

43/84

IN THE PRIVY COUNCIL

No. 17 of 1984

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES,  
COMMON LAW DIVISION, COMMERCIAL LIST,  
MATTER NO. 16157 OF 1980

BETWEEN:

PHILLIP WILLIAM CARNEY  
Appellant (Defendant)

AND:

JOHN EDWARD HERBERT  
Respondent (Plaintiff)

# TRANSCRIPT RECORD OF PROCEEDINGS

## PART I VOLUME I

### SOLICITORS FOR THE APPELLANT

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111 Elizabeth Street,  
SYDNEY.

Telephone: 232 3033  
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By their Agents:

MacFarlanes,  
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DX 223 SYDNEY

By their Agents:

Charles Russell & Co.,  
Hale Court,  
Lincoln's Inn,  
LONDON, WC2A 3JL U.K.

Telephone: (01) 242 1031

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES,  
COMMON LAW DIVISION, COMMERCIAL LIST,  
MATTER NO. 16157 OF 1980

BETWEEN:

PHILLIP WILLIAM GARNEY  
Appellant (Defendant)

AND:

JOHN EDWARD HERBERT  
Respondent (Plaintiff)

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Respondent (Plaintiff)

TRANSCRIPT RECORD OF PROCEEDINGS

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IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW  
DIVISION

No. 16157 of 1980

JOHN EDWARD HERBERT

Plaintiff

PHILLIP WILLIAM  
CARNEY

Defendant

STATEMENT OF CLAIM

1. On 21st March, 1980, Ilerain Pty. Limited agreed with the plaintiff to purchase from the plaintiff certain shares owned by the plaintiff in a company known as Airfoil Registers Pty. Limited.

10

2. Pursuant to the said agreement Ilerain Pty. Limited was to pay the sum of \$109,800.00 as follows:-

(a) As to the sum of \$41,000.00 such sum to be paid on 24th March, 1980.

(b) As to the sum of \$23,000.00 such sum to be paid on 31st July, 1980.

20

(c) As to the sum of \$45,800.00 such sum to be paid on 15th August, 1980.

3. Ilerain Pty. Limited has not paid the sums of \$23,000.00 and \$45,800.00 as hereinbefore set out.

4. The defendant in writing agreed that if the plaintiff would sell Ilerain Pty. Limited the said shares he would guarantee the payment for the said shares.

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5. The plaintiff has made demand in writing to the defendant for

Statement of Claim

payment of the said sums of \$23,000.00 and \$45,800.00 and the defendant has failed to pay the said sums.

6. The plaintiff claims from the defendant

(i) The sum of \$68,800.00

(ii) Interest in the sum of \$68,800.00 from the date of issue hereof until the date of judgment at the rate of \$10.00 per centum per annum pursuant to Section 94 of the Supreme Court.

To the defendant Phillip William Carney of 3 Turon Court, Turon Avenue, Kingsgrove, Company Director.

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1. You are liable to suffer judgment or an order against you unless the prescribed form of notice of your appearance is received in the Registry within fourteen (14) days after service of this Statement of Claim upon you and you comply with the rules of Court relating to your defence.

2. You are required to verify your defence.

3. You may, within fourteen (14) days after service of this Statement of Claim upon you, pay to the plaintiff or his solicitor the amount claimed together with interest thereon at the rate claimed upon the date of filing of this Statement of Claim until payment and

20

L.S. also ~~\$162.00~~ 182.00 for costs. Further proceedings against you will be stayed when you also file a prescribed form of notice of payment.

Nominated place for trial: Sydney

Plaintiff: John Edward Herbert



Statement of Claim

Plaintiff's Address

for Service:

C/- Peet, Simpson & Co.

Solicitors,

123 Forest Road,

Hurstville. 2220

Address of Registry:

Law Courts Building Level 5

Queens Square, Sydney.

D.K. Simpson

.....

Plaintiff's Solicitor

10

Danny Kenneth Simpson

Filed:

L.S. (Initials)

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY  
COMMON LAW DIVISION

No. 16157 of 1980

JOHN EDWARD  
HERBERT

Plaintiff

PHILLIP WILLIAM  
CARNEY

Defendant

DEFENCE

1. In answer to paragraphs 1 and 2 of the Statement of Claim, the Defendant admits that Ilerain Pty. Limited agreed with the Plaintiff to purchase from the Plaintiff certain shares owned by the Plaintiff in a company known as Airfoil Registers Pty. Limited on the terms as to payment set forth in paragraph 2 of the Statement of Claim, but says that the terms of the said agreement are not fully or accurately set forth in the Statement of Claim. Save as aforesaid, the Defendant does not admit the allegations made in paragraphs 1 or 2 of the Statement of Claim or any of them. 10
2. The Defendant admits the allegations made in paragraph 3 of the Statement of Claim. 20
3. In answer to paragraph 4 of the Statement of Claim, the Defendant admits that he agreed to guarantee the obligations of Ilerain Pty. Limited in respect 30

Defence

of the purchase by Ilerain Pty. Limited of shares of the Plaintiff in the capital of Airfoil Registers Pty. Limited, but says that the terms of the said agreement are not fully or accurately set forth in the Statement of Claim. Save as aforesaid, the Defendant does not admit the allegations made in paragraph 4 of the Statement of Claim or any of them.

4. The Defendant admits the allegations made in paragraph 5 of the Statement of Claim. 10
5. In further answer to the whole of the Statement of Claim, the Defendant says that -

(i) It was a term and condition of the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof, or alternatively, of the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and of the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof, that Newbridge Industries Pty. Limited, a subsidiary of the said Airfoil Registers Pty. Limited within the meaning of that word as used in the Companies Act 1961, would give financial assistance for the purpose of and in connection with the said purchase by Ilerain Pty. Limited 20

Defence

of shares of the Plaintiff in Airfoil Registers Pty. Limited by providing security, namely an unregistered mortgage of real estate, for the payment of the unpaid balance of the price of the said shares;

(ii) Pursuant to the said agreement, or alternatively, pursuant to the said agreements, the said Newbridge Industries Pty. Limited provided security, namely an unregistered mortgage of real estate, for the unpaid balance of the price of the said shares;

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(iii) In the premises, the said agreement, or alternatively, the said agreements, were illegal and unenforceable by reason of the provisions of Section 67 of the Companies Act 1961.

6. Alternatively to paragraph 5, in further answer to the whole of the Statement of Claim, the Defendant says that -

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(i) The agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof, was, or alternatively, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof, were, interdependent with

## Defence

an agreement by which Newbridge Industries Pty. Limited, a subsidiary of the said Airfoil Registers Pty. Limited within the meaning of that word as used in the Companies Act 1961, agreed to give financial assistance for the purpose of and in connection with the said purchase by Ilerain Pty. Limited of shares of the Plaintiff in Airfoil Registers Pty. Limited by providing security, namely an unregistered mortgage of real estate, for the payment of the unpaid balance of the price of the said shares;

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(ii) Pursuant to the last-mentioned agreement, the said Newbridge Industries Pty. Limited provided security, namely an unregistered mortgage of real estate, for the unpaid balance of the price of the said shares;

(iii) In the premises, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof, was, or alternatively, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof, were, illegal and unenforceable by reason

20

Defence

of the provisions of Section 67 of the Companies Act 1961.

7. Alternatively to paragraphs 5 and 6, in further answer to the whole of the Statement of Claim, the Defendant says that -

- (i) The agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof was, or alternatively, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof were, entered into by the parties thereto in the expectation of the parties that Newbridge Industries Pty. Limited, a subsidiary of the said Airfoil Registers Pty. Limited within the meaning of that word as used in the Companies Act 1961, would give financial assistance for the purpose of and in connection with the said purchase by Ilerain Pty. Limited of shares of the Plaintiff in Airfoil Registers Pty. Limited by providing security, namely an unregistered mortgage of real estate, for the payment of the unpaid balance of the price of the said shares;
- (ii) In accordance with the said expectation,

Defence

Newbridge Industries Pty. Limited provided security, namely an unregistered mortgage of real estate, for the unpaid balance of the price of the said shares;

- (iii) In the premises, the said agreement was, or alternatively, the said agreements were, illegal and unenforceable by reason of the provisions of Section 67 of the Companies Act 1961.

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8. In further answer to the whole of the Statement of Claim, the Defendant says that -

- (i) It was a term and condition of the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof, or alternatively, of the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and of the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof, that Airfoil Registers Pty. Limited would give financial assistance for the purpose of and in connection with the said purchase by Ilerain Pty. Limited of shares of the Plaintiff in Airfoil Registers Pty. Limited by advancing on loan the first instalment of the price of the said shares;

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Defence

(ii) Pursuant to the said agreement, or alternatively, pursuant to the said agreements, Airfoil Registers Pty. Limited advanced on loan the first instalment of the price of the said shares;

(iii) In the premises, the said agreement was, or alternatively, the said agreements were, illegal and unenforceable by reason of the provisions of Section 67 of the Companies Act 1961.

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9. Alternatively to paragraph 8 hereof, in further answer to the whole of the Statement of Claim, the Defendant says that -

(i) The agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof was, or alternatively, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof were, interdependent with an agreement by which Airfoil Registers Pty. Limited agreed to give financial assistance for the purpose of and in connection with the said purchase by Ilerain Pty. Limited of shares of the Plaintiff in Airfoil Registers Pty. Limited

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Defence

by advancing on loan the first instalment of the price of the said shares;

- (ii) Pursuant to the last-mentioned agreement, Airfoil Registers Pty. Limited advanced on loan the first instalment of the price of the said shares;
- (iii) In the premises, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof was, or alternatively, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof were, illegal and unenforceable by reason of the provisions of Section 67 of the Companies Act 1961.

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10. Alternatively to paragraphs 8 and 9 hereof, in further answer to the whole of the Statement of Claim, the Defendant says that -

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- (i) The agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof was, or alternatively, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which

Defence

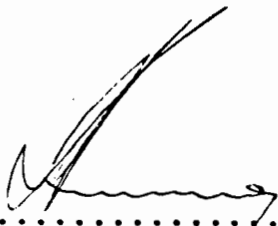
the Defendant agreed as admitted in paragraph 3 hereof were, entered into by the parties thereto in the expectation of the parties that Airfoil Registers Pty. Limited would give financial assistance for the purchase of and in connection with the said purchase by Ilerain Pty. Limited of shares of the Plaintiff in Airfoil Registers Pty. Limited by advancing on loan the first instalment of the price of the said shares;

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(ii) In accordance with the said expectation Airfoil Registers Pty. Limited advanced on loan the first instalment of the price of the said shares;

(iii) In the premises, the said agreement was, or alternatively, the said agreements were, illegal and unenforceable by reason of the provisions of Section 67 of the Companies Act 1961.

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.....  
Defendant's Solicitor

Defence

AFFIDAVIT

On 20th February 1981, I, PHILLIP WILLIAM CARNEY of  
3 Turon Avenue Kingsgrove, Company Director, say on  
oath:-

1. I am the Defendant.
2. The defence set out above is true in substance and  
in fact.

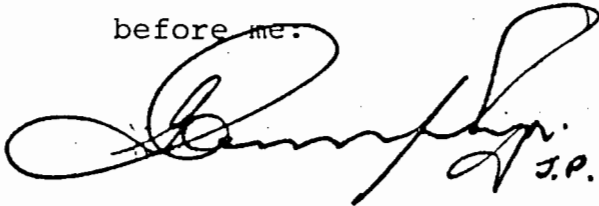
SWORN by the deponent )

at PADSTOW )

before me.

P.W. Carney

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A handwritten signature in black ink, appearing to be 'D. J. P.', with 'J.P.' written below it.

A Justice of the Peace

Filed: 23 February 1981

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW DIVISION

No. 16157 of 1980

JOHN EDWARD HERBERT

Plaintiff

PHILLIP WILLIAM  
CARNEY

Defendant

NOTICE OF MOTION

The plaintiff will at 10.00 a.m. on 13th May 1981 at No. (L.S.) Court, Supreme Court, Queens Square, Sydney move the Court for orders:

1. Directing the entry of judgment for the plaintiff. 10
2. Alternatively, striking out the defence and directing the entry of judgment for the plaintiff.
3. For such further or other relief as the nature of the case may require.
4. For costs. 20

FILED 7th May 1981

D.K. Simpson  
.....  
Plaintiff's Solicitor

TO: Phillip William Carney

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW DIVISION

No. 16157 of 1980

JOHN EDWARD HERBERT

Plaintiff

PHILLIP WILLIAM  
CARNEY

Defendant

AFFIDAVIT

Deponent:  
John Edward  
Herbert

Sworn:

On 1st May 1981, I, JOHN EDWARD  
HERBERT of 15 McDougall Avenue,  
Baulkham Hills, Sales Manager, say  
on oath:

1. I am the Plaintiff.

2. Annexed hereto and marked  
with the letter "A" is a copy of  
the agreement referred to in para-  
graph 1 of the Statement of Claim  
herein.

10

3. Paragraphs 2 and 3 of the  
Statement of Claim herein are  
correct.

4. Annexed hereto and marked  
"B" is a copy of the agreement re-  
ferred to in paragraph 4 of the  
Statement of Claim.

20

5. Annexed hereto and marked "C"  
is a copy of a letter bearing date  
1st September, 1980 from my  
Solicitors Messrs. Peet, Simpson  
& Co. to the Defendant. That  
letter was written on my instruc-  
tions. I am informed by Mr. Danny  
Kenneth Simpson of that firm and  
verily believe that the said letter  
was posted to the Defendant on the

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date it bears, namely 1st September, 1980. I say that the Defendant has failed to pay the sums referred to in paragraph 5 of the Statement of Claim or any part thereof and I crave leave to refer to paragraph 4 of the defence filed herein.

6. I believe that the Defendant has no defence to my claim or part.

7. I respectfully request this Honourable Court to make orders in accordance with the Notice of Motion intended to be filed on my behalf herein.

10

SWORN at HURSTVILLE

this 1st day of MAY

1981.

Before me:

D.K. Simpson

)  
)  
)  
)  
)  
)  
)

J.E. Herbert

Solicitor  
of the Supreme  
Court of NSW

This is the annexure marked "A" referred to in the Affidavit of John Edward Herbert sworn at Hurstville this 1st day of May 1981 Before me:

D.K. Simpson

Solicitor of the Supreme Court of NSW

"A"

THIS DEED made the 21st day of March, One thousand nine hundred and eighty between JOHN EDWARD HERBERT of 15 McDougall Avenue, Baulkham Hills, in the State of New South Wales, Sales Manager (hereinafter called "the Vendor") of the first part and ILERAIN PTY. LIMITED a company duly incorporated in the State of New South Wales and having its registered office C/- Charles M. Harvey & Co., 3rd Floor, 163 Clarence Street, Sydney in the said State (hereinafter called "the Purchaser") of the second part.

10

WHEREAS

- (a) The Vendor is the owner of Share Certificate No. 2 in respect of 5 shares IN company known as AIRFOIL REGISTERS PTY. LIMITED being a company duly incorporated in the State of New South Wales and having its registered office at 131-133 Newbridge Road, Moorebank in the said State (hereinafter called "the Company") (Such shares being numbered 91 - 95 inclusive).
- (b) The Vendor has agreed to sell the said shares to the Purchaser for the sum of One hundred and nine thousand eight hundred dollars (\$109,800.00)

20

NOW THIS DEED WITNESSETH AND IT IS HERBY AGREED AND DECLARED AS FOLLOWS:

Annexure "A" to the  
Affidavit of J.E. Herbert

1.          The Purchaser shall pay to the Vendor the sum of One hundred and nine thousand eight hundred dollars (\$109,800.00) such amount to be made by cash or bank cheque as follows:

- a) As to the sum of \$41,000.00 such sum to be paid on 24th March, 1980.
- b) As to the sum of \$23,000.00 such sum to be paid on 31st July, 1980.

10

J.E. Herbert P.W. Carney  
D.K. Simpson W.S. Morton

-2-

- c) As to the sum of \$45,800.00 such sum to be paid on 15th August, 1980.

2.          Upon receipt of the payment of the said \$41,000.00 the Vendor shall execute a Transfer of the said shares in favour of the Purchaser in appropriate form and shall hand such Transfer to the Purchaser.

3.          Should any payment due by the Purchaser to the Vendor under Clause (1) hereunder be in arrears exceeding fourteen (14) days from the due date then the Vendor shall be at liberty to immediately commence proceedings to recover the amount due as a liquidated sum.

20

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals on the day and in the year first hereinbefore mentioned.



Annexure "A" to the  
Affidavit of J.E. Herbert

SIGNED SEALED AND DELIVERED )

by the said JOHN EDWARD HERBERT )

J.E. Herbert

in the presence of: )

D.K. Simpson

Solicitor

THE COMMON SEAL of ILERAIN PTY. )

(L.S.)

LIMITED was hereunto affixed )

P.W. Carney

by authority of the Board of )

.....  
Director

Directors in the presence of: )

W.S. Morton

.....

Secretary

10

This is the annexure marked "A" referred to in the Affidavit of John Edward Herbert sworn at Hurstville this 1st day of May 1981 Before me:

D.K. Simpson Solicitor

"B"

THIS DEED made the 24th day of March One thousand nine hundred and eighty between PHILLIP WILLIAM CARNEY of 22 Miller Street, Kingsgrove in the State of New South Wales, Company Director (hereinafter called "the guarantor") of the first part and JOHN EDWARD HERBERT of 15 McDougall Avenue, Baulkham Hills in the said State, Sales Manager, DARRELL BRUCE ARNETT of 5 Oatley Avenue, Padstow Heights in the said State, Manager and KARLO JEHNIC of 50 Victor Avenue, Picnic Point, in the said State, Manager (hereinafter called the "vendors") of the second part

10

WHEREAS by Deed dated 21st day of March, One thousand nine hundred and eighty the vendors each severally agreed to sell certain shares in Company known as AIRFOIL REGISTERS PTY. LIMITED (hereinafter called the "company") to ILERAIN PTY. LIMITED (hereinafter called the "purchaser") AND WHEREAS pursuant to the said Deeds certain monies are expressed to be payable by the purchaser to each of the vendors AND WHEREAS the guarantor has agreed to guarantee the obligations of the company under the said Deeds.

20

NOW THIS DEED WITNESSETH AND IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:

1. In consideration of each of the vendors entering into the said Deed with the said purchaser the guarantor hereby agrees that if the said

purchaser shall make default for more than 14 days in payment of any principal monies due under any of the said Deeds the said guarantor will pay the amount thereof to the said vendors at the expiration of 3 days after demand in writing thereof shall have been made upon the said guarantor by or on behalf of the said vendors.

2. All monies received by the said vendors from the said guarantor shall be applied by them for the benefit of the said purchaser in satisfaction and discharge of any monies

10

K. Jehnic D.B. Arnett  
J.E. Herbert

-2-

due to them as such.

3. Any default made by the said purchaser shall without further proof entitle the said vendors to sue upon this covenant and to recover from the said purchaser the sums hereby secured.

20

4. This covenant and guarantee shall be a continuing guarantee and shall remain in operation until all monies due under the said Deeds are paid unless previously determined and revoked with the consent of all parties hereto.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals on the day and in the year first hereinbefore mentioned.

Annexure "B" to the  
Affidavit of J.E. Herbert

SIGNED SEALED AND DELIVERED )  
 )  
by the said PHILLIP WILLIAM CARNEY ) P.W. Carney  
 )  
in the presence of: )

W.S. Morton

SIGNED SEALED AND DELIVERED )  
 )  
by the said JOHN EDWARD HERBERT ) J.E. Herbert  
 )  
in the presence of: )

D.K. Simpson

10

SIGNED SEALED AND DELIVERED )  
 )  
by the said DARRELL BRUCE ARNETT ) D.B. Arnett  
 )  
in the presence of: )

D.K. Simpson

SIGNED SEALED AND DELIVERED )  
 )  
By the said KARLO JEHNIC ) K. Jehnic  
 )  
in the presence of: )

D.K. Simpson

"C"

Peet, Simpson & Co.  
SOLICITORS & ATTORNEYS

Kenneth Clive Peet  
Danny Kenneth Simpson, LL.B.

123-125 Forest Road, Hurstville, 2220  
(P.O. Box 295, Hurstville, 2220)  
Our ref. DKS:KS Your Ref. TELEPHONE 579-4466

1st September, 1980.

P.W. Carney, Esq.,  
3 Turon Court,  
Turon Avenue,  
KINGSGROVE. 2208

10

Dear Sir,

RE: John Edward Herbert

We refer to the Deed of Guarantee which you executed on 24th March, 1980 in respect of monies due by Ilerain Pty. Limited to Mr. Herbert.

You will recollect that pursuant to that Agreement you agreed that if Ilerain Pty. Limited defaulted for more than 14 days in respect of any principal monies due under the Agreement you would pay the amount thereof to Mr. Herbert at the expiration of 3 days after demand in writing.

20

We hereby advise you that payment due to Mr. Herbert on 15th August, 1980, in the sum of \$45,800.00 was not made and we hereby give you notice that we require you to pay those monies to Mr. Herbert pursuant to the Guarantee Agreement.

At the expiration of 3 days from the date hereof we propose to commence proceedings to recover same on behalf of our client.

30

Yours faithfully,  
PEET, SIMPSON & CO.

D.K. SIMPSON.

This is the annexure marked "C" referred to in the Affidavit of John Edward Herbert sworn at Hurstville this 1st day of May, 1981. Before me

D.K. Simpson

Solicitor

D.X. Kogarah 11111

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Annexure "C" to the  
23. Affidavit of J.E. Herbert

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY  
COMMON LAW DIVISION  
No. 16158 of 1980

KARLO JEHNIC

Plaintiff

PHILLIP WILLIAM  
CARNEY

Defendant

Deponent:  
K. Jehnic  
Sworn:  
1st May 1981

AFFIDAVIT

On 1st May 1981 I, KARLO JEHNIC of  
50 Victor Avenue, Picnic Point,  
Manager say on oath:

1.        I am the Plaintiff.
2.        Annexed hereto and marked "A"  
is a copy of the agreement refer-  
ed to in paragraph 1 of the  
Statement of Claim herein. 10
3.        Paragraphs 2 and 3 of the  
Statement of Claim herein are  
correct.
4.        Annexed hereto and marked "B"  
is a copy of the agreement refer-  
ed to in paragraph 4 of the  
Statement of Claim. 20
5.        Annexed hereto and marked "C"  
is a copy of a letter bearing date  
1st September, 1980 from my  
Solicitors Messrs. Peet, Simpson  
& Co. to the Defendant. That  
letter was written on my instruc-  
tions. I am informed by Mr. Danny  
Kenneth Simpson of that firm and  
verily believe that the said letter  
was posted to the Defendant on the 30  
date it bears, namely 1st September,  
1980. I say that the Defendant

Affidavit of K. Jehnic

has failed to pay the sums referred to in paragraph 5 of the Statement of Claim or any part thereof and I crave leave to refer to paragraph 4 of the defence filed herein.

6.      I believe that the Defendant has no defence to my claim or part.

7.      I respectfully request this Honourable Court to make orders in accordance with the Notice of Motion intended to be filed on my behalf herein.

10

SWORN at HURSTVILLE            )  
  )  
this 1st day of MAY                )     K. Jehnic  
  )  
1981 Before me:                    )  
  )  
      D.K. Simpson                  )

Solicitor  
of the Supreme  
Court of NSW

This is the annexure marked "A" referred to in the  
Affidavit of Karlo Jehnic sworn at Hurstville this  
1st day of May 1981 Before me:

D.K. Simpson

Solicitor of the  
Supreme Court of NSW

"A"

THIS DEED made the 21st day of March One thousand  
nine hundred and eighty between KARLO JEHNIC of  
50 Victor Avenue, Picnic Point in the State of New  
South Wales, Manager (hereinafter called "the  
Vendor") of the first part and ILERAIN PTY.  
LIMITED a company duly incorporated in the State  
of New South Wales and having its registered  
office C/- Charles M. Harvey & Co., 3rd Floor,  
163 Clarence Street, Sydney in the said State  
(hereinafter called "the Purchaser") of the  
second part WHEREAS

10

(a) The Vendor is the owner of Share Certificate  
No. 3 in respect of 5 shares and Share Cer-  
tificate No.5 in respect of 3 shares in  
company known as AIRFOIL REGISTERS PTY.  
LIMITED being a Company duly incorporated  
in the State of New South Wales and having  
its registered office at 131-133 Newbridge  
Road, Moorebank in the said State (herein-  
after called "the Company") (Such shares  
being numbered 96 - 100 and 104 - 106  
inclusive)

20

(b) The Vendor has agreed to sell the said  
shares to the Purchaser for the sum of One  
hundred and seventy six thousand seven  
hundred dollars (\$176,700.00).

NOW THIS DEED WITNESSETH AND IT IS HEREBY AGREED  
AND DECLARED AS FOLLOWS:



Annexure "A" to the  
Affidavit of K. Jehnic

1.          The Purchaser shall pay to the Vendor the sum of One hundred and seventy six thousand seven hundred dollars (\$176,700.00) such amount to be made by cash or bank cheque as follows:-

- a) As to the sum of \$68,000.00 such sum to be paid on 24th March, 1980
- b) As to the sum of \$37,000.00 such sum to be paid on 31st July, 1980
- c) As to the sum of \$71,700.00 such sum to be paid on 15th August, 1980.

10

K. Jehnic            P.W. Carney  
                                W.S. Morton

-2-

2.          Upon receipt of the payment of the said \$68,000.00 the Vendor shall execute a Transfer of the said shares in favour of the Purchaser in appropriate form and shall hand such Transfer to the Purchaser.

3.          Should any payment due by the Purchaser to the Vendor under Clause (1) hereunder be in arrears exceeding fourteen (14) days from the due date then the Vendor shall be at liberty to immediately commence proceedings to recover the amount due as a liquidated sum.

20

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals on the day and in the year first hereinbefore mentioned.

SIGNED SEALED AND DELIVERED

by the said KARLO JEHNIC

in the presence of:

D.K. Simpson Solicitor

THE COMMON SEAL of ILERAIN PTY.

LIMITED was hereunto affixed

by authority of the Board of

Directors in the presence of:

W.S. Morton  
.....

Secretary

)  
)  
) K. Jehnic  
)  
)  
)  
)  
) (L.S.)  
)  
) P.W. Carney  
) .....  
) Director  
)  
)  
)

This is the annexure marked "B" referred to in the Affidavit of Karlo Jehnic sworn at Hurstville this 1st day of May 1981 Before me:

D.K. Simpson

Solicitor of the Supreme Court of NSW

"B"

THIS DEED made the 24th day of March One thousand nine hundred and eighty between PHILLIP WILLIAM CARNEY of 22 Miller Street, Kingsgrove in the State of New South Wales, Company Director (hereinafter called "the guarantor") of the first part and JOHN EDWARD HERBERT of 15 McDougall Avenue, Baulkham Hills in the said State, Sales Manager, DARRELL BRUCE ARNETT of 5 Oatley Avenue, Padstow Heights in the said State, Manager and KARLO JEHNIC of 50 Victor Avenue, Picnic Point, in the said State, Manager (hereinafter called the "vendors") of the second part

10

WHEREAS by Deed dated 21st day of March, One thousand nine hundred and eighty the vendors each severally agreed to sell certain shares in Company known as AIRFOIL REGISTERS PTY. LIMITED (hereinafter called the "company") to ILERAIN PTY. LIMITED (hereinafter called the "purchaser") AND WHEREAS pursuant to the said Deeds certain monies are expressed to be payable by the purchaser to each of the vendors AND WHEREAS the guarantor has agreed to guarantee the obligations of the company under the said Deeds.

20

NOW THIS DEED WITNESSETH AND IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:

1. In consideration of each of the vendors entering into the said Deed with the said purchaser the guarantor hereby agrees that if the said

Annexure "B" to the  
Affidavit of K. Jehnic

purchaser shall make default for more than 14 days in payment of any principal monies due under any of the said Deeds the said guarantor will pay the amount thereof to the said vendors at the expiration of 3 days after demand in writing thereof shall have been made upon the said guarantor by or on behalf of the said vendors.

2. All monies received by the said vendors from the said guarantor shall be applied by them for the benefit of the said purchaser in satisfaction and discharge of any monies 10

K. Jehnic D.B. Arnett  
J.E. Herbert

-2-

due to them as such.

3. Any default made by the said purchaser shall without further proof entitle the said vendors to sue upon this covenant and to recover from the said purchaser the sums hereby secured. 20

4. This covenant and guarantee shall be a continuing guarantee and shall remain in operation until all monies due under the said Deeds are paid unless previously determined and revoked with the consent of all parties hereto.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals on the day and in the year first hereinbefore mentioned.

Annexure "B" to the  
Affidavit of K. Jehnic

SIGNED SEALED AND DELIVERED )  
 )  
by the said PHILLIP WILLIAM CARNEY ) P.W. Carney  
 )  
in the presence of: )  
  
W.S. Morton

SIGNED SEALED AND DELIVERED )  
 )  
by the said JOHN EDWARD HERBERT ) J.E. Herbert  
 )  
in the presence of: )  
  
D.K. Simpson

10

SIGNED SEALED AND DELIVERED )  
 )  
by the said DARRELL BRUCE ARNETT ) D.B. Arnett  
 )  
in the presence of: )  
  
D.K. Simpson

SIGNED SEALED AND DELIVERED )  
 )  
By the said KARLO JEHNIC ) K. Jehnic  
 )  
in the presence of: )  
  
D.K. Simpson

"C"

Peet, Simpson & Co.  
SOLICITORS & ATTORNEYS

Kenneth Clive Peet  
Danny Kenneth Simpson, LL.B.

123-125 Forest Road, Hurstville, 2220  
(P.O. Box 295, Hurstville, 2220)  
Our ref. DKS:KS Your Ref. TELEPHONE 579-4466

1st September, 1980.

P.W. Carney, Esq.,  
3 Turon Court,  
Turon Avenue,  
KINGSGROVE. 2208

10

Dear Sir,

RE: Karlo Jehnic

We refer to the Deed of Guarantee which you executed on 24th March, 1980 in respect of monies due by Ilerain Pty. Limited to Mr. Jehnic.

You will recollect that pursuant to that Agreement you agreed that if Ilerain Pty. Limited defaulted for more than 14 days in respect of any principal monies due under the Agreement you would pay the amount thereof to Mr. Jehnic at the expiration of 3 days after demand in writing.

20

We hereby advise you that payment due to Mr. Jehnic on 15th August, 1980, in the sum of \$71,700.00 was not made and we hereby give you notice that we require you to pay those monies to Mr. Jehnic pursuant to the Guarantee Agreement.

At the expiration of 3 days from the date hereof we propose to commence proceedings to recover same on behalf of our client.

30

Yours faithfully,  
PEET, SIMPSON & CO.

D.K. SIMPSON.

This is the annexure marked "C" referred to in the Affidavit of Karlo Jehnic sworn at Hurstville this 1st day of May, 1981.

D.K. Simpson

D.X. Kogarah 11111

Solicitor of the 40  
Supreme Court of NSW

Annexure "C" to the  
32. Affidavit of K. Jehnic

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW  
DIVISION

No. 16159 of 1980

DARRELL BRUCE  
ARNETT

Plaintiff

PHILLIP WILLIAM  
CARNEY

Defendant

AFFIDAVIT

Deponent:  
Darrell Bruce  
Arnett

Sworn: 1st May  
1981

On 1981, I, DARRELL BRUCE

ARNETT of 5 Oatley Avenue, Padstow

Heights, Manager, say on oath:

1. I am the Plaintiff.

2. Annexed hereto and marked "A" is a copy of the agreement referred to in paragraph 1 of the Statement of Claim herein.

10

3. Paragraphs 2 and 3 of the Statement of Claim herein are correct.

4. Annexed hereto and marked "B" is a copy of the agreement referred to in paragraph 4 of the Statement of Claim.

20

5. Annexed hereto and marked "C" is a copy of a letter bearing date 1st September, 1980 from my Solicitors Messrs. Peet, Simpson & Co. to the Defendant. That letter was written

on my instructions. I am informed by

30

Mr. Danny Kenneth Simpson of that firm and verily believe that the said letter was posted to the Defendant on the date it bears, namely

1st September, 1980. I say that the Defendant has failed to pay the sums referred to in paragraph 5 of

Affidavit of D.B. Arnett

the Statement of Claim or any part thereof and I crave leave to refer to paragraph 4 of the defence filed herein.

6. I believe that the Defendant has no defence to my claim or part.

7. I respectfully request this Honourable Court to make orders in accordance with the Notice of Motion intended to be filed on my behalf herein.

SWORN at HURSTVILLE )  
 )  
this 1st day of MAY )  
 )  
1981. Before me: )

D.B. Arnett

10

D.K. Simpson  
Solicitor of the  
Supreme Court of NSW



This is the annexure marked "A" referred to in the Affidavit of Darrell Bruce Arnett sworn at Hurstville this 1st day of MAY 1981. Before me:

D.K. Simpson  
Solicitor of the  
Supreme Court of NSW

"A"

THIS DEED made the 21st day of March, One thousand nine hundred and eighty between DARRELL BRUCE ARNETT of 5 Oatley Avenue, Padstow Heights in the State of New South Wales, Manager (hereinafter called "the Vendor") of the first part and ILERAIN PTY. LIMITED a company duly incorporated in the State of New South Wales and having its registered office C/- Charles M. Harvey & Co., 3rd Floor, 163 Clarence Street, Sydney in the said State (hereinafter called "the Purchaser") of the second part

10

WHEREAS

- (a) The Vendor is the owner of Share Certificate No. 6 in respect of 5 shares in company known as AIRFOIL REGISTERS PTY. LIMITED being a Company duly incorporated in the State of New South Wales and having its registered office at 131-133 Newbridge Road, Moorebank in the said State (hereinafter called the "the Company") (such shares being numbered 107 - 111 inclusive).
- (b) The Vendor has agreed to sell the said shares to the Purchaser for the sum of One hundred and six thousand five hundred dollars (\$106,500.00)

20

NOW THIS DEED WITNESSETH AND IT IS HEREBY AGREED

AND DECLARED AS FOLLOWS:

1. The Purchaser shall pay to the Vendor the  
Annexure "A" to the  
35. Affidavit of D.B. Arnett

Annexure "A" to the  
Affidavit of D.B. Arnett

sum of One hundred and six thousand five hundred  
dollars (\$106,500.00) such amount to be made by cash or  
bank cheque as follows:-

- a) As to the sum of \$41,000.00 such sum to be  
paid on 24th March, 1980.
- b) As to the sum of \$28,000.00 such sum to be  
paid on 31st July, 1980.
- c) As to the sum of \$37,500.00 such sum to be 10  
paid on 15th August, 1980.

P.W. Carney            D.B. Arnett  
W.S. Morton         D.K. Simpson

-2-

2. Upon receipt of the payment of the said \$41,000.00  
the Vendor shall execute a Transfer of the said shares  
in favour of the Purchaser in appropriate form and  
shall hand such Transfer to the Purchaser.

3. Should any payment due by the Purchaser to the  
Vendor under Clause (1) hereunder be in arrears exceed- 20  
ing fourteen (14) days from the due date then the  
Vendor shall be at liberty to immediately commence pro-  
ceedings to recover the amount due as a liquidated sum.

IN WITNESS WHEREOF the parties hereto have hereunto  
set their hands and seals on the day and in the year  
first hereinbefore mentioned:

Annexure "A" to the  
Affidavit of D.B. Arnett

SIGNED SEALED AND DELIVERED )  
 )  
by the said DARRELL BRUCE ARNETT ) D.B. Arnett  
 )  
in the presence of: )  
  
D.K. Simpson Solicitor

THE COMMON SEAL of ILERAIN PTY. ) (L.S.)  
 )  
LIMITED was hereunto affixed by ) P.W. Carney  
 ) .....  
 ) Director  
authority of the Board of )  
 )  
Directors in the presence of: )

10

W. S. Morton  
.....  
Secretary

"B"

This is the annexure marked "B" referred to in the Affidavit of Darrell Bruce Arnett sworn at Hurstville this 1st day of May 1981 Before me:

D.K. Simpson Solicitor of the Supreme Court of NSW

THIS DEED made the 24th day of March One thousand nine hundred and eighty between PHILLIP WILLIAM CARNEY of 22 Miller Street, Kingsgrove in the State of New South Wales, Company Director (hereinafter called "the guarantor") of the first part and JOHN EDWARD HERBERT of 15 McDougall Avenue, Baulkham Hills in the said State, Sales Manager, DARRELL BRUCE ARNETT of 5 Oatley Avenue, Padstow Heights in the said State, Manager and KARLO JEHNIC 10 of 50 Victor Avenue, Picnic Point, in the said State, Manager (hereinafter called the "vendors") of the second part

WHEREAS by Deed dated 21st day of March, One thousand nine hundred and eighty the vendors each severally agreed to sell certain shares in Company known as AIRFOIL REGISTERS PTY. LIMITED (hereinafter called the "company") to ILERAIN PTY. LIMITED (hereinafter called the "purchaser") AND WHEREAS 20 pursuant to the said Deeds certain monies are expressed to be payable by the purchaser to each of the vendors AND WHEREAS the guarantor has agreed to guarantee the obligations of the company under the said Deeds.

NOW THIS DEED WITNESSETH AND IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:

1. In consideration of each of the vendors entering into the said Deed with the said purchaser the guarantor hereby agrees that if the said

purchaser shall make default for more than 14 days in payment of any principal monies due under any of the said Deeds the said guarantor will pay the amount thereof to the said vendors at the expiration of 3 days after demand in writing thereof shall have been made upon the said guarantor by or on behalf of the said vendors.

2. All monies received by the said vendors from the said guarantor shall be applied by them for the benefit of the said purchaser in satisfaction and discharge of any monies

K. Jehnic                    D.B. Arnett  
                                       J.E. Herbert

-2-

due to them as such.

3. Any default made by the said purchaser shall without further proof entitle the said vendors to sue upon this covenant and to recover from the said purchaser the sums hereby secured.

4. This covenant and guarantee shall be a continuing guarantee and shall remain in operation until all monies due under the said Deeds are paid unless previously determined and revoked with the consent of all parties hereto.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals on the day and in the year first hereinbefore mentioned.

Annexure "B" to the  
Affidavit of D.B. Arnett

SIGNED SEALED AND DELIVERED )  
 )  
by the said PHILLIP WILLIAM CARNEY ) P.W. Carney  
 )  
in the presence of: )  
  
W.S. Morton

SIGNED SEALED AND DELIVERED )  
 )  
by the said JOHN EDWARD HERBERT ) J.E. Herbert  
 )  
in the presence of: )  
  
D.K. Simpson

10

SIGNED SEALED AND DELIVERED )  
 )  
by the said DARRELL BRUCE ARNETT ) D.B. Arnett  
 )  
in the presence of: )  
  
D.K. Simpson

SIGNED SEALED AND DELIVERED )  
 )  
By the said KARLO JEHNIC ) K. Jehnic  
 )  
in the presence of: )  
  
D.K. Simpson

Annexure "B" to the  
Affidavit of D.B. Arnett

DATED \_\_\_\_\_

BETWEEN:

PHILLIP WILLIAM CARNEY  
of the first part

AND:

JOHN EDWARD HERBERT,  
DARRELL BRUCE ARNETT  
and KARLO JEHNIC

10

of the second part

\_\_\_\_\_  
D E E D  
\_\_\_\_\_

PEET, SIMPSON & CO.  
Solicitors,  
123 Forest Road,  
Hurstville. 2220  
Tel. No. 579 4466

"C"

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Peet, Simpson & Co.  
SOLICITORS & ATTORNEYS

Kenneth Clive Peet  
Danny Kenneth Simpson, LL.B.

123-125 Forest Road, Hurstville, 2220  
(P.O. Box 295, Hurstville, 2220)

Our ref. DKS:KS Your ref. TELEPHONE 579-4466

1st September, 1980.

P.W. Carney, Esq.,  
3 Turon Court,  
Turon Avenue,  
KINGSGROVE. 2208

10

Dear Sir,

RE: Darrell Bruce Arnett

We refer to the Deed of Guarantee which you executed on 24th March, 1980 in respect of monies due by Ilerain Pty. Limited to Darrell Bruce Arnett.

You will recollect that pursuant to that Agreement you agreed that if Ilerain Pty. Limited defaulted for more than 14 days in respect of any principal monies due under the Agreement you would pay the amount thereof to Mr. Arnett at the expiration of 3 days after demand in writing.

20

We hereby advise you that payment due to Mr. Arnett on 15th August, 1980, in the sum of \$37,500.00 was not made and we hereby give you notice that we require you to pay those monies to Mr. Arnett pursuant to the Guarantee Agreement.

At the expiration of 3 days from the date hereof we propose to commence proceedings to recover same on behalf of our client.

30

Yours faithfully,  
PEET, SIMPSON & CO.

D.K. SIMPSON.

This is the annexure marked "C" referred to in the Affidavit of Darrell Bruce Arnett sworn at Hurstville this 1st day of MAY 1981. Before me:

D.K. Simpson Solicitor of the  
Supreme Court of NSW  
D.X. Kogarah 11111

40

Annexure "C" to the  
42. Affidavit of D.B. Arnett



IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW  
DIVISION

No. 16157 of 1980

JOHN EDWARD  
HERBERT

Plaintiff

PHILLIP WILLIAM  
CARNEY

Defendant

AFFIDAVIT

Deponent:  
P.W. Carney

Sworn:  
3 September, 1981

On the 3 day of September, 1981

PHILLIP WILLIAM CARNEY of 3 Turon

Avenue, Kingsgrove in the State of

New South Wales, Company Director,

being duly sworn makes oath and says

as follows:-

1. Annexed hereto and marked "A" is  
a true copy of the agreement in writ-  
ing referred to in paragraph 4 of the  
statement of claim. That agreement  
was signed by me and was delivered  
to the plaintiff and to Messrs Arnett  
and Jehnic on 24th March, 1980 during  
a meeting at the offices of Airfoil  
Registers Pty. Limited (hereinafter  
called "Airfoil") at 131 Newbridge  
Road, Moorebank.

2. The said deed was delivered to  
the plaintiff and to Messrs Arnett  
and Jehnic that day as part of a  
series of transactions relating to  
the acquisition by Ilerain Pty.  
Limited (hereinafter called "Ilerain")  
of shares in Airfoil held by the  
plaintiff and by Messrs Arnett and  
Jehnic.

3. At the same meeting referred to  
in paragraph 1, there was delivered

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to the plaintiff an agreement for sale of shares being the agreement referred to in paragraph 1 of the statement of claim of which a copy is annexed hereto marked "B". The common seal of Ilerain was affixed to the said deed in my presence and in the presence of Wayne Stanley Morton, who was the Secretary of Ilerain, at the said meeting. I am and I was then a director of Ilerain. Although the deed is dated 21st March, 1980, the common seal of the company was affixed to it and it was delivered to the plaintiff on 24th March, 1980.

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4. At the same time I wrote out and delivered to the plaintiff a cheque drawn on the account of Airfoil in the sum of \$41,000 being the amount referred to in paragraph 1 (a) of the agreement for sale of shares. Annexed hereto and marked "C" is a true copy of the said cheque.

5. At the same time I handed over to Darrell Bruce Arnett and Karlo Jehnic cheques for \$41,000 and \$68,000 respectively, being the amounts referred to in paragraph 1 (a) of agreements dated 21st March, 1980 between Ilerain and the said Mr. Arnett and the said Mr. Jehnic respectively.

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6. At the same meeting referred to in paragraph 1, there was delivered to the plaintiff a memorandum of mortgage of which a copy is annexed hereto marked "D". The common seal of Newbridge Industries Pty. Limited (hereinafter called "Newbridge") was affixed to the said memorandum of mortgage in my presence and in the

presence of the said Wayne Morton, who was also the secretary of Newbridge, at the said meeting. I am and I was then a director of Newbridge. The principal sum referred to in the said memorandum of mortgage is identical with the purchase price referred to in the said deed for sale of shares.

7. On 24th March, 1980, Newbridge was a subsidiary of Airfoil. Produced and shown to me at the time of swearing this affidavit and marked "P.W.C.1" is the share register of Newbridge.

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8. The acquisition of the shares in Airfoil held by the plaintiff, Mr. Arnett and Mr. Jehnic was discussed by me with them on a number of occasions during January through to March, 1980. In or about the first week of March, 1980, I said to those three persons who were each present at the time at the company's offices at Moorebank, something to the following effect -

"I am prepared to purchase all of your shares in the company (meaning thereby Airfoil) at a price based on a valuation of the company's nett assets. I believe that the nett assets are worth between \$2,000,000 and \$2,500,000. But, before any purchase price is arranged, a valuation will have to be carried out by Wayne Morton and the figures agreed individually by all of us."

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9. During the next week, the plaintiff, Messrs Arnett and Jehnic and myself all did a considerable amount of work towards valuing the nett assets of Airfoil, including the property owned by Newbridge, which

Affidavit of Defendant

was valued by a valuer at the direction of Mr. Arnett with my authority.

A further conversation took place some time in the second week in March. Present were the plaintiff, Messrs Arnett Jehnic and Morton and myself. The conversation took place at Airfoil's offices at Moorebank and was to the following effect:-

Carney: I won't be able to pay the full amount to you (the plaintiff and Messrs Arnett and Jehnic) immediately. 10

Mr. Arnett: We realise that this money can't be paid all at once. Whatever terms of payment we agree upon, we will want security for any outstanding balance.

Carney: I can't give you security, everything I own is mortgaged.

Mr. Arnett: We will take a second mortgage over the factory.

Carney: Okay but you will have to arrange for the mortgages to be prepared and you will have to pay the legal costs yourselves. 20

Morton: Do you realise you will have to get permission for the mortgage from the first mortgagees?

Mr. Arnett: We'll get our solicitor to get onto to Hampson and Heffernan and arrange it.

10. At the time these negotiations were being carried on Airfoil's bank account was subject to an approved overdraft limit of \$65,000.00. On 19 February 1980 the

account was in excess of \$105,000.00 overdrawn. The first payments to be made to the vendors under the agreements for sale of shares referred to in paragraphs 4 and 5 totalled \$150,000.00.

On 24 March 1980 the account had a credit balance in excess of \$16,000.00. All accounts payable by Airfoil between 19 February 1980 and 24 March 1980 were paid as they fell due.

During the second week of March I walked into Airfoil's offices and observed that little work was being carried on. A conversation took place in the presence of the plaintiff and Messrs. Arnett and Jehnic to the following effect:-

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Carney: You boys aren't doing any work.

Arnett: If you're going to start Flexmaster (a new enterprise proposed by Carney) with Airfoil's money we're not going to help and we want our money out of Airfoil's account first.

Carney: If you want your money you will have to help collect it.

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Jehnic: We will do everything we can to fuck up Flexmaster.

(At this point Mr. Jehnic left the office).

Arnett: Well what do we have to do.

Carney: We've got to start ringing people up and collect some money.

Affidavit of Defendant

Airfoil's stenographer/receptionist Mrs. Vannan and I then proceeded to telephone several of Airfoil's debtors requesting immediate payment of their accounts. Many of the telephone conversations took place in the hearing of Mr. Jehnic who was often in the office.

The plaintiff personally called on at least six of Airfoil's debtors and collected cheques in payment of their accounts. The plaintiff also personally called on several of Airfoil's debtors whose accounts were the subject of some dispute.

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Mr. Arnett personally called on at least one of Airfoil's debtors and collected a cheque in payment of its account. Mr. Arnett also did some banking of amounts into Airfoil's account which was not normally his function.

11. During the third week of March, a conversation to the following effect took place between the plaintiff, Messrs Arnett and Jehnic and myself at Airfoil's offices at Moorebank.

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Carney: Based on my preliminary figures, I will agree to a nett asset value of \$2,500,000 There will of course be minor adjustments to take account of loan accounts and so on. (I then left the room in which we were speaking and returned a few minutes later).

Mr. Arnett: We are prepared to sell at prices worked out on that basis.

Mr. Jehnic: I want my money quickly. I won't wait three years for it.

Carney: I can pay around \$150,000 immediately but the rest will have to be paid over a few months. I will probably buy the shares through a company and I will let you know its name as soon as possible.

12. At the time of the conversations referred to in the last three preceding paragraphs I believed that the land owned by Newbridge was subject to a first mortgage in favour of Mr. Hampson and Mr. Heffernan. Annexed hereto marked "E" is a true copy of a memorandum of mortgage relating to the said land executed under the common seal of Newbridge in or around January, 1979.

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13. Soon after the conversation referred to in paragraph 11 a further conversation to the following effect took place between the plaintiff, Messrs Arnett and Jehnic and myself who were all present at the time at the company's offices -

Mr. Arnett: I have spoken to our solicitor and he says that you will have to speak to Hampson and Heffernan to get their consent to the second mortgages.

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Carney: I will approach them and ask them for their consent, but I am not too happy about doing so and there is a good chance they will refuse.

Mr. Arnett: You will have to get their consent. If we don't get that security, we will not go through with the deal.

14. I subsequently spoke to the said mortgagees. I said to Mr. Arnett -

"It's alright, Hampson and Heffernan are agreeable and your solicitor should contact theirs to get the details".

15. The said memorandum of mortgage was executed by Newbridge pursuant to the preceding conversations.

16. At some time prior to 21st March, 1980, I said to Mr. Arnett -

"The name of the company which will be the purchaser is Ilerain Pty. Limited". 10

17. At the meeting on 24th March, 1980, referred to in paragraph 1, a solicitor - Mr. Simpson - produced various documents including the deed of guarantee, deed for sale of shares and memorandum of mortgage referred to in the preceding paragraphs. The said solicitor was not instructed by me or on behalf of Ilerain or Airfoil.

18. At the same meeting at the time of handing over the cheques drawn on Airfoil's account, I said something to the following effect - 20

"Don't present them (the cheques) for a day or two. Airfoil does not have the money in the bank today, but there will be money there in a few days."

19. After writing out the first of the said cheques I said to Mr. Morton in the presence and hearing of the plaintiff and the said Messrs Arnett and Jehnic something to the following effect -



Affidavit of Defendant

"What will I put on the cheque butt?"

Morton replied -

"Put "loan - P. Carney"."

I did.

Produced and shown to me at the time of swearing this affidavit and marked "P.W.C. - 2" is the cheque book of Airfoil which formerly contained the cheque forms upon which the said cheques were written out and which now contains the butts of the said cheques. The handwriting on the three said butts is my handwriting.

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20. When the said deed of guarantee and the deed for sale of shares and the memorandum of mortgage were delivered to the vendors, there were delivered to me at the said meeting, forms of transfer of shares in the capital of Airfoil, signed by the plaintiff, Mr. Arnett and Mr. Jehnic respectively.

21. At the same meeting, the plaintiff and Messrs Arnett and Jehnic said to me something to the following effect -

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"We want post dated cheques for the remaining payments"

I replied -

"You know that post dated cheques are illegal"

They said -

"We insist on having post dated cheques drawn on Airfoil's account."

SWORN by the abovenamed )

deponent at Sydney )

P.W. Carney

Before me: )

Keith Phillip Rewell

Solicitor, Sydney

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"A"

THIS DEED made the 24th day of March One thousand nine hundred and eighty between PHILLIP WILLIAM CARNEY of 22 Miller Street, Kingsgrove in the State of New South Wales, Company Director (hereinafter called "the guarantor") of the first part and JOHN EDWARD HERBERT of 15 McDougall Avenue, Baulkham Hills in the said State, Sales Manager, DARRELL BRUCE ARNETT of 5 Oatley Avenue, Padstow Heights in the said State, Manager and KARLO JEHNIC of 50 Victor Avenue, Picnic Point, in the said State, Manager (hereinafter called the "vendors") of the second part

WHEREAS by Deed dated 21st day of March, One thousand nine hundred and eighty the vendors each severally agreed to sell certain shares in Company known as AIRFOIL REGISTERS PTY. LIMITED (hereinafter called the "company") to ILERAIN PTY. LIMITED (hereinafter called the "purchaser") AND WHEREAS pursuant to the said Deeds certain monies are expressed to be payable by the purchaser to each of the vendors AND WHEREAS the guarantor has agreed to guarantee the obligations of the company under the said Deeds.

NOW THIS DEED WITNESSETH AND IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:

1. In consideration of each of the vendors entering into the said Deed with the said purchaser the guarantor hereby agrees that if the said purchaser shall make default for more than 14 days in payment of any principal monies due under any of the said Deeds the

This is the annexure marked "A" referred to in the Affidavit of P.W. Carney sworn before me on 3.9.81  
Keith Phillip Rewell

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Annexure "A" to the  
Affidavit of Defendant

said guarantor will pay the amount thereof to the said vendors at the expiration of 3 days after demand in writing thereof shall have been made upon the said guarantor by or on behalf of the said vendors.

2. All monies received by the said vendors from the said guarantor shall be applied by them for the benefit of the said purchaser in satisfaction and discharge of any monies

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P.W. Carney  
K. Jehnic J.E. Herbert D.B. Arnett

-2-

due to them as such.

3. Any default made by the said purchaser shall without further proof entitle the said vendors to sue upon this covenant and to recover from the said purchaser the sums hereby secured.

4. This covenant and guarantee shall be a continuing guarantee and shall remain in operation until all monies due under the said Deeds are paid unless previously determined and revoked with the consent of all parties hereto.

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IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals on the day and in the year first hereinbefore mentioned.

SIGNED SEALED AND DELIVERED )  
 )  
by the said PHILLIP WILLIAM CARNEY ) P.W. Carney  
 )  
in the presence of: W.S. Morton )

Annexure "A" to the  
Affidavit of Defendant

SIGNED SEALED AND DELIVERED )  
 )  
by the said JOHN EDWARD HERBERT ) J.E. Herbert  
 )  
in the presence of: )  
  
D.K. Simpson

SIGNED SEALED AND DELIVERED )  
 )  
by the said DARRELL BRUCE ARNETT ) D.B. Arnett  
 )  
in the presence of: )  
  
D.K. Simpson

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SIGNED SEALED AND DELIVERED )  
 )  
By the said KARLO JEHNIC ) K. Jehnic  
 )  
in the presence of: )  
  
D.K. Simpson

This is the annexure marked "B" referred to in the Affidavit of P.W. Carney sworn before me on 3.9.81 Keith Phillip Rewell

THIS DEED made the 21st day of March, One thousand nine hundred and eighty between JOHN EDWARD HERBERT of 15 McDougall Avenue, Baulkham Hills, in the State of New South Wales, Sales Manager (hereinafter called "the Vendor") of the first part and ILERAIN PTY. LIMITED a company duly incorporated in the State of New South Wales and having its registered office C/- Charles M. Harvey & Co., 3rd Floor, 163 Clarence Street, Sydney in the said State (hereinafter called "the Purchaser") of the second part.

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WHEREAS

(a) The Vendor is the owner of Share Certificate No. 2 in respect of 5 shares IN company known as AIRFOIL REGISTERS PTY. LIMITED being a company duly incorporated in the State of New South Wales and having its registered office at 131-133 Newbridge Road, Moorebank in the said State (hereinafter called "the Company") (Such shares being numbered 91 - 95 inclusive).

(b) The Vendor has agreed to sell the said shares to the Purchaser for the sum of One hundred and nine thousand eight hundred dollars (\$109,800.00)

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NOW THIS DEED WITNESSETH AND IT IS HERBY AGREED AND DECLARED AS FOLLOWS:

1. The Purchaser shall pay to the Vendor the sum of One hundred and nine thousand eight hundred dollars (\$109,800.00) such amount to be made by cash or bank cheque as follows:

- a) As to the sum of \$41,000.00 such sum to be Annexure "B" to the Affidavit of Defendant

paid on 24th March, 1980.

b) As to the sum of \$23,000.00 such sum to be paid on 31st July, 1980.

-2-

c) As to the sum of \$45,800.00 such sum to be paid on 15th August, 1980.

2. Upon receipt of the payment of the said \$41,000.00 the Vendor shall execute a Transfer of the said shares in favour of the Purchaser in appropriate form and shall hand such Transfer to the Purchaser.

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3. Should any payment due by the Purchaser to the Vendor under Clause (1) hereunder be in arrears exceeding fourteen (14) days from the due date then the Vendor shall be at liberty to immediately commence proceedings to recover the amount due as a liquidated sum.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals on the day and in the year first hereinbefore mentioned.

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SIGNED SEALED AND DELIVERED )  
 )  
by the said JOHN EDWARD HERBERT )  
 )  
in the presence of: )

THE COMMON SEAL of ILERAIN PTY. )  
 )  
LIMITED was hereunto affixed )  
 )  
by authority of the Board of )  
 )  
Directors in the presence of: )  
 )  
..... )  
Secretary

.....  
Director

Annexure "B" to the  
Affidavit of Defendant

DATED 21st March, 1980.

BETWEEN:

JOHN EDWARD HERBERT

of the first part

AND:

ILERAIN PTY. LIMITED

of the second part

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D E E D

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PEET, SIMPSON & CO.  
Solicitors,  
123-125 Forest Road,  
HURSTVILLE. 2220

Tel. No. 579 4466

"C"

This is the annexure marked "C" referred to in the Affidavit of P.W. Carney sworn before me on 3.9.81  
Keith Phillip Rewell

25/3

STAMP DUTY PAID

THE COMMERCIAL BANK OF AUSTRALIA LIMITED  
PADSTON NSW 536166

NOT NEGOTIABLE  
CREDIT ACCOUNT  
S.W. PERMANENT ST.  
BUILDING SOCIETY LIMITED  
25 MAR 1980

RURAL BANK OF NEW SOUTH WALES  
301 CHURCH STREET  
PARRAMATTA

PAY TO THE ORDER OF	OR BEARER	24/3/1980
Cash on hand		\$4,000.00
PAY THE SUM OF		

AIRFOIL REGISTERS PTY. LTD

*[Signature]*

536166 042 230 28 69 105 10000010000100000000

Please pay Susan Herland.  
165915

*[Signature]*



"D"

This is the annexure marked "D" referred to in the Affidavit of P.W. Carney sworn before me on 3.9.81  
Keith Phillip Rewell

RP 25  
1978

STAMP DUTY



**MORTGAGE**

REAL PROPERTY ACT, 1900  
(To be lodged in duplicate)

(See Instructions for Completion issued separately)

OFFICE USE ONLY	
M	of
\$	

DESCRIPTION OF LAND Note (a)	Torrens Title Reference	If Part Only, Delete Whole and Give Details	Location
	Certificate of Title Volume 4838 Folio 22	WHOLE	Moorebank
MORTGAGOR Note (b)	NEWBRIDGE INDUSTRIES PTY. LIMITED a company duly incorporated in the State of New South Wales and having its registered office at 131-133 Newbridge Road, Moorebank		OFFICE USE ONLY N

(the abovenamed MORTGAGOR) hereby acknowledges receipt of the principal sum of \$ 109,800.00

coversants with the undermentioned Mortgagee that the provisions set forth in the Schedule hereto shall be deemed to be incorporated herein, and, for the purpose of securing to the Mortgagee the payment of the principal sum and interest thereon, mortgages to the MORTGAGEE,

MORTGAGEE Note (b)	JOHN EDWARD HERBERT of 15 McDougall Avenue, Baulkham Hills, Sales Manager	OFFICE USE ONLY
TENANCY Note (c)	as joint tenants/tenants in common	

PRIOR ENCUMBRANCES Note (d) all the Mortgagor's estate and interest in the land above described (which land is referred to in the Memorandum hereinafter mentioned and in the Schedule hereto as the mortgaged land) subject to the following PRIOR ENCUMBRANCES 1. Mortgage N725548  
2. Mortgage P799030 3.

DATE OF MORTGAGE 21st March, 1980.

We hereby certify this dealing to be correct for the purposes of the Real Property Act, 1900.

Signed in my presence by the mortgagor who is personally known to me

EXECUTION Note (e)

THE COMMON SEAL of NEWBRIDGE )  
INDUSTRIES PTY. LIMITED was )  
hereunto affixed by authority )  
of the Board of Directors in )  
the presence of: )  
M. S. Horton Secretary )

Signature of Mortgagor  
Director

Signed in my presence by the mortgagee who is personally known to me

Notes (e)

\_\_\_\_\_  
Signatures of Witness

\_\_\_\_\_  
Name of Witness (BLOCK LETTERS)

\_\_\_\_\_  
Address and occupation of Witness

Signature of Mortgagee

TO BE COMPLETED BY LODGING PARTY Notes (f) and (g)	LODGED BY		LOCATION OF DOCUMENTS	
	CT	OTHER	Herewith. In R.G.O. with _____ Produced by _____	
OFFICE USE ONLY	Delivery Box Number	Extra Fee	Checked by	REGISTERED - -19
				Registrar General

SCHEDULE HEREINBEFORE REFERRED TO

FOR THE CONSIDERATION AFORESAID the Mortgagor hereby

(a) Irrevocably appoints the mortgagee the attorney of the mortgagor immediately on or at any time after any breach or default by the mortgagor to exercise in the name of the mortgagor all rights, powers and remedies of the mortgagee expressed or implied herein and to receive any moneys payable to the mortgagor in respect of the mortgaged land whether in respect of the insurance compensation or otherwise and to do all things required to be done by the mortgagor and to execute all documents and to do all things necessary in regard to such matters.

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(b) covenants with the mortgagee as follows:

Firstly - The mortgagor will pay to the mortgagee the principal sum, or so much thereof as shall remain unpaid, on the as to the sum of \$41,000.00 on 24th March, 1980, as to the sum of \$23,000,00 on 31st July, 1980 and as to the sum of \$45,800.00 on 15th August, 1980

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~~Secondly---The mortgagor will pay interest on the principal sum or on so much thereof as for the time being shall remain unpaid, and upon any judgment or order in which this or the preceding covenant may become merged, at the rate of~~

~~( ) per centum per annum as follows, namely - By equal payments on the days of the months of in each and every year until the principal sum shall be fully paid and satisfied, the first of such payments computed from the day of 19 , to be made on the day of~~

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~~next: Provided always, and it is hereby agreed and declared, that if the mortgagor shall on every day on which interest is hereinbefore made payable under this security, or within fourteen days after each of such days respectively, pay to the mortgagee interest on the principal sum or on so much thereof as shall for the time being remain unpaid at the rate of~~

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~~( ) per centum per annum, and shall also duly observe and perform all and every the covenants on the mortgagor's part herein contained or implied then the mortgagee shall accept interest on the said principal sum or on so much thereof as shall for the time being remain unpaid at the rate of~~

~~( ) per centum per annum in lieu of ( ) per centum per annum for every for which such interest shall be paid to the mortgagee within such fourteen days as aforesaid,-----~~

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Annexure "D" to the  
Affidavit of Defendant

Thirdly - The mortgagor will observe the provisions set forth in the Memorandum filed in the Registrar General's Office as Number Q860000, which provisions are deemed to be incorporated herein.

DELETION OF  
COVENANTS  
Note (h)  
  
ADDITIONAL  
COVENANTS  
Note (i)

~~Fourthly---It-is-hereby-agreed-and-declared that notwithstanding anything hereinbefore contained the mortgagor shall have the right to repay the principal sum at any time upon payment of interest to the end of the then current month-together-with-one-month's-penalty-interest.~~

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Fifthly - That the mortgagor will not without the consent in writing of the mortgagee first had and obtained further mortgage charge or otherwise encumber the mortgaged land provided further and it is hereby agreed and declared that should the mortgagor during the continuance of this security mortgage charge or otherwise encumber the said land or agree or attempt to mortgage charge or otherwise encumber the same without the written consent of the mortgagee first had and obtained then the principal sum together with interest at the rate aforesaid shall at the option of the mortgagee become due and payable to and recoverable by the mortgagee immediately.

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~~Sixthly---It-is-hereby-further-acknowledged-that the mortgagor will pay the stamp duty and legal fees of-the-mortgagee-in-connection-with-this-mortgage.---~~

X  
  
X

OFFICE USE ONLY

DIRECTION: PROP		FIRST SCHEDULE DIRECTIONS			
No. OF NAMES:					
(A) FOLIO IDENTIFIER	(B) No.	(C) SHARE	(D) I	(E)	NAME AND DESCRIPTION
SECOND SCHEDULE & OTHER DIRECTIONS					
(F) FOLIO IDENTIFIER FOR REGD. DEALING & FOLIO IDENTIFIERS	(G) DIRECTION	(H) NOTFN TYPE	(I)	(J) DEALING NUMBER	(K) DETAILS

4227-6 21 78 D. WEST, GOVERNMENT PRINTER

"E"

This is the annexure marked "E" referred to in the Affidavit of P.W. Carney sworn before me on 3.9.81  
Keith Phillip Rewell



NEW SOUTH WALES  
**MEMORANDUM OF MORTGAGE**

REAL PROPERTY ACT, 1900  
(To be lodged in duplicate)

NEW SOUTH WALES  
\$ 677.00

\$677.00

OFFICE USE ONLY

\$		

Typewriting and hand-  
writing should be clear,  
legible and in permanent  
black ink on copying paper.  
The provisions should be  
made by a surveyor, who  
will be retained must be  
retained through and  
retained by a surveyor or  
otherwise in the mortgage.

<sup>(a)</sup> **NEWBRIDGE INDUSTRIES PTY. LIMITED** being a company duly incorporated and having its registered office at \_\_\_\_\_ hereinafter referred to as the MORTGAGOR

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(a) Full name, address and occupation of the mortgagor.

being registered proprietor of an estate in fee simple <sup>(b)</sup>

in the land hereinafter described, subject to the following encumbrances and interests

(b) A short and full description of an estate, tenement or interest in land, and the nature and extent of the same, and the name of the proprietor, and the name of the mortgagee, and the name of the land.

<sup>(c)</sup> Reservations and conditions, if any, contained in the Crown Grant(s).

in consideration of One hundred and Eighty-Three Thousand Dollars (\$ 183,000.00 )

(c) The date and if temporary, the term and date of expiry.

(hereinafter called the principal sum, the receipt of which is hereby acknowledged) lent to the mortgagor <sup>(d)</sup>

by

(d) Full name, address and occupation of mortgagee. If more than one name further full names or names in common. If the mortgagee is a company, the name of the company, and the name of the person or persons to be bound by the mortgage.

<sup>(e)</sup> **JAMES CORNELIUS HAMPSON** of 17 Talinga Avenue, Georges Hall, Company Director, and **JOHN ANTHONY HEFFERNAN** of 26 Kingsland Road, Strathfield, Company Director, as Tenants in Common, hereinafter referred to as the MORTGAGEE

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for the purpose of securing to the mortgagee the payment in manner hereinafter mentioned of the said principal sum and interest thereon, hereby mortgages to the mortgagee all such his estate and interest in the land described in the following schedule (hereinafter called the mortgaged land)

(f) Serial lot and also number of the plan, section, block and lot, and the Land Occupancy Act, 1933.

Reference to title		Whole or Part	Description of land if part only <sup>(f)</sup>	County	Parish
Volume	Folio				
<u>4838</u>	<u>22</u>	<u>WHOLE</u>		<u>CUMBERLAND</u>	<u>HOLSWORTHY</u>

AND FOR THE CONSIDERATION AFORESAID the mortgagor covenants with the mortgagee as follows:

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44 Firstly - That the mortgagor will pay to the mortgagee the principal sum, or so much thereof as shall remain unpaid on ~~the~~ or before the fifteenth day of October, 1980.

~~Secondly---That the mortgagor will pay interest on the principal sum or on so much thereof as for the time being shall remain unpaid and upon any judgment or order in which this or the preceding covenant may become merged, at the rate of ( ) per centum per annum as follows, namely - By equal payments on the \_\_\_\_\_ day of the months of \_\_\_\_\_ in each and every year until the principal sum shall be fully paid and satisfied~~

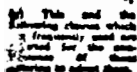
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Annexure "E" to the  
Affidavit of Defendant

~~the first of such payments computed from the  
day of 19 , to be made on the  
day of next: Provided always, and it is  
hereby agreed and declared, that if the mortgagor shall  
on every day on which interest is hereinbefore made  
payable under this security, or within fourteen days  
after each of such days respectively, pay to the mort-  
gagee interest on the principal sum or on so much  
thereof as shall for the time being remain unpaid at  
the rate of ( ) per centum  
per annum, and shall also duly observe and perform all  
and every the covenants on the mortgagor's part herein  
contained or implied then the mortgagee shall accept  
interest on the said principal sum or on so much there-  
of as shall for the time being remain unpaid at the  
rate of ( ) per centum per  
annum in lieu of ( ) per centum  
per annum for every for which  
such interest shall be paid to the mortgagee within such  
fourteen-days-as-aforsaid.-----~~

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A handwritten signature and a circular stamp are located to the left of the third paragraph. The stamp contains illegible text, possibly a date or a reference number.

Thirdly(g) - That the mortgagor will insure and keep insured against loss or damage by fire all buildings now or hereafter erected on the said mortgaged land in the name of the mortgagee for indemnity of the mortgagee or of the mortgagor and the mortgagor in the full insurable value in some insurance office approved by the mortgagee, and that in the event of the loss the mortgagee alone shall have power to settle and compromise any claim against any insurance company (without being responsible for any loss occasioned thereby) and the sum received on account of such insurance shall be applicable either in or towards repair or rebuilding or in or towards repayment of the mortgage debt at the option of the mortgagee, and that the mortgagor will hand the policy or policies evidencing such insurance and all receipts for moneys paid and other usual evidence of insurance to the mortgagee immediately upon the issue thereof. If at any time the mortgagor is entitled to the benefit of an insurance on the buildings for the time being comprised in this memorandum of mortgage which is not effected or maintained in pursuance of his obligation aforesaid then all moneys received by virtue of such insurance shall if the mortgagee so requires be applied at the option of the mortgagee either in making good the damage or loss in respect of which the same shall have been received or be paid to the mortgagee and be applied by the mortgagee in or towards repayment of the mortgage debt.

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Fourthly - That the mortgagor will during the continuance of this security, whether the mortgagee shall or shall not have entered upon and taken possession of the said mortgaged land make such repairs as may be

Annexure "E" to the  
Affidavit of Defendant

necessary for keeping the buildings now or hereafter to be erected on the mortgaged land in good and tenantable repair, order and condition, and in particular will whenever the mortgagee considers it necessary paint in a proper and workmanlike manner to the satisfaction of the mortgagee such parts of the mortgaged premises as are usually painted and will on being required by the mortgagee so to do forthwith amend every defect in the repair and condition thereof, and will forthwith carry out all work that may be ordered by any Board of Health or any competent public, local, shire or municipal authority in respect thereof, and pay all rates, taxes, charges, outgoings, and assessments (including any land or property tax) that may now or at any time be or become payable or become chargeable or be assessed or become due upon or in respect of the said mortgaged land or any part thereof, under or in pursuance of the provisions of any Act or Ordinance of the Commonwealth of Australia or the State of New South Wales, or any regulations thereunder now in force or that may come into operation during the continuance of this security, and will at all times indemnify and keep indemnified the mortgagee from the payment of such rates, charges, outgoings, and assessments, and every or any part thereof, and from all claims and demands in respect thereof, and that the mortgagee shall at all reasonable times during the continuance of this security be at liberty with or without surveyors or others to enter into and upon the mortgaged land and view and inspect the state of repair of the buildings and improvements thereon.

RULE UP ALL BLANKS 19590D.

Fifthly - That in case the mortgagor shall at any time fail to keep the said buildings so insured and in good and tenantable repair order and condition, or to carry out all work that may be ordered by any Board of Health or any competent public, local, shire or municipal authority in respect thereof or of the mortgaged land or any part thereof, or to pay such rates, taxes, charges, outgoings, and assessments as aforesaid or any part thereof it shall be lawful for but not obligatory upon the mortgagee to effect and maintain such insurance repairs and order and to do such work and to pay such rates, taxes, charges, outgoings, and assessments or part thereof as the case may be and all moneys or payments so expended or made shall be repayable by the mortgagor upon demand and be deemed principal moneys covered by this security and shall carry interest until such repayment at the rate of Twelve Dollars ----- (\$12.00) per centum per annum.

Sixthly - That in addition to all costs and

Annexure "E" to the  
Affidavit of Defendant

expenses which the mortgagor may be liable at law or in equity to pay in respect of this security or otherwise in relation thereto the mortgagor will upon demand pay all costs and expenses including costs as between solicitor and client incurred by the mortgagee in consequence or on account of any default on the part of the mortgagor hereunder or incurred by the mortgagee for the preservation of or in any manner in reference to this security, all of which costs and expenses shall from the time of payment or expenditure thereof respectively until repaid to the mortgagee by the mortgagor be deemed principal moneys covered by this security, and shall carry interest at the rate mentioned in the last preceding paragraph. 10

Seventhly - That upon default being made in payment at the respective times and in the manner hereinbefore mentioned of the principal sum or any part thereof, or of the interest thereon or any part thereof, or upon default being made in the observance or performance of any of the covenants herein contained or implied by the Real Property Act, 1900, or the Conveyancing Act, 1919, the mortgagee shall (notwithstanding any omission, neglect or waiver of the right to exercise all or any of such powers on any former occasion) be at liberty to exercise all or any of the powers of a mortgagee under the said Acts immediately upon or at any time after default as hereinbefore mentioned, without the necessity of giving the mortgagor any notice whatsoever required by the said Acts or otherwise. And that if at any time default shall be made in the due payment of the interest on any of the days when the same respectively shall become payable or within the time thereafter hereinbefore mentioned, or if the power of sale given to the mortgagee under either of the said Acts shall become exercisable, then the principal sum shall immediately become due and the mortgagor will thereafter pay the same on demand. 20 30

Eighthly - That upon sale or lease as aforesaid the mortgaged land or any part thereof may be sold or leased together with other property in mortgage from the mortgagor to the mortgagee, whether (if land) under the Real Property Act, 1900, or not, by one contract and one price or at one rent or in any other manner that the mortgagee may deem expedient. Provided that the mortgagee shall fairly and equitably apportion all costs expenses purchase moneys and rents between the several subjects of the sale or lease, but a failure to make such apportionment shall not affect the purchaser or lessee or the title to the land sold or leased. 40 50

Ninthly - That upon sale the mortgagee shall be at liberty to allow a purchaser any time for payment of

Annexure "E" to the  
Affidavit of Defendant

the whole or any part of the purchase money with or without interest and either with or without taking security therefor.

Tenthly - That except with the written consent of the mortgagee the mortgagor will not apply for or obtain from the Crown or from any statutory authority any money or material or otherwise do or suffer to be done anything whereby any charge or liability shall or might be imposed on the mortgaged property or any part thereof in priority to or in derogation of this security. 10

Eleventhly - That in applying the purchase money towards satisfaction of the moneys for the time being owing on the security hereof the mortgagor shall be credited only with so much of the said moneys available for that purpose as shall be received in cash by the mortgagee, such credit to date from the time of such receipt and all purchase money left outstanding on credit or otherwise shall until actually received by the mortgagee in cash, be deemed a continuing unsatisfied part of the principal money hereby secured, and carry interest accordingly, provided that any interest paid by the purchaser shall be set off pro tanto against the interest hereby secured and the mortgagee shall be in no way liable for any such outstanding moneys or for any loss occasioned by the exercise of such power of sale. 20

Twelfthly - That the mortgagee shall, so long as any moneys shall remain owing on this security, have and retain possession of the Crown grant or certificate of title to the said mortgaged land and of any certificates of title to be hereafter issued in substitution therefor, whether to a purchaser of the equity of redemption or otherwise. 30

Thirteenthly - That all powers, rights, and remedies implied in favour of or conferred upon mortgagees by the Conveyancing Act, 1919, or the Real Property Act, 1900, shall be in enlargement and not in curtailment of the powers, rights and remedies conferred by these presents, and that sub-sections 5, 6, 7 and 8 of section 106 of the Conveyancing Act, 1919, shall not apply to a lease by the mortgagee hereunder, and also that the mortgagor shall not be entitled to exercise the power of leasing, conferred by that section without the previous written consent of the mortgagee. 40

Fourteenthly - That service of any notice required or authorised by these presents may be effected in the manner permitted by section 170 of the Conveyancing Act, 1919.



Annexure "E" to the  
Affidavit of Defendant

Fifteenthly - That every covenant expressed or implied in these presents and by which more persons than one covenant shall unless the contrary intention is expressed, bind such persons, and every two or greater number of them jointly and each of them severally, and every reference in these presents to the Real Property Act, 1900, or the Conveyancing Act, 1919, shall be construed as including every Act amending or in substitution for the Act referred to.

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St  
Sixteenthly-(h) That notwithstanding anything hereinbefore contained or implied, the Mortgagor shall pay monthly instalments of Twelve Thousand Two Hundred Dollars (\$12,200.00) each in reduction of the principal sum on the fifteenth day of each and every month, commencing on the fifteenth day of August, 1979, until and including the fifteenth day of October, 1980.

(Where add. if intended, any further amendments to the terms provided in hereof, additional sheets of the same size and quality of paper as this form should be used. A binding margin of 25 mm and other margins of not less than 12 mm should be preserved. Each additional sheet must be signed by the parties and the attending witnesses.

Annexure "E" to the Affidavit of Defendant

And the mortgagor hereby irrevocably appoints the mortgagee the attorney of the mortgagor immediately on or at any time after any breach or default by the mortgagor hereunder to exercise in the name of the mortgagor all rights, powers and remedies of the mortgagee expressed or implied hereunder and to receive any moneys payable to the mortgagor in respect of the mortgaged property whether in respect of insurance compensation or otherwise and to do all things required to be done by the mortgagor hereunder and to execute all documents and to do all things necessary in regard to any such matters.

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Dated at Bankstown this Thirty-First day of January, 19 79

(1) Further proof of execution and of contents to be received if signed or authenticated by one of the following persons will being a party to the document to which the signature is done.

(2) I have examined the original copy of the instrument, and the copy of the instrument as shown to me by the mortgagor, and I am satisfied that the same are correct copies of the original instrument.

(3) I have examined the original copy of the instrument, and the copy of the instrument as shown to me by the mortgagor, and I am satisfied that the same are correct copies of the original instrument.

(4) I have examined the original copy of the instrument, and the copy of the instrument as shown to me by the mortgagor, and I am satisfied that the same are correct copies of the original instrument.

(5) I have examined the original copy of the instrument, and the copy of the instrument as shown to me by the mortgagor, and I am satisfied that the same are correct copies of the original instrument.

(6) I have examined the original copy of the instrument, and the copy of the instrument as shown to me by the mortgagor, and I am satisfied that the same are correct copies of the original instrument.

(7) I have examined the original copy of the instrument, and the copy of the instrument as shown to me by the mortgagor, and I am satisfied that the same are correct copies of the original instrument.

(8) I have examined the original copy of the instrument, and the copy of the instrument as shown to me by the mortgagor, and I am satisfied that the same are correct copies of the original instrument.

(9) I have examined the original copy of the instrument, and the copy of the instrument as shown to me by the mortgagor, and I am satisfied that the same are correct copies of the original instrument.

(10) I have examined the original copy of the instrument, and the copy of the instrument as shown to me by the mortgagor, and I am satisfied that the same are correct copies of the original instrument.

Signed in my presence by the mortgagor who is personally known to me

THE COMMON SEAL of NEWBRIDGE INDUSTRIES PTY. LIMITED was hereunto affixed in the presence of ;

*[Signature]*  
Signature of witness

*[Signature]*  
Name of witness (BLOCK LETTERS)

*[Signature]*  
Secretary

*[Signature]*  
Qualification of witness



*[Signature]*  
Director

Signed in my presence by the mortgagee who is personally known to me

*[Signature]*  
Signature of witness

RUSSELL GRAHAME DUNCAN  
Name of witness (BLOCK LETTERS)

106 CHAPEL ROAD BANKSTOWN N S W 2200  
Address of witness

Accepted and certified correct for the purposes of the Real Property Act, 1900.

*[Signature]*  
Mortgagee

**Annexure "E" to the  
Affidavit of Defendant**

<p align="center"><small>DEPARTMENTAL USE ONLY</small></p> <p><b>MORTGAGE</b></p>	<p align="center"><b>TO BE COMPLETED BY LODGING PARTY</b></p> <p>Lodged by <b>R. G. DUNCAN, SOLICITOR,</b>  <b>436 CHAPL ROAD,</b>  <b>Address: BANKSTOWN, N.S.W. 2200</b>  <b>DX No.: DX. 250 Sydney N.S.W. Tel. 709.2166</b>  <b>264 M</b>  <b>Documents lodged herewith</b></p> <p>1. _____</p> <p>2. _____</p> <p>3. _____</p> <p>4. _____</p> <p>5. _____</p>								
<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:15%; padding: 2px;">Checked</td> <td style="padding: 2px;"><b>REGISTERED</b></td> </tr> <tr> <td style="padding: 2px;">Passed</td> <td style="padding: 2px;">_____</td> </tr> <tr> <td style="padding: 2px;">Signed</td> <td style="padding: 2px;">Registrar General</td> </tr> </table>	Checked	<b>REGISTERED</b>	Passed	_____	Signed	Registrar General	<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:60%; padding: 2px;">Received Documents _____</td> <td style="width:40%; padding: 2px;">Receiving Clerk _____</td> </tr> </table> <p><b>AUTHORITY FOR USE OF INSTRUMENT OF TITLE<sup>(a)</sup></b></p> <p>Authority is hereby given for the use of _____  <small>(insert reference to certificates, grants or dealings)</small> lodged  in connection with _____ for the  <small>(insert number of plan or dealing)</small>  registration of this dealing and for delivery to _____    <p align="center"><small>(BLOCK LETTERS)</small></p> <p align="center">_____  <i>Signature</i></p> <p align="center">_____  <small>Name (BLOCK LETTERS)</small></p> </p>	Received Documents _____	Receiving Clerk _____
Checked	<b>REGISTERED</b>								
Passed	_____								
Signed	Registrar General								
Received Documents _____	Receiving Clerk _____								
	<p><b>MEMORANDUM AS TO NON-REVOCAION OF POWER OF ATTORNEY</b></p> <p align="center"><small>(To be signed at the time of executing the within dealing)</small></p> <p>The undersigned states that he has no notice of the revocation of the Power of Attorney registered in the Office of the Registrar General, Book No. _____, under the authority of which he has just executed the within dealing.</p> <p>Signed at _____  the _____ day of _____, 19____</p> <p align="center">_____  <i>Signature of Attorney</i></p> <p align="center">_____  <i>Signature of Witness</i></p>								
	<p><b>CERTIFICATE OF J.P., AC., TAKING DECLARATION OF ATTESTING WITNESS<sup>(b)</sup></b></p> <p>I certify that _____  the attesting witness to this dealing, appeared before me at  the _____ day of _____, 19____  and declared that he personally knew _____  _____ the person signing the same, and whose signature thereto he has attested, and that the same purporting to be such signature of the said _____  _____ is his own handwriting and that he was of sound mind and freely and voluntarily signed the same.</p> <p align="center">_____  <i>Signature</i></p> <p align="center">_____  <small>Name (BLOCK LETTERS)</small></p> <p align="center">_____  <small>Qualification</small></p>								

(a) Unless the instrument of title has been lodged by the person lodging the dealing, or its use has been authorized previously, the authority must be attached by the person lodging to delivery of the certificate of title, grant etc.

(b) Has resigned whose dealing appeared in accordance with sub-section (1) of section 10 of the Act and the person referred to in sub-section (a).

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW  
DIVISION

No. 16157 of 1980

JOHN EDWARD  
HERBERT

Plaintiff

PHILLIP WILLIAM  
CARNEY

Defendant

AFFIDAVIT

Deponent:  
W.S. Morton

Sworn:  
3 September,  
1981

On the 3 day of September, 1981

WAYNE STANLEY MORTON of 163 Clarence  
Street, Sydney, Chartered Accountant,  
being duly sworn makes oath and says  
as follows:-

1. I am a partner in the firm

Charles M. Harvey & Co., Chartered  
Accountants.

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2. I am the secretary of Ilerain  
Pty. Limited (hereinafter called  
"Ilerain") and I have been the secre-  
tary of that Company since March 1980.

3. I am the secretary of Newbridge  
Industries Pty. Limited (hereinafter  
called "Newbridge") and I have been  
the secretary of that company since  
31st March, 1980.

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4. On behalf of my said firm, I have  
carried out accountancy work for  
Airfoil Registers Pty. Limited  
(hereinafter called "Airfoil") between  
1976 and 1980.

5. Between January, 1980 and March  
1980 I was present at a number of  
discussions between Phillip William  
Carney (hereinafter called "Mr.  
Carney"), Darrell Bruce Arnett (here-  
inafter called "Mr. Arnett"),

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Karlo Jehnic (hereinafter called "Mr. Jehnic") and John Edward Herbert (hereinafter called "Mr. Herbert") at the offices of Airfoil at 131 Newbridge Road Moorebank concerning the acquisition by Mr. Carney of the shares held by Mr. Arnett, Mr. Jehnic and Mr. Herbert respectively in the capital of Airfoil.

4. Early in March 1980, Mr. Carney said something to me concerning a conversation he had had with Mr. Arnett, Mr. Jehnic and Mr. Herbert in respect of the price Mr. Carney was prepared to pay for their shares in Airfoil.

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5. Some time around the second week of March 1980, a conversation to the following effect took place between Mr. Carney, Mr. Arnett, Mr. Jehnic and Mr. Herbert and myself, all of whom were present at the time at Airfoil's offices:

Mr. Arnett: We realise that this money can't be paid all at once. Whatever terms of payment we agree on, we will want security for any outstanding balance.

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Mr. Carney: What security do you want?

Mr. Arnett: We would accept a second mortgage over the factory site.

Mr. Carney: O.K.

Morton: Do you realise you will have to get permission for the mortgage from the first mortgagees?

Mr. Arnett: We'll get our solicitor to get on to Hampson and Heffernan and arrange it.

6. Airfoil's factory was situated at 131 Newbridge Road, Moorebank on land which stood in the name of Newbridge as registered proprietor. It was my belief at the time of the conversation set out in the last preceding paragraph that Mr. Hampson and Mr. Heffernan held a first mortgage from Newbridge over that land.

7. Throughout the period from January to 24th March 1980, Newbridge was a subsidiary of Airfoil and Mr. Arnett, Mr. Jehnic and Mr. Herbert were each directors of both Airfoil and Newbridge.

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SWORN by the abovenamed )  
deponent at Sydney ) W.S. Morton  
before me: )

Keith Phillip Rewell  
.....  
~~A-Justice-of-the-Peace.~~

Solicitor, Sydney

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW  
DIVISION

No. 16157 of 1980

JOHN EDWARD HERBERT

Plaintiff

PHILLIP WILLIAM  
CARNEY

Defendant

AFFIDAVIT

Deponent:  
Leon J. Kelk

Sworn:  
11th September,  
1981.

I, LEON JAMES KELK of 17 Renton Avenue, Moorebank in the State of New South Wales, Accountant, make oath and says as follows:-

1. I am the Accountant for Karlo Jehnic, Darrell Bruce Arnett, and John Edward Herbert. 10

2. On or about 19th March, 1980 the plaintiffs attended at my office at 17 Renton Avenue, Moorebank. Also present at that time was Mr. Dan Simpson, a Solicitor.

3. During the course of the meeting I was shown by Messrs. Jehnic, Arnett and Herbert a number of cheques each of which was drawn on the Commercial Bank of Australia Limited, Padstow and drawn on the account of Airfoil Registers Pty. Limited. 20

4. I have this day examined the following cheques drawn on the Commercial Bank of Australia Limited, Padstow on the account of Airfoil Registers Pty. Limited:- 30

(a) cheque number 536168 dated 15.8.1980 payee - Karlo Jehnic - \$71,700.00

- (b) cheque number 536172 dated 31.7.1980 payee -  
Karlo Jehnic - \$37,000.00
- (c) cheque number 536173 dated 31.7.1980  
payee - Darrell Arnett - \$28,000.00
- (d) cheque number 536170 dated 15.8.1980  
payee - Darrell Arnett - \$37,500.00
- (e) cheque number 536169 dated 15.8.1980  
payee - John Herbert - \$45,800.00

-2-

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- (f) cheque number 536171 dated 31.7.1980  
payee John Herbert - \$23,000.00

5.      I have this day examined those cheques and am satisfied that those cheques were included amongst those which I saw on or about 19th March, 1980.

SWORN at \_\_\_\_\_ )  
 )  
 this 11th day of )  
 )  
 September, 1981. ) .....  
 )  
 Before me: )  
 )  
 ..... )



IN THE SUPREME COURT )  
 ) No. 16157/90  
OF NEW SOUTH WALES ) No. 16158/80  
 ) No. 16159/80  
COMMON LAW DIVISION )

BEFORE MASTER ALLEN,

TUESDAY: 15TH SEPTEMBER, 1981

HERBERT v. CARNEY

JEHNIC v. CARNEY

ARNETT v. CARNEY

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MR. PORTER, Q.C., with MR. McDOUGALL appeared for the plaintiffs.

MR. ROLFE, Q.C., with MR. STOWE appeared for the defendant.

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(Mr. Porter opened to the Master.)

(Mr. McDougall read the affidavit of John Edward Herbert sworn on 1st May 1981).

(Mr. Rolfe read the affidavit of Wayne Stanley Morton sworn on 3rd September 1981).

MASTER: I note that the plaintiff objects to the evidence in para. 5 of the affidavit of Mr. Morton on the ground that it is irrelevant and an attempt to vary the provisions of the Deed of Purchase. I admit those paragraphs subject to relevance.

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(Mr. Rolfe read the affidavit of Phillip William Carney sworn on 3rd September 1981; Mr. Porter objected to the rest of the affidavit.)

MASTER: I reject paragraph 2 subsequent to the words, "that day". In respect of paragraph 8 I note that the whole of the paragraph is objected to after the first sentence. It is admitted subject to relevance.

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It is noted that paragraph 9 is objected to in respect of the part which is subsequent to the first paragraph. That part of it is admitted subject to relevance.

I note that paragraph 10 on the affidavit is objected to and I admit in evidence the whole of the paragraph but again, subject to relevance.

Paragraph 11 is objected to and also admitted subject to relevance.

Paragraph 13 is objected to by Mr. Porter and admitted subject to relevance.

Paragraph 14 is objected to by Mr. Porter and admitted subject to relevance.

Paragraph 15 is objected to and rejected.

Paragraph 16 is objected to and admitted subject to relevance.

Paragraph 18 is not read. Paragraph 19 is objected to and admitted subject to relevance. 10

Paragraph 21 is objected to and admitted subject to relevance.

(The affidavits of Mr. Jehnic and Mr. Arnett were both read and the same objections taken and the same rule applied).

(The affidavit of Mr. Morton in the matters of Mr. Jehnic and Mr. Arnett were read and the same objections taken to them as was taken to Mr. Morton's affidavit in the matter of Herbert and the same ruling again applied). 20

JOHN EDWARD HERBERT  
Sworn and examined:

MR. PORTER: Q. What is your full name? A. John Edward Herbert.

Q. What is your address? A. 15 McDougall Avenue, Baulkham Hills.

Q. You are the plaintiff in this matter? A. Yes.

Q. You have already sworn an affidavit in the matter? A. Yes I have. 30

CROSS-EXAMINATION:

MR. ROLFE: Q. Do you recall a meeting held in the office of Airfoil on 24th March 1980 when Mr. Jehnic, Mr. Arnett, Mr. Simpson, Mr. Morton and Mr. Carney were present and certain documents were handed over in relation to the sale of the shares? A. Yes.

Q. Prior to that meeting I think you had spoken to an accountant, Mr. Kelk, had you not? A. I had, yes.

Q. He was an accountant engaged by Mr. Jehnic and Mr. Arnett, was he not? A. He was. 40

Q. He was engaged by the three of you for the purpose of advising you in relation to the sale of the shares in Airfoil was he not? A. Yes.

Q. And he in fact initially prepared certain documents relating to the sale, did he not? A. I do not recall any documents.

Q. Do you recall having any discussion yourself with Mr. Kelk about the way in which the balance of the purchase money might be secured? A. No, I do not recall that. 10

Q. Do you recall having any conversations yourself with Mr. Kelk about the company Newbridge Industries giving a mortgage to secure the payment of the balance of purchase money? A. I do not recall that clearly.

Q. Do you recall it at all? A. I do not recall it.

Q. Do you know in fact that a mortgage was given by Newbridge Industries to you? A. I think that is true.

Q. I think you received a subpoena to produce a mortgage from Newbridge Industries did you not? A. Yes I did. 20

Q. Do you have that document with you now?  
A. (No answer).

MR. PORTER: That document is in court.

MR. ROLFE: Q. Do you recall receiving a subpoena to produce the mortgage? (No answer).

Q. Do you recall receiving a subpoena from anybody to produce documents? A. Yes.

Q. Was one of those documents a mortgage given by Newbridge Industries? A. Yes it was. 30

Q. That was a document you had in your possession was it? A. Yes.

Q. You had had it in your possession since 24th March 1980 I take it? A. Yes.

Q. You obtained it on the 24th March 1980 at this meeting when all the parties I referred to earlier were present, did you not? A. Yes.

Q. You were aware at this stage that the purpose of that document was to secure the repayment or the payment of the balance of the purchase money, were you not? A. Yes. 40

Q. Prior to the 24th March 1980 you were aware that you would be receiving a mortgage to secure the payments of the balance of the purchase money, were you not? A. Yes.

Q. That was a document to your knowledge which was going to be prepared by your solicitor, was it not?  
A. Yes, it was.

Q. Prior to the 24th March 1980 you were a director of Airfoil? A. Yes, I was. 10

Q. You were a director of Newbridge Industries were you not? A. To be truthful I do not really know whether Airfoil and Newbridge were combined to that extent so far as my direction was concerned.

Q. You know that you were a director of Airfoil?  
A. Yes.

Q. Is it your recollection that you were also a director of Newbridge Industries? A. Sir, I do not recall that I was actually a director of Newbridge Industries. 20

Q. You are aware are you not that sometime after the 24th March 1980 a caveat was put on the title of the property which Newbridge Industries had mortgaged to protect your interests as mortgagee. A. Yes, I believe that happened.

Q. And the purpose of that so far as you were concerned was to have as much protection as you could for the payment of the second and third instalments. That is so is it not? A. As a guarantee for payment. I believed this was the way it was supposed to be. 30

Q. And that was your belief prior to the 24th March 1980 (objected to and admitted subject to relevance).

Q. That was your belief prior to 24th March 1980, was it not? A. Not necessarily prior; it was my belief after it was done that that was the case.

Q. I thought you said a few minutes ago that you knew that a mortgage was going to be granted before the 24th March 1980? A. Yes.

Q. You knew it was going to be granted prior to the 24th March 1980 so that as from the 24th March 1980 you would have additional security or guarantee for the payment of the last two instalments, did you not?  
A. Yes. 40

Q. You received a cheque for some \$41,000 did you not? A. No.

Q. You did not? A. No.

Q. On the 24th March 1980 did you receive a cheque at all? A. To my recollection I received a salary cheque at that time.

Q. Did you ever receive a cheque in March 1980 for the first instalment of \$41,000? A. Yes, I did.

Q. When was that? A. One week prior - the 18th - approximately 18th March.

Q. You received the cheque on or about 18th March for \$41,000? A. Yes. 10

Q. That cheque bore the date of the 24th March did it not? A. I do not recall.

Q. I do not want to tax your recollection unduly; this is not a memory exercise (approaching). Would you just have a look at that document. That was the cheque you say you received on about 18th March was it not?  
A. Yes, I think that is the cheque.

Q. Is there any doubt about it? (No answer).

Q. That is the cheque for the first instalment is it not? A. That is the cheque. 20

Q. It is a cheque drawn on Airfoil Registers Pty. Ltd.? A. Yes.

Q. You were fully aware that the first instalment was going to be drawn on Airfoil Registers Pty. Ltd., were you not? A. Yes.

Q. You also received post-dated cheques did you not for the second and third instalments? A. Yes I did.

Q. And each of those was drawn on Airfoil Registers Pty. Ltd., was it not? A. Yes. 30

Q. You were fully aware that the post-dated cheques were to be drawn on Airfoil Registers Pty. Ltd. were you not? A. Yes, I was.

Q. That was something you were aware of prior to 24th March 1980 was it not? A. Yes.

Q. Because in fact you had arranged or assisted in collecting some money for Airfoil Registers to put this account in a better financial shape, had you not?

A. It was a regular function so far as I was concerned to collect money. It was something that was done not then or at any particular time. 40

Q. But certainly at this particular time namely February/March 1980 when there were discussions about you selling your shares to the companies to be controlled by Mr. Carney, special efforts were made to get moneys into the Airfoil account were there not? A. I truthfully cannot remember being over-active in that department at the time.

Q. Whether you were or not you were aware that the cheques you were to receive in payment for your shares were to be cheques drawn on the Airfoil Registers Pty. Ltd. account were you not? A. Yes. 10

Q. Now the cheque you have in front of you, you in fact negotiated - put through your bank account and got the money? A. Yes.

Q. Then the second instalment payable to you was some 23,000 dollars on the 31st July was it not? A. Yes.

Q. And that was a cheque drawn on Airfoil Registers Pty. Ltd.? A. Yes.

Q. You presented that to the bank for payment? A. Yes. 20

Q. It was not met on payment? A. No.

Q. But you attempted to obtain payment of that cheque did you not? A. Yes.

Q. And the final instalment was payable on 15th August 1980 in the sum of \$45,800, was it not? A. Yes.

Q. You had a cheque in your possession from Airfoil Registers for that amount? A. Yes.

Q. On the date it bore you presented it to the bank for payment? A. Yes. 30

Q. Because you wanted to be paid and that was the reason to present the second cheque to obtain payment? A. Yes.

Q. And that cheque also was not met on presentation was it? A. No, it was not.

Q. You were told the account had been closed were you not? A. On the issue of the second cheque?

Q. You were told the account had been closed? A. On the issue of the second cheque.

Q. On the issue or the presentation to the bank of the second cheque? A. On the presentation. 40

Q. On the presentation to the bank of the second cheque you were told that the account had been closed, correct? A. Yes.

Q. But then when the date of the third cheque came around you still went along with the cheque, seeking payment? A. Yes.

Q. You were told the same situation obtained, namely the account had been closed, correct? A. Yes.

Q. Were you aware Mr. Herbert that the factory in which Airfoil carried on its business was built on land owned by Newbridge Industries Pty. Ltd.? A. Yes. 10

MASTER: Q. You knew this before the 24th March did you? A. Yes.

MR. ROLFE: Q. Now on the 24th March you had requested the post-dated cheques had you not? A. No.

Q. Did you at any time request post-dated cheques?  
A. I am trying to recall exactly what happened. The amounts were agreed upon and the cheques were raised at that time and they were post-dated. I do not specifically recall asking for post-dated cheques because the dates were determined by Mr. Carney as to when he would be able to meet the commitment. 20

Q. Do you remember being present at a conversation when either Mr. Arnett or Mr. Jehnic said, "We insisted on having post-dated cheques drawn on Airfoil's account"? A. No.

Q. You have any recollection one way or the other?  
A. I do not recollect the conversation.

Q. You would not deny that it was said though. (Question disallowed). 30

Q. Do you deny that either in your presence Mr. Arnett or Mr. Jehnic said to Mr. Carney, "We insist on having post-dated cheques drawn on Airfoil's account"?  
A. I deny having heard that.

Q. In any event you got your post-dated cheques as we all now know? A. Yes.

Q. Do you recall having any conversation with either Mr. Arnett or Mr. Jehnic about the mortgage from Newbridge Industries? A. Yes. 40

Q. So was it with both of them that you had the conversation? A. Well probably both.

Q. Was this conversation to your recollection before the 24th March 1980? A. Probably.

Q. Because it must have been really, must it not?  
A. Well probably. I could not say definitely - so it must have been.

Q. You got the mortgage on the 24th March 1980 at that meeting that I asked you about at the very beginning? A. Yes.

Q. Did you not agree with me that you had had discussions with Mr. Arnett and/or Mr. Jehnic prior to the 24th March 1980 about the mortgage? A. Yes. 10

Q. Because the mortgage so far as you personally were concerned was an important part of the transaction, was it not? A. Yes.

Q. It was important? A. Yes.

Q. Without that additional security you may well not have gone ahead with this deal? A. No, we would not have gone ahead with it at all. The deed - it was some form of guarantee. 20

Q. And the deal was done - do you mean by that, that all the deal was done by the giving of the mortgage as some form of guarantee? A. No, the agreement had been made for us to sell our shares to Mr. Carney, or me to sell my shares to Mr. Carney, for an amount which was determined at a meeting. It was after that that we spoke to Mr. Kelk as I have said or Mr. Simpson with regard to guaranteeing the payment and that is it.

Q. And one form of guarantee which was obtained was the personal guarantee of Mr. Carney, correct? A. Yes. 30

Q. And the other form of guarantee which was obtained, was the mortgage? A. Yes.

Q. I think you said earlier, and correct me if I am wrong, that so far as you were concerned, that the mortgage was an important part of the deal? A. Yes.

(Witness retired)

(Short adjournment).

KARLO JEHNIC  
Sworn and examined:

MR. PORTER: Q. Is your full name Karlo Jehnic? A. Yes. 40

Q. Is your address 50 Victor Avenue, Picnic Point?

A. Yes.

J.E. Herbert, xx, ret'd.



Q. You have sworn an affidavit in relation to this matter? A. Yes.

CROSS-EXAMINATION:

MR. ROLFE: Q. As at the 24th March 1980 you were a director of Airfoil Registers Pty. Ltd. were you not?

A. I am not quite sure of that.

Q. You are not sure? A. Because I never signed anything to say I was a director.

Q. As of the 24th March 1980 you were a director of Newbridge Industries Pty. Ltd. were you not? A. I am not sure again because I never signed anything. 10

Q. You were aware were you not that the factory in which Airfoil Registers Pty. Ltd. carried on its business was built on land owned by Newbridge Industries Pty. Ltd. were you not; in March 1980? A. Yes, I think this is correct.

Q. In February and March 1980 you, Mr. Herbert and Mr. Arnett were negotiating with Mr. Carney to sell your shareholding in Airfoil to a company of which Mr. Carney was going to give you the name. That is so, is it not? A. Yes, he was going to get another company. 20

Q. I take it that the three of you had various discussions between yourselves as to how the sale should go through? A. Yes, we did discuss.

Q. And the three of you retained the services of a Mr. Kelk, an accountant, to help you, did you not?

A. I met Mr. Kelk through Mr. Arnett. He was a personal friend and he gave us a bit of advice.

Q. Was part of that advice that it would be advisable to have a mortgage over the land owned by Newbridge Industries? A. No, I do not think so. 30

Q. You do not think so? A. No.

Q. Do you recollect Mr. Kelk referring to a mortgage over any land at all. (No answer).

Q. To secure the purchase price? A. Yes, I think we did ask for some sort of security.

Q. You asked whom for some sort of security?

A. We said to Mr. Carney.

Q. You wanted some security? A. Yes, some sort of security. 40

Q. Am I correct in thinking that Mr. Arnett was the main spokesman for the three of you? A. Yes, he knew Mr. Kelk.

Q. Now do you remember attending a meeting on the 24th March 1980 in the offices of Airfoil at which you, Mr. Arnett, Mr. Herbert and your own solicitor Mr. Simpson, Mr. Carney and Mr. Morton were present?

A. Yes, that is correct.

Q. That was the day was it not when various documents were handed over in relation to the sale of the shares? 10

A. Yes.

Q. Also on that day you received a cheque did you not for your first instalment? A. No.

Q. Did you receive a cheque for your first instalment at all? A. On the 17th or 18th March that is when I had my three cheques. That is when I received it.

Q. You received the cheque on the 17th or 18th March? A. Yes, I received the cheque on the 17th or 18th March. 20

Q. Would you have a look at this document please. Is that the cheque you received for the first instalment?

A. I received three. That is one. I received three.

Q. Is that the cheque I am showing you that you received for the first instalment - and you will notice it is in the sum of \$68,000? A. Yes, that is correct.

Q. You were aware when you received that cheque that it was drawn on the account of Airfoil Registers Pty. Ltd. were you not? A. Yes.

Q. You knew when you received that cheque that the money was coming out of the Airfoil Registers to pay you in part for the shares you were selling, did you not? 30

A. Yes, that is correct. Mr. Carney, he asked that.

Q. But you knew what I had just suggested to you, did you not? A. Yes, he said he is buying the shares and he get an Airfoil cheque book and write the three cheques out for me.

Q. When you received that cheque you knew that the first instalment was being paid out of the bank account of Airfoil Registers Pty. Ltd. did you not? A. Yes, I assume so. 40

Q. You only had to look at the cheque? A. Yes.

- Q. You knew so, did you not? A. Yes, that is correct. I took it to the bank.
- Q. You subsequently banked that cheque for \$68,000?  
A. Yes.
- Q. And received the proceeds? A. Agreed.
- Q. You got the \$68,000? A. Yes, that is correct.
- Q. You were given two other cheques which were post-dated, were you not? A. Correct.
- Q. They were for the second and third instalments? 10  
A. Yes, that is right.
- Q. You I think went to the bank when the second instalment was due and took in the cheque to get payment of it, did you not? A. Yes.
- Q. And you were told the account was closed?  
A. The bank manager told me that.
- Q. Then, when the third instalment fell due you went along again and presented the cheque for the third instalment? A. Yes.
- Q. And the bank manager told you again that the account was closed? A. Yes, correct. Actually he said, 20  
"Go and see Mr. Carney. I am sure he will issue you with another cheque." That was his comment to me.
- Q. Whether he said that or not, the fact of the matter is you sought to obtain payment of the cheques for the second and third instalments, did you not?  
A. I am sorry, I did not.
- Q. You sought to cash the cheques for the second and third instalments when the cheques fell due? A. Yes.
- Q. To bank them? A. Yes, correct. 30
- Q. And each of those cheques was a cheque drawn on Airfoil Registers Pty. Ltd. was it not? A. Yes, correct.
- Q. Now do you remember on 24th March 1980 at the meeting about which I have asked you, receiving a mortgage over certain land owned by Newbridge Industries?  
A. Yes, correct.
- Q. And that was something you expected to get when the matter was finalised was it not? A. I am sorry.
- Q. It did not come as a surprise to you that you got 40

that mortgage on the 24th March 1980 did it? A. Yes.

Q. Because you had expected to get it, had you not?

A. Yes, correct.

Q. It was something you wanted in order to go ahead with the transaction, was it not? A. Yes, for the security of the shares.

Q. You wanted that mortgage to try and make as sure as possible that the second and third instalments would be made, did you not? A. Yes. 10

Q. And without that mortgage you would not have gone ahead with the deal? A. I do not know. I cannot say now what I would do at that moment.

Q. But at that time you required the mortgage to go ahead with the deal? A. Yes, that was the deal.

Q. You required the mortgage to go ahead with the deal? A. Yes, that was the deal at that time and we agreed to the deal.

Q. Without the mortgage at that time you would not have gone ahead with the deal? A. I just said I do not know what I would do at that time. 20

Q. You would have to think about it all over again?

A. I cannot answer that because I do not know what I would do at that time.

Q. The mortgage was fairly important to you at that time? A. Yes, to make the security on the shares.

Q. It was fairly important for that purpose was it not? A. Yes, I would say so.

Q. Now did you ever discuss with Mr. Arnett or Mr. Herbert post-dated cheques for the other two instalments? 30

A. No.

Q. Never discussed that at all? A. Never.

Q. So do you ever recall having a meeting with Mr. Carney in which one of you said, "We insist on having post-dated cheques drawn on Airfoil Register's account"?

A. I never heard that.

Q. Never heard that at all? A. No.

Q. It just came as a complete surprise to you when you got the post-dated cheques? A. No, Mr. Carney did mention when he wrote the cheque out, "You are aware I cannot give you the money now because I have not got 40

the money but I can give you one cheque and you can put it in the bank in a week's time, that is the first one and the other two will be post-dated and if you look on my cheque it has got down March and he crossed that out and he put down 15th August - he changed the date on it.

Q. You were aware prior to the 24th March 1980 that you were not getting the full amount on that date were you not? A. Yes.

Q. You were aware prior to 24th March 1980 that you were getting a cheque which was dated 24th March 1980? 10  
A. Yes.

Q. And two other cheques dated in July and August?  
A. Yes, correct.

Q. You knew that those cheques would be drawn on the account of Airfoil Registers Pty. Ltd. did you not?  
A. I did not know where he was getting the money but when we agreed on the money he got the cheque book and drew all the cheques in half a minute. We have no cheques in our hands - it was that quick - so I do not know but he did say, "Do not put in the bank." Then when I left on the 24th Mr. Carney said, "Not to bank the cheque until Wednesday or Thursday but I will have the money and put it in the bank." 20

Q. But you were aware prior to those cheques being written that they were going to be drawn on the bank account of Airfoil Registers? A. I did not know I'm sorry.

Q. Did you know before the cheques were written out by Mr. Carney that the cheques would be written out on the bank account of Airfoil Registers? A. No, I did not know that. 30

Q. Did you discuss with either Mr. Arnett or Mr. Herbert on whose account the cheques would be written out?  
A. No.

Q. You were not interested? A. No, we never discussed that.

Q. You were not interested? A. Yes, I was interested but we never discussed that because we agreed to a figure and when we agreed to a figure Mr. Carney he just grabbed the cheque book and wrote all the cheques out. 40

Q. What did you do with the cheques after you got them? A. I took them home.

Q. Did you ever take them to Mr. Kelk's office?  
A. Yes, next day.

Q. Why did you do that? A. He gave us a bit of information and advice as to what ought to be done.

Q. What advice did you ask Mr. Kelk for on the following day? A. Mr. Arnett talked to him.

Q. What did Mr. Arnett ask him about? A. I do not know. He said, "I talk to him and I will get a solicitor," and I have the cheques in my house for a week or so.

Q. Did you take the cheques to Mr. Kelk's office? 10  
A. Yes, next day.

Q. Did you show them to Mr. Kelk? A. Yes.

Q. Why did you take the cheques to Mr. Kelk's office?  
A. To show him what we agreed at.

Q. The cheques really showed an amount of money?  
A. Sorry.

Q. You said you took the cheques to show what we had agreed at? A. Yes.

Q. You showed the cheques to Mr. Kelk did you? 20  
A. Yes, he saw the cheques.

Q. On about 18th or 19th March? A. Yes, on the second day we got the cheques.

Q. Who suggested to you that you took the cheques to Mr. Kelk's office on that day? A. Nobody. I just bring them with me to work each day and we went - with Mr. Arnett to Mr. Kelk and we have a bit of a discussion with him.

Q. What did you have a discussion with Mr. Kelk about? A. About, if we get the cheques what is the correct way to do it - to secure - the security or something. 30

Q. To get some sort of security? A. Yes, and that is when some sort of solicitor came in.

Q. What sort of security did Mr. Kelk suggest you get? A. He did not suggest any because he said, "You have to leave that." He said, "I would not know. I could not get involved in anything like that".

Q. He could not get involved in anything like that?  
A. With any legal thing.

Q. Why did you show him the cheques? A. I had no reason not to. 40

Q. What did you do with the three cheques - show them to him? A. Yes, and we agreed with the instalment payment.

Q. But he was not going to prepare any document as you understood it? A. Yes.

Q. That was for the solicitor to do? A. Yes.

Q. And in fact, you then went to Mr. Simpson your solicitor did you not? A. Mr. Kelk got in touch with him.

10

Q. And ultimately you and the other two, namely, Mr. Herbert and Mr. Arnett went to see Mr. Simpson?  
A. He came to see us.

Q. Did you show the cheque to Mr. Simpson? A. I am not sure. I think he said, "We got the cheques".

Q. Did you show the cheques to Mr. Simpson? A. I am not sure. I cannot answer.

Q. And Mr. Simpson prepared some document for you did he not? A. Yes, that is correct.

Q. And Mr. Simpson went along to the meeting on the 24th March 1980? A. Yes, he came over.

20

Q. He had various documents with him? A. Yes, correct.

Q. Including the mortgages? A. Yes.

Q. I am speaking now of the meeting of the 24th March. You understood that did you? A. Yes, Mr. Simpson come on the 24th March.

Q. He had the mortgages with him on the 24th March?  
A. Yes.

Q. And you knew full well prior to the meeting that one of the documents which would be produced at that meeting, would be the mortgage in your favour; did you not? A. Yes.

30

Q. As part of the security for this particular transaction? A. Yes, for the shares for the other two payments.

Q. And that was why you wanted the mortgage? A. Yes, we did ask for security.

Q. You were aware that the mortgage was over land owned by Newbridge Industries were you not? A. Newbridge Industries?

40

Q. You were aware of that were you not? A. Yes, I think I did.

Q. You were aware that the mortgage was over land at 131 to 133 Newbridge Road, Moorebank were you not?

A. To my knowledge Newbridge Industries was in premises of Airfoil Registers, not the land, but the premises called Airfoil Registers.

Q. Was it your knowledge that Newbridge Industries owned the land on which Airfoils factory was built? 10

A. Yes.

Q. And that was land over which the mortgage was being taken, was it not? A. Yes, correct.

Q. That was something of which you were aware at least prior to 24th March 1980? A. What Mr. Carney used to tell me.

Q. That was something of which you were aware prior to 24th March 1980 was it not? A. I was thinking that, but that was not the case.

Q. That was something of which you were aware? 20

A. I was believing that but that was not the case.

Q. What was the case? A. Because Mr. Carney took half of the property and Airfoil had the other half and I was not aware of that until the week we left because I found that out.

Q. You were aware that Newbridge Industries owned the land? A. Yes.

Q. And that the premises of Airfoil were built on that land? A. That half Newbridge Industries was Mr. Carney and the other half was Airfoil - Airfoil owned half - I found that out. 30

Q. Of the land or the building? A. Of where Newbridge was working.

Q. All I am asking you is this. You were aware prior to 24th March 1980 that Newbridge Industries owned the land at 131-133 Newbridge Road, Moorebank? A. Yes.

Q. You were aware prior to the 24th March 1980 that erected on that land was the factory on which Airfoil carried on its business? A. Yes, of Newbridge Industries. 40

(Witness retired).



DARRELL BRUCE ARNETT  
Sworn and examined:

MR. PORTER: Q. Is your full name Darrell Bruce Arnett?  
A. Yes.

Q. You live at 5 Oakley Avenue, Padstow Heights?  
A. Yes.

Q. You are the plaintiff in this matter? A. Yes.

Q. You have sworn an affidavit in relation to this matter? A. Yes.

CROSS-EXAMINATION:

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MR. ROLFE: Q. You know an accountant called Mr. Kelk do you not? A. Yes.

Q. You have known him for some time? A. Yes. I met him at Nestles when I used to work there.

Q. Was that some time ago? A. Yes.

Q. About when? A. About 1970.

Q. When was it that discussions first began about the purchase either by Mr. Carney or by a company to be formed by him of the purchases held by yourself, Mr. Herbert and Mr. Jehnic? A. Around the start of March. 20

Q. About the start of March? A. Yes.

Q. I take it that you consulted Mr. Kelk about this matter? A. Yes.

Q. Was that about the start of March? A. Yes.

Q. So that from about the beginning of March you were receiving advice from Mr. Kelk concerning the sale of the shares? A. Yes, to a degree, yes.

Q. I suppose being a friend of Mr. Kelk's you were the spokesman for the three of you in any discussions with him? A. I was an acquaintance of Mr. Kelk's. I had not seen him for ten years. 30

Q. I suppose being an acquaintance you were basically the spokesman for the three of you? A. Yes.

Q. From March 1980 you were a director were you not of Airfoil Registers Pty. Ltd? A. Yes, I believe so.

Q. You believe so? A. I have never sighted any documents but I believe I was.

Q. You acted as a director? A. We never had any meetings. I acted as a worker.

Q. What about Newbridge Industries Pty. Ltd. Were you a director of that company in March 1980? A. I do not know.

Q. You were aware were you not that Newbridge Industries owned the land at 131-133 Newbridge Road, Moorebank, were you not? A. Mr. Carney told me that was the case, yes.

Q. That was the land upon which there was erected the factory premises in which Airfoil carried on its business, was it not? A. No, I could not say that was correct. 10

Q. You could not say that was correct? A. No.

Q. Do you know whether it was correct or not? A. The situation as I understand it was that the factory was purchased from Heffernan and Hansen as land for a factory. It was before I joined Airfoil but I understand there was a saving of some sort of duty or tax by purchasing the company called Newbridge Industries and in that way buying the factory. 20

Q. What was the address of Airfoil? A. 131-133 Newbridge Road, Moorebank.

Q. And that was land owned by Newbridge Industries as you understood it? A. Yes.

Q. And on it was erected some sort of a factory?  
A. Yes.

Q. In which Airfoil Registers carried on its business?  
A. Yes.

Q. It was at 131 to 133 Newbridge Road was it not?  
A. Yes, that is correct. 30

Q. Did you have any discussion with Mr. Kelk about taking a mortgage over that land to secure the payment of the instalments of the purchase money? A. Yes and no.

Q. I find that a little difficult but perhaps you can define it.

MASTER: Q. What is the answer? A. I suggested to Mr. Kelk, "Could I have some sort of security?" and Mr. Kelk said, "Yes". After talking with Mr. Carney he suggested that he had no personal security apart from his interest in Airfoil. I suggested to him that possibly a mortgage over that property might act as security and I suggested to Mr. Kelk subsequent to that and that was what was discussed. 40

MR. ROLFE: Q. So it was your suggestion to Mr. Carney that a mortgage should be given over the land? A. Yes, if there was no other security.

Q. But the suggestion came from you? A. Yes, it did.

Q. I am not suggesting there was anything wrong with it. I want to get it straight? A. Yes.

MASTER: Q. What did you put to Mr. Carney - a mortgage over the land or a mortgage over the shares in the company? A. I thought it was a mortgage over the land. 10

MR. ROLFE: Q. Do you remember saying words to Mr. Carney to this effect, "We will take a second mortgage over the factory"? A. To that effect, yes.

Q. And by the factory you meant the land and the building or the whole shooting match, did you not?  
A. I meant the separate block of land and the factory, not the adjacent land.

Q. It was a second mortgage you were speaking about because you knew there was an existing first mortgage? A. Yes. 20

Q. Now prior to the 24th March 1980 you were aware that efforts were made to get in as much money owing to Airfoil Registers as possible, were you not? A. No, not any more than normal circumstances - just like every month - debtors money.

Q. Just debtors money during March 1980? A. I do not know - it was usually a phone call to different debtors.

Q. In any event, during March 1980 a considerable amount of money was got in, was it not? A. I do not know. The money was going to be organised by Mr. Carney in a different fashion. 30

Q. You received three cheques from Mr. Carney in respect of the payment of purchase money for the shares did you not? A. Yes.

Q. And that was received I suggest on the 24th March 1980? A. I took them home on the Monday or Tuesday night previous to that.

Q. Immediately before the 24th? A. Yes, that would have been the 17th or 18th I believe. 40

Q. So you say three cheques do you? A. Yes.

Q. On either the 17th or the 18th of March but not the 24th? A. Not the 24th - no - definitely not.

Q. Those cheques - were those all post-dated that you received, were they? A. Yes.

Q. They were all drawn on Airfoil Registers Pty. Ltd?  
A. Yes.

Q. So I suppose when you got the cheques you realised that Airfoil Registers Pty. Ltd. was supplying funds to buy the shares? A. No, not at all. 10

Q. When you got the cheques they were drawn on Airfoil Register's account were they not? A. Yes.

Q. I suppose you appreciated that when the cheques were banked the moneys would come out of Airfoil's account? A. Out of Mr. Carney's loan account as I understood it?

Q. Out of Mr. Carney's loan account as you understood it? A. Yes, that is correct.

Q. You had some discussions with him about that did you? A. No. 20

Q. The loan account was never mentioned by Mr. Carney to you in relation to those transactions? A. I do not recall it being mentioned.

Q. So the situation was that you received three cheques drawn on the account of Airfoil Registers, did you not? A. Yes.

Q. You had no discussion with Mr. Carney about the loan account? A. Not that I remember.

Q. Or the debiting of any loan account of Mr. Carney's? A. The only discussion was on the Monday or Tuesday whereby Mr. Carney in the conversation indicated he did not have security and Mr. Carney made comments to the effect that he should organise the money, but that is solid in my mind. 30

Q. But what is not solid is that each of those three cheques was drawn on Airfoil Registers? A. No, not at all.

Q. In due course you cashed the first of those cheques? A. Yes.

Q. And that was met on presentation? A. Yes. 40

Q. You then went to the bank when the second cheque fell due and that was not met? A. Yes.

Q. And the manager told you that the account had been closed? A. Yes.

Q. When the third cheque fell due you went to the bank again and presented the cheque? A. Yes.

Q. You were once again told by the manager that the account had been closed? A. Yes.

Q. So you sought to negotiate the two subsequent cheques - the second and third instalment cheques?

A. I sought to cash them. 10

Q. I take it so far as you were concerned the mortgage was a fairly important part of the transaction?

A. As the only available security, yes.

Q. And without that mortgage you would not have gone ahead? A. I possibly would have but at that stage there had been no discussion about the personal guarantees and if a personal guarantee had been available to us when the mortgage was available to us I might well have.

Q. Without the mortgage? A. The mortgage and the Deed of Sale were delivered to us on Friday the 21st. Mr. Carney took them home over the weekend because he wanted to go over them with Mr. Morton. Our solicitor could not be available on the 21st which was the day we were going to settle and leave the company and we arranged with him that he would be available on the Monday. On the Monday he brought along another document which was the personal guarantee and that is how the document arrived then and with Mr. Carney. 20

Q. So it would be quite incorrect to say that Mr. Simpson brought the mortgage along to the meeting of the 24th March would it? A. He did not. 30

Q. He did not? A. No, he brought it on the Friday. It could have been - I'm not sure, but it was delivered on the Friday.

Q. I take it that you discussed on Friday the 21st with Mr. Herbert and Mr. Jehnic the fact that the mortgage and the sale agreement had been delivered?

A. And with Mr. Carney.

Q. But you certainly discussed it with Mr. Jehnic did you not? A. Yes, I think I would have, I'm not sure. I'm not sure, but I probably would have but I cannot say I absolutely did, but I am sure I would have, the circumstances being what they were. 40

Q. You see, the sale agreement is dated 21st March 1980 is it not? (No answer).

Q. Is that your recollection? A. Yes, my recollection is that it is.

Q. And it was backdated was it not? A. Not to my recollection.

Q. Have you ever told anyone it was backdated?  
A. The sale agreement?

Q. Yes. A. No, it is not to my recollection that it was. 10

Q. Would it be in accord with your recollection that although expressed to be made on the 25th March 1980, the relevant deed, and I am now speaking about the sale deed, was signed, sealed and delivered on 24th March 1980? A. Yes, that is what happened.

Q. So it was backdated? A. No, on the 21st it was not - on the 24th, yes.

Q. It was signed, sealed and delivered on 24th March 1980? A. No, it was not delivered. I had it and it was signed on the 24th and it was dated the 21st. 20

Q. It was backdated? A. If that is what you mean. (Objected to).

MASTER: Q. It showed the date of the 24th? A. Yes, I got it on the 24th.

Q. When was it in fact signed? A. On Monday the 24th.

Q. It was filled in on the Friday? A. We had intended to settle that day.

Q. It was handed over on Friday and dated that day and handed over on the Monday? A. It was signed on the Monday. 30

Q. Signed on the Monday? A. Yes.

Q. So the date 21st was filled in on the Friday?  
A. Yes.

Q. But on the Monday it was signed and handed over?  
A. Yes.

MR. ROLFE: Q. Handed over to whom? A. Pardon.

Q. Handed over to whom? A. On the Monday that document?

Q. Yes. A. Mr. Carney brought it to the meeting.

Q. And he handed it over, is that what you say?

A. Yes, he had it for the weekend.

Q. Do you remember at the meeting on the 24th March 1980 either you or Mr. Herbert or Mr. Jehnic saying to Mr. Carney, words to this effect, "We insist on having post-dated cheques drawn on Airfoil's account". A. The cheques were drawn. I never said that. The cheques were already drawn a week earlier and that was never said in my presence.

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Q. Not by anybody? A. No, not by anybody. If I may, in discussing the amount to be paid Mr. Carney went to the gentleman's and came back and said, "Agreed to the figures for the shares". He then immediately grabbed the cheque book and wrote out three cheques and subsequently - it was on the 17th or the 18th - one of those evenings.

Q. Was there any discussion about them being post-dated? A. No.

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Q. When you got the cheques did you not say, "what is all this. These cheques are to be paid in July and August?" A. I thought it was fine.

Q. You thought it was fine? A. Yes, we both agreed.

Q. Do you remember seeing a copy of the sale deed or agreement with the date written in rather than typed in? A. No, I may have, but I do not remember.

(Witness retired.)

PHILLIP WILLIAM CARNEY  
Sworn and examined:

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MR. ROLFE: Q. I think your full name is Phillip William Carney? A. Yes.

Q. Do you reside at 3 Turon Avenue, Kingsgrove?

A. Yes.

Q. You swore an affidavit in relation to these proceedings? A. Yes.

CROSS-EXAMINATION:

MR. PORTER: Q. Airfoil Registers Pty. Ltd. had 111 shares issued before all this happened, did it not?

A. 111 - there were 100 originally then I issued three - which is exactly - that is correct.

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Q. What all this was about was that you held 93 shares; Jehnic held eight and the other two plaintiffs held five shares each? A. Yes, correct.

Q. You wanted to buy the 18 shares other than your 93? A. Yes, correct.

Q. And the company was quite an extensive company with quite a lot of assets was it not? A. Yes.

Q. In fact at the relevant time, that is in March 1980, the net assets were worth over \$2 million? 10  
A. Yes, correct.

Q. Even though there was only 111 shares? A. Yes, correct.

Q. And they were \$1 shares? A. Yes, correct.

Q. So I take it quite a deal of loan money had gone into the company? A. No, we had generated over the previous years quite substantial profits and the profits of the company created the generation and the growth in the company, and the strength of the company was in assets of the company. 20

Q. In order to avoid Division 7 tax you had to distribute? A. Yes.

Q. And the way you distributed was crediting various directors in their loan account with a dividend? A. Yes.

Q. You had substantial credit in your loan account?  
A. Yes.

Q. On the 24th of March 1980, how much were you owed by the company? A. I would not know exactly.

Q. But it was well over \$150,000 was it not? A. We had not declared a dividend. No, it was not. 30

Q. I am suggesting to you it was well over \$150,000.  
A. No, it was not.

Q. Was it \$150,000? A. No, it was less than that.

Q. Did you check? A. No.

Q. You are an accountant are you not? A. Yes.

Q. A chartered accountant? A. No.

Q. A public accountant? A. Yes.

Q. Registered as such? A. Yes.



Q. You are perfectly aware of the provisions of Section 67 of the Companies' Act? A. Yes.

Q. So, as at the time you drew the cheques for the purchase moneys, that is the first lot of cheques, totalled \$159,000? A. Yes.

Q. That is what they did total, is it not? A. Yes.

Q. As at the time you drew the cheques dated 24th March, totalled \$150,000, you knew that the only way you could do that lawfully was if the company owed you the moneys on loan account? A. I did not know that at the time.

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Q. You know it now? A. Yes.

Q. You had a pretty fair idea at the time, did you not? A. No.

Q. Did you make any check to see how much you were owed on loan account as at that time? A. No.

Q. Have you ever made the check since? A. No.

Q. As you sit in the witness box now you do not know whether when you drew those cheques you were owed \$150,000 or more than that or less than that? A. No.

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Q. You do not know? A. No, I do not know.

Q. By the way, when you entered into this agreement to buy these shares? A. Yes.

Q. You did intend to pay the money? A. Yes, my word.

Q. You did in fact get the shares on the 24th March?  
A. Yes, I did.

Q. You have used them? A. Yes.

Q. In point of fact soon after you acquired the totality of the shares? A. Yes.

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Q. In Airfoil Registers, you disposed of a company did you not? A. Yes.

Q. So we can all know precisely what I mean by disposal of the company, will you tell the court? A. I sold all the shares in my company to a buyer, to a purchaser.

Q. How long was that after the 24th March? A. I think the sale agreement was completed - the time would be three or four days before about the 26th or the 27th June.

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Q. That was done before the end of the financial year? A. Yes, it was.

Q. It had very substantial tax advantages for you, did it not? A. Yes it did.

Q. Subsequently you wrote to the three purchasers saying that a new company had been formed and called Airfoil Registers Sales Pty. Ltd. A. Yes, correct.

Q. And that if they returned the cheques drawn on Airfoil Registers, those two cheques, the outstanding cheques, you would give them new cheques? A. Yes, correct. 10

Q. Did they return them? A. No.

Q. Would you be prepared to give them those cheques now? A. No.

MASTER: Q. Why not? A. We did a deal and I think the word deal has been used many times by my ex-partners. The deal was I would purchase the shares at a certain price which we agreed upon and then I would pay them a certain amount of money. As they were aware I was to be the liquidator of the company because it was growing and was under pressure and I agreed to pay them \$150,000 immediately and the balance in two payments. On doing the deal there were many occasions when we drank together a lot. We were good friends and we discussed the fact that the right thing would be done. The right thing was this that our industry specialised and I assumed these people would not go into opposition against me. We - I was asked by my accountant, Mr. Morton, to please draw up a trade agreement and I said, "It is not necessary to do that; there is no problem. The right thing will be done." I subsequently found out in July that the right thing was not going to be done and these particular people, without checking in, had registered a company in March, even prior to the signing of the agreement and the completion of the agreement and had full intention of going into competition with me, and I will compliment them - they have cost me \$1 million over the past twelve months. They have done a good job - and that is the reason why I could not pay them. 20 30 40

MR. PORTER: Q. When did you discover that they were going to go into competition with you? A. It was mid-July or August.

Q. Because you wrote to them on 25th July asking them to return the cheques so that their fresh cheques could be issued as soon as possible? A. Yes, that is quite probable.

Q. Have a look at these letters will you. That is the date you wrote to them? A. Yes, 25th July. That is correct.

(Letter headed on Airfoil Register Sales Pty. Ltd. to each of the plaintiffs dated 25th July 1981 tendered and marked Exhibit A without objection).

Q. You signed each of those letters? A. I do not know.

Q. They were signed on your behalf? A. Yes. 10

Q. You knew about the letters? A. Yes.

Q. They were in substance your letters? A. Yes, definitely.

Q. Did you know about the plaintiffs going into competition with you before or after those letters?

A. In the industry, it is a small industry.

Q. Did you know about the plaintiffs going into competition with you before or after those letters?

A. After the letters for sure.

Q. A moment ago you said "For sure". A. Before that date I would not have known for sure. 20

Q. Did you ever send any other letter to the plaintiffs? A. Not to my knowledge.

Q. You have never subsequently let the plaintiffs know the reason for not paying them? (No answer).

Q. You have never subsequently let the plaintiffs know the reason for not paying them until today? A. Yes, I have. I have had personal contacts with one or two of the directors and I have indicated to them that I felt the wrong thing was done and therefore the money was not fairly due to be paid. 30

Q. The deal was this that they told you or you told them that you wanted to buy their shares; who told who?

A. What happened was ---

Q. Who told whom? Did they tell you they wanted to sell or did you tell them you wanted to buy? A. I told them I wanted to buy.

Q. The second part of the deal is, would you agree with me, you had a valuation made to see what the shares were worth. A. Yes, we all got involved. 40

Q. And a valuation was made? A. Yes.

Q. You had agreed on the price of the shares? A. Yes.

Q. Making adjustments for loan accounts? A. Yes.

Q. I think they made them verbally? A. Yes.

Q. You then all agreed as to how much each was to receive for his shares? A. Yes.

Q. And would you agree with me that you said that having reached agreement on the price, I can't pay you immediately? A. Yes.

MR. PORTER: Q. You then said, "These are the dates I will pay you". A. Yes, correct. 10

Q. And they agreed with that? A. Yes.

Q. Then subsequently there was a discussion as to the security for those payments - for the 2nd and 3rd payments? A. The deal would not have gone ahead at that point in time as the discussion between Mr. Arnett, Mr. Jehnic and Mr. Herbert with my accountant, Mr. Morton. Mr. Arnett said, "We would not proceed on the deal unless we get sufficient security".

Q. They wanted security? A. Yes. 20

Q. That is your version? A. Yes, fair enough.

Q. But the first thing was that you wanted to buy and the second thing was the agreement as to price and the third thing was agreement as to time of payment?  
A. Yes.

Q. You all agreed on that? A. Yes.

Q. And the fourth thing was security for the outstanding moneys? A. In what form and the completion of it, yes. We discussed security.

(Luncheon adjournment) 30

ON RESUMPTION:

MR. PORTER: That completes my examination.

MASTER: Q. Mr. Carney, you told Mr. Porter before lunch that to avoid division 7 tax, moneys were credited to the directors in their loan accounts. That was correct, was it? A. I believe that no dividends were - any profits that we made were then transferred into our loan account. They were not paid out in cash. That is correct.

Q. Were the plaintiffs and yourself paid any wages?  
A. Oh yes on a monthly basis.

Q. These were not debited to the loan accounts but paid direct? A. Yes.

Q. The payments which were made into the loan accounts were they made at any particular time? A. Payments into the loan account?

Q. Yes. A. I think that Mr. Morton did our final year accounts. We were throwing up a working profit for the year which would then have been allocated to the directors and we had to pay tax on that profit. We did not avoid it by division 7. We had to pay tax on the profits that we actually declared to the Taxation Department, per year. 10

Q. So the plaintiffs would have been well aware of the existence of these loan accounts? A. Yes.

Q. Would they not have been well aware you would have had a substantial credit in your account in view of the success of the company? A. Has Mr. Porter mentioned a substantial credit in my loan account? 20

Q. Just answer my question. Would they not have been well aware that you would have had a substantial credit in your loan account in view of the profitability of the company and the practice of putting moneys into the loan account instead of paying them? A. I do not think they would have really. I do not think so.

Q. For how long had this practice been going on?  
A. What?

Q. The practice of paying moneys to the credit of the directors in their loan account rather than by dividends? A. Since incorporation. 30

Q. How long had the company existed? A. Since September 1976.

Q. How long before this agreement was entered into in March 1980 had these three plaintiffs been with the company? A. Mr. Jehnic and Mr. Herbert from its inception. Mr. Arnett for a period, I would say, fifteen months, I might be a couple of months out either way.

Q. During the period they were with the company they would have been aware after the first occasion in which the moneys that were put into their loan accounts of the practice would they not - of not paying a dividend? A. They were aware that they were not receiving a cheque for dividend and it was a book entry. I am sure 40

they would have been aware. I assume they would have been aware that they were being credited with those loan accounts for the year.

Q. But bearing in mind that you owned 93 shares out of 111? A. Yes.

Q. So you were getting the lion's share. Surely they were aware, were they not, that you were being equally treated by the moneys being put into the loan account rather than you receiving cash? A. Yes, most definitely. I did not take any moneys out of the company. 10

Q. They knew that, did they not? A. Yes.

Q. Surely in March 1980 they would have been aware that you had substantial moneys to your credit in the loan account? A. Well actually at March 1980 it would have been \$150,000.

Q. I did not ask you the particular amount, substantial moneys? A. Yes.

Q. They would have known that since the inception of the company that instead of dividends you were receiving credits to your loan account with the company? A. Yes, fair enough. 20

Q. And it had been a very successful company? A. Yes.

Q. And they knew that? A. Yes.

FURTHER EXAMINATION:

MR. ROLFE: Q. Mr. Carney, did Ilerain have a loan account with the company Airfoil? A. No.

Q. You were asked several questions about substantial amounts just now; what figures did you have in mind when you were answering those questions? A. The company by that time was a very successful company. It only showed excessive or very large profits in the year basically of the purchase and the sale so therefore the balance of my loan account as per the books in March, I do not think in actual dollars would be substantial because at that point in time we had not made excessive profits or shown excessive profits in the previous 1976, 1977 and 1978 years. It was only in that current year that we really made a lot of money and obviously at the end of the financial year is when you then transfer the profit to the respective loan accounts and not in March or February. It is done once a year. So the actual account itself would not have been substantial I do not think. I am not sure though. 30 40

(Witness retired.)

(Counsel addressed.)

(For the Master's judgment see separate transcript).

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COMMON LAW DIVISION

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No. 16157 of 1980

BEFORE MASTER ALLEN

23 October, 1981

HERBERT v. CARNEY

JUDGMENT

MASTER: This case concerns share transactions in a company Airfoil Registers Pty. Limited (which, for convenience, I refer to as Airfoil). At the relevant time the issued share capital was 111 one dollar shares. There were only four shareholders. The principal shareholder was the defendant. He owned 93 of the shares. The other three shareholders were the plaintiff, who owned five shares a Mr. Arnett, who also owned five shares, and Mr. Jehnic who owned the remaining eight shares. 10

The company had been highly successful. In March, 1980 its net assets were worth over two million dollars - notwithstanding that it had been trading for less than four years. Its place of business was a factory owned by another company known as "Newbridge Industries Pty. Limited" (which I refer hereafter as Newbridge). Newbridge was a subsidiary (within the meaning of the Companies Act, 1961) of Airfoil. 20

There is considerable common ground between the parties as to what happened in the share transaction with which this case is concerned. The defendant



indicated their willingness to sell. The shareholders co-operated in having valuations done to establish the value of the shares. The parties arrived at a mutually acceptable price. There remained, however, further matters to be negotiated before any contract for sale arose. It was accepted that the defendant would not be able to make an immediate cash payment for the whole of the purchase price of the shares. Something would have to be worked out as to that. Further, at a later stage in negotiations, the defendant foreshadowed that it was probable that he would be making the purchase "through a company".

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It is common ground, also, that on 24 March, 1980 a formal contract for the purchase by the plaintiff of the defendants' shares was entered into at the offices of Airfoil and that at the same meeting a mortgage and guarantee were given as required by the formal contract. This meeting at the offices of Airfoil lacked the somewhat informal character of the previous discussions between the defendant and the other shareholders. It was a formal meeting. Those who attended were, or included, the defendant, each of the other shareholders and the solicitor for the other shareholders. The documents had been prepared by that solicitor.

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I turn immediately to the documents themselves. I am concerned, in this case, with those directly relating to the plaintiff. It is common ground, however, that

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the documentation in respect of the other shareholders was in the same form differing only as to the names of the parties, the number of shares and the amount of the consideration. The transactions concerning these other two shareholders were dealt with contemporaneously with that between the plaintiff and the defendant. The first document is the deed of sale. It is between the plaintiff then a company known as Ilerain Pty. Limited (here- 10 after called Ilerain). This is the company which the defendant had nominated to be the purchaser of the shares. The deed recites the plaintiff's ownership of five shares in Airfoil and his agreement to sell them to Ilerain for \$109,800.00. I set out the whole of the operative part of the deed:

1. The Purchaser shall pay to the Vendor the sum of One hundred and nine thousand eight hundred dollars (\$109,800.00) such amount to be made by cash or bank cheque as follows: 20

- a) As to the sum of \$41,000.00 such sum to be paid on 24th March, 1980.
- b) As to the sum of \$23,000.00 such sum to be paid on 31st July, 1980.
- c) As to the sum of \$45,800.00 such sum to be paid on 15th August, 1980.

2. Upon receipt of the payment of the said \$41,000.00 the Vendor shall execute a Transfer of the said shares in favour of the Purchaser in

appropriate form and shall hand such Transfer to the Purchaser.

3. Should any payment due by the Purchaser to the Vendor under Clause (1) hereunder be in arrears exceeding fourteen (14) days from the due date then the Vendor shall be at liberty to immediately commence proceedings to recover the amount due as a liquidated sum.

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The second document is a deed of guarantee. By that deed the defendant guaranteed payment of the moneys which had become due to the plaintiff under the deed of sale.

The third document is a mortgage by Newbridge of the factory premises as security for payment of the price instalments of the purchase price is provided by the deed of sale.

The plaintiff was paid the first of the instalments of purchase price. The manner of payment occasions some difficulty which I shall consider later. But neither of the remaining two instalments (totalling \$68,800.00) has been paid. Accordingly he sues the defendant, in this court, under the deed guarantee claiming \$68,800.00 (together with interest pursuant to S.94 of the Supreme Court Act, 1970). The motion before me is for summary judgment.

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The substance of the defence is that the share transaction was illegal as it infringed section 67 of

the Companies Act. That section, so far as relevant, provides:

"... no company shall, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, give any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary in its holding company or in any way purchase, deal in or lend money on its own shares..."

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The case for the defendant which it would seek to advance at the trial, if summary judgment is denied, is that section was infringed in two respects. The first is that the mortgage given by Newbridge constituted the provision of security by that company "for the purpose of or in connection with" the purchase of the plaintiff's shares in Airfoil of which company Newbridge was a subsidiary. The second is that Airfoil itself gave "financial assistance for the purpose of or in connection with" the purchase in that it provided cheques in favour of the plaintiff for the purchase price. The deed of sale provided for payment "by cash or bank cheque" of the purchase price by three instalments the first of which was to be paid on the day of settlement. In fact what the plaintiff received was three cheques drawn by Airfoil. All these cheques were received at the time of settlement or, on one version of the facts, a few days before settlement. Those relating to the second and third instalments were postdated.

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It is convenient to deal first with the claim of

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illegality arising from the giving by Newbridge of the mortgage. For the purposes of this motion for summary judgment counsel for the plaintiff conceded that it is reasonably arguable that the giving of that mortgage was prohibited by section 67 and that not only did both the plaintiff and the defendant contemplate that such a mortgage would be given but, also, it was part of the totality of the agreement between them as to the selling 10  
by the plaintiff to the defendant of his shares. For the purposes of the motion for summary judgment he rested the plaintiff's case, in respect of illegality in relation of the giving of the mortgage, on a single proposition. That proposition is that the only relevant effect of section 67 was that the unlawful giving by Newbridge of the mortgage was void. The plaintiff, therefore, has lost the benefit which he had been promised of the security over the factory. But that is all he has lost. The sale of the shares was not itself illegal; 20  
nor was the promise by Ilerain to pay the purchase price; nor was the guarantee by the defendant of payment of that price.

Several cases were cited in argument. On the single proposition however for which the plaintiff has argued it is unnecessary for me to go beyond the decision of the Full Court of the Supreme Court of Victoria in Niemann v. Smedley (1973) V.R. 769. In my opinion the unanimous judgment of the Full Court in that case is

clearly correct including the treatment in it of earlier decisions.

Shortly stated the essential facts in Niemann's case were as follows. The directors of a company created a special class of shares of the nominal amount of five shillings each out of the unissued capital. The shares were created pursuant to a scheme resolved upon by the directors to offer such shares to selected employees. The directors resolved that the shares were to be issued at a premium of five shillings per share and that the full amount of ten shillings should be payable in full on application. It was also resolved that the shares were to be available upon financing terms offered by the company which involved an option in respect of payment whereby the employee would be entitled to choose between (a) payment in cash in full; (b) payment partly by deposit in cash to be determined by the employee and the balance by instalments of an amount and frequency selected by the employee; (c) payment entirely by such instalments. Many thousands of the shares were issued with the subscribers taking advantage of these generous terms as to finance. The question which the Full Court had to consider was whether the breach of the statutory prohibition against a company financing the purchase of its own shares (then s. 56 of the Companies Act 1958 (Victoria)) invalidated the allotment of the shares and the promise of the subscribers to pay for them. Their Honours said:

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"There is perhaps room for debate as to whether the promise of the company was, on the one hand a term of the agreement constituted by the application for shares and notification of the allotment thereof, or, on the other hand, the subject matter of a separate agreement. We think the preferable view is that it was a term of the agreement for the acquisition of the shares. It is clear we think that the contravention of S.56 did make that term illegal and void. But there is nothing in the language of the section which suggests that the illegality of such a term infects the agreement as a whole and renders it illegal and void. The section does not prohibit a purchase of or subscription for shares one of the terms of which provides for financial assistance being given by the company in connexion with that transaction. It prohibits a company 'giving financial assistance for the purpose of or in connexion with the purchase or subscription made or to be made by any person of or for any shares in the company' - a transaction which is otherwise a perfectly lawful one. The question accordingly, in our opinion, is whether the illegal term is severable from the remainder of the agreement constituted by the application for shares and notice of the allotment thereof." (at 778).

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In my opinion this analysis undoubtedly is correct.

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By analogy in the present case the question is whether the illegal term that Newbridge would give the mortgage is severable from the remainder of the agreement for the sale of the shares to Ilerain and the guarantee by the defendant of payment of the purchase price. In my opinion it is clear beyond argument that it is so severable.

It is unnecessary for me to review the case law concerning the principles of severability. The most pertinent of the cases are examined in Niemann's case. The analysis of them made in that case is, in my opinion, clearly correct. The ultimate issues, in a

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case such as the present, are clearly stated in the following passage in the joint judgment of the Full Court, namely:

"In the present case the offending term is, as a matter of language, verbally separate from the remainder of the agreement and it is capable of removal by a blue pencil without affecting the meaning of the part remaining. The material matter, we think, is whether elimination of that term should basically alter the true nature of the contract or involve the formation of a new and different contract. In our opinion, it would not do so. The whole purport and substance of the agreement was the subscription for shares. It was one in which, as Nelson J. (the Judge at first instance) found, the applicants applied for and were allotted fully paid 5s. shares at a premium of 5s. The promise of the company to finance 'the purchase' over a period was not the whole or the main consideration to support the promise of the applicants to pay for those shares, but was subsidiary to the main purpose of the contract - a contract to acquire fully paid up shares in the company. In our opinion, accordingly the term by which the company agreed to finance the transaction was severable from the rest of the agreement which remains valid." (at 779).

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In the present case it is, of course, clear that a blue pencil can be put through the mortgage without affecting the meaning of the sale deed and of the guarantee. To do so would not basically alter the true nature of the contract or involve the formation of a new and different contract. The whole purport and substance of the contract was the sale of the shares. The giving of the mortgage to secure the purchase price was not the whole or the main consideration to support the promise of Ilerain to pay for those shares or the guarantee of the defendant of such payment, but was subsidiary

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of the main purpose of the contract - a contract for the sale of the shares. In my opinion it is manifest beyond argument that the mortgage is severable from the rest of the contract.

I come now to the second of the ways in which the defendant submits section 67 was infringed - namely what occurred in respect of the Airfoil cheques. There is some conflict in the evidence as to precisely what was said and done and as to when it was that particular events occurred. This is not the time to resolve such issues. An application for summary judgment must be determined on the assumption that primary facts of which there is evidence will be found to be those favourable to the defendant and that all inferences which may reasonably be drawn from the facts will be drawn in favour of the defendant.

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What the defendant has submitted is that the evidence given in these proceedings shows that there would be a reasonably arguable issue of fact at the trial that it was part of the entirety of the contractual arrangements in respect of the sale of the shares that the Airfoil cheques would be given. The contractual obligation, in that respect, involved a clear infringement of section 67 and, so the argument continues, that part of the arrangement can not be severed from the balance of the contract. It went, so the argument runs, to the very heart of the contract - namely the payment for the shares.

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Reasons for Judgment  
of Master Allen

It is convenient, in considering the defendant's submissions, to deal first with the cheque in respect of the payment of purchase price which fell due immediately upon the delivery of the deed of sale. It would not be open, in my opinion, for a tribunal of fact, acting reasonably, to infer from the primary facts of which there is evidence that the contractual obligation of Ilerain was to make that payment by an Airfoil cheque. There is no direct evidence that such was the agreement. The direct evidence is what is stated in the deed of sale itself - namely that the purchase price was to be paid "by cash or bank cheque". It is manifest that what occurred is that in respect of that initial payment that fell due on the delivery of the deed there was an accord and, when the cheque was met on presentation, satisfaction of the contractual obligation to pay by cash or bank cheque. It would be engaging in fantasy to suppose that it was the mutual intention of the parties that the mere receipt by the plaintiff of the Airfoil cheque for the payment constituted performance by the purchaser, Ilerain, of its obligation to make that payment. Surely the parties would have contemplated that Ilerain would remain liable to make the payment in the event that Airfoil's cheque was not met on presentation. Surely, also, the parties would have contemplated that if Ilerain then failed to make the payment (Airfoil's cheque having been dishonoured)

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Reasons for Judgment  
of Master Allen

the defendant would have been liable, pursuant to the deed of guarantee to pay the amount due by Ilerain. If, however, the giving of Airfoil's cheque had constituted payment of the first instalment of purchase price (whether or not the cheque was later met) the deed of guarantee would have been, in relation to that payment, otiose. It is manifest that there never was a contractual obligation to hand over an Airfoil cheque for the first instalment of the purchase price as distinct from making payment in cash or by bank cheque. There was, as I have said, accord followed, upon the cheque being met, by satisfaction. The contractual obligation was, as the deed stated, to pay by cash or bank cheque. The acceptance by the plaintiff of Airfoil's cheque did not discharge that contractual obligation. It did not vary the contract or create a new contract. When, however, the cheque was met there was satisfaction. Then, and only then, was Ilerain discharged from its contractual obligation to pay the initial instalment of the purchase price.

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If it is manifest that the correct view of what occurred in relation to the cheque for the first instalment of purchase price is that there was an accord and satisfaction the contract for the sale of the shares was not tainted by any illegality by reason of the breach committed of S.67. The payment made by Airfoil was prohibited by that section. The particular payment

Reasons for Judgment  
of Master Allen

was illegal. But that illegality affords no basis for striking down the contract for sale itself.

I turn now to the postdated cheques for the final two instalments of the purchase price. It well may be that the correct view to take in respect of those two cheques is that, as in the case of the cheque for the first instalment, there was no contractual obligation that they be given and no contractual obligation that they be received. The cheques in fact were given and received. The correct view well may be that if they had been honoured on presentation there would have been an accord and satisfaction which discharged the obligation of Ilerain to pay those instalments. But payment on the cheques was not, in fact, made. There was no satisfaction - and hence no discharge. Whilst, however, that may be the correct view of what occurred there is another view, reasonably open, which is closer to that for which the defendant contends. I proceed to consider that view.

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The defendant has given evidence that at the settlement meeting which occurred on 24 March, 1980 the plaintiff and the other shareholders said: "We insist on having postdated cheques drawn on Airfoil's account" for the remaining payments of the purchase price. Counsel for the plaintiff has urged that it does not expressly appear from the affidavit of the defendant in that regard that the demand was made before the various

Reasons for Judgment  
of Master Allen

executed documents were handed over and the sale became binding. That is, in my opinion, too fine a point to be persuasive in an application for summary judgment. The evidence of the defendant, if accepted, is sufficient, viewed broadly, to show that at the trial the defendant may be able to establish that the vendors, including the plaintiff, made it plain that unless they received postdated cheques drawn on Airfoil's account 10 for the remaining two instalments of the purchase price there would be no sale. That being so I shall assume, for the purpose of this motion for summary judgment, that it was a term of the contractual arrangements that post-dated Airfoil cheques would be handed over on settlement for the amounts of these two instalments which, under the contract, would not fall due for payment until later. But I am not prepared to take the further step of assuming that it was the intention of the parties that the handing over of the Airfoil cheques, whether or 20 not they were thereafter presented and honoured, was to be deemed payment by Ilerain, purchaser, of the balance of the purchase price. It would be quite absurd to infer, from any version of the primary facts, that that is what the parties intended. The cheques were not equivalent to cash (or to a bank cheque presently payable). There might never be payment on the cheques. It is manifest that it would have been the intention of the parties that the liability of Ilerain, the purchaser,

Reasons for Judgment  
of Master Allen

for payment of the balance of the purchase price would remain notwithstanding the handing over of the Airfoil cheques (albeit that liability could be discharged by payment if these cheques were presented and honoured when the instalments became due). Unless Ilerain remained liable, the defendant would not be liable upon default in payment. He didn't guarantee payment by Airfoil. His guarantee was of payment by Ilerain. The liability of the defendant to pay or procure payment for the shares was at the heart of the whole transaction. It was he who the parties contemplated to be, in commercial reality as distinct from legal form, the real purchaser. He was a man of substance. He already owned nearly all the shares in Airfoil and by the share sales was acquiring control of the balance (through the company Ilerain). The highest at which the defendant's case can be put, within the limits of reality, is that the vendors demanded and received the postdated cheques by way of additional security that the balance of the purchase money would be paid; and that it became a term of the contractual obligations as a whole that such security would be given. The giving of the cheques was prohibited by S.67. But that is not an end to the matter. The term (which I have assumed to have been part of the contractual arrangements) that the cheques would be given by way of further assurance that the balance of purchase money would be paid, clearly was

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severable from the remainder of the contract. It was severable for the same reasons that the mortgage was severable. The plaintiff could not sue on the cheques. But the remainder of the contract is valid.

I do not overlook that the question of severability is not the same where there are two separate contractual provisions to be severed as it is where there is only one such provisions to be severed. One must consider the cumulative effect of the provisions the severence of which is in question. In the present case, however, the two provisions in question, namely the giving of the mortgage and the giving of the post-dated cheques, are of the same general character in the contractual arrangements as a whole - namely the giving of security or assurance that the purchase price would be paid as provided by the deed of sale and the guarantee. The striking down of each of these terms would not alter the true nature of the contract or involve the formation of a new and different contract. The whole purport and substance of the agreement would remain unchanged - namely the sale and purchase of the shares. The promises in respect of the mortgage and the post-dated cheques were not the whole or the main considerations to support the promise to sell the shares but were subsidiary to the main purpose of the contract. I am of opinion that it is clear beyond argument that both promises are severable from the remainder of the contract.

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Reasons for Judgment  
of Master Allen

I have not dealt in these reasons for judgment with several of the alternative arguments which were put to me. In particular I have not dealt with the rival contentions advanced as to the extent to which it is permissible to go beyond the written instruments to determine whether there were contractual arrangements which infringed S.67. It has not been necessary because in analysing the primary facts and the inferences that can be drawn from them I have had regard to the entirety of the evidence as to the conversations between the parties and the entirety of the evidence as to what was done. I have looked to the substance. 10

A further submission for the defendant was that it would not matter, for the purpose of application of S.67, that any relevant understanding between the parties as to what should be done fell short of being a contractual provision. I need not deal with that submission either. I have assumed that the whole of the understanding between the parties was contractual. 20

I am satisfied that it is manifest that neither the evidence nor the submissions of law disclose any issue of fact or law worthy of going to trial.

I direct entry of judgment for the plaintiff for \$68,800.00, together with \$7,068.49 for interest thereon pursuant to S.94 of the Supreme Court Act, 1970 at the rate of 10 per centum per annum from 16 October, 1980 to this day. The defendant is to pay the plaintiff's



Reasons for Judgment  
of Master Allen

costs of the proceedings generally including the costs of this motion for summary judgment which costs are to include the brief fee on hearing for senior counsel on the basis of a single brief on hearing covering the motion for summary judgment in this case and the motions for summary judgment in Jehnic v. Carney (16158 of 1980) and in Arnett v. Carney (16159 of 1980).

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW  
DIVISION

No. 16157 of 1980

JOHN EDWARD  
HERBERT

Plaintiff

PHILLIP WILLIAM  
CARNEY

Defendant

JUDGMENT

Judgment -

1. that the defendant pay the plaintiff \$68,800.00 together with \$7,068.49 for interest thereon pursuant to s.94 of the Supreme Court Act 1970 at the rate of 10 per centum per annum from 16th October 1980 to 26th October 1981;

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The Court orders that -

2. the defendant pay the plaintiff's costs of the proceedings generally including the costs of this motion for summary judgment which costs are to include the brief fee on hearing for senior Counsel on the basis of a single brief on hearing covering the motion for summary judgment in this case and the motions for summary judgment in Jehnic v. Carney (16158 of 1980) and in Arnett v. Carney (16159 of 1980).

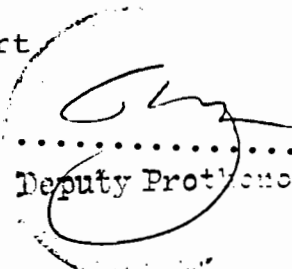
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Ordered 26th October 1981 and

entered 15 July 1983.

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By the Court

  
.....  
Deputy Prothonotary.

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW  
DIVISION

S17456 of 1981  
16157 of 1980

PHILLIP WILLIAM  
CARNEY

Appellant

JOHN EDWARD  
HERBERT

Respondent

IN THE COURT  
BELOW

JOHN EDWARD  
HERBERT

Plaintiff

PHILLIP WILLIAM  
CARNEY

Defendant

NOTICE OF APPEAL

The appellant appeals to the Court constituted by a Judge from the decision of Master Allen made on 26 October 1981.

GROUNDS:

1. That the Master erred in holding that any term of the contract between the plaintiff and Ilerain Pty.

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Limited relating to the acquisition by Ilerain Pty. Limited of the plaintiff's shares in Airfoil Registers

Pty. Limited requiring the provision of a mortgage by Newbridge Industries Pty. Limited as security for payment of the purchase price was severable from the rest of the contract. (L.S.)

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2. That the Master erred in holding that it would not be open to a tribunal of fact acting reasonably on a trial of these proceedings to infer that the contractual obligation of Ilerain Pty. Limited was to make the first payment of the said purchase price by a cheque drawn on the account of Airfoil Registers Pty. Limited.

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3. That the Master should have found

Notice of Appeal

that it was reasonably arguable that it was a term of the contract between the plaintiff and Ilerain Pty. Limited that the first payment on account of the said purchase price was to be made by a cheque drawn on the account of Airfoil Registers Pty. Limited.

4. That the Master erred in holding that any term of the said contract between the plaintiff and Ilerain Pty. Limited requiring that post-dated cheques drawn on the account of Airfoil Registers Pty. Limited should be handed over to secure the balance of the said purchase price was severable from the rest of that contract.

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(L.S.)

5. That on the evidence presented there was a proper defence to go to trial that the principal obligation relied upon the plaintiff in these proceedings was void by reason of Section 67 of the Companies Act 1961.

ORDERS SOUGHT:

1. That in lieu of the directions and orders made by Master Allen the following orders be made -

- (a) That the summons be dismissed.
- (b) That the plaintiff pay the defendant's costs including the fees for Senior Counsel.

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2. Costs.

For hearing: 10 am 12th February 1982. (L.S.)

(Sgd.) D.S. Kennedy  
.....  
Appellant's Solicitor

FILED: 23 NOVEMBER 1981



IN THE SUPREME COURT )  
 ) No. 16157 of 1980  
OF NEW SOUTH WALES ) 16158 of 1980  
 ) 16159 of 1980  
COMMON LAW DIVISION )

CORAM: BEGG, J.

MONDAY, 24th MAY, 1982.

HERBERT & ORS. v. CARNEY

JUDGMENT

HIS HONOUR: These are three appeals from a decision 10  
of Master Allen delivered on 3rd October, 1981, follow-  
ing applications by the plaintiff in these three actions  
for summary judgment. The decision of the Master  
involved a finding that there was not a triable issue  
on the pleadings and he directed judgment in the three  
matters for the plaintiff in each of them.

When the matter was called before me this morning  
Mr. Staff of learned Queen's Counsel for the plaintiff/  
respondent to this appeal, informed the Court that he 20  
could not urge any argument upon this Court contrary to  
an order allowing these three appeals. He has done so  
on the basis that a decision of the Court of Appeal of  
this State, in a matter D.J.E. Constructions Pty.  
Limited v. Maddocks Products & Ors. which had in fact  
been delivered on 31st August, 1981, (but which had not  
been reported prior to the date upon which Master Allen  
gave his decision) established principles of law which  
apply to the present proceedings, would show that  
there is an issuable matter to go to trial. Accordingly,  
the proper order in these appeals is that the appeals 30

be allowed and the summary judgments be set aside.

On the question of costs Mr. Staff has urged that the appropriate order in the case would be to make an order that the defendant's costs of the proceedings before the Master and here should be the defendant's costs in the cause. He said that regrettably the unreported decision had not been adverted to in the proceedings before the Master. It was a decision which in a sense altered the law in some ways in this State. Heretofore it would appear that the authority referred to by the learned Master in his judgment of the Victorian Full Court was authority in point at that time and which, in accordance with the ordinary rules of following the judgment of a Full Court of another State of Australia, would have resulted in the Master coming to a different conclusion. However, while there is some weight in the matters put by Mr. Staff I feel the person who is the moving party in the proceedings before the Court, although he might have "backed the wrong horse" in a sense in seeking to embrace an order of another Court of another State of Australia, must face the possibility that ultimately the law might be decided against him and if that is so the ordinary rule would apply that he must pay the costs that have been incurred.

I think for this reason that there have been procedures made in current legislation relating to the

Suitors Fund Act, but orders might be made and I will consider that in a moment. At the present time I feel the proper order here in allowing the appeals is to order that the plaintiff pay the defendant's costs before the Master and of these appeals.

I have not looked at the Suitors Fund Act recently but normally the procedure is if there had been an error in law made by the learned trial Judge or Master and that was corrected on appeal it would be an appropriate case for a Suitors Fund order and here the Master misinterpreted the law by reason of the fact that he was not aware of the most recent decision. In those circumstances I will make an order in this form: the plaintiff/respondent is to have the appropriate order for such of those costs ordered to be paid as would come within the provisions of the Suitors Fund Act. I grant liberty to apply, in chambers, for a more detailed order if necessary.

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I order that any exhibits remaining in Court may be handed out to the respective parties.

I grant liberty to apply in relation to a deed for security for costs or any further orders if necessary.

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I certify that this and the two preceding pages are a true copy of the reasons for judgment herein of His Honour, Mr. Justice Begg.

Georgia Seatow  
Associate

Dated 28/7/83

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IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW  
DIVISION

No. 16157 of 1980  
No. 16158 of 1980  
No. 16159 of 1980

PHILLIP WILLIAM  
CARNEY  
Appellant/  
Defendant

DARRELL BRUCE  
ARNETT  
Respondent/  
Plaintiff

PHILLIP WILLIAM  
CARNEY  
Appellant/  
Defendant

KARLO JEHNIC  
Respondent/  
Plaintiff

PHILLIP WILLIAM  
CARNEY  
Appellant/  
Defendant

JOHN EDWARD  
HERBERT  
Respondent/  
Plaintiff

ORDER

The Court orders that -

1. these appeals be allowed and summary judgment be set aside;
2. the plaintiffs pay the defendant's costs before the Master and of these appeals;
3. the plaintiff have a certificate under the Suitors' Fund Act;
4. there be liberty to apply for more detailed order if necessary;
5. there be liberty to apply for any necessary orders relating to the defendant's bond for security for costs;
6. any exhibits remaining in Court be handed out to the parties.

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Ordered 24th May 1982 and entered  
15.2.1983

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By the Court

(Sgd:) W. Farlow (L.S.)  
.....  
Chief Clerk



IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW  
DIVISION

No. 16157 of 1980

JOHN EDWARD  
HERBERT

Plaintiff

PHILLIP WILLIAM  
CARNEY

Defendant

AMENDED  
DEFENCE

1. In answer to paragraphs 1 and 2 of the Statement of Claim, the Defendant admits that Ilerain Pty. Limited agreed with the Plaintiff to purchase from the Plaintiff certain shares owned by the Plaintiff in a company known as Airfoil Registers Pty. Limited on the terms as to payment set forth in paragraph 2 of the Statement of Claim, but says that the terms of the said agreement are not fully or accurately set forth in the Statement of Claim. Save as aforesaid, the Defendant does not admit the allegations made in paragraphs 1 or 2 of the Statement of Claim or any of them.
2. The Defendant admits the allegations made in paragraph 3 of the Statement of Claim.
3. In answer to paragraph 4 of the Statement of Claim, the Defendant admits that he agreed to guarantee the obligations of Ilerain Pty. Limited in respect of the purchase by Ilerain Pty. Limited of shares of the Plaintiff in the capital of

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Amended Defence

Airfoil Registers Pty. Limited, but says that the terms of the said agreement are not fully or accurately set forth in the Statement of Claim. Save as aforesaid, the Defendant does not admit the allegations made in paragraph 4 of the Statement of Claim or any of them.

4. The Defendant admits the allegations made in paragraph 5 of the Statement of Claim.

5. In further answer to the whole of the Statement of Claim, the Defendant says that - 10

(i) It was a term and condition of the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof, or alternatively, of the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and of the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof, that Newbridge Industries Pty. Limited, a subsidiary of the said Airfoil Registers Pty. Limited within the meaning of that word as used in the Companies Act 1961, would give financial assistance for the purpose of and in connection with the said purchase by Ilerain Pty. Limited of shares of the Plaintiff in Airfoil Registers Pty. Limited by providing 20

Amended Defence

security, namely an unregistered mortgage of real estate, for the payment of the unpaid balance of the price of the said shares;

(ii) Pursuant to the said agreement, or alternatively, pursuant to the said agreements, the said Newbridge Industries Pty. Limited provided security, namely an unregistered mortgage of real estate, for the unpaid balance of the price of the said shares;

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(iii) In the premises, the said agreement, or alternatively, the said agreements, were illegal and unenforceable by reason of the provisions of Section 67 of the Companies Act 1961.

6. Alternatively to paragraph 5, in further answer to the whole of the Statement of Claim, the Defendant says that -

(i) The agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof, was, or alternatively, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof, were, interdependent with an agreement by which Newbridge

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Amended Defence

Industries Pty. Limited, a subsidiary of the said Airfoil Registers Pty. Limited within the meaning of that word as used in the Companies Act 1961, agreed to give financial assistance for the purpose of and in connection with the said purchase by Ilerain Pty. Limited of shares of the Plaintiff in Airfoil Registers Pty. Limited by providing security, namely an unregistered mortgage of real estate, for the payment of the unpaid balance of the price of the said shares;

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- (ii) Pursuant to the last-mentioned agreement, the said Newbridge Industries Pty. Limited provided security, namely an unregistered mortgage of real estate, for the unpaid balance of the price of the said shares;
- (iii) In the premises, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof, was, or alternatively, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof, were, illegal and unenforceable by reason of the provisions of Section 67 of the Companies Act 1961.

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Amended Defence

7. Alternatively to paragraphs 5 and 6, in further answer to the whole of the Statement of Claim, the Defendant says that -

(i) The agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof was, or alternatively, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof were, entered into by the parties thereto in the expectation of the parties that Newbridge Industries Pty. Limited, a subsidiary of the said Airfoil Registers Pty. Limited within the meaning of that word as used in the Companies Act 1961, would give financial assistance for the purpose of and in connection with the said purchase by Ilerain Pty. Limited of shares of the Plaintiff in Airfoil Registers Pty. Limited by providing security, namely an unregistered mortgage of real estate, for the payment of the unpaid balance of the price of the said shares;

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(ii) In accordance with the said expectation, Newbridge Industries Pty. Limited provided security, namely an unregistered mortgage

Amended Defence

of real estate, for the unpaid balance of the price of the said shares;

(iii) In the premises, the said agreement was, or alternatively, the said agreements were, illegal and unenforceable by reason of the provisions of Section 67 of the Companies Act 1961.

8. In further answer to the whole of the Statement of Claim, the Defendant says that -

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(i) It was a term and condition of the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof, or alternatively, of the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and of the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof, that Airfoil Registers Pty. Limited would give financial assistance for the purpose of and in connection with the said purchase by Ilerain Pty. Limited of shares of the Plaintiff in Airfoil Registers Pty. Limited by advancing on loan the first instalment of the price of the said shares;

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(ii) Pursuant to the said agreement, or alternatively, pursuant to the said agreements,

Amended Defence

Airfoil Registers Pty. Limited advanced on loan the first instalment of the price of the said shares;

(iii) In the premises, the said agreement was, or alternatively, the said agreements were, illegal and unenforceable by reason of the provisions of Section 67 of the Companies Act 1961.

9. Alternatively to paragraph 8 hereof, in further answer to the whole of the Statement of Claim, the Defendant says that - 10

(i) The agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof was, or alternatively, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof were, interdependent with an agreement by which Airfoil Registers Pty. Limited agreed to give financial assistance for the purpose of and in connection with the said purchase by Ilerain Pty. Limited of shares of the Plaintiff in Airfoil Registers Pty. Limited by advancing on loan the first instalment of the price of the said shares; 20

(ii) Pursuant to the last-mentioned agreement,

Amended Defence

Airfoil Registers Pty. Limited advanced on loan the first instalment of the price of the said shares;

- (iii) In the premises, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof was, or alternatively, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof were, illegal and unenforceable by reason of the provisions of Section 67 of the Companies Act 1961. 10

10. Alternatively to paragraphs 8 and 9 hereof, in further answer to the whole of the Statement of Claim, the Defendant says that -

- (i) The agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof was, or alternatively, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof were, entered into by the parties thereto in the expectation of the 20



Amended Defence

parties that Airfoil Registers Pty. Limited would give financial assistance for the purchase of and in connection with the said purchase by Ilerain Pty. Limited of shares of the Plaintiff in Airfoil Registers Pty. Limited by advancing on loan the first instalment of the price of the said shares;

(ii) In accordance with the said expectation Airfoil Registers Pty. Limited advanced on loan the first instalment of the price of the said shares; 10

(iii) In the premises, the said agreement was, or alternatively, the said agreements were, illegal and unenforceable by reason of the provisions of Section 67 of the Companies Act 1961.

11. In further answer to the whole of the Statement of Claim, the Defendant says that -

(i) It was a term and condition of the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof, or alternatively, of the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and of the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof, that Airfoil Registers 20

Amended Defence

Pty. Limited would sell to the Plaintiff at a price less than its true value, a certain motor vehicle owned by Airfoil Registers Pty. Limited.

(ii) Pursuant to the said agreement, or alternatively, pursuant to the said agreements, Airfoil Registers Pty. Limited sold to the Plaintiff the said motor vehicle at a price less than its true value. 10

(iii) The sale of the said motor vehicle as aforesaid constituted the giving by Airfoil Registers Pty. Limited of financial assistance in connection with the purchase by Ilerain Pty. Limited of shares in Airfoil Registers Pty. Limited.

(iv) In the premises, the said agreement was, or alternatively, the said agreements were, illegal and unenforceable by reason of the provisions of Section 67 of the Companies Act 1961. 20

12. Alternatively to paragraph 11, and in further answer to the whole of the Statement of Claim, the Defendant says that -

(i) The agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof, was, or alternatively, the agreement pursuant to which Ilerain

Amended Defence

Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof, were, interdependent with an agreement by which Airfoil Registers Pty. Limited agreed to sell to the Plaintiff at a price less than its true value a certain motor vehicle owned by Airfoil Registers Pty. Limited.

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- (ii) Pursuant to the last mentioned agreement, Airfoil Registers Pty. Limited sold to the Plaintiff the said motor vehicle at a price less than the true value.
- (iii) The sale of the said motor vehicle as aforesaid constituted the giving by Airfoil Registers Pty. Limited of financial assistance in connection with the purchase by Ilerain Pty. Limited of shares in Airfoil Registers Pty. Limited.
- (iv) In the premises, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the Defendant agreed as admitted in paragraph 3 hereof, was, or alternatively, the agreement pursuant to which Ilerain Pty. Limited agreed as admitted in paragraph 1 hereof and the agreement pursuant to which the Defendant agreed as admitted in paragraph 3 hereof,

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Amended Defence

were, illegal and unenforceable by reason of the provisions of Section 67 of the Companies Act 1961.

13. Alternatively to paragraphs 11 and 12, in further answer to the whole of the Statement of Claim, the Defendant says that -

(i) The agreement pursuant to which Ilerain Pty.

Limited agreed as admitted in paragraph 1

hereof and the Defendant agreed as admitted

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in paragraph 3 hereof was, or alternatively,

the agreement pursuant to which Ilerain Pty.

Limited agreed as admitted in paragraph 1

hereof and the agreement pursuant to which

the Defendant agreed as admitted in paragraph

3 hereof, were, entered into by the parties

thereto in the expectation of the parties

that Airfoil Registers Pty. Limited would

sell to the Plaintiff at a price less than

its true value a certain motor vehicle own-

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ed by Airfoil Registers Pty. Limited.

(ii) In accordance with the said expectation,

Airfoil Registers Pty. Limited sold to the

Plaintiff the said motor vehicle at a price

less than its true value.

(iii) The sale of the said motor vehicle as afore-

said constituted the giving by Airfoil

Registers Pty. Limited of financial assist-

ance in connection with the purchase by

Amended Defence

Ilerain Pty. Limited of shares in Airfoil  
Registers Pty. Limited.

(iv) In the premises, the said agreement was, or  
alternatively, the said agreements were,  
illegal and unenforceable by reason of the  
provisions of Section 67 of the Companies  
Act 1961.

Defendant's Solicitor.

AFFIDAVIT

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On 4th ~~September~~ November 1982, I, PHILLIP WILLIAM  
CARNEY, of 3 Turon Avenue Kingsgrove, Company Director,  
say on oath:-

1. I am the Defendant.
2. The defences set out above are true in substance  
and in fact.

SWORN by the Deponent            )  
before me:                            )     (Sgd)

(sgd)

A Justice of the Peace

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Filed:           September, 1982

HERBERT, JEHNIC AND ARNETT -v- CARNEY

AGREED EXHIBIT INDEX

1	Agreement for sale of shares between Darrell Bruce Arnett as vendor and Ilerain Pty. Limited as purchaser bearing date 21st March 1980.	
2	Agreement for sale of shares between John Edward Herbert as vendor and Ilerain Pty. Limited as purchaser bearing date 21st March 1980.	
3	Agreement for sale of shares between Karlo Jehnic as vendor and Ilerain Pty. Limited as purchaser bearing date 21st March 1980.	10
4	Letter dated 21st September 1982 from Kennedy and Kennedy to Peet Simpson and Co. with particulars of motor vehicle sales.	
5	Memorandum of mortgage from Newbridge Industries Pty. Limited to Darrell Bruce Arnett bearing date 21st March 1980.	
6	Memorandum of mortgage from Newbridge Industries Pty. Limited to John Edward Herbert bearing date 21st March 1980.	20
7	Memorandum of mortgage from Newbridge Industries Pty. Limited to Karlo Jehnic bearing date 21st March 1980.	
8	Caveats R758527 - 9 inclusive.	
9	Draft agreement for mortgage.	
10	Deed of guarantee between Phillip William Carney of the one part and John Edward Herbert, Darrell Bruce Arnett and Karlo Jehnic of the other part bearing date 24th March 1980.	
11	Page 30 dated 27th March 1980 of the statement of the account of Airfoil Registers Pty. Limited ("Airfoil") with the Padstow branch of the Commercial Bank of Australia Limited.	30
12	Cheque no. 536165 dated 24th March 1980 drawn by Airfoil on the said account in favour of K. Jehnic for \$68,000.00.	
13	Cheque no. 536166 dated 24th March 1980 drawn by Airfoil on the said account in favour of J. Herbert for \$41,000.00.	
14	Cheque no. 536167 drawn by Airfoil on the said account in favour of D. Arnett for \$41,000.00.	40

Agreed List of Documents

15	Original cheque drawn by Airfoil	536168	
16	" " " " "	536169	
17	" " " " "	536170	
18	Original cheque drawn by Airfoil	536171	
19	" " " " "	536172	
20	" " " " "	536173	
21	Airfoil cheque stub No.	536160	
22	" " " "	536161	
23	" " " "	536162	10
24	" " " "	536163	
25	" " " "	536164	
26	" " " "	536165	
27	" " " "	536166	
28	" " " "	536167	
29	" " " "	536168	
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31	" " " "	536170	
32	" " " "	536171	
33	" " " "	536172	20
34	" " " "	536173	
35	" " " "	536174	
36	" " " "	536175	
37	" " " "	536176	
38	" " " "	536177	
39	" " " "	536178	
40	" " " "	536179	
41	" " " "	536180	
42	Pages 103 and 109 of cash book for Airfoil for the		

Agreed List of Documents

period 17th September 1976 to 15th June 1980 inclusive.

43	Reconstituted ledger account no. 18 for Airfoil - loan account for P. Carney.		
44	Annual Return for Airfoil made up to 31st December, 1979.		
45	Copy balance sheet for Airfoil, annotated in pencil and marked "Valuation Accounts".		
46	Resignations as directors of Airfoil each dated 31st March 1980 from Darrell Arnett, John Herbert and Karlo Jehnic respectively.	10	
47	Balance sheet for Airfoil as at 27th June 1980 and profit and loss account for Airfoil for the period ended 27th June 1980.		
48	Letters dated 25th July 1980 from Airfoil Registers (Sales) Pty. Limited to each of the plaintiffs.		
49	Application and allotment journal. (Newbridge Industries Pty. Ltd.)		
50	Transfer journal.	" " "	20
51	Register of members.	" " "	
52	Register of directors.	" " "	
53	Register of managers and secretaries.	" " "	
54	Register of directors' shareholdings etc.	" " "	
55	Share Register.	" " "	
56	Register of mortgages and charges.	" " "	
57	Certificate pursuant to Section 134 Companies Act 1961 dated 12th December 1980.		30
58	Original but undated agreement between John Hefferman and James Hampson as vendors and Airfoil and Phillip William Carney as purchasers and Newbridge.		
59	Resignation as director and manager of Newbridge dated 31st January 1979 from James C. Hampson.		
60	Resignation as a director and secretary of Newbridge		



Agreed List of Documents

dated 31st January 1979 from John A. Heffernan.

- 61 Stamped share transfer dated 31st January 1979 from J. Heffernan to Airfoil of 1 share in Newbridge.
- 62 Stamped share transfer dated 31st January 1979 from James Hampson to Phillip William Carney of 1 share in Newbridge.
- 63 Memorandum of mortgage from Newbridge to James Cornelius Hampson and John Anthony Heffernan dated 31st January 1979.
- 64 Annual Return for Newbridge made up to 31st December 1979.

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IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES ) No. 16157 of 1980  
 ) 16158 of 1980  
COMMON LAW DIVISION ) 16159 of 1980  
 )  
COMMERCIAL LIST )

CORAM: ROGERS J.

Monday, 28th March, 1983.

HERBERT V. CARNEY  
 JEHNIC V. CARNEY  
 ARNETT V. CARNEY

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MR. SHAND Q.C. with MR. McDOUGALL appeared for the  
 plaintiffs.  
 MR. STOWE with MR. REWELL appeared for the defendant.

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(Mr. Shand called on subpoena duces tecum the Medical Superintendent, Royal Prince Alfred Hospital; called three times outside Court; no appearance.)

(Documents 1, 2, 3 and 10 of agreed bundle of documents tendered without objection and marked Exhibit A.)

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(Case for the plaintiffs closed.)

CASE FOR DEFENDANT

(Mr. Stowe opened to his Honour)

MR. STOWE: The propositions we make are these:  
 Firstly the instruments upon which the plaintiffs sue  
 are part of a wider agreement between the parties;  
 that the wider agreement was partly oral and partly  
 written; that it included the following terms: firstly  
 that the purchase price to be paid by the purchasing  
 company, Ilerain Pty. Ltd., would be paid by the cheques  
 of Airfoil Registers Pty. Ltd; secondly that Airfoil's  
 subsidiary, Newbridge Industries Pty. Ltd., would provide  
 security for the deferred balance of the purchase price  
 by means of real property mortgages; thirdly, in con-  
 nection with the claims by Mr. Jehnic and Mr. Herbert,  
 that the amounts of the loan accounts of those two  
 persons with Airfoil Registers would be credited  
 against the purchase price payable to them; and fourth-  
 ly that each of the vendors would be permitted to buy  
 from Airfoil Registers that company's car which he had  
 been using, at a price less than the car's full value.

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The next proposition is that each of the four terms referred to involved a breach of s. 67 of the Companies Act, in that the first, third and fourth involved the company Airfoil Registers in giving directly financial assistance for the purpose of or in connection with a purchase of Ilerain Pty. Limited of shares in Airfoil; and in the case of the second term, it involved Airfoil's subsidiary, Newbridge, in giving similar financial assistance in respect of the purchase of shares in its holding company.

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The next proposition is that each of those terms was therefore illegal and void, and that the illegality affects the entire agreement and renders the whole of the agreement void. Accordingly, since the plaintiff, in order to establish his claim in each case, is obliged to rely upon the written parts of the overall agreement, those agreements being illegal and void, the plaintiff must fail; and as an alternative proposition, that the agreement between the parties contemplated from its inception the four breaches of s. 67 to which I have referred as a means of carrying the agreement into execution, and that those illegal means perforce became integral elements of the performance, with the same results as those which I have just referred to.

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HIS HONOUR: Where is the factual dispute?

MR. STOWE: It does not appear from the pleadings where the factual dispute is; it might be more appropriate if Mr. Shand ----

HIS HONOUR: Mr. Shand, Mr. Stowe has outlined what he claims to be the factual situation; where does the dispute lie?

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MR. SHAND: Firstly, may I mention this, your Honour. I believe I am correct in saying that one of the terms put forward as forming part of the overall agreement, namely the third, dealing with the claims of Messrs. Jehnic and Herbert, about which it is said that the amounts of the loan accounts were agreed would be credited against them, the amounts they owed to Airfoil have not been pleaded nor particularised.

MR. STOWE: That is not so.

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MR. SHAND: If it is not so, I am open to correction.

HIS HONOUR: You can perhaps sort that out in a moment. Then subject to that?

MR. SHAND: It is firstly put, your Honour that - this is partly no doubt a question of law and partly a question of fact - the agreements sued upon, namely the principal agreement for the purchase of the shares and the guarantee, were two agreements complete in themselves,

standing on their own feet, and that they were not inter-dependent with any of the agreements alleged or the terms alleged; secondly that there was no agreement that the purchase price to be paid by Ilerain would be paid by the cheques of Airfoil; that to the extent to which there was an agreement that Newbridge would provide security by mortgages for the deferred balance of the purchase price, such an agreement was quite separate and distinct; and fourthly that to the extent to which there was an agreement that each or any of the plaintiffs would buy from Airfoil the company's car which each had in use, such an agreement was quite separate from and independent of the agreement for the purchase of the shares; and that furthermore, the price at which the motor vehicles were to be purchased was not less than full or proper value. If your Honour wishes me to deal with the term which I have submitted has not been pleaded ---

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HIS HONOUR: I think what I should do with that is to give you an opportunity of speaking to Mr. Stowe, so he can point out to you where it was pleaded or particularised. Perhaps you could do that between the two of you now, and come to a concession one way or the other. (Counsel confer)

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MR. STOWE: Your Honour, contrary to my confident denial of what Mr. Shand said, it does not appear to have been pleaded. I was under the belief that we had pleaded it, but we had not done so. I seek leave to amend the defences in respect of Mr. Jehnic's and Mr. Herbert's actions by adding an additional ground.

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MR. SHAND: We oppose that, and would say, I am required to say - your Honour, this is the sort of action where, bearing in mind the nature of the defence to it, the least one could expect is a full and comprehensive statement of defences, at a reasonably early time. The actions themselves commenced in 1980 and the original defences were filed in February 1981. Thereafter amended defences were filed in September 1982 or November, I am not sure which, because the copy I have says "Filed, blank, September 1982", but the affidavit verifying is 4th November, 1982, but perhaps it does not matter greatly.

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So that there has been a repeated attempt by the defendant to mount his defensive case, and the matter has proceeded with that long history to this point without the plaintiffs being made aware of yet another of these, if I may say so with respect, unworthy defences. Now we have yet another one attempted to be loaded in, on the very threshold of the hearing, and we would submit that whereas in some circumstances there might be more recognizable acceptability for omission, or a more acceptable basis for excusing omission, there is no reason in this sort of case why indulgence should be

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granted to the defendant who, on the facts, pleaded quite clearly, is seeking to take advantage of a technical defence productive of clear injustice to these three plaintiffs, if successful - a defence which involves no merit whatsoever, in terms of the morality of the matter, whether or not it happens to involve any legal merit.

Added to that is the following situation, that the defendant was interrogated, and the notice was dated August 1982, and amongst the questions asked were, "How? Upon what basis or bases, and with reference to what facts was the purchase price of \$106,500" - and I am picking out one of the three - "Therein set out calculated?", question 7, and the answer came back, "The defendant objects to answering this interrogatory on the ground that it does not relate to any matter in question between him and the plaintiff". So the defendant closed the door upon himself; and it is our submission that is yet another reason why further indulgence or some indulgence of this kind should not be allowed.

MR. STOWE: Your Honour, all I can say is that it might not be inappropriate to permit the amendment on the provisional basis, which I can particularise so far as the quantum of the loan account is concerned, is raised by the defence, and to give the plaintiffs the opportunity of renewing their objections in the course of the evidence, if the evidence given in support of that defence takes them by surprise or leaves them otherwise unable to properly deal with the matter. It is a point of fairly small ambit so far as the facts are concerned; it involves no different principles so far as law is concerned. The allegation is that in respect of the amounts payable to Mr. Jehnic and Mr. Herbert, in arriving at the amount to be paid it was agreed between the parties that there would be deducted from their shares, in the case of Mr. Jehnic the sum of \$7,000 - when I say "from their shares", I mean the purchase price payable to them - and \$3,000 in the case of Mr. Herbert, upon the basis that their loan accounts with the company in corresponding amounts would be mortgaged. That is the entire ambit of the facts that would be alleged in support of that defence, and the principles by which those facts, we would contend, give rise, to a defence, and that that did involve the giving of financial assistance by Airfoil Registers, and that it was forgiving indebtedness or agreeing to forgive indebtedness by way of assistance to the person who was buying shares in the company from the two people concerned.

HIS HONOUR: What do you say about the interrogatories?

MR. STOWE: There is nothing I can say about that. The matter in respect to which interrogatories were administered is certainly pertinent in the case of Mr. Jehnic

and Mr. Herbert, if that defence is raised by Mr. Carney in response to their claims. I can I think only seek to supplement our omission in replying to that interrogatory by stating from the bar table now, if necessary, and alternatively by something in writing in the course of the afternoon, how we contend the various amounts were made up. Of course the interrogatory would be properly objected to in the case of Mr. Arnett, because in his case there is no defence of this kind sought to be raised. In the case of Mr. Jehnic and Mr. Herbert, I really concede that the raising of the defence renders the interrogatory material. 10

(For his Honour's judgment on application for leave to amend, please see separate transcript.)

HIS HONOUR: I do not propose to put the hearing in jeopardy by allowing an amendment which may require a further adjournment. I refuse the application for leave to amend.

MR. SHAND: In further indication of the issues, which we see being raised in answer to the summary of the defences, passing over the propositions of law which my learned friend enunciated under s. 61, I come to the alternative method of putting the defence, namely that the agreement between the parties contemplated from the inception that the respects in which it is said breaches of s. 67 occurred were agreed upon between the parties as the means to be adopted for carrying the agreement into execution, and that those illegal means of performance became in effect integral parts of the agreement. In our submission none of the means of carrying the agreement into execution or of performing the agreement were the subject of specific agreement - that is, the agreement sued upon - and the case will be that, at the most, the means ultimately adopted of carrying the agreement into execution were not the subject of agreement, nor were such means necessarily involved in the performance of the agreement; that in other words they were causal or adventitious breaches of s. 67, if in fact they were breaches at all. 20 30

HIS HONOUR: Thank you; I understand that. 40

MR. SHAND: May we have access to two sets of documents which have now been produced from the Registry in answer to the subpoena. One is the hospital record.

HIS HONOUR: But relating to Mr. Carney?

MR. SHAND: Indeed. The other one is a subpoena addressed to Westpac, relating to the bank accounts, no doubt, of the company Airfoil.

HIS HONOUR: Any objection to those records being inspected by counsel for the plaintiffs?

MR. STOWE: No. I seek access on behalf of the defendant also, your Honour.

HIS HONOUR: All right; no objection being raised by counsel for the defendant, both parties may have access to those records.

MR. SHAND: Your Honour, I should add that I am informed that the subpoena to Westpac also calls for the bank records relating to Mr. and Mrs. Carney as well as to Airfoil we make the same application.

HIS HONOUR: Do you have any objection to that? 10

MR. STOWE: Yes, I do.

HIS HONOUR: Then until you have had a look at those records and until you make some decision about this in a final way, I will not allow access to Mr. and Mrs. Carney's bank records. You had better have a look at this overnight, and then tell me whether you intend to persevere in that objection.

MR. STOWE: There are also two subpoenas to produce documents issued by the defendant, addressed to the National Bank of Australasia, Kingsgrove, and Westpac Banking Corporation, Padstow, in response to which documents have been produced. Might the defendant have access to those documents; in both cases they relate to bank records of Airfoil Registers Pty. Limited, primarily its cheques. 20

HIS HONOUR: Both parties may have access to those.

MR. STOWE: The documents I would seek to tender from the agreed bundle are 5-9 inclusive, and 11-20 inclusive.

MR. SHAND: Your Honour, we take what may be regarded perhaps as a formal, but nonetheless real objection, on the basis that they are irrelevant, we submit, to the cause of action sued upon by the plaintiffs. In so saying, I appreciate that no doubt the defendant is attempting to discharge an onus. 30

HIS HONOUR: Yes.

(Documents 5-9 and 11-20 inclusive of agreed bundle of documents tendered; admitted subject to relevance and marked Exhibit 1.)

MR. STOWE: I think it is common ground that there was a total of three cheques issued in respect of the three vendors. The ones which are more extensively referred to in 12, 13 and 14 comprise what might be called the first instalment to the vendors. The others are the second and third instalments respectively. May it also 40

be noted that it is admitted by the plaintiffs - at all material times Newbridge Industries Pty. Limited was a subsidiary of Airfoil Registers Pty. Limited.

HIS HONOUR: Yes. In essence, the factual dispute is, you say it was either a term and condition of the agreement that things should be done as you stated, or alternatively it was agreed that the agreement should be carried into execution in that way, and Mr. Shand denies it.

MR. STOWE: Yes.

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DEFENDANT  
Sworn and examined:

MR. STOWE: Q. Is your full name Phillip William Carney? A. Yes.

Q. And do you reside at 3 Turon Avenue, Kingsgrove?  
A. Yes.

Q. Are you a company director by occupation? A. Yes.

Q. And you are the defendant in each of these three actions? A. Yes.

Q. You were a director of the company Airfoil Registers Pty. Limited in February and March of 1980? A. Yes.

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Q. In February and in March, prior to 24th March, were there 111 shares issued in the capital of Airfoil Registers Pty. Limited? A. Yes.

Q. And of those, were 93 held by yourself? A. Yes.

Q. 8 by the plaintiff, Mr. Jehnic? A. Yes.

Q. And 5 each by the plaintiffs Mr. Herbert and Mr. Arnett? A. Yes.

Q. In February 1980 did a difference of opinion arise between you on the one hand and Messrs. Jehnic, Herbert and Arnett on the other hand, arising out of some proposals in relation to a company to be called Flexmaster Pty. Limited? A. Yes.

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Q. In connection with that difference of opinion, did you have a conversation, towards the end of January 1980, with Messrs. Jehnic, Herbert and Arnett, concerning their shares in Airfoil Registers Pty. Limited?  
A. Yes.

(The usual order was made for all witnesses to leave court.)

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Q. I asked you whether you could recall a conversation



concerning shares of the three plaintiffs in Airfoil Registers, and I think you said yes? A. Yes.

Q. Where did that conversation take place? A. It took place in the office of Airfoil.

Q. Can you recall what you said to them about that subject on that occasion? A. Yes, Flexmaster was a new company that we intended to --- (objected to).

Q. I am only asking you to tell the court what you said, following a difference with the three plaintiffs about Flexmaster, concerning their shares in Airfoil Registers? A. I would be prepared to buy their shares, at a value based on the net asset value of the company, and that we would, between ourselves, work together to establish that net asset value. 10

Q. Was anything discussed or arranged as to who would do what in connection with the determining of the net asset value of Airfoil Registers Pty. Limited? A. Yes, we arranged for a stocktake to be taken the following week, of which all of us had agreed to attend, namely, Mr. Arnett, Mr. Herbert, Mr. Jehnic and myself, and our accountant, Mr. Morton; and as regards to the real estate, Mr. Arnett has been involved in real estate in the past, and he was given the job to value the real estate that we had in the name of Airfoil Registers Pty. Limited. 20

Q. Did you say anything, on the occasion of the conversation that you refer to, concerning the vehicle by which you were offering to purchase their shares? A. Yes, at that time I had informed them that I would be purchasing the shares in the name of the company; the name of the company I did not know at the time, but I would inform them of the name of the company. 30

Q. At the time that you made that statement and discussed those arrangements with them, what did any of them say about your proposal? A. At that time they each had different statements. Mr. Arnett had informed me that before he would establish the worth of the company he would want a balance sheet prepared and he would give it to his accountant. I informed him in reference to that that that was private information, and confidential. He informed me that a pencil balance sheet would have been sufficient. In relation to Herbert and Arnett, I had a discussion a few days after that particular discussion, with Mr. Jehnic at the New Brighton Golf Club, when he asked me what I considered the net asset value of the company was, I commented that I thought it would be approximately \$2.2-million. He then asked me what would that represent as far as his shares were concerned. I informed him approximately \$170,000. 40 50

Q. That last discussion was a discussion separate from the occasion when you raised the question?

A. That is right.

Q. Can you recall any subsequent discussion in February 1980?

MR. SHAND: I think you had better not lead on dates, if you do not mind.

MR. STOWE: Q. Can you recall any subsequent discussions when things were said between you, on the one hand, and the three plaintiffs, on the other hand, about the terms by which any purchase price to be paid by the purchasing company would be paid? A. Yes, I had informed Karlo Jehnic and Darrell Arnett and John Herbert that I would not be able to pay the money immediately, but I would make a substantial payment initially, and Mr. Jehnic said, "I don't want to wait three years for my money", and I said, that I would organise the final payments within a couple of months.

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Q. Was that the sum total of that discussion? Was anything said about anything being done in relation to the deferred balance of the purchase price? A. The other discussion, as far as the deferred balance was concerned, was that --

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MR. SHAND: When was this? It is all very vague.

WITNESS: This was in February, just after the stocktake; we had a meeting.

MR. STOWE: Q. You are telling us, are you, about one discussion that took place in February? A. In February, yes.

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Q. Where did the discussion take place? A. Right. There was the discussion in Mr. Jehnic's office and ---

Q. That is the discussion that you have begun to refer to a moment ago, is it? A. No, that first discussion was in relation to the actual amount of how we were going to value the company; ~~and we sort of, I had a rough idea that the company was worth~~ ---- (objected to; ordered by his Honour to be struck out from "and we sort of".)

HIS HONOUR: Q. Mr. Carney, lawyers seem to have these peculiar rules about evidence, so do not let yourself be put off by these interruptions. So that we can get this correctly, you started off telling us about the conversation in which you told these gentlemen that you were prepared to buy their shares? A. Yes.

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Q. Now when and where did that one occur? A. That one occurred in the offices of Airfoil Registers.

Q. In what month? A. That occurred late January/early February.

Q. Then you told us about having a conversation with Mr. Jehnic a few days later at the golf club? A. That is right.

Q. Then you told us about another conversation with the three of them when you said that you would not be able to pay the money at once? A. That is right. 10

Q. And where did that occur? A. That occurred also in Airfoil's offices.

Q. And when? A. That occurred late in February - we were talking about the money late in February.

Q. And you were about to come to another conversation now, were you? A. Right, yes.

Q. And that was in Mr. Jehnic's office? A. That is right.

Q. And when? A. That was one week after the stocktake; we were working on valuing the stocktake. 20

HIS HONOUR: All right. I think we are now at that point.

MR. STOWE: Q. What was said by you and by any of the other three, on the occasion of that last discussion? A. Right. Arnett - also at that discussion there was a Mr. Morton, - my accountant, was also in the office of Mr. Jehnic. And Arnett said, "Presumably you can't pay all the money immediately. We accept that, but we want to be secured for the balance owing". 30

Q. What did you say in answer to that? A. I said, "That is a bit of a problem, because all my assets are tied up". They were mortgaged at the bank.

Q. Did he say anything else? A. He said, "We want a second mortgage on the factory".

Q. By "the factory" what did you understand him to refer to? A. The factory where we were in - that is, the Airfoil Registers' factory - the Newbridge Industries factory, sorry.

Q. By whom was the land, upon which the factory had been erected, owned? A. Newbridge Industries. 40

Q. What did you say in response to that request?

A. Mr. Morton actually - Mr. Morton interrupted and said, "You would need consent by Mr. Heffernan and Mr. Hampson, or Jim and John, to get a second mortgage".

Q. Who are Jim and John? A. Jim and John are Jim Hampson and John Heffernan, the first mortgagees of the property that we were talking about.

Q. That is, first mortgagees from Newbridge Industries Pty. Limited, of the land on which the factory was built? 10

A. That is right.

Q. Yes; did you say anything when that subject was raised by Mr. Morton? A. I said, "I am not sure whether Jim and John will consent to giving us a second mortgage, and I am not real happy to ask them for their consent".

Q. Was there any reply made to that statement by you?

A. Arnett said, "You have got to get consent. If we don't get the security, we won't go through with the deal". 20

Q. Was anything else said at that discussion about that mortgage? A. No.

Q. Following that discussion, did you do anything about the matter of the mortgage? A. Yes, I approached - about two days after that discussion I approached Jim and John ~~and told them my predicament~~. (Objected to from "and told them"; ordered by his Honour to be struck out).

Q. After you had spoken to Mr. Hampson and Mr. Heffernan, did you speak to any of the three plaintiffs? 30

A. Yes, I spoke to Darrell Arnett.

Q. What did you say to him? A. And told him that Jim and John had given their consent, and that he should inform his solicitor to get in touch with Duncan, who were their solicitors, in reference to that consent.

Q. Can you recall any subsequent discussion involving yourself and the three plaintiffs, at which the proposed purchase was discussed in greater detail? A. Yes, on 18th March we had a meeting.

Q. Where did that meeting take place? A. Also at Airfoil's offices. 40

Q. Who was present at the meeting? A. Myself, Mr. Jehnic, Mr. Herbert and Mr. Arnett.

Q. Can you tell us what was said and done in the

course of that discussion? A. Yes, I said that "It appears that the valuation of the net assets of the company appear to be approximately \$2.2-million", although Mr. Morton, my accountant, disagreed and indicated that \$1.8-million to 1.9-million was the more realistic figure. I believe that \$2.2-million was the figure.

Q. Just stopping there, had the stocktake that you talked about earlier been carried out at that time?

A. Yes.

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Q. And had draft accounts been completed at that time? A. No.

Q. Did any of the three plaintiffs say anything, when you made that comment to them? A. Yes, they were satisfied that --- (Objected to).

HIS HONOUR: You will have to try and tell us what they said, rather than give us your opinion.

MR. STOWE: Q. Did any one of them say anything, and if so, what was it that the person said? A. Arnett said that, based on \$2.2-million, that would mean that Mr. Jehnic's share would be \$170,000.

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Q. Did Mr. Jehnic say anything? A. Yes, he said that he wanted \$200,000.

Q. What else was said? A. I said, "No way". Mr. Arnett then said, "Well, how about \$180,000?" I said to Mr. Arnett, "What does \$180,000 value the net assets of the company at?" he said, "\$2.5-million". I said, "Is everyone happy with that?" Mr. Arnett then said, "Would you please leave the room for a few minutes while we have a private chat?"

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Q. And what did you do then? A. I left the room.

Q. And did you subsequently return to the room?  
A. Yes.

Q. About how much longer? A. Oh, five minutes - four or five minutes.

Q. And when you returned to the room, what was said?  
A. Arnett said that he and John were happy with the amounts calculated on an amount of \$180,000 that Mr. Jehnic was going to get, and that they were happy with that offer.

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Q. Did they say anything about the basis upon which -

MR. SHAND: Please do not lead.

MR. STOWE: Q. Was anything else said about the prices to be paid for the shares? A. I said that in that offer there was to be no dividends to be added on to that offer; that the individual personal loan accounts had to be deducted from the personal purchase prices in relation to the total price to be paid.

Q. Anything else said about determination of the amounts of the purchase prices? A. Yes, the total amount of the purchase price, based on \$180,000 --- (Objected to). 10

Q. You are asked just to tell the court what anybody said on the subject of purchase prices, additional to what you have told us already has been said - just try to use the sort of words that were used by whoever else spoke on the subject? A. Right. Mr. Arnett said that the total price would be \$405,000, less the two loan accounts of \$7,000 for Mr. Jehnic and \$5,000 for Mr. Herbert, giving a final purchase price of \$393,000.

MR. STOWE: Q. Was anything said about any other items at the time of that conversation? A. Yes. Mr. Arnett said "What about Karlo's car. Will you throw that in as part of the deal". 20

Q. What did you understand him to mean by Karlo's car? A. It was a Ford Fairlane Statesman model.

Q. Who owned that car? A. Airfoil Registers Pty. Limited.

Q. Were there any other cars used by the other two vendors? A. Yes.

Q. What other cars were there? A. John Herbert had a red Holden station wagon which was a 1976 model and Darrell Arnett had a T-bar Fairlane station wagon - Ford Fairlane station wagon. 30

Q. I will come back to the details of the cars themselves. At the moment, when that question was put to you by Mr. Arnett, what did you say? A. I said "No way. I believe that we have done - that the deal was a fair deal and that I couldn't see any reason why I should throw the car in as part of the deal".

Q. Did that conversation continue? A. "But I would be prepared to sell it to Mr. Jehnic at the right price." 40

Q. What do you mean by the right price? (Objected to, question rejected).

Q. Did you say what you meant by the right price?

Q. Yes. I said I would sell the car for \$3,700 to Mr. Jehnic.

Q. Was anything else said? A. Mr. Arnett said "What's \$3,700 to you. Why don't you give it to him".

Q. What did you say? A. "I've already given it to him as the value of the car would be between eight and 10,000 dollars."

Q. Was anything else said? A. Arnett said "What about mine and John's car". I said "I would be prepared to sell them to them. What are they worth". Arnett said "Mine's worth about \$1500 and John was - he was happy to pay \$800". (Objected to.) 10

HIS HONOUR: Q. Try and tell us what he said? A. John said he would be happy to pay \$800.

MR. STOWE: Q. What did you say? A. "Okay".

Q. Just going back to the three cars, I think you have told us that Mr. Jehnic's car was a Ford Fairlane? A. Mr. Jehnic's car was a Ford Fairlane Statesman model. 20

Q. What year model was that car? A. 1978 model which we purchased in 1979.

Q. When you say we purchased, you mean Airfoil Registers Pty. Limited? A. Airfoil Registers yes, sorry.

Q. What price did Airfoil Registers pay for the car in 1979? (Objected to, question rejected).

Q. can you describe the condition of the car in March 1980? A. The car had done approximately 20,000 kilometres. It was in excellent condition. It had a vinyl roof which needed to be brushed up and repolished but other than that the car was immaculate. 30

Q. What sort of car and what year model was the car that was being used by Mr. Herbert?

HIS HONOUR: He has already told us that it was a red 1976 Holden station sedan.

WITNESS: Right.

MR. STOWE: Q. Would you describe the condition of that car in March 1980? A. Yes, it was in very good order. John looked after his car. Quite a good car. 40

Q. Have you told us what sort of car Mr. Arnett had?  
A. Yes.

Q. Would you describe the condition of that car in March 1980? A. Poor. The car was not really well looked after and the car really was - ~~It needed seven or \$800 to be spent on the car.~~ (Objected to, evidence struck out.)

Q. What year model was that car? A. 1976.

Q. Did this same discussion that you have been telling us about, was there anything further said about the manner in which the total purchase price was to be split up? A. Yes. 10

Q. What was said about that? A. I informed them that I could pay \$150,000 within a couple of weeks. It was a week and a half. And that I would pay - I then asked - Mr. Arnett said that there were to be adjustments to be made between themselves which I had no knowledge of and I then asked him to work out what he would want split up to be for the second instalment of \$155,000.

Q. What did you say about this \$155,000? A. I asked Mr. Arnett to give me the figures that I had to pay each of the individual parties for - which amounted to \$155,000 after their own adjustments that they made between themselves. 20

Q. I think you told us about an initial instalment of \$150,000? A. That's right.

Q. Did you say something as to the timing of a second instalment? A. Yes, at the end of July and the third on the 15th August.

Q. Was there any further discussion at that time about the amounts of individual cheques to be made to the three vendors? A. Yes at that time we discussed the fact that - (objected to). 30

Q. Try to say what a specific person said? A. Mr. Arnett demanded postdated cheques in relation to - (objected to). Mr. Arnett asked for postdated cheques (objected to).

HIS HONOUR: Q. Just pretend that you are a gramophone and you are just replaying what happened in this room and you will play what Mr. Arnett was saying "I want", what did he say? A. Mr. Arnett said that "I want postdated cheques for the purchase price namely the first instalment, the second instalment and the third instalment". 40

MR. STOWE: Q. What did you say to that? A. I said that "I thought that postdated cheques were illegal". He said "I want the postdated cheques".



Q. We are still at the meeting on 18th March are we?  
A. That's right.

Q. Was anything said or done in relation to the de-  
termination of the amounts of individual cheques?  
A. Yes, the first instalment was calculated (objected  
to).

HIS HONOUR: Q. Did you see somebody do something or  
what are you telling me or did somebody say something?  
A. Yes, Mr. Arnett said that the first instalment of 10  
\$150,000, the cheques to be drawn are 60 - the figures,  
\$68,000 to Mr. Jehnic, \$41,000 to Mr. Arnett and  
\$41,000 to Mr. Herbert making a total of \$150,000.

MR. STOWE: Q. Was anything said or done about the  
calculation of the amounts of the second instalment  
payable to the three vendors? A. ~~Mr. Arnett calculated~~  
~~these amounts and gave me the figures.~~ (Objected to,  
evidence struck out.)

HIS HONOUR: Q. Can you tell us what you saw him doing  
and then what you heard him say? A. He had calculated - 20  
(Objected to).

Q. Did you see him writing something or did you see  
him talking to the others or did he gaze up at the ceil-  
ing and get inspiration or what? A. No. When I  
arrived back from the room after I left for five  
minutes, Mr. Arnett said that there would be some adjust-  
ments between the three of them and I said "Okay" and he  
then implemented those adjustments in the second payment.

MR. STOWE: Q. Did he do something that you saw and if  
so, what was it or did he say something to you and if so 30  
what did he say? A. He wrote down the figures and  
gave me the figures.

Q. Did he say something to you? A. That "that is  
the second instalment that is required by us".

Q. Did he tell you what the amount of the instalment  
was to be? A. I had told him that I would be able to  
pay \$155,000.

Q. Did he say anything to you about what the indivi-  
dual shares of that instalment were to be or did he  
give you something? A. He gave me the figures. 40

HIS HONOUR: Q. I think Mr. Stowe is asking you did he  
give you the figures on a piece of paper or did he tell  
you? A. He gave me the figures on a sheet of paper.

MR. STOWE: Q. Do you still have that sheet of paper?  
A. No.

Q. Can you recall what the figures set out on the sheet of paper were? A. I have actually rewritten the figures myself but I don't know how the figures were calculated by Mr. Arnett. I don't know.

Q. Can you remember what they were? A. The amount of the cheques?

Q. Yes? A. No I would have to look for my memory is not - I just can't remember the exact amount of each cheque. 10

Q. They weren't cheques at this time I take it, they were numbers? A. No, they were just figures.

Q. On a piece of paper? A. Yes.

Q. Was anything said or done after that about the third instalment? A. Yes, the third instalment left us a balance of \$100,000.

HIS HONOUR: Q. Were the figures for the third instalment written on that sheet of paper as well? A. No. I merely dictated the loan amounts of Mr. Herbert and Mr. Arnett and Mr. Jehnic for the final payment. They are loan amounts of their third instalment which was going to be \$100,000 but because of the loan account went to \$88,000. 20

MR. STOWE: Q. When you say it went to \$88,000 do you mean the total of the three cheques amounted to \$88,000? A. That's right, yes.

Q. When the amounts of each of those payments had been calculated in the manner that you described, what happened next? A. We sat down in my office. I drew the cheques. As I was drawing the cheques I felt that the 150 - (objected to.) I said that the \$155,000 second instalment would strain the company's liquidity and that I would make the second - the third instalment the second instalment and the second instalment and third instalment and I drew the cheques and dated them accordingly. 30

Q. What cheque book did you use to draw the cheques? A. Airfoil Registers Pty. Limited.

Q. What did you do with the cheques having drawn them? A. I handed them to the three parties.

Q. You have in front of you a great bundle of documents, was it on p.12, are the nine cheques that appear on that and the two subsequent pages the cheques that you referred to? A. Yes. 40

HIS HONOUR: Q. They are photostats? A. Yes, they are the cheques.

MR. STOWE: Q. They are photostats of the cheques?

A. Sorry, they are photostats of the cheques, yes.

Q. Did the four of you do anything at that stage of your meeting? A. No. We just shook hands and we - I mentioned to Mr. Arnett to have him to organise the paperwork, the balance of the paperwork. The agreements, as soon as he possibly could.

Q. Did he say anything to you about what he was going to do about that? A. He informed me that he felt that the documents would be completed by the end of next week and that we could - that is the 21st March and that we could finalise the transaction on that date. 10

Q. Is that the end of next week? A. Yes that is the 21st, sorry, that is at the end of the week which was, sorry, the 21st.

Q. Did he say anything or do anything in relation to you later on that week about these documents? A. Yes. On Friday the 21st he gave me a bundle of documents and asked me to examine the documents for my approval. 20

Q. Are you able to recall what the documents were that he gave you? A. There was the sale agreement, the mortgage document. The sale agreement and the mortgage document.

Q. What did you do with the documents? A. I quickly looked at the documents and noticed a peculiarity in the sale agreement and I gave them back to Darrell and said "Darrell, there appears to be something wrong. Would you please get it fixed up".

Q. What did he say? A. He said "I'll get it fixed up and I'll have them back, the documents back corrected on Monday". 30

Q. Did you have any further meeting or discussion about the matter on that day or on the following Monday?

A. The following Monday we had a meeting, yes.

Q. When did that meeting take place? A. Monday afternoon.

Q. Where did it take place? A. At Airfoil Registers' office.

Q. And who was present? A. Myself, Arnett, Herbert - Jehnic, Morton, my accountant, and Mr. Simpson their solicitor. 40

Q. The solicitor for the three vendors? A. That's right.

Q. Did anybody produce any documents? A. Yes.  
Their solicitor produced the documents.

Q. What were the documents that he produced? A. He produced the sale agreement. He produced the mortgage documents. He produced share transfers and he produced a personal guarantee.

Q. What was then done in relation to those documents?

A. Mr. Morton said "What was the personal guarantee for. It wasn't discussed" and he said I shouldn't sign the personal guarantee.

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Q. What did you do or say? A. I said that if the company pays, I own the company so I will sign the personal guarantee.

Q. And what were the various documents that you have referred to executed at that meeting? A. Yes. We put the common seal on the - the Newbridge common seal on the mortgage document and signed them and we put the common seal of Ilerain on the sale agreement.

Q. Did you say anything more about the cheques at that meeting? A. Yes, I asked Mr. Jehnic to hold his cheque for a couple of days as there was insufficient funds to cover his cheque. He said "No problem".

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Q. Prior to that meeting on 24th March, did you cause any document to be prepared in relation to the mortgage of the factory land? A. I'm sorry, I just don't understand that.

Q. Before the meeting on 24th March, did you yourself cause any document to be prepared in relation to the mortgage over the factory land? A. No. I told Darrell that if he wanted or if they wanted a mortgage over the property that they had to prepare the mortgage and pay whatever costs had to - whatever costs in relation to that preparing of that document.

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Q. Did you give any instructions yourself to anyone else in relation to the preparation of a mortgage?

A. No.

CROSS-EXAMINATION:

MR. SHAND: Q. Mr. Carney, you told us I think that on 18th March a considerable quantity of conversation took place which ended in you handing cheques to the three of these men? A. Yes.

40

Q. Is that true? A. Yes.

Q. You are quite clear about that are you? A. Yes.

Q. Has that always been your recollection of what happened? A. No.

Q. When did it become your recollection of what happened. I am asking you for a point of time? A. I discussed -

Q. No, no, when did it become your recollection?  
A. Immediately after the previous case we had.

Q. You mean the case that was heard by the Master, Master Allen? A. That's right. 10

Q. And when you say immediately after, what do you mean by that? A. I thought about it and I had erred.

Q. You had erred in your sworn evidence and did you take steps to have your legal advisers inform the Court? A. No.

Q. You knew you had given false evidence, did you not? A. Yes.

Q. It was open to you was it not at that time to inform your solicitor or counsel that you had given false evidence was it not? A. Yes, yes. 20

Q. You weren't out of communication with them were you? A. No.

Q. How long after you had given that evidence - I am speaking about a specific period of time - did you realise you had given false evidence? A. I'm sorry, could you just - I'm sorry I missed that point again.

Q. When was it that, with as much precision as you can muster, after you had given that evidence that you realised you had given false evidence? A. Within a week. 30

Q. Does that mean it was the same day as you had given the evidence? A. No.

Q. You can put it no more precisely than within a week? A. No I can't.

Q. And had the Master delivered his judgment by then?  
A. No he had not.

Q. So that you knew when you realised that you had given false evidence that he was deliberating upon the result of that hearing taking into account the false evidence that you had given? A. I didn't think about it. 40

Q. You knew that did you not? A. I didn't think about it.

Q. You must have known it, must you not Mr. Carney?

A. I didn't think about it.

Q. Did you realise that the evidence you had given was false and you then knew did you not that the Master had been left to consider the matter upon the basis of false evidence did you not? A. I didn't think about it.

10

Q. You must have must you not? A. I didn't think of the fact that I had - that I was - that I had given false evidence.

Q. You knew within a week that you had given false evidence you told us? A. Yes.

Q. That's right, is it not? A. Yes.

Q. You knew that that evidence was material upon which the Master was considering his decision did you not? A. Yes.

Q. You therefore knew that there was a false basis upon which he might come to his decision? A. I didn't consider it.

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Q. You knew that must be the case did you not?

A. I didn't consider it.

Q. When you realised that you had given false evidence and the thought came into your mind after that?

A. I had erred, I had got my dates mixed up and I made a mistake and I admit that.

Q. You knew then that you had misled the Court did you not? A. I had misled the Court, yes.

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Q. You realised then that you had misled the Court did you not? A. Yes I did.

Q. It follows from that does it not that as a matter of honesty if that is the appropriate word, you knew you had the opportunity of bringing to the notice of the Court the fact that you had misled it did you not?

A. I didn't consider it.

Q. You say it did not occur to you that as a matter of honesty you ought to make known that you had given false evidence which the Master was then considering?

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A. I didn't consider the importance of it. I just didn't consider it.

Q. The importance of false evidence given on oath?

A. It is important that you should have your facts correct and I had made an error. I admit that.

Q. You had the opportunity of correcting it did you not? A. I don't know I wasn't aware that I could correct it.

Q. Oh really, did you think that you might take advice from your legal advisers at that time after you had realised as to what maybe done? A. I didn't consider it. 10

Q. Having come to that realisation, did you know that you could consult your legal advisers? A. I didn't give it any thought to do that.

Q. Were you aware that you still had access to your legal advisers? A. Oh yes.

Q. And that therefore you could go to them and tell them that the evidence that you had given you now realised was false? A. Yes.

Q. You knew that? A. Yes. 20

Q. But you made a positive decision not to do so, did you not? A. I didn't consider it.

Q. You knew you could do it? A. I assume I could do it but I just didn't consider it.

Q. You must have known at that time? A. I didn't consider it.

Q. Are you an honest man? A. Yes I am.

Q. Are you really? A. Yes I am.

Q. And you realise the paramount obligation to be honest in giving evidence to a Court of law, do you not? 30

A. I do and I am embarrassed I made an error.

Q. Embarrassed, is that as high as you put it?

A. Yes.

Q. Today is the first time that you have revealed, is it not, that you have given false evidence? A. Yes.

Q. Even to your legal advisers? A. No.

Q. When did you first reveal it? A. Just recently when we were ascertaining the steps in relation to when the cheques would be drawn. 40

Q. When was that? A. Within the last three weeks.

Q. Who did you report it to? A. At a meeting with Mr. Kennedy.

- Q. That is your solicitor is it? A. That's right.
- Q. Within the last three weeks? A. We had been discussing the matters, yes.
- Q. How long had gone by Mr. Carney between your realisation that you had given false evidence and this event within the last three weeks that you speak of?  
A. How long has gone by?
- Q. Yes? A. Nine months.
- Q. Since you gave evidence? A. I'm not sure I'm sorry, when was that. 10
- Q. You gave your evidence on 15th September 1981 did you not? A. 1981.
- Q. That means does it not that well in excess of a year went by while you did nothing to divulge to anyone that you had given false evidence? A. I had not spoken to my solicitor about the case for a fairly lengthy period of time.
- Q. But you had the opportunity if you so wished?  
A. Yes, but I didn't discuss anything with them. 20
- Q. Would you mind telling us this, you indicated that on 18th March 1980 after the handing over of the cheques that you just shook hands? A. Yes.
- Q. What did that signify to you? A. I thought that we had reached an agreement.
- Q. An honourable agreement? A. Yes.
- Q. One that you proposed to adhere to? A. Yes.
- Q. One that you felt both as a matter of legal obligation and honour you would not depart from? A. Yes.
- Q. Between you and your then almost former business partners? A. Yes. 30
- Q. Is that what you felt? A. That's right.
- Q. That you were bound to that in honour? A. Yes I was.
- Q. Does that word have any significance to you?  
A. Yes.
- Q. What is it? A. I believe that the right thing should be done, you know, and respect a transaction.



Q. Do you believe by the use of that expression that being an honourable man nothing would induce you to depart from your obligation? A. I think there is a limit to where your honour goes.

Q. Your honour was qualified was it? A. Yes it was.

Q. And it was qualified back then too was it?  
A. Yes it was.

Q. Did you express to your then almost former partners that whilst you were shaking their hands, in future you might depart from your honourable obligation did you? A. No. 10

Q. You just had it in the back of your mind that you might, did you? A. No. I asked - I discussed with them and they said that they would do the right thing by me and the honourable - the thing that I would do for them as well.

Q. Is this part of the conversation that occurred on 18th March? A. No this has been conversations that were made on a number of occasions up to 18th March. 20

Q. You each said to each other "Look we'll do the right thing in future"? A. That's right.

Q. That is all that was said about it? A. That's right.

Q. And you all knew what the right thing was?  
A. That's right.

Q. Did it in your mind include the possibility that you might accept what they had transferred to you in the form of their interest in the company that you were to wholly own and not pay them for it? A. I'm sorry, can you please say that question again. 30

Q. Did the qualification about your attitude and honour at that time include the thought in your mind that having accepted a transfer to you of their interest in that company you might thereafter neglect to pay them? A. No.

Q. It didn't? A. No.

Q. That of course would be a disgusting and dishonourable thing would it not? A. That's right.

Q. You will agree will you not to reach a final bargain shaking hands upon it as a matter of honour and then deliberately repudiate it is a disgusting and dishonourable thing? A. Deliberately yes. 40

Q. That is what you did is it not? A. No I didn't.

Q. You in fact deliberately repudiated the agreement did you not? A. And they -

Q. Excuse me please could you answer? A. Yes I did.

Q. You did, did you not? A. Yes.

Q. You have agreed that it is a disgusting and dishonourable thing to do have you not? A. Yes.

Q. That does not bother you does it Mr. Carney?

A. Yes.

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Q. That does not bother you one scrap does it? A. It does.

Q. You see, these men had to come to a Court of law to get their money and to face a technical defence on your part. That is what it is is it not? A. They have cost me millions of dollars in competition and they didn't do the right thing and that was disgusting.

Q. You knew that they sold out their interest in your company, the company you came to own fully for a great sum of money did you not? A. Yes.

20

Q. You knew that? A. Yes.

Q. You knew you were under the clearest of obligations to pay them the great amount did you not? A. Yes.

Q. No tags? A. Yes there was a tag.

Q. Something you have not told us about? A. Yes.

Q. Just tell us how this tag came into existence and what it was would you? A. Right. Mr. Arnett, Mr. Herbert and Mr. Jehnic were very very talented men in the industry that our company was working in. They had very very excellent knowledge of the industry that I was in.

30

Q. The tag must be something that passed between you was it not? A. The tag was that these particular people were - we discussed it on many occasions before the finalising of the deal that the right thing would be done and that they would not come in opposition to me and they went and done it within one week of getting the deposit and that was honourable.

Q. I asked you a question a moment ago about what was said about doing the right thing? A. Yes.

40

Q. And I asked you whether that was all that was said about it and you said yes that was all, did you not? A. Yes.

Q. That was all that was said on that subject?  
A. Yes.

Q. That was your sworn evidence was it not? A. Yes.

Q. Was that a true answer? A. Yes, we discussed the fact.

Q. If that was all that was said on the subject of doing the right thing that is what you swore, was it not? A. That's right. 10

Q. And now of course you say it wasn't all that was said on that subject, do you not? A. No.

Q. You have just added to it have you not? A. No.

Q. You have not? A. I'm sorry.

Q. What is false, what is true and what is false with all that was said? A. Yes.

Q. Between you was that each of you would do the right thing? A. That's right. 20

Q. Or that more than that was said on that subject. Which is true? (Objected to).

HIS HONOUR: Q. You concede that some of the evidence you gave before the Master was false. What was that evidence? A. I erred at the time of the actual date where I drew the cheques your Honour.

Q. The other thing I want to know is this. You told Mr. Shand a few minutes ago that you discovered on reflection within a week or so that that was incorrect but you had no opportunity or no occasion to mention it to your lawyers until you saw them a matter of some weeks or months ago? A. That's right. 30

Q. Surely that is not right is it. There was an appeal from the Master's decision. Did you not see your lawyers then? A. It was after the appeal. That was when I noticed that the error was made. It was at the final time we went to Court. I discussed it with Mr. Arnett actually and he informed me that I had made an error outside the Court. That I had made an error that he had got the cheques on that day and that he had shown his parents the cheques and I thought about that and I thought I must have made a mistake and it was only after him saying that that was the case I then thought "Right, I've made a mistake. It was my error". 40

Defendant, xx

Q. I thought that you said you discovered the error one week after the Master heard your evidence. A. No I don't know. Which Master? The last time we were in Court. I'm not sure who the Master was then.

(Witness stood down.)

(Further hearing adjourned to 10 a.m. on Tuesday, 29th March, 1983.)

<u>IN THE SUPREME COURT</u>	)	
	)	
<u>OF NEW SOUTH WALES</u>	)	No. 16157 of 1980
	)	16158 of 1980
<u>COMMON LAW DIVISION</u>	)	16159 of 1980
	)	
<u>COMMERCIAL LIST</u>	)	

CORAM: ROGERS, J.

HERBERT v. CARNEY  
 JEHNIC v. CARNEY  
ARNETT v. CARNEY

SECOND DAY: TUESDAY, 29TH MARCH, 1983

10

(Mr. Shand indicated the following matters in the transcript:

At p. 16, first question, the last word on first line should be, "pays", not "buys"; his Honour ordered transcript to be corrected.  
 On p. 21, 9th question, Mr. Shand indicated that he did not think "great" sum of money was correct.  
 On p. 21, 11th question, "in the clearest of obligations" should be "under".)

(Mr. Shand sought leave to make certain amendments to statement of claim.)

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(Mr. Stowe indicated he had no corrections to make to transcript.)

(Short adjournment.)

ON RESUMPTION:

(Mr. Stowe indicated he would oppose the amendment sought; addressed his Honour.)

HIS HONOUR: Mr. Shand, you will have to join Ilerain as a party, will you not?

MR. SHAND: Your Honour, a search of the Corporate Affairs Commission, conducted last Thursday, as to returns of directors, indicates that current directors of Ilerain are Phillip William Carney and Anita Carney; they are the only directors. The current secretaries of the company are Phillip William Carney and Wayne Stanley Morton, who has already received mention in these proceedings. So that there is nothing Mr. Carney does not know about Ilerain; it is under his control.

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HIS HONOUR: Can you supply the particulars that Mr. Stowe wants to know?

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MR. SHAND: Certainly.

HIS HONOUR: I just want to see if, on consideration, Mr. Stowe can bring himself to accept that the factual situation is not going to be any different, and we can get the evidence in, and then have some written submissions, supplemented by some oral argument. In fairness to him, I want him to have a chance of seeing, to the point of demonstration, that what I believe to be the situation is the situation.

Mr. Herbert, Mr. Jehnic, Mr. Arnett and Mr. Carney, what I say is addressed to you all. Under the Supreme Court Act, as a Judge sitting in the Commercial List, Parliament has told me that I should try and achieve a speedy resolution of the real issues between the parties, without regard, if necessary, to the Rules. To that I would add only one thing, that the Parliament obviously expected me not only to act speedily and to get at the real issues, but also to act justly. 10

Now there are some matters in dispute between you that do not admit of any doubt. Messrs. Herbert, Jehnic and Arnett own some shares in Airfoil; they parted with those shares to Ilerain Pty. Limited. They were promised payment of some money. They did not receive a considerable portion of that money. The defence which is raised in answer to their claim for that money seems at the moment, on the evidence that Mr. Carney has given, and I have not heard Mr. Herbert or Mr. Jehnic or Mr. Arnett, to have some basis in law. However, to my simple mind it defies reasonable common sense to expect the law to shut its eyes, put on blinkers, and say it is perfectly all right for somebody to take the shares of three other people and not to have to pay for them, even though a promise and a guarantee had been given; and I understand Mr. Carney to be saying that he has some grievance against the three gentlemen himself. Now we are at the unpalatable stage where, in order for me to try and do justice, I will have to allow some amendment to be made to the plaintiffs' claim in order to ensure that every ground of relief which is available to them may be argued. 20 30 40

I am told by Mr. Stowe - and I do not want you to think that I am being at all critical of Mr. Stowe; I perfectly accept his word - that he cannot go on with the case until he gets some further opportunity of preparation. But that means that this very stale and old case is going to have to be stood over for a further period of time.

There is an old statement that "justice delayed is justice denied". If there is one thing I do not want to happen in this Court, it is for any person to feel that justice has been denied to him; yet I seem to have no option but to delay it in this case. 50

You gentlemen were engaged in a business enterprise together. I can readily understand that what has happened since has poisoned the relationship between you, but I would like you all, if you would, to try and be as fair to one another as you can. If necessary, I will adjourn this case and it will go on some other time, and to the best of my ability I will decide it. But do you not think that we have now really gone a long way towards trying to work out the legal implications of what has happened; you have now been before a Master of this Court, you have been to a Judge of this Court, and you are now here, and apparently you are about to have to come back again, and then perhaps go to the Court of Appeal.

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It is my very earnest appeal to you that you should pause before you commit yourself further to great cost and expense, and just try and think whether it is what you really want. If you really want it this way, the law affords you the opportunity of litigating to the bitter end; but it is not really a very reasonable way of going about it.

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I will adjourn for ten minutes or so so that you can speak to your legal representatives and discuss the problem which has arisen with them, and if it is still your wish at the end of that that I should adjourn this case and go on to another date, I will do that: I hope you do not.

(Short adjournment.)

ON RESUMPTION:

HIS HONOUR: What is the situation?

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MR. SHAND: Your Honour, so far as we are concerned, the matter still remains active. If the price of achieving these amendments is an adjournment, then we would prefer not to pay it, and to proceed.

HIS HONOUR: Very well. In that case, we will proceed.

DEFENDANT

On former oath:

CROSS-EXAMINATION CONT'D:

MR. SHAND: Q. Mr. Carney, I want to suggest to you that the evidence you gave yesterday concerning your realisation of having given false evidence before the Master was itself false; what do you say about that?

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A. What evidence are you referring to?

Q. Don't you remember giving evidence yesterday, as to your realization that you had given false evidence before the Master? A. In relation to the drawing of the cheques - the date?

Q. Yes? A. Yes.

Q. What do you say to the suggestion I now make to you that the evidence you gave yesterday as to your realization that you had given false evidence was itself false?

HIS HONOUR: I think he may have some difficulty in understanding that. Are you saying that what was false was his evidence as to the circumstances in which he realized - ?

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MR. SHAND: I will make it clear, thank you, your Honour.

Q. What do you say as to the suggestion, firstly, that the evidence you gave yesterday as to the time at which you realized that that evidence had been false, was itself false? A. I am sorry, would you say that again? I am not quite sure what you are saying.

Q. I will put it to you again in perhaps even a simpler way. Will you now agree that the evidence you gave yesterday about when you realized that your evidence before the Master was false was again false?

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A. No, it was true.

Q. True, was it? A. Yes.

Q. And do you claim to be a careful witness? A. I would not know whether I was careful or not.

Q. Do you know what it means to attempt to take care that your evidence is accurate? A. I do my best.

Q. Does that mean that there is a strong possibility that your best is not good enough? A. I have made a mistake, yes.

Q. Have you made a mistake yesterday? A. No.

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Q. When do you say you first realized that that previous evidence was false? A. About a week after the second case that we had. After that second case I spoke to Mr. Arnett.

Q. Just a minute, please; I am only asking you when? A. About a week or so after - the second time we went to Court.

Q. Are you saying that the first time you went to Court was before the Master? A. Yes.

Q. You gave evidence then? A. Yes.

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Q. And the second time was when you appealed against



the Master's decision and went before a Judge? A. Yes.

Q. That is a carefully considered answer, is it?

A. Yes.

Q. So within a week after the appearance before the Judge? A. After the appearance before the Judge, yes.

Q. I will come back to that. But you said yesterday, p. 19, that you first revealed to your legal advisers that that your evidence had been false within the last three weeks? A. Yes.

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Q. And that is still true, is it? A. Yes.

Q. And you further said about that that you reported it at a meeting with Mr. Kennedy - right? A. Yes.

Q. And you said this, in answer to this question. The question was, "That means, does it not, that well in excess of a year went by while you did nothing to divulge to anyone that you had given false evidence?" and your answer was, "I had not spoken to my solicitor about the case for a fairly lengthy period of time"? A. That is right.

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Q. And you were giving that answer as a sort of explanation as to why so long could have gone by before you had reported this matter of false evidence to your solicitor, weren't you? A. That is right.

Q. As if to say, "Well, I hadn't been seeing my solicitor, therefore the opportunity had not arisen, until about three weeks ago"? A. I didn't consider it, that is right.

Q. Do you remember when this case was due to be heard, last year? A. Yes, it was - what day -

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Q. It was a Monday, wasn't it? A. I am not sure exactly.

Q. In December? A. Yes.

Q. Late in December or early in December? A. Monday, early in December.

Q. The very first Monday in December, wasn't it? A. Yes, I think you would be correct in that, yes.

Q. And you remember that you were admitted to hospital? A. Yes.

Q. A matter of two or three days before that Monday? A. Yes.

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Q. So you know what I am talking about now, don't you? A. No.

Q. You know the time I am talking about now, don't you? A. Oh yes, sorry, the time.

Q. And you had been engaged in the preparation for that case, hadn't you? A. Yes.

Q. Talking to your solicitor in the course of that? A. Yes.

Q. And you had been doing so for some days before you went into hospital, hadn't you? A. Yes. 10

Q. Now in the light of those facts you have just sworn to, do you still say that you have not had, in practical terms, the opportunity of informing your solicitor about that previous false evidence until about three weeks ago? A. I -

Q. Do you still say that? A. Yes.

Q. It cannot be true, can it? A. I was -

Q. Mr. Carney, please answer. It cannot be true, can it, that statement? A. It is true. 20

Q. It cannot be true, can it? A. It is true.

Q. I suggest to you it cannot, for this reason, that on your sworn evidence a moment ago, you had full opportunity, just before you went into hospital in December last year, to tell your solicitor this, didn't you? A. We had discussed it in the previous, before the previous date of the case.

Q. Please answer my question. It cannot be true, can it, what you have said, because you had full opportunity of telling him about that matter while you were with him in preparation of your case, before entering hospital last year? A. We discussed the matter. 30

Q. In that case it is not correct to say, is it, that you first revealed that matter to your solicitor within the last three weeks? A. At the first -

Q. Please answer? A. Yes.

Q. It is not correct, is it? A. No.

Q. So that is another piece of false evidence, isn't it? (No reply).

Q. Isn't it? A. We had discussed this - 40

Q. Please answer. A. Yes.

Q. Given yesterday? A. Yes.

Q. Does that trouble you at all, Mr. Carney? A. Yes, I should have thought about it before I said that, yes.

Q. That does not faze you in the slightest, does it, that you had given false evidence yesterday? A. It does.

Q. Let me read it to you, just in case you suggest there was some ambiguity or doubt or vagueness about the question. Page 19 - "When did you first reveal it?" 10

A. Just recently when we were ascertaining the steps in relation to when the cheques would be drawn.

Q. When was that? A. Within the last three weeks." Any doubt or vagueness or ambiguity about those questions? A. No.

Q. And at the time you gave that answer, as you now say, you knew that you had discussed that very matter with your solicitor, in preparation, before you entered hospital last year, didn't you? A. It was discussed, yes. 20

Q. You knew that when you gave those answers yesterday? A. I didn't think at the time of it being important, to be honest with you.

Q. Now let me suggest this to you as being the true facts, quite distinct from the versions you have given so far. Do you remember that the hearing before Master Allen occupied two days? A. It most probably did; I am not completely sure, but I think it did, yes.

Q. And I suggest to you that it commenced on 15th September, 1981, and that on the Wednesday, 16th September, the addresses by counsel were completed. Is that correct, according to your recollection, or not? 30

A. I have not got the documents in front of me. You are reading that. If that is the case, and that is true, that is it. I don't know what days they were.

Q. Don't worry about the documents. Do you remember that the hearing itself was not concluded on one day, because the barristers involved completed their addresses on the second day? A. Yes, there was at least two days. I am not saying there was not three, but there was at least two days, yes. 40

Q. And you came back for a subsequent day while that hearing went on, didn't you? A. Yes.

Q. And when you arrived at the Court you saw

Mr. Arnett, didn't you, on that subsequent day?

A. Yes, he was there, he was in attendance.

Q. And do you recall having a conversation with him before the Court hearing started? A. Yes, we discussed business.

Q. And do you remember that there was discussion between the two of you then about the evidence which had been given, that these cheques had in fact been written out and signed, not on 24th March, but on the 18th? A. No, my recollection, it was done at the second Court case.

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Q. Let me put this to you quite clearly: will you deny that you had a conversation with Mr. Arnett about that very matter, before the conclusion of the hearing in the first Court case? A. Yes.

Q. You will deny that, will you? A. Yes.

Q. Are you prepared to be positive about that?

A. Yes.

Q. That means that you are in no doubt about it at all? A. That is right, I am in no doubt about it at all. It was not until the second case, I remember talking to Darrell about it.

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Q. How many days did the second hearing last?

A. One.

Q. When did you speak to him about it then? A. I think it was after the Court case.

Q. You mean after the hearing finished? A. Yes.

Q. Do you recall that your conversation with him about the difference in your accounts of when the cheques had been made out and signed, followed closely after the time when you had each given evidence about it? A. No, because we didn't give evidence at that particular hearing.

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Q. That is what I am putting to you, you see. Is this not true, that the conversation about the different accounts, as to when the cheques had been made out and signed, took place as a result of the different evidence given by you and the others on the matter?

A. No.

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Q. Well, what stimulated that topic on the later occasion when no evidence was given? A. The fact that I stated in my previous evidence that the dates that I recollected that I drew the cheques on; it annoyed me

that I had made an error. I thought I could not work out whether I had made an error, I was not sure, and when I discussed it with Mr. Arnett, he was very adamant, he was exacting. I then thought to myself I might have made a mistake; and on perusing the mortgage document I noticed the date on the document was the 21st, I noticed that the three cheques that were drawn, the amounts on the mortgage documents were for three amounts, namely the first instalment, the second instalment and the third instalment and therefore I must have made a mistake, because if I had not have given him the cheques before the 24th, then there was no need to put the first instalment in, in the mortgage, because the mortgage could only have been for the second and third instalment.

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Q. All that, you say, stimulated this conversation on the second Court hearing? A. No, it did not stimulate it. It just, as a result of his definite nature, and the fact that he said three heads are better than one, when we discussed it for two hours, it made me think that I had made a mistake, which I have admitted I have, and I apologise.

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Q. Well, do we have this straight now, that if your account is correct about the conversation having happened then, you were then in company with your solicitor on that very day? A. No, I don't think so, I don't know.

Q. Wasn't he there at the second hearing? A. Oh yes.

Q. So that is this right, dealing with what you have said about your attitude to the giving of false evidence and misleading the Court, that having heard that conversation with Mr. Arnett, all you had to do was to turn to your solicitor and say, "Look, I now realize that evidence I gave was incorrect"? A. I didn't then at the time realize that the evidence was incorrect.

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Q. Well, what brought you to that realization later? A. As I said yesterday, a week or so went by. As a matter of fact we had discussed it on a lot of occasions with my legal people, that I was, I just could not understand why my affidavit differed from theirs, and their response was to say, "Well, whatever happened happened, and that is what you have to say", and the mere fact that what I said before, they said, "It is irrelevant. If you have made a mistake, you just tell it the way it really is." and that is what I am doing.

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Q. Didn't you agree yesterday that the effect of what happened was that you left the Master to consider his decision in the light of the false evidence that you realized you had given? A. No - you said that.

Q. And you agreed, did you not? (No reply.)

Q. Didn't you? A. Yes.

MR. STOWE: In fairness to the witness, he has sought to say subsequently that his recollection is that the conversation took place after the appeal proceedings before Begg, J. It is confusing him, in my submission, to put the question that was just put to him, in the light of what he said before.

HIS HONOUR: I do not think it is confusing. I think he said that in terms. Equally, Mr. Shand, I do think, if I may say so, that I am fully seised of the point and I do not know that we are going to get much further forward. 10

MR. SHAND: Your Honour, I appreciate that. I want to get on to one point which is allied to it. Your Honour may think questions of credit may be of some importance perhaps in this case.

Q. You apparently now say, do you, that the cheques were made out and signed on 18th March, 1980? A. Yes. 20

Q. Not on the 24th? A. No.

Q. You have told us I think who was present on the 18th, haven't you? A. Yes.

Q. Page 10; they consisted of yourself and Mr. Jehnic, Mr. Herbert and Mr. Arnett? A. Yes.

Q. And that is all? A. That is right.

Q. Not Mr. Morton? A. That is right.

Q. You swore an affidavit, did you not, for the purpose of the proceedings before the Master, in which you stated quite clearly that at the time those cheques were made out, Mr. Morton was present? A. I stated that Mr. Morton - 30

Q. Please, will you answer? A. Yes, I did. This is in the previous - yes.

Q. That was false? A. I had erred.

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

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Q. And you even went to the lengths, didn't you, in that affidavit, of giving the conversation which you claimed occurred, in which Mr. Morton was involved, relating to the making out of the cheques, didn't you? 40

A. Yes, I did.

Q. That was just a piece of imagination, was it?

A. No.

Q. Because it never occurred, did it? A. Yes, it did.

Q. That conversation never occurred on the 18th, did it? A. It didn't occur on the 18th.

Q. Thank you. You see you said this, didn't you - par. 19 of your affidavit - "after writing out the first of the said cheques, I said to Mr. Morton, in the presence and hearing of the plaintiff and the said Messrs. Arnett and Herbert, something to the following effect, 'What will I put on the cheque butt'?" A. That is right. 10

Q. That is what you swore? A. Yes.

Q. Morton replied, "put 'loan P. Carney'. I did."?

A. I did.

Q. All false in relation to the 18th, wasn't it?

A. All false in relation to the 18th, I didn't -

Q. That is all I am asking you, thank you? A. That is right. 20

Q. Let me take you to another matter. Did you enter hospital in December last year purely for reasons of your own health? A. No.

Q. You had other reasons, did you? A. I don't - what did you say, sorry?

Q. I asked you whether you entered hospital in December last year purely for reasons of your own health? A. Yes, that is right.

Q. No other reasons in your own mind? A. No. 30

Q. It would not have been the fact that this case was to be heard in very early December, that played its part in your decision, did it? A. No part whatsoever.

Q. None at all? A. None at all.

Q. When did you come out of hospital? A. I think about the 6th or 7th.

Q. What day of the week was it? A. A Wednesday.

Q. Did you visit any of these three plaintiffs on that Wednesday? A. No.

Q. Did you see them? A. No.

Q. Did they see you? A. Not to my knowledge.

Q. Do you remember sitting and drinking cans of beer on a Wednesday? A. No.

Q. No chance of that being right? A. That is not right.

Q. By the way, I suppose you told your wife before you went into hospital that you were going, did you?

A. My wife actually picked me up.

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Q. Terribly distressed, was she? A. Yes.

Q. Do you remember she was served with a subpoena, just after you had gone to hospital? A. A subpoena came, yes.

Q. I suppose you would have thought she would have been distraught at that time, wouldn't she? A. Yes, she would have been.

Q. Not cheerful, happy and joking? A. No.

Q. You had yourself discharged from hospital, without undergoing the tests that they had recommended, didn't you? A. I had undergone all the tests.

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Q. You were to undergo, were you not, a cardiac catheter? A. It was recommended.

Q. And you decided you would not do that? A. I sought medical advice on it, and I made up a decision.

Q. You had the pre-med. preparation for it, didn't you? A. Yes.

Q. And you elected not to have it, and you had yourself discharged? A. Yes, after a discussion with my brother-in-law who happens to be the No. 2 at the Prince Alfred Hospital.

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Q. And you failed to report again for a further check in January? A. I was, I rung them because I had missed the date, and my doctor had forgotten to give me the date on which to go, and I did not turn up on that particular date, that is correct.

Q. And did you attend in February? A. No.

Q. You have not attended since? A. No, because the doctor said, "If you have no pain, we gave you medication, it would not be necessary".

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Q. Do you know the difference between assuming something and being told something? A. Yes, (objected to: allowed.)

Q. Is it correct to say that with regard to what was to happen after you had purchased from these three men their shares in Airfoil, you assumed that they would not go into competition against you? A. We discussed it.

Q. Will you please answer my question: would it be correct to say, as I put to you, that you assumed - 10  
A. No, I didn't.

Q. So you have answered my question fully, to your satisfaction, have you?

HIS HONOUR: Mr. Shand, now you are being a bit unfair.

MR. SHAND: Q. Let me make sure that you are answering it fully. It would not be correct to say, would it, that you assumed that these men would not go into competition with you after you had purchased their shares? A. Yes, I would assume that they would not have gone into competition, yes. 20

Q. That would be a correct description of your belief about that matter? A. No, we had discussed it and they said they would not go in competition and I - Mr. Morton asked me in front of -

Q. I don't want to hear about Mr. Morton, if you don't mind. Did you assume that they would not go into competition with you? A. Yes, I had assumed, yes.

Q. You do remember the answer you gave a moment ago, that you appreciate the difference between being told something and assuming it? A. That is right. 30

Q. You have not lost that appreciation of the distinction, have you? A. No - you said after I - after the date, you said after; before we had talked about it.

HIS HONOUR: Q. I am sorry, I should get this clear. What are you trying to say? A. Well, Mr. Morton had asked me whether or not I required a restraint of trade agreement. In front of Mr. Herbert, Mr. Jehnic and Mr. Arnett, I said, he asked again whether I required it. I said, "No, it will not be necessary, the right thing is going to be done." We discussed it. Now the assumption that you are asking me about is that after I purchased the shares I had assumed that they would not go into competition. I assumed that, yes. 40

MR. SHAND: Q. Well, it has always been clear in your mind, has it, ever since the conversation involving Mr. Morton and the absence of a need for a restraint of trade agreement that there had been discussions between you and these three men clearly establishing that matter? A. Yes.

Q. It has always been clear in your memory that those discussions had taken place? A. Yes.

Q. So that if you were asked any question about it, there was not the faintest difficulty in your referring to these discussions having taken place? A. Very vague discussions, yes. 10

Q. Oh, very vague; that is your description of them now, is it? A. Well, I speak to these people and I say, "Well, obviously the right thing is going to be done; you are not going into competition". They say, "No, we are not going into competition."

Q. What is vague about that? A. Well, okay, if that is specific it is specific. 20

Q. Well, it is not very vague, is it? (No reply.)

Q. Is it? A. It is not as concrete as a mortgage document or anything like that.

Q. It is completely specific, isn't it? A. Well, if that is what you consider specific, yes, it is.

Q. And that is what happened, is it? A. Yes.

Q. And that is what you remembered was the position when you gave evidence before the Master, is it?  
A. Yes.

Q. You had not forgotten it then, had you? A. No, we never discussed that. 30

Q. What do you mean "we never discussed that"?  
A. Well, my solicitors informed me that that particular evidence was irrelevant.

Q. When did they inform you as to that? A. When we were preparing all the necessary documents as far as the case was concerned.

Q. That means that your attention was drawn to that matter while you were preparing for that hearing, doesn't it? A. Yes. 40

Q. And so that you then remembered these conversations that had occurred previously, which were either very vague or specific, is that so? A. Yes.

Q. And you remember being asked about this matter in evidence before the Master, don't you? A. Not really.

Q. Do you remember the answer you gave? A. That we did a deal that was unwritten, that was not in this Court of law, the same as we are talking about here now.

Q. You remember the answer you gave; that is all I am asking you. Well, it is a long answer, so you probably would not, and I will put it to you. On p. 19 from the Master's transcript, the question was, "Would you be prepared to give them those cheques now?". What answer did you give to that? A. I don't really think that was what, I thought that what the question was, that the Master said, "Why don't you pay them?"

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Q. Let me read it to you. A. My recollection is not - I can't remember.

Q. You were asked, "Did they return them?"? A. The cheques?

Q. I will read you the previous few questions, "Subsequently you wrote to the three purchasers saying that a new company had been formed and called Airfoil Registers Sales Pty. Limited. You said, Yes, correct." "Q. And that if they returned the cheques drawn on Airfoil Registers, those two cheques, the outstanding cheques, you would give them new cheques", and you said, "Yes, correct." "Q. Did they return them? A. No. Q. Would you be prepared to give them those cheques now? A. No." Do you agree that that is the evidence that you gave in answer to those questions? A. That seems fair enough, yes.

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Q. So you were saying that you would not then be prepared to give them the new cheques - you remember saying that? A. That is right.

Q. Then a question from the Master, "Why not?" and your answer, which is a long one, "We did a deal, and I think the word 'deal' has been used many times by my ex-partners. The deal was, I would purchase the shares at a certain price, which we agreed upon, and then I would pay them a certain amount of money. As they were aware, I was to be the liquidator of the company because it was growing and was under pressure, and I agreed to pay them \$150,000 immediately and the balance in two payments. But doing the deal, there were many occasions when we drank together a lot, we were good friends, and we discussed the fact that the right thing would be done. The right thing was that our industry specialised, and I assumed these people would not go into opposition against me." Do you remember giving that answer? A. I don't remember the word "liquidator".

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No, a lot of those words there I just never used.

Q. Let me continue your answer: "We, I was asked by my accountant Mr. Morton to please draw up a trade agreement, and I said, 'It is not necessary to do that, there is no problem, the right thing will be done'", and I pause there - no statement by you that at that time any of these three gentlemen were present and made any such statement as you have claimed to do, was there?

A. They were present.

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Q. Please answer my question - there is no mention by you, from what I have read so far, of them being present and making any statement, is there? A. No.

Q. Had you forgotten? A. I didn't elaborate on it at all. I just felt that the Master just could not understand why I just would not pay these people. He just wanted to satisfy himself, I assume he just could not understand why I would not pay them.

Q. Well, he asked the question "Why not?" didn't he; that indicated what he was concerned about? A. That is right.

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Q. You understood that he was concerned to find out why you were not honouring your promise? A. He could not understand it.

HIS HONOUR: Q. I must say, Mr. Carney, I share his puzzlement myself, because, as I understand it, your complaint is that these men had promised you that they would not trade in competition with you, and they did. Did it ever occur to you that if that were so, you could perhaps sue them, instead of refusing to pay on the guarantee and taking this objection which you have?

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A. Your Honour, we didn't enter into any trade agreement.

Q. But you said they promised they would not trade in competition with you? A. They promised, yes.

Q. Well, isn't that an agreement? A. If I lose this Court case, I will sue on that basis. If I have grounds on that, your Honour, if that would be fair.

MR. SHAND: Q. You claim, do you, that there was an agreement that they would not attack the goodwill of your company, by going into competition? A. Not the goodwill. The fact that they would attack my company, not so much in respect to the goodwill - into the actual amount of business that they would attract from my business, not the goodwill.

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Q. That is the goodwill, isn't it? A. No.

Q. Didn't you appreciate that if they started in competition and attracted business away from your company, what you would lose is your company's goodwill?

A. Goodwill is based on many different forms. You can value it in many different ways.

Q. You didn't think that what I am talking about had anything to do with goodwill? A. No, they just took business away from my company.

Q. And that is not in your view a degree or a form of damaging your company's goodwill? A. No, not to the goodwill; to the actual volume of trade we were doing. 10

Q. You are a qualified accountant, aren't you?

A. That is right.

Q. What is your qualification? A. I am a qualified accountant.

Q. Well, what exams or qualifications did you pass or acquire? A. Yes, I passed my Accountancy Certificate at the Tech. 20

Q. You are a Public Accountant; are you a Chartered Accountant? A. No, I am a Public Accountant. I am not a Chartered Accountant.

Q. And no doubt you studied, in the course of those studies, what goodwill was? A. Yes.

Q. You needed to, so as to be able to formulate balance sheets and the like, didn't you? A. That is right.

Q. And you did some legal training in the course of that accountancy, didn't you? A. It is part of the course, yes. 30

Q. Legal training, which involved some not inconsiderable study of the Companies Act? A. The Companies Act was part of it, yes.

Q. Including s.67, as it was? A. Yes, if it was that section, yes.

Q. That was included in your studies, wasn't it?

A. Yes, I suppose, yes, it was. Yes, s.67 would have been, yes.

Q. In this transaction you knew very well that you were not in fact paying anything to these three men for the goodwill of your company, didn't you? 40

A. Correct.

Q. You were paying or promising to pay, through Ilerain, sums of money calculated on the net tangible assets of Airfoil, weren't you? A. Correct.

Q. In those circumstances will you agree, from your knowledge of accountancy and the law as you studied it, that it would be entirely foreign to such a transaction to suggest, no goodwill being involved in the moneys promised to them, that they thereby were disqualified from entering into competition against you? A. I am sorry, I didn't quite get your assumption there. What was that again? 10

Q. You were not paying them for the goodwill of the company in which their shareholdings had participated, were you? A. No, and I was not paying for the goodwill, right.

Q. You were not giving them anything extra, above the net tangible assets, for goodwill, were you?  
A. Correct.

Q. Will you agree, from your training and your education and experience, that it would be totally foreign to the transaction that you entered into with them to suggest that, having regard to its form, they were in some way morally bound not to enter into competition against your company, wouldn't it? 20

HIS HONOUR: Q. Mr. Shand is saying to you, it would be very unusual for anyone who is not getting paid goodwill to promise not to enter into competition with you: what do you say? A. Well, goodwill is what we call an intangible asset. You don't know what is going to happen the next day or the day after. 30

Q. I thought I simplified the question for you - it is very simple. Would you agree that it is very unusual for someone to promise not to enter into competition with you when you don't pay him anything for goodwill? A. I have never thought about it, but I would say that would be unusual.

Q. That is what you say happened in this case, is it? A. Yes, that happened.

Q. And these three gentlemen who were selling your shares to you were trying to get as much out of the deal as they could? A. And they succeeded. 40

Q. And of course they could have asked you for more money, for a promise not to trade against you - something on account of goodwill? A. It was not discussed.

MR. SHAND: Q. Although you knew they could have asked

for it? A. If they would have asked for that additional money, we would have discussed it and I would have refused it.

HIS HONOUR: Q. But you would have only paid it on terms that day entered into a promise not to trade against you? A. Actually, I should have got a trading agreement with the particular arrangement we made on the price; because the shares were never ever purchased, they were given to them except in the case of Karlo, who paid \$3,000.

10

MR. SHAND: Q. That entered into your thinking, too, did it? A. No, it didn't.

Q. Well, why did you just mention it? A. Because the fair thing was done. We all agreed on a fair price, we all participated in valuing assets. Karlo, John and Darrell all agreed, that we done it fair. There were no under the table sort of transactions; it was out in the open. I even upped my value from what my accountant advised me, by something like \$7,000. The deal was fair.

20

Q. And they got all they deserved? A. They would have, if they did not go into competition with me, against me.

Q. And as a result they only got one-third of what they deserved? A. 150 of 400,000 is 45 per cent, 40-odd per cent, yes, something like that.

Q. That does not offend your sense of fairness at all; we can assume that, can't we, is that so? A. You can assume it?

Q. We can assume that quite safely? A. I mentioned that it was honourable, yesterday.

30

Q. Yes. Do you remember what was said yesterday about these mortgagees? A. Heffernan and Hampson?

Q. Yes; do you? A. I mentioned their names a couple of times, in reference to ---

Q. Yes, but do you remember what you said about them, apart from their names, in the course of the conversation you say took place about them? A. Yes, I remember the conversation I had about them, yes, with Mr. Arnett, Mr. Herbert, Mr. Jehnic and Mr. Morton.

40

Q. And was that evidence true - it is on p.9 or thereabouts? A. Yes.

Q. And what you told us yesterday was that you approached these two men, Jim and John, after having

said that you were not really happy about asking them for their consent; do you remember saying that? A. Yes.

Q. That was not true either, was it? A. My word it was.

Q. You said yesterday that Mr. Morton interrupted and said you would need consent of Messrs. Heffernan and Hampson, or Jim and John, to get a second mortgage?  
A. Yes.

Q. And that is what happened, is it? A. That is what Mr. Morton said you need, that is right, "You need the consent of the mortgagees, Jim and John, before you get a second mortgage; that is right." 10

Q. And isn't this what happened, that Mr. Arnett said, "I have spoken to our solicitor and he says you will have to speak to Hampson and Heffernan to get their consent to the second mortgages"? A. That was on a later conversation, where Mr. Morton was not present, only Mr. Arnett, Mr. Herbert and Mr. Jehnic was at the office discussing it. 20

Q. Well, you didn't mention that conversation involving Mr. Morton, did you, when you swore your affidavit for the proceedings before the Master? A. Yes, I did. I think I did, yes, I am sure.

MR. SHAND: Well, I invite reference to it, if you did.

HIS HONOUR: Do you want me to show him his affidavit.

MR. SHAND: Yes, could he be shown it, your Honour. It is the affidavit sworn on 3rd September, 1981. (Shown to witness.)

Q. If you go to par. 12 of that affidavit, which takes up the subject of the first mortgage? A. On p.4 of my affidavit, Mr. Morton said, "Do you realize that you will have to get permission for the mortgage from the first mortgagees?" 30

Q. Yes, does that involve some reference to Mr. Morton? A. That is what he said - yes, he was at the meeting at the time.

Q. That is what Mr. Morton said, was it? A. That is right.

Q. But this is Mr. Arnett speaking, according to your affidavit, not Mr. Morton, isn't it? A. No. 40

Q. The affidavit said it, didn't it? A. No, not my affidavit, not the one I have got here.



Q. I am looking at the end of par. 9, aren't I?  
A. Yes - oh no, hang on. It says here Mr. Arnett said he would take a second mortgage over the factory.

Q. Let me read it to you so that it is quite clear. You report Mr. Arnett as having said, "We will take a second mortgage over the factory"? A. Yes.

Q. And yourself as having replied, "Okay, but you will have to arrange for the mortgages to be prepared, and you will have to pay the legal costs yourself."? 10  
A. Yes.

Q. And then you bring in Mr. Morton? A. That is right.

Q. Now let me take you to another matter. With regard to the existence of loan accounts between any of these three men and Airfoil, did you say this to the three of them, "Based on my preliminary figures, I will agree to a net asset value of \$2,500,000. There will of course be minor adjustments to take account of loan accounts and so on"? A. Yes. 20

Q. That is accurate, is it? A. Yes.

Q. And what did they say to that, if any of them said anything? A. They accepted the offer.

Q. What, there and then? A. Yes.

Q. Do you remember who said what, or words to that effect? A. Mr. Morton said that we were happy, based on the way, the calculation of \$180,000, it was \$2-and-a-half-million." We were happy with the way the valuation of their shares were calculated," and that was it, there was not a problem. Then we went on to the cars. 30

Q. So there was no further discussion at all about the loan accounts or taking account of them? A. Only in the calculation of the cheques, which I said that we would deduct the loan accounts off the last cheques drawn, off the last instalment.

Q. Would you look at this document I show you, and tell us whether the two pages that appear there are in your handwriting? A. Yes, that is my handwriting.

Q. Did you write out those pages on 18th March, 1980?  
A. This was formulating calculations - 40

Q. I am not asking you that. The question is a simple one: did you write out those pages on 18th March, 1980? (No reply)

Q. Well, what is the answer to the question? (No reply.)

Q. Mr. Carney, would you do me the courtesy of an answer, please? A. I am sorry, I am just trying to put the date to these. I must have wrote those out on the 18th.

Q. Would you just look at this photographic copy I show you, instead of the one you have been looking at. It is the same, isn't it, except that it is more complete, in the sense that the bottom of the page has not been chopped off. Compare them, if you would.

10

A. They are the same, aren't they?

Q. Yes, but I think you will find that the ones I have shown you last are somewhat more complete, in the sense that the bottom of the page has not been at all chopped off. You agree that they are the same? A. Yes.

(Photocopy of calculations in defendant's handwriting, tendered without objection and marked Exhibit 2.)

20

Q. Mr. Carney, you wrote out those two pages, did you not? A. That is my handwriting, yes.

Q. Towards the conclusion of the conversations of 18th March while these men were still with you? A. Me and Darrell Arnett were working the figures out, yes.

Q. All four of you were still there, weren't you? A. Yes.

Q. After this transaction took place - and I am taking you now beyond 18th March - when was it that you informed any of these three men that the name of the company which would purchase the shares from them was Ilerain Pty. Limited? A. The company was incorporated.

30

Q. Look, that is not an answer to my question, if you do not mind. When was it that you informed any of these men, if you did so, that the name of the company which was to purchase the shares was Ilerain Pty. Ltd? A. I can't recall mentioning that name.

Q. Well, you must have told someone, mustn't you? A. At that time, we had had the company just being named, and maybe the name came from Wayne Morton. I can't recall what day I said, "The name of the company is" - I am not sure of the day I said it, if I did. I just can't think what day I said it, exactly what day.

40

Q. Well, the company was incorporated on 4th March, 1980, wasn't it? A. Not to my knowledge.

Q. It was handled by Mr. Morton, wasn't it? A. Yes.

Q. (Approaches witness.) Perhaps I can show you the results of the company search and ask you whether you still maintain your lack of knowledge. This is a company search at the Corporate Affairs Commission showing incorporation of that company as 4th March, 1980?

A. If that is correct, that is fine. I thought it was a little bit later than that, but that is fine.

Q. And you have given evidence yesterday that on Friday 21st March you were given a bundle of documents? 10

A. Correct.

Q. And you said those documents comprised the sale agreement and the mortgage document? A. Yes.

Q. The sale agreement mentioned the name Ilerain Pty. Limited as the purchaser, didn't it? A. Yes.

Q. So that information as to name must have been communicated either on or before Friday, 21st March?

A. Yes, for sure, yes.

Q. Well, did you communicate it to someone? A. I have recollection that I did say that the name of the company that was purchasing the shares was Ilerain. 20

Q. Who did you say that to? A. Mr. Arnett.

Q. You had said that you would let him know its name as soon as possible, hadn't you? A. Yes, I had mentioned that, because I didn't have the -

Q. Don't worry about the reasons. Now after the production of those two documents to you on Friday 21st, you took them with you over the weekend, did you not?

A. No. 30

Q. Do you say No because you are positive about that?

A. I didn't take them with me on the weekend.

Q. Well, you retained possession of them where you parted company with these other people on Friday 21st, didn't you? A. I am not saying the documents were not left at the office, but I handed them back to Arnett and said, "There is something wrong with the documents."

Q. What appeared to be wrong? A. On perusing the sale agreement, Mr. Simpson, their solicitor, had Ilerain buying the shares which was agreed, and had Ilerain guaranteeing the repayment of the amounts outstanding, and I said to Mr. Arnett that I did not feel that that was correct; I was not sure, but I said, "I don't think that is correct." 40

Q. Was that really what the document said? A. Yes, it did.

Q. Ilerain as the purchaser, and guaranteeing payment of the purchase moneys? A. That is right.

Q. Ordinarily speaking, you would expect in the purchase document to find the purchaser agreeing to pay for what it was purchasing, wouldn't you? A. That is right.

Q. And that is what you found, was it? A. The way the document was worded, it was worded that Ilerain was guaranteeing payment - it just did not seem right to me. I just could not understand the document and I just said, "I think there is something wrong with the document" and that was it. 10

Q. It sounds pretty nonsensical, you will agree, won't you, as having been apparently wrong with the document? A. Nonsensical?

Q. It doesn't make sense what you say you said that you thought was wrong with the document? A. I just felt the document was, there was something wrong with the document. It just did not seem to make sense to me - yes, nonsense, that is right, it did not make sense to me. 20

Q. But in fact the purchaser was guaranteeing payment of the purchase price? A. That is right.

Q. Does that make any sense to you now? A. That is the way I read the document.

Q. Does it make sense to you now? Do you see anything extraordinary about the purchaser in the purchase document guaranteeing payment for the purchase? A. Yes, I think that does not seem right to me, yes. 30

Q. What is wrong with it? A. Well, if you have an agreement to buy something off somebody, why should that company pay for, why should it guarantee it? It is automatic; there is a legally binding contract with Ilerain.

Q. You mean it should just promise to pay? A. That is right, there is no reason to guarantee it.

Q. And the word "guarantee" you claim sticks in your memory, does it? A. No, I am not exactly sure what the wording was, but the document gave me the impression that Ilerain was guaranteeing that it would pay the debt and it was going to contract to do that anyway. 40

Q. Might the witness be shown that deed of 21st March, part of Exhibit A. (Approaches witness.) I am showing you Exhibit A, one part of it being the deed between Mr. Arnett and Ilerain. A. Is this the documents I got on the Friday, the wrong ones, or this is the ones on the Monday?

Q. Just answer the question. Look at the document I am showing you now, being part of Exhibit A, being a copy of a deed of 21st March, 1980, between Mr. Arnett and Ilerain. Does that contain the wording that you thought was inappropriate? A. No. 10

Q. And I think you can assume that the other two deeds between Ilerain and the other two gentlemen are the same? A. Correct.

Q. Where was this expression that you noticed in the documents, that you thought was inappropriate, where did it appear? A. I am not sure, but there was somewhere in the document that was wrong.

Q. When you received these two documents, was anyone else present? A. No, I was sitting down opposite Darrell Arnett, and he handed them to me, the incorrect ones, or what I thought were incorrect, and he said, "Have a look at them over the weekend," and that was it. 20

Q. Don't worry about that; I was asking you whether anyone else was present. Just the two of you, was it? A. Yes.

Q. So that you have no doubt that you did not have those documents over the weekend, do you? A. I didn't have possession of them personally, no. 30

Q. Well, did you hand them over to anyone else? A. I gave them to Mr. Arnett.

Q. So no one else, representing you, had them over the weekend? A. Oh no.

Q. Is that a clear recollection? A. Yes.

Q. Or one about which you might be mistaken, as you have been in other respects? A. No, that is clear.

Q. Now on the Monday you mention that the personal guarantee to be signed by you was produced, and Mr. Morton gave you certain advice? A. Yes. 40

Q. And then you were asked yesterday what you did or said after he gave the advice. What did you say? A. I said that there was no problem, that I owned the companies, and that they would pay for the amounts

outstanding, therefore the guarantee was not a problem.

Q. "I owned the companies, they would pay the amounts outstanding, and therefore the guarantee was not a problem" - that is what you said, was it? A. That is right.

Q. And by "the companies", what companies were you referring to? A. Well, I owned Airfoil; I had use of Ilerain; I owned Newbridge Industries - well, my whole assets were the companies that I owned. 10

Q. That is what you were referring to as "the companies", though, were you, the three companies that you mentioned? A. Yes.

Q. At the point of time we are talking about - that is, 18th March through to the 24th - you were aware, weren't you, that s. 67 of the Companies Act prohibited the company giving financial assistance in relation to the purchase of shares in it? A. I was not aware at that time.

Q. You had always been aware that that is what s. 67 said, hadn't you? A. I had not looked at s. 67 for ten years. I wouldn't know whether it was the same section or not. 20

Q. Your recollection of s. 67 had, since you learned about it, always been to that effect, hadn't it?  
A. Since I learned about it, yes.

HIS HONOUR: I think you are at cross-purposes as to what you mean by "when you learned about it."

MR. SHAND: Yes.

Q. Since you had learned about s. 67 in the course of your training as an accountant, your recollection of it had always been, had it not, that it prohibited a company giving financial assistance in relation to the purchase of shares in it? A. Yes, I remember learning that, yes. 30

Q. And nothing had occurred, in between the time you learned that and this period in March 1980, to change your belief about that, had it? A. I was not a practising accountant. I would not know what the law was today and what it was when I learned it. I really don't know. 40

Q. Nothing had occurred to change your belief in the effect of that section that you had been trained to know about, is that so? A. No, nothing occurred, I wouldn't have known.

Q. Did you believe that what you were doing in the course of this transaction was to cause Airfoil to give financial assistance in relation to the purchase of shares in it? A. No.

Q. You didn't? A. Didn't consider it, didn't think of it, just didn't think about it.

Q. When did you first have any idea that you might be able to avoid payment of the balance of these purchase moneys because of s. 67 - when? A. I could be out a week or two, or whatever. I think my first appointment with Mr. Kennedy - 10

Q. No, please, I do not want any other facts. When?  
A. I can't answer your question.

Q. Approximately when? A. May.

Q. May, what year? A. May 1980.

HIS HONOUR: Mr. Shand, there are a few things I wanted to clear up. Yesterday you asked for access to Mr. Carney's bank accounts; Mr. Stowe was going to have a look at that overnight and tell me what his attitude was. 20

MR. STOWE: Yes, we have looked at the documents. Insofar as they relate to the private accounts of Mr. and Mrs. Carney, it certainly is not apparent to us in what way they are relevant.

HIS HONOUR: Well he made a statement that all his assets were encumbered. It is quite obvious, I would think myself, that it bears on that topic.

MR. STOWE: Certainly there may be relevance in Mr. Carney's account, I do not know that Mrs. Carney's account would be relevant. 30

HIS HONOUR: Yes. Yesterday when you opened your case you said that the first alleged breach of s. 67 was that the purchase price to be paid by the purchasing company, Ilerain, would be paid by cheques of Airfoil Registers Pty. Limited. I may be misreading it, but as I read the defence, certainly in Mr. Herbert's case, it is restricted to the first instalment of the purchase price. Could you check that for me over lunch and tell me what you are intending to do? Mr. Shand, how can you get Mrs. Carney's bank records in? 40

MR. SHAND: I would like to consider that, your Honour. I do feel some doubt about it.

HIS HONOUR: All right. Then I grant the plaintiff access to Mr. Carney's bank accounts, but I withhold

access to Mrs. Carney's account. The other thing that I must say I am not quite clear about, Mr. Shand, is this. I can see that you are hoping to structure a case that the motor vehicles were paid for in full, and therefore there was no breach of s. 67; you may lead some evidence that there was no breach of s. 67 because it was purely fortuitous, without any prior agreement, that the cheques of Airfoil were used, and perhaps even in relation to the motor cars. But I am not quite clear how you are going to put that in relation to this Newbridge Industries security.

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MR. SHAND: We say, and we submit this is borne out by the authorities, the agreement for security of course is a separate document; therefore it is not part of the substantial agreement itself at all, the principal agreement. It is an agreement which, even if it were considered to be in some way linked to the principal agreement, is clearly severable, and in the course of that line of reasoning, leaves untouched the obligations under the principal agreement.

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(Luncheon adjournment.)

(Mr. Stowe sought leave to amend pars. 8(i) 9(i) and 10(i) of the amended defence by deleting the words "first instalment of" wherever appearing; objected to; granted.)

DEFENDANT

Recalled,

On former oath:

MR. SHAND: Q. (Document 48 shown). Do you recollect that letter? A. This is document 48, is it?

30

Q. (Approaching.) I am directing your attention to three letters which are all part of document 48 each bearing dated 25th July 1980 addressed to the three plaintiffs, would you make sure that is so. Did you write those letters or at least did you sign and despatch them? A. I did not sign them but my secretary did, yes.

Q. On your behalf? A. Yes.

Q. And you remember sending them? A. Yes.

40

Q. Were they intended as a trick? A. Prior to 27th June -

Q. Please answer my question. They are written on 25th July 1980, were they intended as a trick? A. No, not as a trick.

Q. As a device to defeat these three men? A. No.



Q. Were they intended by you to be read as genuinely expressing the statements contained in them? A. No. I don't think I was being genuine.

Q. You were not? A. No.

Q. You were being deceptive, were you? A. I think it was more or less -

Q. Were you being deceptive? A. If you want to use that word, yes.

Q. Does it bother you, that word? A. Not after what I found what they did, no. They weren't honourable, neither was I. 10

Q. So you were not trying to trick them by writing those letters? A. No, not trick them.

Q. You were trying, were you not, to present a false picture of your intentions? Weren't you? A. I had no intentions.

Q. Will you answer that question yes or no, if you don't mind; were you not trying to present a false picture of your intentions? A. Yes. 20

Q. So you did have intentions, didn't you? A. I had no intention. It was only just that I had been, it was a false, yes.

Q. You did have intentions, didn't you? A. No.

Q. I put it to you your intentions at that time were to obtain back from them the cheques that they had received from you, that's number 1, is that so? A. No.

Q. That is what the letter said, wasn't it? A. There was no way they were going to be returned.

Q. Would you answer my question: that is what the letters requested, wasn't it? A. Yes. 30

Q. So it was an effort by you to regain those cheques, wasn't it? A. Feeble one, yes.

Q. That was one intention the letter had, wasn't it? A. Yes.

Q. And there was a second intention in your mind at that time, wasn't there? A. No.

Q. Did you intend that fresh cheques would be issued as soon as possible after the return of those cheques you requested? A. No.

- Q. You did not? A. No.
- Q. So that was a second intention on your part, was it not, namely not to send out fresh cheques? A. That is right.
- Q. So that in these two respects at that time you were presenting a false picture of your intentions, weren't you? A. Yes.
- Q. And deliberately so? A. Yes.
- Q. For the purpose of attempting to trick them into returning those cheques? A. No. 10
- Q. What was your purpose? A. They wouldn't, I couldn't trick them to return those cheques.
- Q. What was your purpose in requesting the return of the cheques? A. Well, the cheques were of no value to them because the account was closed and, therefore, if they presented them it was of no consequence to them so, therefore, they should return the cheques. They were of no value to them.
- Q. What was your purpose in requesting a return of those cheques? A. No purpose. 20
- Q. It was just a completely idle exercise, this letter, from your point of view, was it? A. Yes.
- Q. You did not want the cheques back? A. Not really.
- Q. Just tell his Honour because you will recall you are on oath? A. Yes.
- Q. What was the point of writing a letter? A. Oh, we asked for the cheques back but if we did not get them it wasn't a problem.
- Q. So the purpose of the letters was to attempt to get the cheques back if the three men were prepared to return them? A. Yes. 30
- Q. And that attempt you were making by use of trickery?  
A. If you want to call it trickery. I wouldn't call it trickery.
- Q. You have already agreed it was trickery, haven't you? A. No, not trickery. You said trickery.
- Q. You have already agreed it was a trick, haven't you? A. I sent the letter out -
- Q. Please answer my question? A. Yes, all right. 40

It's a trick. Yes, all right, if that suits you that's fine.

HIS HONOUR: Q. What do you call it? A. It was not a trick. I sent the letter out -

Q. Listen. Just tell me what you would call it?  
A. It wasn't a trick. There is no way -

Q. We know what you say it was not; I am asking you what you would call it? A. Deceitful was the word you said. Yes, I agree that was deceitful in asking for them back. 10

MR. SHAND: Q. You have incredibly low business morals, haven't you? A. In this particular case, yes.

Q. Let me ask you this: did you give true evidence before the Master as to the time at which you learned anything about these three men starting business in competition with you? Did you? A. What evidence did I give?

Q. Just answer my question would you? A. I can't remember. 20

Q. Do you think there's a possibility you did not give true evidence? A. No.

Q. Your answer to my question should have been yes then, shouldn't it? A. Well, I don't know what I said to the Master. If you tell me I will verify that statement and I would not have told him any lies in regards to that.

Q. Oh, you wouldn't? A. No.

Q. Isn't this the position you take up, that you are not prepared to vouch for the truth of your evidence before the Master without being directed to the specific words of it? A. I don't know what you are referring to. 30

Q. Just listen to my question: You are not prepared to say, are you, without being referred to specific answers that you have given before the Master that your evidence before him was totally true? Are you?

A. It would have been true whatever I had said to his Master, it would have been true.

Q. Would it? A. Yes.

Q. Therefore will you tell us whether the evidence you gave to the Master about the first time at which you learned anything about the setting up of business in competition with you occurred, that is whether the 40

evidence you gave as to when you first learned about that was true? Now was it? A. I can't recall the evidence I gave.

Q. And you are not prepared merely to say that that evidence would have been true? A. Yes, if I gave that evidence it would be true.

Q. Let me read to you this question and answer and see if you still adhere to that last answer:

"Q. When did you discover that they were going to go into competition with you?" (p.20) \*\* 10

Do you remember being asked that question? A. No.

Q. You can assume you were. What would the truthful answer to that be? A. I can't assume I was.

Q. Well I am asking you the question now if that is the case; when did you discover that they were going to go into competition with you? A. Approximately three weeks after. It was a combination of -

\*Q. When please? A. Well I can't give you that information. I don't know exactly when. It was a combination of information that came back to me from the trade, from the suppliers and all of this information added one and one and then I was rung up by somebody who told me about a company that had been formed and I then checked it out. This was over a period of time. When, I can't answer that question. 20

\*Q. When did these events commence which gave you some indication? A. Very shortly after the signing of the agreement.

\*Q. That is just totally untrue, isn't it? A. No it isn't untrue. That's the facts. 30

\*Q. And we can rely on that, can we? A. That is right. I wouldn't sign an agreement otherwise.

\*Q. You were able to answer this question, I suggest to you, when you gave evidence before the Master and in due course I will tell you what your answer was?  
A. Right.

\*Q. But I will ask you the question again now: when did you discover that they were going to go into competition with you? A. After 24th March. 40

\*Q. March 1980? A. That is right.

\*Q. But how much after? A. There was information that came over a period -

\*\*See now page 100.

\*HIS HONOUR: Q. We have been through all that?

A. Yes, right.

\*Q. Can you tell us how much after? Was it a matter of days, weeks, months? A. I would say about over a period of three weeks I suppose.

MR. SHAND: Q. So by the end of about three weeks you knew that they were going into competition with you, did you? A. I had suspected that and on the information I had that was the case, yes.

10

Q. You knew at the end of about three weeks after 24th March? A. Hang on, I said I am not sure whether it is three weeks.

Q. That is your sworn evidence? A. Well, you know.

(Questions on pp. 48 and 49 marked \* read back by Court Reporter.)

*See now pp. 206 and 207 respectively.*

Q. You used the expression "over a period of three weeks". Did you mean by that that over some period of three weeks you gained the information you described? A. It could have been some period of four weeks. It was a period of time approximately three weeks.

20

Q. And do you mean by that a period of time be it approximately three or four -? A. Five.

Q. Just a minute. Be it approximately three or four weeks from 24th March 1980? A. Yes.

Q. So that by three or four weeks from that date you knew that these men were going into competition with you, didn't you? A. Yes.

Q. Now I will read to you the answer that you gave before the Master, repeating the question as I do:

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"Q. When did you discover that they were going to go into competition with you? A. It was mid July or August."

Is that answer true? A. No.

Q. That is another false answer? A. I gave over a period of time -

Q. That is another false answer, isn't it? A. Yes.

Q. You gave further false answers before the Master

on the subject following that, didn't you? A. What subject?

Q. You don't recall any further false answers?  
A. No.

Q. Very well. From what you have now told us, if it is true, you knew about the plaintiffs going into competition with you before you despatched these letters of 25th July 1980, didn't you? A. Yes I did.

Q. In fact on this account you have just given us you knew that about three months before you sent them off, didn't you? A. Yes. Most probably that would be right. 10

Q. In fact it would follow from what you have said today that that knowledge was a very significant cause of you sending the letters, is that so? A. Yes.

Q. In the light of that let me read to you what you \*said before the Master (p.20):

"You signed each of those letters? A. I don't know. 20

Q. They were signed on your behalf? A. Yes.

Q. You knew about the letters? A. Yes.

Q. They were, in substance, your letters?  
A. Yes, definitely.

Q. Did you know about the plaintiffs going into competition with you before or after those letters? A. In the industry, it is a small industry -

Q. Did you know about the plaintiffs going into competition with you before or after those letters? A. After the letters for sure. 30

Q. A moment ago you said 'for sure'? A. Before that date I would not have known for sure."

True answers? A. As I said, it took three weeks.

Q. Will you answer my question: were they true answers? A. Yes.

Q. They could not be true from what you have sworn in the last few minutes, could they? A. I said that over a period -

Q. Will you answer? In the light of what you have \*See now page 101. 40

sworn in the last few minutes those answers could not possibly be true, could they? A. Yes, they are true.

Q. Do you really know what you are saying? A. Yes. What happened was a period of time -

Q. Are you serious about what you are saying?

A. I do know.

Q. Please answer: are you determined not to answer my question? A. I will answer your question.

HIS HONOUR: Q. Look Mr. Carney, let us just think calmly about this. A few minutes ago you told me that you knew these men were going into competition with you within three or four weeks from March 1980. That is right, is it not? A. What happened was we were getting - 10

Q. No, look? A. Yes, okay. I thought they were. Right.

Q. Please Mr. Carney, do you want to change that evidence? A. There was a period of -

Q. Do you want - ? A. Yes, yes.

MR. SHAND: Q. And do you want to change it because you know what you have said is false? A. I want to change it - 20

Q. No, please answer my question? A. Yes.

Q. And once again do you feel any sort of revulsion at that concession? A. It was not intentional.

Q. You see, when you were before the Master you wanted to give the impression that you had sent out these letters on 25th July 1980 before you had really realised that these men were going into competition with you, didn't you? A. It appears, if what you said I said, yes. 30

Q. So that you hoped it would look as if you were not just using the letters as a tactic in response to your realisation that they were going into competition with you? A. I already told you I was deceitful. I told you we sent the letters out, I sent the letters out. That there was no way in the world they were going to send the cheques. It was really irrelevant as to whether I knew about it or not.

Q. But at the time you gave your evidence before the Master you certainly had not decided that you would concede that the sending out of the letters had been deceitful, had you? A. Well, if I was asked that question 40

I didn't intend to deceive anyone. As far as I am concerned there was no way in the world those cheques were going to be returned. The letter was really a joke, if you want to be serious about it.

Q. Who was expected to laugh at it? A. I sent the letters out.

Q. Who was expected to laugh at it? A. Well, I was.

(Document 48 in agreed bundle of documents tendered, admitted without objection and marked part of Exhibit A.)

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HIS HONOUR: Mr. Shand, you may have some reason to continue on in this way and I will not stop you, but I can tell you now that I have already formed an opinion which is sufficiently clear as to any question of the witness' credit.

MR. SHAND: Q. You recall giving evidence yesterday that in conversation with these three men on the subject of security you said (p.9):

20

"A. That's a bit of a problem because all my assets are tied up. They were mortgaged at the bank."

A. Yes.

Q. Is that correct? Correct evidence? A. It was mortgaged at the bank. It was mortgaged at the bank, my house.

Q. You mean "all my assets" should have been "it", namely your house? A. That is right.

Q. What about your shares in Airfoil, they were not mortgaged, were they? A. Didn't consider it.

30

Q. They were not mortgaged, were they? A. Oh, no, no.

Q. And you knew that at the time you had this conversation, didn't you? A. Didn't consider it.

Q. You were aware of that fact whether you considered it or not? A. Yes.

Q. At the time of this conversation, weren't you? A. Yes.

Q. And as an accountant you would appreciate that your shares were available to be mortgaged or pledged  
\*See now page 157

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in suitable form, wouldn't you? A. Could have been done, yes.

Q. Were you trying to be deceptive by that statement to these men? A. No.

Q. Although you will agree the effect of it was deceptive? A. No.

Q. Wasn't it? A. Oh yeah. Well, yeah. Right.

Q. Are you sure you don't have some other assets as well apart from your house? A. Yes. 10

Q. And the shares? A. My wife owns a house at Enmore. That was it.

Q. You knew did you not as at 18th March 1980 that you stood in credit in your loan account with Airfoil to a figure of about \$150,000? A. No.

Q. Is this the factual position, as at March 1980 your credit in your loan account with that company would have been \$150,000? A. No.

Q. Yet you swore that before the Master, didn't you? \* (p. 22) Didn't you? A. No. 20

Q. Are you serious about that denial you have just given? A. I don't recall that.

Q. And you are prepared to say a flat "no"? A. I don't recall saying that figure.

Q. Well if you did say it would it have been true? A. No.

Q. I see. You glibly say that if you mentioned that as being the fact it would not have been true? A. No.

\*Q. And may we take it that if you did say it you would have known full well at the time that it wasn't true? A. No. 30

HIS HONOUR: Mr. Carney, the law provides for penalties against perjury - saying something on oath before a Court which, to your knowledge is false, is, to put it compactly, perjury. When asked questions as to whether or not you had said something which amounts to perjury you are entitled to decline to answer on the grounds that the answer may incriminate you.

I will have the question read to you again and I will have the answer struck out and you can do whatever 40

\*See now page 104.

you wish in relation to it. If you wish to consult with your counsel I will give you an opportunity to do that.

(Question marked \* read by Court reporter.)

WITNESS: I can't answer that on the grounds of incrimination, is that right?

HIS HONOUR: Q. On the ground that it might incriminate you? A. It might incriminate me.

MR. SHAND: (Approaching.) Q. I put before you a record of the evidence given before Master Allen on 15th September 1981 portion of which was given by you 10  
\*commencing at p. 17. You will agree there you started in your evidence by giving your name and address and by referring to your affidavit? A. Yes.

\*Q. I turn now to p. 22 which you will see is still part of your evidence? A. Yes.

Q. And to a question exactly halfway down the page:

"Q. Surely in March 1980 they would have been aware that you had substantial moneys to your credit in the loan account? A. Well, actually at 20  
March 1980 it would have been \$150,000."

Now you gave that answer to that question, didn't you?

A. Yes, if it is there.

Q. And it was a true answer, wasn't it? A. On checking the balance of my loan account subsequent to being asked that, off the top of my head I found that that is not true.

Q. Where have you checked may I ask? A. I had asked Mr. Morton. 30

Q. You had asked? A. After the case, yes.

Q. Have you looked at your loan account? A. Yes.

Q. When? A. I think we looked at it together with our solicitors and everything on a number of occasions.

Q. Who is "we"? A. David Kennedy, myself, Wayne Morton.

Q. Wayne Morton is a close colleague of yours, isn't he? A. Yes.

Q. In fact, he holds a number of shares in a company called Flexmaster, doesn't he? A. No. 40  
\*See now pages 97 and 104 respectively.

Q. Or did? A. He held them in trust.

Q. For whom? A. Flexmaster - he doesn't hold shares in Flexmaster to my knowledge.

Q. Flexmaster was your company, wasn't it? A. No. Flexmaster was a company called, it started off as -

Q. I am not asking you what it started off as, I am merely asking you was Flexmaster in effect your company?

A. No. Flexmaster was a wholly owned subsidiary of Airfoil. 10

Q. And always was? A. No. It evolved or involved or was created as a result of a personal company of mine and we were using this company that would be called Flexmaster to be incorporated under the Airfoil shield.

Q. So it was entirely your company and then it became a subsidiary of Airfoil, is that right? A. That is right.

Q. (Approaching.) This is a document file with the Corporate Affairs Commission. I show you the page before? A. Ah, yes. 20

Q. Flexmaster Pty. Limited? A. Yes, that is right.

Q. Does that give you some understanding? A. Yes. Mr. Wayne Morton was a shareholder there of 15 shares held in trust for another person.

Q. Who was that? A. Fred Baker.

Q. Who is Fred Baker? A. A business associate of and a client of Airfoil Registers. He was going to become a partner of the new enterprise, Flexmaster.

Wayne is not a shareholder in Flexmaster. He was only holding those shares in trust. 30

Q. He works very close to you, doesn't he? Mr. Morton? A. He is a personal friend and my accountant.

Q. Flexmaster was the company that you were arranging to import equipment or materials from overseas as part of your business here, wasn't it? A. Yes. It was a company that we were going to do that, yes.

Q. Which would, in effect, draw business away from Airfoil? A. No.

Q. Was it not the idea when Flexmaster was introduced that it would carry on portion of the business activities which otherwise would have been conducted 40

through Airfoil. A. Airfoil had sold some of those products, yes.

Q. So that Mr. Baker was being introduced through Flexmaster as your colleague co-venturer so as to - ?

A. As our colleague.

Q. So as to divert business away from the group of shareholders who owned Airfoil? A. No.

Q. Sounds a bit like it, doesn't it? A. The way you are putting it.

10

Q. Strangely like it? A. The way you are putting it.

Q. And that is what gave rise to the difference of opinion that you referred to yesterday, doesn't it?

A. In relation to what?

Q. You know what I am talking about, don't you?

A. The difference of opinion between us shareholders?

Q. Between these three plaintiffs and yourself?

A. Yes. It started a rift between us three, yes. Us four.

Q. Because they claimed you were going to bypass Airfoil by the use of Flexmaster thereby depriving Airfoil of the business it should have had, that's right isn't it? A. That is what they thought but that is not what was going to happen.

20

Q. They could rely upon your honour in ensuring it would not happen? A. That is right. That is right.

Q. You had every opportunity of clarifying the facts concerning your loan account as it stood back in March 1980 when you gave your evidence before the Master, didn't you? A. No.

30

Q. Have you thought about that answer? A. Yes.

Q. Where was the document recording the details of your loan account at that time? A. With my accountant Wayne Morton.

Q. And was not Mr. Morton in Court? A. Yes.

Q. And was not he available to answer your queries as to how your loan account had stood at March 1980 if you had asked him? A. He was there, yes.

Q. And you could have asked him? A. No I couldn't.

Q. Oh really. Can you tell me why? A. Well, I was

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asked a question like you have just asked me now. Did Wayne Morton have 15 shares in Flexmaster? I wasn't sure exactly what the balance of my loan account was and when asked a question I couldn't ask Mr. Morton if he was outside to please come in and tell me what it is because, you know, I had the opportunity but I gave my evidence.

Q. But you had an extra opportunity to do that, didn't you, by reason of the fact you were questioned on this topic before the luncheon adjournment and then questioned again after the adjournment on the same topic, weren't you? A. I don't recall. 10

Q. In any case let me put to you what happened before the luncheon adjournment. (P. 18) You were asked this question:

"Q. You had substantial credit in your loan account? A. Yes."

Do you agree you said that? A. If I did, yes.

Q. That was your belief at the time, wasn't it? A. Yes. 20

Q. "Q. On 24th March, 1980 how much were you owed by the company? A. I wouldn't know exactly."

A. That is right.

Q. That would have been a correct answer? A. That is right.

Q. "Q. But it was well over \$150,000, was it not? A. We had not declared dividend. No it was not."

A. Right.

Q. I see you get some comfort out of that answer, don't you? A. That's the facts. 30

Q. "Q. I am suggesting to you it was well over \$150,000? A. No it was not."

Do you reaffirm your denial? A. That is right.

Q. "Q. Was it \$150,000? A. No. It was less than that."

A. Well, that is right.

Q. You know that is right now, do you? A. I knew it was -

\*See now page 98

Q. You know -? A. You said I said \$150,000. I could not recall saying \$150,000.

Q. I will come back to it Mr. Carney? A. Oh fine, right.

Q. Don't think I read something that wasn't there?  
A. Oh fine, no. It was there.

Q. I will read you the last question:

"Q. Was not \$150,000? A. No, it was less than that.

10

Q. Did you check? A. No.

Q. You are an accountant aren't you .. "

then further questions proceeded about what sort of accountant you were. So would you agree in that set of answers you persisted in a denial that it was well over \$150,000 or near to that figure and said "it was less than that" but did you have in mind when you gave those answers what it was? A. No.

Q. Any sort of idea? A. No. I think I did say that it was definitely not over \$100,000. I do remember, I am not sure but I know that I didn't, it was definitely not over \$150,000 because I explained to his Master that we hadn't, our profitability had been met in that current year and, therefore, the loan account would have had to have been well, not a large figure.

20

Q. But you did admit in the answers I just read to you to having at that time a substantial credit in your loan account, didn't you? A. Yes, substantial. Yes, that is right.

Q. And then having answered those questions the luncheon adjournment occurred a bit later on and Mr. Porter who had been cross-examining you indicated immediately that he had completed his examination of you. You may remember that? A. Yes, fine.

30

Q. And the Master then asked you some questions, quite a number of questions. Now in the lunch hour who had you been with? A. I don't know. Yes, I think I had lunch with Keith Rewell at one of the bars just down the road, underneath.

Q. That is Mr. Rewell, barrister? A. Yes.

40

Q. Was then a solicitor? A. Solicitor, yes.

Q. And Mr. Morton perhaps? A. No.

Q. And did you acquire any further information during the adjournment about your loan account? A. No.

Q. Then perhaps you can tell us how it was after the luncheon adjournment in answer to the Master you \*came to give this answer (p. 22):

"Q. Surely in March 1980 they would have been aware that you had substantial moneys to your credit in the loan account? A. Well, actually at March 1980 it would have been \$150,000." 10

How could you have come to give that answer? A. I don't think I gave that answer. I just can't understand why I would say that because I know that at that point in time that it could not have possibly been that amount of money and that is my answer. You know, I explained that before. I can't understand that figure. There's just no way.

Q. I show you document No. 43 from the agreed bundle. Do you recognise that as the record of your loan account? A. That is Wayne's writing. 20

Q. That is Wayne Morton's writing, is it? A. Yes.

Q. You are an accountant and you can read these sorts of documents, can't you? A. Yes.

Q. What does it tell you your loan account position was at about March 1980? A. It is \$120,000 on the debit side roughly and \$184,000 on the credit side so therefore at March 1980, the 24th, my loan account balance would have been approximately \$64,000.

Q. Show us the figures you used to get to that position? A. The debit side is \$113,000 made up of whatever. 30

Q. Against what date do you find that? A. There it is. It adds up.

Q. Against what date do you find that? A. Well there is no date because it is an addition of all the balances.

Q. So you are not able to say that that figure indicates the debit balance as at March 1980, are you? A. Which amount? The \$113,000?

Q. Yes? A. No, it does not indicate that at all because you have to add the January 1980 so the figure as at March 1980 is \$120,200. That is what it is at that point in time. Then in the case of the credit side - 40

\*See now page 104.

Q. Before you come to that what is the significance of the entry we find below that against June 23 - cash pays? A. \$150,000?

Q. Yes? A. What that was, Mr. Morton said put on the cheque butt "Loan account P. Carney" and he has debited my loan account for \$150,000 which I lent on behalf of Ilerain.

Q. Then we come to the credit side? A. Yes.

Q. What figure do you point to there which in any way indicates the appropriated credit figure in March 1980? 10  
A. Well you don't do accounts on a monthly basis. It is when you add it up. Adding this up picking a date at the entry done on the date if you are balancing the books the balance on the credit side was \$184,817. The debit side would have been \$120,239. If you take the debit from the credit you will find my loan account as at March 1980 was \$64,000 in credit.

Q. That is something you now know or claim to know now by a study of this document as completed? A. I 20  
have seen that document and I am aware my balance as at March was \$64,000 approximately, yes.

Q. But you didn't know that at the time, namely March 1980? A. No.

(Document No. 43 of the agreed bundle by consent tendered, admitted and marked as part of Exhibit A.)

Q. It is quite clear that by the time you came to give evidence before the Master you hadn't had whatever advantage this last document gives you to enable you to say that the figure you have mentioned now is your loan account balance at that time, had you? A. No, that is right. 30

Q. When you gave your answer before the Master you gave the figure which best expressed your belief at that time as to what your balance had been at March 1980, didn't you? A. I didn't know exactly what it was and I gave an idea, yes.

Q. When you answered a question after the luncheon adjournment you then gave your best belief as to what your loan account balance had been as at March 1980, didn't you? A. Yes to be quite truthful I don't remember saying \$150,000. 40

Q. I think you can take it there is no doubt you did say it and if you did say it it would represent what was then your best belief as to your loan account



balance as at March 1980, wouldn't it? A. It was but I knew it was substantially less than that when I said it.

Q. If you had known that you would have said that in evidence? A. You have read it back that I said it was less than \$150,000.

Q. We are in the somewhat familiar position where part of your evidence is false, do you agree? A. Yes, if I said \$150,000.

10

Q. As at March 1980 you knew that in that then current financial year this company Airfoil had been making very large profits, didn't you? A. The company was doing very well.

Q. Making very large profits? A. Yes.

Q. And indeed you were aware that as at 30th June 1979, it had unappropriated profits of \$165,000 odd?  
A. That could have been true, yes. I have not got those figures.

Q. I show you from the agreed bundle document 44?  
A. Right.

20

Q. Part of which is a balance sheet of Airfoil Registers as at 13th June 1979? A. Yes.

Q. Showing unappropriated profits of \$165,446.51?  
A. That would be correct, yes.

Q. What percentage of that company did you own before you sold these shares? A. I owned 93 of 111 so that was about 90 percent I suppose. 87 per cent.

Q. You will agree that the profit and loss statement for the year ended 30th June 1979 within document No. 44 showed that for that year the net profit had been \$155,709? A. Yes that is right. But I had a loan account. The loan account you are referring to does not just take into account the profits. I did borrow off the company and I knew at that point in time we had made reasonable money and my loan account less the amount of money I had already borrowed would no way exceed \$150,000. Nowhere near it.

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Q. You were also aware that it was open to you being a shareholder having something approaching 90 per cent of the shares to declare a dividend if you so chose, correct? A. I beg your pardon?

40

Q. You were also aware being a shareholder as to something approaching 90 per cent of the shares in the

company that you were in a position to declare a dividend if you so chose? A. I am not sure about that.

Q. The same profit and loss statement for 30th June, 1979, showed profits from the current year after some adjustments from the adding back of divisions of \$151,022, correct? A. Yes.

Q. To which was to be added unappropriated profits brought forward from previous years - \$58,429? A. Yes.

Q. Thereby making available for appropriation \$209,451? A. Yes. 10

Q. And the document records there was provision for a dividend of \$4,005? A. That is correct.

Q. Leaving the unappropriated profits figure to which we have already made reference? A. Yes.

Q. If we go to the next document in the bundle, No. 45, which is the balance sheet for the company as at 30th December, 1979? A. Yes.

Q. It shows that at that point of time the unappropriated profits amounted to \$442,914, is that correct? A. Yes. 20

Q. This is Mr. Morton's document, isn't it? A. Yes that is right.

Q. So it was quite clear during the six months to 30th December, 1979, very substantial profits were being made? A. Yes.

Q. If we come to the 27th June, 1980, the balance sheet as at that date is document 47 in the bundle, right? A. Yes, that is right. 1.9 million. That is spot on. 30

Q. I am directing your attention to this document? A. That is right.

Q. It showed as at that date which you will agree is about a month after this transaction was completed by execution? A. Three months after. Well, two months anyway, three months.

Q. That the unappropriated profits of the company by that time had become \$1,857,290, hadn't they? Do you need to pause about that? A. The assets of the company, yes, that is right. 40

Q. That is the figure for unappropriated profits? A. That is right.

Q. Thus indicating a huge profit for the 12 months ending 27th June 1980? A. Yes.

Q. It is notable that that was represented in part by cash at the bank of \$1,000,000 of the same figure?  
A. Yes.

Q. We know how that came to be, don't we? A. Yes.

Q. Before we come to that I show you the next part of document 47 which is the profit and loss account for the period ended 27th June 1980. That was for a 12 month period was it not? A. Right. 10

Q. Showing a gross profit of \$2,167,744? A. Yes.

Q. And a net profit for the period of \$1,692,637, correct? A. Yes.

Q. With an income tax expense which is registered as nil? A. Yes.

Q. To which was then added unappropriated profits as at 1st July, 1979 of \$165,446, correct? A. Yes.

Q. Eventually after some adjustments and formation expenses, provision for annual leave, most of which have no figures against them at all, representing a figure of \$1,857,290, was that the residual value of this company? (Objected to - question rejected). 20

Q. What does the figure of \$1,857,290 represent?  
A. Unappropriated profits as you said.

Q. It is notable that the company then consisted of that figure with unappropriated profits, capital profits reserve of \$75,253, share premium reserve of \$3,000, paid up share capital of \$111, as against assets consisting solely of cash at bank, correct? A. Yes. 30

Q. \$1,932,954? A. Yes, right.

Q. To whom were shares in Airfoil Register given? (Objected to - question withdrawn.)

Q. When were the assets of the company transformed into cash at the bank in that figure? (Objected to - question allowed). A. 27th June.

Q. On that date and not before? A. No, on that date.

Q. At which time you were, with Ilerain, the sole shareholder? A. No I was not the sole shareholder at Ilerain. 40

Q. At that time you, with Ilerain, were the sole shareholders? A. Yes, with Ilerain.

Q. And therefore the sole Registers? A. Yes.

Q. The shares in Ilerain were held by whom?  
A. Myself and my wife.

Q. Your wife in her own right? A. Yes.

Q. One share each? A. Yes.

Q. As at 31st December, 1979, where you have acknowledged the unappropriated profits stood at \$442,914 it was well and truly open to the Board of Airfoil Registers to declare a dividend in a figure amounting to that figure or something approaching it, wasn't it? A. To be truthful I don't recall that document, the actual balance sheet being done at the end of December. It must have been done for a reason. I don't recall that balance sheet being done. 10

Q. Assuming it honestly and fairly presents the picture of the company's situation and affairs? A. Yes.

Q. At that time and you would expect it to, wouldn't you? A. My word. 20

Q. It was open to the Board of Airfoil Registers to declare a dividend to the extent of the figure of unappropriated profits or something approaching it, wasn't it? (Objected to - question disallowed.)

Q. You remained a director of Airfoil Registers until the end of June or thereabouts, 1980? A. Yes.

Q. And then you resigned, did you? A. Yes.

Q. Who was your co-director or co-directors until that time? A. Wayne was our secretary, my wife. 30

Q. Your wife had become a director? A. I think so. She should have been. I'm not sure.

(Documents 44, 45 and 47 of the bundle tendered and admitted and marked part of Exhibit A after objection to part of document 47 consisting of the balance sheet of 27th June, 1980.)

RE-EXAMINATION:

MR. STOWE: Q. During what period did you undertake your training as an accountant? A. 1963 to, about between 1962 and 1964. 40

Q. After you had completed your training did you practice as an accountant? A. No. I had a job as an accountant. I didn't practise purely as an accountant. I had a job as an accountant for a mining company.

Q. During what period did you have that job?

A. From after I completed my studies, so from 1964 onwards and then I joined Anemostat as an accountant.

Q. You began with an accounting company in 1964. When did you leave that company? A. This is as a full time qualified accountant. I stayed there for a couple of years and I worked for a textile company called Australian Cotton for three or four years. I don't know exactly what years I worked for where. I practised as an accountant in basically the normal company accounting procedures. 10

Q. You mentioned three companies I think? A. Yes.

Q. When did you complete your period of employment as an accountant with the third of those companies?

A. It was approximately June 1976. May or June 1976. I could be out a couple of months. 20

Q. What sort of duties did you have as an accountant with the first of those three companies? A. Basic book work, book working, mainly book work and accounting.

Q. And the second of the three companies? A. The same sort of tasks - clerical, book work.

Q. And the third? A. I graduated and I think I took a better role in management of the company so it was more an accounting management job.

Q. Did you have anything to do during the period of your employment with those three companies with share purchases or takeovers or similar matters? A. No. 30

Q. Can you recall whether or not during that period you ever had any occasion to direct your attention to s.67 of the Companies Act? A. No I don't recall ever, no.

Q. Had you had any occasion between the time you ceased your employment with the third of those companies and the end of 1979 to be concerned with s. 67 of the Companies Act? A. No. 40

Q. Can you recall whether at any time since the completion of your studies as an accountant and the time at which the significance of s. 67 in relation to the matters to which these proceedings relate was

brought to your attention had you had any occasion to read or direct your mind to s. 67? A. No.

Q. In what circumstances was its significance brought to your attention in relation to the subject matter of these proceedings? A. The circumstances were that we had to pay a second, third instalment. I found out that my ex-partners had gone into competition. When I went to David Kennedy and I said I have got a problem, the wrong thing has been done and I went to do the wrong thing back. He advised me on looking at the paper work immediately and actually chastised me and said, "Do you know what you have done?" (Objected to.) That is when s. 67 was brought up to me by David Kennedy.

10

Q. Are you able to state with any degree of precision when it was you had that consultation with Mr. Kennedy?  
A. Late May, June-ish. It would have to be late May, June.

Q. Are you able to say how long before the second instalment was due to the three vendors that you consulted him? A. Not exactly but as I said it would have been June-ish.

20

Q. Do you recall the date on which the second instalment was due? A. The end of July.

Q. Had s. 67 or its significance ever occurred to you during the course of the negotiations in relation to the matters that these proceedings relate to? A. No.

Q. Do you remember in the course of your cross-examination by Mr. Shand, Q.C., his directing your attention to statements that you had made on the affidavits filed for the proceedings before the Master, concerning conversations with Mr. Morton about cheque butts on 24th March, 1980. A. Yes.

30

Q. What do you say now as to whether you had any conversation with Mr. Morton about cheque butts on 24th March? (Objected to - question rejected.)

Q. Do you recall being shown the Agreement for Sale dated 21st March, 1980, in the course of your cross-examination? A. Yes.

Q. Do you recall being asked questions about defects which you recall finding in a sale document submitted to you on that day? A. Yes.

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Q. Was the document that was put to you in the course of your cross-examination the same document as the one in which you found faults on 21st March? A. No, I didn't sight the false one.

Defendant, re-x

Q. I'm sorry? A. The document that I had been shown was the correct one. The false one I have not sighted to date.

Q. The document which you were shown bore the date 21st March? A. That's right.

Q. Do you have any explanation as to how it came to bear that date? (Objected to; question withdrawn.)

Q. When do you first recall seeing a copy of the document which was shown to you during your cross-examination? A. The 24th. 10

Q. Was it dated at the time you saw it on that day?  
A. Yes.

(Witness retired.)

ROSS GERRARD VAN DER SLUIS  
Sworn and examined:

MR. STOWE: Q. Is your full name Ross Gerrard Van der Sluis? A. That's correct.

Q. Are you normally addressed as Ross Van? A. Yes.

Q. You live at 295 Kissing Point Road, Dundas? 20  
A. Yes.

Q. Are you the auction sales manager for F.R. Strange Pty. Limited? A. That's right.

Q. Was your employer carrying on business as general auctioneers at Alexandria? A. Yes.

Q. Are you a licensed auctioneer? A. Yes.

Q. Do you act as an auctioneer of, among other things, used motor vehicles? A. That's right.

Q. Do you, in the course of your duties, carry out valuations of motor vehicles? A. Yes. 30

Q. For how long have you had experience in relation to the selling by auction, first of all, of motor vehicles? A. Approximately nine years.

Q. Is the period of your experience in relation to the evaluations the same? A. Yes, it would be.

Q. What is the extent of the auctions of motor vehicles that you conduct? A. The extent? You mean in the numbers of motor vehicles?

Q. Yes? A. It can vary between - at the moment I would say it is a minimum of 45 to 50 a month. Could go up to 70 a month.

Q. Approximately how many evaluations do you carry out in addition to your auctioneering duties? A. That is, written valuations?

Q. Yes? A. That can vary. You might do ten a month. It could be 50 a month. It depends on who requires valuations.

10

Q. Do you do oral valuations as well as written valuations? A. Oral indications. We do not believe in actually doing oral valuations.

Q. That is valuations simply in respect of the cars you sell by auction or are called upon to perform valuations in respect of other cars as well? A. Yes.

Q. The latter? Other cars? A. Yes, other cars.

Q. Are you able to express a view as to the value in March 1980 of a 1976, Holden Kingswood station wagon making this assumption about its condition; that the condition was poor to very poor with extensive rust to body and frame? (Objected to.)

20

Q. Are there a number of values that can be attributed to any given motor car at a given time? A. That's correct, yes.

Q. What are the various values that can be given for one car? A. You can have your auction realisable value which is a value put upon that vehicle that it would bring at an auction under the hammer. You can have a fair market value, that is the value one would attribute to the vehicle which is a similar vehicle that you would purchase from a dealer. You also have a going concern valuation which that vehicle would be worth, possibly, to an operating company. You have insurance valuations as well.

30

Q. What relationship normally exists between the auction realisation value and the market value? (Objected to; rejected.)

Q. Do you have any experience yourself, and if so, how have you derived it in relation to the determination of market values of motor vehicles as opposed to their auction value? A. The auction value, I think, is something going by experience really and generally following the market of vehicles. The same thing applies with market value. You are in the market all the time and get to know the market value of the vehicles.

40



HIS HONOUR: Q. My problem is this. I know that you conduct auctions and you said that you make valuations of vehicles but unless you deal in the general market apart from auctions I am not quite sure how you are meant to know what the prices are in that market. Have you dealt with cars or valued cars apart from auctions?  
A. No, all the valuation work I have been involved in is strictly through auction.

MR. STOWE: Q. You endeavoured to explain to us a few moments ago how one derived information concerning the market value of cars? (Objected to.) 10

Q. Would you explain to the Court what you mean by following the market? A. Following the market is being in touch with other people in the retailing of cars but I suppose that is basically how you keep in touch with the fair market value, what you class as the fair market value is, keeping in touch with - we have a lot of dealers that come to our place and buy. We keep in touch with those people. We ask questions. 20

HIS HONOUR: There is a yellow book in the business. Will you accept that as a representative price for vehicles at a general time and conditions?

MR. SHAND: I am not sure that it works like that, your Honour.

MR. STOWE: Q. Are you familiar with the book to which his Honour referred? A. It is the yellow book?

HIS HONOUR: Yes.

WITNESS: The Dealer's Guide.

HIS HONOUR: That is correct. 30

MR. STOWE: Q. Do you have available to you a copy of the Dealer's Guide? A. Yes.

Q. What kind of figures does it contain in relation to various different markets? (Objected to; rejected)

HIS HONOUR: In order to keep in touch with auction values do you go round motor car yards pricing vehicles or checking pricing? A. I do to a certain extent.

Q. Is that what you mean by saying you follow the market, that you go round inspecting cars and see what prices are being sought? A. That is part of it.

HIS HONOUR: Q. What is the other part? A. The other part is the actual auctioning of the vehicles we put through, yes.

Q. From looking at prices charged for vehicles in dealers yards and bearing in mind auction values, have you been able to arrive at any sort of relationship between the two sets of prices? (Objected to by Mr. Shand)

HIS HONOUR: The evidence is allowed as to what it would fetch at an auction. The description is a 1976 Holden Kingswood station wagon.

MR. STOWE: Yes, poor to very poor condition with exterior rust to body and frame. 10

Q. The value you are asked to give is the value as at March 1980? A. It is near impossible to put an auction value on that particular vehicle. I would only indicate a value on that age of car in relatively good condition. It is hard to put a value on anything without seeing it.

Q. Is it possible to put a range of values on a car described to you in that way, that is, a minimum figure and a maximum figure? A. No, I don't feel so. 20

HIS HONOUR: Q. Ultimately, with a vehicle like that, it is a question of whether you find anyone interested in buying it and the best price you can get out of it? A. I think it is the condition of the car. You can say a car is in bad condition but I don't know to what extent.

MR. STOWE: Q. Would you assume for the purpose of making your estimate, the car is in average condition? A. Average condition? (Question and answer rejected.)

Q. The description I gave comes from another source. Would you express a view as to the value of the vehicle I have described as in very good order? A. An indication that is placed on the limited information that I have? 30

Q. Yes. Would you express that view? A. On which vehicle?

Q. A 1976 Holden Kingswood station wagon in very good order? A. Well, as I said before, there are so many variations in that particular model vehicle we can only assume it is a particular one and I think the view I did express on that - (answer objected to; rejected). 40

Q. I am asking you to express a view now if you are able to do so, a value on an auction realisation basis on a 1976 Holden Kingswood station wagon in very good condition? (Objected to; rejected).

Q. In what circumstances would you feel yourself able to express a view about the value of a car which you had not actually seen but about which you had been given a description? (Objected to; rejected)

Q. Are you able to express a view as to the value on the same basis and much the same date on a 1978, Ford Fairlane in good to average condition? A. Yes.

Q. What is your view as to the value on that basis at that time? (Objected to; Mr. Shand requested leave to ask questions on the voir dire; granted.)

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EXAMINATION ON THE VOIR DIRE:

MR. SHAND: Q. What do you regard as better - good or average? A. Good.

Q. You have some doubt about that? A. No.

Q. How much better than average is good? A. I can't answer that.

Q. Perhaps you would tell us, a 1978 Ford Fairlane, does that have variable characteristics? A. Not as far as I am aware. Unless you talk about say the options on a vehicle.

20

Q. They would certainly come within the description of variables? A. Yes, I suppose they would.

Q. For instance, does the Ford Fairlane come in manual and automatic gear form? A. I believe it only comes in automatic.

Q. Are you sure about that? A. Not without checking, I am not.

Q. Does it come in various different interior finishes? A. I think the Fairlane is just a standard interior finish.

30

Q. No finish in cloth? A. No, the Fairlane being the upper class vehicle comes in a velour trim.

Q. That is all? A. Yes.

Q. Are you sure you know enough about it to say that?  
A. I think so.

Q. What is your basis? A. Experience.

Q. You mean you are telling us you are able to say there has never been a 1978, Ford Fairlane that has

come within your observation that has other than just one trim? A. Not to my recollection, no.

Q. How many have you seen? A. I wouldn't know how many.

Q. No idea? It could be anything between none and fifty? A. Could be anything between that and any number.

Q. No idea? I suppose the fittings in the vehicles, the extras make a very significant difference to its value? A. Normally a Fairlane will come standard with power steering, air conditioning that is all standard in a vehicle of that nature. 10

Q. Do you mean by that, that is always there or it can be expected there more often than not? A. No, it is normally always there.

Q. You have not, of course, been given the slightest indication of the distance travelled by this vehicle, have you? A. Which vehicle? (Question and answer rejected). 20

Q. To attach any sort of valuation to a vehicle you have got to know the distance it has travelled? A. Yes.

Q. Whether it has been properly maintained? A. Yes.

Q. You have got to know whether the engine is in good or otherwise condition? A. That is correct.

Q. Merely to have a look at the external appearance, be it within the car or outside the car, is only a very partial feature? A. Yes.

Q. You would agree that probably the most important part of the car for its value at auction is whether the engine is in good condition and likely to remain so? A. I would say so. One of them. 30

Q. The condition of the tyres is important? A. Yes.

Q. Are you in a position to tell us whether the Ford Fairlane 1978 comes only in one size engine or more than one? A. I do believe it comes in more than one sized engine.

Q. And as to whether or not it does come not only in power steering but without? A. I don't believe it does. 40

Q. But you are not sure about that? A. No, I wouldn't be 100 per cent sure.

R.G. Van der Sluis,  
x on Voir Dire

Q. You are not sure whether it has power brakes or some other form of brakes? A. I am sure they all have power brakes.

Q. Disc brakes? A. Yes, power assisted disc.

Q. Are they the same thing? A. Are what the same thing?

Q. Power brakes and disc brakes? A. No, they are not the same. 10

Q. Do you know whether the 1978 Ford Fairlane came in some cases with power brakes and in other cases with disc brakes? A. They came with power steering disc brakes.

Q. This is a combined or hybrid version? A. No, this is a standard version.

Q. I think you said power and disc brakes are two different things? A. No, I said power and disc brakes are two variations. The standard cars, they will come with power disc brakes on the front. You can get an option of four wheel assisted power disc brakes. 20

Q. That is another variable? A. Yes, that is another variable.

Q. Are there also differences within the model in terms of whether arms are provided between the two halves of the rear seat or not? A. I don't believe so.

Q. Do you know? A. Not 100 per cent.

Q. The sort of radio provided is another variable?  
A. Provided.

Q. Is it always the same sort of radio? A. Normally a standard radio. 30

Q. Is it always the same? (No reply)

HIS HONOUR: It has a standard radio.

MR. SHAND: Q. Is that what you are saying, what his Honour was mentioning? A. Yes.

(Conclusion of the voir dire.)

(Objection pressed by Mr. Shand.)

HIS HONOUR: Mr. Stowe, I will allow the question you now put and then I will rule on it.

R.G. Van der Sluis,  
231. x on Voir Dire

MR. STOWE: I wish to ask two questions.

Q. I am asking you about a 1978 Ford Fairlane, firstly, in good or average condition. I am asking you to assume that it is standard and has no additional options fitted to it, that the registration is about to run out, that it is the smallest engine size available, that if it is an option between having power disc brakes at all, or on the four wheels or the front wheels, that it is the cheapest version of the brakes. I ask you to assume it has done 20,000 kilometres. Would you tell the court what, in your view, the value of that vehicle would be? (Objected to; allowed.) A. My view based on that information supplied would be only an indication of value which would be somewhere in the vicinity of \$6,000.

10

Q. If the vehicle had a standard vinyl roof, would it be worth any less? A. Yes.

Q. How much less, assuming the worst spoiling of the roof? (Objected to)

Q. I am asking you to assume that the vinyl roof is as spoiled as a vehicle roof can be? (Objected to)

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HIS HONOUR: Assume it had a vinyl roof which needed renewing.

MR. STOWE: Q. Would you make that assumption - a vinyl roof which needed complete renewal? A. I suppose in appearance it could affect the price anything up to \$500 or so.

(Witness stood down)

(Hearing adjourned until 10 a.m., Wednesday, 30th March, 1983.)

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IN THE SUPREME COURT )  
 ) No. 16157 of 1980  
OF NEW SOUTH WALES ) 16158 of 1980  
 ) 16159 of 1980  
COMMON LAW DIVISION )  
 )  
COMMERCIAL LIST )

CORAM: ROGERS, J.

HERBERT v. CARNEY  
 JEHNIC v. CARNEY  
ARNETT v. CARNEY

10

THIRD DAY: WEDNESDAY, 30TH MARCH, 1983

HIS HONOUR: It may be noted on the transcript that by agreement between counsel and with my consent, the partially examined witness, Mr. Van der Sluis, is withdrawn for the time being.

WAYNE STANLEY MORTON  
 Sworn and examined:

MR. STOWE: Q. Is your full name Wayne Stanley Morton?  
A. Yes.

Q. Do you practice at 163 Clarence Street, Sydney? 20  
A. Yes.

Q. You are a chartered accountant by occupation?  
A. Yes.

Q. And have you been, since 1st July, 1977, a partner in the accounting firm of Charles M. Harvey & Co.?  
A. Yes.

Q. And has that firm carried out, since you joined it as a partner, the accounting work for Airfoil Registers Pty. Ltd? A. Yes.

Q. And have you done that work during that period? 30  
A. Yes.

Q. And prior to that, as an employee of H.V. Robson and Co., did you carry out accounting work for Airfoil Registers Pty. Ltd? A. Yes.

Q. Since that company commenced business in about 1976? A. Yes.

Q. Can you recall, in early 1980, commencing the preparation of a set of accounts, on the instructions of Mr. Carney, for the purposes of a proposed purchase by him of shares from the other shareholders in the company? 40  
A. Yes.

Q. Where did you set about carrying out the task of preparing those accounts? A. At the offices of Airfoil Registers Pty. Ltd.

Q. And when did you start that job? A. It was the week beginning 9th March, 1980.

Q. And while you were engaged in that task at the premises of Airfoil Registers, do you recall having any conversation with any shareholders of the company, when a matter of security was mentioned? A. Yes. 10

Q. How many such conversations were there? A. Two.

Q. As to the first of them, when did the conversation take place? A. The first day that I was at the office preparing the accounts.

Q. Can you remember where it took place? A. I was working in the office of Mr. Jehnic, and it took place in that office.

Q. Who was present at that conversation? A. Myself, Mr. Carney, Mr. Arnett and Mr. Herbert.

Q. Not Mr. Jehnic? A. No. 20

Q. Can you recall what was said on the subject I referred to, at that meeting? (Objected to; allowed)  
A. Yes.

Q. Would you tell the Court what was said, Mr. Morton?  
A. Mr. Arnett came in the office with Mr. Herbert, and spoke to me about preparing the accounts and arriving at a figure; then said to Phil, "Whatever figure we agree on or Wayne comes up with, we understand that the full amount cannot be paid immediately. We therefore would like security to be given for any outstanding amount owing." Mr. Carney then said, "Yes, fine, what security would you like?" Mr. Arnett said, "We would like mortgage over the factory". 30

Q. Was anything else said on that occasion? A. Not in relation to the mortgage, no.

Q. What other matters were talked about? A. There was general discussion on the preparation of the accounts. I had mentioned that part of the requirements of the accounts would be to do a stocktake, as the major asset of the company, or one of the major assets of the company was the stock. We came to an agreement that because it was such a large part - (objected to; rejected). 40

Q. You said there were two conversations, Mr. Morton.



When did the second one take place? A. One or two days after the first conversation.

Q. And where did it take place? A. In the offices of Airfoil Registers Pty. Ltd.

Q. Any particular spot? A. I can't remember.

Q. And who was present on that occasion? A. Myself, Mr. Carney, Mr. Arnett, Mr. Herbert and Mr. Jehnic.

Q. Can you tell the Court what was said? A. Mr. Arnett said to Phil, "We have been in touch with our solicitors, and there is a first mortgage over the property. To get our second mortgage we will have to get permission of the first mortgagee". Mr. Carney said, "That will be Hampson and Heffernan. I don't know whether they will approve of the issuing of a second mortgage." Mr. Arnett said, "You will have to approach them. Unless we get the second mortgage, we won't go ahead with the deal." Phil said, "Well, I don't want to do it. If you want the mortgage, you handle it." 10

Q. Did a stocktake take place? A. Yes. 20

Q. When was that carried out? A. Sunday, 16th March.

Q. And after the stocktake had been completed, were you still in the process of preparing the accounts that you had been asked to prepare? A. Yes.

Q. Did you ever complete those accounts? A. No.

Q. When did you stop? A. Tuesday, 18th March.

Q. What was the occasion for your stopping? A. Mr. Carney phoned me and said he - (Objected to; rejected).

Q. When did he phone you? A. Tuesday, 18th March.

Q. Did you prepare any document in relation to the provisions of security over the factory land? A. Yes. 30

Q. Could Mr. Morton be shown document 9 in the agreed bundle? (Shown) A. That is right.

Q. Is that the document that you prepared? A. Yes.

Q. When did you prepare that document? A. Following the conversation with Mr. Carney on 18th March.

Q. And what did you do with that document? A. Took it with me on the settlement day, which was 24th March.

Q. Was it used on that occasion? A. No.

Q. Was there any reason why you did not use it on that occasion? A. Because the document - (objected to; allowed) because the document was not required. There was already a mortgage document prepared by the solicitor on the day.

Q. Apart from the preparation of that document, did you do anything else in connection with the purchase of shares in Airfoil by Mr. Carney during the week ending 21st March, 1980? A. I prepared share transfers, stamp duty documents in relation to those share transfers, and documents to establish a daily share register for the company.

10

Q. Did you have a conversation with anybody about the matter beyond the conversation you have referred to with Mr. Carney on the Tuesday? A. No.

Q. Can you recall on Monday 24th attending a meeting in connection with the share purchase? A. Yes.

Q. Where did that meeting take place? A. At Airfoil's offices.

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Q. And where specifically in the offices did it take place? A. Not totally, but mainly in Mr. Carney's office.

Q. Who was present? A. Myself, Mr. Carney, Mr. Jehnic, Mr. Arnett, Mr. Herbert and Mr. Simpson.

Q. Were any documents produced at that meeting by anybody, and if so, who produced them? A. I produced the share transfers, the stamp duty documents and the documents relating to the establishment of the daily register. Mr. Simpson produced a mortgage document and a personal guarantee document.

30

Q. Was a sale agreement produced at that meeting?  
A. Yes.

Q. By whom was that document produced? A. Mr. Simpson.

Q. Were any documents produced by Mr. Carney at that meeting? A. Not that I can remember.

Q. The documents having been produced, what was done? A. Everyone signed where they had to sign, and the matter was completed at that.

40

Q. When the signing of those documents had been completed, can you recall Mr. Carney doing anything?  
A. Mr. Carney produced a cheque book and proceeded to sign three cheques.

Q. Did anybody say anything to him before he signed the cheques? A. Yes, the cheques that were signed were balancing cheques, as a result of an agreement that -

Q. What do you mean by balancing cheques? A. They were not cheques - (Objected to; rejected)

Q. What I ask of you, Mr. Morton, was whether anyone said anything to him at the time you saw him doing something with the cheques? A. Mr. Arnett gave Mr. Carney instructions as to the amounts for which the cheques -

10

HIS HONOUR: Q. What did he say? Did he say, "Make out the cheques for X dollars", or what? A. He said, "Make out the cheques for whatever the dollars were, because of this adjustment", and he then went and -

Q. Just a moment - he did not say "because of this adjustment"; what did he say? (No reply)

MR. STOWE: Q. Are you able to recall the words he used in referring to the adjustment? A. No.

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Q. Did he, so far as you can recall, have any document with him? A. He had a sheet of paper, yes, which had calculations on it.

Q. What did he do with that? A. He discussed it and showed it to Mr. Carney and myself.

Q. What did you actually see Mr. Carney doing in relation to the cheque book? A. Signing a cheque - signing cheques.

Q. How many cheques did you see him sign? A. Three.

Q. What did he do with the cheques, after he had signed them? A. Handed them over to Mr. Jehnic, Mr. Arnett and Mr. Herbert.

30

Q. Did he say anything about this time? A. In relation to what, do you mean? I don't understand.

Q. Did he say anything to you in relation to the cheque book? A. He asked me what details he would write on the cheque butts.

Q. What did you say to him? A. "Loan, P. Carney".

Q. Did you see him do anything after you said that?  
A. No.

40

Q. Could Mr. Morton be shown document 43 in the

agreed bundle. You have before you document 43 in the agreed bundle of documents, Mr. Morton; do you recognise that document? A. It is a photocopy of a ledger account from Airfoil Registers Pty. Ltd.

Q. What ledger is it? A. Loan account, P. Carney.

Q. Are you able to tell the Court, from that document, what the balance of Mr. Carney's loan account was as at 24th March, 1980?

MR. SHAND: First of all, your Honour, I do not think we have found out who compiled it. What the witness is being asked to do at the moment, as far as we know, is to look at someone's document, maybe someone else, and interpret it. 10

WITNESS: It is just that I did keep the book; it is all my writing.

HIS HONOUR: All right.

MR. STOWE: Q. All entries on the sheet are yours?  
A. Yes.

Q. And were the entries made by you from the other accounting records? A. Yes, totally. (Objected to as leading.) 20

HIS HONOUR: Well, it is leading.

MR. STOWE: I am content to allow the document to speak for itself, your Honour. I have no further questions.

CROSS-EXAMINATION:

MR. SHAND: Q. You are not only the accountant providing his services for Mr. Carney, are you? A. No.

Q. You have a somewhat greater relationship with Mr. Carney than that, don't you? A. I don't understand. 30

Q. Do you have any business relationship with him, apart from accountant to client? A. No.

Q. Are you a shareholder in any of the companies in which he is interested? A. As a nominee.

Q. And which company or companies are those?  
A. A company called Flexmaster Pty. Ltd.

Q. When did you become such a nominee shareholder?  
A. I would say late 1979.

Q. And you were aware what the shareholding situation

of that company was when you became a nominee? A. Yes.

Q. What was it? A. One share each, owned by Mr. Carney and Mrs. Carney.

Q. And did those two shares show on the share register as being so owned? A. Yes.

Q. And further shares registered in your name?  
A. There were a number of shares issued when my shares were issued, as well.

Q. Yes, when were your shares issued? A. As I said, 10  
I think December, late 1979.

Q. And do you mean by your evidence that initially there were two shares? A. That is right.

Q. Held respectively by Mr. and Mrs. Carney?  
A. Yes.

MR. STOWE: Your Honour, save insofar as it goes to establish any business relationship between Mr. Morton and Mr. Carney, I object to the evidence on the basis of relevance.

HIS HONOUR: Is this on credit? 20

MR. SHAND: Yes; bias, too.

HIS HONOUR: Very well.

MR. SHAND: Q. You have said that after those two shares had been previously issued, additional shares were issued, some of them in your name? A. As trustee, as nominee.

Q. Is there a document which was executed to record that? A. Yes.

Q. And for whom were you trustee? A. For a gentleman called Baker. 30

Q. Who did not appear in any of the official records of the company? A. Correct.

Q. Did Mr. Carney have some conversation with you as to the reason for him wanting you to appear as trustee for Mr. Baker? (Objected to; allowed) A. Yes.

Q. What reason did he give? A. Simply that Mr. Baker was employed by another company, and Mr. Baker did not want his name on public record as a shareholder of Flexmaster.

Q. That is all he said, is it? A. Yes.

Q. He did not happen to mention that he wanted to keep Mr. Baker's participation secret from Messrs. Herbert, Jehnic and Arnett, did he? A. No.

Q. Did he tell you that Mr. Baker was working with some company in competition with Airfoil? A. Yes.

Q. And you didn't detect anything which you considered was smelly about this situation, did you? A. No.

Q. You didn't detect the possibility, Mr. Morton, that this company, and the interest of Mr. Baker in it, might be intended to take business away from Airfoil? 10  
A. It was not my position to make any assumptions like that.

MR. SHAND: I am not asking you about that.

HIS HONOUR: Well, I am.

Q. You were about to become a nominee shareholder; wasn't it your position to see what you were lending your name to? A. The reason I was told that the shares were being issued to Mr. Baker in Flexmaster Pty. Ltd. was at that stage he was considering leaving his present employment and joining Flexmaster. 20

MR. SHAND: Q. But you were also told, were you not, that Flexmaster was to do business which otherwise might well have been thought to be the ordinary business of Airfoil? A. No.

Q. Well, what business were you told Flexmaster was going to do? A. Flexmaster was going to produce air-conditioning ducting.

Q. Which is what Airfoil did? A. No. 30

Q. Well, what was the difference? A. Airfoil produces grilles, manufactures grilles.

Q. Can we call them brothers and sisters, in terms of airconditioning equipment - the grilles and the ducting? A. I am not an expert on airconditioning.

Q. You don't have to be, do you, to answer that question? (No reply).

Q. You don't have to be, do you? A. You can't have one without the other.

Q. Well, they are both necessary components? 40  
A. Yes, right.

Q. It was quite clear to you, was it not, being perfectly frank about it, Mr. Morton, that this company was going to be involved in the introduction or importation or production of equipment used integrally with the equipment sold by Airfoil? A. No.

Q. Well, what do you qualify -? A. Well, Airfoil had operated for three years in the airconditioning game and had made considerable profits, without manufacturing the particular product that Flexmaster was going to now manufacture. 10

HIS HONOUR: Q. Well, would you favour us with this information; did you have any idea as to why it was Flexmaster that was going to go into this business, rather than Airfoil? A. No - only ---

Q. I suppose you thought that was not any part of your business, was it? A. No. No, it wasn't.

MR. SHAND: Q. You may have thought it was no part of your business to enquire about it, but did you enquire about it? A. No. 20

Q. Just kept your mind closed on the subject, did you?  
A. I was not involved in the management of the affairs of the company; I was simply the accountant.

Q. You were an adviser to Mr. Carney, weren't you?  
A. In a very limited capacity.

Q. Did you make that available to the company, Flexmaster, whether it held that name or not? A. No.

Q. Where did it come from? A. It had been a company of Mr. Carney's long before I was his accountant.

Q. Inactive? A. Active for a period of time, and then inactive. 30

Q. But you were conscious of the fact that the business of this company was going to be the production, or acquisition for profit, of airconditioning equipment?  
A. Yes.

Q. Without going into specific detail, exactly the same business as Airfoil? A. No.

Q. Very well. Did you enquire whether any of these three men - Arnett, Jehnic and Herbert - were going to have an interest in it? A. No, I did not enquire. 40

Q. I suppose it had entered your head that that might be possible? A. Yes.

Q. And having entered your head, you chose not to enquire? A. Again, this is not my business.

Q. Hear no evil, see no evil, speak no evil; that was the sort of attitude? A. No.

Q. Did you continue to advise Mr. Carney or to act as his accountant throughout the month that followed March 1980? A. Yes.

Q. And you still do, don't you? A. Yes.

Q. Did you have any conversation with him after March 1980 on the subject of his intention not to pay these three men for their shares? A. Yes. 10

Q. When was it? A. I can't remember.

Q. Just do your best for us, Mr. Morton, would you?  
A. It was prior to the end of that financial year.

Q. Yes? A. I don't know.

Q. And where did you have it? A. Again, I can't remember.

Q. Did he tell you, in that conversation, upon what basis he proposed to refuse to pay? A. Yes. 20

Q. Upon what, perhaps, argument of law he proposed to rely? A. No.

Q. Did you discuss with him the question of his legal rights to refuse to pay? A. No.

Q. What did he say to you about his intention?  
A. He said that he was not going to pay the three shareholders, because they had gone into business in opposition to him. He then said he was proposing to go to a solicitor - pardon me, I do remember where this conversation was held now, because I remember where I made the phone call. It was at the office of Airfoil Registers. He then told me he was going to a solicitor to discuss it, at Bankstown. I said, "I don't think that solicitor is good enough", and rang up Mr. David Kennedy and arranged an appointment for the two of us to go and see Mr. Kennedy. 30

Q. Did that strike you as being dishonourable or dishonest on his part, what he proposed to do? Well, did it? A. I didn't make a judgment.

Q. I suppose it entered your head, did it, to consider the moral calibre of what he proposed? A. You are asking for an opinion of me? 40



Q. I am asking for what entered your head? A. I thought that there was a dishonourable thing being done, if you like, by both parties.

Q. Oh, did you. So you thought it was a tit for tat situation, and therefore you should stand behind Mr. Carney? A. I was not asked to stand behind anyone.

Q. Was there a restraint of trade agreement executed between Mr. Carney and these three men? A. No.

Q. And was goodwill taken into account in the calculation of the sale price of their shares? A. I do not know how the calculation of the sale price was arrived at. 10

Q. You never found out? A. No.

Q. Didn't you take part in any way in attempting to calculate - A. Yes. It was never completed.

Q. What were you aiming at calculating? A. A valuation of the three shareholders' interests of the company.

Q. And their interests in the nett tangible assets? A. Yes. 20

Q. So you knew, in the course of that exercise, that goodwill was not being taken into account, didn't you? A. No.

Q. Well, were you asked to take goodwill into account? A. I never completed the preparation of figures, because I was never given a stock figure.

Q. Were you ever asked to take goodwill into account? A. No.

Q. So far as you knew, that was not to be the basis or part of the basis of the calculation of the sale price, was it? A. Correct. 30

Q. Do you remember when the proceedings which are now being heard had commenced, by these three men suing Mr. Carney? A. Yes.

Q. And no doubt you had conferences with Mr. Carney following that event? A. Yes.

Q. And you, I suppose, searched your memory, in company with him, to recall events which had taken place leading up to the settlement of the sale of the shares? A. That only arose in company with Mr. Carney's solicitors. 40

Q. Yes, it did arise in conversation between you and Mr. Carney, too, didn't it? A. After Mr. Carney had initially contacted his solicitors.

Q. And was it after some indication had been given to you that Mr. Carney was going to try and avoid the obligation to pay, by use of s. 67 of the Companies Act?

A. That was only after the solicitors had brought that up, yes.

Q. So you became aware from him that he had that intention? A. Yes. 10

Q. And you lent your aid, did you not, to attempting to remember facts which might assist in supporting that defence, didn't you? A. I simply lent my aid in remembering facts.

Q. But you did that in conjunction with Mr. Carney, didn't you? A. I did that in conjunction with questions asked of me as to what occurred.

Q. And in conversation with Mr. Carney as to what had occurred? A. Yes, I must have, yes. 20

Q. You put your head together with him, didn't you?  
A. No - I don't understand what you are saying.

Q. Don't you? A. Are you saying there was collusion?

Q. I am just suggesting to you, Mr. Morton, as an associate, as accountant with Mr. Carney, you got together with him to talk over your recollections of what had happened leading up to the completion of the transaction? A. Yes.

Q. And Mr. Carney told you what he claimed had been said, didn't he? A. Yes. 30

Q. And you told him what you thought had been said?  
A. Yes.

Q. And each of you reminded the other where there appeared to be some shortcoming of memory? A. Yes.

Q. Until finally you reached agreement upon the various conversations which you both said occurred?  
A. I don't think we did reach agreement on all sections of the conversations.

Q. Can you recollect any respect in which you did not reach agreement? A. In respect to the issuing of the cheques. 40

Q. Is that the only one? A. Yes, I don't know fully

what Mr. Carney's recollections or all his statements are, so I can't tell you. I haven't read or seen any of his statements.

Q. Yes, but I am asking you whether you can recollect any other respect in which, in the course of your conversations together, you did not reach agreement about the events and conversations leading up to the final settlement. Now can you give us any other? A. Not that I can remember, no. I am not sure. I can't remember. I have just stated what I can remember, and Mr. Carney has not, whether he remembers or not, has not influenced what I have remembered. 10

Q. Not even by these conversations in which you said you compared your recollections one with the other?  
A. Yes.

Q. And talked about ---? A. He did not colour my recollections or change what I thought happened.

Q. Your recollections have never budged, you say?

A. Not in the general principles of what was said, no. 20

Q. Nor been assisted by his statement of his recollections? A. No.

Q. That is not of course in agreement with what you said a few minutes ago, is it? A. No, what I said - no, I disagree with that.

Q. Do you? A. Yes.

Q. Let us take the one respect that you can recall, about the signing of cheques? A. Yes.

Q. When did it become known to you that your recollections upon that matter differed? A. In discussions with Mr. Carney's solicitors. 30

Q. When? A. I don't know; presumably late 1980. I can't remember, I really can't remember.

Q. How did you become aware of that difference?

A. It was pointed out to me that - sorry.

Q. Tell us by whom, if it was something that was pointed out to you? A. Mr. Carney's solicitors.

Q. Mr. who? A. Mr. Kennedy told us, Mr. Carney and myself, that the three minority shareholders had stated that they received all the cheques for consideration of the deal on 18th March. I did not believe that to be correct. 40

Q. And were you then told what Mr. Carney's recollection was? A. I can't, you know, I don't know what Phil remembered, to be honest with you.

Q. You have told us that one respect in which you ascertained that your recollection differed from that of Mr. Carney was in respect of the time at which the cheques were signed, haven't you? A. Yes.

Q. When did you become aware of that difference between you and Mr. Carney? A. I just told you. 10

Q. Well, when was it? A. In conference with Mr. Kennedy.

Q. You have not yet said anything, concerning that conference, about being told that yours and Mr. Carney's recollections differed on the subject, have you?

A. Yes, that was also told to me, yes.

Q. By Mr. Kennedy? A. Yes.

Q. In the presence of Mr. Carney? A. I can't remember.

Q. Well, you have said that Mr. Carney was there with you, haven't you? A. Well, I --- 20

Q. You have said that, haven't you? A. Yes.

Q. Now do you suggest that you were not informed about that difference between you and Mr. Carney, while Mr. Carney was present? A. Yes I was.

Q. While you were both there? A. While we were both there, yes.

Q. What did Mr. Carney say? A. I can't remember.

Q. What did you say? A. Only that that was my recollection. 30

Q. Just tell us what you said as to your recollection, would you? A. Only that on the afternoon of the settlement, Mr. Arnett gave instructions to Mr. Carney about amounts to be drawn for cheques as a result of adjustments made between the three minority shareholders. I said to Phil - yes, I told him - I said to Mr. Carney, "I was there and Mr. Arnett told you and myself what the adjustments were for, and told you what the amounts of the cheques were to be drawn for".

Q. That is what you said? A. Yes. 40

Q. And you say now, do you, that the event that you

were then referring to was one that occurred on 24th March? A. Yes.

Q. And what did Mr. Carney say - according with that recollection, or not? A. Mr. Carney appeared confused, and said, "To be honest with you, I don't really remember".

Q. Did he? A. I thought so.

Q. Now these discussions you are talking about, in Mr. Kennedy's office, took place before you had sworn an affidavit for the purpose of the proceedings which came on before the Master, didn't they? A. I can't recollect whether they were before, or when I made the affidavit. 10

Q. You mean when you swore it? A. Yes - well, no, I had to discuss it with the solicitor, my recollection of the events.

Q. Of course you did; and you did that in company with Mr. Carney, didn't you? A. That I can't remember.

Q. Well, you have just been telling us how you did, haven't you? A. Oh, no, no, no. We had many conversations with the solicitors. Certain of those conversations were together, other times I had conversations with the solicitors by myself. Now I can remember, in relation to the details of my first affidavit, I gave that to Mr. Rewell, by myself. 20

Q. Of your first affidavit? A. The first notes of the transactions that took place.

Q. That of course would have been after you had had this conversation where the difference emerged between you and Mr. Carney? A. No, before. 30

Q. You are confident about that, are you? A. Yes.

Q. But you are clear about this, are you not, that at the time you came to swear your affidavit you had made known to Mr. Carney the difference in your recollection about the date upon which the cheques were signed? A. It was made known to the both of us, the differences.

Q. By Mr. Kennedy? A. Yes.

Q. That is so that you could turn it over in your mind? A. I don't know why he told us. 40

Q. But you do know that Mr. Carney had later discussions with you as a result of that? A. Yes.

Q. And what did he tell you about it? A. He was confused ---

Q. He said he was confused, did he? A. As to why I was so certain of my recollection.

Q. Are you aware that, quite obviously after these occasions you speak of, he gave sworn evidence insisting that the cheques were made out and signed on 24th March? A. No.

Q. Are you aware of that? A. I have been made aware of it, yes. 10

Q. So it would seem, would it not, that he decided to follow your version? A. I did not influence him, except to the extent that I told him what my recollection was.

Q. Did he tell you that he was going to follow your recollection? A. I think he did, yes. I can't remember, but I would say that is probably right, yes.

Q. You see, are you aware that he swore quite unequivocally that on 18th March you instructed him to write on the cheque butts? A. Not on 18th March, no. 20

Q. Are you aware that he has sworn that, quite unequivocally? A. No.

Q. Of course that just could not have happened, could it? A. No.

Q. I mean, the event could not have happened? A. No.

MR. STOWE: Your Honour, I do not think that is so, with respect.

HIS HONOUR: If it is not so, then we can disregard it.

MR. SHAND: Perhaps I should withdraw that, your Honour. 30

Q. You are aware, are you not, that he has sworn in affidavits that this instruction about what to put on the cheque butts was given on 24th March? A. Yes, that is when the instructions were given.

Q. And are you now aware that he has changed that now and says that the cheques were written out on the 18th? A. We have discussed it, yes.

Q. When did you discuss it? A. Prior to this case, but you know, I can't remember. There were no great discussions involved, by the way, because I said to him, "I don't care when you say the things were signed or 40

what they were done. I have just said that three cheques were signed on the 24th."

Q. When did he tell you that he was going to say - if he did tell you this - that the cheques were made out on the 18th? A. What he said to me ---

Q. No, please answer.

HIS HONOUR: I do not think that question can be answered.

WITNESS: As for the time, I am not too sure; it was some time last year. He said to me, "Mr. Arnett and the other two gentlemen are absolutely certain that all the cheques were written on the 18th. If they are all saying the same, they must be right". That was the extent of the discussion. 10

MR. SHAND: Q. You gave close attention, I suppose, in your discussions with the solicitors, as to the conversations you could recall in relation to the various aspects of the transaction for the sale of the shares?

A. To the contents of those transactions and discussions, yes. 20

Q. That includes, does it not, the same sort of attention to the contents of conversations concerning the provision of security by mortgage? A. I don't quite understand what you are asking me.

Q. Well, do you say that you were present at conversations involving these three men, and Mr. Carney, when the subject of security for the balance of payments was discussed? A. When I was there, at the offices, twice those conversations were brought up, yes. 30

Q. And it was to those conversations you gave close consideration as to their detail, in conference with the solicitor? A. In connection to what was said, yes.

Q. You carefully searched your memory? A. Of course.

Q. And in due course you came to swear an affidavit on the subject, didn't you? A. Yes.

Q. Now it could not be, could it Mr. Morton, that you got together with Mr. Carney, perhaps in the last few days, in order to improve your recollections of those conversations, could it? A. No. 40

Q. Quite out of the question, is it? A. Quite out of the question.

Q. Did you say, in your affidavit which you swore

upon the subject of security, anything to the effect that "If these men did not get the second mortgage, they would not go ahead with the deal"? A. I didn't say that.

Q. You didn't put one word in your affidavit about that, did you? A. I can't remember.

Q. Might the witness be shown his affidavit, of 3rd September, 1981. (shown) A. Yes, correct.

Q. Not a word about it, is there? A. No. 10

Q. So it is fair to say, is it, that at the time you gave instructions upon which that affidavit was drawn, you could not remember such a statement being made? A. Yes.

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

Q. Somehow or other, you have managed to spirit it up in your recollection? A. Yes.

Q. Did you receive a bit of help in doing that, Mr. Morton? A. In - well, help from whom?

Q. Well, who do you think I would be asking you about? A. Well, no. 20

Q. You think that is rather amusing, do you? A. No.

HIS HONOUR: This is a matter of some considerable concern to people, Mr. Morton.

WITNESS: I am well aware of that fact, your Honour.

HIS HONOUR: Let us just carry on in that spirit, shall we.

MR. SHAND: Q. When did it suddenly emerge from the mists of your memory, Mr. Morton? A. When I gave my second statement - prior to the giving of my second statement, which was given shortly before this case was originally adjourned. 30

Q. You mean very late last year? A. Towards the end of last year, yes. That was when the statement was given.

Q. That is when your second statement was given, was it? A. Yes.

Q. And did you contribute your second statement of your own motion? A. Yes.

Q. You decided you would assist the case a bit by 40



making another statement, did you? A. No, I was requested to give a second statement.

Q. Did you have your first statement with you at the time you gave your second? A. No.

Q. Did you have your affidavit with you at the time you gave your second statement? A. Excuse me - I believe, I don't - I believe I have given one affidavit and one statement, right.

Q. What are you referring to as the second statement? 10

A. Well, it is the statement - well, the first statement then. I gave an affidavit prior to the hearing in the Equity Court, and I gave it ----

Q. I take it it was a hearing in the Supreme Court before Master Allen? A. Yes - no, no.

Q. What do you mean? A. There was a hearing prior to Master Allen, wasn't there. This is the third time this matter has gone to court, isn't it?

Q. You may take it that the first hearing was before Master Allen. You keep laughing, don't you? A. No. 20  
Sorry.

Q. Now what is the first statement, if there was one, that you are referring to? A. The statement that I am referring to is the statement that I gave shortly before this particular case was adjourned, late last year.

Q. All right, that is the first statement, as you call it. Now prior to that you had sworn an affidavit, hadn't you? A. Correct.

Q. And you had done that back in September 1981?  
A. Right.

Q. Was there a second statement? A. No. 30

Q. So we are just talking about two documents?  
A. Right.

Q. And you recall the evidence you have given today about the careful search of your recollection you made before swearing your affidavit? A. Yes.

Q. And of course you did that something like eighteen months after the events that you are attempting to recollect, didn't you? A. Yes.

Q. Were you then aware of what Mr. Carney had said in his affidavit about the question of a mortgage or security? A. No. 40

Q. You are sure you were not? A. Yes.

Q. He didn't tell you, did he, that he had used these words in his affidavit, sworn on exactly the same day as yours, "If we don't get that security, we will not go through with the deal", as allegedly said by Mr. Arnett?

A. I never discussed it with Phil, anything he said in his affidavit.

Q. No; you just discussed with him his recollection of what was said? A. Of course, yes.

10

Q. Now we can take it, can we, that nothing had passed between you and Mr. Carney before 3rd September, 1981, about whether Mr. Arnett had made that statement?

A. I can't remember.

Q. It might have, might it? A. I can't remember.

Q. Do you think it is possible that prior to 3rd September, 1981, your attention was drawn to the fact that he was going to allege that Mr. Arnett had said that? A. I can't remember.

Q. Well, if it were, if it had been brought up in that way, it is clear from the contents of your affidavit that it did not result then in your remembering that Mr. Arnett had said it, did it? A. I did not state it in that affidavit.

20

Q. I know you did not. It is clear that if Mr. Carney did bring up with you that he was making that allegation, that it didn't result in you remembering that Mr. Arnett had said it, did it? A. I said I don't remember him ever bringing it up, discussing it with me prior to that affidavit.

30

Q. Just tell us, would you - what brought this up in your memory about 21 months after the event involved, where you had had no recollection of it at all in about September 1981 - what brought it up? A. Because I had been for 21 months almost constantly thinking about it.

Q. You had not, had you? A. I had.

Q. What, from September 1981 until just before ---?

A. It was regularly on my mind.

Q. Was that because Mr. Carney was at you about it?

40

A. No, I had had regular discussions, as we have already talked about, with Mr. Carney, and with Mr. Carney's solicitors.

Q. And so it was Mr. Carney's business of course, not yours, wasn't it? A. That is correct.

- Q. But it was regularly on your mind? A. Yes.
- Q. And that was because Mr. Carney made sure it was?  
A. I can't say that, I don't know.
- Q. Well, you would not have been thinking about it without him bringing your mind back to it all the time, would you? A. Not necessarily so, because I knew I was being involved in the case.
- Q. And being perfectly honest, Mr. Morton, one of the things that was happening in the course of the matter being regularly on your mind was Mr. Carney bringing back to your recollection what he recalled or claimed he recalled had been said, wasn't it? A. No. 10
- Q. Well, what was he saying to you during that period, if anything, to keep the matter on your mind?  
A. What was mainly talked about was the progress that Mr. Arnett, Mr. Jehnic and Mr. Herbert were making in their new company.
- Q. A matter about which he expressed a great deal of concern? A. That is correct. 20
- Q. Do you find it at all surprising that the words, "We won't go through with the deal" are precisely those that Mr. Carney used in evidence yesterday or the day before? A. No.
- Q. You would not, would you, because you knew he was going to use those words, didn't you? A. No.
- Q. I suggest to you, Mr. Morton, that you would be more than prepared to manufacture your recollection to assist him; what do you say to that? A. No.
- Q. That is exactly what you have done, though, isn't it? A. No. 30
- Q. What was it that reminded you that this had been said? A. I can't remember.
- Q. Something like two and three-quarter years after the event? A. I can't remember. I don't know why anyone remembers anything, what causes memories.
- Q. It would be more likely to be getting fainter in your memory, wouldn't it, than clearer, as time went by? A. If you hadn't put your mind more regularly on the matter, yes. 40
- Q. But you were not putting your mind more regularly on the detail of these conversations, were you?  
A. I said I was.

Q. On the detail of the conversations? A. On the whole transaction.

Q. And why were you doing that? A. Because the matter kept raising its head all the time.

Q. How did it do that? A. As I said, with continuing discussions with Mr. Carney and Mr. Carney's solicitors.

Q. About the details of the conversations? A. About the whole detail of the whole transaction. 10

Q. Including the conversations? A. Including the conversations.

Q. You were desperate to help him, weren't you?  
A. No.

HIS HONOUR: Q. Mr. Morton, can you just help me. In that first conversation that you recounted, you said Mr. Arnett said something to the effect, "Whatever figure we agree on, we understand the full amount cannot be paid immediately, and we want security"? A. Yes your Honour, right. 20

Q. Did you say anything with reference to security in that conversation? A. No, because he was addressing the question to Mr. Carney.

Q. So that conversation then continued something to the effect, "Well, what security do you want?" and Mr. Arnett said, "We would like a mortgage over the factory"?  
A. Yes.

Q. And that was really the end of the topic on that occasion? A. Yes.

Q. You knew, did you, that there was already a mortgage over the factory? A. Yes. 30

Q. Did you say anything to point that out? A. To my recollection at that time, no.

Q. Well, it was a bit odd, wasn't it - to me, at any rate - that you are sitting there and here are these two sets of people wanting to organise their affairs. One side says to the other, "We want a mortgage". You know there is already a mortgage on it, and you say nothing? A. Yes, but the circumstances were - perhaps if I can explain the circumstances, perhaps you might understand it a little bit more. I was writing up financial records of the company at the time; I was not being asked to participate in the conversation. I also was conscious of the fact that Mr. Carney had 40

earlier said to me, when they had agreed to buy out, that, "I want to get rid of the fellows at any cost".

Q. Let me just understand this clearly. Are you now telling us that you were really engaged on writing up the books; you were just keeping a weather eye on the conversation, were you? A. Not to the extent that I did not fully hear what was being said.

Q. But you were going on with your own work at the time, were you? A. I was proceeding with my work, yes. 10

Q. So that you were doing work which required the application of - please do not misunderstand me, I am not saying this offensively - some portion of your mental powers? A. Yes - not much.

Q. You could simultaneously write up the books and also ---? A. I was writing up the cash book.

Q. You can do that and also take up a conversation and remember it subsequently? A. Yes. 20

(Short adjournment.)

MR. SHAND: Q. You tell us, if I noted it correctly, that there were two conversations upon the subject of security and that only in the second of them was there any mention of the need to go and see the first mortgagees? A. Yes.

Q. Is that right? A. Yes.

Q. Would it not be correct to say that in the course of one conversation, one only (referring to p. 9 of the transcript) the conversation covered the desire for a security, the suggestion of a mortgage, the need for consent of the mortgagees. Would that not be so? 30  
A. Are you referring to my first affidavit?

Q. I am referring to the facts? A. No, it didn't happen all in one conversation.

Q. Quite certain about that, are you? A. Yes.

Q. While we are talking about your affidavit when was it that you say that the first of these two conversations took place? A. The first day I was out there preparing the accounts. 40

Q. What date? A. It was - I'm not too sure. It was either - it was the week beginning the 9th. It probably was the Tuesday, 10th March.

\*See now page 158.

Q. And in that first conversation, from what you have told us today, there was no talk about the need to get the approval or permission of the mortgagee? A. No.

Q. That wasn't your recollection at the time you swore your affidavit on 3rd September, was it? A. That is correct, that is correct.

Q. Changed, hasn't it? A. Yes.

Q. Because you intruded that topic into the conversation that you would now call the first conversation, didn't you? A. I can only say what I believe is my recollection of the conversations now. 10

Q. Don't you recall that when you swore that affidavit -? A. Yes.

Q. - you quite clearly said that there was in the first conversation around the second week of March a reference to the need to get permission from the first mortgagees? A. That was in my first affidavit, yes.

Q. And today you were well aware, were you, that you were departing from that in the version that you gave us? A. Yes. 20

Q. When did you come to realise that your affidavit was incorrect in that respect? A. This morning.

Q. Oh, this morning? How did you come to realise that this morning? A. It was pointed out to me by Mr. Carney's counsel.

Q. That you had been wrong in your affidavit?  
A. That my second statement was different to my first affidavit.

Q. How did you perform the function of deciding which was correct? A. Only my more recent recollection. My second or my first statement, as you call it, is as I now recollect the events to be. 30

Q. As you now prefer to recollect them to be? A. As I now recollect them to be.

Q. So you discarded the recollection which was fresher at the time you recorded it, in favour of a recollection which was much staler? A. It is still the recollection I have now.

Q. Why didn't you have it in March 1981? A. I don't know. 40

Q. No explanation? A. I can't, no.

Q. Do you recall that in your affidavit of September 1981 you made no reference at all to a second occasion?

A. That is correct.

Q. When did the recollection of a second occasion come into your mind? A. Prior to the making of my first statement.

Q. And only just prior, I take it? A. I can't remember.

Q. Look, unaided by Mr. Carney? A. Unaided by Mr. Carney. 10

Q. Do you recall any other details of the conversation that occurred when the subject of security was raised between these three men and Mr. Carney? A. Only what I have stated in my first statement there.

Q. In your affidavit? A. In my first statement.

Q. I am asking you about your recollection, you see? A. Yes.

Q. Do you recall any other conversation that happened upon the subject of a desire for security on the part of these three men? A. No other conversation other than the second conversation that was held on the second occasion. 20

Q. Was there no talk on the first occasion about whether Mr. Carney could provide assets in the form of security? A. Not to my recollection.

Q. Did Mr. Arnett say this "Presumably you can't pay all the money immediately. We accept that but we want to be secured for the balance owing"? A. Yes.

Q. He did? A. Yes. 30

Q. That is actual memory you are giving us? A. Yes.

Q. What did Mr. Carney say, if anything, to that? A. Mr. Arnett went on and said "We require a second mortgage" or "We require a mortgage over the factory site" and Mr. Carney then said "That's fine".

Q. Didn't Mr. Carney say this in answer to a statement that these men wanted to be secured for the balance owing, "That is a bit of a problem because all my assets are tied up"? A. I can't remember that.

Q. You would say he didn't say it, would you? A. No, I won't say that. I just can't remember it. 40

Q. Let us assume now that you at the time did hear him say that. That would have struck you as rather odd, that statement, wouldn't it? A. No.

Q. Wouldn't it? A. No.

Q. Did you know all his assets to be tied up? A. Of the assets that I knew that Phil had I believe that they were all secured to the bank in regard to the company's business, yes.

Q. So you would have thought, had that been said, that that was true? A. Yes. 10

Q. What about his shares in Airfoil? A. They were presumably unencumbered.

Q. Don't they fall into the category of assets which could be used as security? A. At that stage I didn't even think of them but you are right, yes.

Q. There can't be any doubt about it? A. No, no, no, I agree with you.

Q. As a chartered accountant in practice, you would have known perfectly well that the over-bearing shareholding in that company would be the obvious asset to provide a security, wouldn't you? A. I don't think the value of the shares as per a lending authority, if I had lodged December accounts, would have covered the amount of the loan required. 20

Q. Do you know what the unappropriated profits were, according to the December accounts? A. Yes.

Q. Far greater than would be required as security, wouldn't they? A. But it would depend on how people valued the assets of the company. 30

Q. These men just wanted security, didn't they?  
A. That is correct.

Q. And the shares would obviously have provided it, wouldn't they? A. I don't know.

Q. You don't, as the company's accountant, know?  
A. No.

Q. Just if you wouldn't mind looking at the accounts for December 1979 for us, which are part of Exhibit A (shown). Do you have the balance sheet as at 31st December 1979? A. Yes. 40

Q. You in fact drew that up? A. Yes.



Q. Unappropriated profits were 442,000-odd? A. Yes.

Q. It would have been a great start to security, wouldn't it? A. Do you want me to comment on the balance sheet, why I don't necessarily agree with what you are saying?

HIS HONOUR: Q. I think that is what he is asking you to do? A. Yes, all right. There are a number of assets that make up that unappropriated profit. First of all there is trade debtors which were listed at book value of 756,000. I think that all the shareholders recognise that there were a fair degree of bad debts in that figure which hadn't been provided. There is stock on hand of \$304,000. No stocktake was taken at the end of December 1979 as such. That was a figure that was given to me. There is a loan account, subsidiary company, \$378,000 which was a loan mainly to a company called Newbridge Industries Pty. Limited in regard to the purchase of a property. I don't know how one would value that. What I am saying to you - 10 20

MR. SHAND: Q. Are you suggesting the loan was not a good one? A. I'm not suggesting. I am just saying that is an unsecured loan.

Q. In respect of a piece of valuable real estate?  
A. It was real estate, yes.

Q. It was valuable real estate? A. It was valuable real estate.

Q. As an accountant you know perfectly well this was a very successful company, don't you? A. It was a successful company, very successful company, but whether you can say that the unappropriated profits of \$446,000 is open to question. 30

Q. The balance sheet on the face of it indicates a very valuable company, doesn't it? A. Yes.

Q. And in fact you knew even at February and March 1980 that the profits had gone on and on? A. Yes.

Q. It was going to have a boom result for that year, wasn't it? A. It was going to have a good result.

Q. You knew in the early part of 1980, didn't you, that Mr. Carney proposed to sell the shares in the company? A. No. 40

Q. When did you first learn that? A. I would say late May early June 1980.

Q. When the assets of course were liquidated, weren't they, realised? A. The company was sold.

Q. And the assets were realised and transformed into cash, weren't they? A. Yes. Oh no.

Q. No. A. No.

Q. What happened? A. The assets were sold to a new company.

Q. For cash? A. I can't say. I don't know.

Q. The balance sheet at 27th June 1980 records the current asset of \$1.932 million, doesn't it, cash at bank? A. Yes.

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Q. That was the cash which resulted from the sale of the assets? A. That was the requirements of the purchaser of the company.

Q. All that was done under your guidance, was it?  
A. What do you mean? What was done under my guidance?

Q. The form of the transaction? A. The preparation of the accounts was done under my guidance.

Q. While you have got those documents in front of you, you did not arrive at a profit figure for 31st December 1979, did you? A. Yes. I will tell you how you can do that. If you look at the balance sheet on the unappropriated profits, June 1979, it is 165. At 30th December it is 442. That is the after-tax profit for the six months.

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Q. And then you in due course calculated a profit for virtually the full 12 months to 27th June 1980?  
A. Yes.

Q. At \$1,692,637? A. Yes, those accounts were prepared on a different basis.

Q. Does it make the profit figure any less? A. Yes, it makes the profit figure greater, the basis of that accounting.

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Q. Should we not accept that figure as being a genuine profit figure? A. To the extent that the accounting procedures have changed, yes.

Q. What should we consider as an appropriate qualification of that figure? A. That stock on hand at the end of the period had been sold at selling price. In other words profit had been brought to account on stock on hand.

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Q. Assuming sales which may not have taken place?  
A. The sale did take place because it was sold to Airfoil Sales Pty. Limited.

Q. I take it that the price attached to that stock on hand was relatively unimportant as to the figure at which it was sold? A. It was a figure that was supplied to me. I just took it up in the accounts.

Q. Did you keep loan accounts for these three men, Arnett -? A. There were loan accounts for them, yes.

Q. Where were they kept? A. In the private ledger.

Q. Where is the private ledger? A. It has been sold to the new owner of the company. It was transferred across to the new owner of the company. 10

Q. You wouldn't know where those records are?  
A. I have no idea.

Q. You would think they could not be found, wouldn't you? A. I have no idea.

Q. Where was it kept while it was still being used actively for Airfoil? A. It was in my possession.

Q. In your own professional offices? A. Yes.

Q. Who gave you the entries to fill out those loan accounts? A. I don't quite understand what you are saying. 20

Q. Who gave you the figures? A. I prepared all the figures that went through there.

Q. From what? A. From the prime sources, from the prime source entries of the company, from cheque books and deposit books.

Q. Certainly not from consultation with any of these three men? A. All accounts, draft accounts -

Q. I am not asking about all accounts. A. Draft accounts were always discussed with the shareholders. 30

Q. I am not asking about draft accounts. I am talking about their loan accounts. I am asking you whether in fact those loan accounts were prepared by you without consultation with them? A. Yes.

Q. And so far as Mr. Carney was concerned you didn't make his loan account details available to those three men, did you? A. It wasn't asked for.

Q. And never happened? A. And never happened.

Q. On the subject of 24th March 1980 are you telling us that three cheques and three only were made out? 40  
A. Yes.

Q. You are prepared to deny emphatically, are you, that nine cheques were made out? A. Yes.

Q. That just didn't happen? A. Yes, it didn't happen.

Q. (Approached) I show you from the agreed bundle a number of photocopies of the cheque butts which of course carry the cheque numbers. You will recall, of course, that you gave a piece of advice that on the cheque butts the words "Loan, P. Carney" should be written? A. Yes.

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Q. Would you look at these cheque butts numbered, for the purpose of the bundle, from 26 through to 34?  
A. Yes.

Q. Which of the cheques that relate to those butts do you say were written out on the 24th? A. I can't tell you.

Q. Would it have been three of those? A. I can't tell you.

Q. Didn't you watch them being written out? A. No, not the details, no.

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Q. Didn't you watch Mr. Carney writing on the cheque butts pursuant to your advice? A. No.

Q. You were there, weren't you? A. Yes.

Q. Didn't you see him write on the cheque butts?  
A. No.

Q. Did he write on the cheque butts in your presence?  
A. I don't know.

Q. You saw the cheques handed over? A. I saw the cheques handed over yes, three cheques.

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Q. Three. A. Yes.

Q. You will observe, will you not, that these cheque butts follow in order of their cheque numbers? A. Yes.

Q. Leaving the first three numbers? A. I understand.

Q. 165 consecutively through to 173? A. Yes, right.

Q. I show you a document in the bundle No. 35. Whose handwriting is on that? A. The same handwriting as what is on those cheques.

Q. You know whose that is, don't you? A. I think that is Mr. Carney's, yes.

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Q. This cheque butt is numbered 536174, isn't it?  
A. Yes.

Q. And it bears date 18th March 1980, doesn't it?  
A. Yes.

Q. So it would be a fair inference to draw, wouldn't it, that that cheque butt was written out after the 9 to which I have been directing your attention? A. No.

Q. Wouldn't it? A. No.

Q. Why wouldn't it? A. Because Mr. Carney is a type of businessman that doesn't necessarily hand over or write out cheques on the date that they are shown on the butts. 10

Q. Can you suggest the faintest of reasons why Mr. Carney would have written out this cheque butt and put on it 18th March 1980 whilst doing it in fact prior to the cheque butts which bear prior numbers? A. I have no idea.

Q. You can't even speculate about a reason, can you?  
A. No. 20

Q. Does it shake your confidence at all in what you have said about the time at which you saw three cheques written out? A. No.

Q. Why not? A. Because I saw them written out. I saw them handed. I saw them - I saw them written out and handed across to them.

Q. It would mean this, wouldn't it? That first of all it would be a fair assumption, wouldn't it, that Mr. Carney had actually written out this cheque butt, No. 35 in the bundle, on the date that it bears, 18th March? A. No, I can't necessarily agree with that. 30

Q. Wouldn't that be a fair assumption to make?  
A. No.

Q. Why wouldn't it? A. Because of the way Mr. Carney conducts his business.

Q. You are not really straining every nerve and muscle, are you, to help his case? You wouldn't think that was a fair description, Mr. Morton? A. I have no reason to do that.

Q. Haven't you? A. No. 40

Q. Just tell us, would you, why Mr. Carney would

have put a false date on the cheque butt? A. I don't even know whether it is a false date.

Q. But it has to be, hasn't it, if what you say is correct about the day upon which he wrote out the three cheques that you concede were written out? A. No.

Q. It doesn't? A. No.

Q. We can assume, can we, that he put the dates on those three cheques on 24th March? A. No.

Q. Can't even assume that? 10

HIS HONOUR: Q. What was the answer? A. No.

MR. SHAND: Q. Why can't we assume that? A. Because I can't assume anything. I can only tell you what I saw and what I remember.

Q. What reason would you put forward even by speculation as being available to explain why he would not have put on those three cheques the date upon which you say he was writing them out? A. If I can answer it this way. I have many times picked up the cheque book of Airfoil Registers Pty. Limited to write up the cashbook and there are cheques written in there which have not been cancelled, preceded them, and other cheques written and those back cheques issued at a later date. I don't speculate on how it happens. It just has happened. 20

Q. What you are suggesting to us must be the case is this, isn't it? That he wrote out the cheque No. 536174 on some date which may have been 18th March, may it not? A. Presumably, according to that. The cheque has been cancelled anyway. 30

Q. You don't really think that is relevant to which we are talking about, do you? A. He may have cancelled it because it is the wrong date.

Q. You are prepared to say anything, aren't you? A. No, I'm not. But you are making suppositions.

Q. Let me get back to the point, Mr. Morton. If we can safely assume (and I will ask for this purpose that you should assume it) that cheque No. 536174 was in fact written out as was the butt on 18th March 1980, then if what you say is right and if nine cheques instead of three were written out on 24th March, at the time Mr. Carney wrote out cheque 536174 he must have deliberately left nine cheques blank, mustn't he? A. Excuse me, your Honour, do I - this is only supposition and assumptions that he is asking me to 40

comment on when all I am saying is, you know, I want to tell you what the facts were, what my recollections were. Do I have to continue, you know, saying "No" or agreeing with his questions?

HIS HONOUR: You can take the suppositions and then make your answers on the basis of the assumptions.

\*(Last question on p. 96 read and disallowed.)

MR. SHAND: Q. You have become aware, have you not, that not only in the agreed bundle cheque marked 35 but 36 and 37, which are two cheques consecutive in the book after 35, were also dated 18th March 1980? A. I can see that, yes. 10

(Documents 26 to 37 in the agreed bundle of documents admitted without objection and added to Exhibit A.)

RE-EXAMINATION:

MR. STOWE: Q. Mr. Morton, can you identify the document that I show to you (shown)? A. It is a cheque book. I can't tell at this stage. I know the writing but I can't tell you whether it is Airfoil Registers' cheque book just by looking at it. But it is a cheque book that has got handwriting in there of staff of Mr. Carney. 20

Q. Can you tell whether it is the cheque book from which the cheques you have just been talking about came? A. If it is the same cheques that we are looking at, yes, these are the cheques here and there is that cancelled cheque. I assume they are, yes.

(Cheque butts Nos. 536001 to 536200 on the account of Airfoil Registers Pty. Limited with The Commercial Bank of Australia Limited admitted without objection and marked Exhibit 3. Mr. Shand pointed out that many cheque butts appeared to be missing from the book.) 30

(Witness retired and excused.)

(Close of case for the defendant, subject to the examination of the witness who was part heard and subject to counsel for the defendant tendering answers to interrogatories by the plaintiffs.)

\*See now page 264.

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CASE IN REPLY

DARRELL BRUCE ARNETT

Sworn and examined:

MR. SHAND: Q. Your full name? A. Darrell Bruce Arnett.

Q. Your address? A. 5 Oatley Place, Padstow Heights.

Q. What is your present occupation? A. Company Director.

Q. You were previously a shareholder and director of Airfoil Registers Pty. Limited, were you not? A. Yes sir. 10

Q. When did you first become connected with that company? A. 1st April 1978.

Q. What function did you perform in it besides being a director? A. It was my function to establish a Melbourne office for the company.

Q. You set about working for that company, we know. Correct? A. Yes sir.

Q. Did there come a time when something developed which led to a conversation between you and Mr. Carney involving a difference of opinion? A. Yes. 20

Q. What was said between you? A. It happened over a number of occasions. It related to the purchase of machinery from the United States by a company called Atol Trading Company. It was my belief -

Q. No doubt you said something to Mr. Carney, did you? A. I did.

Q. What did you say to him? A. That Airfoil was to purchase the machinery. However I noticed a letter in the office dated some four or five months previous to February 1980 which was a letter between Atol and the manufacturer of the machinery, negotiating to purchase the machinery. 30

Q. Machinery for manufacturing what? A. Aluminium duct, airconditioning duct.

Q. The business of Airfoil Registers was to make the airconditioning grilles that one sees in ceilings and walls, is that so? A. We manufactured and sold grilles and we sold duct that was purchased in from another company. 40

Q. Having seen that letter you had some conversation



on a number of occasions with Mr. Carney, did you?

A. I did.

Q. What did you say and what did he reply? A. I asked Mr. Carney was that correct that Atol was purchasing the machinery from the United States. Mr. Carney said, "No, don't worry about that".

Q. Did anything occur on a later occasion between you and him about it or was there only one conversation?

A. On February 8th we had a conversation wherein Mr. Carney arrived at work at about 9.30, followed by Mr. Morton, and they burst through the doors, told the secretary to leave the office for an hour and summoned Karlo Jehnic from the factory to join him, John Herbert, Wayne Morton and I in the office. Mr. Carney started the conversation in an abusive manner - (objected to). 10

Q. What did he say? Just the terms of the conversation? A. Mr. Carney believed -

Q. He said this, did he? A. Mr. Carney said that it was his opinion that we believed that the wrong thing was going to be done by us and we had no reason to distrust him. 20

Q. That the wrong thing was going to be done by him, I suppose he said, did he? A. That is correct.

Q. Was anything further said about what the wrong thing was? A. The wrong thing was that - Mr. Carney said that the wrong thing was not going to be done, the wrong thing being our interests would - Mr. Carney stated that our interests would be protected at all times.

Q. Was there any mention by anyone as to what this wrong thing was which was being discussed? A. Yes sir. 30

Q. What was said as to what it was? A. I commented that we had no assurance that the money of Airfoil Registers, of which I was a minor shareholder, would not be used to purchase machinery in the name of another company of which I was not a shareholder.

Q. Was there any reference to the name of that company? A. Yes.

Q. What was it? A. Flexmaster. 40

Q. Did Flexmaster have any relationship with Atol? A. The company Atol changed its name to Duratube and then to Flexmaster.

Q. Were there any later conversations upon that

subject? A. Through the course of the morning, yes. The discussion went to lunch time.

Q. On that subject, is that so? A. That subject and the general nature of our participation and lack of knowledge of Airfoils' accounts.

Q. I take it there was a very considerable amount of ill-will generated? A. Considerable.

Q. Had you been told that a man called Baker had an interest - (objected to). 10

Q. Had you been told who owned the shares beneficially in Flexmaster? A. I didn't know anyone owned shares in Flexmaster other than Mr. Carney and Mrs. Carney.

Q. Was the name Baker ever mentioned to you? A. As a proposed future common employee with myself.

Q. By Mr. Carney, is that so? A. Yes.

Q. I want to take you forward now. Was there any discussion that day about your shares being acquired by Mr. Carney or not? A. No sir.

Q. May we take it that there were further discussions about the problem that had arisen concerning Flexmaster? A. Yes. 20

Q. I won't ask you for the details of them. Did the time come when there were conversations about the sale of your shares in Airfoil and those of the other two plaintiffs? A. Yes.

Q. What date was it that you remember that happening? A. The week prior to Sunday 9th March.

Q. Where did it take place? A. In the offices of Airfoil. 30

Q. What day of the week was it, can you remember? A. I do not remember.

Q. Who was there? A. Mr. Carney, Mr. Herbert, Mr. Jehnic and myself.

Q. What was said? A. Mr. Carney said it was obvious we could no longer work together "and I want to buy your shares".

Q. And your response to that? A. I said "I agree. We can no longer work together".

Q. Was there any further detail discussed about the 40

purchase of the shares then? A. No further detail about the purchase.

Q. Did you come to any later occasion when there was further discussion about the sale of shares? A. In relation to the sale of shares, on Sunday the 9th we commenced a stocktake which the result - was the result of a meeting on the previous Friday at which the four present directors, plus Mr. Morton in attendance, decided that it would be proper - (objected to).

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Q. Just say what was said on the Friday. A. That a correct value should be struck with the company.

Q. Was there any discussion about the sort of basis for valuation to be used? A. We were to value the assets of the company.

Q. Subsequent to that a stocktake took place, did it?  
A. It did.

Q. Who took part in that? A. Mr. Carney, Mr. Herbert, Mr. Jehnic, Mr. Morton and myself.

Q. Tell us what developed out of that? Was there any further conversation? A. Not specific that I can remember.

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Q. Did you come to any later occasion upon which there were any discussions about the sale of these shares? A. Yes sir.

Q. When and where? A. In the offices of Airfoil on March 17th, a Monday night.

Q. Who was there? A. Mr. Herbert, Mr. Jehnic, Mr. Carney and myself.

Q. What was said? A. I asked of Mr. Carney when would Mr. Morton have the value of the company available to us. Mr. Carney replied "Four to five weeks". I replied to Mr. Carney "That is too long".

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Q. Go on. A. Mr. Carney then said to myself and to Mr. Jehnic and to Mr. Herbert "Do you want to do a deal now?" I said "Yes, that suits me". To my recollection Mr. Jehnic and Mr. Herbert only nodded.

Q. Go on. A. Mr. Carney suggested that if he could make the value of Mr. Jehnic's shareholding, and Mr. Jehnic having eight shares, Mr. Herbert and I only five each, that once that was done it would automatically establish the value of mine and Mr. Herbert's shares. Mr. Carney said to Mr. Jehnic "What do you want for your shares?" Mr. Jehnic didn't answer

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immediately, paused for around about a minute and said "\$220,000". Mr. Carney said "No way. 160,000 maximum". I don't remember the specific bargaining but Mr. Carney said "170,000". Mr. Jehnic said "No, that is not sufficient". Mr. Carney then said "I will leave the room, go to the gentlemen's. Possibly you may care to discuss it between you". When Mr. Carney left the room I took up a calculator from the desk and calculated Mr. Jehnic's share of 2.5 million.

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Q. Based upon eight shares? A. Based upon eight shares of 111. That figure came out at 180,000. 180,000 equalled 2.497 million dollars.

Q. That is valuing the company at 2.497? A. Yes sir. I proposed to Mr. Jehnic and Mr. Herbert that in my opinion that was a fair estimate of the value in relation to what Mr. Carney had said the company was worth over the preceding five to six months which was constantly around two to three million. I said "You realise that you have been in the company 18 months longer than I have. I believe your contribution is in some way greater therefore. I suggest that I take \$6,000 from my amount" which had calculated out to be \$112,500. I suggested to them that possibly in the shares that they have, eight to five, I divide that \$6,000 into that ratio which brought in effect Mr. Jehnic's share to 183,700 being 8/13ths, as I calculated at the time, of \$6,000. Mr. Jehnic and Mr. Herbert said "Yes, well, I suppose that is fair". This took about five minutes. Mr. Carney then came back into the room. He said "Have you come to some conclusion?" I put the situation as we had arrived at it, with the amounts of money we required, and Mr. Carney paused for four or five seconds only and said "Okay".

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Q. You had mentioned specific figures to him, had you? A. Yes sir.

Q. For each of you? A. Yes, I had.

Q. What were those? Do you remember what they were? A. 183,700 for Mr. Jehnic. Slightly testing my memory but 114,800 for Mr. Herbert and 106,500 for myself.

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Q. On what date was this conversation? A. It was on Monday night 17th March.

Q. Was there any further conversation during that meeting? A. Considerable.

Q. Anything relevant to the sale of these shares?  
A. The only thing relevant to the sale of the shares was conversation between Mr. Jehnic and Mr. Carney,

thence Mr. Herbert and Mr. Carney in relation to deductions from the totals arrived at of balances they had owed in their loan accounts.

Q. What do you remember as to what was said about that? A. Very little. Mr. Carney said "You realise that the money you borrowed, Karlo, \$7,000 for your house, must come off". Karlo said "That is all right". "And, John, 5,000 that you borrowed from the company for a swimming pool, that must come off also". I commented at that stage to Mr. Carney and said to Mr. Carney "That is not correct". Mr. Carney didn't comment to me but I continued. "Surely you take account of both sides of a loan account?" Mr. Carney said "No, that is the way the deal will be done", and Mr. Jehnic and Mr. Herbert said nothing. But to my opinion formed at that time - 10

Q. You cannot say what your opinion was. A. ~~Their acquiescence-to-the-last~~ (struck out).

Q. You can only say what was said. Anything else? 20  
A. Nothing was said.

Q. Is that your recollection of all conversation relevant to the sale of these shares at that meeting?  
A. The only other comment that I remember which immediately preceded Mr. Carney drawing nine cheques, was that Mr. Carney said to us "You realise I can't pay all this money at this time". I made the comment to Mr. Carney "I can understand that could be the case but we would require a fair proportion, around \$150,000 at least of the total money at this stage". Mr. Carney said "Right". 30

Q. Does that conclude your recollection of that relevant conversation? A. Yes sir.

Q. What time did that meeting conclude? A. Approximately ten o'clock.

Q. Ten p.m.? A. Yes.

Q. Were any cheques drawn on that occasion or not?  
A. Nine, nine cheques. Three each to myself, Jehnic and Herbert were drawn within three minutes of Mr. Carney - four minutes, three minutes, a short time of Mr. Carney coming back into the group, us having agreed to a satisfactory figure. 40

Q. Was there any mention of motor cars during that get together? A. Yes, there was.

Q. In what part of the sequence can you tell us was that discussion? Before or after the loan accounts or when? A. No, it was after.

Q. Tell us what was said? A. Mr. Carney said to all three of us "Do you want your motor cars? I have got no use for them". Pardon me, that is not correct. "Would you like to purchase your motor cars? I have got no use for them". I commented first. I said "I have got no vehicle apart from that. If the price is right, yes".

Q. Go on. A. With regard to my vehicle Mr. Carney said "What do you think is a fair price?" I said "You know its appearance. You know the way it goes. It isn't a good motor car now. I bought it secondhand. No more than \$1,500". Mr. Carney said "That's fine". There was discussion with Mr. Carney and Mr. Herbert, and Mr. Carney and Mr. Jehnic about their cars. I know the end results but I don't recollect the details.

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Q. There was discussion about each of their cars, was there? A. There was.

Q. Apart from the cheques, did you see Mr. Carney write anything after those discussions or during them?

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A. Prior to concluding and all leaving, Mr. Carney - we were at the stage where it was "Okay, goodbye". Mr. Carney then said "Just a minute". He proceeded then to say "Please give us a look at those cheques again". He noted down on a piece of paper scribblings to do with what he was looking at on the cheques. That was figures that related to values on the cheques. He said "Okay, I just want to check. That's fine".

Q. (Shown Exhibit 2.) You recognise that handwriting?

A. I do. Mr. Carney's handwriting.

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Q. Is that the two-page document that Mr. Carney wrote out as you have described? A. Yes sir.

Q. Was it written out before or after the cheques you have mentioned? A. At the very end of the meeting. The only thing that happened afterwards was we left.

Q. How many cheques were written out? A. Nine. Three each.

Q. You all departed, did you? The three of you each with three cheques in your possession? A. Yes sir, we did.

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Q. Had anything been said at that point of time about what would be the name of the purchaser of the shares or the nature of the purchaser? A. No sir.

Q. What next happened? Let us go past 17th March?

A. On the morning of the 18th when I arrived at work I spoke with Mr. Jehnic and Mr. Herbert and said -

Q. You need not worry about the conversation between you. Following such a conversation did you have any contact with Mr. Carney or what did you do? A. I went to - myself and Mr. Jehnic left the office and went to the home and office of an accountant Mr. Leon Kelk who was an accountant.

Q. You had some conversation with him, did you?  
A. I did.

Q. Did you have your cheques with you then or not? 10  
A. Mine and John's, and Karlo had his own.

Q. The three of you went to see him? A. No, Karlo and I. I had six cheques, Karlo had three.

Q. Conversation ensued with him? A. With Mr. Kelk.

Q. Was anyone else with you or did anyone else join you or not or did you go somewhere? A. No, no one joined us on the morning of 18th.

Q. What happened next? A. Went back to the office of Airfoil Registers.

Q. And then? A. I said to Mr. Carney "We will require some sort of security to ensure that we get paid". 20  
Mr. Carney replied "Everything I have is mortgaged. The only other thing I have is my interest in Airfoil". I replied to Mr. Carney "If everything you have is mortgaged, could we consider a mortgage over the factory?" Mr. Carney said to myself, "Yes, but you will have to arrange for it and you will have to pay for it". Mr. Carney then said "You realise that the factory currently has a first mortgage to Jim and John, Mr. Hampson and Mr. Heffernan". He said "You will have to arrange to 30  
get their permission for a second mortgage". Before I could reply Mr. Carney said "No, I will do that".

Q. Anything further? A. No sir.

Q. Nothing said on that occasion about the name of the purchaser? A. Not on that occasion, the morning of the 18th.

Q. What next happened? A. I believe that it was the afternoon of the 18th. However, it may have been the morning of the Wednesday when Mr. Morton was in the office. Mr. Carney advised myself, Mr. Herbert and Mr. Jehnic the shares would be purchased in the name of a company. They were not sure at that point of time what the name of the company would be. 40

Q. What next happened? A. At 11 o'clock on Wednesday

19th I went to the home of Mr. Kelk along with Mr. Jehnic. As was the previous day, I had six cheques and Mr. Jehnic had three. ~~Mr. Kelk on our request had telephoned his solicitor Mr. Dan Simpson to attend on the 11th to give us advice on~~ (portion struck out).

Q. Did Mr. Simpson arrive on that day or did you see him? A. He arrived before we did. We arrived at 11. He was there with Mr. Kelk when we arrived.

Q. Did you have some conversation with him? A. I did. 10

Q. Did you do anything with the cheques in relation to him? A. Yes.

Q. What did you do with them? A. I placed them on the table.

Q. A conversation followed, did it, with him? A. Yes.

Q. After you had done that. Who kept the cheques? A. At the end of the meeting I took back six and Mr. Jehnic took back three. 20

Q. What happened next? A. Before the end of the meeting?

Q. Yes, involving Mr. Simpson. Were any instructions given to him as to something he might do, work he might do? A. Yes.

Q. He undertook to do what he was told, did he? A. Yes.

Q. What was the next event? A. A telephone call early afternoon I believe on Friday 21st from Mr. Simpson advising myself that he wouldn't be able to attend a meeting at five o'clock in Airfoil offices that day whereby we were to - 30

Q. He just couldn't attend the meeting, he said, did he? A. That is correct.

Q. What transpired that day? A. He sent to myself, for myself, Mr. Jehnic and Mr. Herbert, two documents.

Q. What was the nature of the two documents? A. One was a deed of sale in relation to the purchase of my shares by a company called Ilerain and the other one was a mortgage document. 40

Q. Had you played any part in informing Mr. Simpson about the name Ilerain? A. No sir. Respectfully, yes.



Q. You had? A. Yes.

Q. You had told him that name, had you? A. No, I told Mr. Kelk to tell Mr. Simpson.

Q. You have said there were documents of two kinds which related to you? A. Yes.

Q. Delivered to you? A. Yes sir.

Q. Were any documents of a similar kind which related to the other two men also present or delivered to them? A. Yes.

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Q. Or you? A. Yes.

Q. Similar documents relating to them? A. I read them all.

Q. There were six documents, were there? A. Yes, I remember three sale deeds and at least one mortgage, might have been three, at least one.

Q. Did anything happen after you received those documents relating to Mr. Carney? A. Mr. Carney asked if he could peruse them.

Q. This was in Airfoil's office? A. Yes.

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Q. Were they handed to him? A. Yes.

Q. Do you recall anything being said while he did that or afterwards? A. Afterwards.

Q. What was said? A. He would like to take them home for the weekend and read them through with Mr. Morton.

Q. What was said in answer to that? A. "No problem".

Q. Any other conversation you can recall which took place then? A. None whatever.

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Q. Did Mr. Carney draw attention to anything that he suggested was wrong about the wording of any of the documents? A. I feel like saying "Absolutely no". But not to my recollection, definitely not.

Q. Did you yourself undertake or indicate you would do anything with regard to the correction of the wording of the documents in conjunction with your solicitor Mr. Simpson? A. No.

Q. Did you part company with all those documents?  
A. Yes sir.

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Q. When was the next get together? A. Monday 24th March.

Q. Where and when? A. Mr. Carney's office at Airfoil Registers at approximately five o'clock.

Q. Who was there? A. Mr. Morton, Mr. Carney, Mr. Jehnic, Mr. Herbert and myself and Mr. Dan Simpson.

Q. What happened? A. Mr. Simpson, having handed me previously a document which he explained was a personal guarantee and having suggested earlier to me that Mr. Carney should sign it, I handed that to Mr. Carney to peruse. 10

Q. Anything said after that? A. Yes sir. Mr. Carney said "I can see no problem". He said to Mr. Morton "What do you think?", Mr. Morton said "I wouldn't sign it". Mr. Carney said "Ah, no problem".

Q. What happened next? A. We executed all the documents which included share transfers as well as mortgages and deed of sale, personal guarantee and share transfers, and something else but I don't recollect what. 20

Q. With respect to the deeds of sale and any mortgage documents, how were they produced on the Monday?  
A. Mr. Carney brought them to the meeting.

Q. Where were the cheques on that Monday meeting? Were they there? A. Yes, they were.

Q. In whose possession? A. My three cheques were with myself, Mr. Jehnic's were with himself and Mr. Herbert's three cheques were with Mr. Herbert.

Q. And the documents were all signed up and you dispersed, did you? A. Yes sir. 30

Q. I think the history is plain. You presented the first cheque and were paid its proceeds? A. Correct.

Q. In due course what did you do about the second cheque? A. I attempted to negotiate the cheque at the Padstow Branch of Airfoil's Bank. I was advised by the manager that the account was closed and the cheque would not be met.

Q. In due course you received a letter from Mr. Carney? A. I did. 40

Q. Suggesting the return of the remaining two cheques?  
A. I did.

Q. And the re-issue of cheques? A. Yes.

Q. Did you do that? A. No.

Q. Return the cheques? A. No sir.

Q. And these proceedings started thereafter?

A. They did.

Q. Was anything said during the period leading up to the completion of this transaction about not going into competition with him? A. Never in my presence.

Q. You have heard him say in evidence that there were a number of discussions in which he says in one way or another it was indicated that the three of you would not go into competition with him. Did you hear that? A. To my personal knowledge he is totally mistaken.

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Q. You didn't hear any such thing said? A. Never at any stage.

Q. With regard to the subject of security did you say to him or at all "If we don't get the security we won't go through with the deal"? A. Almost.

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Q. What did you say? A. If we don't get security.

Q. That is not the full statement, is it, "If we don't get security"? A. "If we don't get security we will not proceed".

Q. At the time that was mentioned had there been any mention of a mortgage of the factory? A. Yes.

Q. If in fact the mortgage had not been provided, would you have gone ahead with the deal? (Objected to; question withdrawn)

Q. Were you aware of the existence of s. 67 of the Companies Act at the time? A. No sir.

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Q. You have become aware of it since of course, haven't you? A. Most definitely.

Q. Did you have any inkling at the time that if the company, whose shares you were selling, was to give any sort of financial assistance in the purchase of the shares from you, that the law said that should not happen? A. No.

Q. Or any inkling that the granting of a mortgage by Newbridge, in order to provide security for the

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moneys that had not been paid, was against the law?

A. No.

Q. Had, in the very early part of 1980, Mr. Carney said anything to you about the profits being generated in the company? (Objected to; rejected.)

CROSS-EXAMINATION:

MR. STOWE: Q. Mr. Arnett, the first of the cheques that you had been given by Mr. Carney bore the date 24th March 1980? A. Yes.

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Q. That was the day on which your meeting that you have just described took place? A. When the documents were executed?

Q. Yes. A. Yes.

Q. That meeting took place at about the end of the day? A. It did.

Q. But you took no steps to present that cheque for payment until the following day, is that right? A. Definitely not.

Q. You would have regarded it as inappropriate for you to have presented it until that settlement meeting had taken place and all the events which occurred at that meeting had occurred? A. Yes sir.

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Q. You agree that it would not have been appropriate? A. It would not have been appropriate in my mind, no.

Q. Until that meeting had occurred and all the various things that you exchanged with each other had been exchanged, there was no completed agreement between the parties so far as you were concerned? (Objected to; allowed). A. I believe the agreement was completed on the 17th, on the night of the 17th. In my mind I believe that.

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Q. When you say in your mind you believe that, what you mean is that from a commercial point of view you had reached a deal, for the want of a better word, with Mr. Carney? A. Yes, with regard to agreement, I am thinking purely in terms of he wanting to buy, me happy to sell at an agreed price. Yes, the agreement was completed then.

Q. But nobody, you thought, was ultimately bound until the events which you had anticipated would take place on Monday had in fact taken place? (Rejected).

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Q. Why did you not think it would be appropriate for

you to present your first cheque for payment until after the Monday meeting? A. It would have been unfair to Mr. Carney.

Q. Unfair in what way? A. We had arranged a meeting for the Friday. Due to our solicitor not being able to attend, the meeting was postponed to Monday 24th and it was no fault of Mr. Carney's if there was a change.

Q. But why would it be unfair to him, assuming that there was a mix-up with the solicitor and a bit of a delay in the documents? Accepting that, why would it be unfair for you to present the cheque before the meeting had taken place? A. No other reason, purely that matter of principle. 10

Q. What was the matter of principle that deterred you from presenting the cheque? A. That we had pre-arranged for a Friday meeting and, due to our solicitor's not being able to attend, the meeting was postponed to the Monday. 20

Q. But it also would have been premature, would it not, for you to present that cheque until Mr. Carney had got what he was to get from you? A. Mr. Carney from the outset didn't want any documents whatever. So with regard to that, no.

Q. He had to get a share transfer, didn't he? A. I imagine so. But to be quite honest my knowledge of the Companies Act or whatever is not - I would assume, yes, but I don't know.

Q. It was that that he was buying from you, was it not? The transfer of your shares? A. He was buying my shares. 30

Q. And in order to demonstrate to the world that he had bought your shares, you knew that what he needed was the share transfer in particular? A. No sir.

Q. That was given to you prior to or at the Monday meeting, was it not? A. Yes sir.

Q. Were you surprised when you were given a share transfer to sign? A. No sir.

Q. You knew that something of that kind was required in order to move the shares from your ownership to his? A. At the meeting? 40

Q. Yes, just answer that question. What I asked you was whether you knew that something was required from you in order to move the shares from your ownership into Mr. Carney's ownership? A. A deed of sale, yes.

Q. And a transfer? A. Not necessarily until the third instalment had been paid, as I felt in my mind.

HIS HONOUR: Q. Mr. Arnett, let us cut this short. Even though you had the cheque on the 17th there was no way that you were going to present it and take any further steps until you had the signed documents, the mortgage and so on? A. That is correct.

(Luncheon adjournment.)

Q. I think you told his Honour just before lunch that your attitude about the presentation of the cheques was that you were not going to present them, or the first of them, until you had got all the documents on the Monday? A. That's correct, yes. 10

Q. So far as you were concerned the documents that you were getting were the sale agreement, the mortgage and the personal guarantee? A. Yes.

Q. The mortgage was something that you had received formal advice about from your solicitor and your accountant? A. From my solicitor, I think, yes. I would say from my solicitor I did, yes. Formal advice is formal, written? There was no written advice. 20

Q. You had received advice about it from Mr. Kelk and from Mr. Simpson? A. Mr. Simpson.

Q. Just from Mr. Simpson? A. Yes.

Q. He told you when he gave you the advice that it was desirable to get the mortgage that you should also lodge a caveat to protect your interest? A. No.

Q. You know that one was lodged on your behalf and on each of the other two vendors' behalfs within a day or two of the 24th March meeting? A. I do now, yes. 30

Q. If I can go back to 17th March meeting that you told us about, I take it that the last significant thing that happened that day was the writing out and handing over of the cheques? A. If it was significant the last thing was Mr. Carney's scribbled notes checking the amounts were in order. Preceding that was cars, if that was a significant event. That preceded the last item, the scribbled note.

~~Q.----The cheques coming in were in relation to the cars?~~ 40  
~~A.----Prior.~~

MR. SHAND: I do not understand the question, your Honour. (Question and answer struck out at his Honour's direction.)

MR. STOWE: Q. Which came first? The writing of the cheques or the conversation about the cars? A. The writing of the cheques.

Q. You are quite clear, are you, that you received nine cheques between the three of you and not six at that meeting on the 17th? A. Absolutely positive.

Q. I take it that you saw the cheques that you got that day as being your means of getting payment in accordance with the instalments that you had discussed with Mr. Carney? A. Yes. (Objected to as irrelevant; rejected.) 10

Q. I take it there was never any discussion between you and Mr. Carney or Mr. Morton or anybody else about replacing the Airfoil cheques with any other cheques? A. No, there was not.

Q. Do you agree that the arrangements that you discussed with Mr. Carney as you say on 17th March beginning with the starting point of a payment of \$180,000 to Mr. Jehnic? A. It wasn't that. An amount, not \$180,000. 20

Q. I beg your pardon? A. It wasn't \$180,000. It was \$183,700 less seven.

Q. But the starting point was \$180,000? A. Yes.

Q. That was the starting point from which you worked out how much each of you would get subject to deductions? A. Yes.

Q. The starting point of \$180,000 produced subject to deductions an amount total payable to the three of you of \$405,000? A. Yes. 30

Q. What you initially talked about was the payment of that amount to the three of you collectively for the time by three instalments of \$150,000, \$100,000 and \$155,000? A. No.

Q. What were the instalments that you talked about? A. Just the initial one, after Mr. Carney said to me, "I can't afford to pay you all the money now". My comment was, in essence, "Fair enough but we want a substantial part now, approximately \$150,000" or "\$150,000". No discussion on the subsequent break-up. 40

Q. By the time you parted on 17th March you had reached some conclusions as to what the amount of the Dexion (?) payments would be and when they would be made, had you not? A. By virtue of the cheques that I had.

Q. You had each three cheques, one dated 24th March?

A. Yes.

Q. One dated 31st July? A. Yes.

Q. And one dated 15th August? A. Yes.

Q. You had engaged in discussions with Mr. Carney and you yourselves had carried out calculations which had enabled the amounts of each of those cheques to be calculated? A. Total amount only.

Q. When you say "total amount", do you mean the \$405,000 figure? A. Yes. 10

Q. Didn't you talk to him about the amount that he would pay in the second way of the cheques and the amount that he would pay in the third way of the cheques?

A. To be quite honest the cheques were written in a very short time and there was very little talking at that time at all.

Q. Are you clear that the result of what little talk there was and of the calculations that were made in writing out of these cheques involved the deduction of these two loan account amounts from the second instalment cheques? A. No, I am not clear on that. They were not from my cheques - to be quite honest I couldn't tell you whether it was the first, second or third from Mr. Jehnic to Mr. Herbert. 20

Q. You say you only concerned yourself with the amount you yourself received? A. In detail.

Q. Do you say that you did not know when the second and third payments were intended to be made until you were actually given the cheques? A. No, I can't say that. Mr. Carney told me when they would be paid as he was writing them out. 30

Q. Did you not know what the amount that you would be receiving in the second instalment and the third instalment would be until you got those two cheques?

A. That's correct.

Q. You did not know until then? A. No.

Q. Did you do anything to backtrack and work out the calculations and determine whether the amounts that you had been given on the three cheques were appropriate? A. 40

A. When I was given the cheques I added them up, yes. They came to \$106,500.

Q. That was all you were concerned with, the total?

A. At the time that was everything, yes.



Q. When you said to Mr. Carney, "If we don't get security we don't proceed" who was present? A. I made an error in what I said earlier on that. I was going to ask his Honour if I could correct it later, but in answer to the direct question, Mr. Herbert, Mr. Jehnic and Mr. Carney.

Q. What was the error you wanted to correct about that statement? A. A very small one. When I said to Mr. Carney, or when Mr. Carney said to me, "You will have to get permission off Heffernan and Hampson" and then straight away said, "No, I will do that". He said, "No, I will do that. They may not agree". It might not be important. 10

Q. What you want to add is "they may not agree"?  
A. That is what was said.

Q. Was the statement that you made, "If we don't get security we don't proceed", was that made at the same time as the conversation that you have just corrected your account of? A. It was made directly after. There was doubt on whether the mortgage could be available as a form of security. 20

Q. I think it was directly after Mr. Carney said, "I will have to get the consent of Hampson and Heffernan"?  
A. Directly after Mr. Carney said, "No, I will do that. They may not agree."

Q. That was on 18th March? A. That was on the morning of 18th March. Tuesday.

Q. Wasn't it the situation that the question of cars was raised not by Mr. Carney but by yourself? A. No. 30

Q. Was it your car that was first talked about or that of Mr. Jehnic? A. I don't recollect.

Q. Who was it who was talking about that? Just you and Mr. Carney? A. About my car?

Q. Yes? A. Yes.

Q. Would you describe your car? A. My car was a blue Fairmont station wagon, 160,000 kilometres - yes, there was 80,000 on it when I bought it. There was 160,000 when I bought it from Mr. Carney. I did buy it originally for the company. Extensive rust. The chap I bought it from was a skin diver and it was his. He said that it wasn't really as rusty as it turned out to be in the salt air. I had seatcovers on it because the seats were torn. There was no major body damage. There was a small dint maybe three inches by three inches around near the right front headlight. 40

Q. What size engine did it have? (Question rejected).

MR. SHAND: I take it my friend accepts the situation that he is now not going to be able to put to Mr. Van those facts.

MR. STOWE: Yes, I do accept that.

RE-EXAMINATION:

MR. SHAND: Q. How were the motor vehicles paid for?

A. Paid by personal cheques from us to Airfoil Registers. That was in the case of three. I don't know about the other two. 10

Q. There was a discussion about a motor vehicle that you used owned by the company? A. Yes. I had one and my wife had one.

Q. Did you pay a sum of money for the vehicle which you used? A. Yes I did.

Q. What did you pay? A. \$1500.

HIS HONOUR: Q. Was the \$1500 deducted from the money that was payable to you for the purchase price of the shares or did you give Mr. Carney a cheque? A. I gave him a cheque dated 29th June. 20

Q. For \$1500? A. Yes.

(Witness retired.)

DANNY KENNETH SIMPSON  
Sworn and examined:

MR. SHAND: Q. Your full name? A. Danny Kenneth Simpson.

Q. Your address? A. 21 Jannali Crescent, Jannali.

Q. You are a solicitor of the Supreme Court of N.S.W.? A. I am. 30

Q. You carry on practice, do you, under your own name as a sole solicitor? A. No, I am a partner in the firm of Peet Simpson & Co., 123 Forest Road, Hurstville.

Q. In March 1980 you were practising then as a solicitor under that firm name? A. That's right.

Q. Had you before March 1980 known any of these three plaintiffs, Messrs. Arnett, Jehnic or Herbert? A. No.

Q. What was the first communication with you which brought you into contact with them? A. I was contacted by my accountant, Leon Kelk who said that he had some clients who wanted some agreements drawn and he offered to introduce me to those people. I subsequently went to Mr. Kelk's office at Moorebank on about 18th or 19th March, 1980, at which time I was introduced to Mr. Jehnic and Mr. Arnett. Mr. Herbert was not present on that occasion.

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Q. Did you sight any documents on that occasion?  
A. Yes. I was shown a number of cheques drawn on Airfoil Registers Pty. Limited. I took a note of the amounts of those cheques and wrote them out for my later assistance in drawing the documents. I don't remember exactly how many cheques there were but there were certainly a number of them.

Q. Did you set about drawing some documents subsequent to that meeting? A. Yes. I drew documents for sale between Messrs. Arnett, Jehnic and Herbert selling their shares in Airfoil Registers to a company I think known as Ilerain Pty. Limited and I also drew mortgage documents between each of the plaintiffs and Newbridge Industries Pty. Limited.

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Q. Having done that what is the next step that you can recall occurring in relation to your services to your clients? A. I forwarded those documents I think by courier to either Mr. Kelk's office or direct to Mr. Arnett. I think that took place on the Friday, the 21st as I recollect and subsequent to a conversation with one of the plaintiffs I then drew up a guarantee agreement between Mr. Carney and each of the plaintiffs in respect of the moneys to be paid.

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Q. Would you mind looking at that document, No. 10? (Shown.) A. Yes, that document appears to be the guarantee agreement which I drew up.

Q. So that you provided for the personal guarantee of Mr. Carney in respect of obligations to these three plaintiffs in one document? A. That's right.

Q. Did you attend on the Monday following what might be called a settlement of this particular transaction?  
A. Yes, I went to the property in Newbridge Road, Moorebank.

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Q. Did you take anything with you? A. I took this guarantee agreement. I think that was all I took.

Q. Did you see at the meeting any other document?  
A. I saw the documents which I had forwarded to the

plaintiffs on the preceding Friday. I think I also saw share transfers in respect of the shares of the plaintiffs in the company.

Q. Had you after delivery of the first two categories of documents which you think occurred on the previous Friday carried out any revision or amendments to those documents between then and the Monday? A. No, I hadn't.

Q. Had they been in your possession at all during that period? A. No. 10

Q. Your recollection of the settlement meeting itself, what was done with the documents? A. They were executed as I recollect by the appropriate parties and the share transfers were already executed.

CROSS-EXAMINATION:

MR. STOWE: Q. How are you able to remember the date that you have referred to in connection with your visit to Mr. Kelk's office? A. I recollect that it was either on the Tuesday or the Wednesday of the week preceding the settlement and I have checked that date with the calendar. 20

Q. Do you keep any cost sheet or diary sheet as to your activities? A. I didn't keep cost sheets at that stage. I did keep a diary but the diary for the particular year was destroyed as part of our normal office process.

Q. Did you open any sort of file in respect of this matter? A. Yes.

Q. Did you make any note of interest as to the date on which you did things and which you saw people? A. No, the only note I took at the initial meeting was a note of the amounts of the cheques. 30

Q. Do you still have that note? A. It is in the possession of Mr. Hobart.

Q. Could you get that note from wherever it is at the moment? A. If Mr. Hobart has it. (Shown document.) The document which Mr. Hobart has appears to be one sheet of the notes I took. I recollect that there was another sheet also which contained like particulars in respect of Mr. Herbert's interest. These notes relate only to Arnett and Jehnic but the sheet for Herbert as I recollect was similar in that it set out the amounts of the cheques. (Mr. Stowe approached.) The bottom one only. 40

Q. What do you mean by the bottom one only? A. This

note wasn't one of those. This one only.

Q. Do you have any recollection as to when you learned the name of the company which was to appear in the agreements to be drawn up by you as purchaser? A. No, I don't.

Q. Can you recall when you actually prepared the agreements? A. It was certainly during the week in question. I don't recollect precisely which day. Probably Thursday or the Friday of that week.

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Q. It would not be right that you were called upon either on the Friday afternoon or on the following Monday to revise the sale agreement in order to correct some error in the document you delivered on Friday?  
A. No.

(Witness retired.)

JOHN EDWARD HERBERT  
Sworn and examined:

MR. SHAND: Q. What is your full name? A. John Edward Herbert.

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Q. Your address? A. 15 McDougall Avenue, Baulkham Hills.

Q. Your occupation? A. Director.

Q. You formerly were a shareholder of Airfoil Registers Pty. Ltd.? A. I was.

Q. I want to take you to the events which led up to the sale of the shares that you held in that company. Can you recall an occasion a bit after the middle of March when a conversation occurred between Mr. Carney and you three plaintiffs in the Airfoil offices about the possibility of the sale of your shares to him?

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A. Yes.

Q. What is your recollection as to when that was? (No answer.)

Q. What day of the week? A. In the middle of March. On or about 18th March we spoke with Mr. Carney.

Q. Do you remember now what day that was, what day of the week? A. This was on, I think it was the Monday, Monday 18th March.

Q. What time? A. After 5 o'clock in the evening time.

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Q. Who was there? A. Mr. Carney, Mr. Arnett, Mr. Jehnic and myself.

Q. Tell us as best you can remember, doing the best you can, to reproduce the form of the conversation, what was said and by whom during the course of it?

A. At that particular time Mr. Carney had advised that he wanted to buy our shares and we were trying to establish a value for the company. Mr. Carney was asked if the valuation by Mr. Morton had been completed and this had not been done. 10

Q. As if you were hearing the words spoken by whoever spoke now? "I said", or "He said", and see if you can put the words in inverted commas. Do you understand me? A. Yes.

Q. First of all who said something about the valuation not being complete? A. Mr. Carney.

Q. What did he say? A. Mr. Carney advised that the valuation ---

Q. Mr. Carney said --? A. Mr. Carney said that the valuation was not complete and probably would not be so until a further two to three weeks and continued to say, "Do you want to talk about it now?" 20

Q. Go on? A. Mr. Arnett, Mr. Jehnic and myself agreed to do so and we entered into discussions as to -

Q. That is what I wanted to ask you about. Who said what during the discussion, that you remember?

A. Mr. Carney said, "Do you want to talk about the valuations now?" to which Mr. Arnett, Mr. Jehnic and myself agreed. 30

Q. Go on? A. Mr. Carney asked what sort of a value we had in mind, having on a previous occasion spoken to Mr. Jehnic and indicated that his share value would be worth approximately \$160,000, \$170,000.

Q. You are saying now, are you, that you remember that being said on a previous occasion? A. No, I wasn't party to that conversation. I was advised by Mr. Jehnic that that had happened.

Q. Just go on with what was said on this occasion?

A. Mr. Carney made an offer of shares to Mr. Jehnic. 40

Q. What did he say? A. He offered -

Q. No, "He said" - ? A. He said to Mr. Jehnic, "I will pay you \$160,000 for your shares". Mr. Jehnic

replied that that was not acceptable to him and that he required a figure of some \$220,000. Mr. Carney said, "No" and then said, "Do you want to discuss it between yourselves in which case I will leave the room?" Mr. Carney subsequently left the room and Mr. Jehnic, Mr. Arnett and myself discussed values or discussed the price of - (Objected to).

Q. After those discussions what happened?

A. Mr. Carney returned to the room.

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Q. What was said then? A. He said, "Have you come to any conclusion as to the amounts required?" At which stage Mr. Arnett stated that at \$2.5 million Mr. Jehnic's share would be approximately \$180,000 and the shares of myself and Mr. Arnett would have been valued at the percentage less or were valued at the percentage less for a figure. Mr. Carney agreed with the figures.

Q. In respect of the amounts mentioned by Mr. Arnett to Mr. Carney for each of the three of you after Mr. Carney re-entered the room, were specific sums of money mentioned in respect of each of you? Do you understand me? A. No. Could you ask the question again?

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Q. Who was it who spoke to Mr. Carney about the sums of money when he came back into the room? A. Mr. Arnett.

Q. I think you told us that he mentioned sums of money, that is one in respect of each of you, to Mr. Carney? A. Yes.

Q. He mentioned a particular sum of money in the case of each of you, did he? A. He mentioned a particular sum in relation to Mr. Jehnic. I don't recall that he mentioned the actual amounts for himself. He must have, but they were a percentage of the total value of the shares.

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\*Q. Let me take you back one step. While Mr. Carney was out of the room do you have any recollection of any discussion between the three of you about some allowance being made by Mr. Arnett to the other two? (Objected to; pressed; allowed.) A. When the figures were arrived at.

HIS HONOUR: I think you are being asked about your recollection.

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(Questions marked with \* read by court reporter.)

WITNESS: Yes.

MR. SHAND: Q. What was that discussion? (Objected to; allowed). A. Mr. Arnett made an adjustment to his

figure in favour of myself and Mr. Jehnic to the value of \$6,000 and this was based on his resigning, that he had been in the company for one year less than both of us.

Q. Do you recall whether that adjustment was taken into account in arriving at figures before Mr. Carney re-entered the room? A. It was.

Q. Mr. Carney then, as you have told us, made a response to what Mr. Arnett said to him about the money when he re-entered the room? He made a response? 10

A. Mr. Carney looked at the figures, agreed to the amounts and proceeded to make out cheques in favour of each of us.

Q. When you say he looked at the figures, what was he able to look at? A. The figures were written down in the amounts of each of us.

Q. Who had written them down? A. Mr. Arnett.

Q. He proceeded to write out cheques, you have said? 20  
A. Yes.

Q. How many cheques? A. Three for myself and three for Mr. Arnett, three for Mr. Jehnic.

Q. Was there any conversation additionally that you can remember before he wrote out the cheques or while he was doing so? A. No.

Q. (Shown photocopy cheques part of Exhibit A.) I show you the three cheques which are made out to you. There is one there of 24th March, 1980, and there is one of 15th August, 1980? A. Yes.

Q. There is one of 31st July, 1980? A. Yes. 30

Q. In respect of the second and third of those dates, had there been any discussion at all before they were written on the cheques or not? A. Mr. Carney said that he could not afford to pay all the money at once and worked out figures as to when he would be able to meet the commitment.

Q. What happened to the cheques when he had written them out? A. I just received them and took them home.

Q. He gave them to the three of you, did he? 40  
A. Yes.

Q. How many did you receive? A. Three.

Q. Can you recall any other conversation that went



along between any of the three of you and Mr. Carney before you departed from him? A. Yes. There was conversation with regard to motor vehicles.

Q. When did that occur in relation to the handing over of these cheques? Before or after or what?

A. It was after. After we got the cheques.

Q. What is your recollection of that conversation? Tell us anything you can remember being said by any of you, that is the four of you? A. Mr. Carney said, "What am I going to do with the cars?" and "Do you want to buy them?" We then proceeded to talk about the purchase of the motor vehicles.

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Q. Did you take part in some talk of that kind?

A. Yes.

Q. What did you say and what was said in reply to anything you said? A. My recollection is that Mr. Carney put a value on the car that I was driving at the time.

Q. What did he say in doing that? A. I am sorry?

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Q. What did he say in doing that, in putting a value on it? What were his words? A. He said, "Do you want to buy the car?"

Q. What did you say? A. I said, "Yes".

Q. Go on? A. "How much do you want for the car?"

Q. That is what you said. Did Mr. Carney say something? A. He indicated a figure of \$1500.

Q. Anything else said? A. I think I rejected the car at that stage because it was more than what I was prepared to pay for it.

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Q. Was there anything further said about it before that meeting closed? A. Well, only in a description of the car itself but it wasn't in the best of conditions as far as body work was concerned.

Q. Did you agree upon a figure at which you would buy that car during that meeting? A. Yes.

Q. Please tell us what was said? A. I agreed to purchase the car for a figure of \$800.

Q. Did Mr. Carney agree with that? A. Yes.

Q. Did you ultimately pay that money? A. Yes.

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Q. How did you do that? A. By personal cheque.

Q. Have you any recollection of when you did do that?  
A. I think the cheque was handed to Mr. Carney either the following - during the course of the next few days.

MR. SHAND: Q. Do you remember any other topic being discussed during that meeting? A. The only other topic I can recall was in the light of additional figures.

Q. I am not asking you about that. Do you remember anything being said about security? A. No. 10

Q. Nothing at all? A. Not on that topic - not at that time.

Q. Do you remember any other occasion close to that time when the subject of security was discussed with Mr. Carney? A. No. What I recall of this; on the day following I had discussed with Mr. Arnett and Mr. Jehnic ---

Q. Upon what topic? A. Upon the topic of security.

Q. Following those discussions were you present at any other discussion with Mr. Carney --- A. No. 20

Q. --- about security? A. No.

Q. Is this right; at no time were you present at any discussion where there was mention, in your presence, by Mr. Carney or to him about a mortgage? A. I don't recall it.

Q. Did you yourself ever say to Mr. Carney that you required or insisted upon security for the balance of the purchase moneys after the first cheque? A. I didn't say it to Mr. Carney personally.

Q. At the end of the meeting you have spoken of, Monday the 18th you thought it was, did you see anything written by Mr. Carney? A. Mr. Carney wrote out a sheet with the valuation figures, for his own reference. 30

Q. I just show you a copy of Exhibit 2 (shown). When you say a sheet, is that what you saw? A. Yes.

Q. After the conclusion of that meeting on the Monday, did you play any further part in getting ready for the final completion of the matter? Did you see anyone or talk to anyone? A. No. As I recall, on the following day security was mentioned by Mr. Arnett - 40

Q. I am not asking you just about conversations

between you and Mr. Carney and Mr. Jehnic. Did you visit Mr. Kelk at all or Mr. Simpson? A. No.

Q. What did you do with the three cheques you received on the Monday? A. I took them home that evening and I had them with me the following day.

Q. What happened to them? A. Mr. Arnett took the cheques with him to the meeting he had arranged with Mr. Kelk.

Q. You didn't go to that meeting? A. Yes. 10

Q. Did you get them back at some later stage?  
A. Yes.

Q. Did you eventually attend the meeting on the following Monday? A. Yes.

Q. Did you bring any documents to that meeting?  
A. No.

Q. Where were your three cheques then? A. I may have brought the cheques with me.

Q. Did you sign documents on that following Monday?  
A. Yes. 20

CROSS-EXAMINATION:

MR. STOWE: Q. Mr. Herbert, do you remember that after the meeting that was held on 24th March, on the Monday afternoon, you received a number of documents?  
A. Yes.

Q. You got a copy of a sale agreement? A. Yes.

Q. And a personal guarantee? A. Yes.

Q. And a mortgage --- A. Yes.

Q. Which you subsequently protected by having Mr. Simpson lodge a caveat for you? A. Yes. 30

Q. I take it you expected to receive the mortgage that afternoon (objected to; question allowed)?  
A. Yes.

Q. You had anticipated for some time, prior to the Monday afternoon, that when the matter was formalised on the Monday, you would get such a document? (Question rejected.)

Q. You knew you would have a meeting at which documents would be exchanged? A. Yes.

Q. And for some days prior to Monday 24th, when such a meeting did take place, you had expected that one of the documents you would receive would be the mortgage?

A. Yes.

Q. And the mortgage, you knew, was going to be over the factory land owned by Newbridge Industries? A. Yes.

Q. Did you not take part in any discussions with Mr. Carney concerning his making available that mortgage by Newbridge Industries? A. No.

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Q. Can you recall being present when Mr. Arnett, on behalf of yourself and Mr. Jehnic, said to Mr. Carney something to the effect that the three of you wanted something in the form of security in respect of the deferred shares? A. I don't recall it.

Q. Do you recall a specific request being made by Mr. Arnett to Mr. Carney that the security required was a security over the factory land of Newbridge Industries?

A. ~~I understood that to be so.~~ (Objected to; answer struck out.)

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Q. I will put that question to you again, Mr. Herbert; do you recall a specific request being made by Mr. Arnett to Mr. Carney for a mortgage to be provided by Mr. Carney over the Newbridge Industries factory land. What I am asking you is; did you hear Mr. Arnett saying that to Mr. Carney? A. No.

Q. Were you ever present when Mr. Arnett said to Mr. Carney that, "Unless we get a mortgage over the factory land, the deal won't proceed"? A. No.

Q. Were you told by either Mr. Arnett or Mr. Jehnic that they were going to seek that sort of security?

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A. Yes.

Q. Which of them spoke to you about that, and when?

A. I spoke to Mr. Arnett, - he advised me that he had spoken to Mr. Carney asking for this security.

Q. When did he tell you that? A. It was on the - as I recall, the day after receiving the cheques.

Q. What did you say to him when he told you that?

A. I had no objections.

Q. I guess it went a bit further than you having no objections, it was something that you wanted too? (Objected to; question rejected.)

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Q. Didn't you tell him that you wanted that too?

A. I thought it was a good idea to have some form of security.

Q. And you told him that? A. Yes.

Q. Of the cheques that you had been given by Mr. Carney, as you say on the 17th or 18th March, one was dated 24th March, wasn't it? A. Yes.

Q. And that was the Monday on which you had the meeting when documents were exchanged? A. Yes.

Q. So that on the face of it that cheque could have been presented that morning? A. Yes.

Q. But of course, you didn't present it that morning, did you? A. No. 10

Q. You didn't present it until the following day?  
A. Yes.

Q. And you didn't present it until the following day because it simply was not appropriate for you to do so, having regard to the arrangement you had with Mr. Carney? A. Yes.

Q. You wouldn't present that until you got your mortgage? A. It never occurred to me to deposit it at that time. 20

Q. You wouldn't have deposited that before you got the mortgage from Mr. Carney for a start? A. It never occurred to me to deposit it.

Q. It never occurred to you to present it prior to the meeting on Monday, because it was the natural order of things, as you understood them, that you should get your mortgage and your sale agreement, and your personal guarantee, before it was all clear for you to present that first cheque? A. Yes.

Q. On the day on which you have told us you had the conversation with Mr. Carney about the amounts to be paid off your shares, can you recall a conversation initiated by him in relation to loan accounts? A. Yes. 30

Q. And what he said about that was this, wasn't it; he said to Mr. Jehnic, "You realise that \$7000 will come off your purchase price to satisfy the money you borrowed from the company." Can you recall that being said to Mr. Jehnic? A. Yes.

Q. And then he said to you "John, there will be \$5000 coming off for the amount you borrowed for a swimming pool"? A. He made a deduction of \$5000 from my amount which I understood finalised the loan account. 40

Q. And that was specifically referred to at that

meeting? He said that that is what would be happening?

A. Yes.

Q. And you agreed with it? A. Yes.

Q. And the amount was duly deducted from one of the instalments that would otherwise have been payable to you? A. Yes.

RE-EXAMINATION:

MR. SHAND: Q. Do you remember now the words which were used, relating to the taking into account of your loan account, by Mr. Carney? A. The words used by Mr. Carney, as I recall, were that he was going to make an adjustment to the figure, which would take into account the loan account that I had in my favour.

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(Witness retired.)

KARLO JEHNIC

Sworn and examined:

MR. SHAND: Q. What is your full name? A. Karlo Jehnic.

Q. What is your address? A. 50 Victor Avenue, Picnic Point.

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Q. What is your present occupation? A. Company director.

Q. I want to take you now to a time when there was some conversation about the sale of the shares held by you in that company to Mr. Carney ---- A. Yes.

Q. The conversation with Mr. Carney, do you understand me? A. Yes, I do.

Q. Do you remember the date and/or the day of the week when this occurred? A. Start about end January, first week in February.

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Q. If we get into March, do you remember whether there was a conversation at which you and Mr. Arnett and Mr. Herbert were present with Mr. Carney about the shares? A. Yes.

Q. What date do you remember that was? A. You mean when we agreed to the selling of the shares?

Q. Do you remember an occasion when some cheques were written out? A. 17th March; was Monday.

Q. Tell us who was present? A. Mr. Carney, myself, Mr. Arnett, Mr. Herbert.

Q. Can you recall anything being said by anybody about the sale of these shares? A. Mr. Arnett said to Mr. Carney, "How long before the figures will be worked out by Mr. Morton?" Mr. Carney replied, "That was about another three or four weeks". Mr. Arnett said, "Too long." Mr. Carney said, "You want to make a deal now?" That is where it started.

Q. Go on from there, would you? A. Then we start talking about the value of the company. We have one figure in mind and he has another. He said, "Would you like me to leave the room for five minutes?" He went to the gents, "Make decision when I come back". We have little bit of talk and when he come back we tell him - 10

Q. When he came back, who spoke? A. He asked, "Did you come to agreement?"

Q. What was said then? A. We said, "Yes", what the figure we come up with.

Q. Who was speaking? A. Mr. Arnett.

Q. What did he say? A. We put to Mr. Carney -- 20

Q. Mr. Arnett said something, did he? A. Yes.

Q. What did he say? A. He said, "We come up with the figure".

Q. Did he say what the figures were? A. Yes.

Q. What did he say? A. He said that mine is about \$200,000 and Mr. Arnett and Mr. Herbert was in proportion to me, because mine was the highest one.

Q. Did Mr. Carney say anything to that? A. He said, "Too high". Then we start bargaining.

Q. What was said by whom? A. We was bargaining, we told him the figure, and he said "Too high, no way". 30

Q. Who told him the figure? A. Mr. Arnett.

Q. What figure did he say? A. \$200,000 mine, and Mr. Herbert and Mr. Arnett in proportion to mine.

Q. And Mr. Carney said, "Too high"? A. Yes.

Q. What was said next? A. Then we sort of keep bargaining and then we come to the point of the figure.

Q. What was said by anybody when you came to an agreement about a figure? Someone had to say something, didn't they, in coming to an agreement? A. Yes, Mr. Arnett. 40

Q. What did he say? Did he mention a figure? A. Yes, he did.

Q. Tell us what he said? A. My figure was \$200,000 and Mr. Carney said, "No, 170", and then we come to 180 and I said, "All right, I'll go along with that", and then we worked out Mr. Arnett and Mr. Herbert in proportion of what was mine, and that was the figure. The minute we agree, Mr. Carney get the cheque book and write out the cheques.

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Q. Was anything said after that? A. Yes, after we get the cheques, Mr. Carney said "You want to buy the cars?" And I think we all said, "Yes", because at that time we didn't have the cars, and we said "Yes".

Q. Was anything further said about the cars?  
A. Yes, I had a new car at the time, it was only about four or five ---

Q. Was anything said about money concerning your car?  
A. Yes.

Q. Who said what? A. Mr. Carney put a price on my two cars - I bought two cars - and he put a price on the one I bought and he said, "If you want to take the other one up, you go see the finance company".

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Q. What did you say when he put a price on the one you were driving? A. No, the one I was driving was his.

Q. He put a price on the car he was driving? A. Yes, he said, "\$5000". Mr. Arnett said, "No, give him a go, he helped you set up the company", and he said, "The best I can do, you can have it for \$3700", and I said, "Okay", and he said "I want you to give me a cheque tomorrow.

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Q. And you gave him a cheque the next day? A. Yes, my personal cheque.

Q. Was anything discussed at the meeting about that?  
A. No, not long after that we agreed with the figures, we got the cheques, we got agreement on the cars and was after that we went home.

Q. Did you see Mr. Carney write on paper whilst you were there? A. Yes.

Q. Was there any discussion with Mr. Carney during that meeting about security? A. No, not in my knowledge, anyway.

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Q. Subsequent to that meeting, did you have discussion with anyone about security on any later day?  
A. The next day.



Q. Who did you have discussion with? A. The next morning, I come in ----

Q. Who did you have it with? A. First with Mr. Herbert and Mr. Arnett, and then Mr. Kelk - that is, next day.

Q. Following those discussions, did you see Mr. Carney again? A. Yes.

Q. When was it? A. The next day, after I come back from Mr. Kelk.

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Q. That was Tuesday? A. Yes.

Q. Where did you see him? A. Up in the office.

Q. And who was with you? A. Nobody at that time, just the secretary in the office, but I don't think I told that in front of her. We talk separately.

Q. You and Mr. Kelk? A. Yes, and Mr. Arnett.

Q. See if you can tell us what was said as if you are listening to the words now? A. I think, if I recollect it correctly we said ---

Q. Who is "we"? A. Mr. Arnett would say to him, I was present, "We do require some sort of security on these shares ..." He said, "Yeah, there would be no problem, but everything I own is mortgaged", or whatever he said at that time.

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Q. Go on? A. I think Mr. Arnett suggested, he said, "What is the mortgage over? The factory?" He said, "You realise Mr. Heffernan have the first mortgage", he have to get permission from them and I think Mr. Arnett said, "Okay, we ask them". He said, "No, I'll ask them, leave that to me".

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Q. Anything further said about security? A. Not on that day. We stop there on that day.

Q. Did anyone say, "If we don't get security, or if I don't get security, we won't go through with the deal, or I won't go through with the deal"? A. Not in my presence. I never heard that words before.

Q. What did you do with those three cheques you received on the Monday? A. I took it with me on Monday night, but the next day I bring them back in.

Q. Did you attend a meeting on the following Friday, or not? A. What date was that? That was the 21st?

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Q. Yes, that would be about it? A. Yes, there was no meeting.

Q. There was no meeting? A. No, there was supposed to be, but the solicitor couldn't make it, and was no meeting.

Q. Did you see Mr. Carney that day? A. Yes, he was at work all day.

Q. Were there any documents there? A. The mortgage and sales for the shares arrived by courier about 3.30, quarter to 4, that sort of time. 10

Q. Do you remember any conversations with Mr. Carney after those documents arrived? A. No, Mr. Arnett gave those documents to Mr. Carney and he looked at them roughly and say, "Would you mind if I take them home for weekend? I would like to look at them with Mr. Morton".

Q. Did Mr. Carney say there was anything wrong with the documents? A. No.

Q. What did he do with the documents? A. He took them home for the weekend. 20

Q. Did you go somewhere on the following Monday?  
A. No, I just come to work.

Q. Do you remember something happening on the Monday?  
A. Yes, that was when all the transactions done; we signed everything on Monday, that was 24th.

Q. Was there another document there that you hadn't seen before? A. Yes.

Q. What was that? A. Personal guarantee.

Q. Did you sign that? A. Yes.

Q. And you signed the deed of sale and the mortgage too did you -- A. Yes. 30

Q. And the share transfer? A. Yes.

MR. STOWE: Q. When you say you were given the cheques by Mr. Carney after bargaining about the prices to be paid for your shares, do you remember that before he wrote out any cheques he said to you that there would have to be a sum of \$7,000 coming off your share, to satisfy the amount that you owed the company? A. Yes, he did. When he was writing the cheques out, he said, "You realise I have to deduct \$7,000 off your amount, because you owe \$7,000 to the company?" and I said, "That is right". 40

Q. That was the situation, you did have a debt that you owed to the company, of \$7,000, at that time?

A. Yes.

Q. And that amount was deducted from the amount which otherwise would have been payable to Mr. Carney, according to the figures you agreed on? A. He deducted my figure, yes.

Q. On the next day you say you had a conversation with Mr. Carney, in the company of Mr. Arnett, about security for the postponed instalments of purchase price. 10

MR. SHAND: He didn't say that, with respect.

HIS HONOUR: I do not think you put it like that.

MR. STOWE: Q. I will put the question again. You have told us a moment ago that you had a discussion the day after the 17th, about obtaining security? A. Yes, we did. I approached Mr. Carney some time the next day, yes.

Q. And that Mr. Arnett in your presence said to Mr. Carney, "We want some security"? A. We did require some sort of security, yes. 20

Q. Was this what Mr. Carney said in reply, "That is O.K., but everything I own is mortgaged. All I have got is my interest in Airfoil"? (Objected to; allowed.)  
A. Yes, that is what he said, yes.

Q. Now weren't you present when Mr. Arnett said to Mr. Carney, in talking about security, something to this effect, "If we don't get security over the factory land, we won't go through with the deal"? (Objected to as misleading.) 30

HIS HONOUR: I think, having regard to the way the case is being fought, Mr. Stowe, it is important to use the exact words. Mr. Shand seems to be saying that that is going to bear on the exact shade of meaning that was conveyed; that may be right, wrong or indifferent.

MR. STOWE: I do not really accept the criticism. In my submission the substance is adequate, but I will certainly put it again.

MR. SHAND: The question assumes that something was said, and all it asks the witness to do is indicate whether he was present or not. 40

HIS HONOUR: Yes.

MR. STOWE: Q. Do you remember being present at a

conversation between Mr. Arnett and Mr. Carney, when in your presence Mr. Arnett said this to Mr. Carney, "If we don't get the security, we won't go through with the deal"? A. No.

Q. Do you remember being present at a conversation between those two people, when these words were used by Mr. Arnett to Mr. Carney, in your presence, "If we don't get security, we do not proceed"? A. No.

Q. You say you were never there when any words to that effect were spoken between those two people? 10  
A. No, I never heard that, no.

MR. STOWE: Your Honour, I am instructed to abandon the defence based on the cars, so there would be no desire on our part to call Mr. Van tomorrow. This evidence would presumably finish this afternoon.

Q. On the version that you have described to us a few moments ago, Mr. Jehnic, you had three cheques drawn on the account of Airfoil Registers from 17th March onwards, is that right? A. Yes. 20

Q. The first of those cheques was dated 24th March, 1980? A. Yes.

Q. But you did not present that cheque for payment on that day? A. No.

Q. You did not present it in fact for several days after 24th March, is that right? A. 26th.

Q. And the reason why you didn't present it on Monday - which was the date that it bore - was that it was inappropriate for you to do that until all the documents that were signed up on Monday had been exchanged between the parties, is that right? A. Yes, that is right, yes. 30

Q. In other words, you wanted to get your mortgage and your guarantee and your sale agreement before you in effect --- A. Mr. Carney said to me not to bank it; when he writes the cheque on the 17th, he said, "You realise you can't put it in the bank until everything is finalised; is that acceptable?" Then on the Monday he did say, "Can you hold the cheque until Wednesday? I will have money in the bank on Wednesday; you can put it in the bank on Wednesday". 40

Q. And you would not have banked it anyway without getting your mortgage first? (Objected to; allowed)  
A. I don't know what I would do at the time if the mortgage was not there. I was not even thinking of that.

K. Jehnic, xx

Q. But did Mr. Arnett tell you that he had had a conversation with Mr. Carney in which he had told Mr. Carney that so far as he was concerned, if you didn't get a mortgage the transaction would not proceed? (Objected to; rejected.)

MR. SHAND: I have no re-examination.

(Witness retired.)

(Case for the plaintiff closed.)

HIS HONOUR: Then subject to the interrogatories, that will be the whole of the evidence; you can bring those up tomorrow morning.

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(Counsel addressed.)

(Further hearing adjourned to Thursday, 31st March, 1983.)

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES )  
 ) No. 16157 of 1980  
COMMON LAW DIVISION ) No. 16158 of 1980  
 ) No. 16159 of 1980  
COMMERCIAL LAW LIST )

CORAM: ROGERS, J.

THURSDAY, 31ST MARCH, 1983.

HERBERT v. CARNEY  
 JEHNIC v. CARNEY  
ARNETT v. CARNEY

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JUDGMENT

HIS HONOUR: The plaintiffs sue the defendant in three separate actions. The hearing of the three actions was consolidated. Each of the actions is founded on a Deed of Guarantee made between the defendant (therein called "the guarantor") and the plaintiffs (therein collectively called "the vendors"). It bears date 24th March 1980.

By the deed the defendant guaranteed the obligations of Ilerain Pty. Limited under three several deeds of sale made with the plaintiffs respectively and each of them bearing date 21st March 1980. By their three deeds the plaintiffs agreed in respect of their various shareholdings in Airfoil Registers Pty. Limited to sell such shares to Ilerain Pty. Limited. Clause 1 of each of these agreements was in the same terms with the exception of a difference in monetary amount. Each of them provided as follows, and I take the deed with Mr. Arnett as representative "The purchaser shall pay to the vendor the sum of one hundred and six thousand

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five hundred dollars (\$106,500) such amount to be made by cash or bank cheque as follows." There then followed provision for three payments to be made respectively on 24th March 1980, 31st July 1980 and 15th August 1980. Clause 2 required a transfer of shares to be executed in favour of the purchaser on payment of the first of the instalments.

In the pleadings there is no denial in respect of any of the deeds in question. The defendant's sole defence is that by reason of the operation of s. 67 of the Companies Act, 1961, the several deeds are illegal and void and in the result found no legal entitlement in the plaintiffs. The section invoked, which has now been substantially replaced by the provisions of the Companies Code, provided as follows: 10

"Except as is otherwise expressly provided by this Act no company shall, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, give any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares. 20

...

If there is any contravention of this section, the company and every officer of the company who is in default shall be guilty of an offence against this Act." 30

The defendant claims that the deeds relating to sale of shares and the guarantee were but part of a more wide-ranging agreement between the parties. It was the

additional features of this wider agreement which are said to constitute the alleged infringements of the statutory code. Initially there were three alleged breaches of s. 67 relied upon. Firstly it was claimed that it was part of the agreement that Newbridge Industries Pty. Limited, a subsidiary of Airfoil Registers Pty. Limited, to which for convenience I will refer as "the company", was to provide financial assistance in connection with the purchase by Ilerain Pty. Limited of the shares in the company by providing security in the form of an unregistered second mortgage over its real estate in order to secure the unpaid balance of the purchase price. Secondly it was alleged that it was part of the agreement that the company give financial assistance for the purpose of or in connection with the purchase of the shares in the company by advancing a loan of the purchase price. Thirdly it was alleged that it was agreed that the company provide financial assistance to each of the plaintiffs in connection with the purchase of its shares by selling to each of the plaintiffs the motor vehicle that he had been using whilst a director of the company at a price less than the true value of the motor car.

Towards the conclusion of the evidence the defendant abandoned the third of these allegations. I should mention that when he opened, counsel for the defendant alleged a fourth breach of the provisions of



s. 67 in the actions brought by Jehnic and Herbert. He claimed that there was a breach of s. 67 in that it was part of the agreement between the plaintiffs and the defendant that the personal loan accounts of Messrs. Jehnic and Herbert which were then in debit should be set off against the purchase price. For reasons which appeared to me sufficient and which are set out in a judgment which I gave on the first day of the hearing, I refused the application for leave to amend the Statement of Defence when it was found that in truth the allegation so framed was not included in it.

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Matters proceeded in that vein but on the second day it occurred to me that the evidence given without objection with reference to the loan accounts might oblige me to take notice of the alleged illegality. However, upon reflection I was satisfied that in the circumstances of this case the evidence did not disclose any illegality of which in compliance with the authorities on the subject I was obliged to take notice. For the protection of counsel for the defendant I should record that he sought to address me in order to persuade me that my view on this topic was erroneous. I did not permit him to address me because I think that on this subject it is a matter for the trial Judge as to whether or not he considers that the circumstances require him to take note of any alleged illegality. I was of the view that any prima facie arrangement for

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the payment by a company of a loan account which is otherwise payable to a person does not infringe s. 67 when payment is made on the occasion of a sale of shares. I came to this conclusion comforted by what fell from Mahoney, J.A. in Burton v. Palmer (1980) 2 N.S.W.L.R. 878 at 887.

I should also record in case it should ever become relevant that counsel for the plaintiffs applied for leave to amend on the second day of the hearing in order to introduce into the dispute completely new elements. I was of the view that leave to amend should be granted but counsel for the defendant stated that he could not proceed with the hearing if that were done. I must confess that I found this difficult to accept but it was quite clear to me that I must accept the assertion made by experienced counsel in that regard. When it became clear that the price of leave to amend was an adjournment, the application was withdrawn. For the sake of the record, the text of the amendment sought was initialled by me and placed with the papers.

It is agreed between the parties that at all relevant times Newbridge Industries Pty. Limited was a subsidiary of the company. The defendant's evidence in support of the claimed infringement of the statute was to the following effect. In February/March 1980 the issued capital of the company was 111 shares. Of these he held ninety-three, Mr. Jehnic eight,

Messrs. Herbert and Arnett five each. In late January/early February of that year, the parties agreed that their continued association as shareholders in the company was untenable and the defendant informed the plaintiffs that he was prepared to purchase their shares at a price based on the net value of the assets of the company, such purchase to be in the name of a company to be notified. He also told them that he would not be able to pay the purchase price immediately but would make a substantial initial payment. In response to this statement Mr. Arnett, who I think it is common ground can be termed as the spokesman for the plaintiffs, according to the defendant said the following, "We accept that but we want to be secured for the balance owing". The defendant said, "That is a bit of a problem because all my assets are tied up." Mr. Arnett said, "We want a second mortgage on the factory". There was apparently a first mortgage already over the factory and according to the defendant, his accountant, Mr. Morton, pointed out that the consent of the first mortgagees would be required. The defendant expressed doubt as to whether such consent would be obtained and, in any event, confessed himself as "not real happy" to ask for consent, whereupon Mr. Arnett said this  
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\*(transcript p. 9), "You have got to get consent. If we don't get the security we won't go through with the deal".

In the context, "the security" must be taken to mean the  
\*See now page 158.

second mortgage. According to the defendant the final price was agreed on at a meeting on 18th March and Mr. Arnett on this occasion indicated a need to have post-dated cheques for the purchase price payable in the several instalments arranged. Finally on 24th March 1980 there was a meeting attended, as well as by the plaintiffs and the defendant, by Mr. Morton, the defendant's accountant, and Mr. Simpson, the plaintiffs' solicitor. 10

\*Mr. Simpson, according to the defendant (transcript p.15), produced the sale documents, the mortgage documents and the personal guarantee. It is worthy of note that on everybody's story this was the first appearance of the personal guarantee. The defendant, over the protests of his accountant he says, signed that document and, indeed, the parties executed the others.

Before I turn to the version of the plaintiffs, I should mention that a lengthy and sustained attack was made on the credit of both the defendant and Mr. Morton. 20

If it should matter, I prefer the evidence of the plaintiffs. I do not accept either the defendant or Mr. Morton as witnesses of truth. The defendant is a man who on his own evidence has indulged in what can only be described as an underhand trick in an effort to obtain the return of the cheques outstanding in favour of the plaintiffs. He struck me as a person who did not hesitate to say whatever he considered suited the purpose of the moment. He sought to justify his attitude on  
*\*See now page 166*

the basis that he was fighting fire with fire - I hasten to say this is an expression of mine in the context - and claimed that because the plaintiffs had broken an understanding not to compete with the company, he, the defendant, was justified in using each and every weapon available to him to frustrate them and avoid paying the purchase price. Reasonable businessmen fight their arguments in Court. Those who resort to the tactics employed by the defendant take the well-known risk of being characterised in the fashion that I have described the defendant. Mr. Morton to my mind endeavoured to tailor his evidence to accommodate that of the defendant and his evidence fails with that of the defendant.

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I commenced my evaluation of the defendant's credit with the statement that perhaps in the final result it does not matter. I say that because there is very little, if any, need to discard the evidence of the defendant in preference to that of the plaintiffs as matters turned out.

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According to the plaintiffs, agreement was arrived at after some negotiation on the purchase price payable to them on 17th March. The defendant made clear that he could not pay the whole of the purchase price and so drew nine cheques to cater for the three instalments, one for each plaintiff for each instalment. The first set were dated 24th March, the second 31st July, the third 15th August. I accept the evidence of

\*Mr. Arnett (transcript p. 107A) that Mr. Carney from the outset did not want any documents whatsoever. However, the plaintiffs consulted their accountant and I assume that consequent upon that consultation on 18th March had a discussion with the defendant concerning security for the outstanding purchase price.

The clearest version of what transpired I get from Mr. Arnett's evidence. Mr. Herbert professed himself as not present at any such conversation. Mr. Jehnic's recollection was not clear on some of the matters. However, bearing in mind that Mr. Arnett was the spokesman and, if the three gentlemen will forgive my putting it this way, by far the most clear in the business approach to be made to the problem of the sale, it is to my mind not surprising that he should be the one to give the clearest evidence. I accept it.

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According to Mr. Arnett he told the defendant (transcript p. 104) "We will require some sort of security to ensure that we get paid". Mr. Carney replied "Everything I have is mortgaged. The only other thing I have is my interest in Airfoil". Mr. Arnett replied to Mr. Carney "If everything you have is mortgaged, could we consider a mortgage over the factory?" Mr. Carney said "Yes, but you will have to arrange for it and you will have to pay for it." There was then a discussion about the consent to the mortgage. Still in his evidence in chief Mr. Arnett said that on that occasion he also

*\*See now pages 279 and 273 respectively*

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made the statement, not quite the one ascribed to him  
\*by the defendant but the following (transcript p. 107)  
"If we don't get security we will not proceed". The  
significant omission is the word "the". As I say, I  
accept Mr. Arnett's evidence about what transpired and  
have to consider the consequences of that arrangement  
on that basis.

As to the assertion that there was an infringement 10  
of s. 67 by reason of the payment to the plaintiffs by  
cheques drawn on the company's account, the defendant  
put two submissions. Firstly it was contended that a  
term of the overall agreement was that notwithstanding  
the written deed the obligations should be discharged  
by cheques drawn on the company. This term is said to  
be implied from the fact that the cheques were drawn on  
17th March and at no time up to and including the 24th  
was there any suggestion of any other method of payment.  
As an alternative, it was submitted that whether or not 20  
there was such an implied term, it was intended by both  
parties that the obligation to pay for the shares should  
be by means of the cheques in question.

I am not prepared to accept either of these  
approaches. Clause 1 of the deeds for the sale of  
shares merely calls for payment to be made in cash or by  
bank cheque. There is no reason to suggest that either  
of those two methods was an infringement of the code.

For me to assume or presume that some implied term came  
\*See now page 277

into existence or that the parties had the intention ascribed to them is to impute to them a desire to commit an illegal act punishable in terms of sub-s.3 of s.67. The law leans against imputations of illegality and against findings of intention to commit illegal acts. Counsel sought to persuade me that the inferences I should draw should go in the other direction. That I completely decline to do. In my view the obligation to make payment stood unsullied by any illegality and remained so pursuant to Clause 1 of the deeds for the sale of shares. As it happened, the defendant chose to discharge the obligation which Ilerain Pty. Limited had by means of cheques drawn on the company. However, that is not necessarily inconsistent with a number of ways in which that could have been effected legally. Why should I assume that it was to be done illegally? I do not intend to do so. 10

So far as the breach of s. 67 constituted by the grant of the second mortgages is concerned, it is necessary first of all to determine the true legal principle which should apply. That is a matter of no easy moment. In a judgment of great scholarship, if he will permit me to say so, in Electric Acceptance Pty. Limited v. Doug. Thorley Caravans (Aust.) Pty. Limited (1981) V.R. 799 Brooking, J. endeavoured to reconcile the plethora of cases on illegality and severance of illegal promises into an acceptable principle. If his Honour 20



will forgive my saying so, it is beyond human capacity to achieve that task. A similar endeavour, although in a different way, is manifested by Dr. Treitel in "The Law of Contract, 5th Edition", p. 378. I do not wish to embark on yet another exercise in all the circumstances of this case.

I am relieved of that task by reason of two decisions which are binding on me. I may safely take as my point of departure a principle contended for by the defendant although one which cannot be said to be free of doubt. It is that there is a long line of authority for the proposition that a contractual term cannot be severed if it involves the doing of an act which is contra bonus mores or illegal at common law or by statute. The generality of that statement cannot survive the decision of the High Court in Thomas Brown and Sons Limited v. Fazal Deen & Anor. (1962) 108 C.L.R. 391.

It is sufficient if I read from the headnote for the facts of the case. In 1943 the plaintiff deposited gold and gems in a safe with a Mr. Harden, the general manager of the appellant, to hold them in safe custody until such time as the plaintiff required them. At the time the National Security (Exchange Control) Regulations were in force and Regulation 14 required every person having gold in his possession or control to deliver it to the Commonwealth Bank within one month after it had come into his possession or control.

In 1959 the plaintiff demanded the return of the articles deposited. They were not returned. In January 1960 the plaintiff issued a writ claiming the return of the chattels or their value and damages for their detention and alternatively claiming damages for breach of the contract of bailment and conversion. Kitto, Windeyer and Owen, J.J. delivered a single judgment. Their Honours pointed out at p. 410 that the terms of the bailment required the appellant to hold the gold together with the gems and the safe in safe custody until redelivery was demanded by the plaintiff. So far as the gold was concerned, the performance of that agreement for bailment contravened the regulations,

"But" (said their Honours) "it does not follow that the bailment of the gems and of the safe was tainted by illegality. If the terms of the bailment relating to the gold were severable from those relating to the gems and the safe the bailment of the latter chattels would be lawful. The test of severability was stated by Jordan, C.J. in *McFarlane v. Daniell* 'if the elimination of the invalid promises changes the extent only but not the kind of contract, the valid promises are severable: *Putzman v. Taylor*.' Applying that test, it is clear that the plaintiff's rights of action in respect of the gems and the safe would not be answered by a defence of illegality based upon a breach of the National Security (Exchange Control) Regulations since the contractual obligation upon the company as to the return of the plaintiff's property on demand applied to every part of the property deposited whether demanded together with the rest of it or separately. In the case of the gold, however, the plaintiff could not succeed if he was obliged to rely upon the illegal transaction to establish his case. The learned trial Judge considered that proof of the bailment was not an essential part of the plaintiff's case."

Their Honours then went on to consider the validity

of that conclusion of the trial Judge and rejected it.  
They did so in terms set out at p. 412 of the judgment  
where they said:

"Apart therefore from the contract of bailment,  
the failure by the company to redeliver the gold,  
the gems and the safe following the plaintiff's  
demand for them in 1959 would not have given rise  
to a new cause of action so as to defeat the  
statute. But the cases cited above show that the  
general rule is subject to an exception which is  
correctly stated in Halsbury's Laws of England,  
2nd ed. vol. 33 par. 78, in these terms: 'Where  
a bailee for safe custody has converted the goods,  
the bailor may demand their return and sue in  
detinue upon the bailee's breach of duty to de-  
liver, although his remedy in trover is barred by  
statute.' This is the course which the plaintiff  
followed in the present case and it was a course  
which he was obliged to follow to avoid being met  
by a defence of the Statute of Limitations. It  
meant, however, that he was obliged to prove the  
contract of bailment and, to support his claim  
in detinue, to rely upon the failure of the com-  
pany to comply with the obligation imposed by it  
to redeliver the goods upon the demand which he  
made in 1959. It follows from what has been said  
that the plaintiff's claim to recover the value  
of the gold cannot be supported (A.R.P.L.  
Palaniappa Chettiar v. P.L.A.R. Arunaalam  
Chettiar) and to this extent the appeal succeeds."

The principle to be gleaned from their Honours'  
decision has been differently evaluated by the Judges  
of this State sitting in the Court of Appeal. In  
D.J.E. Constructions Pty. Limited v. Maddocks (1982) 1  
N.S.W.L.R. 5, the Chief Justice, Glass, J.A. and Samuels,  
J.A. composed the Court. Glass, J.A. agreed with both  
the Chief Justice and Samuels, J.A. The Chief Justice  
at p.8 expressed himself as agreeing with the judgment  
of Samuels, J.A. With the utmost deference to his  
Honour, the unwary reader of his judgment detects a

difference in approach from that of Samuels, J.A. The task of reconciling his Honour's agreement with the latter judgment is therefore not manifestly easy. His Honour explained the decision in Thomas Brown as one where severance was applied "in the context of a contract illegal and void by reason of an infringement of a statutory provision" but as being a case where no question of the actual enforcement of such a contract arose. With the utmost deference, the passage I have cited from p.412 of the report of the decision of the High Court to my mind eloquently illustrates that it was precisely the need for enforcement of the contract of bailment that gave rise to the difficulty facing their Honours in the High Court. When I ventured to say that there was a difference in approach between the Chief Justice and Samuels, J.A., I was addressing myself to the approach made by the latter Judge at p. 21 of the report. There his Honour said that the pre-existing principle to which I have earlier referred could not co-exist with the decision of the High Court. That if I may say so with respect is what I glean from the reading of the report and the approach which I propose to follow. As Samuels, J.A. pointed out, the conditions for severance have been variously expressed. For the purposes of the case before the Court his Honour posited it in the following terms:

"So the question is whether the allotment depends wholly or substantially upon an illegal consideration, that is upon the company's loan to Mr. Logan -

in the absence of the company's cheque the agreement would have foundered. It was the prop which sustained the transaction and cannot be removed without destroying the whole contract. I do not see, therefore, how the term providing for the loan can be severed from the rest and the result that the whole contract is illegal and void."

The appropriate test has also been explored by 10  
the Full Court of the Supreme Court of Victoria in Brew  
v. Whitlock No. 2 (1967) V.R. 803 at 812.

Here it is true that the plaintiffs required some security. It is perfectly true, as counsel for the defendant pointed out, that they deferred cashing their cheques for the first instalment until after execution of the documents on Monday 24th March because they regarded it as part of the obligation that documents should be signed. However, the fact that the personal guarantee unexpectedly turned up on Monday for execution by 20  
the defendant highlights the truth of the claim made on the plaintiffs' behalf that they wanted some security and that as it happened that security became a second mortgage over the factory. For aught I know the personal guarantee may by itself have satisfied the craving for security bearing in mind that the purchaser which bound itself to make payment was simply a personal company of the defendant, the defendant had standing behind him assets evidently more substantial than those available to Ilerain Pty. Limited. 30

Once again I take the view that I should not be astute to discover illegality. Whilst conscious of the

fact that hard cases make bad law, the present illustrates what a converse approach might do. On any view the plaintiffs have not been paid for their shares. The shares have long since disappeared in the limbo of history, having been disposed of by Ilerain Pty. Limited at what one can only describe as an immense profit. Any Judge sitting in the Administrative Law Division of this Court only has to look at the balance sheet for 27th June 1980 and apply the knowledge that he gains in income tax appeals to know what has happened to those shares. It would be an affront to justice if, having sold those shares and gained the profits from the sale of those shares, the defendant were now to be excused from making payments for those shares. 10

For those reasons I am glad to be able to come to the conclusion which I have, that there has not here been such an infringement of s. 67 as cannot be severed and therefore entitle the plaintiffs to payment in respect of the sale price of the shares. Accordingly there will be a verdict for each of the plaintiffs in the amounts claimed by them on the guarantee together with interest calculated from the date when the payment became due. 20

I neglected to mention that each of the deeds for sale provided for an acceleration clause in respect of the last of the instalments and, accordingly, the whole of the purchase price became payable on 31st July 1980.

Interest is sought only from the date of issue of the statement of claim and I propose to enter verdicts accordingly.

(Mr. Shand sought leave to amend the statement of claim to seek interest from the earlier date, 31st July 1980, and not from the date of issue of the statement of claim. Mr. Stowe informed his Honour that he was instructed to oppose such an amendment but did not wish to say anything further.)

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HIS HONOUR: Having said what I have just said, Mr. Shand applies for an amendment to each of the statements of claim to seek interest from 31st July, 1980 instead of the date of issue of the statement of claim. Mr. Stowe opposes the amendment but does not put anything on the ground of prejudice. Conformably with the principles laid down by the Court of Appeal, I shall grant leave to amend accordingly.

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I will have the matter mentioned on Wednesday morning and counsel can bring in some short minutes then.

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I certify that this and the 14 preceding pages are a true copy of the reasons for judgment herein of The Honourable Mr. Justice Rogers.

Dated 31/3/83

Associate

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW  
DIVISION

16157 of 1980  
16158 of 1980  
16159 of 1980  
(L.S.)

JOHN EDWARD  
HERBERT

Plaintiff

PHILLIP WILLIAM  
CARNEY

Defendant

JUDGMENT

JUDGMENT -

that -

1. That the defendant pay to  
the Plaintiff the sum of \$94,271.08.

2. This judgment takes effect  
on 6 April 1983.

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THE COURT ORDERS that -

1. The Defendant pay the Plain-  
tiff's costs other than the costs of  
the application for summary judgment

heard by Master Allen on 15 and 16  
September, 1981 and of the appeal

from the decision of Master Allen  
heard before Begg J. on 24 May 1982.

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2. The exhibits to remain in  
Court for 28 days from today, to be  
handed out thereafter if no appeal  
brought, or, if any appeal be brought  
within that time, to be dealt with in  
accordance with the Rules of Court.

Ordered 6 April 1983 and entered.  
8.2.1984

By the Court

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W. Farlow (L.S.)  
Chief Clerk



IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW  
DIVISION

No. 16157 of 1980

JOHN EDWARD  
HERBERT

Plaintiff/  
Respondent

PHILLIP WILLIAM  
CARNEY

Defendant/  
Appellant

ORDER

The Court Orders:

1. That leave to appeal to Her Majesty in Council from the judgment of this Court be granted to Phillip William Carney upon the following conditions:-

- (a) That the appellant do within 10  
three months from the date  
of this order give security  
to the satisfaction of the  
Prothonotary in the amount  
of \$1,000 for the due prose-  
cution of the said appeal  
and the payment of such costs 20  
as may become payable to the  
respondent in the event of  
the appellant not obtaining  
an order granting him final  
leave to appeal from the said  
judgment or of the appeal  
being dismissed for non-  
prosecution or of Her Majesty  
in Council ordering the appel-  
lant to pay the respondent's 30  
costs of the said appeal as  
the case may be;

- (b) That the appellant do within  
fourteen days from the date

Order granting Conditional  
323. Leave to Appeal

Order granting Conditional  
Leave to Appeal

of this order deposit with the Prothonotary the sum of \$50 as security for and towards the costs of the preparation of the transcript record for the purposes of the said appeal;

- (c) That the appellant do within three months from the date of this order take out and proceed upon all such appointments and take all such other steps as may be necessary for the purpose of settling the index to the said transcript record and enabling the Prothonotary to certify that the said index has been settled and that the conditions hereinbefore referred to have been duly performed;
- (d) That the appellant do obtain a final order of this Court granting him leave to appeal as aforesaid.

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2. That the costs of all parties of this application and of the preparation of the said transcript record and of all other proceedings hereunder and of the said final order do follow the decision of Her Majesty's Privy Council with respect to the costs of the said appeal or to abide the result of the said appeal in case the same shall stand or be dismissed for non-prosecution or be deemed so to be subject, however, to any orders that may be made by this Court up to and including the

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Order granting Conditional  
Leave to Appeal

said final order or under any of the rules next hereinafter mentioned, that is to say Rules 16, 17, 20 and 21 of the Rules of the second day of April, 1909 regulating appeals from this Court to Her Majesty in Council.

3. That the costs incurred in New South Wales payable under the terms of this order or under any order of Her Majesty's Privy Council by any party to this appeal be taxed and paid to the party to whom the same shall be payable. 10
4. That so much of the said costs as become payable by the appellant under this order or any subsequent order of the Court or any order made by Her Majesty in Council in relation to the said appeal may be paid out of any monies paid into Court as such security as aforesaid so far as the same shall extend and that after such payment out (if any) the balance (if any) of the said monies be paid out of Court to the appellant. 20
5. That each party be at liberty to restore this matter to the list upon giving two days' notice thereof to the other for the purpose of obtaining any necessary rectification of this order.

Ordered 6th May 1983 and entered 8.6.1983

(SGD.) K. QUINN (L.S.)  
Deputy Prothonotary

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY	THE COURT ORDER that -	
COMMON LAW DIVISION	1. The Plaintiffs each pay one-third (1/3) of the Defendant's costs of the Plaintiffs' Applications for Summary Judgment, as taxed on 20 October, 1982.	
16157 of 1980 16158 of 1980 16159 of 1980 (L.S.)		
JOHN EDWARD HERBERT Plaintiff	2. The Defendant's costs of the three appeals by the Defendant from the decisions of the Master be taxed on a consolidated Bill of Costs.	10
PHILLIP WILLIAM CARNEY Defendant		
16158 of 1980	3. The Plaintiffs each pay one-third (1/3) of the Defendant's costs of the said appeals.	
KARLO JEHNIC Plaintiff		
PHILLIP WILLIAM CARNEY Defendant	4. Each of the Plaintiffs to have a certificate under the Suitors Fund Act in respect of those appeals (including that part payable by him of the Defen- dant's costs of those appeals.)	20
16159 of 1980		
DARRELL BRUCE ARNETT Plaintiff		
PHILLIP WILLIAM CARNEY Defendant	Ordered 6 April 1983, and entered 8.2.1984	
ORDER	<del>{Judge}</del> By the Court (Sgd:) W. FARLOW (L.S.) Chief Clerk	30

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW  
DIVISION

No. 16157 of 1980  
16158 of 1980  
16159 of 1980  
(L.S.)

JOHN EDWARD HERBERT

Plaintiff/Respondent

PHILLIP WILLIAM  
CARNEY

Defendant/Appellant

ORDER

THE COURT ORDERS that -

Final leave be granted to the  
Appellant to appeal to Her Majesty  
in Council from the Judgment of  
the Court delivered by Rogers J.  
on 31 March 1983.

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Ordered 19 August 1983, and  
entered 8.2.1984.

{Judge}

By the Court

(Sgd:) W. FARLOW (L.S.)

Chief Clerk

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW DIVISION

No. 16157 of 1980  
No. 16158 of 1980  
No. 16159 of 1980

JOHN HERBERT  
Plaintiff/  
Respondent

PHILLIP WILLIAM  
CARNEY  
Defendant/Appellant

KARLO JEHNIC  
Plaintiff/  
Respondent

PHILLIP WILLIAM  
CARNEY  
Defendant/Appellant

DARRELL BRUCE  
ARNETT  
Plaintiff/  
Respondent

PHILLIP WILLIAM  
CARNEY  
Defendant/Appellant

AFFIDAVIT

Deponent: Leonie  
Estelle Farrant

Sworn:

On 15 March 1984 I, LEONIE ESTELLE  
FARRANT of 111 Elizabeth Street,  
Sydney in the State of New South  
Wales, Solicitor, say on oath:-

1. I am a Solicitor in the  
employ of Messrs. Kennedy & Kennedy, 10  
Solicitors for the Defendant/  
Appellant.

2. I have read the transcript  
Records prepared in the appeals in  
these matters and have compared  
them with the documents in the pro- 20  
ceedings in the Supreme Court of  
New South Wales of which they pur-  
port to be copies and I say that  
the transcript Records are correct-  
and true copies of those documents.

Sworn at Sydney

Before me: Leonie E. Farrant



.....  
Solicitor, Sydney.

IN THE SUPREME COURT OF NEW SOUTH WALES  
SYDNEY REGISTRY

COMMON LAW DIVISION

On 15th March, 1984, I GARY ALAN

No. 16157 of 1980  
No. 16158 of 1980  
No. 16159 of 1980

WHITE of 49-51 Eton Street, Suther-  
land in the State of New South

JOHN HERBERT  
Plaintiff/Respondent

Wales, Solicitor, say on oath:-

PHILLIP WILLIAM  
CARNEY  
Defendant/Appellant

1. I am the Solicitor for the  
Plaintiff/Respondents herein.

10

KARLO JEHNIC  
Plaintiff/Respondent

2. I have read the transcript  
Records prepared in the appeals

PHILLIP WILLIAM  
CARNEY  
Defendant/Appellant

in these matters and have compared  
them with the documents in the

DARRELL BRUCE  
ARNETT  
Plaintiff/Respondent

proceedings in the Supreme Court  
of New South Wales of which they

20

PHILLIP WILLIAM  
CARNEY  
Defendant/Appellant

purport to be copies and I say  
that the transcript Records are

AFFIDAVIT.

correct and true copies of those  
documents.

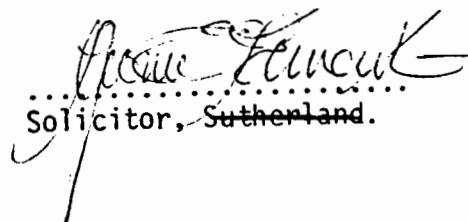
Deponent: Gary Alan  
White

SWORN at Sydney

Before me: Gary A. White

30

Sworn: 15th March  
1984

  
.....  
Solicitor, Sutherland.

CERTIFICATE OF THE DEPUTY PROTHONOTARY,  
COMMON LAW DIVISION OF THE SUPREME COURT  
OF NEW SOUTH WALES

VERIFYING THE TRANSCRIPT RECORD OF PROCEEDINGS

I, GEOFFREY ELDON MANSFIELD LAZAR, Deputy Prothonotary,  
Common Law Division of the Supreme Court of New South  
Wales

DO HEREBY CERTIFY as follows:-

That this transcript record contains a true copy of all  
such Orders Judgments and Documents as have relation to  
the matter of this Appeal and a copy of the reasons for  
the respective judgments pronounced in the course of the  
proceedings out of which the Appeal arose.

10

That the Respondent herein has received notice of the  
Order granting the Appellant Final Leave to Appeal to  
Her Majesty in Council AND has also received notice of  
the despatch of this transcript record to the Registrar  
of the Privy Council.

DATED: At Sydney in the State of New South Wales this  
15th day of March, One thousand nine hundred and eighty-  
four

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G. Lazar (L.S.)  
.....

G. Lazar,  
Deputy Prothonotary,  
Common Law Division,  
Supreme Court of  
New South Wales.