JUDGMENT 2 of 1973

IN THE PRIVY COUNCIL

Appeal No. 15 of 1972

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

BETWEEN:

ALEXANDER BARTON

(Plaintiff) Appellant

AND:

ALEXANDER EWAN ARMSTRONG AND ORS

(Defendants) Respondents

CASE FOR THE APPELLANT

INGLEDEW, BROWN, BENNISON & GARRETT.
51, MINORIES,
LONDON, E.C.3.

SOLICITORS FOR THE APPELLANT

McCaw Johnson & Co.,
60 Pitt Street,
SYDNEY.

Prepared by Wm. C. Young & Cooke, 70-70a Castlereagh St., Sydney—28-3866

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C. REASONS OF APPEAL

NOTE ON ABBREVIATIONS

A. The Appellant Mr. Barton and the first Respondent Mr. Armstrong being so frequently referred to are simply called Barton and Armstrong throughout.

B. References to volumes and pages of the Record. (e.g. Volume 3 page 666) are shown in short form (e.g. 3/666).

C. Landmark Corporation Limited is referred to as Landmark.

Paradise Waters (Sales) Pty. Limited is referred to as Paradise Waters Sales.

Paradise Waters Limited is referred to as Paradise Waters.

Grosvenor Developments Pty. Limited is referred to as Grosvenor Developments.

Goondoo Pty. Limited is referred to as Goondoo.

United Dominions Corporation (Australia) Limited is referred to as U.D.C.

Finlayside Pty. Limited is referred to as Finlayside.

George Armstrong & Sons Pty. Limited is referred to as George Armstrong & Sons.

Southern Tablelands Finance Co. Pty. Limited is referred to as Southern Tablelands.

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A. CIRCUMSTANCES OUT OF WHICH APPEAL ARISES

1. This is an appeal by leave of the Supreme Court of New South Wales (Court of Appeal Division) from a Judgment of that Court (Jacobs J.A., Mason, J.A., and Taylor A-J.A.) given on the 30th June, 1971, and from the Order made by the Court (Jacobs J.A. dissenting) dismissing with costs the appeal of the appellant (Barton) from a decree of Street J. a Judge of that Court sitting in Equity whereby he dismissed with costs a suit brought by Barton against Armstrong and a number of other defendants (all being respondents herein).

2. In his suit, Barton sought a Declaration that a Deed dated 17th January, 1967, and certain ancillary deeds to which he and all the respondents herein were parties were executed by him under duress and were void and asked for consequential relief by way of injunction.

3. The evidence in the suit was extremely voluminous. Oral evidence was given at great length dealing with complicated commercial matters as well as criminal activity and police investigation. A mass of documents became exhibits. Because of the volume and variety of the evidence it has been found extremely difficult to avoid some repetition in this Case. The following paragraph is a very brief sketch of the outlines of the case. Paragraphs 11-29 hereafter are a somewhat fuller

account. Paragraphs 75-160 are a full statement of the commercial situation where it is thought that the repetition involved is justified by that section being self-contained and readable as an independent unit.

4. Armstrong had acquired swamp land near Surfers Paradise a resort on the south coast of Queensland which he sold for a large sum of money to a company Paradise Waters owned 60% by Landmark and 40% by a private company of his own called Finlayside. The greater part ($400,000) of the purchase price paid by Paradise Waters for the land was owing to George Armstrong & Sons, another of Armstrong's companies.

Landmark was reclaiming and developing the land and constructing canals and waterways at very great cost. Landmark was likely to make great profits from sale of the land once developed. Armstrong was the largest shareholder in Landmark, Barton the second largest, and this development project was Landmark's largest undertaking. If the project succeeded Armstrong's shares would be valuable, his 40% of the profits would be very large, and he would be paid the balance of purchase money for the sale of the swamp land.

Until December, 1966 it seemed as if the project would be successful. But in that month events occurred which made it obvious that Landmark must go into liquidation, as it did, one year later.

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In December, 1966, once the events took place Armstrong stood to lose the value of his shares in Landmark, the 40% of the profit on the project, and the balance of the purchase price of the land.

In January, 1967, after threats and menaces directed by Armstrong to Barton, Barton, by executing the deed challenged in these proceedings, agreed to buy all Armstrong's shares in Landmark for almost double their market value and as managing director of Landmark persuaded the Board of that Company to agree in the same deed to pay Armstrong $200,000, half for Armstrong's 40% interest in the Paradise Waters project, the other half in reduction of the amount owing on the purchase price of the land, and give him improved security on the remainder.

5. The essence of Barton's case was that at the time of execution of the deeds he was in real and genuine fear brought about in him by threats made by Armstrong to have Barton killed if he did not execute the deeds. Armstrong's defence was a complete denial of any such behaviour on his part. The case was fought fundamentally on the issue of threats. Barton's case was, threats, therefore duress. Armstrong's case was, no threats, therefore no duress. The middle ground, threats, but no duress, was not investigated by the parties.

9/3219, line 20

6. Street J. found that Barton was in fear of Armstrong for some time before and at the time of

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execution of the deeds; that his fear had been increased by an alarming incident which occurred

9/3166 shortly before the deeds were executed in which a criminal told him that he had been hired by Arm-

9/3183 strong to kill Barton; and that Barton believed that Armstrong had hired criminals to kill him.

7. Street J. made a number of findings concerning the state of Barton's mind and the character and actions of Armstrong which on the hearing of the Appeal in the Court of Appeal were not challenged by Armstrong's Counsel and were accepted by all three Judges of Appeal. 10

As to Barton, Street J. made these findings:

9/3116 "(Barton) was being subjected to threats and intimidation by Mr. Armstrong ... during the course of the negotiations"

9/3182 Barton was reduced to a state of "extreme and genuine fear for the personal safety of himself and his family".

9/3183 "Mr. Barton's fear for his own life and safety was reasonable and justifiable." 20

9/3183 Barton was in a state "of very real mental torment".

9/3814 Barton "feared what he believed to be Mr. Armstrong's capacity to cause him physical harm".

9/3219 "Mr. Barton was throughout the relevant period in real and justifiable fear for the safety of himself and his family."

As to Armstrong, Street J. said: 30

9/3104 "... I think so little of Mr. Armstrong's credit that I am satisfied that on any point of importance he would not hesitate, if he thought it necessary for his own protection or advantage so to do, to give false evidence." "He is exposed as a man having little regard for the need to preserve the

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integrity of Court proceedings and for the obligation of a party to Court proceedings to present a true as distinct from a manufactured case."

9/3109 "He is a man with so little regard for integrity and honesty that he would contemplate stooping to bribery to achieve a desired result."

8. Barton alleged in his evidence that Armstrong had threatened him in conversation both personally and by telephone. Street J. found:

9/3131 "There is evidence that I accept to the effect that Mr. Armstrong was during this period threatening Mr. Barton in conversations."

9/3131 "Mr. Armstrong threatened Mr. Barton to his face, and the hostility then existing between the two men is sufficient to persuade me that Mr. Armstrong was responsible for the telephone calls."

9/3132 "I accept (Mr. Barton's) evidence that Mr. Armstrong did speak to him round about the end of November in threatening terms, advising him to take care and warning him of the risk of being killed."

9/3186 "Mr. Barton said ... on Thursday, 12th January ... Mr. Armstrong rang him up at the Landmark Office and said 'You had better sign this agreement or else' to which Mr. Barton replied, according to his evidence, 'I told him I didn't let myself be blackmailed into any agreement'. Mr. Armstrong denies this conversation but I am inclined to the view that this telephone call did take place."

9. Notwithstanding his foregoing findings Street J. held that Barton had not established that it was his fear which caused him to enter into the deed.

10. Before outlining the grounds upon which the appeal was brought to the Court of Appeal from the Judgment of Street J. and before indicating the reasoning of their Honours on appeal it is necessary to set out in some further detail the factual

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situation which was in evidence before Street J. Paragraphs 11 to 29 hereafter are intended to state facts either as found by Street J. or about which there was no issue between the parties before the Court of Appeal.

11. Landmark, of which Barton was the managing director was a public company, and Armstrong was the chairman of directors. Landmark's business was that of a land-owner, land developer on a large scale and financier. Barton and Armstrong had occupied their positions since late 1964, Barton's company having been taken over at Armstrong's direction some time before, and both also held or controlled by means of "family" companies large parcels of shares in Landmark. By the middle of 1966 the relations between Barton and Armstrong had deteriorated mainly because of Barton's resentment of undue interference by Armstrong in the day to day business activities of the company and the use by Armstrong of the Company's facilities for purposes unconnected with the company's affairs.

12. About the middle of October, 1966, Barton told Armstrong upon his return to Australia after an absence of some weeks that he was not prepared to work with him in any circumstances. In the course of this conversation Armstrong told Barton that the city was not as safe as he might think between office and home, that Barton would see what Armstrong could do against him and that Barton would regret

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the day when he decided not to work with Armstrong.

13. At a board meeting of Landmark on 24th October 1966 a resolution was passed by the Directors restricting Armstrong's use of Landmark's offices and facilities for his private affairs. On the 8th November, 1966 at board meetings of an associated company, Paradise Waters Sales and of its subsidiary Paradise Waters, Armstrong was removed from the chairmanship of those boards and on 17th November he was removed from the chairmanship of the board of Landmark. Landmark owned 60% of the share capital of Paradise Waters Sales and Finlayside a proprietary company controlled by Armstrong owned the remaining 40%. George Armstrong & Son another proprietary company controlled by Armstrong had obtained security for $400,000 at interest from Paradise Waters the principal being repayable in the event of removal of Armstrong as chairman of directors of Landmark.

14. The major undertaking in which Landmark and certain of its subsidiaries were then engaged was the development of the large area of land at Surfers Paradise. Landmark had committed its own funds to this project and had also borrowed $416,000 from United Dominions Corporation (Australia) Limited ("U.D.C.") under a mortgage over the land pursuant to which amounts up to $650,000 were to be advanced. Over and above these sums large amounts of money

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would yet be needed to carry out the project to successful completion at which stage it could reasonably be expected that the company would recover its outlay and make a profit. Funds were not available from the resources of Landmark or its associated or subsidiary companies to repay the $400,000 owed to George Armstrong & Son secured by second mortgage but before Armstrong's removal as Chairman of Landmark arrangements had been made with U.D.C. by Barton (with the concurrence of his co-directors) for an advance to Landmark sufficient to pay out the Armstrong loan. These arrangements were confirmed in a letter from U.D.C. dated 23rd November, 1966.

15. Just after Armstrong's removal as Chairman Barton began to receive telephone calls during the night which continued during the rest of November and December and the early part of January until the eventual making of the deed under challenge in this case. On most occasions nobody spoke and Barton only heard heavy breathing into the telephone. On other occasions a voice said to him "You will get killed". In most of these calls Barton thought the voice distorted and did not recognise it but in one of them in early January 1967 he recognised the voice of Armstrong. The calls were usually between 4 a.m. and 5 a.m. and would be made for four or five days consecutively followed by a break of a few days.

Record: The calls were particularly frequent in the week or so prior to the 2nd December, 1966 the date of the Annual General Meeting of Landmark. Street J. found that the 'phone calls in fact came from Armstrong.

16. At about the same time Barton noticed that his house was being watched and he was being followed. On one occasion he recognised the person watching his house as one Frederick Hume, a private inquiry agent and personal friend of Armstrong. On another occasion Barton saw Hume standing opposite the Landmark office watching it and he was followed both on foot and by motor vehicles. Street J. was not satisfied that the evidence showed the watching and following was attributable to Armstrong, but each of the Judges of Appeal found the watching and following were so attributable. Later in November Armstrong spoke to Barton in threatening terms advising him to take care and warning him of the risk of being killed and about the same time Armstrong said to Barton "You stink, you stink. I will fix you".

17. On the 24th November 1966 Barton engaged the Australian Watching Company (N.S.W.) Pty. Limited to provide him with a bodyguard. The written instructions given to the bodyguard were as follows:-

> "Service instructions. The guard to be with and receive instructions from Mr. Barton, Managing Director, Landmark Corp. Limited. Guard to be responsible for Mr. Barton's safety 24 hours per day until 2nd December, 1966."

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18. The 2nd December, 1966 was the date of the Annual General Meeting of Landmark at which nominees of Armstrong were seeking election to the Board. Both Barton and Armstrong had sought proxies from shareholders respectively for and against Armstrong's attempt to gain control of the Board. At about the same time Barton told a fellow Director, Mr. Bovill "I have hired a bodyguard because he is threatening to kill me" and also told Bovill that Armstrong had said to him "You may not get to the Annual Meeting. If you keep on this fight you are likely to be killed or likely not to get to the Annual Meeting".

19. Also late in November Mr. Bovill had a conversation with Armstrong in which as Street J. found:

9/3134

> "... Armstrong ... made a series of wild and extravagant statements. In summary these were to the effect that by virtue of his office as a Member of the Legislative Council and with enough money he could procure a member of the Police Force to do his bidding; he made mention of organised crime moving into Sydney and said that for $2,000 'you can have someone killed'. He made other references to gang war, the risk of being caught in a hail of bullets at Kings Cross, and to drugs. Mr. Bovill understandably regarded Mr. Armstrong's conduct as extremely irrational."

This conversation was reported by Mr. Bovill to Barton who more than once asked whether he thought Armstrong could get gangsters to have him shot for $2,000.

20. On the 2nd December 1966 the Annual General Meeting of Landmark was held. Present were

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bodyguards hired by the company to protect Barton. At that meeting directors associated with Barton were elected and those nominated by Armstrong for appointment to the board were not. Armstrong did not have to submit himself for re-election at that meeting and remained on the board.

21. Soon after the meeting, by letter dated 10th December, 1966, U.D.C. informed Landmark that it would not advance the moneys necessary to discharge the indebtedness to George Armstrong & Son and that it would make no further loans in connection with the Paradise Waters project. This reversal by U.D.C. caused a crisis in the affairs of Landmark, Armstrong and Barton. Landmark was faced with the demand for $400,000 from Armstrong which it could not meet and the project into which a large proportion of its funds had been sunk was brought to a stop at a stage of development when it was quite unsaleable. Landmark then immedidately faced financial disaster to which it eventually succumbed.

22. A few days later approaches were made to Barton by an accountant, Mr. B.H. Smith, acting on behalf of Armstrong, with a view to concluding an agreement which would settle the differences existing between Barton and Landmark, and Armstrong. In fact, Mr. Smith proposed a transaction whereby Armstrong would be bought out of Landmark on terms favourable to Armstrong and unfavourable to Barton. Discussions were held up to the 22nd December. On

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that date a threat to appoint a receiver virtually forthwith was made by U.D.C. but it was persuaded to stay its hand for a short time. After the holiday period Barton was again approached by Mr. Smith (on the 4th January 1967) with a substantially similar offer, that the debt of $400,000 should be repaid and Armstrong's 40% interest in the Paradise Waters Project should be bought by Landmark for $100,000, $200,000 was to be paid, as to $60,000 by the transfer of a penthouse owned by Landmark and as to $140,000 by payment in cash; the balance of $300,000 was to remain secured at 12% interest and to be paid in one year's time. It was proposed further that Armstrong should be given an option to buy any 35 blocks in the Paradise Waters Estate for 50% of the list prices on low deposits and Landmark was to agree to provide finance to purchasers of the property in which Armstrong was interested. Furthermore, Barton was required, in effect to buy Armstrong's 300,000 shares in Landmark for 60¢ each, a price almost double that for which the shares were then being sold on the Stock Exchange.

23. Within three days of this proposal being put on Armstrong's behalf Barton was telephoned by a man named Vojinovic who, it later emerged, had a bad criminal record. Vojinovic said that he wanted to see Barton urgently. Barton met Vojinovic who told him that Vojinovic's "team" had been hired to

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kill Barton and promised £2,000 by Hume, who was hired by Armstrong, to do it. Vojinovic also told Barton that he had been offered an additional £5,000 if he robbed Barton's wife of a particular diamond ring.

24. Early the following morning (which was a Sunday) Barton telephoned Landmark's Solicitor and later went with him and Mr. Muir Q.C. (as he then was) to the Criminal Investigation Branch where the matter was reported to Detective Inspector Lendrum the officer in charge. On the same day Vojinovic was caught and made a statement to the Police which was seen by Barton in which he again asserted that he had been hired on Armstrong's behalf to kill Barton.

25. Street J. found that as a result of this in-
9/3182 cident Barton was in extreme and genuine fear for himself and his family and believed that Armstrong
9/3183 had indeed hired criminals to kill him. Barton sent members of his family out of the city and secretly moved with his wife and son into a city hotel taking with him a rifle which had been purchased with the assistance of the Police for his protection.
9/3182 At about the same time Barton told Mr. Bovill that the threats were getting worse and that Armstrong had now hired criminals to kill him.

26. Barton saw Sergeant Wild who was in charge of the investigation a few days later on the 11th January. At the trial Sergeant Wild gave evidence

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to the effect that when he told Barton that he had not yet interviewed Hume or the other person named in Vojinovic's statement Barton said that he was worried about what was going on. He added that Barton said:

3/723 lines 7-10 "Well the agreement will be signed on the 18th and it will be all over."

27. Much evidence was given by and about the police investigation of this matter. On most of the issues concerning the police neither Street J. nor the Court of Appeal made any findings. The evidence showed that until about the 11th January the police investigation was all that might be expected in the circumstances, rapid and efficient. Thereafter very little happened, and it was alleged on Barton's behalf that this was due to interference in the matter by Armstrong. Street J. declined to make such a finding and left many questions of fact on this aspect of the matter unresolved. He did characterise the behaviour of the police as "extraordinary", a comment with which Jacobs J.A. and Mason J.A. agreed; but took the matter no further.

28. From the 4th January draft agreements were being prepared by the Solicitors for Armstrong. Mr. Bovill gave evidence that on the 13th January, 1967 9/3189 Barton told him that he did not think that the agreement should be executed. Street J. accepted that such a statement was made by Barton to Mr. Bovill but notwithstanding his general acceptance

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of Mr. Bovill's testimony regarded it as having been made at some stage during the negotiations in December and not on the 13th January. A principal

9/3188 reason stated by his Honour for this view was the date the 13th January was suggested to Mr. Bovill in the question put to him in examination in chief. His Honour also thought that Mr. Bovill's memory was defective in respect of the date. His Honour did not find any other of his evidence unreliable in respect of dates and the appellant submits for reasons subsequently set out in paragraphs 195 to 211 hereunder that his Honour was in error in not accepting the date given for this conversation by Mr. Bovill. Barton spoke again to Mr. Bovill on the 16th January saying he had changed his mind, and persuaded Mr. Bovill that the agreement should be made. Street J. accepted that Barton had been threatened by Armstrong on the 12th January.

29. On the 17th January, 1967 the principal deed sought to be set aside in the suit was signed. Appendix I to this case contains a summary of the provisions of that deed.

30. Chief Findings of Street J.

Upon evidence given before him, the effect of which has been shortly stated above, Street J's principal findings were:

9/3219 (a) Barton was throughout the relevant period in real and justifiable fear for the safety of himself and his family. Such fear was

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induced to a significant extent by Armstrong's acts.

9/3219 (b) Barton's fear was enchanced by the Vojinovic incident and although this was not proved to be an incident for which Armstrong was responsible, Barton firmly believed what he had read in the Vojinovic statement, namely, that Armstrong was plotting to have him murdered;

9/3183 (c) Barton was in a state of very real mental torment;

9/3184 (d) Barton had a hatred for Armstrong he held him in contempt; and he feared what he believed to be Armstrong's capacity to cause him physical harm;

9/3219 (e) The threats themselves were such as might well have intimidated the recipient into signing an agreement such as the one in issue.

9/3116 (f) Armstrong's threats were not shown to be intended to coerce Barton into making the agreement.

9/3198 (g) Armstrong was a "reluctant Vendor" in the transaction.

9/3172 (h) It was the recognition of what Barton and Mr. Bovill regarded as sheer commercial necessity that was the real, and quite possibly the sole, motivating factor underlying the agreement recorded in the Deed of 17th January, 1968;

9/3117, 9/3172 (i) Barton's personal fears for his own safety

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did not play any significant part in his entering into the agreement with Armstrong.

9/3184 (j) Barton did not in his own mind relate Armstrong's threats to a desire by Armstrong to force through the agreements nor was it forced through, so far as Barton was concerned, by reason of his fear of Armstrong's power to harm him;

9/3219 (k) It was not Barton's fear that drove him into the agreement;

9/3184 (l) The agreement went through for the primary and predominant reason that Barton, along with Mr. Bovill, was firmly convinced that it was indispensable for the future of Landmark to enter into some such agreement as this with Armstrong. Their belief was that they had to get rid of Armstrong if Landmark was to survive.

9/3101 31. The test which Street J. stated was the one to be applied to determine whether or not duress had been proved was adopted by him from the Encyclopaedia of the Laws of England Second Edition Volume 7, page 421 as follows:-

> "Where any contract ... has been entered into under the influence of coercion, duress, menaces or intimidation it may be repudiated and avoided and any money paid or property parted with or under it may be recovered ..."

It is submitted that although his Honour stated the test in the form set out, he in fact did not apply that test, and applied quite a different one,

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as it is shown by what he said later in his Judgment concerning what the plaintiff had to prove in order to succeed, namely:

9/3183

> "The evidence touching on his (Barton's) state of mind must be analysed to see whether in truth his willingness to enter into the agreement was brought about by his fear of physical violence or perhaps even death at the hands of Mr. Armstrong."

It is submitted that the making of an agreement "under the influence of" duress may be (and in this case was) quite a different thing from an agreement "brought about" by duress.

32. On the appeal to the Court of Appeal the Appellant pursued three distinct lines of approach:

(a) The appellant sought to obtain from the Court of Appeal different findings of fact on a number of factual issues.

(b) The appellant sought to show that the test applied by Street J. to the findings of fact made by him was incorrect in law.

(c) The appellant sought leave to amend his Statement of Claim (and, consequentially, his Notice of Appeal) and to rely upon a contention that Barton and Armstrong had been in such a relation of influence or domination by Armstrong over Barton that upon proof of Armstrong's threats and Barton's fear either the transaction was because of those facts alone voidable or the onus lay upon Armstrong to show that the relationship, the threats

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and the fear had not caused or influenced the transaction.

The Judges of Appeal were unanimous in refusing the application to amend the Statement of Claim and the consequential application to amend the Notice of Appeal and the Appellant does not now further pursue those applications.

33. All three of the Judges of Appeal held that Street J. was in error in at least some of the inferences of fact which he drew from his findings of primary fact. Each of the Judges delivered separate reasons for his decision and although as to inferences to be drawn from primary facts, there was a considerable degree of agreement between the three Judges of Appeal, no Judge of Appeal agreed completely either with Street J. or with either of the other Judges of Appeal as to the inferences of fact to be drawn from the Trial Judge's primary findings of fact. Similarly, each of the three Judges of Appeal formulated a different test for determining whether the Appeallant had proved duress entitling him to the relief he sought. The view of Jacobs J.A. was that on the proper test of duress the Appellant must succeed. It seems clear that on the facts as found by Street J., Mason J.A. and Taylor A-J.A., the application of the test regarded as the proper one by Jacobs J.A. would also lead to success for the Appellant. The test proposed by Mason J.A. appears to be different from that

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proposed by Street J. in his Judgment (although Mason J.A. appears to suggest that at bottom the tests may amount to the same thing) and is different from that proposed by Taylor A-J.A.

34. It appears therefore, (the Appellant submits) that of the four Judges of the Supreme Court who wrote separate and lengthy judgments in the matter, no two agreed precisely on the facts to which the appropriate legal test should be applied (and in some cases there was marked divergence between the facts found) and no two (with one possible exception) agreed upon the appropriate test to apply to the facts.

35. The Appellant submits that the true test is that formulated and adopted by Jacobs J.A. in his dissenting judgment. Jacobs J.A. stated the test in a number of places in his judgment. At 12/4108 he suggested that the test might be formulated as follows:

12/4108

> "That duress is established when it is found that there are menaces accompanying the transaction which menaces have succeeded in placing the other party to the transaction in that requisite degree of fear from which it can be assumed that his freedom of agency is impaired."

12/4112 At 12/4112, in discussing the test implied in a passage in Bracton which as his judgment later shows, he substantially adopted, he suggested that the test is:

12/4112 lines 36 and following

> "Whether the kind of menace should be regarded as having an appreciable effect upon his mind so as to destroy the voluntas which a

Record:

man has when he is not exposed to the type of extreme personal fear recognised in the common law doctrine of duress."

12/4114 At 12/4114 he said that he thought the principle of duress at common law is correctly expressed in the work quoted by Street J. at first instance (already set out in paragraph 31 above).

12/4117 At 12/4117 Jacobs J.A. said:

> "However, in the case of true common law duress I am of the opinion that a plaintiff is entitled to succeed when he shows that he was under the influence of the menaces and fear consequent upon them. Who can say what a man would or would not have done if he had not been in that particular form of extreme fear which is a necessary condition of the application of the common law doctrine of duress? I am of the opinion that a plaintiff discharges the onus that lies upon him if he shows that at the time of entering into the transaction he was under the influence of menaces directed to the transaction. He may not be a complete stranger to the transaction. He may want some such transaction to take place but the law requires that he be a free agent right up until the time when he enters into the contract. It is no answer for a menacer to say that even if he had not menaced, if he had not put the other party in 'extreme fear for his personal safety and that of his family' still it is not shown that the transaction would not otherwise have gone through. It is not necessary to say that the onus shifts. Rather, it is a case of examination whether the menaces and the fear were one appreciable element in the mind of the party seeking relief at the time when he entered into the transaction."

36. Mason J.A. appears to have adopted substantially the test stated by Williston on Contracts s. 1603-5 which he quoted in his judgment in the following terms:

12/4167

> "The real and ultimate fact to be determined in every case is whether or not the party really had a choice - whether he had freedom of exercising his will."

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In a subsequent part of his Judgment Mason J.A. appears to have taken an extremely restricted view of the area in which the test he had previously formulated could operate. Having discussed the finding of Street J. (unchallenged in the appeal) that Barton was fearful for his own safety and that of his family at the time when he entered into the agreement, he went on to say:

12/4202

> "In this case the appellant's degree of fear and apprehension was not such as to cow him into abject submission or to deprive him of his power to respond rationally."

A little later he remarked:

12/4202

> "... nothing subsequently occurred to instil in him a compelling degree of terror."

Later again in his Judgment Mason J.A. said:

12/4205

> "In my opinion in duress, as well as undue influence, the Court is concerned to ascertain whether entry into the transaction was free and voluntary; the area of that inquiry is not circumscribed by a rigid proposition of law that a condition of fear or apprehension is absolutely and in all circumstances incompatible with the possession of a free and voluntary mind."

37. When the statements of the test as formulated by Mason J.A. are read in the light of the comments quoted above from his Judgment at 4205 it appears that his Honour thought that a man under threat possesses a sufficiently free and voluntary mind to prevent the operation of the doctrine of duress so long as he has not been cowed into abject submission, deprived of his power to respond rationally or has not had instilled in him a compelling degree of terror. Mason J.A. also took Street J. as having

12/4204

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found either that Barton had not shown that his assent to the agreement was given otherwise than with a free and voluntary mind or that he would not have entered into the agreement but for the intimidation. This test also, which the Judgment of Mason J.A. appears to approve is, the Appellant submits, wrong.

38. Taylor A-J.A. first stated his view of the appropriate test in his Judgment at 4247:

12/4247

> "... the appropriate inquiry is, I think, 'would "B" have consented to the agreement had it not been for the threat to his life?' This is a case of common law duress, rendering the agreement voidable. According to the common law the agreement might be avoided if the consent of the party seeking to avoid it was obtained by coercion."

At page 4249 he said:

12/4249

> "There is an analogy between a case of undue influence not arising out of an antecedent relationship but out of a particular situation and a case of duress that extends beyond the question of onus. In either case it has to be shown that the influence exercised as a result of the particular situation or arising from the threat, brought about the transaction that is sought to be set aside.
>
> A person who enters into an agreement or gives a bond or makes a payment under the threat of duress knows what he is doing and agrees to do it. It is his agreement that is forced and it is in this sense that he is coerced. If he wishes to avoid the agreement on this ground, then on principle and on authority it would seem just that he should show that he would not have entered into the agreement but for the coercion. He must show that it was the pressure or threats that caused him to enter into the agreement that he seeks to set aside."

Again, at page 4250, he said:

12/4250

> "The question is was his consent the result of a free choice, if it was the contract

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stands, or did it proceed from the threats offered, in which case the contract may be avoided."

39. Jacobs J.A. specifically disagreed with the findings (f), (g) and (j) of Street J. set out in paragraph 30 above and held that the correct inferences from the primary facts found by Street J. on these matters were:

As to (f) That Armstrong intended to put pressure on Barton to make the agreement.

As to (g) That Armstrong was not a reluctant vendor and was prepared to go to great lengths to obtain the agreement.

As to (j) Barton in his own mind related Armstrong's threats to a desire by Armstrong to force through the Agreement.

40. Mason J.A. specifically disagreed with certain findings of Street J. including findings (f) (g) and (j) as set out in paragraph 30 hereof, as to which he made affirmative findings to the same effect as those of Jacobs J.A. set out in paragraph 39 hereof.

41. Taylor A-J.A. specifically disagreed with certain findings of Street J. including findings (f) and (g) as set out in paragraph 30 hereof.

42. It will be submitted that each of the findings with which the Court of Appeal thus disagreed was crucial to those findings of fact, adverse to Barton, made by the trial judge.

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B. CONTENTIONS TO BE URGED BY APPELLANT

43. Appellants appeal in two parts.

Arising out of the circumstances already narrated, the contentions to be urged by the Appellant fell into two parts. The first part concerns the correct test to be applied to the facts once found. The appellant respectfully contends that the test of Jacobs J.A. is correct. If that be so then no further enquiry into the correctness of any findings of fact is necessary, as it is submitted, on the findings of each of the three other Judges concerned application of the test proposed by Jacobs J.A. produces a result in favour of the Appellant. The second part of the contentions to be urged by the Appellant involves consideration of the various (and sometimes differing) findings of fact of the Judge at first instance and of the Judges in the Court of Appeal in respect of which the Appellant hereafter gives detailed reasons in support of different and more favourable findings being made.

I. Submissions Concerning Proper Test for Duress

44. Before examining the test proposed by Jacobs J.A. and putting the reasons for submitting that it is the correct test, it is relevant to ask why such a diversity of tests for duress should emerge in this case. So far as the appellant has been able to ascertain, in no recorded case prior to the

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present one has a court at one and the same time found that one party to a proposed contract threatened the other party to it with death unless he agreed to it, that the other party, in fear from the threat, agreed to the contract and yet did so uncoerced by the conduct of the threatening party. In the absence of some such set of facts, it had never been necessary for a court prior to the present case to examine the ultimate basis of duress with a view to distinguishing between tests of the type proposed by Jacobs J.A. on the one hand and the remaining Judges on the other. So far as the Appellant has been able to ascertain, in all the recorded cases any of the tests proposed by the four Judges in the present case would have produced the same result.

45. There is also to be found in the cases a use of language which, from the point of view of the present discussion, is indiscriminate in the sense that language is used (very often in the same judgment) which is referable at one point to one of the two chief types of test proposed and at another point to the other, the writer showing no sign of being conscious that in fact he is dealing with two different possible tests. This ambivalent language is to be found from the earliest to the most recent reported cases.

46. For example, before the King's Bench in the reign of Edward III John Castelayn was denying the

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validity of a deed under which he released the defendant from the cause of action he was pursuing. The relevant part of the report (Selden Society, Select Cases in the Court of Kings Bench, Edward III Volume VI, Vol. 82, page 68) runs as follows:-

> "And John, while not acknowledging that the deed has been made at the day and place mentioned in the said deed, says that he ought not to be barred from his action by the aforesaid deed, for he says that Thomas by force and arms took him, John, at Hansworth, and imprisoned him so that he made the aforesaid deed under duress of imprisonment and various threats to life and limb and by reason of the fear of death, wherefor he prays judgment whether he ought to be barred from his action by the said deed etc.
>
> And Thomas says that John was at large and outside any prison at the time the deed was made and that John made the deed of his free and spontaneous will. And as to this he puts himself on the country. And John does likewise. Therefore let a Jury thereon come before the King at York ...
>
> At that day at York John in his own person as well as Thomas by his aforesaid Attorney came before the King. And the jurors likewise came and, chosen and tried by consent of the parties, they say on their oath that John at the time when the aforesaid deed was made, was seized by Thomas and kept under detention by Thomas and taken away entirely against his will, and he was so greatly menaced in life and limb that through fear of death and, if he had refused to make the said deed, Thomas would have killed him. And so he made the deed in Thomas' prison and under duress to the loss of the said John of 300."

John thereafter obtained damages from Thomas notwithstanding the release in the deed which he had given to Thomas. The case shows a mingling of the two separate strands of thought which have emerged in the formulation of the two major types of tests stated by the Judges in the present case. In parts

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of the passage quoted above the inquiry seems to be whether John was in prison and under duress of imprisonment at the time of his making the deed; thus, Thomas replies that John was at large and outside the prison at the time the deed was made. On the other hand John alleged that he made the deed by reason of the fear of death and the jury found that he made the deed through fear of death and to save his life. Once such a finding is made, of course, there is no need to consider whether John could succeed in the absence of such a direct causal relation between the state of fear and duress in which he was placed (directed towards his making of the deed) and his making of it.

47. Five centuries later the same ambivalence is to be found. In Cumming v. Ince 17 L.J. Q.B. 105 the question was whether an agreement made by a lady threatened with imprisonment in a mad-house was binding on her. In argument it was suggested that the imprisonment of the lady at the time when she made the agreement in question (when threatened with further similar imprisonment) was lawful. Lord Denman C.J. in answer to this suggestion observed in argument:

> "If a party was charged with a debt, a bond may be well given to pay for the debt under fear of imprisonment; but the agreement was made under apprehension of imprisonment in a mad-house, which makes a great deal of difference." (106)

This remark is consistent with the view that merely being under duress is sufficient to avoid an

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agreement then made without establishing the direct causal connection stressed by the majority Judges in the Court of Appeal in the present case. Also consistent with this approach is the further remark made by Lord Denman this time in the course of the Court's judgment, which he delivered. He said:

> "... Where one party is alleged to be a lunatic and threatened with the consequences of that allegation, the parties cannot be considered as meeting on equal terms." (107)

Then he makes a comment which seems to combine directly the separate strands of both tests:

> "If she was induced to resign them" (certain title deeds) "by fear of personal suffering, brought upon her by confinement in a lunatic asylum, by the act of the defendants, the resignation would appear to be brought about by a direct interference with her personal freedom. Is not this truly described as duress? And was the contract which resulted made with her free will?" (107)

Yet, a little earlier in the judgment an allegation made on behalf of the lady,

> "... that she acceded to the arrangement only from fear of the consequences" (107)

was spoken of as if it raised the decisive question.

48. Because it has never been necessary, prior to the present case, to investigate the precise formulation of the true test for duress and in view of the ambivalent language (when the matter is analysed with the present purpose in mind) that is to be found running through the cases it is easy to see why in many cases the test has been stated in terms similar to those used by Mason J.A. and

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Taylor A-J.A. Likewise there are to be found in the cases statements which support the view expressed by Jacobs J.A. It is submitted that his analysis of the relevant law is persuasive and his conclusion consistent with principle generally.

49. The Appellant respectfully adopts the reasons advanced by Jacobs J.A. for the view at which he arrived. He began this part of his judgment by saying that the problem of the case could only be solved by an examination of the principles governing 10
12/4108 the law of duress at common law (4108). He then said, in effect, that it fell to the Court of Appeal to decide for itself the true principle underlying the law of duress, thus implicitly accepting the position that there was no binding authority directly upon the point which had arisen. His actual words were:

12/4108 "... It falls to this Court in New South Wales now to define the effect in law of threats to murder made by a man whose position 20 of wealth and power required that those threats be taken seriously."

A little later in his judgment Jacobs J.A. continued:

12/4109 "... I find it necessary to go back to the earliest law not for the sake of historical interest nor for the sake of mere completeness but rather because it is only there that one can find cases which demonstrate the narrowness of the common law concept on the 30 one hand but the far reaching effect of its application on the other hand when circumstances are found which come within the narrow concept."

He then went on to state his understanding of the common law concept of duress, namely as:

> "... a narrow one because it only operated when there was induced thereby a fear which could be assumed to some extent to paralyse the will."

50. When he came to examine the history of duress, Jacobs J.A. began with Bracton. Although of course Bracton deals with much law now obsolete, his standing as an authority is undiminished. F.W. Maitland, in his Introduction to Bracton's Note-book. Vol. 1, page 8, termed 'The Laws and Customs of England' an "heroic work" and continued:

> "It is strictly true what Lord Campbell says, and Lord Campbell cannot be charged with mediaevalism: Bracton 'was rivalled by no English juridical writer till Blackstone erose five centuries afterwards." Twice in the history of England has an Englishman had the motive, the courage, the power to write a great readable, reasonable book about English law as a whole."

Throughout the subsequent history of the common law, when problems have arisen not directly covered by authority, there has been recourse to Bracton by judges of the highest eminence. In addition, in the present case, the passage relied upon by Jacobs J.A. follows immediately a passage adopted by Coke in his Institutes. The great authority of this work persists to the present day, although it has on occasions been departed from in particular instances. The section of the Institutes, however, where Coke cites the passage from Bracton which precedes the passage relied upon by Jacobs J.A. is one that is very firmly imbedded in the Common Law. In the series of digests and compendiums produced from Coke's time down to the present day his

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treatment of menaces at Common Law in the Second Institutes has been referred to as authoritative again and again. (See as random examples of the many editions of various works, Comyns Digest (5th edition, 1822) at 382; Viner's Abridgment (2nd edition 1792) Volume IX. at 315; Bacon's New Abridgment (5th edition 1798) Volume II at 402, 403, and Halsbury's Laws of England (1st edition 1909) Volume 7 at 357).

This consideration makes it necessary to approach with particular respect the paragraph of Bracton following that reproduced in the Second Institutes.

12/4112 51. Jacobs, J.A. set out in his judgment the Latin of the paragraph upon which he particularly relied and indicated his understanding of it. For convenience, however, the translation made by Samuel E. Thorne (Vol. 2, Bracton on the Laws and Customs of England; published in association with the Selden Society by the Belknap Press of Harvard University Press, 1968) is here set out, from page 65:

> "It makes a difference, however, whether the fear precedes or follows the gift, for if I, coerced and compelled by fear, first promise and then freely and voluntarily give, such fear does not then excuse; but if I first promise freely and then, coerced by fear and force, deliver, such fear does excuse, because of the force and compulsion connected with the transfer, for my original intention to transfer the thing to the dones may have been abandoned."

12/4112 52. Jacobs, J.A. took the passage as recognising that once the menaces and their effect are found to

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exist it is speculation whether or not a man would have adhered to his original purpose if the fear had not been superimposed, relying for this observation upon the phrase "cum forte mutate sit prime voluntas". He went on to say that he thought Barton's reasoning as sound in the law today as it was in Bracton's time and stated the test in the words already set out in paragraph 35 of this Case. Jacobs J.A. also drew from the passage the idea that the stress in determining whether or not the doctrine of duress will operate is upon the existence of the threats and the consequent fear, rather than upon an inquiry into the effect of the threats and fear as a problem in causation.

12/4112 lines 36 and following

53. This idea is again supported by Bracton in the passage immediately following that set out by Jacobs J.A. in his judgment. This following passage is here set out, again in the English version taken from Thorne's work already cited, pages 65 and 66:

> "But what of a gift made by a man captured by the enemy and imprisoned? Quaere whether it is valid. At first sight it seems that it ought to be, for if one in such circumstances makes a gift to a relative or friend, to a deserving knight or servant, obviously neither compulsion or fear have played any part in the transaction for the donor desired to give to such person and the gift is thus genuine, free and absolute, and consequently valid. On the other hand, if he made it unwillingly, through imprisonment, compelled by a force he could not resist, it would seem to be invalid. Whence it appears that one imprisoned may or may not make a valid gift depending upon the circumstances. I answer in neither case is the gift valid as long as the donor is

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> imprisoned, but not because he makes it under coercion but because he is not his own master, and one not his own master will not be the master of the things which would otherwise be his. Generally he who is possessed by others can himself possess nothing, and as one on bondage can possess nothing, since he is himself possessed, so a man possessed by the enemy or held captive can possess nothing. But when one so held regains his natural freedom, that is, when he is again made his own master, he may either ratify or revoke what has been done; if he subsequently approves it, by not at once revoking the gift or by taking homage and service, it is good."

Although in parts this passage gives reasons for the conclusion it expresses which are not relevant to the present enquiry, it nevertheless strongly supports the view which Jacobs J.A. arrived at that stress was upon "the temporal not the causative element".

12/4113 54. As Jacobs J.A. said in his judgment, unlawful imprisonment was assumed to affect free agency of the imprisoned man. Jacobs J.A. then passed on to deal with later writers who also support such an approach. Before again taking up the thread of his judgment, certain further comments may be made at this point. Bracton in the passages quoted seems to have posed the very question (although in the terms of his day) which arises in this case, that is, can a man under constraint amounting to duress really act voluntarily? His answer was no, his reason at bottom being that stated by Jacobs J.A., that the apparent voluntariness may be affected by the constraint in which he is placed, and no-one can know that his act was in truth voluntary.

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55. Although Bracton's Notebook and the Year Books contain many cases concerning duress it does not appear that in any of them was it necessary for the formulation of the test to be examined in the way Bracton did in his major work and in the way which now becomes necessary.

56. There is, however, one case in the Year Books where the question was spoken of in precisely the same terms as those used by Bracton. The case appears in Part II of Cases en Ley and is 39 Edw. III (28). One question involved was whether a deed could be relied upon or not. Counsel for the party challenging the deed said:

> "We do not acknowledge the deed, but tell you that this T.B.: (the party who had obtained the deed) "was one of the despoilers of London when the great plundering took place, and came to Charing Cross with a hundred armed men against our grandfather and said that if he would not make the deed, he would cut off his head. And through fear of death, he made the deed of release by duress, and to save his life. Judgment, whether by this deed we ought to be barred."

Kirton, Counsel for the party seeking to uphold the Deed, said:

> "Sir, you will well understand that he has acknowledged the deed, and he said nothing except that he must kill him if he would not make the deed, which was nothing but a spoken word. Wherefore since he will not show anything in the deed calculated to force him to make the deed, we do not understand that by this word it can be understood in any other way than that he made the deed of his free will without any duress."

William de Wichingham, who had been newly appointed as a Justice of the Common Pleas intervened from the bench, saying:

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> "If he threatened to kill him if he would not make the deed, it cannot be understood that he made it of his free will."

The parties then went to issue on the facts.

57. Returning to the thread of the argument of Jacobs J.A.: having set out the passage from Bracton on which he relied and with the aid of which he extracted the principle referred to in paragraph 52 above, he then referred to a passage in Rolles Abridgement under the heading "Menace" which contains a series of propositions which as Jacobs J.A. observed lay,

> "stress upon the nature of the menacing and the nature of the fear produced."

Jacobs J.A. continued:

12/4114

> "If the causative effect of fear were the primary test, there would be no reason for the limited category of menace."

It is submitted that the point made by Jacobs J.A. by reference to the passage he set out from Rolles Abridgement is clearly a correct one. If duress consisted essentially in overbearing conduct on the part of one party causing another against his will to enter into an agreement then the principle is very simply stated in some such terms and there is no need to categorise the nature of the menace or the nature of the fear. The approach which Jacobs J.A. found in Rolles Abridgement is extremely reasonable, in that it is much easier to make an objective appraisal of what a man was subjected to and what his state of mind was following the subjection than it is to assess precisely the degree

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of causal connection between the various elements in a man's state of mind and what he did. The authority of Rolles Abridgement, like that of Bracton, is very high. According to Professor Winfield (the Chief Sources of English Legal History at 239):

> "The Abridgement is one of the lighthouses in the history of our law. Though it was intended only for Rolles' private use and never underwent his final revision, and though its substance is taken largely from other books and reports, yet the form in which it was cast was greatly superior to anything of the sort that had gone before, and it was so full of cases not elsewhere discoverable that it may almost rank with reports. At the present day, citations from it are common in actions where the history of the law is implicated."

58. Rolles Abridgement was a work of the seventeenth century. Having used a passage from that work in support of his approach, Jacobs J.A. passed to some passages from Viner's Abridgement, an eighteenth century work. The passages relied upon by Jacobs J.A. again show, it is submitted, that the emphasis was upon the circumstances under which the agreement came about, attention being directed to the fact of force or menace preceding the making of the agreement and the readiness of the law when such a sequence of events is established to say that the doctrine will operate, without direct reference to causation.

59. Departing again for a moment from a summary of the judgment of Jacobs J.A., it is to be noticed that there is further support for his view in

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another eighteenth century work, Matthew Bacon's 'A New Abridgement of the Law', where under the heading "Duress", sub-heading "C: what contracts of securities may be thus avoided", the author states:

> "If a man makes a lease by duress and the lessee enter, the lessor shall have an assise against him as a disseisor; for the free consent of parties being essential to all contracts, where either of the parties is under force and violence, his free assent cannot be supposed, and therefore such contract is void, and the person who enters by virtue of it is a wrong doer": 5th Edition 1798, page 405.

60. Similarly, in Comyns Digest of the Laws of England, Fifth Edition, 1822 under the heading "Pleader" and sub-heading "Per Minas" it is stated:

> "Menace of life, member, mayhem or imprisonment, is sufficient to avoid a Deed." (At 382, the authority being relied upon being Coke, Second Institute 483).

61. Jacobs J.A. concluded his survey of the authorities by referring to the test which Street J. had apparently taken to be applicable, namely that 12/4114-5 stated in the Encyclopaedia of the Laws of England (and set out in paragraph 31 above). It is implicit in the comments made by Jacobs J.A. on this test that he considered it supported (indeed, plainly expressed) the principle as he understood it, namely one which raises the question "was he under the influence of the threats when he made the agreement?" rather than the question "did the threats cause him to make the agreement?"

62. There are other authorities which support

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the approach of Jacobs J.A. Oliver Wendell Holmes (when he was a Justice of the Supreme Judicial Court of Massachusetts) appears to have been of the same view. He indicated his opinion in Fairbanks v. Snow (145 Massachusetts Reports; 13 North-Eastern Reporter 596). The case, decided in 1887, was one in which Holmes J. had occasion to review the historical origins of duress, with reference to Coke, Thoroughgood's case and one of the Year Book cases. In the course of his judgment, he drew certain analogies between duress and fraud and observed:

> "Again, the ground upon which a contract is voidable for duress is the same as in the case of fraud, and is that, whether it springs from a fear or a belief, the party has been subjected to an improper motive for action." (13 North-Eastern Reporter 596 at 598).

63. Consistent with the same approach is a decision of the Supreme Court of New York, Osborn v. Robbins 36 NY 365 (Decided in 1867). That case concerned the validity of a promissory note obtained from a person under arrest of a false charge of felony, to procure his liberation from the restraint under which he had been illegally placed. The opinion of the Court was stated by Porter J. at 371 he said:

> "The note was executed, when the principal defendant was a prisoner; and it could not be enforced by the payees, if they obtained it through an abuse of legal process, for purposes of oppression and exaction. When a party is arrested without just cause, and from motives which the law does not sanction,

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> any contract into which he may enter with the authors of the wrong, to procure his liberation from restraint is imputed to illegal duress. It is corrupt in its origin, and the wrong doer can take no benefit from its execution."

64. Jacobs J.A. found support for his conclusion as to the proper basis of the doctrine of duress by looking to statements of principle in certain fraud cases, which he said were analogous. There 10
12/4118-9 are passages, which he set out, in Williams' Case L.R. 9 Eq. 225, Smith v. Kay 7 H.L.C. 750 and Reynell v. Sprye 1 De G. M. & G. 707 where what is said in relation to fraud bears a striking resemblance to the authorities relied upon by Jacobs J.A. in respect of duress (and to those additional ones which have been set out in this case). It is submitted that the analogy is a correct one and that both Holmes J. in Fairbanks v. Snow (supra) and Jacobs J.A. in the present case were correct 20
in seeing the connection. In particular, the words in Reynell v. Sprye (supra) are apposite:

> "... it may well be that he would not have acted as he did; - perhaps he might, perhaps he might not. But this is a matter on which I do not feel called upon or indeed at liberty to speculate. Once make out that there has been anything like deception and no contract resting in any degree on that foundation can stand. It is impossible so 30
> to analyse the operations of the human mind as to be able to say how far any particular representation may have led to the formation of any particular resolution or the adoption of any particular line of conduct. No one can do this with certainty, even as to himself, still less as to another ... Where, therefore, in a negotiation between two parties, one of them induces the other to contract on the faith of the representations 40

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> made to him, any one of which has been untrue, the whole contract is in this Court considered as having been obtained fraudulently. Who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed?"

It requires very little adaptation of that passage for it to be written as follows:-

> "... It may well be that he would not have acted as he did; - perhaps he might, perhaps he might not. But this is a matter on which I do not feel called upon or indeed at liberty to speculate. Once make out that there has been duress having an effect upon the man's mind, and no contract resting in any degree on that foundation can stand. It is impossible so to analyse the operations of the human mind as to be able to say how far any particular threat or menace may have led to the formation of any particular resolution or the adoption of any particular line of conduct. No one can do this with certainty, even as to himself, still less as to another .... Who can say that the threat or menace may not have been precisely that which turned the scale in the mind of the party to whom it was addressed?"

Rewritten in this way, the passage is a fair statement of the principle Jacobs J.A. was supporting in relation to duress.

65. Mason J.A. and Taylor A-J.A. both relied upon statements in Williston on Contracts. Jacobs J.A. dealt with the passages they relied on and consistently with the result at which he had arrived following his examination of the authorities, expressed the opinion that although as stated by Williston there had been a vast extension of the doctrine of duress at common law, nevertheless the way in which it was stated by Williston took away an element which existed in the common law doctrine.

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It is respectfully submitted that his Honour was correct in that opinion and that to the extent indicated by his Honour the statements in Williston on Contracts to which he referred and those upon which the other Judges in the case relied are contrary to principle and at variance with authority.

66. Turning to the principles as formulated by Mason J.A. and Taylor A-J.A. in relation to duress, it is submitted that speaking in a general way, although their conclusions were somewhat different, they were arrived at in each case by much the same process, that is -

(i) a use of cases in which the characteristics of duress were expressed in the same way in which they themselves expressed them, those cases being cases of the kind, about which submissions have been made already, where the question which is the vital question on this aspect of the case did not arise for consideration.

(ii) An adoption of the statements in Williston on Contracts which it is submitted must be read subject to the criticisms of Jacobs J.A. The cases relied upon by Williston for the propositions he advanced were not examined by Mason J.A. or Taylor A-J.A. in their judgments nor does it appear that in any of the cases was the present problem considered, nor does it appear that Williston considered it.

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(iii) Their own views as to the proper principle to be derived from the common law, as to which, once again, for the reasons given by Jacobs J.A. with the support of the additional authorities referred to in preceding paragraphs, it is submitted that his approach is to be preferred.

II. Submissions Concerning Inferences of Fact

67. The second part of the contentions to be urged by the appellant seeks different findings and inferences of fact to be made from the primary findings of fact of Street J. The Appellant submits that certain inferences drawn by the Trial Judge were not open to him on the evidence and that other inferences not drawn by him should have been drawn by him and by the Judges of Appeal. The primary inferences to which the appellant refers are as follows:-

9/3172

> "Mr. Barton and Mr. Bovill regarded it as a sheer commercial necessity to rid Landmark of the presence of Mr. Armstrong as a Director and of Mr. Armstrong, through his companies, as a shareholder. It was the recognition of what they regarded as sheer commercial necessity that was the real and quite possibly the sole motivating factor underlying the agreement recorded in the deed of 17th January, 1968 ... the course of the negotiations between the parties and the whole of the evidence leaves me with the distinct impression that neither the fact that Mr. Barton entered into this agreement with Mr. Armstrong, nor any of the terms of that agreement, would have been in any way changed if there were a complete absence of any threats or intimidation on Mr. Armstrong's part. Mr. Barton wanted to be rid of Mr. Armstrong in the interests of Landmark, and, indirectly, in his own interests as a

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substantial shareholder and Managing Director of Landmark."

68. The foregoing findings of the Trial Judge were in substance, accepted by each of their Honours
10/4107 in the Court of Appeal. Jacobs J.A. said that the Trial Judge had found, and the evidence strongly supported the finding, that commercial necessity itself played a large part in the motivation of the Appellant.

12/4201-2 69. Mason J.A. agreed with the Trial Judge in thinking that at all relevant times the appellant, although apprehensive as to the safety of himself and his family in the light of threats and intimidation to which he had been subjected, nevertheless viewed and considered the proposed agreement dispassionately with a free and independent mind. The appellant entered into the agreement and committed Landmark to it, said Mason J.A., not because he was overborne by Armstrong but because in the exercise of his free and independent judgment he considered the agreement to be advantageous. First, his Honour went on, he thought that Paradise Waters held the promise of very considerable profit. Secondly, he appreciated that to enable completion to take place it was essential to secure finance which could be obtained only in the event that the controversy within the company was brought to an end by a settlement which terminated the Armstrong interest in the company, thirdly, for the well being of the company he thought it essential to sever the

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connection with Armstrong and eliminate his capacity to create trouble. For those reasons, his Honour said, which the Trial Judge shortly described as commercial necessity, the appellant decided to enter into the agreement and commit Landmark to it.

12/4254 70. Taylor A-J.A. having referred to a submission by the appellant that having regard to the commercial aspects of the matter there was every reason for the appellant not to enter into the agreement on the 17th January, said that the evidence did not support such a submission and that it was contrary to the facts accepted and findings made by the Trial Judge. The Trial Judge's finding that the agreement was entered into because the appellant wanted to for commercial motives was, his Honour thought, undoubtedly correct.

71. The appellant submits that because of the disagreement of each member of the Court of Appeal with Street J. upon certain inferences of fact which were essential to the findings of Street J. set out in paragraph 67 hereof, it was not open to them simply to accept the findings set out in paragraph 67 in the way in which they did. For example, none of the four Judges sought to explain why, if commercial considerations made it so obviously necessary for the transaction to go forward, Armstrong felt it necessary to threaten Barton with death if he did not go through with it.

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Street, J. solved the problem by his findings (f) and (g) set out in paragraph 30 above but none of the appellate Judges was able to accept this avenue of escape from the mystery, and simply left it unsolved and ignored. The appellant submits that this and other considerations take the present case either outside the practice rules laid down in Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy 1946 A.C. 508, or, if that case is applicable bring it within the exceptions stated in that case.

72. The appellant submits that the true answer to the problem left unsolved by the Court of Appeal is that there was no commercial necessity motivating Barton, the opposite was the case, and that is why Armstrong acted as he did. It is submitted that it is plain that far from being necessary to enter into the agreement there was not even commercial advantage in doing so once the evidence relating to the commercial aspects of the affair is properly understood. Furthermore the appellant submits that apart from the disadvantageous nature of the agreement from Barton's point of view personally, it was an agreement from Landmark's point of view both disadvantageous and unrighteous.

73. Because their views of the commercial necessity or advantage from the appellant's point of view, of entering into the agreement, appear to be of central importance to the inferences the various Judges drew from the primary facts and because, it

Record:

is submitted, a correct appreciation of the financial and commercial position makes it proper to draw the inferences for which the appellant contends, the appellant turns first to this question, and after dealing with it, will turn to the other inferences which it urges are the correct ones.

74. In support of the submission that there was the opposite of commercial advantage to the appellant in entering into the transaction the appellant submits in the following paragraphs a detailed analysis of the commercial aspect of the facts of the case. It is submitted that this analysis shows why Armstrong threatened Barton with death if he would not enter into the agreement. If this submission as to motivation is not correct, Armstrong's actions are inexplicable.

75. Detailed Examination of Commercial Situation:

Introduction

Every effort has been made to be concise in this and the following paragraphs of commercial analysis but the enormous volume of the evidence has made even a concise account a long one.

The financial position of Landmark and of Armstrong and Barton in relation to Landmark during the period most relevant to the suit may be looked at in five successive stages. These are:

(1) the period prior to the removal of Armstrong as Chairman;

(2) the period which began with the removal of

Record:

Armstrong as Chairman and ended with the Annual General Meeting on the 2nd December, 1967;

(3) the period after the Annual General Meeting and before U.D.C. made known its intention to withdraw its promise to provide Landmark with the $450,000 necessary to pay out Armstrong;

(4) the period between the withdrawal of its promise by U.D.C. and the completion of the transaction between Landmark, Armstrong and Barton on the 18th January, 1967.

(5) Subsequent history.

76. (1) First Period

The evidence describing the precise situation of Landmark prior to the removal of Armstrong as Chairman is somewhat scanty. The paid up capital
8/2491 was 1,753,000 $1 shares. Armstrong's companies held approximately 300,000 and Barton's about 200,000.

77. It is clear, however, from recitals in documents subsequently executed, correspondence between
7/2092 the parties, and later financial statements (see
7/2956-7 for example the recitals and schedules in the
7/2950-3 principal deed of 17th January 1967 at 7/2092 the notes at 9/2956 and the summary in the minutes of 16th May, 1967 2950 - 3) that early in November 1966 the Landmark group of companies had four major assets, a mortgage business, Landmark House in Brisbane, Paradise Towers under construction and

Record:

the Paradise Waters project at Surfers Paradise. (The units "Vista Court" at Rozelle although in Landmark's name were held on trust for Armstrong.)

78. The Paradise Waters project arose from the acquisition by Armstrong or Armstrong companies of title to McIntosh Island at some time prior to February 1966. Title to the Island consisted of freehold and leasehold title. It seems that Goondoo was a company the shares in which were acquired by Armstrong or Armstrong companies and that Goondoo originally had the freehold and leasehold title to McIntosh Island. Following a transaction which, in view of the securities being dated 17th February 1966 seems to have taken place early in 1966 the freehold title was in November 1966 to be found in Paradise Waters, the leasehold still in Goondoo (on trust for Paradise Waters) the shares in Paradise Waters entirely owned by Paradise Waters Sales, and the shares in Paradise Waters Sales owned at to 60% by Landmark and 40% by Finlayside. Finlayside was a company in which all the shares were owned or controlled by Armstrong. George Armstrong & Son, another Armstrong company was owed $400,000 by Paradise Waters (secured by Bill of Mortgage over the freehold) guaranteed by Landmark, this $400,000 it is to be inferred, being the balance of purchase money for the transfer of land (hereafter called the Paradise Waters Project) that had in substance been effected from Goondoo to Paradise

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8/2730 Waters Sales (see Smith's note at 8/2730 which shows that the price on sale from Goondoo to Paradise Waters Sales was $600,000).

79. In addition to the securities already mentioned George Armstrong & Son held a mortgage over the leasehold already referred to, the mortgages over both freehold and leasehold being subject to a first mortgage to U.D.C., a lien and charge over the 60% shareholder in Paradise Waters Sales and a Mortgage of life policies held by Landmark on the lives of Armstrong and Barton. (See Schedule 1 to
7/2113 main deed of 17th January, 1967 at 7/2113).

80. As appears from correspondence commencing with a letter dated 10th November, 1966 from Arm-
8/2736 strong's Solicitors to Paradise Waters Sales and
8/2744 from originating summonses in proceedings commenced shortly thereafter provision in the mortgage securing the debt to George Armstrong & Sons gave to the Armstrong company, Finlayside, the right to nominate half of the directors of Paradise Waters Sales and also to nominate the Chairman.

81. The originating summonses referred to were issued on the 15th November, 1966 with the object of bringing about equality on the Board of Paradise Waters Sales abovementioned. So far as the evidence shows the events bringing about Armstrong's desire to take control of the Paradise Waters Sales Board were the growing disagreement between him and the remainder of the Board of Landmark, his removal

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from the offices of Landmark and his being stripped of executive power. It seems, although the documents and evidence are not completely clear about this, that it was not default on the part of Landmark or any of its subsidiary companies that gave rise to the right to control the board but that this right was given by the documents and not exercised by Armstrong while relations with Landmark were good.

82. Period between removal of Armstrong as Chairman and Annual General Meeting.

Once however the situation arose where Armstrong and the rest of the board were at odds and he exercised his rights under the documents of February 1966 he would be able to control, at board level at least, the company which owned the Paradise Waters Project, and Landmark although the 60% shareholder in that company would be left without a say in the management. However Landmark itself was an unsecured creditor of Paradise Waters Sales to a sum of approximately $700,000.

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83. As appears in numerous places in the evidence without however the precise clause ever being set out, another term of the document securing to George Armstrong & Sons the amount of $400,000 owing to it by Landmark was that the money should become payable if Armstrong ceased to be chairman of Landmark (see letter dated 17th November, 1966.) On the 17th November Armstrong was voted out of the

8/2753

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chair of Landmark (see amongst other references the same letter of 17th November, 1966).

84. It thus appears that there were two steps in the events of November: first, the action of Armstrong in seeking to take control of the Paradise Waters Sales Board which made it desirable but not essential for Landmark, if it wished to run the Paradise Waters Project itself, to pay out the securities entitling Armstrong to control of the Board, and second, the decision of the Landmark board to obtain moneys elsewhere to pay out George Armstrong & Son, thus enabling them to remove Armstrong as chairman as happened on the 17th November. As appears from the letter from Armstrong's
8/2755 solicitors dated 18th November the Stock Exchange was informed on the 18th November that Armstrong had been told before his removal from the chair that the amount of $400,000 becoming due because of his removal was payable for repayment.

85. George Armstrong & Sons by letters dated 21st November, 1966 demanded from Landmark and Paradise Waters Limited immediate payment of the $400,000, pursuant, in the case of Landmark, to the covenant contained in the charge over the shares in Paradise Waters Sales and in the case of Paradise Waters
8/2761-2 Limited to the provisions of the mortgage over the freehold. At the same time Southern Tablelands de-
9/2953 manded from Grosvenor Developments (another Landmark company,) an amount of $50,000 which had been

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allegedly outstanding since 30th September, 1966. It seems that non-payment of this amount, whilst not desirable from Landmark's point of view, would have had no immediately serious consequences. Nevertheless it was obviously highly expedient that $450,000 be found to satisfy Armstrong's demands on the Landmark group. In particular if the money could not be found to discharge the securities over the Paradise Waters project Armstrong would be entitled to appoint a receiver to sell the free- 10
hold and leasehold land.

86. On the 24th November a meeting of directors of Paradise Waters Sales was held in the course of which Armstrong sought that steps be taken which would enable his nominees to be appointed to the Board. One, Beale, had already been appointed but apparently it was necessary to have an extraordinary general meeting of shareholders to increase the number of directors of the company before any more could be appointed. It was resolved that an 20
extraordinary general meeting be held on the 7th December to pass appropriate resolutions to increase the number of directors of the Company.

87. At a meeting of the Board of Landmark on the
8/2067 same day (24th November, 1966) a letter from U.D.C. was tabled stating that subject to satisfactory documentation U.D.C. agreed to make available to Landmark the sum of $450,000 plus interest due to pay off its debt to George Armstrong & Sons and

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Southern Tablelands in the event of those companies not withdrawing their present demands by the 25th November 1966. Landmark's solicitors by letter

8/2764 dated 25th November, 1966 informed Armstrong's solicitors that the amount demanded in the three letters of demand of the 21st November, 1966 would be satisfied on Wednesday, 30th November, and various formal requests for information were made in relation to the mechanics of the settlement.

88. At this stage, therefore, Armstrong's position was unpleasant but he was not in financial danger. There were three separate aspects of the general conflict between him and the rest of the Landmark board:

(a) He was attempting to obtain control of the Paradise Waters Sales Board and was being resisted by the other members of the board of Landmark who no doubt were delaying on the basis that Armstrong's rights would come to an end as soon as he was paid out.

(b) The Board of Landmark was seeking to pay out the debt which had fallen due to Armstrong because of his removal as Chairman of the Company.

(c) Preparations were being made on both sides for the Annual General Meeting of the 2nd December where Armstrong had nominated candidates for directorship. If Armstrong's nominees were elected he would again be in control of the Landmark Board.

Record; 89. Indeed as matters progressed towards the Annual General Meeting things must have looked quite rosy from Armstrong's point of view. It seemed that he would be in receipt of $450,000 prior to the meeting, with his equity in Paradise Waters Sales still intact. If not paid out he would be in command of Paradise Waters Sales until such time as he was paid out, it being unlikely that Landmark would use its position as a large unsecured creditor to take immediate action against Paradise Waters Sales. At this stage, however, he probably expected that he would be paid out which would be good rather than bad from his point of view if he won control of the board of Landmark at the Annual General Meeting. In view of the size of his shareholding he must have regarded himself as having a fair chance of success at the meeting. If he were successful he would then be in control of the Landmark Board, would own 40% of Paradise Waters Sales, would have in hand $450,000 which meant to him the realised profit on the sale of his 60% interest in Paradise Waters and Landmark would have a first mortgagee very heavily committed to the Paradise Waters Project U.D.C., whose purse seems to have been regarded by everybody as bottomless, would be virtually committed to financing the project to its conclusion once it took the step of advancing the $450,000 to pay out Armstrong. That he fully appreciated the strength of his position

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is indicated by the fact that 21 months later, under the stress of cross-examination he remembers

4/1317 that he was to have been paid out before the Annual General Meeting.

90. To summarise, therefore, immediately prior to the 30th November, 1966 when Armstrong could reasonably anticipate being paid $450,000 by Landmark,

(a) success at the Annual General Meeting would mean for him:

1. Having in hand the realised profit from what would in these circumstances be the very advantageous transaction of February 1966, the sale of 60% of Paradise Waters to Landmark for a price which valued the land at $1,000,000 in its substantially undeveloped state.

2. Being in control of Landmark and in particular the future carrying on of the Paradise Waters project.

3. Being virtually assured that the project would be financed to its conclusion by a very strong financier.

4. The prospect of substantial capital moneys coming to him from his 40% shareholding in the project.

5. A good price being placed by the Stock Market on his shares in Landmark.

(b) The position of Landmark itself was also sound. So long as U.D.C. kept its promise

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to pay out Armstrong the same advantages accrued to Landmark as have just been listed in respect of Armstrong. So far as the company was concerned it did not matter who won control of the board. There is nothing in the evidence to suggest, and it was never suggested by any party before Street J. that U.D.C.'s promise was not bona fide at the time it was given. Amongst other indicators that the promise must have been bona fide when given are:

1/138 1. The declaration by U.D.C.'s solicitor at Landmark's Annual General Meeting that U.D.C. would advance the money,

9/2968 2. The minute of Paradise Waters Sales of the 7th December, 1966.

91. In the light of the foregoing it seems that the obtaining from U.D.C. of the promise to pay out Armstrong was a magnificent piece of business on the part of Landmark. It meant in effect the success of the Paradise Waters project, despite the length of time it would take to carry it to completion. It thus made control of Landmark extremely valuable to the controller.

92. The reasons why the advance by U.D.C. of the amount necessary to pay Armstrong out virtually committed that company to financing the project to its conclusion are, it is submitted, compelling: U.D.C. was already committed to (and secured by

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9/2951

first mortgage for) advances of $680,000 for the project. $416,000 had been advanced and there was an unpaid engineers certificate for over $80,000.00. A further $450,000 meant that U.D.C. would need to recover from the project, if it had to enforce its rights as mortgagee, upwards of $1,100,000. The value of the land in its then state, and on a mortgagee's sale was hard to determine, but almost certainly less than $1,000,000. Nearly twelve months later, in the proceedings seeking approval of the proposed scheme of arrangement, the expert valuations ranged between $750,000 and $1,000,000. Thus U.D.C., to make certain of regaining its advances would be virtually obliged to lend more money still, to enable the project to be developed to the point where it could be sold in the way which would produce the expected eventual large profits.

93. From Barton's point of view success at the Annual General Meeting was perhaps of even greater importance than it was to Armstrong, as from the evidence in various places it appears that the greater part if not all of Barton's assets were linked up with Landmark and his shareholding in Landmark. If his party succeeded at the Annual General Meeting he would be managing director of a company carrying on, inter alia, the potentially extremely remunerative project of Paradise Waters and his substantial shareholding in the company

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would become much more valuable. He would also be rid of Armstrong.

94. Position immediately after Annual General Meeting

At the Annual General Meeting Barton was successful. Armstrong's nominees were defeated and at the meeting itself Armstrong was humiliated. Immediately after the meeting therefore Barton's fortunes stood at highest point. He had persuaded a most reputable financier to put itself in a position where it would be almost certainly committed to finance the whole of the Paradise Waters Project, he had arranged to be rid of a troublesome creditor, he was in control of a public company with excellent prospects, he held a large percentage of the equity in that company and no doubt he enjoyed a considerable reputation in commercial circles.

95. The position from Armstrong's point of view had changed for the worse in at least one respect. Although he would receive the large capital sum representing, in substance, his profit on the sale of 60% of his interest in the Paradise Waters Project and still retain 40% of the equity in that project, it would be in circumstances where any control over the project itself or the administration of the companies connected with the project would be out of the question. Nevertheless at this point his financial position was sound in that he would have his profit, he would have his equity (although he

Record: would be doubtful whether he would ever get full value for it) and he could be reasonably assured that the Paradise Waters project would go through so that his shareholding in Landmark would increase in value. He had, however, been defeated in circumstances which must have been particularly galling to him, by a man whom he had himself introduced to the management of Landmark.

96. Position when U.D.C. reversed its attitude.

(i) History

Sometime before the 10th December U.D.C. decided not to advance the $450,000 to Landmark or to make any further advances on the Paradise Waters project and refused to pay the engineers certifi-
7/2450 cate for $80,483 for work already done on the project. For a period prior to this happening there seems to have been a lull in the activity between the solicitors for the respective parties in relation to the repayment of Armstrong's loan. This was perhaps due to the preoccupation of the parties with the Annual General Meeting. After the meeting, on the 7th December, 1966 the solicitors for Armstrong raised the question of completing the dis-
8/2767 charge of the mortgage securing the $400,000 debt.
9/2971 Also on the 7th December an extraordinary general meeting of Paradise Waters Sales was held and the permissible number of Directors increased to seven.
9/2968 At a directors' meeting again on the same day it was resolved that the moneys due to George Armstrong

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& Son be paid as soon as possible. It was on this day that Street J. gave his decision in the suit

8/2756 commenced by Finlayside on the 15th November the effect of which was that Armstrong's nominees would be appointed to the board of Paradise Waters Limited and Paradise Waters Sales effective as from the 14th December unless Armstrong was repaid in the meantime.

97. It was in these circumstances that U.D.C.'s

1/47-8 change of mind became known. The evidence is that Barton became aware of this decision on or about the 10th December, 1966. It is not known when Armstrong became aware of it but it seems likely from the course of events narrated hereunder that he became aware of it on or about 8th December.

98. Position of Armstrong upon learning of U.D.C.'s reversal of attitude.

Once Armstrong knew that U.D.C. would not finance the repayment of his loan and would not further finance the Paradise Waters project his financial position was gravely threatened;

(a) As to his security for the $400,000 advance,

(b) As to his shares in Paradise Waters Sales, and

(c) As to his shares in Landmark.

99. His security for the $400,000 owed by Paradise Waters was a second mortgage over the project and a guarantee by Landmark. The first mortgage by U.D.C. provided for advances up to $680,000. At

8/2488 the date of U.D.C.'s decision about $416,000 had

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been advanced. There were unpaid engineer's certificates for some $80,000 which Paradise Waters could rightly claim should be advanced by U.D.C. under its agreement and there was a possibility that in order to put the property into a more saleable condition, advances up to $680,000 might have been made. The value of the project on a receiver's sale was extremely doubtful. In all, the project had cost Landmark some $1,500,000 of which

$416,000 was owing to U.D.C. on first mortgage over the project

$400,000 was owing to George Armstrong & Son

$684,000 was owing to Landmark, as an unsecured debt

8/2487

To complete the project to the end of the first stage required the expenditure of a further $1,100,000 and that expenditure was not anticipated to produce any substantial profit. It was only after the expenditure of yet another $1,000,000 to $2,000,000 and the sale of the land at the hoped for prices in the hoped for period that the project was anticipated to produce large profits. Accordingly, the prospects as at December 1966 of obtaining a purchaser at any price were obviously remote. In the latter half of 1967 Mr. Smith obtained valuations of the project which ranged from $750,000 to $1,000,000 and the project was eventually sold for a gross sum of $900,000 in August 1968.

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Reverting to Armstrong's probable views in

Record: December, 1966, it is apparent that it was very reasonable for him to fear that on a forced sale the project may have realised no more than sufficient to satisfy U.D.C. In such circumstances his second mortgage for $400,000 was only as valuable as Landmark's guarantee. However on the assumption that the sale of the project was at such a price as to require any call on the guarantee, Landmark would have faced the immediate loss of its unsecured advances of at least $680,000. With the failure of the scheme of arrangement, Landmark was forced into liquidation and one can fairly assume that those most closely associated with the company, namely Barton and Armstrong would have realised this inevitable result of the loss of the Paradise Waters project. In fact, each of them would have believed, as Street J. subsequently found on the petition for approval of the scheme of arrangement, that loss of the project would mean that neither the shareholders nor creditors of Landmark would get anything.

There is certainly no reason to suppose that Armstrong had confidence in Barton or any reason whatever for optimism at that point of time (namely after U.D.C. had resiled from its promise) and it follows that in Armstrong's view, the guarantee was worthless.

In fact the result of U.D.C.'s action was to create in Armstrong's mind, the view that his

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security for $400,000 might be worthless.

100. Even if events were to fall out well enough for Armstrong to obtain the $400,000 or some part of it it must have seemed very unlikely to him that there would be any significant surplus remaining from the sale price of the project after the mortgagees had been repaid. This meant that his shares in Paradise Waters Sales became worthless. Had he won the day at the Annual General Meeting these shares would have been worth a very considerable sum at some future time and even after losing at the Annual General Meeting, had U.D.C. kept its promise these shares would have been of considerable value. After U.D.C.'s change of mind their probable value was nil.

101. His holding of 300,000 shares in Landmark, which at times during 1966 he could justifiably have considered to be worth between $200,000 and $300,000 would in his mind be worthless. Even if the Paradise Waters project were sold for a sum sufficient to pay out the secured creditors so that there was no call on the guarantee he would be aware that the loss of the unsecured advances of about $700,000 would probably be fatal to Landmark, as later proved to be the case.

102. Thus, when Armstrong heard of U.D.C.'s decision there was added to his existing sense of defeat and betrayal (see Mr. Grants notes line 1)

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the possibility of a financial disaster of great magnitude, which, to repeat would be:

(a) At worst

loss of the $400,000 security or the greater part of it

loss of $300,000 face value of Landmark shares - say $200,000

loss of 40% equity in Paradise Waters Sales,

an indeterminate but very large sum

Total loss possibly $1,000,000 or more.

(b) At best, a quick sale of Paradise Waters and the return of $400,000.

In the ordinary course of events and without the transaction with Barton and Landmark which intervened in January, Armstrong would have had nothing more to look forward to than something falling within the range between (a) and (b) above.

103. Position of Barton upon learning of U.D.C.'s reversed attitude.

The consequences for Barton of U.D.C.'s decision were immense.

1. Landmark's future was thrown out of balance and probably destroyed.
2. U.D.C. could call up its money and sell the project.
3. Armstrong could call up his money and sell the project.
4. If the project was sold in the unfinished

Record:

state, Landmark's unsecured advances (nearly $700,000) would be lost.

5. There was a likelihood that Landmark would have to meet its guarantee.

6. If Landmark's advances were lost its shares would be worthless.

7. The shares in Paradise Waters would be worthless.

8. Although it was U.D.C.'s decision, Barton had to bear the responsibility for the company's failure.

9. Financiers require that the risk capital be supplied by the borrower. In this case the risk capital was represented by

   (a) the $685,000 unsecured advances by Landmark.

   (b) the $400,000 which was Armstrong's profit on the land.

Doubtless U.D.C. realised that by paying out Armstrong $400,000 the risk capital was reduced to the advances by Landmark. But once the continuation of the project was thrown into doubt and the sale in the unfinished state was contemplated, the risk capital disappeared and U.D.C.'s advances were in jeopardy. For this reason U.D.C.'s decision not to proceed, whether or not it was excusable, was understandable. At the same time Barton would have realised that the same

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considerations which prevented U.D.C. from proceeding would apply to any other financier however well intentioned.

10. Barton was aware of the violent side of Armstrong's character and his obsessive concern for wealth. There would certainly have been in his mind, even if there had been no threats by Armstrong up to this point, the realisation that Armstrong also would be deeply affected by the new situation and that he would blame Barton for it.

104. Negotiations.

The various parties concerned with Landmark were in the positions just described, when negotiations began on the 14th December, 1966. Armstrong
3/569 first went to see Mr. Smith on the 8th December. This indicates that it was probably on that day that he had heard of U.D.C.'s decision. One thing consistently revealed by the evidence concerning Armstrong is that he was prompt in his business affairs. Mr. Smith mentioned that the matter first
3/578 considered was the appointment of a receiver. There was no need for such action, indeed there were good reasons against such action, so long as U.D.C. held to its decision.

105. It is submitted that Armstrong must have realised the financial dangers he faced. Having seen Mr. Smith on the 8th December, next day he saw Senior Counsel, Mr. Staff, Q.C. and his solicitor

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Mr. Grant. Eventually a scheme was formulated by

3/573 Armstrong with the assistance of his financial and legal advisors (13th December) and this scheme was of course formulated solely with Armstrong's interests in mind. This scheme comprised the basic

1/65-6 elements which were the basis of the negotiations and subsequently of the contract.

106. It is submitted that it follows from the analysis already made of the commercial situation that from the time his scheme was formulated, Armstrong can have had but one thought in mind and that was to procure Barton's agreement to enter into

3/578 1/48 some such scheme. Indeed the very next day there is no doubt on either case that this scheme was put to Barton. Barton says that it was put to him accompanied by a threat of death if he did not enter into it. Street J. was not satisfied with this, although he accepted that Barton may well have been threatened by Armstrong on that date. Street J. did accept that the scheme was put to Barton by Mr. Smith on that same day.

107. It is interesting to note that although as from the date (presumably the 8th) when Armstrong learned of U.D.C.'s decision it must have been realised by all hands in his camp that there was no prospect of receiving the payout figure of $450,000 as promised, the pretence was maintained that it would be paid out during December.

108. The first steps in Armstrong's real scheme

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8/2718-9 were taken on the 9th December when letters were written by Mr. Smith to Landmark seeking access to Landmark's records. Nevertheless when Landmark's solicitors wrote concerning the discharge of Armstrong's securities for $450,000 in terms which assumed that the discharge would still take place in the near future (although Lnndmark also must have known at that date that discharge in the near future was impossible), Armstrong's solicitors replied by
8/2773 letter dated 13th December, in terms concealing the knowledge that such settlement would be impossible. A somewhat farcical correspondence then ensued with
8/2774 Landmark's solicitors writing letters on the 13th
8/2776-8 December, 14th December and Armstrong's solicitors
8/2775 writing on the 13th December and the 15th December.
8/2783 In this correspondence each side was concealing from the other knowledge that settlement as contemplated by the correspondence was impossible.

109. While this by-play proceeded Armstrong and Mr. Smith had agreed on a course of action on the 13th December. The evidence of what was then de-
8/2721 cided is contained in Exhibit 35 and is dealt with
3/573 in the transcript. From the transcript there is nothing to be learned of the actual discussion between Mr. Smith and Armstrong. The original instructions however are illuminating. If the negotiation was successful Armstrong would emerge with his $400,000 in cash (the additional $50,000 is sometimes mentioned and sometimes not throughout

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the whole case including the judgment), $175,000 for his shares in Paradise Waters Sales and $180,000 for his shares in Landmark. Such a result would have left Armstrong in a position roughly as good as that which he would have had if he had succeeded at the Annual General Meeting. Considering the view that Armstrong took of the company's position it is a cause for some wonder that te could have contemplated achieving such a remarkably favourable result. It is interesting also to note, in relation to Armstrong's being a reluctant vendor that he wanted an offer immediately along the lines of the proposal subject to acceptance within 48 hours. This is quite contrary to the remarks of Taylor A-J.A. at 12/4242.

12/4242

7/2449 110. By letter dated 13th December 1966 Barton wrote to U.D.C. threatening to seek specific performance against it of the promise to lend the moneys. It was at about this time that Barton received advice that the agreement was unenforceable. He also believed that U.D.C. had made a definite decision and would not change it. By a separate letter on the same day he wrote asking for progress payments to be made under the existing arrangements, an amount of $80,000 being due.

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8/2721 111. Armed with Exhibit 35 Mr. Smith invited Barton to his office and put the proposal contained in the Exhibit. This was on the 14th December. According to him Barton listened to the proposal and at the

3/579 and following

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end of the interview said he would let Mr. Smith know on Friday whether he would be able to reach a firm arrangement in line with the discussion. During the discussion there had been no arguments concerning (a) or (c) on Exhibit 35 but Barton had said that the $175,000 mentioned in (b) was too much and had suggested $100,000 plus options to be granted to Armstrong to acquire a number of blocks of land in the Paradise Waters project at a discount. It is noteworthy that this accords with

Barton's recollection that the proposition put to him on the 14th December, 1966 was that Landmark

1/48 should pay $100,000 not $175,000 for the 40% interest in Paradise Waters Sales. Neither on this nor any other occasion was the price of the shares discussed in any way, and Armstrong's asking price on the 14th December became the price in the agreement of 17th January.

3/579 112. At 3/579 lines 42-51 an important piece of evidence appears. On 14th January 1967 Barton was in Mr. Smith's office. When he mentioned the option aspect of the transaction Mr. Smith rang Armstrong and put it to him. Armstrong replied that the suggested discount on the blocks of land did not mean anything. In the context this can only mean that Armstrong took the view that upon a transaction along the lines he was suggesting being implemented the Paradise Waters project would never be completed and that to talk about options over

Record: land was meaningless. His comment is therefore powerful evidence of his view of the real state of Landmark, first if his proposal in some shape went through, second irrespective of the transaction between him and Landmark and Barton. What Mr. Smith did after Armstrong said to him that the discounts on the blocks of land did not mean anything is even more revealing. It shows the true negotiator in action. He turned back to Barton who had not
3/579 been party to the telephone conversation and said that Armstrong considered the discount should be 40% off list price per block. Armstrong's remark shows his opinion of the plight of Landmark as also does the fact that he was prepared to drop from $175,000 to $100,000 without a second thought in relation to the value of his shares in Paradise Waters Sales. This further indicates that the opening price for these shares may have been arbitrarily fixed at the suggestion of Mr. Smith.

113. Of the items under discussion the only matter representing a personal obligation of Barton was the purchase of the shares. Armstrong or his advisers anticipated reluctance by Barton to pay 60 cents for the shares in these circumstances and they
8/2787 were prepared to reduce the price to 50 cents (or even lower). It would be extraordinary in a normal commercial situation for Barton to make no effort to negotiate on the one matter that affected him
3/584 personally. Later on the same day Mr. Smith rang

Record:

Barton and read over to him his notes of the interview being Exhibit 36. (minus at that stage items 4 and 5 on the right hand side). He says that Barton said to him "I will let you know on Friday".

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8/2765

114. On the 14th Armstrong's solicitor made a note in which in addition to the three main items - the repayment of the mortgage debt and interest, the obtaining of options relating to Paradise Waters and the sale of the shares at 60¢ over 3 years, (note that there is no mention of the $100,000 for the Paradise Waters interest) - he added two important items: that Barton was to guarantee the payment by the 9 purchasers of shares of their obligations and that there was to be an answer by 10 a.m. on Friday. He also added the comment that there was a 75% to 25% chance of pulling it off. Once again it is difficult to reconcile these things with Armstrong being a reluctant vendor, or with the comment of Taylor A-J.A. in his judgment.

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12/4242

3/585

115. On the 16th December, according to Smith, Barton made a counter proposal. This involved payment to Armstrong of the $500,000 comprising the $400,000 mortgage debt and the $100,000 for his interest in Paradise Waters. Payment was, however, to be postponed to the 30th April 1967 the mortgages over the project were to be released and Armstrong's security was to be second mortgages on Paradise Towers and Landmark House. Armstrong was also to have an option to buy the penthouse in Paradise

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Record:

Towers (listed at $80,000) for $60,000. The previous arrangement relating to the option to acquire blocks at a 40% discount in Paradise Waters

3/585-6 was to remain. Smith saw Armstrong subsequently

3/587, 589 on the 16th and reported Barton's offer to him.

8/2728 This appears as Exhibit 39, that part above the line being Mr. Smith's note of Barton's proposal and that part below the line being matters added in the course of his subsequent discussion with Armstrong when Armstrong required certain further assurances and Smith obtained Armstrong's signature.

116. When Mr. Smith saw Barton on the morning of Friday the 16th, Barton left with Mr. Smith 3

8/2725-7 documents comprising Exhibit 38. When Armstrong saw Mr. Smith in the afternoon he wrote on them the comment which appears on the Exhibit. The comments on the Exhibit would seem to suggest that Armstrong was not interested in Barton's proposal but Mr. Smith's evidence is not explicit one way or the

8/2728 other. The writing on Exhibit 39 would suggest that Armstrong was interested in the proposal subject to the further security that he caused Mr.

3/589 line 46 Smith to note at the foot of the Exhibit. When Mr. Smith next spoke to Barton he said that Armstrong was not prepared to accept the proposal he had put

8/2728 and did not say anything about the extra conditions suggested by the notes on Exhibit 39. This makes

3/588 line 17 somewhat mysterious the evidence given by Mr. Smith

Record:

to the effect that he had got Armstrong to sign Exhibit 39 so it would help negotiations with Barton.

117. The reason Mr. Smith gave to Barton for Armstrong not being interested in Barton's proposal was that Armstrong did not think the money would be

3/590 available at the 30th April. This means, that amongst other things, Armstrong was taking a very pessimistic view of Landmark's ability to raise money on the Paradise Waters project because if Barton's proposal was accepted, it would have meant that the only encumbrance on the title to the Paradise Waters land was U.D.C.'s first mortgage; it is significant that the transaction which eventually emerged involved the immediate payment of $200,000 in cash or valuable assets.

118. The upshot of Mr. Smith's voicing doubts about the cash position to Barton was a sensible

3/590 comment made by Mr. Smith to the effect that a visit to U.D.C. by him might help to clear up the matter. Obviously U.D.C. was the key to the situation and if it could be induced to change its mind the whole situation would change again. Barton agreed to Mr.

3/590 line 38 Smith's proposal and Mr. Smith went to U.D.C. at 2.30 p.m. the 19th.

8/2729 119. Exhibit 40 sets out the position as Mr. Smith

3/591-2 understood it following discussions with Barton either late on the 16th (Friday) or early on the 19th December. His notes show the proposition

Record:

already outlined plus an alternative way of securing it. Either proposition meant a postponement of payment to Armstrong but provided that he should get $100,000 for his interest in the Paradise Waters project. The point about each proposal is that besides gaining time for Landmark it left only the first mortgages over the Paradise Waters land, which may have enabled it to raise some further finance at least to get the property into a more saleable condition. The first version of the proposal was according to Mr. Smith rejected by Armstrong and he passed on that rejection to Barton. Nothing is said about the second proposal having been rejected.

8/2735 120. Exhibit 44 is a note of the interview between Messrs. Smith and Honey of U.D.C. in the afternoon of Monday, 19th December. Although in one sense the note indicates a possibility of obtaining further finance from U.D.C., that is really illusory, because one of U.D.C.'s pre-conditions for considering further lending was that Armstrong should leave his $400,000 on mortgage. Another pre-condition was that Armstrong and Barton remain on the board with Smith as chairman. The result of complying with U.D.C.'s wishes from Armstrong's point of view would have been to leave him in a somewhat worse position than he had been at the beginning of November. In any event even this illusory prospect had disappeared by the 21st December when U.D.C.'s

Record:

demands became much more immediate.

121. In the evening of the 19th December Mr. Smith prepared his appreciation of the situation from Armstrong's point of view, Exhibit 49. In essence his view was that the best thing for Armstrong to do was to accept the proposal set out in paragraph 3 of the note at 8/2779. The altnerative s were to take control of Paradise Waters Sales, in his view this would make valueless the shares in Landmark, or to appoint a receiver with the same consequences and additional difficulty; or to do nothing, in which case Mr. Smith thought that the company would collapse. The only objection Mr. Smith had to Barton's proposal was his doubt whether the moneys would be paid by the 30th April, 1967. However, he commented, securities offered, namely a mortgage over 17 units in Paradise Towers and a second charge over Landmark House, were very much more saleable than the existing second security on Paradise Waters. It is interesting to note, that from the point of view of Landmark, the only difference between doing nothing (which in Smith's view would lead to the collapse of Landmark) and the course he advocated, was that his recommendation would lead to a substantial worsening of Landmark's liquidity position. It must follow that in his view although what he recommended was sensible from Armstrong's point of view, it would inevitably hasten the collapse of Landmark.

8/2790
3/591-3
3/650

8/2779

Record:

122. That this was his view is borne out by all his subsequent actions. Although the prospect of the chairmanship of Landmark was remunerative, he declined it obviously for the reason that he did not want to be associated with a company that failed. He did not even consult U.D.C. during
3/638 January; (see 3/638, dealt with in more detail later).

123. Barton's proposition on the 19th December that he would sell Paradise Waters to Armstrong and "would still buy Landmark's shares" is also significant for the light it throws on Barton's view of the value of Landmark shares. If Landmark were relieved of its disastrous obligation in the Paradise Waters project, then Landmark did stand every chance of success upon the basis that with U.D.C. and Armstrong financing the project it would probably recover its unsecured advances.

124. Mr. Smith next saw Armstrong on the following
3/594 day, Tuesday 20th December and gave him a copy of the notes of 19th December. He remembers nothing of the discussion but presumably he advocated the same course that he had concluded was the best one in his memorandum of the 19th December set out at
8/2790 8/2790, and following.

125. It thus appears that as at Tuesday 20th December, Barton had offered a proposal which Smith was recommending to Armstrong should be accepted by him. If one looks purely at the negotiations that had

Record:

been proceeding on a commercial level and leaves out of account the pressure that was otherwise being exerted by Armstrong against Barton at this time one would conclude that but for the further action now taken by U.D.C. an arrangement along the lines of that dealt with in Mr. Smith's memorandum of the evening of the 19th December would have been entered into by the parties. In view of the commercial realities of the situation, it would seem extraordinary that Barton should contemplate such a thing. When Armstrong's threats are taken into account however, the situation is understandable.

126. However, on the 21st December U.D.C. suddenly threatened the immediate appointment of a receiver whereupon Barton saw Smith. Mr. Smith remarked that in order that the negotiations should be successfully completed, it was essential that the appointment of a receiver should not occur.

3/595

3/595 line 17

127. Then, without any further reference in the evidence to the proposal outstanding from the 19th Mr. Smith's evidence is that Barton put a further proposal to the effect that Armstrong should acquire from Landmark Landmark's 60% interest in Paradise Waters for $150,000. He said this would enable Landmark to avoid U.D.C. proceeding to a receiver. Mr. Smith's note of this conversation went into evidence as Exhibit 41 (8/2730 - note that at line 30 the words "Would sell by Landmark

8/2730

Record:

shares" should read "Would still buy Landmark shares"). The notes show that had this proposal been taken up Landmark would have been rid altogether of the Paradise Waters project, it would have had its guarantee of U.D.C.'s and Armstrong's securities released, Armstrong and U.D.C. would each pay half of the outstanding accounts on the project and would buy the machinery and would extricate Landmark from its involvement with the repayment to Armstrong. Mr. Smith also gave evidence on this matter. It is clear that Landmark was prepared to sell its equity in the Paradise Waters project for $150,000 subject to negotiations, on credit without security and also to leave unsecured the amount owing from the project to Landmark, of almost $700,000. This meant that Landmark was risking some $850,000 without security, at very considerable risk for a maximum possible eventual profit of $150,000. This is a further strong indication of Barton's true view of the possibility or rather the improbability of anything good coming from the Paradise Waters project in the foreseeable future.

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128. This offer was presumably sparked into life by U.D.C.'s threat to appoint a receiver. U.D.C. had apparently told Mr. Coleman (Landmark's solicitor) (see Exhibit 41 8/2730) that U.D.C. would consider Armstrong taking over the whole of the equity if he would then go with U.D.C. dollar for dollar.

8/2730 line 10

Record:

At this point of time therefore Armstrong had his opportunity to take the Paradise Waters project or leave it. He chose to leave it.

129. Barton was also expressing his view of whether the company should retain the Paradise Waters project. He preferred that it should go to Armstrong.

130. Both parties as businessmen knew that the project was doomed to ultimate failure unless vast quantities of capital became available from some source outside Landmark. Armstrong however, had a different idea inspired by U.D.C.'s sudden threat. This proposal was put by his solicitor to a board meeting of Landmark on 22nd December, the minutes of which are in evidence. The proposal is dealt with elsewhere in the evidence but it appears most clearly at this point. It was a proposal whereby Armstrong would obtain an asset the list price of which was $80,000 for $60,000 and in return for that (the $60,000 being the amount needed to buy off U.D.C.'s receiver) he was to have control of the company until the 21st January 1967 and obtain the resignation of Barton as chairman and managing director as well as his own re-appointment as chairman.

7/2475

131. The proposal was rejected. Armstrong said (the minutes record) that this was the last chance to save the company. This proposal of Armstrong, if accepted, gave him control of the company and

Record:

an opportunity to see just what its current position was. It got rid of Barton but it left Armstrong with a lot of problems, namely a company whose long term success at the least depended upon either persuading U.D.C. to come back into the picture or another financier to take over. The minutes show that U.D.C. wanted Armstrong to advance a further $400,000 on the project as a condition of its continued interest. (The reference at 8/2800 to seeing whether more money would be lent is a reference only to further advances by Armstrong - see besides the document itself the cross examination of Bovill at 4/482).

8/2800

4/482

132. Had Armstrong had his way, been given until the 21st January to make his assessment of the future and worth of the company, formed an adverse opinion of its prospects and then refused to advance the $300,000 required by U.D.C. he would have been a month worse off; the only advantage to him would have been that he would have acquired a cheap penthouse. He would still have been faced with the problem of getting his $400,000 from Landmark (perhaps less of a problem with himself in charge), of getting value for his interest in the project and of obtaining a good price for his shares. From the company's point of view the chief objection to the proposal was the concession that was being sought in relation to the penthouse, the true value of which may well have been arguable. From

Record:

Barton's point of view, of course, there was no reason to accept the proposal, and indeed so long as the $60,000 could be raised to appease U.D.C. for a time, the company was probably fractionally better off that way.

133. The explanation of Armstrong's proposal consistent with the commercial realities of the situation is that

(i) He recognised how essential it was in his own interest to prevent the appointment of a receiver; once a receiver was appointed the prospect of making a sale of his shares to Barton look reasonable, in anybody's eyes, was out of the question; his equity in the Paradise Waters project became worthless and his second mortgage doubtful.

(ii) His proposal at least averted the evil consequences of (i), gave him time to consider the situation, and still to apply pressure to Barton to carry the transaction through.

134. Barton's position would not have improved by resigning; Armstrong could still pressure him into buying the Landmark shares, and could otherwise do what he wished (Barton would think) as to the rest of the transaction. Bovill also gave reasons why he was against Armstrong's proposal, the reasons obviously being ones that seemed reasonable to him. It may well be significant here that it was following Barton's rejection of his proposal and

Record:

departure for Surfers Paradise that the Vojinovic episode began, culminating on the 7th January.

135. The evidence concerning the board meeting of the 22nd December shows that it was conducted in an atmosphere of hostility between the two camps and it must be inferred, it is submitted, following Barton's offer of the 21st and Armstrong's offer of the 22nd and the hostile rejection of the letter that the proposal outstanding from the 19th December must have been regarded by both parties as being either suspended or at an end.

136. U.D.C.'s demand for $60,000 was satisfied by giving additional security just before Christmas and the threat of the receiver staved off for the time. Nothing further happened in the way of negotiations between Barton and Armstrong until early in the New Year. The only thing that had happened in the meantime was a plea addressed to U.D.C. by

7/2458 Messrs. Cotter and Bovill in a letter dated the 28th December, Exhibit 7. Barton had said that he thought this plea would come to nothing but that it would do no harm.

137. As at the 22nd December therefore, the position from Armstrong's point of view was desperate. The company was likely to collapse, his securities were in jeopardy and what he regarded as the "last chance" to save the company had been rejected. With his knowledge of the affairs of the company and his complete lack of confidence in Barton, he

Record:

could foresee nothing but a tremendous loss. The situation against which Mr. Smith had warned Armstrong, namely "do nothing" was in fact occurring (Exhibit 49). From the commercial point of view the only thing that could save the company and thus his assets was a vast infusion of fresh capital postponed to his securities and to his shares in both companies. There are few ways in which a dramatic change in the company's finances could have occurred but one such way would have been the recovery of the proceeds of the insurance on Barton's life.

138. On this same day - 22nd December, 1966 - significant events occurred at another level:

(a) Hume collected from the panel beaters his Falcon car. This vehicle was only 12 months old but had been smashed by Novak, in September.

(b) Doubtless, the arrangement was made on or about this date pursuant to which on the 29th December the registration of the Falcon motor car was noted in the official records of the Department of Motor Transport as having changed from Hume to Novak. The 29th December was only the second working day after the 22nd December. (Hume gave a false reason for this transfer and it was subsequently shown that Hume regarded the car as his own and dealt with it accordingly.)

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6/1694-5

Record:

(c) As at this date, 22nd December, Hume was seeing Novak nearly every day.

(d) At about this time (during the last week in December) Novak recruited Vojinovic to kill Barton.

2/337 and following

139. In effect then it seems that as from the 22nd December Barton's final offer to Armstrong that Armstrong should take over the project had been rejected, Armstrong's counter proposal had been rejected, so that all negotiations were at an end, and the parties in opposite hostile camps. Grant had told Armstrong that nothing could be done until 4th January, and it was likely that by this time U.D.C. would have appointed a receiver. Armstrong was seeing Hume frequently and Hume had become aware of the existence of the insurance policy (he thought for $500,000, actually for $600,000) on Barton's life.

3/656

140. Despite the fact that negotiations seemed at an end, at 3/600 Mr. Smith said in evidence that he rang Barton on the 3rd January and in effect took the matter up where it had been left at the 20th December, although there seems to be nothing indicating any resumption of negotiations. Mr. Smith went to Barton's office where there was a discussion of which he made notes, Exhibit 42. He also gave evidence of the conversation. In summary Mr. Smith's recollection was that he said to Barton if the $500,000 could not be paid as previously

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8/2731
3/601 and following

Record: arranged, say in April 1967, the time for payment could be made a year away (once again this vendor did not appear reluctant). Also according to him it was Barton who suggested that $200,000 of the $500,000 could be paid immediately, as to $140,000 by cash and as to $60,000 by the transfer of the penthouse leaving only $300,000 to be paid at the end of a year. Different ways of securing the $300,000 outstanding were discussed. Barton proposed that the interest rate should be 7½%. According to Mr. Smith's evidence the purchase of the 300,000 shares was also still on foot in any version of the transaction although according to his note Exhibit 42 it might be thought that the share deal only came into one of the alternative methods.

141. Barton's account of this interview is sketchy.

1/51 He said in chief, that Mr. Smith said that Armstrong wanted Landmark to buy his interest in Paradise Waters Sales for $100,000, wanted his loan for $400,000 to be repaid and wanted him, Barton, to purchase Armstrong's shareholding for 60 cents each. He said further that he replied that he was inclined to make some sort of agreement with Armstrong but he would have to seek advice. He also said he had one or two telephone conversations with Mr. Smith prior to the 7th January. He was not asked questions about any further conversations with Mr. Smith

1/71 until 1/71 when he recounted a conversation occurring on or about the 10th January, 1967. He was

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cross examined by Mr. Staff about the conversation of the 3rd January. It was specifically put to him that he proposed all the items set out in Mr. Smith's note. He said "No" to all these suggestions, making it reasonably clear that none of the proposals that were being put to him by Counsel had ever been made by him. It also seemed to be clear that had he been asked he would have agreed that something like these proposals had been put to him by Mr. Smith. Mr. Smith said that later that day he read to Barton over the telephone the notes he made of the conversation (3rd January) Mr. Smith recalled Barton as saying "Yes, I agree", but presumably this is an agreement to the correctness of Mr. Smith's notes rather than agreement to the proposal embodied therein, which really constitutes 3 alternative offers.

2/260 and following

3/610

3/610 line 46

142. On the 3rd January Mr. Smith also spoke to Armstrong and on the 4th saw him. At that interview Exhibit 43 came into existence embodying what amounted to a counter offer by Armstrong. Armstrong's proposition consisted essentially of accepting the principal terms of what Mr. Smith reported to him as being Barton's "offer" with an increase of the interest on the $300,000 from 7½% to 12% an increase in the number of blocks over which the options were to be had from 30 to 35 together with an increase in discount from 40% to 50% and with an alteration in favour of Landmark of cash

3/611

8/2732

Record:

on completion instead of five years terms; Barton was asked to guarantee payment of the total consideration for the shares and the persons who were to buy them were to be approved by Smith.

143. Having obtained the instructions from Armstrong, Mr. Smith telephoned Barton and there was then a discussion of which Smith made notes which he said in evidence contained his understanding of how the negotiations were to be settled. This is Exhibit 43 the document already referred to. He reports that Barton said that he agreed with the arrangement but added "You understand it is subject to the solicitors". Mr. Smith was asked "When you read the document, Exhibit 43 to Mr. Barton did he make any comment about it" and he answered "No". It seems rather extraordinary that Barton would have agreed without demur to the substantial changes in his "offer" effected by what is set out in Exhibit 43. In particular one would have expected a strong protest against a proposal to increase the interest rate from 7½% to 12%. From Mr. Smith's account of the conversation one would conclude that Barton was well aware of the significance of the words "subject to the Solicitors"; to a lawyer's mind at least such an "agreement" is no agreement at all and Barton was sufficiently experienced in matters of agreement and litigation to realise this. It may well be that Mr. Smith thought that he had achieved an agreement in principle, not

3/617 line 52

3/618

3/618

3/618 line 23

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knowing of the non-commercial matters that were troubling Barton, but it is easy to see, it is submitted, that at this stage Barton was simply giving the appearance of going along with Armstrong's requirements.

144. It is particularly significant that in this incident there is, according to Mr. Smith's evidence a series of extra burdens imposed by Armstrong in a counter offer to which a completely submissive acquiescence is given. Barton gave no specific evidence of this conversation in chief. He was, however, asked about it in cross examination by Mr. Staff. Here again the question was couched in a way that assumed Barton had put proposals to Smith on the 3rd. Mr. Staff also put to him that he had agreed that the matter should be sent to the solicitors for the respective parties for the necessary documentation (2/262 line 13) and in the next question that the whole arrangement in principle had been agreed subject only to the solicitors preparing the requisite documents. Barton answered "no" to both of these questions, correctly if one accepts Barton's approach already mentioned above, which illustrates that all that was ever asked of Barton was whether he had put proposals to Smith to which the answer was always "no". This evidence is corroborated to some extent by Mr. Smith. The cross examiner at one stage (line 44) asked Barton whether Mr. Smith put such a proposal

2/611 line 54

2/262 line 13

3/618

3/618 lines 1-20

Record:

to him but did not persist with the question and no answer was obtained.

145. On the same day, 4th January, Mr. Grant was
3/656 given instructions to prepare documents in accordance with what was reported by Mr. Smith, as quickly as possible (the reluctant vendor). This was obviously triggered off by his learning from U.D.C.'s solicitor that the appointment of a re-
8/2807 ceiver was imminent. Thereafter from Mr. Grant's point of view the matter was one of putting into proper form the complicated transaction that emerged from this report. It is fair to say, subject to one vital exception, that from the 5th until settlement the essential outlines of what was reported to have been agreed upon on the 4th January remained the same and the deal as reported by Mr. Smith on the 4th January was substantially the one consummated on the 17th and 18th January.

146. The vital exception is to be seen by comparing the draft version of clause 15 with the final
8/2822 version. This is a variation in Barton's favour and one which came about at solicitor level. Be-
3/662-5 8/2849 tween solicitors, clause 15 in its draft form, could not be defended on any imaginable basis. The change made it more urgent than ever for Armstrong to bring the transaction to a quick conclusion.

147. Mr. Smith himself had no contact with Barton after the 4th January until the 10th. Then he mentioned to Barton the question that had arisen

Record:
3/619 of the 9 other parties besides Barton who would enter into the contract to purchase Armstrong's shares in Landmark. After that Mr. Smith said to him that "Mr. Armstrong also said that he wanted the contracts exchanged by Friday". Barton said, "That is not possible". Mr. Smith, "I appreciate your point but Mr. Armstrong wants some sort of evidence that you are going to go ahead". Mr. Smith then raised the subject of the $4,000 to be deposited by Barton which he subsequently did deposit to be retained by Armstrong on account of his expenses if the matter was not completed.

148. Barton gave evidence of a conversation with
1/71 Mr. Smith on or about the 10th January in which he made it clear that he was only at that stage going as far as 'to let him prepare some sort of head agreement' to be shown to Barton and Landmark's ad-
1/71 lines 12-15 visers and 'finally the board have to agree or disagree with anything that is in that document'.

3/670 lines 51-53 149. Mr. Smith in evidence made it clear that as at the 13th January he himself had substantial doubt whether U.D.C. would lend money even after Armstrong was out of the company. This is yet another pointer to Mr. Smith's opinion that Landmark was bound to fail.

150. Armstrong - The Reluctant Vendor.

9/3198 line 12 and following Street J. in his judgment said that the evidence indicated "a situation in which Mr. Armstrong was a reluctant vendor whom Mr. Barton had to buy

Record:

out if Landmark was to be saved". As appears from his judgment Street J. said that only concerning the date the 17th January 1967. It is however, it is submitted, a remarkable finding, and one which embodied a conclusion which evidently weighed strongly with the Judge in arriving at his opinion that what Barton did was the result of commercial necessity rather than the pressure of Armstrong. It is submitted that certainly for all periods prior to the 17th January 1967 it is quite incorrect to describe Armstrong as a "reluctant vendor". For the reasons already explained at length, the transaction which was consummated on the 17th and 18th January 1967 was of tremendous value to Armstrong and extricated him from the dismal situation which confronted him as at the 10th December, 1966.

151. The matters which show that he was the very opposite of a reluctant vendor prior to the 17th January, 1967 are:

(a) Prior to the 14th December, 1966 Armstrong had been persistently pressing in writing for the payment of the moneys due to him. Although in the last letter, dated 13th December, Armstrong was threatening the appointment of a receiver if his moneys were not paid, he had already been advised by Mr. Smith that the appointment of a receiver would be financial disadvantageous to him. The threat in the letter was therefore one which

9/2761-2-3
9/2773
9/2775

Record:

he could not carry out and he had to cast about for other means to retrieve his position.

(b) Following his conference with Mr. Smith on the 13th December, he left Mr. Smith with instructions to seek from Barton a firm offer

8/2721 subject to acceptance within 48 hours.

(c) On the 14th December, 1966, in instructions initialled by Armstrong, it is stated that he would accept 50 cents per share from Barton if necessary and give him up to four years to

8/2787 pay, with no interest. In view of Mr. Smith's analysis of 19th December, (Exhibit 49) (already dealt with) Armstrong was probably already aware, or if not soon became so, that it was most unlikely that the dividends he was accepting or prepared to accept in lieu of interest for a period of up to four years would ever be paid. He was thus prepared to drop the price by $30,000 in order to effect the sale.

(d) Mr. Smith, according to his account, obtained from Barton an undertaking that he would endeavour to reach a firm agreement by 10 a.m. on Friday the 16th December, two days later. This is a reflection of the urgency with

8/2726 line 3 which his principal Armstrong was regarding the matter.

(e) There is a note by Mr. Grant dated 14th

8/2785 December, 1966, that "there is a 75% to 25%

Record:

chance of pulling it off". This is a reference to the completion of the deal which Mr. Smith was at that stage trying to negotiate on behalf of Armstrong.

(f) Mr. Smith's analysis made on the 19th December, 1966, plainly shows the grim situation in which Armstrong found himself and the poor prospects of any of the alternatives open to him apart from a bargain along the lines of that which was eventually made. In this analysis Mr. Smith recommends that Armstrong follow the course which in great part was subsequently followed and also recommended that he require completion of documentation by the 21st December, 1966.

8/2790 and following

8/2791 lines 27-30

Before the next indication of Armstrong's urgent desire to sell is found the interlude already described (ante paras 126-139) arising from U.D.C.'s threat to appoint a receiver on the 22nd December, and also the break between Christmas and New Year had intervened. When things again began to happen on the 3rd January, 1967 further indications of Armstrong's attitude were soon apparent. One very good reason for Armstrong's urgency was the possibility of the appointment of a receiver by U.D.C. at any time. (Such appointment would be the end of Armstrong's hopes of receiving immediate cash).

8/2731 (g) In Exhibit 42 Mr. Smith sets out alternative

Record:

methods of settlement. There is reference to "cash promptly (one week)".

(h) In a further note written by Mr. Smith on the 4th January 1967 there is reference to "cash promptly (within seven days)". In each of the last two cases the amount referred to is $140,000 plus interest.

8/2732

8/2732 line 11

(i) On the 4th January Mr. Smith distributed copies of some handwritten notes to Armstrong and Mr. Grant in the course of a conference at Mr. Smith's office at 2.30 or 3 p.m. Mr. Grant wrote on his copy of the notes which appear as Exhibit 50A. He noted, "agreement by noon Friday 6th January", and later "time is to be of the essence of agreement".

3/656 lines 8-14

8/2802-3

8/2802-3 lines 2-3

8/2803 line 25

(j) From his evidence, it appears that Mr. Grant became furiously active upon Armstrong's instructions immediately following the conference with Mr. Smith and Armstrong on the 4th January. As already mentioned this followed the conversation with U.D.C.'s solicitors on 4th January which he diarised and the urgency thereafter displayed shows how realistically Armstrong appreciated the financial loss that would befall him if a receiver was appointed before the transaction was completed. He was instructed to prepare documents as quickly as possible and from his diary notes

3/656 and following

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it is apparent that he carried out those instructions to the letter.

8/2808 (k) Mr. Grant's letter, Exhibit 50C, is also consistent with anxiety on the part of the vendor to carry forward the agreement with the utmost speed.

7/2338 (l) So also are Mr. Grant's diary notes which at the top speak of 'agreement by 2 p.m. otherwise negotiations off', and half way down state "agreement in principle on all issues to be reached by 2 p.m. today". (Exhibit "U", notes made in week commencing 9th January, 3/673 (see 3/673).

3/619 (m) Mr. Smith in his evidence said that he told Barton on the 10th January that Armstrong wanted the contracts exchanged by the 13th (Friday). When Barton said that was not possible Mr. Smith suggested that Barton pay a cheque for $4,000 to be held by Mr. Smith which if Barton did not proceed would be forfeited. Barton gave him the cheque on Monday, the 16th. 3/619 line 40

(n) Each of the Armstrong companies concerned in the transaction passed all necessary resolutions at directors meetings held on the 12th. 8/2854-5 8/2858-9

8/2862 (o) The letters from Mr. Grant of the 16th and 17th January 1967 although no more than ordinary letters of a conveyancer on the brink of settlement, are nevertheless completely 8/2864

Record:

consistent with the picture presented to this stage of Armstrong as an urgent and pressing vendor.

152. The remark by Street J. that as at the 17th Armstrong was a reluctant vendor is not, however, completely inexplicable. From his judgment it seems that the remark is based upon evidence given by Mr. Grant about a conversation between him and Armstrong on the 17th January. Mr. Grant gave oral evidence on the topic and a reading of this evidence together with the diary note referred to by Street J. in the passage just mentioned showed that Mr. Grant's evidence about the events of the 17th was almost entirely an expansion of the diary notes. From this diary note it appears that sometime between 9.30 a.m. and noon on Tuesday, 17th January, Armstrong in a telephone conversation with Mr. Grant said that Mr. Smith might not take the chair. In another telephone conversation shortly afterwards Armstrong said that he was giving Barton control of Landmark for $200,000 that Mr. Smith was crawfishing and he wanted to consider the situation. It seems that it is entirely on the basis of these items of evidence that Street J. concluded that at least for some time on the 17th January Armstrong was a reluctant vendor. In light of everything that had preceded the 17th January it appears almost incredible that Armstrong could really have been considering withdrawing from the transaction at that stage.

9/3197 lines 21 and following

8/2869

Record:

153. It is submitted that for the reasons hereafter stated the evidence upon which Street J. relied, referred to in the preceding paragraph, could not safely be regarded as reliable or used to found the inference which he drew from it.

(a) Further reference to Mr. Grant's diary note
8/2869 appearing at 8/2869 shows that by noon on the day in question (the 17th January) Armstrong was conferring with Messrs. Smith and Grant and spent two hours doing so and that twice more after 4 o'clock on that day he spoke with Mr. Grant by telephone. There is very little indication here of a reluctant vendor.

(b) In the context Armstrong's supposed statement about crawfishing can only mean that Armstrong was saying that Mr. Smith was hesitating about accepting the Chairmanship of Landmark. If Mr. Smith's evidence is accepted, it is certain that by this time on Tuesday Mr. Smith's firm decision not to join the board of Landmark had already (during the weekend) been communicated to both Armstrong and Mr. Grant. If this is right, then there must be some mistake relating to the entry in which Mr. Grant recorded that Armstrong said Smith was crawfishing and that Armstrong wanted to consider the situation. If it is once accepted that there is a mistake in that entry, the whole foundation of Street J.'s view that Armstrong was a reluctant vendor disappears.

Record:

(c) There is a conflict of evidence concerning Mr. Smith's statements about not becoming chairman. It is submitted that Mr. Grant's evidence of these matters could only be safely relied on if the Court concluded that as at Tuesday the 17th Mr. Smith had not definitely refused appointment as Director and/or chairman of Landmark.

(d) Mr. Smith's evidence on this question is clear and unequivocal. He said that on the night of Friday the 13th January he rang Armstrong and said "I do not feel that I will accept a position as a director of the Board of Landmark". Armstrong replied "... you should stay out of any further dealings". What was meant by Armstrong's remark is made clearer a little later. Mr. Smith said that he told Armstrong that he was doubtful about accepting the directorship and asked Armstrong to withdraw that condition from the settlement terms. He said that Armstrong argued with him but then agreed. Mr. Smith said that he then said to Armstrong "Well I suppose I should advise the company". Armstrong said "Oh no it is in the hands of the solicitors now". Mr. Smith said that he rang Mr. Grant on Sunday the 15th January and told him he would not be accepting the appointment. In re-examination he repeated that he spoke to

3/621 lines 27 and following

3/640 line 38

3/621 line 35

3/641 3/636

Record:

Mr. Grant on the Sunday. During cross-examination after a good deal of evasiveness when questioned about the propriety of his not having informed Barton before the settlement on the 18th January about his firm de-

3/636 line 53 cision not to go on the Board he said "I was instructed not to communicate". A little

3/636 line 17 earlier he had said that when he spoke to Mr. Grant on the Sunday "He also said that I should not talk to anybody in relation to it". 10

(e) The fact that Mr. Smith's decision was successfully concealed from Barton until after the settlement was effected is demonstrated

9/2932 by the minutes of Landmark which show that on the 18th January the board appointed Mr. Smith chairman and Barton resigned, and the

9/2961 minutes of Paradise Waters, Mr. Smith being appointed a director, and of Paradise Waters

9/2972 Sales where the same thing happened.

(f) As has been previously remarked, a comparison 20

3/675 of Mr. Grant's oral evidence with his diary

8/2869 notes gives substantial grounds for thinking that the oral evidence he gave was entirely based on the diary note. In view of the clear and definite evidence of Mr. Smith concerning his notification to Armstrong and Mr. Grant of his intention not to go to the

8/2869 Board, the note that "Smith mightn't take the chair" must, it is submitted, be incorrect,

Record:

although Mr. Grant swore that the note was made on the same day. How the incorrectness arose is difficult to say.

(g) If it is accepted that Mr. Smith's evidence is correct in this matter, then all of the evidence of Mr. Grant concerning Armstrong's attitude on the 17th must be wrong. This destroys the basis suggested by Street J. for his view that Armstrong was, on the 17th January, a reluctant vendor. Indeed, irrespective of the accuracy of Mr. Grant's recollection of the events of 17th January, there seems no doubt that there was a successful concerted attempt between Mr. Grant, Mr. Smith and Armstrong to conceal from Barton and his co-directors until after the settlement the fact that Mr. Smith was not to go on to the board of Landmark. The only possible purpose of this concealment was to avoid giving Barton an excuse for resiling from the agreement. This is completely inconsistent with any idea of Armstrong as a reluctant vendor.

154. The significance of Mr. Smith's attitude to the Chairmanship.

It has already been submitted that both Armstrong and Barton realised the disastrous position in which Landmark had been placed by the reversal of U.D.C.'s attitude on or about the 8th

Record:

December. Mr. Smith was offered chairmanship of

3/631 Landmark and a salary of $4,000 a year. He realised that U.D.C. was the key to the situation and ob-

3/590 tained permission to see U.D.C. on the 19th December, 1966. Investigations of Landmark's position

3/602 by his staff commenced on or about the 3rd January 1967. These investigations were continuing at the time when he made his decision not to go on the

3/634 Landmark board. He expressed to Barton his doubt

3/620 whether any further finance would be forthcoming from U.D.C. At the crucial time so far as his decision whether to accept the chairmanship was concerned, he agreed in cross-examination he con-

3/633 sidered that U.D.C.'s attitude was an important factor. It is submitted that although he did not in terms admit it, it is clear from his cross-examination in the passages referred to that in his mind the attitude of U.D.C. was of critical importance if there was to be any chance of saving Landmark. If this is accepted, then the fact that Mr.

3/638 Smith did not get in touch with U.D.C. in order to find out its attitude during the week ending the 13th January is a clear indication that he thought U.D.C. was not going to assist further. Had he thought there was any prospect of U.D.C. giving further assistance, he undoubtedly would have made further enquiries because the chairmanship of such a company as Landmark, with U.D.C. assisting it,

Record:

besides being financially rewarding, would also have been a matter of considerable prestige to him.

155. It is therefore submitted that Mr. Smith, as well as Barton and Armstrong, had come to the conclusion by the 13th January 1967 that U.D.C. was not going to assist Landmark further and that Landmark was bound to collapse. Mr. Smith was in a special position in relation to the company because he was an independent accountant of wide experience and considerable capacity. It is implicit in his decision not to go on the Board that not only did he believe that the company would collapse but that the directors might be involved in allegations of impropriety. He feared that the directors would be involved in personal liability if the declared dividend were paid. It may be assumed that with those views of the company's future he would not have regarded the transaction with Armstrong as righteous.

156. Subsequent history: Effect of transaction from point of view of Landmark:

The only benefit to Landmark from the transaction with Armstrong was to remove the immediate possibility of the appointment of a receiver by Armstrong by reason of the non-payment of the $400,000 due to him. The transaction meant that Armstrong received cash or assets from the company to the value of $200,000 and made an advance to the company of $30,000 for 12 months at 12% interest.

Record:

The company still faced a hostile creditor who, it would have assumed, would be anxious to take advantage of any possible default and indeed did so when the interest was paid one day late. The amount required to repay Armstrong was $400,000 and an amount of cash or its equivalent of $200,000 was in fact paid. Accordingly, all that was required was a loan of $200,000 from an outside source. The company could have borrowed over the ensuing few weeks $200,000 on the unsold units in Paradise Towers and on Landmark House. The effect of a transaction of this kind meant that the company would have been $200,000 better off in liquid funds and would have been left with a liability of $200,000 instead of $300,000.

157. Position after settlement on 18th January 1967

(a) Landmark's funds were depleted by $140,000 and one penthouse sold cheaply.

(b) Landmark was committed to repay $300,000 in one year's time with interest running in the meantime at 12%.

(c) There was a second mortgage over the Paradise Waters project.

(d) It had no immediate prospect of finding a backer to lend sufficient funds to complete the project.

(e) It had considerably depleted its possibilities of obtaining further assistance by reason of the deal with Armstrong

Record:

(f) Ineffectual efforts were made to obtain further finance but these were fore-doomed to failure by reason of the effect on other financiers of U.D.C.'s withdrawl and the redoubling of this effect by handing over to Armstrong of $200,000 of the company's assets.

(g) Work on the project stopped with the cessation of efforts to obtain finance.

158. Armstrong's position (a) during period 8th December to 17th January and (b) after transaction 17th/18th January.

Asset or legal right	Before	After
(a) 40% holding in Paradise Waters Sales	Value nil	$100,000 received in cash. $175,000 face value options over choice blocks in Paradise Waters project.
(b) $400,000 moneys secured by 2nd mortgage over Paradise Waters project	Value extremely doubtful	$300,000 secured by 2nd mortgage at 12% and Landmark guarantee $100,000 (or equivalent) paid in cash.
(c) Shares in Landmark	Value nil	a good chance of receiving $180,000
Total (a)(b)(c)	Possibly nil	Possible $580,000
(d) Right to control board of Paradise Waters Sales	This right would be of no advantage if UDC appointed a receiver	No longer had this comparatively useless right
(e) Right to appoint receiver	For reasons already explained this right was of very doubtful value; indeed, so long as he held 40% in Paradise Waters Sales and his Landmark shares exercise of the right would be self-destructive.	He now had a much more valuable right to appoint a receiver; in that event his 40% in Paradise Waters Sales and his shares in Landmark would not be destroyed.

Record:

159. Effect of transaction on Barton.

Barton personally was left with an obligation to pay $180,000 for shares which in his opinion were worthless. Barton as managing director of Landmark had given away the company's most effective weapon against Armstrong - by paying him out for his shares in Paradise Waters Sales and by buying his shares, he had allowed Armstrong to reach the position where, upon the slightest default he could appoint a receiver without causing damage to himself. So long as Armstrong retained his shares in Paradise Waters Sales and Landmark he could not, as a practical matter (and as Mr. Smith had advised him) appoint a receiver to Paradise Waters Sales or over the Paradise Waters project.

9/3220 160. Aftermath.

Street J. in his judgment referred to what happened after 18th January 1967.

(a) Landmark never obtained the finance it needed (Smith had foreseen this. It is submitted that there is no reason why Barton should be disbelieved when he said that he had foreseen it too.)

(b) A petition was presented under s. 222 to wind up the Company.

(c) A scheme of arrangement was not approved by Street J; (1968) N.S.W.R. 759.

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(d) The Company was ordered to be wound up on 11th January 1968. (1968) 1 N.S.W.R. 705.

(e) Paradise Waters project was sold for

3/630 $900,000, which was not enough to discharge the encumbrances on it.

(f) The shares in Landmark are worthless and there is little prospect of unsecured creditors receiving a dividend in the winding up.

161. Submissions on Fact Finding.

It is now possible to return to the specific factual matters and inferences of fact which the Appellant challenges in this Appeal. Before the Court of Appeal a schedule was prepared of the findings of Street J. sought to be reversed on Appeal with which was incorporated a list of the findings and inferences of fact sought in substitution for those attacked. This schedule is reproduced as Appendix II to this case. In dealing with this part of the case Mason J.A. said that in his opinion the Court of Appeal should not upset Street J.'s findings of fact unless it appeared that a finding of fact was incorrect. Adopting this approach, he came to the conclusion that with the exception of four findings, he was in agreement

12/4175 with the findings of fact made by Street. J. He continued by saying that he did not propose to deal with all the findings challenged by the Appellant and it would be sufficient for him to refer to the major findings. He then divided the major findings

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under attack into sixteen factual conclusions and dealt with each individually. This method resulted in the most detailed and systematic examination of challenged findings of fact by any of the three Judges of Appeal and provides a convenient means by which the Appellant presents his submissions that a number of the findings should be reversed. Both Jacobs J.A. and Taylor A-J.A. dealt, more or less, with the same matters as Mason J.A. dealt with under his sixteen headings. The Appellant therefore will deal with each of the sixteen factual conclusions in the order in which Mason J.A. dealt with them, indicating in relation to each conclusion what was the position taken by each of the Judges of Appeal and then urging the Appellant's contentions in respect of each matter. Although the findings challenged in Appendix II are more numerous than those dealt with by Mason J.A., it is sufficient for the Appellant's purposes to deal with the matters dealt with by Mason J.A., which as he said, were the major findings of fact. Insofar as the Appellant succeeds in relation to any of those findings, it is submitted there would be a necessary reversal of relevant consequential minor findings set out in Appendix II. If the major findings are not disturbed in any way, then there is little point in looking to the other matters dealt with in Appendix II.

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162. Criticism of Court of Appeal's Approach.

Before dealing with the principal findings in this way however the Appellant puts a general submission. The method adopted by Mason J.A. of examining individual findings is clearly useful. However, it is submitted that it is not sufficient merely to deal with each finding more or less in isolation from the others, as broadly speaking each of the Judges of Appeal did. It is submitted that once having reviewed the main findings, and having reversed some of them, the Judges of Appeal should then have considered the conclusions at which Street J. would have arrived had he been able to come to the same conclusions as the Judges of Appeal. For instance, if Street J. had at his disposal, in addition to the unchallenged findings that he made, the facts that Armstrong was not a reluctant vendor, but a very anxious one, that Barton did associate Armstrong's threats with his wish to have the contract agreed to, and that Armstrong had been responsible for having him watched and followed (these facts all being inferences drawn by the Court of Appeal and not by Street J.) his whole approach must have been different, above all in relation to Barton's motivation at the time of signing the agreement, the likelihood of Armstrong threatening Barton on the 16th January, and the absence of 'commercial necessity' as a reason for Barton entering into the agreement. But the

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approach of Mason J.A. never rose above atomistic analysis. Having taken all the pieces apart separately he did not attempt to put them together again as Street J. would have done had he had the extra data to take into account which became available to the Court of Appeal. The findings which Street J. made which were adverse to Barton were all in some degree influenced by the very inferences which the Court of Appeal said he had incorrectly drawn. It is submitted that failure to reconsider the whole situation in this light was either error in law, or such a defect in procedure in the Court of Appeal's approach as to leave it open, in this final appeal, for the reconsideration the Appellant requests. Alternatively the case is of such an unusual nature as to require reconsideration. Having said this, it is now necessary to return to the individual findings as dealt with by Mason J.A.

163. First finding: Did Barton believe Landmark Worthless?

The first finding dealt with by Mason J.A. was Street J.'s finding that Barton did not believe that Landmark was worthless after 10th December, 1966. If the analysis of the evidence concerning the commercial aspect of the whole transaction which has been made in preceding paragraphs is correct, it demonstrates that both Armstrong and Mr. Smith, during the period from approximately

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10th December, 1966 until the consummation of the transaction in mid-January, 1967 took a most gloomy view of Landmark's future. It is submitted that this view was correct and that there is equally as much reason for Barton holding the same opinion as there was for Armstrong and Mr. Smith to arrive at it. One matter that is explained by an acceptance of Barton's assertion that he thought Landmark was worthless after that date, is the otherwise inexplicable fact that Armstrong in addition to threatening Barton with death if he did not enter into the transaction, believed that Barton would not enter into the transaction unless so threatened. That is, it is submitted, it was obvious to Armstrong that the only way out of his impending financial disaster was by means of the transaction with Barton and Landmark, and it was so obvious to him that Landmark would fail, that he took it for granted that Barton must take the same view and consequently must be subjected to threats and intimidations in order to enter into the transaction. Barton was accepted by Street J. as a competent businessman and it is submitted that there is no reason at all for refusing to accept his assertion that he had arrived to the same conclusion in relation to the future of Landmark as had both Armstrong and Mr. Smith.

164. Mason, J.A., whose opinion was that Street J.'s finding was correct, based that opinion on

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several matters. He acknowledged that the Appellant recognised that Landmark's prospects of success depended on further finance of which there was no certainty and that on 13th December, 1966, the Appellant was despondent about the future of the
12/4177 company, but accepted the following as contrary indications:

12/1475 (i) Barton had persuaded himself he was coerced into the agreement against his will

12/4175 (ii) Barton had made strenuous effort to obtain other finance. 10

12/4176 (iii) Barton had given confident assurances to financiers in connection with the company's prospects.

12/4176 (iv) Barton had made statements at the conclusion of the transaction to persons indicating confidence in Landmark.

(v) Mr. Bovill was confident that Landmark could obtain further finance.

165. It is submitted that the first four of the above elements do not justify the conclusion when all the circumstances of the case are considered. Barton's fear of Armstrong at the general meeting on 2nd December, 1966 was such that he had three armed body-guards present; his knowledge of Armstrong's character must have led him to expect a violent reaction from Armstrong upon learning of the news (about 8th to 10th December) that U.D.C. had withdrawn its finance with possible calamitous

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consequences not only to Landmark, but also Armstrong.

166. Then on the 14th December, 1966, he received a demand to buy Armstrong's shares (inter alia) at a price approaching double their then market value. It is an unchallenged finding of fact that he was in fear of Armstrong at this time. It is also the fact that eventually he entered into this disastrous transaction. It is submitted that the thought must have been present in his mind from the 14th December onwards that he would, as he eventually did, submit to the pressure. So there must have been two thoughts in his mind; that the company would fail and that nevertheless he might be forced to stake his own commercial future on that of the company. With these two thoughts in mind, no doubt he would hope to resist the demands of Armstrong, but realising he might capitulate to them, would prepare to fight for his own financial existence and that of Landmark in the event that he did submit to Armstrong's threats.

167. In such circumstances it is readily understandable why, having communicated his despondence and despair to Mr. Bovill on the 13th December, later he should have been somewhat more optimistic with Mr. Bovill whom as a co-director of Landmark he would have to persuade to go through with the transaction if he (Barton) eventually gave in to Armstrong and agreed to it. Essentially, what is

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overlooked by reliance upon the five elements set out in paragraph 164 as supporting the finding of fact is the psychology of even the clearest-headed and strongest minded person who is subjected to pressure of the kind exerted by Armstrong on Barton. Even a cold and objective person, capable of calculation under great strain, nevertheless may be fearful in such circumstances and, as was found by all Judges in the present case, Barton in fact was in fear. The objective person in these circumstances recognises that he may give into the fear and prepares as best he can to deal with the predicament in which he will find himself after having bowed to the force he foresaw he might not withstand.

168. It is to be expected that a person seeking finance from financial institutions will put a brave front upon his application for money, no matter what his private opinion may be. Also it is to be expected that Barton after completing a transaction which linked his fortunes inextricably with those of Landmark would express confidence to all concerned in the company. It is also to be expected that he would try to persuade his fellow directors to do their best for the company by instilling optimism into them.

169. A matter which weighed heavily with the Trial Judge and with the Court of Appeal was the notion that Barton believed that if Armstrong could be

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removed from the Board of Directors and his shares acquired, finance could be obtained, the Paradise Waters project would be a great financial success and the company would be saved. Two remarks made by Barton to Grant and Smith shortly after the agreements were executed are used by their Honours to justify the existence of this notion. The Appellant submits that quite undue weight was given by their Honours to these remarks and that in the light of the whole circumstances the two remarks, when properly understood, cannot support the notion which, it is submitted, is unrealistic.

170. While it is true that a financier may not provide finance for a company where there is conflict amongst the Board Members, no realistic businessman would think that the mere resolution of that conflict would immediately result in offers of finance for the company's project. Even less could it be thought to do so where the resolution of the conflict involved disposing of liquid funds and assets of the company and otherwise entering into an unrighteous and unprofitable agreement such as it is submitted occurred here.

171. In any event U.D.C. had offered all necessary finance and confirmed that offer by letter. Its solicitor had in person assured the general meeting of the availability of such finance. This was at a time when U.D.C. was well aware of the contention which existed between Armstrong and the other Board

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members, that Armstrong owned substantial numbers of shares in the company and that Armstrong would remain on the Board, as he did not come up for re-election after the general meeting had been held. No further public dissension occurred amongst the board members between the date of the Annual General Meeting and the date when U.D.C. withdrew its offer of finance nor is there any indication of any other particular event likely to affect U.D.C.'s attitude. It is submitted that the withdrawal of the offer of finance can only have been caused by a realisation on the part of U.D.C. that if it provided further moneys it would be committed so far that it would have to continue with the project no matter what happened. It was the realisation that there was insufficient equity or risk capital in the project that caused U.D.C. to reconsider its offer and not any dissension amongst board members. Consequently it cannot reasonably be inferred that the resolution of the conflict, let alone the buying out of Armstrong at great cost to the company, the giving to him of securities which otherwise might have been available to U.D.C. or some other financier, the arming of him with a weapon to wind the company up at the latest in twelve months time and the destruction of the shield which the company had until then enjoyed constituted by the risk to Armstrong's investments, would lead U.D.C.

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or any other financier to lend the large sums required to save the company from doom.

1/78 lines 15-20

172. As the Appellant himself put it -

> "As at 13th January 1967 I had one more reason to believe that no finance can be obtained; because of the Managing Director of a public company - his life is threatened at a time when the company itself publicly has been damaged - just was not really prospect of obtaining money from anywhere."

To have complained to the company's solicitors before the agreements were signed would certainly have resulted in those solicitors refusing to continue with the agreement and the threat of imminent death, as Barton believed, being carried out. To have complained to the solicitors after the agreement had been executed or to have complained to Mr. Smith or to Mr. Grant would, as Barton no doubt believed, have resulted in rumours throughout the city because of the sensational nature of the complaint which would have been sufficient to discourage any financier who might, hopefully, have been persuaded to lend money to prevent what appeared inevitable disaster.

173. It must have been plain not only to Barton but to all, on Friday, the 13th January that Mr. Smith, who had been conducting an investigation into the company's affairs, who thought that the company ought not to pay a dividend, that liquidation was not out of the question, was unconvinced that finance was obtainable and he was proposing to abandon his intention of becoming chairman of

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directors was, to say the least, spectical of the company's chances of survival. Barton, aware that Mr. Smith was close to the centre of the financial and business life of the city, had to put on a brave front. If Barton believed Mr. Smith when he was told on the morning of the 18th January that Mr. Smith had not attended the meeting to be appointed as chairman simply because Armstrong had withdrawn the condition that he should joint the Board, then the news must have been welcome to Barton in one respect, at least, for until then he could only have thought, (Mr. Grant and Armstrong having concealed from the company Mr. Smith's decision not to join the Board) that Mr. Smith's reluctance flowed from his expressed doubts as to the financial stability of the company. Once that appeared not to be the case Barton had to seize the opportunity to leave Mr. Smith with an impression of confidence and optimism and avoid discussing why he had not joined the Board.

174. The statement made to Mr. Grant "now we have got rid of Armstrong nothing will stop us ..." cannot safely be used to support the notion that Barton regarded the removal of Armstrong as being a panacea for the ills of the company when the detailed effects of the Deeds executed at the time, of the mortgages granted and the consequences of default under those mortgages are appreciated. It is submitted that their Honours overlooked the

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presence in the evidence of documents which plainly indicate that Grant's firm had a substantial claim against Paradise Waters Sales. That is disclosed in Exhibit 38 and in Exhibit 7 and in Exhibit 58 and in Exhibit 56. Thus Grant had a claim certainly against Paradise Waters Sales and by the Deed between that company and Southern Tablelands of the 17th January 1967 (Exhibit "T") the whole of the sum of $300,000 therein mentioned became due and payable (Clause 4(ii)(a)) if execution was levied against the company or it went into liquidation or was wound up or was the subject of a scheme of arrangement or official management or the like. Similarly the Deed between Landmark and Southern Tablelands of the same date made Landmark Principal debtor for the $300,000 lent to Paradise Waters Sales and made the whole amount become due (clause 9) in the event of execution being levied against it or it going into liquidation or being the subject of a scheme of arrangement, official management or the like. The same consequences flow from the provision of a deed between Landmark and Southern Tablelands of the same date in which Landmark is referred to as the "Lienor".

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175. Barton, of course, knew that Mr. Grant was Armstrong's solicitor and a director of Southern Tablelands. What he referred to, according to Mr. Grant immediately after signing (inter alia) the Deeds which have just been mentioned were the two

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debts which Mr. Grant could immediately enforce against the company thus causing it to go into default under the Deeds and oblige it to pay the $300,000. Those two debts were the dividend which had been declared but not paid - Mr. Grant was a shareholder in Landmark - and the amount of costs outstanding. It is extraordinary that Barton should have executed deeds purporting to allow the companies a year to pay the $300,000 to the Armstrong company knowing that another creditor, Mr. Grant, who was firmly in the Armstrong camp could by simply petitioning to wind up the company or by obtaining judgment and issuing execution cause the $300,000 to become immediately payable. That he had not overlooked this possibility is obvious from his direct reference to the debts which Mr. Grant was able to enforce.

3/680 176. The statement, 'now we have got rid of Armstrong nothing will stop us' was made in direct association with a reference to paying debts which could be used to bring the company down. The conversation is plainly open to the inference that Barton was seeking to appease and, perhaps, bluff slightly, a creditor who might with one stroke sever the tenuous grip on survival which the company still had.

177. Jacobs J.A. did not expressly address himself to the first finding dealt with by Mason J.A.

12/4097-8 He indicated that he was not disposed to alter

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any of the primary findings of fact of Street J. although he felt there were certain inferences

12/4105 drawn from those findings which should be altered. He did however state in an unqualified way that at the relevant time he himself regarded the company

12/4125 12/4253 as worthless without finance. Taylor A-J.A. referred in his judgment to the Appellant's contention that Street J. should have found that Barton was aware the shares in Landmark were worthless as from the middle of December, 1966, but without examining the reasons in support of the submission, contented himself with saying that it was contrary

12/4254 to the facts accepted and findings made by Street J.

178. Second finding: Was Armstrong responsible for the watching and following of Barton?

The second finding dealt with by Mason J.A. was Street J.'s finding that the evidence did not establish that Armstrong was responsible for the watching and following of the Appellant which occurred in November and December, 1966. Mason J.A.

12/4178 was satisfied that the inference should be drawn that Armstrong was responsible for the activities referred to, accepting inter alia, that Hume had watched Barton's house on one occasion and his office on another occasion, upon Armstrong's orders. Jacobs J.A. did not deal specifically with this particular finding. Taylor A-J.A. found that

12/4234 Armstrong was responsible for the watching and following of Barton by Hume and Novak.

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179. Third finding: Did Armstrong threaten Barton on 7.12.66?

The third finding dealt with by Mason J.A. was Street J.'s finding that Armstrong did not threaten the Appellant with physical violence on 7th December after a Board Meeting of Paradise Waters Sales. Barton was the only witness who gave positive evidence of the threats on this occasion. His evidence was not accepted primarily because Street J. thought he should not accept it in the absence of evidence from other persons present. The Minutes of the Meeting show that Mr. Bovill was present and he was asked no questions either in chief by counsel for the Appellant or in cross-examination by Counsel for the Respondents. As noted by Mason J.A., however, Mr. Grant, Armstrong's solicitor, was also present at the meeting, was called as a witness and gave no evidence denying the making of the threat. Mason J.A. did not consider this circumstance of sufficient weight to displace the conclusion of Street J. on the issue. It is submitted, however, that as:

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(i) Barton was accepted by the Judge as a witness who at the least was endeavouring to tell the truth, although his memory may have been distorted by subsequent brooding over events,

(ii) It was found that Armstrong was threatening Barton in this period;

(iii) Counsel for Armstrong refrained from asking

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Mr. Bovill or Mr. Grant any questions on the matter.

(iv) The only matter in denial was the worthless assertion of Armstrong

the proper conclusion on the probabilities, was in favour of what the Appellant contends. Jacobs J.A. did not deal specifically with this incident, Taylor A-J.A. did, refusing to interfere with

12/4236 Street J.'s finding on grounds that appear at bottom to be the same as those of Mason J.A. 10

180. Fourth finding: Did Armstrong threaten Barton on 14.12.66?

The fourth finding dealt with by Mason J.A. was the finding of Street J. that Armstrong did not threaten the Appellant on 14th December, 1966 in a conversation outside a Board Meeting of one of the Paradise Waters companies that unless he agreed to purchase Armstrong's shares in Landmark and the Paradise Waters companies and to pay off the money owing to the Armstrong companies, he 20 would be "fixed". Mason, J.A., in the language he used in his judgment in relation to this finding does not appear to be asserting that he agrees

12/4180 with it but simply that he had not been persuaded that the finding was incorrect. Prior to making this observation he had stated the reasons given

9/3152-4 by Street J. for his finding, without particular comment. When those reasons are examined, they appear to have two principal features. The first

Record:

is the lack of corroboration. Substantially the same reasons are advanced by the Appellant why this is not a convincing approach as were set out in relation to the previous finding dealt with by Mason J.A. and are therefore not now repeated. The second element is that Street J. was not persuaded in general that:-

(a) There was a relationship between the watching and following of Barton and Armstrong, and

(b) Armstrong's threats were not related to the business transaction.

In both these respects he was held to be wrong in the Court of Appeal. If the events of the 14th December, 1966 are looked at in the light of the findings that at that time Barton was being watched and followed at the direction of Armstrong, and Armstrong's threats were directed to his business intentions quo Barton, it is submitted that when Street J. said that Armstrong may well have threatened Barton on 14th December, he would have gone onto find not that there was nothing to support Barton's claim that the threat was directly and expressly related to a requirement that he enter into an agreement with Armstrong, but that the probabilities were, assuming Armstrong threatened Barton on 14th December, that it was in connection with the business situation which existed between them.

9/3153 line 18

Record:

181. The Appellant also points to an inconsistency in the judgment of Street J., not adverted to by Mason J.A. in his comments on the question, in that

9/3153 lines 30-32 Street J. said that he did not accept Barton's claim to have been threatened on 14th December,

lines 18-20 nevertheless earlier on the same page he had said that Armstrong may well have threatened Barton on 14th December. It is submitted that some uncertainty was shown by Street J. in relation to this finding and that given the facts, as subsequently found by the Court of Appeal, that the watching and following were prompted by Armstrong and the threats were connected with Armstrong's business intentions towards Barton, he would have had no hesitation in accepting Barton's evidence. Again, Jacobs, J.A., did not deal specifically with this finding and Taylor A-J.A. adopting a different approach from

12/4237 that of Mason J.A. said he did not think the finding open to question.

182. Fifth Finding: Was there a Plot involving Armstrong?

The fifth finding dealt with by Mason J.A. was Street J.'s not being satisfied that Armstrong initiated or was implicated in a plot, involving Hume Novak and Vojinovic, to have Barton killed or injured. Mason J.A. agreed with Street J. in thinking

12/4181 the burden of proof on this issue had not been discharged because in Mason J.A.'s view:

(i) The case was one of surmise and suspicion

Record:

(ii) Although there was some evidence, it was not sufficient to substantiate such a grave charge

(iii) He should not interfere with Street J.'s view (that he was not satisfied) concerning the Hawkesbury incident.

(iv) He should not interfere with Street J.'s finding concerning the written record of interview with Hume in January, 1967. One reason for refusing to find the existence of the written record of interview was the failure of Barton to call as a witness his son who he said also saw it.

183. As to these criticisms, it was established that Hume was the agent of Armstrong and the evidence supports the description of him as Armstrong's "strong-arm man". Both Mason J.A. and Taylor A-J.A. were satisfied that the watching and following of Barton by Hume were engineered by Armstrong. Similarly there is abundant evidence to show the close association of Hume with Novak. Novak was frequently employed by Hume, at times saw him almost daily, drove his car for weeks at a time and lived at Hume's premises from time to time. Hume was concerned in his cross-examination to deny that he used Novak for anything but odd jobs or in divorce work and was caught out in complete and deliberate lies concerning this aspect. Although Vojinovic's evidence is that of a common criminal and thus unreliable, no reason has been suggested to doubt his

6/1807
6/1891, 6/1885
5/1616, 1617
5/1661, 5/1664
5/1686, 6/1959
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5/1617, 6/1807
6/1872, 6/1974
6/1782, 6/1810
6/1780, 6/1806
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Record:

assertion that he was in the company of Novak continually during the period immediately preceding the meeting by Vojinovic with Barton and the making of the threats by Vojinovic to Barton. He and Novak were driving around during this period in Hume's car.

2/335, 2/338 2/340, 5/1618

184. As to the Hawkesbury incident, it is submitted that a close consideration of the evidence should lead to the drawing of an inference opposite to that drawn by Street J. It is submitted further, however, that although a favourable inference to the Appellant in this respect would be of assistance to his case, it is not of essential importance; nor is it of critical importance if the finding stands. As to the non-calling of Barton's son, a very young man, it is conceded that it is a matter fit to be taken into consideration, but its importance must vary according to the weight or otherwise of the other evidence.

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185. The chief matter upon which the Appellant relies is the evidence concerning the written record of interview. Barton's evidence was that on 11th January 1967 he saw a written record of an interview by Sergeant Wild with Hume. Sergeant Wild and Hume both maintained that it was impossible for Barton to have seen such a document, first because the interview it purported to record did not take place until about 18th January, 1967 and secondly because no written record was made of that interview when it did take place. There is evidence to suggest

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1/63-4 1/68-9 2/537-42

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that Barton had a good memory and this was a fact known to his business associates. In the course of the lengthy evidence he gave at the hearing, he showed some lapses of memory but also showed a considerable capacity for remembering dates of the Board Meetings of the many companies with which he was associated, what was decided at the meetings and what the Minutes contained. In general, with one notable lapse his recollection of business details was shown to be exceptionally good.

186. Subpoenas were directed to all likely witnesses to produce the record of interview at the very beginning of the Plaintiff's case. After it became clear that the Police could not or would not produce the document and that any knowledge of its existence was denied, Barton set down from his own recollection those questions and answers which he could then recall. He did this early in the case, before Sergeant Wild, Hume or Detective Constable Follington had given evidence.

8/2518 187. Exhibit 29.

The document he thus created became Exhibit 29, tendered in evidence by Counsel for Armstrong. Appendix III to this case sets out questions and answers from Exhibit 29, those parts of Sergeant Wild's evidence which relate to such questions and answers, and those parts of Hume's evidence dealing with the same questions and answers. For ease of comparison, the method adopted is first to set

Record:

out the question and answer as it appears in Exhi-

8/2518 bit 29, then the question as put to Wild and his reply and then the question as put to Hume and his reply in parallel columns. The appendix also con-

8/2518 tains, after setting out the parallel columns show-

8/2518 ing the similarity between Exhibit 29, what Wild said and what Hume said, some further answers of

8/2518 Hume relating to events referred to in Exhibit 29.

188. It is submitted that upon careful consideration of what was said by Barton to have been in the

8/2518 document in comparison with the evidence of Wild and Hume and, in the light of the evidence as a whole, of what Barton could and could not have known at the time he was giving his evidence, it emerges that there are a number of matters appear-

8/2518 ing in Exhibit 29 which could not be the result of invention and could only be the result of Barton

8/2518 having seen a document of the type of Exhibit 29. None of the Judges reached this conclusion. It is however, open to an Appellate Court, it is submitted, if the Appellate Court is convinced that there

8/2518 are matters in Exhibit 29 which could not have come to Barton's knowledge in any other way than that sworn to by him, to find that Barton must have seen such a document at or about the time that he swore to.

189. Once that conclusion is reached, a number of matters fall into place. First, the strange be-

6/3176, 6/3181 haviour of the Police remarked upon by Street J.

Record:
12/4182 and Mason J.A. and all the strange and otherwise inexplicable inconsistencies in the Police evidence can be accounted for. The explanation is that they were lying when they denied the existence of Hume's statement. Second, the strange halt in Police investigations almost immediately after obtaining Vojinovic's statement can be explained. Street J., and the Court of Appeal in refusing to depart from his view, were left in the situation of saying that for some reason which could not be explained, the Police, although they had a very serious complaint before them and although they had evidence from Vojinovic concerning the persons involved in the incident which on any view merited quick and careful investigation, did nothing at all about the matter. Sergeant Wild's superior officer, Detective Inspector Lendrum said that Sergeant Wild was a very competent Police officer and that it would
6/1942 have been 'most desirable' if a written record of interview with Hume had been obtained.

190. Once it is accepted that Hume's statement existed, it means the Police had in their hands evidence that Armstrong was engaging criminals and other persons to "do Barton over a bit ... frighten him and ... tell him that there was more to come".
8/2519 line 30 (Exhibit 29.) That the Police then did not carry out their duties, and in fact dropped any effective investigation at all, seems indisputable. It was suggested to Sergeant Wild (who resigned from the

Record:

Police Department before the hearing before Street J. concluded) that he had been bribed by Armstrong to stifle the investigation. Wild denied the suggestion.

6/1896-1900
7/2992

191. It was to be inferred from Hume's evidence that he had told Armstrong promptly of the allegations Vojinovic was making. Thus Armstrong knew of a damaging accusation against him, knew also (if Hume had made a statement such as Exhibit 29) that there was evidence against Armstrong, knew that

2/433

policemen could be bribed and evidence suppressed and, in fact, the police investigation began, stopped and evidence disappeared. It is submitted that the circumstances point to only one conclusion - that Armstrong was the moving figure in the plot alleged.

192. Jacobs J.A. thought it "extraordinary" that Sergeant Wild was as "inactive and dilatory" in his

12/4088

investigation as he said he was. He commented that that on the facts found by Street J., there was no attempt to interview Hume until 18th January and no statement or record of interview ever taken from him; nor was there any attempt to interview Armstrong. Jacobs J.A. again said that the situa-

12/4089

tion was "indeed an extraordinary" one. However, because of view he took of the function of the Appellate tribunal he said he did not think it pos-

12/4089

sible for the Court of Appeal to interfere with the finding.

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193. With reference to the same matter, Taylor A-J.A. said that Street J.'s finding that there was not sufficient evidence to involve Armstrong was in his opinion clearly right. He continued that there
12/4243 was not "any direct evidence" that Armstrong had anything to do with the Vojinovic incident or the
12/4244 plot alleged by Vojinovic to have existed. He later said that his own opinion on the matter would be to hold to the contrary of there being any such conspiracy.

194. The comments of Taylor A-J.A. on the question of Exhibit 29 highlight the difficulty in the case relating to this issue. Street J. was critical of Sergeant Wild and Detective Constable Follington and, in general, disposed to accept what Barton said, subject to safe guarding himself against the effects of honest but perhaps erroneous reconstruction. This attitude of the trial Judge to the Police evidence on the one hand and Barton's evidence on the other raised the difficulty of the Judge's simultaneously not being satisfied with the existence of Exhibit 29, not accepting the Police evidence, and (subject to the stated qualifications) accepting Barton's evidence. Street J. did not deal with this difficulty and simply left the matter up in the air (that is so far as the question of credit of the witnesses was concerned). Taylor, A-J.A. did not resolve the difficulty either, but it is submitted, perhaps compounded it

Record:

by adding his own view of Barton, namely that he could not possibly perform the feat of memory re-

12/4245 quired to reproduce Exhibit 29 as he did; this finding of fact clearly coloured his attitude to this quest. It is a finding of fact not made by Street J. and one which on the principles enunciated by Taylor A-J.A. concerning the manner in which the Judges in the Appellate Court should approach questions of fact was not open to him. It was with the aid of this extra fact which he found for himself inconsistently (it is submitted) with his avowed approach to the matter that he arrived at the eventual conclusion that Exhibit 29 was not

12/4746 reliable for the purpose of determining the particular issue. It is respectfully submitted that this finding (the fifth in Mason J.A.'s list) should be reversed.

195. Sixth and seventh findings.

The sixth and seventh findings dealt with by Mason J.A. were as follows:-

6. That the appellant did not in a telephone conversation with Mr. Smith on Friday, 13th January 1967 in response to a statement that unless the documents were signed and exchanged that day, say "I am not prepared to sign or exchange the document on behalf of myself, and also I am not prepared to advise my co-directors on behalf of Landmark Corporation to do so".

Record:

7. That the appellant did not in a conversation with Mr. Bovill on Friday, 13th January, 1967 say to Mr. Bovill, "It is a bad business. It is risky. We should not execute these agreements ... I don't believe the finance will necessarily be forthcoming".

196. Mason J.A. prefaced his remarks concerning these findings with the observation that they were related to the finding concerning Landmark being worthless in Barton's belief after 10th December, 1966. If the appellant's submission is accepted that Barton did have such a belief, then it is submitted that these two findings should be reversed. Even if the 'no belief in worthlessness' finding
12/4183 is not reversed, there are still powerful arguments why these two should be.

197. Mason J.A. refers to the appellant's argument in support of his contentions concerning the conversation with Mr. Smith on Friday, 13th January, 1967, to the effect that Mr. Smith in his evidence corroborated what Barton had said. Mason J.A. sets out part of the evidence of the cross-examination of Mr. Smith upon which the Appellant relies. His Honour however, then goes on to say that he thought Street J. regarded the answer and he himself regarded the answer not as one assenting to the substance of the question put to him, but as a statement that Barton approved of the agreement subject only to its form being examined by the Solicitors.

Record:

198. It is respectfully submitted that when the whole of Mr. Smith's examination on this aspect is read (and it is all in examination in chief) it becomes clear that his answer was really intended to mean that Barton had indeed said something to him along the lines of what was put to him in the question and that his answer consists of three parts; the first part, where he is saying that he remembers the conversation but differs from Barton as to the date on which it occurred, placing it on the Wednesday preceding the Friday on which Barton had placed it; the second part where he begins to add his own recollection to his assent to a remark of that kind having been made to him by Barton, and a third part (the last two sentences of the answer) which may have been a commentary of his own or may have been a further recollection, although stated in indirect speech, of what was said by Barton.

3/620, 627, 628

199. Whether or not the third part of the answer was comment or recollection, the answer seems clearly to be at pains not to contradict anything of what had been put to him as having been said to him by Barton. The interpretation put upon the answer by Street J. and Mason J.A., however, involves Mr. Smith in a contradiction of what Barton had said, and it is submitted that this was something clearly not intended by the witness. This approach gains substance when it is noted that

Record:

Mr. Smith himself gave contradictory answers about the days of this week - at one stage in chief he said he did not speak to or see Barton between Tues-

3/620 day 10th and Friday 13th January; when he was ask-ed whether he had the conversation in question with

3/628 Barton on the 13th, he said, 'I believe it was on Wednesday 11th'.

200. Jacobs J.A. did not examine the finding in the same way as Mason J.A. but seems simply to have accepted it as a primary finding of fact with which

12/4092 he did not feel himself entitled to interfere.

12/4098 201. Taylor A-J.A., in his discussion on this find-ing again reveals (it is respectfully submitted) an

12/4238 inconsistency in his approach. As he embarked on a discussion of the events of 13th January he said he accepted Street J.'s findings on Barton's account of his mistake about the date Smith opened negotia-tions but then contradictorily added -

12/4238 lines 7-10

> "I have had difficulty in appreciating how the moving forward of these events from December to January could have been other than deliberate."

He said nothing more, specifically, about Barton's conversation with Smith on this day.

202. It is submitted that it appears from this, and other passages subsequently to be dealt with that Taylor A-J.A. formed a more adverse view of Barton's credit than Street J., and notwithstanding his acceptance, at an intellectual level, of Street J.'s findings, his attitude to factual matters was thereby somewhat distorted.

Record:

203. In dealing with finding 7, Mason J.A. partly stated the Appellant's arguments. In order to state the Appellant's contentions in answer to the reasons advanced by his Honour for not interfering with the conclusions of Street J. on this aspect, it is necessary to return to the judgment of Street J. He had accepted Mr. Bovill's evidence as being truthful and with the exception of one day, reliable.

204. The evidence from which Street J. took the quotation at 3188 from Bovill's account of his conversation with Barton appears at 2/437. Street J. gave reasons for his finding that the conversation happened earlier than Mr. Bovill's recollection placed it. In summary his reasons were:

9/3188 2/437

9/3188-9 (i) Counsel suggested the date.

(ii) Barton had some optimism regarding re-
9/3190 arrangement of Landmark affairs.

(iii) No step was taken to cancel the meeting ar-
9/3190 ranged with Mr. Smith on the 13th January 1967.

(iv) The evidence given by Mr. Smith of the meet-
9/3191 ing of the 13th January 1967 (an extract from which was included in Street J.'s judgment).

9/3192 (v) The long and late conference between Messrs. Solomon and Grant.

9/3192 (vi) Mr. Solomon's current instructions.

205. But as to (i) in the preceding paragraph, and generally, Counsel did not suggest anything to Mr. Bovill at or prior to the part of his evidence at

Record:
2/437 2/437 line 26 concerning the phrase "the first set of agreements" which appears in his answer. This phrase had not been used by Counsel or witness in any of the preceding part of Mr. Bovill's examination in chief. It was therefore a spontaneous recollection of Mr. Bovill and cannot be placed in the same category as the date which Street J. was quite right in saying had been referred to by Counsel before the witness himself mentioned it. The significance and true meaning of the phrase "the
2/511 first set of Agreements" emerged clearly in cross-examination where Mr. Bovill mentioned an agreement
2/571 line 26 2/512 early in January which was "thrown out", and said that the only earlier proposal was one:

2/512 "in the first week of January that I recall, which was thrown out (lines 10-12)

On the same page he said (lines 13-16) that the agreement was fairly similar to the one subsequently accepted - he said that he could not recall what difference there was in it. At line 21 he said that there were no other proposals.

206. It thus appears that the cross-examiner (Armstrong's Counsel) elicited unprompted details, additional to the original spontaneous reference to "the first set of Agreements" which were substantially correct, to the effect that there was a proposal in the first week of January (as there was) which was thrown out, (which is correct in one view if the draft and final clauses 15 are compared), and that there was no earlier proposal

Record:

(and only one later one) and that it was after the first one that the conversation with Barton took place. He was also right in saying the two proposals were similar. Once Street J. accepted that the conversation took place, as he unequivocally did, it can only have taken place, it is submitted, after the 9th and before the 16th January.

207. As to (ii) in paragraph 204 above, it is submitted that the contentions already urged relating to this aspect of the situation show that in view of the commercial state of affairs generally, the opinion of Mr. Smith, the opinion of Armstrong and of what Mr. Smith said on the 13th himself (doubts about finance from U.D.C.) Barton could only have been optimistic about the chance of finance on a completely unrealistic and unlikely basis and the probabilities are that he was not.

3/620, 635, 641

208. As to (iii) in paragraph 204 above, it is submitted that the reason given is of little weight, when Mr. Smith's evidence of what happened at the meeting is taken fully into account. This evidence is conveniently set out in the Judgment of Street J. At line 34 Mr. Smith referred to the fact that the possiblity of finance from U.D.C. still had to be proved to Hawley and himself. At line 47 his parting words to the gathering were that he felt the negotiations would be successfully completed. It is thus clear that at that time nothing had been settled or agreed in any final sense. Mr. Smith

9/3191

Record:

was expressing confidence that there would be a successful negotiation but doubt about finance from U.D.C. There was no more point in cancelling the meeting than holding it. If Barton was going to defy Armstrong's threats, his best method might well be to temporise and procrastinate rather than make his intention absolutely clear to Armstrong at once. Whilst doing so, however he would not be human if he did not have in mind the possibility that he might capitulate, and thus realise that he had to keep up an optimistic front so that in the event of capitulation, he could at least do his best to save what he could from the wreckage of Landmark, even if that should prove to be a hopless task as his objective reasoning powers led him to believe. Similar reasoning applies to (iv), (v), and (vi) set out in paragraph 204 above.

209. Jacobs J.A. did not deal specifically with the findings but Taylor A-J.A. did. His reasoning was in essentials the same as that of Mason J.A. although he did not go into the same detail. The appellant's submissions concerning the manner in which Taylor A-J.A. approached the findings are also in essentials the same as those which have already been put concerning Mason J.A.'s reasons. However, in addition, it may be said that the reasoning of Taylor A-J.A. more clearly shows what, it is respectfully submitted, is the fallacy in the finding of Street J. concerning the date of

Record:

Mr. Bovill's conversation with Barton. Taylor
12/4238 A-J.A. recognises and accepts that Street J. found that the conversation did take place. Taylor A-J.A. then acknowledged that "the earliest time Barton could have seen draft agreements would have been in the week of the 13th January" and remarked that the Court had been much pressed with the argument that this circumstance placed the conversation in
9/3189 that week. Taylor A-J.A. then referred to the remark by Street J. in his Judgment that notwithstanding that the terms of the conversation as deposed to by Mr. Bovill referred to the first set of agreements and the execution of "these agreements" Mr. Bovill had no clear recollection of having seen either a form of agreement or a draft on any occasion prior to 18th January 1967. Taylor, A-J.A. rightly said that if that finding of Street J. was correct, then there was no effective tie between the time Mr. Bovill saw the agreements and the conversation.

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210. However, Taylor A-J.A. did not examine Street J.'s statement that Mr. Bovill had no clear recollection of having seen either a form of agreement or a draft on any occasion prior to 18th January 1967. The only portion of Mr. Bovill's evidence upon which the trial Judge could have based this finding, so far as the appellant has been able to see, is some evidence given during
2/511 cross-examination of Mr. Bovill. It is submitted

Record:

that this evidence should be read bearing in mind that Mr. Bovill had, unprompted, volunteered in

2/437 chief a comment about "the first set agreements that were prepared" and that Street J. regarded him as a truthful witness. The evidence in cross-examination is as follows:-

"Q. Now would you tell me to the best of your recollection when you first saw the proposed deed in written form? When did you first see the proposed deed in written form?

A. I am very hazy on when I saw the proposed deed in written form. I cannot recall whether Barton showed me an outline of it - a precis - or whether the first time I saw it was when the Solicitor arrived with it. I think it could have been when the Solicitor arrived with it for execution.

Q. Well now, prior to that had you seen any draft of the Deed?

A. I cannot recall having seen a draft of the final one, no.

Q. Or the draft of any earlier one?

A. I think I had seen only early in January which as I said before, was thrown out. I think I had seen some draft. It may even have been a precis also. I can't recall it.

Q. Can you recall who showed it to you?

A. No, I can't. I can't recall who showed it to me.

....

Q. Was there any discussion?

A. There was discussion between Barton and I.

Q. Regarding the engagement of Solicitors to prepare or approve the proposed deed of settlement?

A. There could have been. I think there would have been. But, when I say that, the company's Solicitors were Allen, Allen & Hemsley, and they were, I think, the

Record:

Solicitors who prepared the agreement. I think it would have been the normal function that Mr. Barton would have gone to them, with or without discussing it with me.

Q. Is it your recollection that it got to the Solicitors for their attention on behalf of Landmark and its subsidiaries before the sending of it to them was discussed with you?

A. I could not tell you. I really don't remember those sort of details over this length of time.

Q. May I take it that you were not first asked did you approve of engaging Solicitors to draw up or approve the deed?

A. I could not tell you. I could not tell you.

Q. What is your recollection of what that proposal was?

A. I recall fairly similar to the one that was accepted. I cannot recall what difference there was in it."

211. It is submitted that the only fair inference from this evidence, in the light of Street J.'s acceptance of Mr. Bovill's truthfulness, is that although he had no precise recollection of seeing documents prior to 18th January 1967 he had a clear and definite recollection of having discussed proposed agreements with Barton and moreover proposed agreements which were in written form. The point, so far as the finding now being discussed is concerned, is not whether Mr. Bovill saw agreements or draft agreements before the 18th January, but whether he discussed agreements or draft agreements with Barton before that date. On the assumptions which Street J. made, it is submitted that the only conclusion can be that he did have such a discussion with Barton. Once that point is reached

Record:

it follows inevitably that such discussion must have been during the week in which the 13th January fell. It is impossible for the conversation to have taken place before Christmas 1966 as Street J. surmised. Once that impossibility is realised, and bearing still in mind that Mr. Bovill was accepted by Street J. as truthful, there is not only no reason for not accepting the 13th January as the right date, but positive reason why, on the evidence and on the relevant assumptions, that or a date very close to it must be correct.

212. Eighth and ninth findings:

The eighth and ninth findings dealt with by Mason J.A. were dealt with together and were as follows:

8. That nothing of significance appears to have taken place over the weekend of 14th-15th January.

9. No occasion existed on the morning of Monday, 16th January for the Appellant to be coerced into a change of mind.

The appellant criticised these findings before the Court of Appeal on the basis that on Friday, 13th January, Mr. Smith had told Armstrong that he was not willing to accept appointment as a Director of Landmark. Submissions have already been made in paragraphs 207 and 208 concerning this aspect of the matter.

213. Mason J.A. recognised that there was a solid

Record:

factual basis to this criticism; he said in his

12/4187 judgment:

> "Mr. Armstrong's instruction that his unwillingness should not be communicated to the Appellant is said to be significant as it indicates that there was a real apprehension that the Appellant would terminate the negotiations. Once he disccoered this to be the position and that there was a need for further coercion to ensure execution of the agreements before the Appellant ascertained the truth of the matter."

In this passage, Mason J.A., it is submitted, was accepting the Appellant's submissions as to fact referred to in paragraphs 152 and 153 above to the effect that Armstrong required both Mr. Smith and Mr. Grant not to let Barton know over the weekend that Mr. Smith was not going to be appointed as Chairman of Directors.

12/4187 214. Mason J.A. said, however, that the language of Street J. meant that he did not regard the circumstances as throwing significant light on the question whether a threat in the terms alleged was made by Armstrong on 16th January. He said that he himself was of the same opinion because the circumstances did not provide a sufficiently firm foundation for estimating the probabilities. It seems, however, from a careful reading of the Judgment of Street J. that this circumstance was one which he did not take into account at all.

215. Once taken into account, it shows first that Armstrong was extremely anxious that nothing should impede the completion of the agreement and second that he was apprehensive that Barton would avail

Record:

himself of any reason for refusing to carry out the proposed transaction. It also indicates that Armstrong's view was that, at the least, Barton was disposed to resist the making of the agreement and the completion of the transaction. This in turn supports the view that Barton had told Armstrong on the 13th that he would not make the agreement with him. All in all, once these matters are properly understood, every occasion existed for the making of a further threat by a man who had already made threats and whose position, financially, was growing more dangerous every day the making of the agreement was postponed.

216. Once again, Jacobs J.A. did not examine these findings for himself, but accepted them as primary findings of fact with which he did not feel himself entitled to interfere. Taylor A-J.A. dealt with these particular findings, and others, saying:-

> "These were all questions of fact for the trial Judge, their determination depended upon the oral testimony of witnesses whom he saw and evaluated, advantages we do not have. The refusal to make these findings was a matter for the Trial Judge from which I do not differ."

In so far as this statement indicates a refusal to examine the material from which Street J. arrived at the conclusions he stated, it is respectfully submitted that there is no reason why that material should not have been examined, in the way that Mason J.A. did, nor why such an examination should not have produced a reversal of the finding for

Record: reasons already submitted when dealing with the reasons of Mason J.A. So far as Taylor A-J.A.'s comment that he does not differ from the trial Judge's findings indicates that he himself formed the same opinion, it is submitted that opinion is wrong, also for the reasons already advanced.

217. Tenth Finding. Armstrong - reluctant Vendor?

The tenth finding dealt with by Mason J.A. was the finding that Armstrong was a reluctant vendor whom the Appellant had to buy out if Landmark was to be saved. Mason J.A. expressed the view 12/4188 that this was an incorrect finding and that the making of threats by Armstrong to Barton on the 12th January together with the subsequent emphasis given by Armstrong and those who represented him to the necessity of having the documents prepared and executed with the utmost despatch was quite inconsistent with Armstrong's being a reluctant Vendor.

12/4188 218. Mason J.A. continued however, that that conclusion did not greatly assist Barton's case, because he said Barton wanted to continue in control of Landmark because he thought large profits remained to be made by that Company. This is only correct if it is accepted that Barton did not be- 12/4189 lieve Landmark's prospects were hopeless. Mason J.A. said that Armstrong was in a position of great negotiating strength which enabled him virtually to dictate his terms to Barton so long as Barton

Record:

wished to remain in control of Landmark. This, according to Mason J.A. was the real point of Street J.'s finding.

219. The reasons already advanced show, it is submitted that it was not Barton's objective to remain in control of Landmark. That situation was one he was left with rather one he was any longer seeking. Indeed, why should Armstrong be so anxious a vendor and so insistent upon an early settlement and so threatening to Barton (even on the minimum accepted facts) if Barton were such an anxious purchaser? The only possible explanation of such a situation is that Mr. Smith and Armstrong were farsighted enough to see what must happen to Landmark whereas Barton was so blind that he could not. He had been extremely despondent about the prospects of Landmark from the 13th December until Christmas at least. Nothing of a commercial kind had happened to change the reasons upon which that despondency was based; on the non-commercial level, however, there had been threats by Armstrong and Vojinovic had come upon the scene.

2/435 lines 42-51

220. Jacobs J.A. also drew a different inference from that drawn by Street J. on this finding. He said that Armstrong's conversations with Mr. Smith, his entries in his diary and his threat to Barton of 12th January all showed a person very concerned to see that the proposed agreement went through. He continued however, by saying that he did not

12/4106

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regard a concluded finding upon this point to be essential to a determination of the case; he made no further comment on the point.

221. Although a concluded finding upon the point may not be essential to a determination of the case, it is submitted that it is extremely relevant to the questions arising upon re-examining Street J.'s factual conclusions. Street J. was satisfied that Armstrong subjected Barton to threats of violence but thought that Barton entered into the agreement for commercial reasons. An important element in the thinking leading him to that factual conclusion was his inability to connect Armstrong's actions with an intention to force Barton to enter into the agreement. With that element missing in his factual findings, he came to the conclusion in a number of instances that he was simply not satisfied that Barton had discharged the onus of satisfying him of various facts. All of those instances of non-satisfaction must have been influenced in Street J.'s mind by the idea that Armstrong was a reluctant vendor. The line of thought is obvious; if Armstrong was a reluctant vendor there was no reason for him to threaten Barton with violence to make him buy Armstrong's shares and therefore Armstrong's threats were motivated by some other (unknown) reason.

222. Thus, all of Street J.'s doubts and hesitations in making positive findings on a number of

Record:

facts must be related to his view that Armstrong did not really wish to sell. Once it is found that Armstrong was very anxious to sell, then what must have been a quite decisive factor in many of Street J.'s findings is shown to have been misconceived. One result is that such findings must be looked at either afresh by the appellant tribunal, or at the least with a view to deducing what Street J. would have decided (bearing in mind the various unchallenged findings of fact) in the light of the true position concerning the "reluctant vendor" question.

223. Taylor A-J.A. was somewhat more reluctant to hold Street J. incorrect in his assessment of Armstrong as a reluctant vendor. However, he did conclude that Armstrong sought to get as much in
12/4242 cash or kind (after the meeting of 22nd December) in reduction of his debt as he could since he, after the 22nd, thought the Company would fail, if he did not think so before. Having said so much, Taylor A-J.A. did not go on to examine the consequences of the reversal of Street J.'s finding. The consequences are, it is submitted, as set out in the preceding paragraph of this case.

224. Eleventh and twelfth findings: Telephone conversation, Barton - Mr. Bovill 16/1/67 and telephone conversation Barton - Armstrong 16/1/67.

Street J. held that the dominant theme of

Record:

the telephone conversation between the Appellant and Mr. Bovill on 16th January was the commercial necessity of getting Armstrong out of the company.

9/3194 and following

Street J. had drawn attention to the discrepancy between the accounts given by Barton and Mr. Bovill. Barton's account referred to statements that it was not his duty as a director to resist Armstrong and get killed and he was no longer prepared to refuse demands of Armstrong. Mr. Bovill's recollection, on the other hand, was that Barton spoke of the need to sever the connection between Landmark and Armstrong as soon as possible, before Armstrong changed his mind.

9/3195

225. Both Street J. and Mason J.A. preferred Mr. Bovill's version of the conversation and then drew from it the conclusion that because Barton was speaking about the need to get Armstrong out of the company and not speaking about threats made to him by Armstrong he really had in mind the matters he was mentioning to Mr. Bovill. Consider, however, the position if, as he has been submitted, Barton had been resisting Armstrong and then decided shortly before his conversation with Mr. Bovill to give in. His mind would be full of two things; the first would be fear influencing his decision, and whether he said so to Mr. Bovill or not the elements in that decision would be the very thoughts that it was not his duty to resist Armstrong to the point of being killed and that he was no longer

Record:

prepared to refuse Armstrong's demands. The other matter in his mind would be the necessity of ensuring Mr. Bovill's assent to the proposed agreement. Mr. Bovill's recollection of the conversation is entirely consistent with such a state of mind in Barton. It shows Barton advancing reasons to Mr. Bovill why Mr. Bovill should speedily play his part in carrying through the transaction with Armstrong. On this approach, it is indeed more likely that Barton would have spoken to Mr. Bovill in the terms that Mr. Bovill recalled rather than those which he himself remembered.

226. If it is assumed that that is what happened and that Barton did not mention his thoughts about getting killed to Mr. Bovill, it is nevertheless understandable how, when endeavouring to recollect in the witness box some 18 months later what he had said to Mr. Bovill on this particular occasion, he could confuse something that must have been very much in his thoughts at the time when he spoke to Mr. Bovill with what he actually said to him. Approached in this manner, the two differing accounts of the conversation between Barton and Mr. Bovill on 16th January do not in any way cut down Barton's evidence concerning the 'phone call from Armstrong on that day. Once this reason for criticism of Barton's recollection is removed, the logic of events to that instant makes it probable that there was a further occurrence of the kind

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which he described and, it is submitted that it is illogical and incorrect to accept his uncorroborated testimony concerning the telephone threat on the 12th January (which was unchallenged) and not to accept it concerning the threat on the 16th January.

227. Jacobs J.A. dealt with this finding (as he
12/4097 had those concerning the events of the 13th January) by saying that Barton's account was not accepted by the trial Judge and the issue was so tied up with the credibility of the witnesses that he did not think the Court could or should substitute any different finding.

228. Taylor A-J.A. also rested his opinion concerning this finding upon its having been a ques-
12/4241 tion of fact for the trial Judge adding the comment for himself that as he read Street J.'s judgment, Street J. thought the events of the 13th and 16th
12/4240 January were closely integrated and that he had rejected Barton's version of events on those days because he regarded them as part of a reconstructed case.

229. However, it is submitted that there were at least two elements in Street J.'s assessment of the events of the 13th and 16th January which were demonstrably in error and which must have influenced his conclusion; his view that Armstrong was a reluctant vendor and his view that the conversation between Mr. Bovill and Barton (which Street J.

Record:

accepted as having taken place) had taken place before Christmas. If the appellant's contentions concerning those two elements are accepted, much of the reason for regarding Barton's evidence concerning those days as suspect disappears. If the matter is then reconsidered taking into account the unchallenged parts of Street J.'s judgment together with the extra facts which the appellant contends must be taken into account, then the fact that the events of the 13th and the 16th January are closely integrated helps rather than hinders Barton's case and, as has been said the fear of reconstruction is much diminished.

230. Thirteenth and fourteenth findings:

The thirteenth and fourteenth findings of Street J. which were dealt with by Mason J.A. were:

13. That Armstrong's threats and intimidations were not intended to coerce the Appellant into the making of the agreement.

14. The Appellant did not, in his own mind, relate Armstrong's threats to a desire by Armstrong to force through the agreement.

231. All the Judges of Appeal disagreed with and made findings contrary to these two findings of Street J. It is respectfully submitted that they were quite correct in doing so; and further that their findings are the only possible inferences to be drawn from the primary facts found by Street J. (and unchallenged on appeal) that there had been

Record:

a course of threatening behaviour by Armstrong and that he had threatened Barton on 12th January in relation to the agreement which Armstrong wanted. These findings however, by the Court of Appeal raised the question already posed in this Case in paragraph 71. It is submitted that there is no satisfactory answer to this question to be found in any of the judgments in the Court of Appeal. It is further submitted that the only satisfactory conclusion that can be reached after the Court of Appeal's finding that Armstrong was threatening Barton in relation to the agreement as late as 12th January is that Armstrong believed that Barton would not enter into the agreement unless he was so threatened and this conclusion in turn provides very sound foundation for accepting Barton's own assertion that he would not have made the agreement had not been threatened by Armstrong.

232. Fifteenth finding: Was Barton's conduct inconsistent with his being coerced into agreement?

The fifteenth finding of Street J. dealt with by Mason J.A. was the finding that the appellant's course of conduct both in what he said and what he did between December 1966 and a time shortly prior to the commencement of the suit, is consistent with his having been coerced into the making of the agreement. Jacobs J.A. did not agree with this finding but Mason J.A. and Taylor A-J.A. did and

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both were clearly very considerably influenced by the events of the year following the making of the agreement.

233. This finding really has two parts, one dealing with the period prior to the execution of the agreement and the other dealing with the period between the execution of the agreement and the time shortly prior to the commencement of the suit. In regard to the former period, the argument has already been put (paras. 166-176) why a man who has in mind that he may be compelled to enter into an agreement which he believes will be disastrous to him will conduct himself in a way which will enable him if he is compelled to enter into the agreement to do the best he can in thereafter retrieving the disastrous commercial position in which he believes he will by then be placed. These arguments are therefore not repeated.

234. As to the period after the execution of the agreement until shortly before the institution of the suit, it is submitted that both Mason J.A. and Taylor A-J.A. have fallen into error in the way they used the evidence concerning it. Counsel for Barton sought at the hearing before Street J. to lead evidence as to the state of Barton's mind following the settlement. Counsel for Armstrong objected to any evidence being led in respect of the period subsequent to settlement.

1/84 line 29 and following

235. At that stage and at occasional intervals

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thereafter when evidence was being given (and many unrecorded arguments took place) Counsel for Armstrong persisted in the attitude expressed at 1/84

12/4128 (which is reproduced in the judgment of Jacobs J.A.) and made statements to the effect of what he said and was recorded in his final address:

> "We do not seek to raise any defence of laches acquiesence or delay arising out of failure to institute proceedings. If Mr. Barton can satisfy the Court that he had a right in January then we do not raise the defence raised upon the fact that it was a year later that he came to assert it. We do, however, submit that the fact that it took him twelve months to make his claim is highly significant, and it is significant upon the probabilities of whether he ever had a claim or whether the event which he says happened ever did happen."

236. Street J. commented upon the matter when he said in his judgment:

9/3207

> "Mr. Staff Q.C. has specifically disclaimed relying upon any defence of acquiescence or delay. He relies, however, upon Mr. Barton's inactivities throughout 1967 as indicating that Mr. Barton was not intimidated in January, 1967, and that Mr. Barton did not throughout 1967 hold the opinion that he had been intimidated."

12/4127

In the circumstances of the objection by Counsel for Armstrong to the admission of evidence concerning Barton's state of mind after the settlement, the questions of Barton's state of mind after that date and his motivation for doing the various things he did were never fully or properly explored with a view to determining what assistance could be gained from those events for an evaluation of his state of mind on the 17th and 18th January.

237. Because of the objection taken by Counsel

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for Armstrong, the fact that there was no defence based on delay and the fact that Armstrong by his Counsel made it clear throughout the hearing that he was concerned to deny and to fight as the issue in the case the allegations of threats directed at Barton as at the 17th January, 1967, the events following that date were never fully explored.

238. They were, however, explored to some extent notwithstanding the general lines of battle that had been drawn. There is evidence, upon which the Trial Judge made no finding, that Barton was in touch with Detective Constable Follington after 17th January and that Detective Constable Follington led Barton to believe over a considerable period that the police were still investigating the matter and were hoping eventually to catch Armstrong. Barton also gave evidence that Armstrong threatened him during the period between the making of the agreement and the institution of the Suit. Under cross-examination by Counsel for Armstrong, the following evidence was given:

2/561, 563

"Q. In the subsequent conversations shortly after February did Constable Follington tell you that something was likely to happen to clear up the problem you had?

A. Yes.

Q. And something was likely to happen shortly thereafter?

A. Yes.

Q. And this is the reason, is it, that you say you waited without doing anything about attacking the agreement?

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A. I had two reasons.

Q. You what?

A. I had two reasons. One is the C.I.B. indicated to me that the persons and parties to this thing will be arrested.

Q. When you say the C.I.B. you mean to say Constable Follington do you?

A. Yes.

....

Q. What was your second reason?

A. The second reason was that I was in fear of my life to do anything else." 10

239. When Barton's evidence concerning Follington is examined and contrasted with the impression given by Follington during cross-examination, in which his uneasiness prevarication and lack of credit were so marked that, it is submitted, they emerge clearly even from the printed page, it is submitted, that in view of Street J.'s general findings about Barton and his criticism of Follington, there is no reason at all why Barton's account of 20 his transactions with Follington in the period after January 1967 should not be accepted.

240. Barton was cross-examined by Counsel for Armstrong concerning various matters arising after the 17th January, 1967. It is submitted that these questions were asked and allowed as directed to the issue, not of the existence or otherwise in Barton's mind of fear after the 17th January but on the issue whether on and prior to the 17th

Record:

January he really believed that the financial situation of Landmark was hopeless.

241. Counsel for Armstrong, hampered by the restrictions flowing from Armstrong's express disclaimer of the defence of delay or acquiescence sought to bring the defence into the case by taking the line which he did in the passage quoted from his address in paragraph 236 and seeking to use the evidence of subsequent actions of Barton as reflecting the state of his mind so far as fear and coercion were concerned as at the 17th January. It is this approach, adopted likewise by Mason J.A. and Taylor A-J.A. which the Appellant respectfully criticises as being unjustified in the light of the way in which the hearing was conducted.

242. The finding that Barton's conduct was inconsistent with coercion is of critical importance to the Appellant's case. The various reasons given by Mason J.A. in support of his opinion that the finding was demonstrably correct are therefore all examined. (All of the reasons noted by Taylor A-J.A. are included in those considered by Mason J.A. so are not separately dealt with later.)

243. First he referred to the absence of evidence from the Solicitors who acted for the Appellant and Landmark who could give evidence of complaints made to them of coercion. However, it is an accepted fact in the case that Barton was subjected to threats and pressure. In that sense he was being

12/4193-4

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coerced; the question is whether the coercion was successful. Whether other witnesses should or should not have been called is not a relevant matter for consideration on the question whether coercion was in fact exerted against Barton by Armstrong, once that fact is arrived at (as it was) independently of those other possible witnesses. As already pointed out, if the coercion was successful, Barton would be left in the situation where his only hope of financial survival would be by trying, against the odds and his own conviction, to make Landmark prosper. He would certainly not achieve that by revealing to his business and professional associates what he considered the true state of the Company to be and what he regarded as the calamitous nature of the agreement to which he was committing both himself and Landmark.

244. Mason J.A. continued that the evidence of the complaint to the Police on 17th January did not indicate that the complaint was that the Appellant

12/4194 was being coerced into the proposed agreement. However, the same comment again applies; in fact the findings of Street J. and the Judges of Appeal are to the effect that Armstrong was seeking to coerce the Appellant into the proposed Agreement and Barton so understood his action. With that fact established, the question arises, why was no disclosure made by Barton of the purpose behind Armstrong's threats. It is submitted the answer

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must be the one given in the previous paragraph; conscious that he might succumb to Armstrong's pressure Barton wanted to give himself the best chance of recovering whatever could be recovered from the subsequent wreckage. Such conduct may not be admirable; it is however, so far as Barton's own interests were concerned an intelligible response to the unprecedented circumstances in which he found himself placed.

245. It is said of Barton by various Judges that he is cool and possesses foresight. It has been held by all the Judges that he was in fear. It is submitted that the explanation here offered explains the events which took place and is consistent with the assessment of his character and mental state at the time of the events of January, 1967.

246. The remarks made by Barton to Mr. Grant on 12/4194 18th January and Mr. Smith on 19th January to which Mason J.A. next referred are explicable on precisely the same basis as that referred to in previous paragraphs; they have also been dealt with in paragraphs 174-176 above.

247. The next matter referred to by Mason J.A. was that proceedings were taken by Landmark, under Barton's direction, against various Armstrong companies towards the middle of 1967. Mason J.A. said that the importance of the matter was that in those proceedings it would have been to the

Record:

advantage of Barton to allege that the contract of

12/4195 loan had been procured by coercion yet he did not avail himself of that ground for relief, but of another (which Mason J.A. without any argument ever having been addressed to this question, the facts of which were unexplored, described as spurious).

248. Mason J.A. made the further points, that

12/4195-6 Barton's fear of Armstrong did not restrain him from bringing or causing to be brought those proceedings in mid-1967 nor had his fear dissuaded him from bringing to the notice of the Police his allegations concerning Vojinovic in January, and that again, further proceedings in 1967 took place between Landmark and Armstrong companies in which, although it would have been to the advantage of Barton to raise the question of coercion, it was not raised.

249. It is respectfully submitted that the comments concerning the Court proceedings did not recognise a most important distinction. It was one thing for Barton to contest matters of law, which perhaps involved disputes of fact of a commercial kind between himself and Armstrong, which is what was occurring in the proceedings taken in mid-1967; it would have been quite another thing for Barton to raise in those proceedings allegations against Armstrong of criminal actions of a very serious kind.

250. In mid-1967 it was Barton's belief that

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1/66-7

Armstrong, who was still threatening him had engaged in a criminal conspiracy to do him harm and had been powerful enough to stifle the police investigation of that conspiracy. Armstrong was a member of the Legislative Council and, according to the evidence given by Barton, which for reasons mentioned in paragraphs 234 to 241 was never fully gone into, was still in fear of Armstrong. Bearing in mind once more than the accepted fact is that Armstrong had taken steps to coerce Barton at the time of the making of the agreement of January 1967, and that that was provable, it is submitted that the fact that Barton did not raise those matters in the proceedings in mid-1967 is rather corroborative of his still existing fear of Armstrong and the truth of his whole case than of the conclusion drawn from it by Mason J.A.

251. So far as Mason J.A.'s comments about what he brought to the notice of the police in January is concerned, this aspect has been dealt with in paragraphs 244 and 245 above.

252. Before leaving this aspect of the proceedings in 1967, the Appellant points out that, although the Appellant submits that the use sought to be made of those proceedings in support of finding 15 is not open to the Court in the circumstances, nevertheless at least one matter of significance in support of Barton's case is to be found in the documents filed in the proceedings. In an

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Affidavit sworn by Barton on 31st March, 1967, Barton reports Armstrong as having said shortly before the making of the agreement:

7/2465

> "... I do not believe that Landmark can get a clear title to the penthouse. I do not believe Landmark has the necessary cash to pay me out. I do not believe that Mr. Barton will purchase my shares and I do not believe that he genuinely wants to make an agreement." (7/2465).

The affidavit does not then record any protestations by Barton that he was anxious to make the agreement as one would normally expect in face of such a statement. It simply then contains an assertion by Mr. Smith, Armstrong's agent, that he thought Barton wanted to make the agreement. This account is completely consistent with the contentions urged in this case concerning Barton's motivations during January.

253. Affirmation.

In his remarks on this finding Mason J.A. also dealt with assurances and statements made by Barton indicating optimism in the future of Landmark, which have already been dealt with, and then stated that all Barton's actions were consistent with an affirmation of the agreement until it ap-

12/4197 peared that Landmark was in inextricable financial difficulty.

254. This statement illustrates the problems arising from the express non-reliance by Armstrong's Counsel on any defence of affirmation and the fact that as a consequence there was a quite incomplete

Record:

investigation of Barton's motivation and state of mind following the making of the agreement. It is submitted that all matters of affirmation are so closely bound up with the notion that behaviour subsequent to the making of the agreement can reflect the state of mind of Barton at the time when he made the agreement, that an abandonment of the other as well.

255. The evidence relevant to the two issues is so nearly co-extensive that a party who has been checked in presenting evidence on the first issue as being irrelevant cannot fairly be expected to realise that bits and pieces of the relevant evidence which happened to make their way into the case, not fully explored, may be used supposedly on the other issue. The confusion and unfairness created by this situation are demonstrated by Mason J.A. stating that all Barton's actions were consistent with an affirmation of the agreement;

12/4197 this amounts to a judicial finding on an issue expressly not before the Court, on facts far from fully before the Court. It is therefore unsafe to reason from the apparent consistency of Barton's actions (reasoning which in any event is submitted to be faulty) with an affirmation of the agreement to the conclusion that therefore the Appellant was not coerced at the time of the making of the agreement.

256. As has been remarked, the comments of

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Taylor A-J.A. on this finding were based on similar reasoning to that of Mason J.A. and are therefore not dealt with separately. However, Taylor A-J.A. did make some comments upon which it is desired to make submissions. He said:

> "Why was no Solicitor called before Street J. to say that he had been told by Barton of these matters and to explain why no action was taken? The only explanation is that Barton had not told them of the threats and it was because of these threats he was being forced into signing the agreement."

257. The phrase "to explain why no action was taken" shows that his Honour's mind was directed to the issue of affirmation which was not before the Court. Furthermore, there was evidence before Street J. which was never contested by anybody that Barton had attended the C.I.B. with Counsel and Solicitor to complain of Vojinovic's threats and to complain that in his belief Armstrong was responsible for them. Thus, unless the query of Taylor A-J.A. is directed to the fact that Barton did not complain, at the same time as he told the police of the Vojinovic episode and his suspicions about Armstrong's part in it, that the threats were directed to making him enter into the agreement, then he simply has not properly taken into account the relevant evidence. If his point was intended to be that Barton did not tell the Police that the threats were connected with the Agreement, there nevertheless remains the remark of Barton reported in the evidence of Sergeant Wild and noticed by

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Jacobs J.A. that on the 18th January (settlement day) "it will be all over" as well as the argument put in paragraph 244.

3/723 lines 7-10

12/4256 258. Taylor A-J.A. also asked if Barton had believed he was being coerced, why did he not go to the Police earlier? But it is undisputed that Barton was being threatened, and related the threats to the agreement. Taylor A-J.A. must be drawing a distinction between the two situations and his question must really mean, if Barton had believed he was going to submit to coercion, why is it that he did not go to the Police earlier. Unless it means that, it flies in the face of the facts found by Street J. and accepted by Taylor A-J.A. himself in the course of his Judgment. But to state it in the terms in which it has just been stated, namely, if he believed he was going to submit to coercion, why did he not go to the police earlier? is to ask a question the answer to which leads to the opposite conclusion from that at which Taylor A-J.A. arrived. Obviously, if Barton believed he was going to submit to coercion the factors influencing his submission would lead him to hold back from the police the object and result of the coercing behaviour.

259. Sixteenth finding: Was Barton coerced into signing the documents?

The sixteenth (and last) finding of Street J. dealt with by Mason J.A. was that the Appellant did not establish that he was coerced into signing

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the documents of 17th and 18th January. To a large extent this finding is a conclusion from those which preceded it, and if the arguments (or any appreciable part of them) which have been put by the Appellant in relation to the preceding findings are accepted then it will follow, it is submitted, that this finding is incorrect.

260. Some matters are, however, dealt with by Mason J.A. under this finding which are not elsewhere dealt with so specifically and therefore the Appellant here states his contentions concerning them. Mason J.A. regarded it as significant that in the interview with Inspector Lendrum on Sunday morning 8th January, 1967 Mr. Millar, Landmark's Solicitor, who accompanied Barton and Senior Counsel to the C.I.B. said to Inspector Lendrum, without contradiction or intervention by Barton that Barton and Armstrong on 4th January, 1967 "personally reached what appeared to be an agreement subject to documentation". The point is made that nothing was then stated by Barton to the effect that Armstrong's threats were related to the making of the agreement.

261. It is submitted that there are various reasons, all having considerable force, why this incident does not bear the weight placed upon it by Street J. and Mason J.A. First, Barton was in company with Senior Counsel and an experienced Solicitor well known in commercial circles. During

Record:

the previous afternoon and evening Barton had been caught up in events which had shaken him considerably. It has been held that he was in fear of Armstrong at the time. The thought must have been in his mind, as already submitted, that he might have to submit to Armstrong's coercion. He was no doubt hoping that Armstrong's part in the threats would be exposed and action taken against Armstrong; this would have released him from his being subjected to Armstrong's threats and pressure.

10.

261. It is hard to see what result would have followed from Barton's complaint to the police against Vojinovic and Armstrong if it was successful, other than the abandonment of the agreement in any event; this itself contradicts any finding that Barton was anxious for the agreement to be carried through. But at the same time Barton must have had in mind Armstrong's earlier threats and boasts about his power over police and evidence. In the circumstances, it must have taken considerable effort on his part to bring the complaint against Armstrong. In a state of uncertainty as to the result of the complaints, mindful of Armstrong's power, and believing that if the complaint against Armstrong should not be successful, he would still be subjected to pressure from that quarter, it is respectfully submitted that it was prudent for a man who has been characterised as both fearful and foresighted to leave to his legal representatives

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as much of the talking to the police as possible. The point of the expedition to the C.I.B. was the apprehension of the person causing terror to Barton. To gain this point, it was not necessary to make a complete explanation of the commercial side of affairs to the police, nor indeed to his legal representatives.

263. Second, it is submitted that the extremely tentative nature of the language used by Mr. Millar to Inspector Lendrum is significant. The inconclusive nature of what had occurred between Barton and Armstrong, according to Mr. Millar, is the outstanding feature of the phrase quoted by Mason J.A. In this respect it is consistent with Barton's case, which is to the effect that under pressure from Armstrong he put off the day of the agreement as long as possible, the opposite side of this coin being demonstrated by Armstrong's continual insistance on speed in settlement.

264. Third, notwithstanding that Barton was, as it is submitted, refraining as a matter of policy from connecting the threats and the business transaction nevertheless he did let fall the one remark, perhaps inadvertently, which clearly shows the very real connection in his mind between the threats and the agreement at the time when he was speaking to the police. This is the remark which Jacobs J.A. noticed and which has been mentioned previously in this Case. Sergeant Wild was a witness called by

Record:

Armstrong and, to say the least, was not prepared to assent to many of the factual suggestions put to him by Counsel for Barton. It was in his examination in chief and not in response to any suggestion of Counsel for Barton that Sergeant Wild volunteered part of a conversation he had with Mr. Barton on the 11th day of January 1967. He had been asked whether Armstrong was mentioned by anybody and replied:

3/723 lines 3-10 also in judgment of Jacobs J.A. 12/4094

> "Mr. Barton, when he told me that he was worried, or when he said, I am still worried about this matter, and I replied that I felt that he should have no worry, said, "Well the agreement will be signed on the 18th and it will be all over", but I do not recall whether he actually mentioned Mr. Armstrong."

265. Mason, J.A., having stated his own view, in the light of the previous findings of fact, that

12/4201 Barton exercised free and independent judgment in entering into the agreement said that Barton did so because he thought it was an advantageous one and then gave the reasons why he thought Barton so considered it.

266. The reasons were in short that he considered Barton thought Paradise Waters held the promise of very considerable profits and that the only way of achieving the commercial success involved in obtaining those profits would be by getting rid of Armstrong. It seems that if Mason J.A. did not accept that Barton did think in that way concerning Landmark and Paradise Waters, he would have been disposed to agree that Barton was not exercising free

Record:

and independent judgment and that his case should have succeeded. For reasons already exhaustively set out, it is submitted not only were none of the reasons said to be the foundation of Barton's belief in the commercial future of Landmark correct, but that Barton himself could not have believed them to be correct.

267. Also in relation to this finding Mason J.A. said:

12/4202

> "... it may be said, initmidation and the fear which it caused, played a part in producing the Appellant's assent to the agreement."

He went on to say that such an element in the reasoning of the Appellant leading him to assent to the agreement added nothing to his case but subtracted from it because it showed a mind capable of appraising dispassionately the merits of the transaction, not a mind overborne or coerced by fear. This passage seems to assume that a person in fear is not capable of rational thought. The real point is, it is submitted, that the mind of a person who is in fear may well operate rationally, but will operate rationally in a different way from that in which it will operate when the person is not in fear. The rational solution of a business problem by a man who has to consider only commercial elements in solving it, may well be different from the rational solution of the same problem by the same man when he has to take into account in

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his problem not only the commercial elements, but also the additional factor that he or his family may be killed or injured if he does not arrive at one particular solution. In other words, if Barton believed that Armstrong would carry out his threat, even if Barton were not physically or mentally in fear, it might well be rational, if Barton could think of no other way of averting the threat, for Barton to agree to what Armstrong proposed; he would in one very real sense be willing to agree with Armstrong in such circumstances; nevertheless it is submitted he would, in ordinary English have been coerced into making the agreement.

268. The Appellant makes one final submission on the facts, based upon a passage in the judgment of Jacobs J.A. near the end of his judgment Jacobs J.A. summarised what he called the "bare circumstances" of the case, as follows:

12/4125

"1. Without finance the company was worthless.

2. The financier had withdrawn. There was no finance and no clear source of finance.

3. The last liquid funds were to be used to pay money to Mr. Armstrong.

4. A price was to be paid for the shares which was at least 50 per centum above their market value.

5. Mr. Barton was to guarantee the indebtedness not only of himself and members of his family and of his family company but also of strangers.

6. Mr. Barton is placed by the threats of Mr. Armstrong and by events in extreme fear of Mr. Armstrong. He secretly changes his abode.

Record:

7. Mr. Barton believes that when the agreement shall have been signed on 18th the source of his fear will be past. 'It will be all over'. Meanwhile he buys a rifle for self protection.

8. The day after the agreement is made Mr. Barton feels free to return to his usual abode."

269. These are the undisputed basic facts in the case. They are used by Jacobs J.A. as a foundation for the conclusion that Barton must have been influenced by threats in such circumstances and that 12/4126 he was not a man abnormally uninfluenced by the emotion of extreme fear. It is submitted that such conclusions are completely legitimate upon the undisputed facts. Jacobs J.A. felt himself constrained by the rules concerning appellate interference with primary fact-finding not to interfere with Street J.'s finding that the predominant motive of Barton in entering into the transaction was a commercial one. However, it is submitted that by reference only to the basic facts listed by Jacobs J.A. it is not only permissible and legitimate to arrive at the positive conclusion that Barton was substantially influenced by Armstrong's threats into entering into the agreement but also that such a conclusion is the only reasonable conclusion to be drawn. It is respectfully submitted that the tribunal to which this final appeal is address will come to the conclusion that Barton entered into the agreement with Armstrong substantially influenced by the threats and terror of Armstrong and would not have entered into the agreement otherwise.

Record:

C. REASONS OF APPEAL

270. The Appellant therefore respectfully submits that this Appeal should be allowed, that the decree of the Supreme Court of New South Wales in its Equitable Jurisdiction (Street J.) dated 23rd day of December, 1968 should be set aside and that the following declaration and orders should be made:

(a) A declaration that the deed of 17th January 1967 and all deeds ancillary or consequential thereto were executed by the Appellant under duress and were not his deeds.

(b) In the alternative a declaration that the said deed and ancillary and consequential deeds were executed by Appellant under duress and have been duly avoided by him.

(c) A declaration that the said deed and ancillary and consequential deeds are void or alternatively are void so far as concerns the Plaintiff.

(d) An order restraining the first, second, third, fourth, fifth and sixth respondents from acting upon or purporting to act upon the said deed, ancillary deeds and consequential deeds in any way whatsoever or alternatively so far as concerns the Plaintiff.

(e) That the guarantee and mortgages by the Appellant and other obligations of the Appellant contained in the said ancillary and consequential deeds are invalid and void and not binding upon the Appellant.

Record:

(f) That the first, second, third, fourth, fifth and sixth respondents be ordered to pay the Appellant's costs of this Appeal, the Appeal in the Court of Appeal and of this suit.

For the following amongst other

REASONS:

1. That upon the findings of fact made by them the majority of the Judges of the Court of Appeal erred in Law in dismissing the Appellant's appeal and in refusing to grant the relief claimed.

2. That upon the evidence the Court of Appeal erred in dismissing the Appellant's suit and refusing to grant the relief he claimed.

3. That upon the findings by the Court that the Appellant was being subjected to threat and intimidation by the Respondent Armstrong, that these were current during the negotiations, that the Appellant was in fear for the safety of himself and his family and that on the 12th January, 1967, the Respondent Armstrong directly threatened the Appellant regarding the signing of the agreement, Street J. at first instance and the majority of the Court of Appeal upon Appeal erred in Law in not finding or alternatively should have found that the agreement was executed by the Appellant as the result of or under the influence of duress or unlawful pressure.

Record:

4. That the finding of Street J. at first instance and the majority of the Court of Appeal on Appeal that the Appellant was not coerced by the Respondent Armstrong into executing the deed was an incorrect inference, the correct inference being that he was coerced into executing the deed.

5. That the case having been fought at first instance on the issue whether or not the Appellant had been threatened by the Respondent Armstrong prior to and during the course of negotiations and this fact having been found in the Appellant's favour by the Judge at first instance, both that Judge and the Court of Appeal should have made a decree in favour of the Plaintiff.

6. That Street J. and the Court of Appeal erred in holding:

(a) that there was not sufficient evidence to make a judicial finding that the Respondent Armstrong was implicated through Hume either in a plot as alleged on the pleadings to have the Plaintiff killed or injured or in some other identifiable plot adverse to him.

(b) that the written statement of Hume taken by Detective Sergeant Wild and Constable Follington never existed.

(c) that the Appellant was not intimidated

Record:

by the Respondent Armstrong's threats into executing the deed.

7. That upon the findings of fact of Street J. in the first instance and each of the members of the Court of Appeal and upon the evidence Street J. and the Court of Appeal should have found as a matter of inference:

(a) That the Respondent Armstrong was implicated through Hume in a plot to have the Appellant killed.

(b) A statement of Hume made to Detective Sergeant Wild and Constable Follington did exist and was seen by the Appellant and the terms of the statement were as given in the Appellant's evidence.

8. Street J., Mason J.A. and Taylor A-J.A., all erred in Law in their several statements of the test for duress.

9. That the correct test for duress was that formulated by Jacobs J.A.

10. That the application to the facts found by Street J., or Jacobs J.A., or Mason J.A., or Taylor, A-J.A., in law in each case leads to the conclusion reached by Jacobs J.A., that is, that the Appellant should have succeeded before Street J. and before the

Court of Appeal and that his present Appeal should be allowed.

.....

L.C. GRUZMAN

.....

L.J. PRIESTLEY

.....

R.N.J. PURVIS

APPENDIX I (see paragraph 29)

SUMMARY OF DEED OF 17TH JANUARY, 1967

Record: The twenty two clauses of this deed are summarised as follows:

(1) to (5): These provide for a loan of $300,000 to be made by Southern Tablelands Finance to Paradise Waters Sales secured at the option of Southern Tablelands Finance over certain assets of Paradise Waters Sales or over Landmark House; the security documents mentioned in the deed provide that the loan be repaid at the expiration of one year and bear interest at the rate of 12 per cent. per annum.

(6): An option to Armstrong or his nominee to purchase 35 lots in the Paradise Waters project at half list price; the option to be exercisable on or before 15th March, 1967; if exercised, the contract for purchase required the payment of ten per cent. of the purchase price on the exercise of the option, and the balance on completion.

(7): Covenants by Paradise Waters and Paradise Waters Sales not to alter their memoranda or articles or to sell any of the unsold shares referable to development lots prior to 15th March, 1967.

(8): Agreement by an Armstrong company to sell to Barton and seven other persons or companies nominated by Barton and approved by Mr. Smith not more than 300,000 shares in Landmark at 60 cents per share; the dividend to remain payable to the

Armstrong company and, if not paid on or before 18th January, 1968, then, in lieu thereof, an equivalent amount to be paid by the purchaser to Armstrong as part of the purchase price. The purchase price to be paid by three equal annual instalments on 18th January, 1968, 18th January, 1969 and 18th January 1970; no interest expressed to be payable on the instalments of the purchase price; price to be secured by a mortgage back over the shares and a personal guarantee by Barton of each purchase contract.

(9): Covenant by Barton that he will procure seven other persons who, with himself will agree to purchase the shares from the Armstrong company.

(10): Provision of finance by the Landmark companies for the project in evidence as the Vista Court project at Rozelle, referred to in paragraph
8/2732 (4) of Exhibit 43.

(11): Covenant by Finlayside to sell its 40 per cent. interest in the Paradise Waters project for $100,000.

(12): Agreement by one of the Landmark companies to sell to Finlayside the furnished penthouse for $60,000.

(13): Covenant by the Landmark group of companies to apply the $300,000 loan mentioned in clause (1) to (5) in reduction of the $400,000 debt due by Paradise Waters Sales to George Armstrong & Son.

(14): Settlement of conveyancing transactions to take place on or before 18th January 1967 (the following day).

(15): Whole deed void in the event of United Dominions Corporation appointing a receiver prior to settlement.

(16): If no settlement by 18th January due to default of Barton or the Landmark group then Barton will step down from control of Landmark in favour of Armstrong.

(17): Upon settlement Mr. Smith will become Chairman of Directors of Landmark, whereupon Armstrong will resign from the Boards of all the Landmark companies; another nominee of Armstrong to be appointed to the Boards of the Landmark companies.

(18): The necessary meetings and passing of resolutions to give effect to the transactions provided for.

(19): The three equity suits to be withdrawn.

(20): Deals with stamp duty, legal expenses and other similar incidental matters.

(21): The proper law of the agreement to be the law of New South Wales.

(22): Barton and his family companies will support Mr. Smith and Mr. Hawley, the other proposed new director, at the 1967 Annual General Meeting of Landmark.

APPENDIX II (see paragraph 161)

FINDINGS AND INFERENCES OF STREET J.

SOUGHT TO BE REVERSED ON APPEAL

RECORD	FINDING	FINDING/INFERENCE OF FACT SOUGHT TO BE DRAWN
9/3115	... and as will appear later, I do not accept his evidence regarding his state of mind in December 1966 or January 1967 with reference to the future of Landmark.	Barton was of the opinion in December 1966 and January 1967 that shares in Landmark were worthless, etc.
9/3115	... and ... I do not accept his evidence ... with reference to the casual link between Mr. Armstrong's threats and the making of the Agreement of 17th January.	The threats of Armstrong were a casual link in the making of the Agreement of 17th January.
9/3116	... but that belief is self-induced rather than being based on fact.	The belief of Barton, namely that he was pressured into signing the Agreement by the threats and intimidation of Armstrong is based on fact.
9/3116	... I do not accept, however, that Mr. Armstrong's threats and intimidation were intended to coerce Mr. Barton into making the Agreement, nor that Mr. Armstrong's threats and intimidation had the effect of coercing Mr. Barton to make the Agreement.	Mr. Armstrong's threats and intimidation were intended to coerce Mr. Barton into making the Agreement and Armstrong's threats and intimidation had the effect of coercing Barton to make the Agreement.
9/3117	... nor do I accept that Mr. Barton's concern and fear engendered by his interview with Vojinovic were factors of any significance in the execution of the documents of the 17th and 18th January.	Mr. Barton's concern and fear engendered by his interview with Vojinovic were factors of significance in the execution of the documents of the 17th and 18th January.
9/3117	It is quite possible that he is sincere in his belief and his claim that he was coerced by Armstrong into purchasing the shares. But I am not satisfied on the evidence that he was in truth coerced.	On the evidence, Barton was coerced into purchasing the shares.

RECORD	FINDING	FINDING/INFERENCE OF FACT SOUGHT TO BE DRAWN
9/3118	... The understandable lasting fear engendered in him by the Vojinovic incident have led to his distorting and exaggerating, perhaps unconsciously, some of the events and conversations.	The understandable lasting fear engendered in him by the Vojinovic incident have not led to Barton's distorting and exaggerating some of the events and conversations.
9/3131	... but there is not, in my view, sufficient evidence to enable me to make a finding to this effect (Watching and following). I accordingly conclude that Mr. Armstrong is not proved to have been responsible for having Mr. Barton watched and followed during the period following Mr. Armstrong's removal as Chairman.	The evidence is sufficient to enable a finding to be made to the effect that Armstrong was responsible for having Barton watched and followed during the period following Armstrong's removal as Chairman.
9/3131	... There is insufficient evidence to enable me to make an affirmative finding that he was responsible for the watching and following.	The evidence is sufficient to enable a Court to make an affirmative finding that Armstrong was responsible for the watching and following.
9/3136	Whilst the events leading up to and associated with the Annual General Meeting are of importance in the history of the dispute between Mr. Barton and Mr. Armstrong, they do not necessarily assist Mr. Barton in the claim that he makes in this suit.	The events leading up to and associated with the Annual General Meeting, such as the watching, following, telephone calls, and the employment of bodyguards are of importance in the history of the dispute between Barton and Armstrong, and assist Barton in the claim he makes in this suit.
9/3137	But these threats on Mr. Armstrong's part and the resultant fear caused to Mr. Barton cannot be seen to be associated with the negotiation of any business transaction between the two men. There is no suggestion at that point of time that Mr. Armstrong wanted to force Mr. Barton to buy out his shares in Landmark.	The threats on Armstrong's part and the resultant fear caused to Barton are associated with the negotiation of the business transaction resulting in the Agreement of the 17th January 1967. It is apparent on the evidence that Armstrong wanted to force Barton to buy his shares in Landmark.

RECORD	FINDING	FINDING/INFERENCE OF FACT SOUGHT TO BE DRAWN
9/3137	... It was well before, and therefore not associated in any way with the negotiations leading up to the Agreement which Mr. Barton challenges in this suit ... but they are harmful to his (Barton's) case in that the continuity of this threatening course of conduct on Mr. Armstrong's part from late November may tend against a finding that this threatening conduct was intended by Mr. Armstrong, or believed by Mr. Barton to be casually related to the negotiations which were not current or contemplated when that course of conduct commenced.	The conduct of Armstrong was asoociated with Barton in his attempts to create a dominance over Barton. The continuity of the threatening course of conduct on Armstrong's part is consistent with the creation of a relationship between Armstrong and Barton and is casually related to the negotiations which resulted in the Agreement of 17th January.
9/3138	I accordingly decline to find that Mr. Armstrong threatened Mr. Barton with physical violence on the 7th December.	Armstrong threatened Barton with physical violence on 7th December.
9/3141/ 3142	... The enthusiasm and diligence with which he (Barton) sought finance from other sources, and the statements and assurances he is proved to have made in connection with these attempts are inconsistent with his holding the view that Landmark was to all intents and purposes worthless on and after 10th December, 1966.	The enthusiasm and diligence with which Barton apparently sought finance, and the statements and assurances made in connection with these attempts are consistent with his holding the view that Landmark was to all intents and purposes worthless on and after 10th December, 1966.
9/3148	But his activities in the attempts to obtain finance, and the statement made by him in the course of seeking to preserve Landmark as a going concern are inconsistent with his having, as he claims, formed a final conclusion by the middle of December that the shares were worthless.	The activities of Barton in attempting to obtain finance and statements made by him in the course of seeking to preserve Landmark are consistent with his having formed a final conclusion that the shares in Landmark were worthless, and his declared responsibility to the shareholders of Landmark.

RECORD	FINDING	FINDING/INFERENCE OF FACT SOUGHT TO BE DRAWN
9/3152/ 3153	... I am not satisfied that Mr. Armstrong did threaten Mr. Barton on 14th December 1966 in the terms deposed to by Mr. Barton, and I do not accept Mr. Barton's evidence that this conversation took place.	Armstrong threatened Barton on 14th December 1966 in the terms deposed to by Barton.
9/3154	Whatever suspicions might exist in connection with the identity of the person authorising the watching and following of Mr. Barton, in the period prior to the Annual General Meeting there is not, as I have already held, sufficient evidence to identify Mr. Armstrong with these actions.	Sufficient evidence is available to identify Armstrong with the watching and following of Mr. Barton in the period prior to the Annual General Meeting.
9/3154	... At this stage it is sufficient to state that the evidence does not establish responsibility on Mr. Armstrong's part for the watching and following of Mr. Barton at any time subsequently to the Annual General Meeting.	The evidence establishes that Mr. Armstrong was responsible for the watching and following of Mr. Barton subsequently to the Annual General Meeting.
9/3169	... This is consistent with Mr. Smith's evidence, and it is inconsistent with the Vojinovic incident having any operative effect on Mr. Barton's decision to make an Agreement with Mr. Armstrong on the terms arranged on 4th January and reduced to legal draft form on Friday, 6th January.	The evidence of Inspector Lendrum that he was told that on 4th January 1967 Smith and Barton reached what appeared to be an Agreement subject to documentation is not inconsistent with the Vojinovic incident having any operative effect on Barton's decision to make an Agreement with Armstrong in the terms arranged on 4th January and reduced to legal draft form on Friday, 6th January. The terms in fact of the Agreement were not arranged on 4th January, and were not finally reduced to legal draft form on Friday, 6th January.

RECORD	FINDING	FINDING/INFERENCE OF FACT SOUGHT TO BE DRAWN
9/3169	... At the other end of the time scale this tends rather towards Mr. Barton believing that Mr. Armstrong's threats and actions against him were dissociated from the negotiations that did not in fact commence until 14th December.	The evidence of Barton that he believed Armstrong had retained Hume as early as July 1966 to keep a tag on him does not tend towards Barton believing that Armstrong's threats and actions were dissociated from the negotiations commencing in December 1966.
9/3170	... If, as Mr. Barton seeks to maintain in this suit, Mr. Armstrong was seeking to intimidate him into buying Mr. Armstrong's shares in a company either worthless, or at least of doubtful worth, it is difficult to see why Mr. Barton did not tell this to Inspector Lendrum.	The circumstances of the conference at the C.I.B. on 8th January, 1967 at which Mr. Millar was the spokesman for Mr. Barton, he then being in fear of his life, are not indicative of any attitude then held by Mr. Barton. Mr. Millar, having just returned from overseas and having had delivered to his office on the 5th January a draft of the Agreement, without having discussed the same with Mr. Barton, would naturally himself assume the matters recounted.
9/3171	So far from any suggestion that Mr. Armstrong was seeking to intimidate him into buying out Mr. Armstrong's shares and paying off the amounts owing to his Company, Mr. Barton acquiesced in Mr. Millar telling Inspector Lendrum that he, Mr. Barton, had managed to save the Company ...	The comments attributed to Mr. Millar cannot be visited against Barton having in mind his then state of mind.
9/3171	... He (Barton) ascribes Mr. Armstrong's threats against his life and safety to sheer malevolence on Mr. Armstrong's part ... I am not satisfied that Mr. Barton was in truth coerced into the Agreement.	Sheer malevolence, as it is described, on Armstrong's part played no part in the threats against the life and safety of Barton. Barton was coerced into the Agreement.

RECORD	FINDING	FINDING/INFERENCE OF FACT SOUGHT TO BE DRAWN
9/3172	... It was the recognition of what they regarded as sheer commercial necessity that was the real, and quite possibly the sole motivating factor underlying the Agreement recorded in the Deed of 17th January 1967.	Sheer commercial necessity was not a real or a motivating factor underlying the Agreement of the 17th January 1967 other than that it may have become in due course the only way to save the Company.
9/3172	... I am not satisfied that Mr. Barton's personal fears for his own safety played any significant part in his entering into the Agreement with Mr. Armstrong.	Barton's personal fears for his own safety were significant in his entering into the Agreement with Mr. Armstrong.
9/3172	... Mr. Barton wanted to be rid of Mr. Armstrong in the interests of Landmark, and indirectly in his own interests as a substantial shareholder and Managing Director of Landmark.	The desire of Barton to be rid of Armstrong in the interests of Landmark, and in his own interests as a substantial shareholder and Managing Director of Landmark, were subsidiary to the fears engendered in him by the dominance created by Armstrong and the threats by Armstrong to the life of Barton.
9/3179	The evidence is in such a state that I am not able to conclude in Mr. Barton's favour that there was such a statement (Exhibit 29).	The evidence is sufficient to establish that a statement was obtained by Sgt. Wild from Mr. Hume on or about the 11th January 1967, part of which was to the effect of that set forth in Exhibit 29.
9/3180	... Both Sgt. Wild and Const. Follington, however, are supported in their denials by their official diaries, neither of which contained any reference to Hume having been interviewed prior to 18th January.	The diary of Sgt. Wild of the 18th January does not contain any reference to Hume being interviewed on that date.
9/3181/ 3182	... I decline to find in Mr. Barton's favour that such a statement (Exhibit 29) existed.	Exhibit 29 is part of a statement taken by Sgt. Wild of Mr. Hume, and seen by Barton on the 11th January 1967.

RECORD	FINDING	FINDING/INFERENCE OF FACT SOUGHT TO BE DRAWN
9/3183	... But Mr. Barton, although he took steps to preserve his personal safety so far as he was able, has not satisfied me that he yielded his independent business judgment by reason of his fear of Mr. Armstrong.	Barton yielded his independent business judgment by reason of his fear of Armstrong.
9/3184	But he did not in his own mind relate Mr. Armstrong's threats to a desire by Mr. Armstrong to force through the Agreement; nor was it forced through so far as Mr. Barton was concerned by reason of his fear of Mr. Armstrong's power to harm him. The Agreement went through for the primary and predominant reason that Mr. Armstrong, along with Mr. Bovilll, was firmly convinced that it was indispensable for the future of Landmark to enter into some such Agreement as this with Mr. Armstrong.	Barton in his own mind related Armstrong's threats to a desire by Armstrong to force through the Agreement, and such Agreement was forced through so far as Barton was concerned by reason of his fear of Armstrong's power to harm him. The Agreement went through for the primary and predominant reason that Barton, along with Bovill, was convinced that the threats on his life made it indispensable that he enter into some such arrangement with Armstrong.
9/3186	... I believe that in truth Mr. Barton was not coerced into this Agreement by reason of any threat of physical violence.	Barton was coerced into the Agreement of the 17th January by reason of threat of physical violence.
9/3189	... but I am satisfied that it was much earlier in the negotiations (that is Bovill's evidence as to conversation re Agreement).	The conversation with Bovill took place on or about the 13th January, 1967.
9/3189	... In the first place Mr. Barton's acts and statements in January 1967 up to and including 18th January are inconsistent with a belief on his part that finance would not necessarily be forthcoming.	The acts and statements of Barton in January 1967 up to and including 18th January are not inconsistent with a belief on his part that finance would not necessarily be forthcoming.

RECORD	FINDING	FINDING/INFERENCE OF FACT SOUGHT TO BE DRAWN
9/3187/ 3193	It is in the light of these events that I decline to accept Mr. Barton's evidence of his conversation with Mr. Smith, and I decline to accept Friday, the 13th, as the date of a conversation such as Mr. Bovill recollects having had with Mr. Barton.	Bovill had the conversation referred to with Barton on Friday, the 13th.
9/3187/ 3193	... I find that Mr. Barton's willingness to enter into the settlement with Mr. Armstrong continued uninterrupted from and after 4th January; in so far as it may be relevant, I find that Mr. Bovill is mistaken in assenting to the suggestion put to him by Counsel that Mr. Barton had this conversation with him on 13th January.	There was no settlement with Armstrong in the sense in which that word is used in the Judgment. The preparedness of Barton to enter into an agreement with Armstrong did not continue uninterrupted from and after the 4th January. Barton would have avoided an Agreement with Armstrong if this had been physically and emotionally possible. Bovill had the conversation alleged by himself and Barton on or about the 13th January.
9/3194	No occasion existed on the morning of Monday, 16th, for him (Barton) to be coerced into a change of mind.	On the morning of Monday, 16th, the mind of Barton had to be coerced into a change of mind having considered the events of Friday, the 13th.
9/3196	... But in my view the dominant theme of the conversation was the commercial necessity of getting Mr. Armstrong out of the Company and the need for urgency lest Mr. Armstrong change his mind rather than that Mr. Barton's will had been overborne by Mr. Armstrong's threats. Whatever words were used in this conversation, I am not satisfied that everything Mr. Barton said to Mr. Bovill on the morning of Monday, 16th January, indicated a mental state of having been intimidated or coerced through fear for his personal safety into yielding to Mr. Armstrong's demands.	There was no urgency lest Armstrong change his mind. The mind of Barton had been overborne by Armstrong's threats. The dominant theme of the conversation was not commercial necessity. On the morning of Monday, 16th January, Barton was in a mental state of having been intimidated or coerced through fear for his personal safety into yielding to Armstrong's demands.

RECORD	FINDING	FINDING/INFERENCE OF FACT SOUGHT TO BE DRAWN
9/3192	It indicates a situation in which Mr. Armstrong was a reluctant vendor who Mr. Barton had to buy out if Landmark was to be saved; it does not indicate a situation in which Mr. Armstrong was driving Mr. Barton by threats of personal violence into making an Agreement contrary to Mr. Barton's own free will.	Armstrong was not a reluctant vendor, but on the contrary was an anxious vendor. There was no need for Barton to buy out the shares of Armstrong to save Landmark. Armstrong was driving Barton by threats of physical violence into making an Agreement contrary to Barton's own free will.
9/3192	... In the light of the foregoing considerations I am not satisfied that Mr. Armstrong threatened Mr. Barton in a telephone call on the morning of 16th January. I reject Mr. Barton's claim that this telephone call took place.	Armstrong threatened Barton in a telephone call on the morning of 16th January 1967.
9/3200, 3201	The course of negotiations does not support Mr. Barton's claim that Mr. Armstrong coerced him into making the Agreement, and indeed it is inconsistent with that claim in a number of respects.	The course of negotiations supports Barton's claim that Armstrong coerced him into making the Agreement.
9/3201	... There are points in the evidence consistent with the conclusion that Mr. Barton was optimistic about the future of Landmark (Such points in the evidence are itemised on pages 3201, 3202, 3203).	The actions of Barton subsequent to the Agreement of the 17th January were not consistent with his being optimistic about the future of Landmark, but rather with his doing such things as may be necessary to prevent the demise of Landmark.
9/3207	My impression is that it is only in the ensuing months as the extent of the Landmark disaster became more clearly apparent that Mr. Barton in his own mind reconstructed the events of December 1966 - January 1967 and formed the belief that Mr. Armstrong's threats had coerced him into signing the Agreement.	Barton's mind as at the 17th January 1967, and Barton had been coerced into signing the Agreement.

RECORD	FINDING	FINDING/INFERENCE OF FACT SOUGHT TO BE DRAWN
9/3207	... But the evidence does not bear out his claims that he was in truth intimidated in January 1967 into signing these Agreements.	Barton was intimidated in January 1967 into signing the Agreement of the 17th January, 1967.
9/3211	... There is insufficient evidence to enable me to find as a proven fact that Mr. Armstrong either originated or was a participant in a specifically identifiable activity adverse to Mr. Barton on the part of Mr. Hume or on the part of Novak or Vojinovic.	The evidence is sufficient to find as a proven fact that Armstrong originated and was a participant in a specifically identifiable activity adverse to Barton on the part of Hume, Novak and Vojinovic.
9/3211	... It is no light matter to find as a fact that Mr. Armstrong was a participant in some activity hostile to Mr. Barton, planned to be carried out through the medium of Mr. Hume.	Armstrong was a participant in a conspiracy hostile to Barton, planned to be carried out through the medium of Hume.
9/3215/ 3216	... I am left in a state where I am not satisfied that I should make a judicial finding to the effect that Mr. Armstrong was implicated through Mr. Hume, either in a plot as alleged in the pleadings, to have Mr. Barton killed or injured, or in some other identifiable plot adverse to Mr. Barton.	Armstrong was implicated through Hume in a plot to have Barton killed or injured.
9/3216	... Barton has failed to discharge that burden of proof on his part of his case.	Barton bearing a burden of proof commensurate with the seriousness of the charge made by him has discharged the same and established that Armstrong was implicated through Hume in a conspiracy to have Barton killed or injured.
9/3216	... I do not consider that I can safely accept Vojinovic's evidence that the activity was a murder plot.	The evidence of Vojinovic is consistent with the activity having been a murder plot.

RECORD	FINDING	FINDING/INFERENCE OF FACT SOUGHT TO BE DRAWN
9/3217	The weight of evidence establishes that Mr. Hume was at the Hawkesbury River on that Saturday night (7th January) and I reject Vojinovic's evidence that he telephoned Mr. Hume that evening.	Vojinovic did telephone Hume at or about 5.30 p.m. on the evening of 7th January 1967, at which time he spoke with Hume.
9/3218	In the first place I have found as a fact that Mr. Barton was not coerced by fear for his personal safety into the making of the Agreement - it was commercial exigency, and not personal fear that led him to make it.	Barton was coerced by fear for his personal safety into the making of the Agreement.
9/3218	... and in the second place I have declined to make a finding that Mr. Armstrong was implicated through Mr. Hume in a plot to kill or injure Mr. Barton.	Armstrong was implicated through Hume in a plot to kill or injure Barton.
9/3218	... There is insufficient evidence to link Mr. Armstrong with their activities so as to make their activities of probative significance against Mr. Armstrong.	The evidence adduced is sufficient to link Armstrong with the activities of Hume, Novak and Vojinovic so as to make the activities of Hume, Novak and Vojinovic of probative significance against Armstrong.
9/3219	But I am not satisfied that Mr. Barton was intimidated by Mr. Armstrong's threats into signing the Agreement.	Barton was intimidated by Armstrong's threats into signing the Agreement.
9/3219	... It was not Mr. Barton's fear that drove him into the Agreement.	Barton's fear drove him into the Agreement.
9/3219	... Mr. Barton was not in fact coerced into making the Agreement.	Barton was coerced into making the Agreement.

APPENDIX III (see paragraph 187)

EXHIBIT 29	WILD	HUME
1. Q. Do you know a Yugoslav named Alex Vojinovic? A. No.	Q. Did you ever say to Frederick Hume "Do you know a Yugoslav named Alex Vojinovic"? A. Yes. Q. What did he answer? A. He said that he knew him by name. (See also Wild at 3/874-775)	Q. First of all you were asked "Do you know a Yugoslav named Alex Vojinovic". Were you asked that question? A. No. He said "Do you know a man called Vojinovic?" Q. I see. What did you answer? A. No. Then he showed me the photograph.
	(At 3/770)	(At 6/1972)
2. Q. I now show you the photograph of that man. Do you know this man? A. Oh yes, I've seen him around the Cross and at the Kellett Club.	Q. Did you show to Hume a photograph? A. I did yes. Q. Oh him? A. Yes. Q. And did you say, "Do you know this man?" A. Yes. Q. And what did he say? A. He said, "Yes that is the man I know him from around the Cross, I think he is a safe-breaker. Q. And at the Kellett Club? A. No, I don't think the Kellett Club was ever mentioned. (See also Wild at 2/775).	Q. Did he say, "I now show you a photograph of that man. Do you know this man?" A. Yes. Q. And did you say, "Yes I have seen him around the Cross and at the Kellett Club?" A. I have never been in the Kellett Club etc. (at 6/1972)
	(At 3/775)	(At 6/1973)
3. Q. How many times have you seen this man? A. A few times when I was looking for somebody.	Q. Did you ask him this question, how many times have you seen this man? And did he answer, A few times when I was looking for somebody. A. No, I don't recall that.	Q. Were you asked this about Vojinovic. By Sgt. Wild? Q. "How many times have you seen this man?" A. No, I don't think I was asked that. Q. What were you asked along those lines? A. I don't know really "What do you know about this man" and that sort of thing. That is what I would have been asked. Q. "What do you know about him?" A. Yes, I think I was asked that.

	EXHIBIT 29	WILD	HUME
		(At 3/775)	(At 6/1973)
4. Q.	What do you know about him. A. He was a bad criminal and he hangs around with criminals mostly at the Kellett Club.	Q. Did you ask him, What do you know about him. And did he answer, He is a bad criminal and he hangs around with criminals mostly at the Kellett Club? A. No. My previous answer - he said "he is a criminal and I think he is a safe-breaker". The Kellett Club to my mind was never mentioned Mr. Gruzman.	Q. "What do you know about him?" A. Yes, I think I was asked that. Q. And what did you answer to that? A. He is a small time criminal and he is associated with some small time criminals around the Cross" that is all. Q. Did you answer "He is a bad criminal, and he hangs around with criminals mostly at the Kellett Club. A. No I didn't. The Kellett Club was never brought into it at all. I never mentioned the Kellett Club.
		(At 3/775-776)	(At 6/1973)
5. Q.	Have you seen him with Momo? A. Yes, but I told Momo to keep away from him.	Q. Did you ask him "Have you seen him with Momo"? A. No. Q. And did he answer "Yes, but I told Momo to keep away from him"? A. No, that was never said (Further down the page).. Q. Or did you ask him "Have you seen him with Momo"? A. I don't recall having asked him that. Q. It is a question you may have asked? A. I may have but I don't recall. Q. Did he answer "Yes but I told Momo to keep away from him"? A. No, there was never any suggestion of him telling Momo what to do, no.	Q. Did Sgt. Wild ask you "Have you seen him with Momo"? A. Didn't (sic). A. Did Sgt. Wild ask you that question? A. I don't know. He could have. I suppose he could have. Q. I put it to you that you answered "Yes I told Momo to keep away from him". A. No that is fabrication.

	EXHIBIT 29		WILD		HUME
			(At 3/776)		(At 6/1973)
6.	Q. What is Momo's real name? A. Michael Ziric.	Q.	Did you ask what Momo's real name was? A. I did. Q. And did he reply "Michael Ziric"? A. Yes.	Q.	Were you asked "What is Momo's real name? A. Yes. Q. Did you answer "Michael Ziric"? A. Yes. He is also known as Michael Novak and also known as Momo.
			(At 3/766)		(At 6/1973-1974)
7.	Q. Does he have any other names that he uses? A. I don't think so, I would know if he did have.	Q.	Did you ask "Does he have another name that he uses"? A. Who is this referring to? Q. Momo. A. No he only told me his name was Michael Ziric. Q. Did he say "I don't think so. I would know if he did have"? A. No, that was not said.	Q.	Were you asked "Does he have any other names that he uses"? A. Yes. Q. Did you answer "I don't think so. I would know if he did have"? A. Well I told him of all those names and apart from those I don't think he has any other names. Not to my knowledge.
			(At 3/766)		(At 6/1974)
8.	Q. Have you ever employed or hired Momo? A. Yes I wanted to help him as a friend and used him many times in my work as a private investigator to help me.	Q.	Did you ask "Have you ever employed or hired Momo"? A. Yes. Q. Did he answer "Yes, I wanted to help him as a friend and used him many times in my work as a private investigator to help me"? A. No, not in its entirety. He said he had employed him at Surfers Paradise and had been asked by his probation officer to assist him.	Q.	Were you asked "Have you ever employed or hired Momo"? A. Yes. Q. What did you answer? A. "Yes". Of course, yes. Q. Did you answer in these terms "Yes I wanted to help him as a friend. I used him many times in my work as a private investigator to help me". A. No, that was never asked. That was never mentioned. I told him exactly how I met Mr. Novak and I also told him how Mr. Gibbons came to me and asked me later on to look after Mr. Novak while he was still at

EXHIBIT 29	WILD	HUME
		Long Bay and I promised Mr. Gibbons I would do that. Q. Mr. Hume did you want to help Novak as a friend? A. I wanted to help Mr. Novak because Mr. Gibbons asked me and I believed in Mr. Novak. Yes of course I wanted to help him. I did in fact help him. Q. And did you use him many times in your work as a private investigator? A. Well I used him a number of times yes. I would not say as a private investigator etc. (at 6/1974)
	(At 3/776)	(At 6/1975)
9. Q. What do you mean by helping you. A. You know, with little simple things. Following people and reporting to me.	Q. Did you ask "What do you mean by helping him" and did he say "You know by little simple things like following people and reporting to me"? A. No. Q. Nothing like that was said? A. No, nothing like that.	Q. Were you asked by Sgt. Wild "What do you mean by helping you"? A. No. He has never asked that question at all.
	(3/776)	(At 6/1975)
10. Q. Could you find Momo in a hurry for us? A. Yes I can bring him here within twenty four hours.	Q. Did you ask him "Could you find Momo in a hurry for us"? A. I asked him could he find Momo for me"? A. I asked him could he find Momo for me"? Q. Did he say "Yes I can bring him here within twenty-four hours"? A. No. He said "I will get him to contact you".	Q. Were you asked by Sgt. Wild "Can you find Momo in a hurry for us" A. No. No policeman would ask a question like that. I would say "Go find him yourself", if he asked me a question like that. If he asked me could I find him in a hurry I would say "Go find him yourself". He probably asked me could I find him, or something like that. Q. Did you answer "Yes I can bring him here within twenty-four hours"? A. No I did not etc. (at 6/1975)

EXHIBIT 29	WILD	HUME
	(At 3/777)	(At 6/1975)
11.Q. Do you know Alexander Barton of Landmark Corporation. A. Yes I did a job for him at Surfers Paradise.	Q. Later did you ask "Do you know Alexander Barton of Landmark Corporation"? A. Yes. Q. Did he answer "Yes, I did a job for him at Surfers Paradise". A. That is correct.	Q. Were you asked "Do you know Alexander Barton of Landmark Corporation". A. Yes of course I was asked that. Q. Did you answer, "Yes, I did a job for him at Surfers Paradise". A. I could have answered yes that I did that. I could have answered that I did a a job for him - for the company. I would not have said for Mr. Barton because I am not proud of working for Mr. Barton, so I would not have mentioned it.
	(At 3/777)	(At 6/1975-1976)
12.Q. What kind of job? A. Mr. Barton and Mr. Armstrong's company had a problem with a contractor and I was hired by Mr. Barton to take possession of some machinery.	Q. Did you ask "What kind of job?" and did he answer "Barton and Armstrong's company had a problem with a contractor and I was hired by Mr. Barton to take possession of some machinery"? A. In essence he went there to take possession of some machinery. He told me that.	Q. Were you asked "What kind of job?" A. Yes, I believe I was. Repossession of machinery or something like that. Q. Did you answer "Mr. Barton and Mr. Armstrong's company had a problem with a contractor and I was hired by Mr. Barton to take possession of some machinery"? A. No I don't think - no I would not have gone so far as that into the details. I just told them briefly what happened. Q. What did you tell him? A. I said I went over there to repossess machinery. Q. That is all you said? A. That is right "I was once employed by them - by the company, and Mr. Barton and Mr. Armstrong were in this company". That is all. "I went over there and repossessed machinery."

EXHIBIT 29	WILD	HUME
	(At 3/777)	(At 6/1976)
13.Q. You previously named Armstrong. Is that man Alexander Armstrong M.L.C.? A. Yes.	Q. Did you say you previously named a man Armstrong: is that Alexander Armstrong, M.L.C."? A. I asked him did he know Mr. Armstrong. Q. What do you say he said in answer to that? A. He said "Yes I know him socially, I play tennis with him".	Q. Was there discussion about Mr. Armstrong. A. Yes. He asked me a number of things about Mr. Armstrong. Q. First of all did he ask you "Is that man Alexander Armstrong M.L.C.?" A. I would not know whether he was. I only learned this once the newspapers stated publishing the story. I don't know what M.L.C.
	(At 2/777)	(At 6/1976)
14.Q. How well do you know him? A. He is my friend and my best client.	Q. Did he answer the first question "Yes" and did you say "How well do you know him" and did he answer "He is my friend and my best client". A. No.	Q. Well in respect of Mr. Armstrong did Sgt. Wild ask you how well you knew him? A. Yes he did ask me that. Q. And did you answer "He is my friend and my best client"? A. No, I didn't.
	(At 3/777)	(At 6/1977)
15.Q. What do you mean by "He is my friend". A. You know I am with him a lot socially and I play tennis with him".	Q. Did you question him and say "What do you mean by he is my friend"? A. No. Q. And did he answer "You know, I am with him a lot socially and I play tennis with him". A. He told me he knew him socially and played tennis with him.	Q. Did Sgt. Wild say this to you "What do you mean by "he is my friend"?. A. I don't quite follow this. Q. Did Sgt. Wild ask you that question, "What do you mean by "He is my friend"? A. I never said he was my friend, so how could he ask me "What do you mean by that"? Q. You say you never told Sgt. Wild? A. I never did ... Q. And did you answer to Sgt. Wild "You know I am with him a lot socially and I play tennis with him"? A. I said "I play tennis with him". I did not say I was with him a lot socially. That is wrong.

EXHIBIT 29	WILD	HUME
16.Q. How often do you see him? A. Two or three times a week when he is in Sydney.	(At 3/777) Q. Did you ask him how often he had seen him? A. No. Q. Did he answer "Two or three times a week when he is in Sydney"? A. No.	(At 6/1978) Q. Were you asked "How often do you see Mr. Armstrong"? A. Yes I think I was. Q. You were asked that? A. Yes I think so. Q. And did you answer "Two or three times a week when he is in Sydney"? A. Two or three times a week when he is coming down to play tennis with us. That is at the public courts because we only used to play once a week at his place. If he wanted to play tennis usually he used to come to where we were playing at Cooper Park or Jensens Park. That is the only time.
17.Q. What do you mean by "he is my best client"? A. He gives me a lot of investigating to do and I earn good money from him.	(At 3/777) Q. Did you ask him "What do you mean "He is my best client"? A. No, I didn't. Q. Did he answer "He gives me a lot of investigating to do and I earn good money from him"? A. No.	(At 6/1978) Q. Did Sgt. Wild ask you "What do you mean by 'he is my best client'"? A. No.
18.Q. What do you mean "good" money? A. I always give him big bills and he always pays.	(At 3/777) Q. Did you ask him "What do you mean 'good money'"? A. No. I did not. Q. Did he say "I always give him big bills and he always pays? A. No.	(At 6/1978) Q. Did you tell Sgt. Wild that Mr. Armstrong gives you a lot of investigation to do" and "I earn good money from him"? A. No.

EXHIBIT 29

19.Q. How much money have you got from him lately? A. I don't remember but not much.

WILD

(At 3/777)

Q. Did you question him "How much money have you got from him lately" and did he answer "I don't remember but not much"?
A. No I never asked him.

HUME

(At 6/1979)

Q. Did Sgt. Wild ask you whether you had received any moneys from Mr. Armstrong? Yes or no. A. No I don't think he even asked that. Q. No question like that was asked? A. No, he asked me what work I did. I told him and that I was paid - I told him I was paid by the company. I told him once that Mr. Barton signed a cheque for the company. I don't know who was paying it. I doubt whether it was Mr. Barton.
Q. You did tell him that you had received moneys from the companies?
A. Yes I think I did yes. Q. Did you tell him they were large bills.
A. I don't think he even asked me whether they were large or small. He asked me what sort of work I did and got paid for it. I told him that ...
Q. Were you asked "How much money have you got from him lately"? A. No.
Q. Did you answer "I don't remember but not much"? A. I was never asked that question and never made any answer.

EXHIBIT 29	WILD	HUME
	(At 3/777-778)	(At 6/1979-1980)
20.Q. Allegations have been made that Alexander Armstrong hired you to employ criminals to kill Alexander Barton. These are very serious allegations. What do you say to that? A. I hired Momo and his friend to follow Mr. Barton and if the opportunity arose just to do him over a bit, you know to frighten him and to tell him that there was more to come.	Q. Did you subsequently say to him "allegations have been made that Alexander Armstrong hired you to employ criminals to kill Alexander Barton. These are very serious allegations. What do you say to that?" A. Words to that effect, yes, I asked him. Q. Did he answer "I hired Momo and his friend to follow Mr. Barton and if the opportunity arose just to do him over a bit, you know to frighten him and to tell him that there is more to come"? A. No he denied the allegations.	Q. Did Sgt. Wild say to you "Allegations have been made that Alexander Armstrong hired you to employ criminals to kill Alexander Barton. These are very serious allegations, what do you say to them?" A. Yes I believe he said something to that effect. Q. Did you answer "I hired Momo and his friend to follow Mr. Barton and if the opportunity arose just to do him over a bit, you know to frighten him and to tell him there is more to come". Did you give that answer? A. No, your Honour, never.
	(At 3/778)	(At 1557)
21.Q. What friend of Momo do you mean? A. Alec. You just showed me his photograph.	Q. Did you question him "What friend of Momo do you mean" and did he answer "Alex. You just showed me his photograph. A. No, he did not.	Q. Did Sgt. Wild say that to you? Did he ask "What friend of Momo do you mean"? A. No he didn't. Q. And did you answer "Alec. You just showed me his photograph. A. No definitely not.

The remainder of Exhibit 29 was also put to both Wild and Hume but each of them denied that anything resembling the questions and answers in the balance of the interview ever took place - but as to Hume see "Further evidence of Hume relating to event referred to in Exhibit 29".

FURTHER EVIDENCE OF HUME RELATING TO EVENTS REFERRED TO IN EXHIBIT 29 INTERVIEW BETWEEN WILD AND HUME, JANUARY 1967

EXHIBIT 29	EVIDENCE	APPEAL BOOK
Q. Do you know a Yugoslav named Alex Vojinovic?	Q. And at that time Mr. Hume you were unaware of Vojinovic's name?	
A. No.	A. Yes, unaware. I was unaware even on the date when I was being interviewed by Sgt. Wild. I was unaware on that date, but when he showed me the photograph then I knew the man he was referring to.	6/1965-1966
Q. I now show you the photograph of that man. Do you know this man?	Q. You have just stated to his Honour that when you were interviewed by Sgt. Wild you were unaware of Vojinovic's name?	
A. Oh yes, I have seen him around the Cross and at the Kellett Club.	A. Until he showed me the photograph and then he told me the name.	6/1966
	Q. When he showed you the photograph and suggested to you the name Vojinovic it meant nothing to you?	
	A. When he showed me the photograph I certainly recognised the man at once as one I had seen at the Cross.	
Q. What do you know about him?	Q. Is it true that to your knowledge he is an associate of criminals - to your knowledge?	5/1697
A. He is a bad criminal and he hangs around with criminals mostly at the Kellett Club.	A. Yes.	
	Q. That is true. A. That is right.	
	Q. I asked you what was your knowledge then as to his association with criminals.	5/1697
	A. Very vague.	
	Q. What was it? A. Some time I suppose in 1966 I had seen him around with some of the small time criminals around the Cross.	
	Q. Because Vojinovic was a man around the Cross known to you wasn't he?	6/1778

Q. Have you ever employed or hired Momo?

A. Yes, I wanted to help him as a friend and used him many times in my work as a private investigator to help me.

Q. What do you mean by "helping you"?

A. You know, with little simple things. Following people and reporting to me.

Q. After that when did you see him again?

A. Every time when he came to Sydney I saw Mr. Novak. He was nearly always short of money and he used to come down and ask me if I had something for him to do, some little jobs and I would give him a few little jobs to do, like going around and checking up whether the people are there and sometimes if the enquiries were unimportant I even let him go and observe the premises if I was suspicious of circumstances alleged by the client. 5/1617

Q. And you were actively working with Novak during that period weren't you? 6/1779

A. Well, if he was doing some jobs yes, he was actively working for me.

Q. But he has done work for you hasn't he?

A. Yes, but they were unimportant little things like going and finding out if something is living at that address. 5/1651

Q. When did you first start employing Ziric or Novak to do work for you? 6/1728

A. I would not know. When he was short of money I used to give him little things to do.

Q. How did he come in contact with Ziric (referring to Mr. Eckstein) 6/1729

A. He asked me could I tell him somebody who would work for his company. I said "You can contact Michael Novak and he will help you with it. He knows something about following people".

Q. How well do you know him?

A. He is my friend and my best client?

Q. ... He (Follington) asked me another question, "How friendly are you with Mr. Armstrong?" 5/1703

Q. I am asking you will you agree that according to your book out of your gross takings of $3,184.44 up to 8th January there are included $420 ascribed to Barton on 3rd August.

A. That is right.

Q. $500 ascribed to Armstrong on 9th November.

A. That is right.

Q. And $1094.30 ascribed to Southern Tablelands on 5th January.

A. That is right.

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

Q. So that out of your gross taking of $3000 odd more than $2000 came from those three payments didn't they?

A. Yes, that is right.

Q. And each of these payments arose from your connection with Armstrong didn't it?

A. Yes I suppose that would be so because he after all got the jobs for me or he asked me ...

Q. What do you mean by "he is my friend"?

A. You know, I am with him a lot socially and I play tennis with him.

Q. What did you tell him? 5/1655

A. I told him I know him socially, Mr. Alexander Armstrong I play tennis with him and I go to his house.

Q. Were you ever at Mr. Armstrong's house a couple of months ago? 5/1712

A. Was I ever at Mr. Armstrong's? I have been there a number of times. A couple of months ago? Yes, I would have been there.

Q. How many times have you been to Mr. Armstrong's home Since January 1967?

A. I could not answer that. We go there mainly on Sundays, we play tennis ...

Q. But you have never said that is your friend? 6/1976

Q. What do you mean by saying that Mr. Armstrong is a bad man?

A. Well he is known to me socially, yes, quite well.

Q. Was there a discussion about Mr. Armstrong?

A. Yes, he asked me a number of things about Mr. Armstrong.

A. He does a lot of illegal things. For example he buys stolen jewellery.

Q. What does he do with stolen jewellery.

A. He hides it in his house.

Q. Do you know where he hides it?

Q. Where abouts in the motel/hotel were you in the premises when you signed the document? 5/1621

A. Yes.

Q. Where does he hide it?

A. The front of the building is where the office. The night club is at the side of that building and the small lodging or rooms are on the other side where you park the car in front. I can draw it if necessary.

A. I will draw you a sketch as best as I can.

Q. And it is not a Walther Sport?

A. If you show me a picture I will show you the one that I have got. 6/1736

Q. Yes ....

A. I can even draw it for you if it helps you.