

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL - IN CAUSE NO. 22 OF 1969

BETWEEN: ALEXANDER BARTON

Plaintiff (Appellant)

AND: ALEXANDER EWAN ARMSTRONG
GEORGE ARMSTRONG & SON PTY. LIMITED
FINLAYSIDE PTY. LIMITED
SOUTHERN TABLELANDS FINANCE CO. PTY. LTD.
GOULBURN ACCEPTANCE PTY. LIMITED
A.E. ARMSTRONG PTY. LIMITED
LANDMARK (QUEENSLAND) PTY. LIMITED (In
Liquidation)
PARADISE WATERS (SALES) PTY. LIMITED
PARADISE WATERS LIMITED
GOONDOO PTY. LIMITED
LANDMARK HOME UNITS PTY. LIMITED
LANDMARK FINANCE PTY. LIMITED
LANDMARK HOUSING & DEVELOPMENT PTY. LTD.
LANDMARK CORPORATION LIMITED
CLARE BARTON
TERRENCE BARTON
AGOSTON GONGZE
JOHN OSBORNE BOVILL
HOME HOLDINGS PTY. LIMITED
ALLEBART PTY. LIMITED
ALLEBART INVESTMENTS PTY. LIMITED

Defendants (Respondents)

APPEAL BOOK

VOLUME 10

SOLICITORS FOR THE APPELLANTS
(1st to 6th Defendants)

Dare, Reed, Martin & Grant,
187 Macquarie Street,
SYDNEY.

SOLICITORS FOR THE APPELLANT
(Plaintiff)

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

SOLICITORS FOR THE RESPONDENTS
(15th to 21st Defendants)

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

SOLICITORS FOR THE RESPONDENTS
(1st to 6th Defendants)

Dare, Reed, Martin & Grant,
187 Macquarie Street,
SYDNEY.

SOLICITORS FOR THE RESPONDENTS
(7th, 9th, 10th & 13th Defendants)

Francis White, Barnes & McGuire,
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IN THE PRIVY COUNCIL

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PLAINTIFF'S EXHIBIT "L" - EXERCISE OF
OPTION - 14TH MARCH, 1967.

(MISLAID AND NOT PRINTED IN RECORD)

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

Term No. 22 of 1969

CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

BARTON v. ARMONSTRONG & ORS.

SECOND DAY: MONDAY, 22nd FEBRUARY, 1971.

MR. POWELL: I presume your Honours wish to hear some comment on the letter that was sent to the Court. There is a second appeal in which I appear with my learned friends Mr. Goldstein and Mr. Bruce. That was an appeal in relation to a notice of motion that was brought during the course of the trial.

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JACOBS, J.A.: That was the first appeal?

MR. POWELL: May be the first appeal, but as to that - so far as I am aware - none of the respondents have been served and no appearance was announced for them the other day. We have taken the view that while the ground of law taken is sound the amount in issue is of so little intrinsic worth that we would not wish to trouble the Court on it and at the appropriate time we will ask that the appeal be dismissed without order as to costs.

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MR. GRUZMAN: I am unable to confirm my friend's observations that no respondents have been served. Would your Honours defer consideration of that matter until a later stage?

As I indicated the other day, there is a large quantity of material in the matter and we appreciate that your Honours have spent some considerable period of time going through the appeal books. Our approach at this point is that your Honours are in a somewhat similar position to what Street, J. was at the end of the evidence.

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Shortly, we will be dealing with the various aspects of the matter in some depth and we shall be referring to specific aspects of the evidence but before we get down to that - by that time your Honours will be expecting to have each point proved, and will be in fact asking questions - I would like to open the matter fairly briefly, both on the facts and on the law, and then to start on a detailed examination of our submissions.

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The starting point is to have a look at some of the findings of his Honour on the pressure. First of all, I am going to refer to the passage of his Honour's judgment at page 3116 where his Honour said "I accept that he was subjected to threats ... and by Landmark."

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At page 3129: "It is claimed by Mr. Barton that he ... recognised the voice of Mr. Armstrong".

Page 3130: "These telephone calls were usually between four and five o'clock in the morning ... in genuine fear for his own safety".

Page 3131: "There is evidence that I accept ... telephone calls."

Page 3132: "Whether or not Mr. Barton is correct ... such lines".

Page 3135: "I am satisfied that Mr. Barton ... inquiry" 10

Page 3136: "... do not necessarily assist ... for his own safety".

Page 3164-5: "On Saturday, 7th January an event of a most extraordinary and alarming character occurred. Mr. Barton was telephoned by a man later identified ... of the transaction".

Page 3166: "There is no doubt that Mr. Barton was genuinely alarmed ... to kill him."

Page 3182: "His actions in the next two or three days are ample corroboration of his evidence that he was in extreme and genuine fear for his personal safety ... for his protection." 20

Page 3183: "In the light of the ... murdered."

Page 3219: "The threats themselves were such as might well have intimidated the respondent into signing an agreement such as this and I am satisfied that Mr. Barton was throughout the relevant period in real and justifiable fear ... but that was not proved to my satisfaction to be an incident for which Mr. Armstrong was responsible." 30

It was in that atmosphere and in that time and with those influences operating that Mr. Barton signed the agreement which is the subject of these proceedings.

We would submit that your Honours' decision on this matter will be definitive to a large extent under which agreements may be operated and negotiated. We have sought, by way of assisting your Honours, to examine not only systems of law - the British system - but have gone outside the British system and looked at the law in many countries of the world and sought assistance from professors of law in America, India, Germany and other places. In the end, as we will say, it is the British system of law which places the greatest sanctity on the free negotiation of agreements by a mind unaffected in any way by pressure. It is the British system of law which basically says it is against public policy for anyone to take the benefit of a contract negotiated under pressure. 40 50

Just before we have a brief look at the law we are going to open to your Honours the commercial side of this transaction very briefly. The starting point, and I will refer your Honours to the evidence on this later, was that it was Mr. Armstrong's object to use public moneys to exploit his own assets for his benefit. Your Honours may remember reading some such phrase in one of Mr. Armstrong's documents. His basic object was to exploit his assets by using public moneys.

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He bought at some stage this swampland in Surfers' Paradise area. The evidence as to what he paid for it is not entirely clear. There is a suggestion that he paid £150,000 and Mr. Armstrong said "You mean dollars", or words to that effect, but it is still not positive evidence. There is a balance sheet, which is in evidence, which shows that in the company Dunedoo (?), which had been owed by Mr. Armstrong, there is provision for taxation of some \$184,000, the suggestion that a profit had been earned in that company of something of the order of \$400,000. We know that the transaction in which \$400,000 security was given was one in connection with the purchase of the land, providing for payment in 1969 and a payment in 1966 and that the interest rate was a mere 7½ percent.

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Perhaps it is not of major importance, but it is clear that this \$400,000 arose in some way from the purchase of this land from Mr. Armstrong. This land, which was then swampland, was sold to Landmark for \$600,000. Of course, its value at that time was still the same as when Mr. Armstrong had bought it.

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Some months after that Mr. Armstrong obtained payment from the company of \$200,000, and the \$400,000 then remained on this security. Therefore \$700,000 of public funds - that is, funds of Landmark - were used to improve this land. The scheme, as your Honours will be aware from the evidence, was one of those schemes whereby low-lying land is drained by the provision of canals and pumping so that lots of land are formed with waterways in between. \$700,000 was advanced, unsecured, by Landmark and expended on the reclamation of this land. In addition, Mr. Armstrong agreed to postpone his security over the land (\$400,000) to an advance by United Dominions Corporation for amounts of up to \$680,000. This money went as to \$200,000 on payment to Armstrong and as to the balance in further improvement of the land.

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Although we have said that the land was sold to Landmark, and I am not worrying about intervening companies for the moment - I am painting with a very broad brush, I said it was sold for \$600,000 to Landmark and that is not quite right because actually Mr. Armstrong retained 40 per cent. of the value of the land.

TAYLOR, A-J.A.: You mean he owned 40 per cent. of the company that bought it?

MR. GRUZMAN: Yes, your Honour, that is a more accurate way of putting it. At the time when the amount was owing on the land and the supposed value of the land was the same and there was no equity, it did not matter what company owned the land. Paradise Waters Sales Limited of Paradise Waters really owned the land and in that company 40 per cent. of the shares were owned by Mr. Armstrong. So the land had been sold, in one way of putting it, with a figure of \$1,000,000 - 60 per cent. of \$600,000. Not only did Mr. Armstrong retain that 40 per cent. interest but he also had the right to completely control the project by appointing directors of Paradise Waters and Paradise Waters Sales, and to remain as chairman of Landmark and in default he was to be paid this \$400,000 prematurely. It was implicit in the arrangement that what was in contemplation was that \$400,000 would come out of the profits to be made by the reclamation of the land and then the sale of the land. It followed that if at any time this \$400,000 was prematurely withdrawn - that is the \$400,000 which had never been earned at the time when the company was spending money - Landmark Corporation must be in a difficult position. At the time when the deal or the transaction was being carried out Barton was prepared to go along with it because Landmark had a chance of making a large profit without putting in any cash but Mr. Armstrong was not satisfied with the profitable transaction which he had made. He used the Landmark facilities to run his private companies and he wanted Landmark to provide for his personal expenses: For example, two boats - one in Sydney and one in Surfers' Parade. He interfered in the running of the company and on an occasion where Mr. Bovill, one of the company directors, told him that he did not like the pockets of the shareholders being picked behind their backs he said "So-and-so the shareholders". The situation being unsupportable to the other directors, they decided to get rid of Armstrong.

United Dominions Corporation was persuaded to agree to provide the money to pay Armstrong out. One may assume that it had been in close consultation with the company from the beginning and doubtless they agreed that Barton's attitude about Armstrong was just right. Later on the general meeting came and it was won by Barton on the strength of the letter from U.D.C. Later on U.D.C., who would have known presumably of the original deal under which the land was purchased, would have realised that paying out Armstrong the \$400,000 of unrealised profits was very greatly weakening their security. When U.D.C. presumably - we do not know the real reason, we can only speculate or infer - for some such reason declined to further advance the project finance, to further finance the project, under the same reasoning it would follow that no other financier would be prepared to finance Landmark or to advance to these companies the enormous sums that were required to complete the project and it followed that when U.D.C. withdrew

its finance then, as a matter of plain logic, Landmark was doomed.

TAYLOR, A-J.A.: It is not quite right to say it was doomed. They furnished a letter which said they would provide it and I would think that was written for the benefit of the shareholders, and then they later went back on it.

MR. GRUZMAN: Quite so. As I say, I am painting with a rather broad brush at this moment. We will go into those details later.

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When the decision was made by U.D.C. on 8th December, 1966, Armstrong's decision was this: First of all, in view of the fact that your Honours have read the evidence perhaps I should put this more clearly than I was going to - I was going to say that he had lost the whole or part of his \$400,000. I will enlarge on that a little later. The project was unfinished, nothing was saleable and the job was in the middle. The sale price of the project at that time we do not know, but there is evidence before your Honours that it was valued by experts some two years later at a gross sale price between \$750,000 and \$1,000,000. There was owing on it, first of all, the U.D.C. security. That security was for a figure of \$680,000. In fact, at the relevant time advances totalling \$416,000 had been made. There was an unpaid engineer's certificate, I think, for some \$82,000 or \$84,000. There was a possibility that in order to put the land in a saleable state U.D.C. might advance further moneys up to the \$680,000 and, of course, the interest bill was ticking up all the time at a very large rate. So that the amount that would be owing to U.D.C. could well have been \$680,000.

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If one assumes for the sake of this submission that one of the experts (\$750,000) was right some years later, then obviously there could have been little or nothing left for Armstrong out of the security.

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He had a further security in the sense that he had a guarantee from Landmark. Landmark was in the position that it had advanced - I think the figure was \$684,000, unsecured - to improve this land. Therefore if the land was being sold at some such figures as I have suggested, that money was wholly lost. Therefore, and there is evidence here, that would cause the failure of Landmark - and in fact it did. So his security from Landmark was worthless.

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For that reason the position was that the U.D.C. decision meant first that Mr. Armstrong would lose the whole or part of the \$400,000. Secondly, he had shares in the companies of face value of \$300,000. Your Honours recollect the evidence about those shares, that he had offered to buy from Barton in November - before the U.D.C.

decision - Barton's shares at 70 cents. So in Armstrong's mind the effect of the U.D.C. decision was to render worthless the shares that he valued at something like \$200,000.

Thirdly, he had his shares in Paradise Waters Sales, giving him 40 per cent. of the profit of the project. But one does not know what value he in his mind put on those shares, but at one stage profits of the order of \$1,000,000 or so had been spoken of.

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So at that point of time when U.D.C. decided it would not proceed with any further loans to Landmark Mr. Armstrong's position was that he had lost something like, possibly, \$1,000,000, the whole or part of \$400,000 secured, \$200,000 - in his mind - value of the shares and 40 per cent. of the possible profit on the project.

MASON, J.A.: This submission is made on a valuation subsequently made?

MR. GRUZMAN: Yes, it is.

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MASON, J.A.: Is it supported entirely on that foundation?

MR. GRUZMAN: It is supported in this way: firstly, your Honours might infer that a partly completed project of this kind which required something like a further million dollars to be spent on it would be of indeterminate value at any given time. So your Honours have that to consider in trying to determine what would be in Mr. Armstrong's mind as to the value of the security at that time.

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MASON, J.A.: You are speaking of Mr. Armstrong's mind, but so far you are basing your submission on valuations made two years later. It must be equally obvious to any mind at that time, if it is to be obvious at all.

MR. GRUZMAN: I agree this applies to everybody associated with Landmark, U.D.C., Barton and Armstrong would have thought the same way. That is the strength of the submission. I am putting it as to Mr. Armstrong's mind for the purpose of this submission, and what comes after that. Everybody, particularly Mr. Barton, would have known that. Particularly U.D.C., because that is the reason why they did not finance it any further. Once U.D.C. started thinking along the lines concerning the security they had when contemplating paying out \$400,000, (Mr. Armstrong) they would have realised immediately it just would not work, for the reasons which I have put. I think I am restricting it to Mr. Armstrong for the sake of this submission, but it would certainly apply to everybody.

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Mr. Armstrong's object therefore must have been this: first of all to obtain payment of, or to further secure, the \$400,000 which was in jeopardy;

secondly, to convert his shares into cash because once Landmark failed the shares were worthless and, thirdly, to see if he could realise money in respect of the anticipated profit represented by the 40 per cent. interest he had in Paradise Waters Sales.

Looking at it from the point of view of Barton or the other directors, Landmark was in this position: U.D.C., having lost confidence in the project, demanded its money back and set about appointing a receiver. Your Honours remember the evidence of how on 21st December a gentleman was being sent up to Surfers' Paradise with documents arranging to appoint him as receiver. So there is no doubt that they meant business.

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There was no answer to U.D.C.'s claim, but even from Armstrong's point of view the company did have this hold, as it were, over him: that they could say to Mr. Armstrong, "if you act precipitously in calling up your money you will lose any chance of any value in the shares, 200,000, or in the shares in Paradise Waters".

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So that, commercially speaking, Armstrong was in a difficult position. If he exercises his rights under the security with one he lost substantial rights on the other. Your Honours will remember Mr. Smith's note when Mr. Armstrong first saw him, and contemplated appointing a receiver. Mr. Smith appears to have made clear to him what would happen - he just could not do it. Mr. Smith, Mr. Grant and Mr. Armstrong formulated the proposition which subsequently in substance became the contract here under discussion.

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What happened then was that Mr. Armstrong obtained from the company everything he wanted. He achieved every object, denuding the company of its remaining liquidity and ensured its downfall.

To put it one way: Mr. Armstrong was owed \$400,000 and he had certain other rights.

TAYLOR, A-J.A.: You mean he was owed that on the Paradise Waters estate, secured by second mortgage over what real estate it had?

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MR. GRUZMAN: No, secured only over the estate. His securities consisted only of - and I speak accurately - second mortgage over Paradise Waters estate, guaranteed by Landmark and (a matter which will become very significant) the U.D.C. lien on a life policy over the lives of Mr. Barton and Mr. Armstrong under which \$600,000 would be paid to the company if, so far as relevant, Mr. Barton died. But I will come to that later. At the moment I am trying to look at the short commercial situation but it is one of the realities of the commercial situation. The whole problem of this company would be solved if Mr. Barton happened to die.

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But I was just looking at it in a facile way, nevertheless that is what happened. Armstrong was owed \$400,000 and he had certain other rights. He was paid \$100,000 for reduction of the \$400,000, he was paid \$100,000 - being a recompense for the loss of his anticipated profit if the deal had ever gone through. He received options over the land which on paper were worth \$175,000, which is \$375,000 in total and he was still owed by Landmark \$300,000 and by Barton \$180,000. That was the nett effect of this deal which is here under discussion.

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I am just connecting this part of it by mentioning to your Honours, and concluding this part of it, that so far as the company was concerned even if it had to pay \$400,000 to Armstrong, even if Armstrong did not see reason for the reasons which I have just suggested to your Honours, the position was that the companies had valuable securities. First of all there was this second mortgage of Paradise Waters and, after all, it was a piece of land on which (I cannot recall the exact figures) something over \$1,000,000 had been spent and at that point of time some \$416,000 had been advanced on the first mortgage. So it had that. It had Landmark House, which was an office building being built in Brisbane, not completed, but in which there was a substantial equity. I make these observations because they were the alternative securities which in the course of negotiations were offered and considered on both sides. It had \$350,000 or some such figure worth of unsold units in Paradise Towers, a home unit building which had to be built at Surfers Paradise. These latter two securities were in fact offered at one stage to Armstrong and, indeed, the second mortgage on Landmark House appears in the agreement of 17th January. Armstrong has a right at a certain date to exchange in effect his security for Paradise Waters estate to a security for Landmark House, so these are real securities.

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In addition it had \$200,000. It only owed \$400,000 under the deal which was under discussion. Mr. Armstrong received in cash \$200,000, so if he had been treated as a creditor in those circumstances they would have said, "Here is \$200,000 and we will borrow \$200,000". For them to get \$200,000 on all these assets would have been very simple. In addition Mr. Barton personally undertook to pay him \$180,000 for shares which then on the market, and with the public's limited knowledge of the affairs of Landmark, stood at only 30 cents - just approximately half of what he agreed to pay. So Barton committed himself to a further \$180,000. To put it in another way, they could have borrowed \$200,000 and paid 25 per cent. interest and still would have been \$175,000 better off.

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TAYLOR, A-J.A.: You said this company paid \$200,000 in cash. I see there was an overdraft at the bank of \$300,000.

MR. GRUZMAN: I cannot say that I am exactly certain of the source from where this \$200,000 came but the fact is that it paid it by cash in this transaction of 17th or 18th January to Mr. Armstrong, \$200,000 by its cheque. It actually paid \$200,000, it says there \$100,000, reducing the \$400,000 to \$300,000.

TAYLOR, A-J.A.: But that was not in cash.

MR. GRUZMAN: I must correct that. It was \$140,000 in cash, a penthouse which was valued at \$80,000 - for \$60,000. It was cash or the equivalent of cash. It is not a paper \$200,000 but \$140,000 was cash or money and \$80,000 penthouse put in at \$60,000, fully furnished, at Surfers Paradise.

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One further matter. Armstrong himself, once he had been paid out as a creditor, could easily have been neutralised. This company had control of the general meeting, as has been evidenced, a majority of directors and there were many ways in which one dissident director could have been dealt with, committees, dismissing him, etc.

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That is an outline of the commercial situation. I have also very broadly outlined from his Honour's judgment the situation of pressure.

Now I just want to have a look at some of the principles of law, again on a broad basis. This appeal is concerned with the methods by which this unrighteous agreement was procured and whether such an agreement, procured in this atmosphere, created by Armstrong, should be upheld by a Court of Equity.

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From time to time in the course of this hearing - we have been trying to speed up the matter - I ask your Honours' leave to hand up three volumes now which are entitled Law I, because these volumes contain nothing except photostats of the cases - (Produced to Court).

JACOBS, J.A.: The Court is grateful for this assistance, Mr. Gruzman.

MR. GRUZMAN: I am going to refer to it, not in great detail and I am not going to ask your Honours to deal with these cases at this time because that is going to come later, but we have sorted out a few of the cases which seem to illustrate the principle and I am only going to look broadly at them. The first one is Bridgeman v. Green, 97 E.R., 24, Wm. 58. (Reads from pages 23 and 24). The question was whether the Court would look at a man's donations and whether they were such as a wise man would not have made.

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When your Honours are reading these cases I ask your Honours to have in mind that this is the case of a butler gaining influence one way or another. How much would the law consider the sort of influence in this man?

TAYLOR, A-J.A.: We should bear in mind that this happened in 1770, in a completely different society.

MR. GRUZMAN: Yes, but I would think that either a footman or a butler would then have even less chance than now.

TAYLOR, A-J.A.: I did not have that in mind, I was thinking more of the difference in education.

MR. GRUZMAN: (Continues reading from page 27.)

I will add later some of the indicia that Street, J. considered in saying that the commercial deal was of such importance. 10

I will now refer to page 28: "This Court will not ... admit no fruit to the contrary".

I have read that passage to show the basis on which the Court interferes. "The relation between them". This goes to the law which recognises the situation in which you cannot tell whether the influence may have had an effect and that is why the law intervenes, not because in most cases the law is satisfied - indeed, perhaps it is satisfied to the contrary yet it may still intervene because one cannot sort it out. Then towards the end of the page, "Here is disguise, artifice, false colouring and the low, dirty, shallow cunning from one end to the other". 20

In Hugenin v. Basely - in the headnote it says the defendant was a clergyman but this is not a spiritual case. He undertook to manage an estate and it was that relationship with which the Court dealt. (Reads headnote.) In our submission we will be laying some emphasis on the principles of public policy and utility which flows from these cases. This is not a case - at page 527 - "... and the ultimate remainder ... the deed is executed, provided for the ultimate remainder to Mrs. Hugenin." Then at page 528, in the second paragraph, "The deed as prepared provided for ... and signed it". She altered that and signed it and gave herself the ultimate limitation. The argument here by Sir Samuel Romley was the successful argument and that was approved in subsequent authority to which I will refer your Honours, Dent v. Bennett. Sir Samuel Romley refers to cases - (read). The connection is fairly continuous, one person undertaking to manage the affairs of another. It is not like an attorney and client. Throughout his address he refers to the ground of public utility. At page 531, which really had the approval of subsequent authority, "The duty imposed on the defendant ... obtained over him". 30 40 50

TAYLOR, A-J.A.: Are you putting that this is a case of relationship?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: What is the relationship?

MR. GRUZMAN: We have tried to find two words to describe it. We have thought of words like murderer and murderer and terroriser and terroree.

TAYLOR, A-J.A.: You have thought of those, and no doubt abandoned them?

MR. GRUZMAN: We did. We cannot think of appropriate words, simply because it is hard to put into language.

TAYLOR, A-J.A.: If a man says "If you do not sign that document I will shoot you", that does not constitute a relationship between them. If he signs the document he does so to save his life, but that is not a relationship.

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MR. GRUZMAN: That could be so, and this is part of the case but it is not wholly this case. If I could ask rhetorically "How could one describe a situation where one man is in fear of another?" We will be citing cases. There is one in the latest edition of the All England Reports which may have just found its way to your Honours' chambers and I will be citing it later. It was the case of a woman who was a Polish prisoner and who in order to escape, by a very long and complicated scheme, married a man - in order to escape from the prison and the terror in which she was. That case came before the court in England on an application to annul the marriage on the ground of duress. The principle is simply that she was in a permanent state of terror, not at the hands of the man she married because she was marrying him to escape the terror, and the court held in that case that the marriage was void for duress, consent was lacking, free consent.

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I do not want to go into it too deeply at this stage. I think your Honours will be satisfied in due course that the Court will recognise such a relationship which whereby one person, in any case, acquires some influence over another, and the way we will be putting it is that because a housekeeper is kind to the old gentleman - as the High Court had dealt with Johnson's Case - or because the butler was good to the man in the last case - that is a minor kind of relationship compared with the situation where a man is continuously threatening another for his life. We will submit that your Honours will come to the conclusion in the end that there was a relationship. I do not want to get involved in the argument at this stage, I am only trying to illustrate principles of law which appear in the books and then go into the facts and then go into the law.

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Looking at the last paragraph on page 531: "Having before mentioned ... undue influence over it". May I emphasise those words, "If the donor is in such a situation with respect to the donee as may naturally give an undue influence over him" - that is all that is required. "However, if there

be the least scintilla of fraud this Court will ... to the present case". I ask your Honours to observe that paragraph dealing with the relationship of influence - "What is authority, guardian, or even parental authority ... important to the community". That case, paraphrased, is this case.

There are one or two more passages in the judgment of Lord Eldon at page 535: "If the incidents ... the Court will undo them". At page 536, halfway through the third paragraph dealing with some of the evidence - "And there was that exaltation ... how the intention was produced". That is going to be your Honours' problem in this case. There is no question that Mr. Barton intended to enter into an agreement and knew what he was doing and had the intention, but the whole question is: "How was that intention produced?"

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"The decision rests upon the ground of public utility. For the purpose of maintaining the principle ...". He is saying there: Was she properly advised? In the particular circumstances the Court says "Maybe they did not know what they should have advised" and he says "The decision rests upon the ground of public utility and for the purpose of maintaining that principle it is necessary to impute knowledge ... to the defendant."

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Throughout these cases the principle seems to flow that it is a public matter, it is a matter of public interest, whether contracts procured in this kind of way should be upheld by the Courts.

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The next case is quite amazing in some ways, Hatch v. Hatch, where a young woman was induced to make a gift to her guardian. The significance of the matter from the public point of view is that one has the amazing circumstance that the attorney who drew up the deed was the brother of the guardian but also married to the girl concerned, and he was one of the plaintiffs. The action was not brought to suit until twenty years later. (Reads headnote.) Again the question of not whether the court was positively satisfied that undue influence occurred but whether the possibility existed, and on the ground of public policy the court would not enforce the deed.

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TAYLOR, A-J.A.: This woman was completely deaf and talked on her fingers.

MR. GRUZMAN: That was not the principle. The principle is whether the possibility existed, not whether that was proved. The man who obtained the deed was dead, and the co-plaintiff was her husband. The principle on which these cases are decided - (A) Is there some relationship? (B) If there is, is there then as a matter of public policy, public utility, a situation in which the court will not interfere (and those words appear in some of the judgments) the court will not interfere, not because it is satisfied that some undue

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influence occurred but because it does not know and cannot be certain that no undue influence occurred. That is the basis. Your Honours will see shortly that that is correct.

Mr. Mansfield, Sir Samuel Romley, and Mr. Hart - incidentally at the start of his address said: "This appeal is filed twenty years after the transaction ...". That was a case against setting aside this verdict. At page 617 the Court said: "Is it proved that in the immediate ... care of her guardian or trustee".

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That is the way the court looked at it. They had to be satisfied and they said it is almost impossible, because inquiry is so easily baffled in a court of justice, but if that constitutes such a relationship as exists, and the courts will protect against undue kindness as here, if there is any question of lack of knowledge, that the guardian had been unduly kind to the ward and therefore it is thought possible that the ward has been influenced by this undue kindness - therefore the court will set aside the deed.

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Again I interpolate if that is the principle of the Equity Court against such influence, how much more so in a case like this where the possibilities are, I might say, fantastic?

I am reminded that they join together in this particular statement: "Misled by undue kindness or force or oppression". The Equity Court regards both influences as the same. I am not going to go through a lot of detail in this, I hope, but having dealt with that for some length of time his Honour says, "I am clearly of opinion that this relief ... this unrighteous transaction", and the word "unrighteous" appears in a number of cases, "cannot be made ... he gets any benefit".

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The next case I would like to briefly refer to is Williams v. Bayley (reads headnote). At page 206 the Attorney General said: "It is impossible to doubt that when a father knows his son committed forgery ... was a greater ingredient in the decision". That was the argument, and the Lord Chancellor said at page 212: "Is that a transaction which a Court of Equity will tolerate or is it not ... do not apply in this case". In Williams v. Bayley all the Court had to go on was really this threat in the background that the son would be prosecuted, but it was never said. Indeed, as his Lordship points out, the parties were all honourable people, of good character, with no aspersions on them, and all doing their best in their respective interests, and yet because of this unspoken threat the deed was set aside. At page 212 "I do not agree very much that a good deal of the ... adopted by the bankers".

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TAYLOR, A-J.A.: This is a case of duress?

MR. GRUZMAN: It is not exactly. Nobody ever said to this father "We will prosecute if you do not sign".

TAYLOR, A-J.A.: "If you do not sign the deed we will"?

MR. GRUZMAN: No. As the headnote indicates that was the interpretation of what was behind the scene in the same way as we say that behind the scenes Barton knew that Armstrong would continue with the threats and the pressure and perhaps carry them out unless he signed this agreement. Whether or not that was said in the same way in the background, as it was in this case, there was simply the fact known to all parties - the possibility that the son would be prosecuted unless the father paid the debts. That was never actually said, but there were certain pieces of evidence from which the court inferred that was behind it, but it was never actually said. Yet they say because the pressure existed it must have been in the father's mind that would be the result and therefore the deed should be set aside.

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TAYLOR, A-J.A.: Are you saying in this case that if it is accepted that Armstrong threatened Barton's life or physical well-being, that of itself and nothing more, then the court should set aside this deed?

MR. GRUZMAN: Yes, I would make that submission.

TAYLOR, A-J.A.: Speaking only for myself on this, I would have thought if the trial judge had found that Barton executed this deed because of the threats to his life or physical well-being he would have set it aside, as indeed I would expect this court to do. I would have thought that the only point in the appeal is whether or not it was established - that the judge's finding that he had seen the documents which evidenced threats to his life, and purely the commercial undertaking - but you say there is another point involved in the appeal, as to whether or not he was so influenced into signing the deed that it should be set aside?

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MR. GRUZMAN: We have looked through the books ---

TAYLOR, A-J.A.: Why don't you keep the search to the facts of this case? If that finding is wrong you must succeed.

MR. GRUZMAN: We propose to argue the findings in a moment, but what I am doing at present is trying to illustrate the principles of law before I turn to the facts and we are going to ask your Honours to reverse certain findings of his Honour, Mr. Justice Street.

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TAYLOR, A-J.A.: Are you saying you are entitled to succeed in this appeal even on the judge's finding of fact?

MR. GRUZMAN: We are.

TAYLOR, A-J.A.: That is the thing I did not quite understand.

MR. GRUZMAN: Yes. We were saying on the judge's findings that he finds a situation of terror between these people and that by so finding the law says the onus of proof is reversed and in that situation nobody knows what effect that terror may have had on Barton and therefore the onus is thrown onto the defendant, and we say that onus was not satisfied. 10

TAYLOR, A-J.A.: It is in respect of that, really, that you are taking us to these cases?

MR. GRUZMAN: Yes.

MASON, J.A.: Coming back to Williams v. Bayley, that related to an agreement in respect of a prosecution, and it was held invalid on that ground?

MR. GRUZMAN: It was held invalid on both grounds. At page 212 the Lord Chancellor says, "Many grounds on which a Court of Equity ... it is not legal".

MASON, J.A.: That is the point, is it not; whether or not it was legal? The Lord Chancellor said it was not legal because the object was to avoid prosecution and the Lord Chancellor is saying it is doubtful whether the pressure would have been such as to enable relief to be granted. 20

MR. GRUZMAN: If I might refer your Honours to page 216: "My Lords, there are two aspects of this case or, rather, two points of view in which it may be regarded ..." Then at page 218: "The question therefore, my Lords, is whether a father appealed to under such circumstances would have taken upon himself ... of such description". That is the point of this case which we seek to emphasise, whether your Honours are satisfied that in this case this was the security of a man who acted with that freedom, and by your deliberations it must undoubtedly be considered necessary whether this validated a transaction of such a description. Then his Honour goes on to say, "My Lords, there remains the other aspect of the case, which is this ... settled principles of law". 30 40

At page 221: "My Lords, I will agree ... it ought to be set aside". It was never put point blank - "We will not prosecute". The consent is pictured, and I might come to this case later on.

TAYLOR, A-J.A.: It was a case of duress.

MR. GRUZMAN: I do not know what one calls it. I am not sure what you would call it these days. I started off thinking duress was duress, and undue influence was undue influence, but now I am not sure. It is called here a case of pressure. His Honour Mr. Justice Street uses that term also from 50

time to time. He seemed to think one classified these general influences under the generic term of pressure. I must say it seems to fill the bill if I may say so here. This man was under pressure because of the unspoken threat or possibility that his son would be prosecuted. In the same way, even if you put this case no higher, nobody could possibly doubt that Mr. Barton, in signing this deed, did so to be relieved of pressure.

The next case is Allcard v. Skinner. It is the case of the lady who went into the convent, one of the rules of which was poverty, and she made over to the convent her property. Then some years after she left she tried to get it back.

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MASON, J.A.: It seems far removed from this case, doesn't it?

MR. GRUZMAN: The principles are the same, even if one could hardly regard the officers of Landmark Corporation as anything like a convent.

MASON, J.A.: That is what I had in mind.

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MR. GRUZMAN: I thought so. The gunmen behind the curtain. The principles are quite interesting. I only propose to deal with the principles. Each case is a development. I am going to refer to page 171, the judgment of Lord Justice Cotton, which was dissented. Each case that comes up, the Courts say "We have never had anything like this before". It does not seem to alter the principles. As his Lordship says here at page 171, "Is the plaintiff entitled to legal ...". Lord Justice Cotton was dissenting, but in fact the lady lost the case because of delay. "These decisions may be divided into two classes ..." On the next page, page 172, "The words of Lord Justice Knight-Bruce ... an entirely free agent". That is what the Courts are looking for in this case. On page 173, the third sentence, "The question is I think whether at the time she executed the transfer ... with her property", remembering here no suggestion of coercion, no suggestion of improprieties of any kind alleged against the Sisterhood.

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At page 179 Lord Justice Lindley says this, "The Sisterhood was building a hospital" and at page 181 his Lordship says, in the middle paragraph, "The doctrine relied upon by the appellant is the doctrine of undue influence ...". Over the page, page 182, "Taken that she, the plaintiff intended to give it to him ... how the intention was produced". Then at the foot of that page ---

MASON, J.A.: Into which of these two categories of which Lord Justice Lindley spoke do you say this case falls?

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MR. GRUZMAN: It comes under the second category of a general exercise of pressure.

MASON, J.A.: That is not the second category, is it?

MR. GRUZMAN: It is his first category, I am sorry, "Some coercion from outside". If one may look at the bottom of page 182 his Honour says, "What is the principle?"

If I might address your Honour Mr. Justice Mason, we fall into the second category of the classification of his Honour Sir Owen Dixon in Johnson v. Buttress, to which I will refer in a moment. 10

Lord Justice Lindley at the bottom of page 182 says, "It does not follow that it is not reached ... of fraud". This sort of situation, which is not referred to in the books, but obviously we would submit is a fortiori case, "as no Court has ever attempted to define fraud ..." as I read the next paragraph I ask your Honours to bear in mind and to consider as similar the religious influence and the commercial influence which, indeed, some of the evidence will suggest, there is not much difference. I do not know whether I made myself clear. His Honour Mr. Justice Street said there was a great commercial interest. 20

TAYLOR, A-J.A.: I think I understand what you want us to do, I do not think I understand how we are to do it.

MR. GRUZMAN: When I am reading the next paragraph you will see the principle. His Lordship says this lady was very much taken up with the religious work, so that she had a tremendous influence to do this, quite apart from any undue influence, and in the same way there was perhaps some commercial influence on Barton. 30

After I have opened up I will deal with Mr. Armstrong as a topic. Here his Lordship accepts the tremendous influence of the church on this lady, genuine, proper influence, and yet he is able to say she was still subject to an undue influence. "Everything that the plaintiff did is in my opinion referable to her own willing submission ... to regard as undue". How much more so would the sort of influence which must result in the conduct which took place in this case, irrespective of what other influences might have been operating on Barton. At page 185 I refer to the passage "But if the gift is so large ... the plaintiff now demands no more". I will refer also if I may to page 189, to Lord Justice Bowen, who said, "This is a case of great importance ... was the plaintiff entitled to the benefit of it." 40 50

His Lordship there put it fairly and squarely it does not matter, applying it to this case, that Mr. Barton did and did intentionally everything that he set out to do. What they say is the question is whether Mr. Armstrong - you forget

about Barton, you put Barton out of mind. That follows from "It seems to me so far as her rights she had the absolute right to deal with her property as she chose". So you forget about the donor, she has no rights to give to the Court. We assume for this purpose neither has Barton. "Passing next to the duties of the donee (that is Armstrong) it seems to me that although this power of disposition ... public policy and fair play". It is a rather important equitable principle.

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Now we come to Johnson v. Buttress. It is a case which your Honours may find of some assistance. It is comparatively recent, 1936, the judgment of Sir Owen Dixon. It collects some of the principles of the early cases. As one reads the case and sees how the Court elucidates, examines and finds out just what influence this lady had over this old labourer, and then tries to work out from that was that influence undue, and then applies the principles, one could fairly submit that whatever influence the Court was able to find would be infinitesimal compared to the sort of influence that Armstrong had over Barton; as indeed, it is sufficient to say his Honour Mr. Justice Street accepts. (Headnote read.) If I might just refer to a short passage in the judgment of Chief Justice Latham at page 119, I refer to the last complete paragraph, "Where such a relation ... the mind of the donor".

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(Luncheon adjournment.)

Your Honours, I was referring to Johnson v. Buttress. I was referring to the judgment of Sir Owen Dixon there. I might go to page 133 where his Honour says "This narrative of facts includes no circumstances or combination of circumstances ... or of a mixture of these motives". Just pausing there for a moment, your Honours will remember in Allcard v. Skinner the positive result of the religious convictions and desires, legitimate and proper religious convictions and desires, of the lady concerned. In other words she wanted to give her property to the Sisterhood. She was entitled to, she did so without any outside influence. I likened that to the commercial situation which of course must also have operated on Barton's mind. That religious influence, right and proper though it was, was not allowed to stand in the way of the Court saying No, there was an ulterior impropriety beyond those inferences properly operating on her mind. It was because of the ulterior impropriety that the contract or the deed was set aside. So in this case Sir Owen Dixon says "This narrative of facts includes no circumstances or combination of circumstances ... or a mixture of these motives". In other words, Buttress had a proper motive and intention of transferring this property, based on the most proper of acts on the part of the other side. That again I will liken to the commercial influences operating on Barton's mind.

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I turn now to the last complete sentence on the page, "If the circumstances of the transaction

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are such as to throw upon a donee ... that requirement is not satisfied". Here one has a classic example, enunciated by his Honour, the case depends entirely on onus. In Johnson v. Buttress, in the opinion of Sir Owen Dixon, the case depended entirely on onus. He says, "whichever party has to prove will lose". This is what his Honour is saying. He says it all depends on what the law says should be the onus. Then he goes on to consider that point. At page 134 the judgment proceeds "The basis of the equitable jurisdiction to set aside an alienation of property ... was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee ... to make it difficult to disentangle the inducements which led to the transaction ... the Court examines the propriety of what wears the appearance of a business deal", rather close to what we will be submitting in this case. "These differences form an additional cause ... in which dominion maybe exercised by one person over another."

TAYLOR, A-J.A.: Is not the first part of the paragraph which you read, going back to page 134, the part we are concerned with here? You read four lines from the top, "The source of power ... ". You cannot say there is a special relationship. There was no special relationship between Barton and Armstrong.

MR. GRUZMAN: We submit that there was. 30

HIS HONOUR: Why?

MR. GRUZMAN: Might I put it this way, if the High Court can say that a special arrangement arose between Johnson and Buttress, because the Johnsons were kind to Buttress ---

TAYLOR, A-J.A.: He was old and silly and did not like people, and all the rest of it.

MR. GRUZMAN: Those are the reasons, but basically it was because the relationship was only that he was old and not very bright. 40

TAYLOR, A-J.A.: And could not read.

MR. GRUZMAN: Yes, and the Johnsons were nice to him. That was the only relationship, nothing else.

TAYLOR, A-J.A.: And they had come to mean to him people whom he relied on, people whom he trusted, people he went to.

MR. GRUZMAN: Exactly. All those little things went together to create in the mind of the Court a situation of a relationship; in the same way we read one this morning, the footman got a relationship. 50

TAYLOR, A-J.A.: You are not suggesting there was some situation here of domination, leave aside the question of threats? As far as this battle between these two people was concerned, Barton gave as good as he got, and a bit better. He won all the battles. The only thing that happened is that Armstrong threatens him. That does not constitute a relationship, surely.

MR. GRUZMAN: If that were the whole case, then perhaps one would have to agree with your Honour, but it is not. The case is this - we traced it back. The relationship grew. It started as early at least as 1966. By the time of this transaction Barton was completely under Armstrong's dominance in the sense that Barton was subject to a fear that he could be killed by Armstrong. I want to examine the evidence of that. Your Honours will require proof of that, and the proof is in the evidence, and we will refer to it. For the moment our submissions are that over a period of months, not on one occasion - this is not a case where A says to B "Sign the contract or I will kill you".

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TAYLOR, A-J.A.: How could you say he was under his dominance on the 17th November when he successfully moves the resolution and gets him out of the chair of the Company? That does not sound much like domination to me.

MR. GRUZMAN: It may not, but on the other hand as Sir Owen Dixon says, one may be looking at something, one is examining the propriety of what wears the appearance of a business dealing. I concede that to certain members of the public, looking at all the transactions between these parties, it would wear the appearance of a business dealing. It is only when you go beneath the scenes, to the matters which have only been revealed and are satisfied to his Honour Mr. Justice Street, that all the time, although Barton was apparently acting in response to business motives, although he was fighting a general meeting apparently in the usual way, who could have believed that when these parties were solemnly counting votes at the general meeting, that they had two armed gunmen standing behind the dais waiting to save Barton's life in case he was shot.

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TAYLOR, A-J.A.: We are talking about the commercial dealings. You are saying this had the appearance of a commercial dealing.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: On my reading of the evidence I do not think Barton was in any way dominated by Armstrong. He had contempt for Armstrong; he thought he was a fool, which he demonstrated on a number of occasions.

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MR. GRUZMAN: That is one way of looking at it. The fact is, and may I just rest my case for this

moment, because I am only trying to open the matter, on the judgment of his Honour Mr. Justice Street. He says that he was in a state of real fear and mental torment. He left his home and his family. This man was in abject terror, and this had continued over months. Indeed, his Honour, if I might just add this, uses against Mr. Barton the anterior relationship. What his Honour finds is that the relationship of terror and fear had existed prior to the annual general meeting when Barton was being followed and watched and threatened, but his Honour says that anterior relationship does not assist Barton because it was not related to the instant agreement.

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For the sake of answering your Honour may I put that is sufficient to indicate that there was a continuous relationship over a period, without saying any more.

TAYLOR, A-J.A.: There was a continuation of threats?

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MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: I do not know why you call that a relationship.

MR. GRUZMAN: If a relationship of kindness, undue kindness of a guardian to a ward, some dependence and kindness between Johnson and Buttress - if that is a relationship then ---

JACOBS, J.A.: "Dependence" is the important word there.

MR. GRUZMAN: That is in that particular relationship.

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JACOBS, J.A.: The alternative is dominance.

MR. GRUZMAN: Yes. I do not accept, if I may, that there are two alternatives only. It applies to every relationship. A relationship may be neither dominance nor dependence.

MASON, J.A.: The passage to which you have already referred in the judgment of Mr. Justice Dixon says the presumption which you seek to apply here applies whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over another or dependence or trust on his part. Which of the four mentioned there do you say is in the present case?

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MR. GRUZMAN: I am sorry, I missed the page.

MASON, J.A.: The bottom of page 134, the top of page 135. You concede that this is not a traditional relationship of influence in the present case.

MR. GRUZMAN: Yes. May I first of all say this,

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Mr. Justice Dixon chooses those words to describe what another judge has described as "all the variety of relationships". I think his Honour's words should be taken as being expansive and trying to convey within a few words the whole variety of human relationships. I would not feel impelled to necessarily bring the relationship contended for here into one of those words.

MASON, J.A.: You are not suggesting the evidence here establishes the whole variety of human relationships, you are saying it establishes a particular relationship.

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MR. GRUZMAN: Yes.

MASON, J.A.: Mr. Justice Dixon is giving an illustration of a number.

MR. GRUZMAN: Yes.

MASON, J.A.: What I am asking is this, of the illustration which he gives, which is it, and if it is not one of the illustrations which he gives, what is it?

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MR. GRUZMAN: Of the illustrations of his Honour we would choose an illustration involving ascendancy. In other words, let us just take one of the alternatives put forward by his Honour Mr. Justice Street as to the motives of Armstrong in creating this situation. His Honour postulated as one motive to weaken Barton in his opposition to Armstrong. In other words, one could paraphrase that by saying that his Honour accepted as a possible motive of Armstrong the intent to gain an ascendancy over Barton in relation to the affairs of the company. As I indicated before, I had not really wished to argue these cases ---

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TAYLOR, A-J.A.: I only want to understand how you apply this case.

MR. GRUZMAN: I really appreciate the interruptions except I will be coming to the detail of the evidence at a much later stage.

Perhaps if I might come back to page 136, "The suggested relation has not its exact counterpart in any decided case". It continues, "But this is of little weight ... over the weaker". At the bottom of the page, "The first and most important consideration affecting the question ... elements". If I may just go to the end of that judgment, to page 138, where his Honour adverts to the matter which your Honour Mr. Justice Jacobs had in mind, "But it shows beyond doubt that such matters ... and failed to do".

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Your Honour might think at first sight that that is different to this case, but what we submit is that the principle is the same. It does not matter whether one person has a low intellect and

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another has a higher; it does not matter whether one depends on the other, the question is, is there a relation of influence, and I would submit that there could not be a heavier relation of influence, one party believes that he owes his continuity of life to the goodwill of another.

JACOBS, J.A.: That is not antecedent, that is part of the transaction.

MR. GRUZMAN: "Antecedent" as I understand it, used in these judgments is a temporal expression. That is, how long has it been going on? Here they have put the very thing that his Honour Mr. Justice Street found against Barton on, was that the relationship of terror had proceeded for so long that it could not be said to have been directed to this particular agreement.

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TAYLOR, A-J.A.: It had never got to a stage where the relationship prevented Barton, up to the time of signing, doing what he wanted to do. That is your difficulty as I see it.

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MR. GRUZMAN: No, your Honour. The reason is this, that if one had to - if the law was you had to say did Barton do it for this reason or that reason, there might be a problem, but we will be referring your Honours later to a book "Causation in the Law". The theory there put forward is that of eligibility. The theory of causation, the legal principle of causation, is said to be the question of eligibility does a particular influence make a particular cause of conduct more eligible. For example, the commercial consideration certainly may make a proposition eligible. But if to escape from a situation of terror - that that is a factor which makes the proposition more eligible - then in the eye of the law that was one of the factors, and it is with that approach that nobody we would submit could fail to believe that Barton would not have regarded a deal with Armstrong as the more eligible, if it was going to bring an end to the state of terror in which he was.

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There are one or two other cases I would like to refer your Honours to. Let me, if I may, refer to Kaufman v. Gerson. What happened there was the question arose whether an English Court would enforce a foreign contract which was valid by the law of the country in which it was made if the Court deemed the contract to be in contravention of some essential principle of justice or morality. (Headnote read.)

The argument at page 592 states "The contract sued upon ... amounting to duress". If one looks to the last sentence, "A contract to interfere with the course of justice ... the English law deems a general principle of morality". Then half-way down, "A party contracting cannot be said not to be a free agent ... entering into the contract". In the judgment at page 595, "the second

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point raised was, as I have said ... there should be no prosecution on the part of Kaufman". If one turns over the page to page 596 at the top, "desired to obtain some further advantage ... to be paid". I now miss a paragraph, and in the next paragraph, "It is said that by the law of France ... ought to be universally recognised". I miss the next few sentences, and then "There is the passage which was cited in paragraph 258 of Storey ... international jurisprudence". The last sentence of the page, "The difficulty in every particular instance ... even on the assumption that this contract could have been enforced by the law of France". The last sentence on the page, "I think that to enforce a contract so procured ... enforce a contract which was obtained by such means". The other judge refers to such a contract as "unjust and immoral".

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To illustrate this rather all pervading principle of duress I hand to your Honours photostat copies of the case I referred to this morning, which is in the latest copy of the All England Law Reports. It is an interesting case. In reading this case, and I am going to deal with it slightly, would your Honours please have regard to this matter: His Honour Mr. Justice Street found that the Vojinovic matter had not been sheeted home to Armstrong. That that truthful evidence had an effect on Barton's fears, so you have a case, according to his Honour's judgment, of a matter which affected Barton but which was not caused by the defendant. In other words, a third party applying the pressure, not even shall we say to the knowledge of the defendant. Having that in mind, may one have a look at this case. In this case I won't go into the facts. If your Honours think the facts of Barton v. Armstrong are astonishing, the facts in this case are fantastic; terror and hardship unsurpassed I suppose in any judgment that I have read.

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It was a case of a woman who as a baby was thrown out of a truck when her parents were being taken to the concentration camp and was found by some people and looked after. She was in bad health. She eventually went to university, despite all her handicaps, and then herself got involved in Poland in some activity which was said to be contrary to the regime, and the events we are concerned with, she was in prison under terrible circumstances, in a small cell and small supplies of food and cold and hungry and in comunicado, and being examined seven or eight hours a day. It was in these circumstances that the people who had befriended her, a husband and wife, agreed on quite an amazing plot, as it is called here to get her out of gaol. What they did, the husband was wellknown in Poland and the Polish authorities really wanted to get rid of him out of the country, so the husband and wife went through a form of divorce, and eventually he was allowed to marry the girl who was in prison, and because they wanted him out of the country he was allowed eventually to leave with the girl, and they were

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going I think to Israel but they went to England. In England this matter came before the English Court on an application to annul the marriage on the ground of duress.

TAYLOR, A-J.A.: She entered into it to get out of gaol.

MR. GRUZMAN; Yes. She was not in gaol because of the defendant. The duress was applied by someone quite unconnected with the defendant. The divorce Court judge gave this matter very careful consideration. As he said, "It is not open to a Court of law ..." and he got the Queen's Proctor to argue it. I am not going to take your Honours through all of this. It is worth reading as a novel, but not today. At page 910, if one would look at line F, just to give some idea of the immediate facts, "The knowledge that the police were far from unwilling to see him out of the country ... remarry Lydia". May I now refer to page 911, "In August 1969 Lydia came to England with her youngest son ... has not been consummated". Towards the end of that paragraph his Honour said, "I requested the independent assistance of the Queen's Proctor". At page 1913, the quotation at line C - (read). Line G states the civil code in Poland. (Read.) I might say English law was applied in this case. On the next page, page 914, and may I emphasize it was English law that applied in this case, "although I do not think that in modern law ...".

JACOBS, J.A.: I do not know why you are reading this, because this refers to marriage being a status. 30

MR. GRUZMAN: Both in the extract which I quoted and in the judgment it is said that there is no difference.

JACOBS, J.A.: If she had hired a taxi instead of contracting a marriage, do you mean to say the taxi driver could not get his fare?

MR. GRUZMAN: It would be the same.

JACOBS, J.A.: I find it very surprising. 40

MR. GRUZMAN: Fortunately one does not have to look far to find some authority for my submission. On the same page, page 914, between lines C and D, "It is said that the marriage contract ... proof of either".

JACOBS, J.A.: "Distorted" is the word there.

MR. GRUZMAN: The force of this judgment is this, and some of these principles if I might so put, were principles which I certainly was not aware of - for example, the principle, and we will show it to your Honours on high authority from ancient times up to the present day. If A and B make a contract and A, unknown to B, without any knowledge 50

whatever about his consent or in any way, if A has been subject to duress, B cannot maintain the contract.

TAYLOR, A-J.A.: Do you mean duress proceeding from any source whatsoever?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: That is because I suppose he did not contract with a free mind?

MR. GRUZMAN: Exactly. It does not matter. It is an important principle. In other words, if Vojinovic in this case, fear of Vojinovic who we will assume had nothing to do with Armstrong - if that affected Barton's freedom of mind, Armstrong cannot maintain the contract. That is what this case, amongst others, decides. 10

TAYLOR, A-J.A.: That makes good what you failed despite strenuous efforts to achieve before Mr. Justice Street.

MR. GRUZMAN: Exactly.

TAYLOR, A-J.A.: You do not have to worry about satisfying us that Armstrong was behind it. 20

MR. GRUZMAN: That is right. Nevertheless, we will try. Mr. Justice Jacobs in effect asked what the point of this case was. Our submissions as to the value of this case and two other cases cited within it are that in each case the vitiating element came from a completely outside source, unconnected with and unknown to the other contracting party. If I might just refer to it, his Honour says at line F on page 91⁴ "In the nature of things the source of the fear ... I am content to follow my decisions ... ordinary wedlock". 30

Those are a series of cases, and I will ask your Honours to consider others at a later stage, showing that the force or the vitiating element need not emanate at all from the defendant.

MASON, J.A.: Now you have referred us to these cases, what is the major principle of law upon which you rely? Can you state it so that we can get it down and bear it in mind as we look at the cases and hear them? 40

MR. GRUZMAN: Yes. If your Honours wish to really put it down, would your Honours prefer me to do it now or in the morning?

MASON, J.A.: I would like you to do it early. I do not mind whether you do it now or tomorrow.

MR. GRUZMAN: Basically of course we put this: we say Armstrong exerted pressure, there was a relationship of pressure between Armstrong and Barton over a considerable period. A contract was entered into, it is for Armstrong to satisfy the 50

Court that the making of the contract was not contributed to by the pressure.

MASON, J.A.: Let me get it down in the form of one, two or three propositions of law in fairly precise form.

MR. GRUZMAN: May we do that in very precise form in the morning. Secondly, we would say this, and I will refer your Honours to authority on it in a moment, one of the reasons why Barton entered into this contract we will be submitting is a proper inference on the evidence was to relieve himself of this pressure. That has two effects, (a) it vitiates on the principles which I have mentioned and (b) it means that part of the consideration was illegal. May I state that again. It is illegal for Armstrong to get a benefit from not applying illegal pressure to Barton. Even if it were, the unspoken consideration between the parties was that in consideration of me entering into this contract, you will not threaten my life any more, and if the Court is satisfied that that was implicit in the bargain between the parties then the contract is illegal, it is void for illegality as opposed to duress. 10 20

TAYLOR, A-J.A.: Why do you have to import difficulties like that into the situation; it is difficult enough already. If that were the fact, it is a plain case of duress. If these are the facts, it is a plain case of duress. It does not come any better by talking about consideration of illegality, it is forbidden by the law to threaten a person's life and make him enter into a contract. 30

MR. GRUZMAN: There are various positions. First of all the illegal contract is void and a contract effected by duress is voidable. Secondly, it may even be an easier case, it takes out of consideration the question of overcoming somebody's mind. All your Honours will have to be satisfied of is that it was part of the unspoken consideration that for a consideration of this contract there would be no more of this following. In other words, Barton did this, as one of the cases put it, for the sake of peace. 40

MASON, J.A.: It is a bit hard, isn't it, because this consideration was never mentioned by the two negotiators in their discussions.

MR. GRUZMAN: It was never mentioned in the case I mentioned before, the forgery case, and that was one of the points, it was never mentioned.

TAYLOR, A-J.A.: In which case? 50

MR. GRUZMAN: Williams v. Bailey. It was never mentioned. There was an inference drawn by the Court but these people who were in fact of good character - they were nice people, they were bankers, they did not go on and say "We will put you in gaol unless you pay up". That was never

said, that was an inference which the Court drew, and it is the inference which we would ask this Court to draw.

MASON, J.A.: Did you ask Mr. Justice Street to draw it?

MR. GRUZMAN: No, your Honour. I am only going to very briefly mention this, because your Honours know they exist, in a book which I hand to your Honours - I have photostats of Pothier here. Strangely enough, although the modern cases are developing concepts, the more ancient the writings one looks at the more clearly stated is the concept. (Pages 15 and 16 of Pothier read.) (Pages 60 and 61 of Shephards Touchstone read.)

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That concludes the cases I want to refer to at this time. May I just make one further comment on the law: His Honour Mr. Justice Street said that the contract went through for commercial reasons. One of the things that we will be considering here is what were the commercial realities and whether for example if a director of a company such as Armstrong so conducts himself as by threatening one or more of his co-directors and so wrongfully and improperly in the eye of the law creates a situation where it is necessary to get rid of it, whether that is a commercial consideration or is it not an aspect of duress or pressure? I just mention that at this stage.

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Enlarging on what Mr. Justice Street said, what did he find? He found the pressure and he found a commercial situation. I hope I am not unfairly paraphrasing his Honour's judgment, he said in effect one had nothing to do with the other. As I put to your Honours the other day it is as if his Honour found that Barton's mind was like a cabinet with drawers, and in one drawer real genuine terror, and the other drawer is a sound disposing mind. And one has no relation to the other. We will be submitting to your Honours in due course that that is not a reasonable inference from the facts.

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TAYLOR, A-J.A.: That what his Honour Mr. Justice Street found was not reasonable?

MR. GRUZMAN: Yes. We will be submitting that it is not possible for a man to be subjected to terror of this kind, at the relevant time, without it having some effect.

TAYLOR, A-J.A.: That may be so as an abstract proposition, but we are only concerned here with what the facts were in this case. As I understand the judgment of Mr. Justice Street it was a bit more than saying it was a commercial transaction. For example, he started when the negotiations started, he traced every step whereby Barton negotiated with Smith through December, and the agreement which he described as the 4th January. In not one of those situations was it ever exhibited by your client that he was being influenced or terrified or doing

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this because of any threats which Armstrong made. That is the reason as I understand the judgment shortly stated that he came to the conclusion that Barton entered into this agreement for commercial reasons; that is, that whatever threats had influenced him --- Barton himself said so; said it in writing on more than one occasion. I only draw your attention to that. Is not just an abstract proposition, it seems to me we have to find out what are the facts.

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MR. GRUZMAN: We will be seeking to persuade your Honours to find something different. I am only seeking to open one subject. It is obvious the effects of pressure on one hand was commercial I think and the inter action of these matters on Barton's mind are matters of substance to be considered, as they were by his Honour, and as they will be by your Honours.

It brings me to this point that in some way or other your Honours will have to make in due course a decision on the effect on Barton's mind of certain matters, as Mr. Justice Street did. It is a matter I suppose of judicial notice or judicial knowledge, the source from which the standards are obtained by which that judgment is made by a Court. It has been held by the High Court that evidence cannot be given as to the ordinary workings of the ordinary human mind. Since we are dealing with the ordinary workings of the ordinary human mind and not with some malady it is not a case for expert evidence. Therefore, this matter which comes within, broadly speaking, judicial notice, based on knowledge and experience of the Court - that knowledge and experience is gained from many sources. The parties of course are unaware as to what knowledge or experience in particular the Court has. On questions of judicial knowledge the Court is entitled to inform itself or to have its mind refreshed by publications of various kinds. These publications are long and varied. Your Honours may feel there is no argument necessary, but if there should be, we have had a look at some of the cases where the Courts for example, the judges, have taken down a volume on accounting off the shelf and referred to that, and referred to it in their judgment, to inform themselves on some accounting procedure. In this case we are dealing with the ordinary workings of the human mind. On that subject, some books have been written. We would like to feel that your Honours have read some works of a popular kind - I do not mean technical books, but works of a popular kind; to use the phrase which is used in one of the judgments, that your Honours have on this subject the ordinary knowledge of the well-read gentleman on that particular subject.

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With that rather awkward sort of preamble we would ask your Honours to read a book which I will hand to your Honours, or to have available this book for reading. (Produced to Court.)

TAYLOR, A-J.A.: Whose thoughts are these?

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MR. GRUZMAN: These are the thoughts of a man who is a leading psychiatrist. It is a paper back volume so it is a popular book. On the other hand, your Honours will see from the book that he is a man of great distinction and learning at the present time. This books deals with the effect on the human mind of suggestions, brain-washing, war, threats and that kind of thing. Of course this book cannot be used to prove facts but it means that if I am making submissions and say "We have all heard of the Pavlov dog experiment and we all know there is brain-washing and that sort of thing", it means we are on common ground. That is all I wish to say at this stage. I will refer to some of the matters in this book at a later stage.

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It deals with the way suggestions can be implanted in somebody's mind, the way the Communists work, and it shows that the human mind is just an ordinary organism.

We have opened these subjects now and, if I may, what I would like to do is this; we have prepared small documents to hand to your Honours and I am still not to the stage of going through these in fine detail, but this document sets out a correlation in times between what we will call the acts of pressure on the one hand and the commercial transaction on the other.

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TAYLOR, A-J.A.: Is this based on a view of the evidence Mr. Justice Street suggested?

MR. GRUZMAN: It is intended to include all the evidence. In other words, Smith's evidence is there, although Barton does not agree with it. Barton's evidence is there although Smith does not agree with it. I am not putting it forward as an entirely accurate document but indeed it is similar to a document put before Street, J. It is based on a document which was handed to his Honour, Mr. Justice Street. The object of presenting the document to your Honours at this stage is to enable me to run just briefly through an outline of the evidence to show the correlation in point of time of the various aspects.

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MR. POWELL: I hesitate to object but I understand my friend was putting this forward as a correlation of points of time between acts of pressure and the commercial transaction.

JACOBS, J.A.: You say there is material in it which is not in the evidence?

MR. POWELL: I merely turned to the first page and one sees, for example, there is a reference to Hume getting a car from Kay's. Mr. Hume in getting the car from Kay's - which is not a commercial ---

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JACOBS, J.A.: Is that the evidence, that he got the car from Kay's?

MR. POWELL: I do not know, but as to the commercial transaction ---

JACOBS, J.A.: You will have every opportunity to say that. If you are saying this goes outside the evidence then you are entitled to deal with it now, otherwise you are not.

MR. POWELL: Mr. Horton points out that it is in the wrong place, anyway; it should be under "unlawful pressure".

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MR. GRUZMAN: Your Honours will notice against every reference is the appeal book volume, page, exhibit and the witness. I am not going to refer to the evidence but just take your Honours through the catch phrases.

TAYLOR, A-J.A.: Looking at Exhibits "JJ" and 6 on the basis of establishing that Armstrong did employ Hume ---

MR. GRUZMAN: We are putting it as illustrating our evidence and submissions on those two matters. Mr. Barton mentioned they should be on the other side.

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We go back to approximately May, 1966. There is a letter in evidence where Martin, I think it was, was going overseas and he writes to the company secretary (Stewart) about how to handle the various matters in his absence. About the same time Martin is saying to Armstrong "You are a vicious and ruthless man. You would go as far as death." I have referred to bribing people - I think he even referred to that - and Armstrong said that he had his own way of getting things done.

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During June Barton is overseas on company business, and Armstrong tells Bovill that Barton has shot through, and Barton is recalled. In July there is a board meeting, to borrow \$680,000 from U.D.C. In the meantime there has been trouble with the Surfers Paradise project because the contractors have gone broke and under the terms of the contract they are entitled to receive the machines.

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TAYLOR, A-J.A.: Was it 27th June when Barton came back?

MR. GRUZMAN: This is in July, the 9th. The chronology which we prepared is such that anything your Honours want to refer to can be seen by looking at that chronology.

MR. POWELL: I would ask your Honours to disregard -

JACOBS, J.A.: Mr. Powell must say there is material in it which is not in the evidence, that seems to be the basis on which he sent the notification.

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MR. GRUZMAN: If that is the basis for it, then there is no substance in it.

Everything in that chronology is made up from what is in the appeal books, taking them apart and putting it into order. We have gone to great expense to assist your Honours and if Mr. Powell wants to prevent your Honours looking at it perhaps we should invite him to say so.

JACOBS, J.A.: In due course, when you want to refer to it.

MR. POWELL: It was never my intention to prevent your Honours reading it. I merely wish to indicate, having read some part of it, that the material ought to be read with some circumspection. 10

JACOBS, J.A.: That is the way we treat all submissions.

MR. POWELL: May I merely indicate, because my learned friend has something about it, that we were able to - after a sketchy reading, and it is a very sketchy reading because I have not been in this case the three years that Mr. Gruzman has been in it; I have only been in it ten or twelve days - we were able to find in the chronology material said to be evidence that was not, in the sense that it included extracts from material taken on the voir dire and material which proved to have no relevance although it may be said to be in evidence. One gets, for example, the whole of the criminal record of the man and one also finds material attributed to a witness who did not give evidence. In fact somebody else gave that evidence. 20

MASON, J.A.: Attributed to a "witness" who was not called at all! 30

MR. POWELL: Some material attributed to the person called Novak who was called on the voir dire in answer to the subpoena, and also Ziric.

TAYLOR, A-J.A.: Ziric gave evidence as to handwriting.

MR. POWELL: There are a variety of things of that nature. It is merely a case of, on a preliminary view, seeing a number of things of that nature we do not wish it to be thought that we accept it in toto. 40

JACOBS, J.A.: I am quite sure you never run that particular risk, Mr. Powell.

MR. POWELL: I am glad to have the opportunity to make some comment.

MR. GRUZMAN: First of all, in regard to what my friend said, Mr. Powell of course was in the case and was receiving the transcript throughout the case and in fact interviewed my client. Then my friend said he has only been in the case ten days. He was intimately associated with the case throughout the hearing. 50

The other matter is this question of the material. My friend refers to it as on the voir dire. It was material in answer to the subpoena, evidence given in answer to the subpoena, and as a result of what we heard from him we had a look at the law and the law, as we submit it, is that evidence taken from a witness on the answer to a subpoena is evidence in the suit; it is not evidence on the voir dire.

TAYLOR, A-J.A.: If you be right about that they were entitled to cross-examine Novak? 10

MR. GRUZMAN: That is absolutely right, your Honour.

TAYLOR, A-J.A.: Do you mean nobody knew that?

MR. GRUZMAN: The fact is that it was not done, and I will refer your Honours to the authorities on this, because we did have a look at them.

De Gioia v. Darling Island Stevedoring and Lighterage Company, 41 S.R. 1, judgment of Jordan, C.J.

JACOBS, J.A.: Is this the stage when you intend to deal with this matter? 20

MR. GRUZMAN: Perhaps I will deal with it in the morning, your Honour. We have the authorities now.

JACOBS, J.A.: Did you intend to deal with now?

MR. GRUZMAN: No, I did not.

JACOBS, J.A.: Then keep to the order, I suggest.

MR. GRUZMAN: I was going to take your Honours through this rough chronology of the evidence showing the juxtaposition of the acts of pressure to the commercial transaction. So we come to the July situation when Barton returned from overseas about 27th or 28th. I have checked it. All the action took place in 1966 and took place in that year and tumbles over to 1967. 30

This was the first time that Martin who, I think, on the evidence you will find is a pretty normal businessman and had no connection with anything of a criminal or violent nature - nothing is suggested in his life of having any connection with violence of any description - this is the first time in the evidence that Martin is brought up against something of a violent nature. They have to take possession of this machinery and they go up to Surfers Paradise, Barton and Armstrong. Armstrong says, "I have a man I employ permanently who does all my dirty work - all my strong-arm work". He then turns to his wife (I think, according to the evidence) and says, "Give me Fred's number". She has it in a small book and she says, "I don't think Alec (Mr. Barton) will approve of the methods you and Fred use". 40 50

At any rate Hume goes up to Surfers Paradise. I won't go into the details of it now because we

will deal with it later. He takes possession of the machinery. There is a vicious dog there. Your Honours will remember the evidence on that, I think Armstrong said "Shoot it". Anyway, the dog was not shot, but in the result Barton would not go there and it was Armstrong apparently who went to the scene with Hume.

In the meantime we find out from the books that Hume hired Novak to assist in this work at Surfers Paradise. This is the first direct relationship we know of with Novak. Hume gets this car from Kays about the 23rd. This is the car which we submit is a very important element running through this case. This car was transferred from Hume to Novak on 22nd December.

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JACOBS, J.A.: It is a drive-yourself car?

MR. GRUZMAN: Yes, I am sorry, it is a hire car. We will go to the other a little later.

At the same time in August Hume gave evidence that he was instructed by Barton and yet, according to the ground (?) his instructions came from Armstrong. In August Hume was employed as a body-guard for this man Lesic who had already been blown-up once and feared a further attack on his life by compatriots. He employed him as a body-guard. On 1st September Armstrong goes overseas. Hume in October pays Novak \$40 - we do not know why. Just "a job of work", I think the account says.

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The next two items are of the utmost significance. Hume had been subpoenaed to produce his books of accounts and his records and he brought to the court hundreds of envelopes containing thousands of vouchers. We just had a look through them and happened to find these two documents, one dated 2nd October, and on the back there was Barton's address and the words "White Mercedes" in Hume's writing, and Barton has a White Mercedes.

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TAYLOR, A-J.A.: You mean that Landmark Corporation had a white Mercedes?

MR. GRUZMAN: Well, Barton drove it.

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Then on 9th October we found on the back of an envelope the numbers EAZ-654, which is the number of the Mercedes, and DJY-211 which I think is the Valiant. I am told that the Valiant was in Mr. Barton's name. On 15th October, according to Bovill's evidence, the dispute had become more acute. Armstrong returned from overseas on 15th October and Barton told Armstrong that he was not prepared to work with him, and that the city was not as safe as he might think ---

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JACOBS, J.A.: Did Barton tell this to Armstrong?

MR. GRUZMAN: Yes, Barton told Armstrong that he was not prepared to work with him and Armstrong said that the city was not as safe as he might

think between office and home and he would regret the day that he decided not to work for him, and that conversation was accepted by Mr. Justice Street.

On 18th October there was a meeting of the Board at which Barton prepared a resolution to strip Armstrong of his assumed executive power. Barton's complaint was that Armstrong was involving the company and interfering with the affairs of the company when, as chairman, he should not be doing so and that Barton, as managing director, was the person who alone could control the company from the executive point of view. This brought reaction from Armstrong and there were a few conversations where he was asked, "Have you had any more 222 notices lately?" There was a reference to the shares, which your Honours will read about, and a general carrying-on.

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TAYLOR, A-J.A.: He was highly critical of the way Barton was running it.

MR. GRUZMAN: Yes, and he was seeking to run it himself as chairman - which the other directors objected to.

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TAYLOR, A-J.A.: Who was doing the dominating at this stage?

MR. GRUZMAN: What was happening was that Armstrong was being dominated. Armstrong was demanding that he be provided with a boat in Surfers Paradise and a boat in Sydney and, I think, a chauffeur-driven car at the expense of Landmark.

TAYLOR, A-J.A.: Barton took him on and won the bout?

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MR. GRUZMAN: He had to do that or Barton would have been in dereliction of his duty as director, and so would the other directors.

TAYLOR, A-J.A.: I am not criticising it. The fact is that he took him on and laid down terms as to how Barton would behave.

MR. GRUZMAN: Let us follow it through as to what happened as a result of that and let us assume that what your Honour says is right and see what happens. Barton took Armstrong on in the board room. Hume sent on 21st November another \$40 to Novak at Surfers Paradise and we do not know why. That was one of the records. On 24th October, Barton's resolution comes before the Board and there is a motion of confidence in Barton and Armstrong is ordered to vacate his room at Landmark by 15th November. Coming to 28th October, Bovill is trying to avoid a schism. He is trying to be a peacemaker, and Armstrong refuses to sign the accounts.

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On 1st November Hume is paid \$500. This little item when examined showed that Armstrong had sent Hume as a spy to Surfers Paradise, as the

evidence shows. He had bribed a man called Hawthorne with \$100 and was paid this amount by Armstrong.

The next thing is this offer. Armstrong offered Barton 70 cents for his shares but on condition that Barton will act as his dummy. The solicitor writes back and rejects the offer on the grounds that it is improper and in a conversation between Armstrong and Bovill at that time Armstrong refers to the use of this offensive expression in relation to the shareholders. On 7th November \$500 is drawn from Pacific Panorama (one of Armstrong's companies) to pay Hume. 1st November was the date of the account and on 7th November it was paid.

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On 8th November Armstrong is removed from Paradise Waters and Barton is appointed chairman. On 9th November the offer of Armstrong is rejected by the solicitor on the ground that it is improper and on that date a cheque for \$500 was banked by Hume. On 10th November Armstrong told Pratten, a member of Parliament, that Hume was employed by him. On 14th it appears that Armstrong has seen Pratten, who is a very large creditor in the company to the extent of \$200,000, and it appears from the evidence and the cross-examination that Armstrong told him in effect that the company was in difficulties and he was going to put in a 222 notice and that Pratten ought to do the same, and on that Pratten writes to the company.

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Then Barton tells the company secretary on 15th November not to make information and the books available to the other directors. Armstrong is supposed to leave the Landmark office and take his private companies with him. At the same time a summons is taken out whereby Armstrong is seeking to get control of Paradise Waters sales under the terms of the agreement so that he can control the project. Under this original agreement - Armstrong is removed as chairman on 17th November and on 18th November the telephone calls to Barton start and thereafter continue.

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That particular matter was accepted by his Honour. So this is where the real threats and terror start.

On 21st November Armstrong demands \$450,000. Your Honours will see the problem here, it is either \$400,000 or \$450,000 and the two amounts are spoken of interchangeably, even by Mr. Justice Street in his judgment. I think there was \$400,000 on the first mortgage to Paradise Waters and another \$50,000 or some amount due to Armstrong on another property. You could call it \$400,000 or \$450,000 and it won't matter. I am reminded that \$50,000 was in fact paid.

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On 21st November Hume pays Novak \$145 and there is no explanation of that.

Then they are preparing for the June meeting. Barton sees men near his home, watching continuously there, and again this is a matter that Mr. Justice Street accepts as true - but not that they were directed by Armstrong. That is a matter on which we will have more to say.

He does accept that on the next day Armstrong said that he was of German origin and warned Barton that he could get killed. On the same day he got a letter from U.D.C. saying that they were prepared to provide \$450,000. Armstrong sends a letter to the shareholders saying, amongst other things, that he has great fears about the money and it could be on terms which would be fatal. Then various matters take place and on 24th Armstrong comes to the Landmark office, (Barton has a bodyguard there), and tells the company solicitor that he is not working for the widows and orphans. 10

TAYLOR, A-J.A.: By that he meant the shareholders?

MR. GRUZMAN: Yes, your Honour. 20

Barton by this time is in such a state of fear that he employs a bodyguard. The written instructions for the bodyguard are in evidence and show that he was to be responsible for Barton's safety and be with him 24 hours a day. On one side you have got the Board meeting, confirming the removal of Armstrong on the 24th, and Armstrong moved to increase the number of directors of Paradise Waters, to get control - as he was entitled to do under the agreement. 30

On the next day the company's solicitors, Allen, Allen & Hemsley, replied to Mr. Grant (Armstrong's solicitor) in respect of their demand for payment of the money. On the same day Barton is being followed and sees Hume near Landmark and his home. He is followed by a blue Falcon and a red truck. That again is accepted as true by his Honour. Barton has instructed his secretary that she is to give no information to Armstrong.

TAYLOR, A-J.A.: When you say that Armstrong was seeking to appoint additional directors to Paradise Waters, he was entitled to do that; he had a second mortgage for \$400,000. 40

MR. GRUZMAN: Yes. I said that he was entitled to do it.

TAYLOR, A-J.A.: I thought you meant he was legally entitled but there was something wrong about him doing that.

MR. GRUZMAN: No. As I opened before, not only was the \$400,000, not only had he an equity, but he also had a legal right to control, but since he was to be paid out that right would disappear when he was paid out. At that stage they had the letter from U.D.C. saying that he would be paid out, so 50

there was not a lot of advantage to be gained by allowing him to take control of the project and do what he liked with it when he was going to be paid out within a matter of days, as they anticipated.

(Further hearing adjourned until 10.15 a.m., Tuesday, 23rd February, 1971.)

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

Term No. 22 of 1969

CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

BARTON v. ARMSTRONG & ORS.

THIRD DAY: TUESDAY, 23RD FEBRUARY, 1971.

MR. GRUZMAN: In my first address to your Honour, Mr. Justice Jacobs, your Honour made some remark yesterday about duress in marriage cases and pointed out that that was a matter of status. I do not want to go into it in detail at this point of time but we say to your Honours that on the authorities the marriage instance is an a fortiori case, but the sort of duress which will affect the marriage - which is both status and contract - has to be more significant than that which affects mere civil contracts.

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Your Honour also postulated the proposition of the man getting a taxi. May I just say this: if a man is in fear of his life and his method of escaping from the fear is to make a contract with a taxi driver then, since he has not got a proper consent in mind, that contract could be vitiated by duress. That is the effect of Pothier, Shepherd's Touchstone and the later cases right up to the last one which I cited to your Honours yesterday. In other words, the fear actuating a man's mind does not have to be associated with or directed by the other contracting party.

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TAYLOR, A-J.A.: You say that applies to cases of physical duress?

MR. GRUZMAN: Yes, your Honour. I won't refer to the authorities again at this stage but it appears that Shepherd's Touchstone bears that out, and it appears in all those authorities.

TAYLOR, A-J.A.: You say it is not a great leap forward, it is a great leap backwards?

MR. GRUZMAN: It is a principle that has never changed. It has gone neither forwards nor backwards. It starts in antiquity and goes on in an unbroken line up to the present day.

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I am reminded that Lord Cooke spoke of it also. If A seals a deed to B under duress from C, B having nothing whatever to do with C, that deed is bad.

JACOBS, J.A.: And not knowing that he was under duress?

MR. GRUZMAN: Yes. I realise it sounds different to something which, speaking for myself, I had thought to be the law but we have researched it and when we come to the authority towards the end of this appeal your Honours will see that there is an unbroken line of authority. That is the law and it has always been.

JACOBS, J.A.: If you are going over it again, it is best to leave it until then - time is limited.

MR. GRUZMAN: I appreciate that.

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MASON, J.A.: One thing I would like to know before we get to the end of the case is whether you draw any distinction in law between duress and undue influence in terms of onus.

MR. GRUZMAN: We do not, your Honour.

MASON, J.A.: You do not?

MR. GRUZMAN: No.

The terms duress and undue influence appear to have been used interchangeably but we say that wherever there is a relationship the onus, whatever it is called, is changed ---

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MASON, J.A.: Duress is common law and undue influence is equitable.

MR. GRUZMAN: Duress is used in an equitable term also.

MASON, J.A.: Do you say there is no difference between undue influence and duress?

MR. GRUZMAN: I would not like to put it that way, because the terms are used in different cases in different ways. We prefer to put it in the way in which his Honour Mr. Justice Street used - "pressure" - in the way in which the authorities use it - "pressure" - whatever it is called.

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Whilst I am addressing your Honour, Mr. Justice Mason, your Honour referred yesterday to a situation in the convent. I do not know whether I made myself clear.

MASON, J.A.: I think you did subsequently.

MR. GRUZMAN: May I say this: what I was seeking to put was that we say in the Barton v. Armstrong case there was a commercial situation, there was a situation of pressure. We say that in almost every case something similar will appear.

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TAYLOR, A-J.A.: In almost every case of undue pressure?

MR. GRUZMAN: Yes, there will be something similar. In other words, take the case of the clergyman - and this is one of the cases we will be citing at

a later stage - who exerts such an influence over this lady that she was prepared to give him all her money in return for his undivided attention to her spiritual needs. That to her at the time seemed a good contract, she was prepared to do it (I have forgotten whether she went to a solicitor or not, but it would not matter), she voluntarily did it believing that was what she wanted. There was a commercial level. But the court then stepped in and said there was undue influence. As the authority I cited yesterday said, it does not matter that the intention is there; the question is: how was the intention created? So with the lady in the convent. The court said that this lady had a very real intention to give her property to the Sisterhood, she wanted to do it and she had a real and truthful desire, but she was not coerced in any way. That is the commercial side of the genuine motive. But again the law stepped in and said that supervening there was undue influence whether the lady realised it or not.

MASON, J.A.: I follow that but the difficulty, I think, is this: in the case to which you appealed there was a traditional relationship, there was a general relationship that subsisted between the two parties and as a result of it one could make a broad approach and end up with a situation in which the onus was on the person who received the benefit. But when one looks at the facts of this case it seems somewhat different. There is no traditional relationship and you are in the situation where on the established evidence there was a general relationship existing between the parties which is a sufficient foundation for coming to the same conclusion on the question of onus.

MR. GRUZMAN: Your Honour, with respect, I accept that. The only thing I say is that in each of the cases which we have looked at, or most of the cases, the court has had to look at a new relationship. Each time they say "This relationship has not come before the court before. Let us look at it."

MASON, J.A.: I follow that. It does not seem to be of much assistance to you to appeal to cases in which a traditional relationship existed, but the courts were confronted with a new situation, and you say then we have to examine the evidence in the particular case to see whether a general relationship of sufficient degree exists on that evidence, and to appeal to solicitor-and-client decisions, clergyman-and-parishioner, and patients' cases, seems to me to be of very little advantage.

MR. GRUZMAN: I agree, if I may say so. But we cited these in our opening to invite your Honours' attention to the principles in the cases and to show that with the variety of relationships, which will be unlimited, there is no limit to this and to show the law which applies to that relationship, whatever it may be. Particularly, I will turn to

the facts shortly and invite your Honours to find that although no traditional relationship exists, it will still invite the attention of this Court.

Indeed, I had intended to address a remark to your Honour Mr. Justice Taylor but I think it is covered by what I submitted to your Honour Mr. Justice Mason, dealing with the relationship over a period to which your Honour referred yesterday.

The other matter, if I may address your Honour Mr. Justice Taylor, to which your Honour adverted was that your Honour said "Why bring illegality into it?" 10

TAYLOR, A-J.A.: You answered that yesterday; it gives you a better situation so far as the evidence is concerned because an illegal contract is void; a contract entered into under duress is voidable.

MR. GRUZMAN: Exactly, and of course duress on the mind is relevant. In other words, if the court came to the conclusion that part of the consideration for this contract was that the illegal threats would cease --- 20

TAYLOR, A-J.A.: I thought your whole case before Mr. Justice Street was that they had ceased, after they went on ---

MR. GRUZMAN: That is true, but if part of the consideration - which the Court adduces from the evidence - is this: if this Court believes that Barton entered into this contract in the hope and in the belief that the threats against him would cease, then he was contracting for an illegal consideration. 30

Your Honour Mr. Justice Mason yesterday, I think, in relation to that said: "You are in a difficulty, are you not, because nothing was said about it?" If I might only refer to Williams v. Bayley again?

MASON, J.A.: You referred us to it yesterday and made your point then, did you not?

MR. GRUZMAN: I thought so, but it was never stated by them there; it was purely a matter of inference taken by the Court. 40

Yesterday I was just going through the broad summary of the juxtaposition in point of time between the acts of what we term unlawful pressure on the one hand and the commercial transaction on the other. I had dealt with the period approaching the general meeting where on the one hand, as at 25th November (page 7 of the summary) one had letters passing between the solicitors, the loan or the amount owing, \$450,000, to be called up, on the other hand a bodyguard at the Landmark office and Barton being followed - as his Honour found to be the fact - with Hume near the Landmark office and at his home, he being followed by a blue Falcon and a red truck. 50

JACOBS, J.A.: I think you could go through it a little quicker because we have it all in front of us, otherwise it all gets taken down again. You could simply say: "Page 9" and give the reference.

MR. GRUZMAN: Yes. We come to 29th November, Hume going to Surfers Paradise and the board meeting, on the one hand with Armstrong saying that he has embarrassing information and saying to Barton: "You snake, I will fix you", and saying that he could get criminals - McMillan and Rilley - who would kill for \$1,000.

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TAYLOR, A-J.A.: It was said to Bovill.

MR. GRUZMAN: Yes, said to Bovill and repeated to Barton. This is significant because, as we put it, that is what happened in the end. It was exactly these threats which Armstrong made, which his Honour accepted as having been made, to hire criminals to kill Barton which Barton was told of on 30th November, which actually came to fruition on 7th January.

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December opened up. The annual general meeting took place on 2nd December. On 1st December Barton had been followed. In the meantime there were proceedings before Street J. on a purely commercial basis to deal with properties.

Then we come to 2nd December which on the surface show that you have the annual general meeting of a large public company with a Queen's Counsel on the dais and apparently all regular, but actually behind the curtain on the dais there were two armed guards with instructions to protect Barton's life. It illustrates par excellence what we want to submit. The surface is regular but behind the scenes there is criminality, threats, pressure - everything that we would submit this court would set its face against.

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After the meeting Barton terminated this bodyguard, apparently believing that the threats would cease.

TAYLOR, A-J.A.: There was no good purpose for it. The general meeting had been held, he had survived, nobody had attacked him, he had won the day; why did he want a bodyguard?

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MR. GRUZMAN: That is right. Of course he was not to know the calamity that was going to fall and that was that U.D.C., which was providing the money which would pay out Armstrong, was going to decide otherwise. That was the calamity that hit everybody and it was Armstrong who stood to lose most. It was Armstrong who then reinstated the rein of terror.

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At the board meeting of Paradise Waters Sales, held on 7th December, Barton says that "You can employ as many bodyguards as you want, I will

still fix you", was stated in front of everybody at the board meeting.

On 8th December - and this appears to be the date, and we will be dealing with this in considerable detail but I propose to interpose here to say that before his Honour Mr. Justice Street we never made a close and detailed analysis of the commercial situation. Our submissions were basically that there were threats, there was terror and "if you are satisfied on that you don't have to worry about anything else". There was neither in the course of the hearing nor in his Honour's judgment any detailed analysis of the commercial situation. We will be putting that in the course of the next day or so.

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TAYLOR, A-J.A.: I do not understand what you mean by that. His Honour went to some pains to trace the course of negotiations between these people, commencing with the first interview between Smith and Armstrong and then going to Smith and Barton, and went into details in this regard. That is the commercial situation, is it not? You want to detail every one of them?

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MR. GRUZMAN: No, it is more than that.

TAYLOR, A-J.A.: That is the main part of it.

MR. GRUZMAN: When one really analyses it and has a look at the documents in evidence and understands what is behind it, we will establish - we hope - to the satisfaction of each of your Honours that this commercial transaction, this commercial situation and the contract entered into, was as unrighteous and improper and one-sided as it is possible for a contract to be; that it was in truth a fraud not only on Barton but upon the Landmark Corporation. We will establish this by an analysis of the evidence which is before your Honours. So I interpose there to say that before Street J. we never made that sort of detailed analysis.

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TAYLOR, A-J.A.: Are you telling us now, Mr. Gruzman, that there were some words which were not said before his Honour?

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MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: I would never have got that impression by reading the transcript.

MR. GRUZMAN: The submissions were all too short.

JACOBS, J.A.: When I first heard of this case I thought from the size of the evidence that it must have been a most complicated company transaction but when I read through all the evidence I found it was just a dispute of fact, as to whether you believed witnesses or not and the application to that of certain principles of law, with a judicial approach, but when this case comes on appeal and you say it will go for weeks, I just cannot believe it.

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MR. GRUZMAN: Unfortunately each of us, counsel for the plaintiff and counsel for the defendant, informed his Honour Mr. Justice Street it was a simple case - at the conclusion of the evidence.

JACOBS, J.A.: And that is a correct statement. Not simple in answer but simple in the questions of the issues involved.

MR. GRUZMAN: But when one goes into it, unfortunately it is not. It is not simple in fact and it is not simple in law, and when we really analyse it --

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JACOBS, J.A.: I do not mean easy, but I mean the issues are simple.

MR. GRUZMAN: I appreciate what is falling from your Honour. What I can say, if I may say so, is that I was of the same view but having really gone into this case, as I submit, and really understanding the submissions we wish to make to your Honours, this is as complicated and difficult a case in our submission as will ever fall to your Honours for decision. The issues in it are deep and vital, the issues of law are not simple, and as I submitted to your Honours earlier, your Honours' decision may well be definitive of the extent to which businessmen can enter into relations with one another and yet retain the benefit of contract between them.

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If I may just proceed with this general outline. As at 9th December - we are now passed the general meeting - 8th December was the date which we will show your Honours from the commercial side was the probable date when U.D.C. decided not to advance this money and that, of course, was a calamity of the first order. On that day Mr. Armstrong saw Mr. Smith and later Mr. Grant and I will be dealing with this in more detail. Perhaps one significant matter is that the whole contract in essence, the essence of the contract, the essence of the substantial terms of the contract, was determined in conference with Mr. Smith. They were never determined in the first instance by or in consultation with Mr. Barton. A proposition was formulated which in its essential terms never changed (I am speaking generally). Sixty cents a share for 30,000 shares, a large sum of money - \$175,000 and \$100,000 plus some options for the interest of Paradise Waters and repayment or re-security for \$400,000. The essential terms of the proposition were formulated in conference between Smith and Armstrong and they were continued and embodied in the final agreement. That was done about 8th or 9th December. From then on we start the rein of terror again.

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It is significant that on 9th December Mr. Barton wrote to the Postmaster-General's Department complaining about telephone calls. Your Honours recollect the nature of those telephone calls. They were of a somewhat awe-inspiring nature, in the early hours of the morning, a person breathing

in the telephone and saying, "You will get killed", matters of that kind. It is really a shocking thing to contemplate between two businessmen in dispute. It must be remembered that Street J. held that these telephone calls were made by Mr. Armstrong to Mr. Barton.

Then on the commercial side the tempo increases. There is a proposition that Mr. Smith will examine the books. This is on the 9th. Armstrong sees Smith at 2.15 and they go with Grant to the chambers of Mr. Staff, Q.C. Barton learns that U.D.C. has refused to pay \$450,000 and to pay any further certificates, which means that the project has been brought to a halt and the million dollars or more than one million dollars expended on this swamp is thrown into complete jeopardy.

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There are other letters between the parties. On the surface, when you look at the files and correspondence, one would never believe that in the early hours of the morning Armstrong was threatening Barton on the telephone.

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TAYLOR, A-J.A.: You have a finding in your favour that he did. Why do you keep telling us about it? I thought we took a fortnight off to read the evidence, I have read it, and I understand the judge's reasoning. I find this a sheer waste of time.

MR. GRUZMAN: I am sorry if I am taking too long about it but I have to try to show your Honours that there was in truth a situation of the relationship between them.

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TAYLOR, A-J.A.: You have a finding to that effect in your paper; your client was terrified.

MR. GRUZMAN: I understood that your Honour doubted whether that situation was a relationship.

TAYLOR, A-J.A.: That is a matter of argument. It is not a matter of going over the evidence again if I thought that. I have been puzzled to know what you mean by relationship, but that is not an invitation to you to turn around now and to take us through all the evidence. I read it, and took some time to read it. Why do not you go on to what you say follows from it?

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MR. GRUZMAN: At the moment I am seeking to show the correlation in time between the commercial transaction and the pressure.

TAYLOR, A-J.A.: We have all read that and it is all in the appeal book.

MR. GRUZMAN: With respect, your Honour, I feel I should submit that now, in the mass of evidence, it is necessary for me to invite your Honours' attention to the dates and to what was happening at any particular or given time.

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JACOBS, J.A.: Mr. Gruzman, I think you are entitled - if I may say so - to do what you are doing now but not in great detail. You are entitled, by summary - we having read the evidence - and by not referring to the evidence in detail to point out the facts. I agree with my brother Taylor that you need waste no time in your argument in chief on supporting the propositions of fact which were found in your favour by Mr. Justice Street. That would be quite unnecessary and, indeed, it may be that they won't be challenged, that Mr. Powell will not feel himself able to challenge them in view of the nature of this case and the question of credibility will not arise.

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MR. POWELL: I assure your Honours I will take that view.

JACOBS, J.A.: You therefore do not need to spend time on that aspect but I feel that you are entitled to do what you are doing now and go through the summary quickly in the way you are doing.

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MR. GRUZMAN: I would like to go a little further. This is a case which depends on the effect of certain actions on a man's mind and I submit I am also entitled to try to recapture for your Honours the effect on Barton of these events, because ultimately that is one of the matters your Honours will have to consider.

JACOBS, J.A.: You are entitled to do that, but you are entitled to do it in this way, by making reference to the evidence in the summary which we have already read, but only in summary form, because - as my brother Taylor says - we have taken two weeks to read it.

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MASON, J.A.: Before you proceed, when you said that you are going to identify for us the various findings on the facts and conclusions of law of the trial tudge, when do you propose to take us to them?

MR. GRUZMAN: We have really done that in the details which we handed up to your Honours.

MASON, J.A.: You are standing by all of this matter which is indicated in the various underlinings in the document?

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MR. GRUZMAN: Unless we have made some slight error.

TAYLOR, A-J.A.: Apart from the fact that you had some of the reds and blacks transposed, the reds are the "goodies", are they not?

MR. GRUZMAN: That was the original intention, and we think that is still right, basically and subject to any human error the reds are the goodies and the blacks we do not like and will seek to have your Honours change.

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JACOBS, J.A.: You were stressing the importance of U.D.C. changing its attitude.

MR. GRUZMAN: Yes. I will have more to say about that at a later stage.

JACOBS, J.A.: That is what perhaps troubles us. You do not have to go into great detail as we have read it all. It seems best to deal with it as you go. You keep on saying that you will have more to say later on, but I think it is best to deal with the matters as they arise.

MR. GRUZMAN: It is not what I proposed to do.

JACOBS, J.A.: We do not intend to hear argument twice on the same point. 10

MR. GRUZMAN: What I intended to do was to take your Honours through a broad approach to it, and that is practically finished, and then seek to ask your Honours to change the findings made by the trial judge.

JACOBS, J.A.: Depending on the credibility of witnesses?

MR. GRUZMAN: Mainly the inference - basically I do not suppose credibility is in question although on one aspect it will be. We are going to ask your Honours to do that and accordingly it is our job to refer to these matters specifically. 20

JACOBS, J.A.: That is what my brother Mason was referring to. When will you indicate the precise questions of primary fact, not depending on the credibility of witnesses, which you propose to challenge? I hope you do not propose to challenge ones which depend on the credibility of witnesses because that would be unheard of in our function and would be simply something we cannot do, by long authority. 30

MR. GRUZMAN: We did try to divide up and classify those findings which we challenge; which were findings of fact, those findings which we challenge which were inferences from the facts, but when one looks at it it is very difficult to apply such a classification.

TAYLOR, A-J.A.: You are referring now to Annexure "A"? 40

MR. GRUZMAN: Yes. Really I was referring to the judgment and perhaps to Annexure "A" as the same. I do not really wish to, but if I may get onto the subject at this point of time ---

JACOBS, J.A.: Could I give you one example? You referred to 17th December in the summary, a conversation with Mr. Barton and Mr. Armstrong, and you implied that something occurs - "You can employ as many guards as you like, I will still fix you". The judge did not believe that. Do you still propose to put that forward? 50

MR. GRUZMAN: Yes.

JACOBS, J.A.: He based that on his belief from what he saw in the witness box.

MR. GRUZMAN: When one goes into this appeal one finds it difficult. May I give your Honours an illustration of the way in which we will approach that subject. Mr. Barton's credit was substantially upheld by his Honour. He believed most of what Mr. Barton said. On the other hand he examines his credit in the judgment and says that Mr. Barton denied having any dealings with Mr. Smith prior to 4th January. 10

TAYLOR, A-J.A.: On that he did not believe Barton.

MR. GRUZMAN: On that it was conceded, so far as we were concerned. We never pressed his Honour to believe Barton as opposed to Smith.

TAYLOR, A-J.A.: You do not want to alter that now?

MR. GRUZMAN: No, but we will now be submitting to your Honours that here is Mr. Barton, a truthful man, who forgets or says this did not occur - a whole series of conversations with Smith prior to 4th January. Mr. Justice Street took that as if it reflected on Mr. Barton's credit, and we say it does not. We will submit to your Honours that if you consider the strain that Barton was under, the terror he was facing at the time - and I will enlarge on this further - with an appreciation of the human mind, your Honours may come to the conclusion that this mental block suffered by Mr. Barton not only does not reflect on his credit but establishes fairly clearly the strain he was under at the time. True, it was nothing to do with the case, it did not affect Mr. Barton's case one little bit whether or not he had conversations with Smith before or after 4th January. 20 30

TAYLOR, A-J.A.: That is not right, is it?

I said it was not right, but the effect on Barton's case could be vital because his case was that this all started about 4th January, the negotiations with Smith and that, of course, might be of importance. This matter was found by his Honour, that the negotiations with Smith had gone from 12th December and right up to before Christmas and Barton was away at Surfers Paradise and came back on 2nd, and perhaps he believed that Barton lied about that. Do you want to say something else? 40

MR. GRUZMAN: Yes, your Honour.

Might I take issue with what fell from your Honour. Firstly we do not dispute that Smith had given evidence that the negotiations had started on 14th December. But it so happened that Mr. Barton had given evidence that on 14th December he was approached by Mr. Armstrong and that Armstrong had said to him, "Unless you buy my shares for 60 ¢ and 50

pay back \$400,000 and buy my interest in Paradise Waters, \$100,000, I will have you fixed". His Honour found that that specific conversation had not taken place although, as his Honour did find, Mr. Armstrong may have threatened Mr. Barton on that day. But it turns out that Barton forgot that on that day he was also approached by Smith with almost the very same proposition, the self-same proposition, and that there was other conversation between that date and 4th January.

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TAYLOR, A-J.A.: When you say that he forgot it, do you mean he forgot it and corrected what he said before Mr. Justice Street?

MR. GRUZMAN: No, I am not suggesting that. What we are thinking, and I hope I make myself clear ---

TAYLOR, A-J.A.: This is what you are inviting us to find?

MR. GRUZMAN: Yes, indeed. What I am putting is that Barton, who obviously gave - and indeed in the eyes of his Honour did so - substantially truthful and accurate evidence, and a great deal of it, on this matter he was entirely wrong, indefensibly wrong, if one likes. He completely forgot an important conversation between Smith and himself, or important conversations between Smith and himself, between 14th December and 4th January. Yet he fixes with complete accuracy the date of the commencement of the negotiations - to the exact date. So we submit that, without fear of contradiction, Barton could not gain anything by reason of the difference in the date, by reason of this conversation with Smith, because he fixes the same date as Smith does as being the commencement of negotiations. What we say on his behalf is that if a man such as Barton, a substantially truthful and accurate witness, can forget conversations like that of some importance it shows the state of terror in which he was at that time. We will enlarge on that later.

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Whilst I appreciate what fell from your Honour Mr. Justice Jacobs, I appreciate that to the full ---

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JACOBS, J.A.: I just want to add to it to say this: I think in this approach you run a very great risk that we will all miss the wood for the trees. You have already enunciated your main point. I do not suggest you stop now, I am not suggesting that for the moment, but you have enunciated your main points which you say stand out like beacons. Here is a businessman, affected by threats and who when asked pays double the Stock Exchange price for shares and never demurs to it. You have said that previously. But if you begin to go into every little facet and try to challenge the findings of fact in that way we will get bogged down in all the factors as they existed at that time.

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Secondly, speaking for myself, if we are taken at some length through the evidence of

matters on which the judge has based his findings on the credibility of witnesses then, whatever the result of the appeal, there will be an appropriate order for costs to deal with that.

MR. GRUZMAN: I am sorry, your Honours, but we must understand and appreciate this situation. I thank your Honours for the indication, but we feel that we have a duty to submit this appeal and invite your Honours to change the findings of facts. That being so we feel there is no alternative but to look in detail, and in great detail - if I may say so - at the evidence.

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JACOBS, J.A.: Speaking for myself, you run at least the two risks I have just indicated.

MR. GRUZMAN: One must feel regret that your Honours consider we do run that risk but, on the other hand, it is our duty as counsel to present the matter as we feel we should.

TAYLOR, A-J.A.: As I understand it, you say that the inferences his Honour drew from the proven facts are not the correct ones, we can draw inferences ourselves. But I do not see how you can ask us to reverse the findings of fact, where the credit of witnesses was involved, and his Honour has seen all the witnesses. You say it is your obligation to present the appeal properly. I would not regard that as presenting it properly. How can you challenge the findings of fact of the judge who has had the benefit of seeing the witnesses and assessing them and made findings as to their credibility? You want us to retry this case here on different issues, different pleadings, and you seek from us different findings of fact?

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MR. GRUZMAN: Yes, your Honour.

TAYLOR, A-J.A.: It is not for me to say whether we should allow it.

MR. GRUZMAN: Well, your Honour, there are authorities. May I say in further answer to your Honour, Mr. Justice Taylor, that we shall be showing your Honours on the authorities that we are entitled to present this appeal in this way to your Honours, an appeal by way of re-hearing and - subject, of course, to any direction from your Honours - we propose to invite your Honours to examine the evidence in detail. I must say that I personally regret, indeed, as much as your Honours do that this is obviously going to be a lengthy procedure. On our part you will find that we have done a great deal to save the time of this court. We have expended a great deal of our client's money in an effort to present the appeal to your Honours in a most compact form. Your Honours will find as we go along in this appeal that is the position, and I think your Honours will be satisfied with that.

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JACOBS, J.A.: You will be able to put to the court

anything you wish, but whether you do it orally or in writing is a matter the court will decide.

MR. GRUZMAN: We have had in mind what your Honour Mr. Justice Jacobs said as a matter of fact, and your Honours will find that we have submitted quite a deal in writing.

JACOBS, J.A.: It may be that at some stage a review of the facts said to be challenged and the findings of credibility may all have to be reduced to writing in one form or another.

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MR. GRUZMAN: I appreciate that.

If I may then proceed. I had reached the stage of saying that after the June meeting on 2nd December, which was on 9th December, Mr. Barton had occasion to write to the Postmaster-General's Department about these 'phone calls. So that whilst the general meeting had terminated, obviously something else had happened. On 8th December, of course, we know that U.D.C. decided not to proceed. On 13th December the situation with respect to the company was so critical, arising from the U.D.C. decision, that Barton offered to resign from the company. At the same time there was going on between the company's solicitors and Armstrong's solicitors a series of correspondence (which I won't refer to in detail now) which was in its own way a little vignette of a surface situation and an underground situation. At this stage both parties knew that U.D.C. were not going to provide the funds and yet one sees the correspondence between the two solicitors dealing with the details of the deed of release which both must have known would never be executed.

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On 13th December Barton writes a letter to U.D.C. in effect threatening legal action because of their failure to comply with their promise in the earlier letter. On 14th December Barton gave evidence that Armstrong saw him and I have already told your Honours of the contents of that conversation but, sufficient to say in very broad substance, it contains the elements of the final agreement.

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On the commercial side; looking to the left and halfway down, Smith sees Barton at 1.30 p.m. This was a conversation of which Barton made no mention and, indeed, denied took place. Smith's notes on negotiations were tendered, and we will look at all that later.

On the same day, on the 14th, Hume gave a tape recorder to a man called Hoggett who figures in the evidence. As Hume said, it was to do something against Barton. The tape recorder was purchased and the invoice was in evidence. Telephone calls from Armstrong to Barton - "You will be killed".

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Might I refer your Honours to something

which has been pointed out by Mr. Priestley. I would refer your Honour Mr. Justice Taylor to his Honour's judgment at page 3113, line 33. "It is urged by counsel for Mr. Armstrong ... deliberately". When his Honour refers to the affidavit - I only interpolate this - what happened was that in affidavits made in April and March, 1967 Mr. Barton made exactly the same mistake, and this case was never in contemplation.

TAYLOR, A-J.A.: You mean these were proceedings under the Money-Lenders Act? 10

MR. GRUZMAN: Yes, the seven days' notice.

TAYLOR, A-J.A.: And the other ones were equity proceedings?

MR. GRUZMAN: Yes, equity proceedings for an injunction arising out of the non-payment of interest. They were heard before Street J., who would have had some knowledge of it.

I only indicate that so that your Honour should not have the impression that in any way his Honour had found that Mr. Barton's mistake was a deliberate mistake. His Honour specifically said it was not done deliberately, and of course that was verified by the affidavit with the same mistake long before this case was ever contemplated. 20

At page 3115 his Honour says: "I am satisfied or some bona fide distorted reconstruction". So that from a credit point of view, that is of a man endeavouring to speak the truth. We put Mr. Barton forward as a man of the highest credit, as was held by his Honour Mr. Justice Street. But there are some of his Honour's findings that we will challenge, and we will challenge them for some of the reasons we had indicated. 30

We have dealt now with this fateful day of 14th December where this difference arose. In the ensuing days there were more conferences, conferences between Smith and Grant, all of which we will deal with in due course. I do not propose to look at it as to the commercial side at this stage. Sufficient to say that commercial transactions ensued, the evidence indicating that the 'phone calls had continued on. 40

On the commercial side we have Barton writing to the Stock Exchange on 20th December to say that the dividend would be paid.

TAYLOR, A-J.A.: How could he possibly say that when he knew that U.D.C. was not going to make the money available? He knew that the company was bankrupt. 50

MR. GRUZMAN: I think the evidence was that they had had legal advice to the effect that, the dividend having been declared, it was a debt due to the shareholders, the same as any other debt. But

I can say this: at this stage the company, of course, had not been denuded of the \$200,000. I think that Mr. Barton said in evidence that what Mr. Armstrong took from the company, \$200,000 or the equivalent of it, was the dividend money which I think was \$87,000. So when Barton wrote that letter, whatever may have been the ultimate fate of the company, he had been advised and believed that this was a debt due to the shareholders because the dividend had been properly declared out of the profits. I suppose he was justified in saying that.

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In point of fact I think the true explanation of that is that this was the Board's view, the explanation that Barton gave, it was the Board's view collectively and not his own view.

MASON, J.A.: You are suggesting it was not Barton's view?

MR. GRUZMAN: I am suggesting it was not Barton's view. That was his evidence.

TAYLOR, A-J.A.: He said that in evidence he wrote that because it was the Board's view but he himself did not believe it.

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MR. GRUZMAN: Yes.

On 21st December there is an account in evidence with which your Honours are familiar, the account from Hume for Southern Tablelands, Mr. Armstrong's company, for \$1094.30. I won't take your Honours through that at the present time but we will be submitting that that document is of sinister significance. This was the payment of \$100 by Armstrong to Hume to secure Vojinovic - in connection with the procuration of Vojinovic.

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TAYLOR, A-J.A.: There just is not any evidence of that. I would think you would be entitled to ask Mr. Justice Street to draw an inference that that was money paid by Armstrong's company to Hume for Hume to watch, or to engage other people to watch, Barton. There is no evidence to show that it was a payment of \$1000 to Vojinovic to kill him.

MR. GRUZMAN: Speaking here in the civil court, I know how difficult it is to contemplate this sort of thing.

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TAYLOR, A-J.A.: There is no difficulty contemplating it, it is just a matter that the evidence is not there. It is a very interesting speculation, but you cannot speculate.

MR. GRUZMAN: I cannot say everything I would like to say at the one time. We will be making submissions on conspiracy and whether there has been a conspiracy proven. We will establish, we hope, to your Honours' full satisfaction indeed that there was a conspiracy because Vojinovic proves it in evidence; that there was a conspiracy along those lines. The only question in such an inquiry is:

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who were the conspirators? I ask your Honours to please not anticipate, because we submit that at the end your Honours are going to come to a different conclusion to that which your Honours may have at the present time. Mr. Justice Street found that Barton believed there was a conspiracy between Armstrong, Hume, Novak and Vojinovic to kill Barton. That was the finding of Mr. Justice Street. He found that Barton believed a conspiracy existed, and believed it on good and proper grounds.

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Another question arises, as to whether in fact it existed, but as to Barton's belief there is no doubt. That was so found by his Honour. We hope to show your Honours that this was true.

I would only add this, as at 22nd December - I am not going to enlarge on it now - when Armstrong said that was the last chance to save the company and that was rejected, I would ask your Honours only to have in mind that there was an insurance on Barton's life. I realise how difficult it is, and I only ask your Honours to reserve - as I know your Honours will - your Honours' thoughts on it for the time being. I know how incredible it is and how difficult it is to contemplate but the evidence will speak to your Honours far better than I can.

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So we come to this day of 22nd December which your Honours will find on the evidence is a very important day. It is a day when U.D.C. are going to put in the receiver and this is going to spell the end of the company. It is the day when Armstrong puts his proposition that if he gets the penthouse for \$60,000 he will negotiate with U.D.C., which will give a month's respite, but Armstrong is to go into the chair for that month and then decide what he will do. A lot of other things happened, which I won't deal with at the moment.

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Your Honours see what happens on the commercial side. These various discussions take place.

Over the next couple of days U.D.C. is given the \$60,000 further security and that persuades them to hold their hands, I think, for seven days. At the same time Vojinovic begins to see Novak nearly every day and Hume sees Novak nearly every day when he was there. Over the ensuing days not much occurs. Barton goes to Surfers Paradise and Bovill and Cotter write a letter to U.D.C. Barton is saying it is not going to be any good, which it was not. In the meantime an amazing thing happens. Hume transfers the registration of this 12 months old blue Falcon to this man Novak, and Vojinovic talks with Novak about killing Barton. Your Honours will remember the piece of paper that was in the car with Barton's name and, I think, his telephone number on it. Again I won't go into that in detail at this stage.

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On 3rd January Vojinovic talks to Novak in the Falcon and Novak goes down in the car with

Vojinovic to see Hume and Novak gets out of the car and sees Hume at the corner of William and Riley Streets.

On the commercial side Smith is negotiating with Barton and Smith is seeing Armstrong and on 4th January the heads of agreement are reached.

TAYLOR, A-J.A.: That is the day Smith and Grant had a conference.

MR. GRUZMAN: Smith and Grant had the conference and Smith and Barton, I think, had a conference and your Honours will remember the form. It was in effect "Get Barton to make this offer and give me an answer within 48 hours". It is on the same day that this cheque for \$1,000-odd comes from Southern Tablelands to Hume, and the telephone calls and the breathing and the "You will get killed" are continuing. On the commercial side the commercial deal is going ahead. 4th January was the date of that cheque for \$1,000 and Hume actually received it the next day, on 5th January. On the 6th Armstrong has discussions with Smith and notes in his diary - the validity of which we challenge - "Armstrong says new proposals, doubt if each will come of that", or "doubt if much will come of them". That is Armstrong, writing in his diary. This is a rather different concept from that which is in Armstrong's mind as to what was the concluded agreement. But Grant did first hear of it and enter in his diary "75/25% of pulling it off". These matters will be dealt with further in his Honour's consideration of Armstrong as a reluctant vendor, as to which we say there is no justification. On 7th January, I won't take your Honours through this in detail, there would not be any doubt that his Honour found the incidents which occurred were enough to strike terror into the heart of anybody.

On the following day Vojinovic is captured and gives a statement to the police which we say establishes the conspiracy.

Thereafter we have, it is enough to say, Barton obviously deeply concerned and involved in police inquiries of various kinds. Just as I am reading this we ask your Honours to think what effect that is having on Barton, the businessman.

Armstrong's diary on 9th January says "No progress yet". In the meantime Barton has gone to the C.I.B. and paid \$400, he says, and sent his parents to Katoomba. The police are apparently making inquiries, they say, to locate Hume and Novak. On the 10th on the commercial side, Armstrong's diary says "Still discussions Barton re matter", not suggesting a concluded deal in his mind even at that stage. Barton tells Bovill something about the threats, and Barton is still in fear of his life, and Vojinovic is given \$300 by Detective Sergeant Wild.

On 11th February Vojinovic sees Wild, Barton

goes to the C.I.B., a rifle is purchased with the assistance of Detective Follington, and Barton saw the statement made by him at the C.I.B. Barton moved out of his home and went to the Wentworth Hotel and sent members of his family to the Blue Mountains. Hume is still watching him.

On 11th January Barton is alleged to have told Wild "The agreement will be signed on the 18th. It will be all over". On 12th January the commercial deal is going on, but on the other hand there is a lot taking place. His Honour finds it a fact that Armstrong rang Barton and said "Sign that contract or get fixed".

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JACOBS, J.A.: "Or else".

MR. GRUZMAN: Yes, "or else". Barton said that he would not be blackmailed into signing the agreement. On the same day Vojinovic, who had told the police about this plot, goes to Melbourne with Novak in the same blue Falcon. Barton apparently is seen with it, according to Bovill, and at the same time we had evidence from the probationary officer that Novak had gone to Melbourne and had disclosed that to him.

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TAYLOR, A-J.A.: How on earth that was allowed into evidence I do not understand.

MR. GRUZMAN: One may ask how was Gibbons called. We did not call him. However, it is part of the evidence.

On the 13th there are commercial conversations and Barton said he told Smith that he was not prepared to sign the agreement. Barton had a conversation with Bovill, according to Bovill, that the agreements were risky and should not be signed and Smith apparently - Barton says - told him that he was expected to do it or the deal was off. According to Armstrong's diary he said the agreement had not been accepted on the Monday, and on Monday the 16th, according to Barton's evidence, at 8.20 a.m. Armstrong 'phoned him and said, "Unless you sign the agreement you will get killed". Later that day he gives a cheque for \$4,000 to Smith as security for executing the agreement, Bovill gets called in by Barton and strongly recommends it - Barton gets Bovill in and strongly recommends it as signing the agreement and says he does not regard it as his duty as director to go so far as to get killed. In Armstrong's diary he said the matter was dragging and he gave Barton his last extension, I think, until 4 p.m. Tuesday - or some such time. That is a matter which does not seem to have been reflected anywhere else.

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Barton decided to sign. On the 17th Barton signs and agrees to buy these 300,000 shares at 60¢. At that date they stood at 33¢. On the same day the Victorian police notify Hume that Vojinovic had stolen his car, and you will remember our allegation is that Vojinovic was framed by Hume

and Novak, to be put into gaol to be kept out of the road - having given this information to the police. There is an entry in Hume's diary, and Barton said that in his opinion on that day the Landmark shares were worthless.

On the 17th the agreement was signed and on the 18th the final agreements were signed and Smith and Horley were to go on the board. They waited until a late hour, the resolution appointing them had already been passed, but they did not turn up. It turned out that on the preceding weekend both Grant and Armstrong had been told by Smith that they were not going to go on the board. I will have more to say about that later on.

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Detective Follington says in his report at that time Barton was in fear. Wild intervenes again here, and Momo (the same man as Novak, who is the same as Ziric) was interviewed by Wilde. Barton left the Wentworth Hotel.

Perhaps it is not without significance that he left the Wentworth Hotel the day after he signed the agreement and feels free to go home. On the 24th Vojinovic is arrested in Melbourne. On the 25th Barton writes to the Stock Exchange saying that the payment of the dividend had been temporarily postponed. On 27th January Vojinovic is duly convicted in Melbourne and on the 10th Hume pays his secretary \$330. We will have more to say about that. I do not think I need worry your Honours too much at this stage about that. There is some evidence in this regard which we will be dealing with later in detail.

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In November Armstrong says to Barton "Use the money you stashed away. Unless you do you will get killed".

That is the outline of the evidence as it appears before your Honours.

MR. GRUZMAN: That is an outline of the evidence as it appears before your Honours. We now have to go through in detail and look at the whole of the evidence, as I have already indicated.

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JACOBS, J.A.: You will not read any of it, will you, Mr. Gruzman? We have spent two weeks doing that. Give any references to it that you like, it is all being taken down. The court is not prepared to hear the evidence read, in view of having spent two weeks reading it. You may give any references, either in writing or orally.

MR. GRUZMAN: It would not enable me to present the case to your Honours as I would wish to if I cannot read any evidence. I am very much in your Honours' hands.

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JACOBS, J.A.: The time to raise that was before we adjourned to read it. I thought you acceded, indeed, wanted us to do just that thing.

MR. GRUZMAN: Yes, exactly, we did, but this is the problem - may I just show your Honours. There is a tremendous mass of evidence here. We felt your Honours should have a general purview of the evidence so that when we approached the addresses here, the submissions, your Honours would be in much the same position as his Honour Mr. Justice Street was. We would put it no better and no worse. His Honour felt, in view of the amount of evidence, that reading parts of the evidence was helpful, which we did. We propose to read no more to your Honours than if your Honours had in fact heard the case.

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JACOBS, J.A.: There is a difference, Mr. Gruzman. We have had two weeks to consider the written words. I asked my brothers, and I know myself, that I have read it all. I have read some parts of it, by crossing back to it, a number of times. I do not wish to stop you giving us any references that you wish, and we will read those again before judgment is delivered in this matter, but we will not, having spent two weeks reading it, have passages read again.

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MR. GRUZMAN: As I understood it your Honour Mr. Justice Jacobs indicated at an early stage of the appeal that your Honours did not wish great slabs of evidence being read, and if I may say so with respect, rightly so. But that I think what your Honour Mr. Justice Jacobs referred to as the purple passages, significant matters, should be read, and the matter should be allowed to develop.

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JACOBS, J.A.: I did not say the matter should be allowed to develop, I said naturally you would want to refer to some few, or even many special passages.

MR. GRUZMAN: Yes. I said we would wish to do something more. I will tell you the course we have taken. What we have done, we have divided the case up, we have taken Armstrong - although I know his credit has been established, there is a little more to it than that. We have taken the commercial situation.

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TAYLOR, A-J.A.: You mean his credit has been destroyed.

MR. GRUZMAN: I appreciate that.

TAYLOR, A-J.A.: You said "established".

MR. GRUZMAN: I meant "destroyed". We have taken Armstrong and what we did, we tore up an appeal book or series of them and we extracted the relevant matters into a form like this. (indicating). Often on one page there is only one extract. There is nothing in the book except a short index, some extracts from the judgment, and then actual extracts from the appeal books. We propose to hand one of these to each of your Honours.

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TAYLOR, A-J.A.: You mean this is evidence on which you rely to show that the finding of the judge in his judgment is not proper?

MR. GRUZMAN: Yes, exactly. We propose to hand those up to your Honours and then we propose to refer to them, and even though that is only a small part of the evidence, we only propose to refer to a small part of what is in this book; then to make some submissions on Armstrong's credit and on other matters relating to Armstrong.

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JACOBS, J.A.: I do not know about that. You can call these things if you have material in written form. That would be most useful, there would be no doubt about that. I was only dealing with reading the evidence.

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MR. GRUZMAN: What we wish to do, we have cut the volume down very considerably by doing it in this form. We have done the same with other subject matters, the commercial transaction for example, so that your Honours will have we think in complete form a volume dealing with Armstrong, a volume dealing with commercial matters, including documents, exhibits, and you will have that in front of you. We propose to go through it, not we hope at length, but we wish to refer your Honours to some of the matters which appear in these volumes and to read perhaps some extracts from what appears in the volumes.

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JACOBS, J.A.: I think before reading any evidence you should ask the permission of the court, Mr. Gruzman, because we have read the evidence and you have reproduced it in that book, you have reproduced it in a chronology, so that every way we approach it we will have evidence before us. It is this reading of it in court that I am referring to, and only that.

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MR. GRUZMAN: I appreciate that. There are some bits we would like to read.

JACOBS, J.A.: Would you make sure you have the assent of the court before reading out the evidence, even in these books.

MR. GRUZMAN: If your Honour pleases.

(Short adjournment.)

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At this stage I propose to make some submissions on the commercial aspects and subsequently to take your Honours to the evidence and to the documents relating to it.

JACOBS, J.A.: Certainly, Mr. Gruzman. Just to come back to the earlier problem, you are entitled to state in what respects you challenge the findings of the judge at first instance and that is in any particular matter, and you are entitled to support that challenge by telling us what evidence you rely on to seek a different finding. In the course of so doing you will no doubt wish to give us references to the witness and the pages in the appeal book, and then if any of us feel that we wish to hear further elucidation and have specific passages read, then

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we will tell you. Otherwise we make no ruling. I indicated you would have to seek leave to read passages. That may be cumbersome, and I do not press that, certainly at this stage.

MR. GRUZMAN: If your Honours would allow me to make my submissions, I propose to refer your Honours to the evidence, and perhaps if I read evidence your Honours do not wish me to read, I am sure your Honours will indicate it very quickly. One of the foundations of this case is the commercial situation.

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TAYLOR, A-J.A.: What do you mean by that?

MR. GRUZMAN: What I mean by that is this - would your Honours allow me first of all to read from the judgment of his Honour Mr. Justice Street, a couple of passages?

TAYLOR, A-J.A.: Yes, go on.

MR. GRUZMAN: Firstly I again summarise or paraphrase what his Honour found, as we see it, that (a) Barton was subject to threats and terror but (b) he entered into the agreement for commercial considerations. That is our understanding of his Honour's basic finding and summing up of the case. His Honour expressed it in these words at page 3172 at line 15, "Mr. Barton and Mr. Bovill regarded it as a sheer commercial necessity ... and managing director of Landmark". May I turn also to page 3183 in his Honour's judgment at line 8, "In the light of the Vojinovic incident and Mr. Armstrong's previous conduct towards him ... have abandoned altogether any attempt to continue negotiating for commercially acceptable terms and might well have been prepared to surrender absolutely ... to get rid of Mr. Armstrong if Landmark was to survive."

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We propose to analyse from the evidence what the actual commercial realities were and to establish that his Honour's influence, as perhaps summarised in the last sentence which I read, "Their belief was that they had to get rid of Mr. Armstrong if Landmark was to survive" ---

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TAYLOR, A-J.A.: The question is not what the commercial realities actually were, the question is what did Barton believe them to be. That is the question.

MR. GRUZMAN: That is true. We accept that.

TAYLOR, A-J.A.: It may not necessarily be the same thing.

MR. GRUZMAN: They may not. But on the other hand, may I remind your Honour, and this is the point which I tried to make and which I have not in the case I know succeeded in putting clearly, to differentiate and to say that this court, sitting as a Court of Equity, will itself look at the realities of the transaction.

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TAYLOR, A-J.A.: The realities are what Barton believed them to be.

MR. GRUZMAN: There are two things. I realise I have not made the point to your Honour, and that is my fault. May I put it again. I have said it two or three times.

TAYLOR, A-J.A.: You say if the transaction is an improvident transaction it matters not that the person entering into it believed it to be a good transaction.

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MR. GRUZMAN: Exactly.

TAYLOR, A-J.A.: This is a question of what is motivating a man's mind.

MR. GRUZMAN: No, with respect. If it is in fact as the authorities say an unrighteous transaction then this court will say so. The adequacy of consideration becomes a material question, says Sir Owen Dixon. Instead of inquiring how the subordinate party came to bear a benefit the court examines the propriety of what wears the appearance of a business dealing.

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TAYLOR, A-J.A.: It is a straight out case of duress, from a single incident or a number of incidents, as I understand the judgment.

MR. GRUZMAN; I cannot deal with everything at once, if I may say so. I am now going to show that what bears the appearance of a business dealing was an unrighteous and improper deal.

MASON, J.A.: That is not another matter. In directing your challenge to this particular aspect of the judgment your challenge is to his Honour's finding in terms of what operated as a motive in the plaintiff's mind. Sir Owen Dixon was talking about an objective fairness of a transaction. They are two quite distinct things really.

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MR. GRUZMAN: Indeed they are. It is to both of those matters I direct my attention. What we propose to show is (a) that the transaction - I use the word "unrighteous" because it is a word which appears in the authorities - or the effect of impropriety, if one likes. I propose to show (a) that the transaction was in fact unrighteous and affected by impropriety and (b) that Barton knew it. I propose to show both. In other words, to put it more simply, I propose to show that Barton knew the realities of the situation, and so it then brings itself down to saying, if I say that, your Honours will say "What in fact was the situation?"

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MASON, J.A.: Insofar as you are attacking this particular aspect of the judgment you should be directing your attention to what was operating in the plaintiff's mind should you not?

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MR. GRUZMAN: That is true, but one cannot leave out of account the way ---

TAYLOR, A-J.A.: The other is surely an alternative case.

MR. GRUZMAN: It is.

TAYLOR, A-J.A.: Mr. Justice Mason put to you that you are challenging this. You say it is wrong.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: If you succeed on that, or if you persuade us on that, we do not hear the other. You are entitled to put I suppose an alternative case, whether he believed it or not, it is what you call an improvident unrighteous transaction, and we ought to set it aside. But there are two separate cases. 10

MR. GRUZMAN: True. His Honour Mr. Justice Mason, if I may say, very fairly asked of us yesterday to produce a statement of the principles of law. We have not done so yet. It is not because we have been dilatory about it. Your Honour is entitled to expect that. We hope to present it to your Honour tomorrow. It is not easy, for obvious reasons. We propose to show that there are principles of law which will be fully acceptable to your Honours which amply cover this case. 20

MASON, J.A.: One thing rather surprises me about your reference to this passage in the judgment. You seem so anxious to attack it that perhaps you have overlooked one aspect of it that may be somewhat favourable to your case, and that is, and I would be obliged if you would let me know whether you agree with what I put to you, his Honour does not reject the notion that the threats, the pressure, were a relevant factor in all the factors that induced the plaintiff to enter into the agreement. His Honour is not prepared to hold that the threats, the pressure, formed no part of the motive that induced the plaintiff to enter into the agreement. Indeed, his Honour is not prepared to go beyond saying that commercial necessity was the real motivating factor and quite possibly the sole motivating factor. He leaves that an open question. What do you say? 30 40

MR. GRUZMAN: We appreciate the strength we had in his Honour's judgment from that point of view. Our problem is that his Honour eventually found, and really if anyone is to blame for it it is me, because of the way we presented the case - it is my fault - his Honour eventually found "Look, you have set up a case that these threats were directed to this particular contract and you have not proved it, and really so far as this contract is concerned it was commercial motivated, therefore you lose". We can appreciate his Honour's findings on that. As I said before, and I say it again, we presented the case to his Honour; indeed, it is one of our grounds of appeal, we put as a ground of appeal that the case having been fought as we put it on the question of threats, or no threats, and his Honour having found threats, we should have succeeded. 50

Maybe that is right or it is wrong; I am not arguing that at the moment. I am only indicating that is how we regarded the case. We said "If you find that this man Armstrong threatened Barton with his life" and we had opened and said throughout there was a commercial transaction as well on the surface, "If you find these threats, you cannot possibly find in effect that the commercial transaction had nothing to do with any real influence, or if it did, the fact of the threats is sufficient for us to succeed".

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Whereas that was a simple proposition, and both sides told his Honour at the close of the case it is a simple proposition, "In effect you either believe the threats or you do not", his Honour having found "Yes, there were threats but no that is not an end of the matter", here is what gave rise to this appeal. That is why it is we have had to change our ground somewhat before your Honours, and I argue, even assuming what his Honour found was right, that we should succeed.

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In addition we say well, perhaps we were dilatory, but we never argued this commercial matter before his Honour to any great extent. We said yes, of course there was a commercial matter, so what, obviously there would have been, but now coming before your Honours on this re-hearing we propose to submit in detail and to show that yes, there was a commercial matter but it was itself an unrighteous matter, and Barton knew it. Your Honours, I cannot pretend that I am going to be short about it or I am going to be long. It is not easy, there is a lot of evidence.

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JACOBS, J.A.: I just want to say something further, not on that subject. You confess that it is your fault in not putting certain matters?

MR. GRUZMAN: Yes.

JACOBS, J.A.: I think it would be a pity if some time in the future you felt you had the same fault from changing the ground too much.

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MR. GRUZMAN: Your Honour, not only might I not be right all the time, I won't be right any of the time.

JACOBS, J.A.: What I mean by that is the basket with the relationship of influence in it can break just as many of the eggs as the other one.

MR. GRUZMAN: I appreciate the difficulty. We presented a case before his Honour Mr. Justice Street with a singleminded intention to prove something, which we proved. Then his Honour said that was not the end of it. Since then we have had to consider what is the law applicable really to the situation which his Honour found.

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TAYLOR, A-J.A.: What intrigues me is by what criterion are we to determine whether this was an

improvident or a provident transaction. We know nothing about land at Surfers Paradise, we know nothing about the cost of development. We know nothing about what businessmen - we are not businessmen - would have thought of the prospect of realisation of these blocks of land. We do not even know, as I understand it, what the assets of the company were. How are we to decide whether this was provident or improvident? You never raised this before Mr. Justice Street.

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MR. GRUZMAN: The evidence was there.

TAYLOR, A-J.A.: Whatever evidence was there, I suppose it is available to us.

MR. GRUZMAN: That is exactly so.

TAYLOR, A-J.A.: How do we determine this?

MR. GRUZMAN: That is my task.

TAYLOR, A-J.A.: No, it is not, unfortunately. You are here to make submissions, we are here to decide.

MR. GRUZMAN: It is my task, I was going to say, to make submissions to your Honours, to show your Honours that the evidence is there, and to show that there is ample material before your Honours ---

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TAYLOR, A-J.A.: If I can interrupt you again, perhaps one of your handicaps is if you have made some decision in this case.

MR. GRUZMAN: There you are. I have to tell you what I have done. I would like now to proceed to a survey of this financial position of Landmark. We divided it up into five periods. Firstly, the period prior to the removal of Armstrong as Chairman. Secondly, the period between the removal of Armstrong as Chairman and up to the annual general meeting on 2nd December. Then the period after the annual general meeting of 2nd December up to the time of U.D.C. made known its intention to withdraw its promise to provide Landmark with the \$450,000 necessary to pay out Armstrong. The fourth period is the period between the withdrawal of its promise by U.D.C. and the completion of the transaction on 18th January. The fifth period is the subsequent history. Now let us look at the first period.

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JACOBS, J.A.: First of all, what was the issued capital of the company?

MR. GRUZMAN: I think there were 1,870,000-odd \$1 shares.

JACOBS, J.A.: I could not find it.

MR. GRUZMAN: I think that is so. Your Honours may have been a little handicapped because we notice there is at least one, or two documents that were not copies in the appeal books, despite the

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size of them, and to which I will be referring. I do not know how that came to happen, but it has happened.

TAYLOR, A-J.A.: What are they, two documents we have not seen?

MR. GRUZMAN: There are some documents your Honours have not seen unless your Honours have looked at the actual exhibits. My learned junior will come up with that figure in a moment.

JACOBS, J.A.: I could not find it.

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MR. GRUZMAN: What we have done, and where we have got this evidence from, we will refer your Honours to it in more detail later. These are the submissions. We have extracted this evidence for example from recitals from documents which are in evidence and from various sources; we have taken a bit from Mr. Smith's notes and we have put it together, and we can show your Honour where the evidence is.

Early in November, 1966 the Landmark group of companies had four major assets, a mortgage business, Landmark House in Brisbane, Paradise Towers under construction, and the Paradise Waters project at Surfers Paradise.

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TAYLOR, A-J.A.: It still had the units out at Rozelle too.

MR. GRUZMAN: Those units at Rozelle - there is a long story to those; built by Landmark, sold to Armstrong. He bought them from the company.

TAYLOR, A-J.A.: They were still a company asset in 1966 and 1967.

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MR. GRUZMAN: No, they had gone to Mr. Armstrong. They may appear in the company's books, but they were held in trust for Mr. Armstrong. They were not the company's assets, as I understand it. This is why you had this provision about end finance. There was a provision apparently that Armstrong was to be entitled, with Landmark, to lend money at a low rate of interest for the purchase of the units. That was in one of the discussions.

The Paradise Waters project with which we are here concerned arose from the acquisition by Armstrong of title to McIntosh Island at some time prior to February 1966. Title to the island consisted of freehold and leasehold title. It seems that Goondoo was a company the shares in which were acquired by Armstrong for the Armstrong companies, and that Goondoo originally had the freehold and leasehold title to McIntosh Island. Then there was a transaction in respect of which the securities are dated 17th February 1966, so the transaction must have taken place early in 1966, and under that transaction the freehold title was in November 1966 in Paradise Waters and the leasehold title was still

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in Goondoo on trust for Paradise Waters and the shares in Paradise Waters were entirely owned by Paradise Waters Sales, and those shares in turn were owned as to 60 per cent. by Landmark and 40 per cent. by Finlayside, one of the Armstrong companies.

I have already mentioned that there is some evidence of an unpositive kind where it was suggested to Mr. Armstrong in cross-examination that the purchase price to him of this land was £150,000 and the sale price £600,000, and subsequently he says, 10
"You meant dollars?"

TAYLOR, A-J.A.: He bought for £150,000?

MR. GRUZMAN: Dollars. Actually, our submission is that one can adduce from the evidence that the purchase price was approximately \$150,000 and the sale price was \$600,000.

TAYLOR, A-J.A.: What interval of time?

MR. GRUZMAN: The evidence is not clear, but one would describe it as a short interval of time.

TAYLOR, A-J.A.: What do you say follows from that? 20
It would not be unusual round Surfers Paradise for land to be sold for ten times what it had been bought for, I would not have thought.

MR. GRUZMAN: Maybe. Finlayside was a company in which all the shares were owned or controlled by Armstrong. What I am going to give your Honours is not a fully connected account, it is what we can adduce from the evidence. These are facts which appear in the evidence. George Armstrong and Son, another Armstrong company, was owed \$400,000 by Paradise Waters, secured by bill of mortgage over the freehold and guaranteed by Landmark. 30

TAYLOR, A-J.A.: Second mortgage.

MR. GRUZMAN: Second mortgage. It is to be inferred that this \$400,000 is the balance of purchase money for the transfer of the land. The price of the land, as appears from Mr. Smith's note, on sale from Goondoo to Paradise Waters Sales was \$600,000. In addition to its securities George Armstrong and Son held a mortgage over the leasehold, both mortgages being subject to a first mortgage to U.D.C., and George Armstrong had a lien and charge over Landmark's 60 per cent. shareholding in Paradise Waters Sales, and George Armstrong also had a mortgage over the life policies for \$600,000 held by Landmark on the lives of Armstrong and Barton. 40

If I might just give your Honours a reference, page 2491, paid up capital certainly at 28th April 1967, was 1,753,000 \$1 shares. It is in that letter to the Bank of New South Wales. 50

JACOBS, J.A.: So that between them the Armstrong group and the Barton group held 700,000 - not quite, 500,000. So there were plenty of shares to be bought and sold.

MR. GRUZMAN: Plenty of shares available, if you wanted shares.

TAYLOR, A-J.A.: Where do you say this appears?

MR. GRUZMAN: It appears in that letter to the Bank of New South Wales, about a quarter of the way down. Under the mortgage securing the debt to George Armstrong and Son, the other Armstrong company, Finlayside, had the right to nominate half of the directors of Paradise Waters Sales and also to nominate the chairman of Paradise Waters Sales. The effect of that was ---

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TAYLOR, A-J.A.: He not being one of the half? Do you mean that gave him half?

MR. GRUZMAN: He had a casting vote. I think he had under the Articles a casting vote.

TAYLOR, A-J.A.: It gave him control.

MR. GRUZMAN: It gave him control. In other words, as security for the \$400,000, in addition to its second mortgage and its guarantee from Landmark, Armstrong had the right to control the project through this right given here, and also a mortgage over the life policies.

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TAYLOR, A-J.A.: The second mortgage was only an eight per cent. mortgage, for some reason.

MR. GRUZMAN: In the course of the evidence I cross-examined Mr. Armstrong with the object of showing the enormous profit which he had made.

TAYLOR, A-J.A.: What about answering my question?

MR. GRUZMAN: Your Honours, he had said that it was generous on his part to lend this money at 7 and a half per cent., I think, for three years, but rather than have further cross-examination on the original transaction he withdrew the suggestion that that was a generous transaction to the company.

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TAYLOR, A-J.A.: The fact was it was 7 and a half per cent.

MR. GRUZMAN: In fact it was 7 and a half per cent., but we suggest 7 and a half per cent. on profits unearned. On the 15th November, 1966 an originating summons was taken out, two of them, I think, before his Honour Mr. Justice Street with the object of bringing about the equality on the board of Paradise Waters Sales, or indeed, giving Armstrong the control.

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TAYLOR, A-J.A.: That was to enforce his rights under the mortgage.

MR. GRUZMAN: Exactly, with respect to the directors. The evidence shows that the events which brought about Armstrong's desire to take control of the Paradise Waters Sales board in this way was the

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growing disagreement between him and the remainder of the board of Landmark, his removal from the offices of Landmark and his being stripped of executive power.

TAYLOR, A-J.A.: He lost his control of Landmark, so he moved in to take control of his biggest asset.

MR. GRUZMAN: Yes. There had at this stage been no default by the companies; the right to assume control of the project was an unrestricted right given to him by the mortgage documents. That is the state of the position prior to the removal of Armstrong as chairman. 10

Now we come to the position after his removal as chairman and up to the annual general meeting. When the situation arose that Armstrong and the rest of the board were at odds, and he exercised his rights under these documents of February 1966 to exercise control, Landmark although it was a 60 per cent. shareholder in the company, would be left without a say in the management. Landmark itself had advanced approximately \$700,000, \$680,000 of its own funds into this project, and in respect of that it was an unsecured creditor. So if Armstrong took control of the board and acted in a way contrary to the wishes of Landmark, Landmark would be on the one hand in difficulties, on the other hand it could make claims in respect of these unsecured advances. 20

TAYLOR, A-J.A.: You said that Landmark had lent \$750,000 of its own money. That means if you took what U.D.C. had put in, it would be over \$1,000,000. 30

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: Where does that appear?

MR. GRUZMAN: I will come to that.

TAYLOR, A-J.A.: I thought it might be in the same letter, Exhibit 18.

MR. GRUZMAN: I will have to give it to you. I will give you the actual documents in due course. I will make the submissions, and I will give you the documents and the evidence to support it. Your Honour's calculation I may say is correct. 40

JACOBS, J.A.: That means we will be going over it twice.

MR. GRUZMAN: Not exactly. It is hard to do everything at once. If I interrupted all the time to get out each document ---

TAYLOR, A-J.A.: You do not have to do it, get one of your learned juniors to write it on a piece of paper, and just give me the reference.

MR. GRUZMAN: We will do it in a way which we think will be more helpful than that. Another term of 50

the mortgage documents was that the amount of \$400,000 owing to George Armstrong and Son by Landmark would become payable if Armstrong ceased to be chairman of Landmark. In fact, on 17th November Armstrong was voted out of the chair of Landmark, with consequent results.

TAYLOR, A-J.A.: An actual notice of demand was served.

MR. GRUZMAN: An actual notice of demand was subsequently served. There were two steps in the events of November. First, Armstrong sought to take control of the Paradise Waters Sales board, which made it desirable but not essential to Landmark, if it wished to run the Paradise Waters project itself, to pay out the securities entitling Armstrong to control of the board, and secondly, the decision of the Landmark board to obtain moneys elsewhere to pay out George Armstrong and Son, thus enabling them to remove Armstrong as chairman, as happened on 17th November. The Stock Exchanges were informed on 18th November that Armstrong had been told, before his removal from the chair, that the amount of \$400,000 becoming due because of this removal was available to pay him. 10 20

TAYLOR, A-J.A.: That was on the strength of the letter from U.D.C.?

MR. GRUZMAN: Yes, exactly, nothing else.

(Luncheon adjournment.)

Just before I continue with this submission on commerce may I just read a very short extract from a case which I will be dealing with later called The Earl of Chesterfield v. Jackson, where amongst other things it is said by the Lord Chancellor "A fourth kind of fraud may be collected or inferred in the consideration of this court ... other parties to the fraudulent agreement". At a later stage when I come to deal with the effect on Landmark of this transaction, I ask your Honours to have that passage in mind. 30

I had reached the point in the submissions where I had said, I think, that it was expedient that the \$450,000 be found to satisfy Armstrong's demands on the Landmark group, and in particular, if the money could not be found to discharge the securities to the Paradise Waters project, Armstrong would be entitled to appoint a receiver to sell the freehold and the leasehold land. 40

On 24th November a meeting of directors of Paradise Waters Sales was held, in the course of which Armstrong sought that steps be taken which would enable his nominees to be appointed to the board. Mr. Beale had already been appointed, but then it was necessary to have an extraordinary general meeting of shareholders to increase the number of directors before any more directors could be 50

appointed. It was resolved that an extraordinary general meeting be held on 7th December to pass the appropriate resolutions to increase the number of directors of the company.

On the same day, at a meeting of the board of Landmark, a letter from U.D.C. was tabled, stating that subject to satisfactory documentation U.D.C. agreed to make available to Landmark the sum of \$450,000 plus interest due to pay off its debt to George Armstrong and Son and Southern Tablelands in the event of those companies not withdrawing their present demands by 25th November. 10

MASON, J.A.: Those would be demands for --?

MR. GRUZMAN: For the \$400,000 and the \$50,000.

MASON, J.A.: There having been default at that time.

MR. GRUZMAN: He having been removed from the chair.

MASON, J.A.: Was there no interest owing as at that time?

MR. GRUZMAN: Not in default. What had happened, George Armstrong and Son by letter of 21st November 1966 demanded from Landmark and Paradise Waters Limited payment of the \$400,000 pursuant, in the case of Landmark, to the covenant contained in the charge over the shares in Paradise Waters Sales, and in the case of Paradise Waters Limited for provisions of the mortgage over the freehold. At the same time, Southern Tablelands demanded from Grosvenor Developments, which was another Landmark company, an amount of \$50,000 which was said to have been outstanding since 30th September. As far as one can see, non-payment of that \$50,000, whilst not desirable, would not have resulted in any very adverse result. However, with Paradise Waters, as I have mentioned, if that was not paid, Armstrong could have appointed a receiver to sell the Paradise Waters estate. 20 30

I have dealt with the letter from U.D.C. Landmark's solicitors, by a letter dated 25th November, informed Armstrong's solicitors that the amount demanded in the three letters of demand of 21st November would be satisfied on the 30th November. So at this stage Armstrong's position was perhaps not pleasant. 40

TAYLOR, A-J.A.: Was what?

MR. GRUZMAN: Perhaps not pleasant, in that he had been removed as chairman, but he was not in financial danger. First of all, he was attempting to obtain control of the Paradise Waters Sales board.

TAYLOR, A-J.A.: Armstrong?

MR. GRUZMAN: Yes, Armstrong. 50

TAYLOR, A-J.A.: He was entitled to do that if he wanted to.

MR. GRUZMAN: He was attempting to.

TAYLOR, A-J.A.: He was going to carry out his rights.

MR. GRUZMAN: He had to go to court. He had gone to court. Whilst he had the right, it had not come to fruition. There were proceedings about it. He had the right but in fact he had not achieved the exercise of the right.

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JACOBS, J.A.: Why hadn't he? How were those proceedings resisted?

MASON, J.A.: What defence was there?

MR. GRUZMAN: I am not clear. I do not think anybody ever went, in the evidence, into the resistance to these proceedings. As far as we can see, the arguments must have been of a technical nature.

MASON, J.A.: Very technical.

MR. GRUZMAN: But of course, the practicalities of the situation were here was Armstrong trying to get control of the Paradise Waters Board when he was going to be paid out, and have no further right to do so, from the 30th November.

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TAYLOR, A-J.A.: That is why nothing more happened.

MR. GRUZMAN: That is right. He starts proceedings I think on 15th November, designed to get him control of the board for two weeks, and of course, as far as Barton was concerned, he had the assurance and letter of U.D.C. that the money would be paid. He told Armstrong he was going to be paid, and these proceedings were a complete waste of time. Still, Armstrong had the technical right, and Armstrong was entitled technically to take the proceedings until such time as he was paid out.

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JACOBS, J.A.: It was accepted of course that the U.D.C. resolution or letter confirming it was not until 23rd November.

MR. GRUZMAN: But Barton had apparently had their assurance prior to that, and had given Armstrong the assurance that he would be paid. It was recognised. Barton recognised that Armstrong had to be paid as a condition of his removal from the board.

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TAYLOR, A-J.A.: As a condition of Barton getting control. It is no use getting Armstrong's shares, that would not achieve anything.

MR. GRUZMAN: Nothing.

TAYLOR, A-J.A.: He could only control Landmark if you paid him out of Paradise Sales or altered the board so that he did not have control of Paradise Sales.

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MR. GRUZMAN: Well, substantially. The only thing that gave him control, that is Armstrong, was the \$400,000. The rest of it was irrelevant. The rest of it was paper, and useless paper at that. The \$400,000 it was which entitled him to be chairman of Landmark and to have directors - control of Paradise Waters. The moment he was paid out, that was the end of it. U.D.C. had promised to provide the money to pay him out, and so Barton and the company were perfectly justified in getting rid of him. They were doing him no injustice, they were paying him out what he was entitled to or said to be entitled to, and he had no further rights of that company. 10

I am told that in fact his Honour Mr. Justice Street, and I think this appears in the evidence - Mr. Powell has passed the information to me, for which I thank him, that the proceedings before his Honour Mr. Justice Street were adjourned to enable Mr. Armstrong to be paid out on 30th November, as was anticipated. And indeed, the Stock Exchange had been told on 18th November that he was going to be paid out. 20

I am just examining now Mr. Armstrong's position at that point of time. First of all, as I was saying, he perhaps was not in a pleasant position in the light of what was happening, but on the other hand, financially he was in no financial danger. Firstly, he was going through the process of getting control of Paradise Waters Sales board and was being resisted by the board of Landmark upon the basis that they were going to pay him out anyway. Secondly, the board of Landmark proposed to pay him out his debt which had fallen due because of his removal as chairman. That was an advised decision taken by the board of Landmark. Thirdly, preparations were being made on both sides for the annual general meeting of the 2nd December, where Armstrong had nominated candidates for directorship. If Armstrong's nominees were elected he would again be in control of the Landmark board. 30 40

TAYLOR, A-J.A.: U.D.C. would not have had to pay him out. Once he went back as chairman, the money was not due.

MR. GRUZMAN: Yes. There was that possibility also. The stage was fairly set at that time. From Armstrong's point of view financially the position looked pretty rosy. He was assured of receipt of the \$450,000.

JACOBS, J.A.: My volume 8 has not an index in it. 50

MR. GRUZMAN: Volumes 7, 8 and 9 are the exhibits. Alternatively, there is the index which we handed up to your Honours.

MASON, J.A.: I have an index to volume 8. I suffered from another disability, and that was that my volume 1 pagination was back to front. You had to read from the back to the beginning in order to understand it.

MR. GRUZMAN: I am sorry about that, your Honour. There is a separate index, there is the index which we prepared and there is an index volume. Has your Honour this volume?

JACOBS, J.A.: That would cover it. I do not have it.

MR. GRUZMAN: If your Honour would like to mention the document, I can give your Honour the reference to it.

JACOBS, J.A.: What was the interlocutory relief in the suit brought by the Armstrong interests? 10

MR. GRUZMAN: It is Exhibit 45, page 2756.

JACOBS, J.A.: They got what they wanted, from a quick reading of the decretal order.

MR. GRUZMAN: Except I notice that on page 2758 part of the order was "Each of the defendants do on the 14th December ... the procuring of such moneys". That is on the second last page of the decretal order. What happened simply was that this letter from U.D.C. I think was produced to his Honour Mr. Justice Street and they said, "Here we are, we have the finance, it is only a matter of machinery" and his Honour allowed Mr. Grant to be appointed to the board but said nothing was to be done to prevent Armstrong being paid out, as was anticipated. 20

JACOBS, J.A.: I would say a total victory for the plaintiff, myself.

MR. GRUZMAN: A victory in that sense except that obviously anticipated - a victory, yes, but obviously anticipated on all sides that he be paid out. The victory could not be used to perpetuate his position as a creditor. 30

As I was saying, I used the expression "At this point of time" of which I was speaking, this is prior to the annual general meeting, and I said things must have looked rosy from Armstrong's point of view. The assumption was that he would be in receipt of \$450,000 prior to the meeting, and his equity in Paradise Waters Sales would be intact. If he was not paid out, he would be in command of Paradise Waters Sales until such time as he was paid out, and it would be unlikely at that point of time that Landmark could use its position as a large unsecured creditor to take any immediate action against Paradise Waters Sales. From the point of view of being paid out he was in really an excellent position because this money was let out - I say "let out" in view of the circumstances in which the sum had come into existence, the interest was at a low rate. That meant that if he could get payment of that money in cash, as was anticipated, prior to the general meeting, he could of course lend it out possibly at a higher rate. At the same time, in view of the size of his shareholding in the company he would have regarded himself as having a 40 50

reasonable chance of success at the meeting which was to come up on 2nd December, the meeting of Landmark. If he was successful at that meeting he would then be in control of the Landmark board, he would own 40 per cent. of Paradise Waters Sales, he would have in hand the \$450,000, which meant to him that he had realised the profit which he made.

TAYLOR, A-J.A.: What do you mean he had in hand?

MR. GRUZMAN: We anticipate he would have been paid out.

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TAYLOR, A-J.A.: If he stayed there as chairman there would be no default. Was there need for U.D.C. to pay him out?

MR. GRUZMAN: The default had already occurred and the letter from U.D.C. was in the terms that unless he withdrew his demands by I think 21st November he would be paid out. It was common ground, it was anticipated, that that is what in fact would happen at that point of time. The letter from U.D.C. ---

TAYLOR, A-J.A.: The letter from U.D.C. had to be written - they had to have that letter before they went to the annual general meeting. Without that letter Armstrong would have got back, because the shareholders would have said "If we do not put him back he will foreclose on his mortgage and we will have no other money". Barton had to have that letter to show that he would have that money.

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MR. GRUZMAN: It went further than that. What your Honour says is in fact what happened. I am advertising to the situation before, and what was contemplated. What was contemplated, as appears by the letter, was that Armstrong could in fact be paid out before the annual general meeting, that is what the letter says.

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TAYLOR, A-J.A.: It did not happen.

MR. GRUZMAN: No, it did not happen. I am only speaking now - I am trying to look at the situation in stages.

TAYLOR, A-J.A.: You could put it very shortly, couldn't you, that Armstrong would have been in precisely the same position if he had been successful with the board as he was before all the trouble started, except that he had a majority on the board.

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MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: He was back as chairman, he could have got rid of Barton as managing director if he wanted to, he had the numbers on the board.

MR. GRUZMAN: Yes. I might add, if you took the situation a week before the annual general meeting, he even had reason and proper reason to expect that he would have been paid out in cash before that. There is another point also, and that is, as I will

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be developing shortly, the whole success of this company depended on the support of U.D.C. With U.D.C. having committed themselves for a further \$450,000, the future support of U.D.C. was made certain.

TAYLOR, A-J.A.: It is a matter of speculation, Mr. Gruzman but I could not see any financial institution paying Armstrong out unless it had to, when it would mean as well as the \$750,000 already put into the development they put in another \$450,000 of dead money, which did not go anywhere towards the development, and if it just did nothing, you could use Armstrong's money. However, it is a matter of speculation.

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MR. GRUZMAN: What your Honour says is exactly what I want to submit.

TAYLOR, A-J.A.: Let us get on from there.

MR. GRUZMAN: After all, U.D.C. had said they were going to do this and had passed a resolution, and the Stock Exchange had been informed, and Armstrong had been ...

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TAYLOR, A-J.A.: Are you suggesting that everything the Stock Exchange is told is true, Mr. Gruzman?

MR. GRUZMAN: In the opinion of the board. His Honour Mr. Justice Street had acted on the basis that this prospect was really there. Everything had happened on the basis that U.D.C. would in fact advance this money. There was no delusion in the minds of anyone, but as your Honour said, subsequently they changed their mind. If they had advanced it as they had promised to do, you would have had the situation that your Honour referred to, namely, that U.D.C. which had already advanced over \$400,000 would have provided another \$450,000 which had not gone into the improvement of anything, had gone into Armstrong's pocket, and they were therefore in so deep that they would have been impelled to continue this project through to the end. The position before the annual general meeting was that from Armstrong's point of view, and I am only looking at it for the moment from Armstrong's point of view, things could not have been better. Here he stood the chance of being in control of this company, and as your Honour says, dismissing Barton if he wanted to, having his money in his pocket, having assured finance, having his equity in Paradise Waters Sales, and for all those reasons having his shares in Landmark as of real value.

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Let us take the position of Landmark itself as it was immediately prior to the annual general meeting. It was also in a good, sound position. So long as U.D.C. kept its promise to pay out Armstrong the same advantages that I have mentioned as accrued to Armstrong also enured for the benefit of Landmark.

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TAYLOR, A-J.A.: I do not follow that.

MR. GRUZMAN: Yes, your Honour. There was the difference about the 7 and a half per cent., but a difference which in that context was not major. They had borrowed \$416,000, they intended to borrow something like \$1,000,000 or more from U.D.C. possibly \$2,000,000 from U.D.C., at U.D.C.'s rates of interest, and proportionately the additional interest on three or four hundred thousand dollars was not a determining factor, even a very major factor, in the affairs of Landmark.

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So far as the company was concerned, indeed it did not matter to Landmark who controlled the board at that point of time, because they owed the money, whoever they owed it to, and it did not matter to them. One has to reflect that the obtaining from U.D.C. of this promise to pay out Armstrong, to provide the moneys to pay out Armstrong, was an excellent piece of business for Landmark, mainly because it meant that U.D.C. would be for ever committed to carry this project through to completion. I see your Honour Mr. Justice Taylor I do not think agrees with that submission.

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TAYLOR, A-J.A.: It seems to me to be absurd. No lending institution is going to put itself in a position that you say it is going to put itself in unless it has to. However, I understand the submission.

MR. GRUZMAN: Everything your Honour says is absolutely right, if I may say so - of course it is - but the fact is it did not happen that way.

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TAYLOR, A-J.A.: You say U.D.C. was going to lend this money.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: I do not think they had any intention of lending the money, but that is by the way.

MR. GRUZMAN: If your Honour has that view, and I understand that ---

TAYLOR, A-J.A.: They reversed it within a week.

MR. GRUZMAN: I know they did. Your Honour's commercial sense is affronted by it, that is all there is to it, but the fact is it happened. The fact is Stock Exchanges, Judges, general meetings, everybody acted, and there is no question but acted bona fide in the belief that this was going to happen. If they had not believed it, who would have thought they would have removed Armstrong. It would be incredible. It would have just meant ruination of the company for nothing. I would have to submit that your Honour should be disabused of any thought that U.D.C. did not, when they passed that resolution - after all, there is evidence that they are a subsidiary I think of the largest finance company in the United Kingdom, and one should not accept or believe in any respect that they were misleading Landmark Corporation or the public. Their

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own solicitor came to the annual general meeting of Landmark Corporation and stated to the assembled shareholders that this money would be advanced, and it would in our submission not be right or indeed fair to U.D.C. to believe or to accept or to even think that U.D.C. did not bona fide have the intention of making this loan when they said they would. The fact that they changed their mind ---

TAYLOR, A-J.A.: You did give me a date. You said the letter from U.D.C. was tabled at the meeting of directors, I think you said 25th November, was it? 10

MR. GRUZMAN: No, your Honour. Would your Honours look at page 2069, that is the letter. It is volume 7, page 2069, the letter dated 23rd November.

TAYLOR, A-J.A.: That was written after the default under the mortgage.

MR. GRUZMAN: It shows your Honour the degree of trust between these people.

TAYLOR, A-J.A.: It was the 17th when Armstrong was removed as chairman. 20

MR. GRUZMAN: The letter says "We refer to several discussions". Obviously what happened, and Barton was asked in cross-examination, "Do you mean to say you removed Armstrong on the verbal undertaking of U.D.C.?" He said, "Their word was good enough for me", and in fact, they confirmed it in writing, they passed a resolution. So that Barton obviously - there is no suggestion to the contrary - acted in good faith. U.D.C. acted in good faith, and everyone believed, including U.D.C., that this is what would happen. On the other hand, everything which falls from your Honour Mr. Justice Taylor about how commercially absurd it was is absolutely true. That is part of our submission. When U.D.C. through its board, or who knows, perhaps its English superiors really considered the matter it is apparent that they came to some such conclusion as your Honour Mr. Justice Taylor postulates, and rightly so. But by that time all the troubles had occurred. 30

I spent a little time on that, but it is important to an understanding of this case to know that everybody acted in good faith, including U.D.C. Everybody believed what U.D.C. said, and acted on it. U.D.C., acting in their own best and proper interests, had not been I suppose - there is some question of legal advice being obtained, being legally permitted - acted in what it thought was its own proper interests, and decided not to proceed with it. If your Honours look at volume 8, page 2764 - (read). 40 50

TAYLOR, A-J.A.: There is great correspondence between the solicitors about what form the discharge would take.

MR. GRUZMAN: That was at a later date. Indeed, some of that was written after Dare, Reed, Martin

and Grant knew that the transaction was not going to go through because U.D.C. had changed their mind. This letter I have referred to on the 25th November was written by Allen, Allen and Hemsley initiating the discussion with Dare, Reed, Martin and Grant, referring to letters of 21st November, and they wrote back four days later and said "We will pay you on 30th November". There is not a suggestion of any kind anywhere by anyone that anybody was not acting bona fide or in the full knowledge this was going to come to fruition.

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MASON, J.A.: You can add to that too a letter from the defendant's solicitors at page 2753, written on 17th November, which seems to indicate that the defendants thought that the negotiations with U.D.C. were proceeding favourably, because they record the proposition coming from the managing director of U.D.C. that provided matters were adjourned, he would be putting certain proposals to them.

MR. GRUZMAN: Yes. I thank your Honour for that reference. At page 138, line 41, Mr. Barton, giving evidence, said when asked by Mr. Staff as to what happened at that general meeting, "And did you tell the shareholders ... money".

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TAYLOR, A-J.A.: He told them that in the circular, didn't he? Barton told them that in the circular, and he told them that U.D.C. would pay.

MR. GRUZMAN: Yes. He said, "I did not need to ... with no strings attached". It is beyond any doubt that in good faith everyone believed, including U.D.C., that they would pay out this money. Again I repeat what your Honour Mr. Justice Taylor says as to the commercial realities was equally true. The point at which your Honour was not happy with what I was putting was when I said that U.D.C. having agreed to make this advance meant that it was committed forever. I know your Honour Mr. Justice Taylor would agree with me, and that is our submission, that if they had in fact advanced this further \$450,000, that they would indeed have been committed to the continual financing of the project, because they would then have been owed something like \$1,000,000, and they would have been so deep in they could not have got out. That is why I suggested that it was not a bad piece of business for Landmark to have got that letter written from U.D.C.

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JACOBS, J.A.: I think one explanation of that may be, although I think this is all guess work, whether it is good or bad or remarkable or what, it may be they were so far in already that when they saw this disastrous dissention developing, and knowing the nature of the development company, they were not very happy - they thought the most disastrous thing of all was the dissention.

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MR. GRUZMAN: The trouble is they were only in for \$416,000 at that point of time. It may even have been a little less. To commit themselves to another

\$450,000 - the significance I draw from it and seek to submit is that once you had U.D.C. in for the additional money, they were certainly committed for ever, and it meant that since U.D.C. had virtually a bottomless purse, the project would be successful, from a money point of view. If your Honours would like a reference to that figure, volume 9, page 2951, shows that \$416,000 had been advanced (read).

Further considering U.D.C.'s position at that point of time, they had agreed to make advances of up to \$680,000. As I have mentioned, they had in fact advanced \$416,000, and there was this unpaid engineers certificate. If they advanced the further \$450,000, then if they had to enforce their rights, they could have had to obtain something of the order of \$1,100,000 out of this land. The value of the land, whilst it was hard to determine, was, one might say, certainly less than \$1,000,000.

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I referred to the valuations in the evidence, and I thought I told one of your Honours in answer to a question that these were some two years later. I think your Honour Mr. Justice Mason asked me. In fact, they were less than that. The valuations which appear in the evidence I think refer to a period in September, 1967. It is only about 9 months, indeed, 8 months probably after January 1967, and there is evidence that work had been proceeding during the intervening period although at a reduced rate; I think of the order of \$25,000 a month if I remember rightly.

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MR. GRUZMAN: The valuations in the evidence are of some assistance, firstly as to what the realities were, and indeed assuming the people involved to be reasonable businessmen, probably as to their ideas and, therefore, the figure of \$750,000 to \$1,000,000 may be taken as being in the minds of everybody at the relevant time. On that basis if U.D.C. had in fact gone ahead with the advance they had very little chance of getting it back again.

TAYLOR, A-J.A.: Nobody would be paid in full on that basis and the land was worthless.

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MR. GRUZMAN: A vast sum lost. But the buffer was the \$680,000 unsecured advanced by Landmark; that was the buffer for the security. In other words, there was actually expended on the land something like \$1,500,000 altogether but of that the \$680,000 from Landmark effectively did not count for these purposes because they were unsecured and that is what I meant when I said to your Honours earlier that one of the objects of Mr. Armstrong agreeing to his documents was to use the public company to exploit his assets. I will refer your Honour to the documents later.

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JACOBS, J.A.: I think you have given us the figure of \$600,000. We only need it in these large millions.

MR. GRUZMAN: I am sorry, but I have got to give your Honour the total amount involved.

JACOBS, J.A.: I thought you said that Landmark was providing unsecured over \$600,000.

MR. GRUZMAN: Yes, but I want to give your Honour another figure of the total amount spent which is \$1,600,000.

JACOBS, J.A.: You said \$1,400,000 before.

MR. GRUZMAN: That is why I wanted to give it to your Honour exactly.

JACOBS, J.A.: What is the next step?

MR. GRUZMAN: So one sees the reason why U.D.C. subsequently changed their mind. 10

Now let us take Barton's point of view, and we are still dealing with the position up to the general meeting. I have dealt with Armstrong, I have dealt with the company. Just let me show Barton's financial position as we approach the general meeting. It appears from the evidence that most of Barton's assets were linked with Landmark and his shareholding in Landmark. As far as he was concerned, if he succeeded he would be the managing director of a company which was carrying on quite a big project and, with the support of U.D.C., a project likely to be successful. 20

I said before that Armstrong expected to be paid out before the annual general meeting. That appears in his evidence at Volume 4, page 1317. Now I come to the position immediately after the general meeting. Barton, of course, was successful. Armstrong's nominees were defeated and, if your Honours recollect the evidence, it is true to say that Armstrong himself had been humiliated at the meeting; he had made statements which had been contradicted by the shareholders, and so on. So immediately after the meeting Barton's fortunes stood pretty high. He had persuaded a most reputable financier to put itself in the position where it had been almost certainly committed to finance the whole of the project. He had arranged to be rid of a troublesome creditor who was in control of a public company with excellent prospects. He held a good percentage of the equity in the company and doubtless his reputation was high in the circles in which he moved. 30 40

Armstrong's position, of course, had changed for the worse. Whilst he would receive what was in substance his profit on the sale of the interest which he sold to the Paradise Waters project and he would retain the 40% equity, still he would have no control over it. Nevertheless he would have no reason to suppose at that point of time that no profit would be developed or received, so that he would expect to get his 40% of the profit and since it was reasonably assured that the project would go through, he could expect his shares in Landmark to be valuable and, indeed, probably to increase in value. He had of course been defeated at the annual 50

general meeting but, whilst his finances were not materially affected, one would suppose that to a man like Armstrong this would have rankled.

Now come to the position when U.D.C. reversed its attitude and, if I might just point this out, you cannot exactly fix the date from the evidence but probably on 8th December 1966 U.D.C. decided not to advance the \$450,000 to Landmark or to make any further advances on the Paradise Waters project and refused to pay an engineer's certificate for \$80,483 for work already done on the project (Volume 7, page 2451). For some period immediately prior to this there seems to have been a lull in the activity between the solicitors for the respective parties in relation to the repayment of Armstrong's loan. This was probably due to the preoccupation of the parties with the annual general meeting. 10

MASON, J.A.: How does the reference you gave establish the 8th December? 20

MR. GRUZMAN: That only establishes the figure of \$80,000. I have pointed out to your Honour that there is no precise evidence of the date when U.D.C. decided to reverse their decision. It is probably, I said, the 8th December.

MASON, J.A.: I notice in your chronology you have the 10th December.

MR. GRUZMAN: 10th December I have as the date that Barton learned. The 9th December I think your Honours will find was the date. The 8th and 9th December were the dates when it looks as though Armstrong learned it because he goes to Mr. Smith, but I will come to that in a bit more detail later on. 30

On 7th December 1966 the solicitors for Armstrong had raised the question of completing the discharge of the mortgage securing the \$400,000 debt. On the same day an extraordinary general meeting of Paradise Waters Sales was held and the permissible number of directors was increased to seven. At a directors' meeting on the same day it was resolved that the moneys due to George Armstrong and Son be paid as soon as possible and on the same day --- 40

TAYLOR, A-J.A.: This is all on the 7th?

MR. GRUZMAN: This is all on the 7th and it was on the same day that Street J., had given his decision in the suit commenced by Finlayside on 15th November which had the effect of causing Armstrong's nominees to be appointed to the board of Paradise Waters Limited and Paradise Waters Sales on 14th December. The effect of the decision was that if Armstrong was repaid the directors need not be appointed but if he was not repaid then the appointments would become effective on 14th December. 50

TAYLOR, A-J.A.: Those appointments then became effective.

MR. GRUZMAN: They became effective. Those were the circumstances. I agree with your Honour Mr. Justice Jacobs that the plaintiff had won a complete victory before Street, J. I think I made clear it was a victory only if he was not paid out, but if Armstrong was paid out then the case would come to nothing.

These were the circumstances between the parties in which U.D.C.'s change of mind became known. Barton's evidence is that he became aware of this decision on 10th December and probably Armstrong became aware of it on 8th December. I now have a look at the position of Armstrong after U.D.C.'s change of attitude.

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TAYLOR, A-J.A.: When do you say they notified their change of attitude?

MR. GRUZMAN: Barton was notified by a letter some time later on, but he certainly became aware of it on the 10th.

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TAYLOR, A-J.A.: On 13th December he wrote requiring that they carry out their undertaking.

MR. GRUZMAN: On the 13th he wrote threatening legal action.

TAYLOR, A-J.A.: There is no letter that I know of from U.D.C. before that.

JACOBS, J.A.: On 10th December Mr. Honey informed Mr. Armstrong that they had decided not to lend.

MR. GRUZMAN: Your Honours may draw the inference from Armstrong's activity on the 8th that he possibly knew before that. Barton gave evidence at page 47 that he received a further letter from U.D.C. on or about the 10th or 11th December and then had a conversation with Mr. Honey and Mr. Honey said that U.D.C. had decided not to advance the money to Landmark to pay out the \$400,000, "and also told me that we would receive a letter from U.D.C. very shortly and the letter would say that they would no longer pay the progress certificates which had been contracted before then".

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TAYLOR, A-J.A.: There is no letter.

MR. GRUZMAN: Barton thought the letter did come but it doesn't look as though it did come in fact. It looks as though it was a personal conversation.

Once Mr. Armstrong knew that U.D.C. would not provide any more finance for the company he was immediately in the gravest possible financial difficulty.

TAYLOR, A-J.A.: Armstrong was?

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MR. GRUZMAN: Yes, Armstrong was.

TAYLOR, A-J.A.: Why? He was exactly where he was on 17th November except that he was no longer chairman.

MR. GRUZMAN: He didn't even have a vote.

TAYLOR, A-J.A.: He had a second mortgage over the whole of the land. He had a guarantee from Landmark.

MR. GRUZMAN: A second mortgage over Landmark, a guarantee, he had 40% interest in Paradise Waters Sales; he had all those things and he had nothing and he knew it, and everybody knew it and the reason is this: firstly, he has a second mortgage over Paradise Waters. I have already demonstrated to your Honours and there is evidence before your Honours that at least one expert, after further moneys had been expended on it and some little time later, thought it was worth no more than \$750,000. Indeed, I think there is evidence that events proved him not far wrong.

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TAYLOR, A-J.A.: Barton thought it would realise \$6,000,000.

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MR. GRUZMAN: That is after you have spent a lot of millions. I am dealing with Armstrong's point of view. I am dealing with the realities.

TAYLOR, A-J.A.: Can you show me anywhere in this evidence where Armstrong said that? You have been addressing us for the best part of two days as a jury. Please don't address us as a dumb jury.

MR. GRUZMAN: I must say I do appreciate your Honour telling me what is in your Honour's view; I really do, because I want to show your Honour that what I am saying and submitting is absolutely completely accurate and no other view is fairly admissible on the evidence. I can only do it by referring to the evidence. It is for your Honours to draw the inferences from the evidence but it is for me to refer your Honours to the evidence and to suggest to your Honours the proper inferences and to submit what they are, and I am going to show your Honours that there is no other inference admissible from the evidence other than what I am submitting to your Honours.

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JACOBS, J.A.: Did U.D.C. then call up their second mortgage?

MR. GRUZMAN: They did.

JACOBS, J.A.: What date was that?

MR. GRUZMAN: On the 21st December.

JACOBS, J.A.: That was some week or so later after events had moved.

MR. GRUZMAN: Not very far. I would just like your Honours to bear with me for a moment because I appreciate this is an important point. The starting point is, what does the evidence show was the value of the U.D.C. loan? In the light of our submissions earlier that there are two points involved, (1) what was the fact as the court will find it was and (2) what was in the minds of the parties.

TAYLOR, A-J.A.: What do you mean by "the value"? Do you mean the value of the whole ---

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MR. GRUZMAN: Yes. I am dealing at the moment with the value of Armstrong's security at the time when he became aware that U.D.C. would advance no further moneys. There is evidence there that the value of the security on a break-up sale price certainly was \$750,000 to \$1,000,000. At Volume 3 page 630 line 9, according to Mr. Smith, "in your view were those statements correct ... \$750,000 to \$1,000,000".

TAYLOR, A-J.A.: Do you say that is evidence of value?

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MR. GRUZMAN: I do.

TAYLOR, A-J.A.: Third-hand hearsay.

MR. GRUZMAN: Mr. Smith was the financial expert.

TAYLOR, A-J.A.: He didn't say it was worth that.

MR. GRUZMAN: But he is not an expert in the value of real estate, but his evidence is there before your Honour.

TAYLOR, A-J.A.: The evidence is that somebody told him that it was worth \$750,000.

MR. GRUZMAN: Perhaps the best evidence of the value of the land is what it was sold for and if -

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TAYLOR, A-J.A.: It is better than that lot.

MR. GRUZMAN: If your Honour would be kind enough to turn the page your Honour will see that it was worth over \$900,000, but of course your Honours are not bound by that figure - that is a post hoc figure. It shows pretty well if the experts valued it at \$750,000 to \$1,000,000 and it was sold at \$900,000, that informed people would believe that the range of values would be \$750,000 to \$1,000,000.

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TAYLOR, A-J.A.: I would be prepared to accept that it was worth about \$900,000 if that was what it brought, but that was a year later.

MR. GRUZMAN: Yes - more work done, inflation, and possibly better conditions - but it doesn't matter; take \$900,000. What your Honours have to determine, the inference that your Honours have to draw from the proven facts is what would have been in the minds of the parties at January of 1967 or December of 1966? First of all, the sale did not

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take place, as you see, for some two years. If one has to form a view as to what - and for this purpose I selected Mr. Armstrong's mind - what was in his mind really - look at the others. I don't suggest he knew more or less than anyone else. What was in his mind at the time? What would he have believed that this land would have been sold for and have no doubt after expenses of sale, advertising, interest, costs of holding and so on. It is obvious, we would submit, that if he thought reasonably pessimistically as a financier he could have regarded \$750,000 as a gross sale price, giving a net return of something like perhaps \$700,000. That is not an improper assumption based on the evidence. U.D.C. held a first mortgage; it had advanced \$416,000; it was really committed to \$80,000 unpaid engineer's certificate.

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TAYLOR, A-J.A.: It did not pay that.

MR. GRUZMAN: It said at the time it would not. It is not in the evidence but the fact is, and I only put it this way, that it would have been within the contemplation of everybody that that money would be paid and added to U.D.C.'s security.

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TAYLOR, A-J.A.: I would have thought the inference was the other way. They said, "We won't pay this", and they did not pay it.

MR. GRUZMAN: I am not allowed to answer your Honour outside the evidence but I put with some firmness to your Honour ---

TAYLOR, A-J.A.: Was it ever put to Armstrong that he thought it would only realise \$750,000? Did he ever say it in a letter?

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MR. GRUZMAN: It is a matter for your Honours. It wouldn't matter what he said, if he said it would bring \$300,000 or \$3,000,000.

TAYLOR, A-J.A.: I thought you were putting to us an affirmative fact that Armstrong believed at the time that it would not realise more than \$750,000 and I was asking you what was your authority for saying that. Is there any evidence of it? Is there any evidence or is there not? Tell me.

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MR. GRUZMAN: I am not putting what your Honour is putting to me. We are at cross-purposes, if I may say so. I am not putting that there is affirmative evidence of what was in Mr. Armstrong's mind as to a figure.

TAYLOR, A-J.A.: So we don't know what he thought at all.

MR. GRUZMAN: That is not my submission. My submission is that this court is entitled to look at the proven facts and say, "Well, in our view Mr. Armstrong would have thought about this matter and would have believed that the value of this land was so much".

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JACOBS, J.A.: If Mr. Armstrong threatened, what does his state of mind matter? Why are we going into his state of mind?

MR. GRUZMAN: First of all we are looking at the commercial negotiations.

JACOBS, J.A.: We are now off onto what I at the moment regard as a side-track which is taking a distressing length of time, on Mr. Armstrong's state of mind. If he threatened that in the terms that have been accepted, what does it matter whether he thought it was good or bad? It is Mr. Barton's state of mind that is more important.

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MR. GRUZMAN: No, with respect.

JACOBS, J.A.: Why not? Just for a moment, not for long, just tell me in two sentences why not?

MR. GRUZMAN: In two sentences, because it is against public policy for a man to stipulate an unrighteous contract.

JACOBS, J.A.: I think that threats of the kind found to be proved were enough especially as it was within the terms that you refer to.

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MR. GRUZMAN: We thought that, as I gather that your Honour is putting, you proved the threats and that is that.

JACOBS, J.A.: No, I am not putting that at all.

MR. GRUZMAN: I am sorry, I did not deliberately misunderstand your Honour.

JACOBS, J.A.: The first thing is prove the threats; then you prove the effect of them.

MR. GRUZMAN: That is not what we are submitting at this moment.

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TAYLOR, A-J.A.: You are putting this on the basis, you say, that you show to our satisfaction - by evidence, I trust - that Armstrong was in financial disaster.

MR. GRUZMAN: He knew it.

TAYLOR, A-J.A.: You say that is the evidence. He had a guarantee from Landmark so I suppose he would rank as an unsecured creditor.

MR. GRUZMAN: I agree with everything your Honour says. If your Honour will permit me, I want to explain to your Honour's satisfaction this position.

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JACOBS, J.A.: I still do not in the least understand, except so far as there may be a principle that if A intends to bring about a result, it is probable that when the result happens his intention had effect. I cannot see what is the relevance of the state of mind of Mr. Armstrong at that time,

once you accept the findings of the Trial Judge.

MR. GRUZMAN: The problem is this, if his Honour had found - as indeed we were submitting - that the threats had been directed to the agreement, his Honour would have found in our favour, but his Honour found (a) that there was a state of terror, and (b) that there was a collateral commercial arrangement, and that one had nothing to do with the other. He found that Armstrong was an unwilling vendor and that the agreement went through solely for commercial reasons. What we are at pains to show to your Honour is that neither Armstrong nor Barton --- 10

MASON, J.A.: I could understand it if you were directing your submission to the plaintiff's mind, that would be relevant to the findings of fact that his Honour made. But I do not understand, for my part, why we are concerned with Mr. Armstrong's state of mind if that is the aspect of the judgment that you are concerned with. 20

MR. GRUZMAN: These are the principles of law which we submit. If it is relevant as to what actuated Barton, and that you look only to the righteousness or unrighteousness of Armstrong as a matter of public policy, then if your Honours come to the conclusion that Armstrong knowingly stipulated for an unrighteous agreement, in those circumstances equity will not permit him to hold it irrespective of the merits or the demerits of the plaintiff.

TAYLOR, A-J.A.: You say it tends to make the agreement unrighteous because it was presented to him when he was desperately short of money? 30

MR. GRUZMAN: Yes.

MASON, J.A.: I follow that, but what is the aspect of Mr. Armstrong's mind that makes the particular agreement unrighteous?

MR. GRUZMAN: Let us take it in stages. Firstly, believing that his security for \$400,000 was unlikely to be paid in whole or in part he forced the situation where he got payment for security for the whole of the \$400,000. 40

Secondly, knowing that his shares in Landmark were completely worthless he forced a situation where he got paid \$180,000 for those shares.

Thirdly, knowing that his shares in Paradise Waters Sales were worthless and that no profit would be earned by Landmark from the Paradise Waters Sales project he forced a situation where he got \$110,000 from the company for profit it would never earn and he did all this, knowing that the company was doomed. I think that is sufficient. 50

TAYLOR, A-J.A.: When you say forced, you mean forced by telephone calls and threats?

MR. GRUZMAN: Not necessarily directed to that subject but as part of the plan for creating a relationship with Barton where Barton would do whatever he wanted him to do, whatever that may be. By putting Barton in subjection to him and putting Landmark in subjection to him and putting the other directors of Landmark in subjection to him so that he could work his will on the company or on Barton. That is a proposition based on principles of law which we think we can establish to your Honours' satisfaction. 10

I will come back to this again but I will refer your Honours to pages 2790, 2791 and 2792 where Mr. Smith - who was Armstrong's finance expert in this matter - made his analysis of the situation. We are not wedded to this document. This is what Armstrong's finance expert is telling him what is the financial situation as at 19th December and before U.D.C. have sought to appoint their receiver, which they did two days later. He sets out under the heading "Alternatives available to A.E. Armstrong" the various alternatives - (read). So if Armstrong did that his fears were worthless and he would have to put another \$100,000 in and if he were lucky there would be \$100,000. However, the prime risk would be on the shoulders of Armstrong. If course 3 were adopted (read) he would have to put in another \$1,000,000, he would not even break even and could get less out of it. If course 4 were adopted (read) - I will develop that. The reason was that he had an enormous interest bill going on and nothing of substance coming in. If course 1 were adopted, and he said these were proposals of Barton but they were proposals Barton was directed to make, as appears from the evidence (reads clause 1) - that is Smith's estimate of the value of this deed to Mr. Armstrong. 20 30

TAYLOR, A-J.A.: This was to the effect that he accept Barton's offer?

MR. GRUZMAN: It is called Barton's offer here.

TAYLOR, A-J.A.: It was Barton's offer. 40

MR. GRUZMAN: Barton was ordered to make it.

TAYLOR, A-J.A.: Who ordered him?

MR. GRUZMAN: Armstrong. Does your Honour not recollect, with respect, the document I have adverted to?

TAYLOR, A-J.A.: He was not ordered to do it.

MR. GRUZMAN: The scheme was prepared by Smith, Grant and Armstrong. The document was prepared and handed to Smith and this document said "Suggest to Barton that he makes this offer". 50

TAYLOR, A-J.A.: And he made it.

MR. GRUZMAN: And he made it. One perhaps can call

it Barton's offer but it did not emanate from Barton.

TAYLOR, A-J.A.: It may not have originated from Barton but he was prepared to make the offer and made it.

MR. GRUZMAN: Yes, as the lady was prepared to give the property to the convent.

TAYLOR, A-J.A.: That does not help.

MR. GRUZMAN: We put it in the same way. Mr. Smith puts a valuation on this settlement of \$755,200 compared with a disaster for Armstrong. It is to these matters - and I am sorry, I know I am slow, but I am trying to develop from the evidence these submissions and I will refer your Honours in due course to the documents from which, beyond any shadow of doubt, it will be seen that this was an unrighteous agreement in Armstrong's mind, which is relevant and important. Armstrong knew at the time he was doing it that he was stipulating for and obtaining an agreement which your Honours will also see was unrighteous. 10
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I was refering to Armstrong's view at that time of the value of his security and I was putting to your Honours that it is not unreasonable to say that from a finance point of view, to someone contemplating the security value of Paradise Waters, that person may well have said "It would gross \$750,000, let us say, as a minimum and if you take the expense of the sale and the delay attendant on the sale, necessarily you would say you would get out of it something like \$700,000 here". U.D.C. had a security for \$680,000 and under that they had lent at that stage Mr. Smith was writing about, apparently \$430,000. I myself thought it was \$416,000 because that figure appears elsewhere in the evidence, but nothing will turn on that. 30

Then there was the unpaid engineer's certificate and U.D.C. had agreed to pay the engineer's certificate up to \$680,000. There was interest accruing and ticking up every day until the land was sold. It was also not unlikely for a financier to consider that in order to effect a sale of land some other expenditure might be made. In other words, a financier considering the value of the Armstrong second mortgage would say "You might net out of it no more than \$700,000 and the U.D.C. advances may be up to the security amount of \$680,000". That leaves \$20,000 and from a security point of view one would say that that second mortgage may be worthless. There may be no value in it whatsoever. 40
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Now, allow me to look at the other matter your Honour Mr. Justice Taylor referred to, the guarantee by Landmark. That sounds all right, a guarantee by Landmark Corporation, but what were the facts? The facts were that Landmark had lent

unsecured what was in effect the greater part of its substance, nearly \$700,000 - it had lent this unsecured into this project. If the project failed and was sold then Armstrong certainly could sue Landmark under its guarantee but what would he get? If Landmark is short of \$700,000 by virtue of its unsecured loan, could there be any doubt in anybody's mind that Landmark was doomed. Indeed, it happened. I say that as a matter of speculation, but Street J. at page 3220 points to this by appending a brief note on the history of Landmark subsequently to 27th January 1967 - "It had not at any point of time ... Paradise Waters project".

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What we are asking the court to do at the moment is to credit Armstrong, Barton, U.D.C. and Mr. Smith and everyone else concerned with the company with the reasonable foresight to have foreseen that after U.D.C. refused to make its advance what would actually transpire and what actually transpired. It did not require any crystal ball to do that and it did not require any great business expertise. So far as Mr. Armstrong was concerned he was as good as told that by Mr. Smith - "Do nothing and the company will collapse".

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So far as the guarantee by Landmark was concerned, that was worthless because with the failure of the Paradise Waters project and the loss of the \$680,000 that was owing to Landmark ---

TAYLOR, A-J.A.: Why do you say that? It owned Landmark House in Brisbane and had documents, according to your client, worth hundreds of thousands of dollars. It had an overdraft of \$300,000 but it had an excess of assets over liabilities of about \$2,000,000.

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MR. GRUZMAN: I will come to that, your Honour. We will refer to these documents which are in evidence or appended to the minutes of March and April 1967.

TAYLOR, A-J.A.: You are inviting us to say this should all be thrown overboard and we should decide that this company is worthless?

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MR. GRUZMAN: We are seeking to assist your Honours to look at all the evidence, what appears to go one way and what appears to go the other, and then come to a decision on the evidence. Of course we are fortified by the fact that everything I am contending for in fact occurred. It will be for your Honours to say what was in the minds of the parties at the time. Smith was Armstrong's representative and he said in writing "Do nothing and it will collapse. Appoint a receiver and you might lose a million. All you can do is take this deal." That was the deal that they themselves had formulated.

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So it is relevant and permissible, in our submission, to look at what was in Armstrong's mind at this relevant time after U.D.C. had declined to proceed with the advances.

I have shown your Honours (a) that the second mortgage security may well have been considered to be absolutely valueless at worst. It might have some value and in the end it did have some value but if U.D.C. had received the money at that time, then Armstrong still lost. It still did not realise enough to meet his security.

JACOBS, J.A.: Where is the page which says that it in fact had some value? I thought I took from what you said that ultimately it turned out that the second mortgage had some value. On what page does that appear? 10

MR. GRUZMAN: It is a matter of calculation. If it was sold for \$900,000 then as a matter of calculation the maximum which could have been advanced was the \$680,000, so Armstrong had something left on his second mortgage. It equally follows that he may not have got that much, he may have got very little.

TAYLOR, A-J.A.: Which are we to take? Is it a substantial amount or very little or does it not matter? 20

MR. GRUZMAN: It does not matter for this reason, that your Honour is not concerned with the ultimate history except that you can draw inferences based on that as to what was in the minds of the parties at the relevant time. What your Honours are concerned with is what was, perhaps, the position (A) as at 14th December when this proposition was put up, (B) we will ask you to look at 22nd December, (C) look at 4th January and (D) perhaps most important of all, look at 17th January when the deed was signed. 30

But your Honour's view of what the position with the parties was then may naturally and should be coloured by the facts of the ultimate result. It does not mean that necessarily everyone foresaw what would happen, but if one assumes that what would happen was what could reasonably be expected, it is not a big jump to say that businessmen associated with this business would have expected what in fact occurred. 40

So I have shown your Honours that in Armstrong's mind, with the U.D.C. failure to proceed, there was a possibility that the second mortgage would be worth little or nothing. Secondly it followed from this that, firstly, his interest in Paradise Waters sales obviously became worth nothing at all because that was a 40% interest in profit and, there being no possibility of profit at that time, the shares in Paradise Waters Sales were utterly worthless. Thirdly I have shown your Honours that with the sale of the project at a loss of \$680,000 owing to Landmark, that would be a loss for Landmark which must fail, as it did, and therefore his shares in Landmark are worthless. 50

Your Honours do not have to take much of what I say. Mr. Smith on 19th December said if

they proceeded with what they were proceeding to do, that is to take control of the Paradise Waters company on transfer of shares and appointment to the board of nominees and subsequently to sue Landmark, if they did that "Your 300,000 shares in Landmark will be valueless". That is what he is telling Armstrong. "You may have to spend \$1,000,000 on a project for which you will only get a second mortgage unless you pay out U.D.C. \$430,000. In which case you have to put up \$1,430,000. If you do that the gross sum you will get from such is \$1,536,000, from stage 1, if all goes well." This is Smith's calculation, and that makes a gross profit of \$106,000, on a further expenditure by Armstrong of \$1,430,000. He says on that you would only get 40%, anyway, so you would be risking \$1,000,000 for 40% of \$100,000, which would be \$40,000. He said "If you do the other thing and appoint a receiver for Landmark, where are you going to be?" He points out that you would have a lot more difficulty because any additional expenditure would rank after the first mortgage "unless you pay out U.D.C. and then you are back in the same position". He has got the same difficulties as in No. 2 with the additional impediment to the result from the fact that the sales would be receiver sales and likely to be less than otherwise would be the case. "If you do that there will be no profit at all, so you cannot do that. If you do nothing, it is the writer's view it would only be a matter of time before the company collapsed."

And then "if you do this deal with Barton it is worth to you \$755,000. But of course the company would still collapse. You will have everything you can have out of it but obviously the company will collapse because if it is going to collapse if you do nothing how much more is it going to collapse if you take \$200,000 worth of cash and profits out of it?"

In Armstrong's view - and I put this submission with confidence, based on documentary evidence of Smith's conversations with Armstrong at the relevant time - he was in an utterly hopeless financial position, facing a financial disaster of the greatest possible proportions. I said at one stage he would have estimated his losses to be of the order of \$1,000,000. Smith said the agreement was worth \$755,000, but that is only allowing a comparatively small amount for the value of the Paradise Waters shares, but if he imagined he was going to get \$1,000,000 profit then in his mind the loss would be even greater.

I had a look at Mr. Armstrong's financial position after U.D.C. had made this decision. I now just have a look at Barton's position. Equally to him the consequences of the U.D.C. decision were very great. Firstly, Landmark's future was thrown into the balance and probably destroyed.

TAYLOR, A-J.A.: Why do you say "probably"? I thought yesterday when putting the case about

Armstrong it was certain, and when you put the case for Barton I think it would be the same. Does it become less when you put the case for Barton?

MR. GRUZMAN: They are the same.

TAYLOR, A-J.A.: Then why did you not say the same?

MR. GRUZMAN: I would say exactly the same.

TAYLOR, A-J.A.: Barton had 270,000 shares, plus his job, plus his Mercedes.

MR. GRUZMAN: He swore in evidence as at 14th December he regarded the shares as worthless and that the company had no hope at all, but perhaps the probabilities were that he could see that U.D.C. would call up its money. 10

TAYLOR, A-J.A.: He put it on paper, there is a reference to the Bank of New South Wales, after these documents were executed.

MR. GRUZMAN: I did not say it was a simple case this time, your Honours. I will come to that and deal with it in detail. Your Honours are sitting here as the court and I am making submissions to your Honours as to what your Honours should find to be the true facts and true mind of the parties, and I am submitting on the evidence what indeed are the only findings your Honours should make. It is the strength of my submission, they are all in equal positions to know, and they all knew. Of course those documents your Honour referred to were on the basis that he could get finance. 20

In the Barton view Landmark had been destroyed. U.D.C. would call up its money and sell the projects, Armstrong would call up his money and sell the projects. If the project was sold in an unfinished state then Landmark's unsecured advances were lost. It could not meet the guarantee and of course its shares - and his shares in Landmark - were worthless. Landmark's shares in Paradise Waters were worthless, and even worse, I suppose, from Barton's point of view he was the person who brought it about in the sense that he had relied on U.D.C. and had Mr. Armstrong in effect removed from the chair. So he bore personal responsibility for that, whether or not it was really his fault. 30 40

So far as any possibility of future finance, it was entirely out of the question for the reasons which simply enough fell from your Honour Mr. Justice Taylor, that the \$400,000 represented money which would not go into the project but would be elsewhere and this was a helpless impediment to further financing the project. There was simply no risk capital left in it and nothing to support a second mortgage. 50

JACOBS, J.A.: You have not got to go anything like as far as that, have you, to talk about the position

of it being hopeless, that it was absolutely impossible to get finance? Neither of those statements could be strictly true. It was not impossible and if finance were obtained it was not hopeless.

MR. GRUZMAN: We would submit that it was.

JACOBS, J.A.: You seem to take on an obligation far greater than anything you have to.

MR. GRUZMAN: That is true but your Honours may find something less than that. However, we submit that is what the evidence admits of.

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There was another aspect. Barton at this stage was already in this relationship with Armstrong where he had experienced, shall be call it, the violent side of Armstrong's nature. That is another subject matter but it is a matter to be remembered and to be determined, to be borne in mind, that if he was frightened of him and had bodyguards because he was frightened of Armstrong at the time when Armstrong regarded the situation as rosy, how much more would he be frightened of Armstrong when Armstrong had suffered this enormous financial disaster at his hand?

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TAYLOR, A-J.A.: That was the time when he got rid of the bodyguards. He got rid of the bodyguards after the annual meeting.

MR. GRUZMAN: This did not occur until 8th December.

TAYLOR, A-J.A.: He did not have any bodyguards again, unless you call the police bodyguards.

MR. GRUZMAN: He went up to Surfers Paradise.

That was the position when the negotiations began on 14th December. On any view of the facts the negotiations in fact began on 14th December; Smith said so and Barton said so.

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TAYLOR, A-J.A.: They began with Barton on 14th December, Smith had got his instructions.

MR. GRUZMAN: Yes, inter partes it is common ground that the negotiations began on 14th December.

TAYLOR, A-J.A.: They had written the letter before that. Smith came to inspect the books on the night.

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MR. GRUZMAN: Yes. Armstrong goes to see Smith on 8th December and probably that indicates that on that day he heard of the U.D.C. decision. Armstrong, the evidence seems to show, was prompt in his business affairs and the first thing that Smith considered was the appointment of a receiver.

Some of the Smith documents we would seek leave, if we may, to uplift - the originals - and have them re-photostatted so that we can hand them up to your Honours in a better form.

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JACOBS, J.A.: In a more convenient form?

MR. GRUZMAN: Yes, so that your Honours won't have to go through the appeal books to find them.

TAYLOR, A-J.A.: Are they not altogether, Nos. 37, 38 and 39?

MR. GRUZMAN: No, they are a bit scattered. We will hand them to your Honours in chronological order.

JACOBS, J.A.: Perhaps you could get the numbers of the exhibits and we will have it clearly so that the court will make the order permitting the uplifting before it adjourns. 10

MR. GRUZMAN: Thank you, your Honour.

On the 9th there was a meeting with Mr. Staff and Mr. Grant and eventually this scheme was formulated - the document was prepared and that appears at Exhibit 49.

TAYLOR, A-J.A.: At page 2784 is when he went to the interview with Barton and at page 2786 is the note that he made following the interview for forwarding on to Mr. Armstrong. 20

MR. GRUZMAN: Yes, your Honour, but I am dealing now with the first one. It is common ground - and it is significant - that this scheme was formulated between Mr. Smith and Mr. Armstrong. This is not a case where two businessmen sat down together and said: "How do we work this out?" This was a scheme worked out for Mr. Armstrong's best advantage.

TAYLOR, A-J.A.: That is what he wanted. He has already offered Barton a way out and this is what he wanted to get out of this himself. 30

MR. GRUZMAN: Putting those two together like that, with respect, is something that cannot be done, for this reason; he offered to buy his shares out when everything in the garden was excellent, and that was one thing. To offer to pay 70¢ for shares in a booming company was one thing, but to be able to sell your shares for 60¢ when they are worthless is a different matter.

TAYLOR, A-J.A.: That is what you say. He put it to Barton and in effect Barton agreed to pay. That is what it came down to. He really agreed. He ultimately agreed with basically what was put to him. 40

MR. GRUZMAN: Our submission would be that it is a complete non sequitur to literally place in juxtaposition and to compare or consider in the same breath an offer to buy shares at 70¢ in a company which was in a sound financial position with a good future, as against an offer to sell shares at 60¢ when the same company is a broken wreck. We say that the two circumstances cannot be placed in juxtaposition. 50

TAYLOR, A-J.A.: What do you suggest we do, ignore the first one?

MR. GRUZMAN: Your Honours should take the evidence for what it is, when the company was a good and valuable company Armstrong was happy to buy Barton out at 70¢ but when the company was broken he never made any such offer but on the other hand required Barton to buy his shares at 60¢ when they stood at 30-odd on the Stock Exchange and anyone in the know would not have paid 2d. for them.

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The exhibit numbers we require are 23, 26, 35, 36, 37, 38 to 44, 48 and 49. We will also ask leave to uplift Hume's cashbook.

JACOBS, J.A.: That is a separate matter, is it?

MR. GRUZMAN: Yes.

JACOBS, J.A.: I think we will leave that problem. You may uplift the other ones.

(Further hearing adjourned until 10.15 a.m. Wednesday, 24th February, 1971.)

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

Term No. 22 of 1969.

CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

BARTON v. ARMSTRONG

FOURTH DAY: WEDNESDAY, 24TH FEBRUARY, 1971.

MR. GRUZMAN: Your Honours, we have prepared a document headed "Principles". I prefer to put it before your Honours at this stage as a forecast of principles we will be submitting. 10

MASON, J.A.: Is this a forecast of a document, or is the document a forecast of the principles?

MR. GRUZMAN: The document is a forecast of the principles. Like most forecasts, a lot of work has gone into it, but it is probably wrong. We will put it before your Honours as what we believe we will be submitting. We may, when it comes to the point, wish to alter the submissions in various ways. I do not propose to argue it at this stage. If I might refer to it --- 20

MASON, J.A.: I suppose when this matter goes to the High Court you will say that the arguments put here were misconceived.

MR. GRUZMAN: I hope we do not have to go there, your Honour, not in our present capacity, anyway. If B enters into a contract with A whilst B is in fear of A, whether or not that fear has been induced by or was known to A, the contract will be set aside at the suit of B unless A proves that the fear played no part in the making of the contract. The second proposition is if B enters into a contract with A whilst B is in fear and A has wrongfully or by illegal means created the fear, the contract will be set aside at the suit of B. The third proposition is that if the understanding between A and B in negotiating a contract is that if a contract is made, A will refrain from committing illegal acts towards B, the contract is void. The fourth proposition is if A by threats creates in B a weakness relative to A, and a contract is entered into between them by the unconscientious use by A of power arising out of these circumstances the contract will be set aside unless A proves that the contract was fair, just and reasonable. 30 40

MASON, J.A.: Mr. Gruzman, what is the illumination provided by proposition 2 that is additional to that provided by proposition 1?

MR. GRUZMAN: The difference is that it will be our 50

submission that if a man sets out deliberately, wrongfully or by illegal means, to create a situation of fear in another man, then all that is required is the suit of the other party to set aside the contract. The Court will not listen to the submission ---

MASON, J.A.: That is, A is absolutely precluded from endeavouring to establish that fear played no part in the making of the contract.

MR. GRUZMAN: Yes.

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MASON, J.A.: That is no defence.

MR. GRUZMAN: Yes. That is assuming he has deliberately set out to create the situation of fear by illegal means.

Your Honours, yesterday I was making submissions on the commercial situation, and we had shown that at the time the negotiations started, on the 14th December, 1966, Armstrong faced the greatest financial calamity possible to imagine. We have also shown that his one and only hope of financial salvation was the sort of contract which was formulated between himself and Mr. Smith, and which was subsequently, in broad substance, enshrined in the contract which was eventually entered into. He had no other escape whatsoever. The securities, everything he had, were worthless in practice and all he could do was make the sort of contract which in fact took place. And of course, as I will be showing, that contract was utterly calamitous to Landmark and to Barton.

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Let us also look at the start of negotiations, that is at the 14th December, at the other party; look at Barton's or Landmark's situation. Armstrong was a troublesome fellow in his capacity as a director, major shareholder and creditor, but many companies have troublesome directors and major shareholders. His shareholding, though large (it was 300,000 shares in almost two million shares) was by no means controlling. So his only real hold over the company was his claim as a creditor, \$400,000. He wanted his money back. He was entitled to his money back. He had been removed from chairman on the strength and promise that he would get his money back. So the only question is whether the company could, or in the circumstances should, have paid this money back.

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Just looking at the commercial realities, here was a company whose asset was secured by first mortgage to U.D.C. There was owing probably - I see the figures repeated - \$430,000, to which I will refer in a moment. There was no reason whatever why U.D.C. should not call up this money. Indeed, it did so, and it was entitled to sell Paradise Waters. There was no legal reason why it should not, there was no commercial reason why it should not. Why? Because, taking the same estimate

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of value which the evidence has shown permits of, something like \$750,000 to \$1 million, with \$430,000 out, U.D.C. could expect to get its money back. Indeed, it could be certain that in due course it would get its money back, every penny of it. We know that within a few days of the negotiations starting U.D.C. appointed a receiver, or sought to appoint a receiver. So that it had both the will to gets its money back and the ability to get its money back, and there was no reason whatever why it should not do so. So that commercially speaking as between Landmark and U.D.C. there was no defence. The effect of U.D.C. calling up its money was to wreck Landmark. That did not matter at all to U.D.C.

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Now let us look at Landmark's commercial situation viz a viz Armstrong. As Mr. Smith pointed out, if Armstrong simply enforced his security, to use Mr. Smith's own words it rendered the 300,000 shares in Landmark valueless - Exhibit 49, line 20, Smith's own statement.

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JACOBS, J.A.: Is that the 19th December?

MR. GRUZMAN: Yes. Secondly, it rendered the shares in Paradise Waters Sales valueless. Thirdly, as I have indicated, it probably rendered his second mortgage valueless, or almost so.

MASON, J.A.: Is that quite right? It seemed to me Mr. Smith's approach to this problem in terms of the security being enforced was rather on the basis of further money being put in with a view to a sale of the property taking place after it had been improved and subdivided. No doubt the prudent course, if one was seeking to preserve the possibility of getting something out of the equity, and undoubtedly Mr. Smith was looking at Mr. Armstrong's position not merely as a secured creditor but as a person who had a very substantial interest in the equity. It was not altogether clear to me that Mr. Smith was applying his mind directly to the possibility of the security being enforced so as to result in an immediate sale of the land in its then existing position and condition.

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MR. GRUZMAN: That is true. The document does not refer to that possibility. We would submit for the very good reason that he regarded it as out of the question. As he said, if you do nothing the company is simply going to collapse.

MASON, J.A.: The company would collapse, certainly, but it does not follow necessarily that the property would collapse in the sense that it would not yield a worthwhile return to the secured creditor.

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MR. GRUZMAN: Quite so, but what is the evidence? What are the facts which must have been known to Mr. Smith and would have been known to everybody else, Barton, Armstrong, U.D.C. and Mr. Smith. What were the facts? The facts were that you had

a swamp land, partly dredged and partly developed. The experts said, within a comparatively short time of this, that it was worth \$750,000 to \$1 million.

MASON, J.A.: It was ultimately sold for \$900,000.

MR. GRUZMAN: Yes.

MASON, J.A.: We do not know how much work was done between December 1966 and the time of sale.

MR. GRUZMAN: There is some evidence of it.

MASON, J.A.: It is impossible to quantify it in terms of value.

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MR. GRUZMAN: That is true. What I think is a fair way of looking at it, we would submit, to try and decide what would have been in Mr. Smith's mind at the time - let us assume that he would have formed an estimate much the same as the experts, and indeed, he was the one who gave this evidence. I do not know, and do not suggest that he had that evidence of value before him at that relevant time. What I am putting is that one would assume that he would have had some such idea of the value.

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I have been through the exercise, which I will not repeat, but if that was in his mind, or some such idea of the value as that, the odds were that realisation of the security would produce little or nothing for the second mortgage. That is why Mr. Smith does not refer to that - I think it is one of the things he just put out of mind - because if one imagines the scene at Surfers Paradise (and I think there are diagrams of it), if one imagines a swamp land with a river running through it and a dredge working, bits of sand everywhere, with possibilities, but at the moment just looking like a swamp, so that the value of that land in that stage was very very indeterminate. Indeed, \$750,000 to \$1 million was said to have been the value, but at that particular time, in December 1966, it might be that Mr. Smith would have had doubt as to whether even the first mortgage would be wholly satisfied.

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What I am reminded of, your Honours, looking at Mr. Smith's notes, one gets the impression that he felt that even if you put a receiver in, the thing was quite unsaleable. You would have to do some work in order to sell it. May I just add this, that he may have had this in mind, it is going to be a very brave purchaser who is going to pay a large sum of money for this land, knowing they have to put in at least another \$1 million before they see a penny out of it. All in all, whilst it is only a matter of inference, one would say that nobody, and I include everybody associated with the matter, would have thought that the Landmark Estate had any very real saleable value in December 1966. So viz a viz Armstrong Landmark had a tremendous hold on him. Landmark could say to him, "Look, yes, you have your legal rights all right, but if

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you call them up, you will get nothing". They could therefore spar with Armstrong as much as they liked. He might have all the legal rights in the world, but they were absolutely worthless to him because in the end he would get nothing. On the other hand, if they had thought it worthwhile to pay him out, then they could have done so. We know that in fact they paid him the equivalent of \$200,000.

JACOBS, J.A.: Where is the evidence of the source of those moneys?

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MR. GRUZMAN: I am not sure. We have looked at the evidence with a view to answering that question for ourselves.

JACOBS, J.A.: And you have not found it?

MR. GRUZMAN: We have not exactly found it, your Honour. But it is quite clear; one thing is certain that on the settlement a cheque for \$140,000 was handed over, and the deeds to the penthouse as representing \$60,000, the penthouse being valued at \$80,000. So that it only required another \$200,000 to completely satisfy Armstrong. For security to borrow that amount they had firstly the second mortgage on Paradise Waters, for whatever that was worth, they had the unsold units in Paradise Towers, which had a face value of something of the order of \$300,000, I think a little more, and they had second mortgage security on Landmark House which they could offer.

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JACOBS, J.A.: Was there a mortgage specifically over the unsold units in Paradise Towers so that certain proportions of the sale price of each unit had to go to the mortgagee?

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MR. GRUZMAN: I do not think so. May I just refer your Honours to Exhibit 49. Smith has something to say about this. If I could refer your Honours to page 2791, it is set out, the value of Paradise Towers and Landmark House for security purposes, it is set out by Mr. Smith.

JACOBS, J.A.: Could you tell me, is there any evidence on the question whether in the event of the sale of the remaining units in Paradise Towers a proportion of the sale price had to be returned to the mortgagee? One knows the common arrangement.

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MR. GRUZMAN: I would answer that No.

JACOBS, J.A.: So that they could be sold.

MR. GRUZMAN: They could be sold.

JACOBS, J.A.: Or there was no evidence one way or the other.

MR. GRUZMAN: There is evidence. It is the other way.

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JACOBS, J.A.: What page?

MR. GRUZMAN: Page 2791. (Read.) Mr. Smith in fact recommends this, so that you have Paradise Towers, which Mr. Smith said alone was good for security for \$250,000, but then you had Landmark House which Mr. Smith said was recommended as security for a further \$250,000. I will come back to that later. So far as the alternatives available were concerned Barton or Landmark had available three sources of security, Landmark House, Paradise Towers, each for \$250,000, and so recommended by Smith, plus the second mortgage on Paradise Waters for what it was worth. Even if there were further encumbrances on that, each one of them was worth enough to pay out the remaining \$250,000. Alternatively if one assumed that the whole of the \$400,000 had to be raised, then there was ample security to raise that, even without looking at Paradise Waters.

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So that at the start of these negotiations what was the position? Firstly, from Armstrong's point of view, utter disaster unless this specific agreement or one very much like it could be procured. From Barton's or Landmark's point of view, complete freedom of action. Either they could hold Armstrong at bay for ever, because Armstrong had so much to lose if he was silly enough to call up his security, or alternatively, if they wanted to be rid of him, pay him out.

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JACOBS, J.A.: Is this submission consistent with the submission that Barton knew at that time the position of Landmark was hopeless?

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MR. GRUZMAN: Completely, because security is security. If the failure of Landmark, no matter how certain it might be, did not affect the value of the units - if you had \$344,000 sale value of units and Mr. Smith, whom we think would have had the same view as Barton of the future of the company - indeed, he says in his document that these securities would be very much more saleable than the second mortgage over Paradise Waters. If I might so put it, it is nothing to the point whether or not the company was going to fail. Financiers are not so very interested in the company, they look at the deeds or the securities that they get. So that at the commencement of the negotiations on the 14th December that is how the parties stood; Armstrong facing financial disaster of the highest magnitude unless he could get this very agreement or one very much like it. In other words, it had to provide to improve his security value to the valueless in Landmark and it had to give value to the profitless profit that he had in Paradise Waters Sales. That is what he had to achieve. On the other hand, you had a company which would hold him at bay for these very reasons for ever and which, if the worst came to the worst, could go and borrow money to pay him out.

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What I propose to do now is to hand some

documents to your Honours. As I indicated earlier, and I think your Honours know, we have put really a tremendous amount of work into trying to lessen the duration of the case and your Honours' tasks. That is as far as we can do mechanically, anyway, to make it easier and quicker. What we have done, we have taken some more appeal books - there is nothing in it that is of a contentious nature - we have torn up more appeal books and re-copied them. We have taken out, we think, all of the evidence on the commercial aspects and put it into one folder, with consecutive numbers. We have taken out all the commercial documents and we have put them into chronological order, and re-copied them, so that your Honours will each get two volumes, one containing, we think, all the commercial evidence and the other containing the commercial documents. The documents are entitled Commercial 1 and the evidence is entitled Commercial 2. (Handed to Court.) 10

TAYLOR, A-J.A.: What you just put to us about the respective position of these parties and the realisation of the desperate financial position is not the subject of any passage in the judgment of Mr. Justice Street. 20

MR. GRUZMAN: No.

TAYLOR, A-J.A.: Does that mean it was never put to him?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: We are never going to be asked to say whether he was right or wrong about it? 30

MR. GRUZMAN: We are going to ask your Honours to draw your own inference about it.

TAYLOR, A-J.A.: On a matter that was never raised before the trial judge?

MR. GRUZMAN: No.

TAYLOR, A-J.A.: That is all I want to know.

MR. GRUZMAN: Neither party said "What would be the position if you found there were threats but also commerce". His Honour may well have had it in mind, and I take responsibility, but the fact is we said "threats" and that is an end of it. 40

TAYLOR, A-J.A.: If you want to make that case, is not the proper thing to send it back to the trial judge?

MR. GRUZMAN: No. Perhaps your Honour should deal with it. There is ample authority for it.

TAYLOR, A-J.A.: You are asking us to find primary facts.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: You never asked the trial judge to find them?

MR. GRUZMAN: That is right. May I put in amplification of that that the other side, that is the defence, never said it was the commercial decision which actuated it. The substance of their case was because there was this commercial situation, therefore there were no threats.

TAYLOR, A-J.A.: How can you say that, in view of the judge's findings? 10

MR. GRUZMAN: His Honour's findings I venture to say - they certainly came as a surprise to us, the nature of them.

TAYLOR, A-J.A.: You say that, Mr. Gruzman. In view of the cross-examination and the matters put, I do not understand how you can say that.

MR. GRUZMAN: Your Honours, perhaps that will be developed a little later. I wonder if I might be permitted to take your Honours to Commercial 1.

JACOBS, J.A.: Mr. Gruzman, I want to ask you this: Do you say it was never litigated before the judge of first instance whether Mr. Armstrong needed the agreement that was made, needed the agreement for commercial or other reasons? 20

MR. GRUZMAN: Pardon me for one moment before I answer your Honour. I do not think that submission was ever put to his Honour.

MASON, J.A.: Perhaps it is not quite so much a matter of submission, or only submission, was it litigated as an issue of fact in the case as to whether or not the making of this agreement or an agreement like it was needed by Mr. Armstrong for the protection of his business position, or perhaps, would be of advantage to him. 30

MR. GRUZMAN: It is very hard to summarise in a few words evidence and submissions that went over six months.

TAYLOR, A-J.A.: But Mr. Gruzman, it is not hard to know - you were there all the time - whether that was ever put to Smith in cross-examination. 40

MR. GRUZMAN: I do not think it was. Your Honour asks me a specific question like that. I do not think I ever put that to Smith in cross-examination.

TAYLOR, A-J.A.: Neither to Smith nor to Armstrong, so far as I can see.

MASON, J.A.: It does seem inconceivable that if your case was that the defendant was exercising pressure on the plaintiff, that you did not endeavour to support that case in fact by evidence or submission, by saying that the purpose of getting 50

it was to bring about an agreement that was advantageous to Mr. Armstrong.

MR. GRUZMAN: Well, your Honour, yes and no. Our case was that this agreement was brought about by pressure. We set about proving threats, criminal activity and so on. We told his Honour from the beginning, in the opening address, that there was a commercial negotiation going on on the surface, but beneath the surface there were threats. We said, "If you find there were threats, what does it matter what the commercial negotiation was?" This is in substance what we said. The defence said, "Look, there was a complete and proper commercial negotiation, how can you believe that there were threats?" They used the commercial negotiation to deny the existence of threats. 10

TAYLOR, A-J.A.: But you left out the real thing that the case was about. The case was about fighting to get control of the company; Barton trying to get Armstrong out and Armstrong trying to get Barton out. That is the very first thing the learned trial judge said in his judgment. If that was not the way the case was fought or what the dispute was about, I find it surprising for you to say that. 20

MR. GRUZMAN: I said before, and I say again ---

TAYLOR, A-J.A.: That is what the threats were directed to, to induce Barton to get out.

MR. GRUZMAN: No, your Honour. That is what I put before to your Honour, and I put it again. We say his Honour's judgment was a complete surprise. 30

TAYLOR, A-J.A.: I do not know what you mean by that. If you mean the result was a complete surprise to you --

MR. GRUZMAN: No. His Honour could have found either way.

TAYLOR, A-J.A.: Are you permitting yourself that luxury?

MR. GRUZMAN: I am sorry, your Honour. Your Honour knows I did not mean it in that way. On the submissions that have been made it was anticipated that his Honour would find either the existence of threats and therefore the end of the contract or no threats and the contract was good. I do not think anybody ever said to his Honour or thought it possible that there could be a state of threats and at the same time a valid contract. I do not think anybody throughout the case - and of course I am open to correction - except in perhaps an off-hand moment, but not in a matter of sustained or substantial submission - nobody ever posed for his Honour's judgment the question "If you find threats will you go further?" I am not saying that his Honour did not have that in mind at various stages 40 50

of the case, because with hindsight one can see some of the questions his Honour asked, but what I am putting, nobody ever took the position before his Honour, "What will happen if you find yes he was in a state of terror but also there was a commercial negotiation?" It is in that sense that we say and submit the judgment was a surprise.

One of the original grounds of appeal was the case having been fought on the question of threats or no threats, and his Honour having found threats, we were entitled to succeed. It is one of the submissions that we would make to your Honours here.

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JACOBS, J.A.: You never suggested to his Honour any reason why the threats were made except personal malevolence.

MR. GRUZMAN: No, that is not right either.

JACOBS, J.A.: What did come out in the evidence, and what was relied on?

MR. GRUZMAN: Would it be possible, to enable me to answer your Honour more accurately, to defer this matter until 2 o'clock? I can have a look at the addresses and I can give your Honours a more accurate answer.

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JACOBS, J.A.: Yes. Was the address transcribed?

MR. GRUZMAN: Yes, it was.

JACOBS, J.A.: Do not refer to it please at this stage. I just thought you might remember.

MR. GRUZMAN: I was just going to have a look ---

JACOBS, J.A.: I repeat the phrase, "The wood for the trees".

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MR. GRUZMAN: Just one thing I would say in answer to your Honour Mr. Justice Mason and to your Honour, I think the true position is that this was a suit to set aside this agreement, and everybody assumed that it was an agreement that Mr. Armstrong wanted, and that that is why he used the pressure and threats to get it.

TAYLOR, A-J.A.: It would be an equally founded assumption that Barton wanted it, wouldn't it?

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MR. GRUZMAN: Yes, but our case was that Armstrong wanted it so badly that he used threats. So far as the commercial side, it was assumed that there was a full commercial negotiation. Nobody disputed that. All of these documents that I am referring to, each and every one of them without exception is tendered by the defence. They tendered every document to which I am going to refer your Honours in the next few minutes. They were tendered by the defence.

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TAYLOR, A-J.A.: The threats started and went on for a period of time when there was no talk of Armstrong getting out or selling out. There was no talk of an agreement. The threats had their genesis in the period where they were fighting for control of the company.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: And Armstrong wanted to stay in.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: What have these threats to do with signing an agreement that was never contemplated, so far as I can see, until he lost the battle for control of the company. 10

MR. GRUZMAN: May I answer your Honour - the answer is very simple.

TAYLOR, A-J.A.: I would sooner it be more convincing.

MR. GRUZMAN: The threats created the relationship. It was those threats and that relationship between the two men which created the situation where this agreement was entered into. That is the strength of the appellant's submissions. If this had been one momentary gun at the head, that is one case. Our case is that it was not. Our case is that Armstrong acquired ascendancy or dominion, if one uses those terms, over Barton by a continual series of threats, so that the position arose, as his Honour Mr. Justice Street found, that Barton feared Armstrong, and that being so it did not seem to matter, because that is what we were contending for - it did not seem to matter what the commercial relationship was. If it is something that Armstrong wanted, which he obviously did - he was the one who initiated it - then what did it matter? And that is why it came as a complete surprise when his Honour said Yes, he was in a state of terror, but on the other hand when you really look at this commercial transaction, it was such a regular as it were negotiation "that I think it was the negotiation which produced the contract and the threats had nothing to do with it". That had never been, to my recollection, the sustained submission of either party, and that is why it is we find ourselves in this position of having to argue before your Honours on the basis firstly that his Honour's judgment is correct, and we say that even on his Honour's judgment we are entitled to succeed. We say further that there are different inferences and so on could be drawn. 20 30 40

JACOBS, J.A.: I would think that your difficulty is, if it is a difficulty, that the evidence is just as consistent once the threats are established with the motive of Mr. Armstrong changing. 50

MR. GRUZMAN: I do not quite ---

JACOBS, J.A.: Changing from the time prior to what happened at the general meeting to afterwards.

MR. GRUZMAN: Yes.

JACOBS, J.A.: But this is not what you are putting at all. You say all the threats did was establish some sort of relationship of dominance.

MR. GRUZMAN: Your Honour sees it does not matter what the motive is, it is the effect. If a parent is nasty to a child, it does not matter if one day it is because the child has gone out without permission and the next day it won't eat its dinner - 10
whatever the particular motive, the question is the relationship. What we say and submit is that there was a relationship between these two men and that it arose at an early stage.

JACOBS, J.A.: But in any particular case if a parent says to a child, "Do that or you will be punished" that is a different situation from one where the parent says, "Do that". The result may be the same because of the relationship, but if you want to prove that the words "or you will be punished" were in fact said, then the motive of the parent may become very important. 20

MR. GRUZMAN: It may, but not forgetting that the words "do that" may in a given relationship imply "do that or you will be severally punished", without it being said.

JACOBS, J.A.: I have already stated that. I have already stated that that could be so, that the effect of the particular relationship may not matter. Again, if I move from the wood for the trees to the eggs in the basket --- 30

MR. GRUZMAN: If I may turn now to the commercial documents, because it is obvious to us now, it was not then, that to analyse the true effect of this commercial negotiation is important. May I address your Honour Mr. Justice Taylor, in view of what fell from your Honour a moment ago. May I only read from his Honour's judgment at page 3185, "The next occasion on which Mr. Armstrong made a threat to Mr. Barton ... telephone call did take place". In the light of that finding by his Honour Armstrong was threatening Barton to sign this agreement, Barton saying he would not be blackmailed into it. With respect, it could not be suggested that Barton wanted the agreement. That is a finding by his Honour. There is no doubt, whatever motive he had before for the threats, the motive five days before the agreement was signed was obviously, and found by his Honour, a motive to threaten, directed to this agreement and nothing else. If I may ask your Honours to have a look at the document Commercial 1, I do not propose to go through all the evidence -- 40 50

JACOBS, J.A.: I remember yesterday you said how you were going to deal with this case, to the extent you said you were going to go to the commercial

aspect, and then I think you mentioned the order of other aspects you were going to deal with. I cannot find the page.

MR. GRUZMAN: I did not deal with it in detail.

JACOBS, J.A.: You are dealing now with the commercial aspect.

MR. GRUZMAN: Yes.

JACOBS, J.A.: Then how are you going on from there?

MR. GRUZMAN: We have made a plan, and changed it slightly. 10

JACOBS, J.A.: You are not bound to it. I would be pleased to know.

MR. GRUZMAN: We only want to assist your Honours, to present a lengthy case in the least possible time, with the most assistance to the Court.

JACOBS, J.A.: It would be of assistance to know the order. You are going to show commercial aspect, that this was not the commercial transaction that appeared on its face. That is putting briefly your submission, isn't it? 20

MR. GRUZMAN: Yes.

JACOBS, J.A.: When you have done that, what is the next stage?

MR. GRUZMAN: Then we are going to deal with Mr. Armstrong as a person.

MASON, J.A.: Deal with his credibility?

MR. GRUZMAN: More than credibility. If I have to anticipate my submissions here, then I shall do so. We will be submitting that Mr. Armstrong was party to a conspiracy and that that conspiracy encompassed the death of Mr. Barton. His Honour found that Mr. Barton believed that, but his Honour also found that we had not proved that in fact that was so. We are going to ask your Honours to find that in fact that was so. 30

TAYLOR, A-J.A.: And that the judge was wrong. You say it was not so.

MR. GRUZMAN: Yes. May I just correct your Honour, with respect, if I may. His Honour did not find that it was not so, his Honour found that we had not proved it was so. 40

TAYLOR, A-J.A.: You are saying it is a wrong finding?

MR. GRUZMAN: That that in fact was not proven; was wrong.

TAYLOR, A-J.A.: You mean you are going through the evidence to indicate the evidence that points to an agreement he made, between a number of people, and which indicated Armstrong was implicated in it?

MR. GRUZMAN: Exactly.

MASON, J.A.: You are going to deal with the evidence on that issue, aren't you, rather than deal with Mr. Armstrong?

MR. GRUZMAN: I was asked the order of the address. I have to take one thing at a time. Your Honours ask why would I deal with Armstrong as a person, and the answer is for those amongst other reasons. It is also going to be important for your Honours to know just what was in Barton's mind about Armstrong, because at the moment I am going through the commercial transaction, and your Honours are considering it, as I am inviting your Honours to do, on a commercial basis.

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TAYLOR, A-J.A.: That has nothing to do with the proof.

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MR. GRUZMAN: No. It has not.

TAYLOR, A-J.A.: That is a different point.

MR. GRUZMAN: That is an entirely different point. The fact I am segmenting the case is because I feel that is of the most assistance to your Honours. That does not mean one can leave out of account each matter as I deal with a question. The next thing I propose to do is, as I say, deal with Armstrong.

TAYLOR, A-J.A.: As a conspirator?

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MR. GRUZMAN: As a person, as a conspirator, what was in Barton's mind about Armstrong, the effect of his pressure, and so on.

TAYLOR, A-J.A.: If you are going to be permitted to set out to show that the judge was wrong and there was in fact a conspiracy, that involves a reference to the evidence and the inferences you draw from it, doesn't it? That involves a reference to various parts of the evidence, indicating what the evidence was, and a submission I suppose as to the inferences to be drawn from it.

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MR. GRUZMAN: Yes, exactly. The same as in any submissions on such a subject.

TAYLOR, A-J.A.: Are you going to do that first and then proceed to something else or are you going to do this as part of -- I do not care which way you do it, I only want to know, so that I can follow it.

MR. GRUZMAN: I am very happy to inform your Honours exactly what is in our minds as to the manner in which we propose ---

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JACOBS, J.A.: Then would you go ahead? Would you do it, Mr. Gruzman.

MR. GRUZMAN: Yes.

JACOBS, J.A.: You have dealt with the commercial transaction.

MR. GRUZMAN: Yes.

JACOBS, J.A.: You have started on that. Now you have this other strange compendium of one of the parties' names to describe a multitude of different aspects with which you are going to deal. Including the fact that you will challenge the finding that he could not be associated with the events of the 7th January.

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MR. GRUZMAN: Your Honour, that is not so. What I said was I was going to deal with Armstrong. I was asked not what I was going to deal with with Armstrong, but why I was going to deal with Armstrong. And the reason is I am going to subsequently, as I will show your Honours, make submissions as to Armstrong's part in the subsequent events. The first point I make is that after I have dealt with the commercial situation I propose to make submissions to your Honours on Mr. Armstrong as a man and what the evidence shows about him.

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JACOBS, J.A.: I follow that now. I think you are bound, speaking for myself, to enunciate your ultimate submissions so as to explain to us why we should hear the addresses on Armstrong, as you put it. Unless we know why that is being done, we are not bound to hear it.

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MR. GRUZMAN: Your Honours, in our submission the fact that we are challenging findings of his Honour the trial judge requires on our part that we should refer in detail to the evidence.

JACOBS, J.A.: I am not referring to that. I must be not making myself clear. Before dealing with my point would you go back and outline how you propose to deal with your submissions from the beginning, which you have already started with the commercial transaction, to the end of your address, the various stages.

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MR. GRUZMAN: There may be some variation, but basically the plan which we have in mind is this: commercial, Armstrong, pressure (that is the aspects of pressure which appear from the evidence), the conspiracy, something about the missing diaries as a separate subject ---

MASON, J.A.: Could I just ask you, "pressure". What does that involve?

MR. GRUZMAN: That comprises what the case for the plaintiff was on the threats and criminal action, 'phone calls and so on.

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MASON, J.A.: But you have substantial findings in your favour in regard to that, haven't you?

MR. GRUZMAN: Yes.

MASON, J.A.: Are you challenging those findings?

MR. GRUZMAN: We are not challenging those findings which are underlined in red, or which are not underlined in the book which we handed in, the annotated copy of the judgment which we handed to your Honours. We are challenging those findings which are annotated in black. Substantially of course his Honour was in our favour on the question of pressure.

MASON, J.A.: Exactly.

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MR. GRUZMAN: But there are certain conversations in the nature of pressure which his Honour did not find established, and we are going to ask your Honours to find that those conversations did occur.

MASON, J.A.: That really is the third heading, is it? When you talk about pressure, you really mean what is relevant to the finding you ask us to make in substitution for his Honour's findings on the plaintiff's case?

MR. GRUZMAN: Your Honours, I am not prepared, if I may say so, to restrict my submissions on pressure to that.

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TAYLOR, A-J.A.: You mean you are not going to challenge the findings that were against you on pressure.

MR. GRUZMAN: No.

TAYLOR, A-J.A.: You want to go into the findings that were favourable to you?

MR. GRUZMAN: No. What one has to do is to show your Honours the whole of the evidence.

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TAYLOR, A-J.A.: We have read it.

MR. GRUZMAN: I realise that. I mean, refer your Honours to the whole of the evidence so that we can properly make submissions on those findings of his Honour which we ask your Honours to change. It is not enough to say there are findings in our favour. From that we ask you to deduce so and so. You will say "His Honour made these findings, it was not good enough for him, in effect he was not prepared to do so, why should we?"

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TAYLOR, A-J.A.: What you want us to do is to take the findings on specific matters on pressure or threats, call it what you will, that were found against you and satisfy us say that those findings were wrong.

MR. GRUZMAN: Exactly.

TAYLOR, A-J.A.: That does not involve surely going through the findings that were in your favour?

MR. GRUZMAN: Supposing there are 10 pieces of

evidence on pressure and his Honour found nine in our favour and one against us. It is not enough - it is impossible to present an appeal by saying "I will only look at the evidence relating to the one matter ---

TAYLOR, A-J.A.: You do not say that. You say "You have read the whole of the evidence in the case and that is why he should have found the tenth one is our favour". You can give us chapter and verse. I find it difficult to understand how it could possibly be either right or proper to go through all the evidence here of the findings in your favour. That seems to me to be nonsense. 10

MR. GRUZMAN: I am not adambating any particular length of time.

TAYLOR, A-J.A.: I am not talking about time, I am talking about futility.

MR. GRUZMAN: I am not saying how long it will take or how long it won't take.

TAYLOR, A-J.A.: The preliminary question of course is whether you should be allowed to do it. That is what I want to be satisfied about. 20

JACOBS, J.A.: You got as far as five different matters, commercial transaction, then what you call Armstrong, then pressure, then conspiracy, and then you were going to say something about the missing diaries.

MR. GRUZMAN: The missing diaries.

JACOBS, J.A.: That is five.

MR. GRUZMAN: The Hume statement, and then a miscellaneous submission which we would term the final submission on the facts. 30

MASON, J.A.: That will pick up all irrelevant matters not otherwise dealt with.

MR. GRUZMAN: Yes, your Honour, and the submission on the law. Within the conspiracy there will be a separate submission on Hume.

JACOBS, J.A.: Do you propose directly to relate those various subject matters to the conclusions which you ask us to reach and which you say the learned trial judge was in error in reaching or failed to reach? 40

MR. GRUZMAN: Yes, your Honour.

JACOBS, J.A.: You do. Can we have those various matters at this stage?

MR. GRUZMAN: Your Honours, all I can say is that it would embarrass me in the presentation of the appeal to --

JACOBS, J.A.: I must say it embarrasses me in that I do not know to what point you are referring to particular parts of the evidence.

MR. GRUZMAN: As I come to each point I hope I will make my position clear.

JACOBS, J.A.: So we will not have a list of the findings that are challenged or the findings of fact that you ask us to make.

MR. GRUZMAN: Your Honour already has that list.

JACOBS, J.A.: Where? 10

MR. GRUZMAN: In the judgment.

JACOBS, J.A.: By that underlining?

MR. GRUZMAN: Yes. There had to be some convenient way of presenting it to your Honours. We also put it in the notice of appeal, the amended notice of appeal.

TAYLOR, A-J.A.: That is Annexure "A"?

MR. GRUZMAN: Yes. But as a matter of the utmost convenience to your Honours we took a copy of the judgment, underlined it, and presented it to your Honours. 20

JACOBS, J.A.: Yes, that will be useful. It will be of great convenience to me if, in respect of each of these matters you did (provided that they are matters subsidiary to the matters in the notice of appeal) list them as though they were in the notice of appeal. That is to say, that his Honour was in error in making this finding, he ought to have made that finding. You mentioned an amended notice of appeal, but I have not looked at that document, and I do not propose to do so. Therefore I would be grateful if whatever matter in it that you wish to put as subordinate matters to your general grounds of appeal were set out. 30

MR. GRUZMAN: Put it in another form?

JACOBS, J.A.: Put it in another form. If I can give an example, that his Honour erred in holding that there was not sufficient evidence to make a judicial finding - that may be as particular as you want to make it. His Honour's finding that the plaintiff was not coerced was against the evidence and the weight of the evidence. Whatever elaboration you wish to make on that, in broad form, I would find it of assistance. 40

MR. GRUZMAN: With respect, if your Honours suggest that we should at this stage give a summary of our submissions, we are unable to do so.

JACOBS, J.A.: Why?

MR. GRUZMAN: It is not practical to do so. It

would be a tremendous task, which we have not undertaken. If your Honours wish to know these matters which we challenge, then your Honours already know them. On the other hand, if your Honours wish it in a more particular form, of course we will provide it. For the remainder, we have indicated the course of the address, your Honours know what we are challenging ---

JACOBS, J.A.: How do we know what you are challenging; because you have said so?

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MR. GRUZMAN: Yes.

JACOBS, J.A.: In this preliminary survey that you made?

MR. GRUZMAN: No. Your Honours know what we are challenging because we said specifically in his Honour's judgment these are the matters in his Honour's judgment which we challenge. There are some other matters which are not referred to in his Honour's judgment. Indeed, his Honour said, "I will not make a finding on certain matters". Some of those we make more in question here.

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JACOBS, J.A.: If we know what you are challenging and we know what the further matters are that you wish to assert, would you please reduce those to writing?

MR. GRUZMAN: Yes.

JACOBS, J.A.: The ones that we know?

MR. GRUZMAN: We certainly shall. I can present it to your Honours tomorrow morning.

JACOBS, J.A.: That will be comprehensive, of course.

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MR. GRUZMAN: Yes.

JACOBS, J.A.: Because we know, and we know what you know.

MR. GRUZMAN: Indeed, your Honour, yes. We were under the impression we had already done so, but we will do it.

JACOBS, J.A.: I think to a degree you have. It would help me.

MR. GRUZMAN: May I say one of my learned juniors has pointed out that perhaps I am being a little optimistic in saying we will present it to your Honours by tomorrow morning. Would your Honours leave it with us to present as soon as human endeavour can get it ready?

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JACOBS, J.A.: Before too long, because it then means that all the time it will not be necessary for us to say "Why are you referring to this aspect of Mr. Armstrong's evidence?" or something of that kind. You have dealt with the commercial transaction, haven't you?

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MR. GRUZMAN: I have started, your Honour. I have started, and I have opened the commercial transaction.

JACOBS, J.A.: But you took it right through to its conclusion, didn't you?

MR. GRUZMAN: No.

JACOBS, J.A.: What was the conclusion of it?

MR. GRUZMAN: The conclusion? I do not know whether I am perhaps not making myself clear. I have taken your Honours to the position at the 14th December when the negotiations started.

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JACOBS, J.A.: I thought that was the time you were really concentrating on as the commercial motivation.

MR. GRUZMAN: No. I had indicated to your Honours that I would be looking at at least four dates, the 14th December, 22nd December, 4th January and the 17th January.

JACOBS, J.A.: I am sorry, that was my error, Mr. Gruzman. I had forgotten you had indicated those four categories.

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MR. GRUZMAN: Before coming to the second period, which is the period from the 14th December up to the 22nd December, may I take your Honours to the volume we prepared entitled Commercial 1. I am not going to look at every document here, but some of them it may be ---

TAYLOR, A-J.A.: Where does the first document appear? I have been looking at Exhibit 56, I haven't been able to find it.

MR. GRUZMAN: Page 2956. I think your Honours will find these are simply pages out of the appeal book, nothing else.

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MR. POWELL: May I just intervene to say this, that if my friend is not going to make a copy of this available to us, I would appreciate greatly if he tells us what he is looking at, and what pages he is looking at, so that we can understand what he is talking about.

TAYLOR, A-J.A.: I cannot hear you.

MR. POWELL: No copy of this has been made available to us. I was merely asking that my friend be directed to indicate specifically what he is looking at and what is the page he is looking at, so that we can understand the nature of the evidence.

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JACOBS, J.A.: I think you have no objection to that, Mr. Gruzman?

MR. GRUZMAN: No, none at all.

JACOBS, J.A.: Would you make sure that your juniors

give a consecutive list of the pages in it as they appear in the document.

MR. GRUZMAN: Yes, we will do that. If I might answer your Honour Mr. Justice Taylor, you might assume that each page is in fact a page torn out of the appeal book.

TAYLOR, A-J.A.: What I was looking for was the minutes of 8th July, 1966.

MR. GRUZMAN: At page 2956.

TAYLOR, A-J.A.: That is the annexure. What I cannot find is the minutes. I want to find what was said about that in the minutes; what it is, how it came to being. There is a minute of 8th December, 1966, in which Mr. Armstrong signed some other minutes as being correct. What happened to the minutes of 16th June, 1966? They are signed as a correct record on page 2911. The next meeting is the 16th September. 10

MR. GRUZMAN: It is one of the defendant's exhibits. As far as we can see at the moment it was a document of which the annexure was tendered and not the minutes. 20

TAYLOR, A-J.A.: Do not worry about it. Apparently they are not there. It is a document signed by the managing director.

MR. GRUZMAN: The minute book is in court. As a book, it is not in evidence.

JACOBS, J.A.: I accept this would be a document which was some evidence, if it was signed by Mr. Barton, of his opinion of the financial negotiations as it is called at that date. 30

MR. GRUZMAN: July 1966. What does it show? For our purposes we are not interested in the details except that Mr. Barton at that time was apparently arranging quite substantial financial transactions, and it probably is part of the evidence which his Honour had in mind in saying - I have forgotten the phrase he used - "quite a good businessman". He is obviously a man accustomed to handling amounts such as this. The first amount is one and a half million. These are, I think, according to the evidence, instructions left by Mr. Barton --- 40

TAYLOR, A-J.A.: They are not the instructions, that was a long time before. They have some similarity.

MR. GRUZMAN: That is right.

TAYLOR, A-J.A.: Not these figures.

MR. GRUZMAN: No. Page 2957, line 20, under the payments of \$200,000 and the \$246,000 to Armstrong, and the Armstrong companies. We have not been able to identify this, and nothing turns on that. The next provides for the loan of \$680,000 from 50

U.D.C. These by the way are in chronological order. When I say they have been taken out of the appeal books, they have been put in date order. So that turning them over, you are getting the sequence. The 16th September is where things look all right. They show a net profit apparently of \$212,000 and they recommend a dividend of five per cent. That is the origin of that five per cent. dividend.

TAYLOR, A-J.A.: Is that a dividend for the year or a dividend for the half year?

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MR. GRUZMAN: For the year, I think, referring to a proper year. The next one does not seem to matter. On 1st November we start seeing the immediate incline commencing with a move - this is the Paradise Waters meeting of 1st November when Mr. Armstrong moves that Mr. Beale be appointed a director. The motion was not seconded. It was opposed by Mr. Barton and Mr. Bovill pending their seeking legal advice.

MR. GRUZMAN: Then Mr. Armstrong was removed from the chair on 8th November and Barton was appointed. Cotter was appointed and at the request of Finlayson Mr. Beale was appointed.

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The next document is the meeting of directors of Landmark on 8th November and I do not think anything turned on that. At the meeting of Directors of Paradise Waters Sales on 8th November also, Armstrong was removed from the chair and Barton was appointed, also Cotter and Beale. "Mr. Armstrong stated that he ... without the express permission of the board". On 10th November there is a letter from Mr. Armstrong's solicitor seeking the appointment of persons to the board.

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JACOBS, J.A.: You are going over the same period as you have already dealt with.

MR. GRUZMAN: I am referring your Honours to the documents.

JACOBS, J.A.: We have the documents. You can do that in writing. We want to hear your submissions on the matters of fact that you say ought to have been found by his Honour or which are supported by the evidence and where his Honour was wrong. You can give the reference to this at that time, or you can put your detailed references in writing or in a chronological form like this for our subsequent assistance.

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MR. GRUZMAN: I am sorry, your Honour, but I do not mean to not understand your Honour but, with respect, I do not understand what your Honour means.

JACOBS, J.A.: It seems to me you are going over this twice.

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MR. GRUZMAN: I have not referred to the documents. I am doing it to the best of my ability, but I submit that I must be allowed some freedom of action.

JACOBS, J.A.: You will be allowed every freedom of action, but not to go over the same period twice.

MR. GRUZMAN: It is not the same period. I have made some submissions and now I am going briefly over the documents.

JACOBS, J.A.: And that finishes this period then?

MR. GRUZMAN: This will finish this period.

JACOBS, J.A.: Will you go over them quickly, because we have read them all?

MR. GRUZMAN: I appreciate that your Honours have read every one of them but your Honours see how a mistaken impression can arise as to where Mr. Barton was found to have told a deliberate untruth. If a mistaken impression could arise in that way, as to whether in fact Mr. Barton told a deliberate untruth or not, it is my duty to seek to invite the attention of each of your Honours to those matters in the evidence which I consider important.

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TAYLOR, A-J.A.: You mean to persuade us that the Judge's finding about his credibility was wrong?

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MR. GRUZMAN: If necessary, but your Honours may wrongfully assume that he made that finding ---

TAYLOR, A-J.A.: Do you claim that his Honour found that it was deliberate?

MR. GRUZMAN: Once once has that I can fairly submit that his Honour was wrong in finding that a certain conversation did not take place.

TAYLOR, A-J.A.: You have the accepted facts that his Honour found that your client was telling the truth, hedged around with many reservations.

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MR. GRUZMAN: I am going to submit that there is evidence which your Honours can consider along these lines. On 14th November the argument was taking place, the documents are before your Honours as to the appointments of these people.

Your Honour Mr. Justice Taylor, with all respect, had some impression that this U.D.C. proposition, in the letter, may not have meant exactly what it said.

TAYLOR, A-J.A.: I have no doubt about what it said and what is meant - it said what it meant.

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MR. GRUZMAN: As to whether it was really said and meant to be acted on. Your Honour may be quite properly affronted by it, but as to the realities of the situation one has to look at the evidence.

At 17th November: "At 10 a.m. Mr. Armstrong spoke to Mr. Honey provided the status quo was maintained". Then on the next page: "It must be assumed .. they have no doubt made provision for

this debt to be paid". On 17th November there is a board meeting, your Honours will remember referring to the fact that the letter did not come from U.D.C. until the 23rd November. (Read.) So that Armstrong was very happy indeed to get paid out by U.D.C. At the same time Mr. Bovill was appointed chairman.

JACOBS, J.A.: I think it would assist if you gave the appeal book references as well.

MR. GRUZMAN: I refer to page 2926, and also page 2927.

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JACOBS, J.A.: I think it best if you give the appeal book reference, otherwise the transcript of the argument will be very confusing.

MR. GRUZMAN: The trouble is that your Honours won't find it unless I give these pages as well. It is page 2927 (Com. 1. page 33) "The Stock Exchange was also notified ... in the United Kingdom." Dare, Reed, Martin and Grant say that "the Stock Exchange were notified that Mr. Armstrong ... anyway". On 21st November the \$400,000 is called up by George Armstrong from Landmark, from Paradise Waters, and then Southern Tablelands calls up \$500,000 from Grosvenor Tablelands. The next one does not matter, it is just fixing a meeting to increase the number of directors of Paradise Waters Sales.

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At the next meeting of Landmark it will be seen how Mr. Barton becomes the chairman because Mr. Armstrong tabled a letter (page 2067; Com. 1. page 40) - (read). Mr. Armstrong produced that letter from Supervised Investments stating that Mr. Bovill did not hold the required shares to qualify as director. I think it transpired in the evidence that the shares were in the parent company. Mr. Bovill stood down from the chair and Mr. Armstrong was appointed to the chair.

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At page 2068 (Com. 1. 41) "The director ... special notice to shareholders". At line 48 Mr. Barton read the letter from U.D.C., it being 24th November so presumably that was the letter of 23rd November. The next document is the actual letter to which I have already referred your Honours. It concerned the advance of \$450,000, dated 23rd November, and it is a reply in the event of these companies not withdrawing their present demands by 25th November, 1966 - this, of course, is well before the annual general meeting.

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On 25th November Allen Allen and Hemsley write and say "How much ... amount you require", etc. Then of course there is the general meeting which intervenes on 7th December, and Dare, Reed, Martin and Grant on behalf of Mr. Armstrong write for the money. They will send back the securities which are set out conveniently there.

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TAYLOR, A-J.A.: That is the letter you referred to us yesterday about the settlement that never happened?

MR. GRUZMAN: Exactly, but at that stage, on 17th December, it was going to happen. It was anticipated by everybody. That is important.

TAYLOR, A-J.A.: Was it not that day or the day after that you say that Mr. Armstrong knew it was not going to happen?

MR. GRUZMAN: No, your Honour, the 8th December, the day before. At this stage when this letter was written they thought it was all right, it was not until the next day - as we can tell from the evidence - that the blow fell. 10

On the same line of page 2968 (Ccm. 1. page 48) Paradise Waters Sales resolve to seal the document relating to the \$400,000 loan. We have referred your Honours to the judgment of Street, J. or the decree which also came out on 7th December.

On 9th December are the letters relating to Mr. Smith being authorised to have a look at the affairs of the company. On the 12th Mr. Barton says that he does not put any reflection on the personal integrity of Mr. Smith but because he is the chairman of the company's main competitor and of other companies which are competitors he thinks it is better to have someone else. 20

On 12th December Allen Allen and Hemsley are writing to say that they need a release, and they include a draft of it, in connection with this money. This correspondence goes on, as we have indicated, as rather a fruitless correspondence.

On 13th December, page 2775; (Com. 1. page 64, line 31) Dare, Reed, Martin and Grant write, saying "We note the last paragraph of your letter under reply ... to make any application". Then at page 2450 (Com. 1. page 67) is a letter from Mr. Barton to Mr. Honey saying "Here are the certificates for \$80,480, please pay them". 30

JACOBS, J.A.: Was that certificate ever paid?

MR. GRUZMAN: The evidence does not show. There is some evidence which would suggest that as late as April it had not been paid. 40

On the same date - page 2449 (Com. 1. page 72) Mr. Barton writes to Mr. Honey in these terms, "We refer to the agreement with your company ..."

JACOBS, J.A.: Is it a fair summary of that to state that it is a letter from Mr. Barton to U.D.C. demanding performance of the deed?

MR. GRUZMAN: Yes, and threatening specific performance. It is a letter obviously written by counsel as a prelude to a suit for specific performance.

TAYLOR, A-J.A.: A letter written by a man who knows that he is not going to get the money? 50

MR. GRUZMAN: Yes, a man who has gone to his lawyers and said "These people have not gone ahead with their bargain. I want you to sue them." The lawyers write this letter and say "Unless this occurs by 2.30 p.m. today ... and its subsidiaries will suffer." It is a letter written by a man who knows that all is lost, written on the instructions of somebody who knows all is lost. He writes to his biggest financiers and threatens to sue him for specific performance and says the damages are irreparable. That letter can mean nothing else but that.

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TAYLOR, A-J.A.: It was not written by a lawyer. It was written by Barton. You mean it was drafted by a lawyer?

MR. GRUZMAN: That is right, your Honour. I would suggest that the format of that letter is the sort of letter which would be written by quite a good commercial lawyer. It sets out the necessities. First of all in paragraph 1 there is the reference to the \$450,000.

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TAYLOR, A-J.A.: I know what it sets out.

MR. GRUZMAN: Your Honour is suggesting it is written for a different motive?

TAYLOR, A-J.A.: I did not say it was written for a different motive at all. I said it was written by a man who knew that he was not going to get the money.

MR. GRUZMAN: The \$60,000 is the part performance, and that is referred to. In effect the estoppel in the second paragraph - "It has been used with your consent" - "we are ready and willing ..." - and in the third paragraph "specific performance", "irreparable damage" in the fifth paragraph; so it is a lawyer's letter if ever there was one, and, of course, referring to the letter written by Dare, Reed and Martin to Allen, Allen and Hemsley of the same date to appoint a receiver if the payment had not been made by 10 p.m. on the Friday - page 2775 (Com. 1. page 64).

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We have now reached the position where the parties start negotiations. One might ask oneself immediately and firstly, why a negotiation at this stage? Who would think that at this point of time Barton and Armstrong would suddenly start negotiating with one another? What did they have to negotiate about? If there was any urgency - I have already indicated this - it was an urgency of U.D.C. - Armstrong was neutralised. He has a conference, goes to see Mr. Smith, and at page 2784 (Com. 1. page 56) this document comes into existence - "I suggest that Barton makes a firm offer in writing which is subject to acceptance within 48 hours ... will resign from the various boards". There are some notes of Mr. Grant's which subsequently find their way to the letter ...

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TAYLOR, A-J.A.: It is not dated.

MR. GRUZMAN: It is not dated but the evidence was that it was 13th December.

TAYLOR, A-J.A.: Following the first conference with Armstrong and Smith?

MR. GRUZMAN: No, I don't think so your Honour.

TAYLOR, A-J.A.: I said "it followed"?

MR. GRUZMAN: Your Honours' copy of the photostat and also mine may not have this shown on it. I think the original document has the date fourteen crossed out and above it the date thirteenth, with a query. I am afraid that there are two copies of this which found their way into evidence. The 14th November has been crossed out and the 13th November added. So there we have the genesis of the agreement.

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I have referred your Honours to the succeeding letters of that date.

Page 2722 (Com. 1. page 73) is the next document of 14th December, headed "Negotiation with Mr. Barton" - (read). That brings me up to the \$805,600. There is what Armstrong is to do - he is to resign as the director of all the companies and Armstrong undertakes not to make statements against Barton.

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TAYLOR, A-J.A.: I am right, am I not, Mr. Gruzman, in thinking that at about this time efforts were being made in the letter, which had never been withdrawn, to appoint directors to Paradise Waters?

MR. GRUZMAN: Yes. One of the matters in his Honour's judgment which we are going to specifically challenge is his Honour's suggestion that Mr. Armstrong was a reluctant vendor. From time to time I will make reference to that, but one sees the genesis of the arrangement - Armstrong's requirement than an offer be made within 48 hours.

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Smith's evidence was that when he saw Barton he listed the proposals and at the end of the interview said that he would let Smith know on Friday as to whether he would be able to reach a firm arrangement in line with the discussion. One of the simple matters about this transaction is the figure of 60 cents, as we have seen, which was Armstrong's or Smith's figure for the shares. Mr. Barton, we know, was a business man. One would have thought that even instinctively he would have offered less. The most simple circumstance of all in this negotiation, as I will demonstrate to your Honours in a moment, is that Mr. Armstrong was prepared to take less. Mr. Armstrong was prepared to accept 50 cents for the shares and obviously less. Nevertheless, and this will go to the question also of the reluctant vendor and indeed to the whole negotiation - one finds Barton, a business man, tamely agreeing to pay 60 cents for shares then worth 33 cents on the Stock Exchange and much less

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to anyone who knew the facts of this company. They were, indeed, worthless.

The only figure in the negotiations of which there was ever any difference was the figure in the interest in the Paradise Waters Sales and that is a profit which was never to be earned. The starting figure, according to Smith, was \$175,000. The starting figure according to Barton was \$100,000. The finishing figure (it is common ground) was \$100,000 plus some options, and that varies - as your Honours will see in a moment.

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There is a little bit of evidence on the question of the options which I would like to read to your Honours. If your Honours will take up Commercial 2 at page 579 (this is in the evidence in chief of Smith) Smith said "\$175,000 is too high ... I will agree to that". Probably your Honours might think that was a significant statement by Mr. Armstrong because in the evidence in chief of Mr. Smith, his negotiator and advisor, "a suggested discount on the block of land did not mean ..."

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TAYLOR, A-J.A.: What was the suggested discount?

MR. GRUZMAN: Barton had said that instead of money he would give him 40 per cent. discount on the blocks of land.

TAYLOR, A-J.A.: He said that is what he would give him at a price below the list price. Armstrong said, "You have an option to purchase a number of blocks at a discount"?

MR. GRUZMAN: If it were said that is not what happened at all.

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TAYLOR, A-J.A.: I am reading from the transcript. He said the discount would be so much and then Armstrong said "The discount should be 40 per cent. off the list price".

MR. GRUZMAN: No. What happened was that Armstrong said "It is worth nothing", but Smith did not say that. Barton, with whom he was negotiating, was alongside of him and Smith said something that Armstrong had never said, namely, "Armstrong wants 40 per cent. off". It is a very important piece of evidence. Smith is a witness who has been accepted by both sides. Smith's credit has never been called into question.

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TAYLOR, A-J.A.: It means that Smith said to Barton "Armstrong considers that the discount should be 40 per cent".

MR. GRUZMAN: That was not true. Mr. Smith is not speaking falsely or telling fibs in his evidence, he is the negotiator.

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TAYLOR, A-J.A.: Had Armstrong told Smith that?

MR. GRUZMAN: No, never.

TAYLOR, A-J.A.: Smith made that up?

MR. GRUZMAN: Exactly.

TAYLOR, A-J.A.: What follows from that?

MR. GRUZMAN: The question is: What was in Armstrong's mind at this stage? The blocks, presumably, are going to be valuable only if the project gets to a certain distance. They are not valuable at the present time because all you have got is a swamp. So Barton says to Smith, one might say almost by way of a joke, "Tell him I will give him some options on the land at a discount". Then Smith says - does your Honour appreciate that Armstrong was not there? 10

TAYLOR, A-J.A.: Of course I do, he is on the telephone.

MR. GRUZMAN: He is on the telephone; Smith and Barton are in the room together, Smith is talking on the 'phone to Armstrong and Barton says to him, "I will give him some options on the land" and Smith says to Armstrong "He will give you some options on the land" and Armstrong says "You are joking. It is worthless". Then Smith translates that to Barton by saying "He wants 40 per cent. discount". So Smith is producing something. 20

It is an amazing thing that Mr. Barton's evidence is that on that day Armstrong had put the proposition to him on the basis of \$100,000, and that the blocks of land just cannot and just did not count for anything - that was not mentioned. And in the very first conversation with Smith it was \$100,000 cash and such make-weight as arose out of this discussion. But this is a little piece of evidence, Smith's evidence, which even though it is contradicted by Mr. Barton in certain respects, we can understand. Mr. Smith is the negotiator and we do not question his credit, and this is what he said happened. It throws a great deal of light on what both Barton and Armstrong thought of the future prospects at this stage. Barton on the one hand proffered it and Armstrong on the other hand said, "Take it away, I am not interested". 30 40

I will go further in a moment and show your Honours that Mr. Barton would have been very happy for Landmark to give Armstrong the whole project, let alone an option on 30 blocks - to give him the lot of it if he wanted it.

There were a few more questions asked by Mr. Bainton, on behalf of Mr. Armstrong, but I won't take your Honours any further through that.

The position at this stage is that we are now at this discussion which opened up this day, and immediately Mr. Barton is completely pliable, except on one thing (the \$100,000), as to which if you accept his evidence of what he said happened on that day - mainly that Armstrong had approached him 50

with a figure of \$100,000 and a threat and the other matters, it is entirely consistent that this would have been one matter he would stand by, because he knew what was in Armstrong's mind. Remembering also that the Trial Judge found that threat by Armstrong may well have been made on that day, although his Honour did not accept that the conversation about the negotiation took place with Armstrong, but it is accepted by his Honour ---

TAYLOR, A-J.A.: You are saying, as I understand you, that Armstrong never said to Smith over the telephone "I will take 40 per cent. discount". 10

MR. GRUZMAN: No.

TAYLOR, A-J.A.: When he came to sign Exhibit 39 he did agree to take 30 blocks at \$4,000 a block, at a discount. The whole point you were making was that Armstrong thought they were worthless.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: Yet he agreed to take this in the form of a discount. 20

MR. GRUZMAN: That is not a fair way of putting it. Armstrong had offered in the morning to take \$100,000 for his Paradise Waters, Smith came up and said "He wants \$175,000". Mr. Barton, knowing what was in Armstrong's mind, said "\$100,000". Then he said, "Tell him he can have some options if he likes", neither party believing that these were of any value. Armstrong's immediate reply, given by his own witness - a man whose credit is not called into question by either party - was to the effect that they are worthless. 30

TAYLOR, A-J.A.: Where does he say that? Can you give me the reference?

MR. GRUZMAN: At page 579, about lines 42 to 44. "Mr. Armstrong replied that the suggested discount on the blocks of land did not mean anything".

TAYLOR, A-J.A.: Yet he took \$120,000. That is what you say. You are the only person to state it.

MR. GRUZMAN: No.

TAYLOR, A-J.A.: At that stage all that was suggested was that he would give him something off the price? 40

MR. GRUZMAN: May I say this, and ask it rhetorically, "What warrant did Mr. Smith have for turning to Mr. Barton and saying 'Mr. Armstrong considers that the discount should be 40 per cent. off the list price per block'". What possible warrant did he have for that? This is simply the case of Mr. Smith, the negotiator, doing his job of negotiating. He knows that \$100,000 is the only thing on which Barton has stood firm, so why is he trying to get these so-called options at a so much better price? 50

TAYLOR, A-J.A.: The documents show that this arrangement in effect did provide for Armstrong or one of his company buying these blocks over a period of time at discount?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: That was a lot of ---

MR. GRUZMAN: Window dressing.

TAYLOR, A-J.A.: I appreciate your point Mr. Gruzman. You have other points, no doubt?

MR. GRUZMAN: Yes, your Honour; some of them as good as that. To say otherwise, with respect, would suggest that business men never do anything unless there is a reason which appeals to somebody with a judicial mind. But we will be showing in this case that this is not the only aspect of the case which appears to be quite incomprehensible unless your Honours imagine yourselves (if I may say so) in the hurley-burley of business life, doing a certain amount of wheeling and dealing. This is a classical instance. Mind you, I would not like to say that no lawyer has ever not in a similar circumstance been told by his client "Tell him I will take five thousand" and then that lawyer turned around and said to the other side "Our minimum is ten thousand". I venture to say that your Honours may find such a matter in any of your Honours' recollection. But this throws a great light on Armstrong's view of the value of this land. 10
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As a matter of fact, later on, of course he would doubtless have to recognise that they had a nuisance value but the fact is that they never were worth anything and Armstrong's original reaction to them was exactly and precisely right. 30

I might finish off this little bit about the block of lands options, just to trace it through the negotiations. First of all it is here as 30 blocks at 40 per cent., the 40 per cent. being dreamed up by Smith. Subsequently, at page 609, we find that Mr. Smith arbitrarily and again without reference to Mr. Armstrong changes it to 50 per cent. and later on it goes up from 30 blocks to 35 blocks. 40

TAYLOR, A-J.A.: Then it came back to 30 blocks at 40 per cent.

MR. GRUZMAN: No, it remained to the end as 35 blocks at 50 per cent. and on your Honour's reasoning it is worth \$55,000 to Mr. Armstrong.

TAYLOR, A-J.A.: The ultimate document presented was 35 at 50 per cent.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: And that increased the amount from \$120,000? 50

MR. GRUZMAN: Yes, to \$175,000.

TAYLOR, A-J.A.: They were said to be selling at \$10,000.

MR. GRUZMAN: They did not exist, the \$10,000 was someone's dream. Smith regarded them as \$8,000. According to the evidence, Barton never demurred at any stage when they increased the percentage or the number of blocks. Smith increased the percentage arbitrarily and spoke to Armstrong about it later as to, in effect, how well he was doing. But Barton never objected or demurred in any way but gave another \$55,000 in to boot.

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(Luncheon adjournment.)

MR. GRUZMAN: I was inviting your Honours' attention to the documents of 14th December and if your Honours would look at page 74 (Com. 1.) and page 2723 - some notes of Mr. Smith - probably I should remark that these documents were all tendered by the defendant under s. 14B of the Evidence Act. We ourselves at that stage were proposing to object to them. These documents revealed some matters with which your Honours are familiar and some additional matters (read). So he says over 1.8 million to stage 1 plus selling and advertising and so on. Smith's then estimate is the 190 blocks to Stage 1, costing two million and on his calculation it will only realise a couple of million and he says it would be \$500,000 light. At Stage 2, apparently a further \$650,000. He is also concerned - looking to the left of the document - about U.D.C. up to \$680,000. That was the amount up to which U.D.C. would advance on the value of the security plus the \$400,000, and he has worked out the various possibilities, and he refers to the Board, with himself as chairman - coming in on behalf of Mr. Armstrong - and giving him control on behalf of Mr. Armstrong. On the right of the document one recognises the proposition of \$400,000; the \$100,000, the \$60,000 penthouse has already appeared, and this is still only on 14th December. Then there are the options, etc.

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I want to skip over, for the moment, the next few documents but I will come back to them. Turning now to page 2785 (Com. 1. page 87), Mr. Grant was approached on that day. We have here his diary note. On 14th December is a most significant note on the document - "75 per cent. - 25 per cent. chance of pulling it off", This compares with his Honour's finding or reference to the reluctant vendor. Here is the vendor's solicitor when the deal is first brought to him, classifying the possibility of success as 75/25 per cent. chance of pulling it off. It is the exact antithesis of a reluctant vendor. Here again one recognises the same terms, although doubtless by accident the \$100,000 is omitted but that does not appear in Mr. Grant's note. There is no significance attached to that, it is just a fact.

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Before lunch I had mentioned that far from being a reluctant vendor Mr. Armstrong was prepared

to sell the shares down to 50 cents certainly, and I would suggest even further if necessary. I would ask your Honours now to refer to Mr. Grant's notes at page 2787 (Com. 1. page 84). These are Mr. Grant's instructions from Mr. Armstrong on the self-same day that the matter was first discussed (read). I did not follow that one about the 15 blocks from what has been discussed, but \$120,000 is there and it may be that there is something wrong with the figuring. "Shares 60 down to 50 cents if necessary ...". Here is this "reluctant vendor" prepared to sell the shares at 50 cents. Those are his instructions. How then does one think that if instructions of that kind are given what is to happen if Barton had offered 30 cents or 40 cents? One would not be surprised to see a deal effected at such a price or even lower. So on the one hand there is established without any doubt the deep urgency on the part of Armstrong to bring off this deal at any cost and the utterly simple attitude of Barton - a business man - who does not even raise a finger to protect himself from this 60 cents per share. All he had to do was to say one word and the solicitors already had the instructions. All he had to do was say "50 cents", which would be accepted. If he said 30 cents or 40 cents it obviously would have led to negotiations and one could understand, on those instructions, a price certainly around the market price being agreed on. That is assuming that Barton had any interest in buying these shares; remembering that there were more than a million shares free on the market, a dividend had been declared but not paid and the newspapers were full of the problems and there had just been an annual general meeting. One cannot imagine that anyone had much faith in the company and if word were dropped anywhere that Armstrong or Barton were selling a few shares the bottom would have fallen out of the market.

If Barton wanted to buy shares he would not have had the slightest difficulty. The shares would have gone down and one might assume that at 5 cents or ten cents Barton could have bought them, almost for nothing, if he be so minded. Of course, on the state of the company, nobody wanted the shares and the more one knew the less one would want them. I am reminded that according to the evidence of Mr. Grant (page 648 line 40) Mr. Armstrong signed and dated that document. So, far from being a reluctant vendor, Armstrong was prepared to do virtually anything - even from a commercial point of view, which is all I am talking about at the moment - to bring about this deal.

But of course at this stage what he is demanding is not only all the fringe benefits, as it were, but also the repayment of the \$400,000 and on that Barton was fairly ineffectually trying to do something. As your Honours will see in a moment, his eventual aim was to try to persuade Armstrong to take over all these supposed benefits, if there were any, in Paradise Waters. Barton, to use an expression "did not want a bar of it for Landmark and if there was to be any profit - if anyone

thought so - he must preferred Armstrong to make it. So he takes down to Smith as rosy a view as he can produce of the future of Landmark. Exhibit 38 page 2726 (Com. 1. page 77). This is presented to Smith and then to Armstrong, so the document before your Honours is produced by Barton and put before Armstrong.

So the first thing is that all these figures are contingent on the finance being obtained. In the December 1966 columns under "payments", looking down to Paradise Waters, one sees \$477,300, and the receipts at \$480,000. That assumes that the money is going to come from U.D.C. and be paid out to Armstrong. So the whole document is based on finance being provided. Of course Mr. Armstrong added at the top in big letters the comment "Where does the finance come from?" In other words Armstrong is saying "This is a lot of poppycock. Where is the money coming from?" which he knew, and everybody else knew, would not exist.

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May I ask your Honours if the photostats which your Honours have are good enough to read the writing? It is not very good on mine. Can your Honours read it?

JACOBS, J.A.: Yes.

MR. GRUZMAN: Because it is fairly important that one should know what Mr. Armstrong's comments were on this document. Halfway down on the right hand side "Waste of money here". In reference to the comment "Proceeds from some real estate sales" Armstrong says very succinctly "Bulls--t".

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JACOBS, J.A.: Yes, you need not ask if we can see it; just carry on with your address.

MR. GRUZMAN: Some of these matters are not very clear in my copy.

"It does not include ... on their own merit". Then "How" says Mr. Armstrong? In other words, Barton is saying in effect in this document that if you get the finance this is what will happen and Armstrong expresses in the clearest and most distinct language his firm belief that there is not the slightest possibility of any finance of that kind being obtained.

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Still on 14th December there is this correspondence going on between the solicitors, pages 2776-7 (Com. 1. pages 79-80) about the discharges on the payment of the money - which is never going to occur. The same applies to page 2778 and the document attached thereto. Then on the same day there is a meeting of the directors of Paradise Waters, page 2496 (Com. 1. page 86). Mr. Grant is appointed director and Mr. Barton reports that the certificate for \$80,000 has been issued and presented to U.D.C. and they have taken legal advice. On the Wednesday night there was a hold-up of the payment of the certificate and there was \$70,000 owing to sub-contractors and creditors who were dependant

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on this certificate being paid. Also on the same day there was a meeting of the directors of Paradise Waters Sales at 9.30 a.m. This was part of the moves in the directorship of this company.

So what had happened on 14th December? First of all, the preceding day Armstrong had told Smith "Get Barton to make an offer". Barton had immediately tamely made an offer. On 14th Barton said Armstrong approached him and said "Buy my shares for 60 cents, pay out \$400,000 and give me \$100,000 for Paradise Waters or you will get killed". The learned Judge found that he may well have been threatened that day but Mr. Armstrong did not put that proposition, but that Mr. Smith put a proposition to him there is no doubt - in substantially the same terms (and without threats) dealing with the \$175,000, that being the only thing to which Mr. Barton demurred (when he said \$100,000), which was inconsistent with him having had a conversation with Mr. Armstrong, he offers options and Armstrong reports that they are meaningless, but nevertheless the options are given.

May we pause for a moment to consider the effect of this proposal on Landmark? Let us suppose that your Honours were sitting here, hearing some application from the liquidator of Landmark concerning the self-same agreement and let us suppose there was no dispute between Barton and Armstrong and it was apparent that the directors had agreed on this. Let us see what would happen to this company. Here it was at a time when its substratum, which was finance and the continuity of finance, had been swept away from under it and it was floundering in the mud of this property at Surfers Paradise. It had certainly no firm prospects, it had no prospects at all. The principal creditor and the principal shareholder and the man who had been the fons et origo of the company, the man who had said that the company should be formed for utilizing his assets would then, I suppose, be salvaging what he could from this company. He has a \$400,000 loan which probably represents profits on something which he had sold to the company. He seeks to convert that into cash or at least to improve his security. He takes out of the coffers of the company - depleted as they are - \$100,000 on account of anticipated profit. He knows then that, according to Smith - his financial advisor - even if he spent another million dollars on this property you could not be sure of making more than \$100,000 gross profit.

But if one considers how much profit would have to be made before there would be an actual \$100,000 to go to Mr. Armstrong, let us look at it. All of the monies involved in that development would have to be recouped. It is clear from Mr. Smith's document that you would probably spend some \$2,000,000 before you reached finality. There were 430 blocks of land which had to be sold. The blocks had to be sold, the funds had to be realised and actually got into possession - which would depend on what end finance could be arranged. One

did not know what vicissitudes the job would face and then it had to find its way into the funds of Paradise Waters Sales - quite an enormous sum of money (let us say at least half a million dollars). So, after they paid the 42 per cent. or 47 per cent. there was still left something like 250,000 clear - this is after everything - of which Mr. Armstrong would be entitled to 40 per cent; which roughly is \$100,000.

Now, the real possibilities of that occurring were at that time non-existent. At the best of times they would be remote. In any event it was a long-term (five or six years) project. So, on what possible basis could one justify the director, the chairman and creditor of the company, getting out of the company this \$100,000 of profits it certainly could never have earned in view of the events facing the company and which, even if it could earn it, might never have been earned. It was an utter dereliction of duty on the part of Mr. Armstrong to take these funds from the company in any circumstances.

Indeed, if one considers also what was obviously in contemplation when the land at Paradise Waters was sold to the company, it is clear that this \$400,000 which remained unpaid and was intended to remain unpaid until 1969 at a comparatively low interest rate was what, if anything did, justified the transaction. It could never have been in the contemplation of the parties that that \$400,000 which had never been earned by the company and which the company did not have would ever be paid to Armstrong unless the company earned that profit.

So, whatever the legal document might have said, that was the reality of the situation.

So what we put is this: So far as Landmark was concerned this transaction was a fraud on that company. It was a fraud on Landmark and it would not matter how many directors agreed with it. It had the effect of taking away from the creditors of the company and all the shareholders monies which they were entitled to. The money which Armstrong got (I refer particularly to \$100,000 for Paradise Waters) was money which was not in the giving of the directors of Landmark. I say that if your Honours were sitting here and considering an application by a liquidator of Landmark your Honours would be impelled by the impropriety of the transaction to set it aside.

And then, if that were not enough, I am reminded about the true effect of these options. I will deal with the negotiations for them later on, and it seems to be true enough that so far as Barton was concerned he did not seem to care very much about the options; if they wanted a few, more or a bigger discount, they could have it. Just the same I would ask your Honours to contemplate for the moment what the effect of these options was.

Firstly, at the time of these events I think the evidence is that 75 per cent. of the dredging had been concluded. Of course we know there was a million dollars to be spent on other parts of the work, perhaps millions of dollars. But if the work continued on any basis at all it was not unlikely that before the company finally came to a halt some blocks might have been purchased. There were 430 blocks to be produced altogether, I think there were 192 in the first stage. Assuming that work continued somehow or other for a time before the company ultimately collapsed, then I suppose some blocks might have been produced.

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Now, the effect of the options was to give to Mr. Armstrong a right of pre-emption at half the list price of the first (in the end) 35 blocks produced. So, again, if the company had by any means staggered through to the point of producing 35 blocks of land Mr. Armstrong was to be entitled to take them. Not only to take them, but as your Honours see from Mr. Smith's calculations, certainly on the first 192 blocks there was virtually no profit. So if he got those at half the list price he was getting them at well below the cost price. So, again, he was taking away from the creditors and shareholders of this company money which was truly theirs.

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TAYLOR, A-J.A.: I thought you said it was worthless.

MR. GRUZMAN: I did. One has to look at possibilities. (A) These were worthless, but the company had some funds - it did not have millions. Let us suppose that another \$100,000 or \$200,000 had been spent on the land and let us suppose that by some fortune of chance some of the blocks were completed. The company would still be doomed, but if any of the blocks had been completed - even ten per cent. of them - Mr. Armstrong could have taken the lot at half the price.

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So I do not think, if it is a matter of submission, that anyone really thought that those blocks were worth anything. I think they were a joke. But just in case the company had managed to get anywhere with the project Mr. Armstrong was enabled to take them. Not only that, but again the effect of that on the company was to make even more certain the impossibility of getting further finance because what finance company would advance funds if the first 35 blocks produced were to be sold at half price? And, further, if Mr. Armstrong had this right of pre-emption then he could take the first 35 blocks and still have at any price - he only had to get half the number - something like half the price and so could ruin the selling of the whole estate, even if it had got anywhere.

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So that I do not think there is any doubt about it, these options were on the evidence treated by both parties as being a joke and worthless but the fact is that it sealed even more completely the

fate of Landmark. That being so, one can well say that if Mr. Barton had had any real thoughts that this project would proceed he would have resisted tooth and nail the giving of these options, because this gave to Armstrong the possibility of ruining the project.

So that as at 14th December, low and behold, out of the blue this project - at the time when Barton is in grave trouble because U.D.C. has taken this step and everybody is in grave trouble because of it - Armstrong is suddenly presented on 14th December, at the lowest ebb of the fortunes of everybody, with a proposition which involves giving him something of the order of about \$800,000. Low and behold, without a moment's demur, he accepts in substance immediately what is proposed. That is hardly the action of any man, let alone a business man, who is a free agent. 10

On 15th December (page 90) there are some further notes of Mr. Grant. I won't take your Honours through this in detail but he refers there for the first time in his notes to the \$100,000. One might imagine that Mr. Grant and Mr. Smith must have been amazed at the ease of these negotiations. They, of course, were entirely excluded from the threats and the subterranean forces. They must have been amazed to think that here was a man going into a deal for \$700,000 or \$800,000, involving himself and his family and everybody else about him, with \$180,000, and never even says "boo". Anyway, there are Mr. Grant's notes of 15th December where he is getting towards the sort of document - the Landmark guarantee, the U.D.C. guarantee and so on. 20 30

On 15th December, page 2783 (Com. 1. page 91) is this unreal correspondence about the payment of the money which is never going to be paid, and it continues.

The next document is Mr. Smith's document, page 2728 (Com. 1. page 92). There is no date on it but I think the evidence shows it is 16th December. It then appears to him on this day - "\$500,000 mortgage ..." That was to be paid by 30th April, interest 12 per cent., the security he regards as the units in Paradise Towers, \$250,000 and a second mortgage on Landmark House. He talks of discount on 30 blocks, \$120,000, discount on the penthouse, \$20,000 and the shares, \$180,000 - which is \$820,000. This is not added up in the actual document. 40 50

Then there is ratification of the end finance of Rozelle. There is a long story about it, with which I won't bother your Honours. I think your Honours asked me about the Rozelle flats, which had been built by Landmark, sold to Armstrong and there had been some agreement about Landmark providing end finance, but your Honours will become interested in this again later in connection with Mr. Hume, because I think it was put forward as one of the justifications for the payment of some money to 60

Mr. Hume. That is a matter to be dealt with later.

Your Honours will note that again without a word of demur from Barton, blithely, the interest rate went up from seven and a half per cent. to twelve per cent. Your Honours will find in these negotiations that it is virtually true to say that Armstrong just asked and he got. There is hardly a word of evidence about this interest rate going up.

Mr. Smith notes that "Mr. Armstrong requires security over the Landmark shares and the Paradise Waters shares whereby if the money is not paid ... \$10,000". The second mortgage is to remain and that was the agreed value for them. 10

On 16th December there appears one of the documents which deals with an incident that gave Mr. Barton some trouble in these proceedings. Here he is, having been let down - as he sees it - by U.D.C. On the 16th December he writes and says - having set out the contents of their letter - "I now wish to inform you that other arrangements ... and the above arrangement is no longer required". Your Honours are entitled, if I may so put it, to raise your eyebrows at that in the light of my submissions. But what are the realities? 20

TAYLOR, A-J.A.: You mean it is not true? Is not that what you are saying?

MR. GRUZMAN: Precisely.

TAYLOR, A-J.A.: Your client is a liar?

MR. GRUZMAN: Not a liar, your Honour; he was a business man. 30

TAYLOR, A-J.A.: Are they the same thing? I draw my own conclusion from it.

MR. GRUZMAN: I appreciate your Honour, Mr. Justice Taylor being decent enough to indicate to me how you regard it. It is a help, really it is, and it is my function, if I can, to persuade your Honour of the realities of it.

It is so different - I hope your Honour will permit me to say this - sitting on the bench and dealing all the time with the most strict use of words, where accuracy and care in these matters are prized beyond all else. But it is so different in the hurley-burley of the commercial world. There are varying forms of commerce. There is the car salesman --- 40

TAYLOR, A-J.A.: Let us leave car salesmen out of it, and keep to the point.

MR. GRUZMAN: This is something I wish to put. With respect, your Honour it is not possible to make these submissions without explaining as best I can --- 50

TAYLOR, A-J.A.: If you cannot make a better explanation than that ---

MR. GRUZMAN: But I do wish to make it.

TAYLOR, A-J.A.: You can please yourself about it, but I do not propose to listen.

MR. GRUZMAN: I am sorry, but I can only do my best. There are varying degrees of methods.

JACOBS, J.A.: Mr. Gruzman, can you tell me where is the note about the interest going up from 7 to 12 per cent? I have got the 12 per cent., which is in the 16th December document. 10

MR. GRUZMAN: If your Honour would look at pages 613, 614: "Is there any difference between what Mr. Barton put to you ..." I do not think your Honours will find much evidence on it.

I was trying to put the difference in approach between a business man who is responsible to the shareholders, to a company, the Stock Exchange, the public and how he regards what he says and what he is likely to say and do, compared with how the same actions appear to a Judge of the Supreme Court who is called upon to look at and analyse every word that he has said and every action that he has taken. In our submission it is not correct to judge a business man by those standards of accuracy which are expected of a witness on his oath. Mr. Barton was in this position: U.D.C., if one wanted to use harsh terms, really had simply reneged on what they had said they would do and Mr. Barton was sufficiently seized with that notion that he had written a letter threatening legal action. What does that achieve in the business world? First of all, he had been advised (the evidence shows) that he did not have a legal cause of action. All he had was a letter, he had operated on trust ... 20 30

JACOBS, J.A.: 8 per cent. was the interest rate.

MR. GRUZMAN: Seven and a half appears in it somewhere, I am sure.

JACOBS, J.A.: It is 8 per cent. on the mortgage, seven and a half per cent. was the right --- 40

MR. GRUZMAN: 8 to 12 per cent. for the purpose of my submission is not a lot of difference.

JACOBS, J.A.: It was not 8 per cent. put forward by Mr. Armstrong through Mr. Smith. It may be in Mr. Armstrong's writing, but he said it could be more.

MR. GRUZMAN: That was the proposition, as I understand it, and your Honours will see that develop later. Our submission is that the interest rate went up from 8 to 12 per cent. with no demur by Barton. That is the substance of the submission. 50

TAYLOR, A-J.A.: You mean if the deal went through the mortgages that would be entered into would carry 12 per cent?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: They did in fact carry 12 per cent. This is a proposal of what interest would have to be paid if the agreement went through; on the mortgage, 12 per cent. payable monthly.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: That is the usual rate for a second mortgage, is it not? 10

MR. GRUZMAN: It had not been right up to that.

TAYLOR, A-J.A.: No, because at that stage Armstrong would be content to leave his money in second mortgage at seven and a half per cent?

JACOBS, J.A.: How do we know that the 8 per cent. was communicated to Mr. Barton?

MR. GRUZMAN: I will give your Honour the answer to that letter.

What I was dealing with was this matter which raises itself in other aspects - "It is a miracle. Now we have got rid of Armstrong nothing will stop us". These comments by Mr. Barton, which in one context are used against him, show that he genuinely loved this deal. These were used against him, used to show that he was happy with it, wanted to do it, and thought everything was excellent. It is for your Honours to say what were the realities of the situation. When he said that, did he mean it? If not, why did he say it? Did he say it with his tongue in his cheek or how? That is one of the matters your Honours will have to consider. 20 30

Let us have a look at a way we can test it out, in connection with the U.D.C. matter. If one advantage be obtained from a lengthy hearing for everybody and for the interest of justice, you can assume that there has been a reasonable amount of research on both sides. Barton makes a statement here which, if it were true, would put an end to his claim that he never thought he could get finance. Here it is in writing, over his own hand - "I informed him that other arrangements are being made for the \$400,000 which is still outstanding and the above arrangement is no longer required". 40

What were the other arrangements? Were there any? Did it turn out in fact that Barton had something up his sleeve, that he arranged finance? Was there evidence that there was a proposal which unfortunately broke down at the last moment? Was there any evidence that this was true? The answer is No. Barton has made this statement. There was no foundation for it whatsoever. Why? It is the same way, as your Honours will recollect the later evidence 50

which I will come to when he is in Surfers Paradise and Mr. Bovill rings him up and he and Cotter have a get-together and he said, "Look, this is not the way to get on with people. This is not how you treat your friends". I think that was the evidence. "Agree for us to write this letter" - which he did. If Barton conceded, remembering that he has no legal right and remembering that Barton has been advised that the company has no legal rights - once it became known in the City that U.D.C. had refused to finance, there would be an immediate run on the company. So all that is happening here is that Barton is whistling in the dark. For that not to be true - let us suppose your Honour Mr. Justice Taylor does not want to believe it and says "No, it is there in writing. Why should I believe it" -

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TAYLOR, A-J.A.: He did not have any other money. He had probably written to Dobbie (?) at that stage but had no chance of ever getting that money. Of course one view could be that if Armstrong was convinced that the money was not coming from U.D.C. then he probably knew he would have to sell.

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MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: The next thing that follows then within a few days was the directors meeting at which Barton was given an opportunity to get completely out of this deal and he refused to take that.

MR. GRUZMAN: I am sorry, your Honour, that is not the evidence. With respect, it is the exact opposite to the evidence.

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TAYLOR, A-J.A.: Let us not discuss it Mr. Gruzman. I have read it.

MR. GRUZMAN: Perhaps that is a different aspect of the evidence. All I can say is what happened in the next few days is that Barton said to Armstrong, "Take the lot. Just take Paradise Waters, take the lot; let us out". That is in writing, and I will come to that.

Your Honour, Mr. Justice Taylor, I think was possibly referring to the 22nd December and I was referring to earlier evidence. It is better if I deal with it in time sequence. I appreciate what your Honour was thinking. I was thinking of something else. May I refer to page 435, line 27, of Volume 2, which unfortunately is not in Com. 1 or Com. 2.

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Mr. Bovill in his evidence in chief - "I want to ask you about another conversation ... I would like to resign". That was Barton's attitude at that time. Here he is, apparently writing to U.D.C. and saying "We don't need your money". This is the letter of the 13th and that is unfortunately the letter that Bovill said he should not have written - "I think it is a bad letter". Barton's reaction is "The money is not coming through. I don't think it will come through. I would like to

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resign - I think it is finished". Bovill, a man whose credit is unimpeachable, said "He said 'I would like ... I do not think you will get it". Then he refers to the letter of 13th December, and following that conversation with Mr. Bovill a further letter was written on 16th December.

JACOBS, J.A.: That is the letter which said that other arrangements had been made?

MR. GRUZMAN: Yes your Honour.

It is difficult. The managing director of a public company has a lot of responsibilities. He has responsibilities primarily I suppose to the company and the shareholders and the creditors, and if there is one thing that is perfectly clear in this case it is that Mr. Barton was fully and completely alive to his responsibilities and acted up to them at all times. There is not the slightest suggestion throughout this evidence that Mr. Barton acted in any other way than a completely honourable man acting in the highest traditions of his duty as a director of a public company. Indeed, as your Honours know, Mr. Justice Street never found otherwise. When he wrote to U.D.C. in response to his co-directors request saying in effect, "Look, it is not the thing to do" and he wrote that letter, whether it was strictly accurate or not, and obviously it was quite inaccurate, it was done with a good heart and a proper motive notwithstanding it was inaccurate. There is only one significance; his Honour Mr. Justice Street uses, if I might so put it, that letter against him and uses other comments that I will deal with against him, saying in effect they meant what they said. It is simply not so.

JACOBS, J.A.: Could I ask you this, Mr. Gruzman, is it any part of your case that Mr. Barton, under duress of Mr. Armstrong, acted otherwise than in the best interests of Landmark?

MR. GRUZMAN: Yes.

JACOBS, J.A.: So he did act otherwise than in the best interests of Landmark?

MR. GRUZMAN: Yes. Under duress, yes.

JACOBS, J.A.: But under duress?

MR. GRUZMAN: Yes. I have already put to your Honours that if your Honours were sitting here considering this case on an application by a liquidator to set aside this deed, that your Honours would set it aside, and I assume for the sake of that submission that Mr. Armstrong and Mr. Barton and the other directors had all knowingly and without duress agreed on what was done. We have said that what Mr. Armstrong procured was a fraud on Landmark. I put that explicitly. Indeed, it is one of the bases of our submissions.

JACOBS, J.A.: Then you cannot say that he at all

times acted in the best interests of Landmark. It is your case that he did not.

MR. GRUZMAN: I said that he acted with a complete sense of honour and responsibility.

JACOBS, J.A.: Why didn't he resign?

MR. GRUZMAN: He offered to; he offered to.

JACOBS, J.A.: But why didn't he resign when he should have realised that under duress he was being required to put his interests ahead of the interests of Landmark? 10

MR. GRUZMAN: First of all he said, "I don't think that it is my duty as a director to go so far as to be killed". That is what he said. We uphold that.

JACOBS, J.A.: I agree with you, but that is not what I was referring to.

MR. GRUZMAN: That is what happened.

JACOBS, J.A.: That is the earlier occasion.

MR. GRUZMAN: No, your Honour, this was on the 16th January, the day before he signed this agreement. He said to Bovill, "I don't think it is my duty as a director to go so far as to be killed". It was a pretty reluctant -- 20

TAYLOR, A-J.A.: He had a way out of all this. He only had to resign from the board.

MR. GRUZMAN: What would happen then?

TAYLOR, A-J.A.: Whatever happened then, it was not his fault.

MR. GRUZMAN: I beg your pardon, I cannot understand your Honour. 30

TAYLOR, A-J.A.: Whatever happened then, it was not his fault. It would not be to his account, whatever happened then.

MR. GRUZMAN: If a director of a public company was as irresponsible as that, it would be a pretty poor show.

TAYLOR, A-J.A.: That meant giving up control.

MR. GRUZMAN: It is not a case of giving up control, he had started this matter because Armstrong, Mr. Bovill said, was picking the pockets of the shareholders. He acted throughout with a proper sense of responsibility, and we know what Armstrong replied to that. 40

TAYLOR, A-J.A.: I cannot understand, if you say he was threatened and he was going to lose all his money, he was going to ruin the company if he went

into it, it was going to ruin him, disaster, disaster and more disaster, why he did not resign.

MR. GRUZMAN: He could not do much more than ---

TAYLOR, A-J.A.: Tell me why he did not resign.

MR. GRUZMAN: Resignation at that point of time would probably equally have meant his death.

TAYLOR, A-J.A.: What!

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: There is no point in killing ex-directors, Mr. Gruzman. They cannot sign documents. 10

MR. GRUZMAN: He was worth, as I am reminded, \$600,000 dead to Mr. Armstrong. Well, your Honour with respect smiles ---

TAYLOR, A-J.A.: There is a bit more to it than that. Are you suggesting that is the reason why he did not resign?

MR. GRUZMAN: That is one.

TAYLOR, A-J.A.: He could have been killed, and Armstrong could have got the money?

MR. GRUZMAN: That is one of the reasons. I know how difficult it is to talk about death and murder and one business man plotting to kill another in the atmosphere of a civil court. The only one sheet anchor is that his Honour Mr. Justice Street believed that Mr. Barton believed on proper grounds that Armstrong had in fact plotted with criminals to kill him. The next step is, is your Honour satisfied it is true. We shall prove, we hope, to your Honours that it was completely true. It was a murder plot and nothing else. 20 30

TAYLOR, A-J.A.: But this has not happened; when he was given a chance to get out.

MR. GRUZMAN: Would your Honour allow me to go to it? I will go to the 22nd December, and I will be spending - I have indicated that I will - I will deal with it in detail.

JACOBS, J.A.: Very well.

MR. GRUZMAN: As a matter of fact, the letter - when Mr. Barton was cross-examined on that letter at page 184 line 28 he was asked, "When you say other arrangements ... before the 16th December? A. Yes." 40

MASON, J.A.: What is the point of drawing that to our attention?

MR. GRUZMAN: That was Mr. Barton's comment when he was asked about it.

TAYLOR, A-J.A.: His explanation for saying in the letter from U.D.C. that other arrangements had been made?

MR. GRUZMAN: If your Honour Mr. Justice Mason means does that answer of Mr. Barton mean the contents of the letter were not true, your Honour is right.

MASON, J.A.: It supports what Mr. Justice Street said about it in his judgment.

MR. GRUZMAN: Well, your Honour, in our submission it does not. It depends whether one accepts the letter as being a true emanation of Mr. Barton's belief or not. If it were true, then there would be evidence to support it. In a case of this kind, if it were true that other arrangements had been made, there would be evidence of it. The fact is no other arrangements had been made. 10

TAYLOR, A-J.A.: At the same time you must not lose sight of the fact that Grant and Armstrong are both talking to Malouf and to somebody from U.D.C. - there are two sets of talks going on, so far as I can see. Apparently Mr. Malouf had the idea that Armstrong was the man with money, and finally put up a proposition to him. 20

MR. GRUZMAN: That is right.

TAYLOR, A-J.A.: Mr. Barton may have wanted to cut off the talks with U.D.C., and the officials from the company had said "Forget about it, we have made arrangements elsewhere".

MR. GRUZMAN: To accept that your Honour has to assume that Mr. Bovill, a witness of unimpeached credit, did not tell the truth, and Mr. Barton, who his Honour does not suggest told any deliberate untruths, was telling an untruth. Your Honour sees that what I am submitting is just the plain fact that when Barton wrote to U.D.C. and said, "We have made other arrangements" or "other arrangements are being made", insofar as that referred to \$400,000, there was simply no substance in it. But on the other hand, he did it at the request of his co-director, to maintain in the financial world at that time not too big a break. You have to remember that the company was in the newspapers, shareholders had put in \$2 million, into this company, and a responsible company director has to think of the shareholders. 30 40

MASON, J.A.: But why does he say something that is untrue?

MR. GRUZMAN: Why did Mr. Smith - may I answer your Honour rhetorically? Why did Mr. Smith --- 50

MASON, J.A.: No, just answer my question please. Do not give me some other complication. Why did he say something that was untrue in the letter to U.D.C.?

MR. GRUZMAN: Because he was seeking as a responsible director to try and do what he could to maintain the credit of the company.

MASON, J.A.: As an irresponsible director?

MR. GRUZMAN: As a responsible director.

MASON, J.A.: Surely it is not the responsibility of a director to tell untruths to outsiders.

MR. GRUZMAN: Perhaps there was some substance in it, in that he had been to see Mr. Dobbie.

MASON, J.A.: He had been to see Mr. Dobbie and Mr. Dobbie told him to make formal application, and he said in the passage from the evidence which you have read to us that he meant that the bank had refused the application. He believed in his own mind that nothing was going to eventuate. 10

MR. GRUZMAN: Exactly, but on the other hand I suppose he can say truthfully, "Well, I have made an application". After all, if someone had asked Mr. Dobbie "Has an application been made?" he would have said, "Yes". "Did you request the application?" "Yes". "Did you request the application knowing it had been torn up?" and he would not answer yes to that. 20

MASON, J.A.: The statement is, "Other arrangements are being made for the \$400,000".

MR. GRUZMAN: Yes. He says he refers to Mr. Dobbie and he had in fact made an application, which I think is in evidence.

TAYLOR, A-J.A.: One way out of the difficulty would be for them to put in money, if it could be cashed, and to put someone on the Board. It was the last thing that Barton wanted, because he was wanting to get rid of him. 30

MR. GRUZMAN: To say that, with respect, leaves entirely out of consideration what Barton said. What was Barton's reaction to all this? He said, "Look, you want \$100,000 profit for your 40 per cent." He said to Armstrong, "Look, give the company" - don't forget Barton is not getting a thing out of this himself. Barton is only a servant of the company. Armstrong is the one with the money, and Barton says on behalf of Landmark, "You give Landmark \$150,000 if you reckon your 40 per cent. is worth \$100,000 already. You give Landmark \$150,000, that is its sixty per cent., and you take the whole project", and he said not only that, he said "You release Landmark from its guarantees". He said, "In order to help the situation you can have all the unsecured moneys from Landmark" at I think seven or eight per cent. That was a magnificent offer. It meant that Barton completely lost control of the project. All these wonderful profits all went to Armstrong, and all he had to do was say yes, and Armstrong, who knew that the project 40 50

was as worthless as Barton knew, refused it, and this was after - I had not come to it in point of time yet. This is afterwards.

TAYLOR, A-J.A.: There were three occasions ---

MR. GRUZMAN: I cannot hear your Honour.

TAYLOR, A-J.A.: There were three occasions. The first one was when he got Armstrong off the board, knowing that that made the \$400,000 owing on Paradise Waters due and knowing perfectly well the company had failed. He was prepared to do that, and he did not. The second thing he did that was of considerable significance was to turn round and say, when Armstrong said to him, "I will buy you out" he said, "I won't be in it because I am too high minded to be a director and pledge myself to support you". That, I would think, was so much humbug. The third thing he did, and this was right on the 22nd November when a deal was offered ---

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MR. GRUZMAN: Your Honour means December.

TAYLOR, A-J.A.: And had been talked over with U.D.C., the effect of it was that money was being provided by Armstrong, time would be provided by U.D.C., and the price of it was that Armstrong had until 21st January to investigate the affairs of the company, and Barton had to get off the board and give up the managing directorship to that day - that he refused to do, although at that time two separate bodies were entitled to appoint receivers. One was U.D.C., and was threatening to do it, and the other one of course was Armstrong, who was also threatening to do it. Those three things would indicate to me very very strongly that whatever the price he had to pay, whatever the price the company had to pay, he would not give way to Armstrong in the control of this company. That speaks to me much louder.

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MR. GRUZMAN: I appreciate what your Honour is putting. May I in three words or a little more answer each of the three points, in none of which in our submission is there any substance.

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TAYLOR, A-J.A.: Yes.

MR. GRUZMAN: The first one, that he put Armstrong off the board when the company had no money.

TAYLOR, A-J.A.: I did not say that. I said, "Did not have the money to repay the mortgage when it became due".

MR. GRUZMAN: When the company had no money to repay Armstrong the \$400,000. The evidence is that by doing that he had the promise of a subsidiary of the largest finance company in the United Kingdom to provide the money. As between gentlemen he accepted their word. Their word was in fact translated into a resolution of their company and the resolution was translated into a letter to the company, and the letter to the company was translated

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into an appearance by their solicitor at the annual general meeting.

TAYLOR, A-J.A.: That means he still did not have the money, he had an unenforceable promise to give it to them on terms.

MR. GRUZMAN: Perhaps he placed too much trust ---

TAYLOR, A-J.A.: We have been over the letter.

MR. GRUZMAN: Your Honour has said, and your Honour will allow me to say so, that these are matters which weigh heavily with your Honour. Please allow me to explain --- 10

TAYLOR, A-J.A.: You have been over the letter. Nothing more could possibly be said about that letter.

MR. GRUZMAN: I do not know. It has not helped me into persuading your Honour.

TAYLOR, A-J.A.: Mr. Gruzman, you may have to face the fact that on these matters, so far as I am concerned, you are beyond help.

MR. GRUZMAN: That is not going to stop me. That is going to keep me going. 20

TAYLOR, A-J.A.: I do not think you should say that. If I told you that I did not want to hear you further on the matter, so far as I am concerned, and I am only speaking for myself, that is the end of it.

MR. GRUZMAN: I do not think, with respect to your Honour, that your Honour would not permit me to seek to change your Honour's mind.

TAYLOR, A-J.A.: I do not think you could say any more about that letter.

MR. GRUZMAN: Let me say this, and I address not only your Honour but each of your Honours, there is absolutely no substance in any suggestion that Mr. Barton acted with anything less than the utmost propriety in removing Mr. Armstrong from the board and in the firm and reasonable belief that the moneys to repay Armstrong would be available. It is not suggested by his Honour Mr. Justice Street, and it is not suggested by the evidence. Indeed, I think this is one of the first suggestions of it. 30

The second point, that he said he would not agree to act as a dummy for Armstrong, your Honour Mr. Justice Taylor is entitled to take whatever view your Honour likes, based on the evidence. There is not the slightest evidence to suggest that Mr. Barton is other than a high minded, a very high minded, company director, and that he acted in accordance with the highest traditions of company directors in refusing to be made a dummy for a man like Mr. Armstrong, even at great personal gain to himself. Never has his Honour Mr. Justice Street, nor I think anybody else, suggested that that is not so. Now that is the second point. 40 50

The third point, and I will reserve that until I come to it - let us look at the situation at the 22nd December, and if your Honour does not mind, I won't be taken out of my sequence. I will be coming to it shortly. We have reached now the 16th December, page 2455 - page 93 - the letter to U.D.C. - which I submit your Honours should be satisfied that there is no basis for suggesting that this represented that further finance was in fact available or was in Mr. Barton's mind available. Whether he is criticised for it or not by your Honours, the fact is that there was no finance, and he did not believe there was.

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MASON, J.A.: What was that last statement you made?

MR. GRUZMAN: I say whether he is criticised for it or not, the fact is that there was no finance, nor did he believe that finance to the extent of \$400,000-odd was available. In our submission in his capacity as a director of a public company, in response to the urgent request of his co-directors, there being no suggestion that any of those were other than high minded gentlemen, that he is undeserving of any censure or criticism whatsoever, but in acting in what he conceived to be the interests of the shareholders. It is a pity that all directors do not do likewise. At the same time he sent to U.D.C. another copy of this cash forecast. That is page 94 - pages 2456 and 2457.

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TAYLOR, A.-J.A.: You said the money was to come from U.D.C.?

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MR. GRUZMAN: Yes.

TAYLOR, A.-J.A.: I do not quite follow how he sends this to U.D.C. as a cash receipt and says that some of the receipts in December amounting to \$486,000 - that he told them he does not want. It must mean he is telling them he is getting it from somebody else.

MR. GRUZMAN: That is what he said in the letter. I am reminded that the evidence is that the letter with the cash forecast went first.

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TAYLOR, A.-J.A.: You told us when you were dealing with that --- When he sent that letter to U.D.C. it may not mean that, it must mean coming from somewhere else.

MR. GRUZMAN: We are not left to speculate on this. Each of these letters has a time on it. The one with the cash forecast went earlier. One was received at U.D.C. at 4.55 p.m., the other one I think was three o'clock in the afternoon. I submit that what he was doing was saying to U.D.C., "We do not need the money, and in effect let us be friends, do not let us fight one another". Again I notice your Honour Mr. Justice Taylor finds that difficult to accept, but that is what happens in business. Here is Barton obviously entitled to

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be very very angry with U.D.C. He is entitled to be, if ever a man was. His first reaction is "sue them, sue them". He is told "You cannot win" so what does he do? His co-directors say "Look, this is not any way to treat your friends" - after all, they dealt with U.D.C. for millions of dollars, so far as one can see, in transactions over the years. He knew Honey very well, these people knew one another, there was a business difference, and he said, "What is the use of fighting and arguing about it, isn't it a lot better to in effect cut your losses and not have an enemy as between the companies". I will repeat, your Honours might think that that might be a much more honourable way of dealing than to have a fight which would only in the end harm the interests of the shareholders of Landmark. Indeed, I am reminded that as a result of that attitude Bovill, who was perhaps one might think somewhat ingenuous in the circumstances but nevertheless was a director entitled to his view on the matter - Bovill's attitude was "If you are nice to U.D.C., U.D.C. might still come to the party". That is why Bovill got Barton to write this letter, as he says, and subsequently got Barton to agree to Bovill writing a letter of the 28th December asking for further funds. That letter of the 28th December could never have been written if this earlier letter had not.

The facts speak for themselves. Supposing for argument's sake that Mr. Barton was trying to maintain that the contents of that letter were true and accurate, that funds to the extent of \$400,000 had in fact been obtained. Supposing I was to make that submission. It would not last long. Because there is simply no evidence of it. What your Honours are concerned with is what was in Barton's mind, and in fact, if a man such as Mr. Barton felt that in the interests of the shareholders the situation of this company was so desperate that he had to say something which was less than the truth, it speaks volumes for the seriousness of the position of the company and the desperate situation as it appeared to Mr. Barton, remembering Mr. Barton is a man of unimpeachable character.

MASON, J.A.: When you say it was a desperate situation of the company, do you mean by that that quite clearly the company was insolvent?

MR. GRUZMAN: Insolvent in the sense, as Mr. Smith said, if you do nothing it will soon collapse.

MASON, J.A.: Unable to pay their debts as they fell due? 50

MR. GRUZMAN: It is a little bit hard. I am not certain of the affairs of the company.

MASON, J.A.: I am just trying to ascertain what precisely it is you have in mind when you use these words like "desperate".

MR. GRUZMAN: What I mean is this, that inevitably

the company will in due course collapse. Whether it will be because the interest bill ticking over - I think they paid \$333,000 interest in the preceding year. I think there is some evidence of that. I do not know enough of the intimate affairs of the company to answer your Honour accurately. What I do know is what we submit, that as Mr. Smith said, inevitably, unless something happened, the company must collapse. I have in mind that possibly it would be the interest going on, with the project stopped and no finance coming in which would lead to its collapse. I am not certain I can say to your Honour they could not pay next week's wages, although there seems to be some evidence of that. The letter I just read out, there was \$70,000 of unpaid bills to people who had worked on the project. That arose from the failure of U.D.C. to pay the \$80,000 progress payment.

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JACOBS, J.A.: I am sorry, could you elaborate that? Does that mean that the company paid that and therefore could not pay other amounts?

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MR. GRUZMAN: That the company - I am sorry?

JACOBS, J.A.: Paid it. You said it was the result of the failure to pay the progress payment. When you refer to \$70,000 unpaid bills, do you refer to the unpaid progress payment?

MR. GRUZMAN: No. I just read to your Honour in the minutes of a meeting, a few pages back, where Barton announced to the meeting of Paradise Waters Sales that \$70,000 of unpaid creditors existed and that that arose from the failure of U.D.C. to pay the \$80,000. It appears on page 2496 - page 86.

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JACOBS, J.A.: I did ask you earlier was there any evidence about this progress payment being unpaid, and you said there was evidence, you thought, but you did not give me the page. You thought that it was still unpaid in April.

MR. GRUZMAN: Yes.

JACOBS, J.A.: I have difficulty seeing how, if that remained unpaid out of any funds at all, it would lead to another \$70,000 being unpaid. Have I misunderstood it?

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MR. GRUZMAN: I am working on this minute (read).

JACOBS, J.A.: You do not owe a subcontractor, so that answers the question.

MR. GRUZMAN: Yes.

JACOBS, J.A.: That is not a sum of money that was owing by Landmark or by Paradise Sales.

MR. GRUZMAN: I think at this stage Landmark were paying all these bills.

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JACOBS, J.A.: All I am saying is - anyway, I do not want to take time, I am clear in my mind.

TAYLOR, A-J.A.: The financial position of the company ---

MR. GRUZMAN: I cannot hear what your Honour is saying. Would your Honour allow me to come to it? This is February, and I am still in December. It is the peculiar system which the accountants have, which says that every penny you spend on a property increases your equity. If you spend \$1 million, they say it is worth \$1 million, and if you spend \$2 million, it is worth \$2 million, and nobody ever looks to see what is behind it. Would your Honour allow me to come to that later? Just remember where the word "equity" appears, it often simply means just how much has gone into it. 10

TAYLOR, A-J.A.: I would not think that a man of the integrity of Barton would make that elementary error.

MR. GRUZMAN: It depends entirely on the point of view.

TAYLOR, A-J.A.: However, you are going to come to it in due course. 20

MR. GRUZMAN: Yes. Your Honour Mr. Justice Jacobs asked by reference to the $7\frac{1}{2}$ per cent. and the 12 per cent. - I will come to it in due course, but in case your Honour wants to look at it, at page 608 Mr. Smith was asked in chief "Who suggested the interest rate of $7\frac{1}{2}$ per cent?" and he answered, "Mr. Barton". This appears to relate to the \$300,000. Page 614, line 20, there is a question by Mr. Bainton, "The interest rate of 12 per cent. ... A. Yes." And at page 618, in reference to Exhibit 43, Mr. Smith says he had a discussion with Mr. Barton in which he said "I have had a discussion with Mr. Armstrong and as a result of the discussion ..." That is page 2732. 30

JACOBS, J.A.: Just momentarily I have forgotten, who wrote the words "8 per cent., maybe more" on that document?

MR. GRUZMAN: Which document is that? It is Exhibit 49, page 2789 - page 85 in Commercial 2. 40

JACOBS, J.A.: Page 73 in that document, or page 75?

MR. GRUZMAN: It is in Mr. Smith's handwriting.

JACOBS, J.A.: And the inference is that he wrote that after a discussion with Mr. Armstrong?

MR. GRUZMAN: Presumably. We will see if there is any evidence on that.

JACOBS, J.A.: You go on, Mr. Gruzman. You had reached page 96.

TAYLOR, A-J.A.: The 19th, isn't it?

MR. GRUZMAN: We are still on the 16th. These are Mr. Grant's notes. (Page 2781 - Exhibit 48 - read). 50

TAYLOR, A-J.A.: He got less cash, didn't he?

MR. GRUZMAN: Yes. In this the principal was to be \$500,000.

TAYLOR, A-J.A.: He did not get the penthouse, it was to stay in.

MR. GRUZMAN: No. He only got \$100,000. Apparently it was recognised the company only had \$100,000, so on this deal he is to get the \$100,000 in cash, and the additional \$100,000 is added to the \$400,000, making \$500,000 to be paid in due course. The penthouse is represented as security, and Landmark House is additional security. So on this deal, until 15th April he got \$500,000 outstanding.

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Then we go to the 19th December. The first one does not matter very much. Mr. Smith says, "and he puts it this way, although there is some evidence to suggest that all of these proposals came from Mr. Armstrong, according to Mr. Barton, - (read).

TAYLOR, A-J.A.: Before you go to that, there was another proposal at the bottom of the previous page which was new. The last of paragraph 4 (read).

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MR. GRUZMAN: Armstrong's idea was this.

TAYLOR, A.-J.A.: (Reading continued). I suppose because they were the only shareholders.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: That would mean that the mortgagor and the mortgagee were in effect the same person for the \$100,000.

MR. GRUZMAN: Yes, but of course, as your Honour will see in a moment, as soon as it is suggested by Barton that Armstrong should take over the whole project, Armstrong ---

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TAYLOR, A-J.A.: That was the counter suggestion that on default he would take over the whole project. That is what it came down to.

MR. GRUZMAN: Yes. But Barton goes one better and says, "No need for default, you just take it".

TAYLOR, A-J.A.: If you examine what that means, it was not taken for nothing, it was taken for \$680,000, the amount that Landmark had spent on it.

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MR. GRUZMAN: But on the other hand he will say "I will leave it as an unsecured loan at 6 per cent."

TAYLOR, A-J.A.: I understand that. He was leaving an unsecured loan at 6 per cent. So Armstrong was invited to buy for \$686,000.

MR. GRUZMAN: No.

TAYLOR, A-J.A.: Yes, he was. He is to take over U.D.C.'s mortgage and the money that Landmark had paid.

MR. GRUZMAN: If the project was no good, what was wrong with that? I do not understand, with respect - I appreciate your Honour putting this to me but --

TAYLOR, A-J.A.: Look what he was paying for it. He was taking over a liability that represented the money that Landmark itself had put into it. 10

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: Which I think you told us was \$680,000. Of course, he had to take over, if he had to take over Paradise Waters, U.D.C., and that was a loan of something like \$400,000.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: And he has to finish it.

MR. GRUZMAN: Yes, he has to finish it.

TAYLOR, A-J.A.: So he is paying \$1 million.

MR. GRUZMAN: That is right. 20

TAYLOR, A-J.A.: Plus finishing it.

MR. GRUZMAN: But on the other hand \$400,000 was his own.

TAYLOR, A-J.A.: That is in addition to his own.

MR. GRUZMAN: Yes, that is right.

TAYLOR, A-J.A.: In other words it is put to him it is worth his own \$400,000, U.D.C.'s \$300,000 to \$400,000 ---

MR. GRUZMAN: \$430,000.

TAYLOR, A-J.A.: That is \$800,000. It is worth \$680,000 to somebody. 30

MR. GRUZMAN: Yes.

TAYLOR, A.-J.A.: That makes it \$1,500,000, and he has to finish it. That is about \$3 million. Somebody must have thought that that was a proposition, and one way and another at some time ---

MR. GRUZMAN: It is a laughable proposition.

TAYLOR, A-J.A.: I do not think that anybody, if I may use the phrase, was laughing all the way to the bank about it. 40

MR. GRUZMAN: That is right.

TAYLOR, A-J.A.: I thought you said this was a

project which nobody thought would ever come to anything.

MR. GRUZMAN: That is right.

TAYLOR, A.-J.A.: Why do you say it was laughable?

MR. GRUZMAN: As I understood what your Honour was putting, what was Barton giving Armstrong. He was giving him nothing, liabilities for \$1,500,000 on a project that required another million to be spent on it. In other words, he was giving him nothing. Nobody in their right senses ---

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TAYLOR, A-J.A.: He was getting Landmark out of a considerable difficulty.

MR. GRUZMAN: Yes, it was.

TAYLOR, A-J.A.: They did not need any more finance, they did not have to pay the \$400,000, they got the \$680,000 back.

MR. GRUZMAN: The shareholders would have been in good shape.

TAYLOR, A-J.A.: As far as Barton was concerned it was worth to Landmark over \$1 million.

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MR. GRUZMAN: Exactly.

TAYLOR, A-J.A.: What was laughable about that?

MR. GRUZMAN: It was excellent from Landmark's point of view. I thought your Honour was suggesting that no-one could believe that Armstrong would accept it.

TAYLOR, A-J.A.: No. I do not think Armstrong would ever take it on because it would involve him in effect in finding \$1 million.

MR. GRUZMAN: Yes, that is right. He would have lost his money, he would have lost even more. That is what Mr. Smith told him.

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TAYLOR, A-J.A.: The fact they were discussing this proposition does not go along with your earlier proposition that this was hopeless, nobody thought it had any value, it was not even worth talking about.

MR. GRUZMAN: Our submission is that is what it proves, it is like a hot potato. Barton was saying, "You take it" and Armstrong was saying "You take it". Nobody wanted it.

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TAYLOR, A-J.A.: Was not there an island which was sold as lots?

MR. GRUZMAN: Yes, that was MacIntosh Island. There was some evidence to show they were sold, and sold very well, but it does not seem to help the situation. The project was so hopeless once finance had gone that each was saying to the other

"You take it", and it was so hot that the one who got left with it got his fingers burnt, for sure. I had come to page 98, which was said to be Landmark's proposal.

TAYLOR, A-J.A.: And Mr. Barton.

MR. GRUZMAN: Said to be Landmark's and Mr. Barton. Then I would like to come to the document of the 19th December. I have already referred to it, page 101, page 2790. I have already referred to it, but I take the liberty of referring to it again, because it is a rather vital document. 10

TAYLOR, A-J.A.: Before you go to that, page 99,

MR. GRUZMAN: I will come back to that. It deals with the U.D.C. discussion. It is important, but in its place. One of the matters that we would put before your Honours is that if the onus is on the defendant to prove the propriety of this transaction one would have expected, for whatever purpose they brought forward the commercial transaction, and it was they who brought it forward - every bit of this evidence is theirs - you would expect to see some expression of opinion as to the propriety of it. The only evidence of it is Mr. Smith. Mr. Smith was accepted by both parties first of all as to his credit, and nobody expressed any doubt that he was what he was known to be in the evidence, a man of -- 20

TAYLOR, A-J.A.: This is the document we went through yesterday.

MR. GRUZMAN: Yes. I am referring to it again because of its importance. 30

TAYLOR, A-J.A.: We went through it yesterday word for word, parsed and analysed it.

MR. GRUZMAN: How long?

TAYLOR, A-J.A.: We parsed and analysed every word of this document yesterday.

MR. GRUZMAN: This is a pretty important document. I mentioned that I would like to refer to it again.

TAYLOR, A-J.A.: You want to go through it again?

MR. GRUZMAN: I would like to.

TAYLOR, A-J.A.: What on earth for? We understood you yesterday. 40

MR. GRUZMAN: Your Honours, as I was saying ---

TAYLOR, A-J.A.: This is the document that demonstrates that whatever Armstrong does must result in disaster to him, so you put it. The document you relied on to establish that in the view of his financial adviser if he did nothing the company ground its way to extinction and his shares were worth nothing, and he had a very very rough chance of getting no money out of Paradise Waters; if on the 50

other hand he accepted clause 4 - no, clause 1 - (read). That is, buying shares and the refinancing. You demonstrated yesterday that if that was accepted then Armstrong, by doing nothing, lost his money, or nearly all of it, and as I understood you to say, even by doing clause 4, taking one course, he stood a pretty rough chance of losing a considerable amount of it, losing a considerable amount of his mortgage. On your figures no further development would go on and he either had to do it himself or sell it. You demonstrated really his forty per cent. in Paradise Waters was not really worth anything like \$100,000, it was worth about \$35,000. That is my recollection of what you said yesterday. If you want to say it again ---

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MR. GRUZMAN: I realise it is quarter past four, but may I just answer your Honour Mr. Justice Taylor on one aspect. Your Honour sees the reason if I may say so - I did not suggest that Paradise Waters was worth \$35,000.

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TAYLOR, A-J.A.: You said his 40 per cent.

MR. GRUZMAN: Or his 40 per cent. I said it was worth nothing.

TAYLOR, A-J.A.: That is right. You said it was not even worth \$35,000. I think that was where the figure of \$35,000 came from.

MR. GRUZMAN: May I show it to your Honours tomorrow morning?

TAYLOR, A-J.A.: Yes.

(Further hearing adjourned until 10.15 a.m., Thursday 25th February, 1971.)

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IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COURT OF APPEAL)

Term No. 22 of 1969

CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

BARTON v. ARMSTRONG & ORS.

FIFTH DAY: THURSDAY, 25TH FEBRUARY, 1971.

MR. GRUZMAN: I wonder if I might address a few remarks to his Honour, Mr. Justice Taylor? 10

TAYLOR, A-J.A.: I do not think there is any point in it. If you are going to take up every morning things that I put to you the previous day, the nett result will be that I won't put anything. It is too time-consuming. I ask you something in the course of argument and you answer it and so far as I am concerned, it is finished. I do not think there is anything to be gained by regurgitating the matter the following day.

MR. GRUZMAN: We only want to assist your Honour. 20

TAYLOR, A-J.A.: The assistance I want is when I ask the question. I want it at that time, not the next day.

MR. GRUZMAN: I would just like to make these general submissions: firstly, it is apparent - and I have taken these a little bit out of order - that on 22nd December there was a change in emphasis. It is very difficult to present an appeal of this kind which covers such a wide range of facts and law and to say everything at once. It is impossible. 30
As I have mentioned before, what we have done is to try to put some order into our presentation by dividing the case up into subject matters, but unfortunately human life is not like that and they all overlap. At the moment I am engaged in addressing your Honours on one aspect and, indeed, it is a fairly minor aspect of the case; that is the commercial side.

Of course it is easy to imagine, and it is really an excursis into the commercial presentation in order to try and get it into its correct perspective, where two men like Barton and Armstrong were associated together that there is some sort of equity between them - in other words, to equate the two men. In such a context as that, it is well to remember that any such concept in this case is utterly wrong and baseless. Never, I suppose, has evidence revealed two more dissimilar men. His Honour, Mr. Justice Street, it is fair to say, painted Mr. Armstrong in the blackest terms that I suppose it would be possible to say of any man and, on the other hand, having seen and heard Mr. Barton for months in his Court he gave him the highest possible credit rating. 40
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MASON, J.A.: Did not he describe him as suspect?

MR. GRUZMAN: What he said was that everything, every inaccuracy which Mr. Barton made in his evidence was understandable and excusable. He completely acquitted him beyond any shadow of doubt of any intentional deception of any kind whatsoever and his Honour was alive, as I hope to make your Honours aware, to the strain under which this man went. But I do not want to deal with that at this stage. I only ask, and I do it with the greatest of respect, that indeed your Honours not assume that from a reading of the appeal book over a period of two weeks, one can understand this case.

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JACOBS, J.A.: I am sure we won't make that assumption.

MR. GRUZMAN: We ourselves have lived through it and spent three months preparing this appeal - three months before senior counsel preparing this appeal - and we still do not claim that we fully apprehend every aspect of the evidence. All we can do is to try to assist your Honours as best we can. I only ask this on behalf of my client, as I know your Honours would in any event do, I ask your Honours to forebear from taking impressions from the reading of the evidence, until your Honours have heard what little I can say.

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I have altered the order of the address in view of some of the matters that fell from your Honours earlier in the case, and that, of course, makes it so much harder for us to bring to your Honours' minds those things which we believed are proper to be considered by your Honours. But just to interpolate into the address on the commercial side, take the 22nd (I am taking it out of time because I think it is proper to do so, in order to try and correct impressions or imperfections) - first of all it is suggested that the suit was a battle for the control of the company. It was not; the suit did not arise out of that and his Honour did not say so. What his Honour said was that the suit had its origin in the battle for the control of the company, but what the suit was concerned with was something which occurred after the control of the company had become worthless. What the suit was concerned with was only the events after United Dominions Corporation had seen fit not to proceed with further finance. The argument was over the wreck of the company, if you like, not over the control of it.

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Of course, his Honour pointed out with care and clarity the original arguments between the men did take place over the control of the company.

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The second matter which doubtless will be troubling your Honours is why did not Barton resign, or why did he not on 22nd December give control to Armstrong?

On 2nd December, only three weeks before the

shareholders - representing close on \$2 million in all - had given to Mr. Barton a mandate to manage and control the affairs of this great public company, which it was prior to these troubles, and to exclude Mr. Armstrong from control - Mr. Armstrong had acquired possession - he had acquired a position of ascendancy by criminal threats over Mr. Barton. But what those threats were directed to is a matter that your Honours will have to consider. His Honour Mr. Justice Street was satisfied that one at least of the motives or possible motives was to weaken Mr. Barton in his opposition to Armstrong with respect to this company.

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If Mr. Armstrong, supported by threats and terror - threats to Barton like "Look, you can have your choice, my man. You can either resign and give me control or if you do not, then you buy my shares" - supposing that were the position - or indeed, it might have been more. Supposing he were saying "Look, you get out of control and I will still reserve my right to pressure you further to buy my shares or, alternatively, you give me what the company has and you buy my shares". All under threat of terror; rhetorically may I ask, does the law permit that. Does the law say if it were so then Barton had the right to resign and give to Armstrong what he wanted in that way, that that is permitted? The question gives its own answer.

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What Armstrong was engaged on was a criminal activity, whether it is a civil court or not. Armstrong was engaged on a criminal activity, and he was out. The result is that he was after a personal financial advantage and did not care how he brought it about. One would wonder what view this Court would have had of Mr. Barton if he had surrendered the mandate of the meeting of shareholders. Your Honours may remember it was a well-attended meeting of shareholders, it had received wide publicity at the time. What view would this Court have had of Mr. Barton if he had surrendered that mandate on Mr. Armstrong's behest? Would not the position be that he had been removed by the Board because he was stealing from the shareholders? His attitude had been expressed in that nasty expression about what would happen to the shareholders when Bovill accused him of picking the shareholders' pockets behind their backs. What trust or confidence could anyone have, and what respect could anyone have for a person who would hand over that company to such a man; whether it was done by resigning or however it was done?

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At this point of time - I have jumped ahead and I am doing it deliberately - one does not know just exactly what actuated Barton's mind. But the evidence seems to show that instinctively he would not have even listened to the proposition at the board meeting. He said that Mr. Grant, Armstrong's solicitor, was stopped halfway when putting the matter to the Board Meeting. But certainly there was not the abject capitulation at that time. There was a letter, and as we will show your Honours, it

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was from this date of 22nd December, that the activities, the physical acts took place, such as the employment of gunmen - Vojinovic was to shoot Mr. Barton.

JACOBS, J.A.: Is it your submission that the domination had not taken effect at 22nd December?

MR. GRUZMAN: No, your Honour, that is not our submission.

JACOBS, J.A.: I must say that the 22nd concerns a matter to which I think you have to give the greatest attention. Although I appreciate the generalities you have just spoken about in connection with the characters of those concerned, the real question will be in respect of that date - I do not mean the real question in the case - was Mr. Barton at that stage possessed of a freedom of will to resign or not resign, to resist the impact of Mr. Armstrong's wishes, or not. I appreciate your point, that to give in to Mr. Armstrong at the expense of the shareholders would be an act for which he could be much criticised, but one would not criticise him, if he were dominated. So to speak in those terms of rhetoric does not seem to me to get to the real point. 10
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MR. GRUZMAN: Perhaps I have not made myself clear. If one imagines Mr. Armstrong has a gun at Mr. Barton's head and says "You can choose any one of six alternatives. You can resign, you can buy my shares, you can pay me a million dollars, you can do part of one and part of the other, but of these alternatives you must choose one". 30

JACOBS, J.A.: I would agree, if that is the analysis there is no freedom. That is the way you put it, is it?

MR. GRUZMAN: That is part of the way we put it.

May I say this, although that is the way we put it, we will be hoping to demonstrate to your Honours later when we analyse in effect Barton's mind and what was happening, that it is not inconsistent with him being under dire pressure if for one moment he rises above it. That is not inconsistent with pressure and the principle I have adverted to is dealt with in Morley v. Loughman, 1893 Ch.D. at 752-7. I will refer to that case later. 40

JACOBS, J.A.: And it would stand to good common sense also but it was not to what I was referring.

MR. GRUZMAN: Perhaps I might read the passage. "There is evidence that ... when in the presence of the defendant".

The other matter I would like to just take out of context is this, we have not made our submission to your Honours on the law yet and your Honour Mr. Justice Jacobs made some remarks as to whether we were putting our eggs in the one basket. 50

I do not understand it, frankly, if I may say so, and I only want to make it clear - as we have said all along - that we rely upon the general relationship. That is one way we can put the case. (2) We rely upon a contrivance to get domination for a particular transaction, (3) We rely on duress and (4) we rely on illegality and we rely on all those principles which we have already set forth in the enunciation of the legal principles, and there may be others. But this case following upon the judgment of Street, J. raises wide questions of law which we have done our best to elucidate and will do for your Honours.

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Your Honours, at the risk of being repetitious and in this respect I hope I will be forgiven, one of the matters which I have indicated that we shall ask your Honours to find is that this was, commercially speaking, an unrighteous transaction. Your Honour, Mr. Justice Taylor, asked me earlier in the case on what basis could a Court make such a finding. We answer firstly that the Court is not without judicial knowledge and is able to take judicial notice of matters of business. But secondly, in this case it has available to it the evidence of a man who is recognised in this case by his Honour as a man of business and a man who investigated the affairs of this company, the man who was advising Mr. Armstrong and who formulated his ideas of the value of this company. Not only that but, as I will show to your Honours later, he did this at personal financial sacrifice to himself. Mr. Smith acted upon his ideas, he was not just in the position of the adviser. He had been offered a financial plum, and the plum was to be Chairman of this company at a salary of \$4000 a year. Not only had he been offered it but Mr. Armstrong had stipulated for it and eventually he was to be accused by Mr. Armstrong of "craw-fishing", because it was said that he was trying to get out of being the chairman of this company and giving away \$4000.

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JACOBS, J.A.: It is not just judicial ignorance, but what does "craw-fishing" mean?

MR. GRUZMAN: It is moving sideways, crabwise. That word appears in Mr. Grant's notes. It means that he was sidling out of the situation of being chairman, it is not my word.

I might give your Honours information from a note I received. I am told that according to Webster's dictionary, to crawl-fish means to retreat from a position, to back out or to attempt to recall something said or done. (Col. U.S.)

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Mr. Smith had nothing to lose by becoming Chairman of Landmark except some amount of his reputation if he was associated as Chairman with a company that apparently went into collapse. He was the man who was selected by Armstrong and who Armstrong was stipulating was to be Chairman of the company. Therefore his evaluation of the company and its prospects is a matter of the gravest importance. The future of this company won't be left

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only to your Honour's judicial knowledge of these matters, but may be founded upon the evidence of Mr. Smith. He sets out in this document of 19th December, and I beg leave to refer to it again, although I referred to it once before, he sets out alternatives available to Mr. Armstrong. (Read).

JACOBS, J.A.: We have read them. You can just say "They are there, and I have already read them".

MR. GRUZMAN: He sets out four different propositions and on any version Armstrong will lose not only what he has put in but possibly another million dollars or part of it, unless Barton will enter into the agreement which in fact he entered into. 10

That summarises Mr. Smith's document. I personally would submit it is worth reading again but I bow to your Honours views on it.

JACOBS, J.A.: We will read it again.

MR. GRUZMAN: Every word of it is of vital significance to your Honours, because of Mr. Smith's expertise, his knowledge of the affairs of the company and the fact that he acted on it to his own personal financial detriment. He calculates that the value of this settlement to Mr. Armstrong is \$750,200. So he presented Mr. Armstrong with the proposition: "You can do what you like, any course of action that you take - and you face financial disaster such as few single men, individuals, have ever faced - unless you get Barton to enter into this agreement which will be worth three-quarters of a million dollars to you". And of course, as I am reminded, on the same day that he made this evaluation of the position of the company he had personally been to see U.D.C. He was leaving, as you would expect a man of his integrity and expertise, not to chance. He went to see U.D.C. and indeed gave to Landmark, vis-a-vis U.D.C., the full benefit of his prestige as a potential chairman of the company. That is a matter which your Honours might think would have greatly helped the situation. 20 30

At page 99 (page 2735) Exhibit 44, Mr. Smith's notes of his meeting, with Mr. Honey - "At the meeting with U.D.C. the following information was obtained ... to their solicitors". That of course is an off-putting statement if ever there was one. It is like "Put in a formal application. You will probably get nothing". Mr. Smith, remember, so understood it. Then it goes on - "(2) U.D.C. will not take sides and will regard Landmark ... on the second mortgage position". And then there is No. 3. (Read.) Each piece of evidence in this matter, with respect, has to be carefully looked at. The significance of some of it escapes. Your Honour sees the significance, if I may say so, with great respect to his Honour, of what escaped Mr. Justice Street. His Honour said that Armstrong - I have forgotten the expression - his Honour said they had to get rid of Armstrong, but U.D.C. was actually saying, "If you get rid of Armstrong we 40 50

will give you nothing". This is from their own witness. His Honour, with respect, was wrong in saying that they had to get rid of Armstrong from this point of view because here is the U.D.C. statement to Mr. Smith: first of all Armstrong has got to leave his \$400,000 on mortgage and, secondly, Armstrong has got to be on the Board. Why? Because Armstrong had to show publicly and financially his confidence in the project. The project had its origin in Mr. Armstrong and U.D.C. were not prepared to carry on what was in a way his baby unless he showed his confidence both to the public and from a financial point of view. We will go further and show later that what they really wanted was for Mr. Armstrong not only to leave in his \$400,000 but to pay in more money. It is on a pretty strong basis, we submit, that his Honour overlooked important parts of the evidence in coming to the conclusion which he did.

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Perhaps I will refer also to Mr. Smith's notes at page 105 (page 2793), where he says that the project to date has cost \$1,100,000. Then there is apparently the further \$60,000. So as at 19th December the stage was set for the next phase. One might assume that what is set out by Mr. Smith in terms on 19th December is that he would have realised and told Mr. Armstrong on 13th December, six days before, in the conference which led to the offer being made. This was in effect, a written brief of a written statement establishing the validity of the course of action which he had already advised Mr. Armstrong to take.

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But then, of course, the problem arose. U.D.C. not only were not going to lend him any money but they had so far lost confidence in the project that they were going to put in a receiver and sell it up. What a further calamity was this to all of the participants, to the company, Mr. Barton and Mr. Armstrong! It was one thing, I suppose, up to this point of time to have U.D.C. as a corporation who in the future was to be a lender but it was another thing for U.D.C. to pull out the rug from under the company and demand repayment of its \$430,000, to put in a receiver with the obvious intention of selling up. That, indeed, destroyed any future for the company. It had this effect also ---

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JACOBS, J.A.: But there was no middle course. U.D.C., once it stopped lending, had to put in a receiver, because nobody else would lend as U.D.C. had the first mortgage. So there were only two courses open to it.

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MR. GRUZMAN: Yes, but it happened. That is what thinking people would regard as inevitable, and it certainly did happen. This had an effect on everybody and it particularly had an effect on Armstrong. Armstrong, on the advice of Mr. Smith, had arrived at a scheme which provided for his personal financial salvation and Barton had tamely gone along with it. But what would happen if a Receiver was

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appointed? The result of that would have been that the scheme would not go through. Then we have a period of frenzied activity on the part of Mr. Armstrong, particularly, and indeed, others, but particularly on the part of Mr. Armstrong to prevent this receiver being appointed.

At page 109 (pages 2798-9) there are Mr. Grant's notes of his summary of the position. These are his cogitations on, or his considerations of the matter. His evidence on this appears at page 651 in answer to Mr. Bainton: "... 21st December, is that when you prepared it? Does it indicate ... give a copy to Mr. Armstrong". This is before Mr. Grant was aware that U.D.C. were appointing a receiver.

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He asks first of all the basis on which U.D.C. will continue to finance the project with A.H.A. in control --- (read). As to Armstrong's position one might imagine that is what he was going to put to U.D.C. in an effort to persuade them. He was a shareholder, apart from the mortgage, and had complete confidence in the project and had no information since Stewart, the company secretary, left. As a third prime proposal, as regards their short term proposal to appoint a receiver as a caretaker, Mr. Armstrong was to be the manager ---

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JACOBS, J.A.: Did he put this proposal to anybody?

MR. GRUZMAN: I think he did.

JACOBS, J.A.: I think we can move on. We have read it through. So long as we know it was not put to anyone in those terms.

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MR. GRUZMAN: What we are looking at is what was in Mr. Armstrong's mind.

JACOBS, J.A.: But these are Mr. Grant's notes.

MR. GRUZMAN: He may have given him a copy. (Read). One sees in this contemplation the germ of what appeared the next day at the board meeting, although I have said it was not put. What was put the next day to the board, seems to have had its origin there.

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On the same day and again this is before U.D.C. has announced its intention to appoint a receiver, page 111 (page 2730) - I am reminded that the evidence on the next document is Mr. Smith's note at the time when he learns that U.D.C. are contemplating appointing a receiver. (Continues reading.) In other words, again it is Armstrong's presence which is, if anything, required for the continuation. It is not a case of getting Armstrong out. So far as U.D.C. are concerned, it has got to keep Armstrong in, but Barton does not want anything of this. This is where Barton's attitude is becoming crystal-clear. He said that Landmark would sell for \$150,000, subject to negotiations, its equity in Paradise Waters and would leave

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unsecured the advance by Landmark for the period to January 1969 with 8 per cent. interest. (Read).

JACOBS, J.A.: Did not you read this yesterday?

MR. GRUZMAN: I referred to it.

JACOBS, J.A.: You referred to it at length. To which part do you now want to refer?

MR. GRUZMAN: Every word of it is of real importance. (Continues reading). That is a fairly important matter, your Honours might think. What he is saying is that Armstrong takes over the whole of the project and he said "Armstrong wants it on the basis of \$250,000 which is the total profit, and he will take the Landmark share at \$150,000 or less, and is prepared to negotiate on it, no question of options, and not only that but he will act in his capacity as a servant of Landmark and would still buy the Landmark shares." Once you relieve Landmark of what had become a horrible weight then Landmark, of course, was quite a good company. So there is no question about whether he would want to buy the shares. Landmark could have survived if it would have rid itself of this burden and Mr. Smith points out --- (read). 10 20

JACOBS, J.A.: When you say "burden" you mean Paradise Waters?

MR. GRUZMAN: Yes.

JACOBS, J.A.: That would leave Landmark with its building and mortgages?

MR. GRUZMAN: Yes, at least two buildings and its mortgages. I am reminded that on Line 30 of that document, as printed in the Appeal Books, it is wrong. If Your Honours are looking at the document we produced it is right, but as it is printed in the Appeal Book, it is wrong. 30

As at 21st December, Barton is simply saying to Armstrong, "Please take the whole thing away and I will co-operate and do anything you like, but just take it off Landmark's hands".

I wanted to go to the 22nd. What happens then? It was by no means an unreal proposition, as has been suggested, that Armstrong should take over this matter. After all, Armstrong knew U.D.C. and U.D.C. knew Armstrong, and his financial capabilities. There is not much evidence of it, but there is some and one sees that he had received \$428,000 in the preceding July from the company and had received another \$200,000, which was part of the \$600,000, early in the year, in April. So even on the evidence he had received \$628,000 in cash that year from the company and he had \$400,000 invested. One does not know, there is no evidence, exactly what Mr. Armstrong's financial capacities were but U.D.C. obviously thought he was good enough and they considered that Landmark could take over the 40 50

whole of the equity and go with them, dollar for dollar. It was a very practical suggestion that he was suggesting and one that Armstrong, it is to be inferred, was perfectly capable of undertaking.

What happened on the 22nd will be found in a convenient way by looking at Com. 2, Page 652, where in answer to Mr. Bainton at line 12, Mr. Grant said: "Q. On 22nd did you learn something ... yes". Those, I think, are the notes I have read to your Honours. That is what he was going to put to Mr. Malouf. Then Mr. Grant and Mr. Armstrong, as appears from page 598 - Mr. Smith gave evidence that Mr. Grant came to see him with Mr. Armstrong on 22nd, and Mr. Armstrong handed him a document: "Q. Did he say why he was giving you the document? A. Yes ... putting in a receiver". That was Armstrong's own thought.

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At page 112 (page 2800) is Mr. Armstrong's proposal. He pays \$60,000 for the penthouse, which is to go to U.D.C. U.D.C. won't appoint a receiver before 21st January, Barton to resign from the chair and as Managing Director today, Cotter and Bovill to remain on the Board, Barton if he wishes: I suppose that means "and if U.D.C. agree".

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JACOBS, J.A.: Or that they do agree?

MR. GRUZMAN: Yes. Then he goes on - "Beale joins the Board today. Armstrong to be Executive Chairman to 21st January ... reliable company by 21st January". Just pausing there, the significance of this context is those words - that is Armstrong's own thought at 22nd December. So the question was whether it was feasible for him to lend sufficient money to Landmark to make it a reliable company.

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JACOBS, J.A.: For U.D.C. to lend?

TAYLOR, A-J.A.: U.D.C. were lending the money. For them to lend sufficient money to let Armstrong make Landmark a reliable company.

MR. GRUZMAN: At paragraph 9, the answer is that Armstrong provides funds. I will have the original documents got out. My impression was that Armstrong was to decide whether he would lend more money. I only remind your Honours, if I may, that some of these documents are typed out.

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TAYLOR, A-J.A.: It is made clear by the minutes.

MR. GRUZMAN: I will read your Honours page 654 Mr. Grant, at about line 12, is saying:-

".... I said that Armstrong wanted to put certain proposals to the meeting, and broadly, they were that he would buy the penthouse for \$60,000 straightaway.

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Q. Who put that? Did Mr. Armstrong put this or did you put it on his behalf? A. I put it on his behalf.

Q. Yes? A. That this money would be available to pay U.D.C.

Q. Yes? A. I think I mentioned that - that U.D.C. was holding their hands to appoint a receiver until 2.30 at least, and probably they could be persuaded to withhold the appointment longer; the basis of this was that Barton resign as Chairman, Armstrong would take over control as Executive Director until 21st of next month- January. This would give him an opportunity to find out whether the company was a viable company, and to get access to information that had been denied to him, and that if he felt that the company was in a financially sound position and was worth investing further funds in he would be prepared to make further advances."

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JACOBS, J.A.: I think they were both going to investigate whether it was feasible to lend.

MR. GRUZMAN: No, your Honour.

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JACOBS, J.A.: That is what it says.

MR. GRUZMAN: I have got to, if I may, correct impressions of the evidence which are wrong.

JACOBS, J.A.: Is this a wrong transcript then?

MR. GRUZMAN: It may be possible; it is possible.

JACOBS, J.A.: It is not corrected by Mr. Grant's evidence you have just read, because he is referring to A.E.A., paragraph 9, providing funds.

MR. GRUZMAN: We will get the evidence out, and satisfy your Honours one way or the other, but my recollection is that the proposition was that this was to enable Armstrong, and Armstrong alone, to decide whether he would put more money into this company. That is our submission.

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JACOBS, J.A.: Summarising the way he, Mr. Grant, put it, Mr. Armstrong would try to see whether it was worth while, what was the position of the company if after his investigation U.D.C. decided it was feasible to lend? Then certain things happened.

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MR. GRUZMAN: That is not what he said in his sworn evidence. What your Honour is relying on there is what may be an imperfect note, but his sworn evidence before his Honour was that this would give him an opportunity to find out whether the company was a viable company and to get access to information which had been denied him and if he felt the company was in a financially sound position and worth investing further sums in, he would be prepared to make further advances.

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To take it a little further, and I hope your Honours won't mind my reiterating but it does mean examining the evidence, at page 114 (Com. 1)

not only does it not relate to U.D.C. putting more money in, but the minutes of the meeting at line 29 show that U.D.C. also wanted Mr. Armstrong to advance a further \$300,000 on the project. So the whole question was: "Would Armstrong put in more money". The light it throws on your Honours problems is that here is Armstrong saying that he does not know even at this point of time whether the company is worth putting more money in.

JACOBS, J.A.: He had been complaining that he did not have access to the books. 10

MR. GRUZMAN: Yes, but the doubt is in his mind as to whether it is any good, and as to whether he is prepared to put in more money to make it a reliable company, as he puts it, and he has got U.D.C. on the other hand, saying "Look, we want him to put in \$300,000 more". Contrast that, if one may, with what his Honour thought - on his Honour's interpretation of it - that once you got Armstrong out, everything should be all right. 20

JACOBS, J.A.: What did you say about the document of the 22nd December by Grant, was that shown to Mr. Armstrong?

MR. GRUZMAN: It is better to get the evidence out.

JACOBS, J.A.: It is headed "A.E.A. Proposal". Surely you can say what your view of it is without the exact evidence.

MR. GRUZMAN: I want to be exact on it because I am not certain. I am not certain whether it is Mr. Armstrong's view of it, or whether they are speaking together. I am not certain it is correctly transcribed, either. I am relying on the sworn evidence and the certified minutes. 30

TAYLOR, A-J.A.: There are no minutes.

MR. GRUZMAN: At page 652, Mr. Grant said, "These were notes after a conference I had ..." In other words, they are notes as to which you have got sworn evidence by Mr. Grant in chief as to what he said, and the minutes of the meeting at which he said it. It only illustrates better than any way I can the importance of examining this. 40

JACOBS, J.A.: It is quite obvious what it says. He said, "I got this from Mr. Armstrong". That is what he said here.

MR. GRUZMAN: It is a mistake, if that is what he wrote down it is false, a mistake, because (a) he never said it and (b) it was never proposed. If that was what he wrote down, he made a mistake. The whole proposition was never at any time whether U.D.C. would lend in this context, the only question was whether Armstrong would lend, to the exclusion of everything else. 50

JACOBS, J.A.: I see what you mean, that I am

talking about a different thing now. I am asking did he get these notes from Mr. Armstrong, and the answer is "Yes, before he went to the meeting"?

MR. GRUZMAN: It says they are notes he made with Mr. Armstrong.

JACOBS, J.A.: Before he went to the conference?

MR. GRUZMAN: Yes, they are dictated by Mr. Armstrong.

JACOBS, J.A.: Mr. Armstrong then envisaged that in certain circumstances he might provide additional funds. That is the problem. I mention it only, I do not say it is an insoluble one. 10

MR. GRUZMAN: Our submission is this way: we say this is an admission by Mr. Armstrong that unless additional funds were provided by him, the company would collapse and he was not clear that the company was worth saving.

JACOBS, J.A.: Yes, and I appreciate that. But he thought it might be.

MR. GRUZMAN: He said he did not know. That is what he said, but he uses the expression "see whether it could be made into a reliable company". The suggestion being that in his mind at that time it was a completely unreliable one. 20

It is altogether too easy, if I may so put it, to suggest that Armstrong was simply going to consider this and this was what Mr. Grant told him, that it was U.D.C. who were saying that they wanted Armstrong to put in \$300,000 more so that he would have \$700,000 in it. Secondly, in paragraph 3, Mr. Armstrong would have executive control until 21st January, during which time he would make an assessment of the future and the worth of the company. That is what he said, but nobody trusted him. Mr. Bovill said that he did not trust Armstrong and he did not believe Mr. Grant. I am trying to deal with this, as it were, on an impersonally commercial basis, and to divorce it from the rest of the evidence. But the evidence is that Mr. Bovill, a man whose credit was unimpeached at all - he was admittedly forced into it - eventually said he did not believe Mr. Grant and Mr. Barton certainly did not believe them, and obviously they thought this was a trick by which Armstrong would get control of the company and rob it and denude it of whatever it had. They regarded this as something which no self-respecting person would suggest. 30 40

JACOBS, J.A.: A position to be resisted at all costs?

MR. GRUZMAN: Yes, and they would resist it. No director of any public company would let a man like Armstrong, who was only concerned with his own ends, get control of this company for three weeks and give him \$20,000 to boot, to give him a pent-house worth \$80,000 for \$60,000 for that privilege. 50

This was the proposition put forward. There would not be any doubt as to what the answer would be.

I am entitled to submit and have your Honours accept, in the light of the absence of credit of Mr. Armstrong, that what he said was his reason for wanting control may well have been untrue and that Barton, in all the circumstances would not trust him to any extent. Of course, it is perhaps significant that although Mr. Grant told this meeting that U.D.C. wanted Armstrong to put in \$300,000 and that is why he wanted control let us look at the preceding page of the notes of Mr. Grant's talk with U.D.C. and see if he was telling the truth. (Reads from page 113; page 2801). Goulburn Acceptance was one of Mr. Armstrong's companies. That was obviously a misinterpretation because what happened was that further security was given by Landmark to U.D.C. for that \$60,000. 10

JACOBS, J.A.: I would say that the only deliberate misinterpretation involved in these documents, Mr. Gruzman, would be to regard the minutes as saying other than that Barton personally would be able to divide \$60,000. 20

MR. GRUZMAN: Your Honour can say that, but our submission is (a) on the evidence there never was any talk of it and (b) it never happened. All that was happening was saying Barton, in his capacity as managing director of Landmark, would provide the money, and that is what happened.

MASON, J.A.: That is what happened? 30

MR. GRUZMAN: Yes.

MASON, J.A.: The real question is what he said. For my part I agree with the observations made by the presiding judge.

MR. GRUZMAN: Well, I do not think his Honour, Mr. Justice Street, thought so.

TAYLOR, A-J.A.: Did you ever put it to him?

MR. GRUZMAN: I think it was put. That was one of the things that was put. Mr. Barton was cross-examined on it explicitly. Mr. Staff asked question after question about it, possibly for hours, I do not know, but certainly extensive cross-examination on this point, quite an extensive cross-examination on it, substantial addresses on it, it was a big point. His Honour Mr. Justice Street was very unimpressed with it and made no specific finding, because in our submission it was obvious that the point as a point against Mr. Barton completely failed, in his Honour's mind. 40

If there was a matter that would have affected his credit it became a significant matter, because the question was, as a result of this statement here, did Mr. Barton at that time actually have \$60,000. It was regarded as throwing light on 50

that point. If his Honour had felt that Mr. Barton had deliberately stated something there and deliberately then gave sworn evidence to the contrary, his Honour would certainly not have upheld his credit in the way that his Honour did. We submit it would not be right, in view of his Honour's finding as to Mr. Barton's credit, to entertain the thought that this meant other than - it goes further than that.

These notes were prepared by Mr. Grant, there are two sets of notes, and I was reading from page 652, line 40, prepared on 22nd December, and he had them both there. "I think there are matters on the top of the note of the 22nd that you prepared for the purpose of your discussion with Mr. Malouf ---"

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JACOBS, J.A.: Just for the record, pages 202 and 203 of the plaintiff's evidence on the question of the \$60,000.

MR. GRUZMAN: Pages 652 and 653, the evidence of Mr. Grant about the notes, 22nd December, from which it is established that however this \$300,000 suggestion arose, that strangely enough it does not appear in Mr. Grant's notes, made immediately after the conference from which it is said to have emanated. Secondly, you had Mr. Bovill being forced into the position in effect of saying he did not believe Mr. Grant. "I was forced into it", because if your Honours look at the evidence, he was most reluctant to say anything of that kind. From the evidence you would not think he was that sort of man.

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That is the position into which he was forced. Strangely enough, there is simply nothing to support Mr. Grant, and certainly, if his notes of an hour or so before were accurate, then his statement at the board meeting was inaccurate.

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There was every reason, one might think, that this company should not have accepted this proposition of Mr. Armstrong, to allow this man, as they knew him, a man who had been dismissed by the board and dismissed by the shareholders only three weeks before, should never have been allowed to go into control for one minute. Indeed, on the evidence, of this or any other company. I suppose it is reasonable to say that even if Mr. Barton had wanted it, one cannot imagine Mr. Bovill and Mr. Cotter being party to it.

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You must remember that although Barton is in the forefront, that he was acting in company matters as the spokesman for the majority of the board. Armstrong was at all times the odd man out, the man who was not respected by his fellow board members, for obvious reasons, and they wanted nothing to do with him.

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I am reminded of page 2800, which appears at page 112 of this document. There appears to be a typographical error there. It should be by Monier.

One further matter your Honours will

doubtless have noticed in these minutes of this meeting of 22nd December was that Mr. Armstrong said that this was the last chance to save the company. When one starts correlating what happened on 22nd December, your Honours see that first of all, just to recapitulate in a few words, on 14th December certain negotiations had started. On 21st December Barton said, "Look, you take the project". On 22nd December Armstrong puts up a proposal which he says is the last chance to save the company, and that is rejected. It is at this stage that the criminal activity, and as I say it is very difficult when one is sorting it out - it is at this stage that there is a sudden upsurge in the criminal activity.

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I am looking at it now from the commercial point of view. Here was a company which on anyone's view, and particularly Armstrong's, was doomed to failure. What he said was the last chance to save the company was rejected. If you take what Mr. Grant said as being correct at the board meeting, namely, that U.D.C. wanted Armstrong to put \$300,000 into the company and any chance of that being done was gone, because it had been rejected by the board, then this company was permanently and forever doomed.

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There was only one thing which could change the affairs of this company, and that is if by some miracle there was injected to the funds of the company a vast sum of money. The only way that that could happen would be if Barton was killed. From a straight commercial point of view it would mean that \$600,000 in cash would pass to Landmark. It would solve all of Armstrong's problems at once. Firstly, and I think most importantly to Armstrong, his financial problems would be solved, as I will be showing to your Honours later. You will remember that even in his divorce he said "It is the commercial side that is important". Armstrong was a man to whom money was God. That is a matter I will deal with later. His commercial problems would be solved. Landmark would be a successful company, and with Barton out of the road I suppose he foresaw the possibility that he would be in control.

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Just to give your Honours some idea, and I do not want it to be said later I have dealt with it, because I have not, I am only trying to indicate the importance of this date of 22nd December, certain significant events occurred.

JACOBS, J.A.: But you are dealing with 22nd December, aren't you?

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MR. GRUZMAN: Not on the criminal side. I am only dealing with it on the straight commercial side. I will deal with it perhaps three more times.

JACOBS, J.A.: Not with any of the same material, at all, I trust?

MR. GRUZMAN: No, but on the different aspects. I will be correlating it in my submissions.

JACOBS, J.A.: In your summary of the criminal activity on that day the only criminal activity was that Mr. Armstrong said, "This is the last chance to save the company"?

MR. GRUZMAN: Yes. But that was just a document of the barest skeleton.

JACOBS, J.A.: It seems to have all the references in it so far.

MR. GRUZMAN: It has only references to the skeleton. This is a long case, and there is a lot of evidence. 10

JACOBS, J.A.: Carry on, Mr. Gruzman.

MR. GRUZMAN: I cannot help it that it is long. I might say, if I put into that document all the events I wanted to refer to, it would have taken me two days to read it out to your Honours. At every point we have done all we can to make it easy for your Honours to grasp, if I might say so.

JACOBS, J.A.: A summary of that kind, if it were full, would be particularly helpful. I am sorry to hear that all the references are just casual ones that were put in. I thought they were the references to the evidence. 20

MR. GRUZMAN: Oh no, your Honour. They are a rough outline ---

JACOBS, J.A.: I think we should abandon it, because it is misleading.

MR. GRUZMAN: I do not know that it is misleading, except insofar as ---

JACOBS, J.A.: So far as it has been remarkably complete, because I have checked as you have gone through, and you have a reference to everything in this commercial side. 30

MR. GRUZMAN: Here are a couple of matters that are not referred to.

JACOBS, J.A.: What is the criminal activity of 22nd?

MR. GRUZMAN: Your Honour appreciates the significance of Hume. Your Honours will remember from the evidence Hume, the blue Falcon car, and the relationship with Novak. 40

JACOBS, J.A.: What happened on the 22nd?

MR. GRUZMAN: On 22nd Hume collected from the panel beaters this Falcon. This has been there, he said, for some time although it was only 12 months old, and it had been smashed by Novak.

JACOBS, J.A.: What other criminal activity on 22nd?

MR. GRUZMAN: The inference is ----

JACOBS, J.A.: What other criminal act?

MR. GRUZMAN: Will your Honour allow me to put it, please?

JACOBS, J.A.: You were saying "inference". I thought you were answering me.

MR. GRUZMAN: I am answering your Honour.

JACOBS, J.A.: Then please do. What other criminal act?

MR. GRUZMAN: The inference we seek your Honours to draw as to a criminal act is that on that day, or perhaps the day after, an arrangement was made under which the registration of that car was transferred by Hume to Novak. 10

JACOBS, J.A.: That was done on 29th, wasn't it?

MR. GRUZMAN: That was only the second working day after 22nd. So if the arrangement was made on 22nd or the next day, the first time the transfer could be registered was the 29th. At this stage Hume was seeing Novak nearly every day, and it was around this time, that is during the last week in December, that Novak recruited Vojinovic to kill Barton, and that is the evidence. As I say, I will come to that in great detail later. At the moment I am trying to confine my principal submissions to the commercial side. 20

JACOBS, J.A.: I thought you were still dealing with the 22nd. I must have misunderstood. I did not realise you were going on to the next day.

MR. GRUZMAN: No, the 22nd.

JACOBS, J.A.: Hume began to see Novak the next day, not the 22nd. 30

MR. GRUZMAN: Well, your Honour, the arrangement was doubtless made. I am trying to give your Honours an idea of the sort of criminal activity which commenced on and from the 22nd.

JACOBS, J.A.: We will not take time about it now; I just point that out to you.

MR. GRUZMAN: Your Honours may remember the evidence that after Grant's lack of success at the board meeting he told Armstrong that nothing more could be done until after Christmas. And of course, this spelled disaster, in Armstrong's mind, U.D.C. will go ahead, appoint the receiver, etc. 40

Just so that your Honours will see the other side, I will mention one more fact on the criminal side, and that is that Armstrong was seeing Hume frequently, and you will remember that Hume alleged in an affidavit that Barton was trying to kill Armstrong for the \$600,000 insurance and had entered into a conspiracy about that, and that he spoke 50

to Armstrong about that. As at 22nd December then, it seemed that the negotiations were at an end. The proposition which had been formulated on 14th December was not spoken of any more that year, and there seemed to have supervened the events of the counter offer by Barton "take the lot" and the appointment by U.D.C. of the receiver.

These events, and the way they occurred, might perhaps explain, bearing in mind of course Barton's state of mind, which I will come to later, at that time how he could have quite forgotten those talks with Mr. Smith between 14th and 19th December. The next thing that happened on the commercial side is that out of the blue as it were, because that is the way the evidence is, Smith rang Barton on 3rd January and took up the negotiations which had been left at the 20th December. When I say "took up the negotiations", just took the matter up where it had been left, as if there had never been a hiatus.

Smith went to Barton's office, where he made some notes. This is what he puts then, that there were these alternatives methods of settlement, the mortgage debt over Paradise Waters to be discharged and the shares back to the \$500,000, cash within one week \$140,000, plus the penthouse \$60,000, that is \$200,000, less the \$200,000, leaves \$300,000 to be outstanding. The balance in one year at $7\frac{1}{2}$ per cent. simple interest. Subject to prior payment on realisation of the securities, the securities were to be the second charge over Landmark House, which was said to have a mortgage value of \$800,000, or a second charge over Paradise Waters plus the option to buy thirty blocks at 40 per cent., plus the sale of shares to Armstrong. The third alternative would be to accept the transfer of the penthouse for \$60,000 and security over Paradise Towers of \$190,000 and \$440,000 over Landmark House, Armstrong to resign but Smith to be appointed as chairman. Although it says zero after Armstrong, I think that that refers to the 12 per cent. I did tell your Honours earlier that there was an unchallenged increase of interest from $7\frac{1}{2}$ per cent to 12 per cent., and that appears in this document.

I think the evidence was that Barton had said $7\frac{1}{2}$ per cent. Barton's evidence appears in Vol. 2, commencing page 60. He was cross-examined by Mr. Staff to suggest that he had made these proposals, and he vigorously denied it, they were not his proposals, and of course, it is common ground that Mr. Smith made the approach. Counsel never put to him whether these proposals were discussed. All he was ever asked was whether he had made these proposals. Mr. Barton was never asked, nor did he deny, that these proposals had in fact been the subject of discussion. The only question was where they emanated from.

Mr. Smith said that late that day he read to Barton over the telephone the notes he had made of the conversation of the 3rd January, and he says

that Mr. Barton said "Yes, I agree". One would think that that probably means that Mr. Smith's notes are correct, because there were three alternatives there. Mr. Smith also spoke to Armstrong on the 3rd and saw him on the 4th. It was at that interview that the document appearing on page 118 came into existence. That document is page 118, page 2732.

The basis of the agreement, this is Mr. Armstrong's proposal to Smith at this point of time, the mortgage over Paradise Waters for \$400,000 plus interest to be discharged and the shares in Paradise Waters to be sold for \$100,000. Payment was to be \$60,000 for the penthouse, furnished as is, prompt cash within seven days, \$140,000 plus interest.

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JACOBS, J.A.: We have read this. This is in the judgment and set out in full, and for myself, I have read the judgment at least ten times, so I must have read this many times more. I do not think you have to read it again.

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MR. GRUZMAN: These are the sort of things that we missed ourselves, and still miss to this day.

JACOBS, J.A.: Refer to some sentence of it.

MR. GRUZMAN: Here suddenly your Honour remembers the 40 per cent., how the 40 per cent. discount comes in.

JACOBS, J.A.: It changes to 35, and 50 per cent.

MR. GRUZMAN: It changes to 35 blocks, and 50 per cent. These are not those figures.

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JACOBS, J.A.: We have noticed that. You referred to it yesterday.

MR. GRUZMAN: Not in the way it came about, and the significance of it. It is so easy, I know, in a mass of evidence to say "Oh well, so what".

JACOBS, J.A.: All I am saying is please do not read this document out as you commenced to do, because I am not exaggerating when I say that I have read it such a number of times, and I feel sure my brothers have. You are drawing to our attention that now it is 35 blocks and it is 50 per cent.

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MR. GRUZMAN: Yes. For myself, if I may say so, we find it difficult to appreciate the significance. We get as bored with the matter as anyone.

JACOBS, J.A.: It is not a matter of being bored.

MR. GRUZMAN: When there is such a mass of evidence to go through, it is so difficult to think that each point is significant.

JACOBS, J.A.: It is only what I am calling to your mind, what was arranged on the first day of the hearing of this case before we adjourned before two

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weeks, that the evidence would not be read at length at this hearing.

MR. GRUZMAN: All I can say is this, and I understand the spirit in which your Honour meant it --

JACOBS, J.A.: Otherwise the Court would never have adjourned for two weeks.

MR. GRUZMAN: We accept to the full that your Honours have ample call on the court's time, and other litigants besides these. We understand that.

JACOBS, J.A.: That is not the point. 10

MR. GRUZMAN: We ourselves took two months to read the appeal book, and we have lived through it.

JACOBS, J.A.: You have told us that.

MR. GRUZMAN: We are not saying that your Honours could not have read it in two weeks.

JACOBS, J.A.: I merely recall to your mind (a) what was then said and (b) that we have read this document many times. You wanted to go to that part about the 35 blocks.

MR. GRUZMAN: I wanted to go to that part about the 35 blocks, and the 50 per cent. That meant a difference of thousands of dollars. Five additional blocks was \$20,000 and it made a difference of \$55,000 in a moment, for no reason, when the company was worse off than it had ever been, when not only had U.D.C. reneged, but also was poised to appoint a receiver, when all was lost there was added without any discussion the equivalent of \$55,000 to Mr. Armstrong, without any demur from Barton, Landmark or anyone. It is a significant matter. It is more than a straw in the wind. It demonstrates the dominating position of Armstrong at this point of time. Anything that Armstrong wanted was agreed to. There are two possibilities of course which come to mind. One is that Barton agreed to whatever Armstrong wanted - that is, agreed in truth, but his mind went with what he said, and the alternative is that he was saying yes, yes, yes, with no more real intention of carrying it out than it has been suggested that perhaps U.D.C. had. 20 30 40

It was good enough, to put it another way, for U.D.C. to go back on its resolution and later, acted on as it was - how much more likely is it that Mr. Barton may have had reservations and said to himself, "Well, I will agree to anything this fellow wants at this point of time, but I am not fully committed until my signature and the company's signature is on the dotted line". So understood, of course, if you look at what Armstrong wrote in his diary as at that date, 4th January - to my memory, and I will get it out for your Honours in a moment, he said "There were some new proposals but I doubt that much will come of them". 50

JACOBS, J.A.: We recall that.

MR. GRUZMAN: I will give your Honours the reference when it is turned up. I would interpolate there that his Honour Mr. Justice Street's view of 4th January as being a date beyond which one should not look in determining the contractual arrangements or agreement is in our submission not correct.

I am reminded that as late as 6th January it was that Mr. Armstrong wrote in his dairy (page 2356) "Spent morning in office and discussed matters re Barton and Landmark with Bruce Smith. There are some new proposals to finish on Friday, January 13th but I doubt if much will come of them." I suppose from one point of view, and from the point of view which is significant and critical in this case, it does not matter - I say from one point of view only, what Barton thought - the question is did Armstrong think it was necessary to put Vojinovic into action, and on his own admission on 6th January he did not think that Barton was going to go through with this deal, "I doubt if much will come of it". Indeed, the likelihood is that he was right, nothing would have come of it, Barton being pressed and pressured, was saying anything to gain time, hoping that something would save him from this shocking position in which he found himself. As I say, I will come to that a little later.

The significant thing is that in Armstrong's mind there was nothing fixed on 4th or 5th or even after he had seen Smith on the 6th. It was all up in the air. One might imagine that a man like Armstrong, who knew the terrible things that he was doing to Barton, could never have felt safe that an agreement would be signed until it actually had been.

May I just give your Honours a reference to page 614, line 22 of the Commercial Document, dealing with this matter of Mr. Smith's evidence about the events of 4th January. The only evidence about the 12 per cent. and the $7\frac{1}{2}$ per cent was "There is a difference of the interest rate, 12 per cent. to $7\frac{1}{2}$ per cent.? A. Yes" and at line 38, "On 4th you discussed with Mr. Armstrong ... instead of 40 per cent." And then "And payment in cash on completion ... Yes, the 15th March." Then at page 617, line 50, "Having got these instructions from Mr. Armstrong and the signature to it ... but you understand it is subject to the solicitors." That is how much Mr. Barton argued about an increase of \$55,000 in the options and from $7\frac{1}{2}$ per cent. to 12 per cent., which my mental arithmetic does not allow me to put a figure to your Honours immediately.

These were matters which were not insignificant. They may have been insignificant from certain points of view. Indeed, our submission is they are. Remembering what you are dealing with is a man of business, running a multi-million dollar company, there are only two possible explanations (1) that he was so much under Armstrong's dominance at that point of time that he just agreed to anything, and the other is ---

MASON, J.A.: I do not think you need to labour it, Mr. Gruzman. The point is clear, and obviously it is a matter in your favour.

MR. GRUZMAN: The alternative being, and this is why I am labouring it, that he did not mean it - (a) he did not mean it when he said it at that point of time and (b) Armstrong never thought he did. You have Armstrong's own admission that he never thought he meant it. And that is the significance of Vojinovic. Your Honours doubtless noticed page 2803, page 122, that time was the essence of the agreement. This is the so-called reluctant vendor, Mr. Armstrong, stipulating time is the essence of the agreement, failure to complete by Friday week, 12 noon - I cannot quite follow the rest - (read). What he is saying there is that unless he agrees by Friday week at 12 noon there will be a board meeting at Landmark at which Beale is to be appointed to the Board, Armstrong to be chairman and Barton to resign. What he wanted was an immediate agreement, he is looking for an agreement in effect this day, and in default of completion by Friday week at 12 noon these events will occur. This is not the long-range discussion, what he is looking for is an immediate agreement under which he got what he wants. The only thing I suppose that he does not get that he wants is Barton's signature. What he is pushing for at this time is for Barton to sign something, heads of agreement, something, but even Armstrong is prepared to sign. Armstrong, the unwilling vendor, signs, but Barton does not sign.

We would submit that the true inference is that Barton is saying, "Yes, I will agree to anything, I will agree to this, you name it, I will agree to it, it does not matter how many thousands, I will agree to it", both parties knowing that until he signs, it is meaningless.

Your Honours will have noticed also perhaps that in paragraph 3 of this document appearing at page 121, page 2802 - (read) - ending "as signed by Smith and Armstrong on 5th January". By the way, the 4th January is a Wednesday. So what is contemplated in this discussion is some signing to take place next day, the 5th January, and names of people, turning over the page, page 2803, by 10.00 a.m., Friday. It says that. So that the pressure is being put on, Barton is being screwed down, and it is put to him "You will agree now, you will sign tomorrow" and by the 13th the matter will be so complete that unless you go through with it Armstrong will take control of Landmark and so on. It is the only thing, on the evidence, that Barton did not do prior to the 7th January. He agreed to anything, but the one thing he would not do was put his pen to paper.

It is consistent with two bases, but one might think on the whole of the evidence that the real answer was he never intended to go through with it if he could possibly get out of it. Indeed, the very document is already there, all signed up

by Smith and Armstrong, the next document, page 123. I do not suppose anything could better indicate the failure by Armstrong to achieve what he wanted before 7th when, as you know, Vojinovic came into it. That week of frenzied activity after Barton's return from Surfers Paradise produced no result - a lot of talk, but no action.

TAYLOR, A-J.A.: Could you tell me this or have one of your juniors look it up, the deeds guaranteeing in respect of these shares are all dated 13th January.

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MR. GRUZMAN: Yes. The answer is that Mr. Armstrong's deeds were all signed on that date.

TAYLOR, A-J.A.: These are the deeds, they are dated the 13th?

MR. GRUZMAN: They are not only dated, they were executed.

TAYLOR, A-J.A.: On the 13th?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: By Mr. Barton?

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MR. GRUZMAN: No, by Armstrong. This is one of the things we will deal with, the reluctant vendor, later.

TAYLOR, A-J.A.: I am talking about the deeds of guarantee signed by Barton.

MR. GRUZMAN: By Armstrong.

TAYLOR, A-J.A.: I see what you mean. They were exchanged?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: The exchanged copies were all executed, that is how they came to be dated.

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MR. GRUZMAN: Yes.

TAYLOR, A.-J.A.: Armstrong executed his copy on the 13th, and they were exchanged on the 18th.

MR. GRUZMAN: Yes. The first agreement was on 17th.

TAYLOR, A-J.A.: And the other on the 18th?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: It was all originally to be settled on the 12th or the 13th?

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MR. GRUZMAN: The 13th. Armstrong ---

TAYLOR, A-J.A.: Thank you, Mr. Gruzman, that satisfied my question.

MR. GRUZMAN: We will be submitting it is of some significance that they were so anxious to sign, they signed earlier - they had done their first signing long prior to that, and their signing on 5th January, their signatures were already there on this document that is now before your Honours.

JACOBS, J.A.: You were saying that Mr. Barton refused to sign earlier.

MR. GRUZMAN: Yes.

JACOBS, J.A.: What page is that? 10

MR. GRUZMAN: It is the fact. The fact is he did not. The fact is he was asked to, the fact is the document was prepared, the fact is there was negotiation with Smith, and the fact is he did not sign. The blackmailing was on the 12th. "I will not be blackmailed into it" was on the 12th.

JACOBS, J.A.: You say it is the inference that he was asked to initial or sign something and did not.

MR. GRUZMAN: Yes.

JACOBS, J.A.: I wanted to be clear about it, thank you. 20

MR. GRUZMAN: It is an inference gained from these documents which I just read to your Honour. At page 123 of the document, page 2804, and Smith's and Armstrong's signatures and the date 5th January, and the names to be provided. One thing is clear if nothing else is, that he was to provide the names of the purchasers by 10.00 a.m. Friday, this being on the Wednesday.

JACOBS, J.A.: You say it is an inference. 30

MR. GRUZMAN: Yes.

JACOBS, J.A.: What is your next point?

MR. GRUZMAN: I was going to refer to page 126, not in detail. This is Mr. Grant's diary notes of 4th January where Mr. Grant immediately spends a great amount of time.

JACOBS, J.A.: I think that is one thing everyone would agree on. He must have, to prepare all those documents.

MR. GRUZMAN: A great deal of time and energy, immediately and without delay, in the preparation of the documents. And as I am reminded, at as great a speed as the position would permit, which is significant. By 6th January he has sent out his drafts. I am reminded that Mr. Grant moved with such expedition that if one looks at page 127 and page 128, pages 2808 and 2809, Mr. Grant sends out his drafts both to Gaden, Bowen and Stewart and to Allen, Allen and Hemsley on behalf of the company on Friday, 6th, and asked for a conference on the Monday. I do not suppose any commercial 40 50

transaction of this magnitude has been carried through faster.

JACOBS, J.A.: Unless there is a receiver threatening you.

MR. GRUZMAN: Yes, because once this deal with the receiver supervened, Armstrong would never get this. Once a receiver came in, that would be the end of Armstrong.

JACOBS, J.A.: And of Barton.

MR. GRUZMAN: Well, your Honours, certainly. Certainly as far as Armstrong. It did not matter that much to Barton. He did not stand to lose one-million. Your Honours have doubtless looked at the deed.

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JACOBS, J.A.: Yes.

MR. GRUZMAN: If your Honours would look at page 2821, which is page 140 in this book you will see that the settlement was to have taken place at 12 noon on Friday, 13th.

JACOBS, J.A.: I have a query on page 2818 I wanted to raise. I have had it in mind. Clauses (b) and (c) near the bottom (read).

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MR. GRUZMAN: It is 65 cents.

JACOBS, J.A.: Is it a mistake, or is it my thought that is wrong?

MR. GRUZMAN: The five cent dividend was declared but not paid.

JACOBS, J.A.: I understand all that.

MR. GRUZMAN: He says the deal is unless the dividend is paid by Landmark Armstrong is to pay Barton five cents more for each share - Barton is to pay Armstrong. In other words, this is to encourage Barton to pay the dividend out of Landmark, otherwise he personally pays five-cents on each of the 300,000 shares.

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JACOBS, J.A.: If a dividend is paid, Barton keeps it, ex dividend. They are sold ex dividend.

MR. GRUZMAN: No. What it is, Barton has to buy the shares. There are two possibilities. One is the dividend to be declared, which Armstrong will get. If Landmark does not pay a dividend, Barton has to pay it.

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JACOBS, J.A.: Yes, I follow now. That is to make sure that Mr. Armstrong gets his dividend.

MR. GRUZMAN: Yes. Not his dividend, to make sure that a dividend that no other shareholder may get, because he believes will be paid to him personally by Barton.

JACOBS, J.A.: When I was going through it previously I just could not see for the moment the reason. I can see it now. You were going to page 2821.

MR. GRUZMAN: In itself, when one considers it, it is probably against public policy in the sense that it places Barton in a position that either he procured Landmark to pay that dividend or he had to pay it himself.

JACOBS, J.A.: There is no issue on that.

MR. GRUZMAN: It is one of the matters.

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JACOBS, J.A.: Page 2821, you were going to. I was only asking on the nature of the transaction, I could not quite follow it, but I can follow it now.

MR. GRUZMAN: I was only going to mention to your Honours that in cl.14 settlement was in fact to have taken place on Friday, 13th. If your Honours would look at page 141, page 2822, it shows that this deed did contemplate the appointment of a receiver by U.D.C. I will go into that later.

Clause 16 is a complicated clause, but what it means is that unless there is a settlement on the prescribed date Barton covenants in effect that he will resign and hand over to Armstrong. He covenants that he will use his casting vote to have Mr. Hawley appointed and then resign as chairman and vote in favour of the appointment of Armstrong as chairman, resign as managing director and director of Landmark, and to appoint Armstrong as chairman of all the Landmark companies.

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JACOBS, J.A.: On what page was that?

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MR. GRUZMAN: It is pages 2822, 2824, which is pages 141 to 143 on this document.

JACOBS, J.A.: Then if a receiver was appointed the agreement was to go ahead, but certainly the money was not to be advanced. That is what it means.

MR. GRUZMAN: Yes. It is sufficient for these purposes - I have not taken your Honours through the whole of the agreement - for the present purposes it is sufficient to refer to pages 2824 and 2825, pages 143 and 144, which contains the covenants under which Mr. Smith and Mr. Hawley are to be appointed to the board by the votes of Mr. Barton and Mr. Armstrong.

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JACOBS, J.A.: That is the end of the deed, is it, for the time being?

MR. GRUZMAN: For the time being.

(Luncheon adjournment.)

Your Honours, we have now dealt with 14th December when the proposition was first put forward to Barton, the 22nd December when the parties parted

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in chaos, in hostile camps, with nothing on foot, the 4th January when Barton - your Honours will remember he had been telephoned in the early hours of the morning by Armstrong on 3rd and I think 4th January, re-awakening the relationship and situation of terror which existed. On 4th January spoke to Grant, and according to Grant a number of proposals were put forward, \$200,000 now and the balance in a year's time, "I will give you this security, that security or the other security", but of course, not a word in writing. On 4th also there had apparently from the documents been suggested or put forward that something should be done immediately by way of signing. It is apparent from the signatures of Smith and Grant on the documents to which I have referred your Honours and the supplying of names by the Friday, this being the Wednesday. 10

Armstrong's anxiety in the matter is shown by the fact that although he had really nothing from Barton, because although Smith says that Barton agreed on the 4th, he had also agreed on the 14th December, and nothing had come of that. So that Barton's verbal agreement on the 4th meant precisely nothing. It was enough indication or encouragement shall we say to the Armstrong camp for Mr. Grant to set about preparing documents. They were prepared with such alacrity that they were in fact delivered to the solicitors on the other side --- 20

JACOBS, J.A.: You are recapitulating, are you, what you said this morning? 30

MR. GRUZMAN: Yes.

JACOBS, J.A.: Do not, please. We have only had an hour or so. Let us go on to the next stage. You did say that, Mr. Gruzman.

MR. GRUZMAN: I am trying to show your Honours the three stages, the various stages.

JACOBS, J.A.: You must give us credit for taking it in, even though we have had lunch, really.

MR. GRUZMAN: The documents were prepared with such alacrity that they were delivered at 5.00 p.m. on the Friday. 40

JACOBS, J.A.: That could display a number of things, couldn't it, sense of guilt?

MR. GRUZMAN: Yes.

JACOBS, J.A.: An urgency of pressure?

MR. GRUZMAN: Yes.

JACOBS, J.A.: Or mere efficiency on the part of the solicitors.

MR. GRUZMAN: Yes, but of them all, having in mind that your Honours know that Armstrong --- 50

JACOBS, J.A.: Wanted speed.

MR. GRUZMAN: --- was subjecting Barton to terror, the most likely and the proper inference for this Court to draw is that it shows guilt.

JACOBS, J.A.: What is the next stage then, after this?

MR. GRUZMAN: What was the position then at 4th January? The answer is nothing had been achieved by Armstrong.

JACOBS, J.A.: No conclusion had been reached. 10

MR. GRUZMAN: They had nothing from Barton.

JACOBS, J.A.: In writing.

MR. GRUZMAN: In writing. All Barton had done was to temporize and to say he agreed, the same as he had done three weeks before, and with as little effect. As we will show your Honours later there had been put into operation the machinery for employing the gunman, Vojinovic, some time prior to the new year. Mr. Armstrong stated in his diary, as you saw this morning, on the 6th, "Does not look as though anything much will come of it". 20

JACOBS, J.A.: Yes, we are aware of that.

MR. GRUZMAN: On 7th Vojinovic was put into operation. By a fortuitous circumstances, instead of killing Mr. Barton as he had been engaged to do he told Mr. Barton of the murder plot. I will deal with it, of course, fully later but he was subsequently taken by the police and made a statement.

JACOBS, J.A.: As a matter of fact, that is something that has not escaped us. Really, Mr. Gruzman. 30

MR. GRUZMAN: Thank you. Taken by the police and made a statement, to which I will refer your Honours later. The substance of the statement established that there had been a conspiracy to murder Mr. Barton.

JACOBS, J.A.: What is the next part of this commercial transaction?

MR. GRUZMAN: Would your Honour allow me to develop it? One cannot pass over quickly the fact that in the course of a commercial transaction there was a plot to murder. One might not wish to hear it too often, perhaps, but the fact is that is what occurred in this case, and that is what this case is about. 40

JACOBS, J.A.: Mr. Gruzman, if you think that that fact has escaped us in the light of the evidence and the findings of the judge, I think you are underestimating us.

MR. GRUZMAN: With respect, we do not underestimate

your Honours one small piece. We understand that your Honours have read it. We wish to place the matter with the significance which we ask your Honours to draw from it, and we seek your Honours to draw more from it and something different from it than his Honour the trial judge. If I just leave it and say your Honours have read the evidence --

JACOBS, J.A.: I am not asking you to do it.

MR. GRUZMAN: --- I may as well not be here.

JACOBS, J.A.: In this particular case you are repeating almost like a chorus every statement you make each day, each hour, and yet at the same time there was a threat, this man felt he was threatened by Mr. Armstrong. Whether he was in fact is a problem you are coming to. He felt that he was threatened with murder. You are repeating that as it were almost strophe and antistrophe, but I feel if you go to the strophean and leave the constant comparison, you won't lose anything by it. We are aware of the broad outline of the case.

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MR. GRUZMAN: It is not the broad outline. His Honour Mr. Justice Street was well aware of the broad outline also.

JACOBS, J.A.: You want us to take a different view.

MR. GRUZMAN: Yes.

JACOBS, J.A.: I do not think you help yourself by consistently repeating - I was about to say the histrionics of it - but it is a histrionic situation, and we are all well aware of it. You do not gain anything by at every stage in your legal, careful argument, pointing out the obvious to us.

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MR. GRUZMAN: I appreciate the assistance which your Honour seeks to afford to me. To speak of it as a histrionic situation means that I am failing in the attempt which we are making to show that it was not a histrionic situation at all.

JACOBS, J.A.: I think you may have misunderstood me by the word "histrionic". I do not underestimate ---

MR. GRUZMAN: This was a matter literally of life and of death to Barton, and it came in the light of a commercial situation. I know how unreal it must sound to your Honours sitting in a civil court to have to deal with this sort of situation, but this is what happened. These are the realities. I only hope that I can succeed in bringing it home to your Honours in the same way as it was brought home to Mr. Barton, so that your Honours will appreciate really what was actuating him. One of the reasons is to show that if there is some illogical action perhaps in Mr. Barton's conduct, that a man subject to such very real threats and very real terror should be forgiven for it, as indeed his Honour Mr. Justice Street forgave judicially anything in Mr. Barton's evidence which could not be exactly added up.

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JACOBS, J.A.: We must use words in different meanings, Mr. Gruzman. With this background that you are going to put forward, what is the next historical step?

MR. GRUZMAN: The simple point I was making, and it is not insignificant, is that when his Honour Mr. Justice Street found that on 4th January in effect there was a concluded agreement and therefore what happened after that was, so far as that agreement was concerned, irrelevant, that his Honour was wrong. The fact was that as at 4th January nothing had been concluded, Barton had not committed himself in any real way. Armstrong on 6th January thought nothing would come of it. What I was showing was that in the commercial context something dramatic if one likes had to occur, something that really brought fear to Barton had to occur if Armstrong was to achieve the one agreement which could save him. I will come back to the Vojinovic incident of course later, but historically ---

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JACOBS, J.A.: We are all aware that it then occurred.

MR. GRUZMAN: Yes.

JACOBS, J.A.: So if you are coming back to it, you can assume we have in the forefront of our minds the fact that this terrible thing occurred whoever was responsible for it.

MR. GRUZMAN: Exactly. The next thing that occurs historically in the commercial context, Smith himself had no further contact with Barton from the 4th January until the 10th. He mentioned to Barton the question had arisen of the nine other parties besides Barton who would enter into the contract to purchase Armstrong's shares in Landmark. Smith said that Mr. Armstrong also said that he wanted the contracts exchanged by Friday. And Barton said "That is not possible".

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JACOBS, J.A.: What page was that?

MR. GRUZMAN: I will give it to you in a moment.

JACOBS, J.A.: Do not stop. I am sure your juniors will get it and give it to you in a moment, and that is the way we will proceed. Could not it be looked up, Mr. Gruzman? Would it not be simpler if you went on and said, "I will get my juniors to look that matter up"?

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MR. GRUZMAN: I am not looking for that matter at all. I am on to the next one. My juniors are looking it up. What I want to go to, while that is being found, is the conversation with Smith on or about 10th January, which is reported at page 71.

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The other reference by the way is page 619. I will come to that in a moment. It is in Commercial 2, page 71, line 10.

MR. GRUZMAN: It was put to him; "shortly before or shortly after you moved to the Wentworth Hotel". In conjunction with Mr. Smith's evidence it is probably the same conversation as took place on 10th January. At line 9 Barton said: "I said to Smith ... I have no authority to agree with him on behalf of Landmark Corporation ... let him prepare some sort of head of agreement which can be shown to me and Landmark advisers and finally the Board have to agree or disagree with anything that is in that document." That is what was in Mr. Barton's mind as at that time. Page 71, line 47 "As at the 10th January you told us you had a conversation on commercial lines with Mr. Smith ... I thought Mr. Armstrong was misleading Mr. Smith ... I realised these criminals had been hired to kill me. I thought I will get killed". This is at a date subsequent to 4th January.

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TAYLOR, A-J.A.: And to the 7th.

MR. GRUZMAN: It is fixed by Mr. Barton at the 10th January, and that is probably right, looking at the other evidence, in particular Mr. Smith's.

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He is saying there as late as 10th January what was in his mind was heads of agreement that can be considered by the Board of Landmark. He was agreeing to anything that was put up to him because of the possible consequences. That is entirely consistent with Mr. Armstrong's view of it at that time. There is no evidence that either party really believed that as at 4th January a situation had been reached where an agreement of any kind other than mere unenforceable and possibly unmeant words had been reached.

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One can add to that matter I will deal with in another way later. After the Vojinovic incident your Honours remember the scene on the Sunday morning at C.I.B. Headquarters, when Mr. Miller and Mr. Muir saw the Police. The Police were told, and it appears from their own notes, that a purported agreement had been reached.

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MASON, J.A.: An agreement had been reached subject to final documentation by the solicitors.

MR. GRUZMAN: There were two notations. One said a purported agreement had been reached and the other said what appeared to be an agreement, subject to documentation.

TAYLOR, A-J.A.: Lendrum at 2890. That was never denied by anybody.

MR. GRUZMAN: The significance is nobody said an agreement had been reached. What was said, and you can imagine it must have been said fairly clearly to be taken down in the rough notes of Police officers getting a background, not an agreement, but one describes it as a purported agreement and the other describes it as what appears to be an agreement subject to documentation. It is one of the nice confirmations of the true position.

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You have Armstrong on the 6th saying he does not think anything will come of it. You have Barton regarding it as heads of agreement. You have a solicitor, Mr. Miller, describing it, and other people interpreted his remarks as meaning on the one hand a purported agreement and on the other hand as what appeared to be an agreement subject to documentation.

It is perfectly obvious what was being conveyed was that there had been some talks, that there had been some off-putting as it were, of the situation. Nobody on any part of the case regarded this as an agreement. 10

It does not matter very much I suppose how anybody regarded it. What is the law? What do your Honours find? Was there anything which could be remotely regarded as an enforceable agreement at that time? Certainly it was not nearly as strong as the U.D.C. situation. Questions of estoppel, written representations, and so on, and that never came to anything. 20

The situation at the 4th January was that there was absolutely nothing which the parties or their attorneys regarded as an agreement. In that with respect his Honour's view is not correct.

Let us follow it through. I won't labour the situation which developed after this except to say Barton left his home, a rifle was purchased for protection, and he sent his family to the country. Subject to what I think his Honour, Street, J. described as a state of real mental torment, he signed this agreement. 30

That covers the chronological substance of that part of the commercial transaction up to that point.

I would like to invite your Honour's attention to the evidence. I am reminded as late as the 13th January, in the document on page 2861 Mr. Grant describes the situation and ends up "agreement reached in principle". 40

JACOBS, J.A.: What are the top words there?

MR. GRUZMAN: Barton had required from Grant through the other solicitors a list of the documents which were required to be produced on the 7th. The words are "not exchanged".

On the same day, 13th January, the preceding document in the folder, Commercial 1, No. 183, your Honours will see a letter from Phillip Malouf to Landmark.

TAYLOR, A-J.A.: Why is that called an exercise of option? 50

MR. GRUZMAN: The reason is that there is a missing exhibit, as far as we can see. I can give your Honour the page reference.

TAYLOR, A-J.A.: It is not an exercise of option.

MR. GRUZMAN: No, but there is an exercise of option, which is missing from the Appeal Book.

JACOBS, J.A.: Can the parties agree on that?

MR. GRUZMAN: Exhibits "L" and "M" come out of U.D.C. file, which was Exhibit "M".

JACOBS, J.A.: Discuss it with Mr. Powell and see if you can reach agreement, and if you cannot, we can go into it in more detail.

MR. GRUZMAN: On 13th January U.D.C. replied to the letter from Messrs. Cotter and Bovill. (Exhibit read.) 10

JACOBS, J.A.: What is your point from this?

MR. GRUZMAN: That they are making a sort of response to Cotter and Bovill's conciliatory letter.

JACOBS, J.A.: They had relented?

MR. GRUZMAN: A very vague and unreal form of relenting. They still had \$430,000. They obviously required the co-operation of Landmark to realise the asset. Landmark having adopted a conciliatory approach arising from Mr. Barton saying "Don't worry we don't need your money, we won't say nasty things about you because you went back on your promise". 20

JACOBS, J.A.: Or Mr. Bovill's letter of 28th which overcame the difficulties. They then replied more or less in the way you would expect a mortgagee to talk.

MR. GRUZMAN: Barton took it up in the same way and wrote an equally conciliatory letter saying "Here is all the information, we hope you are going to do business with us". I do not think anybody had any doubt as to the true position. 30

I was going to make an excursus to give your Honour our submissions on a matter which is fairly important and that is this reluctant vendor concept which appears in his Honour's judgment at page 3198, line 12, where his Honour said: "The evidence indicated a situation in which Mr. Armstrong was a reluctant vendor whom Mr. Barton had to buy out if Landmark was to be sold". That is one of the findings that we specifically challenged. We challenge it among other things upon these bases. 40

JACOBS, J.A.: Is this a summary of what you have been putting?

MR. GRUZMAN: No.

JACOBS, J.A.: You have spoken quite a bit about reluctant vendor. You have taken us through all the correspondence and steps which would show Mr. Armstrong's state of mind. I would have thought

you would summarise and say in your submission that does not show a reluctant vendor. That is what you have kept saying.

MR. GRUZMAN: I know. What I am going to do for your Honours' assistance is to collect together the aspects of the evidence which we say show more clearly that Mr. Armstrong was not a reluctant vendor.

JACOBS, J.A.: Different ones from the ones you have referred to already? 10

MR. GRUZMAN: No.

JACOBS, J.A.: You must credit us with perception of the arguments that you are putting. If we had to decide it this afternoon you might be entitled to reiterate. I have heard you saying now for a day and a half, "This shows that Mr. Armstrong was not a reluctant vendor". Are there any aspects of that which you have not put?

MR. GRUZMAN: No. We wish to put to your Honours in a collected form references. 20

JACOBS, J.A.: Would you do that in writing?

MR. GRUZMAN: We would prefer to give your Honour a reference now to all those matters in the evidence which show that Mr. Armstrong was not a reluctant vendor.

JACOBS, J.A.: The Court would prefer that type of resume of matter you have already put to be put in writing. We do not want to stop you bringing anything to the attention we are going to give and have given to this case. When it comes to the reiteration of matters we have already read or considered, we think it is better done in writing. 30

MR. GRUZMAN: Our problem is that we believe that we should argue the matter and to argue the matter requires an oral presentation in a collected form of the series of points which we say establish a particular proposition.

JACOBS, J.A.: All I say is that the Court is of the opinion that a recapitulation of this kind is better done in writing. Ultimately while you are addressing, that is a decision you have to make. 40

MR. GRUZMAN: I do what your Honour directs me to.

JACOBS, J.A.: I did not direct you. I said, although while you are addressing it is a matter for you to decide what matter to place before the court, the court is of the opinion that a recapitulation of matter already covered is better done in writing.

MR. GRUZMAN: Would it be convenient if I give your Honours a list only of the references now to that subject, and we will submit later a more comprehensive document. 50

JACOBS, J.A.: You take the course you feel is the correct course for you to take. Whatever you are going to do, I am not quite clear. The Court has expressed its view on what you ought to do. Proceed.

MR. GRUZMAN: I hope what I will do will accord with the Court's ruling. I will give your Honour the reference to the position prior to 14th December, the letters which appear as Items 35, 36, 37, 45, 62 and 64 of the document, Com. 1, showing Armstrong persistently pressing for payment prior to 14th December. In the last letter of 13th December, appointment of receiver if moneys not paid; notwithstanding Smith's previous advice. Secondly, the document which appears as 65, Smith's instructions to seek from Barton a firm offer subject to an acceptance within 48 hours. The next one is Document 84, Smith's instructions from Armstrong that he would accept 50 cents a share if necessary and up to four years to pay with no interest. Item 85, firm agreement to be reached by 10 a.m., Friday, two days later. The next one, Item 87, Mr. Grant's note of 14th December, 75 per cent. 25 per cent. chance of pulling it off. The next item, 101, Smith's analysis of the 19th December.

JACOBS, J.A.: Would you give us the reference. I am looking forward to this being reduced into written form, these short references.

MR. GRUZMAN: It will be.

JACOBS, J.A.: Just give us the pages at the moment.

MR. GRUZMAN: 101, Smith's analysis of the 19th December; 102, Smith's recommendation; 117; 118 Cash promptly within seven days; 121, which is in fact page 2802, lines 2 and 3, agreement by noon Friday 6th; document 122 which is page 2803, line 25, time the essence of the agreement.

JACOBS, J.A.: I think that is going to be very useful, but much more useful when it is in writing.

MR. GRUZMAN: We will do that. Document 126, his diary notes showing the speed with which the documentation was carried out. Document 127, 171, Grant's diary notes, agreement by two p.m., otherwise negotiations off. Also agreement in principle on all issues to be reached by 2 p.m. today.

I think I now come to some new matter.

Your Honours might note that Mr. Horton has spoken to Mr. Powell. It is agreed that at page 85, line 26 of the transcript, it is noted "Exercise of option tendered and admitted without objection as Exhibit "L"." The evidence is on or shortly after 14th March, 1967 did the company receive from Mr. Armstrong ---

JACOBS, J.A.: Is this the new matter?

MR. GRUZMAN: This is an interpolation. This is

the missing exercised option which has been agreed between the parties. I refer your Honour to the evidence, my examination of the plaintiff in chief, appearing at page 85, line 19: "On or shortly after 14th March, 1967, did the company receive from Mr. Armstrong ... an exercise of the option in respect of the groups of shares ... do you recognise Mr. Grant's signature on the document? A. Yes. This is the document." Then: "Folder containing U.D.C. correspondence, January 1967, tendered without objection and admitted as Exhibit 'M'." We tendered those documents. Our examination of the original exhibits as compared with the appeal books shows that Exhibit "L" appears in the appeal book as one of the letters out of the folder, and Exhibit "M" as the next document out of the folder, and the option is missing. 10

JACOBS, J.A.: Is the option missing in the original exhibits.

MR. GRUZMAN: Yes. 20

JACOBS, J.A.: Where is it?

MR. GRUZMAN: We went to some trouble to make sure the exhibits were in order.

JACOBS, J.A.: Is it in the documents which we have?

MR. GRUZMAN: No.

JACOBS, J.A.: Is there any copy of it?

MR. GRUZMAN: We have not got one. It must exist somewhere.

MR. POWELL: Apparently no search has been made in the originals kept in the custody of the court. It might still be there. 30

MR. GRUZMAN: My learned junior and the solicitor have searched carefully through the document and they cannot find it.

TAYLOR, A-J.A.: Nothing turns on it.

MR. GRUZMAN: No.

TAYLOR, A-J.A.: He did in March exercise the option?

MR. GRUZMAN: Yes. 40

MR. POWELL: We will see if we can find a copy and make it available.

JACOBS, J.A.: You said you were going on to new matter.

MR. GRUZMAN: This comes both within the chronology of the commercial transaction and also in the heading of Reluctant Vendor. Mr. Smith in his

evidence at Volume 3, 619, said that he told Barton on 10th January, that Armstrong wanted the contracts exchanged by 13th. Barton said that was not possible. Smith asked Barton for a cheque for \$4000 to be held by Smith, which if Barton did not proceed, would be forfeited. Barton did not hand over the cheque at that time, but he did on the Monday following the 'phone call which he received from Armstrong at 8.20 a.m. that day. That was a 'phone call which his Honour Street, J. did not accept and which we will ask your Honours to accept. That is the 'phone call on the morning of 16th. The significance is that the cheque was handed over, having been asked for previously, after the 'phone call.

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The next matter, which I do not think I need take your Honours to in detail, is each of the Armstrong companies passed all the necessary resolutions at Directors meetings which were held on 12th. That appears in your Honours' folders as documents 176, 177, 180 and 181. I will also refer your Honours to the documents which are letters from Mr. Grant of the 16th and 17th January, documents 187 and 189, which we would submit fall within the category of letters of an efficient conveyancing solicitor, but nevertheless are consistent with Mr. Armstrong being an urgent and pressing vendor.

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I would like to refer your Honours to page 3197 of his Honour's judgment.

JACOBS, J.A.: Is this a new subject matter?

MR. GRUZMAN: It is a new aspect of the commercial and reluctant vendor. What his Honour said at the last line of page 3197 was; "It seems that what in fact led to Mr. Armstrong saying this to Mr. Grant was Mr. Smith's having told Mr. Armstrong that he was reluctant to go on the Landmark Board and to act as Chairman. ... I am not satisfied that Mr. Armstrong threatened Mr. Barton in a telephone call on the morning of the 16th January. I reject Mr. Barton's claim that this telephone call took place." That is a matter of some importance in his Honour's judgment. We propose to show your Honours that his Honour was incorrect in the reasoning which led him to accept Mr. Grant's evidence and thereby to find that Mr. Armstrong was a reluctant vendor and therefore to decline to find in Barton's favour that the conversation of the 16th January took place.

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What in fact occurred is that there was a real proven piece of fraud on the part of Armstrong, with relation to this matter. Just how your Honours are going to regard it will be a matter for your Honours.

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At page 621 (this is in Com. 2,) line 25:
"Did you have a discussion with Mr. Armstrong?
A. Yes. ... I advised him that Mr. Armstrong had withdrawn the condition and I would not be accepting the appointment". Mr. Smith was heavily cross-examined about that statement. I cross-examined Mr. Smith to suggest to him that what he

had been asked to do was to wrongfully conceal from Mr. Barton, with whom he had been in negotiation, the fact that he had decided not to accept the position on the Board.

MR. GRUZMAN: At page 636, line 12, "You never spoke to Mr. Barton about it? A. No. ..." I put it to him very strongly at line 42: "Did not you feel a personal obligation to Mr. Barton to say to him, 'I have decided not to take the chairmanship ... I was instructed not to indicate.'" 10

So at page 641, line 41: "What did Mr. Armstrong say ... on the Sunday". That was in the re-examination. We have the situation clear to demonstration by Armstrong's own witness, a man whose credit is not impugned (Mr. Smith) that he decided on the Friday not to accept the chairmanship and he notified Mr. Armstrong on the Friday and was told not to tell anything, and probably out of a sense of responsibility he rang Mr. Grant and was given the same instructions by Mr. Grant. 20

This matter was one of some substance, because apart from anything else I suppose, for what it is worth, at least to the other directors on the board, Mr. Smith's coming on to the Board must have meant something - Mr. Smith carrying with him both his personal prestige and the assistance in the carrying on of the company, or even in liquidation - for this difficult period whatever was ahead.

This was actively concealed from Mr. Barton and the other directors. So much so it was a fraud on the people who entered into the agreement. The fraud was carried to this extent, that resolutions were passed by the company concerned, - Landmark appointing Smith and Horley (?) to the Board on representations and then they went through the solemn farce of going to the Board meeting on the day of settlement and waiting for Smith and Horley to walk through the door, expecting momentarily this to happen and all the time Mr. Grant knew and Mr. Armstrong knew that they were never going to come. 30 40

That is a matter which I put forward as fraud and which in our submission is fraud and nothing else.

JACOBS, J.A.: I am afraid, without being technical about it, if it is relevant to the issue in the case then an allegation of fraud must be alleged in the statement of claim; if it is not relevant to the issue you should not make allegations of fraud.

MR. GRUZMAN: It is that question which occurred in the course of this matter. His Honour Mr. Justice Street took it in another way. 50

JACOBS, J.A.: What do you say it shows in relation to the issues in this case?

MR. GRUZMAN: Really in the context of this case, with the type of conduct about which submissions

have been made, I suppose whether it was fraud or what it was was not important, but the significance is this: that his Honour took it from Smith's supposed conversation with Armstrong and Armstrong's alleged conversation with Grant, that Armstrong was a reluctant vendor.

TAYLOR, A-J.A.: Why do you say "alleged conversation"? Do you say it could not take place?

MR. GRUZMAN: I say it did not take place.

JACOBS, J.A.: I have not quite got your argument. 10.
You referred us to a passage in the judgment regarding craw-fishing. We are back to this: Mr. Smith's statement that he was reluctant to go on to the Landmark Board. That is a bare statement of fact.

MR. GRUZMAN: Yes, but it is wrong. It is a little bit complicated, like a lot of these things, but would your Honours be kind enough to look at Com. 1, page 194? I did not read enough of his Honour's judgment. 20

JACOBS, J.A.: You can be sure that we know this passage. I can see your point. You are saying that part of the reason why the learned Judge came to the conclusion that there was not this telephone call was that Mr. Armstrong was reluctant to enter into this transaction.

MR. GRUZMAN: Which is the only reason ascribed by his Honour.

JACOBS, J.A.: Then you say that what indicated to his Honour that Mr. Armstrong was a reluctant vendor was partly, at least, that Mr. Smith was reluctant to go on to the Board as Chairman? 30

MR. GRUZMAN: No, your Honour. That is where I have not read enough - I have to read another paragraph of his Honour's judgment, if your Honours would allow me. At page 3197, line 20, his Honour finds "Mr. Grant, Mr. Armstrong's solicitor, was occupied throughout the whole of the 17th on matters associated with the agreement ..." This is supposed to be on 17th - "in effect saying he was giving Barton control of Landmark for \$200,000 ... and he wanted to consider the situation". 40

The question is whether it is possible on the evidence which your Honours have read, that on Tuesday 17th for the first time Mr. Armstrong rang Mr. Grant and said "I think Smith is trying to get out of this". That simply is not possible. Smith had told Mr. Armstrong on the Friday positively and had been told "Don't let on". He had told Mr. Grant positively on the Sunday and had been told "Don't let on" and here the solicitor notes a conversation on the Tuesday saying, "I think maybe Mr. Smith won't go on with this". That statement must be untrue. Just what is untrue about it? The conversation simply could not have taken place. 50

Whether Mr. Armstrong went through the solemn farce of saying it, whether the notes were made there or later, one cannot say. We can only point to the concrete evidence.

JACOBS, J.A.: I think, at first sight, you are entitled to say this - it does support what you say: but it does not support the idea that Mr. Armstrong was a reluctant vendor. He was upset with Mr. Smith for going back when this was very important to him - that he be chairman. He particularly did not want other people to know about it, so he did two things: he criticised Mr. Smith for going back what he regarded as going back on what had been arranged, and he said at the same time "Don't tell the other side about that".

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MR. GRUZMAN: I am not making my point clear, I realise, your Honour. Mr. Justice Street did say - so let us look at the events of the Tuesday - on the Tuesday Mr. Armstrong was in doubt as to whether he wanted to go ahead with this deal and he said he would have to consider it in the light of the fact that Smith was threatening to back out.

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JACOBS, J.A.: I thought I had put that to you. I can see the force of what you are putting.

MR. GRUZMAN: Yes, but your Honour has put it not in the way we want to put it. What your Honour has to put is that this conversation on the Tuesday simply could not have taken place.

TAYLOR, A-J.A.: You mean that on the Tuesday Armstrong could not have said to Grant "Smith is craw-fishing"?

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MR. GRUZMAN: Because both Grant and Armstrong knew over the preceding weekend not that there was some possibility that Smith would not take the chair, but positively he would not.

TAYLOR, A-J.A.: There is an entry above it: "A.E.A. told Grant Smith might take the chair at the meeting".

MR. GRUZMAN: Would your Honours have a look at the document?

JACOBS, J.A.: I can see the force of what you are putting, that this did not hang together; that if Mr. Armstrong knew at the weekend that Mr. Smith was not likely to take the chair, or positively knew ---

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TAYLOR, A-J.A.: Why could not Armstrong continue to tell him that he wanted him to take the chair?

MR. GRUZMAN: He did not. You have Armstrong's evidence and Smith's evidence - which is not impaired - and the two were there, and of those two which are you going to choose? Let us have a look at Mr. Grant's notes. First of all, in the morning, Mr. Armstrong (page 2869) apparently "queries

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consent and why required" and according to Mr. Grant is engaged half an hour on that conversation. Yet when he gave his evidence (page 669), Mr. Grant's total reference to that took five or six lines in the transcript; yet the conversation, according to his notes, took half an hour - starting at 8.40 in the morning. It is rather significant that Mr. Armstrong rings at that time, 8.40, on 17th. We say that he made another 'phone call at 8.20 the day before.

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JACOBS, J.A.: I think I can say there may be slightly different approaches to it. I see what you mean by saying that this does not bear out that Mr. Armstrong was a reluctant vendor.

MR. GRUZMAN: Yes, but the other thing it bears on is the validity of the alleged conversation, because if it is a fact that this conversation just never took place, how is it alleged ---

TAYLOR, A-J.A.: If it did not take place why would Grant write it down?

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MR. GRUZMAN: That is the question.

TAYLOR, A-J.A.: You cannot answer it. Grant said it did not take place.

MR. GRUZMAN: May I ask your Honour to look at the conversation? They had a half hour conversation at 8.40 and at that stage both of them knew about it.

TAYLOR, A-J.A.: Did you ever put to Grant, "Did this conversation take place?"

MR. GRUZMAN: No.

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TAYLOR, A-J.A.: And you want us to find that a solicitor of this Court is lying - on your say-so?

MR. GRUZMAN: On the Court's examination of the evidence.

TAYLOR, A-J.A.: You want us to make that finding?

MR. GRUZMAN: One thing is certain, that this conversation never took place.

TAYLOR, A-J.A.: If you never put it to him, so far as I am concerned I would not entertain the proposition - that a Solicitor of this Court is a liar and manufactured evidence - on the allegation from counsel at the Bar table, when it was never put to him?

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MR. GRUZMAN: This was not a particularly relevant issue at the time, and it appears now that it is a matter for this Court to consider the evidence. It is a matter of what is the evidence, not what counsel is putting. The question is: what is the evidence, and the evidence is that both parties knew about this on the Sunday. There was an active

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concealment from Barton. On the Tuesday morning at 8.40 a.m. Smith and Grant have referred to the conversation according to the notes - according to the notes this burning subject was not mentioned - and then there is another conversation and then there is a conversation with Smith at 9.30 and then, out of the blue, appears this note - "Armstrong rings up and says 'What do you know! Smith might not take the chair". Armstrong then says "He has given to Barton control of Landmark for \$200,000. Smith is 10
craw-fishing. Wants to consider it". It might support the case now. But it does not accord with any fact proved in evidence and is directly contrary to every other fact proved in evidence.

JACOBS, J.A.: Did you challenge the credibility of Mr. Grant's evidence?

MR. GRUZMAN: Did I?

JACOBS, J.A.: Yes.

MR. GRUZMAN: I will have to recall that, your Honour. Mr. Bovill said that he would not believe 20
him, I remember that piece of evidence.

JACOBS, J.A.: If you did not challenge Mr. Grant's evidence you are not entitled not to suggest that he was fabricating evidence or party to a fraud. There is no doubt about that.

MR. GRUZMAN: I will renew later ---

JACOBS, J.A.: Anyway, I think it is a small issue on which you have spent enough time.

MR. GRUZMAN: With respect, rhetorically, how can it be a small issue when on the basis of that evidence his Honour found that the threat of 16th 30
January never took place and the fact is that one either has to reject Smith's evidence of what took place on the weekend or Grant's evidence about the 'phone call.

JACOBS, J.A.: There are many other things that the learned Judge refers to concerning the change of attitude between 13th and 16th.

MR. GRUZMAN: Your Honours, his Honour's main point was this - I have read in the space of two paragraphs where his Honour takes these notes and on that basis says he is a reluctant vendor. 40

JACOBS, J.A.: I am not saying it is the only factor, it is not the only factor, and I think you have spent enough time on it. I say, secondly, that unless you can show - before you put this forward - that you had given Mr. Grant an opportunity to answer this, you are not entitled to say either that he was committing perjury or that he was committing fraud. Yet you cannot answer that but 50
have to have time to consider it. I do not think that is satisfactory.

MR. GRUZMAN: If I could remember 3500 pages, even after three months, I would be a better man than I am - plus an address which took a week.

JACOBS, J.A.: If you cannot remember whether you accused a solicitor of this Court of perjury and fraud then I would be very surprised that it should be such a common experience in your practice.

MR. GRUZMAN: It is my duty, and I propose to carry out my duty, to refer to the evidence and I will refer to it, with respect. 10

JACOBS, J.A.: We will see that you do not depart from your duty, so will you please not accuse a solicitor of this court of either perjury or fraud, without assuring the Court that at the hearing at first instance you gave him an opportunity of rebutting? You might think of the matter before you answer, but would you go no further with that until you can give that assurance?

MR. GRUZMAN: I have to refer to the evidence ---

JACOBS, J.A.: I am just asking you about a straightforward matter with which counsel is faced and unless you can assure the Court that you raised the matter below and gave him an opportunity to deal with the accusations will you please refrain from raising them here? 20

MR. GRUZMAN: I will answer your Honour when I have had the opportunity.

JACOBS, J.A.: Would you therefore delay other aspects of this matter until you can give me an unequivocal answer on that? 30

MR. GRUZMAN: If your Honour pleases.

I would just like to say this: I did not accuse Mr. Grant of fraud or perjury.

JACOBS, J.A.: I thought you used the word fraud and I demurred when you used it.

MR. GRUZMAN: What I said was that there was a fraud committed on Mr. Barton by the active concealment from him of the fact that Smith would not go on the Board and I said that fraud was carried through by Armstrong's instructions to say nothing, and carried through to the point where resolutions were passed at the Friday meeting. 40

JACOBS, J.A.: I thought you mentioned that Mr. Grant was concerned.

MR. GRUZMAN: Mr. Grant was concerned.

JACOBS, J.A.: Therefore I properly used the word "fraud" in connection with what you are referring to.

MR. GRUZMAN: All I am saying is that our only

submission is that here is a discrepancy in the evidence. These are the facts. I specifically sought not to put any label on it. When I opened the topic I said to your Honours "I do not know what your Honours are going to make of Mr. Grant's notes".

MASON, J.A.: In opening the matter to us you said it would be proved that there was a fraud.

MR. GRUZMAN: On Mr. Barton.

JACOBS, J.A.: By Mr. Smith, Mr. Grant and Mr. Armstrong.

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MR. GRUZMAN: If I did not say it before, I say it now: there was a fraud in concealing from Mr. Barton the fact that Mr. Smith was not going on the Board. These are the facts. They are undisputed. I said to your Honours at the time "I do not know what you are going to make of Mr. Grant's notes", and I still do not know. It is a matter for your Honours as to how your Honours will deal with it. All I say is this, and it is our submission, on the one hand there is Smith who said he told everybody on the Friday and on the Sunday. On the other hand there is evidence that on the third telephone call on the Tuesday - at least on the second telephone call - between Armstrong and Grant, Armstrong said "Smith might not take the chair". In the third telephone call between Armstrong and Grant, Armstrong said, "Smith is crawl-fishing". I am pointing out the two cannot stand together. They cannot, and I will point out also - and I do not know what the proper inference is - that at the Board meeting on the Wednesday of Directors of Landmark Corporation, at 5 p.m., where Mr. Barton, Mr. Bovill, Mr. Cotter and incidentally, Mr. Grant, were present, there was passed a resolution that B.H. Smith be and is hereby appointed Chairman of the Directors of the Company. I point out also that on the settlement everybody waited for Mr. Smith to appear and Mr. Grant was present.

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Now, your Honours, what is the inference? I have no present recollection that the matter was present to our minds as a matter which was significant and a matter which would be taken up by his Honour and therefore a matter on which cross-examination should specifically take place. Let us assume, because it is my present recollection, that I did not cross-examine Mr. Grant on that matter. But this is a Court of re-hearing. What is the Court to do? Here his Honour, the trial Judge, has taken up a point upon which there was no cross-examination.

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JACOBS, J.A.: I think that on the whole this particular problem has arisen from the extravagance of language you used, and we are only concerned to see that that language - particularly fraud by officers of the Court, is not used. If you had used less extravagant language, perhaps this whole question would not have arisen. But I think we

appreciate your point; namely, that you cannot decide whether the conversation occurred as to his Honour Mr. Justice Street saying that Mr. Armstrong was a reluctant vendor and whether or not that conversation occurred may show whether or not he was a reluctant vendor.

In other words, what your real basis is, I think, if you look at it, it is that you cannot reach an inference or conclusion of that kind in order to decide whether a factual conversation occurred. It is the other way around. If you find that the conversation occurred, then you may be able to use that in order to infer whether or not Mr. Armstrong was a reluctant vendor. I think if you analyse it, that is what you are seeking to submit to us, that the situation was not such that you could firmly draw the inference that he was reluctant. Is not that really the position?

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MR. GRUZMAN: That is half of it. We go further and say that when you have this concatenation of events such as was proven in evidence, with Mr. Smith telling everybody at the weekend that he would not go on the Board and then you have it carried through to the point where the parties sit around the Board table, where the records of the public company are dealt with and resolutions passed on the suggestion and on the basis that Smith is going to be Chairman, what is the proper submission - I ask rhetorically?

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JACOBS, J.A.: I think we appreciate it. "It is hard to say that the person taking part in it was reluctant". But avoid the word "fraud" or any of those hyperboles. We are just going to say you made your point that it is hard to draw the inference.

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MR. GRUZMAN: And indeed, if I may have the last word, that we say it is an inference the other way.

The next matter I would like to deal with is the significance in the commercial context of Mr. Smith's attitude to accepting the chairmanship. It has already been submitted that both Armstrong and Barton realised the disastrous position in which Landmark had been placed by the reversal of U.D.C.'s attitude on 8th December. In Volume 3, page 631, there is evidence that Mr. Smith was being offered \$4000 a year to accept the position of Chairman and he stated that he had no personal difference of opinion with Mr. Barton, so there is no personality complex. I am sorry, he did have one difference of opinion with Mr. Barton and that was on the question of dividend. Mr. Smith was of the opinion that the affairs of the company were in such a state that if that dividend were paid the directors of the company might have a personal responsibility.

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TAYLOR, A-J.A.: He made it perfectly clear that he would never be a party to paying the dividend; so he could not be on the Board, could he?

MR. GRUZMAN: That is part of it.

JACOBS, J.A.: I think that supports what you are putting. Summarising it: the worst criticism you could make of this company was that after an investigation - I will not use the word "favoured by accountants" - nothing succeeds like success in this business world and nothing is worse than failure.

MR. GRUZMAN: Yes. Mr. Smith investigated the company and his conclusion was that the dividend should not be paid. Page 633, line 41: "No. I said it was my view that the dividend should not be paid in case the company should go into liquidation". Then he was asked, "What would happen then? A. There could be a personal liability on the part of the directors". So it went a lot further than just thinking that the company might fail. First of all Mr. Smith was probably in a better position than anybody to determine the commercial aspect of this company and I think your Honours might feel that insofar as it is for this Court to come to a view of its own as to the commercial situation and the commercial propriety or the commercial prospects of the company, that Mr. Smith's view may be of some significance. He had investigated the company. He had also seen U.D.C. himself and he was of the view, right to the date this agreement was signed, that if this dividend - which was for the amount stipulated - was paid, that things were so bad that the directors might have to pay it back themselves.

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I put it to him in cross-examination "Shortly, the real problem of the company in your view was related to finance? You were there in connection with U.D.C., you had to make a decision as to whether you would accept the chairmanship. That in itself would relate to the success or failure of the company, which in turn would relate to finance. Did you go and see U.D.C. and ask them was there any prospect of getting finance for this"? He did not go to see them then. He had been, of course, and seen them on 19th December but he was apparently perfectly satisfied that there was no prospect whatever of getting finance. The reasons which would have satisfied him were not only those that U.D.C. gave him, but the same sort of considerations that fell from your Honour Mr. Justice Taylor, early in the case.

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Let us have a look now at the subsequent history of the transactions. The transaction, as we know, went through and we know what that involved. The only beneficial effect on Landmark of the deal with Armstrong was to remove the immediate possibility of the appointment of a receiver by Armstrong by reason of the non-payment of the \$400,000 due to him. Armstrong, on the other hand, had received cash or assets from the company to the value of \$200,000, and made advances to the company of \$300,000 for 12 months at 12 per cent. interest.

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JACOBS, J.A.: He had got \$100,000 out of it.

MR. GRUZMAN: On security, yes.

TAYLOR, A-J.A.: And Barton had got 12 months time, 12 months to get the show on the road.

MR. GRUZMAN: Yes. We worked it out at something like 50 per cent. interest. For that 12 months Barton had personally involved everything that he could ever hope to have, not only what he wanted, but \$180,000, the company had bought an extra \$100,000 of accommodation, on top there was the 12 per cent. interest and there was the 12 months accommodation of \$200,000. 10

Even then the company still faced a hostile creditor because what Armstrong wanted was money. He had got what he could and the rest he had agreed to be for the time being.

TAYLOR, A-J.A.: So long as they paid the interest he could do nothing for 12 months.

MR. GRUZMAN: The point I am putting is that the company still had a hostile creditor. They had Mr. Armstrong there. 20

JACOBS, J.A.: And not a very friendly one in U.D.C.?

MR. GRUZMAN: At least U.D.C., one might think, would listen to reason; but not Armstrong. And look at what happened when the first payment of interest came due. They were one day late in the payment and Armstrong called up the loan and they were back to where they were. So really all that happened ---

TAYLOR, A-J.A.: They went to Court, they put on an affidavit to say they had seven to 14 days grace although nothing was said about it in the document. They paid the interest for March and April, \$6000 by a bank cheque. Provided they made the other payments on the mortgage they were back to where they were. 30

MR. GRUZMAN: Looked at from the company's point of view as an ordinary person sitting in the seat of one of the directors, what was the company to do? As your Honour might imagine it, as someone sitting in the seat of one of the directors, all the company was getting was a loan of \$300,000 from the person that they trusted, probably least in the whole world, a man who was most likely to take advantage of any slip they made. 40

JACOBS, J.A.: Could I ask you this, and I assure you that I do not do it in a captious way, we are aware from the history that followed, because we have read it and we have read it not so much in order to determine the history of the case but one could not read it without knowing what happened - could you tell me how does it affect the issues? 50

MR. GRUZMAN: Thank you, your Honour. It affects the issue in this way: what had happened subsequently was what a reasonably prudent business man with a knowledge of the circumstances might expect to happen, and therefore the subsequent history of this company is some evidence as to what was in the minds of the actors at the time they entered into this transaction.

JACOBS, J.A.: I will concede that for the moment. We know what happened. It was downhill all the way. The suggestion is that it was uphill all the way, but whether it was up or down, it was down in the financial sense. Does not that summarise the position? I think that is all you have to show, and if that can be used, and perhaps you are quite right to say it can, it is borne out to the hilt; the future was disastrous. 10

MR. GRUZMAN: The only thing I would like to summarise there is that the Landmark position after the settlement was far worse than it was before. Its funds had been depleted by \$200,000 - \$140,000 in cash, and the penthouse at \$60,000. Its interest rate had gone up from 8 per cent. to 12 per cent. and that was a substantial matter. 20

TAYLOR, A-J.A.: It was 8 per cent. on 100,000 dollars and 12 per cent. on \$300,000.

MR. GRUZMAN: When we come to have a look at some of the documents, your Honours will see that what happened was that they borrowed from C.A.G.A. another, I think \$190,000 at 12 per cent. 30

JACOBS, J.A.: I think your points at the moment are, first, it was downhill and, second, they were worse off - you have said - in two respects. They had lost \$200,000 in either cash or immediately saleable assets and the interest rate on a proportion of the money they owed had gone up to 12 per cent. from 8 per cent.

MR. GRUZMAN: Yes, as I will show your Honours later they had to borrow more - which they really borrowed to pay the dividend to the public, according to Barton's evidence, and the money which was paid to Armstrong (\$100,000) included in it \$87,000 which had been intended to pay to the public as dividends they were entitled to. 40

TAYLOR, A-J.A.: Is not this what happened to the company, that after that January this is relevant to show that no person with a free mind would have entered into the agreement?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: And that is all you can get out of it, if you stayed here for the week. The other view, of course, is that here is another man who fell for the common trick of borrowing short and selling long. 50

MR. GRUZMAN: I do not say this captiously, but if I were satisfied that your Honour was with me on the first point I would not worry.

TAYLOR, A-J.A.: We can all see that; it depends which way you take it.

MR. GRUZMAN: But I thought it was obvious in another place.

TAYLOR, A-J.A.: That is what you used it for. It can be used in another way.

JACOBS, J.A.: I can only speak for myself on this, but I think the future was in fact disastrous and not from what actually happened but from the sheer disaster and you can argue that that should have been apparent to business people at the time. The actual details of the disaster - such as the C.A.G.A. business and all that, I do not think is of particular relevance, but still, you are entitled to put it, if you wish. 10

MR. GRUZMAN: I am glad your Honour does not mind my putting it, because I think it will help, if I might say so. It is not a case that this company had a large purse from which it could pay Armstrong but when it had to actually borrow the money to meet these demands - it was not a case necessarily of something which would have happened anyway, although that is probable, but the effect of the deal with Armstrong was to make even more certain (assuming that there was the slightest hope of saving this company before the deal with Armstrong) that there was no hope after the deal. That is the real point I would like to put. 20 30

JACOBS, J.A.: I think the other point is that this deal was done without any real assurance from the main secured creditor? That is the key to it. It does not matter about C.A.G.A. or anything else, the fact is that the deal was carried out without any assurance from someone who might interfere at any moment.

MR. GRUZMAN: That is quite so.

JACOBS, J.A.: The rest of the history would have been entirely different if that - what you would say I imagine - elementary precaution had been taken? 40

MR. GRUZMAN: Yes.

JACOBS, J.A.: Because liquidity is the problem, not only of Landmark ---

MR. GRUZMAN: Yes, but when one puts it in the form of elementary precaution, of course assuming, if one does, there is some sort of normal commercial relationship. The absence of such an obvious precaution helps and establishes our case. 50

Just let me add this about those options:

The effect of the options themselves was of some significance. Your Honours saw the way they came into existence. Perhaps I have satisfied ---

TAYLOR, A-J.A.: You told us yesterday he took the 35 best blocks off the market.

MR. GRUZMAN: Not only that straightforwardly but what about the effect on any possible financier who knows these facts that if 30 blocks happened to be produced they are taken by Armstrong? Each matter was cumulative in forever reducing the possibility that the company would get finance. 10

I cannot leave this matter without referring to some documents that your Honour Mr. Justice Taylor has in mind and to which your Honour referred yesterday. These are the annexures to the minutes of February and March.

TAYLOR, A-J.A.: That is Barton's valuation, stating what it was worth?

MR. GRUZMAN: Yes, I would like to refer to them.

TAYLOR, A-J.A.: You want us to disregard them? 20

MR. GRUZMAN: I want to explain them. It is in your Honours' folios at page 216.

TAYLOR, A-J.A.: I suppose you say it was an over-optimistic assessment put out for the benefit of those who might lend the money?

MR. GRUZMAN: Partly. The other partly is the accounting system. Do not ask me to justify it.

TAYLOR, A-J.A.: I know what you mean.

MR. GRUZMAN: These documents which your Honour Mr. Justice Taylor referred to and which doubtless will be referred to by my learned friend as indicating that in their view --- 30

JACOBS, J.A.: When you have dealt with this does it conclude your dealing with the commercial side?

MR. GRUZMAN: I do not want to say I have concluded. Quite apart from loose ends, I hope your Honours will think that I am not being unduly slow or tedious - perhaps I am - but I have got a plan for presenting this appeal.

JACOBS, J.A.: I asked you what stage in it you had reached, that is all. 40

MR. GRUZMAN: All I can say is that on the detailed examination of the commercial side as a separate entity, I am substantially finished. It does not mean, your Honour, with respect that I will not be coming at a late stage to try and tie the whole thing together rather than dealing with it in detail as I have done now because this is one transaction which is not compartmented as I am seeking to do with the hope of assisting your Honours. 50

JACOBS, J.A.: After you have dealt with it, could you refresh my memory ---

MR. GRUZMAN: I am then going on to deal with Mr. Armstrong.

JACOBS, J.A.: I just want to issue this statement before we adjourn ---

MR. GRUZMAN: I know exactly what your Honour has in mind. We have a difficult job.

JACOBS, J.A.: Please bear it in mind.

MR. GRUZMAN: The thing that we want to prove is that he is a conspirator in murder, that is what we want to prove and that is what his Honour did not accept.

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(Further hearing adjourned until 10.15 a.m., Friday, 26th February, 1971.)

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COURT OF APPEAL)

Term No. 22 of 1969

CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

BARTON V. ARMSTRONG & ORS.

SIXTH DAY: FRIDAY, 26TH FEBRUARY, 1971.

MR. POWELL: Before my friend proceeds may I, as we indicated to your Honours we would yesterday, hand up to your Honours photostats of the missing exercise of option. They have only just come to my hand, and we have not had a chance to pin them together, there are two sheets. (Handed to Court.) 10

MR. GRUZMAN: There are two documents which we have discovered are missing from Commercial 1, that your Honours really should have for your convenience, and we will hand up, if we may, copies of Exhibit "K", which is the list of Stock Exchange prices, appearing at pages 2199 to 2433 in the Appeal Books. They are already punched, and it may be convenient if your Honours would insert them in the Commercial 1 documents. They could be inserted right at the front of Commercial 1. There is also there a letter which should have appeared, to Mr. Stewart from Mr. Barton. 20

TAYLOR, A-J.A.: That is the document he left behind when he went abroad?

MR. GRUZMAN: Yes. That is pages 2430, 2433. There is another document missing which we have not had copied yet, which we will hand to your Honours later, one of the letters written by Barton subsequent to the transaction, the list of Stock Exchange prices. One has to see that as from 14th February the 5/- units were consolidated. One matter that is fairly obvious is that if Barton wanted - first of all, he did not need control of the company, did not need shares to obtain control, he had won the general meeting. Secondly, of course, a rumour in the right places and the shares would have dropped even further. 40

I have covered the general commercial situation up to 17th January, and the aftermath to the company. One point that your Honours will see is that this was the strength, if there was any strength at all, of the defendant's case. This was not our case at all. In fact we thought we had such a powerful case on threats that no one could ever believe that there was any commercial basis behind it. We must concede we did not give his Honour Mr. Justice Street the assistance which his Honour was entitled to on the commercial transaction. 50

JACOBS, J.A.: You have told us that. You really have, a number of times. We do appreciate that approach that you make.

MR. GRUZMAN: Yes. That is illustrated I suppose quite well by the incident of Mr. Grant and Mr. Smith being appointed, and so on. There are one or two documents that I have not referred to and which I should. I should refer to what happened so far as Mr. Barton was concerned, or the company, after the agreement had been made. Your Honours will remember the letter that had come from U.D.C. on or about 13th January, in response to the letter of 28th December from Cotton and Bovill, and there was a reply sent on 19th January, which appears in Commercial 1 at page 213, pages 2208 to 2209, in the Appeal Books. In that Mr. Barton on behalf of the company answers their letter and sends what they want. They had asked for an independent valuation of the selling price of the land, and what was sent was a selling price from the company's agents. It was probably the best that they could put forward. This of course produced no result, and probably no one ever expected it to do so. 10 20

The documents, and I am only going to refer to these briefly, are the documents which appear at page 216 of Commercial 1, and it is the annexure to the Companies Minutes. It is headed "Brief Summary of the Corporation's Assets and Liabilities for approximate figures only as at 31st January, 1967". I think the method of working this out is best understood if one turns to page 217 and looks at the way they handle Paradise Waters Estate. It is Appeal Book No. 2929. What they say there is that the cost was \$1,500,000, the liability was \$716,000 and therefore the equity is \$784,000. This is a recognised form of accountancy. One looks at what money you have put into a project and what is owing, and the balance you say is what is yours. Of course, in reality that \$784,000 did not exist, and if suddenly from some source a plentiful supply of finance had come, it would have existed. So that according to accounting principles you could say this is what the company's books show. In the same way, the same basis apparently, they have gone through the other assets and it is illustrated for example by Toft Monks. It has been purchased for \$300,000 its cost was \$335,000, they owed \$300,000 on it, and therefore they say they have an equity of \$35,000. That obviously means interest and other charges associated with the purchase for \$35,000, and so the company says it has an equity of \$35,000. That document, whilst doubtless accurate according to the company's books, really reflected nothing at all about the company's position and would not have been understood by anybody who read it as reflecting anything of the company's true position. 30 40 50

TAYLOR, A-J.A.: Why was it sent?

MR. GRUZMAN: I do not think, and I am open to correction, that it was sent, that particular 60

document I am referring to. It was annexed to the company's minutes. It is a statement prepared, signed by the Secretary and by Mr. Barton, of what the books show. Your Honours are not particularly concerned about the effect of the document. What your Honours are concerned about at the moment is could it possibly be said that anybody was saying at that point of time that the company had \$2 million surplus. Obviously not. As I say, it is illustrated by the amount of \$680,000 I think, which is said to be in Paradise Waters. It is an amount which may be realisable if the project was successful and finance arose, but not on any other basis.

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If you look at the document on page 222, which is the summary as at 20th April, we find that according to that the equity in Paradise Waters has gone up to \$884,000. In other words, your Honours, and I will show your Honours in a moment why, the work was being kept going, so that on the company's books at that stage Paradise Waters had cost \$1,600,000, they owed \$716,000 and then had \$884,000 so that on this method of bookkeeping, which is normal, between the 10th February and the date in April, they had made \$100,000 on Paradise Waters. It does not mean that at all. All it means is what it says, they had put in \$100,000 into Paradise Waters. This does not reflect, or suggest to anyone what they will necessarily get out. What they are saying is these amounts of money have gone into these projects. The second column says these are the amounts of money which are owing on these projects. The third column, which they labelled, "equity", is the difference. Presumably the company never intended to give its money away when it put it into the assets, so assuming the company is a going concern and has proper finance, in the long run you would say from an accounting point of view, "Yes, they will get out what they put in, at least". But once you consider the company as a break-up proposition, as it was at that stage, it is a pretty meaningless figure except to show what is in the books.

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The next document to which I would refer your Honours appears at page 225, page 2487 and it is the second last document to which I will be referring. Perhaps I should first of all refer to the one that has been missed out of sequence, and we will furnish your Honours with copies of that later. It is a letter of the 7th March, 1967, page 2459. I should mention this, that same method of bookkeeping leads to the company showing assets of \$2 million and in fact they have \$10 million because they have assets in at cost, bought 20 or 30 years ago, and this has greatly increased.

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JACOBS, J.A.: Are you saying it about this company? We are familiar with the fact that values change.

MR. GRUZMAN: We are talking about a method of bookkeeping. It reflects the unreal value here. In every case it reflects it. It reflects the

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unreal value adversely here, and in other cases it reflects an unreal value beneficially. I was going to refer your Honours to the letter of 7th March, 1967, which appears at page 2459 in Volume 7 of the Appeal Books, a letter from Barton on behalf of the company to U.D.C., confirming an interview on Friday, 3rd March. (Read).

JACOBS, J.A.: What was the size of that mortgage at that time?

MR. GRUZMAN: \$600,000, I think.

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JACOBS, J.A.: \$600,000 to U.D.C.?

MR. GRUZMAN: I think that is right.

TAYLOR, A-J.A.: It was \$600,000.

MR. GRUZMAN: It may be by that time it had gone up to \$750,000. It was either \$600,000 or \$750,000. As at April it was \$716,000, I am told. \$750,000 it should be.

JACOBS, J.A.: Just recapitulate for me, because for the moment I have just lost it, what was U.D.C.'s security before the 16th January?

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MR. GRUZMAN: \$430,000 I think is the correct figure.

TAYLOR, A-J.A.: That is the debt. You were asked about the security.

JACOBS, J.A.: That is the debt. The security was Paradise Waters.

MR. GRUZMAN: Paradise Waters, first mortgage.

JACOBS, J.A.: It is first mortgage Paradise Waters?

MR. GRUZMAN: Plus the insurance policies, plus I think share scrip over Paradise Waters.

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JACOBS, J.A.: When was the mortgage over Landmark House given?

MR. GRUZMAN: Given? The original mortgage was \$600,000, I think was given in connection with the purchase - the building of Landmark House, some time early in the year 1967, prior to April. That was increased from \$600,000, to \$750,000. That appears from these two documents to which I referred your Honours.

JACOBS, J.A.: What had been the previous financing on Landmark House?

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MR. GRUZMAN: It had not altered.

JACOBS, J.A.: That was to U.D.C. was it?

MR. GRUZMAN: I.A.C.

JACOBS, J.A.: Why are they talking about you postponing your mortgage over Landmark House in contrast to United Dominion Corporation, page 2459? I lost the track of that.

TAYLOR, A-J.A.: Was not there a time when U.D.C. was given additional securities, or security over additional assets?

MR. GRUZMAN: \$60,000. It could be. I am looking at page 2950, which gives the position specifically with respect to that at 20th April. It shows Landmark House as having cost \$1,200,000, with a mortgage to I.A.C. of \$600,000 and to C.A.G.A. to \$150,000 approximately.

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JACOBS, J.A.: I do not want you to take time now. You can understand why I am confused by the reference.

MR. GRUZMAN: Yes. Let me not take time now. I will sort it out and advise your Honours. He sets out here the various liabilities. (Read).

JACOBS, J.A.: I think we have read it through as we have been going.

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TAYLOR, A-J.A.: Do you say both that letter of 7th March, 1967, and the letter to Dobbie of 28th April, 1967, showed this company as having assets over liabilities of something like \$2 million and we ought not to regard, could not regard as any evidence at all of the value of this company, and in fact it was worthless?

MR. GRUZMAN: Exactly.

TAYLOR, A-J.A.: Despite the fact that they were representations by your client of whose integrity and probity and so forth you have spoken at length? Do you seriously say that?

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MR. GRUZMAN: Exactly.

TAYLOR, A-J.A.: If what you are saying is correct, nobody would know better than him.

MR. GRUZMAN: That is right.

TAYLOR, A-J.A.: It makes it a very dishonest document, doesn't it?

MR. GRUZMAN: Not at all.

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TAYLOR, A-J.A.: I would have thought it is.

MR. GRUZMAN: Not at all.

TAYLOR, A-J.A.: Not at all?

MR. GRUZMAN: Not at all. It is not a case of ---

TAYLOR, A-J.A.: If you tell a man under commercial law that to the best of your knowledge as managing

director of the company the assets are so-and-so, they are in excess of liability by \$2 million, and it should be you believe it is worthless - if that is not being dishonest commercially and in fact, I will say no more, and I do not propose to say any more. I have made my point.

MR. GRUZMAN: It is not as simple as that.

TAYLOR, A-J.A.: Simple?

MR. GRUZMAN: It is not simple. I will tell you why. May I explain our submission on it?

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TAYLOR, A-J.A.: If you stood there for a week, you will never explain it to me.

MR. GRUZMAN: Will your Honour listen for two minutes?

TAYLOR, A-J.A.: I will not. Either the man wrote that honestly believing it, or he did not.

MR. GRUZMAN: No.

TAYLOR, A-J.A.: You cannot have it both ways. If it is worthless and he believed it to be worthless

MR. GRUZMAN: Would your Honour allow me to talk for two minutes on this aspect?

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TAYLOR, A-J.A.: Yes.

MR. GRUZMAN: To test it out with Paradise Waters. Here he sets out in the document that the equity of Landmark in Paradise Waters gets up to \$884,000 and he says Landmark has \$1 million excess of assets over liabilities.

TAYLOR, A-J.A.: Does he believe that?

MR. GRUZMAN: Well, if the bank or whoever it was was to provide the finance to carry the project through, that would have been true, every word of it. That is what appeared in the company's books.

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TAYLOR, A-J.A.: The answer is these documents are true, provided they got finance?

MR. GRUZMAN: That is right.

TAYLOR, A-J.A.: I understand that.

MR. GRUZMAN: It is what is in the company's books. You would not go to a lender and say "We have a perfectly valueless project, would you lend us \$2 million on it?" What you would say is "Here is what we have put into it, we have put \$1,500,000 into it".

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TAYLOR, A-J.A.: When you use "you" you are speaking about yourself, not about me.

MR. GRUZMAN: I am not speaking personally on that; in the third person. A businessman going to a bank manager - I do not think I really have to restrict it to a businessman, but I will - a person going to his bank manager does not say "I have a valueless asset", he says, "Look, I have this house, I spent \$20,000 on it". That is what he says. "Will you lend me \$5000?" The bank manager may answer "Oh well, yes, but we will have a valuation". That is the normal thing. It is common, normal, honest and proper business conduct to say to a lending authority "We have spent \$1,600,000 on this project, we owe on this project \$716,000, our equity in this project is \$884,000. We ask you, because that is so, to lend us money". It is then a matter for the bank to say, as they would, "Well, what is the security really worth today?" Nobody would know. Nobody knew 12 months later what it was worth. One thing was certain, that in the minds of everybody has said that the project was no good, all that they have said was that there was risk attached to it, and that no financier was prepared to run that risk with insufficient equity capital at the bottom as a buffer to finance it.

These documents are honest, proper, genuine documents, such as any reputable businessman would place before any bank. Of course, they did not achieve anything. They did not deceive anyone, they were never intended to deceive anyone. The bank knew as well as everybody else, sure, that is right, provided you got finance. And the question was would a bank provide the finance to make the figures good. The framework of the letter alone is a pleading letter for \$200,000 or \$250,000 on various securities that are offered. It is at a stage - I will show you what Mr. Barton said about it. He said he hawked the proposition round the city to try and get finance. It was his duty to do so. At page 243, line 41, under cross-examination on that - the subsequent letter which I will be reading also - "I was just telling the bank on 28th April ... and I did". May I ask rhetorically what was he expected to do in the position in which he subsequently found himself, just sit down and do nothing or do what was expected of him as the managing director of a company, to make a purchase, try and get partners, to do everything that was conceivably possible to do to finance this project and save the creditors and save the shareholders. He did no more than that and no less. He did it honestly with integrity, and in the precise manner in which any other company director so placed would seek to do it. All of these figures of course are out of the company's books and it is not suggested otherwise.

The only criticism that can be offered is that it does not say in the letter "Of course", which was implicit in everything, "if you do not give us finance the company has (to use a colloquialism) had it" and all these figures would fall to nothing. Nobody was deceived about that. (Letter read).

The other document to which I was going to refer your Honours in this commercial context was his subsequent letter of 28th April to Mr. Dobbie. One can see that if there has been one thing consistent in Mr. Barton's conduct it has been an endeavour to get finance, as was his duty, and the other consistent thing is how dismally unsuccessful he was, as nobody would have doubted. He writes to Mr. Dobbie, and I will not read all the letter - doubtless your Honours have read it. He goes through the history, and the history in the light of what we know is pretty accurate.

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JACOBS, J.A.: On page 2489, page 227 in your summary, line 19, the reference to U.D.C. ---

MR. GRUZMAN: It brings up the \$450,000.

JACOBS, J.A.: Yes. On the page before, page 226, further security was given to U.D.C. What was the other security?

MR. GRUZMAN: That was \$60,000 by the 22nd December. That would be the answer to your Honour's question probably.

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JACOBS, J.A.: Speaking for myself, I have read that letter.

MR. GRUZMAN: I would like to refer your Honours specifically to part of the letter which could be misunderstood. That appears at page 2488 or page 226, line 36. First of all he said they had to continue with the development. If development had stopped there would be forfeiture. That would be the end of everything. "At the time U.D.C. indicated ... had been reached with Mr. Armstrong. This refers obviously to the period prior to the 22nd December.

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MASON, J.A.: Can you tell me how it was that the indebtedness to U.D.C. rose from \$430,000 to a figure of either \$600,000 or \$750,000?

MR. GRUZMAN: Two different properties.

MASON, J.A.: Two different properties?

MR. GRUZMAN: U.D.C. was over Paradise Waters, the \$600,000 or \$750,000 was over Landmark House.

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MASON, J.A.: How was it allocated between them?

MR. GRUZMAN: They were different.

MASON, J.A.: Just a moment. Was it I.A.C. over Landmark House, or U.D.C.?

MR. GRUZMAN: I.A.C. It appears in the document.

MASON, J.A.: What was the figure of \$600,000 to \$750,000 that you mentioned earlier this morning in relation to a question put to you by the Presiding Judge.

MR. GRUZMAN: That was in relation to Landmark House.

MASON, J.A.: It had nothing to do with U.D.C.?

MR. GRUZMAN: Nothing to do with U.D.C.

MASON, J.A.: At all?

MR. GRUZMAN: Nothing to do with U.D.C.

MASON, J.A.: What was the indebtedness to U.D.C. as at 28th April, 1967?

MR. GRUZMAN: There was apparently approximately \$450,000 due to U.D.C., secured first mortgage on Paradise Waters. At 22nd December U.D.C. had been given further security for \$60,000.

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MASON, J.A.: That was the 22nd December?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: After the 22nd December. They demanded it.

MR. GRUZMAN: About the 22nd December. I understand the evidence is that it was asked for on 22nd.

MASON, J.A.: That was covered yesterday. You dealt with that yesterday.

MR. GRUZMAN: I am just answering your Honour. The security which was given for that \$60,000 to U.D.C. I haven't identified in the evidence. It may be that that was given as a further mortgage over Landmark House, and that would explain the matter that his Honour the presiding Judge put to me, as to what it meant in that letter.

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MASON, J.A.: One further question, Mr. Gruzman. It appears that between January and 28th April, approximately \$100,000 further was expended on improvement on Paradise Waters.

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MR. GRUZMAN: Yes.

MASON, J.A.: That would be consistent with the estimate that in order to comply with conditions of the lease approximately \$22,000 to \$25,000 a month had to be spent.

MR. GRUZMAN: Yes.

MASON, J.A.: Where did that money come from?

MR. GRUZMAN: That probably is reflected in the increase - the further \$150,000 borrowed from C.A.G.A. as a second mortgage on Landmark House and which appears, if your Honours look at the two documents, the annexures to the minutes, to which I just referred your Honours. The first one shows \$600,000 and the next one is \$750,000.

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TAYLOR, A-J.A.: I do not think that can be right.

U.D.C. could not have a second mortgage over Landmark House and then C.A.G.A. come in for a \$100,000. I think that \$60,000 additional security was given to U.D.C. and could not be over Landmark House, if C.A.G.A. came in for \$100,000 on the second mortgage. That came in later. My memory was it was given over some other thing. I cannot think for the moment what they were, some units, or something, that were not sold in Paradise.

MR. GRUZMAN: It could be. What your Honour Mr. Justice Jacobs put to me before about the letter to U.D.C. saying in effect it would be the security over Landmark House, that is what appears in the letter, and we are not able really to assist your Honours. The documents do not seem to show it. 10

TAYLOR, A-J.A.: I put something to you yesterday, I believe I was in error. I said that Barton as a result of the document of 17th January had bought time, 12 months time.

MR. GRUZMAN: Yes. 20

TAYLOR, A-J.A.: He abandoned six months of it, when they settled those Equity proceedings.

MR. GRUZMAN: He did not have much choice.

TAYLOR, A-J.A.: The \$300,000 to Armstrong then became due in June, 1967.

MR. GRUZMAN: That is right.

TAYLOR, A-J.A.: I had forgotten that.

MR. GRUZMAN: That was the settlement. There is a letter there, which says it was either that, or get it called up immediately. That, or fight the case, and see what the Court decided. 30

TAYLOR, A-J.A.: That did not happen. They did not have a case.

MR. GRUZMAN: Cases are cases, I suppose, but anyway, Barton took the view it was not worthwhile risking the immediate demise of the company on that case, better to settle.

I would like to just come back for a moment to the paragraph I just read on page 2488 (37), "At the time U.D.C. indicated ... further moneys available for development". What that is is a statement in the rosier possible way of the events which took place between the 19th and the 23rd December. At that stage, as your Honours will remember from the notes from Mr. Smith's interview with U.D.C., U.D.C. had said that if the dispute with Armstrong was resolved, and resolved in the way they wanted, with Armstrong remaining on the Board, and leaving \$400,000 in, or possibly putting in another \$300,000 as well, as Mr. Grant said, then it would be prepared to continue to finance. And then they said "In the meantime ... would be 40 50

enhanced". It is a rather nice way of relating the facts which were that they were within one hour of having a receiver appointed, and that was staved off by giving \$60,000 further security. So in its context, whilst that is a paragraph that could be misunderstood taken out of context, when one relates it to the facts to which it obviously refers and the time sequence within the paragraph, U.D.C. said when it is resolved and so on, then they gave them further security and it is obvious what he is talking about. U.D.C. of course, never at any stage gained or thought or said "Well, it does not matter how you resolve your security with Armstrong, pay him out, give him all the company has got, and we will give you unlimited funds". U.D.C. were not prepared to do anything like that.

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TAYLOR, A-J.A.: I would have thought it was perfectly clear that U.D.C. would not put a stiver into this place unless Armstrong stayed on the Board and put money in.

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MR. GRUZMAN: Thank you your Honour. What your Honour Mr. Justice Taylor put is exactly our submission, and summarises it. The rest of this letter - I do not want to go through it in detail - I assume your Honours have read it all, it relates to efforts which Barton had made which he described as hawking it round the city, trying to get finance, Stocks and Holdings, anyone he could think of, and any method he could think of, to try and get finance to keep this company afloat. He puts forward that the company has asset backing of \$1 a share, and of course, it did if it got the finance to carry its projects through to completion. It finally ends by asking for \$200,000 temporary overdraft to pay the dividend of \$87,000 and to pay \$50,000 for two months of Paradise Waters.

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Finally, and I suppose this is going to be more or less my last word on the commercial side, his true opinion at that time was "In the event that the bank pays the sum of \$300,000 ... (page 2492, page 230, line 35) ... out of the proceeds of sale". His last desperate throw is to say "Lend us this money and if by the 30th June, we have not been able to refinance it, we will sell it", and that will be the end. "If the bank was at that time satisfied ... refinancing". That is a survey of the commercial position.

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We submit we have established that from the company's point of view this was an unrighteous transaction. From Mr. Barton's point of view, it was an unrighteous transaction. All of that was based on the defendant's case, the defendant's evidence, the defendant's documents.

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JACOBS, J.A.: I just wanted to ask you to do one thing for me. I want a list if I may of any evidence touching U.D.C. between the 14th December and 18th January; just a reference to it, not in any context. At the moment there is the conversation on 4th January with Mr. Grant, page 126, the

attempt to appoint the receiver. Tell me what is the next contact with U.D.C. after that.

MR. GRUZMAN: We will check it. So far as I can remember, there was the letter of 13th and the letter of 18th, to which we referred your Honours, and no other contact.

JACOBS, J.A.: Was not Mr. Honey in contact at all? Leave it now. I want to make sure I have not overlooked one thing in relation to U.D.C. in that period.

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MR. GRUZMAN: We will have it checked, and I will give your Honour the reference.

I was going to deal, as I indicated, with Mr. Armstrong, because we now pass from the defendant's case, which was the original case on this commercial transaction, the court will deduce that there were no threats, which was the defendant's proposition. We pass from that to the plaintiff's case, part of which was revealed, for the purposes of the matters which the plaintiff sought to establish, from Mr. Armstrong's cross-examination.

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JACOBS, J.A.: I am sorry, you are going to accept to the full that there were threats?

MR. GRUZMAN: Yes.

JACOBS, J.A.: You are going to seek to establish that there were additional threats on two occasions?

MR. GRUZMAN: Yes.

JACOBS, J.A.: Directly by Mr. Armstrong?

MR. GRUZMAN: Yes.

JACOBS, J.A.: And you are at a later stage going to attempt to link up the other threats, namely, the Vojinovic incident with Mr. Hume and Mr. Armstrong.

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MR. GRUZMAN: Yes.

JACOBS, J.A.: Through him, Mr. Armstrong?

MR. GRUZMAN: Yes.

JACOBS, J.A.: Therefore at the moment, you are now going to submit that - what part of the judgment are you now attacking? You will I know, Mr. Gruzman, take for granted our acceptance to the full of the trial Judge's findings on Mr. Armstrong.

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MR. GRUZMAN: I understand that. We accept that. His Honour Mr. Justice Taylor described him as an incorrigible liar, on the findings. We accept that, and submit that.

TAYLOR, A-J.A.: That is what I understand the findings to mean.

MR. GRUZMAN: Yes. No one is frightened of a man who is an incorrigible liar.

JACOBS, J.A.: No-one is?

MR. GRUZMAN: The fact a person is an incorrigible liar does not make one frightened of that person. It is a non sequiter.

JACOBS, J.A.: I know. I do not think my brother Taylor used that in any connection of the threats.

MR. GRUZMAN: I realise that.

JACOBS, J.A.: You will take for granted, won't you, that we accept the findings of the trial Judge, so far as they went in regard to the actual happenings? 10

MR. GRUZMAN: Yes.

JACOBS, J.A.: What was done, and what occurred.

MR. GRUZMAN: Yes.

JACOBS, J.A.: Although of course you challenge his finding, on the impact of these happenings.

MR. GRUZMAN: Yes.

JACOBS, J.A.: I merely say this as a preliminary, because we do not want to hear about this man at length beyond the impact. It seems much more to be concerned with your client. 20

MR. GRUZMAN: We feel to understand this case and for me to be able to submit at a later stage, to make the submissions which I wish to submit, some of which I have foreshadowed, that your Honours have to be in the position to properly evaluate Mr. Armstrong.

JACOBS, J.A.: You proceed, but I can assure you if I feel you are merely canvassing findings that we already accept, I will tell you, Mr. Gruzman. 30

TAYLOR, A-J.A.: Do you want some other valuation of him different from Mr. Justice Street's?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: What do you want?

MR. GRUZMAN: I would ask that the Court will find that he was party to a conspiracy to murder.

TAYLOR, A-J.A.: That is not a valuation of the man, that is something he did. Are you suggesting, Mr. Gruzman, you are going to go through for example his divorce business and his diaries? 40

MR. GRUZMAN: No. I do not think your Honours - if I may put it this way, I think your Honours may unduly fear that I am going to be too lengthy about. We have done a lot of work on it, as I have mentioned

many times, to try and classify and reduce the amount of words that will be said before your Honours. What I propose to do is in a pretty brief period, I say pretty brief, comparatively speaking, to evaluate the evidence on Mr. Armstrong.

JACOBS, J.A.: Start it then anyway, Mr. Gruzman, and we will see how it goes.

MR. GRUZMAN: I think the starting point, your Honours, is to have a look at his Honour's judgment and just see what his Honour did find.

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JACOBS, J.A.: Summarise it, because really, we have read it so many times, Mr. Gruzman. Go through it quickly then. Do not expect us to take it out again. Give us the references, it will ring a bell like that, I am sure.

MR. GRUZMAN: I will do it in that way. What his Honour says is that by the latter part of 1966, they had reached a state of open conflict and from that conflict there emerged the hatred between the two men that has given rise ultimately to this suit. His Honour said he heard Mr. Armstrong cross-examined over some days, observed him in the witness box and cannot treat his evidence as reliable. "I think so little of Mr. Armstrong's credit that I am satisfied on any point of importance ... to give false evidence". His Honour continued "When the whole story was unfolded ... as distinct from a manufactured case".

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JACOBS, J.A.: Please. We have read all this. I do not want to stop you. Just recall to us that we are so aware of all those things he did say. You need have no fears that we will undermine the strength of what Mr. Justice Street said, because it cannot be undermined. He was the man who was before the learned trial Judge at first instance, and the learned Judge at first instance had the opportunity of evaluating him. We will not differ.

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MR. GRUZMAN: Your Honours, I have a problem. The problem is that we are going to ask your Honours to do something which his Honour Mr. Justice Street was not prepared to do.

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JACOBS, J.A.: Tell me what you are going to ask. Just summarise that.

MR. GRUZMAN: I do not want to go into details.

JACOBS, J.A.: Just summarise it.

MR. GRUZMAN: Broadly, we are going to submit that Mr. Armstrong is shown on the evidence to have been party to a conspiracy to murder Mr. Barton.

JACOBS, J.A.: You have used those words before. What you mean by that is that the learned Judge was in error in not drawing the conclusion from the circumstantial evidence that Mr. Hume was involved with Vojinovic and that he was so involved on the instructions of Mr. Armstrong.

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MR. GRUZMAN: Yes.

JACOBS, J.A.: That the failure of the learned trial Judge to draw that conclusion was not based on any denial by Mr. Armstrong.

MR. GRUZMAN: That is true. It had nothing to do with his credit.

JACOBS, J.A.: He was looking for evidence of it which would satisfy the onus.

MR. GRUZMAN: Yes.

JACOBS, J.A.: If he had found it, I feel confident in saying that in the light of the findings on credit, nothing that Mr. Armstrong said would have deterred him from making that finding. 10

MR. GRUZMAN: Yes.

JACOBS, J.A.: So do not you have to go on that matter to what the positive evidence was, not to what Mr. Armstrong was?

MR. GRUZMAN: Yes. Well, yes and no. The question is what is the positive evidence? If it is desired to prove that A shot B, is the only evidence about A which is relevant, assuming he gives evidence, that A does not tell the truth? 20

TAYLOR, A-J.A.: A does not what?

MR. GRUZMAN: Does not tell the truth. What about A's motives, what about all the ---

JACOBS, J.A.: All this comes into it.

MR. GRUZMAN: Your Honour sees once one starts thinking along those lines, as we will be submitting, one has to know all about the person one is dealing with, so far as it is revealed by the evidence. 30

JACOBS, J.A.: Or the conclusions of someone whom you are going to accept. You proceed, Mr. Gruzman. I think that this is an unnecessary expenditure of time.

MR. GRUZMAN: Your Honours can take my word for this, we are acting in a way which we think is the most economical to this Court's valuable time.

JACOBS, J.A.: You read the judgment which we have read so many times and which deals with a matter which we accept, and which is not in dispute, the credit of a discredited witness --- 40

MR. GRUZMAN: I am not dealing with that. I accept the description of credit of the witness given by his Honour Mr. Justice Taylor. You cannot have it higher.

JACOBS, J.A.: You proceed.

MR. GRUZMAN: I am dealing with other matters other than credit. There will be other submissions other than credit based on this. I agree with your Honours that if what I was about to put to your Honours about Mr. Armstrong dealt solely with his credit it is unnecessary. Your Honours indicate that your Honours do not wish to hear repetition of his Honour's judgment on the matter, so I will do it in this way: what I propose to do is only to go through the evidence, certain aspects of the evidence, 10 by giving your Honours a reference to, and explaining briefly each subject matter. It is not my intention, unless your Honours wish otherwise, to read the passages from the evidence.

Firstly, I will just mention numbers and then I will deal with the subject matters, to go through it more quickly. Pages 115, 116, 122 and 2287. That refers to the evidence of Armstrong having his strong arm work done by Hume and the conversation where Mr. Barton told him in July 1966 20 that Armstrong was a vicious and ruthless man, who --

JACOBS, J.A.: That Armstrong?

MR. GRUZMAN: Yes. Barton told Armstrong - Barton said to Armstrong, "You are a vicious and ruthless man, you are only interested in your own financial affairs, you will go as far as death, conspiring to mislead justice and attack anybody in any high position, including Judges" and Armstrong said "Never mind all this, I have my own way of getting things done and I always get what I want, I agree 30 for you to have the physical running of Landmark Corporation Limited."

TAYLOR, A-J.A.: That you put forward as establishing that he is a man who is capable of resorting to physical violence?

MR. GRUZMAN: Exactly.

TAYLOR, A-J.A.: I understand what you are endeavouring to do is to show that Armstrong was party to having him watched, and all the telephone calls and suchlike. In other words, it was all done at 40 his instigation.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: You are relating a whole series of circumstances as pointing to this?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: This is one of them.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: I suppose you are going to take us through the evidence of the payments made.

MR. GRUZMAN: Yes. 50

TAYLOR, A-J.A.: You are going to go to the evidence to show us that they were not payments made for the purpose that they were said to be?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: So far as I am concerned, that is established, they were not. Then I suppose you are going to go to all the things that were done to make it appear the relationship between Hume ---

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: Then I suppose you are going to take the transaction about the motor car and say that if you take all those together they point to the conclusion that Mr. Justice Street was not prepared to take.

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MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: That is, the matter of circumstantial evidence consistent with no other reasonable hypothesis, other than that Armstrong was party to whatever he did. I have given a lot of thought to this, and I have had a look at the evidence. I myself would be inclined to take the view on the evidence that was so. It does not follow from that, of course, I am prepared to take the view that the trial Judge was wrong. The very fact you have this false facade built up to try and cover up leads me to the conclusion that really there was --- as I understand the law, it is not sufficient that I myself would come to that view, you have to satisfy me I ought to take the further step and say that the trial Judge was wrong in coming to the view he did.

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MR. GRUZMAN: Yes.

JACOBS, J.A.: I am prepared to express the provisional view along these lines that if there was a case made out sufficient to enable a tribunal of fact to reach the conclusion of involvement, then it is a conclusion which on the circumstances I would accept, but I place the onus at the highest - not the full onus, but at the highest one with which one has to be satisfied in these respects and I ask myself the question is it a finding that is open, is there a link, an essential link before such a grave finding can be made, and as I understand the approach of Mr. Justice Street, he could not find that link. If there was a link, then I do not think that there is the problem to which my brother Taylor refers of us perhaps reaching a different conclusion but not interfering with the trial Judge because he would be in error in not finding that link. The real thing I am looking for is not a great mountain of circumstances, I can see all that mountain, it is the essential thing before one can categorise a person as guilty of a criminal offence, if the onus on that finding is slightly lower than the criminal onus. I would be much more interested in seeing the definitive thing - this is what has been overlooked,

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there is the evidence that any jury can say involves this man, if they wanted to, they can say this involves this man.

MR. GRUZMAN: May I say I am most grateful to your Honours for that indication. I have to say at once that there is not on this aspect of the case one specific point to which we can refer your Honours which was overlooked by his Honour. There may have been some failure to put the matter in a different way. The sort of thing I was speaking about ---

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TAYLOR, A-J.A.: I could not accept for a moment you left any stone unturned to get Mr. Armstrong involved.

MR. GRUZMAN: It was an interesting subject. The link really and I am sorry, I have to take the blame again - this link theory really arose I believe from the way in which I made the submissions to his Honour. We appreciated the strength of his Honour's judgment, if I may say so. The link theory arose because we put to his Honour you can look through Armstrong to Hume, to this one, to that one. The way in which we are going to approach it basically to your Honours, although we are going to say the same thing, we are also going to say this, that on the evidence of Vojinovic, a conspiracy was proved. Vojinovic swore there was a conspiracy which involved Armstrong, Hume, Novak and himself.

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JACOBS, J.A.: It is to point out the obvious, isn't it, that that is not evidence against Mr. Armstrong?

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MR. GRUZMAN: That is right. I appreciate that to the full.

JACOBS, J.A.: Or the thing against Hume?

MR. GRUZMAN: That is right. I am not proposing to argue the submission at this stage. Your Honours have been kind enough to indicate a view, and I feel I should indicate what we will be putting. When one looks at the law on conspiracy, there are two matters to be proven to the core. One is the fact of the conspiracy, and the second is who were the actors in the conspiracy. The bare fact of the conspiracy is proven by Vojinovic, in much the same way as if you found a document ---

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TAYLOR, A-J.A.: It does not need to be proved that he and Novak agreed to do anything, except --

MR. GRUZMAN: Would your Honour reserve that for a moment. We have not the authorities here, we are not proposing to argue it. As it appears to us on the authorities, there are two matters which are quite separate and distinct. One has nothing to do with the other. One question is was there the fact of a conspiracy. The second question is who were the conspirators. The fact of the conspiracy can be proved in numerous ways. Often it can be proved by individuals' actions, and so

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sometimes proving the fact of the conspiracy will also prove who the conspirators were. In other cases it can be different. It can be that the fact of the conspiracy is proved in a particular way, as in this case by Vojinovic. That is not the slightest evidence at that point of time against Armstrong. He says there was a conspiracy which involved Armstrong. That is a fact, but it does not involve Armstrong, it is not the slightest evidence against Mr. Armstrong. But then the Courts look to see what evidence is there which involves Armstrong, or any other given person in that conspiracy. At that point of time one looks to other things.

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Entering into a conspiracy is the same as any other act done by a person. Here we tend to look at the criminal law because it has a criminal context, but in so saying I know your Honours have no illusions as to what the proper onus is. The same way as one can look at motive in any other criminal offence, so we look at motive here in the previous threats, all of those matters which go to make up a circumstantial case. In any matter they are proper to be considered by the Court in deciding whether a given party is a party to this conspiracy. Once one has reached that point then the acts and declarations of each of the conspirators, is evidence against the other.

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I have taken myself well out of what I had in mind. May I just answer your Honour, Mr. Justice Taylor, as it were, prognosis, of what we propose to submit? What we are going to do, as I have already indicated, is to run fairly briefly through Armstrong's evidence, to see what one finds out about him in the evidence, and Hume, and then go to the fact of the conspiracy, and then to how the evidence is to be used, in our submission, to establish that Armstrong was one of the conspirators.

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TAYLOR, A-J.A.: There is a much more effective way of doing it than that. I cannot conceive that you are going to read to us slabs of Armstrong's evidence, or Hume's evidence. You are now in a position, we having in front of us the whole of the evidence in the case, if you want to establish there is an agreement to do an unlawful act, in which Armstrong was a party you are in a position really of a person who is particularising the overt acts. You can point to the transcript, every line of the document which you say constitutes an act, an overt act, from which the conspiracy ought to be inferred. I would have thought you could have had that done by now. It is simply a matter of handing it to us. You say (a) there was an agreement to do an unlawful act, and (b) Armstrong took part in it. That is all here in these volumes, you cannot go outside them.

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MR. GRUZMAN: Of course it is all here, there is no doubt about that. It is a matter of sorting it out, and that is what we are trying to do.

TAYLOR, A-J.A.: I imagine you have come here trying to do that.

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MR. GRUZMAN: I do not want to argue conspiracy now. I indicated we do not wish to argue that point at this stage. We are not prepared for it. What we propose to do, subject to any directions your Honours may give us, is to first of all look briefly and by reference at what the material is on which we will be relying.

TAYLOR, A-J.A.: A matter of saying "I want to go to the material to point out that Armstrong was a party to the agreement or a party to having him watched, telephone calls", and all that matter I went over before. 10

MR. GRUZMAN: Yes.

JACOBS, J.A.: What you are doing is saying "Leave the relevance of what you are going to put for the moment and you will give us the evidence and then link it up with the overt act and the legal argument to say there was a conspiracy in law".

MR. GRUZMAN: Yes.

JACOBS, J.A.: I am not sure that that is very satisfactory, Mr. Gruzman. We do not know whether we are dealing with matter relevant to the point or not. We cannot direct our mind to it. 20

MR. GRUZMAN: Your Honours are only then in the same position as any trial Judge.

JACOBS, J.A.: That is where the Appeal Court is in a different situation. We do not approach, by the very nature of it, our problem in the same way as an unfolding set of facts before a Judge.

MR. GRUZMAN: Your Honours have read the appeal books, so that your Honours are, with respect, in the same position as the trial Judge. I only wish to --- 30

JACOBS, J.A.: The trial Judge would never have listened to you recapitulate the evidence without you telling him where you were going?

MR. GRUZMAN: I have indicated where I am going. If I have not, I shall do so again.

JACOBS, J.A.: I know you have in the broadest generality. Oh well, never mind, you go on. 40

MR. GRUZMAN: I will be as brief as I can about it.

MR. GRUZMAN: At 1/49, 50 is the evidence of Armstrong not working for widows and orphans but working for himself. Then there are the references 1/308, 2/432-436. This relates to Bovill and Barton and the conversation in which there is a reference to the hiring of gangsters, killing children - children hooked on drugs - and the matter of the police manufacturing evidence. 50

At 1/47, 2/303-305-309 and 431 is where Mr. Armstrong says to Mr. Barton "I will fix you. I will have you fixed". Armstrong says to Barton that he may employ as many bodyguards as he liked but Armstrong would still fix him. At 1/72, 2/310 on 12th January "You had better sign the agreement or else". 1/74 the threat to kill Barton and also at 1/39. Then 1/80, 1/308-9 on 16th January - "Unless you sign this agreement you will get killed". 2/522, Barton's statement to Bovill "This man is threatening me. He has hired criminals to kill me". 10

That was Barton's evidence on Armstrong.

In Mr. Armstrong's cross-examination, 4/1051-1053, bribery of police is not a serious matter. At 4/1032, as to bribery, "You might think about it" and "his mind is not so pure".

At 4/1033-1038 and 9/3026, consideration given by Armstrong to bribing a judge. Armstrong's notes and his discussion with Frank Browne. 4/1195, 4/1133-1139 - sending Hume to Surfers Paradise to obtain confidential information. 20

4/1308-1309, dealing with Armstrong's denial and his conversation with Mr. Bovill where Bovill said "This is not Chicago" and Armstrong said "This city has reached 2 - million people and organised crime moves in and you could have someone killed for £1,000". That deals with Armstrong on bribery.

The next reference is 4/1122-1123, Mr. Armstrong said that he does not think he ever blackmailed anybody. He cannot recollect using blackmail as a form of pressure. He had been asked whether he had been a party to blackmail and he said it was very difficult to answer. 30

TAYLOR, A-J.A.: What does that mean; that he had not? Did you believe that?

MR. GRUZMAN: Not exactly. I am not going to argue these matters because it is fairly unnecessary but we leave it to your Honours to go through it and evaluate them as your Honours see fit.

4/1138, 7/4234, 4235, Exhibit "W", the card to Ashcroft. We suggest that is a complete blackmailing document, indicating that Mr. Armstrong's intention was to blackmail Ashcroft. 4/1120-1121, 9/9037 - these are the letters speaking about being quite ruthless as regards debtors. 40

4/1086, and here he was seriously considering any steps to deal with a person crossing his path. 4/1110, 1114 is the evidence of Tester dealing with incompetence, negligence, dishonesty, pressure, death. 4/991-1004 is the Eskell matters. He wanted to punish him - there is the Eskell divorce and business association. At 4/1008, 1010; 9/3036, Exhibit 63, the Eskell business of 30th June, 1962. 4/1094-1097, 9/3033 are the notes of being advised to seek a gunman. 4/1088-1091, 50

9/3030 - "Must settle down to be close to him".
9/3030 deals with Eskell, business, and a weak ac-
tion. 4/1287, 1288 deals with Pratten, who was of a
substantial creditor and Armstrong got in touch with
him and frightened him in his relation to the com-
pany by saying that he was the chairman who was go-
ing to put in a 222 note on the company and Arm-
strong said that this man was writing a deliberate
lie in the letter that he was shown.

As to Armstrong, I think that is all, then
as to Barton: 4/1315-6 referring to Barton's
ability to keep the company afloat or to keep liqui-
dity on a proper basis. Then at 7/2358 "A competi-
tor right to the end". There is the diary exhibit.
4/1024-5, the attack on Twigg and Armstrong's be-
lief that Twigg was a party to the arrangement be-
tween Eskell and Cleary.

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As to the conspiracy, 9/3024 (Exhibit 63)
then Eskell's query of 30th June, 1962, 4/982-87
tendered to mislead the Divorce Court as to Eskell.
4/1005-6-8, 1010-13. This is the conspiracy in re-
gard to justice. Then 4/1046, a party to the ar-
rangement to produce false evidence.

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JACOBS, J.A.: You say we would be entitled to find
that he was the type of man who would do this and
therefore did it? In other words we should adopt a
different approach to a criminal conspiracy in a
civil case? That is a worrying thought, is it not?

MR. GRUZMAN: Our submission will be that this
Court should use the evidence which is before it
in so far as it provides a logical and probable
basis for any given proposition.

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JACOBS, J.A.: I do not mean to take you off your
argument; you will no doubt develop that.

MR. GRUZMAN: We intend to.

4/1055, he would not have an arrangement like
that, and attach weight to misleading the Court.

Then 4/1060, 9/3010, 31, 32 and 34 -
Armstrong's reference to divorce being secondary to
the commercial situation - Exhibits 61 and 64.
4/1156-69, Australian Factors, the \$100,000 trans-
action.

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4/899-990, 4/1008 - does not deny that he
was party to the procurement of a false document.
9/3109-10-17, Exhibit 61 is the concern of the
Registrar in Divorce - undermining confidence in
Landmark. 4/1227, 4/1232-1288. Then we come to
the evidence as to a telephone conversation and
the letter of 14th November, Exhibit 13.

7/2177 is the evidence of Barton about the
telephone conversation. The next step is 4/1067-
1074, 9/3026, when the perjury was alleged against
him, the attack in Parliament and it crossed
Armstrong's mind to attack the Judge's family.

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Exhibit 63, there is a declaration about attacking the Judge. That next step was attacking the Judge.

The next one is the declaration as to companies and shareholders: 4/1108, 9/3019, 2/3030 - not working for the widows and orphans. 4/976, what happened to the directors.

The next subheading is "Gangsters". 2/433 Armstrong's reference in that conversation with Bovill to Chicago and gangsters, repeated by Bovill to Barton. 1/19 Armstrong's conversation with Barton: "The city is not as safe as you might expect between office and home". 10

Armstrong's statement about killing, 1/39, 2/309. Armstrong's statement to the effect "You will be killed - you will get killed". 2/431 - Armstrong's statement "You will get sunk". 1/80 Armstrong saying "Unless you sign the agreement you will get killed". Armstrong is saying words to the effect that unless he signs the agreement he will get killed - 16th January - "Unless you sign that document you will be dead. You will get killed". 20

The course we have taken is again to tear up some appeal books and get out the actual evidence and the exhibits and put them in a folder for each of your Honours with an index. It is entitled "Armstrong" and I produce three copies. (produced to Court.) I think your Honours will find that these documents will save time if your Honours wish to refer to any of the matters because the pages are given there. 30

JACOBS, J.A.: We can use them in conjunction with the transcript and run through the various pieces of evidence.

MR. GRUZMAN: Yes. The index is in the front, so your Honours can conveniently pick out the subject matters. There are no submissions in them.

JACOBS, J.A.: Thank you, Mr. Gruzman. That will be very useful.

MR. GRUZMAN: In exactly the same way I am going to give you Honours some references to Mr. Hume, because he is also one of the principal actors in this matter. First of all I think I should invite your Honours' attention to what his Honour Mr. Justice Street said about Hume. He refers to Barton, saying that he recognised Hume standing outside Landmark. "The evidence is unsatisfactory. There is evidence, uncorroborated, ..." At 5/185 is a reference to Hume's qualifications. Hume is a private inquiry agent and his qualifications and his licence as a private inquiry agent are dealt with. It was at 5/1604 that there was a reference to his fluency in Russian, German, Greek and another language. Then at 5/1634-65 the origin of the name "Hammer". At 5/1637 - then 6/17,18, licenced to carry a pistol, 1/735, 1/783-85, reference to training, then 7/623, Exhibit "EE". He 40 50

said he did not have a gun when he went to Queensland because his gun was so big that he could not carry it.

TAYLOR, A-J.A.: There were hours and hours spent on this cross-examination.

MR. GRUZMAN: It took a little time but eventually it proved that he was a liar. We even found the invoice where he bought the gun. Then at 3/760, 3/762 are the letters. Dealing with the nature of his activities and employment, 5/1593, by Armstrong and Barton. At 5/1599, keeping persons under observation. 4/1633, the Glebe Island units, inducing purchasers to be interested. 5/1604, interviewing people. 6/1810-2 and 5/1609, regarding burglary. 5/1631, 1640-1, bodyguard, one who protects people and is so employed re Lesic.

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6/1792-1795-800, 7/2371-4-82, evidence regarding the valuing of motor vehicles. Exhibits "GG", "JJ", "KK". 1/792 there were some questions asked about him doing something to Barton: "Were you ... to watch him? A. No. Who was going to pay me for that? ... I cannot work that out." In other words, Hume obviously did what he did for money.

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5/1469-70, 5/1520-1, he sells his business to his secretary and he is working for her. This concerns his financial interest in the company. I know your Honours won't say to me later on "You have been through it all", because I am only giving references at this stage and not arguing it or referring to it in detail. I would not like your Honours to say to me later "You have been through it", if I refer to it later.

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JACOBS, J.A.: If you merely refer to it ---

MR. GRUZMAN: At a later stage I may wish to make a point and read a piece of the evidence, so I would not like your Honours to say "You have referred us to that, that is all there is to it. I am not arguing the matter at this stage.

JACOBS, J.A.: You mean one of the few pieces of evidence which you may wish to refer to in order to make a special point?

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MR. GRUZMAN: These are only the references if your Honours want to look at them.

6/170-21-23. This shows that the expenditure for the year ended 30th June, 1966, exceeded his receipts by \$435 and for the year ended 30th June, 1965, his earnings were on an average £8 a week. He got loans and advances from his father, 5/6149. He borrowed from his father, 5/1679-80, 6/1670. This is the position of his previous year, and there is a reference to the instalments, his other car, and then we go to 5/1694-5, the blue Falcon. Then the instalments are paid by Novak. 6/1719-20 where Armstrong provided the greater

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part of his finance. 6/1859-61, his best clients were Armstrong and the associated firms or companies. 6/1827-29, the payment to Armstrong of \$440 and \$500. Your Honours remember those payments? I will deal with them subsequently. These are completely unexplained payments which should be in Hume's cash book where he has those two amounts being paid to Armstrong and he cannot explain why, except to say that his father has made a mistake. Our suggestion being that this was a refund of the \$1,000 because this failed. There was a question put to him, in fact he was questioned at length about it, and I will deal with that later. There is no explanation. All he can say is that his father made a mistake, yet the cheques are there; his father is not called. But that is getting off the point.

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6/1831, further payments of \$1,400 as repayment of loan to his parents; no evidence of that amount being received.

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As to the police, his associates, 5/1624, the police frequently visited Hume's premises - security police, Commonwealth Police, C.I.B., and he refers to Detective Sergeant, Col Mackie, significantly enough, as the person whom Vojinovic proposed as a go-between.

5/1702, he referred to Vojinovic. Then there is a reference to giving assistance to the police. 6/1572, gives information to the police. His associates were criminals. 6/1903, 4/1178 - his relations with Novak. I will deal with that separately, because it is a longer subject. Then his relations with Armstrong, 5/1362, and his only association with Armstrong is social - 6/1747-50, 7/3266 his evidence generally in relation to working for Armstrong, Armstrong's \$500, Exhibit "CC". I will also deal with that when I come to deal with the conspiracy.

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Then the interviews and the affidavits. His interview with Wild in January 1967 and the evidence about Exhibit 29, 5/1703 and 8/2518. He saw Wild making notes in his notebook. 6/1970, Follington mentions to Hume that Barton - (read). 6/1972, 1981, the alleged discussion with Novak after 18th January. 6/1896-7, his conversation at Kings Cross about the \$500 insurance on Armstrong's life and the allegation that Barton had entered into a conspiracy to have Armstrong killed for \$500,000. Exhibit 29. The record of interview, Mr. Barton said he was at the C.I.B. - I will deal with that separately.

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The record of interview of 5th February, 1968, Exhibit "MM"; 5/1672, 1674, 7/2394 - Hume's affidavit of 10th February, 1968. Exhibit "LL", 5/1671, reasons why he made the affidavit and 5/1693-4 and 1598, the statement to the police. 7/2387, January 1967 - according to Hume - and that is what is stated in the affidavit.

That is a reference only to the evidence bearing on Mr. Frederick Hume and, again, for the assistance of the Court we have prepared folders consisting of the index, references to his Honour's judgment which I have read and the pages in the appeal book. (Three copies produced to Court.) If your Honours would glance at it now, just to see what the material is so that your Honours may use it.

JACOBS, J.A.: I think the summaries at the front will be most useful, Mr. Gruzman; thank you. It seems we can then turn to any page of the evidence. 10

MR. GRUZMAN: We have now covered Mr. Armstrong and Mr. Hume. I just want to say a few brief words and I am going to turn now to the subject of conspiracy. The evidence shows that Mr. Armstrong was a man who would be feared by anyone who knew him, feared as a person capable of outrageous action, a person who in the past had contemplated outrageous and inhuman actions, a person who had a tremendous motive - financial and otherwise - for entering into a conspiracy to frighten, harm or murder Mr. Barton. 20

I have said before, and I repeat it, one realises the difficulty within the confines of the civil court of suggesting that a man who was a member of Parliament and a wealth man, a man of power and position, would have been prepared to murder a fellow citizen to satisfy his own financial ends. But there is precedent for it, as one knows, in our history. 30

JACOBS, J.A.: That is not in evidence.

MR. GRUZMAN: It is history.

JACOBS, J.A.: It is not in evidence, nor would we dream of reaching a conclusion on such a statement ---

MR. GRUZMAN: The only reason I mention it is that, human beings being what they are, when you find something which is very unusual and very difficult to comprehend, more difficult than something which falls within one's experience, I might cite from Taylor on Evidence about the expert who was ridiculed and discredited at an inquiry because he mentioned that in his opinion eventually railway locomotives might one day reach twelve miles an hour. That was because it was completely outside the knowledge or experience of the learned tribunal who was dealing with the matter. 40

JACOBS, J.A.: Now, Mr. Gruzman, do you really think that one's conclusion on this aspect of the case is likely to be affected by those factors that you have mentioned? You have got the evidence there, you have heard expressions of view. You know you have to point to the evidence. There is not going to be a great preliminary hurdle of the mind to be overcome in this way, obviously. The thing raised by the trial Judge is such that one can see 50

that the consideration of any citizen was largely displaced by the events which were revealed - not in connection with this matter, but generally in the matter. So I do not think you have to worry on that aspect. You have to get on to show that on one view of it, if it was a jury matter, there was a case to go. That is really what you have to do. I think you had best proceed.

MR. GRUZMAN: I do appreciate what falls from your Honour. I was going to refer your Honours to a case which was decided in the Criminal Court of Appeal, R. v. Pope, 1968 (1) N.S.W.R. 539, where what was involved there was a contract to murder. But I appreciate what falls from your Honour, that this sort of thing could happen and the only question is did it happen here. 10

TAYLOR, A-J.A.: The only thing we are concerned with is the evidence. What you say follows from that is the way we are concerned with it.

JACOBS, J.A.: But you still bear that heavy onus, made no heavier by anything of that kind, but you still bear not a criminal onus but a burden that the case is made out and you do not shrink from that. I think I can assure you that you do not bear any different onus from that because of any other factor. 20

MR. GRUZMAN: I am just going to depart for a moment from looking at the evidence. Even that onus, even if it were of the criminal standard, can be satisfied without a tittle of direct evidence. Later on I will be referring to a case which is familiar to your Honours, R. v. Plonk in the High Court and the evidence of motives, intentions, and I suppose all the factors that resulted in the death penalty. Here each of those factors is present. But it is of the nature of things that in a case of this kind the allegation that A conspired with B and C and D to murder X- there is not going to be any written contract and you are not going to expect to find Mr. Armstrong in consultation with Vojinovic. You are not going to expect to find Mr. Armstrong at the scene. 30 40

JACOBS, J.A.: I know you won't be long over this. But if you like this form of statement, make the statement - having been over it - that the Court won't find these things. What you have got to do is to show that the circumstances are such that it ought to be accepted. I think you can assume that we are not likely to find that type of thing.

MR. GRUZMAN: I am laying the ground for this. This subject matter is not one which can be dealt with by reading a list of numbers and references. This is a subject which requires a meticulous examination of a lot of evidence in order to consider the inferences arising from it. 50

TAYLOR, A-J.A.: And it is a matter which you never debated or put to the trial Judge? You told

us before you never sought from the trial Judge permission to make such a case which you are seeking to make now.

MR. GRUZMAN: That is not right. What I said was that we put it in a different way. I said that in approaching the question of the proof of Mr. Armstrong's involvement we looked at all the evidence as meticulously as we are going to do before your Honours, but we looked from a different angle, saying "In regard to A conspiring with B, and with C, D and E", we may have dealt with C and B but did not make the final link. We are going to repeat that again, your Honour, and then find that link or infer it. We are also going to put the matter here differently and are going to say that the effect of the conspiracy was proved and then from other evidence your Honours will infer that Armstrong was party to that conspiracy.

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TAYLOR, A-J.A.: That is not the point. This case was never put to Mr. Justice Street and there is no finding on it.

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MR. GRUZMAN: That is the fine point of the conspiracy and whether Armstrong ---

TAYLOR, A-J.A.: You are going to make a lot of allegations here from the Bar table about a person being a party to a conspiracy; a matter about which no findings were made by the trial Judge.

MR. GRUZMAN: With respect, that is not right. It is not right about the making of allegations concerning someone being a party to a conspiracy being a matter which was not put to the trial Judge. I only indicate that there is a difference in the method of arguing. It was put very clearly to his Honour that Armstrong conspired to have Barton killed.

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TAYLOR, A-J.A.: You say that was put.

MR. GRUZMAN: Yes, your Honour. As his Honour said at page 3210: "The specific allegation in the statement of claim is that Mr. Armstrong engaged certain criminals to kill or otherwise injure Mr. Barton. There is no direct evidence implicating Mr. Armstrong with a conspiracy to kill or injure Mr. Barton ... through the medium of Mr. Hume".

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So the allegation is made in the clearest possible terms. Indeed, his Honour also said at page 3215 "The charge against Mr. Armstrong in this regard is a criminal conspiracy". I am not making allegations here different to what were made to his Honour. The statement of claim said, "Kill, injure".

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TAYLOR, A-J.A.: He never found that.

MR. GRUZMAN: No. We would not be here, I suppose, if his Honour had found that.

TAYLOR, A-J.A.: You start off on the basis that you get a finding by his Honour Mr. Justice Street that he was not prepared to find this, that there was any such agreement.

MR. GRUZMAN: No. His Honour said in the clearest possible terms at page 3213, referring to the conspiracy to murder, and at 3215, "I am not satisfied I should make a judicial finding ... adverse to Mr. Barton". It has always been part of the plaintiff's case before your Honours that Armstrong set out to have Barton killed.

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TAYLOR, A-J.A.: I do not want you to take from anything I said earlier, when I spoke about being prepared to find agreement, that I would have been prepared to find affirmatively the agreement that Mr. Justice Street was not prepared to find; that is an agreement to murder. I have always taken the view that the Vojinovic incident, and what went on between Vojinovic and Barton, could not be related to either Hume or Barton. When Vojinovic talks of telephoning Hume, I accept the evidence that he could not have done this as Hume was not there.

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MR. GRUZMAN: I think it is clear now that there are no allegations being made, as your Honour put it, from the Bar table that were not put before his Honour. Absolutely no suggestion is open.

(Luncheon adjournment.)

MR. GRUZMAN: I do trust that your Honours will not take amiss the submissions which I am about to make. We have sought in the presentation of this appeal to abide by the spirit as well as the letter of the indications which the Court afforded us involving the length of time and reference to evidence in these matters. Indeed, earlier today, when I wished to read extracts from his Honour's judgment the Court indicated that they were matters well known to members of the Bench. Yet your Honour, Mr. Justice Taylor, indicated that he had overlooked - to the extent of suggesting that I was making accusations from the Bar table that had never been made ---

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TAYLOR, A-J.A.: That is not the fact. I understood earlier you said you were going to make a case that had never been made before Mr. Justice Street and you were going to say that this was an agreement that amounted to a conspiracy to commit murder and for that reason this agreement should be set aside.

In discussing or making that case I thought that what had never been put before Mr. Justice Street would not arise. If you are seeking to put that I overlooked it in the statement of claim ---

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MR. GRUZMAN: That is right. Anything your Honour may have said, your Honour was entitled to, but if such a basic matter as what appeared in the statement of claim - hundreds of pages, with days and days of evidence devoted to it and Street J. dealt

with it in his judgment with meticulous detail - if such a matter, on the fifth day of this appeal had not become apparent to one member of the Bench, then it is obvious I would be failing in my duty if I did not accept or act upon the basis that minor points of evidence which to us, in our submission, seemed significant, could be overlooked.

JACOBS, J.A.: What you have just done may be a fair tactical move but I do not regard it as any more than that. I think it is inevitable that from time to time we will want correction and we will want assistance on particular passages but I do not think you are entitled, from the fact that there are these deficiencies, to question the general correctness of what I think I can say the Court has generally said; that we have, to the best of our ability, read all these appeal books. And I think, if I may say so, you are, as it were, doing the obvious thing in what you have just done. 10

MR. GRUZMAN: Your Honour, with respect, I am not. I ask your Honours not to take amiss what I am putting. We understand there is no question of that, of course, and there is no question that your Honours have read the appeal books exactly as your Honour said. 20

JACOBS, J.A.: I think it would be really best if you proceeded.

MR. GRUZMAN: Except this, I must - as I indicated before - put this: speaking as to four counsel appearing for the plaintiff, three of us not only lived through it --- 30

JACOBS, J.A.: For three months, I know.

MR. GRUZMAN: But we still find matters we have overlooked.

JACOBS, J.A.: I think it would be best if you proceeded with your argument.

MR. GRUZMAN: I would like to refer your Honours to a passage in the judgment of the High Court where Isaacs and Rich, JJ., say in London Bank of Australia v. Kendall --- 40

JACOBS, J.A.: That is a case which was referred to by Windeyer, J., in a recent case, is it not?

MR. GRUZMAN: Yes. 28 C.L.R. 407. The Court said, "The Court and not the jury ... it is the duty of the appellate tribunal and it is the statutory right of the litigant who invokes it to require of it the performance of that duty, to determine for itself the true effect of the evidence so far as the circumstances enable it to deal with the evidence as it should be in the Court at first instance". 50

JACOBS, J.A.: So far as I am concerned, and I speak only for myself, that is the precise principle

which for five days I have been attempting to apply in this case. I am grateful for the reference.

MR. GRUZMAN: Windeyer, J., in the judgment your Honour mentioned, De Costa, said "The appellant court must have regard to the evidence and its effects so far as the written transcript reveals".

JACOBS, J.A.: Yes, and I must say that unless I am shown otherwise I do not think De Costa's cast has any relevance to the present case.

MR. GRUZMAN: I refer your Honours to the passage. 10

We come to a subject matter which is important, where your Honours have indicated that the quantum of proof any way is high and which depends on a lot of minor facts and what inference this Court will draw on a serious and important matter from a lot of minor facts. I propose to take your Honours to the evidence on these matters at this time.

On the question of the general conspiracy, one of the first matters which arises is the relationship between Armstrong and Hume. In Volume 1, pages 15, 16, your Honours will remember the evidence of Mr. Barton in relation to taking possession of the machinery at Surfers Paradise and that Mr. Armstrong said, "Mr. Hopgood might put up a fight if we try to get this machinery". He said, "I have a man who does all my dirty work, I employ permanently ... will agree to the methods that you and Fred use". 20

Interpolating there, there is a little indication of the difference between Armstrong on the one hand and Barton on the other and, just in a tiny vignette, the knowledge that even Mrs. Armstrong had of the difference between Barton and Armstrong when she said, "I do not think Alexander Barton will agree to the methods that you and Fred (Hume) use". 30

MASON, J.A.: What flows from this? I do not quite see the significance.

MR. GRUZMAN: The conspiracy. Two of the conspirators are alleged to be Armstrong and Hume. The whole of the relationship between them is relevant to determining whether they have acted in concert and whether they have developed a relationship in which, as Mr. Armstrong said of Hume, "I have a man who does all my dirty work I employ permanently. I employ him permanently and he does all the strong-arm work that I may require". We say that that is evidence --- 40

MASON, J.A.: Are you going to go through every little piece of evidence? 50

MR. GRUZMAN: Every little piece.

MASON, J.A.: Every little piece?

MR. GRUZMAN: Every little piece.

JACOBS, J.A.: Mr. Gruzman, I do not think you are. But you go on.

MR. GRUZMAN: It was on the following day that Armstrong introduced Barton to Fred Hume.

The next reference to that appears where Mr. Pratten, the Member of Parliament - a man whose credit was simply not in question in the proceedings and who had been called by the defendant - at page 1561 in cross-examination, when I asked him "What were you told by Mr. Armstrong?" said "That Mr. Hume was employed by him and that he would make him available for the election campaign and in Mr. Armstrong's opinion he would be best used in areas where there were migrants as he had a knowledge of them". Again pointing to the continuity of employment of Hume by Armstrong.

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The first one was evidence of Barton and the next one was evidence of Pratten. Now we come to the evidence of Mr. Armstrong himself on this subject matter. Mr. Armstrong, in his evidence-in-chief at page 955, was asked by senior counsel "Now, you recall the purpose for which Mr. Hume was invited to Surfers Paradise was related to the termination of the Hopgood contract?" and he replied "That is so". At page 955 Mr. Armstrong in his evidence-in-chief was asked about the subject matter of Surfers Paradise: "I said to Mr. Barton that Fred would be a useful person to do this work and I asked Mrs. Armstrong to give me his number". Hume himself said at page 1953 "Armstrong told me these things and then Mr. Barton said that I am also to protect him from a man called Hopgood. Mr. Barton said 'You are to see that no harm comes to me from a man called Hopgood and his partner', whom he said was a very dangerous man and he feared them ... is a very big man".

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It was put to him that he said (Mr. Armstrong) that the company did not have anyone who could do the job as efficiently as Fred and he said - "I may have said it". At page 1642 Mr. Hume said that Hopgood and his partner were not as violent as Mr. Barton claimed they were. Barton, of course, was a man who, physically anyway, was timid - on the evidence. He was a man who, on the evidence, abhorred physical violence of any kind. Hume, on the other hand, was a man who was engaged to perform it if necessary on that occasion and Armstrong was the man who instigated Hume.

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There is further evidence of this engagement. Your Honours will remember that Hume and, I think, Armstrong said - Hume particularly - that it was Barton who employed him and his instructions were to take orders from Barton and Barton only. At page 1184 he was shown the account that Kilmartin, the agent, had put through for \$200 on 2nd August, 1966. Mr. Armstrong said that he had not seen this and did not know about it and he was asked because

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the document showed "Kilmartin paid the money to Hume on Armstrong's personal instructions" and he would not agree to that. All he said was "Armstrong said I was carrying on all the work at that time at Surfers Paradise".

At page 1195, in cross-examination, we dealt with the fact that in November Hume was sent to Surfers Paradise by Armstrong to spy on his behalf. This, of course, transpired - so far as the plaintiff was concerned, as the result of a cheque for \$500 which had turned up on the subpoena. "7th November, 1966, paid to Hume - investigation". In cross-examination Mr. Armstrong said "It was paid for work done on behalf of investigating what was going on at Paradise Waters in Surfers Paradise - we are dealing now with November". That is an indication of Armstrong's opinion of the company as early as November, that good men were going to leave because they were not getting paid. "I sent Hume up ... that is the reason why that was paid". He cannot recollect an invoice, and there was no written report. I just give your Honours the reference to pages 1237-8 where there is further evidence from Mr. Armstrong that he had sent Hume up to get this confidential information.

At page 1233-4 it was put to Mr. Armstrong that bribery was part of his stock in trade and he said that was offensive. I asked him what was the \$100 paid to Keith Hawthorne for, an employee of Landmark at the time, and he said that Hume told him he had paid the money to get the man to stop a bit longer. Even if there was truth in it, which I suggest there is not, it means that Armstrong thought at November that the company was at an end. "He was employed by Landmark then ... you were unable to get permission? A. Yes."

On the contrary, of course, Hume's version about the \$100 (page 1732) was "Q. Did you regard this as a big job? A. Yes, because I did not know how long I would have to stay up there ... accepted it? A. Yes." It is perfectly obvious that on Hume's version the \$100 was given to Hawthorne for the information that he gave.

At page 1263, which is a reference of course to a matter I have dealt with previously, but this goes to the \$1,094 and included in that amount was a round figure of \$150: "To making inquiries and conducting certain real estate ... Rozelle". "What did Hume do to earn that over there in Rozelle?" I won't bother your Honours with the details. "Is there anything else that Mr. Hume did to earn that that he did". "I should also tell you in connection with that action there was a good deal of trouble in that area with cars being broken into ... for a month or two."

At page 1171, in the same account was an alleged charge for investigation of an employee at Double Bay who it was thought apparently had taken some money out of Armstrong's pocket.

JACOBS, J.A.: Is this to show an association between Armstrong and Hume?

MR. GRUZMAN: Yes.

JACOBS, J.A.: Personally I am satisfied on that.

MR. GRUZMAN: I appreciate that, but so indeed was his Honour Mr. Justice Street; but to what extent? May I be satisfied that your Honours would find they were involved in a conspiracy for murder?

JACOBS, J.A.: No. You can proceed to state whether they were involved in matters which you allege were concerned with the conspiracy. 10

MR. GRUZMAN: Unless one understands the closeness of the association - his Honour found that they played down their association but does not say exactly on what aspects.

JACOBS, J.A.: From my reading of it, I am satisfied that there was a very close association.

MR. GRUZMAN: May I ask your Honour would I be justified in assuming that your Honour would find that there was a close association in any criminal activity which Mr. Armstrong wanted? 20

JACOBS, J.A.: That is what you put to me now, you tell me it goes to evidence of criminal activity, and I have told you that I am satisfied that they were associated but I am not going to say any more than that. I just regard this as unnecessary.

MR. GRUZMAN: I am sorry, your Honour. I have got to have a basis on which to make submissions.

As to the Hoffman matter at page 1171, Mr. and Mrs. Hoffman at that time were in partnership with his wife at Double Bay and there had been some thefts. 30

JACOBS, J.A.: I should add, in case there is any doubt, that the Court is satisfied that there was a close relationship between Mr. Hume and Mr. Armstrong.

MR. GRUZMAN: If that was sufficient, I would be only too happy.

JACOBS, J.A.: It is not sufficient? It carries you that far. I cannot stop you from proving that relationship but I can assure that the Court is satisfied that there was a close - indeed, what might be described as a very close - relationship. I cannot say any more than that. 40

MR. GRUZMAN: We are going to ask your Honours in the end to find a lot more. Without taking your Honours to the evidence at this stage, your Honours will remember in respect of the Hoffman matter Armstrong had no financial interest in the shop himself. There was no reason why he should pay Hume 50

for an investigation into thefts from that shop. We would submit further if this is a justification for the payment of \$1,000 in the account - if it included the investigation carried out at Double Bay by Hoffman on 4th November, \$170, and Mr. Armstrong said it was \$100 in his coat pocket and that disappeared - Mr. Hume and Mr. Armstrong were concerned about that, and one of the girls in the shop was supposed to be taking frocks, and this is while he was overseas. You have Hume investigating it, and he said this was investigated, the dishonesty by an employee, but if he were overseas one might wonder how the \$100 came to be missing from his coat. I put it to him "You may have suggested that the man Hume look into that?" but the shop was owned by his wife and Hoffman and it was a business expense - "Can you offer an explanation ... I said 'I will pay it'".

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That, we will submit, is a matter that your Honours won't accept.

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Then there is evidence, and I am not going to take your Honours through it in great detail, about this alleged electioneering trip as a basis for the payment of \$1,000. At page 1172 he said, "You recall the Federal elections around the Snowy Mountains ... some of the men". That was elicited as meaning that Hume would go down and pay some of the people to vote for a particular candidate, or to distribute literature. That is why he did not ask for a complete report because apparently it might have been embarrassing. He said it could be checked through Mr. Pratten and that is the reason for the electioneering expenses. "What payment did you think Mr. Hume would have ... electioneering job". They had confidence in him. I asked him whether Mr. Hume had any electioneering qualifications and the answer was "I apparently believed so". On the other hand at page 1253: "You are an experienced politician, are you not? A. Yes ...". At page 1175 it was said that Hume gave plenty of verbal reports to Mr. Armstrong.

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As to the payment of the cheque for \$1,093, that is of very substantial and sinister significance.

JACOBS, J.A.: As proving what?

MR. GRUZMAN: We put it as proving payment for Vojinovic to shoot Barton, and it was paid at the very time that the enormous splurge of urgency occurred on 4th January when U.D.C. was likely to appoint a receiver, really, unless the agreement was given or arrived at, and the tremendous energy that went into preparing the agreement, the calls backwards and forwards.

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JACOBS, J.A.: You say it occurred at the same time?

MR. GRUZMAN: On the self-same day, 4th January, that cheque for \$1,094 was signed. What we propose to do later is to just hand up to your Honours a

piece of paper with the times as to what the various people were doing on that day, 4th January.

JACOBS, J.A.: Very good. Now you are up to 4th January.

MR. GRUZMAN: I am up to page 1176 where Armstrong was asked "You paid \$1,094 ... 5th January, I think". Actually the cheque in evidence was dated 4th January and credited to Hume on 5th January.

MR. GRUZMAN: In relation to this payment, at page 1230 the account which was addressed to Southern Tablelands was handed to Mr. Armstrong and he was asked, "Did you arrange for Southern Tablelands ... on that account? A. Yes. 10

JACOBS, J.A.: What page is the account?

MR. GRUZMAN: The account is at page 2351 - what the accounts covered - it is dated 21st December - but your Honours might think the date is suspect. Hume said it was polite to wait for a month before sending accounts. That was his explanation of why the account seems to end at 25th November, but is dated 21st December - but the account, I will not go into the detail, but the Hoffman matter, 170 "contacting real estate agents regarding the sale of flats at Rozelle", and afterwards there was an estate agent, Miss Rosewall had the sale of the flats at her control and her own charge - "making inquiries and contacting estate agents about the sale of flats at Rozelle, \$150, and further interviewing", apparently of employees at Surfers Paradise regarding progress on the island, \$70. Yes, that \$70 included his fares but this electioneering - we have this document open at the moment - he charges \$65 for travelling time from Goulburn to Canberra on 10th November; Sydney, Goulburn Canberra on 10th November. \$65 is his travelling time. Here is a man who earns nett, about £8 a week. 20 30

JACOBS, J.A.: But you do not accept that.

MR. GRUZMAN: No, I am saying it sarcastically, your Honour. 40

JACOBS, J.A.: So it might be his travelling time on real terms.

MR. GRUZMAN: From Armstrong, but nobody else. From the cash book he was a private inquiry agent.

JACOBS, J.A.: If he does not get \$20 an hour as a private inquiry agent - I am speaking quite seriously - it would be very surprising.

MR. GRUZMAN: If he did, or did not?

JACOBS, J.A.: If he did not get \$20 an hour.

MR. GRUZMAN: The only trouble, private inquiry agents are usually paid by, or frequently paid by 50

solicitors, sometimes in cash. But throughout his book he gets no earnings practically from anyone except Armstrong. This represents his big earnings for the whole year. But your Honours will doubtless, at leisure have a look at this account but it is just ridiculous.

JACOBS, J.A.: You say it is a fabrication?

MR. GRUZMAN: Yes, it is a fabrication.

JACOBS, J.A.: This was the money that was paid over; this is the amount, you say, was handed over and then handed back again? 10

MR. GRUZMAN: Yes, your Honour.

JACOBS, J.A.: I follow that.

MR. GRUZMAN: The account: I am not going to take your Honours through it - I will deal with that later. Your Honours remember that I put this was really a round sum of \$1,000 and in that in a moment of exuberance, perhaps, Hume, at one stage, decided to give Miss Catt exactly one-third, namely \$333. This was at a later stage, possibly when he thought he had made a clear profit on it. Then he goes to these long explanations of how he came to give Miss Catt \$330, suggesting it was in relation not at all to one-third of \$1000; and he said it was partly wages and partly this and partly that, and partly travelling expenses, and every theory, each lie, was put up one after another and each one exploded until one was left with the bare fact (a) he got \$1000, and (b) at a later stage and after Vojinovic, he gave one-third to Miss Catt. At a later stage it looks as though Armstrong was demanding back his \$1000 and Hume, of course, had said he had access to money; any time he had trouble with money, with motor cars, or anything else, he got it from his father, or somewhere else. 20 30

However, the document bears its own internal evidence. How long it would take and then, how long it would take to drive from A to B - it varies - it varies from \$10 to \$100 an hour.

At page 2353 appears the actual cheque. Your Honours will see that that is dated 4th January, 1967. It is to "Hume's Investigations, or bearer". It is signed "The Southern Tablelands Finance Company Pty. Limited" and it bears Mr. Armstrong's signature, as well as the signature of Mr. Thorpe. Nevertheless, we have Mr. Hume, at page 1645, saying he does not know Armstrong's signature. 40

JACOBS, J.A.: You ask us not to accept that?

TAYLOR, A-J.A.: Of course, it would be most unfortunate if Mr. Vojinovic had carried out his instructions. That would have spoilt everything. 50

MR. GRUZMAN: No, your Honour.

TAYLOR, A-J.A.: He could not have got the agreement signed then, could he?

MR. GRUZMAN: He did not want the agreement. Look, your Honour, if I may say so, every time your Honour says that, every time your Honour says that, every time your Honour mentions that and \$600,000 comes into the company - the company is valuable, the shares are valuable, Paradise Waters is valuable and Armstrong is Chairman of the company; one bullet and all that goes to Armstrong.

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TAYLOR, A-J.A.: You have put it twice. I regard it as completely without substance and please do not put it again.

MR. GRUZMAN: Your Honours, I do propose, with respect, to address your Honour's brothers on that with some force.

JACOBS, J.A.: You have put it alternatively; if you cannot prove that was the primary intention you are going to seek to establish that, at least, there was a conspiracy to threaten?

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MR. GRUZMAN: Yes, indeed.

JACOBS, J.A.: Just go on. If you put it both ways, which helps you most? I would have some doubt - I would have thought the latter.

MR. GRUZMAN: I can see the force of that, too. We always could. But we are making submissions on what the evidence is.

TAYLOR, A-J.A.: What you say it is.

MR. GRUZMAN: What the books say the evidence is.

JACOBS, J.A.: Now, you are up to 4th January. You dealt with this payment which you say is suspect, to say the least.

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MR. GRUZMAN: Yes.

What I am dealing with, at this point, is the relationship between Armstrong and Hume, as shown by the evidence. I put to him and I will not take your Honours through it in detail, at page 1169, whether these payments were honestly - I asked him whether these payments were honestly charged to Southern Tablelands as being the expense of that company, to which he said, at page 1169, "It is a lending, development company ... at the present time".

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But, perfectly obviously, whatever Hume was engaged upon it was not a legitimate expense of Southern Tablelands Finance Company.

JACOBS, J.A.: Indeed, whatever he was engaged in was not very legitimate.

MR. GRUZMAN: Indeed.

JACOBS, J.A.: That is, indeed, what the Judge found.

MR. GRUZMAN: Yes.

At page 1265 - I had best give your Honours the reference - about where I asked about the \$70 for interviewing employees on 29th November. At pages 1176-7 Mr. Armstrong describes his version of his relationship with Hume. He says, "Just an average relationship". He was introduced by a certain doctor --- "1965 or 1966 ... met through tennis ... first time I ever engaged ... I met him". That is doubtless a mistake but that is what it says. "From time to time I met him and played tennis with him ... water-skiing". His Honour said, "These are the three times I employed him ... him once a week". Then I asked him "It would have been put in my diary ... sometimes he will have a cup of tea ... He plays tennis with me from time to time, yes".

JACOBS, J.A.: You say it went further than that.

MR. GRUZMAN: A lot further. 20

JACOBS, J.A.: Yes. Could you tell me - I can understand when you were referring to the evidence of 4th January and the cheque - I can see that, that would be central to what you were putting - now you seem to have moved away from the immediate point, as it were, the strong point, and you seem to have moved away to the periphery again.

MR. GRUZMAN: When you Honour mentioned "4th January" I started to make it clear I was not going through the evidence in chronological order. We have a plan, on the basis of which, we wish to put this evidence of conspiracy to your Honours. 30

JACOBS, J.A.: Yes, all right. I would like to know, when you refer to a bit of evidence, what it particularly deals with. I can see what the fourth January evidence does about the cheque. You do not need to spell that out, but now you have gone back to proving a degree of relationship which, I think the Court has already said, it accepts.

MR. GRUZMAN: The Court, for our purposes, does not accept it as meaning, or implying, what we are submitting. That is the problem. 40

JACOBS, J.A.: All right. Go on then but I do not see what you are seeking to prove.

MASON, J.A.: Nor does there appear to be any real thread in the matters you are using.

MR. GRUZMAN: Yes.

MASON, J.A.: You say there is no chronology?

MR. GRUZMAN: No.

MASON, J.A.: They seem to lack order or coherence. 50

MR. GRUZMAN: The plan at the moment is we are dealing with the relationship between Armstrong and Hume, sub-headed "Employment, Social and Otherwise". What we are referring to your Honours is the evidence of those matters.

MASON, J.A.: That is the total assessment is it; that is the one sub-heading? Is it?

MR. GRUZMAN: Yes.

MASON, J.A.: The words "or otherwise" ---

MR. GRUZMAN: Generally speaking, with the relationship of Armstrong and Hume on these subjects.

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MASON, J.A.: You know, anyhow; perhaps when everything has emerged - you know what you are driving at, and perhaps when you have mentioned all the matters the coherence will become immediately apparent.

MR. GRUZMAN: That is our object.

MASON, J.A.: We can only wait.

MR. GRUZMAN: Mr. Armstrong says at page 1214 that he slept in the vicinity of Mr. Hume on three or four occasions.

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At pages 1358-1359 we have Mr. Armstrong saying, on his overseas trip, "That afternoon we went for a drive for a couple of hours. We saw Fred's house", and he gives the address, "... some very nice old houses ... very nice area" but when one is dealing with this relationship, he goes overseas and visits Fred's aunt in Zagreb, it is something more than a man who has a private inquiry agent.

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JACOBS, J.A.: I thought we had told you we were of the same view.

MR. GRUZMAN: Yes. Now, at page 1361 this passage appears in Armstrong's evidence; that he was seeing more of Hume in the January period - it was put to him, "I would say in the early January period, yes". January, of course, being the relevant January.

JACOBS, J.A.: Yes.

MR. GRUZMAN: Indeed he was asked, "Did you see Hume during January 1967, early in January, I think, yes ... for about a month".

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Now I won't deal, under this heading, with the weekend at Sackville because it comes under another heading. I have that in mind. It is part of the so-called relationship. We do not accept ---

JACOBS, J.A.: You say, in that connection, in seeking to prove they were together that rather, they were apart.

MR. GRUZMAN: What we submit on that is that Hume probably was at Sackville but that he would have arrived on the Saturday night or the Sunday and there is pretty cogent evidence of that and I would just ask your Honours to consider it when I advance - the two cars - do you remember what is supposed to have happened? Armstrong and this other lady in another car; Hume and Miss Catt in another car; according to their evidence they follow one another all the way up to Sackville with the idea of two of them going back in the boat and the two cars following one another all the way. That is, we submit, obviously impossible. People do not do that; so they must have gone up at different times. That is our submission but we will be dealing with it later.

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I have already read you the passage of page 1178 where Armstrong said he was aware of Hume's knowledge of the underworld and criminals. Then he has also said, at page 1179, that Hume had told him himself he had assisted the police on occasions. He said he assisted police in the apprehension of criminals - we did not go into the details of it - Hume to Armstrong.

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JACOBS, J.A.: What I would suggest it that you give us a list of these references.

MR. GRUZMAN: No your Honour; I would prefer not to.

JACOBS, J.A.: Well I do not see why not. I do not propose to dig about, asking; we have had enough of that. I would suggest to you, in the interests of all concerned, you give us a list of these, as it were, preliminary references.

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MR. GRUZMAN: Your Honours, I have done that, as far as I think that I can properly go. I have done it in the space of an hour or two this morning. I gave your Honour hundreds of references.

JACOBS, J.A.: I do not want to take time but I think you should.

MR. GRUZMAN: Unless your Honours direct me, I do not ---

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JACOBS, J.A.: I am not directing you. You conduct the appeal while you are addressing and you do it in any particular way but I think that would be a wise step.

MR. GRUZMAN: Your Honour knows I gave hundreds of references this morning, covering probably a thousand pages of transcript, condensed into a couple of pages.

MR. GRUZMAN: At page 1180 Hume told Armstrong, according to Mr. Armstrong, that he had been commended for bravery, in assisting the Police. At page 1185, is the reference that shows that according to Armstrong, despite the close and continuous association with Hume, that Hume never said anything

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about being interviewed by the Police, and the allegations of Vojinovic and so on, until about the middle of March, or towards the end of March, 1967. We submit your Honours will not believe that evidence. Mr. Armstrong deals with it in this way, page 1186, "Did Hume tell you the nature of the allegations put to him by the Police ... I wondered why he would want to go to the Wentworth at all". Your Honours may think that is a fairly significant piece of evidence. One could not doubt that Hume would have at this stage, and this is months after he had been admittedly interviewed, Vojinovic's statement put to him by the Police, and here he is in close association with a man he has seen frequently on different levels, and Armstrong claims that even at this stage all that Hume said was that it was something about Barton going to the Wentworth. "I wondered why he would want to go to the Wentworth at all". Your Honours might think that is a pretty strong piece of evidence to suggest that Mr. Armstrong was not telling the truth, and concealing the truth about a matter related to the conspiracy directly.

At another point, at page 1292, it was put to Mr. Armstrong, this is by Hume, "Were you told that there was an allegation that Hume had employed a criminal ... Hume employing a criminal". He said it was ridiculous. This is Mr. Armstrong. "What was ridiculous ... someone had threatened him". This is Armstrong's version about this conversation with Hume, some six or eight weeks later. There is evidence at page 1214 that the association with Hume was still continuing.

Hume's evidence on the same subject matters - I will not take your Honours to it - Hume's evidence of the commencement of the association is at pages 1590 and 1591. At pages 1712 and 1713, he says since January, 1967, taking the whole of 1967 and nine months of 1968, he supposes he had been to Armstrong's place about 20 times. "I went many times to play chess with Mr. Armstrong ... a young man was there watching us play". At page 1730 I will not read it - Hume saw Armstrong once a week when Armstrong was in Sydney. At page 1962 Armstrong apparently wrote to Hume while he was overseas; the postcard that described the changes in Yugoslavia, to what it had been before, and so on. At page 1864 we had Hume going out with Armstrong's daughter. He says the elder daughter on two occasions, always in the company of other people, when Mr. Armstrong was overseas.

At page 1747 I put to Hume, you told us before lunch also I think ... I told you I worked on Mr. Armstrong's behalf". At page 1599 - I won't take your Honours through it - in chief he is asked by counsel about his connection with the flats at Rozelle, Glebe Island, and he says he was introduced to Miss Dorothy Rosewall, who was the managing agent of the units. He also speaks there about keeping an employee of the premises at Double Bay under observation.

JACOBS, J.A.: I am surprised that you think that this recitation has such a great impact that you have to take so long over it, Mr. Gruzman. Indeed, it does not seem in your usual style, in fact. Not that I am saying you are not entitled to change your style. This is the type of thing that can be put down, and then you can express in your manner the conclusions that you draw from it. This seems to me to be something that eminently lends itself, so far as I am concerned ---

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MR. GRUZMAN: I started to address on certain features of conspiracy. Your Honour thought that did not help, and probably so. I am not complaining in any way, but your Honours, really, this is part of our original plan. Nothing has occurred - the only thing that has occurred is that in deference to the indications of the Court, which we accept and about which we do not complain in any way, rather than dealing in some more detail with Armstrong and Hume as people, we dealt with it in the way we did this morning.

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JACOBS, J.A.: Yes. I know. The fact is I would have thought if you had these references down, you could get your impact by pointing out the significance of aspects of it, rather than this recitation.

MR. GRUZMAN: I have tried to, really. With respect, might I say I cannot take the risk that some well intentioned but wrong impression may gain ground, which could be vital.

JACOBS, J.A.: All right, you go on.

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MR. GRUZMAN: At page 1632, he is asked, "Would it be true to say that your only relationship with Mr. Armstrong (this is Hume) was social ... and that is all?" He is not interested in politics. "So you still maintain, do you, sitting here in this Court ... nothing of a business nature, no." That is the evidence on that.

JACOBS, J.A.: What do you refer to that passage for?

MR. GRUZMAN: Because that shows that he is concealing a relationship which other evidence at least shows existed between himself and Mr. Armstrong.

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JACOBS, J.A.: I am satisfied that that is so.

MR. GRUZMAN: But your Honour is not satisfied - at least, your Honour may not be, it is not for me to ask your Honour - we have not yet got to the stage where your Honour is able to indicate to us that your Honour is satisfied that the relationship goes as far as we wish your Honours to find.

JACOBS, J.A.: Well, somehow your style seems to have changed.

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MASON, J.A.: The implication is "and not for the better".

MR. GRUZMAN: I can only do my best. I would like to assure your Honours that the time - I will not mention the time - this is what we prepared.

MASON, J.A.: The point is this, I think had you had a typed list of these particular passages in the evidence, then instead of being forced to read them out publicly, as you are now doing, you would have in the course of argument been able to point them up in the same way, to indicate the point that was to be derived from them, with more telling impact than you are now able to do. 10

MR. GRUZMAN: We feel many a mickle makes a muckle. Each little bit helps to come together.

MASON, J.A.: The impression one gains from this end of the Court room is perhaps not the impression that one gains from the position in the Court room where you now are.

JACOBS, J.A.: What my brother Mason means is that it does not look as if you put as much work into this aspect as you put into the earlier ones. 20

MR. GRUZMAN: That is not right. Just as much work went into this one. Miss Catt said at page 1499 that she went to Mr. Armstrong's home every time Mr. Hume went. "Every time ... I am a friend". I won't take your Honours through the Hoggett matter. Your Honours will remember that right back at the 22nd December, (at pages 1787 and 1788) and I have to take the docket - I will get the docket out in a moment and I will give you the exact date, I asked him, "Did you swear this (which was in his affidavit I think) 'the only job that I did which was against Mr. Barton was to lend a tape recorder to a man' ... Yes, I suppose it could have been". I will give your Honour the date of that. The Exhibit is Exhibit "Z". 30

JACOBS, J.A.: A Phillips 3301 tape recorder which cost \$69. Is that the one you are referring to?

MR. GRUZMAN: Yes. It is the date that I have forgotten, and to which I will refer to the dockets.

JACOBS, J.A.: I have just forgotten the exact date. 40

MR. GRUZMAN: It is 14th December, a date which is not insignificant in the context. Hume's evidence, the payments to Hume, - we could speed up the aspect of the payments, if we could have your Honours' leave, as I indicated the other day, to pick up the cashbook, and re-photograph ---

JACOBS, J.A.: Is that something that we did not rule on?

MR. GRUZMAN: That you did not rule on.

JACOBS, J.A.: Which exhibit number is it? 50

MR. GRUZMAN: No. 76.

JACOBS, J.A.: Mr. Powell, have you any objection to that cashbook being picked up for photostating? Have a look at it anyway.

MR. POWELL: I am not so fully acquainted with this evidence as others.

JACOBS, J.A.: It will be handed down to you. If you do not want it released, you could get the work done, if necessary. Mr. Gruzman could indicate the pages, if you do not want the plaintiff to have it.

MR. POWELL: I assume my friend only wants to have recopied such of it as is in the appeal book? 10

JACOBS, J.A.: I assume so.

MR. POWELL: If we could have a look at it, after the Court rises?

JACOBS, J.A.: Mr. Powell, you had better check up. Whose cash book is it by the way, is it Mr. Hume's?

MR. GRUZMAN: Mr. Hume's cashbook.

JACOBS, J.A.: Perhaps it had better be seen to. Is this the one kept by Mr. Hume's father?

MR. GRUZMAN: Yes. 20

JACOBS, J.A.: Is the whole book in evidence by the way?

MR. GRUZMAN: I think so.

JACOBS, J.A.: Have a look between the parties and you can come to an arrangement. (Exhibit 76 handed to Mr. Powell.)

MR. GRUZMAN: We believe it is all in evidence. Certainly all the relevant parts that we will be referring to are in evidence, and were cross-examined upon. Perhaps I should take your Honours now to Volume 7, page 2388. Perhaps your Honours might be good enough to have a look at that. Your Honours will wish to read it at some stage. May I say, although this is not untedious, at some stage your Honours will wish to look at this evidence. 30

JACOBS, J.A.: We specially want to know the bits that you rely on. Let us go to this document. What particular part do you bring to our notice?

MR. GRUZMAN: I would like to read the whole of the document. 40

JACOBS, J.A.: What, about the Russians and the Germans, too?

MR. GRUZMAN: No, it is interesting when one is looking at what sort of man Hume is, and his relationship to the matter.

JACOBS, J.A.: I have my picture from what the Judge

said and the evidence of Mr. Hume, and I do not think it is unfavourable to any submission that you put.

MR. GRUZMAN: That is so, I will not take your Honours through it.

JACOBS, J.A.: If there is some part of it that you say touches on the problem - we do not want to go over the Hopgood business again, do we?

MR. GRUZMAN: No. There is no real necessity to take your Honours through these early parts. One matter which will become important is on page 2391, line 31 (read). 10

JACOBS, J.A.: Just before that, although we know the facts, what you get from this tape recorder is that it was an extraordinary interest that Mr. Hume was showing in Mr. Barton, trying to get something against him, or something of that kind, on a tape recorder at this date. That is your point, is not it?

MR. GRUZMAN: Yes. The other thing is ---

JACOBS, J.A.: Why this interest in Mr. Hoggett that led to all this care? Is not that your point? 20

MR. GRUZMAN: Yes. The point of this is that Hoggett was Armstrong's nominee for appointment to the Board, and here is an instance of Armstrong, through Hoggett, using Hume to do something which Hume described as against Barton.

JACOBS, J.A.: You were going to the 18th January.

MR. GRUZMAN: Yes. He says he went to the C.I.B. (read). The evidence is that on 17th anyway, he had been telephoned, and told that Vojinovic by name was the man who had stolen his car in Melbourne. At the 18th he certainly knew Vojinovic by name, if he never did before, and Wild had Vojinovic by name, and so on this story they went through the procedure of showing a photograph to identify him when each of them knew him by name. It is perfectly obvious that the interview must have taken place before he knew him by name. There is undisputed evidence of his diary and elsewhere that it was on 17th that he knew his name. 30 40

JACOBS, J.A.: Is there any evidence contemporary with the event of the date when the Falcon car was reported as stolen?

MR. GRUZMAN: The date when it was reported to the Police as stolen?

JACOBS, J.A.: Yes.

MR. GRUZMAN: I will come to that later. What Hume's affidavit then says, that a few days later over the telephone I was told by Hammond - this is his own document prepared and of course, that is subsequently proved to be untrue in the sense that it occurred 50

prior to the 18th. It is a strong piece of evidence, that the interview alleged on the 11th in fact took place on that date, certainly before the 17th - before the 18th. Anyway, he says he was telephoned by Sergeant Hammond from Victoria, and told his car had been stolen (read). When I asked Hume about these matters, he said at page 1897, "When did you think Mr. Barton wanted to kill Mr. Armstrong? ... Yes, quite possibly". And then, at page 1897, "Did you speak to Mr. Armstrong about that ... to gain a lot of money". This evidence is pretty significant really. Here you had this fellow Hume seriously - he was perfectly serious in giving his evidence - talking along the lines that it was Barton who was having a contract put out on Armstrong. This is Hume's estimate, and his sworn evidence of what he believed. We know it is not true, but to see what is possible, what Hume believed was possible, so that he felt that when he was swearing this evidence on his oath before his Honour, that it should be believed.

JACOBS, J.A.: It shows the type of man he was.

MR. GRUZMAN: And shows what can be done.

JACOBS, J.A.: This is his way of life.

MR. GRUZMAN: Yes it is his business.

JACOBS, J.A.: Thinking on these terms. I appreciate that.

MR. GRUZMAN: And of course, it is not an uncommon circumstance for a man who has done such a thing to say that somebody else has done it. Here the allegation we are making is that Hume was a party to employing Vojinovic to kill Barton.

JACOBS, J.A.: I appreciate that.

MR. GRUZMAN: It is incredible that you have Hume saying the opposite happened. One might ask - I mean, these insurance policies were company documents, and so on. Who told Hume that there was a large insurance policy on Barton?

JACOBS, J.A.: That is a very significant matter.

MR. GRUZMAN: "Did you also find out that in case Mr. Armstrong was killed ... I have not got any privileges." I show him the affidavit, and then this passage, "Later on, I found out that ... to someone in the family, I would have mentioned it, I do not think it was Mr. Armstrong". I said, "That is a lie, isn't it, ... it did not affect me, one way or the other". And then, "Mr. Hume, you spoke about this matter precisely to Mr. Armstrong ... I did not think it was very serious anyhow".

JACOBS, J.A.: I think we all get the point. I think we do. We see what you are getting at there, and see the effect of it. He is not telling the truth, he has not been frank.

MR. GRUZMAN: Seeing that I am seeking to prove a conspiracy involving Vojinovic, Hume, Novak, to murder, just look at the question, which I should read to your Honours, which appears next.

JACOBS, J.A.: Then read the next one. I was referring to the ones that had gone before. Go on then.

MR. GRUZMAN: He said "Caruga has never been anything else but a man passing forged £5 notes around the place ... you are examining me on my thoughts". Here we have Hume who says that he believed that on the night in question when we allege a conspiracy to murder took place, that it was his belief that there was a conspiracy to murder took place. The only thing that is transposed is the victim.

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JACOBS, J.A.: A psychological transference now? A transference?

MR. GRUZMAN: Yes, quite so. Lots of criminals do it and ---

JACOBS, J.A.: It is a fair comment. I appreciate what you are putting.

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MR. GRUZMAN: I do not really put it on that basis. I put it on the basis of what criminals would tend to do.

JACOBS, J.A.: They have not the imagination to think at all, so they transfer it from one to another.

MR. GRUZMAN: Yes.

JACOBS, J.A.: I appreciate that, myself. It is a fair comment.

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MR. GRUZMAN: After all, here we are in a civil case, seeking to establish a conspiracy to murder. It is common ground on each side that there was discussion and thought of a conspiracy to murder that night at the Rex Hotel. The only thing is who was to get shot. When I put to him what he had said in his affidavit, "I mentioned this to Mr. Armstrong ... that is a mistake". Then I put to him the whole conversation where Mr. Armstrong, according to his affidavit, said, "Barton loves drama, but just in case, I will have my insurance policy revoked". He is now swearing there was a conversation with Armstrong about the subject. "Mrs. Armstrong gently let Mr. Armstrong know ... at some later date". Then he swears, "You say Mr. Armstrong did say ... yes, later on, at some time".

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JACOBS, J.A.: Unfortunately, Mr. Hume is not quite clear on what he says from one quarter hour to the next, is he?

MR. GRUZMAN: No, that is true. Nonetheless, if your Honours saw him in the witness box, he is a man carrying a gun, and so on.

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JACOBS, J.A.: He was not accepted as a very credible witness.

MR. GRUZMAN: He was also a man who would inspire fear. If you read the cross-examination and see how it goes through ---

MASON, J.A.: He did not seem to inspire any fear in you. You were quite persistent.

MR. GRUZMAN: If I was in a position to fully answer your Honour I would, but I am not in a position to. These are dangerous people, and to be treated as such. And the fact that Hume pretended in the witness box to make himself some sort of a clown, as he deliberately did, does not explain why he was selected as the bodyguard for a man who had already been blown up. It does not explain his record. It does not explain all the scars where he has been beaten up over the years. This is a tough, horrible fellow, and a man who could kill, if anyone could. He pretends in his evidence to be some sort of a clown, and they are the most dangerous of all. 10
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MR. POWELL: I take it this is put as a submission rather than a statement.

MR. GRUZMAN: It is a fact, emerging from the evidence. I cross-examined him as to each scar he had, and how he got it.

MR. POWELL: I ask Mr. Gruzman, to take back this business that he is putting these things forward as facts. It is quite improper with a newspaper reporter in Court.

JACOBS, J.A.: Is there evidence of these matters that you refer to? Mr. Gruzman? 30

MR. GRUZMAN: Yes, I cross-examined him in detail about each scar.

MR. POWELL: Mr. Gruzman is putting them forward as facts rather than submissions. That is the only thing I take objection to. If he puts them forward as submissions, no one can complain.

JACOBS, J.A.: Submissions on the evidence?

MR. POWELL: Yes, but he is putting them forward, and said "That is the fact". That, with respect, is utterly improper. 40

TAYLOR, A-J.A.: You are suggesting he has some knowledge about the matter that is not in evidence?

MR. POWELL: Yes.

JACOBS, J.A.: Mr. Gruzman is not entitled to do it. I stopped him when he did it. I understood what you were putting was based solely on questions you asked to Mr. Hume.

MR. GRUZMAN: Yes.

JACOBS, J.A.: Be sure that it is limited to that, Mr. Gruzman. You did make a remark which would seem to go beyond it, but which I thought I stopped you on, and which you were obeying.

MR. GRUZMAN: I say on the evidence that the fact is Hume is a tough, dangerous individual.

JACOBS, J.A.: On the evidence?

MR. GRUZMAN: On the evidence. I cross-examined him on the scars that were apparent on his head and his face, as to where each scar came from, to demonstrate to the Court the sort of life he had led, and the sort of activities he had been in. I am, in deference to your Honours' rulings - not rulings, but invitation - I am not taking your Honours to each and every part of the evidence, otherwise this appeal would never end. I am trying to indicate matters which we think are important.

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JACOBS, J.A.: Let us be quite clear about it. You were not alleging anything other than what appears in the evidence from your cross-examination?

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MR. GRUZMAN: Yes, directly.

JACOBS, J.A.: As a summing up?

MR. GRUZMAN: Directly in the evidence.

JACOBS, J.A.: I remember the part where you did, and this cross-examination of Mr. Hume lasted for a great deal of time, and covered a great deal of ground.

MR. GRUZMAN: Yes.

JACOBS, J.A.: And was effective, in my view.

MR. GRUZMAN: Thank you. Your Honour sees the point I was making was that Hume sought to pretend that he was some sort of an idiot. In other words, he pretended to make light of the cross-examination, he pretended to be less clever than he was. My submission is that on the evidence he appears as a tough man and a dangerous man, as the sort of man who would be involved in physical violence.

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TAYLOR, A-J.A.: I got the impression he was a man of some social graces; he played tennis, played chess, he seemed to dine with the best people.

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MR. GRUZMAN: I will not take your Honour's classification of the best people.

TAYLOR, A-J.A.: It was not mine, it was his.

MR. GRUZMAN: This was the impression that Hume sought to create. What he was exposed as was a man who obtained the confidence of criminals, and then turned them into the police a man not only of no credit, but no honour, a man of brutality, and a man who as far as we could see, from the way he

was living, the very type of man of whom anyone would be frightened.

JACOBS, J.A.: You are entitled to put those submissions. Are you almost finished now dealing with this aspect of the evidence?

MR. GRUZMAN: No, your Honour.

JACOBS, J.A.: I think really, Mr. Gruzman, it would assist the Court if it was reduced into some other form. I do not think you are assisting the case you have made up to date by dealing with it in this particular manner. It seems to not be as helpful to me, and also much longer. I think the other way which enabled you to leave your main comments for the real points that you want to make was the one that gave real force. Again, I merely make that as a comment. I am not telling you how to argue the appeal. I am only expressing that as a view on the approach to it. Why not get it down?

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MR. GRUZMAN: We have tried all methods, and we are satisfied beyond any doubt that it is our duty to invite your Honours attention to the specific items of evidence that we wish to know have not by any inadvertence, been overlooked.

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(Further hearing adjourned until 10.15 a.m., Monday, 1st March, 1971.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
COURT OF APPEAL)

Term No. 22 of 1969

CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

BARTON v. ARMSTRONG & ORS,

SEVENTH DAY: MONDAY, 1ST MARCH, 1971

MR. GRUZMAN: Over the weekend we have sought to give some consideration to some more expeditious method of presenting some of the matters to the Court. As your Honours see, we do have a real problem in that the range of evidence is so vast and, as I have indicated, it is possible for important and serious matters to be overlooked. 10

What we wish to do is to make submissions to the Court based on evidence but upon this basis: that the Court accepts that there is solid evidence to support those submissions - I have in mind the U.D.C. letter which for certain reasons might have been thought not to exist, but the fact was that it did exist and it meant every word it said. So what we propose to do, subject to what your Honours might indicate, is to make submissions upon the evidence and we would understand that your Honours would, as it were, give full faith and credit to everything that was said. Then if your Honours are in some doubt about it we would expect, with respect, that your Honours would ask for the reference to the evidence and then we would hope to be in a position to have it more or less immediately available. But, short of that, what I am putting is that we will be making submissions on the evidence and acting upon the basis that your Honours are accepting the evidence shows exactly what we are putting. But if your Honours are in some doubt as to some point, as to whether the evidence really justifies such submission, that your Honours will require me to refer to the evidence to support that submission. 20 30 40

JACOBS, J.A.: Otherwise we would be accepting it on the view you have put of it? Is that what you mean? I am not altogether clear on what you mean.

MR. GRUZMAN: No, your Honour. Otherwise we will take it that your Honours accept there is evidence which fully justifies the putting of that submission and putting it in that way.

There are only two alternatives, as we see it: either to specifically invite your Honours' attention to each point of evidence and read it to 50

your Honours if we feel that it is perhaps something, or which your Honours thought was something, that your Honours' mind would not fully accept.

The other way is to leave it to your Honours - to make submissions to your Honours and leave it to your Honours, we then assuming that your Honours accept that the evidence is there and solidly bases such a submission, but if your Honours are in doubt about it then your Honours will require the evidence by our making proper reference to it in order to justify that submission. 10

We put it that if your Honours do not make any comment we will assume there is evidence there. I might refer to not only the instance of the U.D.C. letter, where it might have been thought the letter did not mean anything, but if I did put to your Honours that the letter was there from U.D.C. and was acted upon, then on that basis your Honours would accept that as being a statement of the effect of the evidence, and if your Honours were in any doubt about it your Honours would say "Where is the evidence to establish that?" 20

TAYLOR, A-J.A.: You mean that is a view you can take of the evidence?

MR. GRUZMAN: What we would really wish is that if your Honours are in some doubt about it and if it is a point upon which your Honours really have a reservation when your Honours hear me, your Honours would say "that is a matter upon which we are not satisfied with your submission, where is the evidence?" 30

JACOBS, J.A.: I think I can summarise the position this way: the Court is of the notion that the course adopted by you could prevent the reading out of evidence at great length. Reference to evidence could be useful, particularly in writing, but the Court cannot in the least way fetter its approach to the matter if it is implicit in what you say, in such a concept, although I do not think there would be and I do not think you would suggest it; of course you would not, but subject to that you should take the course you think fit. 40

MR. GRUZMAN: We do respectfully invite your Honours, if there is something I say which your Honours feel perhaps is not justified or fully justified by the evidence or some concept on which your Honours have formed the view, we would ask your Honours to interrupt me and ask for a specific reference to the evidence to justify that submission.

JACOBS, J.A.: It seems to follow thoroughly the regular pattern we have adopted. 50

So that there will not be any misunderstanding, it is clear from my remarks that the Court simply cannot make any prior condition of any kind whatsoever.

MR. GRUZMAN: I only put it on the basis that we do respectfully ask, in perhaps the strongest terms we may possibly do, that your Honours will invite our attention to any matter contained in our submissions as to which your Honours are in doubt as to whether there is evidence which really justifies that submission being made in that way. In other words, so that I won't refer your Honours to evidence that your Honours have well in mind and so that I do refer your Honours to evidence of matters which may trouble your Honours in some way. 10

I now wish to make a submission on a matter and then put it to one side. This is the question that can be made of evidence on the voir dire which is evidence strictly on the return of the subpoena. In this case there is a lot of evidence in the appeal books relating to what happened on calls on subpoena and a question will arise in the course of our submissions as to what use this Court can make of that evidence. I know it is said to be on the voir dire and therefore strictly not evidence in the suit but we submit all the evidence in the appeal books, evidence of witnesses called on the return of subpoenas, is proper evidence to be considered in this suit. 20

TAYLOR, A-J.A.: Do you mean by that, irrespective of what was the agreement between the parties? It is perfectly obvious that some of these witnesses were called and treated as being on the voir dire and left at that. Take the calling of Novak, unless it was clearly understood by both parties that Novak only gave evidence on the voir dire there could have been serious repercussions. If you are right when you say you can take that as evidence in the case, then counsel for Armstrong would have had the right to cross-examine him. 30

What you took as evidence in this case on the voir dire was treated by the trial judge as such.

MR. GRUZMAN: I am not answerable for other counsel. In one case counsel saw fit to follow this case, when Sergeant Anderson was recalled on the return of the subpoena. I examined him, he was cross-examined by the other side and then I re-examined him. 40

TAYLOR, A-J.A.: Was he called purely on the voir dire?

MR. GRUZMAN: Yes, he was called in exactly that way, the way of all the other witnesses who were called to answer the subpoena. There is only one question, really: whether this Court is entitled to look at the evidence so given as evidence in the suit. 50

TAYLOR, A-J.A.: The trial judge treated it as voir dire evidence and any finding of his in no way referred to this evidence.

MR. GRUZMAN: Actually his Honour did not say. If his Honour did regard the evidence in the way in which his Honour should have regarded it in accordance with the authorities, then his Honour took it fully into account - in the same way we ask your Honours to do and submit that your Honours should.

There are two authorities I should like to refer to in regard to this matter. We have photostat copies of them available for your Honours. (Produced to Court). The first is the Pentax Corporation, concerning a company answering the subpoena by its proper officer, as to the origin of those documents. This was a case of the Court of Appeal in England, 1954, being a fairly recent high authority. The question was fairly simple. If your Honours would look at page 661 - because there are various points involved and your Honours need not read the headnote because I will take your Honours to the particular passage, the point we are concerned about is dealt with by Denning, L.J.: "The whole burden of Mr. Capelin's argument was this ... limited to the giving of evidence." There are two sub-sections to this section and the first one deals with persons being called as witnesses. In a previous decision it had been held that a limited company as such cannot be a witness and the argument was because a limited company could not be a witness therefore it could not be compelled to produce documents under the Act. Then the second sub-section - (read). This really raises fairly and squarely the question as to what was said on the return of the subpoena in evidence: "In order to make this good ... in foreign Courts." Then Pearson, L.J. said, "In my view the second proposition should be regarded as a qualification of the first and when so regarded ... if that is found to be necessary."

This has been a case that has been very heavily argued. At page 668 Salmond, L.J. says, "I agree with my Lords and with the majority on this ... skill, vigour and persistence but of no avail." The Court of Appeal there held that the answer to a subpoena to produce documents meant that if the witness was sworn he became a witness giving evidence.

TAYLOR, A-J.A.: Limited evidence, as to the custody and production of the documents.

MR. GRUZMAN: Yes, that is the purpose for which he is called as a witness, but the submission that we would base on this case is that the Court holds that it is a witness giving evidence, it is not dehors the proceedings, it is part and parcel of the proceedings and evidence in the proceedings.

The second authority is quite significant also. It is firstly a decision of Jordan, C.J. in de Goio v. Darling Island Stevedoring & Lighterage Company. The basic question in the case turned on whether evidence on subpoena duces tecum could fill

a gap to defeat a submission of no case to answer in the case. So it is a very strong point, as to whether it is truly evidence in the case or not. What happened was that Mr. Evatt had closed his case and then it was argued that there was a deficiency in it and he called one of the defendant's witnesses on subpoena duces tecum and the question was whether that evidence was evidence in the proceedings.

Perhaps I could refer your Honours to page 5: "In the first instance, plaintiff's counsel closed his case ... paid to them". It deals with what the receipts were. At page 8 his Honour goes on to say "When the plaintiff's counsel was allowed to re-open his case ... would have been supplied in the plaintiff's own case. 10

TAYLOR, J.A.: Does that mean every time you call a witness on subpoena to produce a document and he produces some document and you put him in the box and swear him you can ask him about other documents in the case? 20

MR. GRUZMAN: Yes, your Honour.

Indeed, at page 14 Halse-Rodgers makes the position fairly clear: "On application being made for a non-suit ... in the ordinary way.

JACOBS, J.A.: So the Court was not satisfied to regard the phrase "sworn on the voir dire" as meaning anything but that they found he was just sworn as a witness.

MR. GRUZMAN: The Court does not say what view it took of that and nothing seems to have turned on it in the judgment. "He was examined at considerable length ... indicate the limits of its use". They pointed out the origin of the term, and in the citation from Taylor, at page 15: "The witness called on duces tecum merely for the purpose of producing a document ... non-suit." That again being refused. 30

So we submit that your Honours may look at the whole of the evidence in the appeal books, including the evidence that arises on a return of the subpoenas as evidence in the suit. 40

I am now going to deal in a somewhat different way with this question of conspiracy and I think that by and large - although there may be some differences - I will try to take in together our submissions on the pressure as well during the course of these submissions. It may be that there will be something more I would wish to say on that later.

Just before proceeding with that, I would like to put that in the course of the evidence it was proved that at least two crimes were committed. One was when Barton was intimidated - in other words, there was an attempt to obtain money from 50

Barton in consideration of not murdering him. There was evidence also of certain proposed crimes. One was to murder Barton, (2) to frighten Barton, (3) robbery, (4) assault, (5) housebreaking, (6) to steal, (7) receiving of stolen goods, (8) intimidation, (9) the carrying of a pistol by Vojinovic.

The next submission we make is that there is concrete evidence that the conspiracy in fact existed. That fact is sworn to by Vojinovic and, secondly, although it becomes unnecessary because the existence of a fact of conspiracy - as opposed to the persons who are taking part in the conspiracy - may be proved in various ways. One way is that a witness comes along and swears that there was a conspiracy (in Rex v. Jessopp, 14 Cocks 204 - taken from the note in Phipson, 10th ed. page 273) - "Confession by A that they so conspired is admissible to prove the agreement". The confession by A that there was a conspiracy with B is evidence that there was a conspiracy.

TAYLOR, A-J.A.: Evidence against A.

MR. GRUZMAN: Yes, and evidence in the case that there was in fact a conspiracy.

TAYLOR, A-J.A.: Against A.

MR. GRUZMAN: This conspiracy matter we found difficult and our submission on it is this - and I will refer your Honours to some authority on it later - there are two points. The law on the evidence of conspiracy, in our submission, appears to be that there are two stages: first of all you have to satisfy the Court that a conspiracy in fact existed. You can do that in various ways: you can prove overt acts, you can prove that somebody says that there is a conspiracy, in some way or another the Court is entitled to come to a conclusion that the conspiracy in fact existed.

Then there is the second point: that that in itself is no evidence against the persons who are named as being conspirators - except the person who makes the admission, if there is one.

TAYLOR, A-J.A.: It is only admissible against the one you have proved. But if there is a conspiracy you have to prove against at least two.

MR. GRUZMAN: I do not mean to get too much involved at this stage in this submission. I will give your Honours a clearer submission on this later. What the authorities say is that there are two stages. A witness goes into evidence and gives evidence as to stage one, before stage two, or stage two before stage one. For a long time back the law has said there are two stages in proving that A and B conspired together. Stage one is to prove that a conspiracy in fact existed. For example, that might

be from various documents or it might be gained in various ways. The first point is: did a conspiracy exist?

The second point is to prove it was a matter of who was in that conspiracy. So you will be producing evidence against each of them. The significance of proving the existence of the conspiracy is this: once you have proved the fact of the conspiracy then acts and statements of the conspirators in furtherance of the conspiracy are evidence against the other conspirators. 10

TAYLOR, A-J.A.: Provided you prove a conspiracy to which they are all parties. You cannot prove a conspiracy between A, B and C and then turn around and say that is evidence against D, unless you prove that he was a party to it.

MR. GRUZMAN: Supposing you get a piece of paper which says "A, B and C. hereby conspire together to rob a bank"?

TAYLOR, A-J.A.: And they all sign it? 20

MR. GRUZMAN: No, but it is produced and admitted into the evidence on some proper basis. For example, one of the conspirators said, "This was our agreement".

TAYLOR, A-J.A.: He could not possibly say that as proof against B and C. unless it was proved by way of agreement, because what that conspirator says by way of admission or confession is not evidence against the others. He is only a free agent for the purpose of carrying out the agreement on his own behalf. 30

MR. GRUZMAN: I did not exactly intend to get into the submissions now with your Honour, but if your Honours would just permit me to give these submissions, and if your Honours would take my submissions and give them such value as you think they are worth at this stage, I will cite some further authorities on this matter later.

Our submission is that there are two stages of proving conspiracy. (1) prove the fact of the conspiracy. That can be proved in many ways, one of which is proof from one of the conspirators that that conspiracy existed. Before or after proving the fact of the conspiracy you may give evidence involving individuals in the conspiracy. Once the matter of the conspiracy has been proved then acts and statements of any conspirators in furtherance of the conspiracy are admissible against the others. So once you have proved the fact of the conspiracy it becomes so much easier to involve people on the outskirts of the conspiracy because acts and words of the conspirators in furtherance of the conspiracy are part of the conspiracy. Those are our submissions. 40 50

I do not propose at this stage to argue or cite the authorities and the next submission is this: I would like to prove that a given person was a party to the criminal Act of entering into a conspiracy or, alternatively, through intermediaries caused a criminal act to be permitted or, more succinctly, to prove that Mr. Armstrong was a party to the conspiracy or, alternatively to prove that Armstrong was responsible for putting Vojinovic into action and one can look at a number of matters. I am only going to mention the heads of the type of these matters the Court can look at. One can look at the presence of motive. These are rules applicable to all criminal cases. One can (A) look at the presence of motive, (B) you can look at the means used in carrying out the crime and then make deductions from that, (C) you can look at the opportunity, (D) of course here we are thinking along the lines of circumstantial evidence - you can look at the knowledge and circumstances enabling the crime to be carried out. For example, on that heading one will consider such matters as: did Armstrong know Barton's telephone number and address, cars and movements and so on? (E) You look at the declaration of intention, and with that is (F) threats to do such things.

Those are matters which may be looked at in considering whether he did it.

(G) is enmity towards Barton - his enmity is relevant. (H) special knowledge, skill or capacity. For example, the fact that it is proved that through Hulme he had a direct intermediary in a man he trusted on the one hand, and a man who was an associate of criminals, capable of having access to criminal activity and matters of that kind. (I) character, although I will be making some submissions on that.

So when I am dealing with this general evidence of what happened these are matters which, I will be subsequently putting to your Honours, are factors in the evidence which will assist your Honours in deciding whether it has been established by circumstantial evidence and otherwise that Mr. Armstrong either was a party to conspiracy or was responsible for Vojinovic's actions.

There are one or two other general matters but by and large up to the present time the argument has been put before your Honours primarily on the commercial side. From now on I will be speaking more of the subterranean pressure, the criminal side of it.

I will ask your Honours to observe how in the same way as we will put that Mr. Barton at first was dealing over the years on what was regarded only as a commercial relationship but how gradually he - and indeed we, in our argument - became conditioned to hearing of criminal activity

until before long in the course of our submissions to your Honours it will not seem at all out of keeping if I refer to criminal activity of a fairly severe kind. We will be asking your Honours to observe the effect of these submissions on the Court and, accordingly, could not Barton have come to the view and could he not also have been conditioned as no other businessman would be, to believing that criminality and criminal conduct could take place and he could be the victim?

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As I have said, I propose to approach this matter in periods and in a similar way to the way we approached the commercial transactions and to try and pick up their chronology. So the first period I would ask your Honours to consider is from 1963 up to June 1966. During this period Armstrong was regarded by everybody, including Barton, as a man of wealth, influence and power and a man who was as powerful as anybody in Australia for all those reasons. He was the chairman of Landmark Corporation and Australian Factors. He was a person against whose character little or nothing was said.

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Barton had a company, which appears to have been a small, private company, called Home Septic Tanks and which made septic tanks. He came into contact with Armstrong through this company and Armstrong apparently believed that he was a good businessman and employed him in Landmark, first as manager and subsequently as managing director of Landmark and bought out Barton's company. This was the beginning of the arrangement between them. Under Barton's management Landmark did quite well. I think at about the time Barton joined the company the shares stood at something like 44 cents and under his management they rose to 60 cents and 70 cents later on. Indeed, it was quite apparent from the whole of the evidence, under Barton's management Landmark, if it had not been for the disaster, would have been a company of nett assets of some millions of dollars, That is shown by the document annexed to the minutes - "If the money all comes in this will be the position of the company".

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Mr. Justice Jacobs, we did not forget the document your Honour asked for in connection with U.D.C. Mr. Priestley, in going through the book has had to go through all of the appeal books and that is being done. In Mr. Grant's evidence there is one passage I would like to refer to your Honours, which we had not noticed on that point, where Mr. Grant in evidence in chief and in explaining why he made certain alterations to the draft deed, probably after 9th January, says (page 660, line 50) when he is preparing the final deed - "originally my draft deed was prepared on the basis ... one of Mr. Armstrong's companies". He is dealing with the end finance for the Rozelle flats. "When we got down to discussing it ... and subsequently the document was changed".

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TAYLOR, A-J.A.: That was, by and large, finance for the blocks of units at Rozelle?

MR. GRUZMAN: All we are dealing with here is end finance for the blocks of units at Rozelle. In other words you would not have thought it would have worried U.D.C. very much whether it was land finance or anything else, but here is Mr. Grant's statement in chief as to why he was altering the document because simply, even on that matter, Landmark could not get the finance from U.D.C., 10
The draft was prepared and went out on Friday afternoon, 6th, got to the other solicitors on the 9th and it was some time after the other solicitors were considering it and prepared the final deed, so it must have been after the 9th.

TAYLOR, A-J.A.: And before the 14th? You say that bears out your submission that Mr. Armstrong would have known the U.D.C. attitude about it? You said the 8th?

MR. GRUZMAN: Yes, 8th December, but we are in January now. 20

JACOBS, J.A.: You also put in that word about the U.D.C. letter, that their attitude would have been known much earlier than the 13th?

MR. GRUZMAN: Their attitude was known from the 8th, and on the 4th January there appears in Mr. Grant's notes where he received word on 4th January that U.D.C. attitude is unchanged and they are proposing to appoint a receiver. This bears out that as late as 9th, 10th and 11th January his firm conviction that there is no hope in the business of any kind with U.D.C., even on this matter. And of course, Barton would have known exactly the same thing. 30

That was certainly Mr. Grant's view. This was a discussion between Grant, the solicitor, and Mr. Barton's solicitor.

TAYLOR, A-J.A.: There was also the company solicitor?

MR. GRUZMAN: There were three lots of solicitors, there was Mr. Miller, Grant for the company, but there is evidence in chief where he said (read). He said "When we get down to discussing it on the solicitor level - " that was not acceptable because the Landmark group could not simply get finance from U.D.C. So it appears, if anything, that was told to him by the other solicitors - Barton's solicitor and the company's solicitor are telling him it is no use putting anything in this document which means finance from U.D.C. because it certainly is not on. That indicates little points throughout the evidence strongly support the case made by the appellant. 50

I had reached the stage where I was inviting

the Court's attention to the position between the two men up to June 1966.

MR. GRUZMAN: Barton described it as I think a very fair business relationship, but on the other hand he disowned ever regarding Armstrong as his friend. He was cross-examined how many times he visited him. I think it turned out in all the years they had been associated he had only been to his home three or four times. I have forgotten whether Armstrong was ever in Barton's home. I cross-examined: "Did not you in the course of some evidence refer to Armstrong as your friend?"

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Up to June 1966 you have these two men working together. Armstrong is the Chairman of the company; Barton is the Managing Director. I think it is proper to have regard to the fact that Barton owes his position to Armstrong. Armstrong was an important and powerful man at a time when Barton was running a little septic tank factory.

The first evidence of a change in the relationship comes in June 1966.

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TAYLOR, A-J.A.: This has all been found by the learned Trial Judge to the same effect that you are now putting. He found they were friendly at first and they became unfriendly in 1966. He gives the date when that unfriendliness developed. Do you accept those findings?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: Why do we have to have it all again? Why cannot you say you accept the Judge's findings?

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MR. GRUZMAN: I desire to argue that his Honour should have found some things further.

TAYLOR, A-J.A.: Do you want a further finding that they were less friendly or more friendly?

MR. GRUZMAN: One cannot take a bare finding. Your Honours have to know something of the facts.

TAYLOR, A-J.A.: We are an appellate court. That is what we do not have to know. The trial of an accident is the place where you give your evidence, ask for your findings, and get them. If this is a finding which you do not dispute, you are not entitled to come to this court and ask for a different finding or the same finding on a different basis.

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MR. GRUZMAN: With great respect our submission is different.

TAYLOR, A-J.A.: What is your submission? That you are entitled to have a finding in your favour which you accept, and say "I want to examine the evidence and show why his Honour's finding should be stronger"?

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MR. GRUZMAN: No your Honour. We submit we are entitled to ask your Honours to find a particular relationship existing between these men. We are asking your Honours to find something which his Honour the Trial Judge from one point of view was not asked to find and certainly did not find in the way in which we wish to put it to your Honours.

Your Honours are a court of re-hearing. This is not an appeal on questions of law. I cite the judgment. It is the responsibility of this court to examine the evidence and to come to a conclusion of the evidence. Whilst doubtless your Honours will pay respect to the findings of the learned Trial Judge, your Honours are obliged to come to your own conclusions. In order to do that it simply is not enough to say his Honour the Trial Judge found so and so.

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TAYLOR, A-J.A.: You accept his findings?

MR. GRUZMAN: That only takes it part of the way.

TAYLOR, A-J.A.: Let us take it from that part of the way. Could not we start by saying it is a fact found by the learned Trial Judge they were friendly till some time in 1966, and save the last quarter of an hour?

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MR. GRUZMAN: It is not sufficient in the way we wish to put it.

I was putting that the first evidence of a change in the relationship came in June 1966. Although these two men had been working together for some years they were in fact as we now know from the evidence as dissimilar as it is possible for people to be. Armstrong was a liar, perjurer, briber, blackmailer, with a complete contempt for anything which legally or ethically stood in the way of his financial or other ambitions. His attitude to his responsibility as a director is illustrated by the Australian Factors affair. In that matter he in his capacity as chairman of Australian Factors lent to Palgrave -

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TAYLOR, A-J.A.: Where is the evidence of this?

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MR. GRUZMAN: I will refer your Honour to it.

TAYLOR, A-J.A.: You are entering on to this discussion about factors and Mr. Armstrong quite deliberately.

MR. GRUZMAN: I am sorry, I do not understand, with respect.

TAYLOR, A-J.A.: Don't you?

MR. GRUZMAN: No. If your Honour thinks for some reason I should not, I ask your Honour to indicate it.

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JACOBS, J.A.: Perhaps we could have the passage.

MR. GRUZMAN: Volume 4, page 1156. I was not proposing to go into this in wide detail but I was proposing to put before your Honours the facts of it as disclosed in the evidence as throwing light on the difference between Armstrong and Barton. I do not propose, unless your Honour wishes me to, to read it in detail. It extends over 12 pages. It fully justifies my submissions on it.

TAYLOR, A-J.A.: That is where you say the evidence is, page 1256. 10

MR. GRUZMAN: Our submission on it is in these terms -

TAYLOR, A-J.A.: You are concerned with showing what sort of a man Armstrong was?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: You already have a finding in your favour that he was a person of no credit, a person who was prepared to contemplate bribing the Judge. Is it necessary for the purpose of your argument to discuss and raise the matter you have just referred to? 20

MR. GRUZMAN: Yes your Honour because -

TAYLOR, A-J.A.: For the purpose of showing he was better than or worse than his Honour Street, J. found.

MR. GRUZMAN: So that your Honours will see the difference in the business approach of Armstrong and Barton. May I say that your Honour Taylor, J early in the case rather I thought said that Barton was in effect not perhaps as good as he might be. 30

TAYLOR, A-J.A.: You understood quite erroneously. I said that his Honour Street, J found that he was a witness whose testimony was suspect. That is all I said about it. That is a finding of fact on the credibility of a witness.

MR. GRUZMAN: I understood your Honour was throwing some doubt on Mr. Barton as a man. In fact his Honour accepted Mr. Barton fully as a man.

TAYLOR, A-J.A.: You have said that half a dozen times. 40

MR. GRUZMAN: I am trying to show, particularly to your Honour, and to the court, the essential difference between Armstrong and Barton. Armstrong was a man not only in other matters, extraneous matters, but in his straight business affairs, in his dealings as a director, as different from Barton as chalk from cheese. I illustrate it by an affair which was fully documented in the evidence at great length. I propose to refer to it in the space of 50

two short paragraphs because it does illustrate a matter which is proof beyond doubt in these proceedings and which is proper in our submission to be considered by your Honours. Unless your Honours feel for any reason at all your Honours prefer I did not, I propose to make the submission.

All of this occurred before Armstrong ever knew Barton or Barton ever knew Armstrong. What happened was that Armstrong as director, as chairman, of Australian Factors lent \$100,000 to Palgrave, which was then in the financial doldrums. That company then used this money to buy shares and debentures in Australian Factors at par, five shillings, when the shares stood on the market at 12/3d., he knowing that Australian Factors was then just about to pay a substantial dividend and a bonus. The matter was personally engineered by Armstrong, and Palgrave was enabled to make a substantial profit. The remainder of the profit went to Armstrong personally, that is one of his companies, because he arranged that Palgrave sold those shares eventually to one of Armstrong's private companies still at a price below market value. The submission is that Armstrong was prepared to prostitute his position on the Boards of each company in favour of what he conceived to be his own personal interest.

It is not surprising therefore that in due course, the two men being so different in any possible way, eventually disagreements between them would occur.

We now come to June and July 1966 when for the first time, as far as the evidence goes, Barton sees in Armstrong a new and frightening side of his character.

MASON, J.A.: That is not strictly correct. Had not it appeared to Mr. Barton in May that Mr. Armstrong had a different side to his character.

MR. GRUZMAN: That is true.

MASON, J.A.: Had not Mr. Barton complained that Armstrong had instructed people to spy on him?

MR. GRUZMAN: Yes, your Honour.

MASON, J.A.: And made these other remarks about Armstrong's general character?

MR. GRUZMAN: That is correct.

MASON, J.A.: That he is prepared to stoop to conspiracy.

MR. GRUZMAN: That is true. I had overlooked that.

Certainly in this period leading up to the middle of 1966 it is quite apparent that Barton

had seen for the first time this frightening aspect of Armstrong's character. Whatever rumours he may have heard - and it is fairly apparent from the evidence that there were rumours, and rumours of a frightening and serious kind which would have had a grave effect on Barton - whatever the rumours had been it was in June - July 1966 at Surfer's Paradise that Barton saw for himself a glimpse of the real Armstrong in action. For the first time Barton would have realised - it does carry more conviction if one sees something for oneself rather than hearing something - for the first time he would have observed physical violence contemplated in his relationship with Armstrong. 10

The fact that Armstrong brought Hume into the matter was submitted. Hume was a man who was obviously dangerous, scarred face and so on. When Armstrong described him to Barton as a man whom he employed permanently and who did all his dirty work, this would have been a frightening revelation to Barton. It would have meant that, so far as the evidence goes, this was probably the first confirmation that Barton had of these thoughts which he had apparently heard about Armstrong. 20

The closeness of the association - it was one thing I suppose for Barton to say he employs Hume permanently - "he does all my dirty work". There was immediate confirmation of it when he turned to his wife and said "Give me Fred's number". This is conceded by Armstrong, this is true. At this period there is brought home to Barton that Hume works for Armstrong and that Armstrong can call him into action. 30

The remainder of this incident (and I am not going to take your Honours through it in any detail unless your Honours wish) that is the question of shooting the dogs and Hume trying to twist it and say it is Barton, which is utterly out of character; Hume's conduct expressed in his evidence of Barton's fear of physical violence, and his apparent pride in that fact that Armstrong was not frightened, are significant matters when one is considering the development of a relationship between these two men. When the thoughts and rumours which Barton had had, one does not know for quite how long, are suddenly confirmed in this way; when this relationship between them becomes more significant; Barton said that he was disgusted by the affair, and there is little doubt that the relationship between the two men deteriorated at least from this date. The reference to the passage that your Honour Mr. Justice Mason mentioned, is volume 1, 22 and 2,287. Barton's evidence was that the thing that really struck him was that having made this accusation to Armstrong that he was a vicious and ruthless man and would go as far as death to get his own way - the thing that struck him was that Armstrong did not deny it when the accusation was made to him. 40 50

I have mentioned the early relationship between the men over a period of three years and the inception of it to show what a big step it was for Barton to have to stand up to Armstrong, to whom he owed his position, for the protection of the company. It was no small thing for this man, who was really Armstrong's left hand up to this point of time, to say to him "Look, you cannot take these things out of the company; you cannot let this company run your own private companies". It must have been a matter, one would imagine, that would have caused Barton considerable pain and heart burning before he took that course. One would think it must have been something that was absolutely forced on him because he could not go any higher in the company than be the managing director. He had nothing to gain and everything to lose by using the expression "taking on Armstrong". Nevertheless he and the other directors saw fit to do so. 10

I have dealt on the commercial side of the matter with the matters that motivated them. It is fair to say that the minutes of the documents show that there was justification for the course which Barton subsequently was impelled to take and that he acted properly as a director and managing director of the company in challenging Armstrong and seeing that his executive powers were taken away. 20

One would accept, we submit, from the evidence that it does not appear, notwithstanding the Surfer's Paradise incident, that Barton really feared physical injury at the hands of Armstrong prior to the 15th October. 30

MASON, J.A.: Does the evidence reveal the date of the conversation in which Mr. Armstrong threatened to serve a s.222 notice and demanded an interest rate of 18%.

MR. GRUZMAN: I will have that checked.

MASON, J.A.: You need not answer it now. If it can be checked and if there is a reference to a passage in the evidence which identifies the date, I would like to know, and in particular whether it is identified by reference to the incidents at Surfer's Paradise in July. 40

MR. GRUZMAN: My recollection is not, but I will have it checked.

So far as the 222 notice was concerned, running through the evidence your Honours will see that Mr. Armstrong did refer to those from time to time and whenever he was challenged on some particular act that he did, which really meant robbing the company in some probable manner, he would say "I can always put in a 222 notice". 50

MASON, J.A.: Is there any evidence that the default is there under the mortgages prior to September 1966?

MR. GRUZMAN: There is no evidence of it. The \$50,000 due to Grosvenor - the evidence is according to a letter that has been in default since September.

MASON, J.A.: There is no evidence of default before that incident?

MR. GRUZMAN: I do not think there is any evidence of default. There were other transactions. Your Honours will remember that \$426,000 was paid to Armstrong's companies. Where the evidence refers to 222 notices it may be that Armstrong had moneys going backwards and forwards into the company and refers to matters other than those particularly in question here. 10

What I was putting was that as one would expect, so it occurred; a gradual increase in the problems between the two men culminating in Barton taking a stand, with the assistance of his co-directors, after consultation with the company's solicitor. Your Honours will remember the evidence about the declaration which was drafted. Then, having this fateful conversation with Mr. Armstrong as soon as he returned from overseas on the 15th October, he comes into the Landmark office and Barton hears he is there and sees him and says that he was not prepared to work with him any longer. 20

That of course was a fair statement by Barton. He would expect some reaction from it. On the other hand he was acting as his conscience dictated and in consultation with the other two directors and the company's solicitor. One would imagine that Armstrong's reaction would be as violent in Barton's mind as it is possible to be. Armstrong replied to him "You will regret the day that you decided not to work with me. The city is not as safe as you might think between the office and home. I will see what I can do against you", or words to that effect. That was a shocking thing in Barton's mind when he tells Armstrong it had been decided by the directors, and he is threatened immediately with physical violence, and it is said, "The city is not as safe between office and home". That could only mean "you are likely to get shot". 30 40

There is no doubt right from the beginning as soon as Armstrong saw that he could not control Barton by virtue of his superior position to Barton in the company, that he was immediately prepared to threaten to kill him. One asks oneself what would be his object. The object was to maintain his control. If he cannot do it one way he will do it another way. What he cannot do commercially he will do by fear. In our submission there is no other explanation admissible. 50

The object would be to prevent Barton proceeding with plans which were inimical to Armstrong's interests.

JACOBS, J.A.: Would not you rather put it at this stage that the object was to bring him back under control again?

MR. GRUZMAN: Yes. In other words to establish a relationship of control. Whereas before he had commercial or other forms of control, now the form of control was by terror. In other words the relationship between the two men, instead of being the relationship between the wealthy chairman and the man who is made managing director of the company, that commercial business relationship, now it is to be a relationship of fear "You will do as I say or you will get killed". In our submission that is what that declaration meant, and nothing more and nothing less. 10

On the 24th October the Board took a decision to exclude Armstrong from his office. The effect on Armstrong one can imagine. First of all he lost financially the rent free office, secretarial services and so on, and the hopes he had of free perks from the public company, and secondly also the great sense of humiliation at Barton's hands, and the rest of the Board, he being chairman and the man who was financing this company. Possibly for the first time in his life he had found his great wealth as displayed in his loans to the company and his great position were meaning nothing. Here was this upstart, Barton, standing up to him and saying "Look, you cannot rob this company. I don't care who you are, out you go". And the rest of the Board with him. 20 30

On the 17th November Armstrong was removed from the Board. This also was a great public humiliation. On the other hand he could save everything if he could succeed at the annual general meeting which was to take place in just two weeks' time. Neither of them held a controlling interest in the company, each of them had a comparable interest, but combined it was only a comparatively small proportion of the company. It followed from that that the annual general meeting would be won by the side which best organised and appealed to the greater bulk of the shareholders. The affairs of the company had become a matter of great public visitation. One would expect, as the evidence shows, that a great number of shareholders would vote at the meeting. The organisation of large numbers of shareholders, as well as running the affairs of the company, must have made great demands on Barton and those associated with him. Accordingly anything which could distract, annoy or worry Barton would improve Armstrong's chances at the general meeting. 40 50

JACOBS, J.A.: So the telephone calls.

MR. GRUZMAN: One of the most insidious and effective means of inducing terror in a person is to interfere with their rest and sleep. It is apparently

something that Armstrong had either learned or knew by instinct. Therefore he began this campaign from the time that he had been removed as chairman to ensure that Barton's rest was disturbed practically every night.

There is another point to these telephone calls. One regards one's home as a castle or as a place where one is secure. Armstrong, by bringing the telephone calls right into his home, tended to destroy Barton's sense of personal security. One can imagine Barton's terror in the early hours of the morning as he was awakened by this telephone call, deep breathing, or threats, or alternatively waking himself in the early hours of the morning in anticipation that the telephone would ring. 10

Again it is clear that Armstrong was trying to create a relationship where by every means in his power, illegal though it was, he was trying to bring Barton back into subjection to him. 20

On the 22nd November Barton sent his appeal to the shareholders in connection with the meeting. At the same time he found his home under surveillance. This surveillance of his home continues. Most of us who find ourselves in a position where physical well-being is threatened in time of peace - really it must have been a very shocking experience for Barton to see these men watching his home, to realise that he was being followed, to have this campaign of terror being waged against him. 30

As the general meeting approached, Barton was obviously in a state of terror. His relationship with Armstrong is exactly the same as the honest citizen has a relationship for example to the local mafia boss. Your Honours will remember the conversation with Bovill. That is one conversation I will give you in some detail. As a result of that Barton's protection, the thing we instinctively look to or say to ourselves, "this cannot happen in Sydney, Australia in the year 1960-odd. Turn to the police. They will look after such a thing". With Armstrong that did not work. Armstrong claimed and proved that he controlled the effective enforcement of law here. 40

JACOBS, J.A.: He claimed.

MR. GRUZMAN: He claimed it and we will submit proved it.

JACOBS, J.A.: At what stage?

MR. GRUZMAN: Subsequently I will come to that in detail. 50

JACOBS, J.A.: You are not talking about this date?

MR. GRUZMAN: No. Claimed and subsequently proved that he controlled the effective administration of the law so far as the police were concerned.

JACOBS, J.A.: You may say that. You say you will come to that later.

TAYLOR, A-J.A.: You do not mean that he said that in evidence.

MR. GRUZMAN: It was claimed in evidence in a conversation -

TAYLOR, A-J.A.: That he could do this and that. 10

MR. GRUZMAN: Which Mr. Justice Street accepted. We proved that he could do it up to the hilt.

TAYLOR, A-J.A.: You did not prove it to Mr. Justice Street. He believed and preferred the evidence of the police.

MR. GRUZMAN: His Honour was gravely concerned about the police.

Our submission now is this, we say to your Honours (a) Mr. Armstrong claimed he could control the police, and (b) we say he proved it. I will take it all in turn. I expect your Honours to require proof of it from the evidence. 20

The important thing at this point of time is this, that so far as the effect on Barton is concerned one is not very concerned now to know whether Armstrong could make good his claims or not. The question is: did Barton think so, and were there proper grounds on which he should think so? When one asks that question, immediately - I do not want to take your Honours through everything that Armstrong did, but remembering that these documents were produced by Barton it is obvious that Armstrong was a man who at this time Barton would believe to be capable of anything. 30

The proof of Barton's views about Armstrong's relationship with the police is concrete. Barton obviously saw no point at this time in going to the police. He hired a private body guard. One does not need any more cogent evidence than that as to what was in his mind. He hired a private body guard from a proper firm established beyond any doubt, whose instructions were to be with and be responsible for Mr. Barton's safety 24 hours a day. I wonder how often it has ever happened that one businessman has been so frightened of another. I am not dealing now between two gangsters in Surry Hills or Kings Cross; I am dealing with two businessmen with offices in Pitt Street, in a public company. I wonder how often it has happened in the history of this State that one man has had to have a body guard 24 hours a day to protect him from the other. 40 50

It appears at page 2210 in Volume 7. That is the order to Australian Watching Company of the 24th November 1966. Landmark Corporation, first floor, 109 Pitt Street ask for special services: "The guard to be with and receive instructions from Mr. Barton, Managing Director, Landmark Corporation Limited. Guard to be responsible for Mr. Barton's safety 24 hours per day until 2nd December 1966. \$4.20 per hour plus travelling expenses". It cost Landmark \$1,400.

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You could not have more convincing evidence that Mr. Barton not only feared for himself but felt that the proper course to take was to employ a private independent bodyguard.

Barton had very good reason for being frightened at this time. The man Hume, whom he would obviously have regarded as a man of violence, was seen watching his home, and watching him at his office. The blue Falcon was seen, and also a red truck. All of these matters are accepted by his Honour, Street J, although his Honour does not accept that Mr. Armstrong caused this watching and following. Who else? Who would have paid Hume to stand outside Barton's house or Barton's office? Who would have had him watched in the blue Falcon? Who would do it? Who was to gain by it? I ask your Honours to judge this aspect, as the others, by considerations proper to be considered. Who had the motive? Who had the opportunity? Who had the means? Who had the money available to pay? Who had a knowledge of the circumstances enabling adequate instructions to be given? Who had made the declaration of intention: "Sydney is not as safe as you might expect between office and home", and threatened to do it? Who had the enmity towards Barton? As a makeweight, and I think that is the proper way to submit it, who was of such a character? Whose character was such that it could not be said that it would be unlikely that he would take that act? Everything points to Armstrong. Unless this court cannot have regard to cogent circumstantial evidence, the court's findings should be that Armstrong and Armstrong alone caused Barton to be watched and followed in the way shown by the evidence. I will deal with other aspects of that later.

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This tempo of threats and terror was stepped up until Barton told Bovill on the 28th November that Armstrong was threatening to kill him. Barton's home was watched at night. Finally on the 30th November Armstrong had with Bovill one of the most shocking conversations that has ever been recorded in a court of law. This is one conversation I propose to deal with in detail. Volume 2, page 431. At page 431 I said "I would like you to come now to some events which occurred at or following the board meeting of Landmark ... you stink, you stink, I will fix you ..." (reads on to page 433) Armstrong said: "I can get the police to do anything, alter or destroy evidence or do anything I

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want ..." (reads to page 434) "That guard is terrified now. You can see by the look on his face ... if you think so much of Barton, why don't you buy my shares?"

It is obvious he was thinking of so creating the situation, the relationship between himself and Barton and Bovill where anybody would be frightened to cross swords with him, where anybody would do his bidding. (continues reading from page 434). He walked straight into Barton's office and repeated word for word the conversation to Barton. 10

This took place in the Board room. They were a very real indication first of all of what was in Armstrong's mind, even at that time. If one analyses that conversation, first of all it reveals a very close knowledge of the underworld. It reveals that he believed that he could get the police to wrongfully arrest a man, to create, alter or destroy evidence.

JACOBS, J.A.: Don't think I want to stop you on this. Don't run the risk of suggesting what is absolutely apparent to us. It has been accepted. Do you think we do not think it is dreadful? Do you think that somehow you have to convince us how dreadful it is? 20

MR. GRUZMAN: Your Honours have read it. What I am seeking to do is to put it into the categories which your Honours are entitled to consider.

JACOBS, J.A.: Do that by all means. All I am referring to is something which you are perfectly entitled to do, that is your commentary before, during and after. You are entitled to do it. Don't forget that you are merely labouring the obvious when you do it. Relate it to your various arguments by all means. 30

MR. GRUZMAN: This is all I am seeking to do. I have set out to show your Honours these matters, A, B, C, D and E, which are proper to be considered in determining the relationship of Armstrong to what Vojinovic finally did. I am secondly trying to show your Honours the development and perpetuation of the relationship and the conditioning of Barton to a situation where Armstrong could put Barton into a state of terror eventually just by pressing a button, as it were. 40

Your Honour may feel that we cannot over-emphasise this. I do not wish to. Sometimes the significance of a very important conversation to particular aspects is lost unless it is pointed out.

The evidence about the police, having in mind that we are going to seek to convince your Honours of a matter upon which we did not succeed in convincing his Honour, Street J, that is the existence and subsequent destruction of Exhibit 29. It is an amazing circumstance that here in this 50

conversation Mr. Armstrong states that he can do what in fact we say he did. It is one of the matters which as a matter of law your Honours are entitled to take into account. He says here: "I can cause the police to destroy evidence". We say that in fact he did so. It is part of the proof that he did so that he stated that he could do so. It is part of the circumstantial evidence. He says that he could get someone killed. That is an allegation that is not an insignificant matter. 10

There is no doubt that both Barton and Bovill accepted this conversation seriously and accepted the viewpoint that Armstrong was capable of what he claimed. This must have struck terror into the hearts of both men, particularly the fact that Armstrong claimed to be able to control the police. Armstrong's aim in that conversation was to convey to Barton his power over him and Bovill and put him off balance so as to reduce either Barton's desire or his ability to oppose Armstrong. 20

JACOBS, J.A.: What was the date of the offer by Mr. Armstrong to Mr. Barton to sell the shares?

MR. GRUZMAN: The 7th November. The document is the 4th November. I would like to refer your Honour to that evidence. The significance of it is as soon as the offer was put to Barton he accepted it.

JACOBS, J.A.: You do not want to come to that now?

MR. GRUZMAN: Barton had no illusions of grandeur. He did not want to be in this company. 30

TAYLOR, A-J.A.: I thought a letter was written rejecting it.

MR. GRUZMAN: Only when the improper conditions were put on. Barton's evidence, which was never disputed, is as soon as the offer was made by Armstrong to him he said "I accept".

TAYLOR, A-J.A.: And then the solicitor wrote a letter rejecting it.

MR. GRUZMAN: He said at that stage the offer was made without strings. Armstrong would simply sell his shares for 70 cents and Barton said "Yes I accept". He was told then to go to Mr. Grant's home and pick up the agreement. He obviously intended to go ahead with it because he went out to Mr. Armstrong's solicitor's home at Wollstonecraft on a Sunday and picked up these draft heads of agreement, and then to his surprise he found he is expected to take part in deceiving shareholders and act as a dummy for Armstrong. That is something he was simply not prepared to do. It was on that basis and that basis only that that offer was rejected. The letter of rejection was dated 9th November and appears at page 89 of the chronology. 40 50

I was going to say that one could summarise the relations between Armstrong and Barton prior to and at the time of the general meeting as that of one man subject to a reign of terror at the hands of the other and using his best endeavours to stay alive. It is apparent that Barton believed that Armstrong wanted to kill him. There is no doubt that Barton believed they were no empty threats on the part of Armstrong. Firstly, he was likely to be killed, and secondly, the object was to further Armstrong's financial and company aims at the general meeting. There is cogent evidence of this in that after the general meeting Barton dismissed the body guard. In other words it cannot be suggested that Barton feared only male-violence because Armstrong's hatred of him would have been at its highest after he had been publicly humiliated at the general meeting. If it was only that Armstrong wanted to kill Barton as a matter of hatred, immediately after the general meeting when he finally lost would have been the time, but at that time Barton lets the body guard go. It is obvious that Barton in his mind related the threats and the terror that something that Armstrong wanted so that it would have some effect on Barton's actions in the company, whether it was the general meeting or signing agreements or whatever it was. This puts beyond any doubt I would submit that in Barton's mind he related the threats and the terror to something which would be of some financial or other advantage to Armstrong.

JACOBS, J.A.: After the termination of the body guard a new era starts.

MR. GRUZMAN: Yes, which lasts to the 8th, and then there is U.D.C.

(Luncheon adjournment).

MR. GRUZMAN: We will present your Honours with another volume which your Honours may find of some assistance. It is entitled "Pressure and conspiracy". Originally it was going to be a document on conspiracy.

JACOBS, J.A.: So far you have taken us through that document up to the 7th November.

MR. GRUZMAN: Your Honours won't be able to follow my submissions from that document. It simply tears out of the appeal books all the pages relating to this matter. It is indexed. There are about 20 pages of index. The general headings are "The Association of Armstrong and Hume to various transactions". Secondly, "the Association of Armstrong and Novak". (continues reading the headings). It is a convenient way in which your Honours can find any particular evidence. We ask your Honours to read that evidence if it is convenient.

May we answer your Honour Mr. Justice Mason's request upon the 18%. Page 22 of Volume 1. I think

your Honour Mr. Justice Mason's recollection was better than mine. "After that incident in May were there further discussions with Armstrong in ensuing weeks about money matters ..."

MASON, J.A.: My question was did the evidence fix a precise date. I am perfectly aware of the conversation.

MR. GRUZMAN: Line 12 on page 23: "Before or after he went overseas? A. Before". He went overseas towards the end of May and came back just before the end of June. Page 44 line 5, there is a question relating to moneys payable to Southern Tablelands. (read). 10

I had reached the point in the chronology on conspiracy and pressure of the annual general meeting. I had already mentioned the armed men at the meeting indicating the state of Barton's mind and Bovill's mind, because he must have agreed to it, and the other directors and so on.

We come to the 3rd December when Barton having won the general meeting he does not feel it necessary to have the body guard. 20

Since Barton obviously related in his mind Armstrong's threat and pressure to Armstrong wanting something from him or wanting to improve his position in the company or financially, it means that probably if the U.D.C. loan had gone through, that would have been an end of the matter. Armstrong would have got paid. He might have been very angry, but his finances were not in danger. Perhaps he would not have had confidence that Barton would run the company as well without him as with him, or some such matter. By and large he had nothing much to worry about. He would have been paid out and no longer be chairman, but that is that. 30

TAYLOR, A-J.A.: Barton would have had him as a director.

MR. GRUZMAN: Barton would have had him as a director. Under the Articles a committee of directors can be formed so that he does not have to attend a meeting of a Board of Directors except once a year. Armstrong as a minority shareholder who did not have enough support to command a public meeting, who was a minority shareholder - indeed they could just call an extraordinary general meeting and get rid of him altogether as a director. He is paid out. All he is is a substantial shareholder in a public company and cannot affect it in any way. 40

JACOBS, J.A.: You were looking at it to begin with from Mr. Armstrong's point of view. You were saying if he had been paid out he would have ceased to be very concerned. 50

MR. GRUZMAN: Yes, he would have had his money back. He had his prospect of shares in Landmark. There

is no reason why they should not be valuable in the future. There is no reason why his interest in Paradise Waters would not be valuable in the future. This would have been an end of the matter.

What happened to bring about the situation of which the court knows. Obviously it is U.D.C. From the moment U.D.C. decided not to go ahead, there was a dramatic change in everybody's finance, Barton's, Armstrong's and the company's. I have been through that on the commercial side. What happened after all is what is important. 10

On the 7th December there is a meeting of Paradise Waters sales in which Armstrong's nastiness overflows. He said "You can say what you like. You can employ as many body guards as you like. I will still fix you." His Honour did not accept that because we did not call all the witnesses who were present. Barton said that took place in the presence of a large number of people. 20

JACOBS, J.A.: His Honour said he did not accept it because X and Y were present and they were not called. Who were they?

MR. GRUZMAN: Barton's solicitor was present.

TAYLOR, A-J.A.: Cotter was present.

MR. GRUZMAN: Yes. Grant was present. Grant did not deny it by the way. There were a number of people present and none of them were called. In fact throughout the whole case we only called three witnesses, Barton, Bovill and Vojinovic. 30

JACOBS, J.A.: It is only one conversation of many.

MR. GRUZMAN: The next significant matter was U.D.C. At the risk of slight repetition may we put it another way. Barton could apply no pressure to U.D.C. They had absolute right. They had nothing to lose. They could call up their security. He could apply pressure commercially to Armstrong. He could say "If you are silly enough to wreck this company you will lose the value of your shares in Landmark and in Paradise Waters. Don't be stupid. I know we owe you the money. If you wreck this company, you are the one that stands to lose most." As far as Armstrong was concerned he simply had to listen to reason. 40

I only say again to put entirely out of mind any suggestion that Barton wanted Armstrong's shares. Obviously all he had to do was buy them on the market or spread a rumour. If anybody had known the truth of the company or even half of the truth of the state of the company, at that stage the shares would have been worthless, and Barton could have bought as many as he liked at far less than he paid. 50

Apart from the general evidence of phone calls (Barton gave evidence these phone calls were pretty continuous) the period between the annual general meeting and the 22nd December does not appear to contain any specific threat of violence other than what I have mentioned. There is one exception, and that was the 14th December when Armstrong put to Barton, accompanied by a threat, that his shares should be bought and the transaction should be entered into, as it eventually was. His Honour accepts. His Honour says that Barton may well have been threatened on that day by Armstrong.

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JACOBS, J.A.: Is that his language "he may well have been"?

MR. GRUZMAN: I think that is the way his Honour put it.

JACOBS, J.A.: Could you read that passage?

MR. GRUZMAN: Line 17 on page 3153. "Mr. Armstrong may well have threatened Mr. Barton on the 14th December."

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To put it exactly right, what his Honour says is "Mr. Armstrong may well have threatened Mr. Barton on the 14th December, but there is nothing to support Mr. Barton's claim that such threat was directly and expressly related to a requirement that he enter into an agreement with Mr. Armstrong. I am not satisfied that Mr. Armstrong did threaten Mr. Barton on the 14th December 1966 in the terms deposed to by Mr. Barton, and I do not accept Mr. Barton's evidence that this conversation took place".

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TAYLOR, A-J.A.: Do you accept that finding?

MR. GRUZMAN: No.

TAYLOR, A-J.A.: It depends entirely on Barton's credibility.

MR. GRUZMAN: It is not his credibility?

TAYLOR, A-J.A.: You have to believe Barton to believe it in those terms. Nobody else said it in those terms.

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JACOBS, J.A.: Your point is if he said he may well have threatened Mr. Barton in those terms, to say that he threatened in some other terms is simply to draw an inference from a conclusion already reached.

MR. GRUZMAN: His Honour we submit finds Barton is an honest man. Any honest man can make mistakes. Barton makes mistakes, and therefore you have to look at his evidence to see whether this is a mistaken bit of evidence or a correct piece of evidence notwithstanding that Barton is an honest man.

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TAYLOR, A-J.A.: I thought the important part of this threat is it was a threat directed to entering an agreement.

MR. GRUZMAN: His Honour finds on that date first of all Barton may well have been threatened by Armstrong, and secondly that Smith put the proposition to him in almost exactly the terms that Barton said.

TAYLOR, A-J.A.: What is the finding that he may have been threatened. Is that that he was or was not? 10

MR. GRUZMAN: His Honour was not prepared to say that he was not threatened.

TAYLOR, A-J.A.: Does the finding mean he was threatened? It is not a finding one way or the other. It means his Honour was uncertain.

MR. GRUZMAN: This is why we are here so that your Honours may make the finding that we seek.

Here is an amazing fact. If you take his Honour's judgment, his Honour says Smith put that proposition to him. First of all Barton took the date out of his mind. He had no document to refer to. He comes into court and gives his evidence in chief and says on the 14th December Armstrong said do these three things or you will get fixed, or whatever it was. When the evidence is finally given the learned Judge comes to the conclusion (a) there may well have been a threat by one man and the proposition put by his agent. At page 3115 his Honour said "I am satisfied that most of Mr. Barton's inaccuracies are due either to faulty recollection or to some bona fide distorted reconstruction". That is a pretty high finding we would submit for Mr. Barton in the light of all the evidence he had to give. 20 30

It does not really matter when you come to think of it. Does it matter if A threatens and his agent puts the proposition or if A both threatens and puts the proposition all on the one day? We would submit it does not matter.

With some confidence we submit your Honours should find that on that day Barton was both threatened and propositioned, to use that phrase, because that is in accordance with what his Honour in fact found. 40

Armstrong having given a pretty clear demonstration of the lengths to which he would go in telephoning and following and so on, it would not have needed much to re-awaken in Barton the fears which he had evidenced by his conduct in relation to the general meeting. One would imagine that what Armstrong said on the 14th December would have been quite sufficient to put beyond doubt Barton's feeling of subjection to Armstrong. The fact is that he there and then more or less immediately and 50

without further ado agrees in substance with what is put to him. I won't say anything about how incredible that was for a man like Barton in the commercial realities.

JACOBS, J.A.: I think you have really dealt with that. That was when the tape recorder was purchased.

MR. GRUZMAN: I left out of discussion at the moment, and perhaps I should refer your Honours to it because it is pretty significant that Armstrong returns from overseas on the 15th October. If I may recall to your Honours the difficulties the plaintiff faced. He had to prove watching and following. Who could imagine that he would ever get within cooee of really proving, and yet here there were found those documents amongst Hume's papers. 10

JACOBS, J.A.: I do not think we have overlooked that. You mean the notes of the car numbers.

MR. GRUZMAN: Yes. The date is significant because the documents were on pieces of paper dated the 2nd and either the 6th or 21st - I have forgotten. Armstrong arrives back from overseas on the 15th October. These pieces of paper were kept apparently by the telephone. They were kept in Hume's possession by Hume's telephone for a certain length of time and then passed over to Hume's father to be filed and dealt with. 20

JACOBS, J.A.: They were in Hume's writing.

MR. GRUZMAN: One document was actually in Hume's writing. One document he could not identify. 30

JACOBS, J.A.: The one that was in his writing was direct evidence. It would not be in a criminal case but it is in this case.

MR. GRUZMAN: The one in his handwriting is direct evidence. The evidence was that the documents could have been in the vicinity of the telephone in Hume's office or flat in Reilley Street for some time after the date they were produced and until the time they were sent to his father who was at Lane Cove and kept the books. 40

Say the situation was until about the 21st December -

JACOBS, J.A.: It was very active on the commercial side but fairly consistently quiet, if you can call it that, on the other side.

MR. GRUZMAN: Yes, until the 21st December when everything is going to come to an end and U.D.C. is going to appoint a Receiver. Barton says "This is the last chance to save the company," and "everything is lost". 50

When Barton rejected Armstrong's offer - your Honours can have in mind the effect was in Armstrong's mind he had lost everything: his shares in Landmark, shares in Paradise Waters, his security, the full catastrophe.

JACOBS, J.A.: I am sure we have followed. That is what you have already put.

MR. GRUZMAN: It was at that point of time as Armstrong saw it all his legitimate and even illegitimate means adopted up to then to save his fortunate had failed. 10

Here was Barton standing on the deck of the burning ship and going down with it and not taking the elementary steps as Armstrong saw them which were essential to save him.

It was at this point of time when all else had failed and there was nothing else for it that there came into Armstrong's mind the idea of actually killing Barton.

A man does not do that or conceive such a thought (not even Armstrong) if there is any other solution present to his mind. He was trapped. There was nothing else for it as he saw it. He had tried everything. He had threatened Barton. He had reduced Barton to a state of fear. He had tried commercial negotiations. U.D.C. were going to step in. There was no other course open, as Armstrong saw it as at the 22nd or 23rd December, other than to actually have Barton killed. On the commercial side \$600,000 comes into the company. Armstrong is completely saved. The company is saved. The shares are saved. There is complete salvation, and Barton out of the road. 20 30

Remembering that, it would not have been out of his mind: "What do we want to achieve? Punish Eskell. Save Alex".

Hume had known Novak for four or five years. He was known to Hume as a criminal around the Cross. It appears that Hume had informed on Novak to the police about some cameras that Novak had stolen. Then by an incredible occurrence Novak is released on probation and his probation officer puts him in effect into Hume's hands for Hume to look after him. Novak therefore was as much in Hume's power as it was possible for a man to be. He did not have to commit any offence to be put back in gaol. All that had to happen was that Hume would give an adverse report about him to his probation officer and then Novak could find himself back inside a gaol again. If ever there was a man who Hume could employ and trust it was Novak. 40 50

There is no doubt on the evidence that Hume employed Novak and had for some time to watch Barton and paid him sums of money which for Novak were not only substantially but appeared to have

been virtually unprecedented. Your Honours will recollect the evidence that Novak brought up to date restitution payments which had been long overdue. Armstrong therefore instructed Hume to have Barton killed, and Novak to procure a gunman.

It is not an easy matter for a man such as Armstrong to actually arrange a contract to have a man killed without running the risk of incrimination. He had in Hume the perfect go-between, a man who was a close personal friend, a close associate, and indeed on the evidence one might think Armstrong's closest associate and the person in whose company he was the most frequently on the the one hand, and on the other hand a man who is revealed by his own evidence and the evidence of the police and all the evidence as a man in close contact with the criminal underworld. His knowledge of the underworld was sufficiently good that he was sitting in the Sonata cafe when in walked Vojinovic. This was some years before. Hume's knowledge of the underworld was such that he immediately recognised him as someone whom he had not seen. He was told that he was a new starter. Hume said he could tell that he had a stolen transistor radio wrapped in a piece of newspaper at that time. He had in Hume a really perfect go-between. I cross-examined Sergeant Wild to suggest from the sergeant's knowledge the problems there would be in finding such a go-between and demonstrated that Hume was the perfect man to arrange such a contract. Hume had in Novak the next perfect tool, a man whose liberty in fact depended to a large extent on Hume.

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The stage was then launched with Armstrong seeing in his mind no escape except to get Barton killed, and having readily at hand the means to do it with complete safety to himself.

His Honour the Trial Judge looked somewhat askance at the proposition that what he termed such a clumsy conspiracy would have taken place. We ask your Honours to consider. Let us assume for the moment that our submissions are soundly based and that is that Armstrong did intend to have Barton killed. Who would he be likely to have approached other than Hume? On the evidence who would Hume be likely to approach other than Novak? Each one down the chain had confidence in the other.

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TAYLOR, A-J.A.: Why did you not ask Novak?

MR. GRUZMAN: The defendant would not call him.

TAYLOR, A-J.A.: Instead of all this speculation and submissions that go on about it, if you are right there was a man who goes into the box and out of the box and nobody asks him a question. We are asked to make a finding.

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MR. GRUZMAN: The question for this court is whose obligation was it to ask Novak.

TAYLOR, A-J.A.: There is no evidence from Novak. You have to ferret it out by what you call inferences. A man was there that could have put an end to all of this.

MR. GRUZMAN: He was called there because I on behalf of my client sought to demonstrate to his Honour Street J, that Novak was alive and available. It was the duty of the defendant. We had established a prima facie case that there was a conspiracy. It was for the defendant to answer it. 10
Although it was established that Novak was there, the defendant called Novak's probation officer. Why? To prove that Novak had a good character.

TAYLOR, A-J.A.: You tried to prove that Vojinovic was in contact with Hume, that he spoke to Hume on the vital day. The purpose of doing that was to show that everything Vojinovic said to Barton you could take back as far at least as Hume. To do that you relied on a telephone conversation 20
between 5 and 7 on the Saturday. One whole volume of this appeal book is taken up with evidence directed to prove or disprove that that telephone conversation took place. Yet you had one man in the witness box who could answer the question.

MR. GRUZMAN: To put that in that way suggests -

TAYLOR, A-J.A.: That is a fact.

MR. GRUZMAN: No, it is not a fact. That suggestion leaves out of account the whole method of conducting trials for the past 200 years.

TAYLOR, A-J.A.: No. 30

MR. GRUZMAN: Yes your Honour. We were alleging that this man was a man who should have been sentenced to life imprisonment for conspiracy to murder. Your Honour is with respect seriously suggesting that I should put in the witness box and ask him to forgo my right to cross-examine?

TAYLOR, A-J.A.: You would not have done that. You would not have had much trouble I would not have thought in getting leave to treat them as hostile. 40

MR. GRUZMAN: With respect you cannot treat a witness as hostile unless you can establish to the satisfaction of the presiding judge not only that he does not like your client but that he is withholding information. To do that you have to establish that out of the mouth of the witness. It would have been irresponsibly reckless on my part to have sought to establish from Novak the truth of the matter, and it would have been contrary to every tenet of advocacy and conducting law suits for the 50
last 200 years.

TAYLOR, A-J.A.: And the other thing that might have happened is that the truth might have come out.

MR. GRUZMAN: It was not my place to take such a risk.

TAYLOR, A-J.A.: That answer I do understand. It was not your place to take such a risk.

MR. GRUZMAN: The fact was we had established a prima facie case. We had established the defendants advisers were in contact with Novak's probation officer and through him with Novak. We had established that Novak existed. The onus was clearly and squarely on the defendants, if they wanted to deny the charge that had been made, to call Novak. I do not think it was even suggested by Mr. Staff Q.C., who appeared for the respondent, that we should call Novak. If it were suggested it would have been a suggestion without foundation.

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The fact that they called Novak's probation officer but failed to call Novak shows that the respondent recognised where the onus fell.

TAYLOR, A-J.A.: They did not fail to call Novak. They failed to ask him questions. He was called. He was there. He had taken an oath.

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MR. GRUZMAN: Point well taken.

JACOBS, J.A.: Was there evidence of hostility between Mr. Hume and Mr. Novak?

MR. GRUZMAN: I will come to that in a moment, but the evidence was that Hume and Novak arranged to frame Vojinovic and have him put in prison, and he was lucky he was not shot.

JACOBS, J.A.: This is Vojinovic? - I did not mention him.

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MR. GRUZMAN: Between Hume and Novak - there was evidence of friendship between Hume and Novak.

TAYLOR, A-J.A.: I thought you said Hume had Novak charged with stealing on the information he gave.

MR. GRUZMAN: At this stage they were friends and he was acting as his guardian.

JACOBS, J.A.: Is this your point, Mr. Gruzman? In the absence of evidence of hostility at that time, and in the presence of evidence of some communication between them, the person who might be expected to call Novak would be the defendant rather than the plaintiff - is that your point?

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MR. GRUZMAN: Yes. Not only that, it is borne out in a direct way when the police wanted to interview Novak they did not ask Mr. Barton for him; they asked Hume for him and Hume arranged for Novak to go to the police station in connection with this matter. The point I was about to make was that his Honour referred to this I think in the terms of

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a clumsy arrangement, and I was submitting if you are in Armstrong's position, you would trust Hume. He would be the man to go to. Hume on the evidence would obviously go to Novak. Now, I suppose it could be said Armstrong should not have told Hume anything, and Hume should not have told Novak anything, but human nature being what it is, first of all, Armstrong and Hume were very close, in our submission, in relation to this Barton matter, so Hume would have known just as much about the matter, more or less, as Armstrong. 10

Now Hume, on the other hand, felt that in Novak he was dealing with a man who was so much under his thumb that he could trust him. Doubtless he said "Don't tell anyone". We do not know. But then it came to Vojinovic. Vojinovic was not the man who was going to stick his neck out. If Vojinovic were going to fire the gun he was taking a risk, and since you cannot have a written contract about this, it had to depend on trust. 20 You can imagine how much trust there would be between Vojinovic and Novak. You remember the conversation in the car when Vojinovic was recruited by Novak, and if there is one thing in this case that really strikes you as true and correct, it was the conversation of these two little criminals in the car speculating as to whether they had the capacity to do this killing job.

JACOBS, J.A.: If it were not for the fact the whole thing was so terribly serious, one would almost think they had been seeing too many American films. 30

MR. GRUZMAN: True - "For £500 you would not kill a drunk for that," he says, and yet they were speaking in cold blood. There is no possible doubt about this.

JACOBS, J.A.: According to Vojinovic.

MR. GRUZMAN: Perhaps I should interrupt myself there to say: Look at Vojinovic's evidence. Look at Vojinovic's statement to Barton. Let us assume everything we can against Vojinovic and against Barton. Let us take the bare facts of what Vojinovic told Barton and speculate as best we can against the case put forward by the appellant. Where would Vojinovic have got the information. Vojinovic knew a terrible lot about Landmark. He said Barton had put Armstrong off as the head and had got the job. That happened to be literally and precisely true, because he originally was to be chairman, but because of Bovill's disqualification, it was Barton. So that at the time at which Vojinovic was speaking it was perfectly true to say that Barton had put Armstrong off and got his job. Then he speaks of Hume. What an amazing thing for this Vojinovic to know that Hume was an associate of Armstrong and that Barton knew it because - I mean, anyone could come up and say "Look, your enemy wants to kill you." You might do that, but supposing Mr. Smith and 40 50

Mr. Jones are next door neighbours and have a public Court case, and then someone comes up to one of the parties to the Court case and says, "Look, your neighbour wants to kill you". In 99 cases out of 100 no-one could possibly believe that. Mr. Smith would not believe it. He would say "I might have had a fight with him; I might have had a Court case, but I don't for one minute believe he is going to kill me. Go away and tell your funny stories to someone else". The significant thing about the Vojinovic matter is that Vojinovic had the inside knowledge to know, firstly, that Barton would believe that Armstrong would be likely to kill him and that was certainly not information which had been bruited around anywhere. It was very confidential and secret information. Secondly, he knew that the name "Hume" would strike some terror into Barton. Now, where did he get that information from? Thirdly, he knew, as I have indicated, the precise details of what had happened between Armstrong and Barton in respect of the chairmanship of the Board at Landmark. 10 20

Now, this is pretty dramatic information for a new starter criminal around "The Cross" to have about big business affairs in the city. Your Honours might ask yourselves if Vojinovic wanted to make the most impact on Barton, who would he way had sent him. Wouldn't he ring up and say, "Listen, I am Armstrong's man"? But that is not what he said, because at page 257, Volume 152/3, Barton says, "At four o'clock on the same afternoon ... and his friend." Up to the time they met, Armstrong's name had never been mentioned. Up to the time that Barton met Vojinovic, Vojinovic had never mentioned Armstrong's name. There are aspects of Vojinovic's evidence which ring true. I make one point only - that Vojinovic did not ring up in the name of Armstrong. 30

JACOBS, J.A.: I think we appreciate what you put there, and the force of it. 40

MR. GRUZMAN: But then, what does that mean? Let us suppose, if you want to assume, he saw something in the newspaper and built up a story on it.

JACOBS, J.A.: You have not really got to spell it out. If his only purpose were to threaten, you say he would mention the big boss?

MR. GRUZMAN: Yes.

JACOBS, J.A.: But if his purpose were to double-cross, he would do what he did?

MR. GRUZMAN: Yes. 50

JACOBS, J.A.: I do not think you have to spell it out.

MR. GRUZMAN: Thank you, your Honour. But I am using it in just a slightly different way as well.

To test out Vojinovic - to see if Vojinovic were telling the truth, you can say he would have known from the newspapers or some other source that Barton did not like Armstrong, but there was no source other than Hume from which he could know that Barton was frightened of Hume. Your Honour sees the difference?

JACOBS, J.A.: Yes.

MR. GRUZMAN: So that what Vojinovic said betrayed completely that he had knowledge which could only have come in the way said, and that is why I said make whatever assumption you like against Barton or Vojinovic because you will always come to the conclusion in our submission that Vojinovic must have been - - True, it is clumsy, but Vojinovic had to go and get a gun and shoot someone relying for his ultimate payment on a man called Novak, well, Novak he would not trust, so Novak had to convince him of his bona fides to satisfy him that he would, in fact, get paid, and that is why so much information went to Vojinovic. Novak was forced into the position, in order to get Vojinovic to do the job, of a deposit and subsequent payment basis. He had to give him information that would satisfy him that he would, in fact, get paid. So it is not a case of a clumsy arrangement as the trial judge suggested, but a case in which it is inevitable that if you set about a thing like this you deal with a low class of person. Dealing with persons of that type, there is no trust. You cannot say "I will tell you nothing," because they do not trust you, and therefore all the information trickled down the line.

The point I was making there was the information which Vojinovic had and which could only have come from the source he said - now, Hume wanted to deny that Vojinovic was a suitable candidate as a gunman and said in the early questions on this subject that, in effect, he was a new starter, only good for stealing a transistor, but later on he said he knew that Vojinovic had tried to blow a safe and had burned down the building. He stated that he thought that Barton was trying to engage Vojinovic to burn down a building or some such activity, and later on stated his belief that Vojinovic had been engaged by Barton in a conspiracy to kill Armstrong. So that it is proven beyond doubt that so far as Hume was concerned he regarded Vojinovic as a man who was capable of, and willing to, carrying out a contract to kill a man for money.

Just interpolating there, having in mind the difficulties a plaintiff has in a case like this to prove such an outrageous fact, it is incredible that the proof in this case has got to the extent that would prove that Hume was in contact with a man who, he thought, was capable of killing for money. It is probably very hard to imagine a stronger case for a plaintiff or prosecution, as it were, in a case such as this.

Now, the details of the plan had, on the evidence, not been considered as at the 22nd. On the evidence one would say, we would submit, that Armstrong, feeling that he had no other alternative, had ordered Hume to see about getting Barton killed, and Hume had sort of put the machinery into action. One thing would have occurred to Hume, and that is that a car would be required and so we have this incredible transaction with the Falcon. I have said - I won't repeat it - that it must have been, or probably was, about this time that the arrangement was made, and possibly the document signed, to transfer the car to Novak. The transfer was registered on 29th which was two working days after the 22nd. In all these crimes the criminals have to take a choice of two courses: either to steal a car in which they always run the risk that some policeman will see the car and they will be caught, irrespective of the crime they have in mind, simply because it is a stolen car. The other alternative is to use a car which they have, and in this case Hume, apparently believing, I suppose, that it would help his situation, he being associated with Armstrong, if ever it came back he could say he just sold the car at the relevant time.

Hume was one of these fellows who had a great belief in the efficacy of transfers and you remember when this case started before his Honour Mr. Justice Street, at that time or immediately before he transferred his business to Miss Catt with the intention of going overseas. Commencing on 22nd December the tempo of the arrangements increased. Vojinovic began to see Novak nearly every day; Hume saw Novak nearly every day. The car was transferred to Novak. Vojinovic was recruited by Novak to kill Barton, and a fictitious account was prepared to justify the payment of \$1,000 by Armstrong to Hume. At this point of time Armstrong's mind must have been at its vicious best. His solicitors had told him that nothing could be done until after the holidays. One would assume that he became aware that U.D.C. - although there is no evidence of it - that U.D.C. had postponed the appointment of a receiver for seven days, he either knew that, or he did not, but let us assume in his favour that he did, so that there was no rush for seven days, but beyond that U.D.C. was likely to go ahead with the appointment of a receiver, and the evidence confirms that. So that over this Christmas-New Year period Barton went to Surfers Paradise. If we, knowing what was going on with Armstrong, Hume, Novak and Vojinovic, it is not saying too much to say that Barton's holiday in Surfer's Paradise might have saved his life. After he returned out of the blue these commercial negotiations resumed. There was no basis really for assumption because as at 22nd December everything was off. The parties were in hostile armed camps. But suddenly Armstrong - one way or the other, suddenly out of the blue the negotiations resumed, and there is no evidence to suggest any reason why. The price goes up, your Honours remember, by \$75,000 to all of which Barton

says, "Yes, yes, yes, anything you say". Your Honours will remember that although Smith and Armstrong put their signatures on documents at this time and although there was a tremendous sense of urgency on the part of Smith and Armstrong, Barton signed nothing.

JACOBS, J.A.: And you did concentrate on that. We have that in mind.

MR. GRUZMAN: There was another point one of your Honours raised before lunch on the appointment of a receiver for U.D.C. I said it was a calamity for Armstrong. Your Honours said for Barton, too. The difference is Armstrong moved heaven and earth to do something to get this agreement signed, but there is no evidence of any such activity on the part of Barton and of course, Armstrong was by no means deceived by Barton's apparent compliance with his wishes. He had seen that on 14th or 16th December Barton said, "Yes, I agree to the original proposition," but it had not produced any effect whatever. The fact that Barton said again on 4th or 5th January, "Yes, I agree," was likely to produce exactly the same effect until they got a signature from him.

On 4th January Hume was given this \$1,094. The date of the fraudulent invoice was 21st December. There is no reason to suppose that the date has any more validity than any other part of that document, so it is not an unreasonable assumption to suggest that the concept of the payment and the payment took place probably on the same day. So that on 4th January we have a cheque. Armstrong actually signs this cheque in favour of Hume for \$1,094. This accords entirely with Vojinovic's statement, but at that point of time he was simply waiting for \$500 and the gun to go and kill Barton. This is again quite incredible confirmation of this little hoodlum Vojinovic's statement. He says all he has to do was to collect money - \$500 - and a gun and he would go and kill, and right at this relevant time Armstrong pays to Hume the largest sum of money which, according to the evidence, Hume has ever received in his life from anyone, and this is three days before Vojinovic goes out to do the job, and the money is paid on an invoice your Honours will have no doubt was fraudulent.

This is the most direct evidence, I suppose, of Armstrong's participation in the conspiracy that it is possible to imagine. Armstrong, of course, was completely desperate, having brooded over his lamentable situation since 22nd December. It is a great pity, is it not, that his diaries for that period are not available. What a lot of light they would have thrown.

TAYLOR, A-J.A.: Couldn't you spare us the contents of the diaries that are not here, and were never put in evidence? What concern is it of ours really?

It would have been a great embarrassment if they were produced in Court.

MR. GRUZMAN: The law is destruction of evidence is one of the indicia of a guilty party and one of the links in the chain of circumstantial evidence, and we will be citing authorities to your Honours. These are relevant and important matters. I appreciate how hard it is for your Honours to anticipate in advance what our submissions will be, but we put the highest store on them and are going to deal at length on the destruction of these diaries. It is an important matter.

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TAYLOR, A-J.A.: You are not going to tell us what was in it?

MR. GRUZMAN: I will tell your Honours what was not in it. We will establish, I hope not too tediously but certainly to your Honours' satisfaction, that the diary that was produced was a false and fraudulent document written up for the purposes of the case.

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JACOBS, J.A.: That was not on 5th January, was it?

MR. GRUZMAN: The diary of 5th January was part of the documents written up in this way.

JACOBS, J.A.: Will you go on what you were saying about this cheque?

MR. GRUZMAN: I am just interrupting myself. I will call it "D" for diary so that I won't mention "diary". D for 4th January; on this relevant date A wrote in D "Home all day", and yet A was with Smith for three hours that day. There will be other matters to which we will invite your Honours' attention to show that this diary was a false document written up for the purposes of this case.

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One cannot leave out of account the possibility in Armstrong's mind that the plan would not go through exactly as he had ordered it, as our submission is that what was planned and conceived was the actual murder of Barton as the best thing that could occur but if by some chance the attempt failed, if Barton were wounded or if he missed, or whatever else happened, something went wrong, then the second barrel was there - Barton would be shocked and frightened to such an extent that he would enter into this agreement with Armstrong which Armstrong so desperately wanted.

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It must have been about this time, looking at the other side of the evidence, that Armstrong had this discussion with Hume about insurance. If one is looking for evidence of conspiracy, and I have been through it, it is a sinister and significant matter. Indeed, in some of the classic cases on circumstantial evidence that type of thing is

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regarded as significant evidence of guilt - transferring the guilt to somebody else and matters of that kind. Wills on Circumstantial Evidence - I do not know whether your Honours have looked at it for some years - dealing with murders and so on, and it is an interesting point - -

MASON, J.A.: You may have been reading too much of it.

MR. GRUZMAN: Well, your Honour, not enough. That is the authority for the proposition that evidence of bad character is admissible. We will be submitting that evidence of bad character - higher than this - and Wills on Circumstantial Evidence says that evidence of bad character is admissible or may be used. 10

JACOBS, J.A.: This is not the point you were going to. Would you get back to the 4th or 5th January and leave that to your very illuminating argument on the law tomorrow.

MR. GRUZMAN: Tomorrow! 20

JACOBS, J.A.: You were up to 5th January.

MR. GRUZMAN: I was dealing with the events leading up to 7th January where it was obvious that Vojinovic would have wished to have met Hume and it would be equally obvious that Hume would not wish to meet Vojinovic for preference. On the other hand he wants the job done. I do not think anyone could have any doubt of the veracity of the evidence of Vojinovic; how they went down in the car to Riley Street, drove around the corner, Novak got out of the car, spoke to Hume and came back again. 30

JACOBS, J.A.: That was the 3rd January?

MR. GRUZMAN: It is in the week prior to the 7th. We cannot give the exact date. In the chronology it appears as the third but when we look at the evidence we cannot be absolutely certain that was the date.

So we have the situation now posed for the act to be carried out. Vojinovic saw Hume and, making personal contact with Hume, Hume was torn between two problems. On the one hand this could compromise him (which he did not want) and on the other hand if he frightened Vojinovic off he would not get the job done. In the light of the relationship between the three men, Hume seeing Novak daily and Novak seeing Vojinovic every day, it is more suspicious that in point of fact Vojinovic never saw Hume over this period. Vojinovic said that he telephoned Hume on the Saturday night and spoke to him and arranged to meet him at 8.30 in his office. I do not really think that that evidence, if accepted, proves anything. 40 50

TAYLOR, A-J.A.: You say it is not very important?

MR. GRUZMAN: He saw Hume the day before and arranged to meet him and there is no suggestion about this night, but the defence reacted violently to this. They called six witnesses besides Armstrong and Hume and apparently a volume of the appeal books -

JACOBS, J.A.: The six being Murray, Catt, who else?

MR. GRUZMAN: Miles, Miss Rosewell, Green. 10

TAYLOR, A-J.A.: They were not the only ones who reacted violently.

MR. GRUZMAN: They went to inordinate lengths.

TAYLOR, A-J.A.: And the cross-examination went to inordinate lengths.

MR. GRUZMAN: When you have got six witnesses to cross-examine - -

TAYLOR, A-J.A.: You say now that it did not matter; the conversation was unimportant?

MR. GRUZMAN: No, what I said was the significance of the conversation did not seem to be such as to warrant such a vast attempt to disprove it. The defence called six witnesses besides Armstrong and Hume and days and days went into this proof. The appeal book has got dozens of photographs of young ladies and so on, and whilst decorative, it is nevertheless not very helpful to an elucidation of the issues which his Honour had, and your Honours have, to deal with. 20

JACOBS, J.A.: But your submission is that this was picking up an incident and making more of it than was warranted. 30

MR. GRUZMAN: Yes, and even so it would be justified for me to say if your Honours say it does not matter, I am certainly not going to take up a lot of time on it. I am only going to make the point now in the space of three minutes dealing with a few facts on which your Honours won't believe that mass of evidence.

MASON, J.A.: What about Mr. Green? 40

MR. GRUZMAN: He came on the Sunday. His evidence had nothing to do with it. Mr. Green, the B.M.C. representative had nothing to do with it. He took a whole lot of photographs. That was one independent witness. The other independent witness was Mr. Miles, the man down the road, who swore "I saw Miss Catt and Mr. Hume on the Sunday but I don't remember seeing her on the Saturday." He only spoke of Miss Catt. They are the two independent witnesses who did not help one little bit to establish that Hume was there prior to the Sunday. 50

Miss Rosewell is a friend of Mr. Murray's and these two live together and the evidence showed they were in bed together thereon the Saturday night and Mrs. Larkins and Mr. Armstrong were together in the same hut but in separate beds. So these people had a pretty close association between them and would not be described as independent witnesses. So the two independent witnesses they called did not help.

The others support the proposition that Hume was there on the Saturday but in different ways, as I will show your Honours in a moment. I am just going to hand up a document on this. But the salient point, the one which in our submission decides the matter, and the object of this exercise was to bring back Mr. Armstrong's boat which had been left there at the New Year's weekend and for that purpose he was going to go up with Mrs. Larkins - his wife did not like travelling back by the boat. I will go through this very briefly. He and Mrs. Larkins had to come back in the boat. They had to go up there in the car and the car then had to come back. Hume had never been up there before and this was the first time, and Mr. Armstrong was to pick up Mr. Hume and Miss Catt from the flat in Riley Street, and go with them direct to the house because Hume could not find it otherwise. That is the evidence. Then the car had to be brought back. So Mr. Armstrong came in the Valiant with plenty of empty space and, according to this story, the MG with Hume and Miss Catt followed them, nose to tail, all the way up - forty miles to Sackville. The two cars had to be brought the forty miles back with Hume driving one and Miss Catt the other one. It is just fantasy, and when you are faced with a situation of fantasy you have to say it cannot be right. What is the most likely? First of all, they went up there at different times. Once you get them going up at different times that is the end of the matter. We submit that notwithstanding the mass of evidence called the probabilities are that Vojinovic was telling the truth and Hume was in Sydney at least up to the point of half-past six on Saturday night when the phone call took place.

JACOBS, J.A.: Would you just describe shortly the phone call, please, Mr. Gruzman?

MR. GRUZMAN: The phone call was very short, only a few words. It appears at page 345, vol.2: "Before I rang up the second time ... a woman or girl answered the phone first". That is the whole of the conversation.

I will just remind your Honours the attempt to establish this alibi went to extent of Mr. Hume and Miss Catt giving evidence that on New Year's Eve they were unhappy at the New Year's Party and he promised to take Miss Catt out water-skiing the next time that he went, although on one version he had never never been before.

JACOBS, J.A.: Never ever skied before?

MR. GRUZMAN: Yes.

May I hand your Honours a document entitled "Portions of evidence as to presence or not of Hume at Sackville in December 1967"? (documents handed to Court).

It simply classifies the documents on various subjects, the arrangements, the preparation, the arrival, teaching Hume to ski. Hume says Murray helped him in it, that he was a pretty advanced skier, and Murray said he had never skied before. 10

JACOBS, J.A.: The appointment at 8.30 between Hume and Vojinovic was never kept, was it?

MR. GRUZMAN: It was never kept, and that is significant. I am going to come to that.

JACOBS, J.A.: That is all I wanted to know.

MR. GRUZMAN: It was never kept and what happened, we submit, was this - I only want to comment on it. The position is that, on Vojinovic's evidence, he made an appointment to see Hume at 8.30 and never kept that appointment. What effect would that have had on Hume? He would have been immediately worried, having agreed to see him. He would have known from Novak that Vojinovic wanted to see him, suddenly he agrees to see him and he believes he is waiting in his office, but he never turns up. 20

TAYLOR, A-J.A.: So he then goes off up to Mr. Murray's? 30

MR. GRUZMAN: Yes, and this is the very first thing in the morning. I have no doubt that on the evidence the arrangements would have been for him to come up in the morning to bring back the boat and he would have to come in a separate car because Armstrong went the night before, and he went up this night. This was his opportunity to create an alibi, whether he went at ten o'clock that night and slept in the boat with Miss Catt or whether he went late that night or first thing in the morning does not matter. It is our submission that the fact of this broken appointment by Vojinovic immediately gave Hume cause for fright. 40

And of course one does not know what would have happened as a result of that if events had not moved so fast, because the next night Vojinovic was in the hands of the police. The very next night Vojinovic was arrested. Hume had no chance to do anything. But I suppose one thing that would have immediately come to his mind was "Goodness me, I have spoken to Vojinovic", and he would have immediately said to himself, or thought to himself about his alibi. One knows it is not difficult 50

some months later to suggest to people "You remember that I was sleeping on the boat that night", and before long people remember it. The only problem was the two cars and the independent people.

I do not know whether your Honours - and I do not presume to ask - are boating people but Miss Catt said at page 1512 (line 25): "Madam, I put to you that you never ever spent a night at the river ... A. No." Thirty miles up the Hawkesbury the river would not be - -

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JACOBS, J.A.: I appreciate the force of the other submissions you make, but boats are boats.

MR. GRUZMAN: My boating friend here says it would not sway, thirty miles up the river; the river is perfectly still.

Another little point is that it is hard to imagine if Armstrong had his boat there that he really would have wished to spend the night in that hut in those circumstances when he had available what the evidence showed to be a very nice boat.

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JACOBS, J.A.: We are really getting very close then to this very serious day, the most serious day, of the 8th?

MR. GRUZMAN: Yes, the events of the 7th I do not propose to labour. I know your Honours will have looked at them and it does not gain a great deal in the re-telling.

JACOBS, J.A.: You are talking about the 8th now?

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MR. GRUZMAN: No, I am talking about the actual events of the night of the 7th when Vojincvic comes and makes that statement - the Rex Hotel - the evening of the 7th - although this evidence was not allowed I would classify this in Barton's mind as showing that the triggerman that he expected had arrived.

TAYLOR, A-J.A.: So he went off in a white Mercedes to a meeting at King's Cross?

MR. GRUZMAN: He did not, no, your Honour. Believe me I do appreciate these comments because we wish to carry conviction to the minds of each of your Honours.

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What were the facts? Here was a man staying at home with his friends. Someone rings up and says "I have got something to do with Freddy Hume and it is very important to met him", and he goes down to the post office, a short distance from his home, with his son watching but the man does not turn up.

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First of all I would ask your Honours to

consider the state of mind of a businessman, a managing director of a big public company, who is in such a state of mind that when some fellow off the street rings him up and mentions the name "Freddy Hume", what does he do? First of all he is prepared to see him if he can - with someone else watching - and then he takes fright. More so than seeing a film - I know a film could not do justice to this - and someone remarked about seeing the film. Then what did he do? The man telephones again. He employed a bodyguard, to go to the Rex Hotel. This man rings up and mentions the name "Freddy Hume" and what is his immediate reaction? He wants to find out what it is but does not want to get killed either so he employed a bodyguard on that Saturday night. He also got some friends together as well so that there would be witnesses, having in mind at that stage his lack of trust (shall we say) in the police arising from what Armstrong had said. He acted in exactly the way a very frightened businessman would act.

JACOBS, J.A.: Frightened, but not without some courage at the same time.

MR. GRUZMAN: Yes, but not over-courageous. In other words, he employs a bodyguard. He is not the sort of man who says, "I can deal with this situation", he is the sort of man who said, "I cannot deal with it physically, someone else has got to be there", and so he arms himself first with a bodyguard and then independent witnesses and it may be reasonable to remember that he was not meeting this man in a back alley but somewhere at the Rex Hotel which while it is not the best address on the other hand it is a place where he is not likely to get shot, as much as in a back street. The man tells him that he has been engaged to kill him and, incidentally, rob him, and on the knowledge that Vojinovic had - I again refer to the diamond ring. It so happened that Vojinovic knew that Mrs. Barton had a diamond ring which he said was worth \$6,000. There would not be many people whose wife would have a diamond ring worth \$6,000, so this means that Vojinovic had a very special knowledge of this matter.

JACOBS, J.A.: It was worth much more, was it not?

MR. GRUZMAN: Yes, in fact it was worth \$15,000. That is what Barton said he paid for it. But the significance is the depth of knowledge of Vojinovic concerning Barton and his assets, and this proved beyond any doubt that he must have got the information from the source he said. It proves that as nothing else could. It was part of the deal that he would get this ring and sell it to Hume and that would be taken into account in the price for the killing.

Barton, of course, would obviously be terribly frightened by what was said. Anybody

would be. In order to fully understand this case it is necessary for each of your Honours in some way, as I invited your Honours to regard yourselves as company directors, to consider how a company director would react in dealing with a commercial situation; so I must ask your Honours to consider what would be the effect on any person who was told by a man named Vojinovic that somebody was trying to have him killed and, indeed, whether it is true or false, these are facts for this Court. 10

Barton's reaction again was exactly what you would expect of a decent, honest businessman, frightened and confronted with a situation which the evidence showed. He obtained an interview with the very top man at the C.I.B. and at that stage it was obvious that he had what he regarded as concrete evidence which he felt no police force could fail to act upon. Of course he was wrong. That was what was in his mind, and the solicitor obtained the services of a leading Queen's Counsel and it was all regarded as sufficiently serious for the head man on duty at the C.I.B. to see the solicitor with the Queen's Counsel and Barton first thing next morning, the Sunday morning, at police headquarters. The story was told, Mr. Miller - who actually did the talking - had only come back from overseas quite recently, according to the evidence, so one could understand if his recitations to the police of the background was not perfect. It is not often, I suppose, that a leading solicitor such as Mr. Miller would be got to work on the Sunday morning in a case of this kind. But just the same, what he told the police was sufficiently accurate and so the police investigation started. I am going to go to that a little later as a separate matter but I just want to carry these events through. 20 30

The matter was obviously taken very seriously by the police at the time and everything happened exactly as you would expect. The inspector put a senior sergeant of twenty-eight years' experience into the matter. The sergeant was brought in, and a constable - a not inexperienced constable - was sent to Barton's home to be there in case the man called again. All the usual plans were made for capturing this criminal. In due course arrangements were made for Barton, with the police arrangements, to meet Vojinovic that night and Vojinovic was captured. Barton's reaction, of course, directly to Vojinovic was that he was not going to pay him any money and Vojinovic said that he had a policeman there, Detective Sergeant Mackie, who was also a friend of Hume and had been to Hume's place. Mackie was telephoned and all these were facts which were capable of being established and not disproved. 40 50

So we have Vojinovic caught and brought to the police station. I am going to deal with that at some little length, on the question of credit of the police because that is important, and also on 60

the existence of Exhibit 29 - that some of the deliberate untruths that were told by the police about this incident - -

TAYLOR, A-J.A.: This was a piece of evidence that was not accepted by his Honour?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: You are going to invite us to believe Barton when he says that this record of interview which involved Follington - he was a liar and Wild was a liar?

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MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: And you are going to tell us why?

MR. GRUZMAN: It is simply that first of all Wild said of Follington that he was a thief and a liar, - a senior policeman talking about a junior policeman in that way - and secondly, Follington saying that Wild was working for Armstrong.

JACOBS, J.A.: I can appreciate many of the matters you are putting in your case, but when you come to this particular aspect; this Court cannot stop you from putting them, but it was unheard of, as I understand, for this Court to say "We do not accept the finding of the trial Judge on the credibility of witnesses".

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MR. GRUZMAN: I will refer to the passages in his Honour's judgment before I come to that but I say without any doubt his Honour was gravely concerned and dissatisfied with the police evidence.

TAYLOR, A-J.A.: That is not the point. He did not believe Barton.

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MR. GRUZMAN: He said that Barton was an honest witness.

TAYLOR, A-J.A.: He did not believe Barton. Let me tell you this: I do not believe that he ever saw the statement and if you say here come Michaelmas I'll never believe that Barton saw that statement.

MR. GRUZMAN: I do not mind your Honour saying that at this stage but really your Honour ought to allow me to put some submissions to you before making that statement. Your Honour might allow me to put the argument.

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TAYLOR, A-J.A.: Why? Because if I believe the argument you are putting is nonsense, why should I listen to it?

MR. GRUZMAN: We would submit it is premature. This is an appeal by way of re-hearing and we might as well not come here if your Honour is not going to allow me to seek to persuade your Honour of the

correctness of the submissions we make. There might not be any appeals, with respect - -

JACOBS, J.A.: I was not referring to that, Mr. Gruzman, I was saying that what you are putting is on a quite different level altogether from what appears to me to be the position - not about your not coming here - but rather that if the trial judge or the judge at first instance has on the whole of the evidence (having seen the police witnesses) come to the conclusion that there was not a statement, however critical he may be of the fact that there ought to have been a statement but there was not, that is his conclusion of fact based at least partly on his observation of them, and although there are very many matters that you are entitled to raise in this case - and have raised - I think you should consider seriously whether there is any basis upon which, on that matter, we could displace the finding of the judge at first instance.

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MR. GRUZMAN: May I say that we appreciate what falls from your Honour and may we consider it overnight?

JACOBS, J.A.: Very well.

(Further Hearing adjourned until 10.15 a.m. Tuesday, 2nd March 1971).