Honour to proceed with the evidence on the footing that we do not take any point that there has been delay from this morning onwards.

(continued)

HIS HONOUR: What, you would like to argue it on the resumption on the next occasion?

MR. GYLES: Yes I would, or on the conclusion of the Jamieson evidence.

HIS HONOUR: I do not think you would be prejudiced in that respect.

MR. RAYMENT: No your Honour.

20

HIS HONOUR: I will have it noted, on Mr. Gyles' application, the argument on the question of increased security for costs is postponed, so as to allow at least Mr. Jamieson's evidence to be completed if possible today. The application is on the basis that the defendant is not to be prejudiced in any way by the fact that the argument as to the question of security will take place at a later point of time than today. Likewise, you want to postpone the amendment of Mr. Campbell?

30

MR. GYLES: Yes your Honour. I think there may have been some discussion between counsel about it.

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On former oath
Further cross-examined

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(His Honour noted that Mr. Gyles objected to the evidence sought to be elicited from this witness in relation to events in Kuwait but in the interests of seeking to allow witnesses to leave Australia Mr. Gyles was willing to allow the evidence to go in, subject to this objection 10 and the matter to be argued at the conclusion of the case.)

(continued)

MR. CAMPBELL: Q. You were beginning before lunch to tell us what you knew of your own knowledge about the circumstances in which the Thai boat crew came to be paid this \$40,000. Can you continue with that, please?

A. The wages for the boat crew who had been involved in the handling of the barley had not been paid and they made representations to Gulf Fisheries that they should be paid and Gulf Fisheries then communicated with Bank Compafina and an arrangement was made between Bank Compafina and Gulf Fisheries whereby Gulf Fisheries were given authority by Bank Compafina to use part of the proceeds that Gulf Fisheries had received from the Kuwait Supply Company for payment of the boat crew. 20

Q. If we could move to another topic: did you have any conversations with people from the ANZ Bank in July or August 1977 concerning the proposal to ship barley to Kuwait? A. I believe I did. 30

Q. Are you able to tell his Honour who you had those discussions with? A. I believe it was a Mr. Stevens of the Corporate Accounts in the main office of the bank in Sydney. I may also have had a conversation with Mr. Davidson in Melbourne.

Q. Are you able to tell his Honour what you said to those gentlemen, starting first with Mr. Stevens - or Stevenson, is it? A. Stevens. 40

Q. Can you tell his Honour what you told Mr. Stevens? A. I told Mr. Stevens that there would be, from the proceeds of the sale ---

(Mr. Gyles objected to the answer as against his client.)

Q. Could you go on, please? A. May I have the question repeated?

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10 Q. What you told Mr. Stevens? A. Yes, that the barley cargo had been shipped from Brisbane and on the discharge and delivery of the cargo there would be an amount of \$600,000 remitted from Kuwait to the ANZ Bank, representing a twenty percent financing and their contribution to the financing of the cargo.

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Q. I am sorry, I thought I was asking you about any conversations you had with someone from the ANZ Bank before the cargo left Brisbane.

(continued)

HIS HONOUR: Q. What Mr. Campbell is asking you is whether you had any conversation prior to the ship sailing to Kuwait, with anybody from the ANZ Bank? A. Yes.

20 (Mr. Gyles objected as between Mr. Campbell's client and his client and indicated there was no issue about that; question allowed)

Q. Did you have any such conversation?
A. What were the months, again?

Q. In either July or August and before the ship sailed? A. I believe I would have had conversation with them.

30 Q. Do you recollect what those conversations were, or not? (Objected to by Mr. Gyles.)
Did you have any such conversations with them?
A. I believe I did.

Q. Are you saying you did or you did not, or you don't know? A. I did, I believe. I don't recall - because I always did when I came to Sydney or Melbourne but I can't recall what the conversation was, precisely, unless I am given some ---

40 Q. Do you recollect whether you showed anyone from the ANZ Bank at any time a letter of credit that Sheik Hamad was the beneficiary of? A. Yes, I did. (Objected to by Mr. Gyles as leading; allowed).

Q. Do you recollect who you showed the letter of credit to? A. I showed it to Mr. Davidson in Melbourne.

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(continued)

Q. When you showed it to him did you show it to him quickly or so that he had an opportunity to peruse it? A. He ~~looked-at-it-I-believe-that-he-would-have~~ -- (Struck out at his Honour's direction.)

Q. Can you just tell us what he did with the document? A. He looked at it, yes.

Q. Did he look at it quickly or did he have an opportunity to peruse it? A. He had an opportunity but I don't think that he did. 10

Q. Yesterday when you were giving some evidence in chief (p.115) you said that the barley, you were asked whether the barley that was being accumulated or stored in the Queensland silos of I.S.T. - you said that it went direct to the port facility. You were then asked: "Always, did it, it went there directly" and the answer recorded is, "Only New South Wales barley direct to the Maynegrain facility". Was there any of this barley that was being accumulated that did not go direct from the grower to the Maynegrain facility? A. Not to my knowledge. I was not here but not to my knowledge. 20

MR. GYLES: Q. I wish to remind you of some evidence you gave in the guarantee case (p.203). I asked you this question: "Do you also agree that the financing of the acquisition of the barley shipment to eighty percent of value was secured by the issue of warehouse receipts by warehousemen, that is so, isn't it" and your answer was, "I believe so". I then asked you: "And that is, again, quite a normal and customary method of taking security for financing commodities" and your answer was "Yes". Do you recollect those questions and answers? A. Yes. 30

Q. You adhere, I take it, to the answers you then gave? A. Yes. 40

* Q. Of course, by security you understood it to mean that the bank had some sort of pledge in relation to the goods that were held by warehousemen? (Objected to; rejected; pressed on the basis of credit; objection withdrawn.)

Q. (Question marked with an asterisk read by court reporter.) A. It was a security, yes.

Q. And you, I think, have given the instructions for the presentation of the present case on behalf of B.T.E. That is so, is it not? A. Given instructions?

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Q. Yes, you are the one on behalf of B.T.E. who is in charge of the conduct of this piece of litigation? A. Oh, yes.

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10 Q. You know, do you not, that in this litigation B.T.E. do not concede that there is any security in relation to the - or that there was any security over this grain in favour of Bank Compafina, don't you? (Objected to by Mr. Rayment.)

(continued)

(Mr. Rayment conceded on behalf of the defendant company that the grain was offered and accepted as security for the advance of money.)

20 Q. May I then remind you of some other evidence you gave on the last occasion (p.209). You were asked: "And you were in this difficulty, were you, that you could not get the consent of the Compafina Bank to shift the barley and get it released by Maynegrain without a letter of credit in their favour and you could not get a letter of credit in their favour" and your answer was: "The request, the last request that the Compafina Bank made before I left Geneva was to use my best endeavours....credit". Accepting that be so --

30 HIS HONOUR: In the Jamieson case.

40 MR. GYLES: Q."Well, accepting that be so you shipped it without having a back to back arrangement" and the answer was, "That is true".The next question, "So it is not correct to say that what you really did was you got the barley out of the hands of Maynegrain without the consent of the Compafina Bank ever having been obtained" and your answer was, "Without the consent, that is correct but with their knowledge that it was progressing". Do you recall that series of questions and answers? A. Yes.

Q. Do you adhere to the answers you then gave?
A. I do.

Q. Do you appreciate that B.T.E. is conducting this case on the basis that there was a consent from Compafina Bank to the release of the grain from Maynegrain to the ship? A. I consider --

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* Q. Just answer my question. Do you realise that is the way the case is being conducted? In other words, that B.T.E. is saying there was consent by Compafina Bank to the release of the grain by Maynegrain? A. ~~There was tacit consent as I understand the position leading up to the shipment?~~ (Objected to; struck out at his Honour's direction.)

Q. (Question marked with an asterisk read by court reporter.) 10

HIS HONOUR: Q. Do you have difficulty in following the question? A. I guess I do, your Honour.

Q. It is put to you, do you understand that the position is that B.E.T.'s case is that there was in fact a consent to the release of the grain. Do you understand that? A. Yes.

MR. GYLES: Q. Is that not inconsistent with the answer you gave in your evidence in the Jamieson case and which you have now confirmed in this case that there was no consent? A. I considered - well, consent and approval, I don't know whether there is a difference. Consent - no specific direct consent to load the grain, I feel. There was no consent in the sense of, "Go and load the grain" or "Load the grain". That was never said, No, it was not said. 20 30

Q. So that you, when you answered the question in the way that you did, here, "Without consent, that is correct" you now wish to alter that evidence, do you?

HIS HONOUR: He has not said that. He still says there was no consent but he is relying on the second part of his answer.

MR. GYLES: Q. You are relying on knowledge in Compafina Bank? A. I am.

HIS HONOUR: Q. I would like to get clear in my mind what you are saying. You agree they never ever said to you, "Right, Mr. Jamieson. You ship the grain". There was nothing like that, correct? A. Yes.. 40

Q. The only thing that happened, according to you, was that you were supposed to get a

back to back credit and on that basis, you say that they knew of the proposed shipment, right?
A. Yes, and the preparations.

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Q. But, the only thing that they would have even tacitly consented to was this back to back credit? A. That is not what they said. They said use my best endeavours to get credit.

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10 Q. But, they did not give a tacit consent to shipping in the absence of even a back to back credit, did they? A. No.

Q. And you never told them prior to shipment that you did not get a back to back credit, did you? A. No.

(continued)

Q. So, all that they knew was, according to you, you were wanting to ship this cargo? A. Yes.

20 MR. GYLES: Q. Can I just perhaps get one correction. In that answer that I read out to you from p.209 you said that the last request was to use your best endeavours in Kuwait to get a back to back credit for bagged barley against bulk barley head credit. I think you wish to correct that and say that the request was to get a back to back credit for bulk barley against a bagged head credit? A. Yes, that is correct.

Q. And that is your version that you have independently given today? A. A bagged head credit and a bulk loading.

30 Q. It is true, I would suggest to you, that at all times the position taken by Compafina Bank, from the 29th June at least, onwards was that they would not be party to any letter of credit unless it was on a bulk or F.O.B. basis. That is so, is it not? A. No.

Q. You knew that the lender, Compafina Bank, was quite entitled to decline to release the grain from its security unless and until it was paid the amount outstanding to it, was it not? A. Yes.

40 Q. The customary methods of payments in relation to export sales of grain, or indeed other commodities, is by irrevocable letter of credit from an acceptable financial institution. That is so, is it not? A. Not in my experience with bank Compafina, no.

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Q. I think that I put to you that one of the acceptable methods of being paid in international commerce is an irrevocable letter of credit issued by an acceptable financial institution?
A. That is a method.

Q. It is a common method by which vendors of goods are paid and lenders of money are paid? A. It is.

Q. As you say, there are other methods of being paid, are there not? A. Yes. 10

Q. Compafina were therefore in a position to simply say to you, "We are not going to release our security until we are paid", were they not? A. Yes.

Q. And that is the position they did take, was it not? (Objected to by Mr.Rayment).

Q. That is what they told you their position was. That is so, is it not?
A. They did not. 20

Q. Wasn't this the situation, you felt that the sale to Kuwait on a bagged basis was, for one reason or another in the best interests of your companies - the best commercial interests of your companies, is that correct? A. That was one of the reasons.

Q. Your companies elected, in any event, to enter into a contract for the sale of the barley on a bagged basis, didn't they?
A. Yes. 30

Q. And presumably that was done because that was regarded as the best commercial disposal of the barley? A. Yes.
But it involved, of course, risks at the Kuwaiti end in the satisfactory completion of the bagging on time and without damage. That's right, is it not? A. Yes.

Q. Your judgment was that it was worth running those risks for the extra consideration, is that right? When I say "extra consideration" I mean consideration over and above that which you could receive on a bulk basis? A. Well, that consideration against the deterioration of the commodity in Australia. 40

Q. I suppose, also, you had in mind to build up good will for your companies in Kuwait? A. That was not the specific objective.

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Q. In any event, when do you say you first told Bank Compafina that there might be a sale on a bagged basis? A. The early days of July. In fact, it was in June, in mid-June we were negotiating bags with Bank Compafina.

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10 Q. When that was first raised with Bank Compafina I suggest to you that Mr. Ferrasse, made it clear to you that he would not consent or accept any letter of credit on a bagged basis. That is right, is it not? A. No.

(continued)

20 Q. That, I suggest to you, left you with a practical problem. You wished to do a deal on a bagged basis with the Kuwaiti purchaser but you could not get a release of your security without a letter of credit, except on a bulk basis. That is right, is it not? A. No, because the cargo had already been sold on a bulk basis and Mr. Ferrasse knew that he was agreeable to us cancelling that contract with a penalty and re-negotiating another contract on a bagged basis.

30 ~~Q.---So-far-as-Bank-Compafina-were-concerned there-was-no-problems-provided-they-get-an irrevocable-letter-of-credit, from Brisbane shipping-only,--That-is-so, is-it-not?--A, I don't think there would have been - -~~
(Objected to by Mr. Rayment; struck out at His Honour's direction).

Q. You knew, did you not, from the discussions you had held concerning the previous sale that Bank Compafina were happy to accept as payment for the release of their security a letter of credit from an acceptable institution, based on f.o.b. shipment in bulk from Brisbane? A. I could have assumed that. I don't know that it ever was specifically canvassed.

40 Q. Whether you were directly told or whether you made that assumption that was your understanding of the position, is that correct? A. I don't know that I ever applied my mind to it.

Q. When you first raised with the Bank Compafina the question of a possible sale bagged, did they raise any question about it - anybody on behalf

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of Bank Compafina? A. They encouraged it.

Q. Did anybody on behalf of Bank Compafina suggest that there might be any problems associated with the bagged sale? A. No.

Q. But, they still preferred a letter of credit based upon a bulk delivery A. I don't recall any such discussion.

Q. I just wish you to be quite clear as to the topic I am asking you about: I am not asking you as to their approval or disapproval of your actual commercial contract - that being your own business - I ask you whether any officer of the bank indicated a preference on their part for a letter of credit based on bulk shipment f.o.b. Brisbane as compared with a letter of credit on a bagged basis? A. Are you referring specifically to the bagged credit as distinct from another credit - the one the actual credit was established? Are you speaking of that? 10 20

Q. No, I am speaking of bagged as opposed to bulk? A. No.

Q. That was not raised with you? A. No.

Q. And, they never indicated a preference or, indeed, never requested a bulk barley letter of credit? A. No.

Q. Secondly, do you contend that Bank Compafina, or an officer of Bank Compafina, ever said that the bank was agreeable to a letter of credit, it was not to be notified by them and was not to be made out to Penmas? A. I do not follow it, I am sorry. 30

Q. Do you suggest that anybody on Bank Compafina's behalf consented to the letter of credit being drawn in favour of a party other than Penmas or Bank Compafina? A. It was never discussed other than f.o.b. credit when they asked me to use my best endeavours to have that established in favour of Bank Compafina, but never head credit. 40

Q. The request that was made to you for what you have described as a back to back credit was made when? A. At the time of my departure, that is, Friday before I left for Kuwait and Australia and the Bellnes was due two days later - one day later.

<p>Q. So that the first occasion upon which you were requested to provide, if I can put it this way, a direct letter in favour of Bank Compafina or Penmas to be notified Bank Compafina? A. In that particular shipment, yes.</p>	<p>In the <u>Supreme Court</u></p>
<p>Q. So far as barley is concerned? A. So far as the Kuwait shipment is concerned, yes.</p>	<p>First Defendant's Evidence No.6</p>
<p>10 Q. What do you say the position was up until then, that they were happy to accept, what, your word that they would be paid? Is that what I understand? A. There was no negotiation. I don't know what they accepted but there was no negotiation on it advanced sufficiently to the point where those details were discussed. There were negotiations for the sale but it had not at any time, apart from the sale to MAECOM, and that sale had never reached the point</p> <p>20 where the question of payment was canvassed.</p>	<p>Evidence of Alexander Jamieson Cross- Examination 4th March 1981</p> <p>(continued)</p>
<p>Q. In any event, you say quite clearly that the first occasion upon which there was any question between you and any officers of Bank Compafina concerning the party in whose favour the letter of credit should be made out was 29 July in Geneva, between you and Mr. Ferrasse? A. For the f.o.b. value?</p>	
<p>Q. For the f.o.b. value? A. That is the best of my recollection.</p>	
<p>30 Q. Let me suggest to you that whenever it was that you first mooted the question of a bagged sale - although I suggest it was in June, earlier in June - I put to you that Mr. Ferrmasse indicated that he would not be a party to a letter of credit which depended upon delivery in a bagged state. That is so, isn't it? A. No.</p>	
<p>40 Q. I further suggest to you that he indicated to you that there were risks associated with the fulfilment of that commercial contract which he would not be prepared to run. That is so, is it not? A. I don't recall it.</p>	
<p>Q. Would you deny it? A. I do.</p>	
<p>Q. Then, I suggest to you, that by 27 June you were actively involved in discussions with Mrs. Lenos,</p>	

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at least, concerning the method of solving this problem? A. To my knowledge that was on 29 June. (Question withdrawn).

Q. I suggest to you that Mr. Barki was authorised by you to enter into discussions with Bank Compafina to try and find a solution to the problem of, on the one hand you wanted a commercial contract delivered on a bagged basis but, on the other hand, Bank Compafina wanted a letter of credit on a bulk f.o.b. basis. Now, is that right? 10
A. I don't know that it was in that context but I believe Barki was active to facilitate, if he were able, his relations with Makki Aljuma to organise a back to back credit bulk shipment bagged delivery.

Q. Did Mr. Barki report to you that on 27 June or thereabouts he had discussions with officers of the Bank Compafina in order to solve the problem that you wanted a bagged sale and they wanted a bulk letter of credit? 20
A. Not to my recollection but he may have done.

Q. And, I suggest that you, on or about 28 or 29 June, telephoned Mrs. Lenos and indicated that Mr. Barki spoke with your authority concerning those negotiations. That is right, is it not? A. I believe I sent a telex.

HIS HONOUR: Q. Could I ask you to help me in this regard. As I understand it, you have agreed with Mr. Gyles that there was a risk associated with the bagging of the barley, a risk of damage? A. Not an abnormal risk, but a risk. 30

Q. There was a risk. You say that you asked the Compafina Bank, or told the Compafina Bank that you were proposing to sell the barley on the basis that it was bagged in Kuwait? A. Yes. 40

Q. You say they raised no objection, do you?
A. They sought a - well, they raised no objection. They did want the F.O.B.L.C.

Q. You wanted to do this because it was the only way that you could achieve relief from the pressures of your liquidity crisis by selling it the only way you could sell it, namely bagged? A. No.

Q. There was an advantage to you in selling it bagged? A. Yes, there was.

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Q. There was absolutely no advantage to Compafina Bank, was there? A. Yes, there was.

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Q. What was it? A. Well, the sale of the bulk barley was with Maecom \$102, I believe, or \$103 F.O.B.

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Q. Do you say there would not have been enough to pay them out? A. There would have been.

Q. Then what was the advantage to Compafina Bank, why should they agree to it? A. There would not have been enough if it were that the interest and other factors would have been taken into consideration.

(continued)

Q. Interest and what factors? A. If interest and the commissions had been taken into consideration there would not have been sufficient to pay them out at \$102, that is on the amount advanced, yes.

20

Q. So you say that, presumably, the reason why they agreed to allow you to change from bulk to bagged sale was because this was the only way they could get the whole of their money back, do you? A. Yes.

MR. GYLES: Q. I would not want it to be said later that you did not understand the effect of the evidence you were giving just a moment ago. Are you absolutely clear in your mind that the previous sale on a bulk basis at say \$102 Australian per ton would not have paid out Compafina Bank as at July 1977 for their advances in relation to this barley shipment? A. In addition to the commissions and interest -

30

Q. There is no room for you having misunderstood the position, is there?

HIS HONOUR: I don't think he follows.

Q. What Mr. Gyles is saying, he wants to be absolutely certain - and so do I - that it is your assertion that all of Bank Compafina's entitlement would not have been able to be satisfied by the sale of the barley in bulk in July 1977 at \$102 Australian? A. That is Bank Compafina and the A.N.Z. Bank's 20%?

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Q. No, was it not crystal-clear to you that I was talking of Bank Compafina? A. I was considering the value of the cargo, the value of the cost price of the cargo.

Q. Whatever you were considering, let's go back. Do you now say that Bank Compafina could have recovered all its entitlements if the sale of the barley in bulk at \$102 per ton would have gone through? A. Without looking at the figures, I can't say. I believe it may have been done but I can't say without reference to the advances that were made.

10

(continued)

Q. If it would have been satisfied in full, then could you please tell me what advantage you can detect to the bank in agreeing to take the risk of a sale of bagged barley as distinct from a sale of bulk barley? A. If it had of satisfied it, there was no advantage.

20

Q. So on that basis you say that on the hypothesis that they would have been satisfied it was only their good nature, you say, that prompted them to agree to you selling the barley bagged rather than in bulk and take the risk? A. Yes.

MR. GYLES: Q. If I could just return to late June of 1977, I suggest to you that in the course of the discussions between Mr. Barki and Mr. Boulmer and Mrs. Lenos the proposal was developed and put forward by Mr. Barki to the following effect: We want to sell on a bagged basis at 4.4 million. You are owed, let's say, 2.8 million - you, Compafina. You want either a clean letter of credit on an F.O.B. bulk basis of 2.8, which satisfies you, but the alternative is for you to get a clean \$4.4 million bulk letter of credit. The purchaser would not normally agreed to do that because he would like to see his barley bagged before he paid for it, but if you the bank enter into a performance bond in order to guarantee the bagging they might give you a 4.4 letter of credit on a bulk basis. I suggest to you that Mr. Barki put those alternative suggestions to the Bank Compafina in late June 1977 with your authority? A. ~~He didn't.~~ (Objected to: rejected and answer struck out).

30

40

10 Q. I suggest that to your knowledge and with your authority Mr. Barki put the following alternative suggestions to Mr. Boulmer and Mrs. Lenos in the last days of June 1977: that either (a) a clean letter of credit for \$2.8 million in favour of Bank Compafina on a bulk basis be obtained or, alternatively, negotiations be commenced to get a clean letter of credit on a bulk basis in favour of Bank Compafina for \$4.4 million on the footing that Bank Compafina would provide to the purchaser a guarantee of performance of the bagging part of the contract? (Objected to: allowed)
A. If he did, he did it without my knowledge and without my approval.

20 Q. But did you not offer the evidence a few minutes ago that you had telexed Bank Compafina to say that you were authorising Mr. Baki to speak for you in relation to these matters? A. Not with my knowledge and approval did he make that proposal. He did quite a good deal without my knowledge and approval and that he did not have my knowledge or approval. I did not know and I did not approve. He did have approval to do certain things, but that was not one of them.

30 Q. Was not one of them to negotiate with Bank Compafina to arrive at a solution to the problem which confronted your companies of effecting a sale of the grain which was held in Mayne Grain's terminal? A. He took initiative - whether that was part of his initiative, I don't know. I didn't know that that was done.

40 Q. I am putting to you that you authorised Mr. Baki and told the bank you had authorised Mr. Baki to speak for your companies and yourself in relation to the release of the grain in the Maynegrain store? A. No.

Q. Or the release of the barley shipment?
A. Not to my knowledge, I did not.

Q. I put it to you a few minutes ago that you had rung on either 27th, 28th or 29th June and said that Mr. Baki would act on behalf of Penmas in relation to these negotiations and you said "I think I sent a telex". Was that not your answer? A. That's correct, yes.

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Q. You were agreeing with me, I think?
A. I sent him a telex, but not in relation to what you have just described, with my knowledge and approval to negotiate a credit of that kind.

Q. Can I just get one thing clear. You did tell the bank that Mr. Baki was authorised to speak on your behalf and Penmas' behalf, at least, in relation to the sale of the barley shipment, which was then in Brisbane? (Objected to: rejected). 10

HIS HONOUR: Q. Can I get this from you. You left Geneva and Mr, Baki remained there, correct, in June? A. Yes.

Q. Do you agree with counsel that it was necessary to have somebody continue discussions with Bank Compafina? A. It depends on what date.

Q. In June, when you left Geneva? A. I left in July, 29th July. 20

Q. During June was there some discussion with the bank concerning a performance bond? A. Yes, there was.

Q. Who carried out that discussion? A. I believe that may have been Mr. Baki.

Q. And that was because you were not in Geneva? A. No.

Q. No you were not or no that wasn't the reason? A. Mmm.

Q. Did Mr. Baki conduct the discussions because you were not in Geneva? A. Yes. 30

Q. You told the bank that Mr. Baki could carry on the discussions in your absence? A. Yes.

Q. It was necessary in order to further the attempted sale to get a performance bond, wasn't it? A. Yes.

Q. And so you authorised Mr. Baki to conduct those negotiations with the bank in an attempt to secure the bank's consent to a sale of the barley in bags? A. Yes. 40

MR. GYLES: Q. And Mr. Baki reported to you, did he not, that the bank had said they would be

prepared to issue a performance bond of up to 10% of the gross sale price in favour of the buyer guaranteeing delivery in bulk and, ultimately, proper bagging, that was reported to you wasn't it? A. I believe it was reported to my brother.

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Q. But, nonetheless, you learned of the bank's willingness to give that performance bond, is that not correct? A. I believe that went to Makki Juma, the Al Alhia Bank.

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Q. Whether it did or not, did you not learn of the bank's willingness to do it? A. I believe I did, yes.

20

Q. And that was on the footing, was it not, that they would receive an irrevocable letter of credit for \$4.4 million F.O.B. Brisbane? A. I don't know and didn't know the details while the negotiations were going on.

Q. Can you advance one single reason why Bank Compafina would be prepared to enter into a performance bond to guarantee delivery and bagging of 10% of the gross price unless it were to get a letter of credit for the gross price upon shipment in Brisbane? A. That was the discussions between Baki and the bank.

30

Q. I would suggest to you that you thought Mr. Baki was being optimistic in thinking that the purchaser would agree to that, isn't that right? A. I thought that Baki was optimistic in so far as the Gulf Fisheries people in Kuwait had already decided that they would take care of the performance bond and that the other proposal would not be acceptable to them because they controlled the import.

40

Q. Just to cover one possibility that perhaps we have not covered already, you said that the first time a Bank Compafina officer raised with you the question of an F.O.B. bulk letter of credit was on 29th July, the Friday? A. Mmm.

Q. Had you been told by other people, such as your brother or Mr. Baki, that that was the request the bank had been making consistently since June? A. Did I tell them that?

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Q. No, did any of your people tell you that the bank had been consistently requesting an F.O.B. bulk letter of credit?

A. No.

Q. So when Mr. Ferrasse raised this with you on the Friday, that came at more or less as a surprise to you? A. It wasn't a surprise, no.

Q. But it was the first time you had heard of it, is that right? A. I believe so.

10

Q. (Witness shown Exhibit D) Would you please read that. Having looked at that document, do you adhere to the evidence you have given? A. Yes.

Q. Did you receive that letter? A. I don't recall.

Q. You will observe that it was sent to you both care of your Queensland office and care of the Kuwait Hilton at Kuwait? A. I should have received it, but I don't recall.

20

Q. It is, of course, completely inconsistent with the evidence you had given? A. I don't think so.

Q. You don't? A. No.

Q. Do you not observe that it requests a documentary credit directly in favour of Bank Compafina covering barley in bulk, does it not? A. Bank Compafina from this letter were interested in a letter of credit of 2,800.

30

Q. Two million eight hundred thousand? A. Two million eight hundred thousand.

Q. I am directing your attention to the following words: "Further to our recent discussions on the matter, we trust we shall be soon receiving the documentary credit from Kuwait directly in our favour as stipulated by you covering the barley in bulk for an approximate value of U.S.\$2,800,000." Now, do you not agree that that letter was seeking a documentary credit in Compafina's favour covering barley in bulk? A. And that is consistent with my arrangement with them on 29th July that I would use my best endeavours to arrange that credit.

40

Q. But it is not consistent, is it, with your statement that you were simply to use your best endeavours, is it? A. It does not necessarily say that this letter is correct.

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Q. What do you mean by that? A. I mean that it does not necessarily mean that the discussions to which it refers is as stated.

Q. Well, in that case, you immediately telexed back saying "What are you talking about?", did you? A. Well, at that time I was heavily involved in the loading of the vessel and the consignment of the vessel and I don't recall having received it in Australia.

(continued)

MR. GYLES: Q. (Witness shown Exhibit E) Would you read that to yourself, please? A. Yes.

20

Q. Do you recall receiving that document? A. No.

Q. You will observe that that also referred to a letter of credit covering bulk buying? A. I didn't receive it, I wasn't in Kuwait.

30

Q. (Witness shown Exhibits S and T) May I first of all, ask you to go to T, which is the document of 29th June 1977. Would you go over to the second page "Other Conditions" (g) "shipment not later than 45 days after receiving the letter of credit in Geneva in form acceptable to Bank Compafina". That was the original draft, wasn't it? A. I believe so.

Q. And that reflected, I suggest to you, your understanding as at 29th June 1977 as to the requirements of Bank Compafina? A. I never wrote this draft. I wasn't in Kuwait. I was not familiar with the details.

Q. Were you not in constant communication with your brother? A. Certainly not.

40

Q. Just turn over to Exhibit S, you will see the second last paragraph. Did you speak with Mr. John Jamieson after your discussions in Geneva with Bank Compafina officers in July? A. I spoke to Bank Compafina officers last on the Saturday, the 30th of the month. I was

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in Kuwait about eight hours on the
Monday and spoke with my brother.

HIS HONOUR: I want to be absolutely
certain about this: both Mrs.Lenos
and Mr. Ferrasse gave some evidence about
a conversation towards the end of June,
when they asserted that you, for the first
time said that there was a possibility of
a sale to Kuwait at an interesting price
conditional on the barley was being sold
in bags, do you remember that? A. At the
end of June?

10

Q. Yes. A. Yes.

Q. Do you agree that such a conversation
took place or not? A. I believe it did.

MR. GYLES: Could I just intervene, Mr.
Ferrasse put that conversation as early
June, Mrs. Lenos put it as later in June.

HIS HONOUR: Q. For present purposes I will
withdraw the question in that form and put
it to you this way: there was evidence given,
allegedly, as to a conversation that
occurred in June to the effect that the sale
to Iran has gone off and there was a
possibility of another sale at an interesting
price conditional on the barley being sold
in bags, do you remember that evidence?
A. Yes.

20

Q. Did any such conversation take place
in June? A. In June?

30

Q. Yes. A. I believe it did.

Q. Both Mrs.Lenos and Mr. Ferrasse assert
that before the grain could be released the
bank required a letter of credit in your
favour lodged with the Compafina Bank or, at
least, notified through the bank? A. In my
favour, Penmas?

Q. In your or Penmas' favour, but either
lodged with the Compafina Bank or notified
through it. Did any conversation like that
take place? A. There was no conversation
about a letter of credit at that time.

40

Q. None at all? A. At that time. There was
discussions about bags in the middle of the
month.

Q. Then is it true that in the course of that conversation when the possible interesting sale was mentioned Mr. Ferrasse said that the bagging could cause serious problems? A. That question was never raised.

10 Q. The problem associated with bagging or possible problem associated with bagging just wasn't raised? A. No. Indeed, they encouraged me while I was preparing all of the bagging equipment and arranging the bags. They encouraged me in the operation.

Q. Well, we haven't got to that yet, because at this point it is just a glimmer in your eye, that you might have sale conditional on bagging? A. Yes.

Q. What do you say did either Mr. Ferrasse or Mrs. Lenos say when you said there might be an interesting sale conditioned on the barley being bagged? A. What did they say?

20 Q. Yes, what did they say? A. Well, they encouraged me to develop the sale. They said - I had mentioned to them the deterioration of the grain and they said "progress the sale".

Q. Did you indicate to them that there could be problems associated with bagging? A. No.

Q. Did it occur to you that that might be a relevant matter? A. I have not expected it, no.

30 Q. What didn't you expect? A. I didn't expect that there would be problems. There were abnormal circumstances that happened in Kuwait that precipitated the problems such as rain and that was something that had never happened for 50 years in Kuwait at that time of the year. That was what precipitated the problems in bagging.

Q. At a later stage, indubitably, on your own evidence they wanted a letter of credit for a lesser sum or a back to back credit? A. Yes.

40 Q. Well, then, is this what you say, that something or other happened between the first occasion when you mentioned bagging and they said nothing whatsoever about a letter of credit and the subsequent occasion when, for some reason or

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(continued)

other, they wanted a back to back credit?
A. In the terms that you spoke of, insofar
as the letter of credit, I don't recall any
reference to that kind of a discussion at
the end of June, that kind of a credit

Q. Could you perhaps tell me, to your
knowledge, did anything occur which, in
your opinion, might have got the bank for
the first time to suggest this back to back
credit arrangement, never having previously
mentioned the letter of credit? A. The
letter of credit came out - the head letter
of credit came out in the first half of
July and that is when we knew what the terms
of the credit were going to be, because
there was no possibility of arriving at what
we could do with a back to back credit until
we knew the terms of the head credit. That
controlled the secondary credit.

10

Q. Of course, on your evidence Compafina
Bank was really not concerned with who the
letter of credit was made out to, they had
never raised the question previously, is
that right? A. Previous to the head credit
coming out, yes.

20

Q. Yes. A. I don't recall any reference
to it, although I understood that there
would be a letter of credit eventually
required, yes.

Q. A letter of credit of what kind? A. A
letter of credit, a back to back credit for
the FOB portion.

30

Q. From what did you understand that?
A. That would be normal practice.

Q. So is this what you tell me, that you
didn't need to be told that the bank required
a letter of credit because it is normal
practice that it should have one? A. Yes,
except that there had been extraordinary
latitude extended by the bank with credits
and it was not a normal relationship.

40

(Witness stood down)

(Further hearing adjourned until 10 a.m.
Thursday 5th March 1981)

IN THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION
COMMERCIAL LIST No.13528 of 1978

First
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Evidence of
Alexander
Jamieson
5th March
1981

CORAM: ROGERS, J.

COMPAFINA BANK v. BULK TERMINALS &
EXPORTERS PTY. LIMITED & ANOR.

EIGHTH DAY: THURSDAY: 5th March, 1981

10 MR. RAYMENT: In this matter Mr. Jamieson
is still a witness and that would naturally
continue. When his evidence has been
completed I would intend to submit to the
order of the court on behalf of the first
defendant, and seek leave to be exeused and
for the witness to be excused.

(continued)

HIS HONOUR: There will be a verdict for the
plaintiff against the first defendant, I take
it, and the plaintiff's action will continue
against Maynegrain.

20 MR. GYLES: In those circumstances, it appears
unnecessary, to say the least, to go on with
Mr. Jamieson's cross-examination.

HIS HONOUR: Unless you want to get something
from him that you can use against Mr.Campbell.

MR. GYLES: I did have some discussion with
Mr. Rayment before your Honour came on and I
was not clear precisely what the significance
was.

HIS HONOUR: Is my understanding right?

30 MR. RAYMENT: I would propose to submit to the
order of the court.

HIS HONOUR: In a sense, then, you don't consent
to a verdict, it is just that you do not oppose
the entry of a verdict?

MR. RAYMENT: I would not make any submission
about any matter.

HIS HONOUR: In a sense, you are proving your
case exparte.

MR. GYLES: In a common law action I do not know

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(continued)

what "submit to the order of the court" means, with respect to my learned friend. It is not an equity summons, where your Honour makes such orders as your Honour thinks fit, we claim a sum of money for damages.

HIS HONOUR: He is not going to seek to support his defence, so what you can do if it appeals to you is move to have the defence struck out, but if I may say so, before you get too enthusiastic about that, you want to think about whether you want anything further out of Mr. Jamieson.

10

(Short adjournment to enable
Mr. Gyles to consider his position)

MR. GYLES: We would, under the circumstances, seek the striking out of the defence, desiring neither the benefit nor burden of the evidence so far led by the defendant. We would respectfully submit that is the proper course to take.

20

MR. CAMPBELL: I oppose that course.

HIS HONOUR: You are not concerned with the striking out of the defence, but you want to avail yourself of the evidence already given.

MR. CAMPBELL: That is so.

HIS HONOUR: I think I will have to accept that.

MR. GYLES: I would wish to put a submission to the contrary. There is no case between the plaintiff and the defendant on this assumption, the first defendant, and the evidence was led in support of the defendant's case and that is its only purpose. There is no such thing as evidence engross in a case, it is led to support one side or the other. Now, because of the procedural situation, if the case proceeded against both defendants it would be evidence in the case as a whole, but not the case where the party who led it disappears from the scene, we would respectfully submit. Just consider the position that now pertains. It is purposeless to continue cross examining Mr. Jamieson and it would be not right that we should be compelled to do so. There is no issue remaining between us and the defendant, who called him.

30

40

HIS HONOUR: But the evidence that he has given may bear on the issues as between you and the second defendant.

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MR. GYLES: They may, but that evidence was not tendered by the second defendant.

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10 HIS HONOUR: But the second defendant is entitled to say well, for the period that the first defendant was a participant in the case evidence was produced upon which I am entitled to rely for my benefit if I so wish.

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(continued)

20 MR. GYLES: The initial attractiveness of that proposition does not last examination, in my respectful submission. What are we going to do, are we to call evidence in reply? Let us take it away from this particular case and consider a position where a witness called by one defendant gives evidence which needs reply. That case is then withdrawn from the tribunal of fact. The party against whom it was tendered surely cannot be put in a position where it has to reply to evidence which has no relevance to the case in which it was led.

HIS HONOUR: But the matter has relevance in the entirety of the case and insofar as it bears on an issue which is still alive, namely, that between the plaintiff and the second defendant you would have to reply to it.

30 MR. GYLES: With respect, I would submit that is wrong in principle. It must be wrong in principle where you have to put a party in a position of calling evidence in reply to a non-existent case - in my respectful submission unknown to procedure.

HIS HONOUR: Of course it is.

MR. GYLES: A non-existent case, the case to which I would be replying is a non-existent case.

40 HIS HONOUR: Test it this way. Let's assume that there were cross-admissions, the benefits of which are now sought by the second defendant. Can the disappearance of the first defendant from the case result in those admissions just being withdrawn or disappearing from the case.

MR. GYLES: Any admissions between those two

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(continued)

parties have no effect on my case against Mr. Campbell and nor would they in the course of the proceedings. If there were cross-admissions in the sense that all parties made the admission then that would continue to bind, but the admissions between Mr. Rayment and Mr. Campbell had no effect on my case. In any event, that is the submission I make.

HIS HONOUR: I propose, as at presently advised, to allow the evidence to stand.

10

(His Honour offered to adjourn until 2 p.m. to enable the parties to further research whether the evidence should stand. That offer was declined.)

(For Judgment see separate transcript.)

(His Honour granted adjournment to enable Mr. Gyles to consider whether to continue cross-examination of Mr. Jamieson, and the matter was stood down until 2 p.m.)

20

ON RESUMPTION

ALEXANDER JAMIESON
On former oath
Cross-examination contd.

Cross-
Examination
(continued)

MR. GYLES: Might I use a copy of a document produced on discovery, Mr. Jamieson, do you recognise this as being a copy of a document, a certificate certified by you in relation to this shipment of barley?(shown)
A. Yes.

30

Q. I think you agree that the document certifies that the shipment was free from live weevils and insects, is that so?
A. Yes.

Q. Would you also look at the further copy document I show you, produced on discovery. Do you recognise that as a document which was tendered for your attention at the time of despatch of the shipment? A. Yes.

40

Q. Do you agree that was an independent company's certificate of quality and condition, certifying that the barley loaded

was free of live weevils and other insect infestation? A. Yes.

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10 Q. May I just put to you that in no conversation between you and any officer of the Bank Compafina did you tell them, or any one of them, that the vessell "Bellnes" was being actually loaded with this barley shipment; what do you say about that? A. Being loaded? I told Mr. Boulmer, when the vessell had sixteen thousand tons on it, that it was half loaded.

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5th March 1981

(Witness retired and excused)

(continued)

MR. RAYMENT: May I also be excused, your Honour?

HIS HONOUR: Yes, Mr. Rayment, thank you very much. (Mr. Rayment retires)

HIS HONOUR: Mr. Campbell, are you in a position to do anything at all now?

MR. CAMPBELL: No, I am not, your Honour.

20 HIS HONOUR: What about your defence claim?

30 MR. CAMPBELL: Your Honour, the position with that is that a draft is substantially complete. One of the things that my friend was seeking by way of matters to be completed was details of how we came to be a creditor, and that is something on which we are still obtaining precise instructions from Brisbane. Subject to that, it is in a position where it is a developed version of something I showed him yesterday.

HIS HONOUR: Perhaps you might liaise with Mr. Caldwell to try and eliminate any more contention about that. When you recover Mr. Johnson, you will be calling him and he will be cross-examined, and is it proposed by you at this state to call any other evidence?

40 MR. CAMPBELL: It is possible, your Honour; it depends on a conference I will be having this afternoon. There would be only one such witness, I would expect.

HIS HONOUR: I suppose that is on practice. Are you in a position to indicate whether you think you will be calling anything in reply?

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MR. GYLES: I cannot imagine we would,
your Honour.

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HIS HONOUR: So the evidence should finish
some time tomorrow. Will you need time
before you can address?

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MR. GYLES: I am not sure whether your
Honour was proposing the Common Law address
in this case.

(continued)

HIS HONOUR: No, I was proposing an Equity
order. But by the same token I am prepared
to be understanding, that you have had a
heavy week. 10

MR. GYLES: No, your Honour, we are prepared
to address tomorrow.

(Further hearing adjourned to
10 a.m. on Friday, 6th March, 1981)

Second
Defendant's
Evidence
No.6

IN THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION
COMMERCIAL LIST No.13528 of 1978

Evidence of
Stanley
Kenneth
Chilton
Examination
6th March
1981

CORAM: ROGERS, J. 20

COMPAFINA BANK v. BULK TERMINALS &
EXPORTERS PTY. LIMITED & ANOR.

NINTH DAY: FRIDAY, 6TH MARCH, 1981

(continued)

STANLEY KENNETH CHILTON
Sworn and examined

MR. CAMPBELL: Q. Your full name is Stanley
Kenneth Chilton, you live at 22 Kardinia
Road, Clifton Gardens, and you are the
managing director of Oceania Grains?
A. That's correct. 30

Q. And Oceania Grain is a substantial
trader in the Australian Grain market and a
subsidiary of the Swiss Andre Company, is
it not? A. It's not actually a subsidiary.
Andre are their trading partners. I
represent Andre personally.

Q. And you have been connected with Oceania
Grains since its incorporation in 1972, I
believe? A. Yes.

<p>Q. But you were first the general managing director, that you became the sole managing director in the late part of 1973 or early 1974 and have retained that position ever since and you also became the chairman in late 1974 or early 1975? A. Correct.</p> <p>Q. Before joining Oceania you had experience in the grain industry overseas? A. Correct.</p> <p>10 Q. And altogether you had been in the grain industry for more than 20 years? A. Correct.</p> <p>Q. Are you familiar with the expression a warehouse receipt in the industry? A. Yes.</p> <p>Q. Could you tell his Honour what your understanding of the warehouse receipt is?</p> <p>MR. GYLES: The question may be ambiguous. Is he being asked to describe the document or its effect?</p> <p>HIS HONOUR: I think he is describing the document, at the moment.</p> <p>20 Q. Are you? A. Well, I think so. It would be described as a warrant on entitlement of goods that one had put into store.</p> <p>MR. CAMPBELL: Q. Does the warehouse receipt, to your experience, take any particular form? A. Yes, they usually state - give a description of the goods, state the store - the store is listed - is named, rather, a description of the goods.</p> <p>30 Q. And does it say anything else? A. Oh, yes, it usually has the tonnage, of course.</p> <p>Q. Is it a document that is usually addressed to a certain person or not? A. Yes, it is usually addressed to the titleholder of the stocks - usually the owner of the stocks.</p> <p>Q. Is there a practice in Australia that involves the issue of warehouse receipts of the kind that you have described by storage companies to grain companies that lodge grain with them? A. Yes.</p> <p>40 Q. In your experience of the Australian Grain trade is it common for grain traders to borrow against the security of grain in store? A. Yes.</p>	<p>In the <u>Supreme Court</u></p> <p>Second Defendant's Evidence No.6 Evidence of Stanley Kenneth Chilton Examination 6th March 1981</p> <p>(continued)</p>
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Supreme Court

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Evidence of
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(continued)

Q. Could you tell his Honour how that is done? (Objected to; allowed) A. Well, normally we would approach your - perhaps your own bank or a company with which you were associated in trading and get an advance, which would usually be called a pre-shipment advance against the goods. Usually the value is something up to 80% of the value of the goods and you would then lodge your warrants with the institution so that they had security over the goods. 10

Q. Are you aware of any practice in the Australian grain trade of a financier obtaining documents called warehouse receipts direct from a person who has the grain in store? (Objected to)

HIS HONOUR: Q. Have you in your personal experience encountered any situation of the kind just described? A. No, it would be very unusual, but I might like to just qualify that. It was possible that institutions like the Government marketing authorities where the goods are stored in a Government instrumentality such as the Grain Elevator Board or State Wheat Board, where they may institute such a practice, but I haven't heard of it. 20

Q. MR. CAMPBELL: From your experience in the industry would it be true to say that there was any trade understanding as to what followed from the issue of a warehouse receipt direct from a storer to a financier? A. Not really, not without proper clarification. 30

Q. In particular, would it be true to say that there is a trade understanding that when a warehouse receipt is issued direct from a storer to a financier that that grain must be held until the financier has authorised its movement? (Objected to) (Allowed) A. Well, I think I'd have to say no, it would not be a normal practice. 40

Q. (Witness shown p.81 Ex.A) Would you look at that document carefully please. Have you had enough time to look at it? A. Yes.

Q. If someone from the A.N.Z. Bank were to come along to you and say, "I have lent money against certain grain and I have been given this document" and was to ask you "Is it clear to someone who is in your position in

the grain trade that that grain cannot be moved without my permission", what would your answer be? (Objected to)

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HIS HONOUR: I will allow the answer to be given and you can debate it in fact.

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10 MR. CAMPBELL: Q. Do you remember the question? A. Yes, I do remember the question. The best way for me to really answer that is that if that document was presented to me for negotiation I would need it clearly established that the bank did hold title over the goods. I don't think that that document is such that it clearly states that they had entitlement. It would be open to question.

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Stanley Kenneth
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Examination
6th March 1981

(continued)

CROSS-EXAMINATION

Cross-
Examination

MR. GYLES: Q. Your company is not a warehouse of goods, is it? It doesn't own - A. Yes, we do.

Q. You do own warehouses? A. Yes.

20 Q. Have you still got the document open in front of you? A. Yes.

Q. I want to direct your attention to some words in it. First of all, the words I direct your attention to are the words "Making the total held on your account" so many tonnes, do you see those words? A. Yes.

30 Q. As between Maynegrain and the A.N.Z. Bank, there would be no question but that Maynegrain would hold this on account of the A.N.Z. Bank, that is so, isn't it? A. Well, for a young fellow to interpret it without experience, it could be said yes, but for somebody to experienced in the trade it would definitely be open to - it is rather ambiguous.

Q. There is no ambiguity in saying that they held something on account of somebody else, is there? A. No.

40 Q. No ambiguity? A. No.

Q. So the document itself is not ambiguous, is it? A. Well, only that it refers to two parties there.

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(continued)

Q. I beg your pardon? A. It refers to bulk terminals and exporters barley stocks and the manager of the A.N.Z.

Q. Is it not clear that that document is directed to the manager of the A.N.Z. Banking Group? A. Yes, that is quite correct.

Q. And when it says "Held on your account" it is referring to the A.N.Z. Banking group? A. Yes, that would be correct, too. 10

Q. So that would you agree with me that, looking at that document, there would be no doubt that as a document it is not ambiguous, not ambiguous as to on whose account the grain is held? A. Yes.

Q. You agree with me? A. Yes.

Q. I suppose your practical doubt about it is that you know that A.N.Z. is a financier and that bulk terminals and transporters were involved in the grain trade? A. Yes, it goes a little further than that. 20

Q. But that would be something which would cause you, as a practical man, to have a little query in your mind? A. Yes.

Q. In any event, as you have said there is no question but that where you obtained finance in the basis of a warehouse receipt or warrant and that warrant is lodged with the financing institution it is lodged as security over the goods, that is so, is it not? A. Yes. 30

Q. Inherent in the notion of security is that the lending institution will have rights over the goods themselves, that is so, isn't it? A. Yes, if it is a correct warrant of entitlement that has been lodged, yes, indeed.

Q. Has your company obtained finance on security of warehouse receipts? A. Yes, we have - well, yes, we have.

Q. In those cases, I take it from your evidence that you have adopted the practice of keeping the receipt in your own name and lodging, as it were, negotiating that receipt with the bank or financing institution, is that right? A. Yes, that would be right. 40

10 These are procedures that we lay down- there are certain procedures that we lay down and we do adhere to because if the documentation is in any way ambiguous it is open to fraud and one of the problems in our business is that you have a number of companies that are very well established and have enormous backing and you have companies that come along for two or three years and then disappear. Now, we still find it is profitable to trade with those companies, but one must ensure that the documentation over assets, whether they be goods or whatever, are in proper order, otherwise it may be that one goes to the store and finds that the goods aren't there. This has happened in many countries in the world.

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(continued)

20 Q. Just concentrating on the raising of finance on the basis of documentation, when your company has itself raised finance on the basis of goods in store, has it done so from one or more than one organisation?
A. We have done it from more than one organisation.

Q. And have you done it exclusively with banks or with other institutions? A. No, we have done it with banks but mainly with other institutions.

30 Q. What, other traders? A. Yes.

Q. Of similar type to yourselves? A. Yes.

Q. Between the few very substantial trading organisations, I take it you are constantly dealing with each other? A. Yes.

Q. And, indeed, in addition to raising finance on the warehouse warrants or receipts do you negotiate sales based upon the transfer of the document rather than physical possession? A. Yes.

40 Q. Have you advanced money on the basis of warehouse receipts? A. Yes.

Q. To people that you trust? A. Yes, in most cases, yes.

Q. For long or short periods? A. Depends on the term long or short. It would be anything from, say, three months to ten months.

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(continued)

Re-
Examination

Q. Have you taken security over the warehouse receipts in those cases? A. Well, no, we haven't, but what we have done is that we have clearly established that the goods are in store and we have established with the store owner that we are now in control of those goods.

Q. Your interest was notified to the store warehousemen? A. Yes, and we usually insist that the original owner or titleholder of the goods notifies the store as well.

10

Q. Of course, as a result of that, have there been occasions when the store keeper warehouseman issues to you a document acknowledging your interest? A. Yes, they usually confirm.

Q. And from then on it is clear that the goods cannot be moved without your consent? A. Yes.

20

Q. Although they know that you are a financier or you have lent money on the goods rather than paying them? A. Correct.

RE-EXAMINATION

MR. CAMPBELL: Q. When my friend was asking you some questions about the document that is open in front of you, you said that you had some doubts about the documents. My friend said to you something like, "Does that arise from the fact that the A.N.Z. is a financier and B.T.E. is in the grain trade?" and your answer was, as I recall it, "Yes, but it goes a little further than that". Could you tell his Honour what you meant by that expression, "It goes a little further than that"? A. Well, I, from my own company's point of view, I would like to clarify that there is some original documentation indicating that any entitlement of the goods has changed hands. I would just be a little bit unhappy with that, but then that is just 20 years of experience, where I have seen documents that look in order but they are just not quite what they appear to be. I don't know if that truly answers the question.

30

40

10 HIS HONOUR: Q. It is right to say this,
is it not, in a situation where grain is
delivered to a warehouse by organisation A
and thereafter there is a request to the
warehouseman to issue a warehouse receipt
to B, it is as plain as a pikestaff to the
warehouseman that either there has been a
change of ownership of that grain or there
has been a mortgage or pledge on it?
A. If he is clearly asked, yes that's
correct.

Q. There is no other conceivable
reason why he would be issuing a warehouse
receipt to B at A's request other than
some change? A. No.

(continued)

20 MR. CAMPBELL: Q. Has it happened, in your
experience, that a financier has requested
that he be provided with certification of
the amount of grain that is in a store
for the purpose of advancing money against
that grain? (Objected to; rejected)

HIS HONOUR: Q. I think what Mr. Campbell
really wants to know, do you know of any
instance where a document akin to that in
front of you has been issued for any purpose
other than as a warehouse receipt - is that
right?

MR. CAMPBELL: Yes.

30 HIS HONOUR: Q. Do you follow the question?
A. I think so. You are asking if this
document would be issued other than as a
warehouse receipt.

40 Q. Have you ever encountered any situation
where it was being issued for a purpose in
a situation other than as a warehouse receipt?
A. Yes, you do come across letters of
confirmation whereby somebody is keeping
somebody else's - has been asked, rather,
to advise a third party that certain things
are happening. That doesn't always constitute
that there is a change of entitlement. It may
be another contractual agreement. There may
be another, perhaps, say purchase.

(Witness retired & excused)

(Mr. Campbell handed up handwritten
amendment to defence. Mr. Gyles took no
objection)

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(continued)

HIS HONOUR: I grant leave to the second defendant to further amend its defence, conformably with the two documents initialled by me and placed with the papers.

(Mr. Gyles handed up replies to further amendment to defence, Mr. Campbell took no objection).

HIS HONOUR: I grant leave to the plaintiff to amend its reply in the form of the document initialled by me and placed with the papers.

10

(Plaintiff's document setting out basis for its preferred claim for damages tendered without objection and marked Exhibit U).

(Letter from Bank of New South Wales to Messrs. Sly & Russell dated 5th March 1981 tendered without objection and marked Exhibit V)

20

(Letter from Commercial Bank of Australia Limited to Sly & Russell tendered, dated 3rd March 1981, without objection admitted and marked Exhibit W)

(Mr. Gyles sought leave to withdraw that part of Ex.A appearing on pp.26-51 from evidence Opposed by Mr. Campbell and rejected by his Honour)

30

(Admission between the parties noted that Penmas at August 1977 owed to the plaintiff moneys on account other than the barley account)

Evidence of
Peter Johnstone
Examination
6th March 1981

PETER JOHNSTONE
Sworn and examined

MR. CAMPBELL: Q. Your full name is Peter Johnstone, you live at 36 Pioneer Street, Capalbah in the State of Queensland and you are the manager of the Maynegrain terminal at... . A. The spelling is Capalaba, otherwise it is correct.

40

Q. You have been the manager of the Maynegrain terminal since March 1974, I believe? A. That's correct.

	Q. The terminal was purchased by Mayne Nickless in February 1974? A. Correct.	In the <u>Supreme Court</u>
	Q. And prior to the terminal being purchased, Mayne Nickless had acted as managing agent of the Company called Meral since 1972, operating that same terminal? A. Meral (Queensland) Pty. Limited, that's right.	Second Defenant's Evidence No.6 Evidence of Peter Johnstone Examination 6th March 1981
10	Q. During that period you were the operations manager for the terminal? A. That's right.	(continued)
	Q. I believe you were responsible for movement of commodities through the terminal? A. That's right.	
	Q. The terminal opened for business in about January 1973, I believe? A. That's right.	
20	Q. And since that time approximately how many different cargoes of grain have been through the terminal? A. Up to the present time there would be somewhere near 180 cargoes loaded.	
	Q. In the period up to July or August of 1977 roughly how many would have been loaded? A. 70 to 80.	
30	Q. In the period from January 1973 to January 1977 would you be able to give his Honour an indication of the customers that your terminal had for storage of grain? A. Yes, it would be Louis Jaffas, Bungy, Dalgety, Oceania Grain, the State Wheat Board of Queensland, B.T.E., Barley Marketing Board of Queensland, Barley Marketing Board, New South Wales, Queensland Grain Growing Association and Tradax, and another one, Downes Irrigation Cooperative Association Limited.	
40	Q. Are you able to think of any company which was involved in a substantial way in the grain trade in the Southern Queensland area that had not been customer of yours during that period? A. No.	
	Q. Could I show you three documents. Do you recognise those as being photocopies of documents that you are familiar with? A. Yes, I do.	

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(continued)

Q. Apart from the transaction that is shown in those documents, had your company at any time been asked to issue a warehouse receipt to a financier? A. No.

Q. Had you ever heard of the notion of issuing a warehouse receipt to a financier as at January 1977? A. No.

Q. In the course of the operations of the terminal prior to January 1977 had Maynegrain ever been contacted by any financier saying that it gave permission for any grain to be loaded? A. No.

10

Q. Indeed, had the Maynegrain terminal had any contact at all with financiers of grain apart from those letters in front of you? A. No.

(Photostat copy letters Reserve Bank of Australia to Maynegrain dated 6th November 1975, Maynegrain to Lending Department, Reserve Bank of Australia 10th November 1975 and notice from Reserve Bank of Australia to the manager, Maynegrain, dated 6th November 1975 tendered without objection and marked Exhibit C3)

20

Q. Are you aware of whether any of your customers were having their grain financed during the period from when the terminal opened until January of 1977? A. Yes.

Q. By that do you mean you were aware that it was being financed? A. I was aware that it was being financed.

30

Q. If I could take you to January 1977, did you have a conversation with anyone from B.T.E. concerning the production of documents to the A.N.Z. bank? A. Not to the A.N.Z. bank, no.

Q. Did you have a conversation with anyone from B.T.E. concerning the production of documents to anyone? A. Yes, on 6th January 1977 Mr. Behn, who was the manager of B.T.E., rang me and asked - (Objected to)

40

Q. Prior to 6th January your company had received certain grain, namely, barley, from B.T.E., had it not? A. That's right.

	Q. In the ordinary course of events your company prepares a document called a stock movement report inwards whenever it receives a cargo or a truck load of grain into the terminal, does it not?	In the <u>Supreme Court</u>
	A. That's right, that is a daily summary of the individual loads that have been received.	Second Defendant's Evidence No.6 Evidence of Peter Johnstone Examination 6th March 1981
10	Q. In the ordinary course of events, you sent a copy of this document to B.T.E. after having received grain from B.T.E., do you? A. That's right, along with a copy of the individual load docket.	(continued)
	Q. Could I show you this bundle - do you recognise those documents? A. I do.	
	Q. Are they all of the stock movement reports inwards relating to the barley that is in dispute in this case? A. Yes, they are.	
20	(Bundle of stock movement reports tendered; objected to; admitted and marked Exhibit C4)	
	Q. (Witness shown agreed bundle pp.237-254) Do you recognise that? A. Yes, I do.	
	(Documents at pp.237-254 of the agreed bundle of documents tendered; objected to; admitted and marked as part of Ex.C5)	
	Q. Was that agreement still in force as at January 1977? A. It was.	
30	Q. If we can now return to 6th January, you were about to tell his Honour about the terms a conversation with Mr. Behn? (Objected to; allowed) A. Mr. Behn telephoned me on 6th January 1977 and asked could I prepare a letter showing the progressive position of the barley stocks that we were holding on account of bulk terminals and exporting. He said that members of his staff would call to our office to collect that letter. He further said that he would	
40	put on telex to us the type of letter which he would like us to prepare.	
	Q. And that was all he said to you, was it? A. That's true.	
	Q. What did you say to him? A. I said I would consider it after I had received the telex message.	

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(continued)

Q. (Witness shown agreed bundle p.81)
Do you recognise that as being a letter
dated 12th January 1977 signed by you?
Do you recognise that letter? A. I do.

Q. If you turn over to p.82 you will see
that that is a letter in a different form?
A. I beg your pardon?

Q. You will see that that is a letter
in a different form, do you recognise the
letter on p.82? A. Yes.

10

Q. Could you tell his Honour the
circumstances in which that change of form
came about? A. Well, after considering
Mr. Behn's request for a letter of stock
position, I decided that I would send it
in the form that it stated on the letter
of 12th January 1977. After he had received
that letter he called me again and said,
would I reconsider that and send it in the
form which he had set in the telex message
of 6th January 1977. So, on considering
that also, I then produced the letter on
17th January in similar form to which he
had requested, but inserted "Bulk Terminals
& Exporters barley stock" into that letter.

20

Q. When did you first hear of there
being such a thing as Bank Compafina? A. On
30th September 1977.

Q. (Witness shown agreed bundle p.128)
Do you recognise that as an invoice that
you caused to be prepared? A. Yes, I do.

30

Q. That shows an amount of 27,935 metric
tonnes as having been loaded on to the
"Bellnes". Was that all of the barley you
then had from B.T.E.? A. Yes.

Q. And if it were to turn out that that
is less than the total of the documents that
you issued to the A.N.Z. as having acknowledged
receipt of, is there any explanation for
that? A. Yes, that would have been the loss
factor through the handling of the barley
through stores and through the terminal and
the ship loader. It might be a loss factor
by means of spillage or shrinkage or drying
out of the grain, which has been held in
store for some nine months.

40

Q. At the time that you caused the grain to be loaded on to the Bellnes did you have any beliefs about whether B.T.E. was entitled to have it loaded on to the Bellnes? (Objected to)

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HIS HONOUR: I will have it noted that evidence is tendered as against the cross-defendant only.

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10 WITNESS: I believe that B.T.E. were the owners of the barley.

(continued)

MR. CAMPBELL: Q. What had caused you to believe that? (Objected to; allowed in respect of cross-claim) A. Well, I had had no other reason to doubt that they were the owners of the barley, nobody had indicated otherwise to me.

Q. Did someone from B.T.E. instruct you load the grain on to the Bellnes? A. Yes.

20 Q. Did you believe at that time, after having been told that, that B.T.E. were entitled to have it loaded on to the Bellnes? A. Yes, I believe they had the right to.

Q. If you had known that B.T.E. were not entitled to have the barley loaded on to the Bellness would you have caused it to be loaded on to the Bellnes? A. No.

CROSS-EXAMINATION

Cross-
Examination

30 MR. GYLES: A. (Witness shown agreed bundle, p.123) You are familiar with that telex? A. I am.

Q. And that telex to which you have referred, that was received by you from Mr. Behn? A. That's right.

Q. And it was that telex of which you spoke in giving your evidence a few minutes ago? A. That's right.

40 Q. Did you consider the terms of this telex before you drafted your letter of 12th January or your document of 12th January? A. I had read the telex, yes.

Q. You had read it carefully, had you not? A. Yes.

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(continued)

Q. It was a request, you say, out of the ordinary so far as you were concerned? A. That's right.

Q. After sending the document 12th January you received a telephone call from Mr. Behn? A. That's right.

Q. And he asked you to change the form of document you had prepared and to stick to the form that he had proposed in the telex, is that correct? A. That's right. 10

Q. Which caused you to again very carefully consider that telex and its contents? A. That's right.

Q. Following that, you then signed the document on 17th January, correct? A. That's right.

Q. And the succeeding documents in that chain, correct? A. That's right, at his second telephone call he asked that those letters be sent on a weekly basis. 20

Q. And you appreciated that in signing those documents you were sending a warehouse receipt to the A.N.Z. Banking group Limited for the barley there described? A. No.

Q. You appreciate that the documents are described by you as warehouse receipts in the document themselves? A. That's right.

Q. And you are, further, familiar with that, that those documents are addressed to the A.N.Z. Bank, that is so, isn't it? A. B.T.E. collected them from us. 30

Q. My question was the documents were addressed to the A.N.Z. Bank, were they not? A. They had the name of A.N.Z. Bank on them.

Q. They were addressed, were they not, to the A.N.Z. Bank? A. I don't understand what you mean by "address".

Q. They are in the form of a letter, is that correct? A. In the form of a letter, yes. 40

Q. And letters are addressed to somebody from somebody else, are they not? A. If they are sent to those people.

Q. That is the form of a letter, is it not, it is a communication by one person to another person, that is so, isn't it?
A. But we were not communicating with A.N.Z.

Q. Could I just ask you generally, a letter takes the form of a communication from the person who signs the letter to the person to whom the letter is addressed, that's correct, is it not? A. Generally, yes.

Q. And in this case you understand that the form of a document shows itself to be signed by you on behalf of your company, that's correct, isn't it? A. Yes.

Q. So it is a communication by you to somebody, that's correct, isn't it?
A. That's right.

Q. And it is addressed to the A.N.Z. Bank, is it not? A. In that form, yes.

Q. And you appreciated that it was to be shown and given to the A.N.Z. Bank, did you not? A. No.

Q. What did you think was going to be done with it? A. I had no knowledge of what would be done with it. I was asked to give that to B.T.E. B.T.E. said in their telex that they would be warranting the A.N.Z. Bank themselves.

Q. Perhaps so, but you see, if I can just remind you, or just ask you to turn to p.96, is that a document of 25th March 1977?
A. That's right.

Q. And you identify that as being a document signed by you? A. That's right.

Q. On the letterhead of Maynegrain? A. That's right.

Q. And that is a letter addressed to the manager of the A.N.Z. Banking Group Limited, is it not? A. That's right.

Q. From you as manager of Maynegrain? A. That's right.

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(continued)

Q. Do you tell his Honour that that was not in your mind a communication by you, who signed it, to the manager of the A.N.Z. Banking Group Limited? A. Well, I had no way of knowing what would happen to it after we gave it to B.T.E. We didn't post it.

Q. No, I think you have made that clear, but nonetheless the letter is addressed to the manager of the A.N.Z. Banking Group and nobody else, that's so, isn't it?
A. That's right.

10

Q. It is not a letter addressed to B.T.E. is it? A. But B.T.E. collected it.

Q. It is not a letter addressed to B.T.E. is it? A. It is not addressed to B.T.E., but it was given to B.T.E.

Q. And it is a letter addressed only to the A.N.Z. Banking Group Limited, isn't it? A. That's right.

20

Q. Do you adhere to your answer that you did not -I forget the precise words of your answer, you didn't really regard it as being from you to the A.N.Z. Banking Group?
A. That's right, I had no way of knowing what would happen to it.

HIS HONOUR: Q. Whether you had any way of knowing or not, why did you think you were being asked to prepare a document which was addressed to the A.N.Z. Bank saying that you were holding something to their account, or whatever the expression is? A. Well, in the terms of the telex that I was given, it stated that B.T.E. would be warranting A.N.Z.

30

Q. Whatever the telex said, you were asked to prepare a document which is addressed to the A.N.Z. Bank and it says to them in plain letters of one syllable, "I, Maynegrain, am holding a certain amount of barley to your account, A.N.Z. Bank". What did you think that meant? A. Well, it meant what was written.

40

Q. That is to say, that you were telling the A.N.Z. Bank "I am holding it to your account"? A. Well, yes, except for the qualification that I didn't know whether A.N.Z. would get the letter.

Q. Whether it did or didn't, you were saying to the world at large "Here you are, A.N.Z. Bank, here is a document which says I am holding it to your account", that's right, isn't it? A. Well, further, I considered by putting Bulk Terminals & Exporters on the letter that I was declaring that it was clearly Bulk Terminals & Exporters stocks.

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10 (Short adjournment)

MR. GYLES: Q. May I suggest to you that, having read the telex of 6th January, you knew that the finance for the acquisition of the grain which you were holding was being provided from a bank in Geneva through the A.N.Z. Bank, that is so, is it not? A. No.

(continued)

20 Q. Did you know from that telex that B.T.E. were borrowing money from Switzerland via the A.N.Z. Bank? If you would like to look at the telex, please do so, it is at p.123? A. Could you repeat the question?

Q. My question to you is did you know on the basis of that telex that B.T.E. were borrowing money from Switzerland via the ANZ Bank? A. Well, that was not clear to me, no.

Q. The words were "we have made arrangements through the A.N.Z. Bank or loan moneys coming in from a bank in Geneva", that is plain English, isn't it? A. I didn't take it as that.

30 Q. What did you think it meant? A. Well, I didn't put much thought into that at all at that time.

Q. Well, certainly, when you came to re-read the telex after Mr. Behn had asked you to change the form of document you would have directed your mind to it more carefully, would you not? A. The only reason I changed it was to ensure that the understanding was that the stocks were being held for Bulk Terminals & Exporters.

40 Q. I will come back to that in a moment, but may I just direct your attention to the words that you have just read to yourself in the first sentence. Isn't it obvious from those words that even on a quick and cursory reading of the telex that B.T.E. were borrowing moneys from a bank in Switzerland via the A.N.Z. Bank? A. Well, I took it through that that they were

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(continued)

borrowing money but not necessarily
through the A.N.Z.

Q. Well, it says through the A.N.Z.
Bank, does it not? A. It said, "arrange-
ments through the A.N.Z.", but that was
their own bank.

Q. So that they could have been receiving
the moneys directly from Geneva, the A.N.Z.
Bank having organised it, is that the way
you read it? A. No, the only interpretation 10
I put, as far as the A.N.Z. Bank, was that
I knew that the A.N.Z. Bank was their own
bank, but that didn't necessarily mean to me
that the money was being borrowed by any
arrangements through the A.N.Z. Bank.

Q. Certainly, it was clear that they were
borrowing money by virtue of arrangements
made by the A.N.Z. Bank or through the
A.N.Z. Bank was it not? A. Well, I took it 20
that the A.N.Z. were involved in some way
in the documentation.

Q. The words were "We have made arrange-
ments through the A.N.Z. Bank for loan moneys
coming in from a bank in Geneva"? Doesn't
that plainly say that the A.N.Z. bank had
made the arrangements on behalf of their
customer? A. No, because I thought that
the A.N.Z. may have just been monitoring
the stock situation.

Q. Look, the first sentence says nothing 30
about the stock situation does it, it talks
about loan funds? A. Not the first sentence,
no.

Q. And certainly, having read the telex,
you were clear that the purpose of the
document addressed to the A.N.Z. Bank was
to do with security, for the loan moneys
that telex was referring to, that is so,
isn't it? A. That's right.

Q. And you appreciated, did you not, that 40
the document that you were providing to the
A.N.Z. Bank was provided to them in relation
to the arrangements they had made for loan
moneys from Switzerland? A. I didn't put
any interpretation on what the arrangement
was, is that what you mean?

Q. I am asking you whether you appreciated that the letter you were providing addressed to the A.N.Z. Bank was a letter required in connection with the arrangements that they had made for borrowings from Switzerland? A. Yes.

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10

Q. And you said a moment ago, if I correctly understood you, that the change you had made between the 12th January and 17th January was to make it clear that the stocks were Bulk Terminals stocks?
A. That's right.

(continued)

Q. Now that, I suggest to you, is a fabrication. Would you go with me to the letter of 12th January, which is at p.81. That letter of 12th January is addressed to the manager, Bulk Terminals & Exporters Pty. Limited, is it not? A. That's right.

20

Q. And it says that you are holding barley stocks "on your account" that's right, isn't it? A. That's right.

Q. That is on account of Bulk Terminals & Exporters? A. That's right.

Q. And that is the first document that you drafted yourself? A. That is right.

30

Q. Now, the second document, if you just turn over the page, on 17th January is addressed not to Bulk Terminals & Exporters but to the A.N.Z. Banking Group Limited, isn't it? A. That's right.

Q. And that is the significant change between the two documents, isn't it? A. That is the significant change, yes.

Q. And you say that you are holding the total "on your account", that is the A.N.Z. Bank's account, don't you, in that second document? A. That is what it says.

40

Q. And thus, I suggest to you, that far from making it clear in the second document that you were holding it for Bulk Terminals & Exporters, you were making it clear that you weren't? A. That was not my intention.

Q. And I suggest to you that the answer you gave to his Honour some few minutes ago that the change you had made between the two of them was a fabrication done in order to assist your

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company's case. What do you say about
that? A. That is not correct.

Q. I further suggest to you that the
answers you have given to his Honour about
the letter not being directed to the A.N.Z.
Bank in your view were similarly answers
given falsely with the desire of assisting
the case that your company seeks to make?
A. That is not correct.

(continued)

Re-Examination

(FURTHER EXAMINATION - BY LEAVE)

10

MR. CAMPBELL: Q. In the agreement with
Meral that has been tendered to his Honour
it sets out the terms on which storage
occurs at the terminal. There is provision
that they will pay half of the cost of
storage when the barley is received and
half when it is loaded out. You are
familiar with that provision? A. That's
right.

Q. Was any variation made to that
arrangement so far as the particular barley
stocks that this case is concerned with?
A. No.

20

MR. CAMPBELL: Q. So far as the half that is
payable when the stocks first come into
the terminal are concerned, have you caused
to be prepared, from the ordinary receipt
book of Maynegrain, a schedule that shows
when invoices were sent and when they were
paid, in relation to this barley? A. Yes
I have.

30

Q. Could I show you this document; is
that that schedule? A. That's right.

(Summary of B.T.E. invoices and
payments of barley accumulation and
shipment, 10.11.76 to 15.11.77,
tendered without objection and marked
Ex.C6.)

Q. So far as the other half, the half
of the storage charges that are due for
loading out, your company has now been paid
that, is that right? A. Yes.

40

(Witness retired and excused)

MR. CAMPBELL: Your Honour, if I could now tender some further documents, there are some documents in the agreed bundle which have not yet been tendered and which I would seek to tender. The first of them is at pp.146 to 147, a telex of 21st December, 1977, to ANZ from Compafina.

10 MR. GYLES: Your Honour, it is not clear at the moment what the relevance of the document is, but I have got no formal objection to it.

(continued)

(Pages 146 to 147 of agreed bundle tendered without objection and added to Ex.C5.)

20 MR. CAMPBELL: It is a statement that at December 1977 Compafina were still demanding to get back from ANZ Bank \$518,000 resulting from local sorghum sales and the \$600,000 that they had received from the proceeds of the barley sales. It goes to quantum, in my submission.

(Page 223 of agreed bundle tendered, objected to, admitted and marked as part of Ex.C5.)

(Page 224 of agreed bundle tendered without objection and added to Ex.C5.)

(Page 231 of agreed bundle tendered without objection and added to Ex.C5.)

30 (So much of p.233 of agreed bundle as relates to entry of 5.8.77 tendered without objection and added to Ex.C5.)

(Photocopy certificate of incorporation on change of company to Maynegrain Pty. Limited, dated 23.12.76 tendered without objection and marked Ex.C7.)

40 MR. CAMPBELL: Next I would seek to tender some documents from the plaintiff's discovered documents. The first is a bundle from pp.336 to 342. These are all telexes to which Compafina is a party and which give further details as to what happened in Kuwait about the receipt or non-receipt of the money. I would call for the originals. (Produced)

(Bundle of telexes between plaintiff and Kuwait tendered without objection and marked Ex.C8.)

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There are further telexes between
Compafina Bank and Kuwait pp.344,395,398,
399, 401 and 403 of plaintiff's
discovery, which I also call for. (Produced)

(Further telexes tendered without
objection and added to Ex.C8)

MR. CAMPBELL: That completes my case,
if the court pleases.

(continued)

(Luncheon adjournment)

ON RESUMPTION:

10

HIS HONOUR: Yes Mr. Gyles?

MR. GYLES: Your Honour, the first point to
be established by us is that we have title
to sue in conversion. I will not trouble
to read your Honour general passages about
conversion; possession is the basis of the
tort, as your Honour knows, and the question
is whether we have such possession as would
support the action. Your Honour will recall
that I mentioned Crossley Baines' book on
Personal Property, 4th edition. At pp.411-412
the author deals with the subject of pledge,
and towards the foot of p.411 there is
reference to the necessity for delivery of
the chattels to constitute pledge, and the
author said, "Delivery may be constructive
or symbolic....bailee for the pledgee". If
I could come down to the paragraph in the
middle of p.412, "The pledge gives the
pledgee....interference with his possession."

20

30

If I go to the Madras case, Official
Assignee of Madras.v. Mercantile Bank of
India, 1935. A.C.53, the relevant passage in
the judgment is at p.58, last paragraph,
"The argument was advanced on behalf of the
appellant....of the pledgee", and that is a
very neat and authoritative statement of the
position.

Griggs' case is the other case mentioned
in the footnote - Griggs v. National Insurance
Company (1891) 3 Ch.206. "The plaintiff
applied verbally to the defendants for a
loan....charges", and Kekewick, J. sets out
some propositions, some of which deal with
the bill of sale point, which I just leave
aside for the moment. But midway down p.211
his Lordship said this, "If there is any

document at all it is a delivery order... equivalent to possession by the pledgee". So that that again establishes, we would respectfully submit, the same proposition. Once we have possession of the goods, then there is title to sue.

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We would submit that a short statement of facts in the Madras case applies very neatly to the facts of this case.

10 HIS HONOUR: Do you mean the statement of facts or the statement of law?

(continued)

20 MR. GYLES: I meant to say by that that the summary of Lord Wright of the position is identical with the facts in this case. Here the evidence is that the goods were actually physically placed in store by B.T.E., but pursuant to the direction by B.T.E., which is reflected in the telex, part of Ex.A, at p.23, the warehouseman acknowledged that it held the goods on account of the ANZ Bank, which falls squarely within the principles stated in the Madras case. In a sense, on this issue, the evidence as to trade understanding is marginal; that is more relevant, certainly relevant to the negligence count. But insofar as the trade evidence may relate to this count, it is really all as one, that warehouse receipts are used as security for advances on grain stored. That evidence was given not only by two people called as experts, but by Mr. Ferrasse and Mr. Jamieson; I will give your Honour a reference to those particular passages in a moment. It was rather instructive to hear the evidence of Mr. Chilton this morning of what happened when his company was lending money on security and the documents, where they ensured that the warehouseman was aware of the position and acknowledged the interest of the lender in the goods, and we would submit that the trade evidence assists or is perfectly consistent with the authorities as to the place of the warehouse receipt in the overall scheme of things.

30

40

One other authority to which I would refer on this leg of the case is Henderson v. Williams (1895) 1 Q.B. 521. May I just for present purposes read from the head note. "The owner of goods, lying at a warehouse, was induced... at the date of the refusal."

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(continued)

Mr. Ferrasse's evidence on the point appears at p.15 of the transcript. Your Honour will recall Mr. Rector's evidence, which commences at p.90 and proceeds to p.97. Mr. Jamieson's evidence on the point is at p.142, .5, first question in cross-examination, and the two questions that follow that. The evidence of the gentleman from the Queensland Grain Association, Mr. Foote, was quite neutral. It starts at p.135 on the point; he really was not in a position to give any relevant evidence as to practice. 10

If those principles are correct, then the title to sue in conversion is established and there can be no argument that the act of handing over the goods to a third party was an act of conversion, complete on 12th August when the loading was I think complete. Now we submit that from that point it is really a question of damages; I leave aside for the moment the question of the bill of sale, and I would propose to deal with that in reply, if I may. 20

There have been some suggestions from time to time during the case that were probably directed to pars. 7 and 8 of the defence, which I should note before passing on to the question of damages, relating as they do to the breach. I am not quite sure how my learned friend would put his arguments on these paragraphs; for present purposes may I just submit that the interrogatories establish that there was no notice given to the ANZ Bank by Maynegrain, and I would submit there is simply no evidence which would establish consultation with or obtaining consent of the plaintiff or its agent, the ANZ Bank. Certainly the evidence which your Honour heard this morning from Mr. Johnstone is quite inconsistent with there being any misleading of Maynegrain by the plaintiff or its agent. The acknowledgment of their holding of possession on account of the Australian and New Zealand Bank was their own unequivocal statement, and nothing that we or our agent did clothed B.T.E. with any authority. 30 40

Paragraph 11 of the statement of defence is an immaterial allegation; it is either alleging consent - and that we submit is not made out on the facts - or it alleges knowledge by the ANZ Bank, and we submit (a) it is not 50

established on the evidence, but (b) it is irrelevant; the fact that they knew that the loading was taking place, from Mr. Jamieson, is legally irrelevant to the claim that is made of conversion; it puts the duty in an upside-down situation. May I then pass to the question of damages.

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10 HIS HONOUR: For the moment we are restricting ourselves to damages in conversion, and then you will go on to -- (continued)

MR. GYLES: Then I will go on to negligence separately, if I may. The normal measure of damages for conversion, as your Honour would know, is the value of the goods at the date of conversion, plus any consequential loss which flowed from the tort; and my first proposition on this is that this applies in the present case without any deduction for, consideration of or noticing of the fact that the possession was possession as a pledgee. McGregor's book on Damages, 13th edition, par.1012, says, "The plaintiff in conversion is entitled, where he relies on possession, to recover the full value of the goods ... balance of the goods or the owner in possession", and similarly as whether he is a pledgee; and as McGregor says at par. 1015, the same principle applies where he is relying on the immediate right to possession.

HIS HONOUR: What happens - do you hold the balance of the value of the goods on trust for the owner?

MR. GYLES: Yes, well, it would depend on the facts.

HIS HONOUR: Well, he says that really, "Thus where the value recovers, he will hold.... on behalf of the bailor"?

40 MR. GYLES: Yes. In the present case, the Compafina Bank have a general right, it would assert, to the balance to secure the indebtedness of Penmas on the other account. Now it is not necessary for your Honour to become involved in that, but in this case one can readily see that the pledgee, the bank, would say that it has a further right over and above the right in relation to these particular advances, to set off its other indebtedness; and your Honour does not have to hear that case.

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HIS HONOUR: There just is not enough
money left.

MR. GYLES: There is not enough money to
cover everything, and thus we would say,
or it appears prima facie at least, that
there would be no surplus to be held on
trust, it would be applied to other
indebtedness. But I merely mention that
as a passing fact in this context; it would
not matter, your Honour.

10

The font of this principle as applying
to pledges might be regarded as *Swire v.
Leach*, 18 Common Bench New Series 49,
which is reported in 144 E.R. 531. The
plaintiff in that case was a pawnbroker
with whom goods were pledged, and there had
been a warrant of distress executed for
arrears of rent and the pledged goods were
seized. The pawnbroker sued in trover for
that trespass. The first point in the
case was whether the goods were privileged
to distress, and it is not necessary to be
troubled by that question. The second
question was the measure of damages, and
on that, the Chief Justice at p.492 of the
original report and at p.536 of the reprint,
said this, "Then was the plaintiff entitled
to recover damages....value of the goods".
Then your Honour goes from that case to
Winkfield, which is the well-known authority
as to this proposition, reported in 1902
Probate on p.42.

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30

HIS HONOUR: I suppose the theory is to
avoid a multiplicity of actions, otherwise
the bailor would have to bring an action.

MR. GYLES: I suppose the older rationale was
that possession was the right which was
vindicated, and it does not lie in the mouth
of the wrongdoer to have fine distinctions
as to who owned the goods. The Master of
the Rolls examined the principles behind
the notion that a limited interest can
entitle one to the full value of the goods,
and at p.57 I just point out that *Swire v.
Leach* is taken as granted; and just going
back to p.54, the Master of the Rolls, in
the last full paragraph, says "It seems
to me that possession is good against a
wrongdoer....concludes this case against the
respondents". I do not think I need take
your Honour through that judgment in *Winkfield*.

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50

HIS HONOUR: Is there any evidence, as a matter of interest, as to what the amount of the advance was in this case?

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MR. GYLES: Yes, I think so.

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HIS HONOUR: I know they were talking about it being between \$2 and a half million and \$3 million; I do not know whether we ever got down to seeing how much they actually drew.

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(continued)

10 MR. GYLES: I think we did, your Honour. I think it was agreed actually - it was \$2.7 million Australia. We will certainly give your Honour those figures precisely.

There are some other authorities which are in that same line, one in Canada, of Thorne v. McGregor, 35 D.L.R., 3rd series, 687. What happened there was that ---

20 HIS HONOUR: I am sorry Mr. Gyles - it is not only a hypothetical interest, because as I see Ex.U, there would be quite a big surplus.

MR. GYLES: Yes, it is not an academic difference, it would work out to --

HIS HONOUR: A million?

MR. GYLES: It does not work out to be a million dollars, your Honour, because the value of the goods was ---

HIS HONOUR: \$2.9 million and you collected--

30 MR. GYLES: \$2.38 million, I think it was. Doing it the other way, it works out less than that. That is more than the total amount of the advance, plus interest, on these goods, having given credit.

At p.687, this was a case in which an employee was driving a car which his employer had hired. There was an accident, the car was damaged, and that employee sues the other party and recovers the full amount of the property damage. That appears at pp.690 and 692.

40 There is a Queensland case, Kidman v. Farmers Centre, 1959 Q.R.8. "R, a road contractor, obtained advances from K....entitled to recover the full amount of £500", and Stanley, J. applied the principles laid down in McGregor.

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"It will be seen from p.11, second last paragraph, "On the basis that the defendant obtained no interest....the fourth party", and held that full value applied.

There is an exception to this rule in a case where the limited interests are shared between plaintiff and defendant. Your Honour may recall the debate in the hire purchase case, in Pacific Acceptance v. Mirror Motors, 7 W.N. 666, where the hirer and the owner split it between them, then this principle does not apply and there is only a limited interest which can be held against the hirer, and subsequently in the English court it has been extended to cover people down the line from the hirer. There are also exceptions in the case of vendor and purchaser and so on, complications with which I need not trouble your Honour here.

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20

So that we submit that the fact that possession is obtained because there is a pledge does not mean that the normal measure of damages does not apply in the present case, and taking the warehouse receipts, the figures work out as per the document that is now an exhibit.

I should also give your Honour a reference to Winfield's book on Torts, talking about measure of damages. It is Winfield and Jolowicz, 11th edition, p.468, where it said, "If there is any doubt as to the value of the title, the plaintiff will get the benefit.

30

HIS HONOUR: Mr. Campbell was a party to that admission about value.

MR. CAMPBELL: Yes.

MR. GYLES: So we take the higher amount, we say, and also the greater amount of tonnage. The fact that they might have spilled some while they are converting it is really no defence to the fact that in the warehouse themselves they would be taken to have the amount they certified. In this case, we know that the plaintiff simply did not leave it at that point. The plaintiff moved to mitigate its loss, as a consequence of

40

which it paid the amounts for freight and demurrage, to which reference is made in the document, and received back the amount of \$2.4 million-odd, which your Honour sees in the document. And the question arises, how is all of this dealt with?

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10 We submit it is dealt with by applying uncontroversial principles. The first is - and this is really I suppose in chronological order - the plaintiff in these circumstances is entitled to seek to mitigate damages, and provided what it does is reasonable, it is entitled to charge the defendant with the sum spent in so doing; and that the test as to what is reasonable is an undemanding one, and I will take your Honour to the reference about that later.

(continued)

20 MR. GYLES: The other principle is that if you in fact receive and take proceeds back you have got to give credit for it. Now, in the present case the mitigation exercise was a very successful one because it netted an amount of 1.8-odd million U.S. dollars, for which we give credit.

30 Now, your Honour, there was first of all as to the question of mitigation a passage in the Sermonius Fischer decision, your Honour, which refers to this. It is Sermonius Fischer v. Holton Thompson (1979) 2 N.S.W.L.R. 322 at 355, in the judgment of Samuels, J. I think in this respect he was speaking for the court. "The defendants....dispute". I do not think, your Honour, they will be troubled by the facts. Your Honour will see the reference to Banque de Portugal, which is the well known one. That has been referred to and applied by Yeldham, J. in two cases but I do not think they advanced the argument any further; at p.356 there is a
40 reference to another authority which deals with a question as to what happens when the mitigation is unsuccessful. That does not arise in the present case but those passages show the fact that if you properly go into litigate damage and incur expense in doing so and it is unsuccessful then you can charge the defendant with the difference.

The principle that if you receive proceeds back you must credit them is apart from being commonsense referred to in Wilton's case, Wilton v. The Commonwealth Trading Bank (1973) N.S.W.L.R.

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644 at 674. Again it was a recent reference, your Honour. I can tell your Honour that the case went on appeal but it did not touch this issue.

At p.674 it was a conversion of cheque case. There were pay-back cheques received. Mr. Staff argued "This sum.... converted".

(continued)

Looking at it in a slightly different way is the Privy Council in *Salway* against *McLaughlin* (1938) Appeal cases 247. This was a case which involved the conversion of shares and at the foot of p.257 their Lordships say "Their disposal of deposited shares....equivalent", because they had got the same shares or the equivalent back. "It appears to their lordships....". That passage is of some significance when one harks back to the argument as to the events which took place later, unless what happens amounts to satisfaction clearly proved it goes to mitigation of damages only or a lessening of damages. 10 20

HIS HONOUR: Why can he not say - or I do not know if he is going to say it - there may be a point of time when you had the bills of lading, therefore, you had the disposal of the entirety of the goods. Why did you not sell the goods for the best price you could and leave him whistling for his money? 30

MR. GYLES: I submit the way I have put it is quite sufficient, that one applies what we submit are well-known principles and you arrive at the position that what was spent by way of freight and so on was a commercial decision taken bona fide by people who were sensibly trying to mitigate their damage, and they were indeed successful and they got back quite a substantial sum of money. We must give credit for the proceeds received; and we submit that is the way the principle works in the circumstances. However, I will deal with an argument which was touched on during the course of running, along the lines which Your Honour puts to me. 40

Let me consider what happened. This is on the assumption that on 24th August Bank Compaфина finds its pledged cargo is on the

10 high seas in a vessel which it has not chartered, but which is chartered by Penmouth with a destination Kuwait. It knows that there is a letter of credit in favour of Mr. Jamieson's alter ego, in Kuwait, Sheik Hamad, so that is next to useless so far as they are concerned. Furthermore they know the commercial contract upon which the letter of credit is based calls for bagging and they know the barley is in bulk in the vessel. The payment of the freight which gives them the bill of lading does not in any sense restore the position they were in having the goods in store in Brisbane. It is different.

20 Now that is point 1 and it means that you cannot say "Well, they got back what they were putting in". They were put in the same position but it is more different than appears at first sight because obtaining control of the bill of lading did not mean that they could control the vessel. What it did give them was a bargaining tool with the Kuwaiti purchaser. Each has its bargaining power. The Kuwaiti purchaser is entitled to say "I won't pay anything until I receive some bagged barley". Bank Compafina are entitled to say "We won't let the goods off the vessel until we have something to satisfy us". The bargaining position of each was not over-
30 whelming and, therefore, a compromise was reached and compromise it was on the part of Bank Compafina because instead of getting a letter of credit based upon bulk barley they got one based upon bagged barley and they effectively gave a fair chance of retaining a surplus to offset against Mr. Jamieson's other debts but in return for that they relieved themselves of the risks of costs associated with
40 doing anything else with the barley.

50 There has been no evidence called by the defendant here to show that it was a practical proposition to sell this barley for the Brisbane F.A.V. value whilst it was on board the vessel, notwithstanding the fact that they called two people from the grain trade. There was no question asked along those lines except by Mr. Raymond and once the answer came out it was obvious why Mr. Campbell had not asked these questions because in a colourful phrase Mr. Foote described these goods as being a distressed cargo meaning, of course, that once any purchaser knows that the goods are on board a ship with no

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destination then they will appreciate that the person being the disposer of those goods is in a situation of disadvantage, and that evidence, your Honour, appears at p.139 of the transcript.

Again it probably says no more than is commonsense but it does describe in a practical way what would happen; but certainly the defendants sought to make no case that the value was the same on board as it was in the Port of Brisbane.

10

The amount of freight charged to take a vessel from Brisbane to Kuwait was \$550,000 for one voyage and that illustrates the costs which are inherent in sending something around the world full of barley. It is difficult to appreciate what could be done.

There has been some evidence led in the case, your Honour, as to - your Honour knows that the grain was accumulated from the harvest of 1976 and there was no contract of sale until July 1977, and that contract when entered into in the end produced no profit; so that your Honour is entitled to assume from that evidence that people were not falling over themselves to buy barley at that time at a price which would suit Mr. Jamieson. He may have been unreasonable in his demands for money.

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HIS HONOUR: Did Mr. Jamieson say that this barley was deteriorating in Brisbane and it was urgent that he should get it - ?

MR. GYLES: Yes, that was a rather doubtful piece of evidence in the light of the certificates he gave himself so one never knows the true version.

HIS HONOUR: Except for this that it started off as malt barley and ended up as feed barley so I think that was deterioration.

40

MR. GYLES: Well, whether it was a deterioration or not one does not know. In any event, your Honour, placed as Bank Compafina were they at least know there is a buyer committed to taking back barley.

10 The Defendants are completely speculative and one imagines them going to one of the multi-national grain traders. One cannot imagine them falling over themselves to pay a market price when they knew the position the cargo was in. Thus, we submit first of all they had no alternative to pay the freight; that was absolutely essential, and the demurrage was a consequence of the decision to let the vessel go on its appointed journey to Kuwait. Once there I would imagine your Honour would have some confidence that Mr. Ferrasse would exploit the situation as best he could under difficult circumstances.

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20 There has been no attack made upon Mr. Ferrasse on this basis, except your Honour there was some question from my friend as to the occasion upon which he deferred payment as a price for Sheik Hamad extending the letter of credit. The letter of credit was expiring; the prospects of their taking any action in Kuwait were nil.

HIS HONOUR: What about the \$600,000 that the ANZ Bank managed to milk off?

30 MR. GYLES: That is what I am talking about, your Honour. If I could show your Honour that schedule again, Ex.C2. What happened was that a request was made to Bank Compafina to waive its right to payment in relation to the fourth drawing.

HIS HONOUR: Did that \$600,000 come from the first draw?

MR. GYLES: I did not think so, your Honour. There is another -

HIS HONOUR: I am looking under the sub-heading 'ANZ'. Put it aside for the moment and come back to it.

40 MR. GYLES: Your Honour, that is right so far as the \$600,000 is concerned. That simply went out without our - well there is just no explanation for that. It was not something we acquiesced in or consented to. What we consented to was the letter.

HIS HONOUR: Yes, I remember the letter.

MR. GYLES: The payment of the \$600,000 was not done with our consent or approval and Mr.Ferrasse gave

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evidence about that.

HIS HONOUR: Those telexes that Mr. Campbell gave on the \$600,000 I have not appreciated what happened. I think it might be convenient to hear Mr. Campbell's explanation of that.

MR. GYLES: What I do submit about the position it was that emerged once the vessel was on the high seas and once it got to Kuwait is that the tests in mitigation of damages, the appropriate tests, and if what was done was within the bounds of commercial reasonableness then it is not for the court or for the defendant to impose some standard upon the plaintiff that exceeds the duty which lies upon him, which is reflected upon him, a decision which I have referred to. The onus in that decision lies upon the defendant and in the present case there has been no evidence led and no attack made which would lead to any conclusion of that sort to be drawn. 10 20

Your Honour, those are the propositions which we would contend in relation to the conversion claim, having the results which are set out in the document we have handed up.

The negligence count is truly an alternative in this sense that if the plaintiff had title to sue in conversion then that is the simplest way of looking at the case, If by some process of reasoning we did not have any sort of a proprietary interest in the goods, but merely had what might be called a commercial interest then conversion would not apply and there would be no breach of any bailement. I should not gloss over too readily the fact, the result of the analysis we have put to your Honour earlier regarding bailees of - that is implicit in what I have been putting. 30

HIS HONOUR: The problem with this alternative is that if they were not bound to haul for you then what duty did they have to you? 40

MR. GYLES: Well, they should have told us what they were doing.

HIS HONOUR: From what does one spell out that duty bearing in mind the hypothesis on which your are proceeding?

MR. GYLES: The telex of 6th January, part of Ex.A, and the fact that the bailee persisted in its request for this in the second telephone conversation and the form of the documents themselves show that any reasonable person would understand that the documents were being provided to the ANZ Bank on behalf of the overseas lender.

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It does not matter whether it is for purposes of strict security in the strict sense or whether it was because they had an interest in the grain by virtue of it being an asset of the company when lending money, but they certainly had in that sense an interest in the goods which they were being kept informed of by the warehousemen and under those circumstances the warehousemen appreciated there was this interest and their duty should have been to communicate with the ANZ Bank.

(continued)

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HIS HONOUR: What was the date of the last certificate given?

MR. GYLES: March I think, your Honour.

HIS HONOUR: That is a problem because let us assume in favour of the argument that in March they should have realised there was some "interest"; by August anything could have happened to that interest.

MR. GYLES: But there would have been no grain.

HIS HONOUR: But they could have paid them out.

30

MR. GYLES: That could be so but equally it is quite open as to the fact that the interest could have remained, and we submit firstly that a duty did arise at that point and that fulfilment of the duty was not a demanding one but they should have at least under those circumstances communicated with the person who they said they were holding the grain on behalf of.

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Your Honour, I know this is slightly artificial because we say we are so strong on the first point.

HIS HONOUR: I think it is really a case of putting more of your eggs in that first basket.

MR. GYLES: Possibly so, your Honour. I submit a duty did arise based upon the knowledge they had through the telex and the telephone conversations

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and based upon the documents they issued, a duty did arise. A fulfilment of that duty would have required notice to the ANZ Bank of what was happening so that they could have taken appropriate steps.

I have not been able to find a case directly in point - it is not a property damage case - but the one that your Honour might think of some relevance is the decision of Burke, J. of Western Australia, which says that the Public Trustee is liable in tort to a proposed beneficiary of an invalid will drawn by the Public Trustee. 10

HIS HONOUR: I thought there was an English case.

MR. GYLES: There was an English case, yes, but that was against a solicitor. His Honour followed the English decision, the decision is Watts v. The Public Trustee for Western Australia. It is 80 W.A.L.R. p.97. 20

I do not think I need read the case to your Honour in detail but that is the factual situation. An illustration of where there is a non-proprietary but real economic interest, visible economic interest, giving rise to a duty. There have not been many cases which give rise to situations like this.

I would submit that the negligence, the measure of damages, would be by way of analogy with conversion. Alternatively it would be the amount advanced plus interest at that time minus the amounts for which we must give credit. 30

The principles of mitigation and giving credit will not differ between the two.

HIS HONOUR: If need be we can work out figures on that.

MR. GYLES: So far as quantum is concerned I think that my friend may have a query about two amounts which may be advanced for Sorghum, sorghum sold domestically, without consent, and the proceeds reused to acquire barley. We are collecting the references to that and we will give them to my learned friend and your Honour. 40

(Further hearing adjourned, part-heard, to Monday, 9th March 1981 at 10 am)

JUDGMENT OF HIS HONOUR
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IN THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION
COMMERCIAL LIST

13528 of 1978

CORAM: ROGERS, J.
TUESDAY, 10TH MARCH 1981

COMPAFINA BANK v. BULK TERMINALS &
EXPORTERS PTY. LIMITED AND ANOR.

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J U D G M E N T

HIS HONOUR: In 1976/1977 Mr. Alexander Jamieson was engaged in the international grain trade. He utilised a number of corporate vehicles, some were incorporated in Panama. These included Penmas Inc. and Amerapco Inc. The share certificates in respect of the capital in both these entities were in blank and were in the custody of Mr. Jamieson to be dealt with by him as he desired. In every sense of the word, these corporations were an alter ego for Mr. Jamieson.

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In Australia, he utilised at least two corporate structures Inland Satellite Terminals Pty. Limited (I.S.T.) and Bulk Terminals & Exporters Pty. Limited (B.T.E.). In Kuwait, he had an interest, if not the entirety of the interest, in a company Gulf Fisheries Co. W.L.L., Marine Division.

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The plaintiff, Compafina Bank, was at that time a recently formed Swiss banking institution, carrying on business in Geneva. Amongst its personnel it included a Mr. Boulmer, a director of the bank, Mr. Ferrasse, who occupied the position of the manager, and Mrs. Lenos, who assisted them both.

During the relevant period, the Australia New Zealand Banking Group Limited (ANZ) acted as the Australian bankers for Mr. Jamieson and the two Australian companies that I have mentioned.

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Maynegrain Pty. Limited (hereafter called Maynegrain) had storage facilities for, inter alia, grain in Brisbane in the State of Queensland.

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In 1976 Mr. Jamieson introduced himself to the plaintiff with a reference from the ANZ and in the course of the year opened a number of accounts with the plaintiff, one for himself, one for Penmas and one for Amerapco.

In May 1976 Mr. Jamieson told Messrs. Boulmer and Ferrasse that Penmas was interested in borrowing money for the purpose of onlending it to the Australian companies for the pre-shipment financing of sorghum. He suggested that Penmas borrow the funds and on-lend to I.S.T. and B.T.E. and the Australian group would provide warehouse receipts to the ANZ who would forward confirmation of receipt to the plaintiff.

10

According to the plaintiff's internal diary note, there was a meeting between Messrs. Boulmer, Ferrasse and Jamieson on 8th July, 1976. Mr. Ferrasse recounted that at the meeting Jamieson said that he wanted all the advances from the purchase of sorghum or grain to be recorded to the account in the name of Penmas Inc. This, Jamieson said, was simply for the purpose of convenience. Mr. Ferrasse's account of the conversation is supported by the internal diary note of that date, which emphasises that the real beneficiary of the money to be transferred via the ANZ was to be B.T.E.

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A further conversation took place in Geneva on 21st September, 1976. This meeting is, again, recorded in an internal note. Mr. Jamieson sought pre-financing facilities for the purchase of barley. The amount contemplated ranged between \$2.5 and 3 million (unless otherwise indicated, in this judgment all references to dollar amounts are intended to be to United States dollars). The diary note states that the representatives of the plaintiff made it a point that the barley be "pledged in our favour". Mr. Jamieson, apparently, agreed and the method of securing the money was to have the barley held by a third party, Maynegrain, and an acknowledgment by Maynegrain that it was holding on behalf of the plaintiff. Although the diary note uses the word "pledge", in evidence Mr. Ferrasse referred to a "regular charge" over the barley.

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Mr. Ferrasse in his account of the meeting said that Mr. Jamieson proposed that

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warehouse receipts should be issued by Maynegrain certifying that it was holding the barley. Mr. Ferrasse explained his understanding of a warehouse receipt as being a document against which banks made advances of money all over the world. According to Mrs. Lenos Mr. Jamieson promised that the barley was to be pledged to the bank.

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10 There is no dispute between the parties either as to the fact that there was an agreement that the plaintiff should provide finance up to \$3 million for the purchase by B.T.E. of up to 30,000 tonnes of barley or that the financing would be for 80 percent of the purchase price or that the balance of 20 percent was to be financed by the ANZ or that warehouse receipts should be issued by Maynegrain, to be held by the ANZ on behalf of the plaintiff.

(continued)

20 The difference in the evidence relates to the precise expressions employed to indicate the purpose of issuing warehouse receipts. Thus as I have said, Mr. Ferrasse said that it was to be a "regular charge", Mrs. Lenos said it was to be a "pledge", Mr. Jamieson described it as "a security for the barley".

30 Following upon the initial arrangements, a number of letters came into existence, including a letter from B.T.E./I.S.T. to the bank dated 6th January, 1977, which described the procedure to be followed in relation to the financing of the purchase of the barley.

40 The next important development in the transaction between the parties, was the despatch of a telex on 6th January, 1977 by the general manager of B.T.E. Mr. Behn to Maynegrain. The telex explained that B.T.E. had made arrangement "through the ANZ Bank for loan monies coming in from a bank through Geneva". It explained that for the purpose of obtaining the money a warrant was to be sent to the ANZ Bank warranting that B.T.E. "had X tons of barley in stock and would like to drawdown X amount of dollars as pre-shipment finance." The telex requested the issue of a warehouse receipt by Maynegrain, addressed to the Manager, ANZ Banking Group Limited, stating "Further to our warehouse receipt dated-----we further warrant that we
50 have received an additional X metric tons of

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malting barley and X metric tonnes of
feed barley, making the total held
on your account X metric tonnes of malting
barley and X metric tonnes of feed barley"
(my emphasis).

Up to that time the plaintiff had been
receiving documents from B.T.E. in a form
purporting to be warehouse receipts.

Mr. Johnston, the manager of Maynegrain,
did not, initially, send a document in the
form solicited by the telex. The document
which he despatched dated 12th January, 1977
was not addressed to the ANZ Bank at all,
but to the Manager, B.T.E., and did not
follow the text sought. It stated, merely,
that Maynegrain warranted that at the close
of business on 11th January "we were holding
barley stocks on your account" in the
quantities set out.

Thus it can be seen that, on any
reasonable reading of that document, it was
merely a statement to B.T.E. that barley in
the amounts mentioned was held on its behalf.
This, signally failed to satisfy the request
made in the telex. As a result, according
to Mr. Johnston, Mr. Behn telephoned him and
asked that Mr. Johnston reconsider the
position and send a warehouse receipt in
the form set out in the telex. Mr. Johnston
apparently did reconsider the matter and did
on 17th January and thereafter despatch
documents in the form requested, with only one
alteration, in that he put a sub heading on
each of the documents "Bulk Terminals and
Exporters - Barley Stock". It would appear
that B.T.E. forwarded to the ANZ the initial
certificate from Maynegrain dated 12th January
under cover of a letter dated 14th January.
That letter is really a curious document and
demonstrates some lack of understanding of
the concept of a warehouse receipt. It
commences in the form which had theretofore
been utilised warranting the receipt of
additional amounts of barley, states that the
grain was covered by insurance and invites
the addressee, the plaintiff, to treat the
letter as "our official warehouse receipt".
The document was inapt to satisfy that descrip-
tion because, in truth, B.T.E. was not
holding the grain at all. The letter concluded
by stating that there was attached a warehouse
receipt from Maynegrain "certifying stocks

held on our behalf" (my emphasis). This is a curious statement because the whole point of the exercise was that the warehouse receipt from Maynegrain should certify to the grain being held on behalf of the plaintiff. In fairness to the writer I should add that if what was enclosed was the Maynegrain certificate of 12th January then the statement was accurate in stating that Maynegrain was certifying to holding the grain on behalf of B.T.E. There was another letter of the same date from B.T.E. to the Manager of ANZ, stating that B.T.E. required a drawdown from the plaintiff of the sum of money there set out. Thereafter, a regular procedure was followed. Each time there was forwarded to the ANZ a document issued by Maynegrain, described as a warehouse receipt, addressed to the ANZ stating that the total barley "held on your account" was X tonnes as well as another document relating to the same amount of barley, purporting to be a warehouse receipt from B.T.E. and a request for a drawdown from B.T.E. in respect of the additional amount of barley added to the stock since the previous certificate.

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In the light of the defence filed on behalf of B.T.E., I should mention that there is recorded in two internal memoranda, dated 7th January 1977 and 14th January 1977 being respectively a statement as to the procedure to be followed in relation to advances on barley and an account of a meeting held on 14th January, the reasons why the advances were to be made formally on the account in the name of Penmas Inc., but in reality for the purpose of making money available for purchases made by B.T.E.

On 25th March, 1977, Maynegrain issued a final warehouse receipt in respect of 2523.48 tonnes of feed barley and 25,510.98 tonnes of malting barley.

In June 1977 there was a conversation between Mr. Ferrasse and Mrs. Lenos with perhaps Mr. Boulmer also present on behalf of the plaintiff and Messrs. Jamieson and Gerard Barki, who was Mr. Jamieson's agent, at which the suggestion was made by the latter two gentlemen that the barley should be shipped from Australia to Kuwait in bulk and there put in bags. The plaintiff would not accept that suggestion, having regard to the recognised risks involved in the

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bagging of barley.

On 28th June, 1977, according to another internal memorandum, there was a meeting between Mrs. Lenos and Mr. Barki. The latter informed the plaintiff that a firm purchase offer at an exceedingly advantageous price, in excess of \$160 per metric tonne "C. & F." (sic) Kuwait had been received for the barley in bags. It was agreed that funds should be advanced by the plaintiff, should this be necessary, in order to purchase the necessary sacks or bags, as well as an advance made on account of packing and freight on condition that the documentary credit to be opened at Kuwait should be lodged with the bank. No final decision was arrived at because Mr. Jamieson was still considering the offer. 10

The evidence discloses that on 10th July, 1976 the Commercial Bank of Kuwait issued an irrevocable and transferable letter of credit in the sum of \$4.4 million in favour of a Sheik Hamad, in respect of 25,000 metric tonnes, 10 percent more or less, of Australian bagged barley at a price of \$160 per metric tonne C. & F. Kuwait. 20

By letter dated 3rd August, 1977 from the plaintiff to B.T.E. and I.S.T., after referring to recent discussions a request was made for the early receipt of documentary credit from Kuwait directly in favour of the bank, covering the barley in bulk for an approximate value of \$2.8 million being approximately the amount which was then owed to the plaintiff in respect of the barley. 30

Mr. Jamieson asserts that, thereafter, the barley was loaded on the vessel "Bellnes" and that when it was approximately half loaded he told Mr. Boulmer. Mr. Boulmer was not called to give evidence. However, both Mr. Ferrasse and Mrs. Lenos said that the first that they knew of the shipment of the barley to Kuwait was on 24th August, 1977. When on that day they were told of the fact of the shipment they protested, but received no explanation from Mr. Jamieson for his failure to seek the plaintiff's prior consent or to notify them of the release of the cargo and that it was being loaded. There was certainly no claim by Mr. Jamieson that he had previously told Mr. Boulmer that the 40 50

"Bellnes" was half loaded. Not only did Mr. Jamieson finally disclose on 24th August that the barley had been shipped, but it also emerged that the freight had not been paid and that the shipping company demanded a demurrage guarantee before it would release the cargo.

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10 In the result, on the same day there were meetings between officers of the plaintiff and a Mr. Peterson from the shipping company and the plaintiff paid the freight of \$550,000 and provided a demurrage bond guarantee. On the same day a Bill of Lading was issued in respect of barley in bulk totalling 27,495 long tonnes of feed barley to be delivered to Gulf Fisheries Co., Marine Division, which, it will be remembered, was Mr. Jamieson's Kuwait company. There was no explanation for the difference in quantity
20 between the lost warehouse certificate and that shown in the Bill of Lading. The ship had actually left Brisbane somewhat earlier in August.

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30 Subsequently to 24th August the Bill of Lading and other associated documents were handed to Gulf Fisheries Co. to be held on account of the plaintiff. Eventually, after many tribulations, the barley was bagged and in the process a portion of it was damaged, mainly due to rain. When I say there were many tribulations, I am referring to incidents such as the payment to certain Thai boatmen, who were apparently employed on some of the barges used in unloading, of the sum of \$40,000 which they apparently demanded and the Commercial Bank of Kuwait, at Mr. Jamieson's instructions remitted the sum of \$600,000 to the ANZ without the consent of the plaintiff and without the plaintiff having the opportunity of intercepting
40 that amount of money. This amount covered the 20 percent cost of the purchase which had been advanced to B.T.E. by the ANZ. There is outstanding in the courts of Kuwait a claim by the plaintiff against the Commercial Bank of Kuwait in respect of this sum of money.

50 A surveyor reported that some 24,434 metric tonnes of barley was delivered sound, 1779.5 metric tonnes of partially damaged grain was salvaged of which about 69 percent was sound, and 1726.5 metric tonnes of grain was totally damaged.

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The plaintiff conducted extensive and difficult negotiations with the Sheik, in whose favour the original letter of credit was issued, with a view to seeking to safeguard its interests as best as it could. It was in a difficult bargaining position. On the one hand the Sheik had the letter of credit but on the other, the plaintiff had the Bills of Lading and associated documents. It is unnecessary to trade the tortuous history of the negotiations. Suffice it to say that in the eventual result there was a serious shortfall between the amount to which the plaintiff claims to be entitled and the amount actually received by it. 10

The plaintiff received the net amount of \$2,447,509 out of which it was obliged to pay freight of \$550,000 and demurrage of \$19,919.71. Converting the American currency to Australian currency, it is claimed that this threw up a shortfall of \$A1,210,544 between the value of the barley, taken at 28,034.46 metric tonnes at \$A104 per metric tonne (\$A2,915,583) and the net amount received by the plaintiff of \$A1,705,039. It is the shortfall of \$A1,210,544 which the plaintiff claims in the present action, together with interest. 20

The plaintiff commenced the present action against B.T.E. and Maynegrain. B.T.E. withdrew from further defence of the action in the circumstances which I have set out in the judgment delivered in the course of hearing on 5th March and, in the circumstances and for the reasons set out in that judgment, I considered that the appropriate course was to strike out the defence which had been filed on behalf of that company. The action, thereafter, continued and evidence was led and submissions made on behalf of Maynegrain only. I declined to accede to the application made by counsel for the plaintiff that I should exclude from the evidence the material which had been tendered on behalf of B.T.E., including the oral evidence of Mr. Jamieson. 30 40

Before I turn to consider the case made by the plaintiff I should indicate in general terms my approach to the evidence. As I have said, Mr. Boulmer did not give evidence. In the present action his absence was not sought to be explained. Evidence on this point was given in the other action that I heard against 50

Mr. Jamieson personally, but I am not permitted to consider that evidence in this case. I did, at one point, draw the attention of counsel for the plaintiff to the fact that such evidence was not available to be considered in this case, but nothing further was done.

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10 I accept the evidence given by Mr. Ferrasse and Mrs. Lenos, subject to one point. Mrs. Lenos was really very fair when cross-examined on the question of her recollection of the words used at various conversations and, in particular, at the conversation which occurred on 21st September. Particular attention was paid by the cross-examiner to the question whether the word "pledge" had been used or not. It is quite clear from Mrs. Lenos' answers that she did not think that she was being asked to recall the exact words but, rather, the meaning behind them, because it was thought by this obviously logical lady that to expect her to remember the exact words was a feat of memory that she was unable to undertake. On the other hand, it is fair to point out that the internal memorandum used the word "pledge". It is, no doubt, by reference to the internal memorandum that Mrs. Lenos was able to be as definite as she was on the subject matter.

30 I contrast her evidence with that of Mr. Ferrasse to which I have already referred, and it is conspicuous in its lack of reference to the giving of a "pledge". I prefer to decide the matter on the basis that the precise word was not used by the parties.

40 Mr. Gyles made a very strong attack on Mr. Johnston and accused him, in terms of fabricating the evidence that he gave. I think that was a criticism that put the point too high and I absolve Mr. Johnston from any intention of deliberately misleading the court. Having said that, I consider that he was being quite evasive when met with the phraseology of the documents that he issued. I do not accept his evidence or his explanation for couching the documents in the terms which they take, or that he did not appreciate the true effect and meaning that the words utilised carried. I think it is fair to say that Mr. Johnston was trying to do his best in a difficult position, but by the same token I think the words used were crystal clear and did not yield to the efforts which he made to get away from them.

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The plaintiff's case is based, primarily, on conversion. There is a claim made in detinue and there is a subsidiary basis for the action in negligence. Dealing, firstly, with the action for conversion, naturally the primary matter which the plaintiff is required to establish is its entitlement to possession of the barley. The plaintiff claims that there was an agreement between itself and B.T.E., whether or not the word "pledge" was used, for the creation of a security in the nature of a pledge which conferred upon it the right to possession of the barley. 10

Crossley Vaines on Personal Property 4th ed., describes at p.411 the existence of three kinds of security, a simple lien, a mortgage passing property out and out and the third, a security intermediate between a lien and a mortgage where, by a contract, a deposit of goods is made as security for a debt and the right to the property vests in the pledge so far as it is necessary to secure the debt. The author points out that it is essential to a creation of a pledge that there should be a delivery of the chattels comprised therein. Delivery may be actual or constructive. 20

The nature of delivery required where the goods are held by a third party has been dealt with by Lord Wright, delivering the Advice of the Judicial Committee in Official Assignee of Madras v. Mercantile Bank of India Limited 1935 A.C. 53. In what is now a classical passage his Lordship said at p.58: 30

"At the common law a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive. It involved a bailment. If the pledger had the actual goods in his physical possession, he could effect the pledge by actual delivery; in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the 40 50

pledgor to hold for the pledgee, the change being perfected by the third party attorning to the pledgee, that is acknowledging that he thereupon held for him; there was thus a change of possession and a constructive delivery; the goods in the hands of the third party became by this process in the possession constructively of the pledgee."

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10 The plaintiff submits that that is precisely what occurred in this case. The grain was placed in the store by B.T.E. Thereupon, a direction was given to the warehousemen, Maynegrain, by the telex I have earlier described of 6th January, 1977. When Maynegrain issued documents acknowledging that it held barley on account of the addressee of the document, the ANZ which in turn, of course, was receiving those acknowledgments on behalf of the
20 plaintiff, the constructive delivery was complete and there was an attornment by Maynegrain in respect of the barley to which the various documents related.

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30 I should add that evidence has been led, which I accept, from Messrs. Rector and Chilton that warehouse receipts can and are, as a matter of practice, used as security for the goods to which they relate. I accept Mr. Rector's evidence that it is not unusual to
30 issue warehouse receipts direct to a financier, although the normal practice is to assign warehouse receipts.

40 In the light of the whole of the matrix of evidence which, to a very substantial extent, is common ground between the parties I am satisfied that there was an agreement between the plaintiff and B.T.E. that, as security for the advances of money to be made by the plaintiff to B.T.E., from time to time, there should be
40 provided by the latter a pledge, in the sense described in Crossley Vaines, of the barley held by Maynegrain and that by the documents issued by Maynegrain to the ANZ it attorned to the plaintiff through the ANZ in respect of that barley.

50 As an alternative basis, founding its entitlement to possession the plaintiff contended that, even in the absence of an agreement for a pledge, Maynegrain was estopped from denying the plaintiff's entitlement to possession of the
50 barley by reason of the representations contained

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in the documents issued by it and the fact that the plaintiff acted on the faith of those representations to its detriment by making advances of money.

There is no doubt that by the documents Maynegrain represented that it held the barley on behalf of the ANZ and therefore on behalf of its undisclosed principal, the plaintiff. It is true that the evidence that the plaintiff acted on the faith of the warehouse receipts issued by Maynegrain in making further advances is not as clear-cut as it might have been. There is, perhaps, some ambiguity in the telexes sent by the ANZ to the plaintiff from time to time indicating that the ANZ held a warehouse receipt. I have to remember that the documents issued by B.T.E. were also described as warehouse receipts. However, I am entitled to have regard to two matters: firstly, although the B.T.E. documents were described as warehouse receipts, in truth they were not. B.T.E. was in no sense in possession of the goods as a warehouseman but, more importantly, the arrangement between the plaintiff and B.T.E. was clear. It called for warehouse receipts from Maynegrain to be held by the ANZ. It in no wise encompassed, contemplated or required warehouse receipts from B.T.E. Therefore, I think it is right to accept that when the ANZ informed the plaintiff that it held warehouse receipts, it was referring to the documents called for by the agreement between them, namely the documents to be issued by Maynegrain and it was so understood by the plaintiff

Accepting that the documents referred to in the telexes from the ANZ to the plaintiff were the Maynegrain warehouse receipts, there is sufficient evidence to show that it was upon receipt of those respective telexes that advances of money were made and I am satisfied that the plaintiff was acting on the faith of the various Maynegrain warehouse receipts in the making of the advances. The authorities support the plaintiff's contention that attornment operates as an estoppel (see Palmer Bailment p.848 and Spencer Bower & Turner, Estoppel by Representation, 3rd ed., p.213). The warehouse receipts, as I have said, in my opinion, constitute such attornment.

I may conveniently consider whether there has been an invasion of the plaintiff's right

to possession by addressing myself to the various submissions made on behalf of Maynegrain.

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10 It is, firstly, submitted by counsel for Maynegrain that B.T.E. had ostensible authority to instruct Maynegrain to release the barley for loading on the "Bellnes". Counsel points to the fact that all communication and instructions concerning the barley was made and given to Maynegrain by B.T.E. It was B.T.E. that deposited the barley. It was B.T.E. that instructed Maynegrain to issue the warehouse receipts by the telex I have referred to. The warehouse receipts, when issued, although addressed to the ANZ were handed to B.T.E. It was submitted that when in such a setting, Maynegrain received instructions from B.T.E. to have the barley released and loaded, it should be held to have had ostensible authority to give such instructions on behalf of those who remained in the background, the ANZ and the plaintiff.

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30 There are two objections to this submission. First of all, there is nothing in the evidence to suggest that, in giving the relevant instructions to Maynegrain for the release and loading of the barley, B.T.E. was in any sense purporting to act as the agent of the ANZ or of the plaintiff. Secondly, whilst Maynegrain may be correct enough in asserting that B.T.E. acted as the agent of the ANZ and/or the plaintiff in procuring the issue of the warehouse receipts and in obtaining possession of them, that in no-wise constituted B.T.E. in fact or held it out as the agent of the ANZ to give the instructions to release and load the barley. There is a substantial difference in the nature of the activity which was, in fact, undertaken as the agent of the plaintiff or the ANZ and the task which is sought to be assigned to B.T.E. as ostensible agent in giving the instructions to release and load. Either of these reasons I consider to be sufficient answer to the defence of ostensible authority.

50 Alternatively, it was submitted on behalf of Maynegrain that the plaintiff, either itself or through the ANZ consented to the loading taking place and that the breach of the arrangements between B.T.E. and the plaintiff, took place after the cargo was loaded. Thus it is said when Maynegrain parted with possession of the

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barley, it did so with the consent of the plaintiff. The submission founded on the evidence of Mr. Jamieson that he telephoned Mr. Boulmer and told him that the "Bellnes" was half loaded and that loading would be completed in about a week. I have already inferred that I do not accept Mr. Jamieson as a witness of truth. I certainly do not so regard him. He is a self-confessed liar. The admissions he made to this effect when cross-examined in the action against him personally preclude any acceptance of his evidence unless completely corroborated by independent evidence. That cross examination, the parties agreed, should be evidence in the present action on the question of credit. There are inherent improbabilities in explanations that he has offered for a number of his actions and his performance in the witness box has quite satisfied me that he is not a person worthy of any belief. Accordingly, the rock on which the submission of knowledge and, therefore, of consent on the part of the plaintiff itself is sought to be based is incapable of supporting the weight of the submission. 10 20

Alternatively, reliance is sought to be placed on knowledge by the ANZ and, for this purpose, reliance is placed on a diary note made on 3rd August, 1977. It is submitted that the ANZ, knowing that the vessel would be loaded with the barley, made a representation to Maynegrain by remaining silent that it consented to the loading of the cargo. The whole concept of representation by silence is an extremely difficult one, and it is inappropriate in the context of the present case, that I should go into an exploration of the appropriate principles of law, which were not really argued. I reject the submission because there is no evidence whatsoever that Maynegrain ever had an inkling of what knowledge the ANZ had or that Maynegrain, in releasing the cargo, was in any way relying on the alleged representation by silence. 30 40

The submission made on behalf of Maynegrain that has occasioned me the greatest difficulty was the defence which has been termed a defence of waiver, although reference to the authorities suggests that it might perhaps be more appropriately described as an election. Counsel submitted that, placed in the situation in which it was, the plaintiff was presented with 50

two inconsistent rights. It could either take the Bill of Lading and complete the sale entered into by B.T.E. in Kuwait or, alternatively, have nothing to do with either the Bill of Lading or the transaction and sue B.T.E. and/or Maynegrain in conversion. It is submitted that, faced with those two inconsistent courses of conduct, the plaintiff chose the first and is, thereby, precluded now from claiming that there had been conversion in respect of which it is entitled to damages.

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The plaintiff has drawn attention to the fact that it sought to safeguard itself against any suggestion of making such an election and, thereby, abandoning its rights to damages, by the letters which it wrote on 15th September, 1977 and on 9th November, 1977. That is, however, merely one of the matters to be considered in determining whether a final election had been made.

It is, indubitably right to say that once a person has conclusively elected to affirm a transaction which would otherwise found an action in conversion, his right of action founded thereon is at an end. However, as the learned editors of Clerk & Lindsell on Torts, 14th ed., par. 583 point out, the question in each case is whether there has been anything amounting to a final election to affirm the wrongful act. It is necessary to look at all the circumstances in order to arrive at an accurate answer to that question. If an act is ambiguous in character, it does not amount to an election, much less where it is explicable on some other ground (Winfield and Jolowicz on Tort, 11th ed. p.683).

Reliance has been placed by Maynegrain on the decision of the Court of Appeal in England in Verschures Creameries Limited v. Hull and Netherlands Steamship Company Limited (1921) 2 K.B. 608. The facts may be gleaned sufficiently from the headnote. Goods were delivered by the owners to forwarding agents to be carried to a customer in Manchester. When the goods arrived at Hull the owners instructed the forwarding agents not to deliver to the customer but the goods were, nevertheless, delivered to him. The owners thereupon invoiced the goods to the customer and sued him and recovered judgment for the price of goods sold and delivered and then, failing to get satisfaction, took proceedings in

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bankruptcy against him. A unanimous Court of Appeal held that the owner could not thereafter sue the forwarding agents for negligence and for breach of duty. Bankes, L.J. said that the owners, having elected to treat the delivery as an authorised delivery, could not thereafter treat the same act as a misdelivery (p.611). Scrutton, L.J. explained that a person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid and then turn round and say it is void for the purpose of securing some other advantage (p.612). 10

The decision has received differing explanations by Lords of Appeal. Lord Porter in United Australia Limited v. Barclays Bank Limited (1941) A.C.1 at p.51 explained it as a case in which agents acted in the mistaken belief that they had authority and the principals afterwards ratified the authority which the agents thought they had. A rather different view of the decision was taken by Viscount Simon at p.21. However, it is notable that his Lordship's explanation for the decision is founded on the fact that the plaintiffs there recovered judgment. 20

I do not consider that the present is a case of a final election of the kind which debars the action presently on foot. I accept the submission made by the plaintiff that it was placed by the wrongful act of Maynegrain in a position where it had to salvage, as best as it could, whatever monies it could derive from the transactions in Kuwait. The act of conversion was complete on 24th August and thereafter the plaintiff was engaged in doing what the law requires it to do, in mitigating its damage. 40

Consider the position in which the plaintiff was placed: the vessel had sailed from Australia, it was on the high seas, and as witnesses have explained, if in those circumstances a sale had been sought to be effected, any intending purchaser would extort the advantages of a purchaser at a distress or fire sale, by buying at prices well below market. The ship was destined for Kuwait; the plaintiff had no rights to change that destination. If the cargo 50 went to Kuwait, the purchaser being a Kuwaiti company, the plaintiff was entitled to think

that it may have some difficulty in exercising its rights in respect of the cargo. To hold that someone placed in the position of the plaintiff, with really no freedom of choice, is obliged to make a binding election, debarring it from claiming damages for the wrong committed against it merely by seeking to reduce its exposure to loss, would be to pile injustice on top of injury by a wrongful act. I do not accept that the appropriate principles of law require me to arrive at that result. In so doing, I find comfort in another decision of the Court of Appeal in England in Rice v. Reed (1900) 1 Q.B.54. Once again, the facts are sufficiently derived from the headnote.

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The plaintiff's servant wrongfully sold goods of his master to the defendant who knew that the servant was improperly dealing with them, and the servant paid the proceeds of the sale into his account at his bank. The plaintiff brought an action against the servant and the bank, claiming as against the servant, damages for conversion of the goods, and in the alternative for money had and received, and as against the servant and the bank, an injunction to restrain them respectively until the trial of the action, from drawing out or parting with the sum of £1500 then standing to the servant's credit at the bank. Interim injunction was granted, but no further steps in the action were taken. An agreement was arrived at between the plaintiff and the servant that £1,125 out of the £1,500 should be paid to the plaintiff in full settlement of all claims against the servant without prejudice to the plaintiff's claim against the defendant. No judgment was signed. Before the agreement was made the plaintiff brought an action against the defendant claiming damages for the conversion of the goods. The Court of Appeal held that the plaintiff had not, by his proceedings in the former action and by his dealings with the servant, elected to affirm the sale and to waive the tort.

Lord Russell of Killowen, C.J. after referring to certain earlier authorities said at p.64 :-

"Those cases seem to establish two propositions; first that an application

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for the proceeds of goods said to have been tortiously dealt with is not conclusive proof of election to affirm the transaction; and secondly, that the receipt of part of the proceeds is not conclusive proof of election.

In the present case it is to be noticed that the money was obtained from the bank under a compromise and one cannot shut one's eyes to this fact when determining what is the proper inference to be drawn from the circumstances of the case, namely, that the receipt of the money by the plaintiff was in relief of the defendant and went in dimmution of the damages payable by him, and the defendant will get the benefit of the money received from the bank. Upon the whole, I have arrived at the conclusion that there are no such circumstances in this case as to oblige the court to say that the plaintiff has, by his dealings with Soltau, conclusively elected to affirm the sale of the sawdust by Soltau to the defendant."

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In my view the approach adopted by the Lord Chief Justice and also A.L. Smith L.J. (see p.66), may properly be embraced by me in the present case and applied. I therefore hold that all that the plaintiff had done was to take appropriate steps to mitigate its damage and it did not conclusively elect to waive the wrongful act committed against it.

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Nextly, Maynegrain placed reliance upon the provisions of the Companies Act, 1961 (Q) and submitted that by reason of non-compliance with the appropriate statutory provisions, the transaction was avoided as against it. Section 100 of the Act provides in part as follows :-

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"(1) Subject to this Division, where a charge to which this section applies is created by a company, there shall be lodged with the Registrar for registration within 30 days after the creation of the charge a statement of the prescribed particulars and -

- (a) The instrument (if any) by which the charge is created or evidenced;
or

(b) A copy thereof together with an affidavit verifying the execution of the charge and also verifying the copy as being a true copy of the instrument.

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10 and if this section is not complied with in relation to the charge the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company."

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"(3) The charges to which this section applies are -

20 (c) a charge or an assignment created or evidenced by an instrument (including instruments creating or evidencing absolute bills of sale) which if executed by an individual would be of limited effect if not registered under 'The Bills of Sale and Other Instruments Act of 1955', or 'The Liens on Crops of Sugar Cane Acts, 1931 to 1951'."

The Bills of Sale and Other Instruments Act, 1955 (Q) provides a definition for a bill of sale, as including :-

30 "(viii) Any agreement, whether intended to be followed by the execution of any other instrument or not, by which any legal or equitable right to any chattels or any charge or security thereon, or thereover, is conferred."

40 There are excluded from the definition by sub-clause (f) inter alia, warehouse keepers' certificates, and any other document used in the ordinary course of business as proof of the possession or control of chattels, or authorising or purporting to authorise, either by indorsement or delivery, the possessor of such document to transfer or receive the chattels thereby represented.

Maynegrain submitted that a common law pledge is included in the expression "charge". It was then submitted that the documents purporting to be warehouse receipts and issued by B.T.E. were charges, being Bills of Sale and were essential to the plaintiff's case because they appropriated the barley. It is common ground between the

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parties that there was no registration of a charge under the Companies' Act.

The evidence showed that Maynegrain was at the time of issue of the documents by B.T.E., a creditor of B.T.E. and it was submitted the charge thus created was void as against Maynegrain by reason of the lack of registration. The plaintiff has pointed out, however, that firstly it is in nowise relying in its case upon the documents issued by B.T.E.; they were not sought and they were not required. Reliance is placed, not on those documents, but on the warehouse receipts issued by Maynegrain. 10

Alternatively it is submitted on behalf of the plaintiff that the B.T.E. documents were not Bills of Sale because they came within the exclusion, being either warehouse keepers' certificates or "any other document used in the ordinary course of business", in the sense in which those words are employed in sub-clause (f) of the exclusions to the definition of a Bill of Sale. 20

I consider the plaintiff's submission to be well founded. Whether one accepts the true foundation of the plaintiff's case to be that of an agreement to pledge the barley, pursuant to the arrangement made by Mr. Jamieson on behalf of B.T.E. with the plaintiff, and carried into execution by the issue from time to time of warehouse receipts by Maynegrain, followed by drawdowns of advances, or as a case founded on estoppel, by reason of the attornment in the warehouse receipts of Maynegrain. It is right to say that the documents issued by B.T.E. played no relevant role in the structure of the case so erected. The appropriation of barley to the account of the plaintiff took place by the issue of the Maynegrain warehouse receipts certifying to the holding of the appropriate amount of barley to the account of the ANZ on behalf of the plaintiff. In other words, the plaintiff is not seeking to rely on the documents which Maynegrain contends are void. 30 40

In these circumstances it is not really necessary to consider the validity of a further point submitted by counsel on behalf of Maynegrain. On the hypothesis that the sole entitlement of the plaintiff to possession of the barley was founded on estoppel, it was 50

submitted that the defence of jus tertii was available and that Maynegrain was entitled to rely by way of defence on the instructions given to it by the true owner, B.T.E., to release the barley.

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10 The short answer to that submission is that because the Companies Act provisions did not inure for the benefit of B.T.E., it not being a creditor of itself, B.T.E. could not be said to have a better title in the relevant sense than did the plaintiff. Accordingly, acting on the authority of B.T.E. and disposing of the barley in accordance with the instructions of B.T.E. provides no defence to Maynegrain.

(continued)

20 This then brings me to the question of damages. Although the interest of the plaintiff in the barley was limited, the authorities speak with but one voice to the effect that the measure of damages in such a case is the value of the goods at the date of conversion. (See McGregor on Damages, 13th Edition, par.1012; The Winkfield 1902 P.42).

30 The parties agreed that the value of the barley at the relevant time F.O.B. Brisbane ranged from \$A100 per metric tonne and \$104 per metric tonne. Counsel for the plaintiff submitted that conformably with the principles in Amory v. Delamirie (1722) 1 Stra. 505, the plaintiff is entitled to claim at the higher of the two figures. Counsel for Maynegrain argued that the principle was inapplicable where there is evidence of the condition and description of the converted property, and relies upon the judgment of the Full Court of the Supreme Court of Victoria in Ley v. Lewis, 1952 V.L.R. 119. However, this is a case in which the goods were never in the physical possession of the plaintiff, and where there is in truth no full or other description of the condition of the barley as
40 it stood at the time of conversion.

I consider that in the circumstances I am entitled to and I do accept that the value of the goods was at the higher of the two figures at the relevant time. No assistance can be obtained from the price which was actually realised, because it will be recollected that the barley was sold in Kuwait in bags and so the actual price of \$160 is not a guide in any shape or form.

50 Counsel for Maynegrain nextly pointed out that there is a difference between the amount of barley for which the last of the warehouse certificates to

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(continued)

which I have referred was issued, and the amount of barley actually loaded on the "Bellnes". He submitted that the action would lie only in respect of so much of the barley as was actually converted by misdelivery to the ship. However, the demand which the plaintiff made upon Maynegrain was for the entire amount of barley to which the warehouse receipt related, and as I have mentioned, there is also a count in detinue in the Statement of Claim. No suggestion has been advanced that the damages should in any way be different, and accordingly, whether in conversion or in detinue, the plaintiff is entitled to claim for the whole of the amount of the barley.

10

Difficult questions then arise by reason of the fact that large sums of money were disbursed from the total of the proceeds of sale otherwise than to the plaintiff. The plaintiff seeks to restrict the credit it is required to give to the defendant to the net amount it actually received by pointing out that, acting as it was in mitigation of damage, it should be entitled to great latitude, caught as it was in a bind brought about by the wrongdoing of the defendant. The plaintiff points to what fell in this regard from Samuels, J.A. in *Simonius Vischer & Co. v. Holt and Thompson*, (1979) 2 N.S.W.L.R. 322, at p.355. His Honour was quoting from Lord MacMillan in *Banco de Portugal v. Waterlow and Sons Limited* (1932) A.C. 452, at p.506, where his Lordship said :-

20

30

"Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such

40

50

measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

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10 Mr.Gyles accepted that he was required to give credit to Maynegrain for the proceeds of the sale of the barley. That this concession was rightly made is made clear by the advice of the Privy Council in Solloway v. McLaughlin (1938) A.C.247. (See also Wilton v. Commonwealth Trading Bank of Australia (1973) 2 N.S.W.L.R. 644).

(continued)

20 However, it is contended by counsel that it is not appropriate to give credit for the full amount received, and that the plaintiff is entitled to deduct from the proceeds the amounts paid out in respect of demurrage and freight. I consider that submission to be well founded. The price of obtaining the proceeds of sale was the payment out to a third party of the freight of \$550,000 and the demurrage of \$19,919.71.

30 What I think does raise a difficult question is the submission made by Mr.Campbell that the plaintiff should credit Maynegrain with the \$600,000 which was wrongly paid by the Commercial Bank of Kuwait to the ANZ, with the \$40,000 that the plaintiff consented should be paid out of the monies payable to it to the Thai boatmen, and various other sums of money which were disbursed in circumstances which are not clear on the evidence.

Mr. Campbell further claims that there is another basis of assessment of damages which, if accepted, means that there is no money payable to the plaintiff at all.

40 Dealing with this latter submission first, it is submitted by counsel that when the Bill of Lading and associated documents were handed over to the plaintiff, that constituted a return of the goods, and credit should be given for the full value of the goods. He submitted that the value of the barley at the time when the power of disposition over it was handed over to the plaintiff was the same as the value at the time it left Brisbane. In the result, even accepting that there was an act of conversion, counsel submits that no damage has flowed from the wrongful act.

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(continued)

The evidence does not permit of the conclusion being drawn that the value of this barley on the high seas was the same as that which it had prior to the sale, when it stood in storage in Brisbane. Whatever value the goods may have had if they had been handed over to the plaintiff in Brisbane, the plaintiff did not derive the equivalent value or benefit when receiving the documents in respect of the cargo sailing on the high seas to a definite destination, with no opportunity to the plaintiff to re-route the ship. I have already referred to the evidence which has been given by witnesses drawing an analogy with a distress sale, and in the circumstances I think that the appropriate measure of damages is that arrived at after deducting from the value of the goods at the date of conversion such of the proceeds as should have been derived by the plaintiff in proper mitigation of damages. 10 20

With regard to the \$600,000, it seems to be accepted on all hands that that is money that should come to the hands of the plaintiff and should not have gone to the ANZ. On the other hand, it is little consolation to the plaintiff to know that fact when, in point of truth, it had no means of stopping the money going to the ANZ. True it is that the plaintiff has a claim against the Commercial Bank of Kuwait, but why should the plaintiff have to accept the need to litigate a claim in the courts of Kuwait in lieu of an entitlement to the money? After all, one the findings I have made, it is the wrongful act of Maynegrain which has wrought the present result, whereby \$600,000 which should have gone to the plaintiff does not presently rest in its coffers. It is the defendant's act which makes it necessary for the action to be brought in the courts of justice in Kuwait. It should not be for the plaintiff to carry the risk of success in that action, in a foreign country, the burden, if any, should lie at the door of the wrongdoer. 30 40

I consider that the plaintiff is entitled to have its damage assessed on the basis that it has not received the \$600,000. On the other hand, I think that there are remedies available to Maynegrain by way of subrogation, to ensure that the action in Kuwait proceeds, at the risk of Maynegrain. If any monies are recovered, then those monies no doubt will go to Maynegrain, assuming it satisfies the 50

verdict which I propose to award.

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So far as the \$40,000 paid to the Thai boatmen are concerned, I am not satisfied that the plaintiff has satisfactorily explained the reason for that payment, and I think that that is an amount which should go to the credit of Maynegrain and in relief of its liability.

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10 As to the other amounts, I think that the onus of proof lies squarely on Maynegrain and that there is no reason why any other amounts should go in reduction of the liability which otherwise lies at the door of Maynegrain. The reason why I think the position in regard to the Thai boatmen is different is because there is evidence which makes it clear that the consent of the plaintiff was given to that payment and it was for the plaintiff to explain why it consented to that being done. There is
20 no evidence of any consent by the plaintiff to being deprived of other sums.

(continued)

I think it is also right that an order should be made for the payment of interest at the usual rate of ten percent. Interest should be paid on the whole of the monies in respect of which the plaintiff was out of pocket until the receipt of part of the proceeds of sale and thereafter on the smaller sum.

30 This conclusion makes it unnecessary for me to consider the alternative basis on which the plaintiff's case is structured, that of negligence. However, I should say that I do not consider that there was a duty of care in existence here on the hypothesis on which this arm of the action is based. That hypothesis is that there was no valid pledge or right to possession by estoppel. On that assumption, I totally fail to see on what basis it could be said that Maynegrain was required to act in
40 defiance of the owner's directions. However, it is unnecessary to explore this aspect of the matter further.

50 Maynegrain has cross-claimed against B.T.E. The cross-claim is based on the terms of an agreement between B.T.E. and Maynegrain under its previous name of Meral. For the reasons which I have given in my judgment of 5th March, I have struck out the defence to that cross-claim and I consider that Maynegrain is entitled to be indemnified by B.T.E. in respect of the verdict which I propose to give in favour of the plaintiff,

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together with the costs which I propose
to order Maynegrain to pay the plaintiff.

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I propose to stand over the matter for
seven days to allow the plaintiff to bring
in short minutes to give effect to the terms
of this judgment. The short minutes should
make provision for exhibits to be handed out
on the expiration of twenty-eight days,
unless a notice of appeal is lodged in the
meantime. The short minutes will, of course, 10
also make provision for a verdict to be
entered in favour of the plaintiff against
B.T.E.

(continued)

No.8
Minute of
Judgment
entered by
Order of
Court of
Appeal
17th June
1981

No.8

MINUTE OF JUDGMENT
ENTERED BY ORDER OF
COURT OF APPEAL

IN THE SUPREME COURT) No.C.A. 116 of 1981
OF NEW SOUTH WALES) C.L. 13520 of 1978
COURT OF APPEAL)

20

CORAM: HOPE, J.A.
HUTLEY, J.A.
MAHONEY, J.A.

THURSDAY, 17TH JUNE, 1982

MAYNEGRAIN PTY.LTD. v. COMPAFINA BANK

Appeal from Common Law Division (Commercial
List) - pledge by warehouse receipt - basis -
attornment, estoppel, possession - right to
sue in conversion - undisclosed agent -
measure of damages in conversion when a
convertor has interest in the goods - recovery 30
of converted goods by pledgee - effect of
recovery - interest.

O R D E R

Appeal allowed with costs, cross-appeal
allowed with costs, costs to be set off.

For the orders made at first instance, the following orders to take effect on 17th March, 1981, be substituted :

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Supreme Court

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Minute of
Judgment
entered by
order of
Court of Appeal
17th June 1981

- 10
- (1) The first defendant pay the plaintiff \$1,664,377 which sum includes an amount of \$490,157 in respect of interest;
- (2) It be declared that the second defendant should pay to the plaintiff by way of damages the difference between the amount due to it by the first defendant, as pledgee, of the barley and the sum received by it on the sale of the barley and that it be referred to the Common Law Division (Commercial List) to determine this balance;
- 20
- (3) The first defendant pay the plaintiff's costs of the action; the second defendant should pay the plaintiff's costs of the proceedings at first instance insofar as they relate to the establishment of its liability for conversion and the plaintiff should pay the second defendant's costs of the proceedings insofar as they relate to the assessment of damages, costs to be set off;
- (4) The cross-defendant pay to the cross-claimant the sum which the second defendant is ordered to pay the plaintiff;
- 30
- (5) The cross-defendant pay the cross-claimant's costs and the costs which the cross-claimant has been ordered to pay to the plaintiff.

(continued)

In the Court
of Appeal

No. 9

No.9
Supplementary
Notice of
Appeal
2nd June 1981

SUPPLEMENTARY NOTICE
OF APPEAL

IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

CA 116 of 1981
CL 13520 of 1978

MAYNEGRAIN PTY.LTD.	<u>Appellant</u>	
- and -		
COMPAFINA BANK	<u>Respondent</u>	10

IN THE COURT BELOW:

COMPAFINA BANK	<u>Plaintiff</u>	
- and -		
BULK TERMINALS & EXPORTERS PTY. LTD.	<u>First Defendant</u>	
- and -		
MAYNEGRAIN PTY. LTD.	<u>Second Defendant</u>	

SUPPLEMENTARY NOTICE OF APPEAL

Amended pursuant to Part 51
Rule 12 20

The proceedings appealed from were heard on February 23, 24 and 25 and on March 3, 4, 5, 6 and 9, 1981. His Honour delivered reasons for Judgment on 10th March, 1981 and made orders on 17th March, 1981.

The Appellant appeals from the decision of Mr. Justice Rogers.

GROUNDS:

1. THAT his Honour was wrong in finding that the Plaintiff had sufficient title to the barley to enable it to sue in conversion or detinue. 30
2. THAT His Honour was wrong in finding that the warehouse receipts issued by the Appellant were an attornment.
3. THAT His Honour was wrong in not finding that the First Defendant has ostensible

authority from the Plaintiff to load the barley (or alternatively was the apparent owner of the barley).

In the Court
of Appeal

No.9

Supplementary
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Appeal
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4. THAT His Honour was wrong in not finding that ANZ Bank consented to the loading of the barley.
5. THAT His Honour was wrong in not holding that the Plaintiff had elected to affirm any tort which the Appellant had committed by loading the barley.
6. THAT His Honour was wrong in not holding that the warehouse receipts issued by the First Defendant were Bills of Sale within the meaning of the Bills of Sale and Other Instruments Act, 1955 (QLD).
7. THAT His Honour was wrong in holding that the appropriation of barley to the account of the Plaintiff took place by the issue of warehouse receipts by the Appellant.
8. THAT His Honour was wrong in assessing damages on the basis of the barley being valued at Aus.\$104 per tonne rather than a lesser amount.
9. THAT His Honour was wrong in assessing damages with respect to the whole tonnage of barley which the Appellant acknowledged had been delivered to it, rather than with respect to the tonnage of barley loaded onto the "Bellness".
10. THAT His Honour was wrong in not giving effect to Clause 12 of the further amended Defence of the Second Defendant.
11. THAT His Honour was wrong in not holding that the acquiring by the Plaintiff of the Bill of Lading and associated documents was equivalent to the return of the barley, for the purpose of assessment of damages.
12. THAT His Honour was wrong in not holding that at the date the Plaintiff acquired the Bill of Lading and associated documents, the value of the barley was the same as it had been in Brisbane prior to loading, or some greater amount.
13. THAT His Honour was wrong in not holding that at the date the Plaintiff acquired the

(continued)

In the Court
of Appeal

No.9
Supplementary
Notice of
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(continued)

Bill of Lading and associated documents, the value of the barley was equal to the amount which the Plaintiff received for the barley in Kuwait, plus amounts paid by the ultimate purchaser of the barley in Kuwait, but which the Plaintiff failed to receive for reasons not connected with the need to bag the cargo, minus the amount paid by the Plaintiff for freight and demurrage.

10

14. THAT His Honour was wrong in holding that the proper measure of damages, where the Plaintiff was a pledgee who had received back the pledged goods, was the full value of the goods.
- 14A. THAT His Honour was wrong in holding that, where the Defendant had loaded the barley on the instructions of a person with an interest in the barley, the proper measure of damages was the full value of the goods. 20
15. THAT His Honour was wrong in not giving the Appellant credit for the amount of \$600,000.00 which was sent from Kuwait to the ANZ Bank.
16. THAT His Honour was wrong in not giving the Defendant credit for the value of the barley damaged in Kuwait.
17. THAT His Honour was wrong in not giving the Defendant credit for the \$400,000.00 paid to Mr. Jamieson. 30
18. THAT His Honour was wrong in not giving the Defendant credit for the \$40,000.00 paid to Sheikh Hamid
19. THAT His Honour was wrong in not holding that the Plaintiff had failed to mitigate its loss with respect to the unexplained shortfall of approximately \$7,500.00 in the final payment received by it (transcript pages 54 to 55). 40
20. THAT His Honour was wrong in allowing the Plaintiff to receive interest on the amount of the damages at all.
21. THAT His Honour was wrong in allowing the Plaintiff to receive interest on the amount of the damages for the whole of

the period he in fact allowed it.

In the Court
of Appeal

ORDERS SOUGHT:

1. THAT Judgment be entered for the Appellant.
2. ALTERNATIVELY to 1, that the verdict be reduced to such amount as the Court of Appeal thinks fit.
3. ALTERNATIVELY to 1 and 2, that it be remitted to His Honour to reduce the verdict in accordance with principles laid down by the Court of Appeal.
4. THAT the Respondent pay the Appellant's costs in this Court and in the Court below.
5. SUCH further or other order as this Honourable Court may deem fit.

No.9
Supplementary
Notice of
Appeal
2nd June 1981

(continued)

10 Appeal papers will be settled on 24 June 1981,
at 3.00 p.m. in the Registry of the Court of
Appeal.

DATED: , 1981

20 J.F. McDARRA

Solicitor for the Appellant
By his partner

(Sd:) Peter Johnston

APPELLANT: MAYNEGRAIN PTY.LTD.
40 French Street,
Eagle Farm, QLD., 4007

SOLICITOR: DAWSON WALDRON

30 ADDRESS FOR SERVICE: 60 Martin Place
Sydney N.S.W. 2000
Tel. 231 0033

ADDRESS OF REGISTRY: Supreme Court
Queen's Square
Sydney N.S.W. 2000

In the Court
of Appeal

No. 10

NOTICE OF CROSS APPEAL
OF RESPONDENT

No.10
Notice of
Cross Appeal
of Respondent
11th March
1982

IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

C.A. 116 of 1981
C.L. 13520 of 1978

MAYNEGRAIN PTY. LTD. Appellant

- and -

COMPAFINA BANK Respondent

10

IN THE COURT BELOW

COMPAFINA BANK Plaintiff

- and -

BULK TERMINALS & EXPORTERS
PTY. LTD. First
Defendant

- and -

MAYNEGRAIN PTY.LTD. Second
Defendant

NOTICE OF CROSS APPEAL

The proceedings appealed from were heard on February 23, 24 and 25 and on March 3, 4, 5, 6 and 9, 1981. His Honour delivered reasons for judgment on 10th March 1981 and made orders on 17th March 1981.

The respondent cross-appeals from the following parts of the decision of Mr. Justice Rogers.

- (a) at page 713A - J, where His Honour states that he does not consider that there was a duty of care in existence, owed by the second defendant to the plaintiff;
- (b) at page 7121 - L, where His Honour finds that the sum of \$40,000 paid by the Commercial Bank of Kuwait to certain Thai boatmen should go to the credit of Maynegrain and in relief of its liability;
- (c) at page 712 - X, where His Honour found that interest should be paid at the rate of 10%.

30

GROUNDS

1. His Honour was in error in making an order

that interest be paid upon the damages awarded to the respondent at the rate of 10% only.

In the Court
of Appeal

2. His Honour ought to have ordered that interest be paid upon the damages awarded at a commercial rate, as sought by the respondent, such rate being not less than 13 per centum per annum.

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Cross Appeal
of Respondent
11th March
1982

10 3. In the alternative to the claims by the plaintiff against the second defendant in conversion and detinue, His Honour ought to have found that the second defendant was liable to the plaintiff for damages for negligence, as alleged in paragraphs 15, 16 and 17 of the Amended Statement of Claim.

(continued)

20 4. His Honour was in error in holding that the sum of \$40,000 paid by the Commercial Bank of Kuwait to certain Thai boatmen should go to the credit of Maynegrain and in relief of its liability and His Honour ought to have found that such sum of \$40,000 was properly included in the damages awarded to the plaintiffs.

ORDERS SOUGHT:

1. That the amount of damages ordered by His Honour be amended so that such amount be increased by the sum of \$40,000.

30 2. An order that in substitution for the interest which the second defendant was ordered to pay to the plaintiff by His Honour, such interest should be paid, calculated at the rate of 13 per centum per annum.

FILED: 11th March 1982

Sd: J.F. Warburton
Solicitor for the Respondent

PART OF PROCEEDINGS IN
COURT OF APPEAL

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Part of
Proceedings
in Court of
Appeal

.....
higher than the source. The outer limits
are marked by the fact that an agent has
independent possession of his own and does
not have custody merely for his principal.
We suggest that is the ceiling beyond which
any constructive possession or delivery
cannot arise.

10

The other matter that is important in
our submission is that this is an action
in tort for conversion, detinue and negligence.
In it the plaintiff must establish either an
actual possession or a legal right to immediate
possession. There was no actual possession
in the Compafina Bank of this barley in
Brisbane. It has to establish a legal right
to immediate possession. An equitable right
to immediate possession is not good enough.

20

HOPE, J.A.: It is rather technical. Let me
assume in this situation Compafina is required
by the A.N.Z. Bank to take possession.

MR. HANDLEY: I keep on talking about the
consent of the A.N.Z. Bank.

HOPE, J.A.: That is another issue.

MR. HANDLEY: It is another issue. Rogers J.
swept aside the A.N.Z. Bank in this case. We
say that is not possible.

HUTLEY, J.A.: That is not an answer to what
my brother judge said. Is not the simple fact
that they are not there and their consent
would be an item of defence. It would have
nothing to do with the capacity for the action
to be entertained by the Court.

30

MR. HANDLEY: I have not thought past the
consent defence in this area.

HUTLEY, J.A.: Consent is a defence.

MR. HANDLEY: Yes.

HUTLEY, J.A.: It is not a destruction of the
cause of action, which is your present argument.

40

This would have disappeared, except on the basis that their consent might have been a defence.

In the Court
of Appeal

MR. HANDLEY: I think that is correct.

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HUTLEY, J.A.: The result of this proceeding might be to have the A.N.Z. Bank joined and the thing start all over again.

(continued)

MR. HANDLEY: That is better than a verdict of \$1.6 million.

10 Immediately after the Judicature Act in England this problem was looked at in a number of cases. If I can give you Honours these references. These are cases which are authority for the proposition after the Judicature Act to maintain conversion you need to have a legal right.

HOPE, J.A.: Can the equitable owner of the land bring ejectment?

20 MR. HANDLEY: No. It depends what you mean by ejectment.

MAHONEY, J.A.: Jacobs, J. did what you suggested here about beneficiaries, where there was a beneficiary who had only an equitable title. He brought the proceedings, and not the trustee. Jacobs, J. held in certain circumstances there could be a right to bring proceedings in ejectment.

30 MR. HANDLEY: One has to be careful when one says "Can you bring ejectment". One can get an injunction in equity for the specific restitution of a chattel.

MKH:JLP(6)

ON RESUMPTION

MR. HANDLEY: Your Honours, just before we leave the first point, the trial judge dealt with this matter at p.605 through to p.697 in his judgment.

40 HOPE, J.A.: This is on the assumption that there was an attornment to Compafina. Maynegrain had no knowledge of what had taken place. It did not go to any consent or lack of consent or anything, it is relying upon, as it were, the acts of B.T.E. and the position so far as B.T.E. is concerned,

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(continued)

even if one assumed from the material you have referred us to, it might import an approval on the part of the A.N.Z. Bank had it not merely the lack of consent but the positive dissent of Compafina.

MR. HANDLEY: Yes.

HOPE, J.A.: What then do you get from this argument dealing with it from the point of view of the plaintiff?

MR. HANDLEY: If contrary to our submission the legal right was in Compafina, we get nothing from this point. 10

HUTLEY, J.A.: If the legal right is not in Compafina you say the action fails and therefore it is irrelevant?

MR. HANDLEY: Yes, but we say it fails for two reasons, firstly that the wrong plaintiff is before the court and secondly, if the right plaintiff is before the court we have its consent. 20

HOPE, J.A.: We are not going to concern ourselves with what the evidence would be if the right plaintiff were here, surely, so I do not really see what it has got to do with the case in the event that you secondly mentioned, namely that the court had in mind remitting the matter. I do not understand that you are going to put to us that there was an approval for consent by any means by Compafina.

MR. HANDLEY: That is correct, we do not make any such submission. 30

As a result of something your Honour Hope, J.A. said, we looked up the position in relation to ejectment and there is a statement in Halsbury on landlord and tenant which suggested that an equitable ejectment would do, but we looked at the case and the case is authority for the very opposite. The Court of Appeal in Allen v. Woods (1893) 68 L.T. 143 was extremely dogmatic that equitable ejectment was not possible without the legal estate being before the court. 40

HOPE, J.A.: You can join it as a defendant.

MR. HANDLEY: Yes, but the legal estate had to be earned and so the owner of legal estate had to be before the Court.

10 There was also some discussion before lunch about the question of suing in bailment. We took the opportunity to look in Bullen & Leak 3rd ed. and there are bailment counts in tort and contract, but so far as counts against bailees are concerned for breaches of duty, the only cases for which there are precedents are for negligence, damage to or loss of goods or the failure to re-deliver goods. There are no counts for misdelivery as such and these are we suggest simply cases of conversion.

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(continued)

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 116 of 1981
COURT OF APPEAL)

CORAM: HOPE, J.A.
HUTLEY, J.A.
MAHONEY, J.A.

MAYNEGRAIN PTY. LIMITED v. COMPAFINA BANK

20 THIRD DAY: TUESDAY, 16TH MARCH, 1982

MR. GYLES: Before my friend continues, might I announce that I now appear with Mr. Caldwell and Mr. Davies.

HOPE, J.A.: Mr. Gyles, may I ask you do you have any application to make?

MR. GYLES: I have no instructions to make an application at the moment but I will deal with that matter when I come to put my submissions.

30 HOPE, J.A.: Mr. Handley, we had been discussing for some little time the question whether the value of \$100 or \$104 -

MR. HANDLEY : I had not actually opened that matter, your Honour. His Honour Hutley, J.A. had put some propositions to me about it but I had not actually reached that point in my written submission.

40 HOPE, J.A.: You may not have reached it but we certainly discussed it. I am not quite clear and perhaps you may tell me, if you can tell me shortly if you do not wish to pursue it at this point of time, how is that relevant?

If you are right in your first point then

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there is no question of damages arises at all. If, on the other hand, you are wrong, and if in the event one comes to the question of damages, his Honour adopted, did he not, this figure that you say is the highest that could be taken?

MR. HANDLEY: Yes, your Honour.

HOPE, J.A.: You challenge the 104 as opposed to the 100 - is that what you are talking about?

10

MR.HANDLEY: Yes.

HOPE, J.A.: I thought you were talking about 100 to 104 as opposed to any other value. I had not conceded that we were talking about 100 as against 104. What you were saying was that the price ten days out of Brisbane was the highest value that could be set upon the barley and that agreement constituted the evidence of that value.

MR. HANDLEY: I think what I had put was broadly 20 what your Honour has been putting to me. I had not yet got to the difference between 100 and 104.

Thus if one attributes part of that contingency sum to the bagging operation so that the figure that I have picked on on a fairly rough basis - if one says that the total cost of bags and bagging is \$285,000 and divides that by 24,000 tonnes you get a cost of bagging at 11.85 a tonne. Take that from the sale price 30 of bagged barley and you have a bulk value of the order of \$148 a tonne. There are various ways of doing it -

HOPE, J.A.: What is all this directed to? Reading your submissions, the last one on p.19 "If the full value of the barley that was damaged is added", is that damaged as opposed to destroyed?

MR. CAMPBELL: Both damaged and destroyed.

HOPE, J.A.: So that is the 284,563 figure?

40

MR. CAMPBELL: Yes.

HOPE, J.A.: If that is added to the amount received for the undamaged barley one gets \$US2,762,152 as the minimum value to the plaintiff of the whole of the bulk barley in

Kuwait and one might say, when it arrived in Kuwait?

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MR. CAMPBELL: That is right, yes.

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HOPE, J.A.: And you say you should not be debited with the rain damaged barley for the effects of rain and therefore you should be credited on the basis that one works out the value in the way his Honour did with the additional \$284,563, is that so?

(continued)

10 MR. CAMPBELL: Yes, that is so.

HOPE, J.A.: To me the crux is why you should not be bound to who bears the responsibility or risk for the rain but I think Mr. Handley dealt with that.

MR. CAMPBELL: Yes, this is just a method of quantification of the amount of the credit that we are entitled to in relation to rain if our submissions in that respect succeed.

20 Subject to the translation and to providing the Court with a document that your Honour Hope, J.A. requested earlier, those are our submissions.

HOPE, J.A.: Yes, Mr. Gyles?

30 MR. GYLES: Your Honours, may I go back to the first point argued by my learned friend Mr. Handley which is whether we can sue at all. As I indicated at the opening of this appeal, this was one of the number of points which are now argued which were not argued below and my first submission is that the Court will not permit this point now to be raised.

HOPE, J.A.: The plaintiff's entitlement to sue was not raised before?

MR. GYLES: The defect in the plaintiff's entitlement to sue was based on the fact that the document was made out in the name of the ANZ Bank or addressed to the ANZ Bank and delivered to them was never taken.

40 The point which was taken below concerning the ANZ bank was that they had consented to the disposition of the goods.

HUTLEY, J.A.: But if it is an absolutely fatal point subject to the order of costs, which would carry all the costs below, and if it can be rectified

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now and you elect not to apply to rectify it, why should we not deal with it.

MR. GYLES: If they are completely fatal, it is simply a parties point, it is not a fatal bar to the action, it is a non-joinder point.

BMcM/LRH/6

The difference between taking that point below and taking it here is the lapse of time which occurred. It is one thing to be faced at trial where there were various issues to be gone into, with joining a party - you might say for more abundant caution we will join the A.N.Z. Now, it is very much longer in this case. The party for whom I appear is not in Australia and if the amendment is now made then as we understand my friend's submission, the matter should go back for retrial. In any event if the application were made we would be in the hands of the Court as to what would happen to the proceedings. Return of the matter to the trial Judge is at least one of the possibilities. We submit that imposes prejudice on us which we did not have before.

10

20

Secondly, in relation to questions which were raised, it is impossible to say that evidence, to use the words of the High Court;

"It is not a case in which we are able to say.....in the Court below"

30

One of the issues raised in this case is the relationship between the ANZ Bank and Compafina. There is evidence tendered on that point. For example there was evidence of the arrangement between these two parties but it was not tendered and in those circumstances Sutton's case established that the point should not be raised at this stage.

HOPE, J.A.: If we assume we are not in a position to rule on that at the moment, what course do you suggest? I was thinking of the Joinder point.

40

MR. GYLES: What we propose about that is that matter be left until Your Honour's

decision is made. We are put in a position now where it is difficult, if not impossible, to obtain instruction; Secondly, we do suffer the disadvantage to which I have pointed.

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HUTLEY, J.A.: Why did you not tell us as soon as Mr. Handley opened his mouth on this issue which had not been taken below?

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10 MR. GYLES: I did, your Honour. I think my friend may have dealt with that in the course of his submissions.

(continued)

HOPE, J.A.: The only matter that has been discussed about the non-raising -

MR. GYLES: Was the fob point and that arose from the Bench. My friend approached the whole argument by saying it did not exist.

MAHONEY, J.A.: I think he did say it was a verdict point.

20 HOPE, J.A.: There was evidence, was there not as to when Maynegrain first heard about Compafina. I think it was in September. Who asked that?

MR. GYLES: I think Mr. Campbell may have asked it.

HOPE, J.A.: That was asked of his own witnesses?

30 MR. GYLES: That is so. The argument was put that it was the ANZ at a certain consenting point. Incidentally it was part of the chain that said it was the ANZ that Maynegrain knew of and they were the ones they would deal with to get consent.

I do not think there was any positive evidence led to the contrary because ANZ had been our agent although cross examination of the witnesses rather cut down the effect of that.

MAHONEY, J.A.: Do we have agreement by both parties this point was taken below?

HOPE, J.A.: That Compafina's title to sue was defective.

MR. CAMPBELL: It was not taken as a matter of title.

40 HOPE, J.A.: It was raised in the consent issue.

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MR. CAMPBELL: It being asserted that because of the way the documents were worded the only person whose consent mattered for us was the ANZ Bank.

MR. GYLES: Ultimately, in respect of that, that is the Court is not prepared at the moment to say we will not entertain the question, your Honours should not put us to election which we have to decide until we know what the Court's view is. One cannot be quite satisfied there is not some evidence which might be relevant.

10

MAHONEY, J.A.: Can you speculate, for my benefit, as to what evidence might have been called?

MR. GYLES: Evidence of the arrangements between Compafina and the ANZ; there is evidence.

MAHONEY, J.A.: Assume that there is a point taken that if you are suing in conversion that it is only the bank that could sue, how could that be cured?

20

MR. GYLES: If that is the basis for it, if the nature of the relationship between the ANZ Bank and Compafina is relevant to this point, and we submit that it is, then that was not an issue gone into at the trial.

MAHONEY, J.A.: You have not answered my question. As I understand Suttor's case what the Court said was you cannot take the point now because the matter may have been able to be cured by evidence brought at the trial. Can you tell us what kind of evidence? How could evidence have been brought to deal with it at the trial?

30

MR. GYLES: By calling evidence as to the relationship between the ANZ bank and us to make quite clear they were holding this for us and they were our agent in every sense of the word.

MAHONEY, J.A.: Let us assume you could prove they were agents, a view that has been tested in the submissions so far, the question still arises how could they have cured the point for you?

40

MR. GYLES: We submit it would.

MAHONEY, J.A.: But how?

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MR. GYLES: Because if we are a conduit pipe agent then their position is our position.

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10 HOPE, J.A.: Suttor's case was concerned with the facts that they could not be satisfied that all the evidence was there and that is one matter to raise, if it were not concerned with any joinder question. Could there not be evidence that helps establish insofar as the ANZ Bank was the principal party to sue, it would only be as trustee for you and that you would be entitled to join them as a defendant and sue.

(continued)

MR. GYLES: Yes, that is the Joinder part. There is a possibility there is relevant evidence. There is certainty that the point, if good, could have been cured. Now, for practical reasons that is a very disadvantageous course which would just lead to further delays.

20 HUTLEY, J.A.: I would have thought if it is merely one of the parties evidence then that should be sufficient. The real problem is that once the ANZ Bank is called, maybe the reason you are so reluctant to have them there, the \$600,000 can be adequately dealt with instead of it being left to the Litigation in Kuwait because they have got the money in property and there is no reason why they should not have been dealt with too- and improper receipt which is
30 an important part of this case, actually investigated.

MR. GYLES: I think I put prejudice we see in that.

HUTLEY, J.A.: But that would help you.

MR. GYLES: It may but we prefer to have the verdict we have at the moment.

HOPE, J.A.: I think it follows that if the bank were joined they might be entitled to go back to the primary judgment.

40 MR. GYLES: That is a very serious risk.

HOPE, J.A.: You would have to make allegations about their relationship to you of some kind to justify joining them.

MAHONEY, J.A.: Then the other side would be entitled to investigate it.

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MR. GYLES: I do not want to concede it should go back.

MAHONEY, J.A.: You talk abo ut the Joinder point and that I understand, but as far as the evidence point is concerned, apart from evidence to say they were agent, which does not seem to be in contest, what other evidence could have cured it in a claim of conversion?

MR. GYLES: I cannot suggest any other evidence.

10

May I just remind your Honours of what was said in Saffron's case in the High Court. It is reported in 100 CLR 231 at 241:

"To all of this there are two answers.
Issues upon trial"

We submit that is a principal this Court ought to apply. Here, the party who now appeals approached the litigation with a number of attacks in substance upon the question of liability and they are set out one by one in the judgment. 20
All of those grounds, except for the part which deals with consent, are abandoned on appeal. They are lost and they are now abandoned. Instead another point is taken which was not taken below. There was a substantive attack on the nature of the transaction when it was being put by Maynegrain that the warehouse receipts were simply documents which told people how much grain they had and had nothing to do with pledges or security. The two matters set out 30
in the judgment were supposedly matters argued. We submit the approach of the High Court in Saffron's case should be applied.

The other illustration of this approach is in 1903 Probate 42. At page 53 in the Master of the Rolls Judgment:

"The case was dealt with by all parties
.....Claridges case".

The point was taken from 49.4 in the very first submission:

40

"It lies on the appellant.....forwarding agent".

That illustrates the approach of the Court to this type of case. Your Honours are well aware

10 of the policy issue involved in this sort of decision. We submit in a commercial case where the issues are isolated and fought, it is not in the public interest that new points be raised on appeal. Finality of litigation is important which is worthy of considerable weight. The disadvantage which occurs to parties having to meet these cases on appeal when there have been inevitable delays is another reason, particularly in times of high interest rates.

HOPE, J.A.: In The Winkfield all parties were before the Court. Here, if the appellant be right, you have no right to sue at all and if there is a right to sue it is in the ANZ Bank. Notwithstanding what has happened the ANZ Bank is entitled to sue again tomorrow. If the Postmaster General was not in possession it was the carrying ship.

20 MR. GYLES: If Your Honour goes to 49 you will see the point taken there:

"It lies on the plaintiff.....carrying ship"

HOPE, J.A.: The carrying ship was The Winkfield?

MR. GYLES: No, the other ship.

HOPE, J.A.: The owners of the Mexican and the Winkfield were parties to the proceedings?

30 MR. GYLES: The point that was taken was a title point and it would be as destructive to the Postmaster General to sue as this point against us, if it is good, and the Court did not say we will treat the party who is before us as being the plaintiff.

40 The principal applied to this case is that recovery between parties cannot be gained by any other so that this verdict could be pleaded by Maynegrain if there were any proceedings by the ANZ Bank and certainly there could be no double recovery, that is assuming our verdict is met.

In the case of conversion Clark and Linsell makes that point at para.1169 in the 14th edition.

May I come to the substance of the matter. His Honour found that title to sue flowed from two sources. The first was the effective pledge and

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the second was by estoppel, title by estoppel.
May I come to the second of those because
it is the shorter point. His Honours's decision
appears at P.697:

"The authorities support the plaintiff's
contention.....estoppel....."

And His Honour goes on at page 696, u to v:

"There is no doubt that by the documents
.....the plaintiff".

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REASONS FOR JUDGMENT OF
HIS HONOUR MR. JUSTICE HOPE

IN THE SUPREME COURT)
OF NEW SOUTH WALES) C.A. 116 of 1981
COURT OF APPEAL) C.L. 13520 of 1978

CORAM: HOPE, J.A.
HUTLEY, J.A.
MAHONEY, J.A.

Thursday 17th June, 1982

MAYNEGRAIN PTY. LIMITED v.COMPAFINA BANK

20

J U D G M E N T

HOPE, J.A.: In these proceedings the
respondent Compafina Bank, a Swiss bank
(Compafina) claimed and recovered damages from
the appellant Maynegrain Pty. Limited (Maynegrain)
for the conversion of a large quantity of barley,
and for the detention of a relatively small
quantity of the same grain. Before its subse-
quant sale or loss, the barley belonging to 30
Bulk Terminals and Exporters Pty. Limited (B.T.E.)
the first defendant in the proceedings, against
which Compafina also recovered damages. The
barley owned by B.T.E. was delivered to
Maynegrain's storage facilities at Pinkenba in
Brisbane to be held, subject to the rights
arising under any pledge, as bailee for B.T.E.
Compafina's right to possession of the barley

which was said to have been infringed was claimed to have been obtained for the purpose of effecting a common law pledge of the barley to it by B.T.E., the infringements being the delivery, without Compafina's authority, of the bulk of barley to a ship proceeding from Brisbane to Kuwait, and the spillage and other loss of the rest of it. The delivery of the grain to the ship was carried out by Maynegrain at B.T.E.'s direction.

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At the times when the barley was said to have been pledged to Compafina, it was stored and intermixed with other barley not belonging to B.T.E.; and no identified barley had been separated from the larger amount and appropriated to B.T.E.; that is, the subject of the pledge was in fact an undifferentiated part of a larger amount of barley. Likewise what was delivered to the ship or was spilled or otherwise lost was barley taken from that larger amount of barley, the appropriation to B.T.E. or to any pledgee taking place when barley was separated for delivery to the ship. It is common ground that the effectiveness of the pledge and Compafina's right to sue depended upon a delivery of possession of the barley by Maynegrain to Compafina, that there was no actual delivery, and that if there was any delivery it was constructive.

(continued)

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The background of Compafina's claim that there was a constructive delivery of the barley to it is to be found in the financial arrangements which had been made by B.T.E. with Compafina in relation to the grain. Compafina had agreed with B.T.E. that it would from time to time lend to B.T.E. large sums of money upon the security, as Rogers, J. found, of a pledge of the barley held by Maynegrain for B.T.E., the delivery necessary to create the pledge to be effected by what may be described as an attornment by Maynegrain in respect of each of the amounts of barley delivered to it by or on behalf of B.T.E. The attornments were agreed to be in the form of documents addressed by Maynegrain to ANZ Banking Group Limited, Sydney (ANZ). It is not in issue that for all purposes relevant to the question I am now discussing, ANZ was the agent for Compafina, and that when it received the documents so addressed to it by Maynegrain, it was doing so on behalf of Compafina.

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The addressing of the attornment documents by Maynegrain to ANZ resulted from a direction contained in a telex sent to it by B.T.E. in these terms :-

"We have made arrangements through the ANZ Bank for loan monies coming in from a Bank through Geneva. The object of this is cheaper interest rates into Australia. What we simply do is send a warrant to the ANZ warranting that we have X amount of tonnes in stocks and we would like a drawdown X amount of dollars as pre-shipment finance. It is O.K. when these stocks are in our terminals here in the country but in the case of N.S.W. barley it comes direct to Pinkenba. You fill out the mins, forward them on to us and we in turn warrant the Bank by certificate that the stocks are there.

10

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As we are the borrowers, the A.N.Z. has asked could we get you to give us a warehouse receipt for the stocks. The following is the type of thing they are requesting. Could you please give this your very deep consideration as it is a very important thing for a small outfit like us.

'The Manager,
A.N.Z. Banking Group Limited,
4 Bligh Street,
SYDNEY 2000

30

Further to our warehouse receipt dated----- we further warrant that we have received an additional X metric tonnes of malting barley and X metric tonnes of feed barley, making the total held on your account X metric tonnes of malting barley and X metric tonnes of feed barley.'"

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Maynegrain assented to this arrangement, and after some initial difficulties provided documents substantially in the form requested by this telex. It did not send the documents directly to ANZ; it sent them to B.T.E. which in turn sent them to ANZ and thereupon drew further moneys which had been made available by Compafina. Maynegrain was at no time told

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10 that ANZ was an agent and not the principal in the matter, and Maynegrain did not otherwise know that ANZ was not a principal. It knew from the terms of the telex that the origin of the moneys lent to B.T.E. was a bank in Geneva, and it was established by oral evidence that Maynegrain appreciated that the documents addressed to ANZ were required in connection with the arrangements that B.T.E. had made for borrowings from Switzerland. However, this information and knowledge does not establish any disclosure to Maynegrain or knowledge on its part that ANZ was other than a principal in the transaction.

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20 It is in these circumstances that it has been submitted to this Court on behalf of Maynegrain that there was no effective delivery of the barley to Compafina, and hence no effective pledge of the goods to Compafina and no right in Compafina to sue Maynegrain for the conversion or detention of the barley.

30 The submission is that although the documents addressed by Maynegrain to ANZ could operate, and indeed did operate, as attornments to ANZ and hence as constructive deliveries to it of the barley, no attornment and no resulting estoppel could operate as, or establish, a delivery to the undisclosed principal of an agent where the existence of any agency was also undisclosed. Neither party has been able to cite any direct authority on this issue, and I have found none. Hence it must be decided by reference to principle. The general principles concerning the need for delivery of possession for the creation of a valid common law pledge, and the ways in which possession can be delivered were
40 authoritatively stated by the Privy Council in Official Assignee of Madras v. Mercantile Bank of India Limited (1935) A.C. 53 at pp.58-59 :-

50 "At the common law a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive. It involved a bailment. If the pledgor had the actual goods in his physical possession, he could effect the pledge by actual delivery; in other cases he could give possession by some symbolic act, such as handing over the key of the

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store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee, the change being perfected by the third party attorning to the pledgee, that is acknowledging that thereupon held for him; there was thus a change of possession and a constructive delivery: the goods in the hands of the third party became by this process in the possession constructively of the pledgee."

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Where such an attornment has been given, various estoppels result, and in particular the attornor is estopped from denying the right of the attornee to the possession of the goods. The relevance of the estoppels in litigious proceedings has been such that the estoppels have been sometimes treated as though they were part of the attornment itself. Thus in Laurie & Morewood v. Dudin & Sons (1926) 1 K.B.223 at pp.237-238, Scrutton L.J., having described various situations where orders are given to warehousemen holding goods as bailee, said :-

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"In each of those cases I think it ought to be found that the warehouseman had attorned. But I do not see how it is possible to get an attornment or recognition of the title for the person named in the order out of the mere fact that an order is brought by a messenger and given to a clerk, where nothing is done which is communicated to the other party. To raise an estoppel there must be something of which the party setting up the estoppel has notice, and which influences his conduct, but here the plaintiffs had no notice of anything at all."

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On the other hand in Simm v. Anglo-American Telegraph Company (1879) L.R. 5 Q.B.D. 188 at p.212, Brett, L.J., in discussing the decision of Blackburn, J., in Knights v. Wiffen (1870) L.R. 5 Q.B. 660, said:-

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"I confess it seems to me that in that case two well-known doctrines were mixed up, the doctrine of estoppel, and the doctrine of attornment by a warehouseman who has goods in his hands."

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10 I will return to this criticism of
the decision in Knights v. Wiffen later,
but I think that it is clear enough that
an attornment can have an existence quite
apart from the estoppels which may result
from it. This distinction is of relevance
in the case of pledges. What the pledgee
must show is that there has been a delivery
of the pledged goods to him. An attornment
may effect a constructive delivery
regardless of any estoppel. The estoppel
precluding the attornor from denying the
attorney's right to possession is a conse-
20 quential right protecting a pledgee, but not
one upon which, in ordinary cases, the
constructive delivery depends.

(continued)

30 In the present case there is a factor,
to be found also in a number of reported
decisions, which takes it out of the
ordinary type of case. The goods which it
is claimed have been constructively delivered
were not identified chattels, separate and
distinct from other chattels. The barley was
delivered to Maynegrain's depots and there
intermixed with other barley which it held
for other bailors as well as for B.T.E.
Having so received and stored the grain,
Maynegrain sent to B.T.E. an attornment document,
addressed to ANZ, in respect of a specified
quantity of barley which in fact had become
part of the larger quantity which it held.
When it is alleged to have converted the barley,
40 what it did was to take part of the barley
which it thus held on behalf of various bailors
and deliver it to the ship. Can a right of
possession be given by attornment in respect
of an unappropriated and unseparated part of a
larger amount of grain? As it seems to me, it
would not be possible to do so, but for the
operation of the doctrine of estoppel.

50 A person not in actual possession of grain
cannot have a right to possession to any particular
grain held by another unless that grain is
identifiable and has been appropriated to the
person not in actual possession. The person not

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in actual possession has no right to possession of the whole of the larger amount of grain, and unless there has been such an identification and appropriation, he could point to no particular grain in respect of which he has the right to possession. If it were not for the operation of the doctrine of estoppel, it would seem that there could be no effective attornment in such a case; or, put another way, that no attornment would pass the right to possession. However, it has been long established that where there is an attornment in such a case, the person having the actual possession of the grain is estopped from denying that he has made the necessary appropriation. Such a case was Knights v. Wiffen (supra) which was an action for trover in respect of a quantity of barley. The defendant who was a corn merchant had a large quantity of barley in stock, lying in his granary. He sold eighty quarters of this barley to one Maris, but no particular grain was appropriated to the purchaser. While the barley remained in the defendant's granary subject to the order of Maris, the latter sold sixty quarters of it to the plaintiff who paid him for them. There then occurred what was held to be an assent by the defendant to holding sixty quarters of the barley for the plaintiff. Subsequently the defendant refused to part with any barley, Maris having become bankrupt and the defendant not having been paid by him for the barley. 10 20 30

In his judgment in the Divisional Court, Blackburn, J., having described the defendant's acknowledgement that he held for the plaintiff sixty quarters of the barley sold to Maris, said at pp.664-5 :- 40

"The latter (the plaintiff) accordingly, when he did not get the goods, brought an action of trover against Wiffen saying, as it were, 'You said that you had the sixty quarters of barley, and that you would hold the goods for me. You cannot refuse to deliver to me; if you do refuse it will be a conversion.' And Wiffen now says, 'It is all true, but I do refuse to deliver the barley. 50
Granted that I previously said I would hold sixty quarters of barley for you, yet I had none to hold for you. I had no quarters belonging to Maris, for I

never severed them from the bulk, and I am entitled to hold the whole quantity as against Maris, until I am paid the full price.' No doubt the law is that until an appropriation from a bulk is made, so that the vendor has said what portion belongs to him and what portion belongs to the buyer, the goods remain in solido, and no property passes. But can Wiffen here be permitted to say, 'I never set aside any quarters',"

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Blackburn, J., went on to discuss the authorities and to hold that the defendant was estopped from denying that sixty quarters of the barley had been set aside for the plaintiff. In separate judgments, Mellor and Lush, JJ., agreed.

As I understand this and other decisions on the point, although there has been no actual appropriation of goods for the benefit of the person to whom an attornment is to be made, and were it not for estoppel no right to possession could be given by attornment or otherwise, the estoppel precludes the attornor from denying that there has been an appropriation. In such a case it would seem that the estoppel is a necessary part of an attornment; without the estoppel, the purported attornment would not operate in respect of any of the barley or other goods in respect of some part of which the attornment purports to operate. It is for this reason that it seems to me that the criticism of the decision in Knights v. Wiffen by Brett, L.J., in Simm v. Anglo-American Telegraph Company (supra) (a criticism not expressed by the other members of the Bench) was not justified. It is true that in Knights v. Wiffen the doctrines of estoppel and attornment were "mixed up"; but they had to be mixed up in order that there could be any effective attornment at all. There was however a difference of opinion between the members of the Court in Knights v. Wiffen as to the basis of the estoppel which arises in such a case. Blackburn and Lush, JJ., based it upon the alteration of his position by the plaintiff in reliance on the attornment in that he had abstained from taking steps which were open to him to protect his position. Mellor, J., on the other hand, based the estoppel upon the agreement of the parties to act upon an assumed state of facts and not upon the truth. He quoted a statement from Blackburn on Sale :-

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"This is a rule, which, within the limits applied by law, is of great equity; for when parties have agreed to act upon an assumed state of facts, their rights between themselves are justly made to depend on the conventional state of facts and not on the truth. The reason of the rule ceases at once when a stranger to the arrangement seeks to avail himself of the statements which were not made as a basis for him to act upon. They are for a stranger evidence against the party making the statement, but no more than evidence which may be rebutted; between the parties they form an estoppel in law." 10

This view of the basis of estoppel in attornment cases is the same as that acknowledged by Starke, J., in Partridge v. McIntosh & Sons Limited (1933) 49 C.L.R. 453 at p.462, as being the basis of estoppel where a person attorns tenant of land. His Honour quoted this passage from Cababe Principles of Estoppel (1888) p.22 :- 20

"The foundation of the doctrine being that the parties must be deemed to have dealt with one another, on the basis of their rights being regulated by a conventional state of facts, it makes no difference, supposing the actual state of facts to differ from the conventional, that an admission of the former should have been made, or even that they should appear in a deed of demise; the true inference being that the parties desired their legal position to be regulated by the conventional state of facts, notwithstanding that the actual facts were different." 30 40

This position is different from the ordinary case of an estoppel by representation, for it does not seem to depend upon the person setting up the estoppel not having known what the true facts were, or upon his having been misled into altering his position. In many cases, of course, an attornee may have acted to his prejudice as a result of an attornment, and if in the present case there was an attornment to Compafina, then Compafina could point to the advances which it made to B.T.E. as acts to its prejudice made 50

upon the faith of the attornments.

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10 Before dealing with the application of
the doctrines of attornment and estoppel
to a situation where there is an undisclosed
agency, I should refer to a view that has
been expressed as to the way in which a
constructive delivery is effected by an
attornment. In Dublin City Distillery
Limited v. Doherty (1914) A.C. 823 at p.852,
10 Lord Parker, in speaking of common law
pledges and of the need for the delivery of
possession to the pledgee, said :-

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20 "When the goods in question are in the
actual possession of the pledger,
possession of them is, as a rule given
to the pledgee by actual delivery of
the goods themselves. There are,
however, cases in which possession may
pass to the pledgee without actual
delivery, for example, whenever there
is some agreement between the parties
the effect of which is to change the
possession of the pledger from a
possession on his own account as owner
into a possession of bailee for the
pledgee: see Meyerstein v. Barber
L.R. 2 C.P. 38. Such an agreement
operates as a delivery of the goods to
the pledgee and a redelivery of the
30 goods by the pledgee to the pledger as
bailee for the purposes mentioned in
the agreement."

40 With respect to His Lordship, perhaps
a more correct statement of the position is
to be found in Morton v. Woods (1868) L.R.
3 Q.B. 658; (1869) L.R. 4 Q.B. 293. This case
was concerned with the effect of an attornment
clause in a second mortgage of land, but for
relevant purposes the effect of an attornment
in respect of chattels would be the same. In
referring to this decision with approval in
Partridge v. McIntosh & Sons Limited (supra)
at p.467, Dixon, J., said :-

"In Morton v. Woods where a second mortgage,
that is a mortgage of an equity of redemption,
contained an attornment clause, the Court
treated the matter as if the mortgagee having
obtained possession of the premises then let
the mortgagor into possession as his tenant
with the result that a reversion by estoppel

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arose. 'The mortgagor did not go out and receive possession from the mortgagees, but that formal ceremony was not necessary, because he attorned to the "mortgagees" and he must therefore be in the same position as if he had gone out and come in again' (per Lush, J., (1868) L.R. 3 Q.B. at pages 671, 672)."

As it seems to me, an attornment in respect of an undifferentiated portion of a larger quantity of goods does not operate as a delivery of some severed portion of the goods to the attornee and a redelivery of that portion to the attornor; it operates as if such a delivery and redelivery had been effected, the attornor being estopped from denying the necessary severance and appropriation by virtue of the attornment itself, and no doubt in many cases also because the attornee has acted to his prejudice on the basis of the attornment. It is, however, irrelevant that the attornee knows that in fact no severance or appropriation has taken place.

It is necessary now to consider the application of these principles to a situation where a person has attorned to another as the apparent principal in the transaction, and a third person claims to be entitled to a right to possession by virtue of that attornment because he was in truth the principal of the apparent attornee, the fact that the latter was merely an agent not having been disclosed to the attornor. Commonly it is no answer to an action for a tort that the defendant did not know that the plaintiff was the principal of the person whose rights he believed he was infringing. Thus, if in the present case Compafina had the right to possession of the barley, it would be no answer for Maynegrain to say that it had believed that ANZ had that right and did not know of Compafina's interest in the barley. However, the question for decision is different; the question is not whether Compafina, having the right to possession, can sue, but whether Compafina had the right to possession.

In the absence of reported decisions on the matter, it is appropriate to consider the analogous position which has long been established in the general law of contract.

10 With some exceptions which it is not relevant to consider, a person may sue or be sued upon a contract although the other party to the contract did not know that the person with whom he was contracting was acting as an agent, if in fact that person was acting as agent for an undisclosed principal, unless the terms of the contract are inconsistent with the known person being an agent. Either principal or agent may sue or be sued, although the "general rule is that the right of the principal prevails over that of his agent" and the "right of the agent to enforce the contract is destroyed by the intervention of the principal in the exercise of his own right": Salmond & Williams on Contracts, 2nd Ed., 423. The rights and obligations of principal and agent are not joint, but, subject to the superior right of the principal, alternative. There are various subsidiary rules, but it is not necessary to discuss them save to say that an earlier limitation on the right of a foreigner to come in as an undisclosed principal is now rejected: Teheran-Europe Co.Limited v. S.T. Belton (Tractors) Limited (1968) 2 Q.B.545.

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30 This position of the undisclosed principal arises only where the agent was in truth his agent at the time of the transaction; a person claiming as principal cannot purport to ratify as the act of his agent a transaction entered into without his authority by one who purports at the time to be a principal, and does not disclose that he is an agent: Keighley, Maxsted & Co. v. Durant (1901) A.C. 240. There are to be distinguished from these cases transactions where it is known to a party that the other party is an agent, although he does not know the identity of the principal. There are no problems in these cases in the principal suing or being sued upon the contract or being entitled to ratify. Indeed the agent is not a party to the contract at all.

50 Translating the analogy of these principles in the law of contract to attornment, I would have no doubt that an attornment to a person who is known to be and is acting as an agent, within his authority, will operate as an attornment to his principal, even though the identity of that principal is not known. I would likewise have no doubt that the same principle would apply in respect of estoppel whether by agreement to act

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upon an assumed state of facts or by representation, because the agreement or the representation would be intended to be acted upon, personally or vicariously, by the principal. However, these cases do not involve the difficulty of treating the one attornment as effecting a constructive delivery of possession to a person believed to be a principal but who is an agent as well as a constructive delivery of possession to the undisclosed principal. There are several problems in the extension of the relevant principles of delivery and of estoppel to such a situation. Relating these problems to the facts of the present case, it would have to be possible for two concurrent, alternative rights to possession to arise out of the one transaction and indeed out of the one piece of paper, addressed to one only of the parties. Furthermore, applying the analysis which I earlier made, it would have to be possible for deemed possession to be ascribed to two persons at the same time. The attornment of Maynegrain would have to be given an operation as though Maynegrain had delivered the goods concurrently both to ANZ and Compafina, and each had redelivered the goods to it, although the existence of any second person such as Compafina was unknown to Maynegrain as a person to whom Maynegrain was attorning. These problems, which would apply generally to attornments in cases involving undisclosed principals, are exacerbated in the present case because of the need for an estoppel to establish a notional severance and appropriation of part of the barley held by Maynegrain. Contemporaneous estoppels would be required to arise in respect of the same subject-matter and out of the same acts in favour of different people, namely, ANZ and Compafina.

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Considerations of these kinds undoubtedly create theoretical and logical difficulties in the application of what I will call the undisclosed principal doctrine to the constructive delivery of goods. There are, however, other considerations which, although not based on logic, nonetheless suggest that the law is flexible enough to accommodate itself to these difficulties. The principles of attornment and of estoppel have been applied from time to time with considerable flexibility. An example can be seen in the principles which have been developed

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concerning the effect of attornment clauses in successive mortgages of land. Commonly a voluntary attornment by a tenant to a new landlord will operate as a disclaimer of his first landlord's title, and thus terminate the tenancy with that landlord. However, this is not always the position, and in particular where there are attornment clauses in successive mortgages, there will exist concurrent tenancies and rights to possession, protected by estoppels, in favour of different persons in respect of the same land: Partridge v. McIntosh & Sons Limited (supra) at pp.462-463, 466-468. I have found no decision on the point, but I can see no reason why a similar position should not result where there are successive bills of sale of chattels, the mortgagor attorning in each bill of sale. This flexibility has developed for many reasons, but undoubtedly one reason has been to adapt the law to the requirements of the ways in which various kinds of business are carried on.

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There is however another consideration which persuades me that the law is sufficiently flexible to support Compafina's claim. The constructive delivery alleged in the present case happens to have been associated with a purported pledge of the barley. Much of the law in relation to constructive delivery seems to have evolved in connection with the sale of goods. Indeed, in the classical work on possession, Pollock, *Possession in the Common Law*, constructive delivery of possession is dealt with in the context of the sale of goods: see pp.72-75. Undoubtedly in such a transaction possession can be constructively delivered to the buyer by the attornment to the buyer by a bailee holding the goods. It is equally undoubted the undisclosed principal doctrine applies to contracts for the sale of goods, and indeed it would seem that it was in connection with those contracts that the doctrine was developed. It was applied by the High Court to such a contract in Mooney v. Williams (1905) 3 C.L.R. 1. In giving the judgment of the Court, Griffith, C.J., said, at p.8 :-

"Under those circumstances the contract was one made by an agent acting for an undisclosed principal. This is a very ordinary practice, and the rule to be applied in such cases is perfectly well

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known and settled, that the principal may come in and claim the benefit of the contract subject to any rights that the third party may have as against the agent."

Teheran-Europe Co.Limited v. S.T.Belton (Tractors) Limited (supra) is a more recent example of such a case where goods were bought by an English company, apparently acting as principal, but in fact as agent for an Iranian company. It was in this case that Lord Denning said, at p.552 :-

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"It is a well-established rule of English law that an undisclosed principal can sue and be sued upon a contract, even though his name and even his existence is undisclosed, save in those cases when the terms of the contract expressly or impliedly confine it to the parties to it. This rule is an anomaly, but is justified by business convenience."

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My search has not been exhaustive, but I have not been able to find any case concerning the sale of goods to an undisclosed principal which involved a constructive delivery of possession, but it would surely be an anomalous exception to an anomalous principle if a contract for the sale of goods to an undisclosed principal could not be effected where the goods were held by a bailee in a warehouse, without a disclosure of the existence of the principal.

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The logical difficulties of the undisclosed principal doctrine have long been recognised and have been much discussed, and some of that discussion has been concerned with problems analogous to those raised in the present case. In a "Critique of the Doctrine", Stoljar, *The Law of Agency*, pp.228 and following, refers to a challenge to the doctrine by Ames in a lecture entitled "Undisclosed Principal, Rights and Liabilities" (1909) 18 *Yale Law Journal* 443. Stoljar described the challenge in these terms :-

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"Where, he (Ames) argued, T sells goods on credit to A, who without T's knowledge is buying for an undisclosed principal (P), the title to the goods must pass from T to A since A is the

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"sole buyer in this sale, and which excludes a concomitant sale from T to P. But since A gets title, he can only hold the goods as trustee for P. Hence to allow T. to sue P for the price of the goods is to maintain what cannot be maintained, namely, that a cestui que trust may be sued at law upon a contract between the trustee and a third party vendor."

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Stoljar goes on to reject Ames' contention, describing it as "at best a formal or jurisdictional argument rather than a substantive one". More importantly, it is not in accordance with the principles that have been developed, anomalous though they may be. Stoljar develops his own theory of the doctrine, but his theory, although attractive, is but another attempt to try to rationalise the anomaly. The position is that the principles have been developed to enable contracts for the sale of goods to be made in favour of undisclosed principals, and undisclosed principals to obtain the title to goods, although concurrent rights may be given at the same time to the known party who in fact was acting as agent.

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The logical difficulties so discussed are analogous to those which arise in the present case. Despite the absence of direct authority, I think that the undisclosed principal doctrine applies to contracts for the sale of goods and can operate to vest the title to goods in an undisclosed principal, even though the goods are at all relevant times held by a bailee who attorns to the agent of the undisclosed principal. The flexibility which the doctrines of attornment and estoppel have shown in other difficult situations would enable any necessary constructive delivery (including, if relevant, any severance) to be treated as having taken place so as to give a title to the goods to the undisclosed principal. In the present case, the only contract was one of pledge between B.T.E. and Compafina. This contract did not involve any principal not disclosed to another party. However there was a non-disclosure of the existence of any principal to Maynegrain when it attorned in respect of the barley it had received on account of B.T.E. If the doctrines of attornment and estoppel can be applied to effect a constructive delivery to the undisclosed

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principal of an attorney, the non-disclosure that ANZ was an agent, and was acting for Compafina, would not prevent Compafina from obtaining a right to possession to the barley. On the basis of my conclusion in respect of the analogous position under contracts for the sale of goods, the doctrines can be so applied. Accordingly, unless the terms of the attornment or of the arrangements for the making of that attornment require ANZ to be treated as the only attorney, there is, in my opinion, no reason why the attornment and associated estoppels should not operate in favour of Compafina as well as ANZ. Compafina, being the principal, had a superior right to ANZ, and intervened to enforce its rights as soon as it learnt what had happened to the barley. It has been submitted for Maynegrain that the terms of the telex requesting Maynegrain to attorn to ANZ, and the terms of the attornments themselves, are inconsistent with ANZ being other than the principal in the transaction. It is sufficient to say that I do not think this submission can be sustained. Accordingly Maynegrain's challenge to Compafina's title is not made out, and Compafina was entitled to sue for the conversion and detention of the barley.

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I have had the advantage of reading the judgment of Hutley, J.A., in which he has dealt with the other issues raised in the appeal. I agree with those reasons, and with the orders he proposes.

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IN THE SUPREME COURT)
OF NEW SOUTH WALES) No.C.A. 116 of 1981
COURT OF APPEAL) C.L. 13520 of 1978

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CORAM: HOPE, J.A.
HUTLEY, J.A.
MAHONEY, J.A.

THURSDAY, 17TH JUNE, 1982

MAYNEGRAIN PTY. LTD. v. COMPAFINA BANK

J U D G M E N T

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HUTLEY, J.A.: This is an appeal from a judgment of Rogers, J., in the Commercial Causes List given on 17th March, 1981, in the sum of \$1,644,377 in favour of the Bank. A judgment in an identical amount was given against another company, Bulk Terminals & Exporters Pty. Ltd. (hereinafter referred to as "BTE") and the appellant was ordered to be indemnified by BTE in respect of the verdict. Though the facts are complex, for the purpose of this appeal, they can be summarised fairly shortly.

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The respondent bank is a Swiss Bank with headquarters at Geneva. BTE is an Australian company under the control of a Mr. Jamieson. BTE came to an arrangement with the respondent under which the respondent was to finance the purchase of barley bought for export to the extent of 80% of the purchase price; the barley to be put in silos under the control of the appellant, which was to issue warehouse receipts acknowledging its receipt. The Bank employed ANZ in Australia as its Agent. The directions as to warehouse receipts to Maynegrain Pty.Ltd. were given by BTE and the acknowledgment was directed to the ANZ Bank. The appellant did not know of the existence of the respondent and except that it knew that the purchase was being financed at least in part by money raised outside Australia, it had no reason to suspect that the ANZ Bank was not the principal.

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BTE was anxious to export the barley, amounting to approximately 25,000 tonnes, to Kuwait, but the

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Kuwaiti buyer wanted the barley in bags. Mr. Jamieson, acting on behalf of BTE, sought to persuade the respondent to concur in this arrangement, but in the end it declined to authorise the export of the barley under conditions laid down by the purchasers in Kuwait.

BTE directed the appellant to load the barley on a vessel for shipment to Kuwait. Without obtaining any direct authority from the ANZ Bank, it did. Only after the vessel had left Brisbane did the respondent learn what had happened. It, before arrival in Kuwait, obtained an assignment of the bill of lading and in Kuwait the cargo was unloaded and bagged and those parts which were not damaged delivered in satisfaction of the order which had been obtained by BTE. This involved the respondent in expenses which will be detailed below, the result of which was that the net proceeds of sale were not sufficient to discharge the loans and interest. The respondent sued the appellant in conversion detinue and negligence and verdict was entered for the sum set out above. The appellant challenged the following items allowed by His Honour; the disallowance of any of these items would affect the provision for interest:

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- (i) \$600,000 remitted to ANZ Bank
- (ii) \$399,000 obtained by the Gulf Bank 30
- (iii) \$ 61,000 obtained by Sheikh Hamad
- (iv) \$284,563 loss and damage to barley in Kuwait
- (v) \$ 7,500 shortfall in receipts from rain-damaged barley

\$1,342,063

The appellant's numerous challenges to the judgment fall under the following heads:

- (1) It challenges the respondent's right to sue on the basis that an undisclosed principal cannot sue for conversion, detinue or negligence; 40
- (2) It says that though the ANZ Bank did not give express consent to the loading, it gave implied consent;
- (3) It submits that the fundamental basis upon which the trial Judge assessed

damages, namely, that the respondent was entitled to have damages assessed on the basis of the whole value of the barley converted and not in respect of its own interests alone is wrong and it seeks to distinguish this case from the general principle stated in The Winkfield (1902) P.42;

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- 10 (4) It challenges the way in which the trial Judge valued the barley and also a number of items of expenditure involved in the realisation of the barley.

(continued)

The respondent has cross-appealed challenging, in particular, the way in which interest was allowed and the disallowance of a sum of \$40,000 paid by the Commercial Bank of Kuwait to the Thai boatmen. It also seeks to uphold the judgment on the basis of negligence.

- 20 The final acknowledgment of the holding of barley was on the following terms:

"The Manager,
A.N.Z. Banking Group Limited,
4 Bligh Street,
SYDNEY...N.S.W...2000

Bulk Terminals & Exporters Pty.Ltd.
Barley Stocks

"Dear Sir,

- 30 "Further to our warehouse receipt dated 21st March, 1977, we further warrant that we have received an additional 39.83 Metric Tonnes of Feed Barley, making the total held on your account 2523.48 Metric Tonnes of Feed Barley and 25510.98 Metric Tonnes of Malting Barley. "

- 40 As between BTE and the respondent, the ANZ were disclosed agents. Moreover, the whole purpose of the transaction was to give the latter security by way of pledge for its advances. If the agreement did not work because there could not be a pledge in favour of an undisclosed principal there could be no pledge, as between the pledgor and pledgee, there was no agreement by which the Bank became pledgee.

This was not a case in which it has been shown that there was anything specifically important

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in the person of the pledgee to the appellant. I can see no reason why the special property was not vested in the respondent by virtue of the attornment. If it were, there is no reason why the true owner could not sue. Knowledge of the actual owner is irrelevant in conversion (Salmond on Torts, 16th Ed. p.97) or in negligence. No authority for the submission was quoted, so the Court has a free hand. I see no reason in the restriction on the general principle governing undisclosed agents propounded. The point was not taken at the trial. If it had been, it could have been cured by joining the Bank as a co-plaintiff, and if it refused to join, as a defendant. The objection being curable should not be allowed to be raised at this stage to defeat the whole proceedings.

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The appellant submitted that it had the consent to the loading of the barley and it is not disputed that if it had such consent the appeal should be allowed. It relies upon the fact that the ANZ Bank knew of the sale for delivery in Kuwait before the scheduled date for loading and did nothing to stop it. Consent imports some positive act, not mere passivity; though consent may be inferred (Booton v. Clayton 48 S.R. (N.S.W.) 336 at 339) there is no basis for inferring consent. In my opinion, there was no consent, indeed, no evidence of consent.

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The substantial issue in the case is whether the trial Judge was carried in assessing damages by giving to the respondent the whole value of the converted barley, despite the fact that the respondent had merely a special property in the barley as pledgee. The respondent contended that the Court was absolutely bound by authority to affirm the judgment appealed from on this point. Rogers, J. said :

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"Although the interest of the plaintiff in the barley was limited, the authorities speak with but one voice to the effect that the measure of damages in such a case is the value of the goods at the date of conversion. (See McGregor on Damages, 13th Edition, par.1012; The Winkfield 1902 P.42)."

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The authorities do not, however, speak with complete uniformity. Thus, McGregor,

13th Ed. s.1017 says:

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"Where a bailor retakes goods from his bailee, the bailee can recover only to the extent of his limited interest. Generally the bailee's limited interest will arise from his holding the goods as security for a debt owed to him by the owner bailor; this is the position in the case of pledge."

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And in cases involving the conversion of cars subject to hire-purchase agreements, the owner has been allowed to recover only his interest. Thus, in Wickham Holdings Ltd. v. Brooke House Motors Ltd. (1967) 1 W.L.R. 295, Denning, M.R., said at 299 :

"The hirer of a motor car, who has got it on hire-purchase, wrongfully sells it to someone else. The hiring is thereupon automatically determined. The finance company claims the return of the car and damages for detention or, alternatively, damages for conversion. In such a case the finance company in my opinion is not entitled to the full value of the car. The finance company is only entitled to what it has lost by the wrongful act of the defendants. I am well aware, of course, that prima facie in conversion the measure of damages is the value of the goods at the date of the conversion. But that does not apply where the plaintiff, immediately prior to the conversion, has only a limited interest in the goods..."

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followed by the Court of Appeal in Belvoir Finance Co. v. Stapleton (1971) 1 Q.B. 210.

The same conclusion was reached by Owen McClemens and Maguire, JJ., in Pacific Acceptance Corporation Ltd. v. Mirror Motors Pty. Ltd. 77 W.N. 666, where Owen, J. said at 666:

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"It was common ground before us that prima facie, the measure of damages in the case of the conversion of goods is the value of the property converted at the date of conversion. It is clear, however, that where the person who commits the conversion has as between himself and the plaintiff an interest in the property

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converted, the plaintiff is not entitled to recover the full value of that property but only the value of his interest in it. This is merely an application of the rule that damages are intended to place the plaintiff in the same financial position as he would have been had the tort not been committed."

Though this is not a case involving hire-purchase 10 agreements, the principle in those cases, in my opinion, must apply to the special circumstances of this case; the co-defendant BTE was the owner of the goods subject to the pledge and at the time of shipment had an interest in it. Any interest which the appellant had beyond its rights arising under the pledge, the extent of which I will set out later, in the proceeds of judgment it holds for B.T.E. which has to indemnify the appellant 20 to the full extent of the judgment. There is a circuity of claims, a circuity which may operate most unjustly to the appellant in that if it satisfies the judgment in full, the surplus beyond the amount to which the respondent is entitled because of its interests as pledgee, will simply pass into the coffers of BTE, there to be shared among its creditors, including the appellant. Though a bailee can recover the full value of the property converted, 30 it was not suggested that it can retain the whole of the damages recovered for itself.

In this Court, the authority of The Winkfield insofar as it purported to lay down a universal rule for assessment of damages in conversion cannot stand because of the decision of the High Court in Butler v. Egg and Egg Pulp Marketing Board 114 C.L.R. 185. Taylor and Owen, JJ., said at p.191 :

"That principle (i.e., the principle upon which compensatory damages are assessed) is that the injured party should receive compensation in a sum which, so far as money can do so, will put him in the same position as he would have been in if the contract had been performed or the tort had not been committed: Livingstone v. Rawyards Coal Co., (1880) 5 App.Cas.25 at p.39. And this principle is as much applicable to 40 actions of conversion as it is to the case of other actionable wrongs. In most cases of conversion it is, of course, 50

obvious that its application will result in the injured plaintiff recovering the full value of the property converted since that will usually represent the loss that he has sustained by the defendant's wrongful act. Hence the statement which appears so often in the books that the general rule is that the plaintiff in an action of conversion is entitled to recover the full value of the goods converted, but this statement should not be allowed to obscure the basic principle that damages are awarded by way of compensation."

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His Honour
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17th June
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(continued)

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And Menzies, J., said at p.192:

"There is no hard and fast rule that the value of the goods at the time of a conversion is always the measure of the damages to be assessed for the conversion. Often the application of such a rule would produce an obviously unjust result - for example, if goods, converted by a defendant had since been recovered by the plaintiff - owner."

The latter passage is directly in point, as by the assignment to it of the bill of lading the respondent did get the goods which had been converted back.

The conversion did not terminate the bailment. Story on Bailments 7th Ed. s.299 says :

".....if the pledgor recover possession of the pledge wrongfully without the consent of the pledgee this does not terminate the bailment."

When the barley was loaded on the ship it was improperly regained by the pledgor, but when the bill of lading was transferred to the pledgee, it regained it security, albeit damaged, but still only as a security. When it had regained control of the pledge it had the theoretical right to repudiate the pledgor's contract of sale and arrange its own sale, but this was entirely theoretical. The barley was en route to Kuwait and the appellant does not suggest that there was any other market or that any other more advantageous contract could have been negotiated in Kuwait. In these circumstances,

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the adoption of the contract for sale was a proper mitigation of damages. It was not a discharge of liability for the conversion.

A pledge is enforced by sale and this right to sell is inherent in a pledge (Fisher & Lightwood's Law of Mortgage, 7th Ed. p.110). It adopted a system in the ultimate performance of the contracts which BTE had arranged for the sale of the barley, obtaining the proceeds for itself. This sale became its sale. The damages, therefore, have ultimately to be assessed having regard to this fact. In my opinion, the situation under which the pledgee, in effect, exercises its power of sale and appropriates to itself the proceeds of the realisation of the pledge, insofar as it was possible to do so in the light of the wrong doing of the appellant and BTE, makes the rule that the damages are the full value of the goods converted a quite inappropriate measure of damages. The respondent is entitled to be put back in the position that it would have been in if there had been no conversion of its pledge by the appellant. If this is the correct approach, the measure of damages to be found in the difference between the amount of the debt secured together with a full allowance for all the expenses and trouble to which the respondent was put in consequence of the conversion, and the sum actually received from the realisation of the barley. 10 20 30

The debt secured by the pledge includes interest on the amount outstanding from time to time, and this sum should be added to the sum secured for the purpose of this calculation. It is possible that there should be added to this any sum which ought to have been received, if it were not for the wilful neglect and default of the pledgee, assimilating the assessment of damages to the taking of an account between pledgor and pledgee; or, in the alternative, any sum which it would have received had it done what was reasonably required in mitigation. 40

In my opinion, it is not necessary to consider in this case the difficult question which would arise if the value of the pledge became quite apart from any act of conversion less than the secured sum. In this case, the grain was sold in Kuwait in a bagged state for \$3,840,000. As the pledgee would have been 50

entitled to enforce its pledge by sale
and faced with a dilemma in which it was
placed by the act of conversion, in fact,
adopted this sale, in my opinion, this
figure represents the value of the pledged
property. If this sum had been received,
there would have been no shortfall and the
pledgee would have been repaid in full.
In fact, however, the pledgee did not receive
10 this amount and in order to obtain control
of the letter of credit, it had to suffer
various deductions from the fund. Thus, the
ANZ Bank received \$600,000, the Gulf Bank
\$399,000 and Sheikh Hamad \$61,000. The
sum of \$399,000 from the letter of credit
was a fee demanded by the Gulf Bank for the
extension of the letter of credit. This arose
from the delays in bagging grain in Kuwait
so that the cargo had not been completely
20 delivered at the time for the expiry of the
letter of credit.

(continued)

The appellant submits that the allowance
of these deductions is too remote. The
approach, in my opinion, fails to have regard
to the true legal position. The sums were not,
in fact, received by the respondent and do
not enter into the computations of the assess-
ment of damages unless it can be said that
these sums should have been received by it on
30 either of the bases set out above.

The duty to mitigate damages does not
require the plaintiff to risk the expenditure
of money too far (McGregor on Damages 13th Ed.
s.228). The trial Judge considered it was
not reasonable for the respondent to be subjected
to the risks of litigation in Kuwait and so do
I. If the correct approach is that he can only
be credited with what he did not actually
40 receive, if his failure to receive it was due
to his wilful neglect and default, it is a
fortiori case. The sum of \$600,000 apparently
wrongly paid to the ANZ Bank by the Commercial
Bank of Kuwait should not be treated as received
by the respondent.

The moneys received by Sheikh Hamad and
the Gulf Bank were not received by the respondent
and on what basis it could be suggested by a
wrongdoer that the respondent ought have received
them escapes me.

50 The trial Judge disallowed a further sum of
\$40,000 paid to the Thai boatmen and this is the

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(continued)

subject of the cross-appeal. He dealt with it as part of a general plea in mitigation. He said:

"So far as the \$40,000 paid to the Thai boatmen are concerned, I am not satisfied that the plaintiff has satisfactorily explained the reason for that payment, and I think that that is an amount which should go to the credit of Maynegrain and in relief of its liability."

10

It was in no way suggested that this figure of \$40,000 was not paid to the boatmen who appear to have been responsible for lightering the barley from the ship to the wharf. The circumstances are set out in the evidence of Mr. Ferrasse, an officer of the respondent, who gave the following evidence:

"MR. CAMPBELL: Q. What was it that did influence you to accept the transfer to \$3.3 million? A. Because unfortunately we had nothing else to do. I asked the maximum I could ask for Sheik Hamad and his maximum was the amount just to cover the indebtedness of the defendant in respect of the barley.

20

"Q. At the time that you agreed to the letter of credit being transferred for \$3.3 million, it seemed to you that that ought to be just sufficient to cover the liability to the bank?
A. Just sufficient, yes.

30

"Q. The amount that the Commercial Bank of Kuwait failed to remit to you under the letter of credit, and which you claimed to be entitled to receive is some \$480,000, is it not? A. They should have remitted, yes, this amount.

"Q. And at one stage you agreed to an amount of \$40,000 being paid from the proceeds of the sale of grain for certain wages of boat crews, did you not? A. I have a vague recollection of that, but if you can show me some documents I will tell you exactly.

40

"Q. There was a problem was there not, about the crew of a ship that Amerapco had in Kuwait not having received their wages; do you recall that? A. Yes. I think, yes.

50

"Q. If I could show you this document?
A. Yes.

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"Q. On 11th February, 1978, you had a conversation with an officer of the Commercial Bank of Kuwait, did you not?
A. I can't say. I had discussions with people in the Commercial Bank of Kuwait, but I can't say at that date.

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17th June 1982

10 "Q. And you authorised the Commercial Bank of Kuwait to release \$40,000 from the moneys due to come to you to pay the wages of the Thai boat crew, did you not?
A. From the proceeds of the sale of the damaged barley, that is right."

(continued)

20 There was no evidence to the contrary. This was money laid out in payment to workmen necessarily employed in order to complete the deal. It is, in my opinion, clearly money which this pledgee was entitled to add to the sums secured by the pledge as a necessary incident of the realisation of the pledge by sale. The only difficulty which occurs to me is, whether or not this sum has been already deducted. It was a sum authorised to be paid out of the proceeds of the damaged barley. The evidence shows that a sum of \$67,509 was received for damaged barley but it is not clear to me whether this was the sum received after the deduction of \$40,000.

30 It is further necessary, in my opinion, that interest should be differently calculated. The rights of the pledgee as a lender continue until that loan is discharged, in this case, when judgment for damages are entered. Therefore, interest on the outstanding amounts due from time to time under the loan agreement continues to accrue and is secured on the pledge. As the amount secured, including interest, exceeded the actual receipts from the realisation of the
40 pledge interest on the balance at the rate provided for in the pledge agreement should continue up to the time of entering judgment.

For reasons explained above, it is not necessary to consider what the position would have been if the pledged property, unconverted, had not been adequate security for the loan, as there is evidence which shows that it would.

It is not possible on the evidence given to work out the correct measure of damages. If

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17th June
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(continued)

the parties cannot agree on a figure, the proceedings should be remitted to the Common Law Division (Commercial List) for the assessment of damages.

The appellant should have the costs of the appeal; the respondent the costs of the cross-appeal, costs to be set off.

The respondent has succeeded on the question of liability; the appellant on the measure of damages. This, in my opinion, must affect the orders for costs made below which should be varied.

10

In addition to the costs of the appeal and of the cross-appeal, which I have already dealt with, I would suggest that the following formal order should be made:

The appeal should be allowed and the orders below set aside and the following orders made :

- (1) The first defendant pay the plaintiff \$1,664,377 which sum includes an amount of \$490,157 in respect of interest; 20
- (2) It be declared that the second defendant should pay to the plaintiff by way of damages the difference between the amount due to it by the first defendant, as pledgee, of the barley and the sum received by it on the sale of the barley and that it be referred to the Common Law Division (Commercial List) to determine this balance; 30
- (3) The first defendant pay the plaintiff's costs of the action; the second defendant should pay the plaintiff's costs of the proceedings at first instance insofar as they relate to the establishment of its liability for conversion and the plaintiff should pay the second defendant's costs of the proceedings insofar as they relate to the assessment of damages, costs to be set off; 40
- (4) The cross-defendant pay to the cross-claimant the sum which the second defendant is ordered to pay the plaintiff;
- (5) The cross-defendant pay the cross-claimant's costs and the costs which the cross-claimant has been ordered to pay to the plaintiff.

No. 12 (iii)

In the Court
of Appeal

REASONS FOR JUDGMENT OF
HIS HONOUR MR. JUSTICE
MAHONEY

No.12(iii)
Reasons for
Judgment of
His Honour
Mr. Justice
Mahoney
17th June 1982

IN THE SUPREME COURT) C.A. 116 of 1981
OF NEW SOUTH WALES) C.L. 13520 of 1978
COURT OF APPEAL)

10

CORAM: HOPE, J.A.
HUTLEY, J.A.
MAHONEY, J.A.

Thursday, 17th June, 1982

MAYNEGRAIN PTY. LIMITED v. COMPAFINA BANK

J U D G M E N T

MAHONEY, J.A.: I agree with the orders proposed.

No. 13

MINUTE OF ORDER -
REPRODUCED AS ITEM 8

No.13
Minute of
Order -
Reproduced
as Item 8

IN THE SUPREME COURT OF NEW SOUTH WALES

20

COURT OF APPEAL C.A. 116 of 1981
C.L. 13520 of 1978

MAYNEGRAIN PTY. LTD. Appellant

- and -

COMPAFINA BANK Respondent

IN THE COURT BELOW:

COMPAFINA BANK Plaintiff

- and -

BULK TERMINALS & First
EXPORTERS PTY.LTD. Defendant

- and -

30

MAYNEGRAIN PTY.LTD. Second
Defendant

No.13
Minute of
Order -
Reproduced
as Item 8

(continued)

THE COURT ORDERS that :

1. The appeal be allowed with costs;
2. The cross appeal be allowed with costs;
3. The costs with respect to orders 1 and 2 above be set off.

IN LIEU of the orders made by His Honour Mr. Justice Rogers on 17 March 1981 there be substituted the following orders :

4. The first defendant pay the plaintiff \$1,664,377 which sum includes an amount of \$490,157 in respect of interest; 10
5. It be declared that the second defendant should pay to the plaintiff by way of damages the difference between the amount due to it by the first defendant, as pledgee, of the barley and the sum received by it on the sale of the barley and that judgment be entered for the plaintiff in the sum of \$1,067,350; 20
6. The first defendant pay the plaintiff's costs of the action; the second defendant should pay the plaintiff's costs of the proceedings at first instance insofar as they relate to the establishment of its liability for conversion and the plaintiff should pay the second defendant's costs of the proceedings insofar as they relate to the assessment of damages, costs to be set off; 30
7. The cross-defendant pay to the cross-claimant the sum which the second defendant is ordered to pay the plaintiff;
8. The cross-defendant pay the cross-claimant's costs and the costs which the cross-claimant has been ordered to pay to the plaintiff;
9. Orders 4 to 8 inclusive to take effect from 17 March 1981.

THE COURT NOTES that the amount referred to in Order 5 represents \$US684,736 principal and the balance interest. 40

Ordered 17 June 1982 and 19 July 1982 and entered 19 July 1982.

In the Court of Appeal

By the Court

Sd: (Illegible)
Registrar

No.13
Minute of Order -
Reproduced as Item 8

(continued)

No. 14

ORDER GRANTING FINAL
LEAVE TO APPEAL TO HER
MAJESTY IN COUNCIL

In the Court of Appeal

No.14
Order granting Final Leave to appeal to Her Majesty in Council
8th November 1982

10 IN THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL C.A. 116 of 1981
C.L. 13520 of 1978

MAYNEGRAIN PTY. LIMITED Appellant

- and -

COMPAFINA BANK Respondent

IN THE COURT BELOW:

COMPAFINA BANK Plaintiff

- and -

20 BULK TERMINALS & EXPORTERS PTY. LIMITED First Defendant

- and -

MAYNEGRAIN PTY. LIMITED Second Defendant

O R D E R

THE COURT ORDERS that :-

1. Final Leave to be granted to the Appellant to appeal to Her Majesty in Council from the Judgments and Orders of this Court given and made on 17 June, 1982.

In the Court
of Appeal

Ordered 8 November, 1982 and entered
8 November, 1982.

No.14
Order granting
Final Leave
to appeal to
Her Majesty
in Council
8th November
1982

By the Court

Sd: G.J. BERECRY (L.S.)

Registrar

(continued)

No. 57 of 1982

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

IN PROCEEDINGS 116 of 1981

B E T W E E N :

MAYNEGRAIN PTY. LIMITED

Appellant
(Defendant)

- and -

COMPAFINA BANK

Respondent
(Plaintiff)

RECORD OF PROCEEDINGS

VOLUME I

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