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IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA

IN PROCEEDINGS NO. 2121 OF 1980

BETWEEN:

METRO MEAT LIMITED

Appellant and Cross-Respondent  
(Defendant)

AND:

FARES RURAL CO. PTY. LIMITED

Respondent and Cross-Appellant  
(First Plaintiff)

RACHID FARES

Respondent  
(Second Plaintiff)

R E C O R D   O F   P R O C E E D I N G S

P A R T   1

V O L U M E   II

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L142A. 10.00

OLNEY J: Yes, Mr McCusker.

KENNETH DINGWALL:

EXAMINED BY MR McCUSKER (Continuing):

MR McCUSKER: Mr Dingwall, you were telling us yesterday of a meeting with Mr Villegas at the Menzies Hotel in Sydney on 16th November 1979?---That is correct.

Two matters were discussed and in respect of neither was anything resolved so far as you and Villegas were concerned?---That is right.

One of those matters, you have told us, was the question of \$30 extra payment for discharge within 40 days. That was one of the subjects that was discussed?---Of the two principal subjects, yes, that was one. 10

In respect of that subject, following that meeting with Villegas, did you raise it with anyone else? With the plaintiff or anyone else acting on behalf of the plaintiff? ---Not immediately thereafter because I think - -

MR BURBIDGE: I object.

MR McCUSKER: Not immediately thereafter but did you at some time thereafter raise it?---Yes, some time in the middle to possibly the end of the third week in December I raised it again. 20

Did you make any diary note of the occasion that you speak of? ---No, I did not because I could not pinpoint the exact date, I can only go by a reference to a telex I sent I think in February which related to that particular incident where I did not know the exact date.

It is clear you did not know the exact date but what did you do on the occasion of which you are speaking?---There are only two things that I can clearly think about. One was that I asked about the \$30 payment - - 30

First of all, to whom did you speak?---To Mr Fares, sorry - Mr Rachid Fares.

Did you speak to him face to face or by phone?---No, by telephone.

Where were you at the time?---I was in Australia.

Where were you ringing Mr Fares?---I think in London.

Will you tell us what you said to Mr Fares and what he said to you that you can recall?---I do not recall the exact discussion very well other than that I asked him again for the \$30 because I had not received payment. He

RE  
2121/80

DOC. 5 - Defendants evidence - 25.11.82  
K. DINGWALL, XN

said that would be forthcoming. He asked me about the third, fourth and fifth shipments and asked me to talk to Jorge Villegas about it.

MR McCUSKER: About what?---About the third, fourth and fifth shipments and tonnages.

Do you have any recollection of anything else?---No, I do not.

At the time you are speaking of when you rang him and you raised this question of the \$30 can you recall whether or not the second shipment had been completed?---Yes, it would have been because - -

10

MR BURBIDGE: I object.

MR McCUSKER: Can you tell us what the position was in relation to the shipments at that stage as you recall?---The second shipment had discharged in Khorramshahr, Iran, and had turned around to come back to Australia.

I would like to take you now to p.118 of the documents, exhibit 5, a telex from yourself to Captain Mata. Do you have it there?---Yes.

You say in para. 1:

"We estimate vessel earliest arrival Adelaide, all things going perfectly, as 6th January."

20

Is that the Almeria Star you are referring to there? ---Yes, as referred to in the line above.

The next voyage being which voyage?---That would be the third voyage, arriving back in Australia to load for the third voyage.

In para. 2, because of various reasons, you say:

"We don't anticipate having in excess of 3000 tonnes by early January."

30

You have given reasons there. I would like to take you to para. 5:

"For next shipment we would appreciate you establishing the letter of credit for about 2700 tonnes lamb and 1100 tonnes hogget."

Following that telex - - -

MR McCUSKER (Continuing): - - - that telex, did you receive any response from Captain Mata or any communication from Captain Mata in relation to supplies of stock which, from the telex, you are indicating are causing some problem?---Yes. I recall receiving some communication from him, I think by telex, in respect of the indicated shortfall - -

Perhaps I can take you to the telex of 17th December, exhibit 7, p.120. You are referring in para.1 to Bennetts Farmers buying and Elders buying and having difficulty getting numbers. When you say, "And having difficulty getting numbers" what was the position? Are you referring to your own company or to those two buyers that you mentioned?---No. They were two opposition buyers buying live sheep. This is not referring to lamb or hogget for the production of meat. This is live sheep entirely. 10

Going to para.6: "We received the letter of credit for Almeria Star next voyage but no bank letter of guarantee in case shipment cannot be effected." In relation to that is that the bank guarantee that you were discussing with Mr Villegas that you have told us about, in November? ---That is true. 20

In relation to the supply of lamb and the availability of lamb, did you, at any stage, receive any advice from anyone regarding the availability of a quantity of lamb for the third shipment?---Yes. I received two advices actually.

In respect of the first, what quantity are we talking of in the first of those advices? 30

MR BURBIDGE: Your Honour, I object; as I understand it my learned friend, without establishing from whom this advice came, is now seeking to adduce the terms of the advice. "What are we talking about?" Quite frankly, I do not know.

MR McCUSKER: I will take it around the other way.  
TO WITNESS: From whom did you receive the first advice?---The first one, I believe, from our export manager about some stock in store in Victoria.

What quantity of stock in store was there in Victoria on your inquiries?---Approximately 300 tonne. 40

When was this, that you ascertained there was 300 tonne available in Victoria?---I would say approximately some time during the last two weeks in December.

Having ascertained that what did you do about it?---I requested our export manager to negotiate to buy it.

MR McCUSKER: Was it purchased?---Yes.

For what purpose?---For loading in the third shipment to Iran for the Fares contract.

When your company bought that 300 tonnes, was there anything significant about the price?---Yes - -

OLNEY J: Is this relevant to any issue, Mr McCusker?

MR McCUSKER: Yes, it is, in my respectful submission, sir.

OLNEY J: What issue?

MR McCUSKER: It goes directly to a question of credit, in my submission.

10

OLNEY J: Whose credit?

MR McCUSKER: Perhaps I could say it goes towards the issue of the agreement in respect of the Lamb Board purchase, the second of the two purchases - - -

192A. 10.10

MR McCUSKER (Continuing): - - - two purchases, in respect of which the \$125 per tonne agreement was made.

OLNEY J: What does the purchase of 300 tonnes of lamb in Victoria have to do with that?

MR McCUSKER: Your Honour remarked yesterday, in the course of my opening, that possibly one could say that the purchase of the 843 tonnes was something which the defendant was obliged to do and that there was perhaps simply a gratuitous payment being offered in respect of that. The defendant's case is that it purchased some meat at a premium for which it sought no payment, although it had paid well above the market price for it. But in respect of this 843 tonnes it was at a point where the shipment had been virtually fulfilled, on the defendant's case, and therefore the agreement in respect of that 843 tonnes was not gratuitous, it was an agreement made for good consideration to fill up the freight.

10

OLNEY J: So he did not want to have a partly empty ship?

20

MR McCUSKER: Yes.

OLNEY J: All right, that is fair enough but this witness has already said, in exhibit 5, para.3:

"We have been unable to buy any dead meat in from other packers in New ....(reads)....all the surplus from the market."

As I understand the case, they agreed to supply a quantity, whether it was 20,000 or 18,000, and that they were going to get it from either their own stocks, their own slaughterings, or buying it. What he is giving evidence about now is that he bought some in Victoria. If he bought it at a higher price than he contemplated in July, 1978, or a lower price, it has nothing really to do with any issue.

30

MR McCUSKER: In my submission, it goes to this issue of whether there was a gratuitous arrangement in respect of the 843 tonnes or whether there was, indeed, good consideration for it. In that regard it is relevant, I would have thought, to point out that it was not in respect of every purchase at a premium that any such request was made.

40

OLNEY J: What you are really doing is showing that they made a miscalculation in their price and that meat on the Australian market was becoming more expensive than they expected it would be, which does not really help your client

MR McCUSKER: I think it is common ground that that was the case - that it had become more expensive and that they were prepared to meet that expense, take it on the chin. They did so in respect of the 300 tonnes. The question is whether, in respect of the 843 tonnes, they were doing something beyond their contractual obligations or whether they were doing something which was, as it were, a favour to the buyer. I would have thought it is significant to note that when they did purchase meat at a premium, 300 tonnes, no suggestion was made that the buyer should contribute but when it came to a point where in the defendant's case they had all but completed the third shipment requirements it was then that the question of a premium, if they were to buy the 843 tonnes - -

10

OLNEY J: The facts are all covered by evidence, anyhow. The telexes have told us so I do not think you need to ask any questions about how much he paid for the Victorian meat.

20

MR McCUSKER: Very well, sir.

TO WITNESS: Did you, in January, 1980, speak to Mr Fares by telephone?---Yes. I did.

Do you know how many telephone discussions you had with Mr Fares in January?---In the month of January I had at least two.

Can you tell us the first of those?---That was very early in January, either the second or the third of January.

You have heard Mr Fares give evidence that he rang you early in January. Do you agree with that?---No. I do not.

30

What happened?---I rang him.

When you spoke, apart from any normal pleasantries in relation to this matter, what was discussed, if anything?---The discussion was about the purchase of approximately 900 tonnes of meat from the West - - -

A253. 10.15

WITNESS (Continuing): - - - West Australian Lamb Board that was in stock in Western Australia, to completely fill the third shipment of the Almeria Star.

MR McCUSKER: Would you tell us what you said to Mr Fares and what he said to you, as far as you can recall?  
---I said to him that we had purchased approximately 300 tonnes in from Victoria to make up to a tonnage equivalent to approximately 3000 tonnes with what we could produce in our plants prior to the loading of the vessel and that there would be an estimated 800 to 900 tonnes empty space on the vessel. He said back to me, "Ken, that's your problem" and I said, "I don't believe it is, Rashid, because we, in buying that product, bringing it up to approximately 10,000 tonnes, have met our obligations to you as discussed at the start - the 2000, 4000, 4000 in the first three shipments. The circumstances that we have had in our plants with strikes and so on are not something that we can be blamed for. They are circumstances beyond our control. We have done everything possible to make up for this shipment but the problems have been there and we have this tonnage short. I believe you should contribute towards the extra cost of \$256 per tonne that would be involved in buying this tonnage, somewhere between 800 to 900 tonnes that will be required to fill the ship."

10

20

Did you tell him why you believed that he should contribute to that?---Yes; because the cost of the freight involved was approximately \$375, \$385, to our knowledge and that the dead freight cost would be much more than the loss involved of the extra cost of the meat at \$256 over the agreed price.

30

What did he say to that?----He came back to me and offered me \$100 towards it.

OLNEY J: When you say "He came back", was this a telephone conversation?---This is the same conversation, your Honour. He said to me he would be prepared to pay \$100 towards it. I said back to him that I did not think that was a very fair situation under the circumstances that I had given him and asked him if he would meet it halfway. He then increased it to \$125. I accepted that.

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MR McCUSKER: You have heard Mr Fares give evidence that in respect of this \$125 per tonne this was to be payable subject to performance of the entire contract. Was anything of that nature, any condition, attached to the agreement to pay the \$125 per tonne?---I do not recall that being discussed, that particular. ---

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MR McCUSKER: Going back a little in time here, did you at any time meet a Dr Bahrami-Kia?---Yes.

Do you recall when that was?---Yes. He came over to Adelaide in early December 1979.

Did he introduce himself as being the veterinary doctor appointed by the IMO to visit your meatworks establishments?  
---That is true. I had been advised by telex earlier from Captain Mata that he was due to come over at some time. He was introduced to me by our export manager, Mr Phillips, in the morning with a cup of coffee.

10

Did the three of you, that is you, Phillips and Dr Bahrami-Kia have any discussion over coffee relevant to these proceedings?---Yes. We discussed, in general form, what he would be doing at the meatworks - - -



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WITNESS (Continuing): - - - the meatworks and where the progress of the tonnages were on shipping at that particular stage and the general livestock market.

MR McCUSKER: For how long did that discussion last approximately? ---I think quarter of an hour to half an hour approximately.

In the course of that discussion was there any difficulty so far as you observed in communicating with Dr Bahrami-Kia?---A little because he had a funny way of speaking English and I could not understand him very well and I had to also repeat some of my discussion with him. 10

In the course of that discussion did you say anything to the following effect: That you or Metro were going to speak to Mr Fares about the question of difficulty in purchase of meat, or that Metro did not think it could continue with the contract because the cost was too much - anything at all to that effect?---No, no. We talked about livestock costs, yes, but we did not talk of anything along those lines. 20

Did you say anything at all, so far as you can recall, to Dr Bahrami-Kia to suggest that Metro was not going to proceed with the contract or that you were going to talk to Mr Fares about that?---No.

After that meeting with Dr Bahrami-Kia when you and Phillips were introduced to him did you again, after that date, either meet him or see him?---No, it was the only time I ever met him and ever spoke to him.

I take you now to a telex which is exhibit 12, p.127. You refer in that telex to a discussion with Mr Villegas in Argentina and having given him certain figures. That is a telex from you to Captain Mata?---Yes. 30

Without going through the details of that telex, does that correctly set out the position as it then was, factually?

MR BURBIDGE: I am not quite sure what that means, with respect, your Honour. There are a number of inconsistencies in that, I would have thought, but I would object to a blanket question. 40

OLNEY J: Particularise the question, please.

MR McCUSKER: First of all, had you spoken to Mr Villegas on that day in Argentina?---Yes.

Had you given the figures set out there for voyages 3, 4 and 5 to him?---Yes, over the phone, and he requested me to pass them on to Captain Mata by telex.

MR McCUSKER: You are referring there in that telex to "shortfall". Did you mention the shortfall to Mr Villegas in your telephone discussion with him? ---Yes, I did.

In reference to "shortfall" to what are you referring?---I am referring to the estimated tonnages that we believed we would produce and have available on the programmed shipments of the third, fourth and fifth shipments and the shortfall represents that tonnage that we felt was going to be unavailable for each shipment in that order.

10

You refer in para. 3 to Mr Fares arranging to negotiate with the IMO to substitute mutton for the next voyage. You are referring there to which voyage?---I am referring to the third voyage. That paragraph would have been referring to part of a discussion I had with Mr Fares probably just prior to that that I think I referred to earlier. I referred to Mr Fares that matter because I had received inquiries from Iran for mutton - - -

WITNESS (Continuing): - - - mutton and I asked him, therefore, to have a look at that with the Iranians to see whether or not we could substitute mutton on the third voyage to make up for the shortfall of the proposed 1050 tonnes.

MR McCUSKER: Did anything come of that, incidentally, in this proposal, to make up - -?---No. He advised me some time after that, I do not know when exactly, that the Iranian Meat Organisation would not buy mutton.

10

Following the transmission of that telex, did you receive from Captain Mata or from Fares via Captain Mata the telex which is on p.129, exhibit 13? It starts, "We are very concerned for your shortfall. We - -"? ---Yes. I remember getting that telex.

Could I take you next to p.130, the telex which is exhibit 14? That is a telex which was not sent to you, I think, was it?---No. This is from Fares in England to Fares in Australia.

Referring to that telex, can you make any comment regarding the second paragraph where it is stated, "He promised to come back tomorrow by 9 a.m. Adelaide time. Mr Fares suggests you contact him before then"? I will start at para.2, "Ken Dingwall phoned to confirm purchase of the further 270 tonnes" and so on?---Yes. I do not recall having discussed coming back to him at all and I certainly did not go back to him.

20

You have heard Mr Fares give some evidence in relation to that telephone call that he said he thought there was a second call. Can you recall any second call when you went back to him?---No. I do not. I only recall talking to him on the one occasion early in January.

30

In January, on or about the 16th, did you meet with Ayatollah Menhaj?---Yes, in the middle of January. He came on a visit to South Australia. He visited the plant. He came into my office and we had a discussion.

Following that discussion so far as the plaintiff was concerned did you say or do anything? I will take you to the telex of 23rd January, at p.136. You sent that telex. It has been suggested that that is an act of implied repudiation. Why was it that you were recommending to Fares that the decisions regarding the fourth and fifth shipments be deferred?---Because the information I had received from Menhaj was fairly clear. If Australia supported the USA with sanctions - -

40

MR BURBRIDGE: Sir, I object.

MR McCUSKER: Without giving us the conversation, then, what was the purpose in recommending the deferment of the fourth and fifth shipments - - -

MR McCUSKER (Continuing): - - - fifth shipments?---To avoid any possibility of Metro producing product for that fourth shipment, for example, which could not be shipped if the sanctions were invoked.

I will refer you further to a telex which is dated 23rd January from Mata to you. That is at p.135, exhibit 17. It says:

"We must confirm today last two shipments to ensure MV Almeria Star. Blue Star Line will put this ship to our disposition some time between 25th April and 15th May and 15th to 30th July for fifth and last shipment."

10

Those dates that are referred to there - had you had any prior indication that they were the dates for the fourth and fifth shipments?---No. That was the first time that it had been indicated to me or Metro that the shipments which were originally discussed for March and May could be pushed back by two months in each case. If that information had of been available earlier our indication of shortfalls would have been different.

20

Why was that?---We would have had a full two months more to produce the tonnage which would not have been a problem at that time.

With regard to the matter raised there - -

MR BURBIDGE: Your Honour, I must say this; it was never suggested, as I recall - and without the transcript one speaks only from memory, of course - and it was never put to Mr Fares that the conversation which he asserted to have taken place on 2nd January in relation to the re-fixing of the voyages, had never taken place. I do not recall that being put to him in cross-examination at all. I confess freely that I am willing to be corrected as to that matter but I certainly have no recollection of it and in view of its importance I rather think it would have registered had it been put.

30

OLNEY J: I was just going to interrupt the witness to get that clarified. That is my recollection, Mr McCusker.

40

MR McCUSKER: Yes. That accords with my recollection too, although my difficulty is this. I think, to clarify the matter, it would be helpful if I were to put to the witness his diary. Your Honour may recall that I put to Mr Fares that there was a conversation in about mid-January which he said had not occurred.

OLNEY J: This witness says that there were two conversations with Fares in January.

MR McCUSKER: Yes, sir; perhaps I could take him to the second of those conversations.

MR BURBIDGE: With respect, your Honour, that does not meet my concern. It turns on this assertion from the witness that at this time, the receipt of this telex was the first indication that he had that there was any preparedness on the part of the plaintiffs to readjust the schedule. He then goes on to say that had he had any earlier indication to that effect then he could have met it. 10

OLNEY J: Yes, but that last comment was the one I was going to raise because he was talking about shortfalls back on 21st December which was before Mr Fares says that the rescheduling was discussed so, as I say, the witness's last comment is not one that carries much importance in my mind.

MR BURBIDGE: It does not, your Honour, but the thrust of what he is saying is clear, that the first indication he had of the willingness to reschedule was 23rd January which, necessarily, carries with it the proposition that what Mr Fares has said in evidence was untrue, he having given specific evidence, of course, of the re-arrangements; indeed, his assertion is that it was at his suggestion that the voyages were rescheduled - - - 20

MR BURBIDGE (Continuing): - - - rescheduled in order to overcome the problem of the shortfall which had been fore-shadowed on 21st December. My concern is that no suggestion was made to Mr Fares that such a conversation had not in fact occurred.

MR McCUSKER: My learned friend is certainly correct. There was no such suggestion that the conversation regarding those dates had not occurred. I think that it will become clearer. Your Honour has rightly observed, the witness was talking about "had I had such an indication in relation to the December telex". I would like to take the witness to the second conversation he had in January. That may well clarify the matter. It is not quite correct for my learned friend to say that the witness said that he had had no previous discussion at all or indication of rescheduling. I put the question to him perhaps a little too precisely in terms of those dates and perhaps I can clarify the matter by taking it further. 10 20

OLNEY J: Yes.

MR McCUSKER: You have told us that there were two telephone conversations with Mr Fares, you have told us about the first, but can you recall the second of those conversations and approximately when it took place? ---Yes. The second conversation took place the day before the board meeting of Metro, which was on the 25th, so he would have called me on the 24th, in the evening. That was 24th January.

Yes. I said "the second conversation in January" so it must have been 24th January. When he called you would you tell us what he said to you and you to him? ---He said, "Ken, it's urgent that I get your confirmation of the fourth and fifth shipments so I can advise the shipping company, Blue Star, the dates to organise the arrivals in Australia." 30

Yes?---I said to him, "Rachid, I don't understand why you are requesting me to confirm it with you because previously you have said to me that you had a consecutive voyage contract with the shipping company, and if you have a consecutive voyage contract you have already confirmed dates with them on a turn around of the vessel. I can't understand that." 40

MR BURBIDGE: Your Honour, I am just embarrassed by this but again I have no recollection of any assertion of this nature being put to Mr Fares - none at all.

OLNEY J: I think Mr Fares was cross-examined as to whether there was an arrangement for consecutive voyages of

the ship. I think he was cross-examined as to that. I just do not understand this evidence about 24th January which was held after 23rd January when dates were mentioned.

MR BURBIDGE: Perhaps it is best left for cross-examination.

OLNEY J: I think perhaps we could just see how it turns out.

MR BURBIDGE: I think I should say immediately at this stage that Mr Fares is in fact now in Singapore and I am going to have great difficulty in obtaining instructions on matters of this nature.

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MR McCUSKER: Your Honour is quite correct, I did cross-examine Mr Fares on the question of whether consecutive voyages had originally been discussed. So far as the date is concerned of this conversation, this witness has said without reference to any diary, "I think it would have been the 24th", and that is relating back. I would ask your Honour's permission for him to refer to his diary to see if he can verify the date and then to go on to give the - -

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OLNEY J: Yes. Perhaps you could ask him if he has noted in the diary the date of the board meeting of Metro Meats.

WITNESS: It was Friday, the 25th, your Honour - 11 a.m. board meeting - January 1980.

OLNEY J: So you were right when you said the date before, the 24th?---Your Honour, I had some other point that occurred to me that pinpointed that situation.

OLNEY J: You did say that the conversation with Fares was the day before the board meeting, which must make it 24th January. That follows, does it not? ---Yes, your Honour.

30

MR McCUSKER: His Honour has observed, quite rightly, that the 23rd January telex to you from Captain Mata refers to two dates in relation to shipping the fourth and fifth shipments?---That is correct.

Can you recall whether the conversation with Mr Fares when you discussed this question was before or after that - - -



MR McCUSKER (Continuing): - - - after that telex?---It was the day after this telex was received.

Can you tell us what was discussed between you and Mr Fares so far as the question of shipping was concerned?

---He asked me to confirm the shipment dates, which I do not recall being exactly the same as those dates there but they were very close to it - within a few days in each month. I was not prepared to confirm them with him. I told him so and told him I had sent this telex about the sanction situation and that until that got clarified we were not prepared to produce for the Iranian market hogget and lamb and we were holding it in suspension until we got some clarification on that point from the Australian government.

10

In relation to the dates of the fourth and fifth shipments, was that question raised, or the proposed dates?

---Yes. He talked about a shipment May, and a shipment July, and dates I do not know whether exactly the same as that, I think they were slightly different, but he did talk about dates in that. I asked him if we were going to finalise any shipment situations that he make the second one as late as possible, preferably I think early August.

20

In that regard, what Mr Fares says about the question of early August being raised by you you agree with?--- Yes. I do not disagree with that.

You, on 23rd January, sent the telex which is at p.136, raising the question of recommending deferment of decisions. On 29th January did you receive a telex in response at p.138, which concluded by thanking you for your recommendations but saying there was no alternative but to continue shipments? Exhibit 21?---Yes. I have it here.

30

So far as the reasoning given there is concerned as to sanctions not affecting you in substance because the letter of credit is already opened in your favour and Fares was prepared or ready to take delivery of the quantities anyhow therefore you should not worry, did that set your mind at rest on this question of sanctions?---No, by no means at all.

40

Why not?---Because if the sanctions were brought in by the Australian government we would not be able to ship to Iran. There was no way we could get meat aboard a ship and get the required documents to send against a letter of credit.

OLNEY J: Your obligation was not to get meat aboard a ship, it was to get meat alongside a ship, was it not?---No. In the meat industry "free alongside" is not just

placing the meat alongside the ship. The free alongside is with reference to the particular costs you enter. A ship has to load it on board but unless it goes on board you cannot get the various documents. You cannot get the bill of lading, which must nominate the location or the destination of the vessel. You cannot get a certificate of origin. You cannot get your health certificate from the Dept of Primary Industry unless you have all this product on board the vessel and they have to inspect that product going on board. You cannot get those documents unless the product actually physically goes on the vessel.

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OLNEY J: So the ship has to be loaded?---That is right, it must be loaded. Our costs finish at the point of time when we deliver alongside the wharf. Under liner term situation the ship then pays the cost of lifting it over the side. For the documentation, unfortunately it must be on board.

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MR BURBRIDGE: Your Honour, I would just interrupt to say that we have, as your Honour knows, subpoenaed certain documents. We have made do with such as have been produced to us. The full board may have been provided with certain extracts which are said to be relevant to certain things. We have now asked to see the board minutes - - -

MR BURBIDGE (Continuing): - - - the board minutes, in their complete form, for 25th January 1980 and I understand that the defendant is not willing to produce those to us. Might I, for that reason, inquire whether there is something of a sensitive nature unconnected with this case which precludes them doing so or if not, why we may not have access to them?

OLNEY J: Perhaps the first question can be answered by counsel when you look at them.

MR McCUSKER: I will just take a moment and I will get them, your Honour. I must say that I find it slightly irregular to have examination in-chief interrupted in this manner. 10

MR BURBIDGE: I would not normally have to do it, your Honour, if I had full discovery.

MR McCUSKER: I am informed that one page of these minutes has been produced. It is a page on which appears a reference to the Iranian market on 25th January. It reads:

"Mr Dingwall reported that the third shipment of lamb and hogget carcasses is being loaded in Fremantle now. Two more shipments are due in April and July but uncertainty exists until the position on sanctions is clarified by the government." 20

My learned friend has the extract.

The minutes, as your Honour might well expect, contain a considerable amount of information, they go on for some pages. I note that on the first page there is reference to arrangements with the company's bank and without being specifically instructed as to the sensitivity it would seem to me that they probably are of a sensitive nature. 30

MR BURBIDGE: Your Honour, if my learned friend says there is nothing else relevant to this contract, then that will suffice for my purposes - or the Oceanic contract, of course. I made plain that my two areas of concern so far as relevance is concerned, are any matter relating to our contract or any matter relating to the sale by Metro and/or Oceanic in conjunction particularly to the Iranian Meat Authority but other than that, if my learned friend assures me that neither of those matters are contained, that will suffice for my purposes. 40

OLNEY J: I would agree that both those matters are relevant and if there is anything they ought to be made available. I do not think anything else need be made available.

MR McCUSKER: I am quite content for your Honour to see it if it really becomes an issue but there is nothing that I can see in these minutes that could, conceivably, be of relevance to these proceedings; in particular, there is nothing apart from the extract which my learned friend has.

10

OLNEY J: Apart from what you have disclosed.

MR McCUSKER: Yes.

OLNEY J: That should satisfy you, Mr Burbidge.

MR BURBIDGE: Thank you, your Honour. I apologise to my learned friend for interrupting his examination. It did seem to me important.

OLNEY J: It may be something that you needed to cross-examine on, I suppose.

MR McCUSKER (TO WITNESS): Will you look at the document dated 3rd February 1980, p.142. You sent a telex to Mr Fares which sets out a claim in respect of the first, second and third voyages. You conclude that telex by saying in para.5:

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"Subject to receiving the above funds I will then examine the position and possibilities to ship further tonnage in May and late July....(reads)....to supervise the Islamic slaughtering"

and so on. Firstly, had the third voyage by then been completed? I think it is probably common ground that it had?---No. I do not think so. I think the third voyage completed probably within a couple of days of that date. I think it was due to leave Australia at that time beginning of February, leaving Fremantle. I think we had the tonnage because we are quoting the tonnage so we probably had been finished loading.

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OLNEY J: Paragraph 3 indicates the answer to the question.

MR McCUSKER: When I say "completed", had the third voyage been shipped, had the third shipment been shipped - - -

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MR McCUSKER (Continuing): - - - shipped?---Yes.

At that point of time, Mr Dingwall, you told us of having raised with Mr Fares, and you did so by telex in September 1979, the question of the prices he had quoted you as at 2nd July, the IMO prices he had referred to.

MR BURBIDGE: Your Honour, just to clarify that, I had thought that the telex of September referred to the prices he had quoted in relation to the West Australian Lamb Board. 10

MR McCUSKER: I think the telex actually speaks for itself, sir.

MR BURBIDGE: It is p.55, is it not?

OLNEY J: Yes, the long one. It talks about the \$1862.50.

MR McCUSKER: Paragraph 10, sir.

MR BURBIDGE: That does not, with respect, suggest what my learned friend has just said, your Honour - namely that those prices had been quoted to him. That may be an inference, of course.

OLNEY J: Paragraph 8 has reference to the lamb board prices. 20

MR BURBIDGE: Yes.

MR McCUSKER: In any event, at that time you have told us that the reason you raised those matters was because of the competition in the prices that were being offered in the market as well as the information you had had regarding the lamb board?---That is right.

As at 3rd February 1980 had you received any further information in respect of the prices?---No, not at that time.

I am sorry, "13th February" that should read, I think, once again. In response to that telex of 13th February you received exhibit 23, p.145. I should say it was not the first response, you did receive a telex which is at p.143 indicating Mr Fares was on holiday in South America. I would like to take you through that, Mr Dingwall. Page 142 was the telex of 13th February that you sent to Mr Fares raising the question of payment of the \$30 and the payment for the lamb board purchase of 843 tonnes?---Yes. 30

You received, on the next page, a telex sent on behalf obviously of Mr Fares saying that he was on holiday in South America?---That is from his London office, yes. 40

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MR McCUSKER: On p.145 you received the telex which appears there?---At the end of February, I think.

I beg your pardon?---I think it is dated the end of February - 29th February. Yes, I have it here.

It says there in para. A:

"Even though the performance of the former shipments was far from being satisfactory and bonus to be paid for prompt deliveries is entirely left to our discretion, we are nevertheless ready to pay - -" and so on.

10

In any of your discussions with Mr Fares regarding the question of payment of bonus or the \$30 extra payment, as everyone calls it, had there been any question raised by him of it being a discretionary payment? ---No. I had spoken to him twice before about this particular matter and he did not discuss anything about discretionary payment and I was surprised when I received that and it made me go back to the file and look at the file copies that we had of what we had received from Mr Fares. Of course, up until this stage I had only seen one copy of what I thought had come from Mr Fares and it was at a meeting with Captain Mata and Mr Phillips on the 21st or the 20th August, and I was not aware until I went back that those two telexes were different. The paragraph on the first one that came to Australia - - -

WITNESS (Continuing): - - - to Australia was not on the second one and the one I had seen at that meeting was the second one which did not have that paragraph which refers to discretionary powers.

MR BURBRIDGE: I am sorry, your Honour, I do not understand that.

MR McCUSKER: (I will just take the witness through it.) I will refer you, firstly, to p.16 of the book. At p.16 there appears exhibit 1, which was a telex of 3rd July, 1979?---Yes, not to Metro though.

Right, but the evidence is that it was retransmitted?---It is a copy of the one which did come to Metro. It is the one which went to Fares in Perth. 10

You have given evidence that on the morning of 2nd July, following that early morning telephone call, you went overseas?---That is correct.

Did you, yourself, see that telex at the time?---No.

When you came back you said you had a meeting with Captain Mata and this question of who the contracting or exporting party was to be was raised and you called Phillips in. He showed you a telex. Which telex did he show you? 20

OLNEY J: We have had this evidence, Mr McCusker. The evidence is that the exhibit 1 was first seen by this witness in February, 1980. He told me that yesterday. He had seen the telex sent by Phillips to Mata two days after he returned from the USA or the UK, I think 29th July if I remember rightly.

MR McCUSKER: Yes. Thank you, sir. It is simply that my learned friend was raising the question of what he was talking about. 30

OLNEY J: Because the witness was talking as though there had been two telexes sent. I got the impression he was saying there were two telexes sent by Fares, one with this last paragraph and one without. It was obvious that the witness was mistaken or, if he was mistaken, I was mistaken as to what he was saying.

MR McCUSKER: With respect, I think the latter but it was understandable because of the way it was put. If that is clarified sufficiently, I will go on.

OLNEY J: Yes. 40

MR McCUSKER: Mr Dingwall, having seen or having received this telex referring to the discretion, which is at p.145, you went back to the file. Did you then see the telex I have referred you to, exhibit 1?---Yes. I saw the Metro Meat copy of that one.

MR McCUSKER: I will take you, then, to p.149, a telex  
from you to Mr Fares of 5th March, 1980?---Yes.

OLNEY J: "Ref. your telex received here 4th March" - to which  
telex is that referring?---I cannot answer that,  
your Honour. I do not have any other telexes here  
in respect of this particular matter of that date.

The preceding one in the book from Fares is exhibit 23 at  
p.145, which apparently was sent on 29th February?  
---The date on this one is 29th February, your  
Honour - - -



WITNESS (Continuing): - - - is 29th February, your Honour.  
I do not know whether I have got the wrong date on  
it or whether there was one in between.

MR McCUSKER: Do you know the date on which you received the  
telex which is at p.145?---I do not know. If this  
was received by Metro Meat we would normally have a  
receiving stamp and date on it. This is sent from  
Argentina, it may not have arrived on the 29th,  
it could have been delayed, I do not know. It may  
have been received by Metro on the 4th, perhaps.

10

Sir, if it would help to clarify it, I think the original  
telex is in the box that has been produced of  
various documents. It may assist.

OLNEY J: I was just wondering whether there had been something  
intervening?---Your Honour, that was received by  
Metro on its telex on 4th March 1980.

That is the one you are talking about.

MR McCUSKER: Yes, so there would appear to have been some  
delay in the transmission and receipt?---Yes. I think  
it has got two telex numbers or some numbers at the  
top and it may have come via another source.

20

This, I think your Honour, my learned friend foreshadowed could  
possibly occur. We have agreed essentially that  
despite retransmissions the ultimate receipt is  
accepted.

OLNEY J: Thank you.

MR McCUSKER: When you sent that telex "Ref your telex received  
here 4th March", the telex which appears at p.149,  
had you by then seen the telex which is exhibit 1,  
the one which was sent on 3rd July when you had gone  
overseas?---Yes. By that time, yes.

30

You refer in that telex to the question of the 843 tonnes as to  
which Mr Fares had made no comment in his telex?  
---That is true, in para. 4.

I would like to refer you now to this question of prices,  
IMO contract prices, the Fares IMO contract prices.  
Did you at some stage get any further information  
with regard to that?---Yes, I did.

On what date, or approximately what date?---About three or four  
days in February before I went through Iran, which  
would have been somewhere around about 18th or 19th  
February.

40

From whom did you receive the information?---I made a specific  
request for favour from - -

MR BURBIDGE: I object to this, your Honour. It is not responsive to the question?---Sorry.

From whom did you receive that information?---I received it from Stewart Couzens, who was the manager of Oceanic Export Traders in Sydney - - -

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WITNESS (Continuing): - - - in Sydney.

MR McCUSKER: What was the information that you received?

MR BURBIDGE: I object to that on the basis of its relevance,  
your Honour.

OLNEY J: What do you have to say, Mr McCusker?

MR McCUSKER: It is relevant in this regard I would have thought;  
it is not put forward as being evidence of the truth  
but as evidence of what information, whether rightly  
or wrongly, the defendant had at the time that it  
sought to receive payment of the moneys outstanding. 10

OLNEY J: The first question was did you get any information  
about prices, a general question. "Yes; about 19th  
February I got some information about prices."  
I do not know what we are talking about. I suspect  
I know but I am not prepared to surmise. "Couzens  
told me something about prices." That is as far as  
we have got. It does not seem to have any bearing  
on the case yet.

MR McCUSKER: I will take it a step further then, sir.

TO WITNESS: In respect of what prices did you receive 20  
information?---Mr Couzens gave me the two prices  
that he said were from the files in the IMO of the  
prices on the Fares contract that we were supplying  
and the prices given to me by him of lamb at 1850  
- -

MR BURBIDGE: Your Honour, this is the very material I have  
objected to. I am not asking the witness to understand  
these distinctions but surely my learned friend  
ought to control him to that extent. In any event,  
I object to so much of the matter as now purports 30  
to pass on what is said to have been told by a third  
party who is supposed to have obtained the information  
about it from a fourth party. In any event,  
even were it, in some way, admissible I submit there  
is just no relevance of what he was told.

OLNEY J: I suppose it is relevant if he was told something about  
lamb prices and then did something. I would agree  
that what he was told is only of significance  
in explaining his conduct or the events that followed.

MR McCUSKER: Yes. That is the sole significance, sir.

OLNEY J: He was told something. Under pleadings I have been 40  
told what the prices were in the IMO contract - -

MR McCUSKER: Yes; and it is now common knowledge.

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OLNEY J: It may be that Couzens told this man something different but I do not think you can prove what Couzens told him by asking him because, I would agree, it is not relevant.

MR McCUSKER: Relevant only, I would have thought, as explaining his conduct but not as going to the truth of what was said to him by Couzens.

OLNEY J: He was told something by Couzens. What did he do?

MR McCUSKER (TO WITNESS): What date was it that you were told?  
---The 19th of February; that period, 18th or 19th February.

10

Did you, at that point, have any further information apart from what Mr Couzens told you regarding the IMO/ Fares contract?---At which point?

At that point, 19th February?---No; on 19th February I only had two prices supplied to me.

Can I take you to the telex from Mr Ware to Captain Mata dated 17th March 1980, p.160?

V22A. 11.12

MR McCUSKER: Did you see that telex before it was sent or were you aware of its contents at the time it was sent?---No.

As at that date, 17th March, was hogget or lamb being produced at the meatworks for the purpose of this particular contract?---No, it was not.

Why was it not?---Because I had instructed the plants in South Australia and New South Wales on about 17th or 18th January to suspend production on the meat for this contract, and I also instructed the Western Australian manager to make sure that once we completed loading the third shipment, which was going to be by January, to suspend production also there because of the sanction situation. At that stage that suspension had not been lifted.

10

Why had it not been lifted? Did the sanction position not resolve itself and become clearer?---No, the sanction had not been resolved at that stage. We had received no information that indicated that there had been any change in the situation with the Australian government.

20

OLNEY J: Any change from what?---From the situation that they advised us not to commit further on Iranian contracts some time in January.

Who did?---The Department of Trade, sir.

That is the first we have heard about that?---This goes back to some time I think in November, not long after the hostages were taken. I think they were taken in October and there were some discussions with the Department of Trade then because the US government had put on the sanctions and were seeking Australian government support. That I think went back to that time when I first originally took it up with Mr Villegas, that there were possibly some sanctions going to arise from Australia. We had had some information from the Department of Trade.

30

You said the Department of Trade had advised you to suspend production of products for Iran?---No, they did not ask me to suspend that.

I thought you said that?---If I said that, I am incorrect.

40

I thought you said that you had some advice from the Department of Trade about not committing yourself?---Yes, that goes back to the period in 1979.

I suppose it is a matter of comment but you did not mention that to Mr Pares or Captain Mata in the telexes in January? ---I think there was a telex where I did mention it,

your Honour. I do not know which particular telex but I am sure I raised it by telex at some stage in late 1979 - probably November, I would think.

OLNEY J: I should not interrupt. Please go ahead. You were asked why you were not producing lamb and hogget in March and you told us, I think.

MR McCUSKER: You told us that you had suspended production I think in January?---In January in New South Wales and South Australia and it would have been probably very early February in Western Australia. 10

That was in respect of the sanctions. By March had the sanction problem resolved itself or was it still a concern to you?---Nothing had been clarified any further with us at that particular time. We were aware then of the company in Albury and the sanctions that the government had brought on - -

MR BURBIDGE: I object.

MR McCUSKER: Do not go on with that. You say the sanction problem as you saw it had not resolved itself. Was there by March any other factor influencing your suspension of production for this contract?---Yes. 20

What was that?---There were two factors actually. One was that we had not received the funds that we believed we should have received by then - - -

WITNESS (Continuing): - - - by then in respect of the \$30 per tonne and the \$125 per tonne on the meat bought by the Lamb Board and secondly we were then aware that the information I had been given at the commencement of the contract was not in accordance with the figures I had received from Tehran. We therefore continued to take our stance.

MR McCUSKER: I will take you to p.155. This is a telex dated 12th March, 1980, exhibit 29, in response to yours of the 5th March. You received that telex and it concluded by urging you to reply giving final dates of supply for the forthcoming shipment, to which you responded by your telex at p.158, exhibit 31. You commence:

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"I must apologise if I have been wasting very valuable time" etcetera.

Is that right?---Yes.

By that time, the three shipments had discharged?---Yes.

You refer there to the discretion being Mr Fares's poetic licence. By then, of course, in your evidence, you had seen the telex which had been sent on 3rd July?---That is right.

20

I will take you to p.161, exhibit 34. It says there:

"Reference our exchange of telexes, regardless of....(reads),...tonnes will immediately be effected."

I think it is clear you did not give the confirmation that was sought in that telex regarding the further two shipments?---That is correct.

30

Why did you not give that confirmation?---I was not prepared to give him an assurance or confirmation at that stage, because it would have weakened my position in the negotiations I had planned to take with him. Once we received our money I was quite prepared to sit down with him and discuss the last two shipments and organise them, set the dates for them. I had full intention of renegotiating the prices with him on the last two shipments. If I had given that assurance, I would strategically have weakened my position to do that.

40

Why do you say it would have weakened your position in discussing the last two shipments with him?---Because having given my personal assurance that I would do that I believe in my own mind I would have been in a lot weaker position in negotiating those prices.

OLNEY J: What do you mean by "renegotiating the prices - - -"

C77A. 11.22

OLNEY J. (Continuing): " - - - the prices"?---Your Honour, by this stage we had received in the case of the prices that I had received on the contract, which indicated to me that the prices Fares had discussed with me at the start of the contract were incorrect - - He had assured me two months later that they were correct and at that stage I had proof of evidence that on two occasions he had deceived me, because I was in Iran and I made sure that I checked those prices out while I was there.

10

Please answer the question. What do you mean when you say you wanted to "renegotiate the prices"? Did you want to change the prices?---That is right, yes.

Which had been negotiated?---Which had been set at \$1375 and \$1230.

MR McCUSKER: Did you consider you were entitled to do that? ---Yes, I did, because I believed that we had been misled and the prices we had agreed to were based on wrong information.

Why did you not simply tell Mr Fares at that point that you had that information and sought a change in the price? ---I believed if I had done that I would have waved goodbye to the \$360,000.

20

The \$360,000 being what?---Being the two payments yet not paid. We had received one payment of \$30 on the third shipment but not the first two shipments, and the \$125 per tonne on the purchased meat from the West Australian Lamb Board.

I would like to take you to the letter of 21st April 1980, exhibit 36, p.164. Between that date and your telex and the reply of 17th March 1980 had you had any communication with Fares or anyone on his behalf? ---No.

30

Evidence has been given that Mr Villegas came to Western Australia some time in April. Did you know of his proposed arrival?---No, I did not know of his proposed arrival but I became aware that he was in Australia by my wife phoning me when I was in Los Angeles and advising me that he would be there when I got back to Sydney and he was staying at the Menzies. I arrived back on, I think it was, the Sunday and he had left the day before.

40

On receipt of the letter of 21st April 1980 did you send in reply the letter at p.167, that of 24th April 1980? ---Yes, that was my reply which I sent back actually to Mr Rachid Fares with a copy to Captain Mata.

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MR McCUSKER: Why did you do that - send it direct to Fares with a copy to Captain Mata?---I think I spelt it out in the letter, perhaps, I am not sure. We did not ever consider we had a contract with Captain Mata or Fares Rural, we had a contract with Fares Enterprises, and I was replying to him specifically and advising that I was sending a copy of the correspondence to Captain Mata, who had written the original letter.

You conclude that letter by saying, going to p.2:

10

"At no time have I ever stated or indicated that Metro is not prepared to meet its obligations - -" and so on.

That is the third-last paragraph. You conclude in the last paragraph:

"I think it would be more to the point and very much more effective if you handled these discussions yourself rather than asking third parties to intervene on a matter in which they have only second-hand facts which are not accurate."

20

Did you receive any response to that letter?---No, I did not.

Or the suggestion that Mr Fares should handle the discussions himself? Have you received any response to that? ---No. I did not receive any response after that date.

As at that date, 24th April 1980, were you producing meat for this contract?---No, we were not.

Were you in a position to do so?---Yes.

30

One of the matters of alleged repudiation raised in the pleadings, as I think you are aware, is the supply of a quantity of product to Oceanic Meats - - -

188. 11.27

MR McCUSKER (Continuing): - - - Oceanic Meats?---Yes. I am aware of that.

This appears at p.5 of the pleadings, sir.

"The defendant committed the sale of its available stock of lambs and hogget....(reads)....for a price equivalent to US\$1,483 per tonne."

TO WITNESS: Is that correct, that the defendant did sell to Oceanic a quantity of 500 tonnes of hogget carcasses?---Yes, that is correct. It is not entirely, exactly correct. In the contract that we were sharing with Oceanic in Iran, 500 tonnes of hogget was included out of a 12,000 tonne contract. 10

Apart from that sale, was there any other sale during that period made by Metro of either hogget or lamb?---No, there was no sales of hogget at that particular period. There would have been minor sales of lamb.

I should say export sales.

OLNEY J: Export to Iran you really mean, do you not? 20

MR McCUSKER: Yes, I do, sir.

WITNESS: There was no export of lamb at all to Iran.

OLNEY J: You had not produced any lamb for export to Iran since January?---That is correct, for Iran, your Honour. We did produce bits of lamb for the domestic market. We were regularly in that trade particularly in New South Wales and South Australia.

But producing lamb for export to Iran was a rather special thing, was it not?---Yes.

As at April 1980, had you resolved this question that you proposed to discuss with Mr Fares, were you in a position to proceed with the production for export to Iran of lamb and hogget?---Yes; if we had resolved our differences we could have started production on lamb and hogget for that contract and still produced it within a period of late July/early August. 30

CROSS-EXAMINED BY MR BURBIDGE QC:

MR BURBIDGE: Mr Dingwall, can I just understand your evidence; dealing with the period January 1980 until March, do I understand you correctly that you made a decision in January that you would suspend production of lamb and hogget for the Fares contract so far as the 40

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New South Wales and other abattoirs were concerned with the exception of Western Australia?---Yes, that is correct.

MR BURBIDGE: The reason you made the decision to suspend and gave that order was because you had received some advice from the Department of Trade. Is that so?---Yes. The advice from the Department of Trade early or late - - Just "Yes" or "No" will do?----Yes.

Furthermore, you made the same decision in relation to suspension so far as the Western Australian abattoirs were concerned, instructing them to complete the third shipment but no more. Is that so?---I instructed them to suspend production once they completed loading the third vessel. That is right.

10

So you produced no lamb and hogget for the Fares contract which was not, in fact, shipped?----Yes, we did produce some that was not, in fact, shipped - - -

WITNESS (Continuing): - - - fact shipped.

MR BURBIDGE: When and why?---It would have been the overrun at the time of the suspension. To fill the vessels we are producing a product which has a time factor involved for freezing, etcetera, and to make sure we had sufficient to fill the vessel we would have continued production to make sure of that and there would have been an overrun of a small tonnage.

Thirty four tonnes or thereabouts?---That is right.

Other than that every tonne produced for the Fares contract was, in fact, shipped. Correct?---Correct. 10

By early February, you had suspended production of the material for the Fares contract completely?----That is right.

You, of course, never resumed production at any time in respect of that contract, did you?---No. We did not.

The reason you say you suspended the production was because you had received certain advice from the Dept of Trade in or about November?---Yes, and what Menhaj told me.

You told us, I think, on several occasions during the course of your evidence, that the reason you instructed them to suspend was because of the sanctions situation. Is that correct?---Yes, it is the same subject. 20

That was something you never conveyed to the Fares interests, was it?---I do not know what you mean by that. We did convey it.

You never conveyed that you had, in fact, suspended all production for them because of advice which you had received from the Dept of Trade. You did not tell them that, did you? ---I believe I did in a telex in January. 30

Perhaps you can take us to it? Are you looking at p.136?---Yes.

You will see that para.1 seems to suggest you had had discussions with Mr Fares in late December, early January, after you had received this advice you say you got. "Political developments have been taking place since then"?---Yes.

Does that mean since you made the arrangement with Mr Fares to delay the two last voyages? Is that what that means?---No. I think all I am saying there is - -

MR McCUSKER: It is a double barrelled question, sir.

OLNEY J: Yes. I think it is.

MR BURBIDGE: I suggest to you that you had had discussions with Mr Fares. Is that right?---In January, yes.

I suggest to you that in response to Captain Mata's telex seeking some confirmation of your position you responded the same day. Is that so - the 23rd of January?---Yes.

You said:

"Since discussions with Rachid, political developments have been taking place."

10

What was the point in making reference to political change between the time of the conversation with Mr Fares and the time you sent your telex? What was the point of the reference to that, if there had been no agreement reached?---That there had been no agreement reached about what?

I say if there was no agreement reached why bother to mention the change that had taken place in the intervening period since you spoke to him?

OLNEY J: Do you mean agreement as to delaying the fourth and fifth shipment?

20

MR BURBIDGE: Yes, I do.

OLNEY J: I do not think the witness understood that.

MR BURBIDGE: All right, I will make it plain.

TO WITNESS: You heard Mr Fares say that after getting the shortfall telex of December he telephoned or he spoke to you on the telephone - - do you remember him saying that, in evidence?----That he spoke to me on the telephone?

Yes?---Are you talking about early January?

30

Yes. I am. You remember him saying that the other day? Within the last day or so you remember him giving evidence from the witness box to that effect, do you not?---Repeat what you say he said, please.

I suggest he said that after receiving the telex of 21st December - - -

77. 11.37

MR BURBIDGE (Continuing): - - - 21st December that he contacted you on or about 2nd January 1980. Do you remember him saying that?---Mm.

You remember him saying that he suggested, as a means of overcoming the obvious problem of dead freight, that the schedule be re-arranged. You remember him giving that evidence, do you not?---Something along those lines, yes, now that you recall it.

He says the arrangement that he reached with you was that the fourth and fifth voyages would be moved back in time in order to embrace the additional period that you seemed to need, on 21st December, to complete those two voyages. You remember him saying that? I am not asking you to agree but do you remember him saying that or have you forgotten?---I may have forgotten. He may have said it. I do not disagree that he said it at that particular time in his evidence. He could have but I do not recall it. 10

Do you mean you do not recall him giving that evidence within the last two days - yesterday, in fact. 20

OLNEY J: It was the day before.

MR BURBIDGE: The day before yesterday; time flies in Perth, your Honour.

WITNESS: No. I do not recall that particular information to that particular time in the discussions but I am not saying he did not say that.

MR BURBIDGE: Mr Dingwall, you were sitting right behind your counsel during that evidence, were you not?---That is true.

You were taking an interest it seemed?---Yes. 30

Passing notes forward to the table?---Yes.

Studying your diaries from time to time?---My appointment books, yes.

Appointment books if you wish, various documents that you had? ---Yes.

And do you seriously tell us that you have forgotten or that you cannot recall that he said he reached agreement with you about 2nd January for the re-arrangement of the schedule?---He may have done but I possibly missed it.

OLNEY J: Just a moment; you were asked quite specifically and you cannot remember that being said?---No. I cannot remember, your Honour. 40

MR BURBIDGE: Perhaps to enable you to answer my questions I should tell you that he asserted that he phoned you. Do you have p.127 in front of you?---Yes.

He said that by studying that schedule you had sent to him through Mr Villegas that it was apparent at some stage between voyages four and five as listed there, you would pass the 4000 tonnes production figure and by May would have reached the production figure of 5000 tonnes. You see that, do you not?---Will you say that again so I can follow what you are talking about? You are adding some figures up, are you?

10

Yes, I am. If you look at voyage four and five it is apparent, is it not, that you were at that time suggesting that you would be able to produce 5000 tonnes in total by May. Correct?---You are adding the fourth and fifth shipment?

Yes?---Yes, okay.

It follows, of course, that at some stage you would pass the 4000 production mark, would you not?---Between March and May?

20

Yes?---Yes.

And Mr Fares says that he suggested to you that by the simple expedient of moving the fourth voyage back in time to a point at about which one might expect you would have reached the 4000 tonne production mark, he could avoid the dead freight. Do you say you recall nothing of that evidence at all?---He could avoid the dead freight? I do not follow this, avoid the dead freight.

If you look at your own telex - - ?---If you are saying if he could ship at some point at that time, in other words have a shipment of approximately 4000 tonne at that time, that would be correct. I do not understand the dead freight reference.

30

Do not worry about the dead freight but you accept that he could have a full shipment of meat?---Yes.

But you recall, if I understand you, nothing of that evidence at all - - -

A155A. 11.42

MR BURBIDGE (Continuing): - - - at all? Nothing of his assertion that such an agreement was reached?

MR McCUSKER: I think my learned friend should be more specific, sir.

MR BURBIDGE: I withdraw the question.

TO WITNESS: Could I just go on a little further? You say that you went to Iran in early 1980. Is that so?---No, I did not. I said that I went to Iran in late February.

You arrived on Saturday, February 23rd? Does that sound right?---I can give you the exact date if you want me to check it. 10

About February 23rd. Is that right?---Yes.

Did you at that time meet a Mr Rahjah Khan?---Yes, for the first time.

I take it you did not meet him by chance at the airport, did you? ---No.

You met him by arrangement?---I met him by arrangement, yes.

Did you engage his services for some purposes?---No, not at that time. 20

Did you have some agreement to discuss engaging his services? ---Not at that time.

Did you in fact engage him?---At a later date, yes.

For what purpose?---To act as an agent for Metro Meat.

For what purpose did you require an agent for Metro Meat?---To do the day to day negotiations in Iran with the IMO.

Negotiations for the sale of lamb, hogget and young mutton? ---No. At that particular time it was for the sale of mutton and what turned out to be a small quantity of hogget. 30

Which was, was it not, the only hogget at that time available? ---In respect of what? From Australia?

Yes?---No, I do not think that was the case at all.

You have told us in evidence today that you were, when you wrote your letter of 24th April, in a position to supply the balance of the Fares contract. You have told us that?---That is right.

You say it was not beyond your capacity at that time to fulfil

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the balance of the two shipments before early August?  
---That is correct, yes.

MR BURBIDGE: Have you ever suggested to anybody that there was not any lamb available in Australia at that time?  
---No, I have not ever suggested that.

That would be quite untrue. There was, was there, ample supply of lamb?---No, I would not there were ample supplies of lamb but there were supplies of lamb.

Ample to meet Mr Fares's obligation to the IMO?---Yes, the 2500 or 2600 tonnes still to ship, yes. 10

You were however in Iran in order to negotiate the sale of meat. Correct?---Yes, that is correct - mutton.

Only mutton?---Yes. I went there with the intention of discussing mutton and that was what we originally discussed.

And you moved on to another topic, did you?---Yes.

What was that other topic?---The Iranians requested that we offer them 1000 tonnes of hogget.

Did you discuss some long term arrangement with the Iranians at that time?---Not immediately. We did that, I think, the last day or so we were there out of the six days. 20

Just get the period in context: You arrived about Saturday, 23rd February?---Yes.

You were back in Australia by when - 16th or 17th March?---About a week I was there, I think - six days.

You were in Iran for a week, were you?---That is right, approximately a week, yes.

The discussions that you had were approximately the last week in February?---Yes. 30

In that time you arranged a contract for the supply of mutton. Correct?---Yes.

A contract for the supply of hogget. Correct?---Yes.

You arranged longer term contracts for the supply of lamb and hogget and young mutton?---No.

What did you arrange?---We arranged a protocol agreement with the Trade Commissioner of Australia for, I think, approximately two years ahead of the approximate tonnages that could be available from Australia through two organisations - Oceanic and Metro Meat.

MR BURBIDGE: You would regard yourself as a man of honesty,  
I take it?---I hope so, yes.

A man of integrity in your dealings in commercial matters?  
---Yes.

It would, of course, be neither honest nor demonstrative of  
integrity - - -

X114A. 11.47

MR BURBIDGE(Continuing)- - - integrity to tell lies about somebody else's position, would it?---No. It would not.

It would be quite inimicable to that position to say something about Mr Fares's contract which was not true, would it not?---For who to say something about Mr Fares's contract?

For you to say something to the IMO about his contract that was not true would be dishonest, would it not?---  
If it was not true, yes.

10

You see you have assured this court that there was ample supply of lamb and hogget from Australia to enable Mr Fares to complete the quantities which he had contracted for with you, whatever they were?  
---I have given my personal opinion of what could be available, yes.

When you got to Iran, did you expect to meet a Mr Ghavimi?  
---Yes. I did. From Semetco?

Yes?---Yes.

Did you, in fact, arrive in Tehran with Mr Stewart Couzens, whom you have mentioned on a number of occasions?  
---Yes. I met him in Bangkok. I arrived in Tehran with him, yes.

20

He, of course, is the Oceanic man, is he not?---Yes. He is the manager of Oceanic, or he was at that time.

I take it you did not meet him by chance?---No. That was arranged about two days before. I left to meet him in Bangkok.

However, you had had discussions with Oceanic for quite some time prior to that, had you not?---Yes; for two days.

30

You say no discussions had occurred between any representatives of Metro and any representatives of Oceanic about the possibility of supply jointly to Iran of frozen meat?---Not prior to about the 19th of February, no.

Did you, in fact, have discussions with the directors of the IMO the day you arrived?---I am not sure if it was the day I arrived. I had discussions with the directors of the IMO either the day I arrived or the next morning after I arrived. I am not quite sure. If I could look at my diary I could probably check for you.

Yes, please. Do look at anything that would assist your recollection?---I think I made notes at that time.

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MR BURBIDGE: Perhaps you might look at Saturday, February 23rd?---Yes. I met the IMO at 2 p.m. that afternoon. There were four directors.

You made some notes, did you, about some of the matters of conversation you had?---Yes.

About the prices of mutton and hogget?---I made some notes about offers they had received from other parts of the world and from Australia.

Was it at that time that you confirmed what you believed about the Fares contract prices?---No.

10

You told us you checked that out while you were in Iran. I wondered what you meant by that?---When did I check the - -

No, what you did to check it out?---I arranged with Rahjah Khan, who was the agent for Oceanic, to specifically look for three things; the prices in the contract - -

You had a copy of the contract, did you?---No. I did not have a copy of the contract. The contract was in the files of the IMO.

Did you have access to it through Mr Rahjah Khan?---I had access through him to go and see that file, yes.

20

So you were under no doubt at all as to precisely what terms Mr Fares had negotiated with the IMO from about the time you were in Iran in February, 1980 - - -

MR BURBIDGE (Continuing): - - - in February 1980. Is that not so?---No, that is not correct. There were three things only at that particular time that I requested. I did not see the document.

Yes, but you had access to it if you wanted to?---Yes, and I specifically asked for three points to be checked.

I did not ask you that. You had access to the full document, any aspect you wanted to look at. Correct?

MR McCUSKER: I think my learned friend should define what he means by "access".

10

MR BURBIDGE: I withdraw it.

OLNEY J: Perhaps to look at is not quite to find out about.

MR BURBIDGE: I withdraw it.

TO WITNESS: You had a copy of the contract from the middle of 1981 at least, a full copy of his contract, did you not?---Yes.

You knew that it was the Parsi version of the contract as he had signed it and as it was lodged in the IMO. You knew that?---Not for certain. We had a copy that was sent out to us from Iran which we believed to be but we had no certainty that it was.

20

You were not under any real doubt that it was his contract, were you?---No, I do not think we were.

You produced that contract as your counsel opened the other day. Correct?---That is correct, yes.

Although you had an English translation of it, did you not? ---Yes, we did.

It said at the top: "Contract Negotiated By Dr Jean Boueri On Behalf Of Mr Rachid Pares" - all that was familiar to you, was it not?---Yes.

30

Do you seriously say that you did not think that that document was a relevant document to produce before your counsel opened yesterday? Do you say that?---No, that was not my decision.

I see. It was someone else's decision, was it? All right. I take you back to the meeting with the IMO, Saturday, 23rd February?---Yes, okay.

Were you advised by the managing director of the IMO that the IMO authority required lamb and hogget if possible? ---Yes. He asked me if we could supply lamb and hogget. Sorry, he did not ask me, he asked Rahjah Khan, who was acting for us.

40

MR BURBIDGE: You were present, were you not?---I was present, yes.

The effect of it was that there was negotiation proceeding between Metro and the IMO. Correct?---No.

Or Metro and Oceanic?---No, that is not correct.

Tell us what is correct?---There were negotiations and discussions going on between Oceanic and the IMO through Oceanic's agent.

I see, and you had an agreement pursuant to which you would provide 50 per cent of the material sold?---No, we did not. 10

You did not?---No.

What were you doing there if it was discussion between Oceanic and IMO?---You asked me a question and at that time, no, we did not, because I had not seen Mr Ghavimi at that stage from Semetco.

OLNEY J: At that time what were you doing there?---Your Honour, I was principally finding out what we would call the lie of the land in Iran in respect of contracts, possible contracts, etc. 20

You are talking about the particular meeting which I understand you - -?---Well, that was the first meeting I had with them and at that stage we had not offered anything, we were discussing the general situation in Iran of meat supply from different parts of the world and from Australia and from New Zealand. There were no offers made or discussions about offers at that particular stage.

MR BURBIDGE: You were in effect having a preliminary negotiating session, were you?---Yes. This is traditionally what you would do, normally. 30

You gave them some information and they gave you some information, sounding out each other's position, you might say? ---Yes.

An ordinary early negotiation situation, was it?---Yes, you could put it that way.

They told you that they wanted lamb and hogget or, as a last resort, hogget and young mutton, did they not? Something to that effect?---Yes.

Then the topic of conversation moved, did it not, to contracts which the IMO already had. Is that not correct? ---I do not know. I cannot recall exactly whether it was that afternoon or not. Based on my diary notes here, we discussed - - - 40

X65. 11.58

WITNESS (Continuing): - - - here we discussed - -

MR BURBIDGE: Do not tell me that. Just answer the question, Mr Dingwall?---I am asking you to be specific as to that particular meeting.

Your answer is, you do not know?---Yes, all right, I do not remember.

You were only there for one week. Within that time the topic of conversation moved to contracts which they already had with Australia, did it not?---Yes; there was some occasion when that came up. 10

Do not worry about the particular day but on one of those occasions it did so, did it not?---Yes.

And did they disclose some part of their position to you in that regard? Specifically, did they say they had two contracts covering that type of product already? ---Lamb and hogget?

Yes; from Australia, of course?---Yes. I think they discussed that they had some contracts from Australia. I do not know whether it was two or not.

Two; one signed and one unsigned. Correct?---No. I do not recall 20 that part of it.

I suggest that you were well aware that they had an unsigned contract from Semetco and a signed contract with Fares Enterprises, Beirut, Lebanon. You knew that, did you not?---Are you talking about when you talk Fares, his existing contract?

Yes?---Yes. I was aware of that, of course, before I even went there.

Mr Dingwall, let us not fence. You knew perfectly well that the two contracts of which the IMO spoke was one with Mr Fares and the other with Semetco, did you not?---I 30 do not know. They did not refer to me about a contract at that stage, whether you are talking about a Fares contract or a Semetco contract, about signatures.

Did they tell you that they held two contracts, one signed and the other not signed for this type of product from Australia? Did they tell you that?---I do not specifically know whether they did or not. If I can check my notes I might be able to clarify that. 40

Please do; perhaps you might look at your notes for Sunday February 24th. That might help?---Yes. There is a note I have made there.

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MR BURBIDGE: I am not interested in the note. I just want you to refresh your memory. Do you agree now that they disclosed to you that they held two contracts, one signed and the other not, for this type of product from Australia?---No. I do not agree with that. The information that I have here says - -

I am not asking you about that. I do not want you to read aloud from your diary, Mr Dingwall, just answer my questions, please. What was the name of the managing director? Was it a Dr Ourandi?---Of the IMO, yes.

10

Did you advise Dr Ourandi that the contracts which he had would not be met?----In respect of a contract he discussed with me is the one that I have a note of here. I told him that that appeared to be some contract that I had had inquiries from in Australia and that I did not think it would be met. Yes, that is true.

You have answered that in respect of one contract, have you not?  
---That is right.

What about the other one, the signed contract? Did you tell him that that would not be met?---No. I did not tell him that.

20

Are you quite certain?---He asked me a question of a different matter altogether.

It would be quite untrue to say that you advised Dr Ourandi that the contracts he had would not be met? That would be quite untrue to say that, would it?  
---That is untrue, as far as I can recall, yes.

As far as you can recall? Mr Dingwall, if you had said something to that effect, namely that the signed contract he had with Mr Fares - - -



X10. 12.03

MR BURBIDGE (Continuing): - - - Mr Fares, if you had told him that that would not be met - -?---I did not tell him that would not be met.

That would be a terrible thing to do, would it not - quite dishonest?---I would not have said that to him. I did not say that.

Why would you not say it - because it would be dishonest, would it not?---It would have been, yes, under the circumstances.

The circumstances being that you were in preliminary negotiation for products of the same type?---No, the preliminary negotiation was for a product of another type; mutton. 10

Did you tell him - that is, Dr Ourandi and the balance of the directors of the IMO - that only mutton was available in Australia until August? Did you tell him anything like that?---Yes, I did.

Was that true?---It was true in respect of our ability to supply them any lamb or hogget.

So you say you could not supply any lamb or hogget to IMO until August?---Yes, because we already had a contract with Fares. 20

So you had just enough product to supply through Fares? ---That is one of the reasons why we only offered them mutton.

You were keeping it, as it were, in reserve against your obligation to Mr Fares?---That is correct. We would not have offered any of that product out because we were in the off season for lamb and the amount of lamb that would be available would have been only sufficient for that type of tonnage. 30

And you have already agreed, I think, that to say something which was contrary to that position would be to take an unfair commercial advantage and in that sense to be dishonest?---An unfair commercial advantage?

To say that Mr Fares could not meet that contract?---I did not say Mr Fares could not meet that contract.

I know, and if you did it would be dishonest, would it not? 40

MR McCUSKER: It is either a matter of comment or it is - -

MR BURBIDGE: I want you to look at this document. Would you look first at p.1? Is that document which you have there a telex dated the 20th of March 1980 sent to

you by Mr Ghavimi? Do not look at p.2 for the moment; we will come to that soon enough?---This first one you are talking about?

MR BURBIDGE: The first one. Is it a telex from Mr Ghavimi to you?---The first one is a telex from the Australian Embassy.

To be more accurate, the first one is - -

MR McCUSKER: Your Honour, my learned friend - -

MR BURBIDGE: I am sorry, I withdraw the question. To be more accurate the first one is a telex from you to Mr Terry Hunt, is it not, setting out the text of a telex received from Ghavimi of Semetco? ---Yes.

10

And your reply? Is that correct?---Yes.

Does it not read, "Attention, Mr Terry Hunt". Who is he? ---He is the trade commissioner, or was the trade commissioner, in Iran at that time.

So you sent to Mr Terry Hunt, did you not, a telex received from Ghavimi of Semetco and your reply?---Yes.

The first part of your telex is the quote which comprises Mr Ghavimi's telex to you? Is that correct?---The first part of my - -

20

The words, "quote" through to the word "unquote"?---Yes.

It was setting out what he said had happened between you - without worrying about what it was?---Yes.

And your reply follows, does it not?---Yes.

I want to take you now to p.2, point 3. This is what you telexed back to Mr Ghavimi, I take it - a copy being sent on to the Australian Trade Commission?---Yes.

It says, in part - and I want to find out which parts are accurate and which are not - under para. 5 - - -

30

MR BURBIDGE (Continuing): - - - para.5:

"On arrival in Tehran I was expecting to meet someone from your company at the airport or, at the very least, a message left at the hotel."

That is accurate, is it?---Yes, that is right.

You go on to say:

"As this did not occur I decided to organise a meeting with the IMO."

10

Is that true?---It is true to the extent that a meeting was arranged with Stewart Couzens and his agent with the IMO, yes.

It goes on:

"And at least find out personally what meat they were prepared to buy from Australia."

Is that true?---Will you let me read it, please? Yes. That is what it says.

20

I know it is what it says. Is it true?---Yes.

It goes on:

"Dr Ourandi advised me at the meeting that they required lamb and hogget or, as a last resort, hogget and young mutton."

Did he advise you to that effect?---Yes.

I read on:

"And that they held two contracts, one signed and the other not signed, for this type of product from Australia."

30

Did he advise you to that effect?---He obviously did because I have said it here, yes.

It goes on:

"I advised Dr Ourandi that the contracts he had would not be met."

You nod; does that mean that you did advise him to that effect?---Obviously I have if I have said it there.

MR BURBIDGE: So it is clear you did advise Dr Ourandi that the two contracts he had, one signed and the other not signed, for this type of product from Australia would not be met?---I do not think that says that - - You have a situation, unless you understand what was going on here between Metro and Ghavimi - What was said in respect of advice, we advised Dr Ourandi, was not necessarily 100 per cent accurate in saying that to Ghavimi.

10

Do you mean you were saying something that was not true to Mr Ghavimi?---I am saying - - You have to understand what went on between Ghavimi and Metro and what I am trying to do with Ghavimi at this stage in giving him information, because Ghavimi had contacted us - -

I am not asking you that?---Unless you understand that you cannot understand why I am saying some of the things in this telex.

20

OLNEY J: Mr Dingwall, I hope that this is one of the occasions, unlike your dealings with Mr Ghavimi, when you will be giving us the truth?---I have been trying to do that, your Honour.

It seems that you have a variable standard. Carry on, Mr Burbidge.

MR BURBIDGE: Do you say that although you said that to Mr Ghavini that it was not true. Is that what you say?---To the extent that what I told Mr Ghavini had no relationship to what I necessarily would have discussed with Dr Ourandi. I would not disclose everything to Mr Ghavini that happened in my discussions with Dr Ourandi.

30

You mean you would say things to him which were not necessarily true in order to give yourself a better position? Is that what we are to understand from that answer?---I think it is a tactical situation that was going on at that time with Semetco and Metro.

Much the same as you had a tactical situation going on with Mr Fares. Is that right?---Yes. The normal type of tactical situation in business.

40

And one of those tactical considerations as far as Mr Fares was concerned was to demand additional money because you knew that he was going to encounter a loss of \$375 to \$385 per tonne in respect of dead freight space - - -

MR BURBIDGE (Continuing): - - - freight space. That was a tactical consideration too, was it not?---No. It was not.

I thought you told us earlier that, in fact, you had discussed him contributing towards the additional \$253 which Metro had to pay for the WALB lamb, because you knew that his freight costs would be all up \$375 to \$385 per tonne. Did you not tell us that?---Yes. I told you that the discussion I had with Rachid Fares was that I thought he should contribute to that extra cost so there was not going to be dead freight.

10

But you told us it was because you knew he would have to pay so much for dead freight you thought it reasonable that he should pay a lesser sum to have meat in that dead space?---No. I do not think I said that at all.

It sounds a bit like blackmail?---That is what you are trying to make it out to be.

MR McCUSKER: With respect, sir - -

MR BURBIDGE: I withdraw that and I apologise for it, too, sir. Perhaps it is unnecessary.

20

MR McCUSKER: It is heckling the witness, sir, and it really is unfair.

OLNEY J: Yes. I think it is perhaps a rather extravagant way of putting it.

MR BURBIDGE: Perhaps the actions can speak for themselves, sir.

TO WITNESS: I will take you back to the telex you have in front of you and I will ask you again did you advise Dr Ourandi that the contracts he had would not be met? Yes or no?---No. I advised him differently. 30

So you have misled Mr Ghavimi. Correct?---Possibly, yes.

And the Australian Trade Commission, of course?---No. I have not misled the Australian Trade Commission.

Did you not send a copy of his telex and your reply to a Mr Terry Hunt of the Australian Trade Commission?---Yes. I did.

Did you send some explanatory note to say, "Notwithstanding what I have in my reply it is not true"?---No. I did not.

Accordingly, I suppose, unless Mr Terry Hunt was sufficiently sophisticated about your dealings to know that it was not necessarily true, he would have been misled too, would he not, as well as Mr Ghavimi?---He may have been. I do not know.

40

MR BURBIDGE: Did you say to Dr Ourandi that only mutton was available from Australia until August, 1980, when the new lamb and hogget season commenced?  
---Yes. I probably did.

Was it true that only mutton was available from Australia until August, 1980?---As far as I was concerned, taking into account that we still had a commitment for Fares at that time, yes; in other words, he was asking that in relation to what we could offer. We could only offer mutton so he asked can we offer the other and we said no. 10

You were seeking to persuade him to take mutton in lieu of lamb and hogget, were you not?---That is correct, yes.

The reason was because you did not it or it was too expensive to produce lamb and hogget. Correct?---We did not have any additional tonnage or the likelihood of any additional tonnage over what we were committed for.

You did not actually give that to Mr Fares, did you?---Give what?

The reserves you had to meet his contract. You did not actually sell it to him at all, did you?---I do not understand what reserves you are talking about. 20

I will tell you. You told us that the only lamb and hogget available to you before August, 1980, was that which you held in reserve to meet the Fares commitment. Correct?---You are talking about as a reserve; in other words, the availability of that period of time, yes.

Yes. What did you do with it when you did not sell it to Mr Fares?---We did not sell it at all as far as an export contract was concerned. 30

You say it was available to you?---What I am saying is that we would have had enough lamb available in New South Wales and South Australia to produce the 2500-odd tonnes, or whatever the figure exactly was, of lamb, over the period of time from the time I was there, the end of February to the end of July, that we could have got enough lamb to produce for export that tonnage, yes. But I do not call that a reserve in that term. We do not have stock on hand in store. 40

That is a highly desirable and highly saleable product, is it not?---That is right.

Why did you not produce it and sell it to the IMO, who were obviously anxious to have it, when you did not sell it to Mr Fares - - -

92A. 12.18

MR BURBIDGE (Continuing): - - - Mr Fares?---Because there would have been a profit in selling additional tonnages of that lamb anyway at that time. There would not have been any profit in producing lamb for export at that time of the year.

You mean it was too costly to produce?---The total cost, yes, would have been, in my opinion, at that time of year too expensive, when you take all the costs into account, to offer export products.

Yes, and far too expensive to meet Mr Fares' commitment?---No. It had nothing to do with meeting Fares' commitment. We had a commitment there. We would not commit any other tonnage outside of that.

10

You go on in your telex:

"This same advice was given to the IMO by Mr Couzens."

Is it the fact that Mr Couzens also advised Dr Ourandi that the contracts, one signed and the other not signed, would not be met because only mutton was available from Australia? Did Mr Couzens tell him that?---I cannot recall whether Mr Couzens said that or not but I think what I am saying there is that similar advice had been given by Mr Couzens because Mr Couzens' opinion on availability of lamb would not have been any different from mine. In fact he would have had a harder problem because he is not running slaughter plants.

20

What I want to know is whether or not you lied to Dr Ourandi or whether or not you lied to Mr Ghavimi and Mr Hunt in respect of this matter. Did you, I ask you again, tell Dr Ourandi that his two contracts would not be met?---No, I did not tell Dr Ourandi that it would not be met.

30

Can you tell us why you told Mr Ghavimi that you had said that? What was your point in telling him that?---The point about it is that Mr Ghavimi had contacted Australia some time in the previous couple of months and we had received inquiries from, I think the name is, Stern and another company called Okkas in Melbourne inquiring about mutton from Australia. I got led astray thinking that there were requirements from Iran for mutton.

40

You mean you set off under a misapprehension all together?---No, not at that particular stage. I am talking about - - The first inquiry, I think, was in December and then there was another one in January from two different sources. They wanted offers of mutton from Australia to Iran.

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DOC. 5 - Defendants evidence - 25.11.82  
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MR BURBIDGE: How were you led astray?---I was being led astray because the people who gave me the information were getting their information from Iran evidently and they were misinterpreting the translations from requirements for lamb as distinct from requirements for mutton because the words are very similiar, apparently, in translation and it was a misinterpretation somewhere along the line that they were asking for mutton.

Tell us why you told Mr Ghavimi something which was not, you say, true. Tell us why you told him that you had said to Dr Ourandi that his contracts would not be met?



WITNESS: Yes, I can follow now exactly what is involved - what had happened at the time.

MR BURBRIDGE: Let us understand, then: Do you say that notwithstanding what you have written there, you did not in fact advise Dr Ourandi in the terms suggested. Is that the starting point?---That is right. I advised Dr Ourandi different to that which I have said there, but for Ghavimi's purposes what I discussed with Dr Ourandi is virtually the same thing.

I see. Tell us what you did advise Dr Ourandi about the two contracts which he had for that product from Australia? What did you tell him?---I told Dr Ourandi on the case of the contract he had which now I realise was unsigned, to which you referred earlier. 10

That is Semetco, is it not?---That is right - that that would not be met because those people had been contacting us and telling us they wanted to buy mutton, and it was only then that we realised that they were actually negotiating for lamb and hogget.

I see - so Semetco - -?---That is why I told him that would not be met, because it was the wrong product they had been advising us about. 20

So you told Dr Ourandi that his Semetco contract for lamb and hogget would not be met - for what reason?---Because the people who had been negotiating with him for lamb and hogget had been advising us they were interested in mutton. They did not ask for lamb and hogget; they asked for mutton. In our discussions with them that is what we were talking to them about; in other words, we were asked to give indications to Semetco as to whether we could offer mutton. When I got to Iran I find out that they had actually been talking to the IMO about lamb and hogget, and that is the reason why I told them that would not be met, because it is a different product. 30

What did you tell him about the contract that was signed - - -

MR BURBIDGE (Continuing): - - - was signed?---Dr Ourandi asked me a question about he believed Metro was supplying Rachid Fares's contract. I said yes, we had been. He said, "What is the position, then?" I said, "At the present time it is not operating, we are in suspension, because we have a difficulty with Mr Fares" or something along those lines.

'Because we are having a trade sanctions problem with Iran"?  
---No. I do not know whether I said trade sanctions. 10  
I said we had difficulties at that time with the Fares contract. I do not know exactly whether I said sanctions or not.

You can hardly have said that the reason you were suspending Mr Fares's contract was because you were having trade sanctions problems with Iran when you were there to deal with Iran yourself. I do not suppose you really said that, did you?---There are two things involved here. I will explain the reason for why I would be in Iran, despite the fact that there was a possibility of sanctions. 20

I wonder if you would just answer the question? It would be quicker. So you told Dr Ourandi you had suspended delivery under the Fares' contract to the Fares' interests, did you?---I told him we were not producing for the Fares contract at that time, yes, because of certain reasons.

You say you did not tell him you were not producing because only mutton was available from Australia. You did not say that?---No. I did not say it in that way. 30

Then what reason did you give Dr Ourandi in fact for your suspension of the Fares product? What did you tell him was the reason you had suspended it?--- I think at that particular time it would have been late February. I would have possibly mentioned the sanctions and the fact that we had a dispute with Fares. I do not know whether I told him both or not.

But the reason you have told us that you suspended the production in February was because of the advice you had received from the Trade Commission, from the Dept of Trade?---Yes, we did. We did it for that purpose initially. We did it for the period we suspended production in January and early February in Western Australia. We kept that suspension going because of that reason but in early February I requested certain requirements for payment from Fares. We had not received that and that was some time before I went to Iran. 40

So in February you told Dr Ourandi that you had suspended the Fares production (1) because of some problems

about sanctions and (2) because they were not paying their bills. Is that what it was?---I probably did not discuss with him sanctions at that stage. I probably discussed it on the basis that we had a dispute with Mr Fares.

MR BURBIDGE: Over money?---No. I do not think I discussed money with him at all. I would have used the term "We have a dispute with Mr Fares".

Did not Dr Ourandi say, "Is it the type of dispute that is likely to be settled?" Did he not want any detail? 10  
---No. He did not ask for any details and I would not have given him details.

So you left him firmly with the impression that because of some dispute, delivery or production under that contract had been suspended?---Yes - had been stopped.

You then say in your telex, "After this confirmation the IMO then decided to review their policy and consider mutton as a possibility." Is that right?---Yes.

So you are assuring the IMO that they would not be getting any more lamb and hogget and that for that reason they should be considering mutton?---No. I was not assuring them on that at all. 20

But you did make a contract to sell them mutton?---Mutton, yes.

Plus what was left of the hogget?---I was not assuring him of what you said earlier.

Is it true that after this confirmation, that is by you and Mr Couzens, the IMO then decided to review their policy?---The IMO definitely reviewed their policy. They did buy mutton so I presume that was the answer to that - - -

WITNESS (Continuing): - - - to that.

MR BURBIDGE: Their policy up to that time having been to require lamb and hogget only. Correct?---It had been for some number of years, yes.

You had succeeded in persuading them, had you not, that because of the likelihood that they would get no further lamb and hogget from Australia before August they ought to accept mutton?---I would have to qualify that. I did not assure them of that at all. I did not say they would not ever get lamb and hogget from Fares under his contract but what they were asking for was bigger tonnages of product in addition to that and I assured them that there was not the availability and if they wanted additional tonnages they would have to order mutton. 10

Why did you tell Mr Ghavimi that which you have agreed would be dishonest if untrue? Why did you tell him this? ---The problem I had with Mr Ghavimi is that he did not understand what had occurred. He had given us a lot of back and forward discussions about a product that was completely different from what he was really negotiating. In sending this up to Mr Ghavimi I was answering the telex he had sent to me. 20

His telex dealt with assertions, if you go back to it, that you had disregarded agreed quotations, against all business rules and formalities referred to another firm, and then he finished up with a suggestion that you should respect the loyalty and observance of words and writings already effected. That seemed to be the burden of his complaints?---Yes. His complaints were completely unfounded though. 30

It did not seem to have anything to do with misunderstanding or mistranslating words in a contract, did it?---What Ghavimi is saying there is completely inaccurate and completely not in accordance with the facts.

So you replied with a telex of the same kind - one that was inaccurate and did not accord with the facts?---No, I did not reply with a telex of the same kind. You are picking on one particular factor. I believed in telling him of that situation it was a fair understanding of what the situation was in Australia. In other words, he could not expect to buy any lamb or hogget from Australia. 40

Might that document be marked for identification, please? If I am able to put it in at this stage, your Honour, I would seek to tender it.

OLNEY J: Is this not a telex the witness has sent himself?

MR BURBIDGE: Yes, it is, your Honour. I am told the original has been produced, your Honour.

OLNEY J: That would be marked as an exhibit.

MR BURBIDGE: May I see it, your Honour? It seems to have an extra page stuck to it somewhere. I am sorry, it is complete. My copy is deficient one page. I will tender the whole thing, your Honour.

EXHIBIT EXHIBIT 79 .... Telex sent by K. Dingwall.

MR BURBIDGE: I do not think I need read that to your Honour.

OLNEY J: Unless there is anything to which you wish to draw my attention, I will read it myself in a more leisurely fashion. 10

MR BURBIDGE: Not at this stage, your Honour.  
TO WITNESS: Mr Dingwall, I would like to ask you about some of the minutes of the defendant company that have been produced to us. I will perhaps hand you, as a matter of convenience, photostat copies of those which we have been given - - -

38. 12.39

MR BURBIDGE (Continuing): - - - been given. Do you have those minutes for 25th January, 1979 amongst those?---Yes.

If I understand your position in relation to the January situation, did you not tell us that you had no recollection of re-arranging the voyages with Mr Fares by telephone? You told us you recall nothing of that?---Are you talking of the discussion at the beginning of January?

Yes. I am talking about the 2nd or 3rd January?---Yes.

10

We are in agreement, I think, that Mr Fares gave evidence that he believed that he had agreed to re-arrange schedules for the fourth and fifth voyages?---Yes.

You say that you have no recollection of that or it did not happen?---No. I do not recall that happening at that time. I recall it happening at a later date in January, yes.

You then received a telex from Captain Mata in mid-January and you say, if I understand your position, that you spoke to him but did not agree to do it. That is what you told us in your evidence a few minutes ago?---I spoke with Mr Fares or with Captain Mata?

20

You said you rang Mr Fares on the next day, 24th January, or rather, he rang you?---That is right.

It was urgent that he get confirmation and you said, "I was not prepared to confirm those dates, told him we were not prepared" and so on. Do you remember that?---That is right, yes.

I take you to the board minutes of 25th January under the heading "Iranian market" in the centre. "Mr Dingwall reported that the third shipment of lamb and hogget carcasses is being loaded in Fremantle now. Two more shipments are due in April and July." Do you see those words?---Yes.

30

If you were not prepared to agree how was it that you allowed the board to record in its minutes the following day that two more shipments are due in April and July? ---Because we still had a commitment to ship in April and July because I had spoken to Mr Fares the night before.

40

And refused to confirm the dates, you have told us?---That is correct, because I did not want him to confirm dates based on our advice at that stage because of the uncertainty of the sanctions situation.

MR McCUSKER: With respect, your Honour, my learned friend should read the whole of that minute.

MR BURBIDGE: I will put it in.

TO WITNESS: "But uncertainty exists until the position on sanctions is clarified by the government."?---That is correct.

I was asked to read that. How did you come to tell the board that what amounts to a re-scheduling had taken place and been agreed to, "are due in April and July"? How did you come to tell them that?---I am telling the board, in those words, that we still had two further shipments to go under the contract and that - -

10

What about the dates, Mr Dingwall?---The dates are April and July.

When were they agreed to?---They were not agreed to.

Why did you say that they were due? Why "due"?---I think you are changing the impression of what we are giving to the board. They are still due under the contract. I do not know that I even used the word "due". That is a minute taken by the secretary - - -

WITNESS (Continuing): - - - the secretary. He is abbreviating a discussion. I do not know whether that is an exact word that was used, for example.

MR BURBRIDGE: You say that it is not an accurate reflection of what you told the board; is that correct?---No, I am not saying that at all.

Do you not sign the minutes as a true and correct record in the following meeting?---The chairman signs the minutes as a true and correct record, and if we feel as directors there is some amendment necessary to be made, after we see the minutes, it will be corrected at the next board meeting. That is the normal practice. 10

Why did you not speak up at the next meeting and say: "These are not due in April and July. We have been asked by Mr Fares but I have not agreed to it"? Why did you not say that?---But they are still due under the commitment of the contract.

On those dates?---But you are asking me why did I not advise the company whether they were confirmed or not; that did not arise. It was just a matter of informing them generally about the situation, that three shipments had gone, we still had two shipments due, and indicating that it was going to be an April/July shipment. 20

On 25th March 1980 - do you have the minute there in front of you?---Yes.

Under heading "Live Sheep":

"Mr Dingwall reported that The Persia was in a week ago."

Do you see that?---Yes.

That is Mr Fares' vessel for carrying live sheep - correct?---That is right. 30

Continuing:

"We shall probably not be supplying this ship again."

Why was that?---Because we had been informed, I think, at that stage by Fares that we would not be loading any further vessels in South Australia for Fares. I asked for clarification of that because they stated South Australia, and I think I telexed back and they clarified it by saying: "No more sheep ships will be supplied by Metro in Australia". 40

You say that you were so concerned about the sanctions possibility that you were prepared to suspend production for



Mr Fares. Is that correct?---Yes.

MR BURBRIDGE: Were you yourself concerned that those same sanctions might affect your capacity to supply the mutton and hogget which you had negotiated in February? ---No, I was not concerned for the reasons that in the case of mutton we have major other markets around the world, so if we produced and had problems with sanctions being invoked we could ship that mutton to the Japanese market or one of the other major markets. We had a very readily available alternative market. 10

What about the protocol for the production of lamb and hogget? That related to production through 1981 and 1982, did it not?---That is true, yes.

You were not concerned that that product would be affected by the sanctions that persuaded you to suspend Mr Fares' production?---Because that was something a fair distance in the future, and it was a protocol agreement only. It is not a fixed contract. We are not committed to that; it is a protocol, which is similar to what the New Zealanders had for two or three years in front. 20

Did you report to the board on 5th May 1980 that in the event of a blockade of the Persian Gulf alternative ports of discharge "are available in Pakistan and Russia"? ---Yes, this is the board minutes.

Yes, the board meeting relating to the Iranian contract - is it not?---For mutton, yes.

It states:

"Mr Dingwall reported that the first shipment of carcase mutton is being loaded at Fremantle now" (5th May 1980). 30

Is that correct?---Correct.

And then:

"In the event of a blockade of the Persian Gulf alternative ports of discharge are available in Pakistan and Russia."

Correct?---That is right.

It does not say anything about selling it somewhere else in the world, simply discharging it at a different port in the event of a blockade - correct?---That is correct, yes. 40

I would take you right back to July of 1979. You say that you made a few notes on a diary the next morning, and you maybe made some notes at 2.00 a.m. when you spoke on the telephone. Is that right?---Yes. I was not sure

what notes I made at that time or what notes I  
made the next morning.

MR BURBRIDGE: Or even on a third occasion, I think you said?  
---Yes, that is right.

I take it that you have not amended your diary in any way - - -

07. 12.50

MR BURBIDGE (Continuing): - - - in any way, or have you?---I have not amended my diary that we are talking about for - - When I say amendment, I do not amend my dairy. I make notes sometimes in the future - -

I think you know what I mean, Mr Dingwall. Did you, in fact, go to your diary and change or add to it?---No, I have not.

Are you sure?---The only time there would have been any variation to, or any item listed in the diary going backwards, is when an issue comes up at a later date and you refer back to it and you may make some notes on the piece of paper at that same date because you are referring to something that has happened in the past and you tend to do that occasionally. 10

You say that the notes that appear on your diary for July 2nd are all notes which you made that day or the following morning?---No. I do not say that at all.

I see; so that part of the material you have written in your diary for Monday, July 2nd, has been added at some later stage. Is that right?---It could have been, yes. 20

Will you look at it and tell us? Do you see those notes?---Yes.

Do you say that part of those have been written in at some later date than July 2nd or perhaps the 3rd?---Yes. I am sure they have.

Which parts have been written in subsequently?---I would say - - There is a note there, "Telex from Fares, 27 tonnage not as we agreed. See telex IDP to Fares." That would have been put in at some later date because I did not have the knowledge of that particular telex until about two months later. 30

What about all the material that comes before that note?---Above that note?

Yes; when was that put in?---I would be guessing but I would probably say it was put in late August.

That is the material which starts with, "US CAF" and runs down to the note that we have just spoken about?---That is right.

That is the calculations upon which you now rely as establishing a basis for the prices of the contract, is it not, those calculations you show there?---Yes. They were calculations I would have written in at that time to be able to send the telex that I sent on 3rd September, I believe. 40

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MR BURBIDGE: It is in vol.2, I am told, -but I will hand up a copy, your Honour.

OLNEY J: If it is in vol.2 is it convenient that I look at that, if you would like your copy?

MR BURBIDGE: Certainly, your Honour.

TO WITNESS: To just understand that, Mr Dingwall; perhaps you can tell us, where does the original material start? Does it actually start on the July 2nd entry day as opposed to what looks like Sunday, July 1st?  
---Yes, I think it probably did.

10

So the original material starts on the right-hand side of the page, the additional material is that on the left-hand side of the page?---Yes.

Being notes you have put in at some later stage?---Yes. I would say those were put in at a later stage. The notes on the right-hand side would have been done early that morning in Sydney.

OLNEY J: Will you just help me? The notes on the right-hand side of what - that is, under the heading, "Monday July 2"?  
---Yes, that is right.

20

MR BURBIDGE: The notes on the left-hand side are notes which have been made at some subsequent time, you think in late August?---Yes. I believe it would be in late August.

If you look at the right-hand side which you say are the notes you produced on the day in question - - -

MR BURBIDGE (Continuing): - - - in question, how is it that the figure against I suppose what would be hoggets, although not marked, 1230 US FAS come to take its place in that document?---Because that would be the two figures, both lamb and hogget figures, that we had probably agreed the night before, or had agreed with Fares the night before.

Have you forgotten, Mr Dingwall, that you said that you agreed on 1225 and you have pleaded that 1230 was paid subsequently, as evidenced by payments from the plaintiff. You said 1225 not 1230?---Yes, because on my reconstruction of what had happened in August I thought that somewhere along the line a miscalculation had occurred. In other words, when I was looking back at the information I had at that stage and working backwards as to what had been discussed at the time I came out with some figures that indicated a \$5 difference. That did not necessarily change the figures that I had in my mind on that particular mind being 1375 and 1230. 10 20

Your evidence, if I understood you, was that the figure which was agreed upon in respect of hogget was not 1230 at all but 1225, so perhaps that figure was added later on too, was it?---I think it is perhaps out of context. If I have given that on that basis, it is just out of context in that discussion.

If you had come to an agreement for 1225 you would not have written down 1230, would you?---No. Obviously we did come to an agreement at 1230. I do not think there is any doubt about that. 30

You never said that. Indeed, you have pleaded it quite differently, have you not?---No.

You have not?---What I have said - -

You say you have not pleaded it differently?

MR McCUSKER: Your Honour, it is not his pleading, of course.

MR BURBIDGE: Interrogatories are, and I will come to that.

MR McCUSKER: Come to that, but it is not - -

OLNEY J: Perhaps you had better put the difference to him. That is the easiest way.

MR BURBIDGE: I have fallen into some disarray, your Honour. Is that a convenient time at which to pause? 40

LUNCHEON ADJOURNMENT

UPON RESUMPTION:

OLNEY J: Mr Burbidge?

MR BURBIDGE: Mr Dingwall, before the adjournment I was asking you, I think, about the entries in your diary for Monday, July 2nd, and you had indicated to us that the figures on the right-hand side of the page, that is those below the heading "Monday, July 2nd", were, you thought, the entries which you had made on or about that day and those on the left-hand side, under the heading, "Sunday, July 1st" were entries you had made at some subsequent time, perhaps towards the end of August I think you said. I directed your attention to the figure "US\$1230 FAS" and I suggested to you, I think, that your interrogatories differed from the figure you have there nominated. You recall being asked, do you, to sign a document after answering a number of questions which emanated from the plaintiffs? Do you remember that?---Yes. 10

That document I think was filed on the day this trial started - last Monday?---Yes. 20

I would suggest to you that when asked about the figure of US\$1230 per tonne in question 3 of your interrogatories the answer you gave at that time was "The oral contract was made on the 2nd of July, 1979, between Dinwall and Fares, at which time the price for hogget was established at \$1225 per tonne." Is that the answer you gave?---Yes, by the fact of your reading it out.

Can you tell us then how it was that the figure of \$1230 came to be placed in your diary at the time of the telephone conversation or shortly thereafter?---I think that \$1230 would have been, obviously, the price I had carried in my mind from the discussion I had had with Mr Fares that night. 30

Then it would be wrong to swear that the price for hogget was established at \$1225, as you did?---Yes. I was answering what I thought had been established at that time. You are raising a point here about \$1230 at that particular time, which obviously means I had incorrectly, but not necessarily done it dishonestly, made that particular statement. I am trying to make a statement as accurately as I can remember about something a long time ago. 40

What do you say now, \$1225 or \$1230? Which is wrong?---I say \$1225, on the basis of seeing this figure, is the incorrect figure, and the \$1230 would be the correct figure.

MR BURBIDGE: Then how did you come to swear, as recently as a few days ago, that it was \$1225 ?---Probably because I was not aware that the \$1230 was written down here at that particular time, because in making any statement like that I try to find all the facts I can to make a statement so they are as accurate as possible. On the basis of what I have looked at, I have looked at the figures on the other side, which I probably put together in August, when I was sending a telex to Mr Fares, which was a construction in my mind at that time, which was some six or eight weeks later, of what we had discussed. That was the figure I looked at, therefore that was the figure I used. Obviously, I made a mistake.

10

The only document you have, if I understand what you have produced to us, is this document, the diary entry of July 2nd. This is the only document you have on the prices, is it not, from your side?---No, we have a number of documents which have taken place since then.

20

What are they?---The various documents between the parties.

They all say \$1230 ?---Yes. That is true.

I am asking you how you came to swear \$1225 within the last few days?---Because I thought that was the figure that was the discussed figure at the time.

Did you just recall that for the purposes of swearing this document without bothering to look at any of the documentation in the whole case?---No. I did not. I genuinely believed that on the discussion which took place at 2 o'clock in the morning the way the calculations were discussed at the time - - we discussed not hogget in any detail at all. We discussed lamb in a lot of detail with reference to the freight provision and the deduction of the \$50. Then the further discussion about problems to get the further provision of \$30, we did that on lamb. We did not go through the same exercise - - -

30

WITNESS (Continuing): - - - exercise at that time on hogget.  
It was a deduction that was, I think I said, mental  
at the time and I do not know whether in mentally  
doing it we took the figure in my mind or Rachid's  
mind at the time and we said 1230. I do not know  
that I worked anything out on paper in doing that.

MR BURBIDGE: Mr Dingwall, you have told us several times how  
it was that you came to reach the 1230 figure. What  
I am now asking you is how you came a few days ago,  
with the benefit no doubt of having given some little  
thought to this matter, to swear that you reached  
agreement at 1225? Can you offer any explanation for  
that or not?---Only the explanation I have given you  
now. 10

That is the best explanation you have got, is it?---That is  
all I can surmise, that that is the basis I did it on  
at that time, that was my understanding of it.

While you have got your diary open in front of you you might  
just turn to Thursday, August 30th, would you?  
TO HIS HONOUR: Perhaps I should tender that page,  
having departed from it. 20

OLNEY J: Are you tendering the original diary?

MR BURBIDGE: Yes, I am, your Honour. I will tender the pages  
for Sunday, July 1 and Monday, July 2, 1979.  
I am reminded I should further seek to tender the  
two minutes of the board meeting to which I made  
reference, they being a minute of 25th January and  
one of 5th May, 1980.

OLNEY J: They are extracts of minutes, are they not?

MR BURBIDGE: They are extracts of minutes, thank you, your  
Honour, yes. 30

OLNEY J: I take it that it is an open page, 1st and 2nd July -  
they are facing each other?

MR BURBIDGE: It looks to be, your Honour.

EXHIBITS EXHIBIT 80 .... Pages constituted 1st and  
2nd July of diary of  
K. Dingwall.

EXHIBIT 81 .... Extracts of minutes of  
defendant company dated  
25th January and 5th May 1980. 40

OLNEY J: Before you move away from this page I would like to  
ask Mr Dingwall this: When you received the telephone  
call at 2 a.m. on 2nd July 1979 you were at home?  
---That is right, your Honour.



OLNEY J: Did you have that book with you by the telephone?  
---I do not think so, your Honour. I probably wrote  
it on whatever piece of paper happened to be on the  
small table alongside the bed, if I wrote anything  
at all at that particular discussion.

Are you able to say whether anything on exhibit 80, those pages  
now before you, was written at the time of the  
telephone conversation?---No, I could not be sure,  
to say that honestly, whether I did at that particular  
time.

10

MR BURBIDGE: If I understand your answers to his Honour, you  
are uncertain whether you made any written note at all  
at that time - that is, at 2 a.m.?---Well, I am uncertain,  
yes, because I do not have any documents to be proof  
that I did at that particular time.

I would like you to go to the entry for Thursday, 30th August.  
If I understand you, Mr Dingwall, you had by that  
date seen the telexes of 3rd July and of 19th July 1979.  
Correct?---No, not by that date. I had seen the  
telexes that you refer to of the 19th, yes - - -

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V65. 2.25

WITNESS (Continuing): - - - the 19th, yes.

MR BURBIDGE: Did you not tell us that by end August you had seen the second telex?

OLNEY J: No; he said February 1980.

MR BURBIDGE: I will check this but I think we have August 1979 as well.

TO WITNESS: Mr Dingwall, did you not tell us this morning in cross-examination to me that you had seen the second telex by the end of August 1979?

---No. I thought I said I had seen the second - - 10  
I am sorry. What is the second telex you are referring to?

You know the two telexes of which I speak, do you not - one of the 3rd and one of 19th July?

MR McCUSKER: I think the witness might be shown them, sir, and he might identify them.

MR BURBIDGE: Do you have the book there in front of you? One you will find, I think, at p.16 and the other at p.26?---Right; p.16, yes.

That is exhibit 1. Can you tell me when you first saw that document?  
---I did not see this document until this information 20  
came from the Fares organisation. I saw the Metro Meat's copy of the same thing on some time in February, I would say, 1980, of that particular information.

Not before?---Not before, no.

You had not seen that document on your Fares file which you say you opened for each new contract - you had not seen it?  
---No, I had not.

Despite the fact that you had been back through that file, had you not, prior to writing your telex of September 3rd?  
---Yes, I would have been through that but the one 30  
I would have referred to was the one that Mr Phillips had shown me on August 21st, only a few days before I was sending that telex to Mr Fares on the 3rd. That was the only one I was aware of at that stage.

You said you went back to shipping quotes in that file. Do you remember saying that - in September 3?---Shipping quotes?

Yes; the shipping quotes were mentioned in Mr Phillips telex of 2nd July, were they not?---Yes. 40

You say you managed to get back to telexes of 2nd July and did not notice a telex of 3rd July?---No. I did not say that at all.

I did not say I did not notice it. I may have seen that there but what I did not know was there was any difference between the one that was sent on the 19th and the one that was sent on the 2nd or the 3rd because I did not read them completely through in each case to compare one with the other.

MR BURBIDGE: So the only telex you had seen and registered upon was that of the 19th which was Metro's telex to Fares Rural. Is that right?---Yes. I would say that for a particular reason. 10

Do not tell me about that; just my question if you would. You were content, were you, that that telex set out accurately that which had been agreed as it appeared to do?---No. I was not content that it did.

Then why did you not do something about it?---Because what differences were in that - -

Differences from what?---From the discussions that we were talking about on 2nd July with Mr Fares. There was not any differences in that which I felt were a problem.

None that had any materiality?---No. I did not think so at the particular time otherwise I would have raised it at that time, I believe. 20

That, of course, would have been your duty, if you thought that the terms of the document which had been sent by your export manager to Fares Rural differed from that which had, in fact, been agreed. Then, of course, you would have said something, would you not?---Yes, that is right.

May I take it that somehow Mr Phillips had sent this telex himself? You did not send it?---No. I was overseas. 30

But, nonetheless, it appeared to you to reflect, by and large, that which you had agreed with Mr Fares. Correct?---Yes; I did say that there was some variation but it was not something that concerned me at that particular time.

On Thursday, August 30, it would seem you began to draft what looks like the telex that went off, in a slightly altered form, on September 3. Is that correct?---Actually what I did, I put that in there because I was trying to get Mr Fares on the phone and I had some notes to make when I spoke to him. 40

In any event, that was the substance of the matters that you were concerned about at that time. Is that so?---I sent a telex. I do not know what I sent on the telex that necessarily was exactly the same as this.

I am not asking you that - - -

260. 2.30

MR BURBIDGE (Continuing): - - - asking you that?---They were some of the matters, yes.

They were the matters of substance that concerned you at the time that you jotted them down and tried to establish telephone contact?---Let me read them first and make sure it covers all the matters.

I am not suggesting it is identical with September 3rd, but have a look and see if it is the substance of the matters that were troubling you?---Yes, that covers some of the substance that I sent in the telex of the 3rd.

10

One might presume, I suppose, that they were the ones that were worrying you at that time. Is that right?  
---Some of them, yes.

You subsequently settled down and drafted a telex in lieu of the conversation which you could not manage. Is that right?---That's correct, yes.

Am I correct in thinking that at that time amongst the things that were worrying you was this proposition, and I start at the beginning of your note:

20

"The whole situation on the agreement discussed was unsatisfactory because - - "

They are the opening words of your note to yourself, are they not?---That is right.

Thereafter follows a series of things lettered A, B, C, D and so on?---Yes.

If I understand your concern at that time, A - appearing first amongst the matters which you say rendered the situation unsatisfactory - was that "What was agreed upon was based on incorrect facts in respect of the lamb board's contract" - correct?---Yes.

30

I think that a little further on, two pages further on, you said that Jean Boueri apparently only gave you part of the facts on the lamb board contract?---Yes.

Based on that fact "I agreed very reluctantly to lower my quotations from \$1500 for lamb and \$1350 US for hoggets to \$1375 and \$1230 respectively" - correct?---Yes, that is right.

Is that true, what I have just read out?---Yes, that is correct.

That is to say, you agreed very reluctantly to lower your prices to \$1375 and \$1230 respectively because of what you had been told about the West Australian

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Lamb Board contract. Correct?---That is right,  
yes.

MR BURBIDGE: I tender those pages. They are Thursday,  
August 30th - - -

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MR BURBIDGE (Continuing): - - - 30th, running through to Tuesday, September 4th.

OLNEY J: This is 1979.

MR BURBIDGE: Sorry, your Honour, thank you - 1979.

EXHIBIT EXHIBIT 82 .... Diary pages.

MR BURBIDGE: Mr Dingwall, I will just take you quickly to some other telexes, the first at p.147, now exhibit 19.

OLNEY J: Is this vol.1?

MR BURBIDGE: Yes - exhibit 19.

TO WITNESS: That telex was one exchanged between you and Oceanic. Am I correct?---Yes. That is right.

10

Amongst other things, it seemed that the two companies had agreed to appoint an agent in Tehran. Correct?---Yes.

That agent was to be paid, if I understand it, \$50 per net metric tonne for mutton. Is that right?---That is right.

The very figure you mentioned as a sum to be paid to Mr Fares to cover his expenses and his profit. Is that correct?---The same figure, yes.

Did the agent put up any guarantee of \$4 million or any other figure, I wonder?---No. The agent needed the funds for different purposes, perhaps.

20

I will take you to p.162, vol.1. Do you have that?---Yes. I have a copy of it here.

That is a telex from you to the man who was the agent in question. Is that right?---Yes. That would be right.

You will recall telling us before the adjournment that you were not supplying any hogget or lamb to Iran, because there was just enough to cover the Fares contract. Correct?---No. I said we did not offer lamb or hoggets because of that reason, I think.

30

What do you make of the second paragraph in that p.162 reading:

"We were slaughtering hoggets and mutton with all hoggets and selected quality mutton carcasses for the new contract for Iran"?

Was the new contract for Iran one which you had reached with Mr Couzens in Tehran in the last week of February, 1980? Was that what you meant when you said, "The new contract"?---I would say it would be, yes.

MR BURBIDGE: Was it true that you were slaughtering hoggets with all hoggest for the new contract?---Yes. They would be the only contract at that stage, apart from Fares's, that we had. It was part of that 500 tonne hogget contract.

It is the fact, is it, that all hoggets you were slaughtering at that time were being slaughtered not for the Fares contract but for your own contract with the IMO?  
---That is correct.

I will just ask you about the agreement you did reach in end of February. You have spoken of a contract and a long term protocol agreement. Is that right?  
---Yes. That is right.

10

Is it the fact that under that protocol agreement, at least so far as the IMO was concerned, their understanding of that long term protocol agreement is or was that they were entitled to something in excess of 20,000 tonnes for delivery before January, 1981 - - -

L73. 2.40

MR BURBIDGE (Continuing): - - - January 1981 at prices quoted in the contract for current deliveries. Is that your understanding of the document?  
---May I have a look at what is there, please?

Yes. I will not pursue that question, I withdraw the question. Mr Dingwall, was there some performance bond lodged in respect of the contract which you negotiated with the IMO?---Yes.

Did the IMO retain that performance bond against performance of what you call the protocol agreement?---No. 10  
I do not think that is correct.

You do not think so? Do you not know whether you were relieved from the obligations of the performance bond?---Yes.  
I do know that we were.

Was there a contract, in fact, entered into by Mr Couzens on 2nd April 1980 of which you are aware?---A contract?

Yes; a document headed "Contract", exhibit 45?---I do not recall it. If I may see a copy of it, I may.

Yes?---Is it a contract or a protocol agreement again?

That is for you to tell us, Mr Dingwall. It carries the word at its head, "Contract"?---No. This is a document, 20  
a letter of credit.

Will you look at the other part coming to you now?  
Do you see that document there? It looks like a letter to Mr Stewart Couzens of Oceanic?---Yes.

Have you seen that document before?---Yes. I think I have.  
I am pretty sure I have.

You had a deed of indemnity agreement between Ocean Meat Traders (WA) Pty Ltd and Metro Meat Ltd, did you not?  
---Which page are you referring to now? 30

I am looking at another document altogether. Was there not a deed of indemnity between those two companies at any time in 1980?---Yes, there would have been, between Metro and Oceanic on the 11,500 tonne of mutton and 500 tonne of hogget. That would be correct.

I will return you to the contract, exhibit 45. Did you have interest under that contract, as Metro Meat I mean, not you personally, of course? You were providing half of it, were you not?---Just let me read it, please. Yes. Metro had discussions with Oceanic

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along these lines, that they should - - I think the discussion went that we were to increase the tonnage of the protocol agreement by certain tonnages spread over a longer period of time. That is correct, yes.

MR BURBIDGE: Yes; "increase to 100,000 tonnes"?---That is correct; including the first, current commitment.

If I understand the effect of these contractual documents, you and Oceanic had a 50/50 agreement so far as supply was concerned - - -

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MR BURBIDGE (Continuing): - - - was concerned for certain meat. Is that correct?---Not necessarily 50/50. That was subject to negotiation depending on what we had available and what they had available.

The effect of it was that you would join together to supply Iran with frozen meat. Is that correct?---Yes, that is correct.

And the quantities concerned were as set out in exhibit 45, were they?---Yes, they were the quantities that we put through for that agreement. 10

That document, exhibit 45, is of course a copy or a translation of the contract between IMO and Oceanic, who were contracting on behalf of themselves and Metro. Correct? ---Yes.

Under that contract, the contracting parties - Oceanic and Metro - were obliged between 21st March 1980 and 22nd July 1980 to supply amongst other meat 500 tonnes of frozen hogget. Correct?---Between when and when?

Between 21st March 1980 and 22nd July 1980?---Yes.

If I understand you correctly, the provision of that quantity at that time would have made it impossible to supply Fares?---No, it would not have made it impossible. 20

All right?---Number one, the 500 tonnes was not necessarily going to be all done by Metro. It was in actual fact in the period at that time that we did provide it all but it was not in the initial stages decided that Metro would be the supplier of that 500 tonnes.

Did you not, through Metro's solicitors, serve a statement from a person who had studied statistics within the last 10 days suggesting that there was a great deal of lamb and hogget available in Australia in January? ---No. 30

Do you recall doing that?---I think we submitted a statement of statistical information from the West Australian Department of Agriculture of the population of hoggets in Western Australia in that particular year. Is that what you are referring to?

Yes, and that was intended to establish or suggest that there was a great deal of hogget and lamb available. Is that not correct? 40

MR McCUSKER: I would ask that that question be properly put to this witness, sir.

MR BURBIDGE: I will ask it differently.

OLNEY J: I do not know what the witness's knowledge of it is.

MR BURBIDGE: Were you involved in the preparation of the defence case?---Yes, I was.

Did you bring this material to the attention of those advising the defendant company?

MR McCUSKER: Which material?

MR BURBIDGE: The material that has emanated from the West Australian Department of Agriculture?---No, I did not personally, no.

10

Did you obtain it?---No, I did not obtain it personally.

I am not suggesting you went to the board yourself?---That is what you asked me.

Did you suggest to the defendant's solicitors that that material should be obtained in some way, or it was available? Did you give them the idea?---No, I did not give them the idea. Do you want anything further? I did not give them the idea, that is the answer.

The fact of the matter is, if I understand your evidence, that there were not ample stocks of lamb and hogget in the early months of 1980 at all. That is correct, is it not?---It depends on what you term "ample" and in what context.

20

I just want to ask you a few final questions, Mr Dingwall. Am I correct in thinking that there are no board minutes which refer to the making of the contract with Mr Fares or his organisation?---That is possible. I do not know without going through the board minutes but it is quite possible, yes.

Other than the reference I have already made to 25th January 1980, 30 which records that two more shipments were due in April and July, is there any other reference to this contract with Mr Fares at all in any of the board minutes?---I could not answer that without reading them.

Did you not read them for the purpose of discovering whether any documents were relevant for the purposes of production? Were you not asked to do that?---No, I did not because when this was requested I was not in the company. I am not privy to that information any longer.

40

Do you have any recollection of any aspect of the Fares contract being discussed at board level whilst you were with the company?---Yes. I think there was no doubt that it would have been discussed from time to time - - -

X23A. 2.50

WITNESS (Continuing): - - - to time.

MR BURBIDGE: Would that discussion find some reference in the minutes, would you think?---Not necessarily. It depends on whether there is anything specifically requested to be put into the minutes. In boardrooms we talk about a number of contracts. They happen to be, a lot of times, just comments. They are not necessarily for augmentative purposes.

But I ask you this - Mr Phillips was your export manager in July, 1979?---Yes. 10

You were in contact with him every few days, even when overseas?---Generally, yes.

Do you have any note in your diary there which will show that you were in contact with him on 18th July, 1979?--- I do not know. I could check it. No, there is nothing on the 18th.

Have a look at one of your personal docketts?---Sorry, I was looking at August. The 18th of July - no, there is nothing. There is a comment "10.30 - -"

I am not asking you that. I am asking you do you have any reference in your diaries, and I invite you to look at your personal diaries if that is what they are - -?---No. They are the appointment books. On that date? 20

Yes?---It is the same comment, "See R. Barron."

So the answer to my question is no, you have no note?---No, I have no note.

I take it Mr Phillips, from the telex of 2nd July, which you may care to look at, had taken some interest in the negotiations which preceded your telephone call of 2nd July. Is that correct?---Are you referring to the telex? 30

At p.14?---I see.

Is it a fact that Mr Phillips was taking an interest in the development of negotiations between yourself and the Fares organisation?---Yes. That is true.

You say you spoke to him about the contract or the agreement which you had reached on the telephone late at night or early in the morning?---Yes.

Did you give him sufficient detail to allow him to commence implementing that agreement?---I gave him very limited - - If you are asking did I give him all the details, no. I gave him some details. 40

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MR BURBIDGE: It would seem that he did commence to implement the agreement, if you look at the telex of 13th July, 1979?---Yes. That is correct. He was implementing the production and so on.

Did he say anything to you over the telephone on any of these three or four day interval conversations he had with you about implementing this contract?---Yes.

So you had already spoken to him before the 13th to give him sufficient detail to go on with, had you?---Yes.

Obviously enough, as export manager, he would be, I suppose, directly concerned and directly interested in the matter?---Yes. It would be one of his prime matters. 10

And within his authority, of course, to confirm by telex the details of that contract?---To whom?

To Fares Rural Co. Pty Ltd?---Yes, if he had been asked, as he was, he had the authority to send the details over to Fares Rural - if it was Mr Villegas or Captain Mata who asked for some of the details, it would not surprise me at all if he did that if they asked him. 20

He had the authority to confirm the terms and conditions of contract for Iran, did he not?---No, he did not have the authority to confirm a contract. He would have had the authority by usage to give them details.

To confirm the terms and conditions of that contract already negotiated by you?---He was not confirming anything to my opinion. He was giving details which were requested because he did not think they had the details. He was requested by Mr Villegas. 30

We heard that opened by your counsel. Why would he be asked, in your opinion, to confirm the details to Fares Rural - - -

MR BURBIDGE (Continuing): - - - to Fares Rural by anyone?  
---This came up in a meeting on 21st August when they had a meeting with Captain Mata.

Mr Dingwall, could I just stop you for a moment? I wonder could you just go to my question and tell me why would Mr Blanco-Villegas ask Mr Phillips to confirm the details to Fares Rural? Would that not strike you as an extraordinary request if it was made to you?  
---It depends on the circumstances. As I understand it, the circumstances were that Mr Villegas indicated he could not get in contact with Mr Fares and did not have the details. That is as I understood the circumstances. It did not surprise me, if Ian Phillips had sent the information, because of the knowledge that he had of the close association between Mr Villegas and Mr Fares. 10

As far as your pleadings are concerned, you have told us that you were active in the preparation of the defence of this action. Correct?---Yes. I have been assisting with it for quite some time. 20

If I understand the main thrust of your present defence, it is that the contract price was negotiated on some basis involving what Mr Fares was receiving from the IMO. That is the broad thrust of it, is it not?---Of our defence?

Yes?---I think in the defence we are saying - -

I am not binding you to the only defence, Mr Dingwall, but that is the main thrust of it?---That is one of the features of the defence, yes.

It is fair to say, is it not, that that defence was never raised until 17th June 1982. Correct?---I cannot answer that because this has been going on for nearly two years. I do not know when it was actually raised. 30

I am suggesting to you that the first pleading, indeed the first document, in which any suggestion of an inter-relationship between the two contracts of the type you now suggest, made its appearance in a re-amended defence and counterclaim filed on or about 17th June of this year. Do you agree with that or do you know anything to the contrary?---I do not know anything to the contrary because I do not know. I cannot answer that question. 40

A defence was filed originally, I suggest, on 9th January 1981 which made no reference to any such arrangement, agreement or interdependence. Do you agree with that? Would you like to look at the documents?---No, I will accept your word. Yes, I will agree with that, if that is the case.

MR BURBIDGE: I think you filed an affidavit yourself in support of an application you made at an early stage. Do you remember that affidavit bearing the date of 20th February 1981?---I do not remember without looking at it.

Do you remember arguing at an early stage that the contract was not with Fares Rural Co. but with Rachid Fares Enterprises?---Yes. I remember that coming up, yes.

You set out quite an amount of detail about the contract as you said it was made at that time. You made no reference in that to any interdependence of agreement of the kind you now allege, did you?---I do not understand, the interdependence of what agreement? 10

You see, I am suggesting to you that you are now saying that your contract price was to be worked out in some formula fashion from that received by Mr Fares. That is what you are saying now, is it not?---That was the case.

But you never made any suggestion of that kind before June of this year, did you?---I do not know because I have not got all the details in front of me and going through it chronologically. I do not know when that was particularly brought up in the case but that is not a matter that was not discussed on a number of occasions - when we pleaded or when we did not plead I could not say at this stage. 20

I suggest to you that the first time that you asserted that the quantities to be provided by you were 18,000 tonnes in total was by the same pleading, 17th June 1982. That was the first time you said that, 30 was it not?---You have got the record there and if that is when it first came up, I guess that is the first time we said that.

Those additions to your case were made after you obtained a copy of the IMO contract between Mr Fares and the IMO and the translation of it - - -

A186. 3.00

MR BURBIDGE (Continuing): - - - translation of it. Is that not right?---That is not the case.

MR McCUSKER: Your Honour, my learned friend may have overlooked that the affidavit to which he made reference previously sworn February 1981, para.5, does refer to the very point of the quantities.

OLNEY J: I do not have the affidavit before me so I will have to leave you to look at it.

MR BURBIDGE: Mr Dingwall, counsel draws attention to this line: "We eventually agreed on 2nd July 1980 that the defendant would supply 20,000 tonnes plus or minus 10 per cent." That was your position right up until June 1982, was it not?---What date was that made? 10

That was February, 20th, 1981. That was your position then? ---It depends on how it was being expressed in relation to what because I made an offer to Mr Fares of 18,000 tonnes to enable him to book a contract for 20,000 plus or minus 10 per cent.

Mr Dingwall, I think we are understanding what you are saying in relation to that. We are just talking about the pleadings and the position you have taken. What I am suggesting to you is that right up until June of this year your position was that Metro's contract with the Fares organisation was 20,000 tonnes plus or minus 10 per cent and that after June it was 18,000 tonnes simpliciter. Do I make myself clear?---Yes. 20

Do you agree that up until June of this year your claim was, so far as quantities are concerned, that it was 20,000 plus or minus?---Apparently so. 30

It was after you obtained a copy of the IMO contract that you changed your pleadings, was it not?---I do not know why or what the reason was for the change in the pleadings at this stage.

MR McCUSKER: With respect, sir, my learned friend is putting questions to this witness in relation to pleadings and to an affidavit and in so doing, of course, the witness is at a complete disadvantage because he is not having documents put to him and time and time again all he can say is, "If you say so". In relation to quantities, for example, my learned friend read to him part of an affidavit but he did not read the further part which refers to, in para.5, the contents of a telex being inaccurate in that the quantities 40

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of lamb are stated there to be 13,200 and 8800, not 10,000 and 8000 and that that affidavit was sworn in February 1981.

MR BURBIDGE: Plus or minus 10 per cent.

MR McCUSKER: Yes. My learned friend is putting to this witness that previously the question of quantity, that is prior to June of this year, was not raised and it is clear that has been put on an incorrect basis because the affidavit does refer to this question of quantity.

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MR BURBIDGE: My learned friend is quite right. I had not noticed the inconsistency in the affidavit but I will certainly - -

OLNEY J: The fact of the matter is, pleadings have been put in evidence, all of the pleadings have been put in as exhibits, and I suppose one can draw one's own conclusions from the changes that have been made and really all this witness can add to it is whether he has any knowledge of assertions relating to those amended matters being made at a time prior to when they appeared in the pleadings.

20

MR BURBIDGE: Thank you, your Honour.

OLNEY J: On that point, Mr Dingwall, if you turn up p.118 of vol.1 which is exhibit 5, para.3, it does appear there that you were asserting in November 1979 that you had offered 20,000 tonnes?---Your Honour, I think that the usage of 20,000 tonnes versus 18,000 is a fact that was acknowledged between myself and Mr Fares at the time that I increased my offer from 15 to 18 because he was requesting 20,000 tonnes to make his contract and that the 18,000 allowed him to do that because the 20,000 less 10 per cent is 18,000 so he could commit himself to 20,000 and could fulfil the contract by providing 18,000.

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I understand that, Mr Dingwall. A few moments ago you said, "I made an offer of 18,000 tonnes to enable Fares to book a contract for 20,000." In this telex you have said something about "was intended when we offered 20,000 tonnes - - -"

171A. 3.06

OLNEY J. (Continuing): - - - 20,000 tonnes. You either offered 18,000 tonnes or you offered 20,000 tonnes? ---I offered 18,000 tonnes.

So the telex is wrong, then?---It is inaccurate to that degree, yes.

That is your telex?---I realise that, yes.

MR BURBIDGE: Indeed, Mr Dingwall, you swore in your affidavit not only the line I read to you, "We agreed the defendant would supply 20,000 tonnes plus or minus" but, as your counsel rightly points out, you also asserted on the same page, "The quantities of lamb and hogget are inaccurate. They are stated to be 13,200 tonnes and 8800 tonnes, respectively, and not 10,000 tonnes and 8000 tonnes plus or minus 10 per cent as agreed." Do you see that you were asserting in that part of the affidavit that your contract was for 18,000 tonnes plus or minus 10 per cent?---That is incorrect, then, that assertion.

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Yes. That is another error, is it not?---I would say it is, because it was not ten and eight plus 10 per cent or minus 10 per cent.

20

Again, in the very same paragraph, you make reference to a telex which plainly shows that the basic figure was 20,000 tonnes, plus or minus 10 per cent? ---Are you referring to this telex?

It is an affidavit. Do you remember swearing these figures to be so? You do not, obviously?---You were asking me about documents going back over two years and I do not have the document in front of me.

I am about to give it to you. I will direct your attention to p.2. (I will call for the original of the affidavit of 20th February, 1981.) I now hand to you the original, which I think you will find is signed. Have you satisfied yourself that that is the one you swore?---Yes.

30

Would you check it against the copy?---Yes.

Are they the same?---You are talking about p.2?

Yes, p.2 particularly. Are they the same - the original and the copy? I just want you to satisfy yourself that the one I have given you is, in fact, a true copy of the original?---Yes. I am satisfied.

40

Would you retain the copy, or the original - whichever you prefer?---I have the copy.

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MR BURBIDGE: I tender the original, sir.

EXHIBIT EXHIBIT 83 .... Affidavit.

MR BURBIDGE: I will just take you to p.2 of that. You perceive, do you, that you say in the first three or four lines of p.2:

"We eventually agreed that the defendant would supply 20,000 tonnes, plus or minus 10 per cent"?

Do you see that?---Yes.

P83A. 3.11

MR BURBIDGE: Do you agree that you are now pleading 18,000 tonnes without any reference to plus or minus 10 per cent?---Yes.

You are not pleading about 18,000 tonnes, but 18,000 tonnes?  
---That is right.

Precisely the same as Mr Fares' obligation so far as the schedule in the IMO contract is set out there. Is that correct?---You are talking about the shipping schedule?

Yes?---Yes.

10

That is an amendment to your pleadings that you made after you came into possession of the IMO contract, is it not?  
---I do not believe so, no.

I suggest that you got a copy of the IMO contract of Mr Fares not later than the 1st of June, 1981. Are you able to remember that or not?---I do not know when we got that.

I call for the copy bearing the date stamp, your Honour. I think I may have tendered it.

OLNEY J: Yes, that has been put in.

20

MR BURBIDGE: It is exhibit 40 I am told, your Honour. I would call for the original of the document which we have tendered which is a photostat copy.

OLNEY J: Is this an original copy of exhibit 40?

MR BURBIDGE: No, it is in fact the Farsi contract that has been produced. I would also call for the original of the English translation which is in fact exhibit 40.

OLNEY J: I think exhibit 40 is a photocopy of the IMO contract with an English translation.

MR BURBIDGE: What I am seeking from my learned friends is the original of the English translation of their copy of our IMO contract which was handed to us.

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OLNEY J: Is that the one Mr McCusker produced to you in his opening?

MR BURBIDGE: Yes.

OLNEY J: I do not think that is an exhibit.

MR BURBIDGE: It has not been tendered.

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TO WITNESS: Perhaps while that is being looked for, Mr Dingwall, would you agree that you had the Farsi copy at least of the IMO contract of Mr Fares by the 1st of June, 1981?---The stamp says the 1st of June, 1981, yes.

MR BURBIDGE: Did you have a copy of the English translation within some time after that?---I am not sure.

I will take you back now to p.2 of your affidavit. You knew, I suppose, when you signed this document that you were signing a document on your oath, did you not?---Yes. 10

Did you read the document through in order to ensure that it was accurate?---Yes, I always do.

You knew you were executing it in the presence of a justice of the peace or a similar official?---Yes.

And that it had the sanction of an oath when you said it to be so?---Yes.

Can you tell me how it was that you came to sign a document that bears within itself this proposition: "We eventually agreed the defendant would supply 20,000 tonnes plus or minus 10 per cent" and a little lower down in the next paragraph - - - 20

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MR BURBIDGE (Continuing): - - - next paragraph says, "The contents of the telex are inaccurate in that the quantities stated are" so and so"and not 10,000 tonnes and 8000 tonnes-plus or minus 10 per cent as agreed." You see the inconsistency there, do you?---Yes. There is an inconsistency.

Firstly, not only are those two statements inconsistent one with the other but they are inconsistent with what you are swearing here in the witness box now to be the fact, are they not?---I am swearing in the witness box that the facts were - the offer was 10,000 plus 8000.That is what I am saying. 10

Nothing else?---No; there was not a 10 per cent plus or minus on that particular figure.

A little lower down the last line of para.5 says that the telex plainly showed the basic figure was 20,000 tonnes plus or minus 10 per cent. Do you see that? It is the last line of para.5 on p.2?---Would you say that again, please?

Yes. The last line of para.5 says that a photocopy of a telex of 2nd July plainly showed that the basic figure was 20,000 tonnes plus or minus 10 per cent? You were offering that in reinforcement of your assertion, were you not?---What I am saying there is, Mr Ian Phillips sent a telex on 2nd July stating the facts that he knew at that time. 20

We will disregard that one entirely. Will you go back to the other two which we are agreed are inconsistent one with the other?---Yes.

We have also agreed that both of them are different from what you are now swearing to be the case. Correct? Three different positions on quantity. What I am asking you is this. Why should your assertion here today be more accurate than either of your assertions in February 1981?---I think it is probably a misunderstanding more than anything else between one figure and the other and how the two figures were set up in the first place. That is all. 30

RE-EXAMINED BY MR McCUSKER QC:

MR McCUSKER: (May I have exhibit 79, the telex to the Australian Trade Commission, please?) Mr Dingwall, you have been cross-examined at some length regarding your visit to Iran in February 1980?---Yes. 40

Just going over that, do you recall the exact date when you arrived in Tehran?---On 23rd February, I think.

MR McCUSKER: Did you meet there with representatives of the IMO?---Yes, I did.

A Mr Ghavimi - did you meet him?

MR BURBIDGE: I object to the manner in which this - - This is assuming the character of evidence in-chief, with respect. It is being led, apart from anything else, and it is ranging from one topic through to several topics.

OLNEY J: Certainly, refreshing the witness's memory about the date he arrived in Tehran seems to be all right, that arose, and the name of the person who he is said to have met is not one that is familiar to me but it may be, they all sound the same.

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MR BURBIDGE: I think my learned friend has led that he met Mr Ghavimi.

OLNEY J: Was that the gentlemen to whom a telex was sent at some stage?

MR BURBIDGE: Yes. It is the gentleman who I thought did not turn up at the airport or the hotel, your Honour - - -

MR BURBIDGE (Continuing): - - - your Honour, but I am really concerned about the form in which my learned friend is examining rather than the content of the question. It is just where he is going in this fashion. If I do not know what he is leading to it does not really give me an opportunity to know what the nature of the evidence is.

MR McCUSKER: Since I have asked three questions to date perhaps my learned friend will be a little patient and he might learn.

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OLNEY J: I am sure you will not transgress, Mr McCusker.

MR McCUSKER: I have certainly been inhibited in so doing, sir.  
TO WITNESS: The telex which was put to you by my learned friend referred to a question of other contracts?---That is correct.

I think your evidence was that you did discuss with representatives of the IMO the question of other contracts which have been made with Australia or for the supply of meat from Australia?---Yes.

20

Did you make any diary notes at the time or at or about the time of those meetings you had or the meeting with the IMO representatives?---Yes. I did.

It has been put to you, or you were told, that there were two only contracts, one written and one unwritten? ---That is correct. Sorry - one unwritten or one unsigned?

Unsigned, I am sorry. One of those, the unsigned one, was with someone called Semetco?---That is right.

Leaving the signed one with Mr Fares?---I believe that is not right now because at the time I was asked that question I had overlooked that there was another contract discussed with me from a company called Orbit.

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I was going to take you to your diary entry of 24th February, 1980.

MR BURBIDGE: Your Honour that, with respect, can hardly be re-examination. It refers to a series of questions which have been placed upon a particular proposition. In re-examination mention is made of it and the witness says, "I now remember there was another contract and it was not that contract at all." With respect, that is new evidence.

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OLNEY J: It is certainly new evidence if the next question is

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going to try and lead something about the different contract.

MR BURBIDGE: Even the assertion that all the answers he has given to me are based on a mistaken belief - if that answer is to be relied upon I would have no alternative but to seek leave to cross-examine on a new matter that has arisen; namely, the assertion that the contract which he had conceded to be the Fares contract was not the Fares contract at all. 10

OLNEY J: I think that is probably the more appropriate way of handling it.

MR McCUSKER: Could I take you to your diary entry for Sunday, 24th of February, 1980? Would you tell us whether you made an entry on that day regarding discussions with the IMO?---Yes. There is an entry there.

I would like to look at that to refresh your memory of those discussions, in particular in relation to this question of other contracts for the supply of meat? 20

MR BURBIDGE: It is not a matter properly arising in re-examination, it is new material altogether, and I object, sir. If my learned friend is going to seek to adduce new evidence then, with respect, he ought to seek your Honour's leave so to do.

OLNEY J: Does this arise from cross-examination, Mr McCusker?

MR McCUSKER: Quite clearly, it arises directly. The proper purpose of re-examination is to clarify and explain matters which have arisen. A particularly and patently embarrassing series of questions was put to this witness, suggesting to him that in some way he had been guilty of a dishonesty, so much so that your Honour took up the matter - - - 30

MR McCUSKER (Continuing): - - - matter. It is important in fairness to this witness that he be given the opportunity to answer those assertions which have certainly impugned him and his honesty and if a witness is not to be permitted to refer to his diary entry in order to refresh his memory and clarify the situation I would think it would be most unfair, with respect.

OLNEY J: As I understand the position, in his cross-examination he agreed, after refreshing his memory by looking at a copy of a telex, that there had been a discussion at the IMO board about two other contracts to supply meat from Australia - one which was a signed contract and one which was unsigned - and by process of elimination he agreed that the signed one must have been the Fares one. That was the burden of his evidence in cross-examination. 10

MR McCUSKER: Yes. He agreed, as your Honour has rightly observed, by a process of elimination - eventually agreeing with my learned friend - that that must have meant the Fares one that was being referred to. A witness agreeing in that position is not a witness volunteering information quite clearly and all I seek to do is to put to this witness the records he made about that time of the discussions that he had to see whether the process of elimination is indeed a correct process. 20

OLNEY J: I am not quite sure that is a correct approach. You are virtually asking him to look at something he has written, to refresh his memory which in effect is asking him to look at an original record for the evidence. You are restricted from asking leading questions. 30

MR McCUSKER: I do not wish to lead the witness, sir, I wish to ask - -

OLNEY J: Is it not the same thing to say, "Look at this and it says here something or other", "That reminds me, yes, that what I said was wrong before"?

MR McCUSKER: With respect, no. If the witness has a need to refresh his memory and has any contemporaneous record from which he may do so then the normal rule is that he is permitted to do so simply to refresh his memory.

OLNEY J: I understand this witness' memory has been refreshed in some way to the extent that he has said that what he agreed to earlier was not correct and he does not seem, as yet, to have had any lapse in memory on that issue. 40

MR McCUSKER: Very well, sir. Perhaps I will continue, before we go any further, with the diary.  
TO WITNESS: Do you recall when you were meeting with the IMO board any discussion, firstly, regarding the supply of meat under other contracts from Australia?---Yes.

MR McCUSKER: Were you informed of what other contracts there were?---Yes, I was. They informed me about some contracts.

Without going into any detail, it was put to you that there was a signed one and an unsigned one?---Yes.

Were you told of the names of the parties?---Yes.

What were the names of the parties as you were informed?

MR BURBIDGE: I do object to this. Not only did he identify Fares by process of elimination but, of course, he then went on to answer a series of questions directly, "I told them Fares could not supply; I told them that we were in dispute with Fares and I have suspended his operations" and so on. If I understand it, the effect of the evidence my learned friend is now seeking to adduce is to refer him to a name in a diary. If I am any judge the next thing that is going to happen is that he is going to say, "Was that the person you were confusing with the Fares organisation?" If that is to happen, your Honour, I have no objection to it as long as I am permitted to cross-examine in due course, but I do submit it is not re-examination in any sense.

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OLNEY J: It may well be that you will be entitled to ask and be granted leave to further cross-examine. My concern is that the re-examination is now taking the form of leading questions in that the witness was asked whether at that meeting other contracts for supply of meat were discussed and he is now being asked questions which, I think, are in the nature of leading questions and he is not being asked in the normal way of examination-in-chief as to what he was told. He was asked if he was told there were other contracts and he has not been asked what he was told but rather certain specifics have been put to him and I think it is legitimate for - - -

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OLNEY J. (Continuing): - - - legitimate for that to be pursued but by avoiding leading questions.

MR McCUSKER: Your Honour, the last question which I put to the witness, which I will put again with your Honour's permission, is what names he was told - -

OLNEY J: He has not said he was told names. He has said he was told of other contracts.

MR McCUSKER: Were you told the names of the other parties to those contracts?---Yes.

What names were you told?

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MR BURBIDGE: I object, your Honour. My objection is the same. I submit that this is just not re-examination. It does not arise out of any need to clarify any matter in cross-examination to make complete that which is incomplete. This is purely and simply, as I perceive it, to obtain evidence directly contradictory to those answers which he has already given. I do submit that that is not a permissible course in re-examination. There is no ambiguity about what he said in cross-examination at all, with respect. 20

OLNEY J: I think in the circumstances, Mr Burbidge, I will allow the matter to proceed and I will entertain your request later if you wish to make it to further cross-examine.

MR McCUSKER: What were the names of the other parties that you were told of?---Semetco and the Orbit company.

Were you told which was the party to the signed and which was the party to the unsigned contracts?---Yes. My diary indicates, the note that I have got there, that Orbit - -

MR BURBIDGE: I object to that, your Honour.

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MR McCUSKER: Were you told?---I was told at that time, yes.

OLNEY J: Just tell me what you remember.

MR McCUSKER: Perhaps you could close the diary for the moment? ---Yes. I was told or given information by the IMO people at that time that the Orbit one was signed and the Semetco was not signed.

You have told us of some discussion that you had with the IMO representatives regarding the Fares contract. I do not wish to take you over that again. I am sure my learned friend would object to my so doing. In relation to the Fares contract did you at any time

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tell the IMO that it would not be performed?---No.

MR McCUSKER: Or that it could not be performed?---No.

You have told us that you indicated to the IMO that there were certain difficulties in relation to it?---Yes.  
They asked me a question.

OLNEY J: What exactly did you say the difficulties were?  
---They asked me first of all - -

Just tell me what you told them?---I am finding it difficult.  
They asked me a question and I said, "Yes", that Metro were the suppliers of meat for the Fares contract, and they asked me how was it going, and I said that at present it was in a suspension situation because we had a dispute. That was all I told them. I did not say what the dispute was or the details about that. That is my recollection of the discussion on the Fares contract. 10

Specifically you did not say anything about sanctions and you did not say there was any dispute as to payment of money?---I do not think so. I cannot recall exactly what I said but I referred to a dispute and I am sure I did not discuss the cause or what the dispute was about. 20

Was there a dispute at that time - - -

A139. 3.36

OLNEY J. (Continuing): - - - at that time?---In my mind there was because we had a suspension and I think - -

You had a suspension because of sanctions?---That is right, but I did not discuss the sanction situation with them because of the political side of that type of discussion.

Were you in dispute with Fares at that time?---Yes. I believe we were. That was towards the end of February and we had opened a discussion with Fares by telex waiting for payments of funds. 10

When?---Early in February.

My understanding was that the disputation commenced with a telex sent on 29th February that arrived on 4th March? ---No. I think that was the telex they replied to my telex, your Honour. I think my telex was early February and we received a reply from Argentina about the fourth the following month.

You sent a telex asking for certain funds?---That is correct, which we had been asking for for a period of time.

On 13th February you telexed requesting a total of \$430,395 which was the balance - there was \$125 per tonne for the Lamb Board and the \$30 for the first three shipments?---That is the figure. 20

You said, "Subject to receiving the above funds I will then examine the position and possibilities to ship further." Do you say you were in dispute at that stage?---Yes, we were, in my mind we were, because we had not received a reply to that and we had had that amount of money owing, in our own opinion, for quite some considerable time and building up. 30

You had received a reply saying that Mr Fares was away and that he would reply at the end of next week?--Yes. I recognise that; I think that came in and I was aware of that fact but we had not had any positive reply from the Fares organisation but at that point of time we had - -

By the end of next week you were off in Tehran?---That is right, I left on about the 19th or 20th or a little bit later than that because I arrived on the 23rd, I think.

And in your mind you were in dispute over the payment of moneys when - -?---We had also - which I could not say to them - the problem with the sanctions and that was because of the political situation and I could not say that to them. I used the term "dispute" with them to get over that problem. 40

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MR McCUSKER: You referred to a protocol agreement. Can you explain to his Honour the nature of that? When you refer to it as being a protocol agreement was it a concluded contract between you and anyone else? ---No. It is not a concluded contract. A contract normally would include a consideration or a price.

MR BURBIDGE: I object to the evidence of construction of a written document. The document is in evidence.

OLNEY J: The protocol?

MR BURBIDGE: Yes. It is the document under the heading, "Contract" 10 and I think it is exhibit 45.

OLNEY J: I see. It is in the form of a letter to Mr Couzens and is headed, "Contract". That is a translation of the protocol agreement - - -

R71B. 3.41

OLNEY J (Continuing): - - - agreement.

MR BURBIDGE: That is as I understand it, yes.

OLNEY J: Perhaps to clarify it in my mind could you clarify with the witness, Mr McCusker, that that is what he referred to as the protocol agreement or a copy of the English translation?

MR BURBIDGE: I should add, your Honour, that I think he did add later on that that had been varied to increase the 70,000 tonnes to 100,000.

OLNEY J: Yes.

10

MR McCUSKER: Is that the protocol agreement that you have referred to?---Yes, that is the one.

Have any agreements been concluded as to the prices payable?---Not other than the first 12,000 tonnes which was the actual original contract; nothing in respect of anything over and above that.

As a matter of practice within the meat industry is a protocol agreement the usual thing or is this something out of the ordinary?---It is very unusual actually.

Did that contract, or the proposed contract, proceed?---No. Could I clarify that now? I am referring to the protocol part of it, not the 12,000 tonnes. 20

The 12,000 tonnes proceeded but not the - -?---Yes, the 12,000 tonnes did because that was a contract with a fixed price, etc. The protocol agreement did not continue.

I would refer you once again to exhibit 80. It is your diary entry for Monday, the 2nd of July, 1979. It is a fairly significant date?---Yes.

You have told us that the entries which appear on the right-hand side under the date "Monday, July 2nd" were made at a time different from those that appear on the left-hand side under the heading, "Sunday, July 1st"?---That is right. 30

There is some material at the very top of the entry for Monday, July 2nd referring to two people, a Joe Thursday and an Andrews?---That is right.

Which have nothing to do, I take it, with this matter at all?---Yes, they do. They were notes I made to telephone Ian Phillips; the "IDP" stands for Ian Phillips, our export man.

When I say "this matter", did they have anything to do with your conversation with Fares directly?---No, not with the discussion with Fares. This was an instruction; they were notes for instructions to the export manager - to phone the next morning. 40

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OLNEY J: When you say "the next morning" - -?---I am sorry - the same morning, your Honour.

It indicates that you instructed IDP to discuss certain things with certain people?---That is right - people in the meat industry.

Are you able to say whether that note, which appears under the heading, "Monday, July 2nd" was all made at the same time? That is, although you are not sure of the exact time you made the note, was all that note made as one note or on other occasions?---I think they are all the same notes at the same times. They are interrelated.

10

MR BURBIDGE: With respect, he said on several occasions that he was uncertain whether he made any notes that evening and he was certain that some notes had been made the following morning, and he said that whether or not they had been made on two or three occasions he was not sure. With respect, my learned friend is asking the very self same question and the only thing that could happen would be that he reaffirms the answer he has given, which would be irrelevant or, alternatively, he answers something else, which would be not permissible, with respect.

10

OLNEY J: I think perhaps he may be able to say with certainty that at least some was written at a later date, or some of it was written on the 2nd.

MR McCUSKER: In answer to my learned friend's objection, sir, the way my learned friend elicited this evidence from the witness was to ask him whether he could say whether all the note appearing on Monday, July 2nd and Sunday, July 1st, was written at the same time or at what time, to which he said, "No, I cannot say when it was written and whether it was written on just one or two or three occasions.

20

MR BURBIDGE: Your Honour gave a ruling, with respect, and I would ask my learned friend not to discuss the matter.

OLNEY J: You may proceed with the re-examination.

MR McCUSKER: Are you able to say, looking at the entry under the heading, "Monday, July 2", whether the entries that appear there were all made at the one time or whether they were made at different times although appearing all under the one date?---I would say all of that page was done on the morning of July 2 at Sydney airport because they are all inter-related figures that were used for discussions with Mr Phillips.

30

Going over to the entry for Sunday, July 1, in relation to that there is an entry which appears in the first part, before lunch, one might say. Are you able to say whether that entry was made at the same time or at a different time from the entry which appears under the heading "Lunch"?---I could not be sure.

40

There is a note at the bottom of the entry, or forming part of it, with an asterisk against it, "Rachid", and then you have got some information - "13,200 tonnes lamb plus or minus 10 per cent, 8800 hoggets plus or minus 10 per cent". Are you able to say whether that part

of the entry was made at the same time or at a different time from the part of the entry which immediately precedes it under the heading "Lunch"? ---I would say it is at a different time, only because of the colour point of view, there is a different kind of ink used.

MR McCUSKER: That does not appear, of course, on the photocopy. Against "Rachid", or as a note above it, you have a handwritten note: "Telex from Fares 2.7.79, tonnage not as we agreed, see telex IDP to Fares 2.7.79". Are you able to say whether that part of the entry was made at the same time or at a different time from the entry "Rachid"?---I would say definitely at a different time.

10

Having got that far, I know you have said already that you cannot say exactly when those entries were made, the entries under the heading "Sunday, 1st July", are you able to give us in relation to any particular point of time when you consider that the entry for the item "Rachid" and "13,200 tonnes lamb" and so forth to the end of the page was made?

20

MR BURBIDGE: Your Honour, again I object. This is just asking the same questions that were asked in cross-examination, obviously with the likelihood or the possibility that we will just get different answers. With respect, it is not re-examination. I asked solely this question: When were the entries on the left-hand side of the page made? The answer was: "At the end of August 1979". With respect, it is the same question. My learned friend is breaking it up, he is reading the entries aloud which has the effect of introducing written material, which is not evidence of its facts, of course, and it is not clarifying anything. There was no ambiguity in the answer that was given and it is really only affording the witness an opportunity to change his story, as it were, and I do submit it is not re-examination.

30

OLNEY J: He might change it in a way favourable to your client.

MR BURBIDGE: I have noticed some of that, your Honour, but whether that be so or not, I just have no way of knowing what he is going to say - - -

40

Y17. 3.51

MR BURBIDGE (Continuing): - - - to say.

OLNEY J: Yes. I was beginning to get worried myself, Mr McCusker, as to this particular lot of entries. We were told they were made at the end of August - -

MR McCUSKER: Yes, but we were not told whether they were all made at the same time or at some different times.

OLNEY J: I think we were told that the note, "Telex from Fares, 2.7.79" etc. was made at a time later than the material written below it and I understood it that that notation that is written on the slant was written at or about the time of the witness's meeting with Mr Phillips after his return from overseas whenever that was. I gather it was towards the end of August.

10

MR McCUSKER: Yes; very well, sir. I will leave it at that.

OLNEY J: Perhaps by a process of elimination it suggests that the entry, "Rashid" and those details was written before that?

MR McCUSKER: That is the difficulty, sir. My learned friend says I am seeking to introduce written evidence but it is there, he has tendered it and now your Honour has it before you and you are drawing inferences from it that this witness cannot answer.

20

OLNEY J: Yes. I will allow you to continue.

MR McCUSKER: Mr Dingwall, you heard his Honour suggest that perhaps the entry "Rashid" and what follows was written some time before the entry on the slant which reads, "Telex from Fares, 2.7.79". What I am seeking to do is to clarify the sequence in which the entries were written and, if possible, to get as close as you can to the dates?---In my opinion, the part that says, "Telex from Fares, tonnage not as we agreed, see telex IDP from Fares on 2.7" could have been written a year later. I do not think that note there was necessarily the end of August. I think the lines below it where it says, "Rashid, 13,000 2188" was probably part of the information written towards the end of August. I cannot swear to that because I am not dead sure.

30

OLNEY J: I think that is as far as you can take it if he is not dead sure.

40

MR McCUSKER: Yes, I think it is, sir. I have no further questions of this witness, sir.

OLNEY J: Yes, Mr Burbidge?

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MR BURBIDGE: Your Honour, I do seek to ask questions restricted to the matter of the diary.

OLNEY J: Yes, very well.

FURTHER CROSS-EXAMINED BY MR BURBIDGE QC:

MR BURBIDGE: Mr Dingwall, you say that having looked at your diary at some stage since answering my questions about the meeting at the IMO you have recognised that you were told the name Orbit. Is that correct? ---When you say, since discussing, actually I had the diary there in front of me and at lunch-time the bell rang about what Orbit was all about. I have not read it because I have not had the time to read it and then I suddenly realised there was another company that had been discussed at that time that did have a contract. 10

I suggest to you that the meeting was at 2 p.m. on Saturday, February 23rd. Is that what your diary shows? "Meeting with board of IMO, 2 p.m." Does that look right?---On the Saturday, yes.

The entry to Orbit is on Sunday. Correct?---That is right. 20

You have "Sunday morning, 8.30, to Australian Embassy, trade commissioner, Terry Hunt." Correct?---Yes.

"Info" which means information?---Yes.

And it means information coming to you from Terry Hunt, does it not?---It could have been.

It certainly looks like it, does it not?---It is underneath there and it may be related to there but I could not say that I necessarily got it from Terry Hunt.

But it rather looks as though this is the information that you obtained at the Australian Embassy on Sunday, does it not?---Yes. 30

That "Orbit Company, Tehran, have signed a contract for 6000 tonnes lamb and hogget". Correct?---Yes. It appears to be that because of its position under the meeting at the Australian Embassy - - -

WITNESS (Continuing): - - - Australian Embassy.

MR BURBIDGE: So it looks as though the first time you knew about Orbit was Sunday morning, after the IMO contract, after the IMO meeting, does it not? That is how it looks?---That is right. It appears to be that way.

Is that the fact, as well? - you would hardly bother to write it down if you had learned it the previous Saturday, would you?---The previous day.

Yes?---I did write something the previous day. It appears to be in the same order from that meeting, then I wrote it down on the top of the following page under the appointment with the Australian Embassy. I do not know for sure where I got both lots of information but I would say, on appearance it appears that I got a certain amount from the meeting at the IMO and the other amount I got from the Australian Embassy. The point is on that that I referred in the telex you asked me about to talking to Mr Ghavimi about two contracts. That was what I was trying to clear up - that they were the two contracts I was referring to Mr Ghavimi. You were saying I had discussed with - - the telex said that, anyway, and I thought that was the point I wanted to clarify. 10 20

You thought you would clarify it by suggesting to your own counsel in re-examination that what you had said about the signed contract being that of Mr Fares might at least have been that of Orbit. Is that what you are suggesting in your evidence?---I did not talk to my counsel. 30

You just answered his questions a few minutes ago?---I am sorry, yes, all right.

You were suggesting then to the court, were you not, that you might have been innocently in error when you spoke of the signed contract as being that of Mr Fares and it might have actually been the Orbit Company of Tehran. That is what you are suggesting, is it not?---No. I am suggesting that because I did not realise or it did not ring a bell at the time that when you asked the particular question of me as to who was I referring to in that particular paragraph of that telex to Ghavimi you then said "It could only be Semetco and Rachid Fares." I did not know of any other reason, because of the process of elimination, why it would not be but the particular point came up that there was another contract. What I am saying to Mr Ghavimi is accurate. 40

MR BURBIDGE: I do not fully understand that. Perhaps it is my fault. Just answer me directly if you can. Are you suggesting now that when you gave those answers to me before lunch about the signed contract mentioned in the Ghavimi telex that those answers you gave relating back to Mr Fares are incorrect or are you not?---I am suggesting - -

Yes or no?---I am saying they were inaccurate at that moment, yes.

10

Yes, and that really the company you were referring to in the telex to Mr Ghavimi was Orbit. Is that what you are saying?---Yes, that is correct. I am saying that my memory, since that question was asked - -

Do not tell me why. Just answer the question?---Yes.

Although it would seem from your diary that you did not know about Orbit if, indeed, it is bringing lamb from Australia anyway - that you did not know about that until the Sunday after the meeting was over? ---I do not see the point.

20

Just answer the question?---I do not know that I did not know that until the Sunday. Because it is in that order that might be true but I sent the telex to Mr Ghavimi at a much later date.

Do you say that Orbit Company, Tehran's, contract was for Australian lamb? Do you say that or do you not know?---I believe it was for Australian lamb.

Why, because you learnt that information at the Australian Embassy?---I think I got the information at the Australian Embassy, probably.

30

Yes; the day after the IMO meeting. Correct?---It appears to be that way, yes.

You could hardly have advised Dr Ourandi about a contract that you did not know about until the following day, could you?---But A saw Dr Ourandi about five times that week and that was at the beginning of the week.

You see, in your telex to Mr Ghavimi you say:

"On arrival at Tehran I expected to see you at the airport."

Is that correct?---Yes.

C43B. 4.01

MR BURBIDGE: You say, "As this didn't occur I decided to organise a meeting with IMO"?---Yes.

You did organise a meeting with IMO?---Yes, through Mr Couzens.

You then say, "At the meeting" meaning "the" meeting on Saturday?  
---Wait a minute. I am talking about sending a telex to Ghavimi some week or two or three or four weeks later.

And I am reading what you said?---Are you going to tie me down to which particular meeting in a week of meetings?

You say, "I expected to meet you at the airport. This didn't occur. I decided to organise a meeting with IMO"?---Yes. 10

"At the meeting they required lamb and hogget" etc?---Yes.

"I advised Dr Ourandi" and then you say, "The following day IMO received the deputation from the New Zealand Meat Board"?  
---Yes.

And you have noted that in your diary as well for the Sunday?---Yes.

Is that sufficient to establish that your meeting was on the Saturday or not?---I am not disputing I had a meeting with Dr Ourandi on the Saturday. What I am disputing is about a telex that was sent many weeks later referring to meetings in Teheran, a number of those meetings. 20

Look at your entry for the 30th of June?---Which year?

1979. Do you see the word "McSporran" on that page?---Yes.

When did you write that on it?---I do not know.

I suggest you wrote it on there within the last two months?---I do not think that would be right.

I suggest to you that the plaintiffs' advisers were supplied with photostat copies of that page in August or September of this year and the word "McSporran" was not there then?  
---You could be right but I do not know when that was written. That is what I have said. 30

So you do not know whether you wrote "McSporran" on it within the last two months?---No, I do not.

Why would you have written anything on an old diary within the last two months?---Because I have been going through my old diaries in the last two months to get information for this particular case.

Writing bits in it as you went?---What does McSporran mean?

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MR BURBIDGE: Do not worry about that. Did you add bits to your diary as you went through preparing for this particular case?---No, I did not add bits to my diary.

Except you just admitted to your own counsel that part of the entry for July 2nd could have been written in there a year later, did you not?---That is true. I have admitted that.

What were you doing writing in your diary a year later? Why would you be doing that after action had commenced against the company?---If I put an entry in like that it is to jog my memory of what is involved. 10

I should tender these, sir. I will tender, from book 2, the photostat copy of the entry for Saturday, June 30th and I tender the original of the same page.

EXHIBITS EXHIBIT 84 .... Photostat copy of diary entry of June 30th, 1979, p.182.

EXHIBIT 85 .... Original copy of diary entry of June 30th, 1979.

MR BURBIDGE: I would seek an admission from my learned friend that the documents which became exhibits - that document at least - were given to the plaintiffs' advisers - - - 20

MR BURBIDGE (Continuing): - - - advisers about August 1982.  
I do not ask him to do that now but perhaps he might think about that situation and obtain some instructions.

OLNEY J: Yes, all right.

Mr Burbidge has had leave to further cross-examine and you have the right to re-examine on that further cross-examination.

MR McCUSKER: Thank you, sir. I will try not to provoke further cross-examination.

10

FURTHER RE-EXAMINED BY MR McCUSKER:

MR McCUSKER: You were directed to one entry relating to an IMO meeting on the Saturday and I think you have recorded there that there was a meeting at 2 p.m. with the board of IMO?---That is right.

Did you have other meetings with the board of the IMO?---Yes. I had a number of meetings with them in the next few days.

Can you recall at which of those meetings the discussion regarding the signed and unsigned contract came up?---No, I could not exactly pinpoint it. I could only rely on some information that I might have written at the time as an indication but that is not necessarily indicating it was done that particular morning or afternoon.

20

Is there any entry in your diary that you wish to refer to in order to seek to refresh your memory?

OLNEY J: We are getting into a bit of a bind about these entries because they are only legitimate if they are contemporaneous notes and it would seem that much of the discussion we had about 1st and 2nd July probably should never have taken place because it appears that very little if any of it is the sort of thing that a witness is entitled to refer to to refresh his memory. He said as to the notes about the IMO meetings that they were not necessarily made at the time. I do not really think that we should be asking him to look at them and then asking him, "When did you make that note?" because by that process he refreshes his memory and then perhaps says it was not contemporaneous "but I remember anyhow". I think the point is made that there were numerous meetings during the week in Tehran and he cannot recall the occasion at which meeting the reference to the contracts for meat to Australia was made.

30

40

MR McCUSKER: I accept that, with respect, sir.

OLNEY J: I think that is probably as far as he can hope to go  
and probably as far as you need to go.

MR McCUSKER: I do not wish to re-examine further.

WITNESS WITHDREW

A263. 4.11

IAN DALE PHILLIPS, sworn:

EXAMINED BY MR McCUSKER QC:

MR McCUSKER: Mr Phillips, do you live at 3 David Street,  
McGill, South Australia?---I do.

Are you the export manager for Metro Meat, the defendant?---I am.

In the years 1979 and 1980, were you the export manager for  
Metro Meat?---I was.

In that regard were you responsible in respect of exports  
directly to Mr Dingwall?---I was.

Who undertook the actual negotiation on behalf of Metro Meat  
for the supply of meat and livestock overseas? 10  
---In those days it was in two different areas.  
I covered the balance of the world markets, the  
main Middle East markets and livestock were conducted  
by Mr Dingwall.

Can I refer you to a telex which is dated 2nd July 1979?  
It is at p.14, exhibit 38. I think that is a telex  
which you sent to Rachid Fares?---It is, correct.

Prior to sending that had you had any information or telephone  
calls referred to there from Mr Dingwall?---Yes. I had 20  
had a phone call on the morning of 2nd July from  
Mr Dingwall.

Did Mr Dingwall tell you that he had made any agreement with  
Mr Fares?

MR BURBIDGE: Your Honour, I object to conversations between the  
two officers of the company.

MR McCUSKER: My learned friend is technically correct and I will  
not pursue it, sir.

OLNEY J: He said he sent the telex. I suppose we are allowed  
to read the telex if he sent it. That probably answers 30  
the question.

MR McCUSKER: It probably answers the question. The point of the  
objection escapes me except as an objection.

TO WITNESS: As a result of receiving a call from  
Mr Dingwall - - -

A48A. 4.16

MR McCUSKER (Continuing): - - - Mr Dingwall did you, apart from sending that telex, do anything else as regards the attempt to purchase meat?---Yes, I did.

I refer you to the body of that telex. Half-way down you have referred to "schedules for loading we suggest as follows" and you have set out some suggested loading schedules there?---Yes, correct.

Without giving it in detail, was that based, that suggestion, on any information you had or did it simply come out of your head?---You are referring to the shipment dates? 10

Yes?---They were shipment dates given by the shipping company.

When had you received that information as to shipping dates?---I would say probably in the middle of the previous month, the middle of June.

You were then, prior to the 2nd of July, that there were negotiations as to the possibility of a contract for the supply of meat to Mr Fares?---I was.

Had you been involved in some inquiries regarding arrangements for shipping?---Yes, I had.

At the foot of the page you state: "I have today gone back to them" which I think clearly refers to the shipping company "on the basis of 21,000 tonnes for a similar type of reply." Can you explain how the reference to 21,000 tonnes appears there?---No, I cannot. I presume it to be a mistype. 20

At the time you sent that telex what was your understanding as to the quantity your company was to supply?

MR BURBIDGE: I object to that. That is inviting him not only to give the contents of some old conversation which presumably is inadmissible but then to further place his own construction upon it. 30

OLNEY J: Yes. All the witness knows, of course, is what he has been told.

MR McCUSKER: Very well. I take you next to p.15. I think you received that telex in reply from Mr Fares. Did you have any detailed knowledge of the contract that had been concluded between - and I am not asking you to tell us what knowledge you had - Mr Dingwall and Fares? ---The contract concluded by them by telephone?

Yes?---No, I did not. 40

I refer you to p.16, exhibit 1, a telex re-transmitted to Metro Meat from Mr Fares to yourself. Do you recall receiving that telex?---Yes, the original.

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I.D. PHILLIPS, XN

MR McCUSKER: The original of that telex, I should have said, yes. Again I do not want you to give us any information as to what may have been said to you by Dingwall, but had you been told anything as regards prices at the time you received that telex?---No, I had not.

At that point of time, when you received that telex, what, so far as you as the export manager were concerned, were you setting about doing?---At that stage I was endeavouring to - - I had gone out to various people in the trade to buy in quantities of meat. 10

I take you next to a telex, which is at p.26, of the 19th of July, 1979. That is a telex which I think you sent?---To Mr Fares, yes.

Do you recall the circumstances which led to your sending that telex? It is addressed to Fares Rural, I should say? ---Did you say p.24?

It is p.26, a telex of the 19th of July, 1979 - - -

MR McCUSKER (Continuing): - - - July 1979. It is addressed to Fares Rural Co., Perth, from Metro Meat Limited and concludes "Regards, Ian Phillips, Export Manager"? ---Yes.

"We wish to confirm the terms and conditions of contract for Iran as under" - do you recall the circumstances in which you sent that telex, how it came about? ---I do.

Did you have any contact prior to sending that telex with Mr Villegas?---I did.

10

On how many occasions before sending that telex?---To the best of my memory, two.

Do you recall what he said to you and you to him on each of those occasions?---Yes. On the first occasion, which I would say was two days prior, somewhere around 17th July, Mr Villegas phoned me, asked whether I had received a copy of the telex from Mr Fares dated 3rd July, I told him I had. I read the cable or the telex through to Mr Villegas and he asked would I send a copy of it to him confirming the terms and conditions as had been received from Mr Fares himself so that he could show it to the bank. Also to the effect would I delete the last clause of the telex, which I did.

20

Did you, following that call and that request from Mr Villegas, transmit the telex of 19th July?---No, I did not.

What did you do?---Well, I did not do anything on that particular day, which as I say would have been about the 17th. The following day Mr Villegas rang me again, asked whether I had sent it, I told him I had not, that it was on the way, or that I would be doing so. Unfortunately, with the pressures of that day, I did not get it away then. On the 19th in the morning Captain Mata phoned me and asked me would I send it through as Mr Villegas urgently wanted it, which I did that afternoon.

30

OLNEY J: Could you just explain to me what it was you were told was wanted? I understood you to say that Mr Villegas was wanting a copy of the telex that Fares had sent so that he could show it to the bank?---Correct.

40

So it was a copy of Mr Fares's telex?---Yes. The clauses in it made it the same as his telex.

MR McCUSKER: Were you, before you sent that, between the time Mr Villegas spoke to you, which you think was about the 17th, and the time you sent that telex on 19th July, in communication with Mr Dingwall?---That I do not know.

MR McCUSKER: Did you, before sending that telex, discuss the terms of it with Mr Dingwall?---I did not.

Did you have any first-hand knowledge at all of the terms of the contract made between Mr Dingwall on behalf of the company and Mr Fares at the time you sent that telex?---From Mr Dingwall?

Yes?---No, I did not.

For how many years at that stage had you been with the company, with Metro Meats?---For 16 or 17 years.

Were you familiar with the course of dealings over the preceding four or five years between the company through Dingwall and Mr Fares?---I was, yes - - - 10



WITNESS (Continuing): - - - was; yes.

MR McCUSKER: How did you regard the request from Mr Villegas? Did you demur when he raised the question of sending a telex as requested, transmitting the terms of the Fares telex?---No, I did not. Due to the relationship between the two companies I took it as a request and that was the reason why I sent it off.

OLNEY J: Look at p.24 of the book, exhibit 55. On 13th July you apparently told Rachid Fares:

"Ken Dingwall is leaving New York today and is due London" at a certain time on the 13th.

10

From where did you get that information?---I always had a copy of Mr Dingwall's itinerary when he went overseas.

MR McCUSKER: Following the telex that you sent on 19th July did you remain in touch with Mr Dingwall by telephone?---Yes, we spoke every three to four days.

Did you, in the course of any of those telephone discussions, make any reference to the request from Mr Villegas? ---I did not.

20

Do you recall when Mr Dingwall returned from overseas and a meeting with him when he returned in Adelaide?---A meeting I had with him?

Perhaps I can take it in stages. Do you recall when it was approximately Mr Dingwall returned from overseas? ---Yes, it was mid August, about 18th August.

Did you ever show Mr Dingwall the telex that you sent which is that of 19th July 1979 at p.26?---Not at that time.

Did you ever show it to him?---Yes, I did. I showed it to him several days after his return when Capt. Mata was in the office.

30

Do you recall the events then? How was it that you came to show Mr Dingwall the telex?---At that time Capt. Mata was with Ken Dingwall. Ken Dingwall phone through to me on the interoffice phone, asked me to bring the Fares file in which I did. He referred to the telex that had been sent through to Fares Rural and asked me how this came about, which I explained to him.

Did you explain that in the presence of Capt. Mata?---I did; yes.

40

What did you tell Mr Dingwall in Mata's presence?---As I have

said earlier that through Mr Jorge Villegas he had requested the telex, copy of the telex, setting out the terms and conditions from Rachid Fares, which I had complied with.

HEARING ADJOURNED UNTIL 10.00 A.M.

FRIDAY, 26TH NOVEMBER, 1982.

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I.D. PHILLIPS, XN

25.11.82

K9B. 10.00

OLNEY J: Mr McCusker?

IAN DALE PHILLIPS:

EXAMINED BY MR McCUSKER QC (Continuing):

MR McCUSKER: Do you recall, Mr Phillips, a Dr Bahrami-Kia?  
---I do.

Did you meet him when he came to Australia?---I did, in Adelaide.  
As the appointed veterinary doctor for the purpose of inspecting  
your meat establishment?---I did.

Do you recall the date on which you met him?---On Monday, 10  
10th December.

That is 1979?---In 1979, yes.

Was anyone else present when you met Dr Bahrami-Kia?---Yes,  
Mr Ken Dingwall.

Did you have a conversation with Dr Bahrami-Kia about his  
purpose of coming to Australia?---Yes. We  
generally discussed the Iranian contract, production,  
our establishments and various factors of that matter.

In the course of that conversation with Dr Bahrami-Kia did you  
observe anything regarding the facility of Dr Bahrami-  
Kia with English? Was he able to converse freely? 20  
---He was difficult to understand. Many times  
questions had to be re-asked of him.

From his side did there appear to be any difficulty at all?  
---Yes, it was the same thing there. We had to  
repeat questions or answers on many occasions.

In the course of that conversation who did most of the talking  
from the side of Metro Meat?---That was done mainly  
by Ken Dingwall.

Did either he or you say anything to Dr Bahrami-Kia regarding  
the shortage of livestock?---That was mentioned in 30  
discussions.

Did either he or you say anything to Dr Bahrami-Kia to the  
effect that Metro was not prepared or was considering  
not continuing the contract?---Not to my knowledge.

I have no further questions, sir.

CROSS-EXAMINED BY MR BURBIDGE QC:

MR BURBIDGE: Mr Phillips, I take it that notwithstanding any  
difficulties which flowed from the language problem

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you were nonetheless able to make yourself understood to Dr Bahrami-Kia, were?---I presume we were, yes.

MR BURBIDGE: He appeared to respond in a fashion which was appropriate to that which you had set?---Correct, yes.

And vice versa?---Yes.

I would like to just take you to the events of mid-1979.  
Am I correct in thinking that you were aware of discussions taking place before July in relation to a quantity of meat which Metro Meat then had?  
---That Metro Meat had?

10

Well, wanted to sell?---I was, yes.

In short, Metro Meat had, did it not, 15,000 tonnes of frozen lamb which it wanted to place on the Middle East market?---We did not have.

It was anxious to sell that quantity?---To produce and sell.

To produce that quantity?---Yes.

And obviously to sell it?---Correct.

Is it not the fact that Mr Fares represented one possibility for selling that product?---That is correct.

20

To that end it would be fair to say, would it not, that Metro Meat was anxious that it should reach some agreement with Mr Fares which would enable disposition of that quantity of product?---Correct.

I assume it was for that purpose that the inquiries which you seem to have made prior to July in relation to Blue Star Line and the like that those inquiries were made?---Correct.

It was something in the nature of a service to the Fares organisation designed to facilitate your dealings with it?---It was, as we had done in the past.

30

(I wonder if the witness could have Vol. 1, your Honour?)

A129. 10.05

MR BURBIDGE (Continuing): Would you go to p.14, please, Mr Phillips? I may assume, may I, that you as the export manager of the defendant company had a very real interest in the progress of those discussions and negotiations with the Fares organisation?  
---Correct.

On 2nd July it would seem you did receive a telephone call from Mr Dingwall. Is that correct?---Correct.

If I interpret the telex correctly, he told you something to the effect that Mr Fares had concluded or was in the process of concluding an agreement with the IMO for a quantity of 20,000 tonnes plus or minus 10 per cent?---Correct. 10

Mr Dingwall further told you on 2nd July, did he, that the final prices of Mr Fares's contract were still in the process of negotiation?---Correct.

Could you tell me what time was it that Mr Dingwall said to you that Mr Fares's prices with the IMO were still in the process of negotiation - approximately?  
---It was early in the morning, I would say somewhere about 9.00 or 9.30 Adelaide time. 20

Did you understand that Mr Dingwall was at that stage at the Sydney airport?---Correct.

He telephoned you from the Sydney airport and advised you that he had had a conversation with Mr Fares the previous night. Did he make that claim to you?---Yes.

He told you that in the course of a conversation with Mr Fares the previous night Mr Fares had, firstly, sold 20,000 tonnes plus or minus 10 per cent to the IMO. He told you that?---Correct. 30

He told you also that Mr Fares had informed him during that night-time conversation that his, Mr Fares's, prices with the IMO were still finally to be negotiated?---Correct.

You at that time, I suppose, had the charge of implementing whatever agreement had been reached between Mr Dingwall and Mr Fares?---Would you please clarify "implementation"?

Yes. Mr Dingwall was off overseas?---Correct.

You, as export manager, were left with the mechanics of implementing whatever agreement had been made?---Correct.

To that end, you referred back - if I interpret your telex correctly - to the Blue Star Line to determine whether or not the prices which they had quoted to you in 40

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respect of a quantity of 15,000 tonnes held  
good for some higher quantity. Is that  
what you did - - -

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R59A. 10.10

MR BURBIDGE (Continuing): - - - you did?---No. I went back to Blue Star Line and advised them of the increased quantity.

I beg your pardon?---I went back to Blue Star Line and advised them of the increased quantity.

What increased quantity did you advise them of?---As my telex states here, I stated 21,000, but as I pointed out yesterday, I believe that to be a typographical error and it should have been 20,000.

You think it should have been 20,000?---Yes, based on the heading of the telex. 10

When did you first form the view that an error existed in that regard?---It only came to my mind, or came to my attention, a couple of days ago.

In any event, what you did was you had had some quotes from Blue Star Line?---Correct.

And if I understand you you went back to see what the quotes were for an increased quantity?---The availability of shipping and quotation on freight.

Part of your normal operation and part of your normal duty? ---Correct. 20

You got quotes, did you, at that time, it would seem? They are set out in the third-last paragraph on p.14? ---That is still related to the 15,000 tonnes.

At least you knew what the quotes were and other details so far as 15,000 tonnes were concerned?---As set out by the shipping company, yes.

Of course, it would be part of your ordinary expertise to know the freight rates and the competitive nature of any quote that you may receive?---Correct. 30

You then contacted Mr Fares with that telex and set out your understandings of certain matters?---Correct.

You received back a telex dated the same day from Mr Fares in the United Kingdom, which appears at p.15. Correct?---Correct.

He informed you at that time what he said the contract was. Correct? At least so far as tonnages were concerned? ---Correct.

He said that he had reached agreement, in effect - I look at the second paragraph of that telex - with Mr Dingwall as to quantities, 13,200 tonnes of lamb and 8800 tonnes of hogget. That is what he said. Correct?---Yes. 40

MR BURBIDGE: I am not sure that that is right.

MR McCUSKER: No, it is not really right. It was paraphrased, which is always dangerous.

MR BURBIDGE: Perhaps I will ask you to look at it again, Mr Phillips. I am not certain that I have not misled you there. I think what he was saying was that he had signed a contract with the IMO in those quantities? ---Correct.

However, he does go on to set out the prices that he said had been agreed between he and Mr Dingwall. Is that right?---Correct.

10

When Mr Dingwall spoke to you he told you 20,000 tonnes, did he, as a working figure?---Plus or minus, yes.

Did he not also tell you prices?---No, he did not.

Did you make any notes of the conversation that you had with Mr Dingwall over the telephone?---Yes, I would have made some notes.

Where would those notes be now?---I do not know where they would be at this stage of the game.

Where would you expect them to be?---Going back to that period three years ago, those notes could be anywhere at this stage.

20

You would expect them to be the first documents on the Fares file?---I would have thought they would be on the file, yes.

Do you have the Fares file with you?---Not with me, no.

Where is it?---It is here somewhere.

I wonder would you just look in the material which has been produced to the court pursuant to a subpoena and see if you are able to identify amongst that material that document which answers the description "the Fares file"?

30



Y22A. 10.15

WITNESS: It would appear you do not have it here in relation to the Fares file.

MR BURBIDGE: That is what we thought. May I take it, Mr Phillips, that the document which answers the description of "the Fares file" is not amongst the documents produced to the court under subpoena? ---No, this only relates to the telex copies.

Pardon?---No, there are some calculations here.

Mr Phillips, am I correct in thinking that none of the documents in that box answers the description "the Fares file" as it was opened in July of 1979 or even earlier?---The Fares file, when in my care, was in a file such as that. 10

You indicate a manilla folder and you indicate further by your answer, if I interpret it correctly, that manilla folder, as it was when in your care, is not amongst the documents produced. Is that correct? ---That is correct, yes.

Put shortly, the Fares file is not there?---Not as in my care.

Your Honour, I really do not quite know what to say. Here we have a substantial case, to say the least, of a public company and a subpoena, an order of the court, purported to have been answered, and we have now established that there is a file, which obviously is vital to the case, which has not been produced. 20

MR McCUSKER: My instructions as to that, sir, are very clear. There was a Fares file, as Mr Phillips has said, and at some time - and I understand this was quite some time ago - that Fares file as such was broken up into various components which are all in the court. I cannot do any better than that. The manilla folder as such is not there and if my learned friend wants to take it further and ask the witness what were the contents of the file and are they there then we can at least advance the case that much. For my learned friend to express dismay in this way and impliedly impune the company without any further inquiries is perhaps going a bit overboard. There is no evidence at all that the subpoena has not been complied with and the fact that there was a Fares file and no longer is seems to be made much of. The contents of course are there, and if my learned friend were to ask any relevant officer of the company regarding the answering of the subpoena I think that would be more appropriate than to immediately suggest to your Honour that there has been some kind of contempt of court on the part of the company. 30 40

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OLNEY J: Yes. I think answering a subpoena is different from giving discovery. Whereas with discovery the company is obliged to state documents which are or have been in its possession, a subpoena can only be answered at the time and that is as to the production of such documents as are then in possession. Whilst what you have said is not in the nature of evidence in the ordinary sense, it is probably the sort of explanation that one would have expected on the assumption that, as I think one is entitled to assume, your client would have answered the subpoena in a bona fide manner and produced all of the documents requested.

10

MR McCUSKER: Yes.

OLNEY J: I have evidence from Mr Dingwall that a file was opened for every contract and indeed Mr Dingwall says he referred to that file on occasion when he wanted to see what had transpired. This witness confirms that there was a file but the file itself is not here. Whether he is able to say that all of the contents of that file are here of course would be only speculation, assuming that he knew and was able to say what all the contents were. He has been asked to look for, amongst the documents produced, any notes he may have made on 2nd July. He is having some difficulty in doing that because the boxful of documents is not in the form with which he was more familiar at the time.

10

MR McCUSKER: Yes. I may comment there that if there are such notes it would be new to me too.

MR BURBIDGE: Perhaps it is common ground that there are no such notes amongst the documentation produced.

OLNEY J: The witness has had a look albeit a cursory look amongst the papers. He did not open the manilla folder that he indicated which he says was like the one that he knew as the Fares file but I do not know whether that is anything to do with the matter or not.

20

MR BURBIDGE: Perhaps I can take it a little further, your Honour.

TO WITNESS: Mr Phillips, are you aware of the Fares file being at some time dismembered?---Dismembered? No.

30

Taken apart?---Taken apart for - -

For legal purposes?---For getting the documents together, yes.

For legal purposes?---Yes.

Do you mean after the writ was issued?---Sorry, I do not know about whether it was after the writ was issued or not.

When was it done?---It was the file that was sent over here.

Intact? To where?---To Perth.

Yes, to Perth but to where - to the Supreme Court, to your solicitors, to your own office? Where was it sent? ---To the solicitors.

40

When was that done? Can you tell me?---I cannot, no.

MR BURBIDGE: Was it sent as an intact file at that time?  
---That I do not know.

Is it fair to say that there are or should be some notes of  
your own made on 2nd July?---Correct.

You have no idea where those notes are. Is that so?---Correct.

Those notes would record presumably that which you were told  
by Mr Dingwall on 2nd July in relation to his  
conversation with Mr Fares?---They would cover part  
of what was discussed with Mr Fares.

Yes. One would expect to find the important points of that  
which he passed on to you that morning?---I know  
what was passed on that morning. 10

Have you seen those notes in recent times?---I have not, no.

In any event, on 2nd July you knew what Mr Fares was asserting  
the prices to be, and by inference you knew the  
quantity involved. Correct?---Yes.

Indeed, the quantity mentioned by Mr Fares tallied with that  
which had been passed on to you by Mr Dingwall?  
---In tonnage, yes.

The telex from Mr Fares was saying, was it not, in the second-  
last paragraph, that whilst thanking you for your  
inquiries they would look after it themselves. That  
is what he was saying politely, is it not?---Correct,  
yes. 20

You interpreted it as such?---Correct, and that was it.

You learned, of course, additionally from a telex addressed to  
you personally that you might expect to receive  
full specifications the following day when Mr Fares  
was in London the whole day?---Correct.

The following day in fact such a telex arrived at your office? 30  
---Correct, yes.

That would be no surprise to you, you were expecting it?---Correct.

C21B. 10.25

MR BURBIDGE: It set out, did it not, first a polite "thank you" for your negotiations on freight?---Correct.

A repeat of what he had said yesterday, in effect?---Correct.

He then went on, did he not, to set out the main points of agreement reached, or what he said were the main points of agreement, with Mr Dingwall. Is that so?---Correct, yes.

And so far as your information was concerned, the information in the telex tallied, did it not? I am not saying you had all that information but such information as you did have was consistent with what you saw in the telex?---It was sufficient for me for what I wanted at that time. 10

That is not quite what I asked you, Mr Phillips. What I asked you was this: You had some information from Mr Dingwall?---Correct.

You had some general understanding of the nature of the contract which had been contemplated?---Correct.

And the telex which you received was consistent with everything which you knew about the contract. Whatever you knew about it was consistent with what was in the telex? ---That was the first indication we had had of price, or that I had of price that came in from Mr Fares. 20

You had a price allegation the previous day, did you not? ---That is correct, from Mr Fares, yes.

I take it that what you then did was commence to undertake the implementation of the contract, did you not? ---No, we did not.

You see, if you go to p.19, you received a telex, did you not, from Mr Ian Simpson? I would judge that Mr Simpson was associated with the Blue Star Line?---Correct. He handles the actual chartering of vessels. 30

If you look at the first few lines of that document you will see that he is quoting in respect of 21,000 tonnes. Correct?---Correct.

Is that what he is doing?---Correct.

There follows a schedule, and may I take it that that document was a response by Mr Simpson to inquiries which you had made?---Correct.

They were the inquiries of 2nd July, were they?---Correct.

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OLNEY J: What was that last document you referred to?

MR BURBIDGE: It is p.22, your Honour, exhibit 54.  
TO WITNESS: On 13th July, if you look at p.24, it would seem that you continued the correspondence in relation to the implementation of the agreement. Correct?---Correct, in respect of having the establishment approved by the Iranians.

You were undertaking the ordinary mechanics of getting the agreement working?---Correct, yes.

You knew, I suppose, that the customary form of communication between Mr Fares, wherever he may be, and his Perth office or Fremantle office, as it then was, was by telex?---His office? 10

Yes, his own inter-organisational communications involved a telex operation. You knew that there was a telex operation in operation, did you not?---I presume so, yes.

You had seen retransmissions and the like, had you not?---Not retransmissions, no.

In any event, you assumed that he had telex facilities? ---Correct, yes. 20

You knew Mr Blanco-Villegas?---I did.

You knew him to be, if I may loosely put it, part of the Fares interests?---Correct.

He arrived in Australia and made contact with you?---Correct.

He asked you, if I read your evidence correctly, whether you had received a telex from Mr Fares?---Correct.

Relating to the terms of the agreement?---Correct.

You confirmed that you had. He then asked you if you would confirm the terms and conditions as received from Mr Fares so that he could show it to his bank?---Correct. 30

You did not do that immediately?---That is right.

But you did in fact have some contact with Mr Dingwall on 18th July 1979, did you not?---I could not tell you what day I had communication with Mr Dingwall.

Perhaps you might look at your diary and see if that assists your recollection?---Yes.

You spoke to Mr Dingwall by telephone on 18th July. Correct? ---Correct, yes.

MR BURBIDGE: Would you just go back in your diary and tell us when your previous notation of having spoken to Mr Dingwall is?---There is no other reference there back to 1st July.

In any event, you did speak to him on the 18th, that is clear?  
---From that, yes.

If I understand the notation that appears thereabouts, you have made a notation relating to Mr Blanco-Villegas, have you not, up the top? It was on one of those dates about then - perhaps the 19th?---Yes.



C79B. 10.35

MR BURBIDGE: I think the entry indicates, does it not, that you sent a telex as requested by Mr Villegas?  
---Correct.

You have ticked that off as something you have done that day?  
---Correct.

OLNEY J: I thought you told me yesterday that you had not spoken to Mr Dingwall in the period between 2nd and 19th July?---No, sir.

You had not?---Sir, Mr Dingwall and I would talk every three to four days.

10

MR BURBIDGE: I think he said "on this matter", your Honour.

OLNEY J: I see.

WITNESS: It was that matter I had not spoken to him about.

OLNEY J: I must have misunderstood your evidence because I drew your attention to the fact that on 13th July you passed on to Fares Dingwall's London telephone number, etc. I apparently mistakenly had the clear impression that you were saying that you had not contacted Dingwall over that period. You say you had spoken to him but not about this contract?  
---Correct, sir. I think my comment there was in fact that I had a schedule of Mr Dingwall's at Nedlands.

20

MR BURBIDGE: I have it recorded in this way. Your Honour asked that question of that nature and the witness answered that he always had a copy of Mr Dingwall's itinerary when he was overseas. Your Honour then asked: "Did you remain in touch with Mr Dingwall?" and he said: "We spoke every three or four days." Then he was asked, and I am not quite sure whether it was by your Honour: "Did you make any reference" - I think by my learned friend - "to the request from Mr Villegas?" That is as far as it was taken. He said: "I did not."

30

OLNEY J: Thank you.

MR BURBIDGE: Mr Phillips, if I read the notation there on your for the 19th in relation to Mr Villegas, it rather looks as though you made a note to yourself to send off a telex, and you have ticked it off?---Correct.

You, of course, as we have said several times, the export manager. Is that so?---Correct.

40

The message that you sent off commenced with these words: "We wish to confirm the terms and conditions for Iran as under". Is that correct?---Correct.

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MR BURBIDGE: Is that your wording? Is that your introductory material?---That is what I put down, yes.

I can see that but what I am asking is whether they were your words and not somebody else's words?---This was at the request of Mr Villegas.

Mr Phillips, please just answer my question. Mr Blanco-Villegas did not dictate to you the opening words of your own telex, did he?---No, no. I agree on that.

You are not an office boy for Mr Blanco-Villegas?---Correct.

What I am asking you is this: Were the words that appear at the top of the telex at p.26, "We wish to confirm the terms and conditions of contract for Iran as under" your words?---Correct.

10

Who was the "we" that you meant when you said "we"?---The telex is from Metro Meat Limited.

So you were saying "Metro Meat wishes to confirm", were you? ---"The terms and conditions".

Yes, "of the contract". Which contract was that?---I was referring to the contract that Mr Fares had with the IMO.

20

I see. You say that this telex actually relates to the terms and conditions not of the contract between Metro Meat and Mr Fares but between Mr Fares and the Iranian Meat Organisation?---I am quoting the telex from Mr Fares.

The telex which sets out the terms and conditions that Mr Fares says were reached in respect of the contract between himself and Metro Meat. Is that not correct? Would you care to go back to p.16? Do you see the introductory words of Mr Fares's telex? "Mr Dingwall and us have finally agreed on PAS prices for lamb and hogget." Do you see that?---Correct.

30

"For good order's sake, hereafter are the main points on which we agreed." You would read that as an export manager as an assertion of the main points on which Mr Fares and Mr Dingwall had agreed, surely?---The main points, yes.

MR BURBIDGE: It is obvious that he is referring to the contract between Fares and Metro Meat, surely?  
---Yes, I agree.

On the 19th you wrote back, and do you on your oath say to this court that you thought that these terms and conditions that you set out related to some confirmation to Mr Fares's organisation of the terms and conditions which he had negotiated with the IMO?  
---At Mr Villegas's request to show the bank.

I am not asking you that, Mr Phillips, please. I will repeat my question and I would like you to listen to it very carefully. Do you on your oath say to this court that you believed in this telex that you were reiterating nothing more than the terms and conditions which Mr Fares had reached with the IMO? Do you seriously say that or would you like to think about it?---Sorry, I withdraw the word "IMO".

10

In fact the "contract" - I take you back to the word in the introductory material - to which you were referring was the contract between Metro Meat and Mr Fares. Correct?---Yes, it is correct.

20

NO RE-EXAMINATION

WITNESS WITHDREW

PETER WILLIAM GRIERSON, SWORN:

EXAMINED BY MR McCUSKER QC:

MR McCUSKER: Mr Grierson, do you live at Main South Road, Noarlunga, South Australia?---That is correct.

You are an abattoir manager at Noarlunga?---I am.

Employed by Metro Meats?---Yes.

From 1979 through to 1982 were you the abattoir manager for Metro Meats at Katanning?---I was.

30

For some months towards the end of 1979 did a Dr Bahrami-Kia make period inspections of those meatworks?---He did.

For the purpose of carrying out checks as to compliance with the contract specifications regarding the production of hogget for fulfilling the IMO contract?---That is right.

I think that the company at some stage ceased producing hoggets at Katanning, the meatworks of which you were in charge, for the purpose of the Fares contract?---Yes. That was some time in February 1980.

40

MR McCUSKER: Subsequent to the company ceasing to produce hoggets at Katanning did you have any further discussion with or did you ever meet Dr Bahrami-Kia again? ---I really cannot remember if I ever saw him again. I know that after receiving the instruction to bone the hoggets and not to produce them for Iran some time in March I received a phone call from Bahrami-Kia to say that he was coming down to inspect the plant.

What did you say to him?---I informed him that we were no longer producing for that order and told him he would be wasting his time coming down.

10

Did you have any knowledge as to the contractual arrangements between your company and Mr Fares?---No, none at all.

MR McCUSKER: Your position was confined to meatworks production?  
---Yes. Probably if it had not been for the fact that Bahrami-Kia had come to the works I would not have even known that the meat was being produced for Fares.

When you told Bahrami-Kia in effect that there was no point in him coming to the meatworks, was that the end of the matter?---No. Bahrami-Kia told me that he intended to come to the plant anyhow.

Did you do anything about that?---I did. I thought about it for a while and then I rang the general manager of Western Australia, Mr Jack Ware, and - - 10

Do not tell us what you said to Mr Ware because that is in the nature of hearsay but did you leave it to Mr Ware to sort out that question of whether Dr Bahrami-Kia was coming to the plant?---I did.

Did in fact Dr Bahrami-Kia come to the plant?---No.

I do not want you to tell us any reason but apart from the fact that you were not slaughtering hoggets at that time for the Fares order was there any other reason why you did not want him to come to the plant?---Who, Mr Ware? 20

MR BURBIDGE: Can I ask for that question again, your Honour?  
"Is there any other reason why he did not want to come to the plant?"

MR McCUSKER: "Why you did not want Bahrami-Kia to come to the plant."

WITNESS: Yes, there was another reason why I did not want him to come to the plant.

MR McCUSKER: Was it anything directly to do with this matter here today? Was it anything to do directly with the question of the contract between Fares and Metro Meats?---No. 30

NO CROSS-EXAMINATION

WITNESS WITHDREW

JACK WARE, sworn:

EXAMINED BY MR McCUSKER QC:

MR McCUSKER: Mr Ware, do you live at 1 Kookaburra Crescent, Hawthorndene, South Australia?---I do.

You are presently the managing director of Metro Meat Limited?  
---That is correct.

MR McCUSKER: For the period July 1979 to July 1980 were you the general manager of that company for Western Australia?---I was.

I think you answered directly to Mr Dingwall, who was the managing director of the company at that time, the position you now occupy?---That is correct.

In 1979, towards the end of 1979, was your company in Western Australia producing hogget for the purpose of fulfilling the contract which it had with Mr Fares?  
---That is right.

10

At some stage did the production of hogget for that contract cease?---Yes.

Do you know when that was?---It was early in the year, in 1980. I think it was after the third shipment of the Almeria Star.

I do not want you to say what was said but did you have any understanding as to why the production had ceased at that time?---I was aware - -

MR BURBIDGE: I do not mind "yes" or "no", your Honour.

MR McCUSKER: "Yes" or "no" is all I want?---Yes.

20

Whilst production was not proceeding did you have a telephone call at some stage from Mr Grierson?---Yes, I did.

As a result of what he said to you did you do something?  
---Yes.

What did you do?---I sent a telex to the Fares organisation in Western Australia to ask them to - -

Perhaps I can show you the telex. It would be simpler.  
(Could the witness be shown the book at p.160?)

C52B. 10.50

MR McCUSKER (Continuing): Is that the telex that you sent to Captain Mata? I think it is really a retransmission of the telex?---Yes, that is a copy of the telex.

It is a copy of what you sent to Captain Mata?---Yes.

You were in Perth at the time, were you, or in Fremantle?  
---Yes, I was located in Perth - Fremantle, actually.

You sent the telex to Captain Mata initially where?---At Fremantle.

It appears he was not there but somewhere else at the time?  
---It would seem so.

10

Did you hear back from Captain Mata in response to that telex or from anyone else on behalf of the Fares group?  
---In response to that telex, no.

At the time that you sent the telex, so far as you are aware, had the company still a contract with Mr Fares - so far as you were aware at that time?---Yes.

MR BURBIDGE: I object, your Honour, on the basis of the relevance of the matter. What this witness believed about the state of the contract is of no assistance, your Honour, with respect.

20

OLNEY J: Yes, I think that is quite legitimate.

MR McCUSKER: Did you have any authority to terminate the contract between your company and Fares?---No.

Did you have any instruction from anyone with such authority to terminate the contract?---No.

Did anyone from the Fares group at any time say anything to you in relation to that telex, regarding its contents or to ask you what the company's intentions were?  
---Never in regard to that telex, no.

Why did you send that telex to Captain Mata?---I sent the telex to Captain Mata simply to stop Bahrami-Kia from, as the telex says, visiting our abattoirs.

30

I take you to another matter. Do you recall seeing Mr Blanco-Villegas in April of 1980 when he visited Perth?---Yes.

I think you saw him at the Parmelia Hotel where he was staying?  
---I did.

You went there at his request?---Yes.

Can you tell us what he said to you and what you in turn said to him regarding this contract?---Well, it was quite

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early one Saturday morning and I saw him. He asked me, he was concerned that the contract between Fares and Metro was currently in dispute, and he was wondering if there was something that could not be done to fix the matter up. I was aware at that time that there were some problems in relation to some moneys that were owing.

MR BURBIDGE: I object to that, your Honour. I would ask that it be struck out. "I was aware that there were problems in relation to some moneys that were owing." I suppose it is general enough not to be offensive but it is in admissible and, with respect, it ought not remain.

10

OLNEY J: I do not think it carries the case any further for him to say that, Mr Burbidge.

WITNESS: I said that he was really talking to the wrong person as the contract was between Mr Dingwall and Mr Fares and he would have to discuss the matter with Mr Dingwall. We had some discussions and I knew - he told me - that he would make arrangements to see Mr Dingwall.

20

MR McCUSKER: Did you speak with Mr Villegas again after that time?---Not for quite some time. I saw him earlier this year.

As at April 1980 I think it is correct that the company was still not producing hogget, that is in Western Australia, for the Fares contract?---That is correct.

Based on your knowledge of the market position at that time and the availability of stock, are you able to say whether your company could have proceeded with the production of hogget for the Fares contract?---Yes. As the season was that year, it was late rains in Western Australia, we were getting hoggets coming in with our mutton contracts. We in fact were boning hogget as mutton and I was anxious at that stage - -

30

MR BURBIDGE: I object to what he was anxious about.

WITNESS: I wanted at that stage - -

MR BURBIDGE: I object to what he wanted.

MR McCUSKER: Just tell us about the availability?---There was adequate availability to complete the hogget order that was outstanding for the Fares contract.

40



63A. 10.55

MR McCUSKER: Is the boning of hogget for mutton contracts an economical thing to do?---It was at the time.

Do you get a better price for mutton than hogget or vice versa?  
---No, we get a better price for hogget.

You were at the time producing mutton?---Yes.

In the course of that production were you using hogget for fulfilling mutton contracts as well as mutton?  
---Yes, and we did produce an amount of hogget through that period.

In Western Australia your company had two meatworks. Is that right?---That is correct. 10

You have mentioned that this was a dry season. What effect did that have on the availability of hogget?

MR BURBIDGE: I object to this on the basis of relevance, your Honour.

OLNEY J: He said it was a late season, I think.

MR BURBIDGE: Your Honour, I have to object to that. There is no suggestion that the reason that this contract was not filled was because of the lack of availability. The pleadings and the evidence, as I understand them, from my learned friend's side, go quite the other way - namely that there was ample. 20

OLNEY J: Plenty of hogget.

MR McCUSKER: If there is no issue on that, sir, I will not pursue it. That is the very point of the question - to establish that there was in fact ample hogget available. If there is no issue I will not pursue that line of questioning.

MR BURBIDGE: We have said it once already. There is no point in saying it twice. 30

MR McCUSKER: I have no further questions, sir.

CROSS-EXAMINED BY MR BURBIDGE QC:

MR BURBIDGE: Mr Ware, I take it from your silence about lamb that there was not adequate lamb during that season at that time?---We were not supplying from Western Australia the lamb for this contract.

My question, however, is this: Was there a shortage of lamb in 1980?---In my opinion?

Yes?---No.

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J. WARE, XXN

MR BURBIDGE: There was no shortage of lamb?---No. I am talking Western Australia only - that is my only expertise.

OLNEY J: That is all you would know about, surely?---Yes. I know about Western Australia. There was no shortage of lamb.

MR BURBIDGE: No shortage at all?---But it was not available to Metro Meat because it was owned by the West Australian Lamb Marketing Board, who by an Act available acquire all of the lambs in Western Australia at the point of slaughter.

10

Does that mean that Metro Meat could buy as much lamb as it wanted but it was a question of price?---Metro Meat were not able to buy any lamb in Western Australia.

What about from the West Australian Lamb Board?---Except from the West Australian Lamb Marketing Board, and except that I had an arrangement with the Western Australian Lamb Marketing Board whereby I was able to buy lambs that came in mixed with hoggets on a system that was outside of the scheduled rate of purchasing, and they were only a few lambs.

20

May I just understand this? Was it within Metro Meat's power to supply the lamb required for the Fares contract had it gone on or was it not?---I cannot answer that. I was not supplying the lamb.

May I take it that it was not within the power of Metro Meat, in your opinion, to supply the lamb at least from Western Australia? Is that correct?---I really do not know. I have never looked at whether the supply of lamb was available from Western Australia for the Fares contract. It was not within my province to do that.

30

May I take it, Mr Ware, that Dr Bahrami-Kia had visited the Geraldton establishment in the week before you sent off your telex to Captain Mata?---I really have no idea.

Let me refresh your memory. Would you care to open the book at p.162. You are looking at exhibit 35 on p.162?---Yes.

109A. 11.01

MR BURBIDGE: You can see that that is a telex from Mr Dingwall to a Mr Rahjah?---Yes.

Look at the first paragraph. It says:

"Dr Bahrami-Kia, who is in Australia supervising the Fares contract and whose expenses are being met by Fares, visited out meatworks at Geraldton in West Australia in the middle of last week."

That telex is the same date as yours, you will notice - 17th March. Does that refresh your memory?---No. 10

It does not?---No.

You have no recollection of him being there?---He did not have to check with me when he came to visit my meatworks.

That is not what I asked you, Mr Ware?---No, I have no recollection of him being there.

Do you have some recollection of him being there on an occasion when mutton was being stamped with the IMO stamp?---No, I have no recollection of that.

None at all?---None whatsoever.

Look at para. 4 of that telex: 20

"It has come to my attention from our West Australian manager" -

That would be you, would it not?---It could be. I was the general manager actually and I did not like to be called the Western Australian manager. It would be surprising to me if Dingwall referred to me as the Western Australian manager.

In your opinion who would he mean?---He could have meant the - - okay, it could have been me, I guess. It might have been a wrong - - righto, go on, next question. 30

It was you, was it?---Well, it could have been me. My position was the West Australian general manager. We had managers in Western Australia.

"Our West Australian manager". In your opinion, to whom is he referring?

MR McCUSKER: How is that relevant, sir? How can it possibly be relevant?

OLNEY J: It would be very difficult for this witness to express an opinion on Dingwall's cable or telex to Rahjah.

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MR BURBIDGE: Mr Ware, however the matter may be, do you recall a time when the company was using the IMO stamp on mutton carcasses?---Yes.

Do you recall some time at which Dr Bahrami-Kia was unhappy at that happening?---Am I permitted to say what I recall?

I am asking you just to answer my question. Do you recall him being unhappy and requesting the return of the IMO stamps?---Yes, the latter part. I recall that he requested the return of the IMO stamps.

10

You knew, I suppose, that the reason he was requesting it was because he did not want them being used on mutton carcasses. Is that right?---He never said that to me.

Was that your belief as to the reason he wanted them back?

MR McCUSKER: My learned friend has consistently objected to questions put to witnesses as to their belief.

OLNEY J: I do not know that you can ask that, Mr Burbidge.

MR BURBIDGE: Did you know of a new contract for hogget and mutton between Metro Meat and the IMO?---I did.

20

Had you received instructions from Mr Dingwall that all hogget slaughtered from a certain date was to be allocated to that new contract?---Not all hogget. I was aware that there was an order for 500 tonnes of hogget and that we were asked to produce 500 tonnes.

Did you produce any hogget other than the 500 tonnes?---Yes, we did a little bit more than that. We did something like 100-odd tonnes.

To meet some small orders?---No. The hoggets were coming through and I considered it a waste to be packing them as mutton so I took it upon myself to put up a few hoggets in case something happened. They were a valuable commodity but only to one market and if we got back into the business then I was in a position to already have some hoggets produced.

30

NO RE-EXAMINATION

WITNESS WITHDREW

IN THE SUPREME COURT)  
OF WESTERN AUSTRALIA)

CORAM: OLNEY J.

No. 2121 of 1980

B E T W E E N :

FARES RURAL CO. PTY. LTD.

First Plaintiff

and

RACHID FARES

Second Plaintiff 10

and

METRO MEAT LIMITED

Defendant

Mr. R.J. Burbidge Q.C., and Mr. C.L. Zelestis (instructed by Messrs. Lohrmann Tindal & Guthrie) appeared for the plaintiffs.

Mr. M.J. McCusker Q.C., and Mr. C.B. Edmonds (instructed by Messrs. Jackson McDonald & Co.) appeared for the defendant.

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20

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## INTRODUCTION

This action, in which the plaintiffs seek a declaration and damages and the defendant counterclaims for damages, involves a number of complex questions of fact. The trial continued over a period of five days and although the number of witnesses called is not excessive a proper determination of the facts has involved a detailed consideration of an extensive transcript and a large number of exhibits. In the light of the findings of fact that I have made it is unnecessary to deal 10 in detail with some of the issues that were raised and accordingly the reasons which follow for the most part deal only with the issues which on my findings of fact are the live issues in the proceedings, but even so, in order to do justice to the cases presented by the parties I have of necessity had to embark upon a fairly lengthy consideration of the evidence.

The assessment of any damages to which the parties may be entitled has been, by order of the Court, stood over for hearing subsequent to the determination of the other issues. 20

The following summary will mean little to anyone unfamiliar with the pleadings, but as a matter of convenience to the parties I have set out a concise statement of my findings on the more important issues.

## SUMMARY

### The Contract

The contract the subject of this action was made orally on the 2nd July 1979 in a telephone conversation between the second plaintiff and Mr. Raymond Dingwall. Telexes sent by the second plaintiff to the defendant on 3rd July 1979 and by the 30 defendant to the first plaintiff on 19th July 1979 do not

accurately express the terms agreed nor were they intended to constitute conclusive evidence of the contract.

### Contracting Parties

Dingwall contracted as agent for and on behalf of the defendant. The second plaintiff contracted as agent for and on behalf of the first plaintiff.

### Quantities Agreed to be Supplied

The quantity of meat contracted to be sold and purchased was 20,000 tonnes comprising 12,000 tonnes of lamb and 8,000 tonnes of hogget. By custom and usage the defendant had the 10 option to supply, and to be paid for, any lesser or greater quantity within a range of 10% below or above the stated tonnages.

### Contract Price

The price agreed to be paid for lamb was \$US1,375 per tonne F.A.S. and for hogget \$US1,230 per tonne F.A.S. These prices were firm figures and in no way dependent upon prices paid or to be paid by the Iranian Meat Organisation (the I.M.O.), the cost of freight, the plaintiff's profit margin or any other factor.

### Alleged Warranty as to Price

20

The second plaintiff did not make any statement of a promissory nature to Dingwall in relation to the price to be received upon resale of the meat, the cost of freight, the profit margin or the price then being paid to the Western Australian Lamb Marketing Board for meat supplied to the I.M.O.

### Delivery Schedule

The exact details of the programme for the delivery of the meat were left to be worked out between the contracting parties during the course of the performance of the contract.

According to custom and usage it was necessary that the parties co-operate with one another to the extent necessary to

30

enable each to fulfil its contractual obligations.

#### Prompt Discharge Bonus

Dingwall agreed to sell lamb at a lesser price than he had otherwise intended upon the second plaintiff's promise that in respect of each shipment discharged within 40 days, a bonus of an amount to be set by the second plaintiff would be paid.

Three shipments of meat totalling 10,834 tonnes were consigned and discharged within the stated period.

The second plaintiff set the bonus at \$30 per tonne for all meat shipped.

10

#### W.A. Lamb Marketing Board Subsidy

In or about January 1980 the second plaintiff unconditionally agreed to pay the defendant \$125 per tonne for 843 tonnes of lamb purchased by the defendant from the W.A. Lamb Marketing Board and consigned to the plaintiff as part of the third shipment.

#### Repudiation by the Defendant

By its letter of 24th April 1980 and its subsequent conduct the defendant repudiated the contract. Such repudiation was accepted by the contracting plaintiff.

I now set out in detail my reasons for reaching these conclusions.

20



THE CONTRACTING PARTIES

The first plaintiff Fares Rural Co. Pty. Ltd., (hereafter "Fares Rural") was incorporated in Western Australia in 1978. The second plaintiff Rachid Fares (hereafter "Fares") is and has at all times been the major shareholder in, and Chairman of Directors of, Fares Rural. The other shareholders and directors of Fares Rural are Mr. Blanco Villegas (hereafter "Villegas") and Dr. Jean Boueri. In addition, a Captain Mata, the manager of Fares Rural in Australia, is also a director but not a shareholder.

The defendant, Metro Meat Ltd., (hereafter "Metro Meat") is a public company registered in South Australia carrying on 10 business in several Australian States and overseas in various aspects of the meat industry.

Prior to Fares Rural being incorporated Fares had had some business dealings with Metro Meat involving the supply of carcase meat and live sheep for sale in the Middle East. A written contract was entered into between Fares and Metro Meat in 1974 but Fares says that on all occasions prior to the incorporation of Fares Rural his business dealings in Australia were carried on by him on behalf of "a group" comprising himself, Villegas and presumably Dr. Boueri and further that after 20 incorporation of Fares Rural all his Australian business dealings have been carried on on behalf of that company.

I accept Fares' evidence that the instant contract was made by him in his capacity as a director of Fares Rural and with the intention of binding the company. I doubt very much that Dingwall specifically directed his mind to the matter at the time the contract was made but nevertheless there is no reason to disbelieve Fares on this issue. Fares further said and I accept

that Villegas had no connection with any other part of Fares' very extensive business organisation except as a partner in the Fares Rural Group prior to 1979 and then as a director and shareholder of the company. There is no significance in the fact that the meat agreed to be supplied by Metro Meat under the contract was intended and in fact used for the purpose of meeting contractual obligations entered into personally by Fares with the I.M.O. It was Fares' original intention that Fares Rural be seen to be exporting from Australia the meat to be supplied by Metro Meat under this contract and initially he 10 made arrangements appropriate for this to be done but when faced with a strong protest from Metro Meat, who also for the same reason wanted to be seen to be an exporter of carcass meat from Australia, Fares agreed to the documentation being amended so as to make it appear that Metro Meat was the exporter of the meat to an overseas purchaser.

The evidence establishes to my satisfaction on the balance of probabilities that the contract the subject of these proceedings was entered into on behalf of Fares Rural by Fares in his capacity as a director thereof and that Fares Rural is bound 20 by, entitled to the benefit of and entitled to sue on the contract so made. All that was done and said by Fares in relation to this contract was done and said by him in his capacity as a director and as agent on behalf of Fares Rural. To the extent that in what follows hereunder I find that Fares entered into any binding obligations, such were so entered into by him on behalf of Fares Rural and same are binding upon that company rather than on Fares personally.

#### FORMATION OF THE CONTRACT

In 1979 Kenneth Dingwall (Dingwall) was managing director 40 of Metro Meat. He lived in a suburb of Adelaide, South Australia. He was due to fly out of Adelaide at 7.00 a.m. on 2nd July 1979

for the purpose of travelling to Sydney and thence overseas on a business trip. At about 2.00 a.m. that morning his sleep was disturbed by a telephone call from his friend and business associate Rachid Fares who was ringing him from England. During the conversation that ensued an agreement was made. Just what was agreed to is one of several matters which I have to determine in this action. There are also other issues, the most important being whether subsequently one or other of the contracting parties repudiated the agreement as each alleges the other has done. 10

The simplicity with which the parties were able to conclude an agreement involving tens of millions of dollars is breathtaking. One would normally expect greater care and attention to be devoted to the purchase of a second hand motor car but Dingwall and Fares were experienced and successful businessmen. They were personal friends, they trusted each other. Their word was their bond. Unfortunately, no-one thought it necessary to actually record those words at the time, which is perhaps not surprising having regard to the circumstances under which they came to be spoken. 20

In order to set the context in which the agreement was made it is necessary to relate a little historical narrative. Fares and Dingwall first met in 1974. Dingwall was then managing director of Metro Meat. In all that is hereafter related everything that was done by Dingwall was done by him in his capacity as managing director of Metro Meat and on behalf of that company. Fares was at that time, and indeed at all relevant times, engaged, inter alia, in the purchase and sale throughout the world of carcase meat and live sheep. The two men first met at the suggestion of Villegas. Although the exact details are now 30 unimportant the fact is that the initial meeting between Dingwall and Fares resulted in an agreement being entered into between

Metro Meat and Fares by which Metro Meat was to supply carcasses meat and live sheep to Fares. Fares' interest in these products was as a supplier to the I.M.O. Between 1974 and 1979 Fares and Metro Meat were involved in a number of transactions, none of them of any great relevance in themselves except to the extent that they demonstrate the development between Dingwall and Fares of a satisfactory business relationship. In May 1979 Dingwall was a guest of Fares at "Mallards" Fares' country estate in Hampshire England. Villegas was also present. For the most part the three men discussed their mutual interest and involvement in the supplying of live sheep to the Iranian market but another matter was raised and in the light of subsequent events it is necessary to examine with some care exactly what was said as it forms part of the context in which the telephone call of the 2nd July 1979 was made. -10

In evidence, Fares recalled that at this meeting in May 1979, Dingwall suggested that they should talk about meat. He said of this conversation

(Transcript p.64):

"It was only a proposal for Mr. Dingwall that Metro Meat is interested to sell meat to Iran. The figure advanced was about 15,000 tonnes. We were at the same time discussing with Iran a much larger figure from another country of supply. " 20

In answer to a subsequent question Fares explained that "we" referred to "Rachid Fares Beirut who was discussing in Teheran the supply of exactly 30,000 tonnes of frozen meat from New Zealand". Under cross-examination Fares referred again to the meeting between himself, Dingwall and Villegas at his country home when the three of them "spoke about the live sheep and many other things". He continued: 30

(Transcript p.128):

"Mr. Dingwall raised the question of meat and I recall he said: 'What about meat, we want to sell meat'. Then according to what I have been

able to trace he raised the matter of 15,000 tonnes of lamb because we were currently discussing the supply of meat from New Zealand but we were buying sheep from Australia and to cover the export of Australian sheep he wanted to be protected with meat. "

Dingwall who was called to give evidence for the defendant, recalled the meeting at Fares' country home in May 1979. It was also his recollection that initially the three had a long discussion about live sheep but they also moved on to 10 discuss meat. The transcript of Dingwall's evidence discloses the following (p.335):

" (MR. McCUSKER)

What did you discuss?---There was both Mr. Villegas and Mr. Fares there and we initially had a long discussion about live sheep.

Dealing with meat?---I put a proposition to them that they should consider offering 15,000 tonnes of meat from Metro for the coming contracts IMO were looking at for the second half of the year. 20

15,000 tonnes of meat from Metro. Did you specify what kind of meat?---Yes, it was lamb and hogget - approximately 50/50.

When you put that to them did you - - Firstly, if they had accepted that proposal and adopted it how was Metro to have supplied that meat?

.....

..... in relation to that offer of 15,000 tonnes, what happened?---I left them with the offer at that particular time and Rachid promised he would get in touch with me as soon as anything developed in Iran in respect of it. 30

Following that conversation did you have any further conversation with Mr. Fares regarding this matter prior to the 2nd of July?---Yes, I did. If I could have my diary I could tell you exactly when it was because I remember making a note of it.

I do not think the precise date matters?---It was only a day or so before that because he actually called me and asked me for some quotes on beef for Bulgaria and I gave him those quotes and I asked him how the things 40 were going and he said Jean Boueri was in Teheran and things were getting close to a head and he would let me know as soon as possible. I advised him I was going overseas very shortly in the following week and if he could let me know as soon as possible I would appreciate it.

Did you hear further from him on the 2nd of July?---  
Yes.

When he telephoned you, I think?---Yes, he telephoned  
me early in the morning, about 2. a.m. "

I do not propose here to go into all of the details of the 2nd/<sup>July</sup>  
telephone conversation but one aspect of it needs to be mentioned  
namely that from the outset Fares told Dingwall that he preferred  
to have an offer for 20,000 tonnes instead of 15,000 tonnes for  
supply to the I.M.O. and the whole of the conversation that took  
place was with respect to a proposal to supply an amount in 10  
excess of 15,000 tonnes. In the course of Dingwall's evidence  
as to what was said between himself and Fares concerning prices  
being paid for meat supplied to the I.M.O. under other contracts  
the following passage appears

(Transcript p.341):

" (MR. McCUSKER)

He was talking about lamb at that time, I think you  
said?---That is correct; yes. It followed then  
from that. He said, 'That's the figure'. I said,  
'What do you think about the prices that I quoted 20  
on the 15,000 tonnes' that he (sic) had offered at  
US\$1500 FAS and US\$1350 FAS for hogget. He said  
they were too expensive in relation to his price,  
too high in relation to his price. I said, 'Rachid,  
we have had some information on shipping, and price  
levels on the shipping indicate approximately  
\$375 freight rates. He said that might be so but he  
thought the figure should be slightly higher than that  
at \$385. "

(In the passage "that he had offered" the word "he" should 30  
obviously be "we" and I have interpreted the witness's evidence  
accordingly.) Following an objection from counsel for the  
plaintiffs, Dingwall's evidence continues:

"OLNEY J: You told him that your information for  
freight was \$375?---My information was about \$375.

What was his response?---His response was he thought  
it would be more like \$385. I said to Rachid, 'That  
gets us down to' whatever the calculation was that I  
was looking at. He said, 'I need to have an allowance'.  
That brought me below \$1500 mark that I had quoted ...."

Dingwall was not cross-examined at all as to the May 1979 meeting at "Mallards". He was, however referred to some notes that he made in his diary on or about 30th August 1979 in anticipation of discussing a number of matters with Fares on the telephone. As it happens he did not make contact by telephone and subsequently sent a telex (exhibit 42). He agreed with the plaintiffs' counsel that the notes in his diary cover the substance of what he later included in the telex. The diary notes include a statement:

"I agreed very reluctantly to lower my quotations from \$1,500 U.S. FAS for lamb and \$1,350 U.S. FAS for hoggets to \$1,375 and \$1,230 respectively. " 10

He agreed that the statement contained in the portion quoted was true.

Nothing was said as to the outcome of the discussions at "Mallards" in May 1979 but there is no doubt that subsequently both Fares and Metro Meat conducted themselves in a manner suggestive of an expectation that a contract for the supply of meat by Metro Meat would result. The evidence of Ian Dale Phillips (Phillips) then export manager of Metro Meat, indicates 20 that in about the middle of June 1979 he had made enquiries from Blue Star Line concerning the shipment of 15,000 tonnes of meat from Australia to Iran and freight rates were quoted. Upon Phillips being advised by Dingwall on the morning of the 2nd July 1979 that an agreement had been reached with Fares he (Phillips) immediately conveyed to Fares by telex the information that he had already obtained concerning shipment of meat and freight costs in the expectation that this may be of some assistance or interest to Fares. As it happens it was neither but it does indicate that Metro Meat was proceeding in the period between May and July 1979 on the basis that a contract for the sale of 15,000

tonnes of meat to Fares was imminent. And this being so I am satisfied on the evidence that in those preliminary discussions Dingwall indicated a willingness to supply 15,000 tonnes of meat to Fares on the basis of a price of \$US1,500 per tonne for lamb and \$US1,350 per tonne for hogget. I am led to this conclusion upon a consideration of those parts of the evidence to which I have already referred. In addition it is clear from Dingwall's evidence that he knew that for there to be a sale to Fares it would be necessary for Fares to negotiate a contract with the I.M.O. which would take time and for the purpose of which Fares would need to have some idea of the price at which he could acquire the product from Metro Meat. Furthermore, it is beyond question that the possibility of Metro Meat supplying meat to Fares was raised by Dingwall at a time when Fares had neither thought nor intention of purchasing meat from Metro Meat so that from his point of view the discussion at "Mallards" in May 1979 was the first he knew of the proposal. At that stage, however, Dingwall had the figure of 15,000 tonnes firmly in his mind and I have no hesitation in inferring from the evidence that when Dingwall raised the idea of selling 15,000 tonnes of meat to Fares in May 1979 he did so on the basis that he was then prepared to accept \$US1,500 per tonne for lamb and \$US1,350 per tonne for hogget. This conclusion is of considerable relevance in the consideration of what the two parties to the telephone conversation of the 2nd July 1979 say was discussed on that occasion. Perhaps the most significant feature is that even in May 1979 Dingwall had it in mind that the differential between the price of lamb and hogget was \$150. This was more than a month before, as Dingwall claims, Fares represented to him that his (Fares') price from the I.M.O. for hogget was \$150 less than he was getting for lamb. It is surprising that this issue was not pursued more vigorously during the hearing as it does have considerable bearing upon Dingwall's



credibility with regard to what transpired in the 2nd July telephone conversation.

Before I leave this aspect of the evidence I point out that in the extract from p.335 of the transcript which I have already quoted, it is clear that Dingwall made an offer to Fares to supply 15,000 tonnes of meat. He said:

"I left them with the offer at that particular time  
....."

It is also beyond dispute that Dingwall quoted prices for lamb and hogget at \$US1,500 and \$US1,350 respectively prior to the 2nd July telephone conversation. (Transcript p.446). 10  
Furthermore Metro Meat were fully aware of freight costs for shipping meat from Australia to Iran as a result of their own enquiries made approximately in the middle of June 1979.

#### THE ISSUES

Having set the background in which the agreement was made it is now possible to understand more readily the issues raised by the pleadings. In the following extract from the statement of claim as finally amended I have not reproduced paragraphs (c) to (f) inclusive of paragraph 3 which relate to the specification of the carcasses to be supplied and other 20  
matters not in issue. The plaintiffs allege in paragraphs 3 and 4:

- "3. Pursuant to the terms of a contract made 2nd July 1979 between the first plaintiff and the defendant it was agreed, inter alia, that:
- (a) the first plaintiff would buy and the defendant would sell 13,200 tonnes of lamb and 8,800 tonnes of hogget carcasses.
  - (b) the first plaintiff would pay the defendant therefor US\$1,375.00 per tonne for lamb and US\$1,230.00 per tonne for hogget, free alongside ship.
  - (c) ....
  - (d) ....
  - (e) .....
  - (f) ....

- (g) The defendant would make delivery of the carcasses free alongside ship in Adelaide and/or Fremantle as follows:
- (i) 2,000 to 3,000 tonnes at the end of August/ beginning September 1979, in one bottom ('the first shipment'),
  - (ii) about 4,000 to 4,500 tonnes at the end of October 1979 in one bottom, ('the second shipment'),
  - (iii) thereafter the defendant would make deliveries of 4,000 to 4,500 tonnes each at such times as would enable the vessel engaged by the first plaintiff to ship the quantity described in subparagraph (ii) above to effect consecutive trips to Iran until the total quantity agreed to be sold and delivered by the defendant had been sold and delivered ('the third, fourth and fifth shipments').
4. The contract was made orally by the first plaintiff by its servant or agent Rachid Fares and the defendant 20 by its servant or agent Kenneth Dingwall and was evidenced in writing, such writing being inter alia, a telex from the first plaintiff to the defendant dated 3rd July 1979 and a telex from the defendant to the first plaintiff dated 19th July 1979. "

The defence was amended on a number of occasions and the relevant pleading in its final form is as follows:

- "2. As to paragraph 3 of the Re-Amended Statement of Claim, the Defendant admits that on the 2nd July 1979 an oral contract was made between the Defendant and the Second Plaintiff on the terms set out in paragraph 3, save that:-
- (i) As to paragraph 3(a), the quantities to be bought and sold were 10,000 tonnes of lamb and 8,000 tonnes of hogget;
  - (ii) As to paragraph 3 (b), it was agreed that the contract price for lamb and hogget would be the prices which the Iranian Meat Organisation (I.M.O.) had agreed to pay to the Second Plaintiff for lamb and hogget, less an agreed margin, freight allowance and conditional rebate, amounting to US\$465 per tonne for both products. The Second Plaintiff represented to the Defendant on the 2nd July 1979 that the I.M.O. had agreed to pay US\$1840 per tonne of lamb and \$150 less than this amount per tonne for hogget.

On that basis the contract prices were calculated at U.S. \$1375 per tonne for lamb and US\$1225 per tonne for hogget. The price for hogget was then

varied to US\$1230 per tonne. In fact, the I.M.O. had agreed to pay US\$1850 per tonne for lamb and US\$1800 per tonne for hogget. The correct contract prices were therefore US\$1385 per tonne for lamb and US\$1335 per tonne for hogget, subject however to the 'rebate' pleaded in sub-paragraph (v) hereof.

Alternatively, the Second Plaintiff warranted to the Defendant that the I.M.O. prices were US\$1840 per tonne for lamb and US\$150 less for hogget, such warranty being a term of the contract between the parties or alternatively collateral thereto. 10

(iii) As to paragraph 3(g), the agreement was that the Defendant would make delivery free alongside ship in Adelaide and/or Fremantle as follows:-

1. 2000 tonnes at the end of August 1979
2. 4000 tonnes at the end of September 1979
3. 4000 tonnes at the end of December 1979 20
4. Thereafter, two further shipments of 4000 tonnes each.

(iv) It was an implied term of such oral contract that the normal 'force majeure' clause would apply to the contract, relieving the Defendant from responsibility for non-delivery due to Acts of God, the elements, Acts of Government, political or civil disturbances, stoppage or restraint of labour, unforeseen absence or withdrawal of freight facilities, strikes, fires, explosions, droughts, war, riots, insurrections, lockouts, embargoes or any other acts beyond the seller's control. 30

#### PARTICULARS

(a) Such a force majeure provision was customary in the trade.

(b) In all previous written contracts between the parties, relating to the sale of live sheep or carcasses, such a provision had been included. 40

(v) In calculating the price payable, there was included in the margin between the I.M.O. price (as represented by the Second Plaintiff) and the contract price an amount of US\$30 per tonne for 'discharge contingencies'. It was expressly agreed that this sum per tonne would be rebated to the Defendant by the Second Plaintiff, in respect of any shipment discharged in less than 40 days, and it was an implied term that such 'rebate' would be paid immediately or within a reasonable time after discharge of each shipment where discharge was completed within 40 days. 50

3. Paragraph 4 of the Re-Amended Statement of Claim is

denied. The Defendant says that the contract referred to in paragraph 2 of the Re-Amended Statement of Claim was made orally by the Second Plaintiff by its servant or agent Rachid Fares and the Defendant by its servant or agent Kenneth Dingwall. The Defendant denies that the said contract is fully or completely or accurately evidenced by the telexes dated 3rd and 17th (sic) July 1979.

THE TELEXES OF 3RD AND 19TH JULY 1979

The two telexes referred to in the pleadings are reproduced omitting in each case details as the specification of the meat and other matters not in issue and which are identical in both. The telex of 3rd July 1979 was sent by Fares to Phillips of Metro Meat. A copy was apparently also sent to Captain Mata. The copy of the telex actually put in evidence (exhibit 1) was a copy of the message sent to Mata but it was agreed that it did in fact reflect exactly the telex sent to Metro Meat. It was in these terms:

"Flwg Tlx has been sent to MM this afternoon

Q U O T E

3/7/79

20

WE RESTRANSMIT FWLG FROM MR FARES TO MR IAN PHILLIPS

GOOD AFTERNOON.

THANK YOU FOR YOUR ASSISTANCE IN OUR NEGOTIATIONS ON FREIGHT.

COMPLEMENTING THE INFORMATION GIVEN IN THE TELEX SENT TO YOU YESTERDAY, MR. DINGWALL AND US HAVE FINALLY AGREED ON FAS PRICES FOR LAMB AND HOGGET AS WELL AS ON SPECIFICATIONS AND PROGRAM OF DELIVERIES BEFORE OUR LAWYER SIGNED THE AGREEMENT WITH I.M.O. IN TEHRAN AND SUBSEQUENTLY SUBMITTED THE 10 PERCENT BANK GUARANTEE.

FOR GOOD ORDER'S SAFE HEREAFTER ARE THE MAIN POINTS ON WHICH WE AGREED.

A

QUANTITIES:

13,200 METRIC TON LAMB AND 8,800 METRIC TONS HOGGET CARCASSES

B

PRICES:

USDLR 1,375/METRIC TON FAS FOR LAMBS

USDLR 1,230/METRIC TON FAS FOR HOGGET

C

D

PROGRAM OF DELIVERIES:

ABT 2,000 - 3,000T (PREFERABLY 3,000T) TO BE LOADED  
END AUGUST BEGINNING SEPTEMBER 1979, IN ONE BOTTOM.  
ABT 4,000/4,500 T TO BE LOADED END OCTOBER 1979, IN  
ONE BOTTOM,  
SAME VSL TO EFFECT CONSECUTIVE TRIPS UNTIL FINALISING  
CONTRACT.

WE ALSO AGREED WITH MR. DINGWALL THAT IF VSL IS DISCHARGED  
IN LESS THAN 40 DAYS WE WOULD PAY METRO MEAT A BONUS - 10  
WHICH WILL BE LEFT TO OUR DISCRETION BECAUSE, DUE TO  
DIFFICULTIES IN CONTRACT INCLUDING BIG RISKS OF SLOW  
DISCHARGING PROVOKING DELAYS WHICH WILL NOT BE  
COMPENSATED BY DEMURRAGES,. MR DINGWALL ACCEPTED A  
LAST MINUTE DISCOUNT ON LAMB PRICES.

NOW WE ARE LOOKING FOR VSLS TO SUIT THE DELIVERIES  
PROGRAM AND WILL KEEP YOU INFORMED.

THANK YOU AGAIN FOR YOUR COOPERATION AS ALWAYS.

BEST PERSONAL REGARDS

RACHID FARES

UNQUOTE - 20

TOMORROW WE SHALL RETRANSMIT TWO OTHER TLXS

RGDS

+

FARES AA93087

918842 FARES G "

The telex dated the 19th July 1979 referred to in the  
pleadings (exhibit 2) was sent by Metro Meat to Fares Rural and  
was in these terms:

"FARES AA93087

METMEAT AA82218

19/7/79

1730 HRS

MESSAGE TO: FARES RURAL CO, PERTH - 30

FROM: METRO MEAT LTD., ADELAIDE

WE WISH TO CONFIRM THE TERMS AND CONDITIONS OF CONTRACT  
FOR IRAN AS UNDER:-

A

QUANTITIES

13,200 METRIC TONS LAMB AND 8,800 METRIC TONS HOGGET  
CARCASSES

B

PRICES:

USDLR 1,375/METRIC TON FAS FOR LAMBS

USDLR 1,230/METRIC TON FAS FOR HOGGET

C

D  
PROGRAM OF DELIVERIES:  
ABT 2,000-3,000T (PREFERABLY 3,000T) TO BE LOADED  
END AUGUST BEGINNING SEPTEMBER 1979, IN ONE BOTTOM.  
ABT 4,000/4,500 TO BE LOADED END OCTOBER 1979, IN  
ONE BOTTOM, SAME VSL TO EFFECT CONSECUTIVE TRIPS  
UNTIL FINALISING CONTRACT.

ACCORDINGLY WE WILL SHIP MAXIMUM TONNAGE AVAILABLE  
BY THE FIRST VESSEL AT THE BEGINNING OF SEPTEMBER.

REGARDS  
IAN PHILLIPS  
EXPORT MANAGER

10

CORR D. PLS READ AUGUST NOT AUGUST THKS  
METMEAT AA82218+  
FARES AA 93087 "

The circumstances in which Fares' telex of 3rd July 1979 (exhibit 1) came to be sent were these. It was contemplated that the meat sold by Metro Meat to Fares would be transported to Iran by sea from either Adelaide or Fremantle or both. The prices agreed were F.A.S. (Free Along Side) by which the seller is obliged to deliver the goods to the shipside and becomes entitled to payment upon the goods being taken aboard. The cost of loading and all subsequent costs are at the expense of the buyer. Metro Meat had prior to July 1979 made its own enquiries as to the cost of shipping 15,000 tonnes of meat to Iran. Whether this was in contemplation of itself contracting with the I.M.O. or possibly some other buyer on a C & F (Cost & Freight) basis does not appear from the evidence nor is it of any great importance but nevertheless once a sale on a F.A.S. basis was made to Fares, Metro Meat had no further interest in either the cost or the organisation of shipping the product to Iran. On the morning of 2nd July 1979 Dingwall telephoned Phillips from Sydney Airport and told him of his agreement with Fares and although he did not give Phillips full details of the telephone conversation he did nevertheless let him know that the sale had been made and he gave instructions that steps be taken to prepare for the initial shipment. With the intention of being of assistance to Fares, Phillips decided to pass on to him the information he already had about shipping

30

costs and so sent him a telex in which he quoted details that Blue Star Line had recently supplied to Metro Meat. As there are several matters about this telex (exhibit 38) that will require comment it is set out in full.

" 918842 FARES G  
METMEAT AA82218 2/7/79 1703 HRS

RACHID, I HAVE RECEIVED A PHONE CALL FROM KEN ADVISING THAT THE I.M.O. HAS AGREED TO TAKE UP FROM YOU 20,000 T PLUS OR MINUS 10 PER CENT OF FROZEN LAMB AND HOGGETS. FINAL PRICE STILL TO BE NEGOTIATED. 10

WOULD APPRECIATE RECEIVING FROM YOU AT YOUR EARLIEST CONVENIENCE FULL DETAILS AND SPECIFICATION. ABOUT 10 DAYS AGO WHEN WE WERE LOOKING AT 15,000 TONS I SPOKE WITH BLUE STAR LINE FOR A CONTAINER/CONVENTIONAL LOADING SCHEDULE, IN WHICH THEY CAME UP WITH THE FOLLOWING:

TO LIFT 15,000 TONNES OF CARCASE LAMB STOWING ABOUT 125CBFT SPREAD OVER PERIOD AUGUST 1979 - APRIL 1980

LOADING 1-2 PORTS ADELAIDE AND/OR FREMANTLE.

DISCHARGING 1 PORT IRAN (BANDAR SHAHPOUR) 20

SCHEDULES FOR LOADING. WE SUGGEST AS FOLLOWS:

2,000 TONNES CARCASE LAMB IN 220 TONNES LOTS IN CONTAINERS APPROX EVERY 30 DAYS COMMENCING AUGUST 1979 COMPLETING APRIL 1980 - AND 13,000 TONNES TO BE CARRIED IN CONVENTIONAL TONNAGE:

3,000 TONNES IN AUGUST 1979

2,500 TONNES IN OCTOBER 1979

2,500 TONNES IN DECEMBER 1979

2,500 TONNES IN FEBRUARY 1980

2,500 TONNES IN APRIL 1980 30

FREIGHT FOR CONTAINERS: A.C. 38.2 PER KILO PLUS 4.7 PCT BAF. CAF CURRENTLY UNDER REVIEW BUT FOR THIS EXERCISE WILL EXCLUDE COMPLETELY.

FREIGHT FOR CONVENTIONAL: AUGUST SHIPMENT 1979 US\$335 PER TONNE FULL LINER TERMS BOTH ENDS FOR REMAINDER SHIPMENTS US\$385 PER TONNE FULL INER TERMS BOTH ENDS. FOR ALL 5 CONVENTIONAL SHIPMENTS DISCHARGE TO BE AT RATE OF 200 TONNES PER WEATHER WORKING DAY FRIDAYS AND HOLIDAYS EXCLUDED. ALL TIME WAITING FOR BERTH AT DISCHARGE PORT WHETHER VESSEL IN PORT OR NOT TO COUNT AS LAY-TIME. DEMURRAGE AT US\$6,500 PER DAY OR PRO RATA. 40

WE WOULD BE MOST INTERESTED TO HEAR YOUR VIEWS ON OUR PROPOSALS ESPECIALLY AS TO THE PROPORTIONAL SPLIT BETWEEN CONTAINER/CONVENTIONAL SHIPMENTS. THE ABOVE WE MUST STRESS IS PURELY A SUGGESTION AS TO HOW WE, BLUE STAR LINE, WOULD BE ABLE TO CARRY YOUR CONTRACT FOR 15,000 TONNES CARCASE LAMB

UNQUOTE

I HAVE TODAY GONE BACK TO THEM ON THE BASIS OF 21000 TONES, FOR A SIMILAR TYPE REPLY. WHEN DETAILS ARE RECEIVED TOMORROW I WILL REVERT TO YOU, WHICH HOPEFULLY CAN ASSIST YOU IN YOUR NEGOTIATIONS ON FREIGHTS, DEMURRAGE ETC.

REGARDS  
IAN PHILLIPS "

In response, Fares replied the same day by a further telex (exhibit 39) as follows:

"METMEAT AA82219  
918842 FARES G

- 10

2/7/79

ATTN: MR. IAN PHILLIPS

THANKS YOUR TLX TODAY CONCERNING MEAT CONTRACT WITH I.M.O.

PLEASE BE INFORMED THAT CONTRACT FOR 13,200T OF LAMB AND 8,800T OF HOGGET HAS ALREADY BEEN SIGNED AFTER MR FARES OBTAINED FROM MR DINGWALL FINAL QUOTATIONS OF USDLRS 1,375/METRIC TON FAS FOR LAMB AND USDLRS 1,230/METRIC TON FAS FOR HOGGET.

THE 10 PERCENT BANK GUARANTEE OF WHICH MR. DINGWALL IS AWARE HAS ALSO BEEN SUBMITTED. 20

MR FARES AND MR DINGWALL ALSO AGREED THAT METRO MEAT SHOULD NOT LOOK FOR VESSELS AS THIS WOULD BE DONE FROM OUR END.

WHILE WE THANK YOU FOR THE ENQUIRIES YOU HAVE DONE SO FAR IN RESPECT OF LOOKING FOR VESSELS WE WOULD GREATLY APPRECIATE IF YOU DO NOT PURSUE THESE ENQUIRES FURTHER AND SHOULD WE NEED ANY ASSISTANCE IN THIS RESPECT WE WOULD NOT FAIL TO CALL ON YOU.

TOMORROW MR FARES WILL BE IN LONDON THE WHOLE DAY AND YOU WILL RECEIVE FULL SPECIFICATIONS AND APPROXIMATE LOADING DATES. 30

KINDEST REGARDS

RACHID FARES

918842 FARES G+  
METMEAT AA82218 "

Exhibit 1 was sent on the day after exhibit 39 and I find that it was sent by Fares for the purpose of conveying to Phillips details of what was agreed. He knew Phillips had not been given all of the details by Dingwall. Exhibit 1 was not sent with the intention of reducing the oral agreement to writing. -40



Villegas had occasion to visit Australia in July 1979 in the ordinary course of his business. It was his practice to communicate frequently by telephone with Fares and he did so while in Australia on this particular occasion. Following one conversation with Fares (between the 8th and 10th July) Villegas telephoned Metro Meat in Adelaide to speak to Phillips. It is a matter of some importance as to what was said in this and subsequent conversations and as there is a significant disagreement between Villegas and Phillips on the point I propose to set out in detail the evidence given at the trial. I quote first from 10 the evidence-in-chief of Villegas from pp.212-214 of the transcript:

"MR. BURBIDGE: Mr. Blanco-Villegas, did you speak to Mr. Phillips?---Yes; I called him.

Can you tell us in terms of the date approximately when it was in July?---I think I started calling him around 8th or 10th July, more or less - 10th July.

Can you tell me what you said to him at that time?--- I ask from him if he knew about a contract agreed between our company and Metro Meat and in case he knew about that contract, that I would like to have a confirmation of that contract by telex sent to our office.

20

What did he reply?---He say, 'Yes, I will send it.'

MR. BURBIDGE: How long does telex normally take to pass from Adelaide to Fremantle?---I think only a few minutes from the time we prepare it.

Did a telex, in fact, arrive immediately after that conversation or not?---No.

What did you do next?---I called him again.

30

The same day?---The next day.

What conversation ensued the following day?---I say, 'I didn't receive the telex.' He say, 'Yes, I will be sending it to you.'

Did the telex arrive immediately after that telephone conversation?---No.

What happened next/---I do not remember if I called him for the third consecutive day or if there was a weekend in the middle. I think I waited until Monday and I called him again.

Was there any telex there by that time?---No.

On the third occasion that you telephoned, what conversation ensued?---I do not remember if I made the conversation in the third or the fourth call but in one of those I say, 'What is the reason I am not receiving the telex? Are you tracing Ken to know if you can send it?' He say, 'Yes. You know he is not here. I am trying to see where he is. I am not finding him.'

Did he say which country he was in?---I think he was in the States. 10

Did he make any arrangement about what he would do in respect of the telex you were seeking?---I knew that as soon as he got in touch with Ken we were going to receive the telex, so I say 'Well, please try to get in touch with him and send me a telex.'

MR. BURBIDGE: Did you have a further telephone conversation with him a day or so after that?--- Yes, I have another conversation with him and I ask to him, 'Have you found Ken?' and he say, 'Yes, I find him so I will be sending a telex.' 20

After that conversation did something happen in relation to a telex?---The telex came. "

The witness identified exhibit 2 as the telex referred to in the final answer in the quoted extract.

Villegas was cross-examined at some length on this particular matter and I set out below the relevant passage from pp.226-228 inclusive of the transcript:

"When you saw Mr. Phillips - you have told us that this was in July 1979 - I think you told us that you tried to get from him a telex of confirmation of your company's telex on perhaps three occasions that you approached him?---More. 30

More than three occasions?---Yes.

It was clear to you, was it not, that Mr. Phillips simply did not know what arrangements had been made by Dingwall with Rachid Fares?---Can you repeat that question?

Perhaps I could put it more positively. Did Mr. Phillips tell you that he did not know the arrangements that had been made between Ken Dingwall and Rachid Fares?---No, he did not tell me that he did not know. 40

But he did tell you that he could not himself give confirmation. Is that right?---No, he did not tell me that he could not.

Did he tell you, when you first spoke to him, that before he could give confirmation he would have to

contact Ken Dingwall?--No, he did not tell me that.

MR. McCUSKER: He simply said he would give you the confirmation?---Yes.

You were anxious to get that confirmation?---Of course.

Why was that?---Four million dollars.

Apart from that, you had dealt with Metro Meat in the past very much on a basis of trust, had you not?---Never given \$4 million of guarantee, no, only on the word of men, that something could happen. Even between friends, when you make an agreement, you make an aide memoire to remember what is happening. 10

Did you tell Mr. Phillips that you required this confirmation for the purpose of being able to demonstrate to the IMO that you could fulfil your contract? Did you give him any particular reason for requiring the confirmation?---To have the confirmation of the contract signed.

Yes. Did you tell Phillips why you wanted to have a confirmatory telex from him?---Yes. I do not think it is needed to ask why. 20

No; but do you recall whether you did tell him or not? ---No.

Just to clarify that, do you say that you did not tell him or you simply cannot say whether you told him or not?---I think I told him that I needed confirmation of the contract, because I was worried about knowing, by Mr.Fares, that he gave a bank guarantee of \$4 million---and that our company was bound to pay the losses if they could happen.

MR. McCUSKER: Do you say that Phillips actually told you before he finally sent the telex that he had made contact with Dingwall?---Of course. 30

He told you that he had made contact---I ask him because I could not understand the reason not to receive the confirmation of the contract so after calling so many times I ask, 'Which is the reason, you are needing to contact Ken to send this telex' and he say --- well, I cannot say that he say 'Yes'. 'Well, I have to see', and at the end I discovered that he needed the approval. 40

You cannot say that he actually said (and there were certain shoulder movements then) that he had contacted Mr. Dingwall?---Yes. He said that he had contacted Dingwall at the end, before sending the telex.

When did he tell you that? On the last occasion that you spoke to him?---On the last occasion he spoke with me because of that reason before sending the telex.

Was that at his office or at yours or by telephone?---By telephone all the time.

Are you quite clear in your recollection of that particular point?---Absolutely sure because I was so  
DOCUMENT 6\* - Reasons for Judgment of  
His Honour Mr Justice Olney - 2.2.83

worried about it.

You have told us that he was putting you off and not telling you why. Perhaps I should put it this way: On the more than three occasions you spoke to him he was telling you he would give you a telex and it just never came up?---Yes. The first three or four times he never explain why not, so I ask him which was the reason, if he was trying to contact Ken, and he admitted that.

When did you ask him that? After about three times?--- Yes. 10.0

He admitted that he had tried to contact Ken?---Yes.

And then later you got the telex?---Later I got the telex, yes.

Do you think, Mr. Villegas, that possibly you simply assumed that he had contacted Ken Dingwall before he sent the telex?---No, I do not assume. I am repeating his words.

That is - - ?---That he has contacted Ken Dingwall.

Mr. Phillips will say that he was asked to give a confirmatory telex in a rush by you, and indeed it appears that you were anxious to get it?---I was. " 20

Phillips' evidence-in-chief concerning this aspect of the case is at pp.490-492 inclusive of the transcript. Having agreed that he recalled having sent the telex which is exhibit 2, the following exchange occurred:

"Did you have any contact prior to sending that telex with Mr. Villegas?---I did.

On how many occasions before sending that telex?--- To the best of my memory, two.

Do you recall what he said to you and you to him on each of those occasions?---Yes. On the first occasion which I would say was two days prior, somewhere around 17th July, Mr. Villegas phoned me, asked whether I had received a copy of the telex from Mr. Fares dated 3rd July, I told him I had. I read the cable or the telex through to Mr. Villegas and he asked would I send a copy of it to him confirming the terms and conditions as had been received from Mr. Fares himself so that he could show it to the bank. Also to the effect would I delete the last clause of the telex, which I did. 30 40

Did you, following that call and that request from Mr. Villegas, transmit the telex of 19th July?---No, I did not.

What did you do?---Well, I did not do anything on that particular day, which as I say would have been about the

17th. The following day Mr. Villegas rang me again, asked whether I had sent it, I told him I had not, that it was on the way, or that I would be doing so. Unfortunately, with the pressures of that day, I did not get it away then. On the 19th in the morning Captain Mata phoned me and asked me would I send it through as Mr. Villegas urgently wanted it, which I did that afternoon.

OLNEY J: Could you just explain to me what it was you were told was wanted. I understood you to say that Mr. Villegas was wanting a copy of the telex that Fares had sent so that he could show it to the bank?---Correct. 10

So it was a copy of Mr. Fares' telex?---Yes. The clauses in it made it the same as his telex.

MR. McCUSKER: Were you, before you sent that, between the time Mr. Villegas spoke to you, which you think was about the 17th, and the time you sent that telex on 19th July, in communication with Mr. Dingwall?---That I do not know. 20

MR. McCUSKER: Did you, before sending that telex, discuss the terms of it with Mr. Dingwall?---I did not. Did you have any first-hand knowledge at all of the terms of the contract made between Mr. Dingwall on behalf of the company and Mr. Fares at the time you sent that telex?---From Mr. Dingwall?

Yes?---No, I did not.

For how many years at that stage had you been with the company, with Metro Meats?---For 16 or 17 years.

Were you familiar with the course of dealings over the preceding four or five years between the company through Dingwall and Mr. Fares?---I was, yes--- 30

MR. McCUSKER: How did you regard the request from Mr. Villegas? Did you demur when he raised the question of sending a telex as requested, transmitting the terms of the Fares telex?---No, I did not. Due to the relationship between the two companies I took it as a request and that was the reason why I sent it off. "

Apart from the number of occasions that the two witnesses respectively say contact was made in the period leading up to the sending of exhibit 2, there is no question that communication was made, that it was initiated by Villegas, that it was by telephone, that contact was made on more than one occasion and that Villegas was anxious to obtain a response from Metro Meat. There is, of course, a significant difference between what the two witnesses say concerning the question of whether or not Phillips indicated having discussed the sending of the telex with Dingwall before it 40

was sent. Perhaps the most important aspect of the evidence is that Villegas says that he wanted confirmation of the contract and his reason for that was that Fares had given a \$4,000,000 guarantee to the I.M.O. against the performance of his contract with that body and obviously that guarantee was in jeopardy if the product could not be obtained from Metro Meat. At that stage Fares had nothing in writing from Metro Meat and according to Villegas the purpose of his telephone calls to Phillips was to get something from that company to confirm the existence of the contract. Phillips' evidence is of course significantly different on this point. He says that Villegas was wanting a copy of the telex that Fares had sent (exhibit 1) to show the bank. It is now known, although Phillips would not have known at the time, that Fares had sent Fares Rural a copy of exhibit 1 and indeed (as has already been commented upon) the document produced in court which became exhibit 1 is a copy of that telex taken from the records of Fares Rural. I do not accept that Villegas asked Metro Meat to send to Fares Rural a copy of a document which Fares Rural had had all along. The fact of the matter is that when Phillips sent exhibit 2 he did not purport to send it as a copy of a telex he had received but clearly on the face of it it purported to be confirmation of the terms of a contract entered into. Exhibit 38 is an example of what Phillips had previously done when wishing to send to a third party the text of a telex previously received. He simply set out the full text of the earlier message. In this case he not only did not purport to send a copy of exhibit 1 but omitted from his message a whole paragraph and added another of his own. Whether or not Phillips contacted Dingwall before sending exhibit 2 is of no real importance. There is no evidence to suggest that he discussed with Dingwall the fine details of his agreement. I find that exhibit 2 was sent by Phillips with the intention

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of confirming the terms as he thought them to be of the contract made on behalf of Metro Meat by Dingwall during his telephone conversation with Fares on 2nd July 1979. In so doing he obviously acted on what Fares had said were the terms of the agreement. He knew from Dingwall that an agreement had been made but it is obvious that the only source of the detailed information which he relayed was from Fares' telex. There is nothing in the evidence to support a finding that exhibit 2 was sent with the intention of reducing to writing the terms of an oral agreement. I have no doubt that Phillips believed that the terms agreed to were as stated by Fares but one cannot draw from that the conclusion that what Fares said were the terms, were in fact so. To the extent that the parties are in issue as to what was agreed, exhibits 1 and 2 are of little help in resolving the dispute.

THE TERMS OF THE CONTRACT: PRICES

I now turn to deal with the evidence relating to the telephone conversation of 2nd July 1979.

Dingwall had spoken to Fares on the telephone about a week before the 2nd July 1979 during the course of which he enquired as to progress of the negotiations then going on in Teheran relating to the proposed sale of lamb and hogget which Metro Meat hoped to supply to Fares. At the time he indicated his impending departure for overseas and expressed a desire to know the result of negotiations as soon as possible. And so it was that Dingwall was probably not very surprised to receive Fares' telephone call on the 2nd July 1979 even though it was at an unconventional hour. I have no doubt that it suited his convenience to have the matter settled before his departure for overseas. The only evidence-in-chief that Fares gave of the telephone conversation was to assert that an agreement was reached with Dingwall by telephone on 2nd July 1979 and that on the following day (3rd July 1979) he sent a telex to Australia "informing them of what we have done". He identified exhibit 1 as a copy

of the telex that he caused to be sent.

The cross-examination of Fares concerning the telephone conversation of the 2nd July 1979 was preceded by a series of questions directed to establishing the procedure which he followed in this type of transaction and it is convenient to set out the relevant questions and answers as they appear at pp.72 and 73 of the transcript:

"You would need to have a contract to sell to the Iranian Meat Organisation for the purpose of selling meat to Iran?---Yes; if I take a quotation from Metro Meat I would do, at my turn, another quotation to the meat organisation. I would take my own contract. I get the supply from Metro Meat and then we would agree how we would lodge his bank guarantee and how I would lodge mine, like the normal commercial procedure. 10

As part of your normal commercial procedure, in order to ensure that when you were supplying meat to the IMO you made a profit, did you not discuss with Mr. Dingwall how much your contract price was with the IMO?---No. This is not a rule to discuss with Mr. Dingwall how much money I was making. 20

You certainly did not do so in the case of the sale of live sheep to Iran, did you?---No.

In the case of the sale of meat to Iran, did you not tell Mr. Dingwall that the basis on which you were prepared to supply meat was that after allowing for all expenses and \$50 for your own profit and overheads, the balance would go to Metro Meat?---No, no.

When Mr. Dingwall spoke to you on 2nd July 1979 with regard to this particular contract, did you not then have confirmation from Dr. Boueri in Iran as to the position of your contact with the IMO?---Yes. I had a position from Dr. Boueri in this respect. 30

MR. McCUSKER: At the time you spoke to Mr. Dingwall on 2nd July and, as you say, concluded an agreement with him on that day, had Dr. Boueri, on your information, concluded a contract for you to supply meat to Iran, to the IMO?---From New Zealand.

Not from Metro Meat; not from Australia?---No. We gave the opportunity to Metro Meat to sell under what we were discussing there. " 40

Later in the cross-examination he said that a contract had been entered into by Dr. Jean Boueri as agent for Fares to supply to the I.M.O. meat which Fares contracted to purchase from Metro Meat. I am satisfied on the evidence and it is not disputed



that the contract between Fares and I.M.O. was finalised after Fares' telephone conversation with Dingwall on 2nd July. I also find that during that conversation Dingwall had agreed on behalf of Metro Meat to supply lamb and hogget at the rate of \$US1,375 and \$US1,230 per tonne respectively.

Fares was cross-examined at some length as to a number of statements he was told that Dingwall would make in his evidence which would go to establishing that in the telephone conversation Dingwall had asked Fares the price that he (Fares) was to get from the I.M.O. for the meat to be supplied by Metro Meat and that he was told \$US1,840 per tonne for lamb and \$US150 per tonne less for hogget. Fares was unable to recall exactly whether such a 10 question had been asked of him but he says he would not have been surprised if it had been asked. He categorically denied that any discussion took place with regard to the price for hogget and whilst he maintained that the prices that he was to receive from the I.M.O. "are not to be unveiled to your supplier" he conceded that he could not remember whether he had in fact told Dingwall the price the I.M.O. was to pay him.

In view of the opening sentence of exhibit 38 I think it highly unlikely that Fares did mention any firm figure to 20 Dingwall and if a figure was mentioned it was certainly neither intended by Fares, nor understood by Dingwall, to be anything in the nature of a warranty.

The cross-examination also pursued the line that Dingwall would say that he had enquired from Fares the price that the Western Australian Lamb Marketing Board was receiving from the I.M.O. for lamb and that he was told \$1,862.50 per tonne. Fares again was unable to recall whether he had given that information but he did add that newspaper publicity had been given to the fact in Australia that the price was \$1,850 or \$1,900. Dingwall's 30 evidence was that he asked Fares what other contracts were in force

for the supply of meat from Australia to the I.M.O. His evidence continued (Transcript p.340):

"He said yes, there was a Lamb Board contract. I asked him what type of tonnage was involved and he said 10,000 tonnes. I asked him was there any other contract that he was aware of and he said no. On hearing that then I think I said to him 'It's possible that we therefore can buy additional product outside our own production capacities in the eastern states like New South Wales and Victoria .' But it would depend on the price that we arranged whether that would be possible. The discussion then went on. I asked him first of all, what was the price of the West Australian Lamb Board and he told me \$1,862.50 per tonne. That was the U.S.C. & F price per tonne .... that figure seemed to be low to me in view of the prices that I would have expected the market to be at that time because of the New Zealand price being over \$2,000 a tonne which I was aware of ... he (Fares) said that was the price he had had the information about and then I asked him what was the price he made his offer at and he said he had to go in slightly lower than that price at \$1,840 - and we were talking about lamb at this particular stage. "

In view of the finding I have already made in dealing with the negotiations relating to the proposal to sell 15,000 tonnes of meat, in which Dingwall already had set in his mind a price difference of \$150 per tonne between lamb and hogget I do not accept his evidence in relation to what he claims was asserted by Fares in the telephone conversation as to the price to be paid by the I.M.O. for hogget. Indeed, after a full consideration of the evidence I am satisfied that Dingwall entered upon the negotiations on 2nd July 1979 fully aware of all relevant information affecting the market, including the cost of freight and that he was prepared initially to sell at \$US1,405 per tonne for lamb and \$US1,230 per tonne for hogget. He arrived at these figures relying on his own judgment unaffected by anything Fares told him. That he ultimately agreed to drop the price for lamb to \$1,375 per tonne is not disputed and the circumstances in which that occurred are dealt with hereunder.

I have already said enough to indicate that I find as a fact that the rate per metric tonne agreed to were \$US1,375 for lamb

and \$US1,230 for hogget. I find that these were firm figures agreed to after negotiation but without reliance upon any statement made on the part of Fares as to the price he was to be paid by the I.M.O., the cost of freight or any other matter. The prices were specifically agreed to by Dingwall on behalf of Metro Meat and were not dependent upon being calculated in accordance with an agreed formula. If any confirmation of this is required it is to be found in Dingwall's own evidence when he said that some months later it was his intention to "renegotiate" the prices. The evidence on this point came out in the context of Metro Meat's claim for certain additional payments which will be discussed 10 later, but what was said in evidence indicates quite unequivocally that although firm prices had been agreed, Dingwall nevertheless intended to exploit the situation which had arisen whereby Fares' \$4,000,000 bank guarantee to the I.M.O. could be in jeopardy if shipments were not forthcoming as originally envisaged. This particular passage of the evidence, coming as it does in the evidence-in-chief of Metro Meat's principal witness, explains much of what occurred at the time and helps to put into perspective what was said and written.

Dingwall was referred by counsel to exhibit 34, a telex 20 dated 17th March 1980 sent by Fares to Metro Meat for his (Dingwall's) attention. The full text of the telex (which will be referred to again later) is as follows:

"METMEAT AA82218  
918842 FARES G

17/3/80

REF: FF0422

ATTN: MR. K. DINGWALL

REFERENCE OUR EXCHANGE OF TELEXES. 30  
REGARDLESS OF THE CONSIDERATION WHETHER AMOUNTS ARE DUE OR  
NOT DUE AND IN ORDER TO AVOID FURTHER DISCUSSIONS, WE ARE  
PREPARED TO PAY A BONUS OF U.S. DLRS 30 PER TON ON ALL  
3 (THREE) SHIPMENTS ALREADY EFFECTED AND ON THE SHIPMENTS

TO FOLLOW AS WELL AS A PREMIUM OF U.S. DLRS 125 PER TON ON THE 843 TONS OF WALB LAMB BUT WE NEED TO BE ASSURED THAT YOU ARE GOING TO SUPPLY THE REMAINING TONNAGE.

IN FACT, YOUR ATTITUDE GIVES US SERIOUS DOUBTS AS TO YOUR INTENTIONS IN THIS RESPECT.

AS YOU KNOW, IF THE REMAINING TONNAGE IS NOT SUPPLIED, THE DAMAGES THAT WOULD OCCUR WOULD BY FAR EXCEED ANY AMOUNTS OF BONUS OR PREMIUM.

WHILE WE HAVE ALREADY PROPERLY ENSURED THE PAYMENT FOR METRO, IT IS ALSO OUR RIGHT TO BE ENSURED THAT THE REMAINING TONNAGE WILL BE SUPPLIED. 10

CONSEQUENTLY:

A  
PLEASE CONFIRM THAT METRO WILL SUPPLY THE REMAINING TONNAGE, CONFIRMING ALSO THE DATES OF THE 2 (TWO) FORTHCOMING SHIPMENTS OF ABOUT 4,000 TONS EACH.

B  
FROM OUR SIDE, WE CONFIRM THAT, AS SOON AS WE HAVE YOUR CONFIRMATION, THE PAYMENT TO METRO OF THE U.S. DLRS 30 PER TON BONUS ON THE 3 (THREE) FIRST SHIPMENTS AS WELL AS THE PREMIUM OF U.S. DLRS 125 PER TON FOR THE 843 TONS WILL IMMEDIATELY BE EFFECTED. 20

REGARDS

R FARES

918842 FARES G\*  
METMEAT AA82218 "

In relation to this telex, which was read to the witness in full, the following exchange of questions and answers occurred

(Transcript pp 400/1-402)

"(MR. McCUSKER): I think it is clear you did not give the confirmation that was sought in that telex regarding the further two shipments?---That is correct. 30

Why did you not give that confirmation?---I was not prepared to give him an assurance or confirmation at that stage, because it would have weakened my position in the negotiations I had planned to take with him. Once we received our money I was quite prepared to sit down with him and discuss the last two shipments and organise them, set the dates for them. I had full intention of renegotiating the prices with him on the last two shipments. If I had given that assurance, I would strategically have weakened my position to do that. 40

Why do you say it would have weakened your position in discussing the last two shipments with him?---  
Because having given my personal assurance that I would

do that I believe in my own mind I would have been in a lot weaker position in negotiating those prices.

OLNEY J: What do you mean by 'renegotiating the prices'?---Your Honour, by this stage we had received in the case of the prices that I had received on the contract, which indicated to me that the prices Fares had discussed with me at the start of the contract were incorrect - - He had assured me two months later that they were correct and at that stage I had proof of evidence that on two occasions he had deceived - 10 me, because I was in Iran and I made sure that I checked those prices out while I was there.

Please answer the question. What do you mean when you say you wanted to 'renegotiate the prices'? Did you want to change the prices?---That is right, yes.

Which had been negotiated?---Which had been set at \$1375 and \$1230.

MR. McCUSKER: Did you consider you were entitled to do that?--- Yes, I did, because I believed that we had been misled and the prices we had agreed to were based on wrong information. 20

Why did you not simply tell Mr. Fares at that point that you had that information and sought a change in the price? ---I believed if I had done that I would have waved goodbye to the \$360,000.

The \$360,000 being what?---Being the two payments yet not paid. We had received one payment of \$30 on the third shipment but not the first two shipments, and the \$125 per tonne on the purchased meat from the West Australian Lamb Board. " 30

As I have already said, I am satisfied that Dingwall did not rely upon any information given to him by Fares in arriving at the figures he agreed to, and accordingly there is no substance in the assertions made by Dingwall in the quoted evidence in which he seeks to justify the "renegotiation" of the prices. This evidence is a denial of Metro Meat's pleading that the prices were dependent upon a calculation involving a consideration of the prices being paid by the I.M.O., the cost of freight and the amount of Fares' profit margin.

#### TONNAGE

As to the tonnage discussed in the telephone conversation<sup>40</sup> Fares agreed in cross-examination that Boueri was at the time in Teheran negotiating with the I.M.O. for the supply of meat and

the I.M.O. wanted 20,000 tonnes. When asked whether he had asked Dingwall whether he (Dingwall) could increase the previous offer from 15,000 to 20,000 his reply was:

"I do not recall that. I recall I gave him the opportunity to supply 20,000 tonnes. He suggested that there would be 12,000 tonnes of lamb and 8,000 tonnes of hogget. I asked him at what price and I got the price \$1,405 for lamb and \$1,230 for hogget. " (Transcript p.129)

When again asked whether he had asked Dingwall if the latter could increase his previous offer from 15,000 to 20,000 tonnes the reply was simply "I do not recall. I asked him to supply 20,000 tonnes." (p.129) 10

Dingwall's evidence-in-chief on this point was:

"....(Fares) indicated he needed a greater offer of tonnage because the IMO were willing to buy 20,000 tonnes. Knowing that I had offered him 15,000 tonnes I said to him 'well, Rachid its more tonnage than we envisaged: there can be other factors involved in putting up additional tonnage and I would like to know is there any other contract being let for Australia?' " (Transcript 339) 20

An English translation of Fares' contract with the I.M.O. was put in evidence. (Exhibit 40). It was not dated but I accept Fares' evidence that it was finally executed on his behalf after he had received a firm offer from Dingwall during the 2nd July telephone conversation. Fares' obligation under the I.M.O. contract was to supply and deliver "Australian first grade frozen lamb and hogget with 10% up or down at the sellers option", about 12,000 metric tonnes of lamb carcasses and about 8,000 metric tonnes of hogget carcasses at a price of \$US1,850 per tonne C & F for lambs and \$US1,800 C & F for hogget. The period of the contract was from the date of signing until "31.4.1359" - a date in the Islamic calendar said to be equivalent to 31st July 1980. The contract also provided in paragraph 7 under the heading "Time of Delivery" as follows: 30

"The seller is obliged to ship the meat so as to arrive at B.K. or B.K. as follows and obtain the receipt from buyer's representative.

A. Frozen lamb and hogget from Australia

About 2,000 mt  
About 4,000 mt  
About 4,000 mt  
About 4,000 mt  
About 4,000 mt

(The initials B.K. apparently refer to two alternative Iranian ports). 10

Despite its heading paragraph 7 does not specify any "Time for delivery" and of course only refers to a total of 18,000 tonnes. Fares explained these apparent anomalies in this way. As to the absence of the delivery times he says that the practice was for these to be negotiated with the I.M.O. during performance of the contract and I accept that to be the fact. As to the other point his evidence was thus. (Transcript pp. 150-151):

"---Normally - and I have to explain it - when I buy from a supplier on FAS basis and I sell to a buyer on a C & F basis, I always try to protect myself especially when I give a bank guarantee for \$4 million, that should there be any problem of supply I will not be caught by it through my bank guarantee. Although the contract foreseen for about 12,000 tonnes for lamb and about 8000 tonnes for hogget, I always take the maximum margin from the supplier, FAS, and I always tend to bind myself with the buyer with the minimum. Anyone else who would have made a contract with Iran would have put in this clause, everything to reflect the 20,000. You have to be clever in order to put the clause which I have put for IMO because according to this clause even if I come below my commitments with IMO they cannot - - They can, at any moment they want, seize my bank guarantee but according to that way of putting the programme of deliveries they cannot seize my bank guarantee logically. This is one way of putting it and I am sure somebody else would not have put it that way, somebody else would have completed it to be 20,000 tonnes, and if you would have completed it to be 20,000 tonnes it will be more liable to the bank guarantee ..... " 20 30

Under his contract with the I.M.O. Fares had the option to supply between 18,000 tonnes and 22,000 tonnes. He

committed himself to a delivery schedule appropriate to his minimum obligation. This appears to be sound business practice. He said in his evidence that the I.M.O. were anxious to obtain "the maximum" and that he asked Dingwall to supply "the maximum". All of the evidence leads conclusively to the fact that the tonnage discussed in the telephone conversation was 20,000 tonnes, that this was what was agreed to, that the parties both accepted this agreement committed Metro Meat to supply a minimum of 18,000 tonnes but nevertheless entitled it to supply and to be paid for any quantity in excess of 18,000 tonnes not exceeding 22,000 tonnes. No doubt Fares was anxious to suit the I.M.O. by supplying the 10 maximum under his contract and I accept that he may well have asked Dingwall to assist in this regard by having Metro Meat supply the maximum but I do not accept the assertion pleaded by the plaintiffs that Metro Meat through Dingwall agreed to supply 22,000 tonnes. Nor do I accept the defendant's assertion that it agreed to supply only 18,000 tonnes. Whatever may have been said between Dingwall and Fares on the 2nd July 1979, Dingwall may well have had it in mind that Metro Meat would only supply the minimum which was, after all, closer to the figure of 15,000 tonnes that he had originally contemplated. I find as a fact, 20 however, that the tonnage agreed to on the 2nd July 1979 was 20,000 tonnes being 12,000 tonnes of lamb and 8,000 tonnes of hogget. To the extent that exhibit 1 and exhibit 2 purport to confirm a contract to supply tonnages different from those that I have found were agreed to, those exhibits do not accurately reflect what was agreed. For the plaintiffs it was argued that irrespective of what was actually agreed the two telexes, exhibits 1 and 2 subsequently became conclusive evidence to the contrary. This is, of course, something different from what 30 is pleaded. Both parties say that the contract was oral and was made on 2nd July 1979. The plaintiffs say that the oral contract



was evidenced in writing, such writing being inter alia the telexes exhibits 1 and 2. The pleading itself suggests that there are other writings evidencing the contract but none were proved. The plaintiffs have failed to satisfy me that the two telexes do accurately reflect what was agreed orally between Fares and Dingwall as to the quantity of meat to be supplied by Metro Meat. This is not to say that the telexes do not in other respects reflect what was agreed to. Whether they do or not depends upon what is found on the evidence to have been agreed.

#### DELIVERY SCHEDULE

I am satisfied on the evidence that as originally . 10 contemplated the timetable for delivering of the meat was as stated in general terms in exhibit 1. In this regard I am of course referring only to the timing of shipments and not the tonnages. It is fact, and not in issue, that shipments actually departed from Australia in the months of September 1979, November 1979 and February 1980. In each case the ship "Almeria Star" was used under charter by Fares from the Blue Star Line. Nothing turns upon whether the ship was taken under a single charter for the whole of the contemplated 5 shipments or under a series of separate charterings. It is also not in issue that 20 by about the end of 1979 it was thought that the 4th and 5th shipments would occur in about March and May 1980 respectively. (See exhibit 12).

Metro Meat's case with regard to the delivery schedule was that what was agreed to was the same as in paragraph 7 of Fares' contract with the I.M.O. (exhibit 40), that is, an initial consignment of 2,000 tonnes followed by 4 consignments of 4,000 tonnes each. This, of course, gives a total of 18,000 tonnes and it was on that basis that Metro Meat asserted that the quantity agreed to be supplied was 18,000 tonnes. There was no direct evidence of what 30 was agreed with respect to delivery apart from Fares' statement that his telex of 3rd July 1979 (exhibit 1) contained the terms of the

contract. At that stage Fares was not committed to any definite timetable of deliveries to the I.M.O. except to the extent that the contract was to expire at the end of July 1980. He was however committed to five shipments and no doubt the size of the shipments dictated the type and size of the vessel he would have to charter to ship the meat from Australia. I doubt if anything more than generalities was discussed between Fares and Dingwall during the telephone conversation on the 2nd July 1979. I accept that it was agreed that the first shipment would be less than the later ones and that it was contemplated that five shipments in all would be made. Fares was obviously anxious that the tonnages shipped should at least meet his minimum obligations to the I.M.O. and further that to the extent possible the full capacity of the vessel chartered by him should be availed of so as to avoid "dead freight", but apart from that the shipping arrangements were left very much to be worked out through the co-operation of the parties during the performance of the contract. This is how they had operated before and it is obvious from telexes sent between Phillips and Fares in the early days after 2nd July 1979 (exhibits 38, 54 and 55) that this is how they intended to proceed under this contract. Indeed, that is exactly how they did proceed in respect of the first three shipments involving the consignment of a total of 10,834 tonnes of meat. The obligation

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assumed by Fares was to have shipping available at the appropriate time and place to take delivery of the meat. Metro Meat had an obligation to have the product available in adequate quantities to enable loading to take place. All this involved considerable advanced planning and a high degree of co-operation and I find as a fact that it was basic to the contract that the parties would co-operate to the extent necessary to ensure that each could order its own affairs so as to facilitate the performance by the parties of their respective obligations. There is no other way that the contract could be performed. Fares had a very practical reason for wanting to know well in advance when and where the meat was to be available for loading. As he said in evidence (Transcript p.112):

" When you confirm a ship you pay and before paying you have to know exactly that the meat is there. "

By the same token, Metro Meat could not reasonably be expected to either produce or purchase upwards of 3,000 or 4,000 tonnes of carcasses without some relative certainty that a ship would be available for the goods to be loaded. I will return to this matter in more detail when I deal with the question of the claimed repudiation of the contract by Metro Meat.

There remains one other matter concerning the original agreement with which I must deal, namely the \$30 per tonne "rebate referred to in para.2(v) of the defence. The evidence on this issue is fairly clear. Fares says that when Dingwall offered to supply lamb at \$US1405 per tonne and hogget at \$US1230 per tonne, he (Fares) pointed out that conditions in Iran were then unsettled and there was a real risk of shipping being held up in Iranian ports for long periods and to compensate him for the expense likely to arise through such a contingency he asked Dingwall to reduce the price of lamb by \$30 per tonne. Fares is quite 10 adamant that he only asked for the reduction on the lamb price and I accept his evidence on this point. He says that hogget was not discussed with Dingwall except that the price of \$US1230 per tonne was offered and accepted. Dingwall had had the idea as long ago as May 1979 that the price for hogget should be \$150 per tonne less than for lamb and I have no doubt that when Dingwall offered to sell hogget for \$US1230 per tonne Fares was very conscious that this figure left him plenty of margin to cover any extra expense that shipping delays may cause, but with lamb at \$US1405 per tonne the same margin was not there hence his 20 request that the lamb price be reduced by \$30. Dingwall does not contest the fact that he agreed to reduce the lamb price by \$30. He said that he also agreed to a similar reduction on the price of hogget but his evidence in regard to the hogget price is far from convincing and I accept Fares' evidence that the reduction was sought and agreed to only on the price of lamb. As it happens nothing of importance turns upon this question. Nor is it in issue that Dingwall asked Fares what would be the position if there were in fact no extra costs incurred in the manner contemplated. The parties are, however, not at one as to Fares' 30 response. It is necessary to look to the evidence to see

exactly what the issue is. Fares did not avert to the matter in his evidence-in-chief except to the extent that he affirmed that exhibit 1 reflected the terms of the agreement. It is therefore useful to look in detail at the relevant portion of exhibit 1 and for convenience sake I quote same again.

"We also agreed with Mr. Dingwall that if vs1 is discharged in less than 40 days we would pay Metro Meat a bonus which will be left to our discretion because, due to difficulties in contract including big risks of slow discharge in provoking delays which will not be compensated by demurrages Mr. Dingwall accepted a last minute discount on lamb prices. "

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I accept the evidence given by Fares that the passage quoted reflects what was agreed between the parties. I do not accept, however, the construction that Fares puts upon the words quoted. I think it is important that the passage be examined carefully and I would make the following comments. Firstly, the paragraph is couched in terms of an agreement. It purports to bind Fares to pay "a bonus" in the event of certain contingencies occurring. Secondly, the amount of the bonus is not fixed but is left to the discretion of Fares and thirdly, the consideration for payment of the bonus is expressed to be the acceptance by Metro Meat of a reduced price for lamb. Had this paragraph specified an amount per tonne to be paid by way of bonus in the event of the contingencies being met there would be no doubt that subject to those contingencies an additional amount would be payable and that it would be payable in respect of all meat delivered, not just lamb. I reject Fares' evidence that it was never contemplated that the bonus would be paid on hogget. I also reject his evidence to the effect that the bonus was only contemplated as an additional payment if after all the meat had been delivered, he had shown a profit on the contract. The plain meaning of the words used (and they are Fares' own words) is consistent only with an intention that any bonus payable would be payable in respect of each shipment as and when that

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shipment had been made and subject to the stated contingencies being met with respect to such shipment. The critical aspect of this particular paragraph is that the discretion reserved to Fares is not as to payment of the bonus but as to the amount to be paid. It is clear from the evidence and I so find that both parties contemplated that subject to the contingencies relating to the delivery being satisfactorily met a bonus would be paid. Dingwall assumed that the amount would be \$30 per tonne on all meat delivered. Fares says that he never contemplated paying more than \$15 per tonne and then only on lamb. In the event Dingwall agreed to leave it to Fares to fix the amount. This was quite<sup>10</sup> consistent with the harmonious relationship and mutual trust that then existed between the two men. It may not be the type of arrangement that many businessmen would enter into but it suited these two and it was typical of their previous dealings. Both had much to gain by a continuation of the relationship and although a fairly large amount of money was involved in the "bonus", the total sum was of relatively minor significance in a contract which potentially involved something in excess of \$28 million. No doubt Fares could have set the figure at a merely nominal<sup>20</sup> amount and what would have been the situation had he failed to exercise his discretion to set the amount of the bonus is a matter of academic interest only as the fact is that he ultimately did set the sum at \$30 per tonne on all lamb and hogget delivered in the first three shipments. (See exhibit 34). The actual delivery of the first three shipments occurred well within the contingency period and accordingly Metro Meat is entitled to \$30 per tonne on 10,834 tonnes, a total sum of \$325,020. The first and final paragraphs of exhibit 34 seem to suggest that Fares intended to make payment of the "bonus" conditional upon an assurance from Metro Meat as to its continued performance of the contract. I do<sup>30</sup> not think that it was open to Fares to impose such a condition. His discretion was as to the amount of the bonus. Its payment

was to be conditional upon the stated contingencies being met. Those contingencies were met and in his discretion he set the amount of the bonus at \$30 per tonne. The agreement did not contemplate that Fares' discretion would or could be exercised conditionally. Having set the figure he was bound to pay. In the absence of any agreement as to time, payment should have been made within a reasonable time. In fact, payment of portion of the sum, namely, \$116,383 was made by Fares' bank contrary to his instructions and Metro Meat must bring this amount into account thus leaving a balance of \$208,637 payable. 10

W.A.L.M.B. SUBSIDY.

When Dingwall telexed Mata on 21st December 1979 advising that he anticipated a "shortfall" of 1,050, 1,300 and 1,300 tonnes in respect of the third, fourth and fifth shipments respectively then planned for January, March and May 1980 respectively (exhibit 12) Mata responded with an expression of concern in these terms (exhibit 13):

"REF YR TX DD 21/12/79

WE ARE VERY CONCERNED FOR YR SHORTFALL - WE WILL REVERT WITH OUR ANSWER - IN THE MEANTIME KINDLY BE ADVISED THAT W.A. LAMB BOARD HAS AVAILABLE 900 TNS OF LAMB IN FREMANTLE RIGHT NOW. WE STRONGLY INSIST ON THE NECESSITY TO COMPLETE EVERY SHIPMENT FM AUSTRALIA (ABOUT 3,800 TNS) TO AVOID DEAD FREIGHT ON DEPARTURE FM SECOND PORT. "

20

It was clearly in Fares' interests that ships should not sail with vacant cargo space. He had been disappointed that the amount of meat shipped in the first shipment, although well up to Metro Meat's contractual commitment, was less than the capacity of the vessel. To overcome the possibility of the third shipment falling considerably short of the available cargo capacity Fares suggested that Metro Meat purchase approximately 900 tonnes of lamb referred to in exhibit 13 from the W.A. Lamb Marketing Board. The problem about this meat was that the price 30

being asked by the W.A.L.M.B. was considerably in excess of the cost that Metro Meat had contemplated when the contract was entered into. Dingwall suggested that the additional cost be shared. A figure of \$125 per tonne was discussed. Dingwall says that Fares agreed to pay this amount and that Metro Meat thereupon purchased 843 tonnes of lamb from the W.A.L.M.B. at a price per tonne \$250 in excess of the budgetted price. Fares for his part said he made his acceptance of Dingwall's proposal conditional upon Metro Meat confirming a revised shipping schedule. This came about in the following manner. 10

Fares said that early in 1980 he telephoned Dingwall ostensibly to exchange New Year greetings but in addition to try to solve the problem of the anticipated shortfall referred to in exhibit 12. Mata had already drawn Dingwall's attention to the availability of 900 tonnes of lamb in his telex (exhibit 13) The evidence is somewhat confusing as to exactly when this telephone conversation took place and particularly whether there was more than one conversation and indeed also as to exactly who telephoned who. There is no doubt that on the 3rd January 1980 Fares' secretary in London telexed Mata about a number of things 20 including this conversation with Dingwall. The relevant part of this telex is in these terms:

"K.D. phoned to cfm purchase of further 270 tonnes rising total so far just over 3,000 and proposing to load the balance fm W.A.L.B. if we share difference of price. To enable us considering his offer, we asked him to cfm two dates of shipment about 3,800/4,000 t. (Almeria Star or substitute). He promised to come back tomorrow by 9,00 a.m. Adelaide time. Mr. Fares suggests you ctc him before then. "

30

According to Fares he suggested to Dingwall during the telephone conversation that instead of shipping only 2,500 tonnes in March and again in May it would be preferable to delay the two shipments to give Metro Meat more opportunity to acquire the necessary product to ship a full consignment on each occasion.



The suggested revised shipping times were some time between March and May 1980 for the fourth shipment and the end of July or early August 1980 for the final shipment. I think it is quite clear from Fares' subsequent conduct that Dingwall did not commit himself on this proposal. I say this because exhibit 14 (although it was merely a message passing between different parts of the Fares organisation) satisfies me that at least at the 3rd January 1980 there had been no firm agreement and further that even by the 23rd January 1980 Mata was still endeavouring to obtain confirmation in respect of a revised schedule. On that day Mata telexed Dingwall in these terms (exhibit 17). 10

"Meat Contract. We must confirm today last two shipments to assure M.V. Almeria Star - Blue Star Line will put this ship to our disposition some time between 25th April to 15th May for fourth shipment and between 15th - 30th July for the fifth and last shipment. Kindly confirm today that M.M. will have two shipments of 3,800 Tns. each prepared for each one of the above-mentioned periods. " 20

Fares was quite adamant in his evidence that the arrangement he made for the payment of an additional \$125 per tonne in respect of meat purchased from the W.A.L.M.B. to top up the ship for the third shipment was conditional upon Metro Meat confirming the revised shipping schedule. This evidence is certainly consistent with the message his secretary sent to Mata on the 3rd January 1980. Dingwall on the other hand said in effect that there was no obligation on Metro Meat's part to purchase more than a very small quantity in order to bring the total consignment in the third shipment up to the amount of its minimum commitment to that stage and that he would not have purchased the additional lamb from the W.A.L.M.B. without a firm commitment from Fares to pay the \$125 per tonne subsidy. 30

I find that on the balance of probabilities Fares did agree to pay the subsidy on the lamb purchased from the W.A.L.M.B.

and this agreement was not conditional. There are a number of factors that lead me to this conclusion. With shipping costs at about \$385 per tonne it was good business on Fares' part to pay a little extra to have the ship filled to capacity. The evidence shows that loading of the lamb took place at Fremantle on 21st January 1980 which means that Metro Meat must have purchased the product from the W.A.L.M.B. at least on or before that day. When Dingwall telexed Fares on 13th February 1980 (exhibit 22) claiming payment of the prompt discharge bonus in respect of each of the first three shipments and in addition the subsidy of 10 \$125 on 843 tonnes of lamb purchased from the W.A.L.M.B. Fares replied on 29th February 1980 (exhibit 23) indicating that payment of the prompt discharge bonus was conditional upon the total quantities foreseen in the agreement being delivered but no mention was made of the W.A.L.M.B. subsidy. This fact was drawn to his attention in a further telex sent to him by Dingwall on the 5th March 1980 (exhibit 25) and drew a response in a telex dated 12th March 1980 (exhibit 29) in these terms:

"ATTN: MR K. DINGWALL

A

BACK IN UK WE RECEIVED YOUR SURPRISING TELEX DATED 5 MAR 80 WHILE WE ARE STILL WITHOUT ANY NEWS FROM YOU CONCERNING THE MOST PRESSING MATTER AND THAT IS THE DATES OF THE FORTHCOMING SHIPMENTS. 20

B

THE BONUS BEING ENTIRELY TO OUR DISCRETION IS NOT A CONDITION OF OUR AGREEMENT BUT NEVERTHELESS WE ARE READY TO CONSIDER IT AS AND WHENEVER APPLICABLE.

C

THE EXCEPTIONAL SUBSIDY FOR THE 843 TONS OF LAMB PURCHASED FROM THE WALB FOR THE LAST SHIPMENT IS NOT A CONDITION OF OUR AGREEMENT BUT MERELY TO AVOID DEAD FREIGHT ON THE 3RD SHIPMENT, WHICH YOU HAVE NOT BEEN ABLE TO COMPLETE AS FORESEEN IN OUR AGREEMENT, AND CONSEQUENTLY TO HELP LIMIT THE LOSSES FOR THAT PARTICULAR SHIPMENT. 30

BUT WE ARE ALSO PREPARED TO CONSIDER THIS SUBSIDY AT THE CONDITION THAT THE TOTAL QUANTITIES FORESEEN IN OUR AGREEMENT BEING SUPPLIED AND THE FORTHCOMING SHIPMENTS ARE TO BE COMPLETED BEFORE END OF JULY 1980

AND TO BE OF MINIMUM ABOUT 4,000 TONS EACH, AS FORESEEN IN OUR AGREEMENT, AND NOT 2,500 TONS AS YOU HAD PROPOSED IN YOUR TELEX DATED 25 DEC. 79.

D  
THE TOTAL AMOUNTS RESULTING FROM CONSIDERING THE BONUS AND THE SUBSIDY ARE ONLY A FRACION OF THE PENALTIES AND THE DAMAGES THAT WOULD OCCUR SHOULD YOU NOT SUPPLY THE TOTAL QUANTITIES FORESEEN IN OUR AGREEMENT.

E  
TO AVOID FURTHER STERILE DISCUSSIONS WHICH CAN ONLY LEAD TO LOSS OF TIME OUR/YOUR BANK HAVE BEEN GIVEN FULL POWER TO CREDIT YOU WITH ANY SUCH AMOUNTS WHENEVER APPLICABLE AS LONG AS YOU LEAVE NO DOUBTS THAT YOU ARE SUPPLYING THE REMAINING QUANTITIES FORESEEN IN THE AGREEMENT BY THE END OF JULY 1980.

10

SHOULD YOU WISH TO CASH THE AMOUNTS AS THEY COME YOU CAN EASILY ARRANGE IT WITH YOUR BANK GIVING THE NECESSARY GUARANTEE THAT YOU WILL SUPPLY THE QUANTITIES FORESEEN IN OUR AGREEMENT BY THE END OF JULY 1980.

F  
ONCE MORE, WE URGE YOU TO REPLY GIVING FINAL DATES OF SUPPLY FOR THE FORTHCOMING SHIPMENT AS BESIDES THE PENALTIES OF NON-FULFILLMENT AND THE DAMAGES THAT CAN OCCUR, THE FACT OF MAINTAINING THE VESSEL'S SCHEDULE IN SUCH UNCERTAINTIES IS EXTREMELY PREJUDICIAL AS WELL.

20

KIND REGARDS  
R FARES

918842 FARES G

CORR CORRECTION IN TAPE:

POINT (D) LINE 2  
PLEASE READ ONLY A FRACTION OF THE PENALTIES "

30

My impression is that Fares changed his ground in the course of time and I accept Dingwall's evidence that the subsidy for the W.A.L.M.B. meat was agreed to without conditions. No time was fixed for payment of this amount and accordingly it must be implied that payment would be made without a reasonable time after shipment.

The agreement with respect to this subsidy was quite independent of the original contract and was made mainly for Fares' benefit. It was not a mere gratuitous promise on Fares' part. It may well be that Metro Meat was able to exploit the

situation with regard to dead freight to its own advantage but there was certainly no compelling reason on its part to agree. Fares on the other hand was anxious to avoid unnecessary freight charges and also had to keep in mind the necessity of meeting his own minimum commitment with the I.M.O.

A reasonable time has long since passed and in my opinion Fares Rural is liable to Metro Meat in the sum of \$105,375 being a subsidy of \$125 per tonne on 843 tonnes.

REPUDIATION OF THE DEFENDANT.

In order to consider this matter it is necessary to return to the chronology of events which has been interrupted somewhat by the discussion of the issue just disposed of. 10

Mata's telex of 23rd January 1980, (exhibit 17) drew a response from Dingwall on the same day by telex (exhibit 18) as follows:

" 93087  
FARES AA93087  
METMEAT AA82218 23/1/80 1645 HRS  
  
FOR CAPT. MATA  
-----

'AMERIA STAR' PROPOSED 4TH AND 5TH SHIPMENTS 20

1. SINCE DISCUSSIONS WITH RACHID LATE DECEMBER EARLY JANUARY POLITICAL DEVELOPMENTS HAVE BEEN TAKING PLACE WHICH COULD HAVE A MAJOR INFLUENCE ON CONTINUATION OF SUPPLIES OF MEAT FROM AUSTRALIA TO IRAN.
2. THE AUSTRALIAN PRIME MINISTER IS LEAVING AUSTRALIA LATE JANUARY FOR DISCUSSIONS WITH THE PRESIDENT OF U.S.A. IN EARLY FEBRUARY ON PROPOSED ECONOMIC SANCTIONS AGAINST U.S.S.R. RE AFGANISTAN AND SIMILAR SANCTIONS AGAINST IRAN BECAUSE OF THE U.S. HOSTAGES IN TEHRAN. 30
3. AT THIS STAGE IN THE CASE OF IRAN THE TYPE OF PROPOSED SANCTIONS HAS NOT BEEN CLARIFIED BY PEOPLE IN CANBERRA BUT ON ENQUIRY WE HAVE BEEN WARNED NOT TO MAKE ANY COMMITMENTS TO IRAN UNTIL THE OFFICIAL DECISIONS OF THE OUTCOME OF THE JOINT TALKS IN U.S.A. ARE ANNOUNCED.
4. IN DISCUSSIONS WITH AYATOLAH MENHAIJ IN ADELAIDE LAST THURSDAY HE LEFT ME IN NO DOUBT THAT IF AUSTRALIA AGREED TO SANCTIONS AGAINST IRAN TO SUPPORT THE U.S.A., IRAN WOULD CEASE ALL TRADE WITH AUSTRALIA.

5. I RECOMMEND UNDER THE ABOVE CIRCUMSTANCES THAT RACHID SHOULD EXPLAIN THE ABOVE TO BLUE STAR AND ASK THEM TO DEFER DECISIONS ON THE 4TH AND 5TH SHIPMENTS UNTIL THE SANCTION ISSUE IS CLARIFIED IN APPROXIMATELY TWO WEEKS TIME.

REGARDS  
DINGWALL  
METMEAT AA82218\*  
FARES AA93087 "

Mata replied on the 29th January 1980 (exhibit 21) 10  
setting out a variety of reasons why he felt that Dingwall's  
fears of sanctions were groundless and concluded with the  
following paragraph:

"We thank you for your recommendations in para.5  
of your telex but as we have no other alternative  
but to continue the shipments we ask you to kindly  
make sure the quantities will be prepared in time  
for the foreseen dates of shipment. "

Dingwall did not reply further to Mata but on 13th  
February 1980 sent exhibit 22 (a portion of which has already 20  
been quoted) in which claims were made for payment of the  
prompt discharge bonus and the W.A.L.M.B. subsidy. In that  
telex the penultimate paragraph reads:

"Subject to receiving the above funds I will then  
examine the position and possibilities to ship  
further tonnage in May and July. "

Fares responded (telex dated 29th February 1980 exhibit 23)  
advising that the prompt discharge bonus would be payable  
provided that the full quantities foreseen in the agreement are  
delivered which is followed by a request: 30

"Please take notice of the above and confirm to us  
as soon as you receive this telex the date of the  
next two shipments of 3,800 tonnes each. "

Dingwall replied (telex dated 5th March 1980 exhibit 25)  
re-asserting his claim for payment of the prompt discharge bonus  
and the W.A.L.M.B. subsidy and concluded:

"Only after we have received payment am I prepared  
to discuss tonnage for May and July.

Fares was absent from the United Kingdom when exhibit 25 was received but he had returned by the 12th March 1980 when he telexed his response to Dingwall (exhibit 20 - quoted in full above). The general thrust of this reply is that Metro Meat would be paid the full amount of the claim "as long as you leave no doubts that you are supplying the remaining quantities foreseen in the agreement by the end of July 1980". The message concludes with the familiar plea:

"Once more, we urge you to reply giving final dates of supply for the forthcoming shipment as besides the penalties of non fulfilment and the damages that can occur, the fact of maintaining the vessel schedule in such uncertainties is extremely prejudicial as well. "

10

Dingwall's response came the next day (telex 13th March 1980 exhibit 31) and was somewhat more abrupt than his earlier messages. He reasserted his claims in respect of the prompt discharge bonus and the W.A.L.M.B. subsidy and concluded:

"So pay up because I don't intend to waste my valuable time without first ensuring Metro is fully paid for what is due. "

20

Dingwall sent a further message demanding payment the next day (telex 14th March 1980, exhibit 32) which drew yet another response from Fares (telex 17th March 1980, exhibit 34) which concluded with the statement:

"FROM OUR SIDE, WE CONFIRM THAT, AS SOON AS WE HAVE YOUR CONFIRMATION, THE PAYMENT TO METRO OF THE U.S. DLRS 30 PER TON BONUS ON THE 3 (THREE) FIRST SHIPMENTS AS WELL AS THE PREMIUM OF U.S. DLRS 125 PER TON FOR THE 843 TONS WILL IMMEDIATELY BE EFFECTED. "

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On the same day (17th March 1980) a Mr. Ware of Metro Meat telexed Mata in these terms (exhibit 33):

"As we are no longer producing hogget and lamb for you please advise Dr. Bahrami-Kia of this and that he will not be required to inspect Metro's abattoirs."

The context in which this last telex was sent needs to be explained.

Dingwall admits that production of lamb and hogget for the Fares contract was suspended following the third shipment and says this was because of the uncertain situation created by reason of political events in Iran and the possibility of some form of trade sanctions being imposed by the Australian Government. There was no concrete evidence about the contemplated sanctions. It appears that Dingwall's views on the matter were possibly influenced by something he had been told by an official of the I.M.O. and there was according to him some advice given by the Australian Department of Trade but there is no evidence before the Court upon which any finding could be made that the future performance of the contract was likely to be affected by political action on the part of either the Australian or the Iranian Governments. But be that as it may, the fact of the matter is that Metro Meat did cease production of lamb and hogget for the Fares contract some time towards the end of February 1980 and so when Mr. Ware sent exhibit 33 on the 17th March 1980 what he said was factually correct. Fares construed this telex as an indication by Metro Meat of its repudiation of the contract but a different construction was placed upon it by Mr. Ware who suggested that the telex was sent to prevent Dr. Bahrami-Kia (an I.M.O. inspector) from making any unnecessary visit to Metro's abattoirs. There appears to have been some factor personal to Dr. Bahrami-Kia and another employee of Metro Meat which had some bearing upon the sending of this telegram but I do not regard the telex or its contents of any great significance and same is mentioned here only as a preliminary to mentioning two letters (exhibits 36 and 37) which passed between the parties in April 1980 and which, because of their critical importance in the determination of the issues before the Court are now set out in full despite their length.

The first letter is dated 21st April 1980 and was written

by Captain Mata in his capacity as managing director of Farco Rural to the manager of Metro Meat for attention by Mr. Dingwall. This is exhibit 36; it reads:

" The Manager,  
Metro Meats Limited,  
2 Hurtle Square,  
ADELAIDE, S.A., 5000

April 21, 1980

Attention Mr. Dingwall

Dear Sir,

We are greatly concerned at your telex of March 17 advising that you are no longer producing hogget and lamb for us. In addition we still await reply to our telex of March 17 last. Mr. de Blanco Villegas endeavoured to contact Mr. Dingwall on Sunday last and was advised that he had left for overseas shortly before. On Monday last he endeavoured to contact Mr. Turner by telephone, but was eventually told that he too had left for overseas. 10

We are quite unaware of any valid reason for your refusing to implement our contract of July last. We have at your request undertaken to pay to you money additional to that provided for by the original contract, in order to ensure that the contract is finalised. Our agreement in July was that you would supply 13,200 metric tons of lamb and 8,800 metric tons of hogget, those quantities being repeated by us in our contract with the Iranian Meat Organisation. 20

We subsequently agreed to consider payment on conclusion of the contracts of an additional sum of \$30.00 per ton for lamb contained in any shipment completed in less than 40 days, provided that all other contractual conditions were fulfilled. 30

By telex of February 29, 1980 we confirmed our agreement to your requirement that we pay that bonus, extended in effect so that it related not only to lamb but to all meat comprised in shipments completed in less than 40 days, provided only that you undertook to deliver the full quantities contracted for.

That undertaking was repeated in our telex of March 17 last, as was our agreement to meet your request for a subsidy of \$125US per ton of lamb purchased by you from the Western Australian Lamb Board in order to reduce the dead freight on the third shipment. We again confirm and repeat our willingness to honour these undertakings, conditional only upon your advising your willingness to complete shipment of the original contractual quantities by end July, 1980. 40

At your further insistence we agreed to make all these promised payments available immediately, subject to your arranging a guarantee that such sums would be refunded to us should you not meet this one condition, namely, your concluding the shipment of the quantities



originally contemplated by end July, 1980. Even this requirement was waived by our telex of March 17 and our only condition for immediate payment of all bonuses and subsidies required by you was an indication of your willingness to complete the shipment by end July, 1980. Your failure to even answer this telex and your conduct suggest that you are seeking to resile from your contractual obligations.

You are aware that our contract with the Iranian Meat Organisation involves a performance bond of about US\$4,000,000 and that we are at risk in respect of this sum. We are in a critical phase in respect of this contact insofar as we must make arrangements within the next few days for shipments, in order to comply with the terms of that contact. We have instituted enquiries to ascertain whether alternative supplies and alternative shipping arrangements can be made to honour our contractual obligations and while these enquiries have not in any sense been finalised it is clear that substantial additional expense will be occasioned by us, if indeed such arrangements can be made. We are accordingly in jeopardy in respect of our performance bond, and at best likely to incur substantial additional expense in meeting the terms of our contract with the Iranian Meat Organisation.

This letter is to invite you to confirm that our contract will be honoured, on the terms set out in our telex of March 17 last. In view of the critical shortness of time, we must require your advice of intention to perform the contract before Monday, 28th instant, and in default of your confirmation in this regard we will treat your failure to reply and your conduct as a repudiation of our contract.

We await your reply.

Yours faithfully,  
FARES RURAL CO. PTY. LTD.

.....  
Captain R. Mata  
Managing Director

40

Dingwall responded on 24th April 1980 by writing to Fares Enterprises in London. This is exhibit 37, and it reads:

\*24th April, 1980

Fares Enterprises,  
97 Eaton Place,  
LONDON, SW1  
UNITED KINGDOM

DOCUMENT 6\* - Reasons for Judgment of  
His Honour Mr Justice Olney - 2.2.83

FOR THE ATTENTION OF MR. RACHID FARES

Dear Sir,

I have received the enclosed correspondence from Capt. Mata. of Fares Rural Co. Pty. Ltd. located in Fremantle, West Australia.

I am assuming he has your authority to act on your behalf and therefore I have sent a copy of this correspondence to him. However, as the agreement referred to in his letter was between Fares Enterprises London and Metro Meat Ltd. I therefore address the following to your company in London.

There are a number of inaccurate facts in the letter received from Capt. Mata which I don't intend to cover at this particular time. The most relevant points right now are the failure of your company to meet its payment obligations as and when they fell due under our verbal agreement of July 2nd, 1979. In my telex to you dated the 13th February, 1980, I listed exactly the amounts overdue for payment on the first three voyages of the 'Almeria Star,' as in each case the vessel unloaded in Iran in 10 days. 10

Our verbal agreement was quite clear, that if a vessel unloaded in less than 40 days Metro would be paid an additional \$30 per tonne. This was not a discretionary payment as you claimed in your telex of 4th July. There was never any qualification that this amount would be paid at the end of the contract agreement and therefore it is only common sense that on completion of discharge in Iran in less than 40 days the amount fell due for payment. I discussed this with you on two occasions by phone in December and January and you agreed to pay on the first two shipments that had been completed at that time. 20 30

Additionally in January I discussed with you the extra costs involved in purchasing 800 to 900 tons of West Australian Lamb Board product to ensure the third vessel was fully loaded.

In actual fact based on my original discussion with you in July, Metro agreed to supply approximately 2,000T on the first voyage end August and 4,000T every second month thereafter until the agreed tonnage was completed. On this basis, as Metro had loaded 6,955 tonnes on the first two voyages, Metro really had no obligation to load anymore tonnage than 3,045 tons on the third voyage. In other words only 9 tons needed to be purchased by Metro to have fulfilled our part of the agreement. 40

In order to co-operate to the maximum degree (as we have always done) Metro purchased 843 tons at an extra cost of \$256 per tonne, but only after you agreed over the phone to reimburse \$125 per tonne to Metro to offset some of the losses incurred. Having received your assurances on reimbursement I was absolutely amazed that after the event you then placed conditions on that payment being effective. 50

In further telexes dated the 5th March and 14th March I have made it very clear to you that until Metro is paid

in full for the first three shipments I am not prepared to discuss further shipment.

At no time have I ever stated or indicated that Metro is not prepared to meet its obligations, however, as a matter of general policy Metro will not supply any customer with meat or any other product if his account is overdue for payment. When you pay what is due I will be prepared then (and only then) to discuss the balance of tonnage to be shipped.

Jorge Villegas arrived in Australia and contacted Jack 10  
Ware in Fremantle on the 12th of April. He then  
arrived in Adelaide on the 13th and phoned my home to find  
I had left that morning for Los Angeles. Doreen  
informed Jorge that I would be back in Sydney on the 20th.  
Unfortunately he had to leave for Japan on the 19th,  
he evidently wished to discuss the above problems.

I think it would be more to the point and very much more  
effective if you handled these discussions yourself  
rather than asking third parties to intervene on a matter  
in which they only have second hand facts which are not  
accurate. 20

Yours faithfully,

K. DINGWALL  
MANAGING DIRECTOR "

Whatever may have been said or done by and on behalf  
of Metro Meat prior to 21st April 1980, it is quite clear that  
the author of exhibit 36 did not at the time of writing regard the  
contract as at an end. Captain Mata did not give evidence but  
Fares agreed that exhibit 36 was written with his knowledge and  
approval. The letter contains a number of statements which are 30  
factually inaccurate but I do not think that anything turns upon  
that. It is Dingwall's reply (exhibit 37) and particularly  
the third last paragraph which in my opinion is decisive of the  
issue against Metro Meat.

I do not need to recount the circumstances under which the  
amounts payable in respect of the \$30 bonus and the W.A.L.M.B.

meat became payable. I do not think it was open to Metro Meat to refuse further supply simply because those amounts were outstanding. At the time both payments were very much disputed but in any event, they related to matters which were peripheral to the contract, and in the case of the W.A.L.M.B. subsidy, quite independent of it. Whatever general policy Metro Meat may adopt in its commercial dealings, unless that policy is written into the contract it cannot affect its contractual relationships with another party and in my opinion the first sentence of the third last paragraph of exhibit 37 is an absolute denial by Metro Meat of its obligation to 10 continue to co-operate with Fares for the purpose of arranging the shipment of meat in accordance with their mutual obligations. I have previously pointed out the critical nature of this obligation and in the events which happened, as at the 24th April 1980 the ball was very much in the court of Metro Meat. The second sentence of the particular paragraph underlines Metro Meat's refusal to continue with the contract except upon its own terms and to say that:

"when you pay what is due I will be prepared then (and only then) to discuss the balance of tonnage to be shipped " 20

is in my opinion a repudiation of one of Metro Meat's fundamental obligations under the contract. It is in this context that the passage of evidence quoted from pages 400-402 of the transcript is seen in its full light and perspective. I have no doubt that as at 24th April 1980 Fares was willing, able and anxious to continue to purchase meat from Metro Meat for the purpose of fulfilling their respective obligations under the agreement. Fares had a particular reason for doing this because of the guarantee he had given to the I.M.O. I am equally certain that as at 24th April 1980, and probably for some little time before that, Dingwall 30 had reached a firm resolve not to proceed with the contract unless

he could renegotiate the price. At the same time he was not prepared to do or say anything that would place the payment of the additional bonus and subsidy monies in jeopardy. He well knew the position so far as Fares was concerned. The longer the delay the greater the risk Fares had of losing his \$4 million guarantee. I am satisfied that the statements made in Metro Meat's letter of 24th April 1980 and its subsequent failure to meet the reasonable request of Fares to confirm a programme for the shipment of the fourth and fifth shipments of meat amounted to a repudiation by it of the contract. I think that Metro Meat is right insofar as it has pleaded (amended defence, paragraph 5A) that none of the matters particularised in paragraph 6 of the statement of claim and occurring before 21st April 1980 evinced an unequivocal intention on its part to repudiate its obligation under the contract but the same cannot be said by Metro Meat's letter of 24th April 1980, after which date, both parties ceased to regard themselves as being under any obligation pursuant to the contract. The letter of 21st April 1980 made it quite clear what attitude Fares would take in the absence of a positive response and I am satisfied that Metro Meat's repudiation of the contract was treated by Fares Rural as such and thereafter both parties conducted themselves accordingly.

#### ALLEGED REPUDIATION BY THE PLAINTIFF

The findings of fact already made are sufficient to enable me to dispose of unfavourably to the defendant its allegation that the plaintiff repudiated the contract. To the very end, the plaintiff acted in a manner consistent only with a desire and intention that the contract be performed in accordance with its terms.

In paragraph 12 of the amended counterclaim, Metro Meat asserts 5 separate particulars of repudiation but none of the facts alleged have the quality assigned to them in the

pleading.

It is said firstly that Fares' failure to pay money owing under the contract and further his attempt to impose a new term of the contract amounted to a wrongful repudiation. The only money due under the contract that was not paid is the prompt delivery bonus which I have already kept to be a matter of only peripheral significance in the overall relationship between the parties. Failure to pay could not in any way be regarded as evincing an unequivocal intention to repudiate the contractual obligations. It follows therefore that the attaching of conditions to the payment of a sum actually due under the contract cannot 10 have any more serious effect than an absolute failure to pay.

It is further said that subsequent to 24th April 1980 Fares repudiated the contract by purchasing meat to fulfil his obligations to the I.M.O. other than from Metro Meat; by neither dealing with nor purchasing meat from Metro Meat; and by failing to pay moneys due under the contract. Nothing more need be said as to the last matter and as to the first two, the facts as I find them to be are that until Metro Meat finally repudiated the contract, Fares had no desire or intention to do otherwise than to purchase meat from Metro Meat for the purpose 20 of fulfilling his obligations to the I.M.O. Anything he did after the contract was repudiated has no bearing upon this issue. It may touch upon the question of damages, but that is not presently under consideration.

#### ALLEGED WARRANTIES AS TO PRICE

This matter has already been adequately discussed. There is no need for me to add anything further except to say that the defendant has failed to establish that the alleged warranties were given.

#### CONCLUSION

The first plaintiff is entitled to a declaration that it and the defendant entered into a contract in the terms and manner

consistent with the findings of fact contained in this decision.

There should be a further declaration that the contract was repudiated by the defendant and discharged upon the first plaintiff's acceptance of such repudiation.

The first plaintiff is entitled to have its damages (if any) assessed.

The defendant is entitled to judgment against the first plaintiff on the counterclaim in the sum of \$314,012 being the total of the two amounts of \$208,637 and \$105,375 referred to in this decision.

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IN THE SUPREME COURT )  
OF WESTERN AUSTRALIA )

No. 2121 of 1980

B E T W E E N :

FARES RURAL CO. PTY. LTD.

First Plaintiff

and

RACHID FARES

Second Plaintiff

and

METRO MEATS LIMITED

Defendant

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DATED AND ENTERED THE 2ND DAY OF FEBRUARY 1983

This action having been tried on the 22nd, 23rd, 24th, 25th and 26th days of November 1982 before the Honourable Mr Justice Olney at the Supreme Court, Perth in the presence of Mr R.J. Burbidge, one of Her Majesty's Counsel with him Mr C.L. Zelestis of counsel for the First and Second Plaintiffs and Mr M.J. McCusker, one of Her Majesty's Counsel with him Mr C.B. Edmonds of counsel for the Defendant and the Judge having ordered that the action stand for judgment and the same standing for judgment this day and the Judge having 20 ordered that judgment as hereinafter provided be entered for the Plaintiffs on the claim and the Defendant on the Counterclaim IT IS DECLARED ADJUDGED AND ORDERED that:

1. The First Plaintiff by its agent the Second Plaintiff and the Defendant by its agent KENNETH DINGWALL entered into an oral contract on the 2nd July 1979.



2. The contract included terms, inter alia, that:
- (a) the First Plaintiff would buy and the Defendant would sell 20,000 tonnes of meat comprising 12,000 tonnes of lamb and 8,000 tonnes of hogget. By custom and usage the Defendant had the option to supply, and to be paid for, any lesser or greater quantity within a range of 10% below or above the stated tonnages,
  - (b) the First Plaintiff would pay to the Defendant US\$1,375.00 per tonne of lamb and US\$1,230.00 per 10 tonne of hogget, free alongside ship,
  - (c) the Defendant would supply the meat in five shipments.
3. The contract was repudiated by the Defendant by its letter dated the 24th April 1980 and by its subsequent conduct and such repudiation was accepted by the First Plaintiff by the 28th April 1980 whereby the contract was discharged.
4. Prior to repudiation of the contract, the Defendant delivered to the First Plaintiff pursuant thereto 7,533<sup>20</sup> tonnes of lamb and 3,301 tonnes of hogget.
5. At the time of entering into the contract it was the fact as the Defendant then knew that it was intended that the lamb and hogget the subject of the contract would be sold to the Iranian Meat Organization under a contract between the Second Plaintiff and the Iranian Meat Organization.

AND upon the Plaintiffs' claim the Court doth order that:

6. The Defendant do pay to the First Plaintiff damages to be assessed.
7. The sum lodged by the Second Plaintiff for security for costs together with all interest accrued thereon be paid out to the Second Plaintiff or as he may direct.
8. There be liberty to apply for orders as to the mode of assessment of the First Plaintiff's damages and as to interest on damages and generally.
9. The Defendant do pay the First and Second Plaintiffs' costs of the action (including the costs of 10 interrogatories) to be taxed as one set with a certificate for second Counsel, and with liberty to apply as to the basis of taxation and as to the limits contained in Order 66 Rule 16 and generally.

AND upon the Defendant's counterclaim the Court doth order that:

10. The First Plaintiff do pay to the Defendant the sum of US\$314,012.00.
11. The First Plaintiff do pay the Defendant's costs of the counterclaim (including the costs of interrogatories) 20 to be taxed with a certificate for second Counsel and with liberty to apply as to the basis of taxation and as to the limits contained in Order 66 Rule 16 and generally.
12. The counterclaim against the Second Plaintiff do stand dismissed out of this Court.
13. The Second Plaintiff have liberty to apply in respect of any costs incurred in defending the counterclaim additional to costs recovered pursuant to paragraph 9.

14. There be liberty to apply for orders as to interest on the amount of the counterclaim and generally.

AND the Court doth further order that subject to any further order (as to which either party shall have liberty to apply) that:

15. Any damages to which the First Plaintiff may become entitled shall be set off against the sum of US\$314,012.00 to which the Defendant is entitled on the counterclaim and the balance after such set-off shall be paid by the party from whom to the party to whom the same shall be due. 10

16. The Taxing Officer shall set off the costs of the First Plaintiff on the claim and of the Defendant on the counterclaim and shall certify to which of them the balance after such set-off is due and such balance shall be paid by the party from whom to the party to whom same shall be certified to be due.

The above costs have been taxed and allowed at \$  
as appears by the Taxing Officer's certificate dated the  
day of 19 .

IN THE SUPREME COURT )  
OF WESTERN AUSTRALIA )

No 2121 of 1980

B E T W E E N :

FARES RURAL CO PTY LTD

Appellant  
(First Plaintiff)

- and -

METRO MEAT LIMITED

Respondent  
(Defendant)

BEFORE THE HONOURABLE MR. JUSTICE PIDGEON  
IN CHAMBERS the 4TH DAY OF JULY, 1983

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UPON the Application of the Appellant (First Plaintiff)  
bymotion dated the 23rd day of February 1983 and UPON  
HEARING Mr. C.L. Zelestis of Counsel for the Appellant  
(First Plaintiff) and Mr. M.J. McCusker one of Her  
Majesty's Counsel and with him Mr. C.B. Edmonds of Counsel  
for the Respondent (Defendant) and the Court being of the  
opinion that each of the matters in dispute in this Appeal  
exceed the sum of £500 Sterling, IT IS ORDERED that :

1. Subject to the due performance by the Appellant (First  
Plaintiff) of the conditions hereinafter mentioned and  
subject to the final order of the Court upon the due  
performance thereof the Appellant (First Plaintiff) have  
leave to appeal as of right to Her Majesty in Council  
from the Judgment herein of the Honourable Mr. Justice  
Olney given on the 2nd day of February 1983 upholding the  
Appellant's (First Plaintiff's) claim for damages against  
the Respondent (Defendant) to be assessed and upholding

the Respondent's (Defendant's) counterclaim against the Appellant (First Plaintiff) in the sum of \$314,012.00 upon condition that the Appellant (First Plaintiff) within a period of 3 months from the date hereof deposit on fixed deposit at Perth for a term of 3 months with any banking company carrying on business in Western Australia the sum of \$1,000.00 in the name of "Principal Registrar, Supreme Court of Western Australia" and delivering the receipt therefor to the Principal Registrar of this Honourable Court, as security for the due prosecution of such appeal<sup>10</sup> and the payment of all such costs as may become payable to the Respondent (Defendant) in the event of the Appellant (First Plaintiff) not obtaining an order giving it final leave to appeal or of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the Appellant (First Plaintiff) to pay the costs of the Respondent (Defendant).

2. There be liberty to apply generally. - 20
3. The costs of the application be costs in the appeal.

By the Court

*GLISE DMCC!*

Deputy Registrar

THIS ORDER was extracted by Messrs. Lohrmann Tindal & Guthrie solicitors for the Appellant (First Plaintiff) whose address for service is 20th Floor, 77 St. George's Terrace, Perth, W.A. 6000 Tel: 325 7544 Ref: 32; 11085

WE HEREBY CERTIFY that the Appeal Book in this action  
contains all necessary material for the hearing of this  
Appeal and that all documents copied have been examined  
with the original documents and are correct.

DATED the \_\_\_\_\_ day of \_\_\_\_\_ 1983.

.....  
SOLICITORS FOR THE APPELLANT.

.....  
SOLICITORS FOR THE RESPONDENT.