

1976, 26

IN THE PRIVY COUNCIL

26 15 OF 1976

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

IN TERM NO. 8276 of 1974

BETWEEN:

MARENE KNITTING MILLS PTY. LIMITED

Appellant (Plaintiff)

AND:

GREATER PACIFIC GENERAL INSURANCE LIMITED

Respondent (Defendant)

## TRANSCRIPT RECORD OF PROCEEDINGS

—————  
VOLUME I

SOLICITORS FOR THE APPELLANT

Reid & Vesely,  
85 Bondi Road,  
BONDI

By their City Agents:

Greaves, Wannan & Williams,  
109 Pitt Street,  
SYDNEY

SOLICITORS FOR THE RESPONDENT

Dawson Waldron,  
60 Martin Place,  
SYDNEY

IN THE PRIVY COUNCIL

15 OF 1976

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

IN TERM NO. 8276 of 1974

BETWEEN:

MARENE KNITTING MILLS PTY. LIMITED

Appellant (Plaintiff)

AND:

GREATER PACIFIC GENERAL INSURANCE LIMITED

Respondent (Defendant)

TRANSCRIPT RECORD OF PROCEEDINGS

-----  
VOLUME I

SOLICITORS FOR THE APPELLANT

Reid & Vesely,  
85 Bondi Road,  
BONDI

By their City Agents:

Greaves, Wannan & Williams,  
109 Pitt Street,  
SYDNEY

SOLICITORS FOR THE RESPONDENT

Dawson Waldron,  
60 Martin Place,  
SYDNEY

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES  
IN TERM NO. 8276 of 1974

BETWEEN:

MARENE KNITTING MILLS PTY. LIMITED

Appellant (Plaintiff)

AND:

GREATER PACIFIC GENERAL INSURANCE LIMITED

Respondent (Defendant)

TRANSCRIPT RECORD OF PROCEEDINGS

INDEX OF REFERENCE:

PART I

<u>No.</u>	<u>Description of Document</u>	<u>Date</u>	<u>Page</u>
------------	--------------------------------	-------------	-------------

VOLUME I

1.	Statement of Claim No. 8276 of 1974 between Marene Knitting Mills Pty. Limited (Plaintiff) and Greater Pacific General Insurance Limited (Firstnamed Defendant) and Gerald Ball Insurances Pty. Limited (Secondnamed Defendant)	1 November, 1974	1
2.	Statement of Defence of Firstnamed Defendant	10 December, 1974	6
3.	Plaintiff's Amended Reply to the Statement of Defence of the Firstnamed Defendant	18 November, 1975	8
4.	Transcript of Evidence taken before his Honour, Mr. Justice Yeldham		

CASE FOR THE PLAINTIFF

	Tender of Documents	18 November, 1975	11
--	---------------------	-------------------	----

No.	Description of Document	Date	Page
<u>CASE FOR FIRSTNAMED DEFENDANT</u>			
	<u>SHOUBERT</u> - Ruth		
	Examined		13
	<del>Cross-Examined</del>		15
	<del>Re-Examined</del>		16
	<u>SWANTON</u> - Howell William		
	Examined		17
	<del>Cross-Examined</del>	19 November, 1975	28
	<del>Re-Examined</del>		43
	<u>TRAIN</u> - Betty		
	Examined		44
	<del>Cross-Examined</del>		46
	<del>Re-Examined</del>		48
	<u>CUBBIN</u> - Robert Brisbane		
	Examined		48
	<del>Cross-Examined</del>		52
	<del>Re-Examined</del>		57
	<u>REID-GILTINAN</u> - Jeffrey (inclusion in record objected to by Respondent)		
	Examined		59
	<del>Cross-Examined</del>		73
	<del>Re-Examined</del>		84
	<u>FOXALL</u> - Charles James (Sworn to Answer)		
	Examined	20 November, 1975	86
	<del>Cross-Examined</del>		89
	<u>CUBBIN</u> - Robert Brisbane (Recalled)		
	Examined further		93
	<u>POWELL</u> - Revel Cuthbert Ratcliff (inclusion in record objected to by Respondent)		
	Examined		94
	<del>Cross-Examined</del>		99
	<del>Re-Examined</del>		104
	<u>STANLEY</u> - Terrence Leonard		
	Examined		105
	<del>Cross-Examined</del>		109

No.	Description of Document	Date	Page
<u>CASE FOR FIRSTNAMED DEFENDANT CONT'D</u>			
	<u>HARDY</u> - Robert Lorenzo		
	Examined		112
	Cross-Examined		114
<u>CASE FOR PLAINTIFF IN REPLY</u>			
	<u>FOXALL</u> - Charles James		
	Examined		122
	Cross-Examined		127
	Re-Examined		135
	<u>HERSZBERG</u> - Chil Myer	21 November, 1975	
	Examined		136
	Cross-Examined		150
	Re-Examined		175
	<u>BEST</u> - Richard James		
	Examined		176
5.	Judgment of his Honour, Mr. Justice Yeldham	12 December, 1975	179
6.	Notice of Motion for Conditional Leave to Appeal	19 December, 1975	207
7.	Affidavit of Edward <u>VESELY</u>	19 December, 1975	212
8.	Rule Granting Final Leave to Appeal	2 March, 1976	216
9.	Certificate of Prothonotary verifying Transcript Record		218

PART II

LIST OF EXHIBITS

Plaintiff's Exhibits

"A"	Cover Note 6056 issued by Greater Pacific General Insurance Limited dated the 14 August 1973 together with letter dated 6 February, 1974 from the Firstnamed Defendant to the Secondnamed Defendant together with annexed copy letter dated 6 February, 1974 from the Firstnamed Defendant to the Plaintiff.	327
-----	--	-----

Description of Document	Page
<u>Plaintiff's Exhibits Cont'd</u>	
"B" Form of Fire Policy in the name of Greater Pacific General Insurance Limited together with certain annexures	296
"C" Partnership Agreement dated the 15 November, 1961 between Laib Herszberg and Fela Herszberg	221
<u>Firstnamed Defendant's Exhibits</u>	
1 Notes by H.W. Swanton at scene of fire Hornsby Knitting Company 3 September, 1965	226
2 Copy letter dated 13 October, 1965 from Liquidator of Marene Knitting Mills Pty. Limited to Manager James Knitwear Pty. Limited	256
3 Letter dated 11 January, 1966 on letterhead of Marene Knitting Mills Pty. Limited addressed to H.W. Swanton & Co., and signed Fela Knitting Co., L. Herszberg	262
4 Application dated 10 July, 1967 by L. and F. Herszberg for registration of Fela Knitting Co. as a Business Name	290
5 Letter dated 2 February, 1966 on letterhead of Marene Knitting Mills Pty. Limited addressed to H.W. Swanton and signed Hornsby Knitting Company, L. Herszberg; together with an original and copy letter dated 2 February 1966 addressed to William Townsend & Sons Pty. Limited	265
6 Card advising of new telephone numbers of Marene, Fela Knitting Co. and James Knitwear Pty. Limited	261
7 Letter dated 2 June, 1967 from L. Herszberg to Mr. Swanton	288
8 Letter dated 5 May, 1967 from Foxall, Geeves & Willcox addressed to H.W. Swanton & Co., together with four annexures	283
9 Eight (8) photographs marked A to H.	236
10 Letter dated 23 October, 1974 from Reid & Vesely to H.W. Swanton & Co.	334
11 Letter dated 2 November, 1967 from Foxall, Geeves & Willcox to Messrs. F.W. Duesbury & Co.	293

	Description of Document	Page
<u>Firstnamed Defendant's Exhibits Cont'd</u>		
12	Balance Sheet as at 30 June, 1966 of Hornsby Knitting Company and Fela Knitting Company together with Profit and Loss Accounts for same period and Manufacturing and Trading Account	278
13	Form 2 under the Regulations to the Trade Marks Act registered on the 20 April, 1967 and renewed on the 27 July, 1972	282
14	Two documents of agreed facts	336
15	An account dated 21 October, 1965 from F.R. Strange Pty. Limited	257
16	Notes of discussions between H.W. Swanton and Laib Herszberg and Myer Herszberg on the 7 September, 1965	229
17	Affidavits from file 948 of 1965 from Supreme Court of New South Wales, Equity Office by	
	Charles Law (Sworn 1 October, 1965)	240
	Laib Herszberg (Sworn 24 June, 1966)	244
	Charles Law (Sworn 23 June, 1966)	245
	Charles Law (Sworn 28 April, 1966)	253
18	Two pages of handwritten notes by Reid-Giltinan, undated	294
19	Proposal form dated 4 September, 1973 by Plaintiff to Firstnamed Defendant	305
20	Deed dated 29 June, 1966 between P.J. Hughes and A.I. Buckley and the Plaintiff and C. Law and Fela Investments Pty. Limited	269
21	Minutes of Meeting of Directors of the Plaintiff Company dated 29 June, 1966	276
22	Document in handwriting of witness R.C.R. Powell	309
23	Two white proposal forms by Plaintiff to Firstnamed Defendant bearing receipt stamp 14 November, 1973 one in respect of sum \$200,000.00 and the other in respect of sum \$248,300.00	310
24	Proposal form by Plaintiff to Firstnamed Defendant bearing receipt stamp 2 January, 1974 in respect of sum \$448,300.00	314

Description of Document	Page
<u>Firstnamed Defendant's Exhibits Cont'd</u>	
25 Bundle of correspondence between Firstnamed Defendant and Gerald Ball Insurances Pty. Limited	315
26 Two letters dated 12 February, 1974 and 14 February, 1974 respectively from Arnold Bloch, Liebler & Co., Solicitors, to the Firstnamed Defendant	330
28 Building application dated the 15 March, 1966 to Hornsby Shire Council by L. and F. Herzberg	219

DOCUMENTS NOT INCLUDED IN RECORD

PART I

No.	Description of Document	Date	
1.	Notice of Conditional Appearance on behalf of Greater Pacific General Insurance Limited (Firstnamed Defendant)	14 November,	1974
2.	Notice of Appearance on behalf of Gerald Ball Insurances Pty. Limited (Secondnamed Defendant)	18 November,	1974
3.	Statement of Defence of Secondnamed Defendant	18 November,	1974
4.	Plaintiff's Reply to Statement of Defence of Secondnamed Defendant	5 February,	1975
5.	Plaintiff's Reply to Statement of Defence of Firstnamed Defendant	5 February,	1975
6.	Notice of Motion for Directions	5 February,	1975
7.	Notice of Change of Solicitor for the Secondnamed Defendant	11 February,	1975
8.	Secondnamed Defendant's Amended Statement of Defence	23 April,	1975
9.	Secondnamed Defendant's List of Documents	23 April,	1975
10.	Firstnamed Defendant's List of Documents	2 May,	1975
11.	Firstnamed Defendant's Amended List of Documents	20 May,	1975

Index "F"



No.	Description of Document	Date	
12.	Plaintiff's List of Documents	21 May,	1975
13.	Plaintiff's Notice to Answer Interrogatories	10 October,	1975
14	The Firstnamed Defendant's Notice to Answer Interrogatories	10 November,	1975
15.	Plaintiff's Notice to Set Down for Trial	14 November,	1975
16.	Rule Granting Conditional Leave to Appeal	23 December,	1975
17.	Certificate of Prothonotary of Settlement of Index and Fulfilment of Conditions.	1 March,	1976
18.	Notice of Motion of Appellants for Final Leave to Appeal	1 March,	1976
19.	Affidavit of Edward Vesely in support of Notice of Motion for Final Leave to Appeal	1 March,	1976
20.	Transcript of oral evidence.		

CASE FOR PLAINTIFF IN REPLY

<u>PATTERSON</u> - Venus	21 November,	1975
Examined		
Cross-Examined		
Re-Examined		

EXHIBITS NOT INCLUDED IN RECORD

PART II

No.	Description of Document
27	Three books of account of Fela Knitting Co.
29	Letter from Gerald Ball Insurances Pty. Limited to Myer Herzberg C/- Arnold Bloch, Liebler & Co., dated 6 March, 1974.
30	Photostat copy of letter from Arnold Bloch, Liebler & Co., to Manager, Gerald Ball Insurances Pty. Limited dated 1 April, 1974.
31	Photostat copy letter from Gerald Ball Insurances Pty. Limited to Arnold Bloch, Liebler & Co., dated 19 April, 1974.

---

No. Description of Document

---

- 32 Letter Arnold Bloch, Liebler & Co., to Gerald Ball Insurances Pty. Limited dated 29 April, 1974
- 33 Letter dated 6 May, 1974 from Gerald Ball Insurances Pty. Limited to Arnold Bloch, Liebler & Co.
- 34 Copy of Letter from Arnold Bloch, Liebler & Co., to Rishworth Dodd & Menczell dated 14 May, 1974 and reply dated 30 May, 1974 from Rishworth Dodd & Menczell to Arnold Bloch, Liebler & Co.

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COMMERCIAL CAUSES DIVISION

No. 8276 of 1974

MARENE KNITTING MILLS PTY. LIMITED

Plaintiff

GREATER PACIFIC GENERAL INSURANCE LIMITED

and

GERALD BALL INSURANCES PTY. LIMITED

Defendants

STATEMENT OF CLAIM

10

1. The Plaintiff is a company duly incorporated and entitled to sue in and by its said corporate name and style.

2. The Defendants are each companies duly incorporated and liable to be sued in and by their respective corporate names and styles.

3. On the 14th day of August, 1973 the Plaintiff by way of cover note effected with the firstnamed Defendant a contract of insurance whereby in consideration of premiums to be paid to the said Defendant by the Plaintiff the said Defendant insured the Plaintiff against loss or damage by fire in respect of certain property of the Plaintiff situate at premises at corner Evans and Cranwell Streets, Braybrook, Victoria for the sum of Five hundred and sixty three thousand eight hundred dollars (\$563,800.00) the said contract of insurance to be effected from the said 14th day of August, 1973 until 14th November, 1973 and subject to

20

## Statement of Claim

the terms and conditions of the said cover note. The Plaintiff was at all material times interested in the property the subject of the said cover note to the amount so insured thereon.

4. On the 15th day of August, 1973 a large quantity of the Plaintiff's property at the said situation included in the said contract of insurance was destroyed by fire and the sum of One hundred and thirty thousand five hundred and eighty-three dollars eighty nine cents (\$130,583,89) became due and payable by the said Defendant to the Plaintiff. 10

5. On or about 6th February, 1974 by notice in writing the said Defendant advised the Plaintiff that it thereby avoided the said cover note and rejected the Plaintiff's proposal for insurance. The Plaintiff says that the said Defendant thereby repudiated its contract with the Plaintiff without lawful cause or excuse and the Plaintiff claims damages.

6. Alternatively to paragraphs 3 to 5 inclusive the Plaintiff claims against the secondnamed Defendant as follows:- 20

- (a) In and about the period June to 14th August, 1973 the Plaintiff employed the secondnamed Defendant as an insurance broker to effect, inter alia, fire insurance cover in respect of the property above referred to during the period 14th August, 1973 to 14th November, 1973 for reward to the secondnamed Defendant.

Statement of Claim

- (b) It was a term and condition of the contract of employment of the secondnamed Defendant by the Plaintiff that the secondnamed Defendant would carry out the duties of an insurance broker in respect of the said insurance and advise the Plaintiff on all matters relating thereto with due and proper care, skill and diligence and would make all such disclosures to the insurer as should be necessary of matters known to the secondnamed Defendant relevant to the said insurance. 10
- (c) The Plaintiff says that the secondnamed Defendant effected insurance on behalf of the Plaintiff with the firstnamed Defendant which is the contract of insurance hereinbefore referred to but did not advise the Plaintiff on all matters relating thereto with due or proper care, skill or diligence and did not act in relation to the effecting thereof with due or proper care, skill or diligence and did not advise the firstnamed Defendant of matters known to the secondnamed Defendant of which the secondnamed Defendant should have advised the firstnamed Defendant. 20
- (d) By reason of the premises the firstnamed Defendant has repudiated its contract of insurance with the Plaintiff and the Plaintiff has not been indemnified in respect of a loss falling

Statement of Claim

within the terms of the said contract of insurance and the Plaintiff claims damages against the secondnamed Defendant alternatively to the claim hereinbefore made against the firstnamed Defendant.

PARTICULARS OF NEGLIGENCE

1. The secondnamed Defendant was aware of certain fires suffered by L. and F. Herszberg trading as Hornsby Knitting Mills in or about June, 1958, 10  
September, 1960 and September 1965 and a certain fire suffered by James Knitwear Pty. Limited in or about October, 1961.
2. The Plaintiff will rely on the claim of the firstnamed Defendant that none of these was disclosed to the firstnamed Defendant.
3. The secondnamed Defendant did not advise the Plaintiff that any of the said fires should be disclosed prior to the issue of the cover note or at any relevant time. 20
4. The secondnamed Defendant did not seek any information from the Plaintiff at any such time concerning any of the said fires or the possibility of any such fire.
5. The secondnamed Defendant did not advise the Plaintiff at any such time that non-disclosure of a material fact could or might result in the cover note being avoided.

Statement of Claim

TO THE DEFENDANTS:

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

Plaintiff: Marene Knitting Mills Pty. Limited  
of 85 Bondi Road, Bondi.

Plaintiff's Solicitors: E. Vesley of  
Messrs. Reid & Vesley, 85 Bondi  
Road, Bondi, Telephone 389.0900

10

Solicitors' Agents: Greaves Wannan & Williams of  
109 Pitt Street, Sydney :  
telephone 233.2966

Address for Service: Care of the said Solicitors'  
agents.

Address of Registry: Supreme Court, King Street, Sydney.

E. Vesley  
.....  
Solicitor for the Plaintiff.

20

FILED 1st November 1974.

P. Bodell (L.S.)

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COMMERCIAL CAUSES DIVISION

No. 8276 of 1974

MARENE KNITTING MILLS PTY, LIMITED

Plaintiff

GREATER PACIFIC GENERAL INSURANCE LIMITED

and

GERALD BALL INSURANCES PTY. LIMITED

Defendants

FIRSTNAMED DEFENDANT'S DEFENCE

10

1. \_\_\_\_\_ In answer to paragraph 3 of the Statement of Claim, the firstnamed defendant denies that the terms and conditions of the contract of insurance are fully or accurately set forth in the said paragraph. In further answer to the said paragraph, the said defendant says that it was a term and condition of the said contract of insurance that the plaintiff had before the same was made disclosed to the said defendant all facts material to the acceptance by the said defendant of the said insurance.

20

2. \_\_\_\_\_ In answer to paragraph 4, the firstnamed defendant denies that the sum of One hundred and thirty thousand five hundred and eighty-three dollars and eighty-nine cents (\$135,583.89) or any part thereof became due or payable by the said defendant to the plaintiff as alleged.

3. \_\_\_\_\_ In answer to paragraph 5, the firstnamed defendant denies that the contents of the notice in writing are fully or accurately set forth in the said paragraph.

Statement of Defence  
6. of Firstnamed Defendant



Statement of Defence  
of Firstnamed Defendant

In further answer to the said paragraph, the said defendant denies that by reason of the giving of the said notice it repudiated its contract with the plaintiff without lawful cause or excuse.

4. In further answer to paragraphs 3, 4 and 5, the firstnamed defendant says that by notice in writing dated 6th February 1974 it validly and lawfully avoided the said cover note upon the ground that neither the plaintiff nor anybody on its behalf disclosed to the said defendant either at or prior to the issue of the cover note that the business had previously had four very serious and substantial fires.

10

5. The firstnamed defendant does not admit the matters alleged in paragraph 6 of the Statement of Claim.

George Barton  
by his partner  
J. McDarra  
.....  
Firstnamed Defendant's  
Solicitor

20

Filed: 10th December, 1974.

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COMMERCIAL CAUSES DIVISION

No. 8276 of 1974

MARENE KNITTING MILLS PTY. LIMITED

Plaintiff

GREATER PACIFIC GENERAL INSURANCE LIMITED

AND

GERALD BALL INSURANCES PTY. LIMITED

Defendants

AMENDED REPLY TO THE STATEMENT OF DEFENCE  
OF THE FIRST-NAMED DEFENDANT GREATER PACIFIC  
GENERAL INSURANCE LIMITED

10

1. The Plaintiff joins issue with the First-Named Defendant on its Statement of Defence.

2. In further reply to the First-Named Defendant's Statement of Defence, the Plaintiff says that the First-named Defendant is estopped from relying upon the non-disclosure alleged in its Statement of Defence upon the following grounds:-

- (a) The Contract of Insurance sued upon by the Plaintiff was arranged on behalf of the Plaintiff with the First-Named Defendant by the Second-Named Defendant. 20
- (b) Prior to the 14th August, 1973, the Second-Named Defendant informed the First-Named Defendant that approximately 10 years prior to 1973 there had been a fire at premises of a business known as Hornsby Knitting Mills, Hornsby, which business

Amended Reply

had been conducted by the father of a Director of the Plaintiff Company.

(c) Thereupon the First-Named Defendant by its servant or representative told the Second-Named Defendant:

- (i) That such an event had nothing to do with the Plaintiff;
- (ii) That the fire referred to in paragraph (b) above was not of relevance to the proposal for insurance contemplated by the Plaintiff; 10
- (iii) that it was not necessary to disclose the fact of the fire referred to in paragraph (b) above, or any similar occurrence affecting companies or businesses other than the Plaintiff;
- (iv) that it was necessary only to disclose fires affecting or claims made by the Plaintiff; 20
- (v) That it was not necessary for the Plaintiff or its agents to investigate or seek out any information relating to fires suffered by or claims made by any person or company other than the Plaintiff.

3. In further reply to the whole of the First-Named Defendant's Statement of Defence, the Plaintiff says that the First-Named Defendant waived its right,

Amended Reply

if any, to rely upon the non-disclosure alleged in its  
Statement of Defence upon the grounds set forth in  
Paragraph 2(c) above.

E. Vesely  
.....  
Solicitor for the Plaintiff.

FILED this 18th day of November, 1975.

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

No. 8276 of 1974

CORAM: YELDHAM, J.

TUESDAY, 18TH NOVEMBER, 1975.

MARENE KNITTING MILLS PTY. LIMITED v. GREATER  
PACIFIC GENERAL INSURANCE LIMITED & ANOR.

MR. BURCHETT Q.C. with MR. ABADEE appeared for the Plaintiff. 10  
MR. ROGERS Q.C. with MR. VOSS appeared for the first defendant.  
MR. O'KEEFE Q.C. with MR. STITT appeared for the second defendant.

-----  
(Mr. O'Keefe stated the matter as between the Plaintiff and the second Defendant has been settled, with the effect of the second Defendant being dismissed from the action. He stated terms will be available in the morning.) 20

(Mr. Burchett opened to his Honour.)

(Mr. Burchett stated agreement has been reached on the sum of \$130,583.89 in the pleadings, as to amount.)

(Mr. Burchett called for and Mr. O'Keefe produced cover note No. 6056, together with letter dated 6th February, 1974 from the first defendant to the second defendant, together with annexed copy letter of 6th February, 1974 from the first defendant to the plaintiff. Above-mentioned documents tendered and marked Exhibit "A".) 30

(Mr. Burchett called for the policy. Mr. Rogers produced a form of fire policy in the name of Greater Pacific General Insurance Limited, together with certain annexures. Above-mentioned documents tendered and marked Exhibit "B".)

(His Honour directed it be noted the document produced is the ordinary form of fire policy which was in force as at 14th August, 1973.) 40

(Amendment to reply handed to his Honour. The question of costs of the amendment was reserved.)  
(Case for the plaintiff closed.)

CASE FOR THE FIRST DEFENDANT

(Mr. Rogers opened to his Honour.)

(Commissioner of Police called on subpoena duces tecum. Rudy Kolkman, an officer of the New South Wales Police Force, appeared in answer to the subpoena. He stated the subpoena was not produced. He stated that yesterday a letter was sent to Messrs. Dawson Waldron, solicitors to the effect that in accordance with normal procedures of the Police Department all documents in this matter were destroyed after a period of five years. His Honour directed it be noted that the police officer has indicated the documents have been destroyed. In response to Mr. Rogers the officer identified a document as being a copy of the subpoena served on the Commissioner of Police.)

10

(Mr. Bryce Ernest Ross Jones, of Messrs. Marshall Marks Dezarnaulds and Jones appeared in answer to subpoena and produced documents identified as under. Counterpart of document dated 29th June, 1966 executed under the common seal of Fela Investments Pty. Ltd. and original letter from James Knitwear Pty. Ltd. dated 17th February, 1966. He stated he had no instructions from his client in relation to these documents, and would ask that the client's rights be preserved as a matter of privilege, or alternatively orders be made to him to produce the documents. He stated his client is Mr. C.A. Law, liquidator of Marene Knitting Mills Pty. Ltd., whom he rang yesterday and was unable to contact.)

20

30

His Honour directed it be noted that Mr. Jones claimed privilege, but hands the papers to the court, and indicates he does not wish to argue the matter further, but will abide by any decision of the court. His Honour stated if he felt disclosure and use of the documents might adversely affect those who might be entitled to claim privilege, Mr. Jones is to be notified and is to be given an opportunity to argue the matter if he wishes to do so.

40

Mr. Rogers asked that it be noted the privilege is claimed on behalf of the liquidator. Mr. Jones stated there were three parties, the two directors and the liquidator.)

RUTH SHOOBERT  
Sworn and examined:

- MR. ROGERS: Q. Is your name Ruth Shoobert? A. Yes.
- Q. Do you live at 5 Sanders Road, Baulkham Hills?  
A. Yes.
- Q. Are you a married woman? A. Yes.
- Q. Did you move to 4 James Street in 1955? A. Yes.
- Q. At that time was there a knitting factory being carried on next door at 2 James Street? A. Yes.
- Q. Did you go to work there? A. Yes. 10
- Q. What was your work? A. As a cutter.
- Q. What were you cutting? A. Woollen garments. Men's cardigans, ladies' cardigans.
- Q. How long did you work there? A. Approximately 12 or 13 years altogether.
- Q. Do you remember anything happening just before you left? A. The fire.
- Q. Did you work right up till the time of the fire?  
A. Yes.
- Q. The fire that you speak of, what did that do to the premises at 2 James Street? A. Wiped it out. 20
- HIS HONOUR: Q. What year was this? A. 1965 I think, but I cannot be sure.
- MR. ROGERS: Q. It wiped out the building that you were working in, did it? A. Yes.
- Q. What was the employer called that you were working for? A. Hornsby Knitting Co.
- Q. Was there some person who supervised the running of that business? A. Mr. Herszberg.
- Q. Do you remember his Christian name? A. Laib I think. I knew him as Mr. Herszberg. 30
- Q. What was Mr. Herszberg's job in the company as far as you could see? A. Just to ensure that everything was working correctly.
- Q. Did you know Mrs. Herszberg? A. Yes.
- Q. Did she work there? A. Yes.

Q. What was her job as far as you could observe?

A. Forelady.

Q. Forelady for the whole factory or just a section of it? A. Mainly with us in the cutting, that I had anything to do with.

Q. How much of the day did she spend in the cutting room? A. It depends. Maybe one or two hours, depending on what we had to do.

Q. Did you notice what she was doing the rest of the day whilst you were on cutting? A. No. 10

Q. What was it that was being manufactured on the premises? A. Men's knitwear and ladies' knitwear.

Q. Things such as pullovers and cardigans? A. Yes.

Q. And ladies' and children's knitwear? A. Yes.

Q. When the fire wiped out those premises did you go back to work after a while? A. Yes, I came to the city, Elizabeth Street. Mansion House.

Q. Did you stay at Mansion House or move somewhere else? A. 68 Campbell Street. 20

Q. Did you finally leave work in about 1969?

A. Yes.

Q. Until 1969 were you working at Campbell Street?

A. Yes.

Q. Who did you get paid by at Campbell Street while you were working there? Who was your employer? (Objected to by Mr. Burchett. Withdrawn.)

Q. Did you get paid regularly every Friday? A. Yes.

Q. Did you at the end of the year get a group certificate? A. Yes. 30

Q. Have you still got the group certificate?

A. No.

Q. Whose name was the group certificate in?

A. Marene or something like that.

Q. Did you see Mr. Herszberg at Mansion House?

A. At times, yes.

Q. What was Mr. Herszberg doing at Mansion House?

A. Just the same as at Hornsby. Seeing that everything was going correctly.



Q. Did you see Mrs. Herszberg there? A. Yes.

Q. What did she do? A. The same thing again.  
Forelady.

Q. What was the work that was being done first at  
Mansion House and later at Campbell Street? A. The  
same thing as Hornsby.

Q. Was the sort of product that you were making  
the same? A. I would say so.

Q. Was Mrs. Herszberg concerned with the cutting  
room at all? A. Yes. 10

Q. Did both Mr. and Mrs. Herszberg go to Campbell  
Street when the operations were transferred from Mansion  
House to Campbell Street? A. Yes.

Q. Did you ever meet a gentleman called Myer  
Herszberg? A. Yes.

Q. Where was it that you first saw him on a working  
basis? A. Campbell Street.

Q. What work did he do there? A. Mechanic, as  
far as I know. 20

Q. For approximately how long was he there before  
you left? A. I would not know.

CROSS-EXAMINATION:

MR. BURCHETT: Q. When you were working at Campbell  
Street, do you remember being concerned with the making  
of bowlers' garments? A. Yes.

HIS HONOUR: Q. Lady bowlers? A. Men.

MR. BURCHETT: Q. Men's bowlers' garments? A. Yes.

Q. What were they? A. Cardigans and pullovers.

Q. Those were specifically cardigans and pullovers  
designed for bowlers, were they? A. Yes. 30

Q. That was something you had not been concerned  
with before you went to Mansion House and Campbell  
Street, was it? A. That I just cannot remember off-  
hand.

Q. You answered a question by my friend about the  
sort of product, whether it was the same. I am not  
sure whether he said at Mansion House or Campbell Street,

but after asking you about Mansion House and Campbell Street he said was the product the same sort of thing that you were making at Hornsby. Do you remember that question? A. Yes.

Q. You said you would say the same. You are not really sure, are you? A. I am not really sure about Hornsby, having bowlers' cardigans. I have a recollection there may have been.

Q. What I want to put to you is that there was in fact quite a substantial change in the quality of the garments you were making in Mansion House and later at Campbell Street compared to the quality of the garment being made at Hornsby. That is true, isn't it? A. Yes. Certain things. I do not think it changed such a lot, if any. 10

Q. Have you worked for other clothing manufacturers?  
A. No.

Q. This was the only place you worked, was it?  
A. That is right. 20

Q. You do not put yourself up as an expert on garments other than in the cutting room of this place, is that right? A. Yes.

Q. The truth of the matter is you do not really know whether the style and quality of garment was the same or different, do you? A. No. (Objected to by Mr. Rogers - allowed.)

RE-EXAMINATION:

MR. ROGERS: Q. What is the difference between a bowler's cardigan and an ordinary cardigan so far as manufacture is concerned? Is there any difference?  
A. Nothing whatsoever. It is all knitwear. 30

HIS HONOUR: Q. A white cardigan? A. Yes, one is a white cardigan and the other is a coloured cardigan.

(Witness retired.)

(Document dated 18th February, 1975 referred to during discussion on interrogatories. Counsel addressed. Mr. Rogers asked that it be noted that the plaintiff admits that so far as the plaintiff's officers are aware the plaintiff did not tell to the secondnamed defendant of the occurrence of the fire (a) in or about June 1958, (b) in or about September 1960, (c) in or about October 1961 (d) in or about September, 1965.) 40

HOWELL WILLIAM SWANTON

Sworn and examined:

MR. ROGERS: Q. What is your full name? A. Howell William Swanton.

Q. Where do you reside? A. 50 Ada Avenue, Wahroonga.

Q. You are a loss assessor by occupation, employed by H.W. Swanton Holdings Pty. Ltd., trading as H.W. Swanton & Co., loss assessors, 14 Spring Street, Sydney, is that so? A. Yes.

(Qualifications admitted.)

10

Q. You have enjoyed that occupation since 1939, have you not? A. Yes.

Q. You attended at the premises 2 James Street, Hornsby, following a fire on or about 24th June, 1958, did you not? A. Yes.

Q. Do you remember what structure was erected on the land at 2 James Street, Hornsby? A. There was a dwelling which had been converted for use as a knitting factory.

Q. Did you make some notes at the time of what you saw? A. Yes, I would have done so.

20

Q. And I think those notes are no longer available?  
A. Yes.

Q. You again attended at the same premises following another fire on or about 10th September, 1960, did you not? A. Yes.

Q. In what part of the premises did the fire occur on this occasion? A. My recollection is that there had been an additional structure erected at the rear of the dwelling, and that the fire was seated in that area.

30

Q. What was the use that you observed being made of the area at the rear where this additional structure had been erected? A. I think it was part factory and part storage. Part warehouse.

Q. Did you see some machinery there? A. Yes.

Q. Do you know what sort of machinery it was?  
A. Not with any precision other than it was knitting machinery.

Q. Did you return to the neighbourhood on or about 26th October, 1961 when there was a fire in some nearby premises? A. Yes.

40

Q. Whereabouts were these other premises? A. Just a little further up James Street, on the corner of the highway.

Q. What was the nature of the structure on that corner? A. I think it was a two-storey shop.

Q. What was the damage to the shop? Was it fundamental? Did it destroy the premises or slightly damage them? A. It was an extensive fire on that occasion.

Q. Did you again return to the premises on or about 2nd September, 1965? That is the premises at 2 James Street? A. Yes. 10

Q. What did you observe had happened to the premises on this occasion? A. In the first place the premises had been extended further towards the rear, and on the rear boundary there had been erected a large three-storey factory, and a fire had occurred which had involved practically the entire premises on that occasion.

Q. Did you make some notes on that occasion of the nature of the premises and what use had been made of the premises and what damage you observed? A. Yes. 20

Q. Were those notes prepared by you on your return to your office on 3rd September, 1965? A. They were actually dictated on the site, on to a tape, and typed when I returned to my office.

Q. Do you still have a copy of the notes as transcribed? A. Yes.

(General notes of witness produced. Notes tendered and marked Exhibit 1.)

Q. Did you see any person at the scene of the fire from whom you obtained information? A. Yes. I think my main contact on that initial occasion was with Mr. Herszberg's son, Myer Herszberg. 30

Q. Do you see Myer Herszberg anywhere in court?  
A. I cannot be quite definite but I would say one of the gentlemen in the front. (Indicating.)

Q. Do you mean the front row of benches in court?  
A. Yes.

Q. Did you receive a visit in your city office a few days after you paid your visit to 2 James Street, from some people connected with the James Street premises? A. Yes, Mr. Laib Herszberg, senior, and Myer Herszberg. It had been explained to me on the day of 40

the fire that Mr. Herszberg senior was very ill, and there was not very much discussion that could take place at that stage. It was arranged for him to come and see me when he was available.

Q. When he came to see you was there any discussion about the business that had been carried on on the premises? A. Yes, we discussed the whole subject of the insurance claim.

Q. What was the insurance cover over the premises? Did it include anything relevant to profits? A. Yes. They had a material damage cover, that is building, stock and plant, and also insurance cover on loss of profits. 10

Q. Do you remember who the insured were in respect of the loss of profits insurance cover? If you do not, don't worry? A. No.

Q. Can you refer to it? A. Yes, Mr. and Mrs. Herszberg, Laib and Fela Herszberg, trading as Hornsby Knitting Co. 20

Q. Did you have any discussion with Messrs. Herszberg when they came to see you about their future plans? A. Yes, there was a lot of discussion on that.

Q. Did Laib Herszberg say anything to you as to his intentions? A. Yes.

Q. Do you wish to refresh your recollection from some notes you made at the time? A. If I may.

MR. ROGERS: Q. May I suggest the last page of your notes (objected to by Mr. Burchett; allowed.)

Q. I do not know if after all this time you can remember the question. You were having a look at your documents in order to refresh your mind whether Mr. Laib Herszberg said anything as to his future intentions relating to business which had been carried on at Hornsby? A. Yes, there was a great deal said. In fact, this interview extended between an hour and a couple of hours, covering all aspects of the claim, and very prominently the loss of profits aspect, because I pointed out to Mr. Herszberg that under the policy he was under obligation to rehabilitate the business as quickly as he possibly could, with a view to minimising the interruption, and we discussed various ways whereby that could be achieved. 30 40

Q. Did he say anything as to how he was going to effect or carry out that obligation? A. Yes. First

of all we gave attention to reconstructing the premises at Hornsby, but unfortunately we had run into some real problems from the Council, and whereas on previous occasions there had been a quick restoration, even to the extent of some temporary structural work so that fresh plant could be introduced, and they could get going again. That seemed to be difficult at that stage, and so consideration was given to either other premises in Hornsby or, as is quite frequently considered, acquiring another business of a similar nature. 10

Q. Perhaps we can jump ahead for the moment. Did Mr. Laib Herszberg speak to you again on the 15th September regarding the re-establishment of his business?

A. I do not recall a particular instance, but he spoke to me on many occasions. We were almost in conversation daily.

Q. Would you look at your file to see if you can refresh your mind, to see whether on the 15th September there was a conversation between you and Mr. Herszberg? 20

A. I had a conversation on the 14th September.

Q. Thank you. What was that, so far as the re-establishment of the business was concerned? (Approaching.) Can you tell us with the aid of that note what it was that Mr. Herszberg said to you concerning the possibility of establishing himself elsewhere? A. Yes. On that date, 15th September he was in touch with me and stated that he had been offered some space by Ruttex of George Street opposite Central Railway. The principal, Mr. Rutcovitch, had been in touch with him and he had three thousand five hundred square feet. 30

Q. Did Mr. Herszberg again contact you on the 24th September? A. Yes.

Q. What did he tell you on that occasion? A. On that occasion he said that he could probably secure a small place in the city. It had two partners but had gone into liquidation. There was a concrete floor, and sprinklers, which was quite important having in mind that this was the fourth fire. The rent was £20 to £25 per week. They had a small boiler. My note says "Can buy plant, quite suitable, same as Hornsby but on a small scale. Lot of machinery can be bought in Melbourne but transport and time factors involved. Stock figures are ready with Mr. Foxall, his accountant. James Knitwear not yet ready, but should be available soon". 40

Q. Shortly after you had that conversation with Mr. Herszberg did he move into premises on the 1st floor of Mansion House, 182 Elizabeth Street, Sydney?

A. Yes. I was aware of that. I have got a note, 25th October, 1965, when Mr. Herszberg was in touch with me at 4.30 p.m. I have just got it noted, "Marene Knitting Mills, 182 Elizabeth Street, Mansion House".

Q. Are you able to tell his Honour whether those premises in Mansion House, Elizabeth Street, Sydney, were the premises of the business that he had earlier referred to when he told you that there was a small business with two partners but in liquidation? A. Yes, that is so. 10

Q. That was the same business? A. That was the same establishment.

Q. Did you, on the 12th January, 1966, or thereabouts, receive a letter from Mr. Laib Herszberg, dated 11th January, 1966?

(Copy letter from liquidator, Marene Knitting Mills Pty. Limited, to manager, James Knitwear Pty. Limited, dated 13th October, 1965, tendered and without objection marked Exhibit 2.) 20

Q. Have you had any success? A. I cannot recall that letter.

Q. Perhaps if you might have your files for a moment (shown).

(Letter dated 11th January, 1966, addressed to H.W. Swanton and Co. tendered; objected to by Mr. Burchett; admitted and marked Exhibit 3.)

(Documents from Corporate Affairs Commission relating to Fela Knitting Company tendered and without objection marked Exhibit 4.) 30

Q. I have taken the liberty of extracting, whilst the discussion was proceeding, some further letters from your file. If with his Honour's leave I might approach you, did you receive, on or about 2nd February, 1966, a letter on the letterhead of Marene Knitting Mills Pty. Limited, above which was imposed the rubber stamp of Hornsby Knitting, and signed by Mr. L. Herszberg, enclosing a copy of a letter to William Townsend and Sons Pty. Limited of the 2nd February, 1966, of which this other document is the original? A. Yes. 40

(Original letter of 2nd February, 1966, to Mr. Swanton together with original of enclosure to William Townsend & Sons Pty. Limited, of same date tendered; objected to; admitted and marked Exhibit 5.)

Q. Did you, subsequently to February 1966, receive a card relating to the telephone number at which you could make contact with James Knitwear Pty. Limited?

A. Yes, I recall that.

Q. Is that the card you received (shown)? A. Yes.

(Card tendered and without objection marked Exhibit 6.)

Q. Through the rest of 1966 and into 1967 you continued to have discussions with Mr. Herszberg relating to the quantification of the loss of profits insurance?

10

A. Yes.

Q. Did he from time to time write letters to you in regard to that matter? A. Yes.

Q. Would you have a look at the document shown to you? Is that a letter that you received from Mr. Herszberg on or about the date which it bears? A. Yes, that is so.

(Letter signed by Mr. Laib Herszberg, dated 2nd June, 1967, tendered and without objection marked Exhibit 7.)

20

Q. If I might take you back for a moment to the discussion which you had with the Messrs. Herszberg, and of which you made a note on the 7th September, 1965, I would draw your attention to the paragraph beginning, "Our business generally". Do you recollect Mr. Laib Herszberg saying anything about an earlier occasion when there had been a fire in the James Street premises?

A. Yes. He stated that they had lost money for the first year after the last fire, which was in 1961, and they have been gradually picking up since.

30

Q. So that was Mr. Laib Herszberg speaking in the presence of Mr. Myer Herszberg? A. Yes.

Q. In relation to the loss of profits insurance, did you appoint a firm of chartered accountants called Duesbury and Co. to work out the figures for the loss of insurance policy? A. Yes, ultimately.

Q. Was that done by agreement with Mr. Herszberg and his accountant? A. Yes.

Q. His accountant at the time was a Mr. Foxall, who was a partner in a firm, Foxall, Geeves and Willcox? A. Yes.

40

Q. Did Mr. Foxall send to you from time to time



information relating to the business activity that was being carried on subsequently to the September 1965 fire? A. Yes.

Q. That was done in order to enable you to work out what was the appropriate figure for the loss of profits insurance? A. Yes. The saving that had been achieved.

Q. Did he to your knowledge also send direct to Messrs. Duesbury and Co. information relating to the activity carried on? A. Yes.

10

Q. Would you have a look at two letters, firstly one bearing date 5th May, 1967 from Mr. Foxall to you and the other bearing date 2nd November, 1967, from Mr. Foxall directly to Duesbury and Co. Are they letters which related to the business carried on by Mr. Herszberg, and Mrs. Herszberg, following the 1960 fire? (Objected to; question withdrawn.)

Q. First of all dealing with the May letter, did you receive that? A. Yes we received that.

Q. Were there some annexures with it? A. Yes, schedules.

20

Q. Did you forward the annexures to Messrs. Duesbury? A. Yes.

Q. Was that the last that you saw of the annexures?  
A. Yes.

Q. You did not make any copies of them? A. No.

Q. Were these the annexures to the letter of May (shown)? A. Yes. Those are the first three. There were seven in all.

Q. Perhaps if you could assist us, would you have a look at the file produced by Duesbury and Co? Can you see the other four annexures? A. Yes, those are three.

30

Q. Could you take out the other annexures so that we make up the complete letter with the annexures?  
A. They are stapled.

Q. I am afraid you will just have to tear them.  
A. I cannot see the others, but they are the sundry receipts for rent paid and such like. They may have been returned; they may have been required.

40

Q. Could you hand to the officer the letter of May together with such annexures as you have located?  
A. Yes.

MR. ROGERS: I tender the letter from Foxall Geeves and Willcox, of 5th May, 1967, addressed to Messrs. H.W. Swanton and Co., together with four annexures. The first three annexures are headed Hornsby Knitting Co. Pty. Limited, and purport to give turnover figures from 1st July, 1963 to the 31st August 1965 and from 1st September, 1965 to 31st August, 1966, and finally, the orders held. The last annexure is a receipt from a Mr. Les Hughes, who is an electrical contractor. (No objection.) 10

(Abovementioned documents marked Exhibit 8.)

(Further hearing adjourned until 10 a.m. Wednesday 19th November, 1975.)

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

No. 8276 of 1974

CORAM: YELDHAM, J.

MARENE KNITTING MILLS PTY. LIMITED v. GREATER  
PACIFIC GENERAL INSURANCE LIMITED & ANOR.

SECOND DAY: WEDNESDAY, 19TH NOVEMBER, 1975.

MR. BURCHETT: Mr. O'Keefe and I intimated one aspect could be disposed of by consent, and I hand up terms of settlement signed by Mr. O'Keefe and myself. 10

HIS HONOUR: I enter judgment in accordance with paragraph 1 of the terms as between the plaintiff and the second defendant. There will be no order as to costs.

HOWELL WILLIAM SWANTON  
On former oath:

HIS HONOUR: Q. You are still bound by the oath you took yesterday, do you understand? A. Yes.

MR. ROGERS: Q. In connection with your investigations of the 1965 fire you took a number of photographs of the premises involved in the fire, and of the machinery that was involved in the fire, did you not? A. Yes. 20

Q. The first photograph which I show you was taken from the street looking towards the front of the converted dwelling was it not? A. That is so.

Q. There was displayed on the converted dwelling a sign, James Bargain Centre, temporary premises, and painted apparently on the side of the house, and partially hidden, the words Hornsby Knitting Co., is that right? A. Yes. 30

Q. The words Hornsby Knitting Co., can be seen in full on the second photograph which I now show you, can they not? A. Yes.

Q. And as can be seen, the self same sign in what appears to be a parking area? A. Yes.

Q. The photograph which I now show you and which is the fourth photograph in the bundle shows the two storey extension which had been erected towards the rear of the converted dwelling to house the factory area, is that so? A. Yes, that is taken from the rear. 40

Q. As is the next photograph? A. Yes.

Q. There then follow in the bundle a number of photographs showing the extent of the damage to the machinery and the interior of the two storey extension, is that so? A. Not only the two storey extension. That part of the two storey extension that is at the rear of the dwelling.

Q. You indicate a photograph which depicts as well as some burnt out machinery, a gentleman is that so? 10  
A. Yes.

(Eight photographs tendered and marked Exhibit 9  
A to H.)

Q. After the 1973 fire in Melbourne you received a letter from the plaintiff's attorneys, Messrs. Reid & Vesely, did you not? A. Yes.

Q. Have you got that letter in your files? A. I do not think so.

Q. Is that the letter that you received? (Shown.) 20  
A. Yes.

(Abovementioned letter dated 23rd October 1974,  
tendered and marked Exhibit 10.)

Q. To explain that letter, the plaintiff's solicitors were not aware you were acting for Greater Pacific in this matter, and that is why they wrote to you, is that so? A. Yes.

Q. Yesterday afternoon when we were discussing the question of the loss of profits policy, you mentioned that you had received from Messrs. Foxall Geeves & Willcox some correspondence, and that some had been sent direct to Duesbury & Co., the agreed accountants. 30  
A. Yes.

Q. Would you look at the document which is shown to you? A. Yes.

Q. Is that to your knowledge one of the letters sent to Messrs. Duesbury & Co. by Foxall? A. That would be so, but I have not seen that letter. I did not send it on.

(Letter dated 2nd November, 1967 from Foxall Geeves & Willcox to Messrs. F.W. Duesbury & Co., tendered and marked Exhibit 11.) 40

Q. In connection with the assessment of loss of

profits was a balance sheet received in respect of Hornsby Knitting Co. and Fela Knitting Co. for the period ended 30th June, 1966, and is that document a copy of it? (Shown.) A. Once again I think that would have been tendered direct to Duesbury & Co.

(Balance sheet as at 30th June, 1966, in respect of the Hornsby Knitting Co. and the Fela Knitting Co., together with Profit & Loss Accounts for the same period, tendered and marked Exhibit 12.) 10

(Form No. 2 under the regulations to the Trade Marks Act, showing that on 28th October, 1965, James Knitwear Pty. Ltd. applied in respect of articles of clothing for the registration of the trade mark Marene, tendered, and marked Exhibit 13.)

MR. ROGERS: The admissions are set out in two documents which I now hand up and tender.

(Documents containing admissions marked Exhibit 14.) 20

(His Honour stated this document was marked as a tender at this stage subject to the right of Mr. Burchett to have anything deleted or modified, when the information was checked by his instructing solicitor.)

MR. ROGERS: Q. Just to clear up a couple of things which may not be completely clear, the insured under the loss of profits policy, was that the Hornsby Knitting Co. or someone else as well? A. The loss of profits policy was equally divided between two insurance companies, and stood in the name of Laib Herszberg and Fela Herszberg trading as Hornsby Knitting Co. 30

Q. The Fela Knitting Co. had nothing to do with that policy, is that so? A. Their name did not appear there.

Q. In the case of the 1968 fire of which you have spoken, the premises were occupied by the Hornsby Knitting Co., is that right? A. Yes.

Q. In the case of the 1960 fire the situation was the same, was it not? A. Yes. 40

Q

Q. And in the case of the 1961 fire the premises there concerned were occupied by James Knitwear Pty. Ltd.? A. Yes.

Q. In the case of the 1965 fire the premises concerned were 2 James Street, which had been the premises of the Hornsby Knitting Co. and to which it appeared James Knitwear Pty. Ltd., had also moved after the shop had been gutted in the 1961 fire? A. That is right. That was a dual occupancy.

CROSS-EXAMINATION:

MR. BURCHETT: Q. From your observation of the remnants of the stock of James Knitwear it was clear that it was a bargain and toy shop with quite a wide range of stock, wasn't it? A. You are going back to the James Knitwear fire, are you? 10

Q. If you like. You inspected stock, you told us, of James Knitwear on at least two occasions, did you not? Firstly at the time of the fire in 1961? A. Yes.

Q. And again you have told us in relation to the 1965 fire? A. Yes. There was a very big difference in dimensions. Originally in the 1961 fire their range of goods was very much larger than in the 1965 fire. 20

Q. Range or quantity? A. Both.

Q. Let us go back to 1961 for a minute and confining ourselves at the moment to range. James Knitwear appeared to you to deal in toys, did it not? A. I think there were some toys there.

Q. Not some toys. It appeared to deal in toys, didn't it? A. They were primarily knitwear.

Q. It was not at all confined to knitwear then, was it? A. Not entirely. 30

Q. Not at all, I put to you? A. May I have that again?

Q. What I put to you was, not at all. Do you mean to suggest any qualification to that by adding the word "entirely"? A. Only to the extent it was primarily knitted goods, and my impression is that there was a small quantity of toys and other fancy goods.

Q. It also sold coats and trousers, didn't it, which were not knitted goods? A. Most of it I would say was knitted goods. 40

Q. Did it also sell coats and trousers? A. I cannot recollect as far as the 1961 fire is concerned, and I have no papers to refer back to.

Q. Let us come up to the 1965 fire. Would it be a fair description of James Knitwear stock as you observed it to say that it comprised coats, suits, swimming costumes, and only a small proportion of knitted goods? Before you look at your papers. You have been answering some questions from memory. Would you tell me from your memory, would it be a fair description to say of the position in 1965 that James Knitwear stock comprised coats, suits, swimming costumes, and only a small proportion of knitted stock? A. I do not think so, but I can give you the actual character of it. 10

Q. You would or would not think so? A. I would not think so.

Q. Would you have a look at your notes of 7th September, 1965? A. Yes.

Q. Look at Exhibit 1 (shown)? A. This is 3rd September.

Q. Have you your papers with you? A. Yes, I have my file. 20

Q. Look at the notes of 7th September, 1965?  
A. I have those.

Q. What I want to put to you is if you look at your notes of 7th September, 1965 - and my question is just this - have a look at your notes by all means to refresh your memory, and tell me if it would not be a fair description of the stock of James Knitwear, as far as you could gauge it as at 7th September, 1965, that it comprised coats, suits, swimming costumes, and only a small proportion of knitted stock? A. Yes, that is so. That is my note. 30

Q. Would it be a fair description of its business to say, as you understood it, that it purely bought and sold general stocks? A. Yes. I would like, if I may, to answer that precisely, to refer to the salvage statement which outlines exactly what sort of stock they had.

HIS HONOUR: Q. Which salvage statement? A. I have a salvage statement on file.

HIS HONOUR: I think for the purpose of answering that question you should refer to any documents you wish to. 40

WITNESS: This salvage statement - there is quite a lot here. Twelve pairs of trousers. 120 dozen ... (interrupted).

HIS HONOUR: Q. Without reading them all out, look at them and see if you wish to modify or alter the opinion you expressed a moment ago. A. This leads me to my original answer that the goods were primarily knitted goods. Sweaters, cardigans, a large quantity of them, pullovers.

MR. BURCHETT: Q. The question I was asking was would it be a fair description of the nature of James Knitwear business to describe it as purely the buying and selling of general stocks? By all means look at your salvage statements or any other notes, but would you answer that question? A. In the light of that, they are not general stocks. They are restricted stocks of the character mentioned. 10

Q. As at 7th September, 1965, it was certainly your opinion, was it not, that James Knitwear business could be so described? A. This is actually a statement. Those notes are a statement of Mr. Herszberg.

Q. Could you answer my question? It was your opinion that it could be fairly so described, wasn't it? A. In the light of my information, yes. 20

Q. By 7th September, 1965, that information included a careful inspection of the building and of the remains of the stock, is that so? A. Yes, the stock constituted what is in the salvage statement.

Q. But the answer to my question is by 7th September, 1965, your information did include an inspection of the building and of the remains of the stock, is that right? A. Yes. 30

Q. You have referred several times now to a salvage statement in answers to questions I have asked you. May I see what you are referring to? A. Yes.

Q. The salvage statement you have referred to is clearly headed Ex Hornsby Knitting, is it not? A. Yes, but there is an explanation. This was given to me by Mr. Herszberg, that one third of that would be James and two-thirds Hornsby. This would be a third James and two-thirds Hornsby. It was all gathered up in the premises. 40

Q. When you say that, you are referring to certain of the items on the list which have been marked on folio 1 with two pencilled brackets, is that so? A. Yes.

Q. And when you say "James" you are referring to certain items marked with the letter "J" is that right? A. Yes.



Q. And the total of all the items on folio 1 is £1611 and some shillings? A. Yes.

Q. The nature of the material that you inspected indicated to you that on the Hornsby Knitting premises there had been large quantities of cotton, woollen nylon, woollen terylene, about 50/50 cotton and terylene. Does that summarise the conclusion you reached?

A. 50/50 between Hornsby Knitting and James Knitwear.

10

Q. Is that what you meant? Have a look at your same notes, page 2. Just read it to refresh your memory, will you? A. Yes.

Q. On page 2 you have a paragraph in which you discuss certain materials in relation to some theory you apparently had about spontaneous combustion, is that so? A. Yes.

Q. You are talking about the nature of material in that paragraph, not the question of the ownership, aren't you? A. I am referring there to the yarn that was purchased from Vicars who had had a fire previously, and the nature of the yarn, as to whether or not it might give rise to spontaneous combustion.

20

Q. You are not talking about any apportionment of ownership between Hornsby and James in that paragraph, are you? A. No, there was an earlier paragraph on that.

Q. I think you told me a few minutes ago about two-thirds and one-third, not 50/50, concerning the ownership of the items, did you not? A. That was for salvage.

30

Q. Is there anywhere where you refer to 50/50 ownership in relation to any of the goods? A. Mr. Herszberg's statement that stock in the two front rooms of the dwelling, which was used for retail selling, portion would belong to James Knitwear and portion would belong to Hornsby Knitting, possibly 50/50.

Q. That is the two front rooms of the dwelling section? A. Yes.

Q. A very small part of the total buildings?  
A. Yes.

40

Q. And the point that was being made there was that was different from the situation generally, isn't that so? A. That is the only area that James Knitwear occupied.

Q. That is the only area where any of the goods so far as you knew had anything to do with James Knitwear?

A. Yes.

Q. So that any statement about 50/50 in general terms, when talking about this fire, would be quite misleading, wouldn't it? A. Yes. It was only small as far as James was concerned.

Q. Coming back to what I was asking you a moment ago, so far as your examination of the nature of the materials was concerned, and if you like confining your attention for the moment to Hornsby Knitting, it appeared to you that the materials being used involved a substantial use of cotton to start with, is that right? A. I do not think I would know those proportions. 10

Q. I am not asking you what the proportion was, but a substantial proportion appeared to involve the use of cotton, did it not? (Objected to; allowed.)

A. I can quote Mr. Herszberg's statement to me. 20

Q. At the moment I am asking you not to quote statements, but to tell me what you saw? A. It had all gone up in smoke.

Q. It had not all gone up in smoke had it?

A. Most of it. (Objected to; allowed.)

Q. You did make some observations, didn't you? You investigated not merely by taking someone's word, you actually looked at the remnants after the fire and took photographs did you not? A. Yes. The photographs showed very little was left as far as stock was concerned. 30

Q. You are a trained investigator of these things, aren't you? A. Yes.

Q. With experience? A. Yes.

Q. You did look to see what the indications were, as to what had been stored there, is that right?

A. Yes, as far as it could be determined.

Q. And there was some salvage? A. Yes.

Q. Are you able to answer this question? From your observation it was clear a substantial quantity of cotton had been involved in portions of Hornsby Knitting, isn't that so? A. No, I cannot answer that in those terms. There was not enough evidence. 40

Q. Nevertheless, you did ask Mr. Herszberg, and he told you, did he not, there was quite a lot? For instance, he referred to the cotton waste upstairs waiting to be taken away and sold, is that right? (No answer.)

Q. I am on the same page as I referred you to a few minutes ago, that you read a few minutes ago. Is that right? A. Yes, there was quite a lot of cotton waste upstairs waiting to be taken away and sold. 10

Q. And immediately after that, the very next thing that he told you about was that the garments have an inside of cotton and outside of wool, is that right? A. Yes.

Q. And that was descriptive to you of the nature of the garments which he produced, wasn't it? A. Yes, that would be so.

Q. And you accepted that description? A. Yes, but I could not verify it.

Q. You had no doubt about it and expressed no doubt about it, did you? A. I did not have occasion to. 20

Q. And he also told you concerning a particular purchase of yarn, which he told you comprised a lot of cotton, woollen nylon woollen terylene, about 50/50 cotton terylene, is that right? A. Yes.

Q. That was according to what he told you a very large purchase of yarn, wasn't it? A. No, that would not be a large purchase of yarn. It was some salvage from Vicars' fire and I suspected, having handled the Vicars' fire, this might have been wet and caused spontaneous combustion in the Hornsby fire. 30

Q. He told you that seven machines were used on that yarn, did he not? A. Yes.

Q. That sounds like a large purchase, doesn't it? A. I would not conclude that.

Q. Of the total number of machines in the factory, seven would be a substantial proportion, wouldn't it? A. I do not think so. I can quote the machines that were there.

Q. The machines for handling yarn? Were there 20 or 30 in the entire factory? A. Do you want the exact figure? 40

Q. Can you tell us from memory? A. Not from memory.

There would be a lot of machines there. From the records I can tell you what machines were there.

Q. All right, tell us from the records. A. There were flat knitting machines.

HIS HONOUR: Q. Without detailing them all, can you tell us how many machines there were there? A. 30 under that heading. Circular knitting machines, 7. There were rib machines.

MR. BURCHETT: Q. Can I stop you for the moment? Only the circular machines are actually used for producing, aren't they? A. I would say yes. 10

Q. Counting up all the machines in the factory is not an answer to my question about the proportion of the production, is it? A. No, but there are some flat and some circular, according to what they want to produce.

Q. Flat do not produce the garments, do they? It is part of the procedure, but the circular machines produce the garments, don't they? A. The circular machines produce the circular garments, I do not know much about the knitting trade. 20

Q. How many circular machines were there? A. I cannot recognise all the titles, but there would be about 14 or 15. No, there would be more than that. There would be 15 of them, if I have rightly identified them.

Q. Would you go back to your notes on page 2, and tell me if it was not your impression that this purchase of yarn I have been asking you about was a large purchase? A. Well, I cannot see anything in my notes to suggest it was, and my recollection is it was not a particularly large purchase of yarn. 30

Q. To start with, in describing it, the very first words you used in giving a description of what it comprised, were that it comprised a lot of cotton, and you went on to refer to the woollen nylon and so on, did you not? A. Yes, that related to the yarn that was purchased.

Q. If there was a lot of cotton in it, the total purchase was not a small one, was it? A. Having a recollection of the Vicars' fire, there was not a lot of yarn purchased. It was only salvage. 40

Q. Can you explain why you used the expression "a lot of cotton"? A. I think that is Mr. Herzberg's expression.

Q. It was your expression in your notes summarising the position, wasn't it? A. These are notes of an interview, of a conversation, that took place in my office.

Q. None of this in the paragraph I have been asking you about is put in inverted commas or the first person, is it? A. But it is not a verbatim record, as I said yesterday, this conversation went on for a couple of hours. I have a note of that.

10

Q. These notes summarise your impression following both inspection and conversation, and when you do want to put something as being exactly what Mr. Herszberg told you, as distinct from your conclusions, you then used inverted commas, didn't you? A. No, this is just the product of the conversation.

Q. For instance, referring to something Mr. Herszberg told you, on page 3, you say "Loss of profits". Mr. Herszberg would like to get going immediately somewhere else in a small way". Isn't that so? A. Yes.

20

Q. That is summarising what you understand to be his wishes, is it not? A. Yes.

Q. At that moment you are talking to him? A. Yes.

Q. To finish off something I was putting to you some minutes ago, if you would look at the first page of these notes, the whole of the note there, to get things correctly in their context, that related to James Knitwear that I was asking you about, near the top of the first page, do you see that? A. Yes.

Q. You have a heading James Knitwear Pty. Ltd.? A. Yes.

30

Q. You then go on to say "Used to have shop in Pitt Street. However, about December 1964 they moved to Hornsby and operated in the front of the dwelling section, selling from there. However, stock is stored upstairs in main central section as well, which is occupied as a store for finished goods. There was a certain amount of yarn in the storeroom. Stock in the two front rooms of the dwelling section, which was used for retail selling, and portion would belong to James Knitwear and portion to Hornsby Knitting, possibly 50/50. James Knitwear stock comprises coats, suits, swimming costumes, and only a small proportion of knitted stock, which is sold to them by Hornsby Knitting". A. Yes.

40

Q. The words "which is sold to them by Hornsby Knitting" being in brackets? A. Yes.

Q. "James Knitwear purely buying and selling of general stocks"? A. Yes.

Q. That is the whole of your note on that general topic, is it not? A. That is so.

Q. In the conversation that we have been talking about, the same conversation, I put it to you a minute ago that you had noted as a result of your discussion with him, that Mr. Herszberg would like to get going immediately somewhere else in a smaller way, is that right? A. Yes. 10

Q. On subsequent discussions with Mr. Herszberg and over a substantial period, he expressed to you the intention of getting going somewhere else in order to maintain operations, but then moving back to Hornsby and rebuilding the premises at Hornsby, is that right? A. If possible, but it was pretty hopeless at that stage. The Council had already expressed their opinion on the day of the fire.

Q. Repeatedly the intention was expressed of doing that, is that right? A. It was the prime desire. 20

Q. The prime desire? A. Yes.

Q. When you say it was pretty impossible, that was not your opinion at the time, was it? Not at first? A. It did not look optimistic right from the jump.

Q. A detailed quotation was obtained for that purpose, wasn't it? A. That is so.

Q. From expert builders in fire reconstruction? A. Yes, but we do not take the Council's first rejection. 30

Q. But you did not take the Council's first rejection, you got a detailed quotation and proposals and put them up to Council, is that right? A. Yes.

Q. And there were prolonged discussions when Council did indicate a rejection of those plans with Mr. Herszberg's then solicitors is that right, concerning appeal? A. Yes.

Q. And concerning the best way to proceed to ensure that the factory was rebuilt at Hornsby? A. If possible, yes. 40

Q. And Mr. Herszberg told you that operating in the city meant substantially having a new staff, which was not as satisfactory, is that right? A. Yes.

HIS HONOUR: This is all in the correspondence. This is set out clearly in the letters.

MR. BURCHETT: I am putting it both orally and in correspondence. Not only in correspondence.

Q. You had a large number of discussions with him, didn't you? He did not want to move at all, did he?

A. He did not want to move at all, neither did we want him to move, but it was one of those inevitabilities.

10

HIS HONOUR: Q. Did he ever move back to Hornsby?

A. No. We battled from the first day. We had difficulties on previous occasions with the Council.

MR. BURCHETT: Q. You say he did not want to move. You wanted him to move, did you? A. No.

HIS HONOUR: Q. He did not say that. You said he did not want to move at all, and you did not want him to move either, did you not? A. Yes.

MR. BURCHETT: Q. You did not want him to move, and he did not want to move? A. Yes.

20

Q. It was repeatedly made clear to you that as at these latter months of 1965 and the early months of 1966, the purchase of machinery at the premises leased by Marene from the liquidator, and the establishment of operations in those premises, was at that time intended to be temporary, isn't that so? (Objected to; withdrawn.)

Q. The purchase of machinery from the liquidator of Marene, and the going into the premises which had been leased by Marene, was an operation which at all times in the latter part of 1965 and the early months of 1966, Mr. Herszberg made clear to you was intended to be temporary, isn't that so? A. I do not think that factor was actually discussed. We were seeking to re-establish the Hornsby Knitting Company and certain temporary methods would be necessary. This was one. Just where it was likely to lead remained to be seen.

30

Q. You yourself regarded it as a temporary re-establishment development, did you not? A. At that stage, yes.

40

Q. In your own reports to the insurance companies, for which you were acting you yourself used the expression "temporary re-establishment", to describe what was happening, is that right? A. Yes.

MR. BURCHETT: Q. You have no difficulty in accepting that you used that very expression in a report you made for instance on the 29th October, 1965, is that right? Do you need to look at it? A. Who was that report to, please?

Q. You need to look at it, do you, or can you answer from memory, that you used the expression: "temporary establishment"? A. Putting it in a nutshell, all of these moves were, in their initial stages, of a temporary nature, and I was only concerned with twelve months, but at the same time it was contemplated that if we could not get back to Hornsby, some other permanent arrangement would need to be made.

10

Q. Some other permanent arrangement? A. Yes.

Q. Indeed, as late as April of 1966 when you furnished a report, would you agree that you were still thinking in terms of restoration, restoration of the Hornsby situation? A. I think the matter was still going on then, yes.

20

Q. For instance, on the 4th January, 1966, you informed the Helvetia Swiss Fire Insurance Company that the claimant company, by which you were referring to Hornsby Knitting Company - you informed that its temporary address (Marene Knitwear) was Mansion House 182 Elizabeth Street, Sydney, is that right? A. Yes, that is possibly so. I should add there, I think also there was a limited lease and they were not likely to stay there for a lengthy period.

Q. On the 5th December, 1967, would you agree you regarded it as fair to summarise what had occurred up to that date - if you wish you might check what I am putting to you against page 5 of your report of that date? A. Yes.

30

Q. You regarded it as fair, did you not, to summarise what had occurred by saying that immediately following the fire "We conferred" - that is yourself?  
A. Yes.

Q. "At considerable length with Mr. Herszberg concerning ways and means of rehabilitating the business and particularly in view of the circumstances mentioned it was decided that it would be preferable to set up temporarily at another location until such time as the situation at Hornsby clarified itself. This was achieved by the purchase of a small knitting business in the City and it was subsequently necessary to move to another location in the city due to the limitations of the former lease. All of this, however, only assisted to a

40



limited degree. Nevertheless, it achieved a turnover during the period of indemnity of \$80,029 compared with standard turnover of \$235,000"? A. Yes.

Q. Is that a fair summary? A. Yes.

Q. You went on to say: "The claimants have not yet been successful in securing a rebuilding permit at Hornsby in suitable premises. As a consequence, the full period of indemnity was absorbed by the lease". Is that right? A. Yes.

10

Q. When you referred to the turnover difference between \$80,000 and \$235,000-? A. Yes.

Q. - it was clear to you from your investigations that it had not been possible for the Hornsby company to carry on the whole of its previous business in the City. That was clear, wasn't it? A. Yes.

\*Q. The best that could be said was that by carrying on in the City it had either been able to take some of the previous business with it or had been able to replace it with fresh customers and lines, or a combination of both, is that right? A. I was only concerned with the amount of business that Hornsby Knitting Company had entered. On the third, it was regarded as very favourable.

20

Q. You were not concerned with the break-up or with each of the alternatives I put to you, that they in fact applied, but what I am putting to you is that one or other of those alternatives did apply. That was clear to you? A. I am not ---

Q. Would you like it put again? A. Yes, please, if you would.

30

Q. It was clear to you that either it had not been possible to take all the - I am sorry, I withdraw that. (Question marked \* on this page of transcript read.) One or other of those things. A. I cannot answer that. It was Hornsby Knitting Company that was carrying on its business. They had orders to fulfill, and this was the whole purpose that they acquired other premises, and another business, for the purpose of carrying on and fulfilling those orders.

40

Q. You told me a moment ago that you were only concerned with the replacement of the business income?

A. Of turnover, Hornsby Knitting Mills turnover, yes.

Q. Have you any difficulty in agreeing that the

situation was as put to you in that question that was just re-read out?

HIS HONOUR: He said he did not know.

MR. BURCHETT: The point is the question is in the alternative. He said he did not know which alternative. I am putting to him has he any difficulty in knowing what the situation was as there set out. I am seeking to cover all the alternatives.

WITNESS: If I can clarify it, I had no occasion to analyse the sort of turnover. 10

MR. BURCHETT: Q. You were asked in a letter which my friend tendered through you to supply information to the solicitors for the plaintiff in this action, weren't you? A. Yes.

Q. More than a year ago? A. Yes.

Q. You refused to supply any information at all? (Objected to.)

HIS HONOUR: Q. Are you the assessor for the insurance company in this case, Greater Pacific General Insurance? Did you assess the fire in Melbourne? A. No, no connection with it. 20

Q. You can answer that question. Why didn't you answer the letter? A. Why didn't I answer the letter?

MR. BURCHETT: Q. The first thing I am putting is that you did not in fact, supply any information? A. No. Do you want the answer to their letter?

HIS HONOUR: Q. What Mr. Burchett wants to know is why you did not supply the information they wanted. A. I acknowledged their letter of 31st October and I said: "We would advise, however, that some considerable time ago instructions were received and accepted by us from Greater Pacific General Insurance Company in this matter and our files relating to previous fires referred to by you are in their possession. We are consequently not in a position to furnish you with the information requested." 30

MR. BURCHETT: Q. In point of fact, you were assessing the fire we are concerned with in the present action for Greater Pacific, were you? (Objected to; allowed.) 40

Q. Could you just tell us when you were retained by Greater Pacific? A. I would have to check my office records, but the indications are the 29th April, 1974.

Q. Going back to the matter I was asking you a minute ago, you also summarised the situation yet again on 30th March, 1966, didn't you? If you look at the top of page 5? A. Excuse me, is this a report to an insurance company?

Q. You may have a report to National Mutual Fire Insurance Company of that date, 30th March, 1966?

A. A report to National Mutual? May I ask, please, what it is headed?

10

Q. Fire claim, L. & F. Herszberg, trading as Hornsby Knitting Company. A. We have pleasure in submitting what?

Q. Final report? A. In connection with what?

Q. In connection with the claim for machinery and plant. A. Thank you. 30th March, 1966, yes.

Q. Look to page 5. You again on that occasion, as late as 30th March, 1966, referred to the purchase of the Marene assets as "pending restoration". Perhaps I should go back a bit, "Thereby enabling him to get back into the trade again pending restoration of his Hornsby premises and reinstallation of all of the destroyed plant". Is that right? A. That is on page 5?

20

Q. You used that expression on the top of page 5, "pending restoration of his Hornsby premises and reinstallation of all of the destroyed plant", is that right? A. Yes.

Q. Incidentally, you, of course, gave some consideration to the cause of this fire, didn't you?

A. Yes.

30

Q. You came to the conclusion that there was no evidence which would in any way cast any suspicion on the occurrence, is that right? Does that fairly summarise the conclusion you came to? A. No. The cause could not be determined.

Q. The words I put to you were your very own words, weren't they? A. Yes.

Q. Is that right, in reporting to your insurance company clients. A. What are the words you refer to, please?

40

Q. If you would look at page 3, you said: "We would advise, however, that no evidence has come to light which would, in any way, cast any suspicion on the occurrence"? A. Page 3?

Q. Do you doubt you used those words?

HIS HONOUR: Give him a chance to look at it; it is nine years ago. You asked him to.

Q. If you cannot find it, say so. A. I cannot find it for the moment.

MR. BURCHETT: Q. Have a look at the very middle of page 3. A. Yes, that is so.

Q. Those are the very words you used? A. That is so, but that is limited, "No evidence has come to light". 10

Q. Indeed, you expressed the opinion of Mr. and Mrs. Herszberg that they had been very open and straightforward in all your discussions with them and you felt they were genuinely disturbed that a further fire had occurred? A. Yes.

Q. That was the opinion you expressed? A. I have no hesitation on that.

Q. What is more, in the assessment of the loss you expressed the opinion at least in relation to one of these policies that the loss exceeded by many thousands of pounds the sum insured and that where Mr. Herszberg's estimates of value had been checked, they were invariably on the low side rather than exaggerated? A. Yes. 20

Q. Incidentally, in all your dealings with Hornsby Knitting and James Knitwear, the spokesman for those organisations was Mr. Herszberg, Mr. Laib Herszberg? A. Yes.

Q. Is that right? A. Yes. 30

Q. So far as your observations went, all decisions on behalf of either of those were made by Mr. Laib Herszberg? A. Well, they were conveyed to me by him. I had discussions with Mrs. Herszberg but not to any extent. She didn't come into the negotiations, if I could put it that way.

Q. She did not appear to be involved in anything in the way of management decisions? But merely to work in the knitting room, is that right? (Objected to.)

HIS HONOUR: Q. What, if anything, did you see her doing, was she working there? A. Mrs. Herszberg was there most of the time but had very little to say. 40

MR. BURCHETT: I will not seek to press it any further.

RE-EXAMINATION:

MR. ROGERS: Q. You were asked whether it was always Mr. Laib Herszberg who was the spokesman. On the first occasion you visited the premises in connection with the 1965 fire, was Mr. Laib Herszberg there? A. No.

Q. Who did you speak to? A. I spoke to Mr. Myer Herszberg. Furthermore, not to any great extent.

Q. You were asked questions relating to the temporary nature of the occupation of the premises of Mansion House, you remember that? A. Yes. 10

Q. You were asked some question as to whether the purchase of the machinery was of a temporary nature. Was there anything in what Mr. Herszberg said to you to suggest that the machinery he purchased was intended only to be of temporary use? A. I do not think that aspect was discussed. You see, we had made settlement, we had made a progress payment under the plant claim, and the claimant is invariably - it is at his own discretion how he spends the money and what he buys. 20

Q. There was nothing said to you to give you any indication that it was intended to be only for temporary use, that machinery? A. No.

Q. If you could get out for us, please, from your file, the notes of the 7th September, on which you were cross-examined, and the salvage statement? A. Yes.

Q. Would you be good enough? A. Yes. Might I draw attention to the fact that the value of the yarn purchased from Vicars appears in those notes. 30

(Salvage statement being an account by F.R. Strange Pty. Limited dated 21st October, 1965, tendered and without objection marked Exhibit 15.)

Q. You handed to me your report of 7th September, 1965. There is just one matter I should like you to clear up for his Honour. I am drawing your attention to page 2, under the sub-heading "spontaneous combustion". There appears the sentence "comprised a lot of cotton, woollen nylon and woollen terylene, about 50/50 cotton-terylene". Is that 50/50 intended to be descriptive of the yarn, that it is a yarn made up of 50% cotton, 50% terylene? A. Yes. 40

(Report of 7th September, 1965 tendered and without objection marked Exhibit 16.)  
(Witness retired and excused.)

H.W. Swanton, xx, re-x,

BETTY TRAIN

Sworn and examined:

- MR. ROGERS: Q. Is your full name Betty Train? A. Yes.
- Q. You live at 45 Queens Road, Asquith? A. That is right.
- Q. You are a sales assistant now? A. That is right.
- Q. You worked as a sewing machinist for approximately three years for an organisation called the Hornsby Knitting Company, from about 1955? A. Yes.
- Q. Then you worked for the same organisation as a cutter until 1965? A. Yes. 10
- Q. During the ten years or so that you were with that organisation who was the person who appeared to you to be in charge of running the business? A. The whole business?
- Q. Yes, the whole business. A. Mr. Herszberg.
- Q. Did you happen to know Mr. Herszberg's Christian name? A. I don't recall.
- Q. At any rate, was he a young man or an older man? (No objection to leading.) Was it Mr. Laib Herszberg? A. Who? 20
- Q. Mr. Laib Herszberg. A. No, I could not be sure.
- Q. He was an older man? A. Yes.
- Q. So far as you can see, what was the work that he appeared to be doing in the organisation? A. It would have been the business side, orders, and the office side.
- Q. Was Mrs. Herszberg also working in the organisation? A. Yes.
- Q. Every day? A. Yes.
- Q. What was her work? A. More the type of thing you would call a forelady. She sort of had things running smoothly. 30
- Q. I think the position originally, when you went to work there, was that there were some foreladies in the sewing machine section but when they left Mrs. Herszberg filled that position? A. Yes.
- Q. When you went into the cutting room, who was supervising the work there? A. Mrs. Herszberg.

Q. That lasted until you left the business in 1965?  
A. Yes.

Q. After the 1961 fire, there was an extension of two floors in the back of the old house, was there not?  
A. Yes.

Q. I think the weaving machines were on the ground floor, and on the first floor, the cutters and machinists were working? A. That is right.

Q. What sort of product were you producing in that factory? A. Mostly knitwear, men's knitwear, ladies' - 10

Q. I cannot hear you. A. Mostly men's knitwear, ladies' knitwear, a small amount of children's. There was a very small amount of knitted suits, like, ladies' knitwear, but that would be about it.

HIS HONOUR: Q. Was it all knitted goods? A. Yes.

MR. ROGERS: Q. Into these knitted goods, did any cotton go, how was that done? A. There were some lines that had sort of little cotton tops, you know, summer wear. 20

Q. I do not really. Does that mean that it was in association with some knitwear which went on the lower section of the body, and the top was just made out of cotton? A. Yes. Well, it was woven cotton.

Q. Did you weave that on the premises or did it come in a woven form? A. That I wouldn't be sure of, I don't recall.

Q. Do you remember any of the customers of this organisation, who they were? A. I don't know, I only know some of the labels that were put on the garments. 30

Q. What were the garments? A. Fela Knit, James Knitwear; for David Jones, I think.

Q. Probably St. James, was it? A. Yes, and I think we did do a lot for Gowings, but I don't recall exactly.

Q. Any of the sort of larger retailing type chain such as Woolworths or any of those? A. It was either Woolworths or Coles, but I don't remember which one.

Q. I think that you left before there was a fire in 1965? A. Yes. 40

Q. You were no longer working there? A. That is right.

CROSS-EXAMINATION:

MR. BURCHETT: Q. You also had the Gowings' label, is that right? A. Yes. Yes, we had it.

Q. Did you mention D.W. Murray? A. No, I didn't. I don't recall.

Q. Now that I have reminded you of it, do you have any recollection, any faint recollection, there was also a D.W. Murray label? A. Not really, I don't recall.

Q. The James label was St. James? A. Yes, it would have been. 10

Q. In fact, a very large proportion of what was produced there had labels of that kind, St. James, Gowings, and so on? A. Yes.

Q. It was, in fact, the cheaper kind of knitted garments? A. They were made - I would gather they were made under licence for those people. Like, it was their own labels that were being put on it. The David Jones' products looked very good wool.

Q. Some of the other products were much inferior wool? A. Gowings, I think, had cheaper lines, yes. 20

Q. In fact, you referred to cotton tops, but there were also many garments made where the knitting involved cotton on the inside and wool only on the outside, weren't there? A. Well, I would not be sure of that. I know in the wool, some materials were not 100% wool, it was wool and rayon or viscose with it, which you get mixtures these days, and there was then too.

Q. You tend to get some of these mixtures with the cheaper garments? A. Yes. 30

Q. Is that right? A. Yes. They are better-wearing for everyday sort of wear, they wash better, with the viscose.

Q. So they are everyday wear rather than best wear? A. Yes, they were more the Gowings' lines.

Q. Another aspect of cheaper knitted goods is that with the cheaper garments you often got a turned-up edge rather than a self-edge, didn't you? A. Well, it depends on the fashion more at the time.

Q. That was one of the features, wasn't it? A. Yes. 40

Q. That was one of the features during the whole



period that you were working at Hornsby - I do not mean 100% of the garments produced, but it was generally one of the features of the garments produced? A. It would be a percentage, yes.

Q. A high percentage? A. Not necessarily, no. A lot of it would have had the stitched-on basques, some were woven on.

Q. I suggest to you that there were only a very few machines there that were capable of doing the work, is not that right? A. I would not be sure of the machines. There was a lot of ski wear done that had the fair-isle sort of features. 10

Q. You did have to have a special machine to do that, didn't you? A. I would say so. I don't know a great deal about weaving.

Q. I am not trying to flatter you, but it would be fair to say that you were the best cutter during the time you were working there, wouldn't it? A. No.

Q. Would not that be a fair statement? A. No. 20

Q. One of the best cutters? A. There were only two of us.

Q. There were only two cutters when you were there, weren't there? A. Yes. Basically all the time, yes. Machine-cutters and hand-cutters.

Q. Is cutting something that the best tradesmen are involved in? A. I would not say so. Everybody to their own field, really.

Q. What I am suggesting to you is that you have mentioned that you did do some work for David Jones? A. Yes. 30

Q. What I am suggesting to you is that you out of the people working there were the one who tended to in fact be engaged on the more expensive garments rather than on the cheaper ones we have been talking about; your own personal part in the work, would that be right? A. No.

Q. That would not be right? A. No.

Q. So you just did the same as everybody else, is that what you are saying? A. Yes. 40

RE-EXAMINATION:

MR. ROGERS: Q. You have observed that as Mr. Burchett, that is this gentleman over here, was asking you questions, he got some instructions from a gentleman behind him, and he in turn spoke to a gentleman behind him, the gentleman who, if he will forgive my saying so, is wearing a sort of skull-cap. Do you know that gentleman? A. Yes.

Q. Who is it? A. Myer Herzberg.

(Witness retired and excused.)

10

ROBERT BRISBANE CUBBIN

Sworn and examined:

MR. ROGERS: Q. Your full name is Ernest Cubbin?

A. Robert Brisbane Cubbin.

Q. You live at what address? A. 14 Biamare Parade, Cronulla.

Q. What is your present occupation? A. I am an aged pensioner.

Q. You worked as a foreman at 2 James Street, Hornsby and subsequently at Mansion House and yet later on at 68 Campbell Street, Sydney? A. That is correct.

20

Q. You started at 2 James Street in about 1962?

A. Yes. But I used to do a bit of work for the Herzbergs, 1952, 1953, on Sundays. Not every Sunday, just occasionally on Sunday, when he wanted me.

Q. You finally terminated your association at Campbell Street in about 1971? A. That is correct.

Q. What was the work that you did at Hornsby?

A. Mechanical repairs on machines and making the patterns the designs up for the fabrics.

30

Q. What was the work you did at Mansion House?

A. The same.

Q. And at Campbell Street? A. The same.

Q. We know that there was a fire at Hornsby in 1965 after which there was a move to Mansion House.

A. Yes.

Q. Were any machines at all capable of salvage and taken to Mansion House? A. No, they were pretty bad. They did take one, and it took quite a lot of repairing to get it going again.

40

B. Train, re-x, ret'd.

48. R.B. Cubbin, x

Q. So far as the machines at Mansion House were concerned, were they a different type or kind of machine from the ones that had been used at Hornsby or not?

A. No, similar.

Q. There may have been some difference in manufacture or year of production but they did the same work, did they? A. Yes.

Q. Do you know where that machinery in Mansion House came from or not? A. Oh, it was Marene Knitting Mills that went bankrupt. 10

Q. Did some of the machinery come from somewhere else? A. In Mansion House?

Q. In Mansion House, or in Campbell Street? A. In Campbell Street, yes, Mr. Herszberg bought quite a lot of machines from Bruce Pye in Brisbane.

Q. Bruce Pye were not manufacturers? A. Oh yes, they were a manufacturing company, a big company.

Q. Were they new machines? A. No, no, no.

Q. Second-hand? A. Yes. 20

Q. What sort of work did these machines in Mansion House and Campbell Street, do? A. Well, they were a more modern machine, they were an automatic machine. That means it knitted the basque onto the garment, whereas Hornsby, most of them were not automatics.

HIS HONOUR: Q. Did the Mansion House machines go to Campbell Street? A. Yes, yes, all went to Campbell Street.

MR. ROGERS: Q. With the exception that they were automatic, they did the same sort of work? A. Yes. 30

Q. At all three places, was there one person who appeared to handle the office side of the business?

A. Oh, Mr. Herszberg did most of that.

Q. Because we have a multitude of Mr. Herszbergs, do you remember his Christian name? A. Well, I only referred to him as Mr. Herszberg. Louie.

Q. Laib? A. Well, he used to say Louie.

Q. He called himself Louie? A. Yes.

Q. He was an elderly gentleman? A. Yes.

Q. Did you know Mrs. Fela Herszberg? A. Yes.

Q. Did she work in the business? A. Yes.

Q. Did she work in all three places, Hornsby, Mansion House and Campbell Street? A. Yes.

Q. What work did she do? A. She looked after all the manufacturing side of the garments.

Q. Did you see Mr. Myer Herszberg at any of the three establishments? A. I saw him at the three.

Q. Can you remember approximately when it was that you first saw Mr. Myer Herszberg at Hornsby? A. Well, I remembered him from when he was about this high. I just forget how long it was when he worked at Hornsby, it might have been eighteen months, a couple of years, I do not know. 10

Q. What work was he doing at Hornsby? A. He was helping me.

Q. He worked as a mechanic, to all intents and purposes? A. Yes.

Q. And at Mansion House? A. The same. 20

Q. What about at Campbell Street? A. He did a little bit of mechanical work. It was mainly going out travelling.

Q. Did you know any of the other children of Mr. and Mrs. Herszberg? A. I have met them all. Wolfie used to work with me, not Mansion House, at Campbell Street.

Q. That is Wolfie? A. Avie, used to work in the store room at Campbell Street.

Q. Whilst you were at Hornsby, where was the yarn coming from? A. Oh, numerous places. 30

Q. Do you remember any of them? A. Vicars, Cleckheaten. We used to get some from the South Australian Woollen Mills, we used to get some from Davis Coop. That was mainly cotton and cotton mixtures. We used to get a little bit from Crosba Textiles. There might have been others, I just cannot remember which ones they were.

Q. When you moved to Mansion House and later to Campbell Street, was there any difference in the 40

suppliers? A. Yes. We got a lot of our yarn from Morris Woollen Mills in Queensland, up at Ipswich.

Q. Was there any difference in the yarns? A. Well, no. Different thicknesses or qualities and that, but I think it was a bit cheaper than the other companies.

Q. Basically, you say it was much the same, was it?  
A. Oh yes, the same.

Q. What was the production at Hornsby, what were you producing there? A. Men's pullovers and cardigans, boys' pullovers and cardigans and ladies' pullovers and cardigans. 10

Q. When you went to Mansion House, was there any change in the garments? A. Mansion House, when we first went there, was only very small, and we just tried to keep a few of the machines going until we got the other factory and the extra machines, and actually it was - we cut out all the cotton wear, never made any cotton goods at all. We made a few at Mansion House but not at Campbell Street. 20

Q. How long were you at Mansion House, do you remember? If you cannot remember, it does not matter?  
A. Well, from the fire. I think it was, oh, maybe a couple of months after the fire, Mr. Herszberg bought Mansion House.

Q. Well, you went into Mansion House. Would you have any recollection now as to how long you stayed, or cannot you help us on that? A. I am afraid I cannot.

Q. So far as the customers were concerned, do you remember were they the same as at Hornsby or had there been any change in the customers? A. No, I think they had been mainly the same. 30

Q. Do you remember some of the customers that you had both at Hornsby and at Mansion House and Campbell Street? A. David Jones was one, Myers in Melbourne. We made quite a bit of stuff for them in both places. I think we made for Walton's, Farmers, Woolworths - oh, quite a few other places.

Q. Can you help us on this, when the fire occurred at Hornsby, were there any outstanding orders to fulfill? A. We were very busy, had quite a lot of orders. 40

Q. Do you know, were those orders fulfilled after the fire when manufacturing resumed? A. Most of them were not, because we didn't have the plant to do it.

Q. When you started at Mansion House were you supplying the orders from Hornsby or not? A. Yes.

CROSS-EXAMINATION:

MR. BURCHETT: Q. But over the period at Mansion House and then Campbell Street, you did come to supply a very large number of customers that you had not supplied before, did you not? A. No. I do not think so. There could be but I do not know. See, I was only interested in the manufacturing side and the knitting machines so - mainly only knew a few big customers; I did not know the little ones. 10

Q. Really, in answering my friend's questions, you have, to put it fairly, to some extent been guessing because it was not your side of the business? A. No. Well, I knew some. I was introduced to some of the buyers different times.

Q. But you were never concerned with the merchandising or selling side at all? A. No. I had nothing to do with it actually. 20

Q. You were employed, I think, as a head mechanic?  
A. That is right; foreman.

Q. But you did see something of the garments that went through? A. Oh yes.

Q. And you noticed, as you told my friend, that after the departure from Hornsby, the cotton was all cut out? A. Yes.

Q. Did you also notice that there were a substantial number of bowlers' garments manufactured?  
A. There was, yes. 30

Q. And that was a new and a specialty line?  
A. Yes. From Marene. Mansion House we started those.

Q. And, from your general acquaintance with the industry, you knew that Marene had, for many many years, had a big name in bowlers' knitted garments? A. Yes.

Q. You also noticed that when you changed over to the City, and I think you said, particularly when you got to Campbell Street, there were some new machines bought? A. Not new machines.

Q. I am sorry; fresh machines. Machines new to your business? A. Yes. 40

Q. And although they were not new in that sense,

they were newer than the machines that had been used in Hornsby? A. Much more modern.

Q. And one of the features of them was that they were capable of giving you a self-edge? A. Yes.

Q. Which is a feature of more expensive knitwear, as compared to cheaper lines? A. Yes.

Q. In fact, at Hornsby you have had at most three or four such machines? A. About four.

Q. When you had been at Hornsby, you mentioned boys' wear as having been made. There was childrens' wear? 10

A. Yes. Boys and girls.

Q. And ladies wear at Hornsby? A. Yes.

Q. Once you got established in the City there was no more childrens' wear? A. Oh yes, still.

Q. No more ladies wear? A. No. We still made boys wear.

Q. You still made boys' wear, but not young childrens' wear? A. No.

Q. And not ladies wear? A. A little, not much. 20

Q. Very very little? A. There was a certain amount, small amount.

Q. A very marked change as compared to what the position had been at Hornsby? A. Yes.

HIS HONOUR: Q. Were there any signs or notices up on the outside of the Campbell Street premises with names of the business? A. Yes.

Q. What did the signs say? A. Marene Knitting Mills, Manufacturers of Knitwear and bowlers' garments; I think that is what it was, something like that. 30

Q. Were there any others with any other names on them? A. No. Just Marene.

MR. BURCHETT: Q. And that sign specifically referred to knitwear and bowlers' garments? A. Yes.

Q. And, I think you did tell me a few minutes ago, that from your knowledge of the trade you knew that Marene had, for many years, had a big name in bowlers' garments? A. Yes.

Q. And that continued to be, when you moved to the City premises? A. Yes.

Q. A major line with that company? A. It was, yes.

Q. And, apart from the quantity of bowlers' garments produced, they were a fairly high priced line?

A. Well, a good quality garment, yes.

Q. And other garments that were produced in the City also tended to be a high quality garment? A. Better quality than Hornsby.

10

Q. And one of the features of that was that you made a much higher proportion of garments with the company's own name, the Marene Company, on them; is that right? A. Yes.

Q. Whereas at Hornsby a very high proportion of the output had on it the names of various stores; house brands I think it is called in the trade. Is that right? A. Yes.

Q. And you mentioned suppliers of cotton and wool and yarn. Actually there are in this industry only a quite limited number of suppliers, so that --- A. Quite a few.

20

Q. What I am putting to you is that almost all knitwear manufacturers would get their cotton and wool and yarn from the same suppliers, give or take one or two here or there? A. Probably, yes.

HIS HONOUR: Q. Did you receive group certificates each year when you were at Campbell Street? A. Yes. And Hornsby, yes.

Q. Take the ones from Campbell Street. Have you retained those or are they destroyed? A. I have still got them. I still got the ones from Hornsby too.

30

MR. BURCHETT: Q. At Hornsby - the total staff employed at Hornsby in 1965 would have been somewhere around about forty; would that be right? A. I am not too sure. But be around forty, fifty, sixty.

Q. Might be forty, fifty, sixty you say; but it was in that year anyway? A. Yes.

Q. The number of people who were the same, such as yourself, having been at Hornsby were also working in the city at Mansion House or Campbell Street? A. It would be only about three, three or four; about three.

40



HIS HONOUR: Q. How long, approximately, do you think you were at Mansion House? I know you cannot say exactly, but a matter of months or weeks or years?

A. Well, I am not too sure. I will say at least twelve months.

MR. BURCHETT: Q. And you actually finally left in what year? A. '71. March '71.

Q. And you say you have kept your group certificates?

A. Yes.

10

Q. And your group certificates during the period you were working in the City were in the name of Marene?

A. Marene.

Q. And your group certificates, while you were at Hornsby, were in the name of Hornsby Knitting Company?

A. Hornsby Knitting.

Q. Can you remember, was there a transitional period when you first moved to the City when you received any group certificate for any period still in the name of Hornsby Knitting. Do not answer unless you can remember. A. No. I cannot remember. But I have all the group certificates right from the time I started.

20

Q. Where are they? A. At home.

Q. Were you familiar with the actual knitting process; or as a mechanic were you only concerned with the machines? A. The knitting process too.

Q. You had some knowledge of that too? A. Oh yes.

Q. At Hornsby did you make a considerable number of garments which, in the knitting process, had wool on the outside but cotton on the inside? A. Yes. A few of them.

30

Q. Quite a number? A. I think we kept two machines running on them all the time.

Q. And they would be, again, characteristic of the cheaper type? A. Oh yes, the cheapest.

Q. And you also had a number, quite a large number at Hornsby of wool mixes rather than pure wool?

A. Yes. There was some wool mixes.

Q. And at Hornsby there was, in addition to the factory, a shop at the --- A. Yes.

40

Q. Which had a sign or some indication of James

Bargain Centre I think; is that right? A. There was something on the front. I just don't know exactly what it was.

Q. There were sold there toys, for instance?

A. Toys, womens' underwear, childrens' wear - not knitted.

Q. Quite a wide range of --- A. Wide range. Even carpets, combs, back washers, everything had evidentially been bought at auction over a period of time and used to sell them from there. 10

Q. So that the shop dealt with a much wider range than merely the knitted goods? A. Oh yes.

Q. And a high proportion of the stock that you would see on display in that shop was not knitted goods at all? A. There would not be a high proportion because I believe in a fire they had on the corner, they had a big place there and burnt stock and everything, and this was only some of the salvage, like.

Q. What you are saying is that from 1961, was it, onwards? A. '2. 20

Q. The bargain centre did not operate on the same scale that it operated before? A. No. It did not.

Q. Up to 1962 this shop had operated on quite a substantial scale (objected to).

HIS HONOUR: Q. It began about 1962? A. I started working there, yes.

MR. BURCHETT: Q. Had you been there before that, to the premises? A. Oh yes. Around 1952-1953 I used to go up there on Sundays occasionally to work. 30

Q. You started working full time in 1962?

A. 1962, 1st July.

Q. But you have been working part time since 1952; is that right? A. Around about 1952-53, I am not sure.

Q. And coming and going since 1952 you had observed this bargain centre there; is that right? A. No. When I first started there they did not have the bargain centre.

Q. I do not mean from the very beginning; but from the time when it did start? A. I only did the sewing work for a short time. 40

HIS HONOUR: Q. In 1952 and 1953, this is part time work? A. No. Only did it for a short time and the union come up one day and objected to me working Sundays; so I never went up there.

MR. BURCHETT: Q. When did you first see the bargain centre? A. When I started in 1952.

Q. Did they sell milk there at that time? A. No. Not to my knowledge.

Q. At that time they sold toys? A. Well, I think all the toys were destroyed in that fire in the big warehouse it had on the front. 10

Q. You were aware of the fact that there had been toys there which had been destroyed; is that what you say? A. Yes. Mr. Herszberg told me.

RE-EXAMINATION:

MR. ROGERS: Q. From 1962 onwards what you observed of this bargain centre was it mainly knitted goods or mainly something else that was --- A. The mixture of the lots, mixture; knitted goods and other goods. 20

Q. What was it mainly? A. Well, I do not know. I never used to go in there; or very seldom.

Q. After the fire there was a period before you moved into Mansion House? A. Yes.

Q. When you moved into Mansion House, I think you told us earlier some machines were acquired from Marene; is that right? A. Yes.

Q. Were those machines working full time on production or were some machines not working and some working; what was the position? A. Where? In Mansion House? 30

Q. Yes. When you first started? A. There is only a few machines in Mansion House; when we bought the machines from Bruce Pye in Brisbane.

Q. Let us just stop for a moment. When the machines in Mansion House started production, were they making the same sort of goods as has been made at Hornsby, or a different quality of goods? A. The same as Hornsby, plus the bowlers'. 40

Q. Do you say that you started manufacturing the bowling equipment immediately you started at Mansion House? A. Practically immediate, yes. We just carried it on from Marene.

Q. The material that was being manufactured, that was of the same kind as had been made at Hornsby; approximately how many of the machines did that occupy; do you remember? A. There was, I think there was only about seven or eight machines at Mansion House. Well, we started to make at Hornsby and occupied may be three machines, four machines.

Q. Then, did business increase when you moved to Campbell Street? A. Yes. See, we could not get the machines into Mansion House it was so small and we bought the machines up while we were at Mansion House and shifted them while they were converting them to the place in Campbell Street. 10

Q. When you were established in Campbell Street, up to the time that you left, was the business as big as it had been at Hornsby or bigger or smaller? A. Well, that is very hard to say, but I would say it would be a bit bigger if anything than Hornsby.

(Witness retired.) 20

(Mr. Rogers indicated to his Honour that he proposed to tender, from a file number 948 of 1965, from the Equity Office, the following affidavits:

Affidavit of Charles Allen Law sworn 1st October, 1965; Affidavit of Laib Herszberg sworn 24th June, 1966; Affidavit of Charles Allen Law sworn 23rd June, 1966; and Affidavit of Charles Allen Law sworn 28th April, 1966: Admitted without objection and marked together as Exhibit 17.) 30

(Mr. Rogers indicated to his Honour that one of the documents under subpoena, the statutory records and such like of the plaintiff company - that under that subpoena no minute book of the company had ever been produced. There had also been no production of the register of members, register of directors, managers or secretaries and also the plaintiff's minute book or minute books.)

(In reply to the above Mr. Burchett stated that the register of members and minute book were in the one book which had been lost and could not then be found and it was his understanding has still not been found. Mr. Burchett also indicated that Mr. Foxall, who acted as the accountant, at the request of his instructing solicitor, was making searches in such places as he thinks may assist to see if any light can be cast on 40

the documents. Mr. Burchett further indicated he would inform Mr. Rogers when he gets further information.)

(Mr. Rogers then indicated that if a nil return was made to the subpoena in respect of those documents, he would ask that the person searching for them should be available to answer the subpoena and inform his Honour what he had done.)

HIS HONOUR: I think someone should be here to be sworn, on the subpoena, and give formal evidence, and perhaps arrangements should be made for that to be done. 10

(Mr. Rogers indicated that the wages records of the plaintiff for the period since its acquisition by the defendant company had not been produced on discovery and that he would take the view that they are relevant documents. He asked that Mr. Burchett indicate whether or not he wished to discover them or otherwise make them available; and that otherwise he foreshadowed making an application.) 20

HIS HONOUR: Whether they are formally discovered or not, if available I think they should be produced. They are probably relevant.

(In answer Mr. Burchett indicated that they clearly would be producible upon the subpoena duces tecum, but to the best of his recollection in the lengthy and detailed discussion about both sides the extent of discovery, that this had not been raised.)

HIS HONOUR: You might put steps in train to bring those. 30

MR. BURCHETT: I will.

JEFFREY REID-GILTINAN  
Sworn and examined:

MR. ROGERS: Q. Your full name is Jeffrey Reid-Giltinan of 207 Tower Street, Panania? A. Yes.

Q. You are the employee of an insurance company other than Greater Pacific at the present time?

A. Correct.

Q. You are now thirty and you left school when you were fourteen? A. Yes. 40

Q. And you went to British Traders Insurance Co. Ltd. as a clerk in the fire department for about four years? A. Yes.

Q. And in about the third or fourth year of this period you commenced to learn underwriting practice and procedure and you were working in this area when the company amalgamated with Guardian? A. Correct.

Q. After the amalgamation you were transferred to fire endorsement department and you were there for about two years? A. Correct.

Q. You were then transferred to the accident endorsement department and you were there for almost two years? A. Correct. 10

Q. You then went to Advisory Insurance Brokers where you worked in the office placing covers, checking policies and processing claims? A. Correct.

Q. And after about six months there you went to Sydney Mutual Insurance which subsequently became Greater Pacific General Insurance Ltd.? A. Correct.

Q. And you were initially a metropolitan inspector there? A. Yes.

Q. And you arranged for the underwriting of new business, road cover notes, appointed new agents and serviced accounts? A. Correct. 20

Q. You worked in that capacity for about three years and then transferred to a brokers division of that company where you worked under a Mr. Powell?  
A. That is correct.

Q. And, I think, the brokers division really consisted of yourself and Mr. Powell and some typing and secretarial assistance? A. Yes.

Q. Just prior to going to the brokers division you had acted as the manager of the Camden branch of the company to replace a manager who was sick? A. That is correct. 30

Q. And whilst there you worked in every aspect of insurance, once again including the issue of cover-notes? A. That is correct.

Q. As Mr. Powell's assistant you were required to service brokers, inspect properties requiring cover, underwriting new business, issuing cover notes where appropriate and generally assist brokers in the obtaining of new business for your company? A. Correct. 40

Q. Now I think that some little time prior to 31st July, 1973, you received a telephone call from the

office of Gerald Ball and I think it was Mr. Ball who spoke to you? A. Yes.

Q. I do not think this is controversial; I think Mr. Ball said something to you to the effect, "Client of mine wants to send some goods from Sydney to Melbourne and I want to talk to you about Marene transit cover? A. Correct.

Q. You were not acquainted with Marene rates so accordingly you obtained those rates from someone else in the office? A. Yes. 10

Q. And you made a note of the appropriate rates on a foolscap sheet? A. Correct.

Q. And you did that in pencil? A. Yes.

Q. And this foolscap sheet, on which you were writing, was part of a foolscap sheet pad? A. That is right. In a folder.

Q. And you took that folder with you when you went to visit Mr. Gerald Ball's office on the morning of the 31st July? A. Correct. 20

Q. And was anybody with Mr. Ball when you went to his office? A. Yes.

Q. Was that person introduced to you? A. Yes.

Q. What was he introduced as? A. He was a member of the family who owned Marene Knitting Mills.

Q. Was his name given? A. Yes.

Q. What was his name? A. Mr. Myer Herzberg.

Q. Do you see the gentleman whom you met on that occasion in Mr. Ball's office, in Court? A. Yes.

Q. Could you identify him? A. The gentleman in the striped blue suit. 30

Q. In the first row of witnesses' seats. All right. Now, you then had a conversation with Messrs. Ball and Herzberg? A. Correct.

Q. And as the discussion proceeded did you make notes on this selfsame foolscap pad of yours? A. Yes, I did.

Q. Were you writing on this occasion with pencil or otherwise? A. Fountain pen.

Q. Was there anything peculiar or particular about your fountain pen at this time? A. It was not working very properly. The ink was terribly dried up and I had to bring it down to the nib.

Q. Do you still have the notes that you made on that occasion? A. No.

Q. What happened to the notes that you made on that occasion, do you know? A. They were handed to Mr. Johnson or Mr. Powell.

10

Q. Do not necessarily read them; but just have a look at the document shown to you? (Document shown.) Do you recognise it? A. Yes. There is my notes that were taken when I was speaking to Mr. Ball, Mr. Herzberg.

Q. Those notes can be divided more or less into two sections; the pencil ones and the ones in ink; and the pencil ones were the notes that you obtained prior to the conference. The ones in ink you made at the time of the discussion with Mr. Ball and Mr. Herzberg? A. Correct.

20

MR. BURCHETT: Your Honour, it is difficult for me to object or not because I have not seen the document. It was not produced on discovery and I understand ---

MR. ROGERS: I am told it was produced as part of a bundle and it must have been overlooked by my friend's solicitor.

HIS HONOUR: I think it should be shown now to Mr. Burchett. I would not normally regard the fact it is not produced on discovery thereby making it inadmissible. We will not debate whether it was not produced. Would you like to look at it now?

30

MR. ROGERS: Just so that there is no argument about it later on; there is another note I will be using later on purporting to have been prepared by Mr. Powell. I will hand that document to my friend also in case he has not seen it ---

HIS HONOUR: That may be done during the adjournment. If you require further time, Mr. Burchett, you tell me and I will consider it then.

(Luncheon adjournment.)

40

MR. ROGERS: Your Honour, my friend concedes that he in fact did see this document on discovery.

Q. Mr. Reid-Giltinan, I think we had got to a



position before lunch where you told his Honour that as you were talking to Messrs. Ball & Myer Herzberg you made notes? A. Yes.

Q. The document presently in front of you is the document you prepared so far as the pencil writing is concerned prior to the conference, and so far as the ink writing is concerned at the time of the conversation you had with these two gentlemen? A. Yes.

Q. Looking at that document can you tell his Honour what the pencil notes on the document are referable to? 10

A. Marene Transit risks in regard to items of stock, plant and machinery.

Q. The rate to be quoted was .200 per cent. and on plant .175 per cent., with a \$20 excess? A. Yes.

Q. And that was intended to cover fire, theft, pollution of overturned vessels? A. Yes.

Q. With the assistance of the document can you tell his Honour what the conversation was between you and Mr. Ball and Mr. Herzberg, and what notes you made as the conversation proceeded? A. Mr. Ball asked me would I be interested in taking on cover stock, plant, machinery from Sydney to Melbourne. He said the fire and remaining of the account was not yet due for renewal but as this was a pressing worry at the moment with regard to marine risks this was what we were going to talk about. 20

I asked Mr. Herzberg when he would be moving to Melbourne and he said to me that he wasn't sure, but approximately within two weeks of that date, 31st July. I asked him what type of stock it consisted of and he described it as being stock of knitting mills such as wool and raw materials, cardigans and jumpers and that type of stock, and the machinery and plant was also described as normal knitting machinery used in the mills in this type of business. 30

Q. Did he give an estimate as to the value of the stock and plant? A. Yes. I asked him what covers he would be seeking in regard to the stock and plant and he advised \$300,000 on the stock in trade and \$300,000 on plant, machinery. 40

Q. Did you make a note of the fact that it was \$300,000 in respect of both the stock and plant?  
A. Yes.

Q. How did the conversation proceed? A. Then, I asked him how was the move going to be made, how was it

going to take place, was it going by rail, or road. Mr. Herszberg said he was not sure and asked did I have any type of recommendations or suggestions as to how it would take place. I said I didn't have any recommendations because I was not in this type of field or had the experience to tell him who would be able to move such type of plant, machinery or stock, but as long as he went to a well-established company he should be quite safe because they should be doing it in a correct manner. I said, "As regards to suggestions, you would have to make various enquiries if you were going by road, and your machinery and plant would not be covered by mechanical derangement due to vibration of the trucks, loading or unloading of the stock, and the type of packaging you were going to take it by in relation to the vehicles, to be enclosed from bad weather and dust etc. and also if they were going to be in a locked enclosed van or just wire cages on the side of the vehicles".

Q. Did Mr. Herszberg then ask you something in relation to cover? A. Yes. He asked me what would be the procedure in regards to asking for cover. I said, "You would have to contact Mr. Gerald Ball as he is the broker, and advise him when you are going to move, a couple of days beforehand of each shipment, giving him a date the shipment was going to leave Sydney, the sum insured, required for each shipment and what type of stock was going to go if it was stock or plant, machinery, or a combination of both, and the sum insured, and the despatch date".

Q. Did Mr. Herszberg ask you what type of cover would be provided if he sent the material by road?  
A. Yes.

Q. What did you tell him? A. Fire, theft, flood, collision and overturning of the vehicle.

Q. Did you say anything about a rate at which insurance would be charged? A. Yes I discussed a rate of .200% on the stock, and plant machinery. 175.

Q. Did you also give him relevant rates in respect of the plant? A. Yes, .175 on plant, machinery.

Q. On the note that you prepared you have a note about Marene Knitting. Do you remember what was said in relation to that? A. Vaguely that there were other companies involved, and from what I can recall there was a Marene Distributors, or Marene Knitwear. There were subsidiaries.

Q. Incorporating the name "Marene" in their own name? A. Yes.

Q. The address Evans Street was the address given in Victoria by Mr. Herszberg? A. Yes.

Q. And he gave you an estimate that there would be a load for approximately 7 semi-trailers for the plant?  
A. Yes, he would say there was going to be about seven semi-trailers on plant, machinery.

Q. Did the conversation then return to a question of fire and burglary? A. Yes. 10

Q. Who said something about it? A. I asked what was the claims experience like.

Q. Did someone bring the conversation back to fire and burglary first? A. Yes.

Q. What was said? Who said something? A. Mr. Ball.

Q. What did he say? A. He said, "Well, the fire and burglary and remaining of the account was not yet due for renewal but would Greater Pacific like to go on cover now as soon as possible in Sydney". 20

Q. What did you say? A. I said, "No" because with the move coming up within two weeks it would be a waste of time in going out to the Sydney premises, completing fire and burglary surveys, arranging marine insurance to other companies and rating it to the premium and stamp duty applicable to Sydney rates, in other words, doing all the work for two weeks I thought it was not worth all the work involved.

Q. Did you say anything about the situation in Melbourne? A. Yes I advised him that I would be advising the Melbourne office that they would be calling out to make the fire and burglary inspection on the new premises and also to do a rating structure so that we would know what premium to charge and also to advise me if there was any recommendations in regards to fire and burglary. 30

Q. Having said that did you say anything further with regard to fire and burglary? A. I asked Mr. Ball - I asked both parties what was the claims experience like. 40

Q. And who answered you? A. Mr. Ball.

Q. What did he say? A. "We have had no fires or burglaries; we have had the occasional fusion claim

over the last ten years but there is no need to worry on this account as the claims experience is good".

Q. When he told you that did you make a note on your pad to any effect? A. Yes.

Q. What did you write? A. "Claims fire nil; fusion over last ten years".

HIS HONOUR: Q. What was the date of this conversation?

A. 31st July.

MR. ROGERS: Q. Did the conversation then continue with regard to a description of the Melbourne premises?

10

A. Yes.

Q. And you asked if the walls were brick; what the floors were and you were told they were concrete floors and you were given various other descriptions of the building and of the fire fighting equipment available, which you noted? A. Yes.

Q. And you told Mr. Ball and Mr. Herszberg you would arrange for a fire and burglary survey to be carried out by your Melbourne office and obtained the name and address of Mr. Abraham Herszberg, with the particular telephone number at which contact could be made with him so as to arrange for an inspection of the building in Melbourne? A. Yes.

20

Q. And you then enquired as to what sort of cover was required against burglary and were given certain figures? A. Yes.

Q. Which you again noted on the pad you were working on? A. Yes.

(Two sheets of paper containing handwriting of witness on 31st July 1973 tendered, admitted and marked Exhibit 18.)

30

Q. In the midst of the pencil writing is a figure "600,000" in ink at the top of the page. That was a figure written by you during the conference? A. Yes.

Q. You then returned to your company's office and prepared a sheet of paper setting out certain details for the attention of Mr. Powell so that he could write a memorandum to Melbourne setting in train the fire and burglary survey to be made of the premises? A. Yes.

40

Q. And is this what you wrote out on your return to the office? A. Yes, that is what I wrote down.

(Abovementioned sheet of paper tendered -  
objected to by Mr. Voss, tender not pressed -  
rejected.)

Q. The memorandum to Melbourne went off on 1st August, and in the ensuing fortnight Mr. Herszberg did telephone you five or six times I think? A. Around about that number, yes.

Q. And you had discussions with him relating to the transit cover only? A. Yes. 10

Q. Nothing was said about fire, burglary? A. No.

Q. You also on one or two occasions during this period of a fortnight or so spoke to Miss Patterson of Gerald Ball Insurances concerning transit cover, but nothing was said concerning fire or burglary cover?  
A. That is correct.

Q. On Tuesday, 14th August, did you telephone the office of Gerald Ball Insurances? A. Yes.

Q. Who did you speak to? A. I am sure that Mr. Ball was not there as I would have referred to him first, so I then asked for Miss Patterson. 20

Q. Did you succeed in making contact with her?  
A. Yes.

Q. What did you say to her? A. I told her I had received from Melbourne the fire and burglary surveys from our Melbourne branch in which they were advising me that various recommendations were to be done before cover was to take place and I had rung her to find out what the covers were to be on the stock and plant, machinery for fire cover and also to advise her that we were not going on cover as regards burglary until such recommendations from our Melbourne office had been completed. This was in regards to the burglar alarm I think it was. 30

Q. What about fire? A. I asked - I wanted to verify with her what the actual sums insured were required under the cover note on the fire.

Q. You were prepared to go and give cover on the fire? A. Yes.

Q. What did she say? A. She said - she gave me the sums insured for the fire as regards the items of stock and plant, machinery but was concerned I could not go on cover for the burglary and gave me a 'phone number to contact Mr. Herszberg in Melbourne. 40

Q. Mr. Myer Herszberg? A. Yes, I think it was Mr. Myer Herszberg.

Q. You tried to make contact with him in Melbourne and you couldn't and you were given a telephone number in Sydney? A. Yes.

Q. You tried to ring him there and you were unsuccessful in the first instance and in the fullness of time Mr. Myer Herszberg returned your call? A. Yes.

MR. ROGERS: Q. That was at about 4.30 in the afternoon, is that right? A. Yes. 10

Q. What did you and Myer Herszberg say to each other? A. I told him I had spoken to Miss Patterson as regards the fire cover, and she advised me what was to be covered under fire, for stock, the sum insured, and the plant and machinery, also for the sum insured. The public risk and workers compensation were additional, and were not covered, and as regards burglary, it could not go on the cover until the recommendations that were advised by the Melbourne Office were made and these were completed. He was quite concerned having no burglary cover at all, and he asked what was required, and I said "We need some alarms and additional locking devices", and that it would have to be discussed with the gentleman, whoever did the inspections, whoever let him into the building, which was Mr. Abraham, I take it, they would have discussed with him what additional protection was required while being on the actual site with them. 20

Q. There was some discussion about the burglary cover. It was arranged if certain things were possible he would telephone you back, but he did not ring you back and cover for burglary was not given, is that right? A. Yes, he said "What can be done to get cover that night, and I said "If you can, get a security man to be on the premises out of trading hours or the hours no one is there, if we were to give cover, especially at night time. 30

Q. You did not get a further telephone call from Mr. Herszberg, and that was the end of your work that day on this particular account is that correct? 40  
A. That is correct.

Q. Look at Exhibit "A". Look at the top document forming part of Exhibit "A", the cover note. Is that in your handwriting? A. No, it is in a junior clerk's handwriting.

Q. But you signed it? A. That is right.

Q. On the day following, 15th August, you heard that there had been a fire at the premises where the Marene Knitting Mills goods were located, did you not?

A. That is correct.

Q. Subsequently to that, in late August 1973, did you accompany Mr. Powell to the office of Gerald Ball?

A. Yes.

Q. When you and Mr. Powell got there you had a meeting with Mr. Gerald Ball and Miss Patterson, did you not? A. That is right.

10

Q. Did you speak at this meeting at all? A. No.

Q. You were a non-participating attendant, were you? A. That is right.

Q. Did Miss Patterson speak? A. No. The conversation was mainly between Mr. Powell and Mr. Ball.

Q. What do you recollect Mr. Powell saying to Mr. Ball and Mr. Ball saying to Mr. Powell? A. Mr. Powell asked Mr. Ball did he know the full claims history of the Herszberg family.

20

HIS HONOUR: What date is this?

MR. ROGERS: Late August.

Q. What else was said? A. Mr. Ball replied yes, he knew the full particulars. Mr. Powell asked Mr. Ball "Are there any fires we should know about?" Mr. Ball said, "No". Mr. Powell seemed to press it a bit more and said "Are you sure there have been no fires we should know about?" And in a vague sort of way Mr. Ball said "There was one a long, long time ago, and I cannot remember when it was".

30

Apparently it was his father that was running the company then, and was now deceased, and the insured was not in the business, he was just a young teenager. So then Mr. Powell said, "Can we obtain further information on this previous fire?" Mr. Ball said "It will take some time. I do not know how much it was or when it occurred", and this type of thing. He said "We will have to go into it for you".

Q. Then there was some further discussion, was there? A. Yes.

40

Q. Do you remember what else was said?

A. Vaguely there was some conversation about the clause on reinstatement and replacement conditions.

Q. And you do not remember the details? A. No.

HIS HONOUR: Was this policy ever issued, Mr. Rogers?  
It was typed up.

MR. ROGERS: It was typed up but never issued.

Q. Was anything else said at that meeting about a  
proposal? A. Yes.

Q. Who said something? A. Mr. Powell said to  
Mr. Ball "When can we have the complete proposals for  
this account?" and Mr. Ball in some conversation said 10  
"the assured is not here, he is in Melbourne as regards  
to the fire. You will have to wait till he is back in  
Sydney, and when he is back in Sydney I will get him  
into the office to complete the proposals and give them  
to you".

Q. A And you eventually went back to the office of  
Gerald Ball Insurance on the morning of 4th September,  
1973, did you not? A. That is correct.

Q. Up till that point no proposal had been received  
from Gerald Ball Insurance or from anyone else on 20  
behalf of Marene Knitting Mills is that correct?

A. That is correct.

Q

Q. Do you know how you came to be at the office of  
Gerald Ball on this particular day, 4th September?

A. It was arranged by appointment. I do not know  
if Mr. Powell had spoken to Mr. Ball. I was just in-  
structed to call at Gerald Ball's office and pick up  
the proposals for that account.

Q. You have entered the office of Gerald Ball  
Insurance. Where were you shown to? A. I asked for 30  
Mr. Ball, and he was not there, and then I asked for  
Miss Patterson, and she said "I am in here, in Mr.  
Ball's office. Come in". When I walked in there Myer  
Herszberg was in there, and Miss Patterson.

Q. Did Miss Patterson have any document on the  
desk at that time? A. Yes.

Q. Was that a document which was completed so far  
as you could observe or not? A. Yes, it was half  
completed. I would say a quarter of it was completed.

Q. Whilst you were there did Miss Patterson address 40  
any question or questions to you? A. Yes, she came  
across the part where she said "the attachment of the  
risk, when did we go on cover for this particular  
proposal?" I said "What are we completing?" She said,



"The fire proposal". I said "the Marene proposal, the fire one". I said "As per our conversation on the 'phone. What was the date of the cover note there?" She said "The 14th", and I said "That is the date you put down".

Q. Having transacted that part of the conversation did she then go onto another part of the document?

A. Yes, she seemed to complete most of the proposal.

Q. Did she say anything when she came to a particular question in the proposal? A. Yes, there were two questions there in reference to "Have you or any member of your family ever had a claim or have you or any member of your family ever been declined by any other insurance company". 10

Q. Did she say something? A. Yes, she said "We will leave those questions until Mr. Ball is back. He is out but will be back in a couple of minutes. We will leave those".

Q. Did she complete the rest of the proposal? 20

A. Yes.

Q. Did you observe what sort of writing instrument Miss Patterson was using for this purpose? A. I am not sure but I would say it was a blue biro.

Q. Look at the top document out of the documents handed to you. Just confine your attention to the top documents. Do you recognise it? A. Yes.

Q. What document is that? A. This is the fire proposal that was handed to me on 4th September.

Q. Do you recognise so much of the handwriting as appears to be in blue ink? A. Yes, that is Miss Patterson's handwriting. 30

Q. After Miss Patterson completed writing in blue ink so much of the document as she completed, what happened? A. We were then waiting for Mr. Ball to come back, and with that there was a small conversation with Myer Herszberg with regard to him advising me that the previous tenant that was in the building, that he has just leased out to down in Melbourne, had a buyer not very far away, and it was quite a substantial loss. 40

Q. Did Mr. Herszberg then say anything else?

A. Yes, in a round about type of conversation he said the assessor was down there and was looking around, and I said yes. He said, "The assessor asked me about previous claims". He said, "I can recollect something

about a fire with my father about 10 years ago. Would you have records to this effect that you would be able to trace?" I said, "No, it is very unlikely this type of record would be kept". It was not more or less a direct question to me.

Q. He said to you what you have just stated to his Honour, did he? A. Yes.

Q. I think you and Miss Patterson then left Mr. Herszberg in Mr. Gerald Ball's office and went to the main office to talk about other matters that are irrelevant to the present issue of this case, and Mr. Herszberg stayed in Mr. Ball's office? A. Yes. 10

Q. Sometime later Mr. Ball arrived on the scene and went into his office, and what did you see happen next?  
A. After about 10 or 15 minutes later Mr. Herszberg left Gerald Ball's office and Mr. Ball came out with the fire proposal and handed it to Miss Patterson and asked her to take a photostat copy for their records, and then it was handed to me, the fire proposal. 20

Q. Did you notice anything about the proposal which was handed to you that was in any way different from the way the proposal form appeared to you when you were in Gerald Ball's office earlier? A. Yes the questions that I was interested in were completed in black biro.

Q. Do you know the handwriting in which the black biro material appears? A. No.

Q. Did you, having observed that, speak to anybody?  
A. Yes, I referred to the questions that were answered in black biro in the course of obtaining more information. 30

Q. Who did you speak to? A. I spoke to both Miss Patterson and Mr. Gerald Ball.

Q. What did you say to those two persons? A. I asked them did they know the approximate cost of how much the claim was mentioned here, and neither party said they did. They said they did not know. I said, "Have any of the insurances ever been cancelled?" Miss Patterson then said, "No, there was no need to because there was no more cover required. There was nothing to cover. They were cancelled. They lapsed out of the records". 40

Q. You took the original proposal form with you and took it back to the office and gave it to Mr. Powell or Mr. Johnson, did you not? A. That is correct.

Q. Mr. Johnson was at that time occupying what position with Greater Pacific? A. State manager for New South Wales.

Q. In your hand you have the proposal form together with some attachments. Were those attachments with the document when it was handed to you? A. Yes.

Q. Were they already attached when the document was in Gerald Ball's office? A. No, I do not recall actually sighting those in Mr. Ball's office. 10

Q. However, they were attached to the proposal form when it was finally handed to you and you departed from the office? A. That is right.

(Proposal form dated 4th September, 1973, tendered and marked Exhibit 19.)

CROSS-EXAMINATION:

MR. BURCHETT: Q. After you got that proposal form there was quite a considerable amount of correspondence that went backwards and forwards between Gerald Ball's office and your insurance company's office was there not? --- 20

MR. ROGERS: I will be calling Mr. Powell who handled that aspect.

MR. BURCHETT: Q. You are aware of that, aren't you? It was within your knowledge there was a considerable amount of correspondence which passed between Gerald Ball's office and the insurance company between 4th September and up to some time in December, isn't that so? A. Yes, but I would not have seen it.

Q. Did you not see it at all? A. Only if I made my own inquiries. It went to the claims manager, or Mr. Powell or Mr. Johnson. 30

Q. You told us you and Mr. Powell formed something like a two-man department, did you not? A. I was his offsider.

Q. And Mr. Powell was actively handling that correspondence? A. I would say Mr. Powell and Mr. Johnson were in combination more than I was with Mr. Powell.

Q. Was the matter one of any interest to you at all? A. Yes, it was. 40

Q. You were aware that the correspondence and also oral discussions debated questions of whether the cover

was for reinstatement or not, isn't that so? A. Yes, it was reinstatement as regards a meeting that Mr. Powell and myself had when we went to Mr. Ball's office.

Q. And you are aware Mr. Ball's office indicated considerable concern at the suggestion that you were not giving reinstatement cover, are you not? A. That is right.

Q. And you are aware that right through the period of the latter part of 1973, there was no suggestion made either by letter or orally from the insurance company that there was no material non-disclosure involved? A. That is right. 10

Q. And of course in the latter part of 1973, you were well aware of the fact that there had been a fire at Hornsby which had involved a company managed by the deceased's father of Mr. Myer Herszberg? (Objected to.)

Q. You had read yourself on 4th September the answer to the question couched in terms "Has husband/wife or anyone interested in this insurance ever had any property damaged or destroyed by any of the contingencies to be insured against, and if so, state" hadn't you? Do you remember that? A. Yes. 20

Q. You had read opposite that the words "Father. Deceased. Date approximately ten years ago. Amount unknown. Address 2 James Street, Hornsby. Insurance company unknown". Do you remember that? A. Yes.

Q. You had read the comment underneath it "I seem to remember the policies were cancelled after this fire", had you not? A. That is correct. 30

Q. Had you by the end of the year 1973 any further details in your possession concerning that fire referred to in that answer? A. No, all I obtained was information ... (interrupted).

Q. The answer is no, you had no further details in your possession at all? A. That is right.

Q. On the basis of the information that you did have, you did not feel that there was any reason to do other than assure Mr. Ball that the policy would issue. (Objected to.) 40

HIS HONOUR: Q. Did you assure him the policy would issue? A. All I wanted was the policy.

Q. Did you assure him the policy would issue?  
A. No, I did not assure him of anything. No.

MR. BURCHETT: Q. But you were aware that assurance was given on behalf of your company, weren't you?

A. No. (Objected to.)

Q. What is the position in this office of yours with Mr. Powell? Do you share the office? A. No, Mr. Powell has his own manager's office, or did have, and I was located in another office outside his office.

Q. Did you discuss your work at all? A. No, I was just allocated some brokers, and he also handled the major brokers, and we worked on different accounts. Sometimes we would work on one account together. Mainly we were working separately because I also had to supply figures besides his. 10

Q. You had been allocated some tasks in connection with this particular matter, had you not? You have told us about some, is that right? A. What tasks?

Q. You have told us about the fact you were the person who went up to get the proposal form from Gerald Ball's office, have you not? A. Only at Mr. Powell's or Mr. Johnson's request. 20

Q. That is what I put to you, you were allocated some tasks in connection with this, and you had also been present at conversations prior to the issue of the cover note, and had signed the cover note yourself?

A. That is right.

Q. So this was not just any matter in the office?

A. No.

Q. It was a matter you personally had some connection with? A. That is correct. 30

Q. What I am putting to you is this, did you not discuss the progress of the matter with Mr. Powell after 4th September, 1973? A. No, I did not.

Q. Not at all? A. In a minor conversation, yes, but not in a major conversation.

Q. I am not asking you whether the conversations were major or minor but you did discuss the progress of the matter with Mr. Powell, would that be right?

A. Yes.

Q. And you were presently well aware from that discussion, were you not, that assurances had been given of more than one occasion to Gerald Ball that a policy would issue? A. No. (Objected to.) 40

Q. Were you informed by Mr. Powell that Mr. Ball's office had been told the policy would issue? (Allowed.)

A. No, I did not assure him of that. I did not know the proposal was going to be accepted.

Q. Do you say you were unaware of any statement emanating from the insurance company office to the effect the policy would be issued? (Objected to; allowed.)

A. That is correct, I was unaware.

Q. I beg your pardon? A. I was not aware of any statement. 10

Q. Look at this document and tell me if this is the first time you have seen that. Is that the first time you have seen that? A. Yes.

Q. Are you telling his Honour prior to seeing that you were quite unaware of its contents? A. That is right.

Q. Do you see on it a signature? A. Yes.

Q. Is that signature known to you? A. Yes.

Q. Whose signature is it? A. Mr. Powell's. 20

Q. Are you telling his Honour Mr. Powell at no time communicated to you the fact he had given an intimation in the terms of that letter, or similar terms? A. No.

HIS HONOUR: Q. You are saying no, that he did not tell you anything about this, are you? A. He did not tell me.

Q. What is the date of that letter? A. 9th November.

MR. BURCHETT: Q. The letter uses the very word I used to you a moment ago, the word "assurance", doesn't it? 30

A. An assurance that the policy will be issued.

Q. Had you told Mr. Powell by 9th November of the proposal form you had seen in Mr. Ball's office? A. I thought I had brought it back from Mr. Ball's office. I am sure I had brought it back from Mr. Ball's office.

Q. You are sure you had brought it back with you?

A. That is right.

Q. In your experience as an underwriter, it was your understanding that a fire some ten years before, if it occurred at a time when the business was managed and controlled by the deceased father of Myer Herzberg, 40

was not in fact relevant to the question of insurance on behalf of the company now managed by Myer Herszberg, is not that so? A. No, I think as an underwriter I am interested in all fires, no matter if it is a subsidiary company that has been abolished from the group or any type of fire or claim, or any major claim, a liability claim or public risk claim, as an underwriter I am always interested.

Q. Do you say that was the attitude of your company? 10  
A. Yes.

Q. If that was the attitude of your company, can you explain on the basis of the facts you have told us about in evidence today, how a letter such as that could be written after the proposal form of 4th September had been brought back by you? (Objected to; rejected.)

(Abovementioned letter m.f.i. 1.)

Q. When you saw that proposal form of 4th September, that was not the first occasion that you had heard of a fire in which Mr. Herszberg's father was involved, was it? A. That is correct. 20

Q. You had previously heard of that? A. Yes.

Q. From Miss Patterson, hadn't you? A. No.

HIS HONOUR: Q. Who had you heard it from? A. Mr. Ball.

MR. BURCHETT: Q. I suggest to you that prior to the issue of the cover note Miss Patterson had told you that there had been a fire involving Hornsby Knitting Mills which had been managed by Mr. Herszberg's deceased father. A. No. 30

Q. Do you remember saying to Miss Patterson something to the effect "If that is another company that is no concern to us"? A. No.

Q. You mentioned Mr. Gerald Ball. You say he had informed you something about this matter. When did he inform you? A. The first I heard of this fire was when I was with Mr. Powell in his office about the 28th or 29th of August. That was the first I had ever heard of the fire.

HIS HONOUR: Q. This is after the fire took place in Melbourne? A. That is right. 40

MR. BURCHETT: Q. You say that was in Mr. Powell's office, do you? A. I was with Mr. Powell and Miss Patterson and Mr. Ball in Mr. Gerald Ball's office.

Q. Who first mentioned it on that occasion?

A. Mr. Ball.

Q. What did he say? A. Mr. Powell asked Mr. Ball did Greater Pacific know the full claims history of the Herszberg family. Mr. Ball answered "Yes". Mr. Powell asked "Are you sure there are no other fires or burglaries?" Mr. Ball said, "Well, there was a fire with his father a long time ago, but I do not remember how long ago or what the actual case was. I do remember that his father has had a claim some time ago". Mr. Powell came back and said "Would you know how much?" Mr. Ball came back and answered he would have to take some time in checking some records and finding out when the date of loss was and all this type of thing.

10

Q. Do you say that was the very first occasion you had heard from anyone anything about a prior fire?

A. No.

Q. When was the first occasion? A. In the office from a Mr. Wilkinson, our claims manager.

20

Q. When did you hear of it from Mr. Wilkinson?

A. I do not remember the date.

HIS HONOUR: Q. Was it before or after the fire?

A. After the fire.

Q. After the Melbourne fire? A. Yes.

MR. BURCHETT: Q. How long after? A. I do not know. It was just that when I asked had we heard anything from the assessor, and apparently there was some information there was another fire, I do not know the amount or when it was, he was not very helpful with what information he had, he just advised me of that.

30

Q. If you had never heard of it before that you would have been rather interested, wouldn't you? A. I was interested, and I asked questions of him, but he said, "I am in the dark on the matter, I do not know much about it. I have just heard there has been a fire and we are checking to see when it was and how much it was". He said, "Don't ask me any more. I do not know". I just left it at that.

Q. You left it at that? A. Yes.

40

Q. You are not able now to tell us when that was, are you? A. Yes. I cannot precisely remember, but I would say not very long after we received the assessor's report, because I was keen to read his report and see what he said. I was interested to see how the fire



started and this sort of thing, and I was interested to read the report.

HIS HONOUR: Q. Did you have any duties on the claims side in relation to fires? A. No.

Q. You were in the brokers branch, were you?

A. That is right.

MR. BURCHETT: Q. You are not suggesting that Mr. Ball was concealing anything from you, are you? (Objected to.)

10

HIS HONOUR: Q. You have no reason to believe Mr. Ball was concealing anything from you, did you? A. No.

MR. BURCHETT: Q. The fact of the matter is your company continued to write insurance using Mr. Ball as a broker, is it not? A. Yes, on other accounts.

Q. Indeed, although this cover note in this particular case was signed by you personally at this time, your company had left and continued to leave in Mr. Ball's office a cover note book, had it not? (Objected to.)

20

HIS HONOUR: Q. Did he have a cover note book of yours? A. I do not know. If it was allocated to him no doubt it was there.

MR. BURCHETT: Q. You do not doubt it, do you?

A. No. They still have our cover note books.

Q. You have told us of a conversation you had with Mr. Ball prior to the cover note issuing when you discussed fire cover. I want to suggest to you you also had a conversation with Miss Patterson prior to the cover note issuing in relation to fire cover. Is that not so? A. That is correct.

30

Q. When did you have the conversation with Miss Patterson? A. On the 14th.

HIS HONOUR: Q. August? A. August.

MR. BURCHETT: Q. I suggest to you you had a conversation with her earlier than that. You had spoken to Miss Patterson concerning fire cover for Marene Knitting prior to the very day of the cover note, hadn't you?

A. No, I cannot recollect speaking to Miss Patterson on the fire side. I only rang her to confirm covers.

40

Q. During the middle of 1973, you were quite frequently in Gerald Ball's office in connection with your work, weren't you? A. That is correct.

Q. And they were acting as brokers in transacting insurance for Greater Pacific in a considerable number of transactions? A. That is correct.

Q. And you were commonly dealing with Miss Patterson? A. Yes.

Q. And in relation to the affairs of Marene you had a number of conversations because there were a number of insurances involved, isn't that so? A. No, I do not recall this in regard to Marene with Miss Patterson at all. 10

Q. Are you suggesting you did not have conversations with Miss Patterson about the insurance for Marene but you did about other insurance? Is that what you say? A. No. All I talked about with Miss Patterson, on what I can recall of Marene, was the actual Marene transit list.

Q. Did you have a number of conversations with her in relation to the Marene transit list? A. I think Mr. Ball first requested the first Marene transit cover note, and I think that Miss Patterson may have requested one or two, and then the remaining cover notes were issued by the request of the insurers. 20

Q. Did you have another one or two conversations with Miss Patterson concerning the transit covers? A. That is right.

Q. Did you in the course of those conversations, or one of them have a conversation prior to the 14th with Miss Patterson on the subject of also covering Marene for fire? A. No, I cannot recollect that conversation at all. 30

Q. Would you deny that you had such a conversation? A. No, I would not deny it, but I cannot recall that topic.

Q. I suggest to you that prior to the 14th Miss Patterson had told you that the father of Myer Herzberg, who managed Hornsby Knitting Co. had had a fire, and that you told her that was a different company.

A. No, I do not recall that conversation at all.

Q. Would you deny that you had such a conversation? A. No, I would not deny it, because - I just would not deny it. 40

Q. You would not deny it? A. I cannot recollect it. I cannot recollect speaking to her on that particular matter.

Q. The notes you have produced and which are now Exhibit 18, would you have a look at those for a moment?  
A. Yes.

MR. BURCHETT: Q. (Shown Exhibit 18). A. Yes.

Q. I suggest to you that those notes do not, if you will look at the last two lines again carefully, contain a denial of any prior fires but assert "Claims Fires nil - Over last ten years", is that right?

A. "Fusion Over last 10 years".

10

Q. Would you look at those notes again? There is Fusion has a capital "F" and then the line ceases although there is plenty of room to the right-hand side of the word "Fusion", is that right? A. That is right.

Q. You come down to a new line and you have put a capital "O", haven't you? A. Yes.

Q. It is simply not correct to read that as one continuous sentence "Fusion over last 10 years", is it? (Objected to; disallowed.)

Q. These are your notes? A. That is correct.

20

Q. May we judge of your manner of recording things by the manner in which you have recorded other notes on the same sheet of paper? Is that right? A. That is correct.

Q. Where you were dealing with more or less the same subject matter in a number of places on this sheet of paper you have continued a line on well over towards the right-hand margin of the paper, haven't you?

A. That is correct.

Q. In this particular case you have written "Claims Fires nil". Then you have written the word "Fusion" with a capital "F" and then you have broken off the line altogether and written underneath that expression with a capital "O", "Over last ten years". What I am asking you is isn't it correct to read the words "Over last ten years" as referring back to "Claims Fires nil"? (Objected to.)

30

HIS HONOUR: Q. What did you write that to be read as?  
A. I wrote that to be read "Claims fires nil" and "Fusion over last ten years". I have not completed the line from "Fusion over last ten years" - I was writing without a desk in front of me, and when I was writing on the top of the page as regards to "stock" etc., I had more or less, as I said, a board which holds this pad in there. I could rest my arm. But when I was

40

getting to the bottom of the page, then I was starting to rest my hand only on my knee and I didn't have anything to rest my "armpit" on at all. That is why I just didn't write out - that is why I have come back underneath there with the three lines.

Q. What does "Fusion over last ten years" mean as a note, as your note? A. They were the claims disclosed to me by Mr. Ball as regards to - that is the claims that have happened, the actual burning-out of a motor, whereby there were - it could be \$400 or \$500 claims.

10

(Document handed to his Honour and Mr. Rogers.)

Q. Do you know when this policy was in fact typed up in the insurance company's office? A. No, I don't.

Q. Are you able to place any limitation on a date before or after which it would have been? A. No, I don't.

Q. So you have no idea at all? A. No.

Q. Did you have a conversation with Miss Patterson the day before you signed the cover note? A. On the 14th?

20

Q. The day before. A. The 13th?

Q. Yes. A. No, I do not recollect the 13th.

Q. When I say the day before, did you deliver the cover note the same day you signed it? A. I don't know if I ever delivered the cover note, to be quite honest with you.

Q. I suggest to you that the day before the cover note was delivered you had a conversation with Miss Patterson at which you asked her the question: "Are you going to give me the fire insurance on the factory in Melbourne?" and she said: "Of course". Do you remember a conversation like that? A. No, I don't.

30

Q. You were interested in new business? A. Always interested in new business.

Q. You would not deny that you may have said something like that to Miss Patterson, or would you?

A. I would only be referring to, say, the building in that case, because as previously discussed, I wanted to - Mr. Ball had offered me the fire on the stock and plant etc., so I might have been enquiring as to the building insurance.

40

Q. Did you say to her: "We had better issue a cover note straight away" or anything like that, to Miss Patterson? A. Can I just get what date we are talking on, please?

Q. Yes. I am suggesting to you the day before the cover note was delivered? A. I don't know what day that was. I would not know what date we are talking about there. It could have been delivered a couple of days after ---

10

Q. So there is an area of uncertainty there, whether it was delivered the day it is dated or not. At about that time, then, do you remember saying to Miss Patterson: "We had better issue a cover note straight away"? A. No.

Q. On the occasion that you have told us about, when you called with Mr. Powell, after the fire, do you remember Miss Patterson saying in your presence to Mr. Powell, concerning the Hornsby Knitting Company fire, "I told Mr. Giltinan and he said that it was not important as it did not relate to Marene Knitting". A. No, I do not recall those words at all.

20

Q. I suggest to you that those words were spoken and that you said nothing. Would you deny that? A. I would not deny it; I cannot recall it.

Q. Do you remember Mr. Powell saying: "Let Mr. Herszberg complete the proposal form and we will see what he says"? A. No.

Q. Do you remember Mr. Powell saying, "This business has been with the National and General for the past eight years, don't you think we could throw the claim back to them?" A. No.

30

Q. Do you remember him saying anything like that? A. No.

Q. Would you deny that he said something like that? A. I would not deny it, but I would be quite certain that he would not say anything like that.

Q. It is the fact that you left the talking to Mr. Powell, is that right? A. Under his instructions, before I went down, yes.

40

Q. Was there some difficulty so far as you were concerned between you and Mr. Powell over the fact that you had signed this cover note? A. No, no. Mr. Johnson seemed to speak to Mr. Powell. I was there, but speak to Mr. Powell, to put the responsibility onto him in regards to asking further questions.

Q. At any rate, you were under instructions to leave the talking to Mr. Powell? A. Oh, well, yes.

Q. In fact, after the 4th September, you are telling us you did leave everything to Mr. Powell so far as all the future correspondence and conversations with Gerald Ball were concerned? A. So far as I can recall, yes.

Q. You were in the broker's division of the insurance company? A. That is correct.

Q. One of the brokers that that division dealt with was Gerald Ball? A. That is correct. 10

Q. Was Gerald Ball's office primarily your responsibility in the division of labour in the brokers' division? A. It was a combination of Mr. Powell's and my own. Mainly, if Miss Patterson had something - if an account was rather small, if Mr. Ball wanted someone to talk to, the account, it was either Mr. Powell, or if he could not make it, it might have been myself. Mr. Ball went to Mr. Powell, and Miss Patterson came to me. 20

Q. So that normally Miss Patterson came to you, is that what you are saying? A. That is right.

RE-EXAMINATION:

MR. ROGERS: Q. You were asked by Mr. Burchett whether you would deny that Miss Patterson may have told you prior to the fire that Mr. Herzberg's father had had a small fire. Do you remember being asked that question? A. Yes, I do remember.

Q. If Miss Patterson had, prior to the issue of the cover note, said that Mr. Herzberg's father had suffered a fire, what would you have done? A. I would have asked for more information as regards to approximate loss, the amount of the loss, when it occurred, and just generally did the insurance company pay on the loss and who was the insurance company that had the loss. I think I mentioned the date it was, and if the company was still going, and what happened, you know. 30

Q. Did you, before the fire, ask any questions of the kind which you have just described to his Honour? A. No. 40

Q. In the light of the fact that you did not ask these questions, to your recollection, did Miss Patterson say anything to you of the kind put to you by Mr. Burchett? (Objected to; question not pressed.)

Q. What do you understand by the question: "Would you deny", something or other? What do you think that is - (his Honour stated that he gained no assistance from a witness being asked whether he would deny something when he had already given evidence that he could not remember).

Q. Although you were under instructions to keep quiet and leave the conversation to Mr. Powell ---?

A. Yes.

10

Q. --- on the occasion of the visit late in August, had Miss Patterson said, or Mr. Ball, something to the effect that they or either of them, had previously to the fire, told you of a fire suffered by Mr. Herszberg's father, would you have done anything? A. Yes, I would have asked further questions.

Q. In fact, on this occasion, when you were there with Mr. Powell, did you open your mouth, apart from saying "Good day"? A. No.

(Witness retired.)

20

(Counsel discussed with his Honour the claim of privilege in respect of the documents produced by Mr. Bryce-Jones.)

MR. BURCHETT: I am prepared to tender the photostat, and I would be prepared to admit that a counterpart of that document did have affixed to it the seal of Fela Investments Pty. Limited.

(Deed dated 29th June, 1966, between Hughes and Buckley and the plaintiff and Mr. Law and Fela Investments Pty. Limited, marked Exhibit 20.)

30

(Further hearing adjourned until 9.45 a.m. on Thursday, 20th November, 1975.)

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

No. 8276 of 1974

CORAM: YELDHAM, J.

MARENE KNITTING MILLS PTY. LIMITED v. GREATER  
PACIFIC GENERAL INSURANCE LIMITED & ANOR.

THIRD DAY: THURSDAY, 20TH NOVEMBER, 1975

CHARLES JAMES FOXALL  
Sworn to answer:

10

MR. ROGERS: Q. What is your full name? A. Charles James Foxall.

Q. What is your address? A. 163 Clarence Street, Sydney.

Q. What is your occupation? A. Chartered Accountant.

Q. You have from at least 1953 acted as the financial - I am sorry, you have been served with a subpoena yourself for the production of documents?

20

A. That is true.

Q. You have not produced any documents in answer to that subpoena? A. Yes, some records in connection with James Knitwear Pty. Ltd.

Q. You are also answering the subpoena that was served on Marene Knitting Mills Pty. Ltd? A. I don't know whether I am. I presume I am.

Q. That is not very satisfactory. You think you are? A. Yes.

Q. Have you sought to procure for the production in this court the minute book of that company? A. I have.

30

Q. Have you ever seen the minute book of that company? A. I have seen a minute book of that company. There was a minute book I understand in existence when the Company went into liquidation in 1965. I have never seen that minute book. I prepared, after Fela Investments Pty. Ltd. acquired the shares, another minute book in which minutes have been written up until at least 1972.

Q. Did you prepare the minute book for the period

40



from 1966 and subsequently in your capacity as an officer of the company? A. Yes.

Q. What position did you occupy? A. I was the auditor of the company.

Q. When did you last see that book? A. I think approximately 1971.

Q. Where did you see it? A. At the offices of the company in Campbell Street.

Q. In whose possession did you see the book? 10  
A. Mr. Herszberg senior produced it at that stage.

Q. Did you continue as auditor of the company?  
A. Yes.

Q. As auditor did you check on whether statutory records were kept? A. Up to 1972, yes.

Q. In checking whether statutory records were kept, did you see the minute book up to and including 1972? A. I cannot remember in respect of 1972.

Q. What is the registered office of the company? 20  
A. 68 Campbell Street, Sydney, I think.

Q. Did you make a search for the minute book?  
A. Yes, I have made a search.

Q. Where did you search? A. I searched at 68 Campbell Street prior to the company moving to Melbourne, and then I made a search last Christmas time through the company's office in Melbourne.

Q. In fact on the 19th July, 1974, according to the records kept by the Corporate Affairs Commission, the registered office was changed to the plaintiff's present solicitors at Bondi. Did you make any search there? A. No. 30

Q. Did you make any inquiries as to whether the minute book might be there? A. No.

Q. Did you make any inquiries as to whether the statutory records were kept or transferred to that place? A. No.

MR. ROGERS: Your Honour, we would submit there has not been sufficient search made for this document and we would submit that your Honour should order that the company should comply with the subpoena. 40

HIS HONOUR: Your complaint, I gather from the questions

is in relation to the solicitors office.

MR. ROGERS: Let me put it this way, it is not up to us really to locate every possible hiding place for this document. The registered office, however, is at the solicitors' office, and as far as the witness who has been tendered to answer the subpoena is concerned, he has never made any inquiries.

HIS HONOUR: Supposing the instructing solicitor is called, would you be satisfied with that? 10

MR. ROGERS: That would then leave the question of who if anyone searched in Melbourne. I do not want to take too much time with this. The fact of the matter is that there is an argument being run that Marene Knitting Mills is a different business.

HIS HONOUR: Mr. Burchett, I think the defendant is entitled to have these documents either produced, or their absence accounted for. This evidence is not satisfactory. I am not saying that in any way derogatory of Mr. Foxall. After all, he is only the auditor. 20

Are you able to give evidence as to whether searches have been made in Melbourne and in your solicitor's office?

MR. BURCHETT: Perhaps I misheard Mr. Foxall, but I thought he gave evidence about a search in Melbourne. Might I ask a question?

MR. ROGERS: Just before my friend does, it has been brought to my attention that there is one further matter I should have put to the witness.

Q. You continued as the auditor of the company up to and including 1974? A. That is correct. 30

Q. Didn't you view the statutory records of the company such as a minute book? A. No, not at that stage.

Q. Is not that part of your duties as an auditor?  
A. Loosely spoken ---

Q. You mean strictly speaking? A. Strictly speaking, yes. It is not always done in the case of a proprietary company.

Q. Did you check to see whether any records were kept? A. Yes. 40

Q. What records did you check on? A. I checked

the complete books and records of the company.

Q. You mean the register of Members? A. No.

Q. And minute books? A. Not the register of members or the minute book.

Q. Did you check to see whether the annual returns were being filed? A. Yes.

Q. In fact, you had to sign them as auditor?

A. I signed them as auditor.

Q. That statutory return disclosed information as to who the shareholders were, who the directors were and who the secretaries were? A. That is correct. 10

Q. How pray did you get that material if you did not see the minute book? A. I was informed by - I was not informed - I took it for granted that there had been no share transfers made during those periods.

Q. What about directors? A. There were returns of directors, change of director - return of change of director was lodged when Mr. Herszberg senior died.

Q. Apart from that you did not concern yourself with the matter? A. No. 20

HIS HONOUR: Q. Who is the secretary of the company?

A. Mr. Myer Herszberg.

MR. ROGERS: Q. You signed a certificate to the effect that the company has in your opinion kept proper accounting records and other books during the period covered by these accounts. You did not think that that covered statutory records, only financial records, did you?

A. No, I was aware that it covered statutory records.

Q. You signed a certificate that books which you had not seen were in fact being kept? A. That is correct. 30

CROSS-EXAMINATION:

MR. BURCHETT: Q. I just want to check with you, my friend asked you a question about where you had searched for this minute book. You told him that you had searched at 68 Campbell Street? A. That is correct.

Q. You made some reference to a search at Melbourne? Did you make the search at Melbourne yourself or not?

A. I made the search at Melbourne with Mr. Myer Herszberg and Mr. David Herszberg. 40

Q. You made it personally? A. I made it personally.

Q. I think you do have a copy of the minute relating to the transfer of shares in the company, is that so? A. That is correct.

Q. You can produce that? A. I can produce that.

HIS HONOUR: Do you want to see it, Mr. Rogers?

MR. ROGERS: Yes.

HIS HONOUR: Q. Do you have it there with you? A. It is over there. (Document produced.)

10

MR. ROGERS: Q. This document that you have produced is the original minute, is it? A. As far as I know, yes.

Q. How come it was not pasted into a book? A. I do not know.

Q. Who prepared it? A. It was prepared in the office of Mr. C.A. Law, who was the liquidator of the company at that time. I was not involved with the company at that stage.

Q. How did you come into possession of it? A. I don't know. I found it in some files the other day.

20

(Minutes of meeting of directors tendered.)

HIS HONOUR: This evidence that has been given so far is evidence on the subpoena and is not evidence in the case, as I understand it, unless the parties agree that it should be. You want to tender this in the case, do you?

MR. ROGERS: Yes. I withdraw that tender at this stage.

MR. BURCHETT: I do not want to be technical about that. My friend can tender it.

30

HIS HONOUR: You can tender it now in the case, Mr. Rogers, if you wish to, by consent.

(Minutes of the meeting of directors of the plaintiff, dated 29th June, 1966, tendered and without objection marked Exhibit 21.)

HIS HONOUR: What if anything do you want to do further in relation to the subpoena?

MR. ROGERS: There is nothing further that can usefully

be done apparently in relation to the subpoena. I assume that my friend will, without my having to waste time in calling the solicitor, ask him to search in his office and make a return one way or the other.

HIS HONOUR: I think that should be done.

MR. BURCHETT: Originally the subpoena was issued and returned before Mr. Justice Sheppard. We then said that the solicitor has searched and been unable to find it. He is here again if my friend wants that again.

10

HIS HONOUR: Mr. Burchett, nobody has told me that. You tell me that your instructing solicitor has searched and has not been able to find the document called for in the subpoena?

MR. BURCHETT: Yes.

HIS HONOUR: That will be noted, and I am sure Mr. Rogers is satisfied with that.

(Witness retired.)

HIS HONOUR: Mr. Rishworth, have you been able to speak to your people yet? A. Yes.

20

Q. What is the position? A. He instructs me to claim privilege.

Q. At some stage this will have to be argued. Do you want to argue it yourself or do you want to have somebody argue it for you? A. No, your Honour, I think my proposition is fairly easy. I do not think there is any necessity to require counsel.

HIS HONOUR: It is a question of just when this should be done. There are some limits to this. Phipson, in the edition I have, the tenth, deals with it at some length on page 250 onwards. I would like some assistance from counsel at some time; it need not necessarily be done now. Do you want to use these documents now, Mr. Rogers, or seek to?

30

MR. ROGERS: Not at the moment, no.

MR. RISHWORTH: What I have to say could be put in a very few words. As far as I am concerned, once your Honour has heard me, it is a matter for your Honour. I am not concerned at that stage one way or the other.

HIS HONOUR: If you are content just to put your submission now, I will hear counsel later. I will then rule no doubt in your absence on what the situation in my view is.

40

MR. RISHWORTH: I am quite content with that. Briefly as I see the position it is this: your Honour will notice that this correspondence represents correspondence passing between my firm and a firm of solicitors in Melbourne, who were then the solicitors for the plaintiff company. There is further correspondence passing between my firm and the present solicitors for the plaintiff company. During the whole of the period encompassed in this correspondence the plaintiff's solicitors, either those in Melbourne or those in Sydney, were preparing the plaintiff's case against the defendant Greater Pacific Insurance Company. At the same time, your Honour, in my submission my client, Gerald Ball Insurances Pty. Ltd., was at the relevant period the broker for the plaintiff company, and as such the agent for the plaintiff company. Therefore correspondence and information such as it may be afforded by the broker as agent to the plaintiff company at a time when the plaintiff company was engaged in preparing its case against the defendant ought to be privileged communication. 10 20

HIS HONOUR: You do not put it on the basis of communication passing between yourself and your own client?

MR. RISHWORTH: No, your Honour.

HIS HONOUR: These communications on behalf of your client were when you were acting for that client ---

MR. RISHWORTH: Who was then the agent for the plaintiff. At that stage my client was the agent for the plaintiff. That, so far as the correspondence, is all I wish to say. So far as the statement which has also been subpoenaed, that falls into a different category altogether. That was a statement which was not prepared by me, and is an unsigned statement, and was passed to me with a request that I would obtain a signature to it. The statement has never been signed, and it is not conceded that the statement even accurately reflects the terms of the conversation which it purports to do. 30

HIS HONOUR: That may be a different matter. That may go to its weight. I have noted the grounds upon which you have been instructed to claim privilege, and I will hear argument if need be in due course in relation to those matters. You consent to any order I propose to make? 40

MR. RISHWORTH: Yes.

HIS HONOUR: The papers can be handed back to the officer, and I will excuse you.

MR. ROGERS: To reduce the scope of the argument, would your Honour be prepared to do this, as I indicated, quite a bit of correspondence between Gerald

Ball and the solicitor and Arnold Bloch, Leibler has been discovered, and I do not want to waste time ---

HIS HONOUR: You want to know what is here, do you? I will tell you what is here. I must say, having heard the ground upon which the claim is put, I will need some convincing that it is privileged. My present tentative view, Mr. Burchett, is that it is not privileged. I will hear argument in due course.

(His Honour outlined to Counsel the contents of the correspondence.)

10

MR. ROGERS: I am afraid there are letters there we have not seen. There is one other matter that can be dealt with very shortly, and that is, I should like to recall Mr. Cubbin.

ROBERT BRISBANE CUBBIN  
Recalled:

HIS HONOUR: Q. You are on the oath still that you took yesterday, do you understand that? A. Yes.

MR. ROGERS: Q. You remember his Honour asked you yesterday if you still had your group certificates?  
A. Yes.

20

Q. You told him that you had but you have searched for them and you have not got them? A. I found five.

Q. But not for the correct years, On the other hand, you found copies of the income tax returns that you made out for the years ended 30th June, 1965, 1966 and 1967, and these are exact copies of the returns that you made? A. Yes, exact copies.

Q. You made up these returns on the basis of the group certificates which you attached to the originals which you sent in to the Commissioner of Taxation?  
A. Yes.

30

Q. Are these copies of the returns for the three years in question? A. Yes.

MR. BURCHETT: I am content for my friend to read onto the record the information appearing on that part of the return which purports to represent the employers.

MR. ROGERS: For the period from 1st July, 1964 to 30th June, 1965 the employer was Hornsby Knitting Company. For the period from 7th July, 1965 to 13th October, 1965, the same. From the 13th October, 1965 to the 29th June, 1966, Fela Knitting Company. From 1st July, 1966 to the end of that financial year, Marene Knitting Mills Pty. Ltd.

40

MR. BURCHETT: No questions. (Witness retired.)  
R.B. Cubbin, rec'd,  
93. further x, ret'd.

REVELL CUTHBERT RATCLIFF POWELL

Sworn and examined:

MR. ROGERS: Q. Would you tell us your full name please? A. Revell Cuthbert Ratcliff Powell.

Q. What is your residential address? A. 623 Victoria Road, Ryde.

Q. You are presently employed by Blue Circle Southern Cement Ltd. as its insurance officer? A. Yes.

Q. You started work in the insurance industry in about 1935 with Henry Head & Co. Ltd. in London, and you became an underwriting member of Lloyds in 1939? 10  
A. Yes.

Q. War interrupted your work in the industry, and in 1948 you came to Australia and worked in the new business department and second in charge of the Marine Department of Edward Lumley & Sons in Melbourne? A. Yes.

Q. 1954 you started your own brokerage company in Melbourne? A. Yes.

Q. In 1963 your company merged with an organisation called Eastern Insurance Brokers Pty. Ltd. You continued with that merged organisation, and in 1964 there was a further merger when there was a take-over by the Swan group, and you continued to work with the Swan group in Sydney and Melbourne until 1966? A. Yes. 20

Q. That year you went to Perth where you managed an underwriting company and two brokerage companies for that self same group? A. Yes.

Q. In 1968 you resigned and became the branch superintendent for Australia for Traders Prudent Insurance Company Limited? A. Yes. 30

Q. You left that organisation in order to establish the brokers division of Greater Pacific in 1970, where you stayed until 1975, when you took up - well, until June 1975, when you took up your present post? A. Yes.

Q. In July 1973, at the end of that month, Mr. Reid-Giltinan came to see you in connection with a proposition from Gerald Ball Insurances Pty. Ltd. relating to an organisation known as Marene Knitting Mills Pty. Ltd.? A. Yes. 40

Q. You instituted some inquiries in Melbourne in the context of a fire and burglary survey? A. Yes.

Q. On the 14th and 15th August of that year you were away on business, up on the North Coast? A. Yes.

Q. When you returned, you heard that there had been



a fire at the Melbourne premises of Marene Knitting?

A. Yes.

Q. Thereafter a loss assessor was instructed in Melbourne? A. Yes.

Q. You were told something - you need not tell us what it was - that had been reported by the loss assessor, by somebody within the organisation? A. Yes.

Q. On the 28th or 29th August you went with Reid-Giltinan to a meeting at the offices of Gerald Ball, right? A. Yes. 10

Q. Prior to going to that office you prepared what one might call an aid memoir for yourself as to what you intended to achieve? A. Yes.

Q. Just to clarify that, it is the 28th August according to your diary and the 29th August according to a note that you wrote? A. Yes.

Q. After your return from Ball's office, you added a further note to the aid memoir that you had prepared for yourself before the conference? A. Yes. 20

Q. You again added a further note to that document on the 30th August? A. Yes.

Q. The aid memoir that you prepared for yourself was in the context of questions that you wanted to ask Mr. Ball? A. Yes.

Q. Did you give any instructions to Reid-Giltinan as to the role if any that he was to play at that meeting? A. Yes. I told him I would do the talking a he would just listen.

Q. Did he carry out that instruction? A. Yes. 30

Q. Besides yourself and Reid-Giltinan, who else was present? A. Miss Patterson, who worked with Gerald Ball.

Q. What about Mr. Ball? A. And Mr. Ball, yes.

Q. To the best of your recollection what was the conversation at the office of Gerald Ball? A. To the best of my recollection I said, "Gerald, is there any previous claims history as far as the Herszberg family are concerned in insurance?" He said, "No". I said, "Are you sure?" He said, "No". I asked him again, "I said, "Are you really sure, because you have been their broker for many years?" And he said "Well, Herszberg 40

senior did have a fire some years ago in another company". I then said, "Could we please have the full story on this?" And Gerald Ball said, "Yes, but it may take some time to go through the records.

Q. There then followed some discussion about a claim as to a replacement condition on the stock in trade?

A. Yes.

Q. That is not relevant to the present dispute?

A. Yes.

10

Q. Would you have a look at the document shown to you. Whose handwriting is that in? A. It is my handwriting.

Q. Up to the material beginning with the numerals 29/8, when was that written by you in relation to the conference? Was it at the conference, before or after?

A. This would have been written in my office that morning or the day before.

Q. The material 29/8 together with the material appearing against that date, when did you write that?

20

A. The first paragraph was written when I made the appointment, the second paragraph when I came back from the interview.

Q. The material 30/8, that was written on or about that date? A. In my office, yes, after I had 'phoned Gerald Ball.

Q. When Mr. Ball said to you "It may take some time to go through the records", was there any particular reason why you did not take the matter any further with him? A. Yes. I had been asked by my head office to try and get an admission that there had been a previous fire, and I did not want to press it, I wanted to see what evidence he would come up with.

30

(Document in the witness' handwriting, prepared in the manner described tendered and without objection marked Exhibit 22.)

Q. (Shown Exhibit 22.) You will observe that in your aid memoir one of the matters to which you refer as the third item, if I read your writing correctly, is "Proposal forms urgent, firm Friday"? A. "Promised Friday".

40

Q. Was anything said about the proposal form?

A. Well, yes. I asked Mr. Ball for a proposal form, and he promised it by Friday.

Q. You sent Reid-Giltinan down to the office and he brought back a proposal form? A. Yes.

Q. Would you have a look at Exhibit 19. Is that the proposal brought back by Reid-Giltinan? A. Yes.

Q. Thereafter there was some correspondence between you and Gerald Ball relating to the form of the proposal?  
A. Yes.

Q. Another proposal was obtained from Gerald Ball. Would you have a look at the document now shown to you? Is that another proposal which was obtained from Gerald Ball in relation to Marene Knitting Mills? A. I always initial the proposals in the left hand corner when I see them. I have not initialled this one, so as far as I can remember - we did receive another one, but whether that is the extra one I could not swear, because I have not initialled it. 10

Q. Would you be good enough to look at the document now shown to you. You will observe a proposal form there. Do you know if that proposal form was received by your organisation? A. It has the broker's division receipt stamp on it, yes. 20

Q. If you will be kind enough to look at the document earlier shown to you, does that not also have the broker's division receipt stamp on it? A. Yes, it does.

Q. There appear to have been received by the broker's division three separate proposals? A. Yes.

Q. The first one being Exhibit 19, and the other two being the documents presently before you? A. Yes. 30

Q. Subject to you being kind enough to check it for me, I think they all bear date 4th September? A. Those two, the 14th November, Oh, date of signature, yes.

Q. The date of signature purports to be 4th September? A. Yes.

Q. The last two that were handed to you, that is to say, the two which have not yet been tendered as exhibits, are in typewritten form as distinct from the exhibit? A. That is in typewritten form, yes. But handwritten notes at the bottom. 40

Q. That is right. The two questions relating to previous history or handwritten in all of them?  
A. Yes.

Q. (Approaching.) I am showing you two white proposal forms for the moment. Are they both relating to the same risk? A. Yes. These were the old company forms, and the green one was the new one for the new company.

Q. They were both apparently received on the 14th November 1973 but they are for different amounts?

A. The sum insured is different, and the schedule is different.

10

(Two proposal forms, white, both bearing receipt stamp, 14th November, 1973, one in respect of the sum of \$200,000, the other in respect of the sum of \$248,000 tendered, and without objection marked Exhibit 23.)

MR. ROGERS: Q. Was there some explanation you wished to give? A. I think one was for machinery and plant and one for stock.

(Proposal form received 2nd January, 1974 tendered and marked Exhibit 24.)

20

Q. You had a great deal of correspondence with Gerald Ball concerning these various proposals during the period covered by the receipt of the various proposals, did you not? A. Yes.

Q. Is this a bundle of correspondence exchanged between you and Gerald Ball Insurance Pty. Ltd.? A. Yes.

(Bundle of correspondence tendered and marked Exhibit 25.)

Q. The only letter I would like you to direct your attention to is the letter of 9th November, 1973. Would you read to yourself the last paragraph of that letter? A. Yes.

30

Q. Was there any reason in your mind why you made the statement in that paragraph? A. Yes, my company assumed we could not reject the claim unless the policy had been issued.

HIS HONOUR: Q. Why did you assume that? A. Because we assumed there was no contract until the policy had been issued, and cancellation calls for the policy, not the cover note.

40

MR. ROGERS: Q. Look at Exhibit "B". Why was that prepared in the form in which it appears? A. This was prepared at the request of our solicitors to see what the policy would have been if it had been issued.

Q. By the time Exhibit "B" had been prepared, had your company been disabused of the notion you could not claim liability before a policy was issued? A. As far as I can recollect, yes.

HIS HONOUR: Q. When did you find out about those other fires that Hornsby Knitting Mills and James Knitwear had? A. I was informed by head office, I suppose about the 20th or the 25th August.

Q. Of the other fires? A. Yes. 10

MR. ROGERS: Q. So that when you went to Mr. Ball's office you already had the information? A. Yes.

Q. Why was there no disclaimer of the liability under the cover note prior to February 1974? A. I was instructed by head office not to discuss that and I left the claim to head office.

Q. What was the reason for the insistence on the proposal being in correct form? A. Because in my opinion the proposal form had to follow the cover note. Therefore the schedules never seemed to be the same. 20

Q. You wanted a correct proposal form on which to issue the policy you believed had to be issued before there could be a disclaimer? A. Yes.

CROSS-EXAMINATION:

MR. BURCHETT: Q. Were you, when you went to see Gerald Ball, trying to trick him? A. I was trying to find the facts.

Q. Can you answer my question yes or no? When you went to see Gerald Ball were you trying to trick him? A. No. 30

Q. That aid memoir that has been referred to included a note then and there "Cancel the cover".  
A. No, that is at a later date.

Q. Do you tell me your note about cancellation was at a later date? A. On the bottom of that piece of paper dated the 30th I noted about the cancellation. In the bottom paragraph.

Q. Was that the first time cancellation appeared?  
A. No.

Q. The fact is at the time you went to the interview with Mr. Ball you intended to get out of this cover one way or another, isn't it? (Objected to; allowed.) 40

A. I do not know, because head office were directing me step by step.

Q. Whether you had formed that intention of your own volition or by instruction from head office, the intention was to get out of that cover, wasn't it?

A. No.

Q. Have another look at Exhibit 22 and tell me why well above any reference to the date the 30th, you have written on that sheet "Give notice of cancellation". (Objected to; allowed.) A. "Give notice of cancellation" means "Will we terminate any further cover". We did consider that. 10

Q. The question I asked you is why did you write that there? A. I presume from memory that I might have discussed it with Gerald Ball.

Q. But you did not discuss cancellation with him, did you? A. Not at that interview, no.

Q. And for months afterwards you were assuring Gerald Ball that the policy would issue, weren't you? (Objected to; allowed.) A. On 30th August, according to my note here, I 'phoned Gerald Ball, telling him we must go off risk as soon as possible. 20

Q. You also told his office in communications which passed between yourself and Miss Patterson by telephone that you would be issuing the policy, is that right? A. Yes, but that is a different issue.

HIS HONOUR: Q. You told her that, did you? A. Yes.

MR. BURCHETT: Q. You told her on at least one occasion you were surprised she had not already received it, didn't you? A. I cannot recollect that. 30

Q. Just think. Did you not suggest to her there must be something wrong with the mails or there had been some slip up in communication, because she should have already received the policy? A. I cannot recollect that. I don't remember.

Q. Do you mean by that answer you may have said that or you may not have said it, you just are not sure? A. I think I would not have said it.

Q. You are not sure whether you said it or not, is that so? A. To be truthful I am not sure, but I do not think I would have said it. 40

Q. I am asking for truthful answers, and to be truthful you are not sure, is that so? A. Yes.

Q. You have told my friend something about the letter which you signed, forming part of Exhibit 25, dated 9th November, 1973. When did you receive legal advice that in fact the policy did not have to issue?

A. I never received legal advice.

Q. You never did? A. I did not personally, no.

Q. When were you personally informed by whoever you were informed that the legal position was that a policy did not have to issue prior to the company cancelling a cover note? A. The day our company rejected the claim.

10

Q. You are telling us, are you, that you fully intended long before that, that just whatever the legal technicalities might be, somehow the claim would not be paid? (Objected to; rejected.)

Q. Is it the fact that it was your intention long before 9th November, leaving aside the technicalities and the manner of doing it, that this claim would not be met? A. I personally was not involved in any of the claims. That was a head office matter.

20

Q. But you were involved, weren't you? You were writing letters and having interviews, weren't you?

A. Not about the claim. About the original proposition.

HIS HONOUR: Q. Did the Brokers Branch normally deal with rejection of claims? A. No, the State branches do that.

MR. BURCHETT: Q. You are telling us for whatever reason of erroneous legal understanding or not, you were in good faith proposing to issue a policy, is that so? A. Would you repeat the question?

30

Q. You are telling us, are you, being concerned only with the brokers division, whatever legal ideas you may or may not have had in your mind, that your intention with regard to action in this matter was that a policy would in fact issue? A. Yes.

Q. And that is what you made clear to Miss Patterson and Mr. Ball? A. Yes.

Q. Indeed the subject of your argument with Mr. Ball which my friend put to you was not relevant, was the subject matter of whether or not, having regard to the terms of Miss Patterson's discussions with Mr. Reid-Giltinan, your company was in truth and reality bound to give a reinstatement cover? A. We were

40

willing to give reinstatement cover on the machinery and plant, but not on the stock.

Q. Then the subject matter of your argument was whether, having regard to the matters I have just put to you, your company was in truth and reality bound to give reinstatement cover in respect of stock? A. There was also a confusion on the schedules for plant and machinery.

Q. The questions relating to the plant and machinery were entirely unrelated to the question whether the stock was to get reinstatement cover, isn't that right? 10

A. No, the other thing was the machinery and plant schedule attached to the cover note was the basis of the insurance, and the schedules supplied with the proposal form were not consistent with the original request for this fire insurance.

Q. But you only got to arguing about the details of the schedule as part of an argument with Mr. Ball as to whether your company had taken on a reinstatement obligation co-extensive with the reinstatement obligation he said had been taken on by the previous insurance? A. I am confused. 20

Q. This whole question of discussing the schedules and all the several proposal forms, and at one stage two proposal forms with different schedules attached to them, arose out of your dispute with Mr. Ball as to whether what your company had taken over was the same obligation which had existed under the insurance which had previously been taken out? A. At no time were we asked to take over on the same terms as previously. 30

Q. Do you appreciate what I am putting to you is not whether or not the respective contentions were right or wrong, but the matter that was in contention between you and Mr. Ball was the matter I have just been putting to you? Is that so? A. Yes.

Q. At the time you went to this interview with Mr. Ball and Miss Patterson, you have told us Mr. Reid-Giltinan was with you, and that you told him you would do the talking and he would just listen, is that right? A. Yes. 40

Q. Was there some strain between you and Mr. Reid-Giltinan at this time? A. Never.

Q. Was it a usual thing in your experience to take him along to an interview with a broker and tell him he was to leave all the talking to you? A. I don't remember us having gone to a broker in similar circumstances before.



Q. You had never done that before? A. No.

Q. Had you ever taken him anywhere with you before and told him he was not to do any of the talking?

A. No.

Q. Do you remember at that interview Miss Patterson intervened at one stage and doing some talking?

A. Yes.

Q. Do you remember Miss Patterson intervening and saying "With reference to the Hornsby Knitting Company, I told Mr. Giltinan, and he said it was not important as it did not relate to Marene Knitting"? A. That was never discussed at that interview. 10

Q. Do you deny that Miss Patterson said anything to that effect? A. Yes.

Q. Has Miss Patterson ever on any occasion said anything of that effect to you, or in your presence?

A. No.

Q. Were you discussing the transcript of Mr. Giltinan's evidence in these proceedings with him? 20

A. No.

Q. Were you talking to him outside the courtroom when the transcript was there in his hand? A. Not in his hand, no. I have not seen him for many months. He had nothing in his hands.

HIS HONOUR: Are you referring to this morning, Mr. Burchett?

MR. BURCHETT: Yes.

Q. This morning, outside the court? A. I have not seen him for many months until this morning, and he had nothing in his hands other than my card, 30

Q. Were you discussing with him the evidence which he gave yesterday? A. No.

Q. To go back to this occasion when you saw Miss Patterson and Mr. Ball, did you make a reference to the business having been with the National and General for the previous eight years? A. Mr. Ball told me that.

Q. Did you make a reference to it? A. No.

Q. Did you say anything like this, "This business

has been with the National and General for the past eight years. Don't you think we could throw the claim back to them"? A. No.

Q. You did not say that? A. I did not, indeed.

RE-EXAMINATION:

MR. ROGERS: Q. Your attention was called to so much of Exhibit 22 as contains this note, "Give notice of cancellation", and I think you told his Honour that you did not in fact do so on this occasion? 10

A. No.

Q. Would you look at the next entry, "Take cover note books for audit"? A. Yes.

Q. Did you execute that injunction to yourself?

A. I took the books back, yes.

Q. What was the purpose of taking the books back? (Objected to; not pressed.)

Q. At the time when you were having this exchange of correspondence with Mr. Ball or Miss Patterson regarding the reinstatement question, to your knowledge were enquiries by the loss assessors still proceeding in Melbourne? A. Yes. 20

Q. So far as you knew from the loss assessor, had the arson squad also investigated the matter?

A. I have no knowledge of that.

Q. At any rate, you say the investigations were still proceeding? A. Yes. I assume they were brought in, naturally.

(Witness retired.)

(Two letters from A. Bloch Leibler & Co., Solicitors, to Greater Pacific, dated 12th and 14th February, 1974, tendered and marked Exhibit 26.) 30

(Three books of account in the name of Fela Knitting Co., being the cash deposit book, the cash payments book and the sales journal, for the period commencing November 1965 and ending August 1966, in each case, tendered and marked Exhibit 27.)

(Letter from Dawson, Waldron to the Manager, Greater Pacific, dated 6th February, 1974, tendered. Tender objected to on the basis of relevancy.)

HIS HONOUR: It will be noted that by letter dated 6th February, 1974 the solicitors for the insurer wrote and advised it that in counsel's opinion it would not be appropriate for a policy to be issued, and they forwarded a draft letter disclaiming liability.

(Short adjournment.)

10

MR. ROGERS: Could it be noted that m.f.i. 1 is now part of Exhibit 25? That is the letter of 9th November.

HIS HONOUR: Yes.

TERRENCE LEONARD STANLEY  
Sworn and examined:

MR. ROGERS: Q. What is your full name?

A. Terrence Leonard Stanley.

Q. Do you reside at 1 Narraburra Close, Mt. Colah?

A. Yes.

20

Q. You are an electrician by occupation, are you not? A. Yes.

Q. Did you go to work for the Hornsby Knitting Co. at 2 James Street, Hornsby, in July, 1958 as an indentured apprentice mechanic? A. Yes.

Q. Your master was Mr. George Gee and you worked there until March 1964, when you completed your apprenticeship, is that so? A. Yes.

Q. You started in 1958 just after there had been a fire in the premises 2 James Street and you helped to fix up a factory which was above the dwelling. Is that right? A. Yes.

30

Q. On that occasion apparently the top floor of the dwelling towards the rear of the house had been burnt? Right? A. Yes.

Q. There was subsequently another fire in 1961. Prior to that fire you had built a single storey extension in the back. Is that right? A. I think so.

Q. You are not quite sure about it, are you and I think you would have to start going through any days. Do not worry too much about it. At any rate during your employment at Hornsby who was in charge of the office work and sales? A. In what department? 10

Q. In the manufacturing section? A. Or in the office itself?

Q. In overall charge of the office section of the organisation and the selling side of the organisation? A. To my knowledge Mr. Herszberg.

Q. Mr. Laib Herszberg?  
A. Mr. Laib Herszberg.

Q. So far as you could judge Mrs. Fela Herszberg was in charge of the actual cutting, sewing and manufacturing side of the business? A. Yes. 20

Q. You know Mr. Myer Herszberg? A. Yes.

Q. When did he first, to your knowledge, start work at the factory on a permanent basis? A. It is hard to say what the permanent basis was. Prior to when I left in 1963, I think it would be in the latter part of 1963 or maybe from the beginning of 1963 he had finished his schooling and he was working as a learner trainee sewing machine mechanic. 30

Q. He was working there each and every day?  
A. It was not really the factory but he would come in maybe two days during the week or after hours.

Q. In the early part of 1966 you went back to work for the Herszberg's who were then located at Mansion House? A. Yes.

Q. And you assisted in planning the removal of the business from Mansion House to Campbell Street, Sydney?  
A. Yes.

Q. You worked on weekends rebuilding the premises at Campbell Street? A. Weekends was only a Sunday; with the Jewish religion, well, they do not work on the Saturday.

Q. The removal took place some time in the early part of 1966, did it? A. Well, I started around February. Left in September/November September/October - it was somewhere around about June or July I think.

Q. June or July 1966 that the move took place and you left the employment of the Herszbergs in about September or October 1967 and then you went back again in 1971 and stayed with them until about June 1973? 10  
A. Yes.

Q. In the period 1966 to 1967 you worked as an assistant mechanic under Mr. Cubbins who had been supervising you at Hornsby as well? A. On the later stages after George left.

Q. And from 1971 to 1973 you were the head mechanic and the foreman of the factory? A. Right. 20

Q. So far as you could judge could Mr. and Mrs. Herszberg continue to do the same sort of work both at Mansion House and at Campbell Street as they had done at Hornsby? A. Well, it was still men's knitted outerwear and when we moved to Campbell Street they were starting like bowlers' jumpers and bowlers' line, that was going to be the selling point. Basically it was still the same type of work.

Q. Mr. Herszberg was still in charge of the office and sales side of the business, Mrs. Herszberg still in apparent charge of manufacturing and production side? A. What stage was this, Mansion House or Campbell Street? 30

Q. Mansion House? A. Yes.

Q. And then when you went to Campbell Street?  
A. The same.

Q. What about Mr. Myer Herszberg. Did you sight him at Mansion House? A. Well, when I first went to work at Mansion House he just started working more on machines with Mr. Cubbins. But I would say he was not there all the time, that he should have been anyway. 40

Q. In 1971/1973 period, I think Mr. Laib Herszberg was sick when you came and he died shortly after that; and who took over his work? A. Well, to my knowledge

Myer run the business side of it. His father had said to me Myer was helping him in the latter stages of his life, selling and running things.

Q. After Mr. Laib Herszberg had to leave work Myer took over? A. Yes.

Q. And another son Wolfie came in and worked on machines? A. Wolfie was there on the period when I started back in 1971, he being more or less helping Mr. Cubbins on the machines then - had a mechanic with him - I do not think Wolfie was there managing the work. 10

Q. At Hornsby you were manufacturing, I think you told us, mainly men's knitted outerwear, cardigans, pull-overs and such like as well as cotton ladies' and men's underwear? A. No. Not underwear, no.

Q. No. I am sorry. Did the company make the same type of garments in Mansion House? A. Well, the ladies' line was more just a cotton T-shirt, was all the ladies' goods, in those days, and men's, they were the same shape pretty well and we never really went into ladies' wear at all. Men's, at Campbell Street. 20

Q. Do you remember who were the customers of the business at Hornsby? A. Well, at Hornsby I think one of the best was Woolworths and Coles, Myers Emporium, Wynns at the time. There is umpteem other little ones who never seem to get bigger.

Q. Do you remember when you came to town did these organisations remain customers or did any of them fall away; what happened? A. Well, we were still making stuff for Waltons, Woolworths when we were in Campbell Street but I think at this stage Wynns had gone down a bit, I think we were still making for Myers. I did not have as much to sort of do on this side that I did when I was at Hornsby. 30

Q. Did any of the staff go from Hornsby to town? A. Well, Mr. Cubbins of course, the head mechanic. The only ones I can recall was Bruce Smith, the cutter. Also one of the machinists, Elsa.

Q. You cannot remember in detail. Just one other thing Mr. Stanley, you did actually overhear Mr. and Mrs. Herszberg having discussions with regard to decisions that had to be made in connection with the business? A. Yes. 40

Q. Naturally sometimes there appeared to be a

difference in view between Mr. and Mrs. Herszberg as to what should be done? A. Yes.

Q. And in any of these occasions did Mrs. Herszberg say anything by way of seeking to promote her point of view? A. Well, I heard a few times her say, you know, "After all it is my factory" and this was it. Mr. Herszberg himself has told me personally that certain things he could not do because, "After all its Mummy's factory", you know.

10

CROSS-EXAMINATION

MR. BURCHETT: Q. Mrs. Herszberg was not fluent in English, was she? A. Depend on what you call fluent English. I could understand her quite well.

Q. But it was not a language in which she spoke freely or easily, was it? A. Well, I could not judge that because she could speak other language. I cannot speak German or - but she could speak a lot of languages.

Q. She could speak a lot of languages but the fact is when she spoke to her husband they normally spoke in a language other than English, did they not? A. No, not always.

20

Q. I said normally? A. Normally, yes. Not all the time.

Q. So far as any reference to the factory was concerned, Mrs. Herszberg's part in the factory, so far as you could actually observe, was as forelady was it not? A. Forelady in charge of cutting and sewing but still had the running of the making up of the garments. Used to give us the orders downstairs of what fabric was wanted, how it was trimmed and all this.

30

Q. The functions she performed that you observed were the functions of a forelady? A. I would say so.

Q. So far as the goods were concerned, that were produced at Hornsby and later at the other addresses you have mentioned, they were knitted goods both places? A. Yes.

Q. You told my friend that it was basically still the same type of work, Was that what you meant when you said basically still the same type of work?

40

A. When we were at Hornsby you would make say a Jacquard line which was straight fabric, it might run two years in one pattern, just change the colours. When we got to Marene there was still making straight

fabric, not so much in the way of Jacquard because, sort of, the style and design had gone out.

HIS HONOUR: Q. What is that word you use? A. Jacquard, When we had Marene we still had same type of machine but also had body length machines.

MR. BURCHETT: Q. You had newer machines at Marene did you not? A. Well, yes and no. They were new to the Company, when we bought them from Marene, they bought the machines as well. They also brought some machines from Brisbane(?), which were body length machines. 10

Q. What I am putting to you is they were also newer, more advanced machines? A. No. I would not say so because we had brand new S.P.J. when we were at Hornsby, much the same as the machines that were Marene, like, you can pull it up on this one, S.P.J. they had was the first one in Sydney.

Q. At Hornsby the garments that you had been making with the machines there were very largely mass production lines. Would that be right? A. Yes, well, just body lengths straight fabric. 20

Q. And they were largely sold as house brands?  
A. What do you mean by house brands.

Q. You do not know that expression? A. No.

Q. You were concerned with the mechanical side and not with selling or anything? A. No. I was not selling.

Q. Not with the quality of the garment? A. Quality of the garment, being mechanic of the machines you are the one that gives the quality. 30

Q. You do not know the expression "house brand"?  
A. If you mean by house brand by making your garment mass production with Woolworths' label or somebody else's label.

Q. That was what in fact was largely being made at Hornsby was it not, things with, say, a brand such as you have just mentioned? A. Well not a lot of time. We had our own sale.

HIS HONOUR: Q. What was your answer? A. A lot of times garments made with their own labels but they would also buy garments with whatever label was there. If you sell a garment by Fela Knit, this is what the label was. 40



MR. BURCHETT: Q. Whatever their reasons and whether they wanted it with their own label or not, the fact is that a large proportion of the garments produced some have labels which were their own labels? A. Yes.

Q. Woolworths or St. James or various others. Is that right? A. Yes. But I think on some labelling you would still find that there was still - might be Woolworths brand with Fela Knit or James Knit or something on the corner. It was not just - I am not saying all, but some. 10

Q. When you were producing in the city you were producing garments which bore the label Marene? A. In some, not all.

Q. Substantially? A. Yes.

Q. And Marene was a very old established producer of knitted wear? A. That is right.

Q. It had gone back for many years? A. Yes.

Q. And it had an established reputation as a producer of fairly high quality knit wear? A. Yes. 20

Q. An established reputation for knitted wear which was sold not under a house brand but under the Marene label? A. Yes.

Q. And, among other things, it particularly had a reputation and a sales connection with the sale of bowlers' wear? A. Is this the old Marene before the - -

Q. Yes. A. I could not go back into what they were doing or selling because I was not working in sales. 30

Q. You were not aware of the bowlers' wear. Is that what you say? A. I was not aware of actually their goods that were made. There were in fact different other factories, just like - -

Q. (Previous question read by reporter). A. I was not aware of what type of goods that they were making. I was not working in the factory then.

Q. You mean by that other than their general reputation in the trade? A. General reputation in the trade. 40

Q. From that general reputation you did at least

know this, that they did make bowlers' wear?

A. To my knowledge, yes.

(Witness retired and excused.)

ROBERT LORENZO HARDY  
Sworn and examined:

MR. ROGERS: Q. Your full name is Robert Lorenzo Hardy?

A. Yes.

Q. You live at 98 Middle Harbour Road. You are an insurance company manager presently on long service leave? A. Yes.

10

Q. Which is your company? A. United Insurance Company.

Q. And you have 43 years in the industry? A. That is correct.

Q. Always with the same company? A. Always the same company.

Q. You were the assistant manager for Victoria in 1953? You were the manager for New Zealand in 1956. You returned to be manager for Victoria in 1959 and you were appointed the manager for Sydney in 1961?

20

A. That is correct.

Q. You are the past chairman of the New South Wales Fire and Accident Underwriters' Association. You are past chairman of the Northern Territory and Mutual Underwriters' Association; a member of the Fire Ratings Committee for New South Wales Fire and Accident Underwriters' Association; you are the insurer's representative on various insurance committees and statutory bodies? A. That is correct.

30

Q. Mr. Hardy, in order to save time you have been shown a copy of Exhibit 14. If you look at Exhibit 14 you will be able to observe that it was a copy of that document that you have seen (Exhibit 14 shown).

A. That is correct.

Q. With the background of that factual material set out in Exhibit 14 would you please make the following assumptions: that Laib and Fela Herszberg referred to in Exhibit 14, conducted a business manufacturing knitwear for a number of years, including the years 1958 to 1965 and during that period suffered three fires on the partnership premises causing damage totalling in

40

T.L. Stanley, xx,  
ret'd,  
R.L. Hardy, x

excess of half a million dollars. Would you further assume that James Knitwear Pty. Limited of which the partners Laib and Fela Herszberg were directors, engaged in the sale of knitwear and of other articles and did, during the self same period 1958/1965, suffer a fire in which damage to a tune of \$121,000 was suffered. Would you further assume that the business conducted by the partnership and James Knitwear Pty. Limited was, from some date in 1965 or 1966 onwards, conducted in the name of a company called Marene Knitting Mills Pty. Limited; and would you assume lastly that in August 1973 Marene Knitting Mills Pty. Limited applied for a fire polly in respect of its stock and plant located at new premises. Now with those assumptions, which had been made clear to you before you entered the witness box, in your opinion based on your experience would a reasonable insurer have been influenced by these facts in fixing the premium or in determining whether he will take the risk? A. I would regard those as most material facts that a prudent underwriter would make the assumptions that fires having taken place previously, that it would behove him to make very careful enquiry of the circumstances of those fires and all relevant facts. In fact in my opinion I think it would be most difficult, without those facts being disclosed, for insurance being placed without imposition of a fire rating factor or some other underwriting consideration which the underwriter would then impose before he took the risk.

HIS HONOUR: Q. Whether that is so or not, in your view, assuming it is the same business, those matters you would want to know about? A. Whether it was the same business or not your Honour.

Q. It was put to you on the assumption it was the same business, for various reasons. A. If it was the same business, yes, that would be the situation.

MR. ROGERS: Q. If it is not precisely the same business but otherwise stated is the same, would that make any difference? A. Otherwise - would you reframe?

Q. With the background contained in Exhibit 14 and on the assumptions that you were asked to make, but deleting for the moment the assumptions that it is the same sort of business; would that make any difference to the view that you have expressed? A. No. The factor is the similarity of shareholding in these holdings, would prompt a prudent underwriter to make even more close scrutiny of the proposition being placed before him.

Q. We bring a new factor into play, if you will

bear with me. You will recollect that I have indicated to you throughout that Mr. Laib Herszberg was a partner in the initial partnership business and that he carried on that business together with Mrs. Fela Herszberg and also the James Knitwear situation. Now, assume that Mr. Laib Herszberg had died, his place being taken by a son, Mr. Myer Herszberg, in the proposed company. Fela Herszberg however is still the same person, still carrying on the self same activity. Would the fact that Mr. Laib Herszberg has passed out of the picture, affect your opinion at all? A. It would not make any affect at all.

10

CROSS-EXAMINATION:

MR. BURCHETT: Q. Mr. Hardy, the factors that in normal practice insurance companies regard as material are factors, are they not, which are taken into account by various companies when proposals forms are drafted. Is that right? A. The answer to that would be in a purist sense, yes, but not for an underwriter who was considering a risk. He goes beyond what may be in the proposal.

20

Q. In a particular case he may go beyond what is in the proposal; but would you agree that the factors which, in the general opinion in the insurance industry, are regarded as likely to be material, are factors which the proposal forms are deliberately drawn up and designed to deal with? A. Yes. I must concede that that is correct. The normal proposal form purports to ask all those questions to assist an underwriter in deciding acceptance or any other factors that he may require.

30

Q. And whether or not it is always successful in an individual case, the intention is to raise all the matters which are likely to affect the acceptance of the risk or the fixing of the premium. Is that right? A. Yes. Again I say in a purist sense, yes; but a skilled underwriter looks behind and makes enquiry in the market place about a particular risk. Particularly, if there has been any disclosures in that proposal form which may alert him to previous experience of ~

40

HIS HONOUR: Q. Are there moral hazards for example that are not subject to questions in ordinary proposal forms? A. Yes there are.

MR. BURCHETT: Q. The insurer, in drafting a proposal form, seeks to elicit information on those matters that the insurer thinks are likely to affect the risk. Is that not so? A. That is correct.

Q. And indeed from your experience in the insurance industry, I take it you are aware that there had been cases where the fact that a proposal form is drafted to ask a particular question, while not asking a related question, has, on occasions at least, been held to indicate that the company is not interested in the other matter but only the matter that is the subject of the question? (Objected to).

HIS HONOUR: Is it put as a proposition of law or a proposition of his experience? 10

MR. BURCHETT: Put as a proposition that in fact there have been such cases.

HIS HONOUR: Q. Do you know about them Mr. Hardy?

A. Your Honour I do know that whether, if there is a material fact that has not been disclosed, in a proposal form, it is still held to be a material fact, in my understanding of the law.

MR. BURCHETT: Q. I did not make myself quite clear Mr. Hardy. The point that I am putting to you is that from your knowledge of the insurance industry, you are aware that there have been cases referred to in the books, where the fact that a particular question has been asked and not some other question which deals with the related subject matter, has been held to narrow the ambit, that it requires it be disclosed. Is that right? A. I am not sure what cases you are referring to. But in my experience any non-disclosure of a material fact whether it is specifically asked of a question in the proposal form or not, is still a non-disclosure of a material fact. 20 30

Q. The question of course is whether the fact is material or not; and what I am putting to you is that in the drafting of a proposal form the insurance company is careful to raise those matters which it deems to be material? (Objected to; question allowed).

Q. (Previous question read by reporter.)

HIS HONOUR: You mean all those matters, the only matters?

MR. BURCHETT: Perhaps I might rephrase if I may. 40

HIS HONOUR: Yes.

MR. BURCHETT: Q. What I am putting to you is that the object of a proposal form, whether or not it is perfectly achieved in a given case, is to endeavour to raise those matters which are regarded by the insurance

company, as material and get answers on them?

A. Yes. That is correct.

\*Q. And it is virtually universal practice among the insurance companies providing fire insurance in this State, that the question relating to prior claims is a question which refers to the proposer himself, his husband or wife as the case may be, or anyone else interested in the insurance. Is that right? A. No. I do not agree with that at all. There is a duty on a proposer - -

10

\*\*Q. I did not ask you about duties on proposal. The question I am asking you is whether it is virtually universal that the form of proposal form used by companies in New South Wales limits the question I put to you in the manner that I just put to you. That is what I asked you. Is that not so? A. Yes. Your Honour, I would like to amend that.

HIS HONOUR: Yes.

WITNESS: I was looking purely at the form. If I can have the question again, I think it referred to the insurer, the proposer, his wife and anybody else.

20

HIS HONOUR: Ask the question again Mr. Burchett please.

Q. (Question marked \* read by reporter). You knew that was the question you were asked? A. Yes.

HIS HONOUR: Q. Do you want to amend your answer to that? A. No. It was the next question.

Q. (Question marked \*\* read.) A. Thank you.

MR. BURCHETT: Q. So far as any question of similarity of shareholding, or common shareholding is concerned between companies, you would agree would you that that must be a question, at very least a question of degree?

30

A. No. I consider that the answer that I gave in the second last question which has just been re-read, where it says or anybody interested in the proposal of insurance, covers all the parties who are interested in proposing the insurance,

Q. You do not understand that question as referring to every shareholder of a company which is a proposer, do you? A. I have the advantage of, I think it was Exhibit 14, of reading that particular question.

40

Q. Mr. Hardy, I am sorry I do not understand that answer. What I put to you was you do not suggest that the reference in the proposal form to anyone interested in the insurance, refers in the case of a company

which is proposing, to every shareholder; do you?  
A. Oh yes, yes. I understand the question. No, it would not be possible to bring in every shareholder in a large company. It would not be possible.

Q. It would be utterly absurd would it not? A. I prefer to use the word it would be impossible.

Q. And in fact it would be quite contrary to any practice you are aware of in the insurance industry?

A. If you are referring again to all shareholders of public or private companies, it would be impossible. But again I make the point of the need for a prudent underwriter to look closely at any proposal which relates to previous claims experienced and to look behind the proposal to see who may have been involved in the company previously. 10

HIS HONOUR: Q. You drew your distinction between big public companies and small private companies? A. would.

MR. BURCHETT: Q. The "previous claims experience" though is the previous claims experience of the proposer, is it not? A. I cannot concede that. 20

Q. Take the case of Marene. You have had these assumptions put to you and you are aware on the assumptions of certain facts relating to that company. Suppose Marene had had a fire in 1963 before any member of the Herszberg family had anything to do with it. Would you suggest that that fire would be material? A. A fire before 1963 - yes, it would be material. You said it was before 1963? 30

Q. I said it was in 1963? A. It would have been material to find out all the factors that were possible relating to that fire.

Q. Why would that have been material? A. You are asking why an underwriter adopts a certain line of practice?

Q. No, I am asking why it would have been material, in your expert opinion? A. To find out what was the cause of the fire, what were the circumstances of the fire, who were the parties involved; and if there was no knowledge of anything about this fire which alert you to establish the problems of acceptance or rating, you accept it as a material factor and may either act on it or may not act on it, 40

Q. What do you mean by that answer? A. Before either deciding that you were going to impose certain

conditions of acceptance, if you did agree to accept it or not, wanted a greater premium or, there may have been other underwriting considerations that you would want to impose.

Q. But in what way would a fire at Marene in 1963 affect the acceptance of the risk or the calculation of the premium? A. The fact that this company had had a previous fire in an industry which is prone, not just prone - which has had a share of fires, you would want to know all the facts of the fires, about what caused the fire, whether in the housekeeping, you may want to impose - there are numbers of considerations that an underwriter would be taking into account even though the fire happened in 1963. 10

HIS HONOUR: Q. You mean - - A. The house, the method, housekeeping is the word.

MR. BURCHETT: Q. In 1963, as I put to you, that was before any members of the Herszberg family had anything to do with it? A. But you asked me the question - - 20

Q. And Marene, you have also been told have you not, moved at the time that we are concerned with, to Melbourne. So it would have nothing to do either with the management or with the factory occupied by Marene. Now in what way would it be material that Marene had a fire in 1963?

HIS HONOUR: Q. Mr. Hardy, would it affect the opinion you expressed which you relate at least in one way to housekeeping, that the directors and shareholders were different to those existing in 1973 and at premises where the fire occurred, that affect the opinion you expressed as to requiring to know details of previous fire? A. Your Honour, the question has been raised here about which I knew nothing, about removal of premises. I was merely asked to predicate here on the hypothesis that I would require, as an underwriter, to know all facts about previous fire. 30

Q. That would be whether they are in the same premises or different premises? A. It does not matter where they are. 40

MR. BURCHETT: Q. You say it does not matter who had them. Who had the previous fire?

HIS HONOUR: Q. The same company? A. Your Honour, I did not say anything about it did not matter who had them.

MR. BURCHETT: Q. Are you asserting that there is no



limit on the ambit of the previous fires which are material to the acceptance of the risk or the calculation of the premium in a company as the proposer?

A. There is no limit at all.

Q. Does that mean that if the company had had a previous fire and since then its management and its shareholding had changed, and its factory had moved to different premises, that the previous fire is still material, in your view? A. It is still material.

10

Q. Well, to what aspect of the risk is it still material? A. The fact that it is an industry which has had a fire, that the factors relating to that fire, cause of the fire, all those things which deal with the physical aspect of the risk; if it is a small company it would be quite normal procedure to look behind the scenes to see who the shareholding was; if it was a large company that is an impossible thing to do, but not if it is a small company. An underwriter makes his fullest enquiry and it is quite limitless, whichever way his mind might move to find out all those factors which could influence his judgment before he either accepted or before he wanted to impose any other rating imposition or other underwriting consideration.

20

Q. Several times in questions I have asked you you have referred to the industry experience with regard to fires. Do you mean to indicate that the duty of disclosure includes disclosing all fires in the industry? A. I was talking about the knitting industry.

Q. Are you suggesting that there is a duty of disclosure of all fires in the knitting industry. Is that you are suggesting? A. No. I am not suggesting that. What I am suggesting is that in this particular company or in a knitting mill you make the fullest enquiry about previous fires or previous fires in the industry and there is quite a lot of information available.

30

Q. But you appreciate you are not being cross-examined about what an underwriter does in the way of making enquiry about an industry before he decides whether he will insure in that industry. You appreciate you are not being asked about that, do you not? A. I thought I was being asked about what a prudent underwriter would do in certain circumstances, when a proposer is placed before him; and this is what I am trying to explain to you.

40

Q. What you are being asked about, at any rate by me, is to consider for a moment, as a way of testing the answers you have given to my friend, whether if

Marene Knitting Mills Pty. Limited had had a fire in 1963 in premises other than those, the subject of this insurance we are now concerned with, and when its management was entirely different, whether such a fire would have been material. That is what you are being asked. What is your answer? A. I consider I have already answered that; and I said in my opinion it would be considered material.

HIS HONOUR: Q. And would you expect that to have disclosed an answer to the question in the proposal about previous fire? A. If the company was the same? 10

Q. Yes? A. Yes. I would.

MR. BURCHETT: Q. When I asked you the reason for that expression of opinion you referred to the insurer's interest in the industry. You can correct me if that is wrong. Did you not refer, in giving the reason for that opinion, to the fact that the insurer would be interested in the industry experience? Is that so or not? A. The original question you asked me, if it was phrased in the same terms as the one you have just phrased to me, my answer would be the same; and I think it was that it would be of interest to an underwriter to look at the whole ambit of the knitting industry and find out generally the terms and conditions which apply to that industry and the loss experience in that industry and rating practice in that industry. 20

Q. Are you suggesting that it would be the duty of the insured or proposer, when seeking insurance, if he happens to be a member of the knitting industry, to disclose details of the knitting industry experience? A. No. That was not the question you asked me. 30

Q. You are not suggesting that are you? A. No. I am not suggesting that.

Q. If he does not owe that duty, can you tell us on what basis you assert that it would be a material matter for him to disclose, with a different factory, run by a company having the same name but under different management, had had a fire at some time in the past. (Objected to). 40

HIS HONOUR: He has answered it Mr. Burchett. I will ask it again. As I understand it he related it to the housekeeping even though it is different premises with different directors and shareholders.

Q. Is that right? A. Yes your Honour.

MR. BURCHETT: Q. On what basis does it relate to the housekeeping - -

HIS HONOUR: Q. Assuming employees who are careless; is that one reason? A. The way the whole factory is set up. There are many - I can talk for an hour about the different factors of housekeeping that would influence an underwriter.

MR. BURCHETT: Q. But the housekeeping that influences the underwriter surely is the housekeeping of the proposer, is it not, is that not right? The housekeeping that influences the underwriter is the housekeeping of the proposer is it not? A. Yes. That is right.

10

Q. And if the management is different, unless you are assuming that all the employees are the same, and if you are please tell me, the matter of housekeeping is quite irrelevant to the question I was asking you, is it not? A. I am sorry, I do not see that.

(Luncheon adjournment.)

MR. BURCHETT: I have no further questions of this witness.

20

(Witness retired and excused.)

MR. ROGERS: I now tender question 4 in the interrogatories.

(By consent question 4 read on to the transcript.)

"Did the plaintiff company (or its liquidator) on the 15th October 1965 sell the company's stock and plant to James Knitwear Pty. Limited for the sum of \$17,000? A. The liquidator of the plaintiff company did on the 13th October 1965 sell the company's stock and plant to James Knitwear Pty. Limited for the sum of \$17,000. However, the moneys for the purchase were provided by L. & F. Herszberg; James Knitwear Pty. Limited purchasing in trust for them."

30

HIS HONOUR: It will be noted that that question and answer are contained in the interrogatories.

MR. ROGERS: The situation is that we have asked for some wages records to be produced, they are in Melbourne, and because of the air strike they have been held up. On that hypothesis that we may tender further documents, I close my case.

40

CHARLES JAMES FOXALL

Sworn and examined:

MR. BURCHETT: Q. What is your full name?

A. Charles James Foxall,

Q. Where do you live? A. 16 Arther Street,  
Killara.

Q. You are a chartered accountant, I think? A. Yes.

Q. You have been in practice I think for a considerable number of years as a chartered accountant?

A. Yes, approximately 24 years.

10

Q. Conducting a business that I think was originally commenced by your grandfather? A. Yes.

Q. Your firm has handled over the years accountancy matters on behalf of a number of clients who have been involved in the clothing industry, is that so? A. Yes, that is right.

Q. Among others you commenced to act for Mr. Laib Herszberg, you personally I think since about 1951, is that so? A. That is right.

Q. He had been a client of the firm before then?

20

A. Yes.

Q. You were aware that Mr. Laib Herszberg and his wife Fela conducted a business known as Hornsby Knitting Company? A. Yes.

Q. You were aware they also formed an investment company known as Fela Investments Pty. Limited?

A. Yes.

Q. Do you know when that was formed? A. I cannot remember the date.

Q. At some stage was there also formed a company, James Knitwear Pty. Limited? A. Yes.

30

Q. Were you concerned with the books of these companies and the partnership? A. Yes.

Q. Did you from time to time go out to the premises at Hornsby in relation to the affairs of these organisations as accountant? A. Yes, frequently.

Q. Did you observe what was done at the premises?

A. Yes.

Q. Can you tell us the nature of James Knitwear's business as distinct from Hornsby Knitting Mills?

40

A. James Knitwear acted as a retail outlet for some of the goods of Hornsby Knitting Company and also purchased goods, garments and toys on its own account and sold these from its premises.

Q. Throughout the time that you acted for these companies and this firm was there any - put it this way, which person or persons gave you your instructions?

A. Mr. Herzberg, Mr. Laib Herzberg.

Q. Was there anyone else in all the time up to the - for the moment we will confine ourselves to the period up until the fire which you know about I think in 1965? A. Yes. 10

Q. Was there anyone else who gave you instructions or to your observation appeared to make management decisions in relation to any of those companies or firms? (Objected to).

Q. First of all instructions. Who gave you instructions? A. Mr. Laib Herzberg.

Q. Did anyone else give you instructions? A. No. 20

Q. Were you present on occasions when decisions were taken? A. Yes.

Q. Once or more than once? A. From memory, several times.

HIS HONOUR: Q. Do you mean at board meetings? A. They were not at board meetings, it was a partnership.

Q. Meeting of partners do you mean, or what?

A. Well, there was never a meeting of the partners to my knowledge; Mr. Herzberg might have asked me - he asked me for advice and then made a decision to act on that advice, or didn't make a decision to act on that advice. 30

MR. BURCHETT: Q. What you are saying is you would communicate advice to him and he would then tell you what the decision was? A. That is right.

Q. On those occasions was anyone else present, either on each occasion you are talking about or on some of the occasions you are talking about? A. Not to my recollection.

Q. Did you know Mrs. Fela Herzberg? A. Yes. 40

Q. Did you observe her performing any functions in relation to any of these businesses? A. Yes.

Q. What functions did you observe her performing?

A. Mrs. Herszberg was a machinist, and she controlled the production section, one section of the factory.

Q. Have you observed her signing documents that related to the business? A. Never. I have never seen her sign any documents.

Q. Do you recall the matter of the availability for purchase of certain assets of a company, Marene Knitting coming up? A. Yes.

10

Q. Did you have discussions with Mr. Laib Herszberg on that subject? A. No.

Q. Did you receive instructions from Mr. Laib Herszberg on that subject? A. No.

Q. In what way were you involved then in relation to that matter? A. After Mr. Herszberg had acquired the assets, he told me that he had acquired these assets.

Q. When he told you that he had acquired these assets, do you recall some question arising concerned with the name Marene? A. Yes.

20

Q. What was that question? A. I was informed that there was some other party who was trying to usurp the name of Marene and - (Objected to; allowed).

HIS HONOUR: Q. Who told you this? You say you were told. By whom? A. By Mr. Herszberg and by his then solicitor.

MR. BURCHETT: Q. Was there then, after he told you that, some decision taken relating to some purchase?

A. Yes. It was decided that the Herszbergs would endeavour to purchase the shares in Marene Knitting Company Pty. Limited.

30

Q. In due course a purchase of shares took place?

A. Yes.

Q. I think you this morning produced a minute relating to that? A. That is right.

Q. I want you to go back for a minute to the partnership of the Hornsby Knitting Company. Would you have a look at the document I now show you. Would you look over the signatures on that document. Do you know those signatures? A. Yes.

40

Q. Whose are they? A. Mr. Laib Herszberg and

Mrs. Fela Herszberg, and Mrs. - I don't know her christian name, but Mrs. Farrow is the witness.

Q. You know Mrs. Farrow? A. Yes.

Q. What was her capacity? A. She was their book keeper.

(Abovementioned document tendered and without objection marked Exhibit "C".)

Q. By the way, do you know where Mrs. Herszberg is now? A. I understand she is in Israel. 10

Q. Do you know how long ago it was that she left Australia? A. No, not precisely. I would say somewhere around about November/December of last year.

Q. At the time of this purchase of shares in Marene Knitting did you have a conversation with Mr. Laib Herszberg concerning the number of directors that would be necessary? A. Yes.

Q. Do you remember what you said to him and what he said to you? (Objected to; allowed).

Q. What did you tell him and what did he tell you? 20  
A. I told Mr. Hersberg that as a company there had to be two directors, and he said that he would make Mrs. Herszberg the second director.

Q. At that stage, and in connection with the matter of the acquisition of shares in Marene Knitting, and I think there was also an associated company, Marene Distributors, is that right? A. That is right.

Q. Did Mrs. Herszberg convey herself any instructions or decisions to you? A. No.

Q. You have told us that you were out at the Hornsby premises on numbers of occasions, is that so? A. Yes. 30

Q. Did you also subsequently to the Marene acquisition go to premises in the city? A. Yes.

Q. Also on numbers of occasions? A. On numbers of occasions.

Q. You told us that you have acted for a number of people involved in the clothing industry? A. Yes.

Q. Have you acquired some knowledge of garments and the nature quality of garments in that industry? 40  
A. I like to think so.

Q. Could you tell his Honour whether the garments that you observed being produced at the Hornsby premises were the same or different in nature from the garments which you observed when you went to the city premises after the Marene acquisition? A. I would say they were different at the Marene Knitting Mills premises. They appeared to me to have been a higher quality, and also the Marene Knitting Company specialised in the making of garments for bowlers, lawn bowlers, white sweaters and cardigans. 10

Q. Did you notice anything about the brands?

A. I cannot remember the brands, I think it used to be a Fela brand on the Hornsby Knitting Company's and to the best of my knowledge all the Marene garments were manufactured under the brand "Marene".

Q. You I think wrote up the books of these businesses?

A. No, not entirely.

Q. You were concerned with the writing up of them?

A. I was concerned with the writing up and the checking and the balancing. 20

Q. The checking of them? A. Yes.

Q. I think you were concerned with the putting in of tax returns of behalf of Marene? A. That is right.

Q. Were you concerned with questions under the Income Tax legislation in relation to those returns, as to whether or not the business conducted after the change of shareholding was the same business which had been conducted before the change of shareholding by Marene? A. Yes. That is so. 30

Q. For that purpose did you look at the nature of the business and the customers and the books indicating the dealings and transactions of Marene? A. Yes.

Q. Did you for the purpose of the income tax legislation and on the basis of your experience and knowledge as an accountant, form an opinion as to whether or not the business was the same business which was being conducted after the change-over of shareholding as had been conducted before? A. Yes. In my opinion it was the same business. (Objected to; allowed). 40

Q. You have answered the question? A. Yes.

Q. You say from your point of view as an accountant, and having regard to the provisions of the income tax legislation, in your view it was the same business before and after acquisition? A. That is right.



Q. That is the business of Marene? A. Yes.

Q. Did you act upon that view in the submission of the income tax returns of the company? (Objected to; allowed).

Q. I think you said you did put in the returns on that basis? A. On that basis, yes.

Q. At the time the acquisition of the shares took place did you tender - you need not tell us what it was now - did you tender advice to Mr. Herszberg on the subject? A. Yes. 10

Q. Of the income tax implications? A. Yes.

Q. In forming the opinion that you told his Honour, did you take into account among other things the identity of the customers of Hornsby Knitting Mills and the customers of Marene? A. That would have been one of the factors which would have - -

Q. Could you summarise for us the factors which you regarded as most significant? (Objected to; allowed).

Q. Could you summarise the factors which you regarded as most significant? A. The name of Marene, the goodwill which had been lost by Hornsby Knitting Company; the availability of losses to carry forward in respect of continuing the Marene business. 20

HIS HONOUR: Q. The fact of the matter was that Marene was then defunct? A. Yes.

Q. And as from some date they took over such of the business of Hornsby as Hornsby had previously done, and in addition carried on things Marene had previously done? A. I think that's the reverse. 30

MR. BURCHETT: Q. Well, you put it in your own terms would you? What was the position as you saw it from the books you were concerned with and the observations of the two businesses that you made? (Objected to; rejected).

CROSS-EXAMINATION:

MR. ROGERS: Q. The situation was, was it not, in 1947 the partnership of L. & F. Herszberg was registered? A. It would have been around that date.

Q. That partnership became transmuted, or the name changed in 1949 to Hornsby Knitting Company? A. Yes. 40

Q. That partnership worked perfectly satisfactorily so far as you could observe without the benefit of a partnership agreement in the ensuing years? A. Yes.

Q. Its business was that of the manufacture of knitwear? A. Yes.

Q. In July 1953 Fela Knitting Company commenced operations without the benefit of registration at that time? A I can't remember that.

Q. You knew of Fela Knitting Company? A. Yes. 10

Q. Do you know the purpose of commencing operations under the name of Fela Knitting Company? A. No.

Q. You were not consulted on that subject? A. No.

Q. Mr. Herszberg took you into his confidence in relation to his business activities? A. I think most of them.

Q. When did you first become aware of the existence of an organisation enjoying the name Fela Knitting Company? A. My first recollection of it was during the period from the 1965 fire to August 1966. 20

Q. And what did you understand that organisation to be doing during that period? A. It was operating in conjunction with Hornsby Knitting Company the business of manufacturing garments.

Q. James Knitwear Pty. Limited after its premises were destroyed in the fire carried on the activity of retailing knitwear purchased from Hornsby Knitting Company? A. Yes.

Q. And with all due respect the company carried on that activity in an endeavour to split the profit that would otherwise be realised from the manufacturing and retailing of knitwear? A. No. I would not admit that. That would be a fact but it was not the primary purpose. 30

Q. We come to the disaster of the 1965 fire. You are in a position to say, are you not, that at the time of the fire there were outstanding orders from customers of Hornsby Knitting Company? A. Yes.

Q. Those orders were fulfilled were they not?  
A. Some may have been; a lot were cancelled.

Q. Those orders fulfilled could only be fulfilled through medium of the machinery purchased from Marene Knitting Mills Pty. Limited? A. Yes. 40

Q. The activity which was being carried on after the 1965 fire was being carried on by Hornsby Knitting Company and this newly-identified Fela Knitting Company?

A. Yes.

Q. James Knitwear Pty. Limited applied for registration of the trade name Marene shortly after the 1965 fire? A. I am not aware of that.

Q. In working out for purposes of the loss of profits policy held by Hornsby Knitting Company what the measure of loss had been you took into account only the production of Hornsby Knitting Company and its sales did you not? A. Yes. 10

Q. Those were transactions that were substantially a carry-over from Hornsby Knitting Company business?

A. Are you talking about subsequent to the fire?

Q. Yes? A. Yes.

Q. You knew did you not that when the liquidator of Marene Knitting Mills Pty. Limited was appointed by order of the Supreme Court in 1965 he ceased carrying on the business? A. Yes. 20

Q. Because the shares remained in the existing share orders of Marene Knitting Mills Pty. Limited the corporate shell remained dormant until the purchase of the shares in June 1966? A. Yes.

Q. So that the business of Marene Knitting Mills Pty. Limited as a corporate entity was not being carried on by any person? A. That's right.

Q. In so far as Hornsby Knitting Company may have been able to obtain by the use of the trade mark Marene any of the previous customers of Marene Knitting Mills Pty. Limited, that was purely fortuitous? A. I would not be able to answer that. 30

HIS HONOUR: Q. Did Hornsby Knitting Company or James Knitwear Pty. Limited carry on any business after June 1966? A. Hornsby Knitting Company carried on business, in my opinion, until 31st August, 1966, when it sold all the assets to Marene Knitting Mills.

Q. What about James Knitwear? A. In effect it has not traded for many years, from about 1965 until about 1974. 40

MR. ROGERS: Q. And what happened was that you took a certain view, rightly or wrongly of the ability to utilise the taxation losses of Marene Knitting Mills

Pty. Limited and it was for that reason that the activities of Hornsby Company were fed into that corporate structure. You are having difficulty? A. Yes.

Q. And from the date of the sale of the Hornsby Knitting Company to Marene Knitting Mills Pty. Limited the company carried on the previous business of Hornsby Knitting Company together with any other business which it was able to obtain? A. Yes.

Q. Were you a participant in the bringing into existence of the partnership agreement Exhibit "C"? 10

A. I can't recollect. I would have to say yes to that.

Q. Mr. Robert Hall who was the solicitor who drew up that agreement was not the regular solicitor of Mr. and Mrs. Herszberg at any rate? A. No.

Q. Do you know how Mr. and Mrs. Herszberg came to go to Mr. Robert Hall? A. On my advice.

Q. So was it your idea that a partnership agreement should be prepared? A. Yes.

Q. And that motive you had was associated with tax problems? A. No not entirely. I am a firm believer that any partnership, whether it is between husband and wife or not should have an agreement, not as between themselves, but if anything should happen to any one of them. 20

Q. You wanted to cover the situation in case any ill-fortune befell either Mr. or Mrs. Herszberg?

A. Yes.

Q. Who gave the instructions to Mr. Robert Hall for the preparation of that document, Exhibit "C"? Was it you? A. It would have been me, yes. 30

Q. So, the contents of that document in so far as they exhibit any unusual characteristics, emanate from you? A. Not necessarily.

Q. But what is the true position? A. I can't remember in respect of the limitation clause whether Mr. Herszberg asked me to put it in, or I suggested it going.

Q. If you suggested it, it certainly did not represent the position as it existed at the date when the document was brought into existence? A. I can't answer that question. 40

Q. Do you know if Mrs. Fela Herszberg in fact

contributed more than half the capital required to bring into existence Hornsby Knitting Company or its predecessor in name? A. I have never been informed that happened.

Q. You don't know one way or the other? A. No.

Q. So that the recital, or statement in Exhibit "C" that the partners contributed equally may be true or false, you don't know? A. No.

Q. You gave an instruction to prepare a partnership agreement embodying that as a statement, because that is the usual position? A. Yes. 10

Q. And you saw no reason why you should trouble to confirm whether in fact in this individual case that was what had happened? A. That is right.

Q. You were good enough to describe Mrs. Fela Herszberg's functions as a machinist. In point of fact she was the lady in charge of the manufacturing side of the business, was she not? A. Yes. I also said that. 20

Q. And Mr. Herszberg was in charge of the office and sales section of the business? A. And purchasing, and financing.

Q. And because your concern was with the administrative side of the business there was no surprise when your instructions emanated from Mr. Laib Herszberg? A. No.

Q. The matters for discussion that arose were matters unconcerned with the factory or production side of the business? A. Yes. 30

Q. Can you recollect any decision which you sought from Mr. Laib Herszberg which concerned basic, or fundamental matters relating to the business as distinct from ordinary, everyday machinery problems relating to accounts or taxation returns? A. I don't get the import of the question.

Q. You told his Honour and Mr. Burchett that you were present on occasions when decisions were taken? A. Yes.

Q. It is the nature of those decisions that I am directing my questions to. I suggest the decisions were purely the day-to-day administrative decisions, or alternatively ones relating to immediate tax problems? A. No, not necessarily. 40

Q. Could you give an example of any other decision?

A. Financial decisions relating to the availability of money, where money could be obtained to assist in the running of the business.

Q. Were those decisions of the type you have lately described taken instantly, or were they reflected on a decision conveyed to you? A. I think normally Mr. Herszberg had been thinking things over before he came to me for advice.

10

Q. So, whether or not he consulted Mrs. Herszberg before he came to you and gave the fruits of their joint thoughts, you don't know? A. No.

Q. The suggestion that the shares were purchased because of some concern felt in regard to the name of Marene I suggest is completely inaccurate. I will put it another way. It is not right to say the shares in Marene Knitting Mills Pty. Limited were purchased by Fela Investments because of some concern felt with regard to the name Marene? A. I think there were other factors.

20

Q. The tax loss? A. Yes.

Q. Indeed at the time when the decision was taken to purchase the shares the question of the name Marene had been well and truly disposed of? A. I was not aware of that.

Q. You do not suggest, do you, that Mrs. Fela Herszberg became a director of Marene Knitting Mills Pty. Limited merely because there had to be two persons occupying directorships? A. My previous dealings with her had been nil, and it would seem to be the natural thing to do.

30

Q. You were associated, I assume, with the incorporation of Fela Investment Pty. Limited? A. Yes.

Q. And she was a director of that company? A. Yes.

Q. And of course it was Fela Investments that was purchasing Marene Knitting Mills Pty. Limited? A. Yes.

Q. She became a director of what was after all a fully owned subsidiary? A. Yes.

Q. In the normal course? A. Yes.

40

Q. The Herszberg family followed your advice in relation to the shareholding structure established for Fela Investments Pty. Limited? A. Yes.

Q. And there you followed the course, you have subscriber shares in the names of the parents, and allocate later shares to the children? A. Yes.

Q. And that is done with a view to death duty savings? A. Yes.

Q. And when Marene Knitting Mills Pty. Limited shares were purchased the shares were taken in the name of Fela Investments Pty. Limited to promote that self-same objective? A. Yes.

10

Q. But it was at all times the intention that the effective management of Marene Knitting Mills should remain with whoever had been the effective manager of the Hornsby Knitting Mills business.

Q. When the Marene Knitting Mills Pty. shares were purchased in the name of Fela Investments Pty. Limited that was done purely in order to promote the death duty scheme? A. Yes.

Q. And it was at all times intended so far as you knew that effective control of the activities of Marene Knitting Mills should be with whoever had been the effective controller, or controllers of Hornsby Knitting Company? A. I presume that was Mr. Herzberg's idea.

20

Q. Well, this was your understanding of the position? A. Yes.

Q. From your extensive knowledge of the garment industry it is true to say, isn't it, that after the early 1950s there was an improvement in the general standard of garments produced in the industry in this country? A. Yes, that is correct.

30

Q. And what followed in the evolution of the standard of product produced firstly by Hornsby Knitting Company and then by Marene followed the general industry trend of improving the quality of the product, competing more effectively with imported products? A. It was to compete more effectively.

Q. But at any rate it was an industry-wide trend that Hornsby and Marene Knitting Company followed?  
A. Yes.

Q. And it is pointed out that at least at one period of time you occupied the distinction of being director of Fela Investments Pty. Limited yourself? A. Yes.

40

A. And you were an original director of that company? A. Yes.

Q. But you terminated your appointment at a period prior to the purchase of the Marene Knitting shares?

A. Yes. It was in 1964 that my partners and myself decided that we would not be directors of any companies.

Q. And the same position applied to James Knitwear Pty. Limited? A. Yes.

HIS HONOUR: I will have it noted that the evidence given this morning by this witness when sworn on subpoena duces tecum is by consent tendered in and has become part of the evidence in the present proceedings. 10

MR. ROGERS: Q. In the income tax returns in the years subsequent to 1965 for the purposes of depreciation did you treat the machinery - In whose return for purposes of depreciation did you treat the machinery purchased from Marene? A. In the income tax return for the year ended 30th June, 1966, in the return of Hornsby Knitting Company, and in their return between the period 1st July, 1966, until 31st August, 1966, at which date - that is the terminating date, the Hornsby Knitting Company and from then on in the return of Marene Knitting Mills Pty. Limited. 20

Q. I show you a document which purports to be a photostat copy of the balance sheet of Marene Knitting Mills Pty. Limited for the year ended 30th June, 1971. I should like to direct your attention to the item headed Loan Account L. & F. Herszberg, and there is a figure entered against the entry. That sum is in a large part the unpaid purchase price for the sale by Mr. and Mrs. Herszberg to Marene Knitting Mills Pty. Limited of the Hornsby Knitting business, is it not? A. Some of that is. Mr. and Mrs. Herszberg used to make advances from time to time to Marene Knitting Mills, but a large part of that would still remain. 30

Q. And you did from time to time after the 1965 fire enjoy communication with Mr. Herszberg by means of letters as distinct from speaking to him? A. Not very often.

Q. But you did become aware of the fact that no doubt because his stationery had been destroyed in the fire he was using the Marene Pty. Limited letterhead? A. With a stamp "Fela Knitting Company" superimposed on it. 40

Q. And at other times it was Hornsby Knitting Company? A. I never saw it with Hornsby Knitting Company.

Q. But at any rate it is fair to say, is it not,



that the niceties of preserving distinction of corporate structures was utilised by Mr. and Mrs. Herszberg for death duty and taxation considerations, but otherwise did not concern them in the conduct of their business? (Objected to).

RE-EXAMINATION:

MR. BURCHETT: Q. After the fire in 1965 did the activities of the Hornsby Knitting Company come to something of a halt? A. Yes, at Hornsby they came to a dead halt. 10

Q. You told my friend that an entry regarding a loan account represented in part some assets sold to Marene by L. & F. Herszberg? A. That is right.

Q. What was the asset so sold? A. The stock, the plant, the sundry debtors - well, all the assets of the partnership of L. & F. Herszberg and all the liabilities, and that was the net balance.

Q. I think in fact you had raised a journal entry in the private journal of Marene Knitting Mills late in this matter? A. Yes. 20

Q. Would you like to refresh your memory from the journal entry? A. I have seen it just recently. I do not know the exact figures in it.

Q. Was there an item there "Plant and machinery at cost"? A. Yes.

Q. And the plant and machinery, what would that be? A. That would be any plant and machinery that had been acquired from the liquidator of Marene, together with any plant that L. and F. Herszberg partnership had acquired between that date and 31st August. 30

Q. So that what you were doing in that journal entry was effecting a transfer back to Marene Knitting Mills Pty. Limited of the plant and machinery which had previously been acquired? A. That is right.

(Witness retired.)

(Mr. Myer Herszberg called. Mr. Rogers made reference to the fact this witness has been in Court during the hearing. His Honour stated Mr. Rogers could make any comment he wishes in his address.) 40

CHIL MYER HERSZBERG

On affirmation:

MR. BURCHETT: Q. What is your full name? A. Chil Myer Herszberg.

Q. Where do you reside? A. 12 Badlure Avenue, East St. Kilda, Victoria.

Q. You are a director of the plaintiff company, are you not? A. I am.

HIS HONOUR: Q. Are you the managing director? A. Yes.

MR. BURCHETT: Q. When you say the managing director, do you mean you do the managing of the company in fact, or have you been in some way formally appointed as managing director? A. I did all the managing of the company. 10

Q. You mean in fact you do do the managing of the company, do you? A. Yes.

Q. How long have you done the managing of the company? A. Since my father passed away in 1971.

Q. At that stage was your mother still in Australia? A. Yes. 20

Q. Did she play any part from the time you became a director in the decision making processes in relation to this company? A. No. (Objected to).

HIS HONOUR: Q. When did you become a director of Marene? A. After my father died.

Q. You were not a director up till then? A. No.

Q. Between that date and the date your mother went to Israel, did you have any discussion at board meetings or otherwise about the general management of the company? A. Not with my mother. 30

MR. BURCHETT: Q. Who made the decisions as to the policy of the company and what was done? A. I made the decisions. I did sometimes discuss it with my brothers.

HIS HONOUR: Q. Did you have any board meetings? A. No.

Q. None at all? A. No, not as such.

MR. BURCHETT: Not in a formal sense? A. Not in a formal sense, no.

HIS HONOUR: Q. How old is your mother? A. Late fifties.

MR. BURCHETT: Q. During your father's lifetime, so far as your observation of the business activities of your father and mother went, can you tell his Honour whether one or both of them made the management decisions? A. My father definitely made all the management decisions. He was very forceful.

Q. Your mother up to some stage did carry on certain activities within the Marene Knitting Mills Pty. Limited organisation, did she not? A. Yes. 10

Q. What were the activities she carried on?  
A. She looked after the girls in a forelady capacity, to do with the making of the garments.

Q. Up to what time did she do that? A. Shortly before we moved to Melbourne.

Q. Can you give us some idea how long before?  
A. Possibly a month.

Q. And from then on was she engaged in any activity related to the - I will withdraw that and put it another way. At the time that the fire in Melbourne occurred had your mother moved from Sydney to Melbourne? A. No. 20

Q. Had other members of the family moved to Melbourne? A. Yes, we had.

Q. Who were the other members of the family who moved to Melbourne? A. One brother and I was in the process of moving.

Q. You were actually in the process of moving at the time the fire occurred? A. Yes. 30

Q. I think you had a younger sister who was still at school in Sydney, did you not? A. Yes.

Q. What was the intention at this stage with regard to her and your mother? A. The intention was she was to finish her schooling. Her mother would stay with her till she finished.

Q. In fact did your mother move with your sister to Melbourne at the end of the year? A. Towards the end of the year, after my sister's examinations. 40

Q. Following the fire did your brothers and you

endeavour to get established some garment making activity, again in Melbourne? A. That is correct.

Q. When did you do that? (objected to as irrelevant; allowed).

Q. When did you start to try and get established?

A. After we were told we were not ....(interrupted).

Q. The date is all I want. A. At the beginning of 1974 we acquired some machinery and we started manufacturing in a small way.

10

Q. Was your mother involved at this stage in that activity? A. Later in 1974 she did come and help us. She just passed the day really. She came and pulled the threads out of the pieces of material.

Q. Later on in 1974 she came and did some tasks on a part time basis, did she? A. Yes.

Q. At the time your mother ceased working, as you have told us shortly before you left Sydney, had she expressed any intention to you as to whether or not she would resume working in any active way in the factory in Melbourne? (Objected to as irrelevant. Allowed. To be argued later).

20

Q. Had your mother expressed some intention at the stage when you have told us shortly before the move to Melbourne she ceased to carry on her work at Marene Knitting Mills? A. Actually her intention, we discussed this when we decided we were going to move, and she said she had worked enough and did not want to be involved any more. It was not shortly before.

Q. When was it? A. I would say it was towards the beginning of the year, towards the beginning of 1973.

30

Q. You say towards the beginning of 1973 you had this discussion? A. Yes.

Q. And shortly before you moved to Melbourne she in fact ceased to attend Marene Knitting Mills?

A. Yes.

Q. At the stage that you had this conversation with her, had she in fact been consulting a doctor? A. Yes.

Q. When did she leave Australia for Israel?

A. About November last year.

40

Q. She is now living permanently there, is she not?

A. Yes. She has remarried.

Q. You, we have been told, were working at the premises of Hornsby Knitting Mills for, a witness said, some 18 months to two years before the fire in 1965. Is that an accurate statement of the time you were working there or not, as best you can remember it? A. Yes.

Q. Before that had you on some occasions been to Hornsby? A. On some occasions, yes.

Q. How far back do your memories go of being on some occasions at Hornsby? A. I do remember when we lived there. 10

Q. At one stage the family lived there, did it?  
A. At one stage the family lived there.

HIS HONOUR: Q. How old are you now? A. 27.

MR. BURCHETT: Q. Were you born in 1948? A. Yes.

Q. When was it the family ceased to live there?  
A. As a family?

Q. Yes. A. I would have been five years old and my older brother would probably be seven. That would have been 1953 or 1954. The two of us went to a school in Melbourne, a Jewish school. We stayed there nearly a year. 20

Q. This older brother you mentioned, who is that?  
A. Israel Herszberg. He is an engineer. He has never been in the business.

Q. He is not associated with it? A. Not at all, apart from being a shareholder.

Q. You went to Melbourne, and what happened when you came back from Melbourne? A. After I came back from Melbourne I probably came back to Hornsby for a very short time, and then my father rented a small flat in Bondi and the three of us moved there. I cannot remember exactly the ages, and we had a woman looking after us. 30

Q. Was that a Mrs. Goldberg? A. Yes. Shortly after that, it would have been a year, we moved into a flat, which the whole family moved into. My parents came up on weekends, and we had a full time house-keeper there. 40

HIS HONOUR: Q. You were living at Hornsby from the date you said onwards, were you? A. Yes.

MR. BURCHETT: Q. The object of this flat and house-keeper at Bondi was so that you could attend a Jewish school, the Mariah(?) College? A. Yes.

HIS HONOUR: Q. Did you know there had been fires in 1958 and 1960 and 1961? A. No.

Q. When did you first find out about this? A. I first found out when I got the letter of rejection.

Q. You never knew before then? A. No.

MR. BURCHETT: Q. I think while you were living at the first place you have mentioned at Bondi your parents were still living at Hornsby as well as conducting the business there, were they not? A. Yes. 10

Q. When you moved to the second place, was that 52 Allens Parade, Bondi Junction? A. Yes.

Q. Your parents also lived there with you, but not the whole of the time, is that right? A. Yes.

Q. Part of the time they lived with you and part of the time they still stayed at Hornsby? A. That is right. 20

Q. You lived at Allens Parade, Bondi Junction until when? A. Until I was about 13 when I spent another year in Melbourne.

Q. What year were you in Melbourne again? A. Just before I was 13, to attend another Jewish school, and when I came back we moved to Ocean Street, Bondi.

Q. You did, however, commence going to Hornsby regularly in about the 18 months to two years before the fire in 1965, did you? A. That is correct.

Q. Prior to that, over the period you have told us about when, for part of which time you were living at various addresses at Bondi and attending schools in that area, and for two separate periods in Melbourne... (Interrupted). A. Yes, it might not have been a complete two years. 30

Q. Did you on some occasions go up to Hornsby?  
A. On rare occasions, yes.

Q. But you tell his Honour you were not aware of the fires in 1958, 1960 and 1961? A. No.

Q. You neither saw anything of them nor did your father tell you anything about them? A. That is right. 40

Q. I think you told us your father was a forceful man? A. He was.

Q. Did he in his lifetime have the habit of discussing his business affairs with you at all? A. No, he did not discuss them with anyone. He made up his own mind about everything. Even about us moving to Bondi. That was his idea. My mother was not ...

Q. In relation to the fire which occurred when you were there in 1965, did you have some part to play with Swanton's, the assessors? A. I only spoke to him at the time of the fire. 10

Q. How did that come about? A. My father was not well and he asked me to go out with my mother, because my mother was very depressed.

Q. Had your father had some mild heart attack at that time? A. Yes.

Q. Was he confined to bed for some period? A. Yes.

Q. Immediately after the fire you went up and spoke to Mr. Swanton, did you? A. The next day. 20

Q. I think you heard evidence from Mr. Swanton as to conversations that he says you were present at. Do you have any recollection of Mr. Swanton ever saying anything to you concerning earlier fires?  
A. No.

Q. You have heard evidence given by a number of people concerning the businesses of Hornsby Knitting Co and Marene Knitting Mills Pty. Limited, making comparisons between the businesses, have you not?  
A. Yes. 30

Q. Would you tell his Honour first of all whether the goods sold by Marene Knitting Mills Pty. Limited were the same lines as the goods that had been sold by Hornsby Knitting Co or not? A. They were a different line.

Q. What was the difference? A. The garments we made in Hornsby were 95% - all the time we were in Hornsby we were trying to improve our garments, but the type of garments we had in Hornsby, they were required to be a very cheap garment. Woollen cotton, woollen fibre, mixtures. The bulk of the manufacturing was woollen cotton while I was there. I believe before I was there they used to make a woollen fibre. 40

HIS HONOUR: Q. Didn't people from Wahroonga come up

occasionally and buy summer pyjamas? A. Yes, they bought what we made. Everything was mass produced in the factory, and you could not make it specially for them, but we did buy in better garments for them.

MR. BURCHETT: Q. The nature of the garments which were made, was that also reflected in the types of yarn that were purchased? A. Yes. As I said in Hornsby it was woollen cotton mainly. Once we took over Marene we had a clientele that were buying pure wool garments, and also the garments which had the self edge finish, a much dearer garment. From memory the dearest garment we made in Hornsby would have been \$4. As a comparison straight after Marene, there was not anything under \$9 to \$10. 10

Q. There was a change of values in any event. Are you saying there was a difference beyond the question of inflation? A. Yes, in a matter of six months, you know.

Q. Did you use quantities of a certain type of cheap yarn from Davis Coop in Hornsby? A. Yes, in Hornsby we had large orders in which we used what we called a lambs wool; it was a cotton and wool mixture, which was a waste product from Davis Coop and we took their complete production of this line. 20

Q. When you got going with Marene Knitting Mills did you take any of this cotton waste product? A. I think we bought a crate of it just to make samples, but none of it was sold. It was just not on. It just did not sell. It was not a proposition as compared to the other stuff we were making. 30

Q. And that was a material which was only suitable if you were making the cheaper line you were making before? A. Yes, very cheap.

Q. Did you make garments at Hornsby, cardigans and pullovers, which had a woollen skin on the outside and something else on the inside? A. Yes, this again, as I classified it before, was a woollen and cotton mixture. The one garment, the one knit, wool outside and cotton inside. The one knit. It was a much cheaper garment. The percentage was about 30% wool and 70% cotton. 40

Q. Was that a line you continued to make in the operations of Marene? A. We did make some of it straight after we first got in but the other lines took over. Marene lines were better lines really.



Q. You made it for a short time but then discontinued, is that right? A. Yes.

Q. When you took over the Marene Knitting Mills, was that an already established company? A. It was, yes.

Q. From your knowledge of the industry can you tell his Honour over what period it had been established in this industry? A. I believe it was established 25 to 30 years before we took it over. 10

Q. Did it have at the time you took it over established outlets? A. Yes, quite a number of smaller shops, better class shops, which we eventually took over. Most of them.

Q. The nature of those outlets and numbers of smaller shops, how did that compare with the nature of the outlets of the Hornsby Knitting Co? A. The Hornsby Knitting Co, they did sell to a few smaller shops but we did not have travellers selling. It was mainly the bigger stores, the department chain stores, D. and W. Murry, Coles, Woolworths. 20

Q. Did the Hornsby Knitting Co make under its own name for them or under house brands? A. House brands for those people. The smaller shops got any label that was going.

Q. Did Marene Knitting Mills make these house brands or under its own name? A. They did make some house brands, but the bulk of the business was under Marene Knitting Mills.

Q. Did Marene have some particular connection associated with the Newcastle area? A. Yes, Marene had a manufacturers' agent called Blunden and he was very well in in the Newcastle and Cessnock area, and he did very very well. Up till 1970 he was with us. 30

Q. Did that account for a sizeable proportion of its output? A. In 1966 I would say 90 to 95% of our production went to Mr. Blunden's customers. No, I am sorry, it could be a bit less than that.

HIS HONOUR: Q. What year? A. 1966. The first year we operated as Marene. It would not be as high as 90%. About 85%. 40

MR. BURCHETT: Q. It was a substantial extent, was it? A. Yes, a really high percentage.

Q. Was Mr. Blunden someone who had been taking production from Marene before you took over Marene?

A. Yes.

HIS HONOUR: Q. How long had Marene not been operating as a business before you took it over? A. About three months.

MR. BURCHETT: Q. What you are saying is at any rate in part you were able to re-establish...(Objected to; rejected).

10

Q. You have told us about Mr. Blunden. You have told us he took in 1966 a very high proportion of your output. You have told us he was taking output from Marene before you took over Marene. That is right, is it not? A. Yes.

Q. By "you" I mean whatever Herszberg connection it was that took it over? A. Yes.

Q. Was there also an established connection long before the Herszberg family became involved with Marene in relation to bowlers' garments? A. Yes. There was. It was a big sizeable business as well.

20

Q. Were you able to re-establish that connection? A. Bowlers' creams was a big line right till the end.

Q. From the time you took it over until Marene finished trading? A. Yes, a large percentage. All our advertising was based on bowlers' creams.

Q. You said something about travellers. Did you say Marene had travellers? A. I believe they only had two. When we took them over there was Mr. Blunden and one other. This other chap started up on his own, and he was using these Marene label. Hence there was some Court action at the time.

30

Q. You had this dispute over the name? A. Yes, he was using the name and that is why we could not use the name from the beginning.

Q. That dispute was satisfactorily resolved when the shareholding was acquired, was it not? A. Yes.

Q. Did Marene under the Herszberg management continue the method of business of having a traveller or travellers? A. Yes, it was much more profitable than the method of business we were doing at Hornsby.

40

Q. At Hornsby did you have travellers? A. We tried

to, with no success. The garments we were manufacturing at Hornsby were not garments the people wanted, that the smaller shops would buy.

Q. It did not lend itself to merchandising in that manner? A. No.

Q. From the point of view of the technicalities of organisation, Marene Knitting Mills Pty. Limited did not sell directly so much as through another company, Marene Distributors Pty. Limited, is that so? A. It was sold through Marene Distributors, yes. 10

Q. And that method of effecting the sales, was that continued on under the Herszbergs' management? A. It was.

Q. Was there a considerable number of suppliers, distributors, or separate outlets through which Marene products were distributed prior to the Herszberg family taking it over? A. Yes. (Leading objected to).

Q. Are you able to tell the Court whether or not after the Herszberg management those distribution outlets were continued to be used? A. You mean customers? 20

Q. Yes, people to whom you supplied your garments?  
A. From Hornsby or Marene?

Q. Marene? A. Yes, we did continue, yes.

Q. So far as the staff were concerned, what was the number of staff that you had at Hornsby Knitting Mills, approximately? A. It could be anything up to 60. Between 40 and 60, depending on the season.

Q. Out of that number, apart from the members of the Herszberg family, how many were there who went to work for Marene Knitting Mills Pty. Limited in 1966? A. There was Mr. Cubbins. He came straight over. Ruth Smith. That was her maiden name. She gave evidence. Terry Stanley, who gave evidence today. He did not come straight over. He came after about six months. He had been working at Hornsby at an earlier time. He did not transfer directly. There was one other that Terry mentioned today that jogged my memory, she worked for about three months after we took over Marene, but not straight away. 30 40

Q. Otherwise did you acquire new staff? A. Yes; some staff from the old Marene.

HIS HONOUR: Q. Were there some staff who went from

Hornsby to Mansion House with you and gave it up because it was too far to travel? A. One, I think. That was the one Terry mentioned.

MR. BURCHETT: Q. You said there was staff who had been employed at Marene before you took over? A. Yes.

Q. Can you remember how many of them there were?

A. There could have been three, maybe four.

Q. Three or four? A. Yes.

Q. We have been told something about the machinery. Could you give us a comparison between the machinery used prior to the fire at Hornsby and the machinery used in the operations of Marene Knitting Mills? 10

A. Yes, the machinery in Hornsby was mainly of the type of roll length machinery. They made rolls. The cutting and sewing was done and there would not be much waste. There were a couple of more modern machines we bought to try and get in the better market. Only a very small percentage of the body length machines, that is the machine that knits its own self-edge and basque on. When we took over Marene they had a relatively small plant. Three, maybe four of those body length machines, but they were giving a lot of stuff out to be commission knitted by Lipro Knitting Mills, who were commission knitting these body lengths. They specialise in body length pieces. When we bought some machinery we bought body length machinery so that we could make the stuff ourselves rather than do commission knitting. The machines we had at Marene were fully automatic machines, and we made a much better garment. The garment we made in Marene was all wool or acrylic or orlon or cashmere no mixtures. The weight of the average garment in Hornsby was about one pound four ounces and the average garment at Marene was going on two and a half pounds. Wool. 20 30

Q. You mentioned automatic machines. Out of the machines at Hornsby what proportion would have been automatic machines? A. There are degrees of automation. Fully automatic, there were two. There were another two that were fully automatic, that could not make stripes. Striping is an important part because you have to reinforce the self-edge. Two fully automatic, two that could not reinforce other threads for the self-edge. 40

Q. And the balance? A. They were all roll length machines. All piece goods machines.

(Further hearing adjourned until Friday, 21st November, 1975 at 10 a.m.)

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

No. 8276 of 1974

CORAM: YELDHAM, J.

MARENE KNITTING MILLS PTY. LIMITED v.  
GREATER PACIFIC GENERAL INSURANCE LIMITED & ANOR.

FOURTH DAY; FRIDAY, 21ST NOVEMBER, 1975

CHIL MYER HERSZBERG  
On affirmation:

10

HIS HONOUR: Q. You are still bound by the affirmation you made yesterday to tell the truth. Do you understand?  
A. Yes.

MR. BURCHETT: Q. You were telling us yesterday about the operations of Marene Knitting. During the period after the 1965 fire at Hornsby and before the shares in Marene Knitting were acquired, can you tell his Honour in what name trading was carried on in that interim period?  
A. Fela Knitwear. The label was Fela Knit.

20

Q. Did your father at or about that time ever express to you what he had in mind in arranging the purchase of the Marene shareholding? (objected to - allowed subject to objection, argument to be heard in due course as to the overall effect of this evidence).

Q. Did your father tell you something about his intentions at the time that he was arranging the purchase of the Marene Knitting Company shareholding? A. He liked the operation of Marene.

Q. Did he tell you? A. Yes, he told me.

30

Q. You started to say he liked something. Would you try and put it as near as you can in the words he used, or to the best of your recollection the effect of the words he used? A. I can tell you the gist of it. The Marene Operation was something that he had been trying to achieve. This is the type of distribution and manufacture which he was trying to achieve.

HIS HONOUR: Q. Is this what he told you? A. Yes.

MR. BURCHETT: Q. Did he explain for what reasons or in what manner? A. They had very good outlets for better quality knitwear which we could never get from Hornsby. With better quality there was less production necessary and more profit on the better garments.

40

Q. Can you remember anything else? A. We did produce a sample range.

Q. I am not asking you what you did, but can you remember anything else that he told you about it? Only we were trying to get the name Marene to continue.

Q. Directing your attention to a particular subject matter, did he say anything to you about the tax position? A. Yes, this was another reason.

Q. Do you recall what he said about that? 10

A. Something to the effect the tax loss of Marene would be worthwhile getting.

Q. So you are telling us he mentioned both aspects to you? A. Yes.

Q. You told us that your father had some slight heart attack at the time of the 1965 fire? A. Yes.

Q. Did he recover from that? A. Yes.

Q. When did he die? A. 1971.

Q. Prior to his death, was there some period when he was unwell? A. Yes, he was actually in hospital for 3 months. Before that he was weaker. 20

Q. Roughly how long was he ailing? A. He suffered from tiredness and fatigue for about 18 months before he went into hospital.

Q. During that period that led up to his final illness and death was there or was there not some transitional period when you came into the management to some extent with him? A. Approximately 1968-1969 I started selling. My father introduced me to all the main customers. From that time on gradually we discussed more and more of the business aspects. He was discussing nearly everything with me. 30

Q. So that the change-over from the position you told us of where he made all the decisions without discussion, occurred somewhere about 1969? A. Yes. It was a gradual changeover at that time. Nearly everything was being discussed.

Q. You told us yesterday about your mother ceasing to work, and something about her being unwell. Would you give us some detail about that? Was there any particular condition she suffered from in the early part of 1973? A. Not only 1973. She had been suffering with bad varicose veins. For ulcers she had a 40

number of operations. She had an operation for blood clots in April or May 1973, and the surgeon at the time....(objected to).

Q. I am not asking you to tell us what the doctor said, but you have told us she did have several operations and one was in about April or May 1973, is that so? A. Yes.

Q. Who was the surgeon? A. Professor Tracy.

Q. He performed surgery on what part of her body? 10  
A. The lower part of her leg. Her ankle. I am not sure whether it was one or both legs. She had surgery on both.

Q. Was the work she was doing in the factory when she was working work that kept her on her feet?  
A. She did run round a hell of a lot. She carried bundles from one end of the factory to the other excessively.

Q. After the fire in Melbourne, I take it you had some kind of family consultation about what you were going to do, is that so? A. Yes. 20

Q. Was it decided that something would be done about the remaining assets of Marene? The machinery type assets that were useful for production? (objected to - allowed on the basis this is leading to relevant evidence).

Q. Was this the position, that it was decided to sell some assets, some machinery, to Fela Investments?  
A. Yes.

Q. Was it decided to carry on some knitwear manufacturing through James Knitwear? A. Yes. 30

Q. That company would not have been active for many years, would it? A. That is right.

Q. When you decided to carry on through James Knitwear, did you give some instructions to Miss Paterson at Gerald Ball Insurances on the subject of insurance of the machinery and equipment? A. We were talking about insurance of various kinds, and she said....(objected to).

Q. Did you give her some instructions about it? 40  
A. Yes.

Q. Subsequently did you see a representative of an insurance company in Melbourne? A. Yes.

Q. Which insurance company? A. Eagle Star and General.

Q. Did you hand him a document? A. Yes.

Q. What was the document you handed to him?

A. A copy of the ....(objected to - allowed at this stage, counsel to argue the matter later).

Q. What was the document? A. The copy of the letter of rejection from Greater Pacific.

Q. Subsequently to your showing him that did you receive other documents through the mail? A. I received a number of cover notes. 10

CROSS EXAMINATION:

\* MR. ROGERS: Q. At page 142 of the transcript, Mr. Burchett asked you this question in relation to Davies Coop: it is the question at line 26 on that page.

"Q. When you got going with Marene Knitting Mills did you take any of this cotton waste product?"

You answered in this way: 20

"A. I think we bought a crate of it just to make samples, but none of it was sold. It was just not on. It just did not sell. It was not a proposition as compared to the other stuff we were making."

I will also read you the previous question and answer.

"Q. Did you use quantities of a certain type of cheap yarn from Davies Coop in Hornsby? A. Yes, in Hornsby we had large orders in which we used what we called a lambswool; it was a cotton and wool mixture, which was a waste produce from Davies Coop." 30

When you answered the question, what period were you seeking to encompass in relation to when you got going with Marene Knitting Mills? What period did you have in mind? A. What was the question and the answer.

Q. I will read you the two questions so that you can get the complete context.

"Q. Did you use quantities of a certain type of cheap yarn from Davies Coop in Hornsby? A. Yes, 40

(\* Transcript page 99.)



in Hornsby we had large orders in which we used what we called a lambswool: it was a cotton and wool mixture, which was a waste product from Davies Coop, and we took their complete production of this line.

Q. When you got going with Marene Knitting Mills did you take any of this cotton waste product?

A. I think we bought a crate of it just to make samples, but none of it was sold. It was just not on. It just did not sell. It was not a proposition as compared to the other stuff we were making." 10

Those were the questions and answers. My question is what period are you referring to when you said "I think we bought a crate of it just to make samples"?

A. After 1966.

Q. After what part of 1966? A. All I can remember is we bought a crate.

Q. You answered this question. What period did you have in mind when you answered it? A. After 1966. 20

Q. In 1967? A. No.

Q. When? A. All I remember is bringing a crate of this lambswool into the factory.

Q. After you left Hornsby did you continue to buy this material from Davies Coop? A. We bought a bit of it, yes.

Q. What do you mean, "a bit of it"? A. Enough to complete some of the orders we still had.

Q. You bought thousands of dollars worth of this stuff as you call it, did you not? A. When? 30

Q. After you left Hornsby? A. When we were still in Mansion House, yes.

Q. Do you say that that material which you purchased from Davies Coop was merely to fill outstanding orders?

A. I am not sure whether it was all this cotton waste. It could have been pure cotton as well. But it was to finish outstanding orders.

Q. When you answered Mr. Burchett "I think we bought a crate of it just to make samples", you were wishing to convey to his Honour that having left Hornsby you discontinued using this product altogether, did you not? A. No. 40

Q. You meant to convey to us that you did go on using Davies Coop lambswool product right through 1966, did you? A. No.

Q. Was there a point of time, do you suggest, when abruptly the use of Davies Coop lambswool products ceased? A. Abruptly?

Q. Yes? A. In 1966 I believe.

Q. Abruptly? A. I do not think it stopped abruptly. It petered out.

10

Q. What did you mean to convey when you told his Honour "I think we bought a crate of it just to make samples, but none of it was sold. It was just not on" (objected to).

Q. I will read you the two questions and answers, and my questions to you will be, what did you mean to convey to his Honour when you provided the answers.

"Q. Did you use quantities of a certain type of cheap yarn from Davies Coop in Hornsby? A. Yes, in Hornsby we had large orders in which we used what we called a lambswool: it was a cotton and wool mixture which was a waste product from Davies Coop, and we took their complete production of this line."

20

Q. When you got going with Marene Knitting Mills did you take any of this cotton waste product? A. I think we bought a crate of it just to make samples, but none of it was sold. It was just not on. It just did not sell. It was not a proposition as compared to the other stuff we were making."

30

May I have your answer? A. The crate or so that we bought, sample-wise, would have been purchased in 1967 or 1968.

Q. So that what you tell us happened was you bought material, to wit, lambswool, from Davies Coop, for the balance of 1965; you bought it in 1966, and you made it up and sold the material, and in 1967 you bought a crate of it? A. No, the yarn that we used was finishing off Hornsby's orders to a customer called D. & W. Murray, and after those orders were finished - they were a wholesaler and they sold off our samples. They kept on bringing orders back in.

40

Q. So that you were not meaning to suggest to us there was an abrupt transition when these purchases

cut out? A. No, nothing stops abruptly. In the knit-wear game it is 12 months in advance. You make samples and sell them, and get orders from them and repeat orders off the samples until you come up with a new sample range.

Q. And in 1967 you did not seek to attract the business of D. & W. Murray because you could see the opportunity for better business profits elsewhere, is that so?

A. I do not know if it was 1967. I said 1967 or 1968, that crate. I am not sure. 10

Q. Is what happened that you decided you could make better profits elsewhere, so you did not seek to attract any further orders from D. & W. Murray? A. No, I think we still submitted a range, but a better quality range.

Q. You did not submit the same range as before, so not surprisingly there was no demand for it? A. The buyer probably would have asked for it if he wanted it. Can I think a minute?

MR. ROGERS: Yes. 20

Q. You had wished for an opportunity to think. You have now thought. Is there anything you wish to add to your previous answer? A. No.

\*Q. On page 143 of the transcript yesterday you are reported as saying, three questions from the bottom, referring to Mr. Blunden - Mr. Burchett asked you:

"Q. Did that account for a sizable proportion of its output?"

That is Marene's output. Your answer was "In 1966 I would say ninety to ninety-five per cent of our production went to Blunden's customers. No, I am sorry, it could be a bit less than that". His Honour asked you "what year?" and you offered the answer "1966, the first year we operated as Marene. It would not be as high as ninety per cent. About eighty-five per cent". Do you remember those answers? A. That is right. 30

Q. Do you wish to adhere to those answers?  
A. Add to them?

HIS HONOUR: Q. Do you still stick to this, you are being asked? A. Yes. 40

MR. ROGERS: Q. When you say "1966, the first year", are we to take that from January 1966 to December 1966 or the financial year or what? A. No, the season.  
(\*Transcript page 100.)

Q. What is the season? A. We start - we come out with the winter sample range in September. That would have been 1966 and it would have carried right through till probably July of 1967.

Q. Were you basing your estimate on some books that you had? A. That is from my memory.

Q. I beg your pardon? A. That is from my memory.

Q. Is there any particular fact or matter which assists you in recollecting that ninety to ninety-five per cent of your production went to Mr. Blunden in that period? A. I changed it. 10

Q. All right, eighty-five per cent. A. No, just my own recollection. Not to Mr. Blunden, Mr. Blunden's customers.

Q. Through Mr. Blunden? A. Yes.

Q. You were invoicing Mr. Blunden? A. Oh no. Oh no.

Q. Did you invoice Mr. Blunden at all? A. Yes.

Q. The other orders were addressed, by way of invoice, direct to the customers? A. That is right. 20

Q. What happened to the books, the sales records, for the 1966 fashion year? A. I don't know. Are they here?

Q. Take it from me they are not. A. They are not?

Q. You do not know what happened to them? A. No.

Q. Do you remember any of the major customers?  
A. Of whom?

Q. I am sorry? A. Mr. Blunden's?

Q. Yes. A. Newcastle Co-operative, Kurri Kurri Co-op., Beare & Ley's, Letts, Winns. 30

Q. Newcastle Co-operative, Kurri Kurri Co-operative, and what was the last one? A. Beare & Ley, Cessnock Co-operative. Oh, there was a lot of customers.

Q. Did you pay Mr. Blunden a commission on the sale? A. Oh yes.

Q. You kept a record of the commissions that you paid him? A. Yes.

Q. Was there an abrupt change in the sales affected by Mr. Blunden in the 1966 fashion year from what had happened previously to that? A. Would you please repeat that?

Q. Was there an abrupt change in the sales effected by Mr. Blunden in the 1966 fashion year compared to what had gone before? A. That happened before?

Q. Compared to what had been the position before. A. Well, Mr. Blunden was one of our top salesmen, Marene Knitting Wear. 10

Q. When did you first avail yourself of the services of Mr. Blunden? A. The beginning of 1966.

Q. Before the commencement of the 1966 fashion year? A. Yes.

Q. Did Mr. Blunden immediately start to dispose of eighty-five per cent of your production? A. Well, if you don't go around with your samples - -

Q. Can you answer please? A. No, not immediately.

Q. What sort of percentage of your production was Mr. Blunden disposing of initially, when he first started with you? A. The first sample range he went out with, he sold approximately eighty-five per cent of our production. That is the only thing I can go by, what he sold. That is the main selling time, when you go out with your sample range. 20

Q. Now that you have said that, may I take you back? A. think you said he started with you at the beginning of 1966? A. Yes.

Q. He did not sell the fashion production until September 1966? A. That would be right. We got orders, yes. 30

Q. Between January 1966 and September 1966 what was he selling? A. He would have sold bowlers' creams - gone round to see the customers and told them that Marene was still going.

Q. He was not selling anything? A. Yes he was selling bowlers' creams.

Q. Approximately what percentage of your production were you disposing of through Mr. Blunden? A. Well, bowlers' creams would account for say ten to twenty per cent of our production, but he would not sell all of that. 40

Q. So he was selling less than ten or fifteen per cent - ten per cent of your production up to September 1966? A. Approximately. You know, I haven't worked it out exactly.

Q. Did you sell the fashion production to David Jones and Farmers and Myers? A. Tried to sell to everyone.

Q. I did not ask whether you tried. Did you sell to David Jones, Farmers, Myers? A. We did sell to David Jones, Myers, we sold to - yes. What was the other, David Jones, Farmers - possibly we sold something to Farmers as well. 10

Q. But only about fifteen per cent of your production went to these major metropolitan outlets?

A. When, the next year?

Q. Fashion production we were talking about, I think.

A. In what year?

Q. In the fashion year 1966? A. That is right.

Q. Who was trying to make those sales? A. My father. 20

Q. What you tell his Honour is that your father was much less successful in selling this better product to metropolitan outlets than he had been in selling cheaper garments to them? A. What really happens - -

Q. Is that right? A. No.

Q. What happened? A. We over-sold what we could make. Mr. Blunden went out first of all with his orders, he sold as much as he could, and, you know, we knew what the capacity of the factory was. My father went and sold - he also sold, and sold pretty well, but he could not sell them all. 30

Q. Getting back to the time of the fire, you had a great number of outstanding orders at that time, did you not? A. I think so. We had orders, yes.

Q. I beg your pardon? A. We had orders. I was not involved greatly at the time.

Q. Do you know in what name the invoices were sent out after the 1965 fire? A. Fela Knitting Company.

Q. Those sales were taken into account for the purposes of calculating Hornsby Knitting Company's loss on the loss of profits policy, is that the position? A. I believe so. 40

Q. The acquisition of the Marene plant was regarded purely as a temporary measure, wasn't it? A. Not really.

Q. It was intended to return to Hornsby as soon as possibly could be done after the 1965 fire? A. I don't think so.

Q. You don't think so? A. No.

Q. Do you have any knowledge on the subject or are you just hazarding a guess? A. No. After we acquired Mansion House, the business in Mansion House, we went - we tried to extend the lease, which they would not. We tried to - - 10

Q. Perhaps if we could bear on the question. You know for a fact, do you, that after going into Mansion House it was intended to stay in the city and not return to Hornsby? A. Yes.

Q. This was a matter that you had discussed with your father, and it was because of what your father had told you that you got this impression which you have just given us? A. That is right. Can I explain it? 20

Q. In a moment you may. You have told his Honour \*yesterday (page 146) that you took some of the staff to Elizabeth Street and you had lost one of them. Do you remember that? A. I said we could have lost one of them, I said.

Q. It would have been no more? A. No.

Q. It was quite incorrect to say that at that time when you embarked on your activities in Mansion House, the old staff at Hornsby was still waiting to be re-employed on the return of the business to Hornsby? A. No. 30

Q. They were waiting, weren't they? A. No, they were not waiting.

Q. They were not waiting? A. They were all paid off.

Q. They were all paid off, all right. Perhaps you might care to look at Exhibit 5 (shown). Would you care to read the letter from Hornsby Knitting Mills to Mr. Swanton. You have read that letter. The signature is that of your father? A. Yes. 40

(\* Transcript page 102.)

Q. Was your father telling you one thing and Mr. Swanton another? Are you having difficulty with that question? You have read it? A. I haven't read it properly.

Q. Please do? A. I am sorry. I have read it now.

Q. My question was, was your father telling you one thing and Mr. Swanton another? A. I don't know.

Q. Just keep that document for the moment. Having read that letter, do you say that the statement in paragraph 3, "We must go back to Hornsby as we have already lost a number of employees here" is incorrect? (objected to; question withdrawn). 10

Q. Was it true that in fact you had lost a number of employees in Elizabeth Street? A. Not from my recollection, no.

Q. Was it true to say that about ninety per cent of your staff from Hornsby was waiting there for you to re-open? A. They had all been paid their holiday pay.

Q. Was it or wasn't it true that about ninety per cent of your staff from Hornsby were waiting there for you to re-open? A. I don't think so. 20

Q. Your father never suggested to you that he was working actively to try and return to Hornsby? A. No.

Q. Indeed, on the contrary, he led you to believe that you were either going to stay in Mansion House, if the lease could be extended, or otherwise set up in some other position in the city? A. That is right.

Q. This was the position as at February 1966? A. Yes. 30

Q. There would have been absolutely no reason for your father to deceive you as to his intentions? A. No.

Q. Would you turn to the next letter along in Exhibit 5. Would you read that to yourself? A. I have read it.

Q. You do accept do you not that as at 2nd February, 1966, your father was communicating with people, actively seeking to promote the return of the firm to Hornsby? A. This appears to be something like that. It does appear - - 40



Q. It what? I cannot hear you? A. It appears from the letters this is what the intention was.

MR. ROGERS: Q. I put it to you that your father never in truth said anything to you to the effect that he intended to stay in town, and on the contrary, at that time he was telling you that the stay in town was intended to be temporary? A. No.

Q. What I suggest to you is that what you said to us earlier was just plain untrue? A. It is not. 10

Q. Was your father putting in applications to the Council to rebuild the premises at Hornsby? A. Yes.

Q. For what purpose please? A. If the building would have been rebuilt the way it was, it would have been a better proposition as far as leasing out.

Q. As far as leasing out is concerned. So you are seeking to tell us that he was going to rebuild at Hornsby for the purpose of leasing, are you? A. Well, he would not have got as much - -

Q. Is that what you say, yes or no? A. What I am trying to say is the amount of money the building was insured for would not have - he could not have put a building like that up with. 20

Q. Having said that, what I am asking you is are you telling the Court that your father was seeking to rebuild at Hornsby purely for the purpose of leasing?  
A. Yes.

Q. That was made clear, so far as you know, to the local Council, was it? A. These things are - I was not taking part in all these things. The things he did tell me, I know. You know, I was not associated with all correspondence and I was not associated with - I know what he did tell me. 30

Q. It is totally untrue then to say that what persuaded your father to stay in the city was the fact that the local Council refused to give permission to rebuild? (Objected to; question withdrawn).

Q. To your knowledge it was not the fact that the Council refused to consent to the premises at Hornsby being rebuilt that persuaded your father not to stay in the city? (objected to). 40

Q. Your father told you, did he not, that the only reason why he did not return to Hornsby was the Council would not allow him to rebuild? A. He never

gave me a reason why he did not return to Hornsby, no. He told me he wanted to stay in the city.

Q. When did he first tell you that? A. When we started getting the - selling the Marene garments, and started going well.

Q. When you started at Mansion House? A. Yes, after production was going.

Q. Production got going within a matter of weeks from the date of purchase of the machinery? A. Oh, not proper production. 10

Q. Not proper production? A. No.

Q. Of course, if he had returned to Hornsby he would have attempted to improve the standard of his product in much the same way as he did in town?

A. Well, where we were, the customers knew where we were. It would have been too big a change if we had gone back to Hornsby again.

HIS HONOUR: Q. Did you know that he wrote in June 1967 to Mr. Swanton and said "We still look forward to shifting back to Hornsby where we are well established". Did you know that he wrote that? A. No, I didn't know that he wrote that. 20

Q. Were you losing money continuously in the city at that time, in June 1967? A. Getting started, yes. I don't know about continuously. It cost money to start to get going.

MR. ROGERS: Q. Would you have a look at this document, please (shown). Look at the signatures. Are those not the signatures of your parents, Mr. and Mrs. Herzberg? A. Yes, they would be. 30

(Building application to Council signed by Mr. and Mrs. Herzberg dated 15th March, 1966, tendered and without objection marked Exhibit 28.)

Q. It is true to say that already at Hornsby before the fire there were attempts being made to upgrade the produce that your factory was producing? A. Attempts, yes.

Q. Are you suggesting by that answer that the attempts were unsuccessful? A. That is right. 40

Q. For what reasons? A. For what reasons? Because Hornsby Knitting Company - I believe we didn't

have the right staff, we didn't have the right sales outlets, and the machinery was not altogether the right machinery.

Q. When you say you did not have the right staff, do you mean the right production staff? A. The right calibre of staff.

Q. They could not make this more expensive product?  
A. No, they were not experienced enough.

Q. At the time of the fire there were very substantial orders outstanding, I suggest to you, to David Jones and the Myers group including Farmers? A. That is right. 10

Q. That was of a good quality product, suitable for sale by stores of that quality? A. All stores have lead lines, as I said before. They have lines - you know, they buy lines to throw out at cost, at under cost.

Q. You are suggesting, are you, that the outstanding orders to David Jones and the Myers group were of lines which they may be disposing of at below cost or at cost? A. Not necessarily, but they are lead lines. This is a line they bought from us to sell at a lower price; not as a quality garment. 20

Q. At the time of the Hornsby fire did you have any sales to the Newcastle district where subsequently Mr. Blunden was operating? A. Oh, there could have been a few small sales, yes.

Q. What do you call small sales? A. Might have been customers that spent \$2,000 a year with us. 30

Q. What, one or two customers of that size is what you suggest, is it? A. Well, we were in Hornsby, right?

Q. Can you please answer the question? A. I am sorry.

Q. It was one or two customers each taking a couple of thousand dollars worth of product? A. I cannot tell you exactly, but business was not based on that, on the Newcastle sales.

Q. Disregarding for the moment whether it was based on Newcastle sales, did you or did you not have substantial sales well in excess of a couple of thousand dollars to the Newcastle district already at the time of the fire? A. Different type of customers, yes. 40

Q. It was not just one or two thousand dollars, indeed, there was \$20,000 worth of orders outstanding to Newcastle district at the time of the fire, were there not? A. I cannot answer that.

Q. It would not surprise you to hear that, would it? You would accept that as an accurate figure, would you? A. No, I think it would surprise me.

Q. It would surprise you? A. Yes.

Q. There were some outstanding orders to David Jones obviously at the time of the fire. In what region did you think those orders might have been, a couple of thousand dollars, \$100,000, what? A. I cannot put a figure on it. 10

Q. Is the position this, that you do not have any idea really of the operation of the business at Hornsby prior to the 1965 fire that leads you to this difficulty? A. No. I knew where the garments were going.

Q. But you cannot say within a couple of thousand dollars what sort of outstanding orders there might have been say both to David Jones and Myers? Would it have been \$5,000, \$10,000, \$30,000, \$50,000? A. Yes. It haven't got a figure in mind, the cut-off point. 20

Q. You cannot help us at all? A. The cut-off point, no, because I was not involved in the sales, but I knew the garments, where they were going.

Q. Do not answer this question until Mr. Burchett has had an opportunity of objecting. You know of the details of the settlement effected with Gerald Ball? (Objected to; the witness left the Court during argument on objection). 30

HIS HONOUR: In so far as Mr. Rogers seeks to ask this witness for details of any settlement with the second defendant upon the ground going to the credit of the second defendant, I reject the question.

(Mr. Rogers pressed the question on quantum; disallowed.)

MR. ROGERS: Q. When you received the letter of rejection of 4th February, 1974, which is Exhibit "A", was there a consultation with the family? A. My brothers? 40

Q. Yes. Did you talk to your mother? A. No. I am sorry, I did.

Q. Did you say to your mother "What on earth is

all this about, a fire in 1958, a fire in 1960?"  
What did you say to her? A. I asked her, I said, "Is  
this true?"

Q. What did she say? A. She said she didn't think  
we had that many, she didn't think we had four.

Q. Did you say to her "What fires were they".  
What do you remember? A. I could not talk to my  
mother too much at the time. She was not well.

Q. When you could come back to her when she recover- 10  
ed, did you raise the question with her again? A. She  
didn't - I could not say anything to her, she was in a  
very nervous state, you could not get too much out of  
my mother.

Q. Suffice it to say that your mother knew that  
there had been previous fires, she did not know how  
many, you say? A. That is right.

Q. Of course, your mother's memory was unimpaired  
by any physical ailment she may have had? A. Unim- 20  
paired?

Q. I am so sorry. Your mother's memory was perfectly  
all right? A. I don't know at the time. I cannot  
vouch for that. She was in a coma for four days.

Q. Before she went into a coma her memory was good?  
Are you having difficulty with that? A. I am just  
trying to think was it good. She did forget things,  
but she had a reasonable memory, yes.

Q. After she recovered from the coma she recovered  
her memory as well? A. She was not 100 per cent after 30  
that.

Q. But her memory seemed to be reasonably good?  
A. No, it was not 100 per cent. She forgot things.

Q. You were a thirteen-year old boy I think when  
the 1961 fire occurred, and you I think said you were  
in Melbourne? A. What date in 1961 was it? I am  
sorry.

Q. It was in October 1961? A. October. No, I  
would be living in Bondi.

Q. A thirteen-year old boy. You are telling his  
Honour, are you, that your parents did not discuss in 40  
front of you the fact that the shop which they had  
owned and conducted on the corner of Pacific Highway  
and James Street had been gutted? A. No, they didn't  
discuss it.

Q. You were a close-knit family, were you? A. They just didn't discuss anything in front of us. As far as business, my father - -

Q. Did they send you out of the room? A. No.

Q. If any question of - A. They would break up and speak in Polish.

Q. Of course, you would have expected your parents to have been somewhat distraught at suffering a loss in excess of \$100,000? A. Yes.

10

Q. There was nothing perceptible to a thirteen-year old boy that you can recollect suggesting that there was anything wrong? A. No. As I explained before, we were hardly home. We left home in the morning at 6 o'clock and we didn't get home until after seven at night. At that time you did your homework and you went to bed. We hardly saw our family.

\* Q. You said to the Court yesterday at page 140 that prior to the letter of rejection you did not know of any other fire. Do you remember that? A. Apart from the one in 1965, the last one.

20

Q. I am so sorry, I do beg your pardon, quite so. Mr. Burchett asked you whether you had any recollection of Mr. Swanton ever saying anything to you concerning earlier fires, and you correctly enough replied no. Do you have any recollection however at being present at a discussion between your father and Mr. Swanton after the 1960 fire? A. I do, yes.

Q. You went there to give assistance and support to your father, did you? A. I mainly went to drive the car really.

30

Q. You were a completely disinterested spectator?  
A. No.

Q. At what transpired between Mr. Swanton and your father? A. No. I was not disinterested at all.

Q. Well, you were listening to what they were saying? A. Yes.

Q. I suggest to you that Mr. Laib Herszberg said that the partnership or Hornsby Knitting Company had lost money for the first year after the last fire which was in 1961 and that the firm had been gradually picking up since? A. I don't remember that.

40

Q. So you say that you heard nothing of the fire (\* Transcript page 99.)

in 1961, and if your father did say something to Mr. Swanton to that effect in 1965, it did not attract your attention? A. No. It was a lengthy interview. I mean, I could have gone out, I don't know.

Q. Here is a very bad fire in 1965, correct?

A. Yes.

Q. To your knowledge there had not been a previous fire? A. That is right.

Q. Here is your father saying something about a fire in 1961? A. I don't remember it. 10

Q. What you say is that if your father had said something, there was nothing in the circumstances which would have made you take note of that fact (Objected to; question withdrawn.)

Q. You will agree, will you not, that because of the fact that there had been a fire just a day or two earlier, if your father had said something about a fire in 1961 it would have been something that you would have taken notice of? A. Yes. 20

Q. What you tell us is that you have no recollection of your attention being directed by your father mentioning a fire in 1961? A. No.

Q. There is no possibility that you would have forgotten about this? If it had been said, you would have remembered it? A. I am pretty sure I would have remembered it, yes.

Q. So therefore you say it just could not have been said? A. No, if it would have rang a bell at the time.

Q. This is precisely what I asked you. It would have rung a bell at the time, wouldn't it, because of all the circumstances? A. Probably. 30

Q. If it had rung a bell would you not have said to your father later on something like "What was this about a fire in 1961?"? A. I definitely would have.

Q. You did from time to time go to Hornsby even after you lived at Bondi? A. Yes.

Q. You knew that the shop on the corner of Pacific Highway and James Street was a shop which had been conducted by your family? A. I knew my mother worked there, that is all. I didn't know it was ours until later. 40

HIS HONOUR: Q. You what? I cannot hear you. Keep your voice up. A. I didn't know it was our shop.

MR. ROGERS: Q. You noticed did you not at some stage after 1961 that the shop on the corner where your mother had worked had been burnt out? A. I never saw it burnt out.

Q. You never saw it burnt out? A. No.

Q. You went past the spot after 1961? A. Yes.

Q. It was always the same shop that was standing there, as far as you can recollect? A. No, there was a vacant block. 10

Q. Did you ever say to your mother "Don't you work there any more, mum, what happened to the shop?", any question like that? A. I said to my father - my recollection of it is that there was a vacant block, a lot of brand new bricks there, and I said "What is happening here on the corner?" and my father said "We own the block now and we are going to build".

Q. That is all? A. That is all that was ever said. 20

HIS HONOUR: Q. When was it you moved to Bondi again?  
A. When did we move?

Q. When did you move? A. I was five years old.

Q. Before that, you lived at Hornsby? A. Yes.

MR. ROGERS: Q. You were on terms of close relationship with your father, when you asked him a question he told you the story? A. Oh yes.

Q. Have you made any search for the minute book of Marene? A. Yes, we have, on numerous occasions.

Q. When did you last see it? A. I don't remember seeing it at all. 30

Q. Never ever? A. Never.

Q. After you became a director in 1971 you never ever had a company meeting? A. Not a formal company meeting, no.

Q. Marene was making a profit and paying tax, wasn't it? A. Oh yes.

Q. It was necessary to declare dividends to avoid having to pay additional tax under Division 7 of the



Income Tax Act. I withdraw that question in that form.  
You knew that you had to pay dividends from time to time?  
A. I didn't really know.

Q. The auditor did tell you that you had to declare dividends, didn't he? A. Yes.

Q. He sent you draft minutes of a meeting at which you were to declare the dividend. He did not? A. He could have given me something to sign when I went to his office.

10

Q. What happened to the document after you signed it?  
A. He may have, I said. I didn't say he did. Actually, right from the time I was appointed a director, or became a director, right from that time Mr. Foxall mentioned to me, he said "We are going to have to find these minute books". They were missing right from the word go, as soon as I became a director.

Q. When you could not find them, did you start a new one? A. No, we started looking, and other things came up. We just stopped looking, other things came up, we looked again, and it just sort of dragged on. It was not something we put a lot of importance on.

20

Q. As I understand you, you say your father was not only a very forceful character, and I do not mean that pejoratively, a very forceful person, but also that he did not like to take anybody else into his confidence so far as his business went, is that right? A. He liked to make decisions on his own, yes.

Q. I put it to you that from 1960 to 1966 he had two total strangers so far as family blood was concerned on the board of directors of James Knitwear Pty. Limited?  
A. Possibly.

30

Q. Possibly? A. Well, I don't know.

Q. In a moment I will show you documents suggesting that Margaret Thew and Elsie Farrow were both directors of that organisation. Did you know Margaret Thew? Perhaps I can ask you, she certainly was not a relative, was she? A. No.

Q. Elsie Farrow I think Mr. Foxall told us was the accountant? A. Bookkeeper.

40

Q. Can you think why your father should have had, as directors of James Knitwear Pty. Limited, himself, your mother, Mr. Foxall, Miss or Mrs. Thew and Miss or Mrs. Farrow in the period 1960 to 1966? A. Possibly because all the children were minors, and if anything

happened to him and my mother - it could have had something to do with that. That is just something - -

Q. You will agree that it is completely out of character for this man who likes to keep his business decisions and his business to himself to have strangers in blood as directors of his company? A. Yes, it is unusual.

(Return of particulars in the register of directors shown to Mr. Burchett.)

10

MR. BURCHETT: I have no objection to my friend reading this information on to the transcript, but I do not want to be taken to accept that it has any relevance whatever by doing that.

MR. ROGERS: It is agreed between the parties that Margaret Thew and Elsie Farrow were directors of James Knitwear Pty. Limited between 1960 and 1966.

HIS HONOUR: I will have noted that Mr. Burchett, whilst agreeing to that, does not admit that that is of any relevance.

20

\* MR. ROGERS: Q. Yesterday at 137 of the transcript you are reported as having said, in answer to a question "What were the activities she carried on?", that is your mother, you said "She looked after the girls in a forelady capacity, to do with the making of the garments". You do not mean to suggest, do you, that your mother was otherwise than in charge of the manufacturing side of the business? I am sorry, let me put it another way. You do not mean to suggest that your mother did not have charge of the manufacturing side?  
A. No, only the garments, only the make up. She did not have anything to do with the knitting.

30

Q. She had the sewing and the cutting operations under her control, did she not? A. To an extent, yes.

Q. What do you mean to an extent, who else was in charge of it? A. My mother used to write up the orders, give the orders what to do, and she just - -

Q. You understand the manufacturing side that I am speaking of is the making of the material into the finished product, and the sales and office administration is divorced from that? A. She only looked after the girls that did the cutting and the girls that did the finishing.

40

Q. She handled everything that related to the making of the garments. The sales were somebody else's (\* Transcript page 96.)

business?

A. Sales administration, yes.

Q. Indeed, right up till the 1973 fire your mother was on the payroll? A. No.

Q. When did she cease to be on the payroll?

A. About twelve months prior.

Q. She was getting a considerably higher remuneration than just a forelady, was she not? A. No.

Q. What was she getting paid towards the end?

A. \$100 a week.

10

Q. The wages records apparently are still on their way? A. I think.

Q. You think. Do you have some doubt? A. It would be about that amount, yes. About \$100 a week. Something in the order of \$100.

Q. What were you getting? A. At the time of the fire?

Q. Yes. A. In the order of \$180, \$170, \$180.

Q. After the letter of rejection, you went and consulted a firm of solicitors in Melbourne, Arnold Bloch, Leibler & Co., didn't you? A. That is right.

20

Q. You gave them certain instructions. You told them what the position was? A. Yes.

Q. You told them to send a letter to Greater Pacific? A. I didn't tell them.

Q. Well, to your knowledge they wrote to Greater Pacific? A. I suppose so.

Q. Have you seen the letter or letters that they sent, either before they went or since that date?

A. No.

30

Q. From that date to this you have not seen the letter? A. Which letter, from Gerald Ball?

Q. (Shown Exhibit 26.) A. Yes.

Q. I do not want to take advantage of you. I realise you read it in the witness box. Please pay particular attention to the paragraph numbered 4. That is the letter of 14th February, part of Exhibit 26?

A. Yes.

Q. Do read it to yourself carefully. I will just make sure you have the right part. (Approaching). It is numbered 4? A. Yes. Just that paragraph?

Q. Pay particular attention to that one if you would be so kind? A. Yes.

Q. Does that paragraph set out the instructions that you gave to Arnold Bloch, Liebler? (Objected to; question withdrawn).

Q. So far as you are concerned, does that paragraph numbered 4 correctly set out the situation as you believe it to be? (Objected to; allowed). 10

Q. At the bottom of page 1 the letter says "The management and by far the greater part of the beneficial ownership of the entities which had in the past made claims with respect to substantial fires were vested in the late Mr. Herzberg and Mrs. Herzberg". First of all, do you understand what is said there? A. Yes, I understand it.

Q. You understand that the writer of the letter is saying in part in that sentence that Mr. and Mrs. Herzberg had the management of the business that suffered the earlier fires? (objected to; question withdrawn). 20

Q. Do you say that your father and mother had the management of Hornsby Knitting Company or not? A. I didn't say that.

Q. You did not say that? A. No.

Q. You say it was your father alone? A. Yes.

Q. It would be quite incorrect to say that your father and mother both had management? A. Yes. 30

Q. You never suggested to anybody that the situation was otherwise than as you have just said, namely, that your father alone had management? A. Management, yes.

Q. When in fact the 1973 fire did occur your mother made no comment to you of any kind relating to the earlier fires? A. No.

Q. Did you 'phone her to tell her that there had been a fire in Melbourne? A. Not straight away. 40

Q. But it was you who told her of the disaster that had happened? A. I don't remember.

Q. At any rate, your mother never said to you, within the weeks following the fire in 1973, words to the effect that this was not the first time that a fire had occurred on premises with which she was in any way associated? A. I hardly saw her. My younger brother stayed in Sydney, I was in Melbourne. The conversations I had with her, she clamped right up, she was very uptight, very nervous.

Q. Do you know if Gerald Ball Insurances were the brokers to Hornsby Knitting Company? A. I do not know for sure. 10

Q. Do you know if they were brokers to Marene Knitting Mills Pty. Limited prior to 1973? A. Yes. I do know.

Q. Do you know when they became brokers to that company? A. It would have been when we started, in 1965.

Q. You say it would have been. Are you saying that because you know or are you making an assumption? (Exhibits 19, 23 and 24 shown). All the proposal forms are proposal forms signed by you. Is that your signature on the three proposal forms? A. Four. 20

Q. It is your signature? A. It is my signature, yes.

Q. Exhibit 19, the one which is purely in a handwritten form. A. Yes.

Q. Is the one that I would wish to attract your attention to first of all? A. Yes.

Q. Do you recognise the handwriting in the black biro? A. Yes. It is mine. 30

Q. When did you make those entires? A. In Mr. Ball's office.

Q. Were you present when any of the other entries in that document, were made? A. I think I was, yes.

Q. You were actually in Mr. Ball's office? A. That is right.

Q. Miss Patterson wrote in the other entries preceding the one that you filled in? A. That is right.

HIS HONOUR: Q. Which is the one you filled in; the one in the square bracket? A. Starting with "father deceased". 40

Q. What about the brackets, 10 years ago? A. Yes. That is my writing.

Q. Why did you write that in? A. I wanted to write everything I knew about any claim.

MR. ROGERS: Q. When Miss Patterson came to the particular questions that are now answered in your own handwriting, did she say that those questions should be deferred until Mr. Ball returned? A. Possibly.

Q. Did you know of any reason why she should have said that? A. No. 10

Q. Well, when you wrote in the answers, in fact Mr. Ball had joined you, had he not? A. Yes. He had.

Q. And what about Mr. Reid-Giltinan; had he been in the room earlier when Miss Patterson was filing in the rest of the document? A. I do not recall him being there.

Q. But - well, you have got no recollection one way or the other? A. No, I have not.

Q. And you equally have no recollection whether he was in the room when you wrote in the answers to the questions yourself? A. I have no recollection. 20

Q. Let us get to the point that Mr. Ball is in the room and the question arises of these two questions and answers. Did he say anything to you concerning these two questions? A. He said "Could you please fill in these questions truthfully." I said, "I haven't had any fires, but my father did", and he said, "will you please write that", and he said "What else do you remember" and I said, "Well, approximately ten years ago we had a claim" and he said, "Who was your insurance company" I said, "I don't remember". He said, "Where was it, 2 James Street, Hornsby?" and I wrote that. 30

Q. At that time, of course, you were already aware of three other fires, were you not? A. No.

Q. Mr. Herszberg, when you said what you have just retailed to Mr. Ball, did he say anything to you about there having been any other fires? A. No.

Q. He just watched you write in what now appears there? A. That is right, and I asked if there is anything else I should write, he said, "Just write what you remember". 40

Q. Let us go to Exhibit 23. I think this one consisting of two proposal forms, is it not? A. That is right.

Q. Did you write any part of those two proposal forms, yourself? A. The same answers, yes.

Q. Where were you when you did that? A. In Melbourne.

Q. You got a letter from Mr. Ball, did you, enclosing the proposal forms? A. I thought by 'phone to my office, a 'phone call about the proposal forms - 10

Q. To your recollection what did he say in the telephone call? A. Just to fill them in, the questions, the relevant questions.

Q. Did you ask him why? A. Yes. He said, "they want other proposal forms" I said "why?". He said, "They are trying to break up the policy into two parts, the one which we can agree on we settle, the other one which we can still talk about".

Q. Did you not say to him, "Well, look, I have already filled in the answer. Can't you write it in yourself?"? A. I did not. I just did not think of it. 20

Q. And in relation to Exhibit 24. Is any part of that document in your hand? A. The last part, yes.

Q. The same questions and answers? A. Yes.

Q. And in relation to those, did you sign that document and put in the entries in Melbourne? A. I do not remember.

Q. And Mr. Ball made the same request to you, did he? A. Miss Patterson. 30

Q. Did she give any explanation as to why she wanted you to put in the answers just to those two questions?  
A. By this time I was just signing papers for everyone, you know.

Q. Is the answer "no she did not", or "Yes she did"?  
A. She did not make any special reason, no. I assumed I had to sign these documents; the questions were asked to me.

Q. Well then, after the letter of rejection, did you telephone Mr. Ball or Miss Patterson? A. Yes, I said, "What's it all about". Actually - 40

Q. Who did you speak to? A. I tried to get on to Mr. Ball.

Q. And you were unsuccessful, I gather, from what you say? A. Actually, I spoke to Mr. Johnson, I think, in the Insurance Company couple of days before, and he said -

Q. I am trying to get the situation --? A. I do not know if I spoke to Mr. Ball when I got the letter.

HIS HONOUR: Q. Who was it with, Mr. Ball or Miss Patterson about this - did you finally speak to Mr. Ball? A. No. Miss Patterson. 10

MR. ROGERS: Q. What did you say to Miss Patterson? A. It was not about the letter. It was about a 'phone call I had from Mr. Johnson that I spoke to Miss Patterson.

Q. Did you speak to Miss Patterson about the proposal form? A. On numerous occasions I asked her why the policy did not issue.

Q. After the rejection did you have a conversation with Miss Patterson about the proposal form? Look, let us do it this way; I think you told his Honour a minute ago that you got the letter of rejection. You spoke to Mr. Johnson and then you spoke to Miss Patterson? A. No. Not in that order. 20

Q. Shortly after? A. No. What happened, I spoke to Mr. Johnson about a week before I got this letter and Mr. Johnson said, "We are not paying - -

Q. I do not want to know what he said. You spoke to Mr. Johnson; got the letter of rejection and after that you spoke to Miss Patterson? A. No. I spoke to Miss Patterson after I spoke to Mr. Johnson. 30

Q. After the letter of rejection did you have a further conversation, either with Mr. Ball or Miss Patterson (Objected to on the ground of relevance; allowed). A. Did I speak to Mr. Ball - I spoke to Miss Patterson.

Q. Did you make a request to her? A. Yes. I said, "Could you please find out what these other fires were about". 40

Q. "Could you please find out what these other fires were about"? A. Yes.

Q. And that was your sole request, was it?



A. Yes. I wanted to know what these other fires were all about. Prior to that - -

Q. Yes. All right. That is what you asked her, and did she supply that information at some stage?

A. No she did not.

Q. Did you make a further request to her in regard either to the fires or to anything else? A. Not that I can remember specifically.

RE-EXAMINATION:

10

MR. BURCHETT: Q. You were asked by my friend about speaking to your mother after the fire in Melbourne, and you said that she was very "uptight" I think was the expression you used. Now you also in your evidence earlier, gave evidence about her being for four days in a coma. Could you tell us when that was in relation to the fire in Melbourne; before or after? A. After the fire.

Q. How long after, approximately? A. It could have been in October or November.

20

Q. And during the period shortly after the fire, was she undergoing some medical treatment? A. Yes, she was always a very nervous person.

Q. When you say "nervous"; was she undergoing psychiatric treatment? A. No.

Q. She was undergoing medical treatment?

A. Medical.

Q. You also were asked a question about when your mother ceased to be on the payroll and you said that for some twelve months before the 1973 fire? A. That is correct.

30

Q. I just want to get one thing clear; did she cease to be on the payroll at a date earlier than the date when she actually stopped working? A. Yes.

Q. So that there was a period after she ceased to be on the payroll, when she still continued to come into work? A. That is right.

Q. You were asked some questions about her responsibilities when she was involved in Marene Knitting and you said she looked after the girls and did the cutting and finishing? A. That is right.

40

Q. I do not want you to take up a lot of time; but

can you briefly tell us what the processes were that were involved in the manufacturing side of this business, enumerate them? A. Well, initially we started with our material which had to be knitted up, knitting into pieces.

Q. Knitted into pieces; now, did your mother have anything to do with that process? A. No. The yarn, of course, had to be ordered, specific orders, knitted into pieces; it had to be pressed, had to be relaxed. Also, some fabrics had to be dyed and trimmings had to be made for them and then they were sent up as complete garments to be cut and finished. 10

Q. They were the processes she did? A. She only did the cutting. After they were finished, they went to examining and then knitted and packing, which was not under her.

(Witness retired.)

RICHARD JAMES BEST  
Sworn and examined: 20

MR. BURCHETT: Q. Is your name Richard James Best and do you reside at number 2 Collaroy Crescent, French's Forest? A. Yes.

Q. What is your occupation? A. I am administrative manager for Australia of City Mutual General Insurance Company.

Q. I think you have certain qualifications in Insurance. You are a Fellow of - which institute?

A. I am a Fellow of the Australian Insurance Institute. 30

Q. And I think that is a qualification obtained by examination? A. Yes.

Q. You were originally an associate and you are now a Fellow. When did you become a Fellow? A. In 1972.

Q. I think you also lectured for the Associateship examination? A. I have been an examiner for the Associate examinations. I have done lectures for the New South Wales Institute, at some regional centres.

Q. Would you tell his Honour your experience in the insurance industry? A. I have been a total of seventeen years in the insurance industry, twelve years with one company and five years of that time as accident claims manager and a period of two years as assistant 40

to the accident underwriter, and a period of twelve months as New South Wales Branch Secretary.

Q. Which company? A. Bankers & Traders. After that I was four years with Amatil which was formerly the British Tobacco Company, as insurance officer, involved in the organisation of insurance, and I have held my present position for twelve months.

Q. You were an insurance officer for Amatil. What was the nature of the duties there? A. Organising and placing insurances for that group of companies. 10

Q. And those insurances extended over what? A. The full range of insurances for all companies within the group, Australia-wide with total assets of about \$150-million.

Q. Were you the person responsible, or were you assisting? A. I was one of two people responsible for that job, responsible in certain areas, certain classes of insurance, one of which was in fact fire insurance.

Q. For how long did you hold that position? A. For four years. 20

Q. Apart from the two years period my friend has referred to did other periods of your experience you have told us about also involve you in duties concerned with underwriting? A. During the latter period, the last six years with Bankers and Traders although accident claims manager, the last twelve months of the period as Branch Secretary I was effectively trouble-shooter's assistant to the Branch Manager, and that encompasses quite a lot of underwriting. 30

Q. Which branch was this? A. The New South Wales Branch.

Q. Would you have a look at Exhibit 14. I think you have already had the opportunity to consider a copy of Exhibit 14, but would you just satisfy yourself that is so? A. Yes.

Q. Assuming the facts you see in Exhibit 14, and assuming that Laib and Fela Herszberg conducted a business, manufacturing knitwear for a number of years including the years 1958 to 1965 and during that period suffered three fires on the partnership premises causing damage totalling in excess of half a million dollars, and assuming that James Knitwear engaged in the sale of knitwear and other articles and did during the same period - 1958 to 1965, suffer a fire in which damage to the extent of over \$100,000 was suffered; 40

would you further assume the business conducted by the partnership, Hornsby Knitting Mills and James Knitwear was from some date in 1965 or 1966 always conducted in the name of a company called Marene Knitting Mills Pty. Limited and assume further that in August, 1973, Marene Knitting Mills applied for a fire policy in respect of its stock and plant located at new premises, indeed at premises in Melbourne, now, would you make those assumptions, and also assume that as at some date in about 1969 due to the onset of ill health on the part of Laib Herszberg his son Myer Herszberg who was born in 1948, had begun to assume some of the management responsibilities, and that in 1971 Mr. Laib Herszberg died and Mr. Myer Herszberg took over the management responsibilities entirely, and also assume that Fela Herszberg had shortly prior to the proposal in 1973 ceased to be engaged in any active capacity in the company - do you have all those assumptions? 10

A. Yes. 20

Q. I think you have been given them previously and you have been given some time to think about them?

A. Yes.

Q. Mr. Best, having regard to those matters would you tell us whether in your opinion the four previous fires were matters which were material in the sense that they would have affected, on the probabilities, the judgment of a reasonably prudent insurer in determining whether to accept the risk or assess the premium. What is your opinion? A. In my opinion, the relevance of the four fires, a prudent underwriter would consider them from two points of view, the material aspect and the moral aspect associated with them. From the facts as you have given them to me the material aspect had changed; they were on completely different terms, and it would also seem that the moral aspect had in fact changed as the operating proprietors had also changed. In my view the relationship between the fires is too remote to be considered as being material. 30

Q. And that is in a sense too remote to be material, in the sense that it would be reasonable for affecting the mind of a prudent insurer? A. Yes, a prudent insurer would have wanted to know of those facts, but I think they would have been too remote. 40

Q. If he had known of the facts I asked you to assume they would then have been, in your view, too remote to affect his mind? A. Yes.

MR. ROGERS: I have no questions, your Honour.

(Witness retired.)

(Matter adjourned to Wednesday 10th December, 1975, for addresses.) 50

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

No. 8276 of 1974.

CORAM: YELDHAM, J.

12TH DECEMBER, 1975

MARENE KNITTING MILLS PTY, LIMITED v.  
GREATER PACIFIC GENERAL INSURANCE LIMITED & ANOR.

JUDGMENT

10

HIS HONOUR: In this action the plaintiff originally sued two defendants. The first is Greater Pacific General Insurance Limited, an insurance company, who is sued for an agreed sum of \$130,583.89 said to be owing pursuant to a fire cover note issued on 14th August 1973 and in respect of a fire which occurred on the following day. The second is Gerald Ball Insurances Pty. Limited, an insurance broker who, according to the statement of claim, was in breach of the contractual duty which it owed to the plaintiff, its client, in that it failed to advise it that it was necessary for certain earlier fires, to which I will later refer, to be disclosed to the insurer before a cover note was issued or alternatively in that the second defendant itself failed to inform the insurer of them. The action between the plaintiff and the broker was settled on terms which do not affect the rights or liabilities of the plaintiff or the insurer as between themselves.

20

The first defendant purported to avoid the

cover note and denied its liability to indemnify the plaintiff "upon the ground that neither the plaintiff nor anybody on its behalf disclosed to the said defendant either at or prior to the issue of the cover note that the business had previously had four very serious and substantial fires". The previous fires, non-disclosure of which was relied upon, occurred between the years 1958 and 1965.

10

The first fire which was on 24th June 1958 was in premises at 2 James Street, Hornsby, upon which was a dwelling converted for use as a knitting factory and used as such by Hornsby Knitting Company, a business conducted in partnership by Laib Herszberg and his wife, Fela. That firm produced knitted goods for men and women. The business manager was Laib Herszberg and I find that his wife was then and at all material times thereafter in charge of the production of the garments. The building was owned by Mr. and Mrs. Herszberg and the contents were the property of the partnership. The claim made upon an insurance company was in the sum of \$40,720.00.

20

The second fire, which was on 10th September 1960, was at the same address but occurred in an additional structure which had been erected at the rear of the dwelling. In this case the claims upon an insurance company totalled \$227,863.00.

On 26th October 1961 a fire occurred in and caused extensive damage to adjacent premises which consisted of a two-storey shop. These premises were owned by Mr. and Mrs. Herszberg and were occupied for business purposes by a company known as James Knitwear Pty. Limited which sold knitwear and some toys and other fancy goods. In this case a claim for indemnity in the sum of \$121,364.00 was made.

10

James Knitwear Pty. Limited had its registered office at 2 James Street, Hornsby from 1953 until the 4th July 1966 and from its formation until the present time Mrs. Fela Herszberg has been one of its two directors and a shareholder. Her husband was a director from 1953 until his death on 26th July 1971 and on 28th July 1971 his son Myer took his place as director, a position he still occupies, although it appears that the company has not traded for a number of years. At all material times the shareholders, apart from Mr. Foxall, an accountant, (who holds twelve shares only) have been members of the Herszberg family.

20

The fourth fire which occurred on 2nd September 1965 was again in the premises at 2 James Street. On the rear boundary there had been erected a large factory and this had been substantially damaged. The owners of the premises were still Mr. and Mrs. Herszberg. According to notes made at the time by Mr. Swanton, a

loss assessor who investigated all the fires and whose evidence I accept, the dwelling in the front was used for office purposes and also by James Knitwear Pty. Limited "which is a disposal bargain centre for reject garments and the like" and which bought and sold general stocks. Immediately behind this was the main storeroom and then the factory with circular knitting machines on the ground floor and sewing machines on the top floor, occupied by Hornsby Knitting Company. 10

Claims were made under Material Damage Policies and by Hornsby Knitting Company for loss of profits. Mr. Swanton said in evidence that he had a number of discussions with Mr. Herszberg and he pointed out to him the obligation of the insured to rehabilitate the business as soon as possible with a view to minimising the interruption caused by the fire. In view of problems experienced with the Hornsby Shire Council in relation to rebuilding consideration was given in conversations which occurred to the partnership acquiring other premises for the purpose of carrying on its business either in Hornsby or elsewhere. 20

Marene Knitting Mills Pty. Limited, the present plaintiff, was incorporated in 1937. On 20th September 1965 it was ordered to be wound up and on 13th October 1965 the liquidator sold the stock and plant to James Knitwear Pty. Limited for the sum of \$17,100.00. The



moneys for the purchase were provided by Mr. and Mrs. Herszberg and James Knitwear Pty. Limited purchased in trust for them. Several weeks earlier Mr. Herszberg had informed Mr. Swanton that he could probably secure a small place in the city from which to carry on his business and Mr. Swanton's notes said, inter alia "Can buy plant, quite suitable, same as Hornsby but on a small scale. Lot of machinery can be bought in Melbourne but transport and time factors involved..."

The premises to which Mr. Herszberg was referring and into which he took the business of Hornsby Knitting Company in October 1965 were in Mansion House, 182 Elizabeth Street, Sydney and were the premises in which the plaintiff had previously carried on business. Such business was at that time defunct.

10

For some time prior to the fire of 1965 a firm called Fela Knitting Company in which Mr. and Mrs. Herszberg were the partners operated in conjunction with Hornsby Knitting Company, its business being also the manufacture of garments and until 29th June 1966 the business which formerly had been conducted at Hornsby was carried on, although undoubtedly on a smaller scale, from the premises in Mansion House and under the name Fela Knitting Company. According to evidence given by Mr. Myer Herszberg invoices during that period were sent out in the name of Fela Knitting

20

Company and sales made were taken into account for the purpose of calculating the loss of Hornsby Knitting Company under the appropriate policy of insurance. The label on garments manufactured at that time was "Fela Knit". On 11th January 1966 a letter was written to Mr. Swanton on the letterhead of the plaintiff, from Mansion House and signed "Fela Knitting Co... L. Herszberg" and it dealt with quotations which he had obtained for the purchase of knitting machines which were available at that time.

10

On 2nd February 1966 Mr. Herszberg signed a letter for Hornsby Knitting Company again on the plaintiff's letterhead, over which had been stamped the words "Hornsby Knitting Company" saying, *inter alia*:

"We must go back to Hornsby as we have already lost a number of our employees here in Elizabeth Street because it is too far for them to travel... about ninety per cent of our staff from Hornsby are waiting there for us to reopen so we hope that this matter can be cleared up satisfactorily as quickly as possible."

20

With that letter was enclosed a letter which Mr. Herszberg had sent to a Mr. Townsend, a builder, informing him that negotiations were taking place with the Council "and we hope soon to get permission to rebuild ... our lease here is expiring and we must go back to Hornsby so an early reply to our enquiries would be appreciated".

30

On the 15th March 1966 both Mr. and Mrs. Herszberg as owners signed an application to the Hornsby Shire Council for permission to rebuild the burnt factory, which application was rejected on 12th April 1966.

On 29th June 1966 Laib Herszberg acquired one share in the plaintiff and the remainder of the issued shares were sold to a company known as Fela Investments Pty. Limited of which at that time Mr. and Mrs.

10

Herszberg were the sole directors and shareholders. On that date also the former directors resigned and Laib and Fela Herszberg were appointed directors in their stead. On the previous day the winding up order which had earlier been made was ordered to be stayed altogether. The directors continued in office until Mr. Herszberg died and thereafter Myer Herszberg was appointed in his place and he and his mother continued to be the only directors of the plaintiff.

From 19th May 1971 the shareholders in Fela Investments Pty. Limited have been six Herszberg children and in addition one share has been owned by Mrs. Herszberg and one by the late Mr. Herszberg until his death and thereafter by his estate.

20

In October 1965 James Knitwear Pty, Limited had applied for registration under the Trade Marks Act of the name "Marene" and such registration was granted in April 1967 and renewed in July 1972.

According to the evidence of Mr. Foxall who was the accountant for Mr. and Mrs. Herszberg and their various partnerships and companies, Hornsby Knitting Company sold all its assets to the plaintiff on 31st August 1966 and so far as James Knitwear Pty. Limited is concerned it did not trade between the date of the fire and about 1974. He gave the following evidence:

10

MR. ROGERS: Q. And what happened was that you took a certain view, rightly or wrongly of the ability to utilise the taxation losses of Marene Knitting Mills Pty. Limited and it was for that reason that the activities of Hornsby Company were fed into that corporate structure. You are having difficulty? A. Yes.

Q. And from the date of the sale of the Hornsby Knitting Company to Marene Knitting Mills Pty. Limited the company carried on the previous business of Hornsby Knitting Company together with any other business which it was able to obtain? A. Yes.

20

And further -

Q. The suggestion that the shares were purchased because of some concern felt in regard to the name of Marene I suggest is completely inaccurate. I will put it another way. It is not right to say the shares in Marene Knitting Mills Pty. Limited were purchased by Fela Investments because of some concern felt with regard to the name Marene? A. I think there were other factors.

30

Q. The tax loss? A. Yes.

Q. Indeed at the time when the decision was taken to purchase the shares the question of the name Marene had been well and truly disposed of? A. I was not aware of that.

Q. You do not suggest, do you, that Mrs. Fela Herszberg became a director of Marene Knitting

40

Mills Pty. Limited merely because there had to be two persons occupying directorships? A. My previous dealings with her had been nil, and it would seem to be the natural thing to do.

Q. You were associated, I assume, with the incorporation of Fela Investment Pty. Limited?  
A. Yes.

Q. And she was a director of that company? 10  
A. Yes.

Q. And of course it was Fela Investments that was purchasing Marene Knitting Mills Pty. Limited?  
A. Yes.

Q. She became a director of what was after all a fully owned subsidiary? A. Yes.

Q. In the normal course? A. Yes.

Q. The Herszberg family followed your advice in relation to the shareholding structure established for Fela Investments Pty. Limited? 20  
A. Yes.

Q. And there you followed the course, you have subscriber shares in the names of the parents, and allocate later shares to the children?  
A. Yes.

Q. And that is done with a view to death duty savings? A. Yes.

Q. And when Marene Knitting Mills Pty. Limited shares were purchased the shares were taken in the name of Fela Investments Pty. Limited to promote that self-same objective? A. Yes. 30

Q. But it was at all times the intention that the effective management of Marene Knitting Mills should remain with whoever had been the effective manager of the Hornsby Knitting Mills business. When the Marene Knitting Mills Pty. Ltd. shares were purchased in the name of Fela Investments Pty. Limited that was done purely in order to promote the death duty scheme? 40  
A. Yes.

Q. And it was at all times intended so far as you know that effective control of the activities of Marene Knitting Mills should be with

whoever had been the effective controller, or controllers of Hornsby Knitting Company? A. I presume that was Mr. Herszberg's idea.

Q. Well, this was your understanding of the position? A. Yes.

During 1966, on a date which is uncertain the business which had previously been conducted by Hornsby Knitting Company and Fela Knitting Co. moved from Mansion House to 68 Campbell Street, Sydney, where it remained until 1973. In a letter from the accountants of these firms to Mr. Swanton dated 5th May 1967 it is said that rent was paid for the premises at Mansion House from 15th October 1965 to 15th August 1966. Schedules were provided by the same accountants of the turnover of Hornsby Knitting Co. (wrongly called Hornsby Knitting Co. Pty. Limited) and this was said to be \$80,027.84 from 1st September 1965 to 31st August 1966. According to a letter dated 2nd November 1967 from the same accountants to the accountants for the insurer upon whom the claim was being made, under the heading "L. and F. Herszberg" it was said that when the firm moved its business from Mansion House to Campbell Street seven machines and certain office equipment to the total value of \$6,700 was retained and taken to Campbell Street; and a manufacturing and trading account in the name of "Hornsby Knitting Company and Fela Knitting Company" for the year ended 30th June 1966 showed sales of \$74,706.00 and an amount

recovered from the insurance company said to be  
\$96,912.00, the loss for the period being \$46,010.00.

On 2nd June 1967 Mr. Laib Herszberg wrote to  
Mr. Swanton saying, inter alia:

"As you know, we have been established in Hornsby  
for twenty years, and we had no staff trouble  
at all.... We are still looking forward to shift  
back to Hornsby where we were very well  
established. Here we are losing continuously.."

10

From the date of the appointment of the liquid-  
ator of the plaintiff, namely, 20th September, 1965,  
until the sale of the shares at the end of June 1966  
the business of Marene Knitting Mills Pty. Limited as  
an entity was not being carried on at all and Hornsby  
Knitting Company and Fela Knitting Company during that  
period fulfilled some of the orders which had been  
outstanding at the date of the fire together with certain  
new orders using the machinery and plant and some  
stock which had been purchased from the liquidator.

20

A small number of employees of Hornsby Knitting  
Company moved with the business to Mansion House and  
then later to Campbell Street. One of these was a  
foreman, Mr. Cubbin, whose evidence I accept. This  
employee had been paid until the date of the fire in  
September 1965 and for several weeks thereafter by  
Hornsby Knitting Company. From 13th October 1965  
to 29th June 1966 he was paid by Fela Knitting Com-  
pany and thereafter by the plaintiff.

30

In the year 1973 the plaintiff decided to move its entire operations to Melbourne. At that time the insurance broker for the plaintiff was Gerald Ball Insurances Pty. Limited which company had so acted for the enterprises of the Herszberg family since about 1964. Miss Patterson, an employee of that company joined it in May 1964 and she said that at that time the Herszbergs and their companies "were new clients". She herself subsequently became aware of the 1965 fire. 10

On 31st July 1973 a Mr. Reid-Giltinan who worked in the brokers' division of the first defendant under a Mr. Powell called at the broker's office and was introduced by Mr. Ball to Mr. Myer Herszberg who, on the death of his father, had become managing director of the plaintiff. A conversation took place in relation to a Marine Transit Policy which the insurer agreed to issue to cover the movement of machinery, plant, stock and raw materials from Sydney to Melbourne. In the course of this conversation, to which it will be necessary to return, a discussion took place about the insurer taking over the cover against the risk of fire in the plaintiff's premises and business in Melbourne. The result was that on 14th August 1973 cover note Number 6056 signed by Mr. Reid-Giltinan was issued in favour of the plaintiff holding it covered against fire subject to the terms and conditions of the 20



company's "fire and perils policy" from that date in respect of stock, machinery, plant and other sundry items in the premises occupied as a knitting mill in Victoria. The following day a fire occurred and as I have indicated the amount of the loss is agreed upon as being the sum of \$130,583.89.

Thereafter considerable correspondence took place between the insurer and the broker and for reasons 10 which are not material to the present matter three separate proposals in all were signed. Each was dated 4th September 1973 and was signed by Mr. Myer Herszberg who in his own handwriting, in answer to the appropriate question in each case ("Has proposer or husband/wife or anyone interested in this insurance ever had any property damaged or destroyed by any of the contingencies to be insured against?") wrote "approx. ten years ago" the address given being 2 James Street, Hornsby and the insurance company being said to be "unknown". 20

Why these proposals were required and why a policy of insurance was in fact prepared (as indeed it was) but not issued I find difficulty in understanding but it appears that the insurer believed, and clearly erroneously, that these steps would have to be taken before it could avoid the contract of insurance. In any event no reliance is placed upon them as being a reason why the insurer could not properly avoid the cover note.

According to Miss Patterson, at the time when she asked Mr. Reid-Giltinan to issue a fire cover note in favour of the plaintiff she said "they have not had any fire claims for the past eight years. But I want you to know that his father who was managing Hornsby Knitting had a claim and this is the son who is managing Marene" to which he is alleged to have replied "It is a different company. It does not relate to this business". The same witness said that subsequently Mr. Ball in her presence asked Mr. Reid-Giltinan "did he think that the fire which was a different company related to this Marene" to which the reply was made "Yes, it if it is a different risk altogether, it is possible that it is a new risk". This conversation was denied by Mr. Reid-Giltinan who said that on the occasion of the discussion with Mr. Ball and Mr. Myer Herszberg to which I have referred, and after being requested to take over the fire risk, he asked what the claims experience was like and was told by Mr. Ball "We have had no fires or burglaries: we have had the occasional fusion claim over the last ten years but there is no need to worry on this account as the claims experience is good". I accept the evidence of Mr. Reid-Giltinan and reject that of Miss Patterson. Mr. Ball was not called. I am fortified in my rejection of the version which Miss Patterson gave by the terms of correspondence which later passed between the

second defendant and the solicitors then acting for the plaintiff. Such letters do not, at least until after litigation involving the brokers was clearly envisaged, make any assertion that Reid-Giltinan had waived the requirement to disclose the earlier fires, a matter which in my opinion would clearly have been highlighted by the brokers to assist their client in obtaining indemnity from the insurer if it had been said. In any event as I have said I prefer the evidence of Mr. Reid-Giltinan to that of Miss Patterson, and I accept also the evidence of Mr. Powell in relation to the terms of the conversation with Mr. Ball at the end of August. In these circumstances I reject the claim of the plaintiff that because of the terms of the conversation between Miss Patterson or Mr. Ball and Mr. Reid-Giltinan the insurer was not entitled to avoid the contract of insurance, assuming there to have been a non-disclosure of material facts.

10

20

To this question it is now necessary to turn. Expert evidence was given by Mr. Hardy on behalf of the plaintiff. He is the Sydney Manager of the United Insurance Company and has had 43 years experience in the insurance industry, having held senior office in associations of underwriters. He was given a summary of the facts which I have recounted and asked to assume the business conducted by the partnership and by James

Knitwear Pty. Limited was from 1965 and 1966 onwards  
"conducted in the name of a company called Marene  
Knitting Mills Pty. Limited" and he expressed the opin-  
ion that, whether the business carried on by the plain-  
tiff at the time of the issue of the cover note was  
the same as that which had previously been carried on  
by the partnership in the company referred to or not,  
previous fires were matters which a prudent insurer 10  
would regard as material and they therefore, in his  
view, should have been disclosed. I accept his evidence  
and the opinions which he expressed. He did not limit  
his opinion to the case where the plaintiff's business  
was the same as that previously conducted at Hornsby,  
even though the entity which was conducting it was  
different. Nonetheless in view of the way in which the  
defendant pleaded its case namely that "the business  
had previously had four very serious and substantial  
fires" which were not disclosed, I consider it is 20  
necessary for me to examine whether or not in substance  
the plaintiff's business in August 1973 was a continua-  
tion of that which had been conducted at 2 James Street,  
Hornsby up to 1965 or whether in substance it was inde-  
pendent of it and either a continuation of that which  
the plaintiff, prior to its going into liquidation,  
had carried on in Sydney or alternatively an entirely  
new business commenced in 1966.

I do not propose to review the evidence in detail.

I think there is no doubt that the premises in Mansion House and the machines and stock which were bought from the liquidator were required so that Hornsby Knitting Company and Fela Knitting Company could carry on in alternative premises in the hope that eventually they might go back to Hornsby. It is clear on the evidence before me that a feature of the business which the plaintiff had carried on prior to 1965 had been the manufacture and sale of garments for lawn bowling and that from 1966 onwards the plaintiff did make and sell these goods. But it is also clear that it continued in substance to make the type of goods which had been made at Hornsby even though, with the advent of more refined techniques and greater competition and a change in demand, the style and quality of the goods improved. The defendant called a number of prior employees of the plaintiff whose evidence in substance I accept in each case and I find as a fact that notwithstanding some differences in brand names and in customers there was a substantial identity between the business conducted at Hornsby and that which thereafter was conducted under the name of the plaintiff. Such was the view of Mr. Foxall in the passage which I have already cited. I should here indicate that I was not greatly impressed with the evidence of Mr. Myer Herzberg and I am not

prepared to infer from his evidence that there was a substantial difference of identity between what had been done at Hornsby prior to 1965 and what was done under the name of the plaintiff from 1966 onwards.

I therefore conclude that after the fire in 1965 and until that which occurred in 1973 the business carried on by the plaintiff, apart from a period of about nine months after the liquidation when it carried on no business at all, was basically that which was previously carried on at Hornsby in the premises where the four fires had occurred, with the addition of the manufacture of some garments, especially those worn by bowlers, which had previously been the specialty of the plaintiff when under different management. In particular, I find that Mr. Herszberg (until his death) and Mrs. Herszberg continued to perform in the business the general duties which they had previously undertaken at Hornsby. So far as Mrs. Herszberg is concerned, it is said in a letter from the plaintiff's Melbourne solicitors to the insurer dated 14th February 1974 that "the management and by far the greater part of the beneficial ownership of the entities which had in the past made claims with respect to substantial fires were vested in the late Mr. L. Herszberg and Mrs. F. Herszberg". This situation continued in her case in the premises at Mansion House and in Campbell Street.

Mr. Myer Herszberg said in evidence that his mother "looked after the girls in a forelady capacity, to do with the making of the garments", a description which in my opinion considerably understates her activities, and she did this until "shortly before we moved to Melbourne .... possibly a month". He added that their intention was that his mother would stay in Sydney with a younger daughter until her schooling was finished at the end of the year when she would then move to Melbourne. 10

Mr. Burchett, senior counsel for the plaintiff, argued that as part at least of the object of the acquisition of the shares in the plaintiff by those who had been concerned with the businesses at Hornsby was to utilise accumulated tax losses I should conclude that, having regard to what was said by Gibbs J. in Avondale Motors (Parts) Pty. Limited v. Commissioner of Taxation 124 C.L.R. 97 at 104-5 there was a true distinction between the business conducted prior to the fire in 1965 and the business later conducted in the name of the plaintiff. He also argued that there were sound business reasons demonstrated in evidence why the activities of Hornsby Knitting Co. should, after their outstanding orders had been fulfilled as far as possible, be terminated and a new business in effect begun in the name of the plaintiff or its old 20

business revived. He pointed out that the relevant date when the question of the identity of the businesses must be considered is the date of the cover note, as it undoubtedly is, and argued that because of the difference in type and quality of the garments, the different sales outlets used, the different staff employed and the different location involved the proper conclusion was there was no substantial identity between the Hornsby businesses and that which the plaintiff conducted in 1973. 10

However after careful consideration, and in the light of the evidence which I accept, I think that the situation was, as Mr. Rogers, senior counsel for the defendant submitted, that the business of Hornsby Knitting Company was carried on from October 1965 in the name, in the premises and with the equipment of the plaintiff, which had lain dormant for some nine months, and that such business continued to be carried on by it until August 1973 together with whatever could be salvaged or acquired from the business previously carried on in the name of the plaintiff. Although it is true, as was submitted on behalf of the plaintiff, that the onus on this issue was upon the defendant nonetheless in asking whether such onus has been discharged I cannot overlook the fact that the details of the organisation and operations of the plaintiff between 20



1966 and 1973 and of Hornsby Knitting Co. before that are matters which are substantially within its own knowledge.

I turn then to the question whether any or all of the fires at Hornsby were material matters which should have been disclosed to the insurer before the issue of the cover note. None was disclosed and if any, of which the plaintiff had knowledge, was material then the defendant was clearly entitled to avoid the contract of insurance. 10

Considerable discussion took place as to the test which should be applied. Many of the cases which were discussed by Samuels J. (as he then was) in Mayne Nickless Ltd. v. Pegler & Anor. (1974) 1 N.S.W.L.R. 228 were referred to by Mr. Burchett, who relied in particular upon Mutual Life Insurance Co. of New York v. Ontario Metal Products Company Ltd. 1925 A.C. 344 at 350-1, Southern Cross Assurance Company Ltd. v. Australian Provincial Assurance Association Ltd. 39 S.R. 174 at 187 and Western Australian Insurance Co. Ltd. v. Dayton 35 C.L.R. 355 at 378-9. Other authorities were referred to by both counsel but these too were considered by Samuels J. in the case to which I have referred. The decision in Mayne Nickless v. Pegler (ante) is, with respect, one with which I completely agree and I think it is sufficient for me to indicate 20

my agreement with the way in which Samuels J. dealt with the earlier cases and with the test which he propounded as being the proper one to apply in relation to materiality. In particular I propose to follow and apply what was said at page 239, namely:

"Accordingly, I do not think that it is generally open to examine what the insurer would in fact have done had he had the information not disclosed. The question is whether that information would have been relevant to the exercise of the insurer's option to accept or reject the insurance proposed. It seems to me that the test of materiality is this: a fact is material if it would have reasonably affected the mind of a prudent insurer in determining whether he will accept the insurance, and if so, at what premium and on what conditions".

10

Mr. Burchett argued that even if, contrary to his submissions, the business carried on by the plaintiff at the date of the cover note was the same as that which had been previously carried on by the partnership at Hornsby, the management, premises and staff at the time of the fire in the new factory in Victoria differed to such an extent that knowledge of the earlier fires would not have influenced a prudent insurer in fixing the premium or in determining whether he would accept the risk. He argued that the evidence of Mr. Best, an expert called by the defendant was to be preferred to that of Mr. Hardy because Mr. Best did take into account and Mr. Hardy did not matters which indicated that the "housekeeping" of the plaintiff could not be related to that of the businesses which suffered the

20

30

earlier fires. He argued also that because Mr. Best was not cross-examined the application of what was said in Browne v. Dunn (1894) 6 R. 67 H.L. required that his evidence be accepted in preference to that of the defendant's expert. See also Reid v. Kerr (1974) 9 S.A.S.R. 367 and Precision Plastics Pty. Limited v. Demir 49 A.L.J.R. 281 at 286. However I do not think that the principle referred to in those cases, which relates to the intention of the opposing party to suggest that a witness is not speaking the truth upon a particular point, has any application in the present circumstances especially in the light of an answer which Mr. Best gave to the effect that a prudent insurer would have wanted to know of the facts relating to the previous fires "but I think they would have been too remote". Whilst it is true that this does not mean that the witness is conceding that the question of materiality should be answered in favour of the defendant, nonetheless I think it explains and justifies the absence of cross-examination. In any event I prefer the evidence of Mr. Hardy and I do not think it is correct to assert, as Mr. Burchett did, that his evidence should be disregarded because he was not asked to assume that Mrs. Herszberg was not connected with the management of the Melbourne factory. On the finding which I have made she was closely related to the manufacturing side of

the business both at Hornsby and in Sydney until at least a short time before the fire. I conclude that there was such identity of management, control, product and overall business structure at Hornsby and in the new premises at the date of the cover note that the opinion of Mr. Hardy is to be preferred to that of Mr. Best. In any event without any acceptable expert evidence I myself would have concluded that the previous fires and each of them were material matters which should have been disclosed. This conclusion would flow largely from the fact that the ultimate control of the plaintiff, making due allowance for the death of Mr. Laib Herszberg, was really substantially the same as the control of the businesses at Hornsby and the day to day management of the manufacturing side of the business at its new premises in Victoria at the date of the fire would still have been markedly affected by the fact that Mrs. Herszberg was in charge of that side of the company's activities until shortly before the move to Melbourne. 10 20

Although the question of materiality is one of fact, provided the proper test is applied, I think that support for the view at which I have arrived is to be found in Arthrude Press Ltd. v. Eagle Star and British Dominions Insurance Company Limited 18 L.L.R. 382 and 19 L.L.R. 373. See also Becker v. Marshall 11 L.L.R. 114; 12 L.L.R. 413. It is clear that in asking whether

"the business" had any prior losses or claims for the purpose of determining the question of materiality of facts which were not disclosed (see Arterial Caravans Ltd. v. Yorkshire Insurance Co. Ltd. (1973) 1 Ll.L.R. 169 at 176) it is not necessary to have regard to the niceties of corporate structure (see generally the cases discussed in Volume 38, Modern Law Review at pages 212-17) although in the present case I am of the view, as I have 10 already said, that the Hornsby businesses were merged in or taken over by the corporate structure which is the plaintiff.

It remains only to consider whether the facts which I have held to be material and which were not disclosed were known to the plaintiff. It is clear that they were known to Fela Herszberg who in August, 1973 was one of the two directors of the plaintiff. Myer Herszberg asserted that they were unknown to him as he was but a boy at the time when the Hornsby fires occurred and did not observe them or their consequences. 20 He was born in 1948 and he said that in about 1953 or 1954 he went to school in Melbourne for almost a year and then returned to reside at Hornsby for a short time moving from there to a flat in Bondi until he was about 13 years of age when he again went to Melbourne, returning to Bondi thereafter. He said he commenced going to Hornsby regularly about 18 months or two years before the 1965 fire.

As I have already said I was not impressed with the evidence of Mr. Herszberg and I find it very difficult to believe that even as a young boy he was not aware of the substantial fires which had occurred in the businesses conducted by his parents. He did say that some time after 1961 he went past where the shop which had been the subject of the fire in that year had been and saw that the land was vacant but claimed that he did not know nor was he told that the building had been burnt down. This evidence I reject and although it does not follow from this rejection that I should affirmatively find knowledge on his part I accept the evidence of Mr. Swanton that during the course of his discussions with Mr. Laib Herszberg after the 1965 fire, in the presence of Myer Herszberg, the latter's father "stated that they had lost money for the first year after the last fire which was in 1961 and they had been gradually picking up since".

In my opinion this is sufficient to fix Myer Herszberg with knowledge of the fire in 1961. It is clear that he knew of the 1965 fire and that his mother, the only other director at the date of the issue of the cover note, knew of them all. In my opinion this is sufficient to establish knowledge on the part of the plaintiff of the fires of 1961 and 1965 each of which I consider was a material matter which should have

been disclosed to the insurer. As I have already indicated, I would have come to this conclusion even without the evidence of Mr. Hardy to which I have referred. See generally Babatsikos v. Car Owners' Mutual Insurance Co. Ltd. (1970) V.R. 297: Mayne Nickless Limited v. Pegler (ante).

In these circumstances it is not necessary for me to resolve the question whether the first defendant has shown that the insured company had knowledge of the fires which occurred in 1958 and 1960. This would involve the question whether knowledge by Mrs. Herszberg alone would be sufficient and also whether such fires are matters the occurrence of which should have been ascertained by the managing director before he sought new insurance cover - see generally Colinvaux, The Law of Insurance (3rd Ed.) paragraph 146 and Ivamy, General Principles of Insurance Law (2nd Ed.) page 92. 10

In the result I have come to the conclusion that the first defendant was entitled to avoid the cover note by reason of the non-disclosure of the third and fourth fires and in these circumstances the plaintiff cannot succeed in its claim. There will be a verdict and judgment for the first defendant and I order the plaintiff to pay that defendant's costs including the costs of the amendment which were reserved. 20

Judgment of his Honour  
Mr. Justice Yeldham

I Certify that the twenty-seven preceding pages are a true copy of the reasons for Judgment herein of The Honourable Mr. Justice Yeldham.

E. Carr  
Associate

Date 12-12-75.



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

No. 8276 of 1974.

BETWEEN:

MARENE KNITTING MILLS PTY, LIMITED

Plaintiff

AND:

GREATER PACIFIC GENERAL INSURANCE  
LIMITED

10

Defendant

NOTICE OF MOTION FOR CONDITIONAL LEAVE  
TO APPEAL TO HER MAJESTY IN COUNCIL

TAKE NOTICE that on the 19th day of December 1975, the abovenamed MARENE KNITTING MILLS PTY, LIMITED, the Plaintiff in this action will move for an order granting leave to appeal to Her Majesty in Council from the verdict found by the Honourable Mr. Justice Yeldham and judgment directed by him to be entered for the Defendant GREATER PACIFIC GENERAL INSURANCE LIMITED on the twelfth day of December 1975, and the further order made by him on the twelfth day of December 1975, that the Plaintiff pay the costs of the Defendant GREATER PACIFIC GENERAL INSURANCE LIMITED upon the following grounds:-

20

1. THAT it was not open for his Honour to find, or alternatively that he should not have found, that the fires of 1961 and 1965 referred to in his judgment were, or either of them was, material.

30

Notice of Motion for  
Conditional Leave to  
Appeal

Notice of Motion for  
Conditional Leave to  
Appeal

2. THAT his Honour should have held that if the business carried on by the Plaintiff at the date of the cover note to wit the 14th August 1973, was the same as those which had been previously carried on by James Knitwear Pty. Limited and Hornsby Knitting Company, or either of them at Hornsby, the management premises and staff of the Plaintiff at its new factory in Victoria at the time of the fire in August 1973, differed to such an extent that it should not be held that knowledge of the earlier fires would have influenced a prudent Insurer in fixing the premium or determining whether he would accept the risk.

10

3. THAT his Honour was in error in not adopting the test of materiality as laid down in Mutual Life Insurance Co. of New York v. Ontario Metal Products Company Ltd., 1925, A.C. 344 at page 350-1 and in not applying the reasoning of the Privy Council in that decision.

20

4. THAT his Honour should have held that upon the correct application of the test of materiality the non-disclosure of the fires of 1961 and 1965 both or either of them would not have in the circumstances influenced a prudent insurer in fixing the premium or determining whether it would accept the risk of the Plaintiff's business.

5. THAT his Honour was in error in holding that

Notice of Motion for  
Conditional Leave to  
Appeal

Myer Herszberg a Director of the Plaintiff had knowledge of the fire of 1961.

6. THAT his Honour should have had regard to the principle of Browns v. Dunn (1894) 6 R. 67 H.L. in considering the expert evidence on materiality tendered in this case.

7. THAT his Honour was in error in holding that the Defendant was entitled to avoid the cover note by reason of the non-disclosure by the Plaintiff of certain fires of the 26th October 1961, and of the 2nd September 1965. 10

8. THAT his Honour should have held that the Defendant had not discharged the onus of showing that the fires of the 26th October 1961, and of the 2nd September 1965, or either of them were fires of the Plaintiff's business.

9. THAT his Honour was in error in holding that the fire of the 26th October 1961, in certain premises at Hornsby occupied for business purposes by a Company known as James Knitwear Pty. Limited was a fire of the business of the Plaintiff and as such ought to have been disclosed to the Defendant. 20

10. THAT his Honour was in error in holding that the fire of the 2nd September 1965, at Hornsby in premises at Hornsby in which said premises a firm known as

Notice of Motion for  
Conditional Leave to  
Appeal

Hornsby Knitting Mills Co., carried on business, was a fire of the business of the Plaintiff and as such ought to have been disclosed to the Defendant.

11. THAT his Honour was in error in holding that there was a substantial identity between the "business conducted at Hornsby" before 1965 and that which thereafter and at the relevant times was conducted under the name of the Plaintiff. 10

12. THAT his Honour should have held that as at the 14th August 1973, when the Defendant issued to the Plaintiff a cover note there was no substantial identity between the Hornsby businesses and that which the Plaintiff conducted in 1973.

13. THAT his Honour was in error in holding that there was such identity of management control product and overall business structure at Hornsby and in the Plaintiff's premises at the date of the Defendant's cover note, to wit the 14th August 1973, that previous fires or one or more of them at Hornsby were material matters that ought to have been disclosed by the Plaintiff to the Defendant at the time of seeking the cover note. 20

14. THAT his Honour was in error in holding that the ultimate control of the Plaintiff was really substantially the same as the control of the business at Hornsby and that the day-to-day management of the

Notice of Motion for  
Conditional Leave to  
Apply

manufacturing side of the business at its new premises in Victoria at the date of the fire of the Plaintiff in August 1973, would still have been markedly effected by the fact that Mrs. Herszberg was in charge of the manufacturing side of the Plaintiff's activities until shortly before the move to Melbourne.

15. THAT the said verdict in favour of the Defendant GREATER PACIFIC GENERAL INSURANCE LIMITED was against the evidence and the weight of evidence. 10

16. THAT his Honour should have found a verdict and directed that judgment be entered for the Plaintiff against Greater Pacific General Insurance Limited for the sum of \$130,583.89 and should further have ordered the said Defendant to pay the costs of the Plaintiff of the action.

The matter in dispute on an appeal to Her Majesty in Council amounts to a sum in excess of Five hundred 20 pounds sterling as mentioned in the Rules regulating appeals to Her Majesty in Council from the State of New South Wales set forth in Order in Council dated the 2nd day of April 1909, and the Judicial Committee Rules 1957. AND for such further or other order as to this Honourable Court seems fit.

DATED this 19th day of December 1975.

A.R. Abadee  
Counsel for the Plaintiff  
(Applicant)

30

Notice of Motion for  
Conditional Leave to  
211. Appeal

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

No. 8276 of 1974

MARENE KNITTING MILLS PTY. LIMITED

Plaintiff

GREATER PACIFIC GENERAL INSURANCE LIMITED

Defendant

AFFIDAVIT IN SUPPORT OF NOTICE OF MOTION FOR  
CONDITIONAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

10

ON the 19th day of December in the year One thousand nine hundred and seventyfive, Edward VESELY of 85 Bondi Road, BONDI, in the State of New South Wales, Solicitor being duly sworn makes oath and says as follows:

1. \_\_\_\_\_ I am a Solicitor of the Supreme Court of New South Wales and am a partner in the firm of Messrs. Reid & Vesely, the Solicitors for the abovenamed Plaintiff which is the Applicant in this Motion for Leave to Appeal, and as such I have the conduct of this matter on behalf of the Plaintiff.

20

2. \_\_\_\_\_ The action herein is a claim for damages by the Plaintiff against the Defendants instituted by a Statement of Claim dated the 1st November, 1974 and No. 8276 of 1974. The action came on for hearing on the 18th, 19th, 20, 21st days of November, and the 10th of December, 1975 before His Honour Mr. Justice Yeldham sitting without/<sup>a</sup>jury and in the Common Law Division Commercial List of the Supreme Court of New South Wales. During the course of the said proceedings, the Plaintiff's action against the secondnamed Defendant was settled. At

30

Affidavit of Edward  
Vesely

the conclusion of the said hearing against the first-named Defendant, Greater Pacific General Insurance Limited, His Honour reserved his judgment.

3. On Friday the 12th December, 1975 His Honour delivered judgment in which he found a verdict and directed entry of judgment accordingly for the first-named Defendant, Greater

-2-

10

Pacific General Insurance Limited and on the same day His Honour further ordered that the Plaintiff pay the costs of the aforesaid first-named Defendant of the said action.

4. The cause of action propounded by the Plaintiff against the first-named Defendant was a claim for damages arising from and by reason of the first-named Defendant's repudiation of a contract of Insurance. The Plaintiff says that on the 14th August, 1973, the Plaintiff by way of cover note affected with the first-named Defendant a contract of insurance whereby in consideration of premiums to be paid to the said first-named Defendant by the Plaintiff the said first-named Defendant insured the Plaintiff against loss or damage by fire in respect of certain property of the Plaintiff situate at premises at the corner of Evans and Cranwell Streets, Braybrook, Victoria, for

20

Affidavit of Edward  
Vesely

the sum of Five Hundred and sixty three thousand eight hundred dollars (\$563,800.00) the said contract of insurance to be effected from the 14th day of August, 1973 until 14th November, 1973 and subject to the terms and conditions of the said cover note. On the 15th day of August, 1973 a large quantity of the Plaintiff's property at said situation included in the said contract of insurance was destroyed by fire and the sum of One hundred and thirty thousand five hundred and eighty three dollars eightynine cents (\$130,583.89) became allegedly due and payable by the said first-named Defendant to the Plaintiff. 10

5. It was agreed between the Plaintiff and the first-named Defendant upon the hearing of the Plaintiff's action, that in the event of the Plaintiff's claim succeeding against the first-named Defendant, the amount of One hundred and thirty thousand five hundred and eighty-three dollars eightynine cents (\$130,583.89) Australian would be the agreed amount of damages to be awarded to the Plaintiff. 20

-3-

6. It is respectfully requested that an order be made herein granting the Plaintiff leave to appeal to Her Majesty in Council against the verdict and judgment in the Plaintiff's action against the first-named Defendant, Greater Pacific General Insurance Limited.



**Affidavit of Edward  
Vesely**

SWORN by the Deponent on  
the day in the year first  
abovementioned - - -  
before me

)  
)  
)  
)  
)

**E. Vesely**

P. Robinson J.P.  
A Justice of the Peace

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COMMON LAW DIVISION

No. 8276 of 1974.

BETWEEN:

MARENE KNITTING MILLS PTY. LIMITED

Appellant (Plaintiff)

AND:

GREATER PACIFIC GENERAL INSURANCE  
LIMITED

Respondent (Defendant)

10

RULE OR ORDER GRANTING FINAL LEAVE TO APPEAL

The 2nd day of March, 1976.

UPON MOTION made this day pursuant to the Notice of Motion filed herein on the 1st day of March, 1976

WHEREUPON AND UPON READING the said Notice of Motion, the Affidavit of Edward Vesely sworn on the 1st day of March, 1976 and the Prothonotary's Certificate of Compliance, AND UPON HEARING what was alleged by Mr. Abadee of Counsel for the Appellant and Mr. Johnstone, Solicitor for the Respondent IT IS ORDERED that final leave

20

to appeal to Her Majesty in Council from the judgment of his Honour Mr. Justice Yeldham given and made herein on the 12th day of December, 1975, be and the same is hereby granted to the Appellant AND IT IS FURTHER ORDERED that the sum of Fifty dollars (\$50.00) deposited in Court by the Appellant as security for and towards the costs of preparation of the transcript record be paid

Rule Granting Final  
Leave to Appeal

out of Court to the Appellant AND IT IS FURTHER ORDERED  
that the Appellant have liberty to apply.

By the Court,

(SGD.) K. DOUGLAS L.S.

DEPUTY PROTHONOTARY

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COMMON LAW DIVISION

} No. 8276 of 1974

BETWEEN: MARENE KNITTING MILLS PTY. LTD.

Appellant (Plaintiff)

AND: GREATER PACIFIC GENERAL INSURANCE  
LIMITED

Respondent (Defendant)

CERTIFICATE VERIFYING TRANSCRIPT

I, JOHN EDWARD NOONAN, of Sydney in the State of New South 10  
Wales, Prothonotary of the Common Law Division of the  
Supreme Court of the said State, DO HEREBY CERTIFY that  
the pages hereunto annexed and numbered one to 340 inclu-  
sive contain a true copy of all the documents relevant  
to the appeal by the Appellant MARENE KNITTING MILLS PTY.  
LTD. to Her Majesty in Council from the judgment of the  
Honourable David Albert Yeldham, a Judge of the said  
Supreme Court given and made herein on the twelfth day  
of December one thousand nine hundred and seventy-five so  
far as the same have relation to the matters of the said 20  
appeal together with the reasons for the said judgment  
given by the said Judge and an index of all the papers,  
documents and Exhibits included in the transcript record  
which true copy is remitted to the Privy Council pursuant  
to the Order of Her Majesty in Council of the twentieth  
day of December in the year of Our Lord, one thousand nine  
hundred and fifty seven.

IN FAITH AND TESTIMONY whereof I have  
hereunto set my hand and caused the  
Seal of the said Supreme Court to be 30  
fixed this 12th day of April in the  
year of Our Lord one thousand nine  
hundred and

J.E. Noonan.  
PROTHONOTARY

L.S.

218. Certificate of  
Prothonotary Verifying  
Transcript Record