IN THE PRIVY COUNCIL

15 OF 1972

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

BETWEEN: ALEXANDER BARTON

Plaintiff (Appellant)

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

Defendants (Respondents)

APPEAL BOOK

VOLUME 12

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

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187 Macquarie Street,
SYDNEY.

SOLICITORS FOR THE APPELLANT
(Plaintiff)

McCaw, Johnson & Co.,
60 Pitt Street,
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SOLICITORS FOR THE RESPONDENTS
(15th to 21st Defendants)

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Dare, Reed, Martin & Grant,
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OF NEW SOUTH WALES) Term No. 22 of 1969
COURT OF APPEAL)

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

BARTON v. ARMSTRONG & ORS.

FIFTEENTH DAY: THURSDAY, 11TH MARCH, 1971.

MR. GRUZMAN: Before the matter proceeds, we find it unfortunately necessary to make a submission which is being made only after deep and serious reflection on the part of counsel.

It may be that at some other time and in some other place we would wish to offer criticism, particularly of the manner in which his Honour Mr. Justice Taylor has conducted this appeal, and it may then be said it is our duty ---

JACOBS, J.A.: You have every right to appeal but you are not going to canvass before us a re-hearing of the appeal. Please refrain. You can take whatever grounds of appeal are appropriate and that depends on other courts and precedents. You can take that course. We will simply proceed with the appeal now and we will not hear argument on that aspect nor any application. Our duty is to hear the appeal.

MR. GRUZMAN: Your Honour, we apprehend that it is our duty to invite the attention of this Court to the fact that we complain about his Honour's conduct of the matter.

JACOBS, J.A.: You have done that.

MR. GRUZMAN: Thank you, your Honour.

JACOBS, J.A.: And for no reason that I can see.

MR. GRUZMAN: Might I, not canvassing the matter, add another thing which is of concern on our part - there is another matter which perhaps your Honours may allow me to mention - two cases: Brassington's Case, (1961) 3 All E.R. 998, 1962 E.R., Probate, commencing at 276. The matter to which I would invite your Honours' attention, (reading at page 990 of 3 All E.R. line C) - "One of the questions before the Court was whether did counsel believe the Judge and pre-judged a matter that he should walk out, in effect, or whether he should reserve rights of appeal".

JACOBS, J.A.: That was a trial at first instance?

MR. GRUZMAN: Yes, your Honour.

JACOBS, J.A.: That was a trial at first instance, a different matter entirely.

MR. GRUZMAN: Holroyd Pearce L.J. said "If a party ... sufficient grounds of appeal".

In Rex v. Peacock, not in the authorised reports, (1969) 1 All E.R. 47, Widgery L.J. at page 50 (F) said, "I find it unnecessary to read the judgment ... before the jury".

JACOBS, J.A.: For myself, I do not want to hear these cases, thank you, Mr. Gruzman. You have taken the point. I think, on the facts of the situation and in the law, it is a most unnecessary point and I am surprised it is taken. I think we should now proceed with the hearing of the appeal.

MASON, J.A.: I think the submission is an irresponsible one.

MR. GRUZMAN: I only want to add one sentence.

JACOBS, J.A.: Please do not. You have given us references to the cases and we will draw what help from them we wish. Now, will you proceed.

MR. GRUZMAN: I wish to refer to the transcript of yesterday, which is incorrect ---

JACOBS, J.A.: We are not here to listen to any argument on the transcript. We are not concerned with that matter. You can take it up with the Court Reporting Branch. It is not the transcript of evidence.

MR. GRUZMAN: There is omitted an interchange that occurred between his Honour Mr. Justice Taylor and myself, when I said ---

JACOBS, J.A.: You can take the matter up with the Court Reporting Branch. This is a transcript for someone's convenience. I hope the unsuccessful party would never have to pay for it.

MR. GRUZMAN: We four counsel and my solicitor agree that there is an important matter that his Honour said which is omitted.

JACOBS, J.A.: You can take that up with the Court Reporting Branch. We are not here to correct the transcript, which is an unofficial record. It is no part of the proceedings before this Court. We agree on that.

Now, will you proceed with the hearing of the appeal, Mr. Gruzman?

MR. GRUZMAN: When I said to your Honour yesterday, "Please, your Honour, may I address you upon what his Honour's judgment says" his Honour Mr. Justice Taylor said, "I do not want you to tell me. I can find out for myself what is in his Honour's

judgment". All counsel and solicitor agree that that is what was said and it is omitted from the transcript at page 512, prior to the statement I made "Might I address your Honours, Mr. Justice Jacobs and Mr. Justice Mason?"

JACOBS, J.A.: Yes, Mr. Gruzman.

MR. GRUZMAN: Before proceeding with the document, we feel we can more expeditiously and simply refer to some aspects of his Honour's judgment by looking at the judgment itself. What I would like to do is to take up the judgment from about page 3185. The substance of his Honour's judgment up to that point of time is that he substantially accepts Mr. Barton as a witness intending to or trying to tell the truth. He finds against him on only one or two matters, out of many aspects of his evidence. His evidence covered hundreds of telephone calls, threats - a great mass of material - and nearly all of which was material all of importance and significant in this case. In many cases this was depending solely on Mr. Barton's credibility - for example, the 'phone calls. His Honour finds all of that proved to his satisfaction.

There are certain exceptions: (1) for example Mr. Barton's complete failure to recollect his negotiations with Smith from 14th to 21st December. As to that I have already submitted that the fear in which he was placed by Mr. Armstrong and the fact that fear often induces that type of lapse of memory, where the human memory puts it out of existence, is sufficient to explain that lapse of memory. The human mind just puts it out. Particularly is that so when there was no reason why Mr. Barton should alter his evidence if he otherwise thought it to be so. Indeed, when Mr. Smith gave his evidence on the subject there was no attack of Mr. Smith to show that Mr. Barton was right, certainly no attack of any substance on Mr. Smith. In other words, it became obvious that his Honour was never asked to find on that that Barton's evidence was correct and Mr. Smith's evidence was wrong, and no such application was made to his Honour to recognise that Barton made a mistake in that.

JACOBS, J.A.: He did make a choice between Smith and Barton.

MR. GRUZMAN: He was never asked.

JACOBS, J.A.: He said he believed Smith.

MR. GRUZMAN: His Honour on this point was never asked to find that Mr. Barton's version of those conversations, or his memory, was accurate, and that Mr. Smith's was not. When Mr. Smith had given his evidence, it was apparent that it was never in issue - it was never an issue on which Street, J. had to make a determination ---

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

said that Smith was right and Barton was wrong.

MR. GRUZMAN: Yes, and the fact was, of course, that Barton had forgotten - put it out of his mind for one reason or another - and his honour was never placed in the position of having to find as a matter of contested issue before him whom he accepted.

Another matter that his Honour found against Mr. Barton was as to the threat on 17th December at the Paradise Waters board meeting, which Mr. Barton said was made by Mr. Armstrong and took place in the presence of a large number of people. His Honour criticised the fact that corroborative evidence which would have been available was not called. His Honour does not refer to the fact that Mr. Grant, who was present on that occasion, never denied that that threat had occurred at that time. The absence of corroborative evidence - if one called six witnesses to prove one threat where vast areas of threatening conduct had already been established - the trial would never have ended. So whilst his Honour was entitled to make his finding on that matter, again it is a matter which does not tell heavily against Mr. Barton.

Dealing now with the matters prior to the 12th January. The third matter is that his Honour expressed a view that he was not satisfied that Barton had seen the document as to which Exhibit 29 provided evidence on the 11th, and his Honour did that without considering the veracity and credibility of the police or expressing any view on it, which in our submission was not possible in the circumstances. However, I think it is with those exceptions that his Honour came to the view that up to 12th January substantially, and over vast areas of his evidence - including evidence vital to his Honour's findings as to which Mr. Barton alone gave evidence - there were findings that Mr. Barton spoke the truth.

It is from then on that his Honour makes findings which we submit are important to the determination of this case and which we submit are not justified. The matters I gave referred to, up to the 12th; substantially he could give truthful evidence subject to those matters. At the 12th his Honour finds, and this of course is a vital matter and a matter which, if I may say so, we take exception to, and with which I took exception with Mr. Justice Taylor yesterday. On the 12th his Honour finds that there had been a threat made by Mr. Armstrong and his Honour could not and did not say or believe that there was no occasions for threats when in fact a threat was made. So, if a finding was made by his Honour that there was no occasion for threats, then his Honour finds that a threat was made, that is a type of - if I may say with respect - illogical finding, a finding which does not follow, and which this Court would be most prone to alter.

JACOBS, J.A.: You are now coming to the point of the findings of the learned trial Judge not coming together?

MR. GRUZMAN: Yes, your Honour.

JACOBS, J.A.: I would like to hear that. I must say I have been expecting you to get to this at some stage in the last 14 days. It is your primary point, is it not?

MR. GRUZMAN: It is one of the points.

JACOBS, J.A.: It must be a primary point. What other points have you?

MR. GRUZMAN: It is not only because the findings do not stand together, this is one of the aspects, being a point on which we submit that the findings are wrong.

TAYLOR, A-J.A.: That is the point, if they are wrong they cannot stand together. This is the thing I asked you to argue three weeks ago. It is the central point of the appeal. You need not argue it if you do not want to. You have a man in terror and you claim he enters into an agreement with a man who is responsible for this inference. It is a matter of prime importance and you are addressing on it on the last day while you are addressing.

MR. GRUZMAN: In our submission, and I may be wrong, but we would have thought that when one was criticising the findings of the learned trial Judge one would have to do so with a knowledge of the evidence. Perhaps it is better if I do not debate that matter with your Honour.

JACOBS, J.A.: You are coming to it now?

MR. GRUZMAN: His Honour's findings about Mr. Barton that up to and including the 12th in substance he is an honest witness, trying to do his best - but not succeeding all the time. As to the 12th he makes a crucial finding that Armstrong rings up and threatens him - "Enter into this agreement or else". Barton says, "I won't be blackmailed into it".

JACOBS, J.A.: More than that; he finds that was a threat relating to the agreement, it was not just a general statement but a threat. That appears at page 3186.

MR. GRUZMAN: "Mr. Armstrong denies this conversation ... physical violence." Pausing there for the moment, firstly if Armstrong felt it necessary to threaten Mr. Barton into signing this agreement he must have felt in his mind that Barton would not sign the agreement unless he was under threat. That being so, there is no room for the inference that Mr. Armstrong was a reluctant vendor. The two cannot stand together. No man who is reluctantly

parting with his valuable goods would ring up the opposite party and say in effect "Sign this agreement or you will get killed". It is, with great respect, one would submit ludicrous to suggest that these two thoughts can play at the one time in the one mind. That is the first point.

The acceptance of that conversation in itself is enough to prove common law duress without any requirement. It is a classic case of common law duress. That is as far as the maker of the threat is concerned.

JACOBS, J.A.: Provided, as you would concede, he was taken seriously?

MR. GRUZMAN: Yes, yes.

Now, let us look at what Barton says and did. First of all it is common ground - common ground in the sense that it is an undisputed finding of his Honour - that Barton was in fear and terror at the hands of Armstrong. That being so, and that being the fact, the effect on Barton found by his Honour that there is no room for suggesting that Barton would not take the threats seriously, must be out of court. It follows, therefore, as a matter of common sense that Barton understood and accepted and believed that Armstrong was threatening his life unless he entered into this agreement. And going ahead a little bit, the fact is that five days later he entered into this very agreement.

So understood, this is a simple case of common duress, a threat of death in relation to the signing of this particular agreement. Both as to the signing of this agreement and the agreement thereafter.

JACOBS, J.A.: You are almost using the words that I used on the first day of the appeal. I said, with some reluctance, it was a simple case, it may be difficult of solution but it is simple in its evidentiary issue. Still, I may pass over that.

MR. GRUZMAN: If I may say so, with great respect, it is a point well taken against me. But we were faced here with his Honour's judgment. If your Honour had been dealing with the matter at first instance it might have been different and, indeed, it was presented to his Honour Mr. Justice Street - as I mentioned - as a simple fact. It was mentioned as a simple case, simple law, and simple of solution once one understood the facts. That is why I said it was surprising when his Honour made this particular type of judgment, when his Honour having found substantially the facts in our favour then said, "It might sound unduly legalistic to go further ..." It is that judgment that we have contended before his Honours was wrong and which requires examination in this case of all the evidence. Because his Honour then went on to say: "I accept Mr. Barton's evidence ... threat of physical violence". One could say, with respect, it is a

complete non sequitur. If a man in fear of his life says "You cannot blackmail me", that it throws no light on whether in face he is being subjected to pressure when the outside facts prove that he is being subjected to pressure.

TAYLOR, A-J.A.: It does throw light on the fact of whether that pressure is having any effect on him, surely?

MR. GRUZMAN: It could show either. Take the man who is being attacked by the bully. He may say, for reasons of self respect or for lots of reasons, "I am not frightened of you"; but that does not mean that he is not. He may be pale, pallid, in fear and trembling and it was perfectly obvious that he was in terrible fear.

TAYLOR, A-J.A.: It could be true or not true. That would be decided by the learned trial Judge, I would have thought. It is very difficult to decide on the transcript.

MR. GRUZMAN: If one is going to adduce from that an absence of fear that would have to be found objectively. You could not deduce - and this is my only submission on this point - from the fact that the man said "I am not frightened" whether he was frightened or not. You would do that from all the surrounding circumstances and what his Honour finds from all the surrounding circumstances is that in fact he was in fear and, indeed, his Honour could not have found otherwise because this was the day after he left his home and sent his family away to the country. The man was obviously in a state of abject terror.

TAYLOR, A-J.A.: Are you saying if that is the finding that is made it was operative on the 17th January and there is no room for any finding that he signed it uninfluenced by that? That is what the finding is, as I understand it.

MR. GRUZMAN: Yes. Our submission is that it is impossible to find when he signed on the 17th he was not influenced by that threat to sign the agreement.

TAYLOR, A-J.A.: In the light of the finding about terror?

MR. GRUZMAN: Yes, and as I put, the finding on terror is one which admitted of no other finding. It is unprecedented that a businessman ---

TAYLOR, A-J.A.: It does not matter whether it is unpredecented that is the finding.

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: And nobody has appealed against it.

MR. GRUZMAN: No. And it follows therefore that

his Honour believed in truth that Mr. Barton was not coerced, and that belief stands on nothing, it has no foundation or support whatever and therefore should be reversed.

His Honour then says "On the 12th there were further discussions between Mr. Barton's solicitor and Mr. Armstrong's solicitor concerning the same agreements ... accordingly." It is impossible to make that deduction from the matters that were in discussion on the 12th, or these conveyancing details between the solicitors themselves; neither party to the application nor subject pressure.

TAYLOR, A-J.A.: If at the trial evidence was given that Barton had said to the solicitor "I have to sign the agreement because if I do not sign this agreement a man will kill me and I am terrified", that would have been allowed in evidence from the solicitor.

MR. GRUZMAN: Yes, if Barton had said that, then there would have been no agreement and this is the problem.

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

MR. GRUZMAN: That is right.

JACOBS, J.A.: Why would there not have been this agreement?

MR. GRUZMAN: Because if the Landmark solicitor had been aware that this agreement was being entered into not for the benefit of Landmark but because Armstrong had threatened Barton he would not have permitted that agreement to go through.

JACOBS, J.A.: My brother Taylor was asking you about the conversation between Mr. Barton and his own private solicitor.

MR. GRUZMAN: Yes, Mr. Bowen would have taken a similar attitude and would have told Coleman ---

TAYLOR, A-J.A.: I would have thought if a responsible solicitor had been told that, and believed it, the first thing he would have done would have been to take his client by one hand to the nearest police station.

MASON, J.A.: That had occurred?

MR. GRUZMAN: It did occur earlier, yes, but Barton's problem was that he wanted to save his life.

TAYLOR, A-J.A.: That is what you say, but he had another problem, did he not? Most people want to save their lives. He wanted Armstrong out.

MR. GRUZMAN: Mainly because, and I will refer your Honour to the evidence in a moment - which was accepted by his Honour, as he said, "He is threatening

to kill me. We have got to get rid of him". I will come to it in a moment. On the 16th, just picture the situation where there are the directors of a large public company sitting down and deciding whether they should enter into an agreement and the evidence is (accepted by his Honour) that the day before the agreement is signed the managing director and his co-director sat down and did not consider what profits would Landmark make, or what the effect on the public would be. The conversation, accepted by his Honour, is that on that day the two directors - Barton and Bovill - were together and Barton said to Bovill "He is threatening to kill me. I have got to get rid of him", and Bovill agrees. This is the conversation accepted by his Honour on the 16th, the day before they signed the agreement.

MASON, J.A.: Could we go back to the question that Mr. Justice Taylor raised with you concerning the absence of evidence from the plaintiff about his state of mind, as to what he feared? I thought there had been evidence that the plaintiff had told Mr. Miller, the solicitor for the company, that he had been threatened by Vojinovic and understood that Armstrong was responsible. I think it was almost accepted as a matter of inference that he must have told Mr. Miller because you say he also said to the police that there were threats to his life and these were associated with entering into an agreement. In other words, he was telling Mr. Miller and the police that he had been threatened and those threats were by way of intimidation to enter into an agreement. Was not that the case he was seeking to make?

MR. GRUZMAN: Yes, your Honour. When one looks at the evidence on that, his Honour used this against Mr. Barton because of what Miller told the police - Miller having just came back from overseas.

MASON, J.A.: Now there is a question as to the interpretation of what the plaintiff told the police and that question has to be determined by reference to the plaintiff's evidence, reference to the two policemen and the diary evidence. Why did not the plaintiff give evidence in the proceedings as to the state of his mind at the relevant time?

MR. GRUZMAN: I am very sorry, your Honour, but I thought he did. I thought that was the whole point of the case.

MASON, J.A.: I am sorry, I had not made it clear. He himself does not give direct evidence, does he, as to what he told Mr. Miller; nor does he give any direct evidence - or any evidence at all - as to what he told Mr. Bowen? The result is that neither Mr. Miller, Mr. Bowen, Mr. Coleman nor Mr. Solomon - all who could conceivably have given evidence of the plaintiff's state of mind - were called as witnesses.

MR. GRUZMAN: That is right, apart from what appears, they were not called.

MASON, J.A.: What about Mr. Miller?

MR. GRUZMAN: What he was told was apparently in the evidence.

TAYLOR, A-J.A.: You mean the evidence of what Miller said at the interview with the police?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: If that is so he was certainly not told that the object of these threats were to get him to sign a disadvantageous agreement.

MR. GRUZMAN: That is the point. That is why it was left in that inchoate way. The significant thing, and the only significance one can draw from Miller's evidence, is that Barton was complaining that Armstrong was threatening him in relation to the affairs of Landmark and in relation to some agreement --

JACOBS, J.A.: Is not that one of your points? That the actual "sign the agreement or else" as a bear threat had not been made on the 7th January? There had only been these threats to kill which were made to Mr. Barton, as disclosed by this interview with the police, which related to the affairs of Landmark. That is why he told the police about the affairs of Landmark?

MR. GRUZMAN: Exactly.

JACOBS, J.A.: It was something to do with their business relationship which had led to the threats to kill, and the police were told that the agreement was being negotiated and had almost been reached.

MR. GRUZMAN: That is right.

MASON, J.A.: The real thing about the business relationship as at the 7th was this agreement because this agreement held the prospect of conclusively defining for all time the boundaries of their business relationship.

MR. GRUZMAN: And the agreement was spoken of.

MASON, J.A.: It was spoken of, yes.

MR. GRUZMAN: But the exact signification of it was not, and that is the thing that his Honour holds against Mr. Barton.

If there had been a clear statement to Miller: "Look, this agreement is a disgrace. This agreement is robbing Landmark and robbing myself, solely because of pressure". If that had been said, of course what your Honour Mr. Justice Mason had impliedly put - Miller would have tried to stop it. That was Barton's problem. If it had been brought home to Miller, the concealment, or to Coleman, exactly the extent of the infamy and the threats

and the effects of them on Barton, it would have been stopped and he would have been killed.

TAYLOR, A-J.A.: And you could include in that - "If he had brought it home to Smith, he would have been killed"!

MR. GRUZMAN: Yes. Smith would not have been a party to it. But the point was this: he would have been killed - there would have been an unfortunate accident.

TAYLOR, A-J.A.: That is what you say, and from that we should draw that inference?

MR. GRUZMAN: That is what his Honour finds and that is what his Honour meant when he said he was in genuine fear. He was in fear of getting killed.

TAYLOR, A-J.A.: You are asserting the fact, that he would have been killed.

MR. GRUZMAN: Our submission is that it would have happened, but whether or not does not matter. The fact is that when his Honour finds ---

JACOBS, J.A.: I understand the submission that "he believed".

MR. GRUZMAN: Our submission is that Barton believed it and in the light of Vojinovic's evidence and the other evidence in this case, believed on reasonable grounds that the fact was he would be killed. Indeed there is evidence before the Court from which the Court can draw the inference that indeed he would have been. That is one of the strengths of the plaintiff's case. These are not empty threats operating on the mind of an easily frightened or unduly frightened man. These were real, genuine threats which the Court objectively can find. There was a real and genuine possibility that they might be carried out, the Court can objectively find that.

JACOBS, J.A.: You would have to go a bit further. You say he did not tell his solicitor or Smith because he knew they would stop the agreement.

MR. GRUZMAN: He felt and believed it would stop the agreement going through.

JACOBS, J.A.: Did he ever say that in evidence?

MR. GRUZMAN: I think he said it, certainly to Mr. Bovill. What he said was - I have forgotten when he said it exactly.

JACOBS, J.A.: He never said that was the reason why he did not tell his solicitor.

MR. GRUZMAN: I don't think he was asked. If he had been that would have been the answer.

JACOBS, J.A.: And that was not why he did not go

to the police before Vojinovic? Was that the reason why?

MR. GRUZMAN: Yes, at that time he was under pressure of threats and had the bodyguard, before he went to the police. Those are the facts. There is no dispute.

JACOBS, J.A.: But as to not going to the police so far as Vojinovic, or previous to Vojinovic, I understand you are putting that as the same reason why he did not tell his solicitor, it would have led to the agreement not being made.

MR. GRUZMAN: No, I did not put that.

JACOBS, J.A.: What was the reason he did not go to the police?

MR. GRUZMAN: That is a different subject matter all together. It falls into different categories. First of all, prior to 17th December he did not have really sufficient ground to bring in the police. He feared that Armstrong would be able to buy the police, we submit in fact occurred.

TAYLOR, A-J.A.: The whole police?

MR. GRUZMAN: Anyone who Armstrong wanted, yes; as the evidence shows. Your Honour may smile but we submit that is the fact and the true effect of the evidence of this case. Armstrong certainly threatened it and his Honour found he threatened and Barton certainly believed it. His Honour does not make any finding contrary to that, and Bovill believed it. That is the significance of this case, when he began to get the threats he spent $1200 on a bodyguard or some such figure.

TAYLOR, A-J.A.: He did not spend it.

MR. GRUZMAN: No, the company spent it because it is one of the aspects of the case I will come to. It was a company matter, to save Barton's life. It appears that the Board of Landmark were prepared to authorise the expenditure of $1200 for personal bodyguards, to stand by Barton 24 hours a day and be on the dais at the general meeting in case Armstrong had him shot at the general meeting. These were real and important matters and there was no point in going to the police then.

But when the Vojinovic affair occurred, he had something which he felt that no money on earth could have stifled. Here was an actual threat of murder by a criminal. He got a top Q.C., top solicitor and saw the top man at the C.I.B. and felt then that he would have a proper investigation.

TAYLOR, A-J.A.: He was wrong.

MR. GRUZMAN: Certainly he was wrong, utterly wrong, as his evidence shows - which his Honour accepted.

Notwithstanding that, his Honour took a different view of the statements to the one we take. We say it was fraud and bribery, corruption, and that the police failed to do their duty. His Honour did not make that finding that we ask your Honours to make. His Honour certainly did criticise the police. So it is common ground that he never did get the sort of investigation he was entitled to, and never has.

So, just concluding in answer to your Honour Mr. Justice Taylor, his reasons for not going to the police prior to 7th January and his reason for going to the police on 7th January are equally clear.

TAYLOR, A-J.A.: His reasons for not going to the police before 7th January were not the same reasons that kept him from going to the solicitor.

MR. GRUZMAN: No.

MASON, J.A.: Before you leave this particular matter, it seems to me that the visit to the police on 7th January is a matter which relates to the plaintiff's state of mind, not because he was in a state of terror (the learned Judge has found that) but on the question as to whether or not the threats were a significantly operating factor in his then decision or subsequent decision to enter into the agreement.

As to that it could be said, of course, that Mr. Miller knew on the 7th that this particular threat to Barton's life had been made. Mr. Miller, of course, would be alive to the possibility of intimidation being a factor which would invalidate any agreement made pursuant to it. Yet we find the plaintiff going on with the agreement and entering into it.

That would seem perhaps to suggest that Mr. Justice Street may have been correct in his assessment and evaluation of the plaintiff's state of mind; that although the threats existed and although the pressure was a real factor in the plaintiff's mind - inducing fear of his life - nevertheless he decided that other factors prevailed.

I know you have got certain answers on that. I know you look to the subsequent threat upon the 12th January, and you ask us to say another threat was made on the 16th and may be they do explain the situation. His Honour found they occurred on the 7th, in circumstances that the plaintiff was quite willing - for other reasons - to go ahead with the negotiations and to arrive at agreement on the basis of the terms already performed?

MR. GRUZMAN: I would answer "no" if by that your Honour means "without reference to the threats".

What I understand your Honour to be saying is that from the fact that Miller was aware that there was a threatened situation and the agreement

was concerned with it, that Mr. Miller would have understood the legal implications and have, shall we say, advised Barton not to do it and that Barton would have said "Yes, I want to do it anyway". Firstly, so spoken, it is obviously the rawest kind of speculation. There is not a tittle of evidence to support it, secondly, if that were the situation then Mr. Miller - who of course was a reputable solicitor - there is no reason why the plaintiff should have fallen in with the defendant if that had been their belief. The fact is, if I remember the evidence, that it does appear that Mr. Miller dropped out of the matter.

MASON, J.A.: But his firm remained in.

MR. GRUZMAN: His firm did. It just happens, and it might be a coincidence, so far as I can remember the evidence I did not think about that until your Honour just called that point to our minds - I do not recall Mr. Miller having anything further directly to do with this matter. That may not be insignificant.

But the basic problem is this: if Barton had said to Miller "I don't want to go into this agreement. I am being forced by threats into it", then one might assume that Miller would have taken some action on behalf of Landmark. And that was the very thing that Barton could not have happen. It is a matter of evaluating what in Barton's mind was the more important: money or his life. To ensure his life he had to give Armstrong money, and anything which stood in the way of that was a threat to his life. That is why it is. Of course he could have told Coleman or Smith or he could have told anyone. He could have perhaps run away overseas, and done all sorts of things to save his life, or not enter into the contract. But, all in all in the circumstances, being in fear and terror and being given or offered the opportunity of escape by putting his signature to a contract, that was the most eligible course of conduct he could take.

TAYLOR, A-J.A.: On the judge's ruling you could have led evidence from Barton as to the reason he did not tell the solicitor, the reason why he did not take it up with Smith. You could have led that evidence on his Honour's rulings to show his state of mind. You are allowed a very wide scope.

MR. GRUZMAN: I do not know whether we could have or not.

TAYLOR, A-J.A.: It is of importance, is it not? If you could have led evidence about it, it is rather difficult to ask us to draw that by way of inference when there is no evidence.

MR. GRUZMAN: We are not asking your Honours to draw any inference.

TAYLOR, A-J.A.: You are offering an explanation, as I understand it, as to why the solicitor did

nothing; because if he knew anything about it - he did not tell them anything about it - for the reason that if he told them, the agreement would have been off and he would have been killed?

MR. GRUZMAN: This was a proper matter for cross-examination and he was never cross-examined on it. I am not sure whether his Honour would have allowed that evidence or not, but whether he would or not it is certainly a matter which, if there was to be any point made of it, was a proper matter for cross-examination.

But we are not asking your Honour to draw any inference. It is his Honour who, without any evidence to support it, draws the evidence that we could have called this solicitor when, on all the evidence, the proper inference is that his solicitor would have been able to contribute little or nothing to a point which is germane to the discussion. We would ask that such a point be considered, this is a point which has been used, as it were, by the defendant or by his Honour against Barton.

JACOBS, J.A.: But, Mr. Gruzman, you accept the situation that he did not inform his solicitor, he did not inform Mr. Bowen, he did not inform Mr. Smith or Mr. Coleman; you accept that?

MR. GRUZMAN: On the evidence I would accept that would be so.

JACOBS, J.A.: So there was no need to ask Mr. Barton whether he had or had not because in fact it is part of your case that he did not tell his solicitor. Whether or not to draw an inference against you from that is a matter of argument.

MR. GRUZMAN: That is what we have submitted.

JACOBS, J.A.: I thought that you in your argument were getting at cross-purposes of whether they should have been called or not. There was no point in calling them if they had nothing to say on the subject.

MR. GRUZMAN: That is exactly our submission and I think it was his Honour Mr. Justice Taylor who raised the point. The matter arose from his Honour's judgment and we would put it exactly as your Honour puts it; namely that they had nothing to contribute to the discussion.

JACOBS, J.A.: It still leaves open the question of whether or not inferences favourable or unfavourable to the plaintiff should be drawn not from the failure to call them but from the fact that they were not told.

MR. GRUZMAN: Perhaps it could be said if any inferences are to be drawn, the only inference is that they - being reputable solicitors - would not have been party to an agreement which took so much money out of the company, apart from anything

else, if they believed that was being executed by threats and pressure. That is the only inference, in our submission, to be drawn.

JACOBS, J.A.: I would expect that officers of the law, solicitors and the legal profession - whether you tell them that you are frightened of a lawless act depends on the confidence you have that the processes of the law can prevent it.

MR. GRUZMAN: Exactly. That is why, if one puts oneself in Barton's position here where he is threatened by a man, a powerful man, and a Member of Parliament - I accept entirely from what fell from your Honour, Mr. Justice Jacobs. Here was a man threatened by a very powerful man, a Member of Parliament, a man who claimed to be able to control the police - believed so by Barton and others. All that happened was that he took a judgment, if you like, that if he wanted to save his life the best thing he could do was to ensure by all the power that he had that this agreement went through.

JACOBS, J.A.: But that analysis is inconsistent with him going to the police and telling them.

MR. GRUZMAN: At that point there was this possibility, that if he could have got Armstrong locked up and put in gaol then his troubles would have been over. That is the only thing that would have saved him.

JACOBS, J.A.: That is one possibility.

MR. GRUZMAN: With respect, it is not only a possibility but it is the fact because his conversation with Vojinovic was "I will pay you money if you would provide evidence to bring Armstrong and Hume to justice". That was his conversation and that is the significance and the way this is dealt with - and also the way that these corrupt police dealt with it - because that is what Barton wanted. He goes down there and says "I am prepared to pay money". He swears he pays money, and Vojinovic says he was paid money. He paid the money to get Armstrong into gaol, where (on the evidence) he should have been. What happened) It all broke down. Up to the 11th there was every possibility that Armstrong would be caught in one way or another and put where he belonged. But then it all broke down from 11th January and was all brought to a stop. Vojinovic was framed, put in gaol and the whole thing is stopped.

TAYLOR, A-J.A.: We have had it ad nauseam, Mr. Gruzman.

MR. GRUZMAN: It is not in its perspective and in its perspective it shows why I have been to some trouble to invite your Honours' attention to all the evidence so that I can refer to it in its perspective now. But I say again, it was from the 11th that everything was stopped. Vojinovic was framed and put in gaol. That is why it was that

Armstrong was never arrested, as he should have been. He was never interviewed, nor was Hume, until after the agreement was signed.

JACOBS, J.A.: You can say another thing. You could put that at least on the 7th and 8th January the substance of the complaint to the police and to the reason for the linking up of the business relationship was "I have had a business relationship, it has come to an end. We are negotiating and almost completed negotiations. I am doing this in an atmosphere of having my life threatened." That puts it in a much lower key than you put it, otherwise why tell them of the background, give them the shareholdings? "Don't worry, we are business associates". Why tell the police the shareholding and all the details?

MR. GRUZMAN: We submit that the real reason was that Barton wanted to get Armstrong put into gaol. Barton was in a position to make a formal complaint to the police which warranted investigation of conspiracy, conspiracy to murder, and if he could have attained the investigation on that matter - to which he was entitled - the strong probability was that within a day or two Armstrong would have been arrested. He therefore would have been freed of his agreement, freed of everything. It would have Armstrong out of the road. That is why he told the police, and Miller told the police as much as they did.

MASON, J.A.: There is not in the evidence from the plaintiff that this was his state of mind at the time, is there?

MR. GRUZMAN: It is a matter of inference, is it not? A man can speak as to his state of mind but he could speak of anything. The real test is what is the proper inference from the surrounding facts. I do not know whether anybody asked him but it was open to the defendant to ask him more particularly than the plaintiff.

MASON, J.A.: If I can interrupt you for the moment, I may be mistaken but I do not think you have asked us to draw that inference from the evidence at any stage. This comes as news to me, completely, unless I have missed something in your argument.

MR. GRUZMAN: I do not know that your Honours have ever asked me, or I have ever asked your Honours, as to what inference to be drawn from that. I think it is a subject matter that your Honour Mr. Justice Taylor raised with me for the first time this morning and it may well be that I had not raised it with your Honours.

JACOBS, J.A.: I think it is influentially in the fact that he wanted something like that to happen by the mere reporting, but I think what my brother Mason is putting to you is that it has never been suggested that that was the end in itself. It may well be evidence that he wanted him arrested because

he was guilty of a crime and that he was doing this with Mr. Barton being the victim.

MASON, J.A.: That was not the end purpose of going to the police?

MR. GRUZMAN: I do not know that it has been put up to me squarely as to what we submit is the proper inference. I think it is a matter which Mr. Justice Mason fairly raised with me this morning, and that would be our submission.

JACOBS, J.A.: It does not help you; it could be called a move to get the other party at a disadvantage.

MR. GRUZMAN: It is not that. One looks at the evidence. What is the evidence? He is approached by Vojinovic who said, "Armstrong has engaged me to kill you". He said to Vojinovic "Look, if you will bring Armstrong to justice I will pay you, but only through the police and in a proper way". He goes to the police, reports it to the police and Vojinovic is duly caught and so on, and here he is - under threats and in terror - made even more so obvious, and one way of bringing it to an end would be if Armstrong was arrested.

Indeed, there is other evidence; that right up to November 1968 Follington is saying "We are about to arrest Armstrong" but at that point of time, and I do not think this is speculation, right up to this minute, as to what was really in Barton's mind at that point of time is why he went to the police it was taken as an obvious course and everything he did was an obvious course. If your Honour asks me to speculate I can say on the evidence that it probably would have been a very good thing for Barton if Armstrong would have been arrested. It would have been a solution to his agreement problem because Armstrong could then not have threatened him, Armstrong would have been safely in gaol and unable to physically harm him.

MASON, J.A.: Once you concede the possibility that that could have been the real motive or purpose in the plaintiff's mind at the time that in itself seems to give greater strength to the view, perhaps, that ultimately in entering into the agreement the state of terror in which he was in was not the significant factor in his mind but that at all times commercial transactions were dominant. That is really the case as found by Street, J.

MR. GRUZMAN: With respect, we would not concede to that view.

MASON, J.A.: I know you would not.

MR. GRUZMAN: We would not accede to the view that even if that was a possible inference it helps, but it is speculation and only directs itself to this: that if Armstrong would have died, for example, or disappeared that would have brought an end to the threats and the terror. There were

various ways, I suppose, in which the threats and terror could have been terminated. The most obvious and easiest way was to just sign the agreement but in those events which happened when Armstrong actually went to the extent of employing this gunman the obvious course was to go to the police. I do not think anyone has asked anyone to speculate before as to what was in Barton's mind at that point of time.

TAYLOR, A-J.A.: He must have changed his view.

MR. GRUZMAN: If the evidence will be of any assistance to your Honours on this I will refer your Honours to it. At page 54, line 34, he said "Q. Please continue? A. Then I told him (Vojinovic) that if this will be done through the police (paying money to bring him in) ... I did not think about the police." So far as Vojinovic was concerned, as I was putting to your Honours earlier, his actual conversation was that if this was done through the police and those who hired him were arrested and dealt with "I was prepared to pay him money".

To Miller he said at page 56, line 46, "I said to Fred Miller that that madman ... ring me back as soon as he could". Was he telling Vojinovic - if one accepts it - that his object was to have these people arrested, could he tell Mr. Miller that he wanted police protection?

TAYLOR, A-J.A.: Is not the thing that he said to Mr. Miller "that madman Armstrong now hires criminals to kill me" - but did not say "unless I sign the agreement"? If that was what it was all about, and that was his main fear, why did he not say that to Mr. Miller?

MR. GRUZMAN: The answer to that - I have already put this in my submission to Mr. Justice Mason - he had various forms of protection against being killed. One was that Armstrong would disappear, another was that if Armstrong was in gaol, the third was if Armstrong was free the only way in his mind the only way he or his family would not get killed was to satisfy Armstrong with this agreement. If he is to get the agreement signed he would ensure that everybody associated with the agreement, the co-directors and the solicitors and so on - did not know that he was doing it under threats because if they were aware that he was doing it under threats they would not be party to it and would say "No agreement". Then he would, as he feared, get killed. So he had to conceal from as many as possible the fact that he was being threatened into this agreement. Then when he came to the point with Bovill, although he told Bovill about the threats, he tried to deal with it in some commercial way as well so that Bovill would agree.

MASON, J.A.: I understand then that your submission is the reason why he did not tell Miller and consciously and deliberately omitted in his report to Miller any reference to the fact that Armstrong's purpose in hiring criminals was to threaten to kill

him in order to get him to sign the agreement, and he deliberately and consciously left that out?

MR. GRUZMAN: Yes, and at this point of time, of course, there was also the thought in Barton's mind that possibly he would be killed for the insurance.

TAYLOR, A-J.A.: Is there anywhere in the evidence anything that indicates that Barton ever said he feared he would get killed for the insurance?

MR. GRUZMAN: I do not think he ever gave any evidence as to why he thought he was going to be killed, apart from giving objective evidence of conversations and the effects of statements. I do not think that Barton gave any evidence at any time as to what was in his mind as to why Armstrong wanted to kill him.

MASON, J.A.: There is perhaps an alternative question, I do not know whether it is correct or not, but of course the threats did not have their genesis in the making of the agreement. Using threats, the general measure of watching and things of that nature - they all had their genesis in the fight for the control of the company and the agreement, in effect, was an outgrowth of the struggle for control. It is not connected specifically with this agreement or these negotiations - the negotiations - but the intimidation subsequently in the conversation of 12th January was found by Street, J. It is quite possible that if in his attitude towards this whole problem of intimidation of Vojinovic as at 7th January he was very much conditioned in his mind to the history of intimidation and he regarded it as intimidation directed to the struggle for control of the company. If the question had been specifically put to him he would not define its relationship to the negotiations but the foremost thing in his mind at the time was the relevance of the struggle for control.

MR. GRUZMAN: And the absence of relationship between them? If that be a correct designation ----

JACOBS, J.A.: If that be a correct designation, perhaps it is difficult to justify the deliberate withholding of information from the solicitor by the plaintiff.

TAYLOR, A-J.A.: 24th October was the first time Armstrong threatened him?

MR. GRUZMAN: Your Honour is referring to the vocal conversation? The 17th October, "You will regret the day. The city is not as safe as you might think". He came back from overseas on 15th October, and he asw Barton and Barton said, "I cannot work with you any longer", and he said, "You will regret the day, the city is not as safe as you might think between office and home".

According to chronology, at page 56 it is put as between 15th and 18th October. I think

Armstrong came back on the 15th. It was within a day or two after that that this conversation took place. It appears at page 19 of the appeal books. The actual question is: "When he returned from overseas what happened?"

We have dealt with 12th January where his Honour accepts that that direct threat was made. I want to come now to the 13th. At page 3186 his Honour said: "The 13th January is a date of particular importance. Mr. Barton claims Mr. Smith telephoned him on Friday, 13th ... on behalf of Landmark Corporation to do so".

If one wanted to contemplate whether Barton was trying to tell the truth or not, there is no reason in the world why he should come to the Court and say, "On the 13th I decided I would not sign". It would have been more consistent with his case to have said, "I had submitted and nothing material occurred so I just signed on the 17th". At one stage it was contemplated there would be a signing on 13th, but it turned out to be the 17th.

JACOBS, J.A.: If I may say so, you have put so much in black and white. What about the more complex situation of the man not being aware, as it were, being deprived of the capacity to exercise his business sense to the full?

MR. GRUZMAN: That has been the main support of our submissions really.

JACOBS, J.A.: Yes, but only as part of duress. I am not referring to it as part of a relationship.

MR. GRUZMAN: I appreciate that. We put it both ways. At the moment I am going to have a look at the next few pages of his Honour's judgment. I have dealt with the incidents of the 12th. His Honour then deals with the 13th and his Honour sets out what Barton said. I am only putting to your Honours his Honour rejects Barton's statements on the 13th.

JACOBS, J.A.: To Mr. Bovill?

MR. GRUZMAN: Yes.

JACOBS, J.A.: I was trying to put that conversation, which the learned Judge accepts, back into December. That is what you are about to do?

MR. GRUZMAN: Yes, that is exactly what I am about to do.

MASON, J.A.: Am I correct in thinking the first time the draft agreement got into the hands of Landmark and those associated with Landmark was 9th January?

MR. GRUZMAN: No, Friday, 6th, in the afternoon. Probably hand delivered late in the afternoon of the 6th; suggesting a meeting on Monday, 9th.

I come now to the next matter in his Honour's judgment. The purport of Barton's evidence was at the Friday he decided not to go ahead with it. Why would Barton say that if, on the face of it it did not help his case? He already had a regret on the 12th. There was no reason why he should have said it.

JACOBS, J.A.: Yes, there was; a good build-up to the 16th.

MR. GRUZMAN: He did not need a good build-up. If one were imagining a situation that he said he was against it despite everything on the 13th, it did not seem to help his case, but be that as it may let us have a look and see what are the fair facts to be deduced from the evidence. What he said was he told Smith, he said, "I am not prepared to sign or exchange the document on behalf of myself and also I am not prepared to advise my co-directors on behalf of Landmark Corporation to do so". His Honour rejects that conversation.

The fact is that Smith, in substance, admits it except that he says it took place on the 11th. I say "in substance". What I put to your Honour was a qualified admission by Smith.

JACOBS, J.A.: At page 628. We have been over this before. There is one thing I want to point out. Note line 31.

MR. GRUZMAN: He says there, "in principle it was O.K. but the contracts were very complicated". I will not take your Honours through it at length. The specific conversation was put to him and he said, "This is where my recollection differs from Mr. Barton's. My recollection is it was on the Wednesday ... Mr. Barton."

JACOBS, J.A.: "But in principle it was O.K." You cannot get over that.

MR. GRUZMAN: He also agrees some such conversation took place. There is a consistency there. If one tries to reconcile all of what Mr. Smith said, one could say, "Mr. Smith is agreeing that Barton said that" on the one hand. On the other hand he says, "As a deal, what is in the documents is all right in substance although there are details". He could be saying, "There is the deed. It is not a bad deal, I am not going on with it at this stage in principle but what is down there is all right".

Mr. Smith certainly does not give anything like a point blank denial of Mr. Barton's evidence so, on the one hand, you have got Barton's evidence. On the other hand you have got Smith, to say the least, not denying it. That is a matter that could go one way or the other; it is certainly not a matter on which you make a major finding against Mr. Barton.

I leave out the next part, which is the

conversation of the 16th, and come back to that. Over the page his Honour said: "The pattern presented ... not to go on with the arrangement".

Then we have Mr. Bovill giving his conversation. If you look at Mr. Bovill's evidence his Honour first of all accepts the conversation took place but he says, and he has accepted Bovill as an honest witness, the date of the conversation is wrong. It is true it was suggested by counsel but, on the other hand, Bovill did swear that counsel's suggestion was right. If, for example, one was querying did Mr. Bovill falsely swear, it would be no excuse for him to say that it was suggested by counsel. It was suggested by counsel two or three times. That is all the more reason why he knew exactly what he was being asked to commit his oath to.

It is a fair criticism by his Honour to say, "If we are trying to fix a date I can take into account what was said by counsel to thewitness". If it is fair it is otherwise established the witness would not have said that. That is why it is essential to look at what the witness said in cross-examination or otherwise to ascertain what he really did mean to say. The very conversation which appears in his Honour's judgment is really sufficient to prove the matter without going any further.

His Honour accepts this conversation took place and according to his Honour's judgment at page 3188, line 16, it says: "Mr. Barton said to me about the first set of agreements that were prepared, he said it is a bad business". Remembering there had been no mention at all in the evidence by anybody about the first set of agreements or anything of that kind, this comes voluntarily from Bovill; his own utterly unaffected recollection: "It is risky, we should not execute these agreements", he is obviously talking about documents and nothing else, "I said I thought the price was high. I therefore put them out of my mind and that was the end of them so far as I was concerned".

There is not the slightest doubt Mr. Bovill was staking his oath to the fact there were agreements which had been prepared and it was a question of executing them or signing them. It is a very simple inquiry then to say, "What agreements were there in existence at any stage of the negotiations?" Before I do that might I turn to the cross-examination. Mr. Bainton put it to him: "He had, you say, a discussion with you around about 13th ... by the 13th I did, yes".

The significance of that passage is it was never suggested by the defence that the conversation took place on any date other than 13th and, indeed, Mr. Bainton's question in cross-examination supports that. There was no issue before his Honour as to the date of this conversation.

TAYLOR, A-J.A.: I understand the explanation. I

always felt this question of the 13th and Bovill was difficult because so much depends on the way the "13th" was put into his mouth. Usually if counsel puts it into the mouth of the witness it is fatal. You say there is other evidence?

MR. GRUZMAN: I accept the fact his Honour makes a valid criticism.

TAYLOR, A-J.A.: You are there, and you see it, and you see counsel and you hear the question and that is when you make up your mind whether or not you are going to accept that.

MR. GRUZMAN: I accept his Honour's criticism was valid and of value; his Honour's criticism of the value to be placed on the evidence. But, that is why it then becomes important to see is there other independent evidence which fixes the date so that one can see?

TAYLOR, A-J.A.: Important from the point of view of asking us to fix it?

MR. GRUZMAN: Yes, or putting it another way; important from the point of view of saying notwithstanding the validity of his Honour's criticism that his Honour was incorrect in changing the date of the conversation. That is the way I put it. We say there is such evidence. We say for the first time Mr. Bovill in his evidence related the conversation to the first set of agreements and the execution of them and the signing of them, so that the conversation to which he deposed was a conversation in which he said there were documents in existence. So, the submission is that you can fix the date of the conversation independently by seeing when were documents in existence. Of course, the only evidence in the whole of the case is that the first time a document came into existence, such as Mr. Bovill described, was on 6th January. It was delivered on 6th January in the evening. If Mr. Bovill's evidence is true, that is in substance but not in the date, and his Honour accepts the evidence, then the conversation must have taken place on or after 6th January. It could not have taken place before. His Honour sets out the conversation and it reads: "But he was hazy about seeing the documents".

I now propose to read the evidence upon which his Honour based that finding and that appears at page 511: "Tell me to the best of your knowledge when you first saw the proposed deed in written form ... I am very hazy on when I saw the proposed deed in written form ... I cannot recall."

The content of his evidence was this conversation occurred when there was a document and "we were contemplating whether we would sign it". In cross-examination it was put to him by Mr. Bainton that it was the 13th and no other date, so it is not disputed it was the 13th.

When asked: "When did you see this other document", which is the document we are speaking of,

he said: "Early in January ... I think I have seen some draft".

The content of the evidence shows beyond any doubt that this conversation must have taken place on or after 6th January. There was not in existence at any time, on any story, any document falling within the description of a draft of the agreement or anything of that kind prior to 6th January.

For these reasons his Honour has, with respect, no justification for putting the date of that conversation prior to 6th January. What are the most likely dates? First of all, Bovill swore it was the 13th. I might say his Honour goes on to say (page 3188; line 25): "In point of sequence Mr. Bovill placed this conversation after his conversation with Mr. Barton when Mr. Barton told him he had moved to the Wentworth Hotel. This would place it on or after Wednesday, 11th".

First of all, the conversation could not have taken place before the 6th. Secondly, Bovill swore he fixed it in relation to the Wentworth Hotel. That was not a date that was suggested to him. It must have been on or after 11th if Bovill is telling the truth. It could not have been before the 6th. The only matter as to which there could be dispute or upon which his Honour could find any date, 11th, 12th, or 13th consistently with all of the evidence, but no earlier date. Which is the more likely; that Mr. Bovill knowing he swore the truth, when all the external evidence proves that it must have been 11th, 12th or 13th and he said it was the 13th, or that he made some grotesque mistake so that the whole of his conversation must be wrong because the conversation took place at a time when there never was in existence the documents which he said he referred to in that conversation. It is quite obvious his Honour is incorrect in saying that conversation took place before Christmas. It could not have happened.

When you put the two things together it is significant that Mr. Smith remembers some conversation; or putting it another way, he remembered some conversation with Barton and he does not make a pointblank denial of the conversation but he fixes it at the 11th. On the external evidence it proves the conversation with Bovill must have taken place on 11th, 12th, or 13th. Up to this point of time in major parts of his evidence much depends on Barton's credence alone, and his Honour accepts; why would Barton have made such a mistake about such a conversation when he has the positive oath of Bovill, which is accepted, and the qualified lack of denial, if no more, of Smith.

Of all the possibilities on the evidence the only one which can be accepted as a proper inference, which a court is entitled to make on the evidence, is that Barton is telling the truth when he says this conversation took place. It is open to the objection it might have been on 11th, 12th,

or 13th, if one is to take into account Smith's evidence; the evidence of these three witnesses.

From the point of view of the presentation of the case it does not matter. If the conversation took place on the 11th, indeed it falls very neatly into line with the case as his Honour found it because if Barton told Smith on the 11th, "I am not going on with this agreement", or indeed if he merely told Smith what Smith positively remembers him saying, "The solicitors are looking at it, it is all very complicated. It looks all right in principle", that sort of thing would indicate, "Yes, it might be for years or it might be for ever when the solicitors will be considering this", but whatever the conversation was, if that was reported back to Armstrong how likely it is that Armstrong on the next day, the 12th, would have rung up and threatened him to sign the agreement or else.

I submit this conversation must have taken place on 11th, 12th, or 13th. The gravamen of what Barton and Bovill were saying was between the period of the first draft and the final agreement Barton at one stage said he would not sign it, and subsequently he did sign it. Does that not accord in any event with what his Honour finds took place on 12th, that Barton said, "I will not be blackmailed into any agreement". Was that not - in terms anyway - an assertion direct to Armstrong which his Honour accepts, that he said he was not going to sign it. Why would it not be so if he said it direct to Armstrong, why would not he say it to Smith and Bovill at the self-same time and in the same context?

We submit it follows from that analysis there is no justification whatever on the evidence for the suggestion that Mr. Bovill, although the date was suggested to him, was agreeing to a wrong date, and no possible basis for putting the conversation back before Christmas. Once we do that then this hereafter alters the whole balance and reasoning of his Honour's judgment. The only reason that his Honour gives for putting the date back is one which we have shown is, with respect to his Honour, invalid. He said: "I accept Mr. Bovill's evidence that such a conversation did take place with Mr. Barton but I am satisfied it was much earlier in the negotiations".

His Honour does not give any reason for that. He goes on to say: "Notwithstanding the terms of the conversation ... 18th January, 1967".

That is precisely what Mr. Bovill did not say. He said, "I saw a draft early in January which was thrown out". His Honour's recollection of the evidence there is incorrect. On that basis he says, "I think it more probably than not the conversation occurred prior to Christmas, 1966". There is absolutely not the slightest possible justification or basis for that view. Then he says,

"Whether this be so or not", so his Honour accepts that his Honour's view may be there incorrect. That phrase, "whether this be so or not", suggests some doubt in his mind and he said: "I do not accept any such conversation ... 4th January".

Barton was away from Christmas until 3rd January so there was no opportunity during that time but, of course, the matter is put at rest by the matter of the agreements which did not come into existence until the 6th.

TAYLOR, A-J.A.: The draft agreement?

MR. GRUZMAN: Yes. I put it this way, with respect to his Honour, "One asks then how does it come about his Honour makes this finding?" It is because his Honour has formed a view that Barton did not change his mind from the 4th onwards but if this conversation took place then that view is obviously untenable and so his Honour, for no reason whatever disclosed by the evidence, arbitrarily, as we would put it, fixed the date of the conversation three or four weeks before. There is no basis or justification whatever to do it. Once one has taken the step of saying, whatever else one does, that part of his Honour's judgment just will not run, then one has to look at what the effect is on the other matters.

He then says there are other reasons. If one may so put it, the way his Honour puts it is they are "make weights". He said there were some other matters which led him to decide on the 13th he did not decide not to proceed. His Honour said: "In the first place Mr. Barton's actions and statements in January, 1967 up to and including the 18th are inconsistent with the belief on his part that finance would not necessarily be forthcoming ... Landmark".

As to that, there is no evidence whatsoever. That is drawn out of the air. Mr. Bovill said Mr. Barton had some hopes. When we read later on through his Honour's judgment that finding has its origin not in what happened at the time but in Barton's subsequent activities; that is here was the managing director of a company with a mandate of a general meeting to run the affairs of the company, and the company being in the situation where it could not pontinue without finance and because he made the best efforts he possibly could to get finance, it is said that means that he thought he would. It is said because he made the efforts that therefore you deduce from that that he was confident the efforts would be successful.

TAYLOR, A-J.A.: The company by this stage could not have had any credit either on the share market or the financial market. Companies that indulge in internecine warfare are not looked upon favourably and nobody would know that better than Barton.

MR. GRUZMAN: The evidence from U.D.C. is that the

only possible basis on which they were going to consider more finance is if Armstrong remained, not if Armstrong went.

TAYLOR, A-J.A.: The important thing is what Barton believed.

MR. GRUZMAN: He could only believe the facts. The worst you could say against him is that he believed, except in some stupid way, but if you assume against him that he believed the facts --

TAYLOR, A-J.A.: That is going back to the commercial argument.

MR. GRUZMAN: One has to consider the whole case. It is not compartmented.

TAYLOR, A-J.A.: That is what makes me think, on this aspect of the case, if Barton got rid of Armstrong he could get finance.

MR. GRUZMAN: On what basis, if I may ask? These are the negotiations with Smith and Grant and their talks with U.D.C. had revealed the only basis on which U.D.C. would consider putting in more money would be on some basis where Armstrong remained and indeed, I think by this time the last we heard from them was that Armstrong not only had to leave his money there, but, on one version, put in another $300,000 and on another version, go dollar for dollar with them. Who could imagine if Armstrong went with all this unearned profit that somebody would come and replace all this unearned profit in the company? Barton never imagined it, or U.D.C. never imagined it. I could understand if there was an attack made on Barton in this case: "Yes, he really knew he could get finance from somewhere", but where? There is no evidence of some negotiation which produces the finance or would have produced it.

They had written this letter to U.D.C. on 28th which he said would not produce anything, and which produced a reply on the 13th and another letter of his on the 18th, all of which produced nothing, as he had anticipated. It could not produce anything because as far as U.D.C. was concerned the risk capital was gone and once that was gone they were not interested. They might talk but they would not be interested. Nobody would know that better than Barton. If he had confidence and real hopes then they could only have been induced by fear.

JACOBS, J.A.: The trial Judge, as I understand it, never really found that he had confidence about finance until January and then there is no reason why he did have confidence. On the trial Judge's findings Mr. Barton said on 13th December, "I do not think the money will come through". He said about 23rd or 24th December, "This cannot proceed, we will never be able to get finance". He then went away to Surfers' Paradise for a week; the financial position deteriorated because there was a

threat of a receiver immediately before, and there were the events which had to take place on the 28th, and a week's rest that was given.

He came back from Surfers' Paradise on the 2nd or 3rd, and on the 4th the heads of agreement were made. There is simply no space, on his Honour's findings, for a growth of confidence in Mr. Barton that finance would be forthcoming. That is how I see it. I may be wrong.

MR. GRUZMAN: That is our submission.

JACOBS, J.A.: He may have got confidence between 3rd January and 17th, he may have got confidence during that period but on the judge's finding he was pessimistic before Christmas.

MR. GRUZMAN: There is no reason to suggest any change in his attitude between 4th and 17th. As to any change in Barton's attitude between 4th and 17th, may I remind your Honours of Bovill's evidence of his appearance, that he could not apply himself to financial matters or the running of the company during that period.

JACOBS, J.A.: I just point that out. It is a rather peculiar sequence if one looks at these particular passages, but there are other passages.

MR. GRUZMAN: Our submission is there is no evidence, no basis. We put it two ways. Firstly, factually we know - the Court knows - that from the consideration of the commercial aspect, that he had no cause for confidence. Secondly, there is no evidence that he in fact had confidence. Thirdly, if he had no cause for confidence and you thought for one moment that he had confidence it would be a very foolish confidence and only the sort of feeling which would be engendered in a man who had impaired judgment consistent with the sort of pressure and threats under which he was. At page 519 Mr. Bovill said: "You could not get him into any money discussion which would provide a solution".

TAYLOR, A-J.A.: Are you saying he did not have any confidence in this up until the 17th?

MR. GRUZMAN: Exactly.

TAYLOR, A-J.A.: What do you say about the learned judge's findings that on 18th, the day after, he told Grant that now they had got rid of Armstrong nothing could stop them?

MR. GRUZMAN: That is whistling in the dark.

TAYLOR, A-J.A.: I would have thought that was a statement; get rid of the obstacle that is holding this company back.

MR. GRUZMAN: The first question is, was it true?

TAYLOR, A-J.A.: You accept that he said that?

MR. GRUZMAN: Accepting that he said it, the first question your Honour would ask yourself was the fact related in the conversation true? Was it a fact Armstrong having disappeared all the company's affairs suddenly came right?

TAYLOR, A-J.A.: I ask myself, is that what he believed?

MR. GRUZMAN: When you test that logically you do not, first of all, believe too easily that a man believed a lie or something which had no basis in fact so you tend more to believe if he says it is daylight you tend to think it is probably daylight. The first thing that hits one about that is here he is saying something which was obviously not true. The fact that Armstrong had gone spelled the doom of the company inevitably. That was the fact. The second question is, did Barton believe the fact or did he believe something which no man in his senses believe?

TAYLOR, A-J.A.: At one time this client of yours is a paragon of virtue and the next time he is looking like some kind of a fool.

MR. GRUZMAN: If one is under some kind of pressure of threats that is exactly how he would react. Another way of saying it is "I am the managing director of this company, I have the responsibility of running it".

TAYLOR, A-J.A.: Why say it to Grant?

MR. GRUZMAN: I suppose there is one very good reason; Grant was a solicitor with a hostile creditor who would have in his hands from time to time and was known to be likely to have in his hands, and did subsequently have in his hands, the power to utterly destroy the company so to anybody, if he was doing his job as managing director, he would seek to uphold the credit of the company, whatever he believed. It was his job and his duty to the shareholders to do it because once he let out that this company had been sunk, that its good substance had gone to Armstrong for nothing, then all the shareholders, ipso facto, lose their money.

JACOBS, J.A.: If you put the case as high as you put it he might as well have done that.

MR. GRUZMAN: From one point of view he might have, but would that have been consistent with his duty to the shareholders? Could it then be said, "Why did he stop at $200,000, why did not he give Armstrong the lot and then go to Brazil?"

JACOBS, J.A.: That is why I think putting it as high as you do, you run the risk of the consequences.

MR. GRUZMAN: The question I was asked was why did he say that to Grant. There are two reasons. One is, one would assume from all the evidence, that Barton had a very real sense of his duty as a director so you, first of all, assume he is doing something for the company. Secondly, you would look

at the facts and say was the factual statement true? Obviously it was not true, so thirdly, you would say why would he make a statement which was factually untrue as probably not representing his mind; and then you say "To whom was it said and in what circumstances". Was it something which would affect the credit of the company in the future or its future operations having in mind he is the managing director of this company.

JACOBS, J.A.: It is consistent with a firmly held belief that there was no future for this company while Mr. Armstrong was in it.

MR. GRUZMAN: It is consistent with a firmly held belief there was no future for the company.

MASON, J.A.: You do not have to go that far, surely.

MR. GRUZMAN: No, I do not.

MASON, J.A.: Why cannot this be regarded as a spontaneous statement made on the spur of the moment, a big hurdle having been crossed, the agreement having been executed, and the plaintiff, although having contained some doubt in his mind about finance being forthcoming, nevertheless endeavouring on the spur of the moment to express the best side of things, and saying, "We have got rid of Mr. Armstrong, nothing can stop us".

JACOBS, J.A.: So long as you put his position as utterly desperate then even that is almost too much to expect from him.

(Luncheon adjournment.)

UPON RESUMPTION:

MR. GRUZMAN: Still dealing with the conversation of 13th January: first of all his Honour decides against that. Firstly, by putting Mr. Bovill's evidence out of order, which I have dealt with and secondly, by referring to Mr. Barton's confidence which I have dealt with. His Honour says, "Mr. Smith has given evidence ...".

JACOBS, J.A.: The Court is of the opinion the appellant may have the remainder of the afternoon to present his case. We are not inviting you to but if it does in fact involve the rest of the afternoon before the respondent's case commences.

MR. GRUZMAN: His Honour says apparently on the 10th an arrangement had been made for this meeting with Smith and Horley on the 13th, and his Honour said Mr. Barton took no step to cancel the meeting as one would have expected if he decided not to go any further. In our submission that is not a point of any real substance. If Barton was in fear, as he said, then obviously he would be temporising and would be seeking time and delay and at the same time not closing the door to the agreement which was the way out of his fears.

I might add as far as Mr. Bovill was concerned he would have liked Mr. Smith on the board in any event. At page 516, line 27, Mr. Bovill said: "No doubt with your approval ... Mr. Smith was to come on the board too and that had my approval". Bovill wanted Smith on the board in any event and there is no reason why they should not have met with Smith on that afternoon as had been arranged, whether or not Barton, at that point of time, had in mind proceeding with the agreement.

When one looks at what takes place at that meeting in the passage set out in the judgment it is really the antithesis of a meeting with a man with a firm determination to enter into the agreement. At page 3191, line 44, his Honour said: "Was anything more said at the discussion on Friday, 13th ... successfully completed".

This is at a time when it is said there was a concluded contract as to which there had been no material variation, according to his Honour, at the 4th. Here the tenor of the discussion with Mr. Smith was such that his parting words were, "I felt that negotiations would be successfully completed". Nothing could show more clearly that nothing was concluded in the mind of Mr. Smith or Mr. Barton on that date. He went on to say: "We are making progress with the investigations, our staff are basing the sale price ... a lot more than that per block".

Mr. Smith must be mistaken there because his documents are in evidence and the estimate he made was $8000 a block, according to his own documents, and it was not showing good profitability, it was showing very poor profitability. It was showing at the first stage it was making negligible profit and even after millions had been expended it would only make a mediocre profit. If that statement was made at the time it would have misled the person who heard it but more likely, I suppose, one would think Mr. Smith has said something here which he has perhaps reconstructed, and remembering that Mr. Smith's credit is not in dispute, nevertheless this is contrary to his own document. His document says $8000 a block.

If he did say this then he was mistaken in what he said. The significance is on the parting words of Mr. Smith, the matter was still in the negotiations stage and that is entirely consistent with Barton's evidence that he had indicated no finality, if not the reverse, at that time.

Looking at the rest of what Mr. Smith said about Friday, 13th, it is entirely inconsistent with what his Honour draws from it. First of all, he said, "He stated to Barton and everyone ...". He said, first of all, they would have to cancel out the dividend and he said if the company was to go into liquidation and a dividend was paid it was his view the directors would be personally liable. The first thing he said was that he told these directors that this company was in such a disastrous state

that if the dividend which they declared was paid the directors might be personally liable.

The second point was that he told them it had not been proved to him that U.D.C. would advance the money to enable the continuance of the development of Paradise Waters. In other words, as everybody knew, what he was saying was, "You have no money, you have no prospect of money, you cannot even pay the dividend without exposing your directors to personal liability". He said Barton stated that in his view the dividend should be paid. He said after Armstrong was out of the company he would have no trouble getting the money from U.D.C. and he said he replied, "That still has to be proved to Horley and myself". There was one simple way of doing that and that was by ringing up U.D.C. he said, "Your only chance is to have Armstrong there and his finances in this company".

Mr. Smith's evidence of what occurred on Friday, 13th, is entirely consistent in every respect with the matter being in a state of flux on that date; he still regarding it as a matter of negotiation. Far from supporting his Honour's view that Mr. Barton's mind, as reflected by the conversations of the 13th, to which Mr. Barton deposed and which reflected his then mind, far from suggesting those conversations did not take place, they fully support that they did. In other words, Smith's statement of the evidence shows that the matter was in a state of flux and no decision had been made by Barton to proceed with the agreement at that date. That is entirely inconsistent with the view his Honour took.

The last matter was that he said because Grant and Solomon were having a conference that afternoon that had something to do as to whether Barton had decided to proceed with the agreement or not. It is an equivocal circumstance, if ever there was one, that one would hardly have expected that because Barton had these conversations and said he was not proceeding that he would have necessarily telephoned all the solicitors and said "Everything is off", remembering that he still recognised the only way to bring the terror to an end was, in fact, to go through with this agreement.

We submit his Honour is not correct on any basis. There is simply no logical or probative basis on which his Honour can find Mr. Barton did not have the conversations that he deposed to, on or about 13th, although it is consistent with the evidence if one wants to look at it with an eye to looking at just what did happen. It is not impossible that those conversations occurred over the 11th, 12th and 13th, but certainly not earlier than that. The next matter in his Honour's judgment is that his Honour said: "Nothing of any significance appears to have taken place over the weekend of the 14th/15th".

If I may say so, that is singularly incorrect.

Matters of enormous importance occurred over this weekend. It was part and parcel of the agreement, it was wanted by Bovill and Armstrong that Smith should go on the board.

MASON, J.A.: I notice it is not one of the passages in the judgment you have underlined.

MR. GRUZMAN: It appears in the documents, page 13.

The question of Mr. Smith coming on the board was a matter of great importance to everybody. The conversation of Friday, 13th, to which his Honour refers, deals wholly or substantially with that question. What happened? On the Friday night Mr. Smith rang Mr. Armstrong and said, "I am not going on this board". Mr. Armstrong said, "Look, don't tell a soul. Don't tell anybody".

JACOBS, J.A.: You have covered all this.

MR. GRUZMAN: I did not really relate to it in the context of his Honour's judgment and the reasoning. I am seeking to draw the thing together.

On the Sunday he rang Mr. Grant and said, "Smith rang and said he is not going on the board", and Grant said, "Don't tell anybody". Over the weekend there was a dramatic change in all the circumstances. Bovill wanted Smith on the board; Barton was prepared to have Smith on the board; Armstrong wanted him on the board, and over the weekend Smith decided he would not go on the board and that obviously reflected the fact the company had no future.

TAYLOR, A-J.A.: Yet they put in the document on the 17th a lot of covenants.

MR. GRUZMAN: It was positively concealed from Barton and his solicitor that Smith had decided not to go on the board; by active concealment. It was because of the fact that Smith decided not to go on the board and the possibility this would leak out to the other directors of Landmark, that it gave the occasion for the threat of the 16th in Armstrong's mind. What was the situation? As at the 12th he threatened, "Sign the agreement or else". Accepting Smith's evidence, if not more, to say the least; vacillation on the part of Barton. Then Smith's firm decision over the weekend not to go on the board. A dramatic event in all the circumstances. The possibility that this would become known to Bovill, Bovill saw an advantage to the company in a man of Smith's calibre and standing coming on the board; and doubtless it appears to be one of the matters which influenced Bovill in favour of the agreement.

It is a singular circumstance. Here is something Barton could not know anything about. Armstrong is not said by Barton to have given his reason when he made his 'phone call on 16th.

MASON, J.A.: I do not quite understand what the

relevance of this submission is. Do you put it purely as a matter that renders it more probable that Mr. Armstrong would have rung up Mr. Barton on 16th and threatened him?

MR. GRUZMAN: Precisely. That is the significance. It is significant of reluctant vendors and other matters but I am only dealing with this on his Honour's judgment at the moment. Whereas his Honour states as part of his reasoning for rejecting the 16th that nothing of any significance took place on that weekend, the fact is matters of significance did occur.

The point I had reached is that Barton, as it were, out of the blue, does not assign a reason in the conversation why Armstrong telephoned him on the 16th. He did not say, Armstrong says "I am doing this so you might find out about Smith". Barton was unaware until the evidence was given in this case, as far as one can see, as to what happened over that weekend. When the evidence is given and cross-examination, it is revealed over that weekend here was Smith telling Armstrong and his solicitor, Mr. Grant, (a) that he will not come on the board and (b) it is to be concealed; obviously for the reason if it was disclosed it might lead to preventing the agreement going through, one may think, perhaps, because of Bovill's attitude. The occasion was there for Mr. Armstrong to make that threat because of something that he knew and which Barton did not know over that weekend. I do put it on this aspect of the matter on the basis that it makes it extremely probably that Armstrong would have again threatened Barton on the 16th.

In this connection I can refer to the fact Armstrong in his diary stated on the Monday he gave Barton his last extension. We would submit it is a forged or fictitious document but on the other hand it may contain where he said "I gave him his last extension", his watered-down version of what would have appeared there, "told him I would kill him unless he signed". Now we come to the final 'phone call. It has been shown it is more likely than not that some such 'phone call took place. Let us examine the evidence on that and restrict ourselves to what is in the judgment; that is conversations accepted by his Honour. At page 3193, line 30, it says: "The next relevant matter is Mr. Barton's evidence ... January". I shall not repeat myself except to say we have demonstrated his Honour was wrong in so finding, "No occasion existed on the morning of Monday, 16th for him to be coerced into a change of mind".

Again we have shown that is not a finding justified by the evidence. There was a very strong occasion, "The conversation, however, does have some importance ... in the end Mr. Bovill agreed".

What does Barton depose to in substance? First of all, he said he got a 'phone call from Armstrong which was a threat about this document.

Secondly, he 'phoned Bovill and there was a conversation which involved two aspects: (1) Threats by Armstrong but not the specific threat of the morning, (2) The commercial side, and it reads: "Mr. Bovill first started to analyse the agreements".

Under cross-examination at page 3195, line 19, he said: "This man is threatening me, he has hired criminals to kill me. I have to get him out of my hair and out of the company's hair ... will you come in quickly".

His Honour said: "I accept Mr. Bovill's evidence that he was telephoned by Mr. Barton the day before the deed was signed and asked to co-operate as a matter of urgency ... yielding to Mr. Armstrong's demands".

Again we have an instance of a finding by his Honour not justified by the evidence or the surrounding facts. He has accepted Mr. Bovill as a witness of truth. His only criticism of Mr. Bovill is that he questions his chronology. That is in relation to the conversation which his Honour puts back in December and which we submit obviously took place at or around the time Bovill swore to. Really there is no valid criticism of Bovill; he is a witness of truth and accuracy and his Honour specifically accepts Bovill's evidence of this conversation but his Honour says it has been coloured. There is simply no justification for it. Barton and Bovill swore the same thing in substance. Each swore that on the morning of the 16th there was a conversation involving threats by Armstrong, and the commercial document. At page 3196, line 15, there is some reference to Barton's belief that Armstrong had to be removed from further contact with Mr. Barton. That is obviously a reference to the threats. As a result of these threats he had left his home and was living in the Wentworth Hotel.

JACOBS, J.A.: We have been through all this. It may be you are putting it a different way, but you have been through all this in detail.

MR. GRUZMAN: I did not think I had been through it in such detail. On the conversation his Honour accepts the most likely thing to have happened was the telephone call from Armstrong had come and that was the occasion, because there is no other occasion suggested for Barton to have rung Bovill to get him in urgently. The second point I make is that on any view, and including the view accepted by his Honour, here were these two company directors at the very instant when, on any view, Barton recommends to Bovill that he signs the agreement and the day before what is their discussion; threats. So, on any view, and the view accepted by his Honour, the decision to sign this agreement in part involved some consideration of the threats between Barton and Armstrong. No more is needed to decide this matter.

I do not propose to take your Honours to the

other reasons accepted by his Honour. We do feel it is encumbent upon us that we should run briefly through the findings that we ask your Honours to make, apart from the specific ones we have dealt with.

JACOBS, J.A.: I think you have put them in writing.

MASON, J.A.: You have addressed orally on the findings you wish us to make.

MR. GRUZMAN: The course we took at your Honours' invitation was to place before your Honours in writing those findings of his Honour which we specifically contested and the findings with which we suggest they should be replaced.

MASON, J.A.: You concluded your oral submissions on this part of the case earlier.

MR. GRUZMAN: We have not referred in the submissions to many of the findings we seek your Honours to make.

TAYLOR, A-J.A.: You want us to make one finding; when he had entered into this deed fear and terror played a part?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: You only want a finding from us to give you a verdict?

MR. GRUZMAN: Yes. On the other hand we seek alternative findings and indeed, the findings we seek are those set out in the right hand column of the document entitled "Findings sought by the appellant".

TAYLOR, A-J.A.: What do you want those findings for? If we make that finding it seems to me you must succeed, and if we do not it does not matter what other findings we make.

MR. GRUZMAN: This is where we disagree with your Honours. If your Honours are prepared to make the primary finding which we seek, that is an end to the matter but if your Honours are not prepared to make that finding there are other findings from which, as a matter of law, the appellant is entitled to succeed.

TAYLOR, A-J.A.: These other findings are only asked for if we fail to make the major finding.

MR. GRUZMAN: If your Honours made the primary finding in our favour and there was an appeal the appellate Court would wish to have the benefit of your Honours' findings on the subsidiary matters. In other words, to support the primary findings.

MASON, J.A.: The point being that some of these issues are interconnected and they have a relevance each to the other?

MR. GRUZMAN: Exactly.

JACOBS, J.A.: We are indebted, as I have already said, to you for this writing. Whether you draw our attention to parts of it or not is a matter of you using the time that is left for you; especially as you have this in writing, but the time is for you to use. It will not go beyond the hour for the appellant. That includes the application for leave to amend as well.

MR. GRUZMAN: In those circumstances I will only refer to one of the matters in that document and that appears at page 9 and although it is a matter that has been dealt with at considerable length it is such a basic finding of his Honour's and so, basically his Honour's judgment. I want to say in the first two extracts from his Honour's judgment at page 3172 there is a reference to "sheer commercial necessity".

The first point I make is this: his Honour says they regard it as sheer commercial necessity to rid Landmark of the presence of Armstrong as a director and of Armstrong, through his companies, as a shareholder. With respect to the trial judge that simply cannot be right. Not only is it not right, but it cannot be right. Armstrong as a director should be neutralised in several ways. First of all, Barton had demonstrated, if it was necessary, that the majority of the shareholders supported him and those associated with him. So, Armstrong could have been removed as a director.

JACOBS, J.A.: That was clear from the meeting of the shareholders.

MR. GRUZMAN: Yes, on 2nd December. He was removed as chairman but allowed to stay on the board. At that stage he did not come up for election. Secondly, he could have been allowed to remain as director and under the Articles a committee of directors could have been formed to run the company, excluding him. In any event, he was only one of four directors. As a director they would not have to see him even if he remained a director and there was no reason, if they did not want him, why they could not get rid of him as a director.

TAYLOR, A-J.A.: He had 12½% per cent. of the shares.

MR. GRUZMAN: I will deal with that in a moment. His Honour deals with two matters. He said they had to get rid of him as a director. I would demonstrate to your Honours that Armstrong as a director was no worry to him. Now he says he had to get rid of him as a shareholder. As a shareholder he was a lightweight, because he had failed. The only reason where a shareholder, who is a major shareholder, can exercise any real power at all or have any real nuisance value is if he can control a general meeting, but it had already been demonstrated that he could not, only a few weeks before, so his powers to harm this company or to harm Barton, or to interfere with the company as a shareholder were nil, or next to nil. When his Honour says they wanted

to get rid of him as a director and a shareholder they obviously would not care very much. There was one capacity in which it was important to get rid of him, if they could, and that was in the capacity of a creditor, a man who could wind up the company, and in that capacity they failed to get rid of him. They saddled themselves with this hostile creditor. It is not "sheer", it is not "commercial", and it was not "necessity".

In our submission there is absolutely no basis whatsoever for the finding by his Honour that Barton and Bovill regarded it as a commercial necessity of any kind to get rid of Armstrong as a shareholder or as a director and insofar as there was an obvious desire or wish to get rid of him as a creditor, this they failed to do and instead of paying the money to satisfy the creditor who really could cause trouble, namely U.D.C. who was momentarily threatening to put a receiver in, they give the money to Armstrong who, because it meant such a great loss to him if they put a receiver in, was, in fact, commercially neutralised already.

This finding of his Honour which his Honour indicates he regards as basic turns out to be without any substance at all. His Honour goes on to say: "There was recognition of what was regarded as sheer commercial necessity ... deed". What is clear is, firstly, that basic view held by his Honour was not correct. Secondly, that the discussion between the two directors as to the signing of this deed, on his Honour's own finding included reference to the threats. In other words, on his Honour's own findings when the two directors decided on 16th what to do it had reference to Armstrong's illegal threats. His Honour seems to recognise that at page 3172 when he says it was the real and quite possibly the sole motivating factor. In other words, it is not even inconsistent with his Honour's judgment that Armstrong's threats comprised part of the motivating factor for the agreement. His Honour suggested Barton wanted to get rid of Armstrong in the interests of Landmark and in his own interests as managing director. For the same reasons that cannot be true. The only effect of this was to immeasurably weaken Landmark and give it funds.

JACOBS, J.A.: Do you say the inquiry is not for the real motivating factor, it is not for the causa causem.

MR. GRUZMAN: Yes, exactly. In other words, to put our submissions in a nutshell, your Honours have only got to be satisfied that fears or threats, or terror, or whatever it is, played some part, or some motivating factor in the formation of this agreement. I propose to proceed on the basis your Honours will have regard to the submissions contained in this document.

JACOBS, J.A.: Certainly.

MR. GRUZMAN: I have not addressed your Honours on the question of conspiracy, but your Honours will have regard to the evidence and the law, circumstantial evidence which establishes that Armstrong was responsible for the Vojinovic incident.

JACOBS, J.A.: You have put all that, but this is a summary of it?

MR. GRUZMAN: Yes.

That brings us now to the amendment of the statement of claim. I should imagine within the space of an hour I can make my submissions on that. We will hand to your Honours another copy because it has been slightly altered.

TAYLOR, A-J.A.: These are the amendments you are applying for leave to make?

MR. GRUZMAN: Yes, we apply.

MASON, J.A.: This incorporates changes in the last one.

MR. GRUZMAN: Yes. As a mechanical matter I would substitute in your Honours' copies some new pages.

MR. GRUZMAN: Just before dealing with the amendment we would like to refer your Honours to the law on the question of amendment. We have not got photostats of these, although they are on your Honours' lists and perhaps your Honours will allow me to refer to this case at this stage: G.L. Baker Limited v. Midway Building and Suppliers Limited, (1958) 1 W.L.R. at 1216, a decision of the Court of Appeal. The trial Judge, in a case involving assets of the third party where the pleadings alleged fraud - Jenkins, L.J. at page 1231 said, "I should commence ... it is not intended that the party making this mistake should be mulcted in the loss of the trial".

In Cropper v. Smith, (1884) 26 Ch. Division, 700, Bowen, L.J. at page 710 said, "Now I think it is a well established principle that the object of courts is to decide the rights of the parties ... it seems to me he ought to be allowed to amend". That was the dissenting judgment of Bowen, L.J. which was approved in Kurtz v. Spence, 36 Ch. Division 774, where Bowen, L.J. was in the majority with Cotton, L.J. At page 773 Cotton L.J. says, "When by an amendment the real substantial question can be raised between the parties ... in their statement of claim, these allegations".

Jordon C.J. in Middleton v. O'Neil & Ors., 43 S R. 178 at 183: "Unless there is some absolute legal bar it is undoubtedly the duty of the court to allow all such amendments which will allow ... relief". The House of Lords disagrees with that in Nocton v. Lord Asberton. "This does not follow ... the party charged will have ample opportunity to meet them".

A decision of the House of Lords is The Ship "Tasmania" v. The Ship "City of Corinth" 15 A.C. 223 - it is a slightly different point but not irrelevant to the submissions being made. At page 225: "At the trial no other point was taken ... had been afforded in the witness box".

I have referred your Honours to Nocton v. Lord Asberton, 1914 A.C. 932. It is probably sufficient to refer to Lord Palmer at page 977: "There is no doubt that par. 37 does ... would have been conducted in either case on the same lines". In that case the trial Judge found no fraud, the Court of Appeal found fraud and for the first time on appeal to the House of Lords the Court said that fraud was irrelevant, it is a negligent case.

There is another principle to which we should invite your Honours' attention mentioned in Curran v. William Neil & Sons Limited, (1961) 1 W.L.R. 1069 at 1078. This is a principle and I am only going to read the last few lines in the findings of Lord Holroyd Pearce: "For those reasons, even if the plaintiff were allowed to amend he could not succeed and I would therefore refuse the amendment and dismiss the appeal".

MASON, J.A.: Was reliance on the regulation in that case a separate case or was it merely evidence upon which the plaintiff might have relied in order to succeed on the case?

MR. GRUZMAN: I think there were two statutory counts, and after examination of the evidence the Court came to the conclusion that even if they allowed the amendment he could not succeed on that. That is why we bring it to the Court. In other words the Court could say "It is no use our allowing the amendment because you could not win even if we did".

The last case is Cardy v. Commissioner for Railways, 104 C.L.R. 274 at page 315 in the judgment of Windeyer, J.: "The argument on this appeal was, however, not strictly confined to the issues raised by the pleadings but dealt with the matter more broadly".

We might say something similar has occurred before your Honours. "We might, I think, first approach the question ...". What happens there is that in the High Court their Honours permitted the case to be argued on wide principles as if the amendments were made.

I am told this is definitely the last one, in Re Potteries & Company v. North Wales Railway Company, 25 Ch. D. 251 at 255. "As the petition was first drawn it stated that the company intended to abandon the undertaking. That was the ground which gave rise to the claim for compensation, according to the pleadings. The case came before Haig, J. on 13th February 1882. His Honour held that no compensation could be granted for the expected abandonment of the railway and no injury had been done to

the petitioners by the company and dismissed the petition with costs. The whole case was fought on the intended abandonment of the undertaking, and they lost, on appeal to the Court of Appeal it was ordered that the petition be amended by asserting an allegation that the railways had been abandoned and it dealt with this matter on this different basis.

JACOBS, J.A.: It was intended to abandon at the time of the hearing of the petition?

MR. GRUZMAN: Yes, your Honour, that was thought to be the ground and the court decided against it and dismissed the case. Then they appealed on a completely new case, that there had been an actual abandonment, and the Court of Appeal dealt with it on that basis.

I would like to also refer to Jones v. Skelton, to which we will give the reference. That matter came before the Full Court here and their Honours said ---

TAYLOR, A-J.A.: They said "Not capable of being defamatory".

MR. GRUZMAN: Yes, but they said "On amendment we would be prepared to allow the amendments but they are not necessary". Then there was an appeal to the Privy Council. What happened there apparently was that the Full Court upheld the appeal and said "We would allow the amendment if it were necessary but it is not necessary in the light of our views". Then it went to the Privy Council who reversed the Court of Appeal and said "It is too late to apply for the amendment".

In other words, even if your Honours were otherwise disposed to say "We could hold the view under which you would not need this amendment" we nevertheless ask your Honours to bear in mind Skelton v. Jones. If we were to appeal in this case and we then had to rely upon arguments which are contained in the amendments we would need the benefit of those amendments. So we ask your Honours that even if your Honours were otherwise disposed, not to say "We do not think you need amendments" - whatever your Honours' views may be.

So the principles are, firstly, if it deals with the matter in dispute between the parties the amendment should be made; secondly, it should be made if it can be done without prejudice to the other side and prejudice can be of two kinds - (a) which can be compensated in costs and (b) the subject of a restriction that the Court is satisfied that the case would have been conducted in substantially the same way in the Court below if the case had been pleaded in that way in the Court below. Thirdly, the Court won't allow an amendment if it is satisfied it will serve no useful purpose.

It is in those circumstances that we turn to the amended statement of claim.

JACOBS, J.A.: What was the third matter you put?

MR. GRUZMAN: The Court has to be satisfied that the case below would not have been materially altered if it had been argued on the amended pleadings. To quote, for example, the Statute of Limitations in a fraud case where it could not be introduced but it could be in a negligence case.

What we did in order to, perhaps, be of some assistance to your Honours was to prepare three copies of the amendments - interleaved with extracts from the authorities which we suggest justify the allegations. In other words, they are all authorities which your Honours have heard but they are just put into a convenient form by interleaving them through the amendment to the statement of claim.

I think the Bromley proposition is not there but Earl of Chesterfield v. Jansson is the same principle and that summarises it.

JACOBS, J.A.: It is implicit in your request for the amendment in respect of relationship and influence that it was during the course of the trial explored to its depth?

MR. GRUZMAN: Yes, your Honour, precisely.

JACOBS, J.A.: By design of both parties?

MR. GRUZMAN: No, incidentally.

JACOBS, J.A.: How can you say it was explored at any depth if it was incidental? How do we know that the defendant did not have evidence?

MR. GRUZMAN: The course of the case was this: the plaintiff said "threats", the defendant said "no threats, no influence, nothing - plain ordinary commercial transaction". What gave rise to the amendments - and I want to make clear what I am saying - I am not saying with hindsight, looking at matters which Street, J. referred to - that one could not discern now some of the matters that his Honour had in mind. With that limitation, so far as the parties were concerned, no party made submissions to his Honour which are reflected in his Honour's judgment.

TAYLOR, A-J.A.: Do you mean no parties made any submissions as to whether any duress might enter into it?

MR. GRUZMAN: No party at all. And his Honour, assuming threats and terror, more or less found it was a commercial transaction which was the sole cause. His Honour found that, nevertheless. What was put was because it was a straight commercial transaction there was no occasions for threats or terror and so there were none.

TAYLOR, A-J.A.: Did not his Honour set out the issues being fought between the parties?

MR. GRUZMAN: Yes, and stated them correctly.

TAYLOR, A-J.A.: And who bore the onus?

MR. GRUZMAN: His Honour states that correctly, but the way in which the case was fought; it was never conceded by the defendant that they had threatened us or that threats of any kind were used but, nevertheless what had brought about the agreement or the commercial transaction was the commercial transaction, to the exclusion of threats.

JACOBS, J.A.: I think that looks at it from the plaintiff's point of view. How do we know that the defendant did not have some evidence which would displace the general relationship of domination. How do we know that?

MR. GRUZMAN: I think it can be said in this case that everything, every aspect of the relationship between these men, was explored.

JACOBS, J.A.: Do we take that from the inordinate length of the case?

MR. GRUZMAN: That is one of the factors.

JACOBS, J.A.: Surely we cannot make an assumption from the inordinate length!

MR. GRUZMAN: It is one of the factors in deciding whether any stones were left unturned, to consider that it was not a short case but extended over five months. On one side (the plaintiff's) was thrown into the scale all those matters which would suggest threats or a relationship which would give rise to the threats. On the defendant's side were put all those matters which would suggest there was a relationship devoid of threats or influence and only a plain ordinary commercial transaction. If the plaintiff had been alleging undue influence he again would have led the same evidence - the same evidence - and the defendant would have also led exactly the same evidence.

JACOBS, J.A.: But undue influence simpliciter does not carry you anywhere because - and I have been over this before and I only hope I have made myself clear - undue influence simpliciter does not carry you anywhere because the evidence of it in this case is evidence which would amount to, in common law, duress. What you want is a relationship of influence in your amendment, and then that is what you are alleging by your amendments. So it would be quite correct to say you would be entitled to an amendment to allege undue influence?

MR. GRUZMAN: No, we put it that we are entitled to an amendment to allege both relationship of influence and a situation of influence.

JACOBS, J.A.: Both of those go beyond an amendment merely to allege undue influence.

MR. GRUZMAN: Yes, your Honour.

JACOBS, J.A.: You said what you were asking for was an amendment to allege undue influence.

MR. GRUZMAN: I am also asking for an amendment to allege illegality and such matters.

I am reminded that in the course of the evidence his Honour said, in dealing with the evidentiary point, "If, of course, the agreement could be shown to be one for proper value that might tend against the probability on the plaintiff having been influenced into it by anything other than financial considerations. If on the other hand ... enhanced". In other words, this question of undue influence was present during the trial.

JACOBS, J.A.: Almost certainly, because there was no difference between undue influence and duress as the case was put. It is only when you get to the relationship or situation of influence that the new element comes in.

MR. GRUZMAN: Yes. What we have to do is satisfy your Honours on the subject of relationship or situation that the case would have been no differently fought on either side, if that had been the pleading. The only difference, in our submission between duress or undue influence of that kind and situation is that we undertook a higher onus than was necessary in order to establish the duress or, as we put it in the statement of claim, unlawful pressure. What was put was not a momentary type of duress. It was not put that it was a man standing with a gun. What was submitted and proved was a course of conduct over a period and we say from that course of conduct over a period this Court will deduce both a relationship during that period and a situation when it came to the point of signing.

TAYLOR, A-J.A.: And this reversed the onus?

MR. GRUZMAN: Yes.

TAYLOR, A-J.A.: And that was never put to the trial Judge?

MR. GRUZMAN: Never. But it has beenput to your Honours.

TAYLOR, A-J.A.: That is a case the trial Judge never heard about and never contemplated?

MR. GRUZMAN: That is right.

TAYLOR, A-J.A.: And you want to come here and make it now?

MR. GRUZMAN: That is right, in the same way in the case which I cited; the trial Judge had never heard the case of actual abandonment of the railway.

TAYLOR, A-J.A.: I suppose you have read what the

High Court said about it in 13 C.L.R., making a case other than the case which went to the jury?

MR. GRUZMAN: I am not familiar with the authority but all the later cases, and indeed all of the earlier ones I can call to mind, say what the rules of this Court say: "All such amendments should be made as they are necessary to permit the real matter in controversy between the parties to be determined".

TAYLOR, A-J.A.: Where is the explanation as to why this case was not made to Mr. Justice Street?

MR. GRUZMAN: The case made before his Honour was a case of duress or unlawful pressure and one would have thought (at least we thought) that his Honour would have found one way or the other, and the defendant thought that his Honour would find one way or the other. His Honour gave a judgment in which his Honour accepted our major premise, namely, that there had been threats, and went on to say "Whilst it may seem unduly legalistic" that he wanted to consider further whether notwithstanding the threats this contract was affected by pressure.

TAYLOR, A-J.A.: That is not what I asked you. I said where was the explanation for not making before his Honour Mr. Justice Street a case of relationship or situation of pressure over a period which put the onus of showing that the agreement of 17th January was not as a result of that on the defendant? Where is the explanation for not making the case?

MR. GRUZMAN: That is exactly what I was seeking to put to your Honour. The explanation is that the plaintiff and his legal advisers believed that once one proved the threats and a contract entered into pursuant to those threats that was the end of the matter. There was no need - and it never occurred to anybody in the case until after his Honour's judgment was delivered that this might have to be regarded as a situation or a relationship case. For better or worse that is the situation. It is obvious from every word in the presentation of the case and it is obvious from his Honour's judgment. His Honour does not say in his judgment it was put by one counsel or the other that notwithstanding the threats he should find so and so - this was a matter which his Honour considered for himself. I am not saying that his Honour was less entitled to do it or anything like that because it was not put to him, but when your Honour asks for the explanation of why the matter was not presented the alternative way before his Honour; it was at that time not regarded, if I may say so, as possible. It was only in the light of his Honour's judgment that it appeared that another mind might accept the view that threats of this kind could exist and not have actually brought about the contract or at least it be found that the existence of those threats should not be taken as proof that the contract was brought about by them. It was, if I may say without appearing disrespectful to the trial Judge, a fine point which had not occurred to us and we, indeed,

submit to your Honours that his Honour in so finding was not correct.

TAYLOR, A-J.A.: He does make the finding, does he not, on the issues which were stated?

MR. GRUZMAN: Yes, but there was a lot of difference between issues which were properly before the Judge and which the Judge is entitled to deal with and the way in which the case is fought.

TAYLOR, A-J.A.: You say that, having heard the case for 58 days, he found on issues which nobody talked about, and then wrote a long and detailed judgment about them?

MR. GRUZMAN: Yes. It is the same in a running down case where the defendant denies that X was the driver, and it may not be the point in issue at all and if his Honour says "There is no evidence about it" ---

JACOBS, J.A.: The real analogy you are seeking to put is where there was no dispute that if certain conduct occurred it was negligent, but that was never mentioned. I do not know what happened below, and I am not disagreeing with what you say about the case, but your real analogy is that, is it not?

MR. GRUZMAN: Yes, your Honour, that is the proper analogy and that is the way we put it.

I think I have already submitted this, if we had alleged undue influence of the type adumbrated by your Honours now what would have been rebuttable.

JACOBS, J.A.: If you had alleged situation or relationship?

MR. GRUZMAN: Yes. I ask rhetorically what would have been rebuttable? First of all it would have been, no threats; secondly, no relationship. In other words "I did not threaten him", and so on, because everything they said and did over the years was mentioned in the evidence. In addition they would have said "This was a normal commercial transaction".

JACOBS, J.A.: They would have said, possibly, something more; which I think is your main difficulty in this particular aspect. They may have said, "We are now going to point to a number of contracts in which Mr. Barton attempted to assert ascendency over Mr. Armstrong, that he fought back, and even if there were threats or violence or telephone calls, but that he displayed not only at board meetings relevant to the areas in which case but on other occasions an independence of spirit inconsistent with a situation of dominance", and they might say "We are now going to produce a dozen instances of that". You may say "How could there be, when this case was so long?" but that is only to show that it perhaps went into areas of irrelevancy.

MR. GRUZMAN: The answer to that, we submit is this - and if necessary I have to go through the whole of the evidence and address your Honours on it, but to summarise my submission, the evidence in this case ran the whole gamut of personal relationships, visits to homes, whatever was involved.

JACOBS, J.A.: If that is conceded it may throw a different light on it.

MR. GRUZMAN: If it is not conceded it can be shown in the evidence.

JACOBS, J.A.: No, you cannot tell from the evidence something that is possibly not in the evidence. You can only make assumptions.

MR. GRUZMAN: If one considers what was sought to be established by the evidence one can make the assumption that everything that would go to establish that appears, and if we were suggesting that Armstrong was threatening Barton or that Barton's will was overcome in relation to this agreement then one can assume against the defendant that every little bit of evidence which might have told about that matter would have been adduced. What sort of evidence would they offer against that? Anything, I would answer, which would show that his spirit was not overborne. That would all be evidence material to show that the threats were either not occurring or not having effect.

When one considers the minute detail in respect of each and every contact between these two men was analysed in the evidence, it is clear that both parties so regarded it. "The evidence of spirited defence by Barton was not only relevant to situational relationship, it was also relevant to the very case before the Court and indeed the case actually made was that it was such a good commercial transaction and the negotiations were conducted in such a manner and in such circumstances as to establish what we say, namely that there were no threats of any kind".

JACOBS, J.A.: I think we appreciate that point. I think that comprehensively covers the point raised.

MR. GRUZMAN: And, of course, I am reminded that in fact his Honour was so convinced.

TAYLOR, A-J.A.: Evidence of what? What was he convinced of - that there were no threats?

MR. GRUZMAN: No, he was convinced of the commercial side of the transaction, we not having exhaustively argued it. His Honour said "The course of negotiations does not support Barton's claim that Armstrong coerced him into making the agreement..."

I would have wished to have taken your Honours through the proposed amendment to indicate -

JACOBS, J.A.: You can put anything further that you wish into writing, Mr. Gruzman. We will hear Mr. Powell tomorrow.

(Further hearing adjourned until 10.15 a.m., Friday, 12th March, 1971.)

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

Term No. 22 of 1969

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

BARTON v. ARMSTRONG & ORS.

SIXTEENTH DAY: FRIDAY, 12TH MARCH, 1971.

JACOBS, J.A.: Yes, Mr. Powell.

MR. POWELL: Your Honours, some of the comments that have been made during the course of Mr. Gruzman's arguments suggested to us that it may be of some assistance to your Honours to enable your Honours to follow the argument we desire to put and perhaps, indeed, to shorten the argument, if your Honours were to have available some general outline of the respondent's case.

Before the appeal commenced we had prepared for our own use an outline of the argument which was directed towards the case we thought the appellant might put. During the course of the argument we have been able to expand it a little in an endeavour to meet points that have arisen. Despite the expansion the document remains a skeleton argument and, of course, suffers from the inherent problems of a skeleton argument. We have had copies of it prepared and we left those with the Registrar last evening. Your Honours will see the outline is numbered in paragraphs and with the outline there are a number of folders which are also numbered. The purpose of numbering the folders is to indicate the material contained in those folders is relevant to the appropriate numbered point in the document.

We would draw attention to the fact, with the possible exception that the names of the parties remain the same, the case now sought to be put before the Court bears little resemblance to the case put below. What is now sought to be done by the appellant is to have the pleadings amended. Consequent upon that, different issues of fact and law raised and decided upon, and then certain additional grounds of appeal raised which were not raised in the grounds of appeal and, indeed, as the case was then framed, could not have been raised having regard to the judgment of the learned trial Judge.

The case made below was one of duress in the common law sense simpliciter. That this is so is made clear by the statement of claim as first framed which alleges in the paragraphs in the outline sketch that for the purpose of compelling Mr. Barton to enter into the agreement and subsidiary

agreements Mr. Armstrong hired certain criminals for the purpose of either frightening or killing him.

Prayers in the statement of claim as originally propounded sought a declaration that by reason of duress the agreement was unenforceable or voidable and secondly, it made it clear the plaintiff had validly avoided the agreements. The argument before the learned trial Judge was bald in its simplicity. Indeed, the argument put by Mr. Gruzman before the trial Judge at the commencement of his final address was purely and simply, "there was a threat on the 16th. That is all your Honour has to find because Mr. Barton says the threat was made and that some few days before that he made up his mind he would not have a thing to do with this proposed agreement and by reason of the threat he took fright and entered into an agreement that he had no desire to enter into". A case of the baldest and most simple form of common law duress, and the judgment of the learned trial Judge likewise reflects that fact. Contrary to the various suggestions that have been made by Mr. Gruzman during the course of his argument the argument put for the defendant, for whom I now appear, was not a simple case of a denial of threats and nothing else. It was argued, and the pleadings and the argument reflect this, that there were no threats and that even if there were threats those threats did not operate as an inducement to Mr. Barton to enter into the agreement; that in any event Mr. Barton had affirmed the agreement by his course of conduct, and finally, that no restitutio in integrum was available and for that reason, if for no other, no relief could be granted to the plaintiff.

JACOBS, J.A.: Where is the affirmation as a separate issue in the pleadings?

MR. POWELL: It was not raised as a separate issue in the pleadings.

JACOBS, J.A.: I thought those passages in the judgment made clear it was only relied on as an aspect of no threat. I want to be very clear about this.

MR. POWELL: If one sees the argument, and we have photostatted the argument, the point was taken by his Honour to Mr. Staff, "This has not been raised in the pleadings as such". As I understand the argument, Mr. Staff then put, "That may be so, but the plaintiff must show that he has a present right to avoid, or at or prior to the commencement of the suit he then had a present right to avoid". The argument then proceeded that it was demonstrated by his conduct that by doing certain acts he did deprive himself. It is proper to add the argument on that point was very short, but nonetheless the point was raised. It is equally proper to add, as I read the argument, the main issues undoubtedly were, as the trial Judge said, "Were there threats, and if so, did they operate?"

JACOBS, J.A.: On the material before us at the moment I would not be satisfied on any question that the subsequent conduct was regarded as relevant of anything other than the issue whether the threats were made. You may be able to show otherwise, in which case the trial seems to have miscarried in that admissible evidence was not admitted when that objection was taken by Mr. Staff.

MR. POWELL: Yes. Coming into it as I did only recently, I must say I found the objection somewhat difficult to accept; because the issue of continuing duress was specifically raised in the plaintiff's case. I found the objection taken by Mr. Staff somewhat difficult to accept because the issue of continuing duress was specifically pleaded in the statement and was put in issue in the several statements of defence.

JACOBS, J.A.: That does not assist you if the point was given away. I find it difficult, but if that is the course the proceedings took I think it is too late.

MR. POWELL: It certainly deprives me at this stage and I would concede it at once, of an argument based on an alleged delay between the cesser of the duress and the commencement of the suit. I cannot raise it and I do not seek to raise it.

As we apprehend the case now sought to be made by the plaintiff seems to involve allegations either that there was duress in the common law sense and/or there was undue influence, and/or there was fraud in the equitable sense, and/or there was an illegality of consideration attendant upon the total transaction. In addition to those issues it is sought to be said by the appellant that there must now be a changed onus of proof. It is to be observed at once that neither undue influence, fraud in any of its varieties, or illegality was pleaded below, nor was any argument addressed to them, nor were all relevant findings of fact made, nor, indeed, was any point taken in regard to them in the original notice of appeal. So far as the onus of proof is concerned, the onus was one, one might almost say, anxiously accepted by the plaintiff and now having tried and lost he seeks to reverse that onus.

It is our primary submission in a case of this type where there has been, as your Honours have observed from time to time, a hearing of fifty-six odd days, no course such as is now sought by the plaintiff should be permitted and that the appeal should be restricted to the pleadings below, the issues of law raised below and the original grounds of appeal.

TAYLOR, A-J.A.: Do you mean by that that we have not the power to hear another case here, we only have the power to rehear the case that was made before Mr. Justice Street?

MR. POWELL: No, as we apprehend the position your Honours have a right, and indeed a duty to rehear. It is true a rehearing is not what might be called a hearing de novo, for all the legal reasons attendant upon that. There would seem to be power, in a proper case, for your Honours to permit amendments so that a new case might be raised on an appeal. There would also seem to be power, without the necessity of an amendment being permitted, to try a case as if the pleadings took upon themselves a somewhat different complexion than they were thought to have below.

Mr. Gruzman has referred your Honours to the judgment of the House of Lords in Nocton v. Ashberton and indeed the judgment of the High Court in Corley v. The Commissioner. It is undoubtedly true in Nocton v. Ashberton, the trial Judge having dealt with the case on the basis of it being an allegation of fraud in the common law sense, the House of Lords nonetheless said that may be so but it is open on the form of the pleadings themselves for a case of equitable fraud to be argued. The aspect of equitable fraud being a breach of the fiduciary duty, a further aspect being negligence in the performance of that duty.

It is not our case and, indeed, we do not apprehend the authorities would permit us to submit that if your Honours thought it appropriate your Honours could not do what is being sought. What we do submit is having regard to the authorities this is not a case in which, consistent with the guidelines for discretion that have been laid down in the authorities, that discretion ought to be exercised in favour of the appellant plaintiff. As I have indicated to your Honours there seems to be little doubt your Honours have the power to permit an amendment of pleadings. That power may be found in a variety of places. First of all, there is the general power of amendment in the Equity Court conferred by Rule 172 of the general equity rules. By s.84 of the Equity Act which deals with the appellate jurisdiction of the Court, the Court of Appeal has the same power conferred on it and if any further power be needed Rule 9 sub-rule 1 of the Court of Appeal rules themselves confer a legal power to make of such amendments as might be thought to be appropriate in any given case. Conceding the power, one must look as to the principles upon which the power is to be exercised. We would say that one must look, technical though it may sound, at the form of the proposed amendment. And as to form, one observes in the Equity Rules it is provided that pleadings must be in a form, they must not contain vexatious and embarrassing matter, they must contain only statements of fact, they must not contain the evidence by which it is sought to establish those primary facts. Further, the principles would seem to be that an amendment must be intelligible in the sense it must set out with some clarity the case that is sought to be put, and it must not be embarrassing in form. If any

authority for that proposition is needed it is found in the judgment of Sir Frederick Jordan in Middleton v. O'Neill to which Mr. Gruzman referred yesterday although he did not refer to the particular passage. That is in point 7 of the material that was handed in yesterday. The judgment is reported in Vol. 43 S.R. at 178.

MR. GRUZMAN: I hesitate to interrupt and I only do so after speaking to my learned friend. This material which is before your Honours that was handed in yesterday and which we have not seen; I cannot follow the argument and I have asked my friend would he give me a copy. When he says "Point No. 7", I cannot follow it at all. As to the material handed up yesterday I have not got a copy. I have asked my friend to give me a copy and he says he will not do it.

JACOBS, J.A.: Did you give a copy of all your material?

MR. GRUZMAN: I think Mr. Powell was given a copy of anything he asked for.

JACOBS, J.A.: Was he given a copy of the outline of argument?

MR. GRUZMAN: I am not sure but anything Mr. Powell asked for he was given.

JACOBS, J.A.: Mr. Powell, you have two courses open to you. You can address the Court without reference to a document or if you address with reference to a document of your own composition such as an outline of argument, then, speaking for myself, I think you should give a copy to the other side. Again speaking for myself, if you do not, I would put your document in a folder to make sure your argument could be followed without reference to it. Is there any reason why you cannot?

MR. POWELL: At the moment, only because we have not got one. I tried to inform my friend all I was saying was an expansion of what was in the notes.

JACOBS, J.A.: Has he got a copy?

MR. POWELL: No.

JACOBS, J.A: When it comes to your folders and to your transcription of all the cases unless you both have an arrangement or unless you feel already a moral obligation because you have been supplied with all that material - -

MR. POWELL: None was offered to us.

MASON, J.A.: I think the only question relates to your outline of argument.

MR. POWELL: We will endeavour to have that during the day. This was merely the skeleton on which we were to address.

JACOBS, J.A.: As long as you do not refer to any section of it by reference as distinct from an argument that stands entirely by itself on its own language then I do not see any reason why you have to.

MR. POWELL: We only put it forward because we had the impression your Honours thought some such guideline would be of assistance.

MASON, J.A.: I commend you for doing it but I do think some such outline should be given to Mr. Gruzman.

MR. POWELL: Yes.

Returning to the reading of Middleton v. O'Neill: there had been a suit originally propounded against one defendant alone. A number of specific allegations of breach of fiduciary duty were pleaded but there was no charge of fraud except in one instance and after the suit was at issue leave was sought and granted to amend the statement of claim by joining an additional party defendant and by alleging, in effect, the additional party defendant had been a party to the alleged breaches of fiduciary duty and that the breaches had been fraudulent.

As your Honours will observe from the head-note under Point 1 on page 179, it was held by the Chief Justice and Mr. Justice Davidson;

> "In essential respects the amendments lacked quality and since they were ... further leave to re-amend".

The judgment of the Chief Justice reads:

> "The objections that have been taken to the amendments ... defective in this respect".

At page 185 his Honour said:

> "In the present case counsel for the plaintiff made it clear during his argument that he relied upon the amendments ... whole".

We submit they are the general principles to be borne in mind when considering form.

TAYLOR, A-J.A.: These are cases where the amend-ment was sought in the pleadings before trial.

MR. POWELL: We would say there is an additional matter, quite apart from the question of form, which we think is consistent whether it be an appeal prior to trial, at the trial, or later on.

TAYLOR, A-J.A.: It can apply to both.

MR. POWELL: Yes. We seek to say there is a super

added factor beyond the general rules applicable to the pleadings which apply where the amendment is sought at the hearing or as part of the process leading to the hearing of an appeal. There are some particular cases and principles to which we would seek to draw to the attention of your Honours.

If one may turn from technical questions of form to more general questions of discretion we submit, first of all, amendments will not be allowed if, firstly, they are so obviously futile that they would be struck out if they appeared in an original pleading. Secondly, we submit that amendments would not be allowed if they would cause substantial injustice to the other party.

As to each of those propositions they are to be found, if authority be needed, in Horton v. Jones (No.2) S.R. 305, 309-10 in the judgment of Sir Frederick Jordan. I apprehend the passage is very well known and it need not be referred to. We would say in a case such as this the super-added factors are these: first of all, an amendment after the close of evidence, and a fortiori, at an appeal, should not be allowed to take advantage of evidence given at the trial. We would ask your Honours to turn to the judgment of the High Court in Gordon v. MacGregor which immediately follows Horton v. Jones in folder No. 7. That is found in Vol. 8 C.L.R. page 316, and the relevant passage is in the judgment of Sir Samuel Griffith at 321. In a situation where it was sought to allow an amendment to cover a point founded on some oral evidence his Honour thought it was an improper exercise of the discretion to allow it so to be done. At page 321 his Honour said:

> "Here I would remind that it is a very dangerous thing after the close of the evidence ..."

Obviously what the learned Chief Justice is saying there is, "Quite apart from the view I have of that particular piece of evidence, it may be when examined fully a different complexion would have been put on it". It is to be observed the Chief Justice equates this sort of problem with the problem that faces the Court when a new point is sought to be raised on appeal when the point was not argued below. Indeed, in the case to which Mr. Gruzman referred yesterday of Curran v. William Neil, 1961, 1 W.L.R. 1069. It was said by Lord Justice Holroyd-Pierce at 1074 that the same principles apply. The relevant passage is in these terms:

> "The main strength of the plaintiff's argument on this appeal depends on regulations ... to give leave to amend".

His Lordship refers to the case of The Tasmania which seems to be the locus classicus of the cases dealing with the points sought to be raised above.

TAYLOR, A-J.A.: That case did not require any fresh evidence to be given.

MR. POWELL: Not on the part of the plaintiff and, indeed, ultimately the case went off on the basis of having construed the regulations their Lordships said, "It is futile because you would not have won anyway" which takes us back to the first point I put bearing in mind the judgment of Sir Frederick Jordan.

More importantly we would submit it would not be a proper exercise of discretion particularly after the close of evidence, and the delivery of judgment, to allow an amendment where facts are not admitted or are the subject of controversy. As authority for that proposition we ask your Honours to refer to the case of O'Keefe v. Williams, 11 C.L.R. 171. From the headnote, there was involved a claim by a person claiming to be a licensed holder from the Crown. The case having been argued in one way below the plaintiff, at the end of his case, sought leave to amend to raise another case although it was, on one view of it, a different legal way of stating the same sort of problem. Halfway down the second page it says:

> "At the trial of this action before Mr. Justice Cohen the plaintiffs applied to add a count ... action".

The headnote records there was no evidence of a breach of an express agreement but that the amendment asked for by the plaintiff should have been allowed as the proposed count was merely an alternative statement of the rights of the parties based on the admitted facts. I refer your Honours to page 185 of the judgment of Sir Samuel Griffith. At the bottom of that page his Honour rehearses some of the history which is perhaps desirable to be read since it raises or founds the argument that the facts were not in issue:

> "In the meantime the case had come on for trial before Mr. Justice Cohen and a jury ... flowing from the uncontroverted facts".

I stress that passage. His Honour continues:

> "I think, therefore, the case should be treated as if the amendments had been made ... now open for discussion and decision".

There seems to be little doubt in that case the facts were not really the subject of any controversy. A similar view is expressed by Mr. Justice Barton at page 201:

> "I come now to the question of amendment. The proposed new count alleging acts ... identical".

His Honour proceeds to refer to the judgment of Lord Justice Bramble which reads:

"My practice has always been ... I think the amendment should have been granted ... what should we do".

He then says, "What should we do", and agrees with the learned Chief Justice.

The judgment of Mr. Justice Isaacs at 205 says much the same thing. His Honour refers to the approach of the Privy Council in Connecticut Fire Insurance Company, one of the superabundance of cases leading from The Tasmania. Similar problems occur where it is sought to convert what was originally a case of fraud in the common law sense into a case of some equitable fraud such as a breach of fiduciary duty.

MASON, J.A.: At page 206 Mr. Justice Isaacs says:

"If the ... opportunity of advancing".

Apparently he had that in mind, if not on the question of amendment or perhaps on the question of justice or injustice, to allow the amendment.

MR. POWELL: Yes. Indeed, that is one of the views commonly expressed in relation to raising a new point below, "Can we be satisfied all the evidence is there?". This is perhaps a particular instance of that sort of approach.

TAYLOR, A-J.A.: The person seeking the amendment has to show that.

MR. POWELL: It would seem to be so although as Mr. Justice Mason has pointed out, Mr. Justice Isaacs says, "He who resisted, what would you have done?", which is rather reversing the onus, but the cases would seem to say the Court must be satisfied all the evidence is there.

JACOBS, J.A.: The only way the Court satisfies itself is to say to counsel for the respondent, "Well, what would you have done? You indicate what would have happened".

MASON, J.A.: In particular, in this case it might have been the nature of the case, the nature of the evidence was such that it prima facie appeared to the Court there would not be any real possibility of countervailing evidence coming into consideration but to safeguard that situation the question was put to the party resisting the amendment. It is not necessarily consistent with the approach that has been taken.

MR. POWELL: Indeed, one would say, prima facie, the Court looks at the nature of the case and says, "That is what evidence was given. What other issues would have been opened up if this other case had been made. On the balance of probabilities does it look as if there was ample room for fresh evidence. If it does not then you who oppose the

amendment tell us why that is not so, what would you have done, what evidence could you have led?"

Perhaps the prima facie approach is to look at the evidence in the case and then resort only to the questions if one has formed a prima facie view the amendment is proper, but that would seem to be a question that is material: can the Court be satisfied?

I ask your Honours to turn to the judgment of Sir John Harvie in Adey v. Fisher, 14 S.R., 407. The relevant passage is at pages 409/10. It is interesting only because it reflects in a local Court much the same approach that was taken in Nocton v. Ashberton much about the same time. It was a case in which the plaintiff originally sought to charge fraud against the legal personal representatives of an estate in which she was interested, the frauds being involved in her execution of a release of her interest in the estate. At page 409, the last paragraph his Honour said:

> "I may as well say at once I do not think this charge of fraud ... charge made on the proceedings".

His Honour then proceeds to say there was enough in the pleadings to put the defendants on notice that what was charged against them was a breach of fiduciary duty.

JACOBS, J.A.: Sir John Harvie says "If the plaintiff charges fraud ... on the ground of undervalue".

MR. POWELL: I can only assume in that context he was using the word "fraud" loosely, in the common law sense rather than the equitable sense.

JACOBS, J.A.: It was more the fact he said it would be unjust to set aside on the ground of undervalue and then he said, "In the present case the plaintiff would make out ... considerable undervalue is the main fact".

MR. POWELL: What we appreciate his Honour as saying is if you had put a bald claim on fraud and had had not included some assertion of fiduciary relationship and undervalue then it would be unjust to allow those things to be added but in the present case there was in the statement of claim an allegation of fiduciary relationship and undervalue.

JACOBS, J.A.: He says, in relation to where it would be unjust to set aside on the ground of undervalue, "Although ... referred to in the pleadings". That is not it. There must be a difference between his reference to undervalue in the first paragraph and his reference to gross or considerable undervalue in the second.

MR. POWELL: That may be so. I am afraid I misread

that. It is perhaps a convenient statement of the sort of approach.

A similar approach is reflected in the judgment of the High Court in Thompson v. Palmer. The appropriate references are at page 518 and pages 528 and 529.

TAYLOR, A-J.A.: It is difficult between cases which have been decided at common law and cases which have been decided in equity. You are dealing with an application to amend. One of the reasons why the application to amend was refused is that they ought not be allowed to make a case. The principles that are set out in Howard Smith at 13 C.L.R., do they refer to cases such as this, appeals by way of re-hearings?

MR. POWELL: May I reserve that?

It is probably relevant to the matter of discretion if one can see the case has been conducted on a particular basis. May I turn to the amendment of the case and the amendment of the ground of appeal and look at what we would comprehend are the relevant principles? We deal firstly with what we submit are the principles to be applied where it is sought to raise a point not taken below. It is our submission the principle is that the Court ought not to decide a case upon it and thus should not permit an appellant to rely upon a point taken for the first time upon appeal unless it is satisfied, firstly, that it has before it all the facts bearing upon the new contention as completely as would have been the case if the question had arisen at the trial. Secondly, that no satisfactory explanation could have been put by those attacked if an opportunity for explanation had been afforded to them in the witness box.

As I have indicated, the locus classicus would seem to be the judgment of Lord Herschell in The Tasmania. The report is included in the file at Point 8. It says:

> "I think a point such as this ... ought to be most jealously scrutinised ... to the point then suggested".

It would seem to be a view in accord with the views in the High Court that even though the pleadings may appear to raise another issue, if that issue has either expressly or sub silentio been abandoned it ought to be treated as not in the issue. It reads:

> "It is ... when in the witness box".

He then proceeds to examine the evidence. That passage has been adverted to time and time again in subsequent authorities. There are other cases but we will only turn to several of them,

but it does indicate a continuing application of that principle. The judgment of Lord Watson in the Connecticut Fire Insurance case at 479/480 is a passage that is commonly referred to as a classic statement of the relevant proposition.

At page 479 his Lordship in delivering the advice in the Privy Council stated:

> "Their Lordships are of opinion that in the circumstances of this appeal the appellants are not entitled to raise any issue except that of fraud ... justice".

That proposition points up the question to which Mr. Justice Mason referred earlier, the nature of the case itself may demonstrate that all the evidence is not there and fraud and negligence, certainly in the common law sense, are totally opposed. Even fraud and negligence in the equitable concept of fraud can be quite different.

JACOBS, J.A.: The principle seems to be fairly clear. It is a question of applying it. Are there any cases in the subsequent cases that have a particular reference?

MR. POWELL: I think not. They were put there for the purpose of completeness and as we indicated, we thought no great advantage would be served if we read them all. The Warehousing Importing Company of East Africa v. Jafferali, 64 A.C., I think is the latest we have been able to find. The judgment of Lord Guest, delivering the advice, prays in aid the judgment of Lord Watson. The power is undoubtedly there and we would not seek to suggest otherwise. The ultimate question turns on what might be called the judicial discretion.

Against the background of that submission as to the principle, may we turn to the proposed new pleading. We submit purely in manner of form it should not be allowed.

I turn now to what appears to be a page marked 2 at the top, to para. 6B. of the proposed re-amended statement of claim. Your Honours will see it is there charged that on a particular date Mr. Armstrong was told by Mr. Barton - -

JACOBS, J.A.: I think it is important that we are quite sure we are all dealing with the same document and in the same construction. My para. 6B is at the bottom of page 2 and on the copy my brother Mason has it is at the top of page 2.

MR. POWELL: As to 6B, the allegation is that on a particular day Mr. Armstrong was told by the plaintiff certain things and thereupon the defendant Armstrong told the plaintiff he would regret the day that he decided not to work with him; in our submission, that is not a statement of fact within the meaning of the rules, it is a pure

statement of evidence and vexatious and contrary to the rules of pleading.

Para. 6C charges that thereafter - one assumes from and after 15th October - Armstrong menaced, harrassed and intimidated the plaintiff for the purpose of weakening the plaintiff as against him and frequently threatened the plaintiff that he would be killed. There is a problem, we would submit, raised by the use of the words "menaced, harrassed and intimidated". It is at least value in content, if it is meant to merely be a statement of acts it is intended to be an interpretation of acts, it is in our submission a mixed allegation of fact and law and likewise would be contrary to the rules and embarrassing.

6D alleges that from about July 1966 the plaintiff knew that Hume was closely associated with and worked for Armstrong and as a man had certain characteristics. With respect, in our submission, that can be nothing else than a matter of evidence.

TAYLOR, A-J.A.: Is that so? If you assert a man knows a certain fact?

MR. POWELL: This is ultimately leading to the next problem and it raises a question of being vexatious and embarrassing in the context of the defendant knowing exactly what it is that we have to face. Is it to be the issue that Mr. Barton knew that we knew Mr. Hume, or is it to be the issue that either upon a certain factual basis Mr. Armstrong was guilty of duress or upon a certain factual basis a situation of influence arose? What is to be the issue, with respect? It may sound carping, your Honour, but in a case of this kind where the plaintiff - -

TAYLOR, A-J.A.: It depends on what your statement of claim is. If it is going to allege undue influence I would have thought this was clearly evidence.

MR. POWELL: Yes. We would submit that when one does finally work through this it is demonstrated at best as evidence which will be tendered as part of a case seeking to make out a relationship or a position of dominance.

JACOBS, J.A.: But you have to be careful that in pressing this argument you do not, when you find a general conclusion of fact, classify it as an allegation of law, because you cannot have it both ways.

MR. POWELL: That is the problem and one appreciates it. What we wish to point to is some problems that arise in the pleadings and some matters, we suggest, which render it irrelevant because the allegation is demurrable if it is sought to found a cause of action and if it is, with respect,

allowed in, so we would adopt the judgment of Sir Frederick Jordan, with respect, that it is not the function of this Court to scrutinise with a view to rescuing what can be rescued. If one gets to that situation, it should not be permitted on technical grounds. We do not wish to go into this in any great detail but it shows your Honours the sort of problem we are concerned with.

We would suggest that 6D is a statement of evidence.

As to 6E we would suggest that it is a statement of evidence simplicater and, what is more, in the absence of an allegation - which does not on our reading appear to be there - that the watchings were carried out by persons either engaged by Armstrong or of whose activities he was then aware, it is irrelevant. I think Mr. Gruzman has indicated to your Honours that he has been able to find no authority dealing with what might be called third party duress and we will at an appropriate stage be asking your Honours to look at a decision of the Court of Appeal in Talbot v. Von Boris (1911) 1 K.B. 858. In our file that is No. 12. In that case the Court of Appeal lays it down that a person who seeks to rely on what might be called third party duress must allege and prove that the third party to the equation knew of and took advantage of the duress in question.

So we would submit that, as in para. 6C, there is no allegation that these persons were, as it were, tools of Armstrong or persons of whose activities he knew and took advantage and it is both irrelevant and demurrable.

JACOBS, J.A.: There are a number of references in one of the cases to duress in the report, and they refer to this subject matter.

MR. POWELL: They do. Unfortunately we have not had time to get them out. They seem to say, with a rather simplistic approach, that so long as there is duress - no matter whose responsibility - that is the end of it.

JACOBS, J.A.: No, they do not put it like that. In Throughgoods' case at first glance one may gain that impression but it is not capable of meaning that. It says in the text "If a stranger.."

MR. POWELL: In addition to Talbot v. Von Boris, the case involves a particular question of onus of proof, there is another authority which, likewise, is in our folder under point 12: Chaplin & Company Limited v. Grammall (1908) 1 K.B. 233. This deals with a situation of third party, undue influence, and the Court found it was a sufficient defence, as they drew the inference that the other party to the arrangement ought to have known that in this situation such an onus would apply, and not having inquired was fixed with that imputed notice. We

will come to this a little later but it is proper to observe that this is the foundation for the submission that 6E and 6F are defective in not alleging the agency of those persons for Armstrong or his knowledge in taking advantage of them.

6G alleges that on a particular day Armstrong threatened and menaced Bovill by informing him of certain things (of which we have heard at great length, one regrets to say). With great respect, that would have nothing whatever to do with Barton except as evidence in support of his case as going to show a state of mind. It could have no other relevance at all and one questions indeed whether it even has that relevance. In our submission that is clearly embarrassing as seeking to raise an issue.

It is not made any better by para.6H which alleges that the menaces and threats were forthwith conveyed to the plaintiff by Bovill and believed. Again the two compounded merely go on to say that by reason of certain factual matters he had a certain state of mind.

JACOBS, J.A.: You say you have to allege a state of mind but not the factual matters? You decline what should be done at all?

MR. POWELL: Yes, I do, your Honour. The defendant must have some advantages but I am beginning to wonder whether they do.

6I is a compounded paragraph. It may be sufficient, and I do not seek to avoid the problem your Honour has raised, if one alleged merely that during a certain period the plaintiff was in fear of Armstrong. Indeed, I would question whether one would have the temerity to suggest that was not a proper statement of ultimate effect. Then you add Hume, he believed on reasonable grounds that Hume had a hatred of him, and that seems to be going on in the same way.

6J is a problem because on one view of it it may be a statement of ultimate fact but although so much of it as alleges that the defendant sought to establish an ascendancy, one would suggest is irrelevant. The relevant fact, if it be relevant at all, is the fact of ascendancy.

JACOBS, J.A.: One minimum thing that I would imagine could not be permitted would be this allegation that there was an ascendancy over Bovill in the affairs of Landmark because that is not the case at all. Ascendancy over Barton has been the whole case, but that is a passing problem.

MR. POWELL: Each paragraph contains these allegations.

MASON, J.A.: Not all of them, I think some contain allegations of evidence.

TAYLOR, A-J.A.: You said that some portion of 6G was relevant?

MR. POWELL: No, not as I recall. It might be relevant in terms of evidence. Your Honours recall the basis on which the learned trial Judge admitted this evidence was that it went to the state of mind, but it is relevant in an evidentiary rather than a pleading sense.

6K raises a similar sort of problem because it alleges, as it were, an attempt - or as an alternative the effect of an attempt - to ascend. That is irrelevant, we would submit, in the light of the authority on ascendancy. Indeed, if it were put in that way I would question whether one could properly be permitted to allege - because it was embarrassing.

JACOBS, J.A.: You say that you have in one paragraph the general subject matter?

MR. POWELL: General subject matter may be all right - -

JACOBS, J.A.: But it is irrelevant if it is put as a separate allegation of fact?

MR. POWELL: Yes. One can plead alternatively, as your Honour has already decided in that dreadful partnership case.

As much as I would like to say something about the intervening paragraphs, they were in the original pleadings and I am deprived of that pleasure.

One can then turn to para. 12. There is an additional part introduced in that paragraph. About halfway through the new para. 12 it is alleged that the plaintiff told Armstrong (read). Either it is agreed or not an agreement. If it is not an agreement it is a question of evidence.

As to para. 12A, we would raise the same objection based on Talbot v. Von Boris and Chaplin v. Grammall.

JACOBS, J.A.: I would hesitate to rely only on the view that it is not for this Court to deal with amendments in that way. I think we have to get the substance of it but I can understand this being put forward.

MR. POWELL: It was not our wish really to rely on technicalities, but if this is the "late final extra" we are greatly troubled as to this being said to be a statement of the issues before this Court.

MASON, J.A.: That is quite understandable.

MR. POWELL: Returning to para. 12A, we refer to

Talbot v. Von Boris and Chaplin v. Grammall and we suggest on those authorities it is irrelevant to the extent to which it is sought to raise these matters and is demurrable.

12B is at best a statement of evidence. The plaintiff saw in a document a statement made by Vojinovic, and at worst it is utterly irrelevant.

12C is at best again a statement of evidence. It may go to Barton's state of mind but it is certainly not any issue as we understand. 12D is again a compound statement of evidence; Bovill told Mr. Barton something. That may be so, but it is not an issue as we understand the pleadings.

14 introduces some new thing "was the result of the undue influence and the unlawful pressure of Armstrong and of Vojinovic", and Mr. Hume makes his appearance as well. Clearly enough, to the extent to which it prays in aid Vojinovic and Hume, Talbot v. Von Boris would be the appropriate authority that it is utterly embarrassing to have introduced in this case as an issue.

There are some other matters of law which we will not delay unduly with, because it is called "undue influence" and in another it is called "unlawful pressure".

TAYLOR, A-J.A.: Are you taking the point that it is not proper to allege undue influence in the statement?

MR. POWELL: At the moment we are merely being technical, but I want to come to the substance later. We would say on a purely technical ground it should not be permitted and we would also say on matters of substance and discretion they are likewise futile and as a matter of discretion they should not be permitted.

Other comments are made, and perhaps I have said enough to indicate the nature of our fear about this document. The document we have handed in, in a rather cryptic way, makes the sort of complaint we would wish to make and unless your Honours feel that benefit is to be obtained in going through it laboriously, perhaps I have said enough.

JACOBS, J.A.: What it seeks to raise is that there was a relation or situation of onus between Mr. Armstrong and Mr. Barton. We will overlook Mr. Bovill. It also seeks to set up that if the threats were established there was a situation of illegality?

MR. POWELL: Yes. That seems to be what it ultimately comes to, but the highway to the desired end is full of S-bends and right-angled curves which are a hazard to the driver.

Having taken that point we would wish - and this is going to the substance - to say that the proposed amendments in any event are futile. Whether or not the case is made in duress or in undue influence or, indeed, on an analysis of Jones v. Wetton or the Johnson type of case, the ultimate question is whether the plaintiff was induced by duress or overcome by influence or had in his mind as a material reason for doing what he did the activity complained of. His Honour has found that Barton entered into this transaction for purely commercial reasons, that is the inducement, and that overbearing was negated. Unless his Honour's finding on that matter can be over-ruled the amendments will be futile and, indeed - assuming against ourselves that his Honour's findings are over-ruled, that will likewise be futile because the ultimate question would be decided in favour of the plaintiff on the case as originally found.

JACOBS, J.A.: So you say that all the matters that are raised simply went to the case that was made?

MR. POWELL: No, perhaps I misunderstand your Honour, because if the plaintiff is to succeed the manner of defending the case, we suggest, would perhaps differ.

JACOBS, J.A.: Do you mean because of onus?

MR. POWELL: It might very well be, your Honour. But first of all we would submit, as we have indicated to your Honours, that the exercise is futile because if the plaintiff is to succeed in inducement he would succeed whether the amendments are made or not. If the plaintiff is to fail on inducement it cannot be demonstrated that this is merely another legal way of stating his position so that he can succeed.

JACOBS, J.A.: That is correct, if it is possible to reach a definitive finding and if the trial Judge did.

MR. POWELL: We suggest, with respect, that he did.

JACOBS, J.A.: Without reliance on the onus?

MR. POWELL: Yes, your Honour. Indeed, as we would put, in the face of the specific finding by his Honour any advantage that the onus question posed to the plaintiff, even if they got their amendment, the onus is truly irrelevant and we would with respect say that in fact it is very useful in time of trouble when you cannot tell who is telling the truth.

JACOBS, J.A.: Not only the truth, but the balance of probabilities.

MR. POWELL: As I say, one hesitates to put that because one may be thought to be over-stating.

TAYLOR, A-J.A.: I did not catch the last thing you said a moment ago when you said "even if the trial Judge's finding is set aside".

MR. POWELL: If the trial Judge's finding is set aside and there be put in its place a finding that, at least in a relevant sense, it was Mr. Barton's fear that led him into the agreement, then undue influence and all these other things are totally unnecessary.

TAYLOR, A-J.A.: You mean that is a case of duress?

MR. POWELL: It is a case of duress. Perhaps it is merely giving duress another name, so that in equity you do not call it duress - you call it undue influence.

JACOBS, J.A.: I think it is important to realise that in the facts of this case it is one or the other.

MR. POWELL: Indeed. We have made available to your Honours, so far as we have been able to, the best discussion on undue influence, which is taken from Williston, and this points out that the ultimate step seems to be an equity concept for it. Eventually it comes down to four categories - undue influence and the other three categories and for equity purposes undue influence includes common law duress, but it is certainly merely another case of putting another label on the same sort of facts - whatever they might call it at common law. It is undue influence here. The form of undue influence was that it was recognised. As we suggest with respect no advantage will flow to the appellants on questions of onus if the finding cannot be set aside - no advantage is to the plaintiff.

TAYLOR, A-J.A: That is the appeal?

MR. POWELL: That, we suggest, is the appeal.

JACOBS, J.A.: You say no reliance was placed by the trial Judge on onus?

MR. POWELL: The ultimate question - that is so - onus. But the subsidiary question of onus was relevant, but on the ultimate question, no.

JACOBS, J.A.: And onus on the subsidiary question went to the ultimate question?

MR. POWELL: It may be said that they do. Your Honour recalls, for example, the rather extended attack that has been made on Sergeant Wild and Constable Follington and all those people, and the learned trial Judge has said that Mr. Barton seeks to allege this activity and he bore the onus. His Honour found at least that he had not discharged that onus. It may be said that the learned trial Judge, sub silentio, then said "there being no

evidence of this activity, there is missing a step from the ultimate question the plaintiff would wish me to find on, and on the ultimate question there is no evidence so I could not suggest in the substantial issues it is irrelevant".

JACOBS, J.A.: If you were wrong on that, have you an alternative submission?

MR. POWELL: Yes I have.

The next submission is that to allow the amendment would cause the greatest possible injustice to the defendants for a variety of reasons, including the displacement of the question of onus after all the evidence has been taken and that, with respect, cannot possibly be remedied. You cannot say to the defendant "you fought on the basis that it was for them to prove the case and you were wrong. It must be you". That is an injustice that is incapable of being remedied.

TAYLOR, A-J.A.: It was not the defendant who fought it on those lines, it was the plaintiff.

MR. POWELL: Quite so. Perhaps when I gave that hypothetical conversation - the plaintiff said "you made a mistake and you are the one who is going to suffer" - but that cannot be remedied.

JACOBS, J.A.: I think that is putting it too widely. I think it is quite correct to say that if you wish to set up a factual situation at common law you change the onus. I can understand your submission, that one should not be allowed to amend a pleading nor to rely on a state of facts which at common law would change the onus. But if there was an error even on the case as it was as to precisely what the onus was, then I cannot see that you can say that the case is fought all on onus. The case must be fought on the proper law.

MR. POWELL: What I had in mind was the argument advanced by Mr. Gruzman that this was situation and onus, that in law once a situation of onus be established there is, as it were, a swinging onus so that although the ultimate onus remains on the plaintiff, halfway through there is a shift of evidentiary onus.

JACOBS, J.A.: I do not think he put that.

MR. POWELL: Perhaps he did not concede that the ultimate onus lay on him.

TAYLOR, A-J.A.: If the Judge had, on the case fought before him and on the case pleaded, got onus wrong and as a result there was a wrong decision, I would think that this Court could set it right. Is not your complaint that everybody went to Court and fought the case on duress, in which there were two issues, as to both of which the onus was on the plaintiff to prove, and he

wants to go back to another Court on another set of issues of which the plaintiff only has the onus on the first?

MR. POWELL: Yes.

TAYLOR, A-J.A.: You stated that if any of these amendments were substantial amendments as to illegality or undue influence - -

MR. POWELL: If they were undue influence, that could be so, but if the duress remained one has a problem there perhaps, with one onus there and quite a different onus somewhere else. Quite apart from the fact that the plaintiff, on the listing of the very first onus, this would lead to a Howard Smith situation, to say that by way of amendment you give him a change of onus. That would be a situation which is beyond remedy.

For that reason, if for no others, we submit that the amendments ought to be disallowed. And we would add, in praying in aid Sir Garfield Barwick's statement. Indeed the one thing demonstrated in this case is that everything was hotly contested and the issues are in many respects different if these amendments are introduced.

TAYLOR, A-J.A.: If you had a case of undue influence, some of these equitable defences might not have been abandoned?

MR. POWELL: In Point 9 in the outline there are defences we wish to raise. We would not have abandoned Laches, and I would seek to rely on it, not only prior to the suit but also in the conduct of the trial.

TAYLOR, A-J.A.: I have often thought that there should be such a doctrine.

MASON, J.A.: And you say that would put a different complexion on it?

MR. POWELL: They sometimes say that hard cases make bad law.

There are the other defences, to which his Honour Mr. Justice Taylor referred, and there are defences which certainly, for my part, would not have been abandoned.

MASON, J.A.: Can you itemise the new defences that might become relevant in the new and extended situation and the respects in which it could possibly be said that the facts are not beyond - -

MR. POWELL: I would certainly endeavour to do this. As your Honours are aware, I have only been in this matter on an appeal level for a comparatively short time. I doubt whether in the next day or two we can but may I have leave to submit that to your Honours in written form, even after the end of the case?

JACOBS, J.A.: Provided you give a copy to Mr. Gruzman.

MR. POWELL: Without elaborating on these matters, those are basically the submissions we make. Might I merely put in by way of situation Bromley v. Ryan to which Mr. Gruzman referred? It is undoubtedly true that at the tail of the chase an amendment, which had quite substantial effect, was allowed but it can be demonstrated by reference to the statement of facts that the question of whether or not the amendment would be allowed (having been decided in favour of the defendant), the plaintiff was then given leave to re-open and lead such evidence as he wanted. My recollection is that he did in fact lead some evidence. I think I picked that up in the judgment of Fullagar, J. There is a reference certainly to the fact that Taylor, J. offered the plaintiff a chance to re-open. I may be in error but I think I can give your Honours the reference to it at a later stage. It is in the judgment of Fullagar, J., that the opportunity was availed of by the plaintiff who would otherwise have been disadvantaged because the issue was being raised by the defendant by way of amendment.

JACOBS, J.A: Of course, onus is a difficult subject and conceivably it might be bound up with the type of case and cause and effect that is to be found.

MR. POWELL: We would seek at a later stage, if your Honours wish, to address some argument on the nature of undue influence and the issues that have to be established in various cases.

JACOBS, J.A.: It seems, does it not, that Mr. Justice Street examined the matter with this test in mind: "Conceding that there were threats to his life, I have to be satisfied that if it had not been for those threats he would not have signed it"?

MR. POWELL: That would seem to be the test his Honour applied. Although it may be a little against us, it is hard to question that as a generalised statement. If it was in some way material in the sense that it was part of the pressure that led to the ultimate result that is all that need be shown.

JACOBS, J.A.: He applied a causa sine qua non, without which he would not have read into it - the agreement as the test of causation appropriate in the circumstances.

MR. POWELL: That would seem to be so, and we find it difficult to question that as a proper statement. It would seem, as we read the authorities, so long as it has a material effect of producing the result, that is all that needs to be shown. The

plaintiff, as we read the authorities, does not have to go so far as to say "That is the only reason" - we would have to argue - -

MASON, J.A.: Precisely what do you mean by the word "material" in the expression "material effect"?

MR. POWELL: That unfortunately leads one into the question of semantics.

MASON, J.A.: I was hoping it was going to lead you to a matter of substance. If it is only going to be a matter of semantics, you need not answer.

MR. POWELL: It seems to be used in a variety of ways. May I distinguish this situation, which is commonly found in fraud and misrepresentation cases: the misrepresentation may be material in the sense that it may have a purely technical view. It is only material so as to make it subject to action or relief if it in fact induces in some way or other. One should not use, perhaps, the word material in the first sense but should say "possible" or "relevant". Perhaps one should leave material to indicate only a representation or fraud. That seems to be the sense in which the word material is used.

JACOBS, J.A.: Could I suggest that "appreciable" might be a useful word when you are dealing with effect? We are not dealing with its materiality, we are not dealing with it in substance. It may be that the word "appreciable" avoids the semantic difficulty of the words "material" and "substance".

MR. POWELL: It may be, and yet I hesitate to use it. It seems to lead one into some sort of value judgment.

MASON, J.A.: The word "appreciable" has one meaning, although the quantum of it may vary. The difficulty of the word "material" is that it covers another area altogether, and so does "substantial".

MR. POWELL: If one reads into the word "appreciable" only that it has some weight then I could not question that.

JACOBS, J.A.: Is it not possible that to look for the causa sine qua non is to look for the sole cause?

MR. POWELL: That may be, your Honour. It may be that, luckily for us, his Honour said it had no effect at all.

MASON, J.A.: But he did not say that, did he?

MR. POWELL: In the ultimate, yes. It is true that if one looks at the phrase step by step his Honour does say "It was not Barton's fear that drove him into the agreement" at page 3219.

JACOBS, J.A.: If you do all this in the light of the test which I have mentioned, that he was looking for the causa sine qua non, then the difficulty that he was in becomes perhaps a little more understandable. But if you are looking to be satisfied that he would not have entered into it except for the threats, then in that atmosphere you can say "the real thing in this case was his commercial instincts", and if you are not satisfied that he would not have entered into it except for the threats, then any small impact of the threats can be ignored.

MR. POWELL: That may be the point, your Honour.

JACOBS, J.A.: That is why you may wish to reconsider your agreement with my causa sine qua non - -

MR. POWELL: I am sorry, perhaps I adopted the wrong phrase. I thought I had indicated to your Honours that it seemed to us that the proper test was: did it have any effect leading to the agreement - looking for the causa sine qua non also.

JACOBS, J.A.: These phrases do not help a great deal, they only state the attitude or the facts. If you are looking for the real proven thing, who would ever know?

MR. POWELL: That may be the problem the law has to solve, by his conduct, rather than by getting into the metaphysical question.

The next submission we wish to make deals with whether or not any additional grounds ought to be permitted to be raised. As to that we would merely pray in aid the judgment of Lord Hersholt in "Tasmania" and Lord Weston in "Connecticut". Your Honours just cannot be satisfied that all relevant material is there in evidence. Nor can your Honours be satisfied that there is no further manner in which other material could have been offered for the defence. If that is so, that is enough to prevent any ground being raised other than those in the Court below.

JACOBS, J.A.: Mr. Justice Windeyer has gone into this question of causation and refers to "Causation and the Law".

(Luncheon adjustment).

MR. POWELL: With those preliminary observations might we now turn to the case made below? That case in our submission, as we foreshadowed earlier, was a case of duress in common law, in the common law sense simpliciter, and as opposed, and as recognised being opposed to anything else, as found by the learned trial Judge at page 3102, in the earlier part of his Honour's judgment: "In determining whether this case has been made out ... denies them both". It is perhaps superfluous to say that

a case of duress in the common law sense involves words or threats of physical violence to the plaintiff or members of his family in certain circumstances. But for convenience we have included in the file headed "Point 12" certain of the authorities and references dealing with that subject matter. The first document is material from which the learned trial Judge set out his statement of principle in his judgment. It is not in fact from, as we had thought, Halsbury's Law of England but from a separate publication called "The Encyclopaedia of the Laws of England" said to be compiled by "the most learned legal authors". This is the second edition, and I think it stretched between the years 1906 and 1909. Ultimately we located it, if one desires to locate it again, in the Supreme Court Library and we found it upstairs in the gallery, for what that is worth. It is of the nature of a latter-day Stroud and attributes certain meanings and certain authorities to words. It is rather in the nature of a legal dictionary. We have put this in because that was the actual source of the material in his Honour's statement of principle and it is to be noted that in the statement "intimidation" the learned authors have said (read). I might give a reference to Cummings' case (1847) 11 Q.B. That is not a dissimilar statement of principle.

JACOBS, J.A.: Why do they say in the preceding paragraph "where any contract has been entered into as the result of duress"?

MR. POWELL: We could make much the same meaning of the phrase "under influence" in the sense that this is a phrase having an inoperative effect.

JACOBS, J.A.: You say "as the result of" is the same thing as "under the influence of"?

MR. POWELL: In the sense that we would attribute to that phrase the same consequential effect rather than a coincidental contemporaneous state of affairs.

JACOBS, J.A.: In other words, you can envisage a situation where a person could be under the influence of duress but not affected by it?

MR. POWELL: Yes, and quite apart from this case one sees, for example, in misrepresentation cases situations where there is a misrepresentation which could undoubtedly have influenced but been found not to influence. One calls to mind only two cases, perhaps, Atwill v. Lindall, one of the standard text book authorities, where there was a contract involving the sale of a mine and the vendor had made certain representations as to the output and the productivity and the profit of the whole enterprise. The putative purchasers in effect said "We will buy if we can satisfy ourselves that these representations are correct", and they resolved to send - and did send - to the mine a deputation designed, as it were, to check up on the accuracy

of the calculations. This deputation was afforded every facility. Then they received a favourable report and even though the report did not find out that the representations were untrue, the House of Lords said it was a representation which could have induced and in fact did not and "that unfortunately is the end of it".

In Smith v. Chadwick (1884) 9 A.C. at 187 a similar situation arose, involving a prospectus in relation to a public company. I did not intend to refer to this but, just having looked at it now, I might point out that in the judgment of Blackburn, J. his Lordship refers to the fact that there were four representations relied on. Two were disposed of in argument as not being untrue and two were left and were clearly untrue. A statement that a Mr. Greive was to be a director of the proposed enterprise was untrue, and then his Lordship proceeds "that if anyone who took shares ... ". His Lordship then proceeds to deal with the other representations and said "These are representations that could have had an effect". He was aware of that and said "I saw a statement that Mr. Greive was to be a director. I had never heard of Mr. Greive before and it did not mean anything to me". As to the other one their Lordships came to the conclusion that the plaintiff had not sufficiently proved that he was influenced.

So one could have that situation. True it is that it is not a complete analogy, so far as one can really find a complete analogy, but it is purely an example of the fact that the law does recognise that a thing may be relevant in that it may have an effect, but unless it is shown to have that effect it is of no assistance to him who relies on it.

Reverting to the material in the file, I am not sure whether your Honours' file has an extract from the 2nd Edition of Halsbury. There is a reference in Halsbury, Vol. 7, 2nd Edition, page 98 et seq dealing with the subject of duress and contract, and in the 3rd Edition this appears at page 94.

The next extract is the most recent edition of Chitty, 23rd Edition, paras. 341 et seq. At para. 341 there is some discussion of the problem that your Honour Mr. Justice Jacobs adverted to earlier, as it were, the labouring of duress and whether it becomes undue influence in equity. The nature of duress is dealt with in para. 342 and in para. 347 there is a reference to who must suffer the duress.

JACOBS, J.A.: I think we are on a different thing. We are dealing with para. 137?

MR. POWELL: That is the 2nd edition of Halsbury, your Honour.

The next matter is headed "Vol. 8, contract" which is the 3rd edition of Halsbury.

JACOBS, J.A.: Why go to the 2nd edition?

MR. POWELL: Only for completeness. When we first went looking for the Encyclopaedia of the Laws of England we thought that it would be Halsbury and we got the second edition of Halsbury, but when the pages did not marry we went elsewhere. This is only for completeness.

The current edition of Chitty is the 23rd dealing with the chapter headed "Undue Influence". Paragraphs 351 and 352 (at page 171 of the Extract) - say (read). This appears under "General effect of duress". Then under the title "Duress exercised by a Third Party" - (read). They are the references which follow the extract and perhaps it is convenient to turn to the two cases of Chaplin & Company Limited v. Grammall and Talbot v. Von Boris.

Chaplin & Company Limited v. Grammall (1908) 1 K.B. 233 was an action against a lady who had executed a guarantee on her husband's account. The form of guarantee had been signed and the husband, in order that he may obtain the wife's signature to it - (reads headnote). Although their Lordships who made up the Court of Appeal did not expressly say the onus lay on the defendant to the action to establish knowledge, it is clear from their Lordships judgment that they imputed such knowledge.

Might I take your Honours in the first instance to the judgment of Vaughan Williams, L.J. at page 237: "In my judgment this appeal should be dismissed ... unaffected by such pressure and ignorance".

The point is made clear in Talbot v. Von Boris. This was an action against a wife concerning joint and several promissory notes (reads headnote) so the question there was essentially one of onus.

The leading judgment is again that of Vaughan Williams, L.J., at page 858. After referring to the fact that the decision really turns on the true construction of the section of the Bills of Exchange Act, "In this case it is not disputed that the defendant signed the notes on which the action is brought ... in good faith". This harks back to what your Honour Mr. Justice Jacobs said to Mr. Gruzman when referring to the case from Germany as to whether there was a problem of defence of bona fide purchase without notice. "I think it will really be seen ... I cannot assent to that contention". So his Lordship was saying quite categorically "That is not the way onus goes".

A similar view is expressed in the judgment at pages 862-3: "In my opinion the law as to onus

of proof as regard duress is the same as between the maker of the promissory note and the payee who advances money on it ... lay on her". His Lordship refers then to Taylor on Evidence.

A similar expression of opinion is found in the judgment of Kennedy L.J. at page 866. I do not know that any great virtue is obtained in going to that as well.

So we would submit that the case the plaintiff had to prove was firstly conduct of the relevant type and that that conduct was conduct on the part of the defendant respondents and their agents or, if it be conduct on the part of some third party, that Mr. Armstrong knew of it.

In addition we would submit that quite apart from the fact that the conduct must be of that character, it must have an operation. So we would submit it is for the plaintiff to show that the threats, if not the only reason, were at least one of the motivating causes of the agreement. The reference to Halsbury and Chitty support that view, as also does the material in Williston which we have included in the folder.

At page 4497 is the extract under the title 1604 where the learned authors write "whatever definition is adopted it is clear that in order that a transaction may be voided on account of duress or undue influence it must appear that the consent of the party seeking to ... he was actually influenced by the duress of undue influence to give his consent ... would not have done otherwise". That would seem to be, if one looks at the footnote, a re-statement of the law of contracts or a summary of it.

Finally we would submit that it is clear beyond any peradventure, indeed it was accepted by the plaintiff at the trial, that the onus of proving the existence of each element lay on his so that if in fact he failed to discharge the onus he must fail in the suit.

TAYLOR, A-J.A.: If you are right about that it means when you are considering the learned trial Judge's judgment, as he makes his findings, you only have to consider those threats and intimidation made by Armstrong himself?

MR. POWELL: In our submission.

TAYLOR, A-J.A.: The telephoning but not the watching?

MR. POWELL: On the way his Honour's judgment goes I think it is proper, although it may be open because his Honour says "I think possibly Mr. Armstrong was involved in some activity adverse" - it may be one could rely on that. You don't have to consider the Vojinovic incident at all.

TAYLOR, A-J.A.: On that finding?

MR. POWELL: If this be, we submit with respect that it is, a true statement of the law, then his Honour - not having found Mr. Armstrong involved in the Vojinovic transaction - finds, as it were that Vojinovic becomes of utter irrelevancy.

TAYLOR, A-J.A.: It goes further than that, because his Honour's finding was that he was in a state of mental torment and I have always taken that to mean "as a result of Vojinovic".

MR. POWELL: Indeed, and we submit that had it not been for Vojinovic his Honour, with respect, would have espoused the view that Mr. Barton himself espoused on the telephone early in the morning - "you ought to be in Callan Park". That is the only effect of the telephone calls, and he treated Armstrong as he indeed described him, according to Mr. Bevill as "that madman", and the threats ...

TAYLOR, A-J.A.: His Honour having found that Vojinovic could not be laid at Mr. Armstrong's door, he did not make any assessment as to how that affected the terror or state of terror in the plaintiff. He went on to describe the state of terror and described the plaintiff's condition as the result of the intimidation by Vojinovic.

MR. POWELL: With respect, one can say that the learned trial Judge's findings amount to this: before Christmas Mr. Armstrong's telephone calls or threats had no effect at all except to annoy him. He thought he was a silly dangerous lunatic - perhaps "fool" might be a more apt description. Certainly by Christmas there is no demonstration on the evidence that after the Annual General Meeting Mr. Barton was in any way worried about his personal well-being. We know that after the Annual General Meeting the bodyguard was dispensed with and never thereafter got again. The question which his Honour seems to have considered in regard to the extent of fear from the Vojinovic incident was that it was not a justifiable terror of his life. If one takes that out of the equation entirely there is nothing, because his Honour says that the telephone call of the 12th had no effect. Mr. Barton says (his Honour found) "I am not going to be blackmailed into this agreement" and, no doubt sub silentio, "you silly fellow". The alleged telephone call of the 16th did not occur. So there was nothing said, on his Honour's finding, which could produce here - other than this Vojinovic incident. If that comes out of the equation then there is no relevant threat at all. But even if it were shown that he was in fear it does not advantage the plaintiff because he cannot say that we were in any way involved with the chain of events which created that fear.

JACOBS, J.A.: You say that is a finding on credibility?

MR. POWELL: It is, essentially.

JACOBS, J.A.: You mean that?

MR. POWELL: Essentially, your Honour. We seek to elaborate it a little more fully. Might I foreshadow it by saying that motivation is essentially a subjective question. Probably the only way you can give evidence of motivation is for the allegedly affected person to get in and say "I was terrified". The only way to test that is to say "How credible is that?"

JACOBS, J.A.: How credible in relation to surrounding circumstances, or in relation to the demeanour of the individual?

MR. POWELL: Both, your Honour. Primarily we would submit that the primary test of this sort of evidence is demeanour. The surrounding circumstances or assessing against possibilities or probabilities can, with respect, be not much more than secondary test.

JACOBS, J.A.: Whether you believe the man or not?

MR. POWELL: Secondary test - whether you believe him or not - because one can say (as indeed one so often finds in medical issues in common law trials), is it consistent or inconsistent? If it is consistent, that goes into the scale on one side. If it is inconsistent it goes into the scale on the other. The primary test is not the only test, it must be what assessment do you make of the witness himself?

JACOBS, J.A.: Whether he is wrong or not?

MR. POWELL: Yes.

TAYLOR, A-J.A.: What sort of a person is he?

MR. POWELL: Yes, credibility, demeanour. Again I hesitate to get into a semantic debate but I suppose one can say "how acceptable is it, coming from a man of this type?"

JACOBS, J.A.: But there is an important question which arises and which is not dealt with by saying whether you believe him, because you can disbelieve a man because he is lying or you can disbelieve him because his memory is faulty. Both of those spring from demeanour to a certain extent but the first one (of lying) springs absolutely from demeanour. You do not categorise a man as a liar unless you are dissatisfied with his demeanour. You categorise a man as having a faulty memory because there is a discrepancy between his account and the probabilities or the account of other persons or something of that kind. There is an essential difference between the two.

MR. POWELL: Quite so. But again, with respect, demeanour comes even into the "Not acceptable but not a liar" assessment, because one gets, for example, the situation where Mr. Barton proclaimed himself as a man of enormous memory.

TAYLOR, A.J.A.: He got a specific finding that he had not.

MR. POWELL: Yes.

JACOBS, J.A.: "Bad memory" - that is thrown into the negative side.

MR. POWELL; It demonstrates two things. He is not half as good as he thinks he is and, equally as a consequence of that, his evidence must be scrutinised with very great care.

JACOBS, J.A.: But you scrutinise it against probabilities.

MR. POWELL: Scrutinised in one sense against the probabilities, and, indeed, against the other - the oral evidence.

JACOBS, J.A.: If it comes to a question of conflict between believing A and disbelieving B, demeanour apprehends quite a difficult area.

MR. POWELL: It is an accumulation. We would accept that it is not just a question of whether one can say that Mr. Armstrong is an incorrigible liar or Mr. Barton is an incorrigible liar.

JACOBS, J.A.: In other words you decide a man has a bad memory by the conflict between what he says and the proven facts, in the light of his statements?

MR. POWELL: It is his behaviour that leads, as it were, to characterising this. One sees first of all a disparity between something on the one hand and the unequivocal or unattacked fact on the other and then one has to say "Did he do that deliberately or did he genuinely believe?" His Honour says in some cases "is it the result of understandable reconstruction or is it just something he plucked out of the air?"

JACOBS, J.A.: I over-simplified it. What you say in effect is that if the Judge had believed Mr. Barton that was the end of the matter?

MR. POWELL: In a sense that is so.

JACOBS, J.A.: If he had believed him he would have accepted that he did this under the influence of threats?

MR. POWELL: Yes.

JACOBS, J.A.: That would have been the end of

the case. But he did not accept him to that extent and therefore it depended on Mr. Barton and it depended on the witnesses. Therefore it is not renewable? That is what your case really comes down to?

MR. POWELL: Ultimately, in its most simple form, that is what it comes down to.

JACOBS, J.A.: Since he could have decided by observation in that way, since the problem was soluble in that way, it was therefore a matter for the trial Judge.

MR. POWELL: Indeed, the only person who gave evidence of motivation was that person.

JACOBS, J.A.: The only person who could?

MR. POWELL: Yes, the only person who could, it is essential to believe. All Mr. Bovill could say is that he told him certain things, and one puts that into the scales.

TAYLOR, A-J.A.: Is it true to say that he was the only person? If you had threats that would be likely to affect someone, and if you had some other factor pointing against the commercial undertaking you would get some support.

MR. POWELL: That is undoubtedly so,if one had been able to say "There is a definite threat" and in pointing to the threat able to show that such a threat had this effect, or had the effect that Mr. Barton said it had. There is his course of conduct - "every threat or act is consistent with terror" - but not a single act is inconsistent with terror. Adding the whole lot together, does the inference you draw from the conduct support the whole testimony? Indeed, if it had been an inference all one way we would apprehend, with respect, his Honour would have found that way but ultimately, in what we suggest is the crux of it in a situation of competing testimony and competing inferences, not one of which preponderates, credibility must be the final solution and we will take your Honours to the authority on that a little later on.

If I might return to the outline - -

MASON, J.A.: Might I interrupt you? On the point you dealt with earlier in response to a question from his Honour Mr. Justice Taylor and which concerned the effect of subtracting the Vojinovic incidents and their effect on the plaintiff's mind, I was not quite clear as to what you said in your answer to the question put to you. Are you submitting that if one subtracts the Vojinovic incidents and looks at the plaintiff's state of mind qua Armstrong, free of the influence of Vojinovic, then the plaintiff was not in a state of fear or terror prior to the Vojinovic incidents?

MR. POWELL: In the light of his Honour's finding that would be our submission.

MASON, J.A.: Is that correct? Because I thought that his Honour found quite distinctly that the plaintiff was in a state of fear as the result of threats made by Mr. Armstrong up to the Annual General Meeting and after his removal as Chairman of Directors of the company.

MR. POWELL: Yes, your Honour.

MASON, J.A.: You concede that is correct?

MR. POWELL: I think that is the effect of his Honour's finding, but I would need to check it.

MASON, J.A.: Then you say some alteration occurred, do you, so far as the plaintiff's state of mind was concerned after the general meeting?

MR. POWELL: Yes. In our submission one can point to the dismissal of the bodyguard which we submit is itself a recognition of no longer having fear and no other act intervening.

MASON, J.A.: Just go back to the judgment for a moment, do not worry about the evidence. Is there any precise timing by his Honour as to the state of terror which subsisted up to the Annual General Meeting and that it ceased from that point thereafter?

MR. POWELL: No, I do not think so. It is an inference we would like to draw.

MASON, J.A.: Your submission depends on the inference drawn from the evidence itself?

MR. POWELL: I think the only finding - and it is a finding which supports me when I say there is no specific finding - is the passage at the foot of page 3136 of his Honour's judgment where his Honour says "whilst the events leading up to and associated with the Annual General Meeting are important in the history of the dispute ... real fear for his own safety". So it is clear that prior to the Annual General Meeting on his Honour's finding Mr. Barton had some measure of fear.

TAYLOR, A-J.A.: For his own sake?

MR. POWELL: Yes, for his own sake.

We would then seek to say that because no other event intervened between that and the Vojinovic incident and because it can be seen that the bodyguard was done away with, Mr. Barton attributed the threats to the power struggle preceding the Annual General Meeting and that now that was over there was no further problem involving his own life. Because his Honour continues at page 3317: "This shows Mr. Armstrong ... business

transaction". They were all associated with the initial power struggle.

MASON, J.A.: I had rather read that in perhaps a different sense as indicating that they had their origin in the power struggle and for that reason they could not be regarded as being associated with the negotiations which subsequently arose.

MR. POWELL: That is entirely open on his Honour's judgment.

MASON, J.A.: Looking at them from the point of view of the threats and the motive behind the threats; there is another finding on page 3137 which could bear on the finding on what subsequently occurred: "The events ... susceptible".

MR. POWELL: It suggests at that point of time perhaps the condition had been created where if the fears had been applied a reaction would have been produced, but for the time being perhaps there was no reaction after the cesser of the initial power struggle.

There is the problem which is undoubtedly thrown up, your Honour; purely by way of recapitulating his Honour's judgment, in substance it comes down to this: he finds that there were some threats by Mr. Armstrong, he found that there were some threats capable of frightening but did not find that Mr. Armstrong was responsible for or knew of them. His Honour found that none of the threats operated - -

TAYLOR, A-J.A.: It is much easier to come to that conclusion it you take Vojinovic out of it.

MR. POWELL: Yes. We submit that ultimately whether or not one takes Vojinovic out, when one sees the evidence that was available on one side of the scale and on the other, one does truly get a situation of competing hypotheses. In our submission it is not capable of being demonstrated that one or other of the hypotheses was so propounded that to accept either was perverse.

TAYLOR, A-J.A.: "Wrong".

MR. POWELL: Yes, your Honour - wrong. Your Honour no doubt, has in mind the views expressed by Sir Garfield Barwick in Whiteley's case and also more recently by Windeyer, J. in da Costa: "The question is not whether the Appellate Court would have given another conclusion".

TAYLOR, A-J,A.: That is the first question. You have to make up your own mind on what the conclusion is - on the transcript. If it is the same as that of the trial Judge you do not have any more problems. If it is different then you have to pose the next question: Are you satisfied that he is wrong? If both views are fairly and equally open you answer that No.

MR. POWELL: That, in our submission, again is what this case comes down to. His Honour was undoubtedly persuaded in no large measure by the view he took of the man and that was a view in our submission which was fairly open, notwithstanding that Your Honours might have come to a different conclusion it cannot be demonstrated that his Honour was in error.

TAYLOR, A-J.A.: On this essential matter?

MR. POWELL: On the critical matter. One can canvas the whole range of the findings but we would submit that ultimately the only issue worth canvassing is what might be described as motivation, and if we fail on that, that is the end of it.

JACOBS, J.A.: I have written this down somewhere or other. If threats are made and believed, of the kind we know, does it avail the defendant to establish either negatively or positively - the onuses are not very important in this context - that even if there had been no threat the plaintiff would, or would probably, or might, have entered into the same agreement?

MR. POWELL: I would think not.

JACOBS, J.A.: Putting it another way; does the plaintiff have to show that if it had not been for the threats we would not have entered into this agreement?

MR. POWELL: I do not think that either. I would submit that the plaintiff must show that it had some effect in producing the results. If he can show no effect or if the Judge says, "I am not satisfied that it had no effect" or if the Judge goes further, as we submit the trial Judge does here, and says, "Not only am I satisfied it did not have any effect but I am satisfied the reason for this agreement was commerce", then he must fail.

JACOBS, J.A.: What if the Judge said:"These threats, any man would be affected by these, but the real reason for this was commercial and I cannot say since they have a primary commercial purpose to what degree, if any, these threats have any effect. All I could rely on was a simplistic idea that people who are threatened in this way are likely to be affected by it". I am trying to express a problem.

It seems one test is to say, is it the correct test to ask, "Have I got to be satisfied as a Judge at first instance that if there had been no threats this agreement would not have been entered into".

MR. POWELL: I think not, but I think that may well be one of the questions one asks in the course of leading to the ultimate inquiry. It is perhaps a test along the way. We would think the ultimate question is did it have any effect?

The ultimate question is faced head-on by the learned trial Judge in this fashion, "I am satisfied Mr. Armstrong did threaten Mr. Barton. I am not satisfied Mr. Barton was intimidated by Mr. Armstrong's threats into signing the agreement".

JACOBS, J.A.: He was satisfied he was frightened, if not intimidated.

MR. POWELL: "I am satisfied that he did threaten him. I am not satisfied that he was intimidated". His Honour said, "The threats were such as might well have intimidated". His Honour appreciates in essence they could have had an effect. One might say if his Honour had felt that he could have found for the plaintiff in this case he would have done so, but he said, "I am satisfied that he was in fear so I am satisfied the potential had, in general terms, an effect. The fear was induced, it was enhanced ... into the agreement".

TAYLOR, A-J.A.: When you are looking at that part of the judgment you have got to keep in mind another part when he finds another cause. This is simply not a judgment that deals with a matter of onus. He is coming back to the questions he posed initially. You do not read that as saying, "I am deciding on onus".

JACOBS, J.A.: He is looking for the real reason.

MR. POWELL: He goes on to say, "It was not Mr. Barton's fear that drove him into the agreement. The detailed evidence ... was not coerced".

As I indicated earlier his Honour did not ultimately rely on onus but in a very detailed and complex conclusion he came to the finding it had no effect.

MASON, J.A.: I suppose the real question is one of interpretation of the judgment. Do you regard the passages to which you have just referred, plus the passage immediately before, at page 3218, where his Honour said, "In the first place I have found as a fact ... it was commercial exigency ..." Do you regard all those passages as being, as it were, the real finding on this question of inducement or do you regard them merely as picking up by way of summary what his Honour had said at an earlier time when he directed his mind to this question? In other words, do you regard the earlier passage as paramount and these passages merely as picking up what was being said, or do you regard it as an ultimate conclusion?

MR. POWELL: We regard this as the primary finding.

MASON, J.A.: The finding on the ultimate question?

MR. POWELL: Yes, the ultimate question.

MASON, J.A.: Paramount for causing findings on the ultimate question of fact?

MR. POWELL: But we do not regard this in the nature of a codification of an existing statute.

MASON, J.A.: It is true if your interpretation of the judgment be not correct and one looks to the earlier passage as his Honour's finding on this ultimate question of fact, then there is some difficulty on your approach to that.

MR. POWELL: There is an argument open if one takes the passage relating to "the real, if not only".

MASON, J.A.: Then you are in a situation there is no finding that commercial necessity was the only thing, the question is left open whether the state of terror induced by intimidation was a basis.

MR. POWELL: "Were they threats, did they have the relevant effect?" His Honour said they did not have the relevant effect. The reason for it was something else. That is the critical matter. The others may be processes in the reasons. One hesitates to criticise a Judge who has gone to such time and trouble to analyse what was a complex state of facts. That does not stand alone. It is reflected elsewhere. At page 3116, line 19:

> "I accept that he was being subjected to threats ... Vojinovic".

MASON, J.A.: That probably explains the intermediate passages. It indicates, perhaps, his Honour was not prepared to find that terror had no part whatsoever but if it did have a part it was an insignificant part, and not appreciable part.

MR. POWELL: Not appreciable. It may have been the background. In the documents before your Honours there are a number of extracts where his Honour turns to these particular matters. They appear at pages 7 and 8 of the notes.

In our submission it is proper to say in coming to his conclusions the learned trial Judge rejected the plaintiff's evidence on a number of matters including, most importantly, the critical question of motivation. In rejecting that his Honour can be seen to have relied on a variety of matters. There were inaccuracies and divergences between Mr. Barton's evidence and proved, and facts ultimately not contested. In that regard there is the bald statement of Mr. Barton that there were no negotiations at all in December. The commercial transaction commenced on 3rd or 4th January. When one looks at Mr. Smith's evidence one sees although he was subjected to cross-examination there was no cross-examination on that evidence, so that the plaintiff's counsel himself abandoned his own client to his assertion and accepted, for the purposes of the exercise, that was nonsense and there had been a course of negotiation which started on 12th, 13th or 14th December. That was a relevant

matter which was not in dispute. Likewise, his Honour accepted the oral evidence of Mr. Grant and Mr. Smith; in the case of Mr. Grant, the day of the ultimate settlement, and in the case of Mr. Smith, the day following the ultimate settlement Barton used language which, on its face, bore an expression of confidence. Not one word of cross-examination was addressed to either Grant or Smith on that aspect.

Likewise, there were inaccuracies that could be demonstrated. It is not just a catch weight to say when Mr. Barton had been asserting that he had never been Armstrong's friend, that he had been a business associate and nothing else and that in the Goodwin case he spoke of Mr. Armstrong as his friend. This is a man who remembers conversations for ten years.

His Honour ultimately relied to a very considerable degree on evaluating, one against the other, the respective credibilities of Barton and Armstrong.

JACOBS, J.A.: I still have the difficulty of knowing what we are looking for and what his Honour was looking for. I think on analysis what sticks in my mind is quite apart from any special set of facts the ordinary course of human experience is that a threat of death which is intended to coerce has the effect of coercing.

I really think on analysis this may be a point, a dividing line that one may have to face up to. If that is wrong then I can quite understand that one has to prove something much more positive than reliance on any such assumption or presumption of fact, as it were.

I repeat: a threat of death as the alternative to doing an act which is intended to achieve performance of that act has the effect of inducing the performance of the act. If that is wrong we are in a neutral Court, as it were, but if that is true I put the question: "Does it avail the defendant to show that even though that be so the plaintiff would in any event have done the act"?

MR. POWELL: In the way I understand your Honour is now putting it; yes, it would. Your Honour is saying, "Looked at it in the abstract a threat of death related to a transaction would, in human experience, normally produce the desired transaction".

JACOBS, J.A.: Would tend to?

MR. POWELL: Yes, but be that as it may he would have entered into this transaction anyway. It does produce a result favourable to our cause. It is not sufficient merely to say the emotive reaction is not unlike the emotive reaction one gets when one reads of a terrible murder in the newspapers, one says emotively "the man who did that must have

been a lunatic". One may take a particularly diabolical crime with mutilation and life; one's undoubted reaction would be "Whoever did that must be a lunatic".

JACOBS, J.A.: When I put to you the idea if threats are made and believed I ask hypothetically, "Does it avail the defendant to show either negatively or positively, depending on the onus, that even if there had been no threats the plaintiff would have entered into or probably would have entered into the agreement". I thought you answered in the negative.

MR. POWELL: I think I misunderstood your Honour. I had apprehended your Honour to put the situation such as was proposed in Edgington v. Fitzmaurice that it had some effect, that it did influence him, but if he had not been influenced by that he would still have done it for other reasons, but there must be shown, in the first instance, there was some appreciable effect. Merely to say "Looked at objectively this could have that effect", is not enough.

JACOBS, J.A.: Do you ask yourself whether even if there had been no threats this transaction would have gone through or if the onus lies on the plaintiff, might have gone through and he had to prove that it would not; if that is the test then I appreciate what you are putting but I thought you were putting much less than that.

MR. POWELL: I had in mind the Edgington v. Fitzmaurice problem. The problem here is what one sees on his Honour's findings is a state that was inherently taken; "Either I am not satisfied it had any effect", or conversely, "I am satisfied it had none".

JACOBS, J.A.: That is all right unless you assume the ordinary course of human experience is that a threat of a serious nature intended to coerce has a coercive effect.

MR. POWELL: With respect, this is tending towards sophistry because the ultimate question still is, "Were there threats? Did they have any effect?" Undoubtedly in assessing whether an established threat did have an effect one could say, on the balance of probabilities, would it?

JACOBS, J.A.: If you find that is the ordinary course of human experience it rather may affect the second question because one cannot simply say, "I am not satisfied that it had any effect unless you are applying a test which is looking for the real cause, the substantial cause of the transaction". That brings one into this second question of mine: If that proposition be true that that is the ordinary course of human experience, then I ask myself a question and, indeed, I ask you, does it avail the defendant to show that even if that be so the

plaintiff would in any event, hypothetically in any event, have entered into the agreement?

MR. POWELL: With respect we would join issue with the first leg of the argument.

JACOBS, J.A.: The first leg being you would not accept it was the ordinary course of human experience that a serious threat intended to coerce has a coercive effect?

MR. POWELL: It may.

JACOBS, J.A.: That is all you say?

MR. POWELL: Yes; because to say it has is to erect it into some sort of presumption. We say "may" rather than "is". For example, in this case one could say merely to have Vojinovic appear on the scene did not mean Mr. Barton, on his Honour's findings, raced off to Mr. Armstrong and said "Where is it so I can sign it?" There were measures available to him; he went to the police.

JACOBS, J.A.: I could have added, "Not only intended to coerce but it has the effect of putting the recipient in extreme fear".

MR. POWELL: Again I would say "may" for much the same reason. I have little doubt if one postulates a dark alley with a big man with a gun in his hand, the normal course of experience in those circumstances, could be that is the result.

JACOBS, J.A.: If there was a danger further down the alley do you say it would avail the big man to prove afterwards the chap was going down the alley anyway? I am only expressing these as problems.

MR. POWELL: The most one can make of it is to say some such reaction or belief as to human nature can be put into the scales in assessing the probabilities. As Mr. Goldstein suggests, if he had gone down the same alley sixteen nights in a row and a thug came up and said "Your life or your money" and he ran away; the same threat on the seventeenth night would bring a laugh and a faster retreat.

JACOBS, J.A.: A closer example would be if the man was in the habit of going down the alley and he was forced to go down that alley but in fact on the night in question there was a great danger there, would it avail the big man, on your example, to prove that he would have probably gone down the alley anyway because he did not know the danger was there?

MR. POWELL: That perhaps begs the question because the ultimate question is "Effect on will".

JACOBS, J.A.: The ultimate question is when do you depart from the area of influence into the area

of speculation and on which side the speculation lies.

MR. POWELL: In our submission it amounts to nothing more than can be used in evaluating. His Honour seems to say that certainly up until the Annual General Meeting he was fearful and because of that fear even though he remained no longer in fear he was subjected to a resurgence if new measures had been introduced. Certainly at some stage along the line Mr. Barton treated the 'phone calls as little better than a sick joke by a sick man, so that in itself, is a circumstance. To have some sick person ring up and say "I will get you killed" could produce a variety of reactions. Mr. Barton's first reaction was to ring the P.M.G. to have him tracked down. He was perhaps annoyed but certainly not fearful. It does ultimately depend on the circumstances.

MASON, J.A.: I asked you something about two passages in the judgment, and I ask these questions bearing in mind the submissions you have already made. In part his Honour's finding on this point is largely based on the credibility of the plaintiff. At page 3137 about the plaintiff being in a state of mind that was susceptible there is a sentence which deals with the preceding events so far as Mr. Justice Street regarded them as harmful to the plaintiff's case and he says, "They are harmful to his case .... when that course of conduct commenced".

Towards the top of page 3184 there is a sentence that expresses precisely the same form. In terms of the reasons explicitly assigned by Mr. Justice Street for coming to the conclusion that the state of terror was not an inducement or did not induce, it is quite evident that this question of the motive behind the threats being dissociated from the negotiations and a corresponding belief on the plaintiff's part that they were so dissociated is perhaps the principal reason assigned by his Honour for coming to the conclusion. There is a question about that. Of course, there is the finding of commercial necessity as well and it is not altogether clear whether that is an entirely independent reason or whether it is associated with the other reasons, but what I want to know is do you yourself seek to support the finding of fact that the threats were dissociated from the negotiations or the agreement and that they were so regarded by the plaintiff?

MR. POWELL: Yes, we would.

MASON, J.A.: You do?

MR. POWELL: Yes.

MASON, J.A.: Notwithstanding the threats in the first instance related to the power struggle, that the agreement obviously was an outgrowth of that

struggle, and that certainly on the 12th there is the finding that a specific threat was made in relation to the agreement?

MR. POWELL: Yes.

MASON, J.A.: You still seek to support that finding of fact?

MR. POWELL: Yes. May I indicate in respect of Barton, if one accepts the statements of Mr. Miller and the police officers, they seem to think this is utterly unrelated. It was an outgrowth of some weird sort of malevolence on Armstrong's part.

TAYLOR, A-J.A.: He could not compete with him in the boardroom and he was losing all along the line and this was the reaction of a person of that mentality to get back.

MR. POWELL: An expression of malevolence, and that is the way his Honour seems to have considered it. We would seek to support that finding.

(Further hearing adjourned until Monday, 15th March, 1971, at 10.15 a.m.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES) Term No. 22 of 1969
)
COURT OF APPEAL)

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

BARTON v. ARMSTRONG & ORS.

SEVENTEENTH DAY: MONDAY, 15TH MARCH, 1971

MR. POWELL: On Friday we had got to the stage where I had put forward certain submissions as to the basis upon which his Honour proceeded in determining the ultimate question. I had submitted that it was a matter of some considerable importance in his Honour's reasoning that Mr. Barton's credit was such that his evidence had to be treated with circumspection and I think on one occasion his Honour went so far as to say that in the absence of corroboration Mr. Barton's evidence had to be treated with very great care.

One of the grounds of appeal filed by the appellant in this case, in the light of the argument addressed to your Honours makes it proper to say - turning to all of those grounds - that the appellant's desire to have your Honours completely reject the finding of the learned trial Judge and to substitute therefor the Court's finding - at the outset we would submit that is not a course which this Court can take in the present case. The principle upon which the Court such as this proceeds, where an appeal is by way of re-hearing, is not (as Mr. Gruzman seems to suggest) a complete hearing de novo but rather a different course of action. While one concedes that where the hearing is a re-hearing, as this is, the Court in proper circumstances can set aside findings made below and substitute its own findings. The situations in which a Court can interfere are, in our submission, limited. We submit that the result of the authorities is that there are only five basic situations in which a Court can intervene and should intervene.

The first of those situations is where the primary Judge has misdirected himself upon some question of law. For example, as to where the onus lies or perhaps the quality of the evidence. That is whether it be, in the broadest terms, simply civil onus or the more extended civil onus; the approach might be called a quasi-criminal approach to the onus.

The second situation is where the trial Judge has failed to take all evidence into account. As to that we would merely add the rider that the authorities seem to suggest that it is for the appellant to show that the Judge has failed to take evidence

into account and that the Court of Appeal is entitled to proceed on the hypothesis that in the absence of a successful attack, the trial Judge has taken all the relevant evidence into account.

Thirdly, the situation in which the Court can intervene is where it can be demonstrated that the trial Judge has misapprehended the effect of evidence. One merely calls to mind as a simple example of that situation the decision of the Court of Appeal here in Perpetual Trustee v. Borthwick, where the learned trial Judge found as a fact that certain events had occurred when the only evidence was to the contrary and it was not disputed that the events had never occurred.

The fourth situation is where the trial Judge has drawn an inference which there is no evidence to support.

The fifth is the converse of the fourth, namely that the trial Judge has failed to draw an inference which he ought to have drawn.

There is one further matter which does appear in the authorities and one case at least which seems to have elevated the principle, but whether it seems to be a principle or not to be stated in the authorities - that an appellant Court should not intervene unless it be satisfied that no advantage enjoyed by the trial Judge by reason of the fact that he and he alone had had the opportunity to observe the witnesses in the witness-box is not sufficient to explain or justify his conclusion. The rider to or extension of that seems to be that the Court ought to be even more reluctant to intervene where the finding of the trial Judge is against the person who bears the onus, be he plaintiff or defendant.

The first of the authorities which seems to be relied on to a great extent is the decision in The Glannibanta (1876) 1 PD 283, 287-8 per James L.J., Baggalley J. & Lush J. All this material is found in File No. 16.

As your Honours will observe from the head-note the gravamen of the decision is that where a Judge of the Court below has come to a conclusion of fact after hearing the witnesses, the Court will not (except in cases of extreme pressure) reverse his decision, but where the decision of the Court below does not depend on the credibility of witnesses but on the inferences from the evidence drawn by the Judge, his findings - the relevant passage commences at page 287. Your Honours see that there is a new paragraph commencing on that page and that then the second sentence in the paragraph commences: "In the course of the argument on behalf of the plaintiffs we were much impressed with the language from time to time made use of ... on both sides".

So the point laid down there seems to be that

if it appears that consideration of demeanour is a material circumstance the Court ought to be most reluctant to intervene.

There are other cases which proceed along the same lines and perhaps we will only give a few of them but they are all there for your Honours' assistance.

Might I now take your Honours only to the next case referred to, Khoo Sit Hoh v. Lim Thean Tong (1912) A.C. 323, the relevant passage appearing in the judgment of Lord Robson, delivering the opinion of the Court. (Reads headnote). Their Lordships restored the finding of the trial Judge but, despite the fact that there was some inconsistency in the evidence, believed the party for whom he found.

Might I take your Honours first to page 325 in the judgment of Lord Robson: "The case was tried before the Judge alone. It turned entirely on questions of fact and there was plain perjury on one side or the other.

The Court of Appeal will hesitate long before it disturbs the finding of the trial Judge based on verbal testimony. At page 331 one sees that after a recital of the evidence his Lordship proceeds: "The learned trial Judge heard and received this evidence as to adoption ... the recognition of the plaintiff as his natural grandson".

We can pass over Mersey Docks & Harbour Board v. Proctor (1923) A.C. 253 and turn to re S.S. Hontestroon (1927) A.C. 37. In this case I think the case of Walter v. Thomas is referred to with approval by Sir Owen Dixon in Paterson v. Paterson, which is also in the file. These are all Admiralty cases up to this stage.

TAYLOR, A-J.A.: They are all Admiralty cases up to this stage, because each was a re-hearing?

MR. POWELL: Yes. But in some of the earlier cases there was an attempt to show that "It is all right for Admiralty because they have a special way of going about appeals, but it is not all right for here". But an analysis of the cases has been developed by Dixon T.J. in Paterson v. Paterson, putting each into its historical place, and this seems to be demonstrated in his judgment - that the same general principle applies to all Courts where there is a re-hearing. His Honour's judgment in Paterson v. Paterson is very lengthy and I do not know whether we would wish to trouble your Honours with it in full..We have added the reference to show also the Judgment of Kitto J., (89 C.L.R. 212).

In the Hontestroom case, at page 41 in the judgment of Lord Sumner the problem is posed at the end of that page: "The learned President, after seeing both pilots ..... (page 43) ..... the only difference between what the learned President

said and what Banks L.J. dwells on ... is only about one word". Then his Lordship proceeds to deal with the views of Banks L.J. at page 44, where Lord Sumner continues: "My Lords, ... it is on the supposed failure of the learned President to pay attention to it ... the question is, what was to be done with it". Then his Lordship proceeds, turning to page 47, "What then is the real effect on the hearing in the Court of Appeal of the fact that the trial Judge saw and heard the witnesses? ... As I understand the position, by law alone".

TAYLOR, A-J.A.: This passage is quoted in Paterson v. Paterson.

MR. POWELL: Yes, your Honour, and it is for that reason we have referred your Honours to the passage.

JACOBS, J.A.: There is a difficulty in this sense: if the estimate of the man forms a substantial part of the reasons for his judgment that means his estimate of the man, based on his observation of him in the witness box and his demeanour; not his estimate of him based on the probabilities of the case.

MR. POWELL: As we read it there is that, but the primary question is: what is he like, now I have seen him? As a subsidiary test we look at him against the probabilities.

JACOBS, J.A.: So far as you make your estimate of the man on his demeanour, that is the test, but so far as whether you accept his evidence against all the probabilities and the surrounding circumstances you are not making an estimation of the man. In other words, there is a complete begging of the question.

MR. POWELL: One is testing evidence otherwise. I think that is right.

JACOBS, J.A.: Yes. You are not reaching your conclusion from an estimate of the man, you are reaching your estimate of the man from the evidence.

MR. POWELL: With respect, there are two ways of doing it. One can say, with respect, "This is my estimate of the man". Then one can say, "Is my estimate shown to be wrong; looking at the other matters?" Or "Is my estimate supported by the other matters?" But if the primary approach is "What is this man's credit worth?" then that is clearly in our submission a material part of the reason and even though the primary Judge might go on to pray in aid the probabilities and external evidence, it does not make the primary observations wrong.

TAYLOR, A-J.A.: If you try to determine the probabilities and you have no stringent evidence, you can never determine that question without giving value to either one or the other.

MR. POWELL: Yes. There may be a situation in which there is no external evidence to look at and in which the assessment on the probabilities is not made entirely.

TAYLOR, A-J.A.: When you get to the next subject, whether there are specific matters, you still have regard to the evaluation. It does not become the sole matter. There must be very few cases in which it is not a matter taken into account.

MR. POWELL: One would think, with respect, that it would be almost impossible to find a case where there was contested testimony and where the credibility could be said to have been totally abandoned. When one gets to The Glannibanta case, at the turn of the century, there was no real contest and the question was one of inference. Then one gets to Dearman's case.

JACOBS, J.A.: My experience is not that there are many such cases. One refers to the possibility of finding some individual quirk of behaviour as the test of a man's honesty, such as the shifting of his eyes, to say that he has been caught out deliberately telling untruths - but one does not often find those advantages. What one is doing is making a finding on the probabilities.

MR. POWELL: That might be so on a particular case, but we submit it is not the general experience.

JACOBS, J.A.: I always have the greatest difficulty in categorising a person, from his demeanour, as a liar - I must confess.

TAYLOR, A-J.A.: If by demeanour you only mean the way that he looks - -

JACOBS, J.A.: And the way he answers.

TAYLOR, A-J.A.: That is important, the way he answers; whether he considers the questions and whether or not you think he is fairly trying to answer the questions or trying to evade them.

MR. POWELL: One takes something that Mr. Gruzman has sought to characterise as some make-weight in this case, because your Honours recall that the essential part of Barton's relationship with Armstrong, concerned the use of the word "friend" and how Mr. Barton sought to react to that. That is a clear example.

One takes another example of the Hoggett transaction, the entering into a transaction with a certain employee, and his Honour said that he was greatly disturbed about it. Although his Honour made no personal finding, his Honour appeared to be concerned about the manner in which Mr. Barton answered the cross-examination, which would undoubtedly go to whether he had shifty eyes or anything of that sort.

JACOBS, J.A.: I do not see quite where this gets you, in respect of the general findings of whether he was a liar or not, because they are in his favour. There are many other aspects of demeanour and credibility besides perjury but the general finding on that not unimportant aspect is in his favour, as I read the judgment.

MR. POWELL: With respect, we wonder if that is the case.

JACOBS, J.A.: Maybe we will move on to that but at the moment perhaps I am taking you off your argument.

MR. POWELL: Might I merely turn to page 3116 where his Honour, at the top of the page, after referring to the points in a mass of evidence casting about, says: "He believes in the truth and justice of his case, his belief is self-induced ... must accordingly be regarded as suspect". That is in the sense that the trial Judge had said that he is at least making an effort to tell the truth as a general matter "but I cannot place too much weight on it". So one questions whether it is right to say, with respect, that the general finding is in favour of Mr. Barton.

JACOBS, J.A.: I did not say that, but the general finding was that he was not a perjurer.

MR. POWELL: Yes your Honour.

JACOBS, J.A.: I also said there are other aspects of credibility besides whether he is a perjurer or not but generally he has the benefit of a conclusion that he is not a perjurer.

MR. POWELL: And no doubt the trial Judge, in coming to the ultimate problem, bore in mind that here was a man whom he found was for the most part trying to do his best.

JACOBS, J.A.: Once you find that he is trying to do his best and anything which he said - as to which you came to the conclusion was wrong - was the result of bad recollection or unconscious reconstruction, then you are reaching a conclusion that he is wrong not because you disbelieve him but because there are other factors in the evidence which lead you (as the trial Judge) to a different conclusion.

So the important thing then is not the finding that he was wrong but on a close examination of those other factors - that is the point I was trying to make. If you say "This man is a perjurer and I disbelieve him on this question and believe someone else", then of course no benefit can come to him from that. But when you find a man who has this in his favour: at least it is open to the argument that in such a context the important thing is not to look at his credibility or go to that but to

regard that as a neutral factor, then the Judge could get no assistance from his disposing, but has to go to another factor which might lead him not accept that statement.

MR. POWELL: The learned Judge did not, with respect, proceed on that basis. If one turns to page 3103 in the judgment, his Honour set his own guidelines and, having stated the issues, then states the burden of the onus. On line 21: "Upon the first question, namely did Mr. Armstrong threaten Mr. Barton, there is ... circumstances prior to it". So his Honour, in setting his own guidelines, is not saying that credit is irrelevant because, as I will show later, his Honour is saying "Credit is a matter of considerable importance and, as I will show later, ... I approach it on the basis of credit and acceptability". He says it depends upon the significance and the weight.

JACOBS, J.A.: If you come to the conclusion that a man tells a deliberate lie, that leads to the inference that the event never happened, as an objective fact. So therefore one not only gets the neutral effect that you cannot accept from his evidence that it did happen but that it is some evidence that it did not happen. But when you find a man who is not found to be a liar but who is an undependable witness, the refusal to depend on him leaves the position neutral.

MR. POWELL: With respect, no, your Honour unless one says it leaves it with no evidence any other way.

JACOBS, J.A.: Leaves the position qua that evidence neutral, and not to accept him must mean you are relying on other circumstances in order to not accept him.

MR. POWELL: We would submit no. Might I postulate this situation: although one cannot have in this case a situation of leaving the external facts entirely alone, what the Judge says is that Mr. Barton's credibility is suspect and the only person who gave evidence of motivation was Mr. Barton. It is in that situation that if the situation is neutral there is no evidence, but it does not turn the scale the other way.

JACOBS, J.A.: Yes. I was taking you from the judgment of Sir Owen Dixon as to the "estimates of the man".

MR. POWELL: We would suggest that his Honour at least makes it clear beyond demonstration that, as far as he was concerned, if not the dominant feature, an important feature in the case did not seem to suggest that we have to go as far as all this, but merely to show that it was a material thing in his judgment.

MASON, J.A.: On the issue of motivation, it seems

that his Honour regarded the plaintiff's evidence as not altogether convincing on this aspect, perhaps (A) because of faulty recollection or (B) because of a characteristic of reconstruction. When you read the relevant passage of the judgment his Honour is entitled, I think, to examine whether it was partly one case or another and he does not define the whole or part to any one of them. But taking the latter consideration (the reconstruction) does it appear whether that conclusion - that he had reconstructed the situation - was the result of an estimate made of the plaintiff in effect as a witness and as a person who appeared before the Judge, or does it appear that it emerged from an evaluation and assessment of events as deposed to not only by the plaintiff but by other witnesses in the case, and the situations?

MR. POWELL: I think, with respect, there is a particular finding on which his Honour pins that either on credibility or external evaluation or a compound of either.

TAYLOR, A-J.A.: That is one, exclusive of the other?

MR. POWELL: I do not think so. One can point to a lot of material which justifies it but what his Honour had in mind, on a strict reading, we do not think is disclosed.

MASON, J.A.: Whether one can come to that conclusion one has to be satisfied from the evidence given in the case as to what the surrounding and objective circumstances were attaching to particular incidents and then contrast with the witness' account all the evidence, and that leaves the situation - in the case where there had been a real attempt to reconstruct - in this way: such a situation does not seem to emerge with precision from any part of the judgment, although it may well do so.

MR. POWELL: No. One can point to evidence which goes either way and one can say of Barton that his Honour is relying on external factors because of his firmly expressed account of the negotiations, and we know that Smith was not attacked and therefore the only conclusion is that either he is lying or that he has convinced himself.

Even if one comes to the conclusion that he has convinced himself of this reconstruction, then that relates to his demeanour - -

TAYLOR, A-J.A.: I have never understood why he transposed the events that happened in December into January, and there was not a deliberate attempt on his part to do it. I do not quite follow that.

MR. POWELL: We would have to be able to canvass the rulings in toto to discuss this matter, but we have to rest upon the authorities.

TAYLOR, A-J.A.: The only basis on which it seems to me you could come to the conclusion that it was not deliberate would be on some sort of assessment of him from what you saw of him, the way that he gave his evidence and some other matters, because his Honour did refer to the fact that there were some affidavits previously filed, presumably in the injunction proceedings.

MR. POWELL: In neither the money-lender or injunction proceedings was there any statement about duress.

TAYLOR, A-J.A.: In the earlier affidavit there was. His Honour seems to think that he carried that forward when he gave evidence in the box and denied vehemently that they were in December. I suppose you can that having done it in the affidavits and carried it forward, it is not deliberate.

MR. POWELL: It is some evidence of consistency, or is persuasive.

TAYLOR, A-J.A.: When the learned Judge said that he was suspect, I have always taken that to mean that he was a man trying to beat a complication, and that would be one reason why you would have to scrutinise his evidence. Another reason why it was a stale claim, and if this failed he is faced with a big loss. They were all reasons why you would have in mind to examine his evidence with care.

MR. POWELL: Indeed, how he made the attack that it was a stale claim - -

MASON, J.A.: Perhaps it should be noted that his Honour did not find that the plaintiff's evidence was entirely free of any element of deliberate misstatement. Indeed his Honour said at page 3115, after referring to the fact that he had observed Mr. Barton closely throughout the whole course of his evidence, "There are substantial inaccuracies ... reconstruction". At the bottom of the page - "Without negativing ... recollection or some bona fide distorted reconstruction".

MR. POWELL: We would agree with that and say that his Honour has not come out, as Mr. Gruzman suggested, on the side that Mr.Barton's credit is as pure as the driven snow. It is suspect for a variety of reasons.

MASON, J.A.: It hardly reads like a First Class Honours pass on the question of the veracity of the witness.

MR. POWELL: It reminds one of the old "Lower" that used to be handed out. I understand that my clients would wish to canvass every one of his Honour's findings but we do not think that the authorities permit that and we are stuck with some of them.

We submit that it is apparent on the face of his Honour's judgment that his assessment of Barton was at least material and that with respect is as far as we need go. So the acceptance or rejection of evidence must be governed by that basic approach.

May we pass from that to the decision of the House of Lords in Watt v. Thomas (1947 A.C. 484). Might I merely pass briefly through the judgment of Viscount Simon before going to the judgment of Lord Thankerton, which is referred to by Dixon C.J. This appears at page 486. After saying that the jurisdiction has to be exercised with caution his Lordship then proceeds "If there is no evidence to support a particular conclusion ... in which evidence is given". Then his Lordship referred to the judgment of Viscount Sankey and the views expressed by the learned President in Dunne's case. Then returning to page 487 in the judgment of Thankerton L.J., to the passage on which Dixon C.J. relies, where his Lordship lays down new principles: "I do not think it necessary to review ... in question". His Lordship then proceeds to point out that divorce cases are a fortiorari cases where credit is critical.

Might I now pass to Benmax v. Austin Motor Company Limited (1955) A.C. 370, by just giving that reference, and then touch briefly on Dearman v. Dearman, 7 C.L.R. 549, and then to the Federal Commissioner of Taxation v. Clerk, 40 C.L.R. 246. In Dearman's case is found support for the submission I made earlier as to the reluctance with which a Court should intervene being much greater when the onus is on the plaintiff or the appellant. That appears at page 553 in the judgment of Griffith C.J.: "Now it is well settled ... wrong".

TAYLOR, A-J.A.: The word "manifestly" seems to have more recently disappeared.

MR. POWELL: It may have made its emergence under another label. Certainly it is not used in that way. "There is perhaps the distinction ... upon a wrong principle".

MASON. J.A.: Does not that principle, accepting the truth of the statement lose much of its course in application to this case on the issue of motivation when at the relevant time the Judge found that the plaintiff was in fear for his life? Once you come to that point do not you go a long way in an evidentiary sense to discharge the onus that was on the plaintiff?

MR. POWELL: With respect, no. It is true that the principle is normally applied in fraud cases where a charge of fraud is proved and the Court is reluctant to intervene. But in this case the critical thing still is: was the Judge satisfied in this context that fear had any operation? One might say it is surprising that it did not, as a matter of pure human reaction, but to merely say

that the context was here does not show that the conclusion was there. The onus still lies on Mr. Barton to show that the context operated.

TAYLOR, A.J.A.: He had at least established another reason. Then you are left at the stage with two possible reasons for signing. Until you get the first one you do not have the other reason.

MR. POWELL: Indeed. We will pass by the other cases and turn only to the last two because this brings up a submission that I think I adverted to earlier. If ultimately what happens is that this Court has two competing hypotheses and the trial Judge has favoured one at the expense of the other, even though the appellant Court might itself have preferred the one rejected, unless it can be demonstrated that the primary judge was in error in the way we have submitted, then that is the end of it.

Here we do have, we submit, two competing hypotheses of at least equal weight. So we would submit that the strongest hypothesis was the desire of Barton to get rid of Armstrong - -

TAYLOR, A-J.A.: But if one has a finding by the trial Judge in such strong terms of terror and mental torment, can these two findings really stand together?

MR. POWELL: We would submit so, looking at the findings. One takes, for example, the evidence of Inspector Lendrum and Sergeant Wild.

TAYLOR, A-J.A.: When you consider that, I do not think it has anything to do with it. But if you accept the finding you have got to make up your mind which you take.

MR. POWELL: It may be that the Court would say that "We would not have to come to that conclusion. We would not have made such a finding, we just would not know". But we submit there is abundance of evidence to support the views accepted by his Honour. One is, and it does not seem to be disputed, that on 8th January there was no suggestion by Barton that these threats were in any way related to the agreement then on foot. But, cri de coeur by Barton to Mr. Miller was "This madman has gone and hired criminals". So Barton certainly did not relate the threats, even if they be relevant, because of Talbot v. Von Boris, to this agreement. One knows, for example, on the 13th (which is the day Mr. Barton said that he changed his mind) he said to Mr. Smith: "Once Armstrong has gone nothing will stop us". One knows that neither Mr. Miller, Mr. Solomon, Mr. Bowen nor Mr. Colman were called to give evidence about this - having regard to Barton's reaction. Whatever was the real threat, one would have thought that for a threat to be relevant and believed by Barton to be relevant to the agreement - -

JACOBS, J.A.: What do you mean by "relevant to the agreement"?

MR. POWELL: Intended to produce a result and treated by Barton as a reason for going into it. That merely agrees with Barton's conduct "As I am going to get rid of Armstrong" and that proceeds through January purely on a commercial level. The only matter which, on his Honour's findings, anything can be pointed to is the Vojinovic incident which we say is legally irrelevant, and the telephone conversation of the 12th - but let us assume it had a meaning "sign this agreement or something nasty will happen to you". If Barton had not otherwise been going into the agreement one would think that he would have gone hotfoot down to either his personal solicitor or the corporation solicitor and said "The man has said this. I do not want to enter into the agreement. What can I do?" We know that neither Mr. Miller, Mr. Bowen, Mr. Solomon nor Mr. Colman were called and at the very least the inference to be drawn is that one of them was told, because if Mr. Barton was told something affecting him he told somebody. The significance, in my submission, is that it really did not matter.

That is the least inference that can be drawn. One knows that in Wigmore a rather stronger inference is suggested. The appropriate inference to draw is a matter of some discussion.

TAYLOR, A-J.A.: The only inference you can draw is that the solicitors were not told.

MR. POWELL: We say there is a double inference clearly, in that at the least one draws the inference they were not told, and the next inference is he did not think it mattered anyway.

TAYLOR, A-J.A.: That does not follow from the failure to call the solicitor, that follows from a number of other things. A mere failure to call solicitors would only have permitted of the inference that the solicitors had not received a complaint. That is all you can take from that point. The next step you take from a lot of other circumstances.

MASON, J.A.: When you say that the Judge found that the agreement went through or was reached as a commercial necessity, what precisely do you mean by that in terms of the reason?

MR. POWELL: Reasoning?

MASON, J.A.: No, not of the reasoning, but what reason? What do you understand that reason to be?

MR. POWELL: As we understand it, perhaps it can be paraphrased: rightly or wrongly Barton and Bovill thought that Armstrong was a disaster for Landmark that so long as he continued in any way associated

with Landmark there was no future. Whatever it cost he had to be got rid of. That was the commercial necessity.

MASON, J.A.: That was what you understood to be the primary and predominant reason to which his Honour is referring in the judgment?

MR. POWELL: That is what we understand his Honour to be saying was the commercial necessity.

MASON, J.A.: You do not understand his Honour to be saying that the primary and predominant reason was that the plaintiff and/or Mr. Bovill considered the agreements to be commercially advantageous, looked at purely as commercial transactions?

MR. POWELL: Not in that sense. We do not suggest his Honour said they saw there was a profit. Rather they approached it on the basis: We are doomed unless we get rid of this man. We must get rid of him, whatever it costs us.

MASON, J.A.: Nor do you suggest that the threats which had issued from Mr. Armstrong to the plaintiff were quite independent of this commercial necessity?

MR. POWELL: I am not quite sure how your Honour puts that.

MASON, J.A.: What I have in mind is this, that in judging whether it was desirable or necessary to get rid of Mr. Armstrong from this company because his continued association with it was a disaster for the company, is it not extremely relevant that Mr. Armstrong had indicated a course of conduct which involved threats and intimidation to the extent that they put the plaintiff in fear of his life?

MR. POWELL: We would suggest not.

TAYLOR, A-J.A.: I thought you said a moment ago they had come to the conclusion that Mr. Armstrong was a disaster, that was one of the reasons that he was a disaster: he wanted to run the show himself, he fought with people, he wanted to get his own nominees on the Board so that would give him a majority of control and, amongst other things, he behaved in an irrational fashion and talked a lot of nonsense about what he could and could not do, and that all went to making him a disaster. I did not take it that you were limiting it to the fact that he was a commercial disaster, in the sense that his judgment was wrong.

MR. POWELL: No, we suggest that apart from the threats he was a man who, for example, had joined issue on this question of the dividend; he wanted to enforce his rights by getting his own representatives on the Board and he was going to have litigation to enforce his rights.

TAYLOR, A-J.A.: One of the things that made him a disaster was that he had the power, in the circumstances that had arisen, to take control of Paradise Waters. He was likely to do that when he was at odds, to say the least, with the other two directors or with Barton, quite apart from the financial aspect. One of the things that made him a disaster was the fact that he had that power, but wasn't it also that he was the type of person who would exercise that out of spite or ill will, and he demonstrated that by these threats? I do not know that you can get the threats and so on out of the commercial necessity.

MASON, J.A.: He was a man who so wanted his way that he was prepared to resort to threats of violence and, in the plaintiff's mind presumably, be prepared to carry them out. Isn't that part of the commercial desirability, the commercial necessity of ridding this company of Mr. Armstrong?

MR. POWELL: It is the last part on which we would join issue, whether or not Mr. Barton did believe that he was prepared to carry them out.

JACOBS, J.A.: There was a finding that he did. You could not join issue on it.

MR. POWELL: A question of whether it goes so far. His Honour says that Barton was pre-disposed as a result of the earlier incident.

JACOBS, J.A.: He was in fear of his life.

MASON, J.A.: The plaintiff believed that he was prepared to resort to activities of this kind to get his own way.

MR. POWELL: This is where we join issue, on this question of "To get his own way". His Honour has proceeded on the basis that he does not find that to be so. He rather proceeds on the basis that Mr. Armstrong is a malevolent man who, not getting his own way, would go out of his way to annoy and upset those to whom he had lost.

MASON, J.A.: What about this sentence: "He had a hatred for Mr. Armstrong. He held him in contempt and he feared what he believed to be Mr. Armstrong's capacity to cause him physical harm"?

MR. POWELL: Unrelated to the agreement, with respect.

MASON, J.A.: Just leave that to one side. We are concerned at the moment with the plaintiff's mind, the effect of the threats in relation to the plaintiff's mind and the general relevance of that situation to the commercial desirability or necessity of ridding Landmark of Mr. Armstrong.

MR. POWELL: It may be on one basis that that is relevant to commercial necessity, in the sense of assessing commerce. If it be so, it is not a motivation in the sense that is asserted here.

TAYLOR, A-J.A.: Isn't that the position, you take what went on at the Annual General Meeting where you have armed bodyguards lurking behind the curtains; this is a piece of behaviour made necessary by Armstrong's threats. I would have thought that getting rid of that man from your Board, what brought about that situation was a commercial necessity. That had nothing whatever to do with this agreement.

MR. POWELL: Quite so, the man still retained the ability to think and act for himself.

TAYLOR, A-J.A.: At that time there was no suggestion that any agreement could be entered into between Armstrong and Barton for the sale of shares. There had been a suggestion that Armstrong would buy Barton's shares, but that had been rejected. If you look at the position as at the day after that Annual General Meeting, you would say, "This man has to go. He has to go because he behaves in such a fashion".

MR. POWELL: I suppose that is so. If one goes to the proprietary company situation, one would say it is just and equitable that the company be wound up if for no other reason.

JACOBS, J.A.: As I understand my brother Mason's suggestion to you, it related to this: that having had that situation at the Annual General Meeting would it not, in that atmosphere of commercial transactions and commercial needs to get rid of Mr. Armstrong, predispose Mr. Barton to pay a larger price to get rid of such a man who would threaten, in a business context?

MR. POWELL: That may be one's immediate reaction, but one knows that as at 22nd December, when the proposal was that Armstrong, as it were, fund the whole transaction, Barton and Bovill rejected that. In the original language of Bovill, "The price was too high".

JACOBS, J.A.: It may be that one has to add the words "If he loses his nerve in the commercial area". If a man is dealing with another man, whom he fears is going to kill him if that other man does not get his own way, to use your words, then it is difficult to see how one can say that the only situation in which there would not be some effect on their commercial dealings would be if the victim did not lose his nerve. He may be frightened but I expect men can still act gravely even though they are frightened.

MR. POWELL: In effect that is what his Honour said, that he did not lose his nerve.

JACOBS, J.A.: He was terrified but he kept his nerve.

MR. POWELL: He retained that capacity to think for himself. He certainly utilised, so far as one can see, the services not only of his personal solicitor

but the company's solicitors. Certainly so far as the transactions are concerned, those solicitors were able to produce results his way. We know, for example, that the so-called "monstrous suggestion" that the money be paid come what may was taken out of the first draft and never thereafter appeared. If, in fact, Armstrong had such a power over Barton I do not suggest anybody would have bothered to quibble. Indeed, the mere fact that Mr. Coleman did not agree to it seems to suggest that Barton had not gone to Mr. Coleman and said "Just check it over but do not worry about trying to protect us. We will sign anything".

JACOBS, J.A.: I do not know that the findings of the learned trial Judge are consistent with Mr. Barton keeping his nerve. They are in such strong terms about the effect of the threats generally on Mr. Barton's mind.

MR. POWELL: This may be so but, with respect, a great deal of it is attracted by the Vojinovic incident on which we say no liability can be sheeted home to Mr. Armstrong.

TAYLOR, A-J.A.: There is no doubt about that, because he has indicated "most alarming".

MR. POWELL: And indeed he goes on to refer particularly to the incident when saying "I do not think his general fear or even the Vojinovic affair played any part in Mr. Barton's thinking". But even so, your Honours, one would have thought that certainly by the 7th, when the Vojinovic incident occurred, there having been a history of negotiations, there was what everybody seems to have agreed was an agreement in principle as the result of suggestions to and fro. There is no doubt, for example, that Mr. Barton and Mr. Bovill felt free and, indeed, they apparently felt bound to reject the 22nd December proposal. So that the next thing that comes into the balance is the discussion between Smith and Barton where this proposal is suggested. The document is forwarded on the 6th; then the Vojinovic incident comes along, but Barton never suggested through Mr. Miller that that was in any way related to the 4th January agreement, or, indeed, had any weight at all.

TAYLOR, A-J.A.: You used the words a minute ago "played any part". Are those the words his Honour used? That is the test. I think we all agree that that is the test.

MASON, J.A.: I think he used the words "any appreciable", and you used the word "material" before. I think on Friday you settled for the word "appreciable" because it moved one element of ambiguity.

JACOBS, J.A.: I only mention that before we leave the question of motivation because of the words "the real cause". If his Honour was looking

for the real cause then there is a certain difficulty.

MR. POWELL: Perhaps I have misconstrued what his Honour said, but I do not think I have misconstrued the substance. The passage I had in mind was at page 3117 where his Honour says "nor do I accept Mr. Barton's concern and fear engendered by his ... factors of any significance in the execution of the document".

MASON, J.A.: He used the adjective "significant" which is perhaps another word for "appreciable" or "substantial".

JACOBS, J.A.: It may or may not be, depending on the context in which one uses them. It takes you back to the test to be applied. The first thing to be asked is why he added those words. Why not say "were factors"? That is one of the queries that that raises in one's mind. It is that other part later that I would mention as causing me some difficulty, namely: "The real, if not the only reason". Iexpect if one sets out that matter in full one would say "I am not bound tofind that it was the only reason. It is sufficient if I find it was the real reason". Is that correct?

MASON, J.A.: To re-inforce that, if you look at page 3184 where his Honour is referring to what he found as the primary reason, he describes at line 14 "The agreement went through for the primary and predominant reason". That again seems to be entirely consistent with the corresponding finding, "the real, if not the only reason", leaving the possibility extant that there was another reason which was not primary, predominant, or the real.

MR. POWELL: It may be that what his Honour is saying is "The only reason which operated to motive". In the ultimate his Honour comes down to the bald assertion that he is not satisfied that Mr. Barton was coerced.

JACOBS, J.A.: It depends in what area of coercion and cause and effect, his Honour's mind was operating.

MASON, J.A.: But it does seem to be the line of reasoning which was poised on a knife's edge; albeit it may be correct to say that a man who is admittedly in a state of terror nevertheless has succeeded in some way in preserving his own business judgment, with the consequence that he enters into the agreement for a reason which involves dispassionate consideration of the impact of the activities of the man upon a company, those activities involving threats to the plaintiff's life as part of the matter upon which he has to form the independent business judgment.

JACOBS, J.A.: That, if I may say so with great respect, adds the two factors together in a way

that I think needs very deeply to be considered; the two different aspects that we were speaking of.

MR. POWELL: That, with respect, was not the way the case was fought below. The case as fought below was basically this: you only have to find the threat of the 16th to find for the plaintiff. It seems to have been the plaintiff's reaction that had it not been for the fact that, as the plaintiff said, he changed his mind on the 13th and then there was added in this new factor, the agreement would have gone through for reasons unrelated to the Vojinovic in ident.

TAYLOR, A-J.A.: Are we not looking at it now on the basis that the finding of his Honour leaves room for a suggestion at least that there was some element of fear motivating him to sign this document, as well as the other. It is not being looked at now as one or the other, it is being looked at now as a sort of hybrid, and that is what I would have thought was the plaintiff's difficulty. But would that be enough? It depends what he meant by "real and significant".

MR. POWELL: When one sees that his Honour said ultimately it was for commercial reasons, his Honour seems to be drawing the dichotomy between threats affecting the man as a person, depriving him of his judgment and, perhaps as Mr. Justice Mason mentioned, threats going into the commercial necessity. It may be that they provide some commercial reason, but they were not anything which deprived Barton of his ability to think and to act for himself. Ultimately the real test seems to be: was he so affected that he lost his capacity to think and protect himself? We would suggest that his Honour's findings, in the light of the evidence, demonstrate that what his Honour is saying is, "No, he did not lose the capacity to think, protect himself commercially and in any other way".

JACOBS, J.A.: Did that depend on his view of Mr. Barton as a witness?

MR. POWELL: We would submit at least in a material part.

JACOBS, J.A.: Because when he said he was deprived he was not believed?

MR. POWELL: Yes, at least in a material part. Support can be found by external facts as well. That ultimately is perhaps the key to the whole case. As we have suggested in our notes, on that critical question of motivation in all probability the only person who could give evidence was Barton. The only way of testing it would either be an assessment of credibility and/or relating it to external facts.

JACOBS, J.A.: I raise these as difficulties more than just as matters which need to be thought

of, but I am not quite clear how the credibility of the plaintiff is of critical importance when, apart from his credibility, you have a situation which I think one could say would gravely affect the ordinary man.

MR. POWELL: We join issue on "would". "Was capable of" in objective terms we could not quibble with.

JACOBS, J.A.: "Could"?

MR. POWELL: "Could" in objective terms. We suggest it is of critical importance because one has undoubtedly the situation that unrelated to any particular threat, the quasi agreement of 4th January was provided. It is not suggested that Armstrong intervened at any time prior to the 12th.

JACOBS, J.A.: When was the first recognition of Mr. Armstrong's voice on these constant telephone calls?

MR. POWELL: I do not think Mr. Barton was ever able to put a date on it. So far as the ultimate agreement is concerned, it is not suggested, as we read the evidence, that anything that Armstrong said over the phone had anything to do with the negotiations through December or that there was any intervening act in the course of those negotiations or up to the 4th January. So that Smith and Barton negotiate an agreement in principle on the 4th, unrelated to any specific act directed to Barton. One must say, with respect, that the background was there, and perhaps only because somebody thought "We have got to get rid of this nasty man". It had no greater weight than that. So the agreement in principle, which his Honour says is ultimately the agreement in substance, is negotiated in that context.

JACOBS, J.A.: I would feel very uncomfortable negotiating with a man who kept ringing me on the telephone and telling me I was going to be killed and constantly doing this. You either treat it as laughable, or try to, and that is what Mr. Barton did at one stage, and he said "You need to be in Callan Park". If you take it seriously, as the finding is, I cannot bring my knowledge of human experience to the extent of saying that one was fearful by night and one went along one's ordinary commercial relationship with the same man by day. To say I believe the man when he says he was terrified but I do not believe him when he says he was affected by it, I must say I find some difficulty. Unless I am applying the test: can I be satisfied that he would not have entered into the agreement if it had not been for the threats? If I apply that test, with the onus on the plaintiff, then I think you are in a very strong position.

MR. POWELL: In a sense that is the test, although not in the sense that one says. This is where I

think your Honour might have gone at cross purposes on Friday. It is not sufficient for the defendant to say he would not have entered into it anyway, come what may, but it is sufficient to say it played no part in his reason. Again I hark back to this analogy between Atwood v. Small and this case. There is no doubt that in Atwood v. Small the representation was of a type which could induce, because it related to profit and output and the like. It was undoubtedly a representation which played some measure in the thinking of putative purchasers, because they said to the vendor "if we can be satisfied that is true we will buy". So one gets to that stage in this case, prima facie a threat of death might reasonably be expected to induce. Prima facie a threat of death related to a particular agreement might reasonably be expected to induce that agreement.

If, however, one goes further, as in Atwood v. Small, and the putative purchasers carried out their own investigations and relied on them, then it was not an operating factor. This was the ultimate view of the House of Lords. Theoretically put, it is relevant but it did not operate.

In this case we suggest that that is as far as the plaintiff gets. It is the sort of threat which might reasonably be expected to produce a result if it were related to a particular agreement, but he still has to tie in the last link of the chain, and he does not. It is not a question of any presumption of evidence. Here is a man who says, as he did, "I was going along on a purely commercial basis until 12th January. Armstrong rang me up and said 'Sign it or else' and I said 'I am not going to be blackmailed'. At that stage I said 'I will sign it if it suits me'. On the 13th I changed my mind". That, with respect, is critical. If his Honour does not accept that he changed his mind then no earlier threat had any operation in the relevant sense, and that was the only one that could have. His Honour said "I don't believe it" on that issue. That indeed, with respect, was the way the case was fought.

JACOBS, J.A.: You say "Was fought".

MR. POWELL: On the basis that Barton changed his mind on the 13th.

JACOBS, J.A.: It goes back before that, on the basis that the negotiations of 4th January were unaffected by any duress.

MR. POWELL: Yes.

TAYLOR, A-J.A.: The plaintiff had to have a finding that nothing happened on the 13th.

MR. POWELL: Barton's whole story was out by at least a month, and then some.

TAYLOR, A-J.A.: On the evidence it could reasonably be taken as a commercial transaction.

JACOBS, J.A.: But doesn't this approach somewhat overlook the complication that Mr. Barton's memory of events in December was wholly defective.

MR. POWELL: It is questionable whether one is as kind to Mr. Barton merely to say his memory was defective.

JACOBS, J.A.: That was not the point I was making. I did not understand the learned trial Judge to understand the issue in those terms. I thought he was going to the fact that the agreement had been mooted on the 13th December.

MR. POWELL: With respect, as we understand it, what his Honour was saying was this: Barton's case was that for the first time there was a negotiation early in January; he changed his mind about it on the 13th and if it had not been for the threat of the 16th that was all there was to it. That was the way the plaintiff put his case. His Honour was saying that is just not right. This was not something which came out of the blue on 4th January; this is something that must be looked at in a context of negotiations to and fro. So that this was not just something which resulted in a few days. There is no doubt that the Smith evidence was at variance to a very considerable degree with the plaintiff on a variety of matters, partly on his credibility, because his Honour said he firmly expressed this view that nothing had happened, and that was just not so. Again the fourth has a significance in a sense, because it does show a continuity in the sense that 60 cents remains constant throughout the whole transaction, although other terms are mooted and rejected on both sides. It has the significance that because terms are to be rejected and substituted, certainly in that time, although Barton may have been concerned about his safety he was not going to surrender his capacity to think or surrender his company to somebody who wished to plunder it. But the plaintiff's case ultimately came down to that: Barton changed his mind on the 13th and if it had not been for the threat of the 16th there would not have been any other.

JACOBS, J.A.: Why go through it all in this way? If the plaintiff never feared from that cause, which undoubtedly he tried to make out at the beginning of his case, why all this? It was just a question of whether you accepted the change of mind on the 13th. It was a simple question: do you accept the change of mind on the 13th and the threat on the 16th?

MR. POWELL: There is no doubt that the defendant saw fit to say "This is all nonsense; look at the whole history of these transactions" and brought Mr. Smith along and brought Mr. Grant along.

JACOBS, J.A.: But the plaintiff never changed his ground at all.

MR. POWELL: No, and indeed, as I recall the final address that was put, the only evidence you have to find on the part of the plaintiff was the change of mind on the 13th and the threat of the 16th.

TAYLOR, A-J.A.: If you accepted his case that it all started - -

MR. POWELL: Or if you accepted ours.

TAYLOR, A-J.A.: Or if you accept Smith's case; if you accepted a case where the negotiations had gone on since 12th December and no threats had operated in any way, then on the 13th, having agreed uninfluenced by threats, he changed his mind.

MR. POWELL: He had second thoughts for some reason.

TAYLOR, A-J.A.: Then there is no agreement.

MR. POWELL: Quite so, so that the case in that way could be pitched to meet either situation if it existed.

TAYLOR, A-J.A.: That is the way the learned Judge seems to think.

MR. POWELL: That seems to be the way the learned Judge ultimately approached it. Indeed, your Honours will recall that his Honour adverts to Mr. Staff's attack on Mr. Barton for that very reason. On page 3113 the learned trial Judge puts "in some respects Mr. Barton's evidence is at variance with proved facts". Then your Honours see Mr. Staff's attack was "This was deliberately selected so as to place greater significance on the effect of Vojinovic's evidence". There is no doubt that the case as opened for the plaintiff was that nothing happened before the 4th, we changed our mind on the 16th, whatever may have been the reason.

JACOBS, J.A.: There is no doubt that he made that case, and you say that was his only case?

MR. POWELL: As we understand it.

JACOBS, J.A.: If you are right on that, all you have to establish from the practical sense is that all the substantial terms were agreed on at a time when his mind was unaffected by threats at all, not that he was not motivated.

MR. POWELL: The relevant evidence was at page 58 of the earlier transcript.

JACOBS, J.A.: Do not go into that detail now. His Honour does refer to events of December 1966, January 1967 and says "I accept he was being subjected to threats and intimidation by Mr.Armstrong.

I accept that these were current during the course of the negotiations. That must be, you say, from the 4th?

MR. POWELL: Yes.

JACOBS, J.A.: But not from the 14th December. You say when his Honour found that he was referring only to the period - -

MR. POWELL: No, in that situation he appears to be speaking from December.

JACOBS, J.A.: From 14th December?

MR. POWELL: Yes.

JACOBS, J.A.: He seems to be dealing with a slightly different and wider point.

MR. POWELL: I will get for your Honours a reference, but the relevant passage in the evidence was a question by Mr. Gruzman: "You tell us this conversation on the 12th and 13th January and of the decision you had made that you would not sign the document. Did something happen between then and the 13th January which had any effect on your decision? A. Yes. I had received a 'phone call about 8.20 that morning of the 16th January from Mr. Armstrong saying 'Unless you sign that document you will be dead, you will be killed, you will get killed' . Q. Did you believe that statement? A. Yes. Q. As a result of that statement what did you decide to do? A. I decided to sign agreement on behalf of myself and I telephoned John Bovill and asked him to go to Landmark Corporation office. I told him 'The best thing we can do in the circumstances that Landmark agree to a settlement with Mr. Armstrong on the basis set out in the agreement'".

JACOBS, J.A.: What page of the transcript are you reading from?

MR. POWELL: I was reading from the argument.

TAYLOR, A-J.A.: Is that 16th January?

MR. POWELL: Yes, that is the telephone call of the 16th.

TAYLOR, A-J.A.: That starts at the top of page 74.

JACOBS, J.A.: You really say that most of the judgment is not dealing with the facts in issue, because the fact in issue was simply: was there a threat on the 16th?

MR. POWELL: That seems to be the way the plaintiff's counsel ultimately put his case.

JACOBS, J.A.: Then the Judge does not seem to

have dealt with it on that basis. He seems to be dealing with the longer period as though it was the period in issue, not simply going to the side question of whether or not he should accept one account or the other of the offence on the 13th and the 16th.

MR. POWELL: That particular incident in itself must have some very critical significance. If that statement is not accepted then it must, of itself, cast a doubt on the whole of Barton's evidence, in the light then of questions of external facts and that is a question which undoubtedly turns on credibility or acceptability of Mr. Barton. If that and that alone goes into the melting pot it becomes material.

JACOBS, J.A.: It bears all the hallmarks of symplistic exaggeration in a situation like this, to try to make a case on one definitive threat and the mind being so simple that it withholds one day and then is overborn the next.

MR. POWELL: That was the plaintiff's case, with respect.

JACOBS, J.A.: And his only case, you would say.

MR. POWELL: We would submit so. There was, no doubt, a history given.

TAYLOR, A-J.A.: If you succeeded in that case on that one issue, the telephone call of the 13th would be rejected.

MR. POWELL: It was, as his Honour Mr. Justice Jacobs said, a pretty simplistic approach, but if that was not the case why give evidence.

TAYLOR, A-J.A.: It would be a very attractive case if you found for him on credit.

MR. POWELL: Here we are, we changed our mind and whatever else may be involved that was it. I think we have strayed a little from the authorities.

May I merely invite your Honours' attention to the two short passages in the High Court judgments of Whiteley Muir and Zwanenberg v. Kerr, and the later on of Da cost v. Cockburn Salvage and Trading Pty. Limited. The decision in Whiteley Muir and Zwanenberg is in 39 A.L.J.R., page 505. This was an appeal from declarations and orders made by a single Judge in a company liquidation. The headnote fairly adequately sets out the gravamen of the views of the Chief Justice, Sir Garfield Barwick. His Honour proceeds to deal with that matter at page 506. I take up the reading half way down on the left hand column: "It is not suggested that the learned trial Judge erred in point of law ... to read the whole record". That seems to suggest that it is not enough merely that your Honours would have come to a different conclusion, in the sense of an

approach, a not unlikely approach in damages appears: is it much, too much, or not too much? If it is much, or too much that probably would be enough. As Mr. Maxwell suggests it is not a case of "Gee" but of "Gee Whiz".

May I now turn to Da Costa v. Cockburn Salvage and Trading Pty. Limited, which is in 44 A.L.J.R. at page 459. The Chief Justice merely adheres to the views that he expressed in Whiteley Muir and Zwanenberg. At the foot of page 459 in the right hand column, Windeyer, J. takes up the matter and says: "If I had had to try this case at first instance ... set his judgment aside". Then his Honour proceeds to look at some of the cases. If one turns to page 461, the last paragraph on the right hand column: "I turn now to his Honour finding that the plaintiff was ... on oral evidence". Then his Honour refers to a number of cases and finishes in the right hand column of page 462, the reference to cases: "Whatever words might be used ... approach". Although it is true to say that "manifestly" has slipped out of the back door, it looks as if "convincingly" may have come in in place of it.

MASON, J.A.: Do you see any difference in the approach enunciated by Windeyer, J. and the approach enunciated by Whiteley Muir and Zwanenberg?

MR. POWELL: In the ultimate not. It seems to come down to this approach: first of all we must see what we would have done; if we would have come to the same conclusion as the trial Judge we would not intervene. If we would have come to a different conclusion then what is there? Is there a misdirection, misuse, or misappreciation of facts? As between competing hypotheses, is one so preponderating that the acceptance of the other must be said to be a misdirection in law, by the taking of a wrong inference. The approach seems to come down much the same. If it is a question of truly competing hypotheses then the Court should not intervene. Ir is only when it gets to the stage of an inference that ought to have been drawn rather than one that might have been.

TAYLOR, A-J.A.: All of those are steps in the process of saying that the judgment is manifestly wrong.

MR. POWELL: They are steps in the approach to say this is what makes it manifestly wrong. It still comes down to the five cases which we say are the five cases which go to assist in saying it is wrong.

JACOBS, J.A.: I see the learned Judge refers to a situation where it involves valued judgments such as reasonableness and negligence. You are not referring to it on that aspect? None of that comes into the question?

MR. POWELL: I think so.

(Luncheon adjournment).

ON RESUMPTION

MR. POWELL: Purely as an example of the manner in which an appellate Court has been seen to approach this sort of problem, we have included a reference to the judgment of Starke, J. in Johnson v. Buttress, 56 C.L.R., where his Honour at page 126 says: "Now I feel some difficulty in assenting to the learned Judge's view ... advantage". Merely for the purpose of completeness, we have added by way of reference the various passages in the judgment where his Honour the trial Judge passed some comment on the acceptability of the plaintiff's evidence, either in general or in contrast to particular witnesses.

The other question which seems to come into consideration of Courts looking at the findings of subsidiary Judges is a question of whether or not whether there was evidence from which the findings might properly flow. For this reason we have prepared a schedule, showing, as we understand it, the various findings of his Honour in chronological order, with the page in the judgment and setting beside it the witnesses who were accepted, rejected and in some cases were not called at all. The significance of this is to show, in our submission, just how strong a case it was that this was the outgrowth of a commercial situation and was designed to produce a commercial end, as well as showing at critical points that his Honour was not willing to accept the evidence of the plaintiff. I do not wish to go in any detail through this, because it is perhaps in a sense, self-explanatory.

Your Honours might observe, for example, that on 13th December 1966 Mr. Barton told Mr. Bovill that he did not have much hope in U.D.C. His Honour, while accepting that that was said, does not accept that that was a true and final statement of Barton's views on the matter. Then for example, on the same day his Honour expressly accepts Mr. Smith, relies on particular documents no doubt in support of that acceptance and rejects Mr. Barton in toto. The same view is maintained throughout the whole of the negotiations, where his Honour at all times prefers Mr. Smith's view to that of Mr. Barton. This is file 18. Your Honours see, for example, that in relation to the meeting of the Paradise Waters companies, where Mr. Barton says that Mr. Armstrong threatened him, his Honour accepts that there was a discussion, does not accept Mr. Barton's version of the threat and comments favourably on the fact that neither Mr. Bowen, Mr. Bovill nor Mr. Cotter gave evidence on the matter, the first and last of that trio not being called at all.

Mr. Barton asserts that there was a threat on that day and Mr. Armstrong denies it, and, one might say gratefully, Mr. Armstrong was accepted.

Likewise, his Honour continues to reject Mr. Barton on critical issues throughout the period of the negotiations in December.

If one comes to page 3150, which is on page 3, the meeting of the Landmark companies, there is the evidence of Mr. Bovill that that proposition was rejected, and Mr. Bovill gave evidence that in that instance the price was too high. No doubt the price was too high, because if all else had failed they would have surrendered control to Armstrong which, in itself, is a very interesting comment on their views and, likewise suggests that certainly at that point of time they retained sufficient freedom of commercial manoeuvre and were in no way troubled by any threats that Mr. Armstrong may have made.

If one turns to page 4, one sees that consistently Mr. Smith is accepted and Mr. Barton rejected on the early stages of the negotiations. Then at the foot of that page one comes to the proceedings of the Criminal Investigation Bureau, where the views of Inspector Lendrum, Sergeant Wild and Constable Follington are accepted, and the views of Mr. Barton as to certain things that were said were rejected. One observes that neither his Honour, Judge Muir, nor Mr. Miller was called to give evidence of what can only be, with respect, a rather critical matter.

May I merely remind your Honours of the exhibits representing the notebook of Inspector Lendrum, Exhibit 51, which is on pages 2879 and there following, they being in vol. 9 of the Appeal Book, and the exhibit representing the notes of Sergeant Wild in the transcript they are Exhibit 52, being pages 2892 and there following. There are a few interesting things to remind your Honours about. At pages 2889 and 2890 it is said that Mr. Miller arrived back from overseas on the 23rd, by plane. It appeared that Landmark would fall, but since then Mr. Barton has managed to save the company and there have been some conferences with representatives for Armstrong with Barton in connection with a compromise. "On Wednesday last 4th January, representatives of Armstrong and Mr. Barton personally reached what appeared to be an agreement, subject to documentation, to be prepared by Armstrong's lawyers, submitted to Miller's firm, and they were in fact submitted to the firm 5 p.m. Friday". It is in no way suggested in the notes that Mr. Barton's view was that the threat in the Vojinovic incident was in any way related to it.

What Mr. Miller appears to have said, without demur from Barton, was "Well, we have got this agreement in principle, the only thing that is to be worked out is the manner and form". Out of the blue this strange incident occurs, which is rather disturbing. We do not know what it is all about. Perhaps that may be a rather loose translation of what did happen. That certainly seems to

be open, because at page 2888 in Inspector Lendrum's note there is "Miller receiving death threats in odd circumstances". It seems to have been a note of the telephone call from his Honour Judge Muir, which was misconstrued by Inspector Lendrum.

JACOBS, J.A.: It should be "Barton receiving them".

MR. POWELL: Yes. The interesting thing is "Death threats in odd circumstances", which seems to be an indication that Mr. Miller was saying "We do not know what it is about because we have an agreement and this does not seem to be related to it". Much the same occurs in the notes of Sergeant Wild.

JACOBS, J.A. I think one has to take in 2889 the beginning of the history, namely that Mr. Barton has received threats to his life. That does not refer to the Vojinovic incident.

MR. POWELL: Quite so.

JACOBS, J.A.: That was the background to it, and then the two men approached for a sum of money, and all that is related to the relationship between Mr. Barton and Mr. Armstrong.

MR. POWELL: But it does not suggest, as one would think it would have been suggested, that the threats were having any effect on Barton in his commercial hat, if I can put it that way. It is not suggested, as one would believe it would be suggested, that this man Armstrong is doing this because he has been thrown out and now he wants to be bought out. It is a history of behaviour, then a statement that a result has been achieved.

JACOBS, J.A.: Why was that history given, in your submission?

MR. POWELL: Purely to fill in.

JACOBS, J.A.: To fill in what?

MR. POWELL: Fill in the history.

JACOBS, J.A.: But why was it relevant?

MR. POWELL: To provide, as we would think, some basis for it being suggested that Armstrong was in some way involved in this.

JACOBS, J.A.: And putting pressure on Barton?

MR. POWELL: Making threats, but not necessarily putting pressure on him in relation to the contract.

JACOBS, J.A.: I want to express this because it is one of my concerns: if I go to the police and say "for some time I have been receiving threats on my life and now I am told that people have been

engaged by Mr. Armstrong to kill me. The background to my relations with Mr. Armstrong is that we have been falling out over the company and the position has got to a very serious stage and I have been winning the battle, so far as the shareholders are concerned. It does seem that in this situation, in negotiating with Armstrong's representatives, I have reached what seems to be an agreement, but I want to tell you about these things that are happening". I have some difficulty in saying that is unrelated to the commercial side of it.

MR. POWELL: It ultimately gets down to the question of motivation. I suppose one stands or falls on this question of motivation. If, as he asserted, Barton was not going to enter into any agreement but for the threats - -

JACOBS, J.A.: Exactly. If that was the case that was being made and necessary to be made, that is one aspect.

MR. POWELL: One would have thought he would have said so.

JACOBS, J.A.: He would have said "Protect me from wntering into this agreement"? Do you say that is what the Judge was looking for?

MR. POWELL: In the sense that he was looking to see whether threats had any appreciable effect.

JACOBS, J.A.: That is not really to answer it. You put it that way and I said "Do you say that is what the Judge was looking for?" I forget exactly how you did put it or I put it. Was the Judge looking for Mr. Barton to make the statement to the police "Protect me from being forced to enter into this agreement" and that he drew an adverse inference from the fact that there was no such request.

MR. POWELL: I do not think he was going that far. I think he was going as far as this - and one would think this would be a proper inquiry - if Barton was in two minds about it, he could see the commercial value in it but was in two minds about it, one would have expected him to go to the police and say "We have an agreement in principle. There is a question of documentation yet. I am in two minds about it. I want to be able to think about this free from any pressure by this man". But he does not say that. He just says categorically, "Mr. Barton has saved the company".

JACOBS, J.A.: Do you say Mr. Barton had to go as far as that in his mind in order to establish duress?

MR. POWELL: I think so, with respect.

JACOBS, J.A.: He had to show it was the overbearing

factor? He was in two minds and the duress put him over the edge, is that what you mean?

MR. POWELL: No your Honour.

JACOBS, J.A.: I think that is the only inference from your language. You said he should have said that he was in two minds about entering the agreement and that he was being subjected to these threats to induce him to be of one mind. That is the inference from what I thought you said.

MR. POWELL: Yes, but that is not the ultimate question. What we were putting was that this is what one would have thought he would have said if he had an open mind and had not decided upon purely commercial views.

JACOBS, J.A.: Doesn't that overlook the fact that he had been subjected to constant threats on his life previously?

MR. POWELL: It does not overlook that because one sees that despite these constant threats he had got rid of his bodyguard a month ago.

JACOBS, J.A.: That is a factual matter.

MR. POWELL: That is something to be thrown into the scales.

JACOBS, J.A.: That would be to say that he was not in a state of any terror or fright.

MR. POWELL: Disturbed, no doubt, but not so frightened that he completely abdicated any power of reasoning, because he had in fact on the 22nd said to Mr. Armstrong "We are not going to be in this".

JACOBS, J.A.: You do not suggest that in order to succeed he would have to have abdicated any power of reasoning?

MR. POWELL: No, perhaps I over-stated it.

JACOBS, J.A.: Those are the words you just used.

MR. POWELL: But if the threats were having any effect one would have thought he would have said so.

JACOBS, J.A.: Why bother to tell them that he had received threats on his life? Why bother to tell them about the agreement at all? I am only saying these as the queries which come to my mind. Why not go to the police and say "Here is this man whom I have had some business associations with and who is threatening my life and who has employed men to kill me"?

MR. POWELL: Read back into that phrase "Death threat in all the circumstances" one would have thought what he was saying was this: this had been

going alone, we have reached an agreement where we were going to get rid of him and now this madman is doing this; I don't know why he is doing it, it may be out of sheer malice. The critical thing is that there is no demur but rather the categorical assertion that there was an agreement. That, no doubt, would have made it odd that threats would have come along.

JACOBS, J.A.: Here again I only ask to clear my mind: is it not odd to give weight to the statement that Mr. Barton had managed to save the company, when we know that he had done nothing of the sort, and, on the Judge's finding, had been expressing a most pessimistic view round about that period just before he went to Surfers Paradise.

MR. POWELL: Quite so, but the trial Judge did not accept that that was a true view.

JACOBS, J.A.: Nor was it a view of Mr. Barton, that he had managed to save the company.

MR. POWELL: No, the trial Judge did not accept that Mr. Barton's expressed doubts truly represented his state of mind. Indeed, he expressly rejected it. He said "He is a far more resilient man than that".

JACOBS, J.A.: We do know that nothing had happened at 23rd December to support the statement that Mr. Barton had managed to save the company.

MR. POWELL: Looking at it objectively, no. But Mr. Barton, Mr. Bovill and Mr. Cotter certainly felt they were not in an utterly hopeless position, because they were quite content to reject Armstrong out of hand.

JACOBS, J.A.: The Judge put Mr. Bovill's conversation, which he deposed to on 13th January, as happening just around Christmas time. That was a pessimistic conversation on Mr. Barton's part, indeed. So at least on that date there was no saving of the company; on the contrary. Yet that is the date that is referred to here.

TAYLOR, A-J.A.: I have taken that "Mr. Barton saved the company" to refer to the fact that on 4th January they had substantially reached an agreement whereby Armstrong went out.

MR. POWELL: That ultimately is what we submit is the conclusion, that one does not look at this objectively and say "Was that true". One does not look at Barton's previously expressed doubts. One comes to this question that whatever he might have thought before, he had produced a solution and the fact that there was a solution saved the company: "At least we have got rid of this dreadful man Armstrong".

TAYLOR, A-J.A.: That was the only thing he could say.

MR. POWELL: On the assumption that Armstrong was a disaster, for any one of a variety of reasons. Certainly that seems to fit in with what Mr. Miller was telling the police officers and it certainly accords with that evidence.

Sergeant Wild's material starts at page 2900 and, after again giving a little of the history and referring to the Bovill comment, it is interesting to observe that at line 39 the Bovill threat was said not to have been taken seriously; and then he picks up again opposite the figure 6: "Miller arrived on 23rd December ... comprdmise".

JACOBS, J.A.: That seems to me as though it was somebody talking very favourably of Mr. Miller. He arrived back from overseas on the 23rd and then salvation.

MR. POWELL: Certainly the same thread runs through. There was discussion regarding a compromise "which resulted in discussion last Wednesday ... purported to be a compromise".

JACOBS, J.A.: If we are going to rely on little bits of language, take that extraordinary piece.

MR. POWELL: It is dealt with immediately below: "Last Wednesday, 4/1/67, legally documentated".

JACOBS, J.A.: Aren't they saying this, in effect: admittedly we have agreed in principle, but pressure is being put on us?

MR. POWELL: With respect, that is one thing they did say. It is to be observed - and it is a matter of some critical importance, that neither his Honour Judge Muir, or Mr. Miller was called. The principle, as we understand the principle in Jones v. Dunkeld, is that if there be a witness to one side or the other might elucidate a problem - -

JACOBS, J.A.: No, it does not say that, not "elucidate the problem". "Who could give evidence on the question, then you do not rely on an inference or, if you wish to rely on a contrary inference it may more readily be drawn".

MR. POWELL: According to the headnote, it said "A direction of the trial Judge was incomplete ... absence". It was that phrase "able to put the true complexion" that we relied on for the suggestion that "elucidate" might be the right word. The reference is 101 C.L.R. at page 298, and there is a discussion by Windeyer, J. at page 317 and there following, and a reference to the passage in Wigmore where the American authorities seem to suggest that one goes even further than that.

Be that as it may, it was open on the evidence of the document to suggest an agreement had been reached. That was open. If the plaintiff had sought to contend to the contrary then one would

have thought his Honour and Mr. Miller or either of them, would have been called. There being no explanation as to why neither was, then one might be the more confident to accept that an agreement in principle had been reached.

JACOBS, J.A.: That that was said?

MR. POWELL: Yes.

JACOBS, J.A.: I do not think there can be any doubt he said it.

MR. POWELL: As I recall it, Mr. Barton denied that that was so.

JACOBS, J.A.: Speaking for myself, I would accept that.

MR. POWELL: The mere fact of that denial against an acceptance of Inspector Lendrum and Sergeant Wild, coupled with the failure to call his Honour Judge Muir or Mr. Miller - -

JACOBS, J.A.: An agreement which purported to be a compromise was reached?

MR. POWELL: An agreement in principle, yes.

JACOBS, J.A.: That is not the language of the document.

MR. POWELL: In one line that is the language and in the next line it is "an agreement subject to documentation".

JACOBS, J.A.: An agreement in principle subject to the clause that it was a document which purported to be a compromise.

MR. POWELL: The ultimate importance is that Mr. Barton vehemently denied that anything of that kind was said. That must be a most critical feature where the man is coming along and saying, either on the one view "I changed my mind" or "I never agreed, I was temporising". He goes a step further and does not say he was temporising. He just says no such agreement was reached. There is that material on that matter.

Then the material continues until the critical date of the 13th, which is on page 5, and your Honours will note that - that being the date on which Mr. Barton says he changed his mind - he told Smith in this discussion later on in the afternoon that he was confident of getting the money from U.D.C.; which hardly suggests that he changed his mind. His Honour finds that Mr. Barton did not change his mind. There is a meeting with Mr. Barton, Mr. Cotton, Mr. Bovill, Mr. Smith and Mr. Horley. There is an interesting meeting between Mr. Grant and Mr. Solomons at which an interesting sidelight is introduced by Mr. Solomons who asked Mr. Grant for

a list of documents because Mr. Barton was troubled that (having got to the barrier, as it were) Mr. Armstrong would think of something else to stop the settlement going forward. Again Mr. Solomons was not called. Whichever of the three it was down at Allen Allen & Hemsley who had the overall superintendence, certainly Mr. Solomons at the latter end of the negotiation had the detailed control.

This is a most interesting reflection on the state of Mr. Barton's mind, that he was anxious to have all the points worked out so that he would not be surprised. It may be that he was saying in effect to Mr. Solomons, "This man is erratic. You do not know what he is going to do next. Tie him up for me". If that be so - and it is a not unreasonable interpretation of what Mr. Solomons said - he (Barton) was anxious to get on with the settlement.

It is to be observed that throughout the whole of this period there were solicitors - Bowen, Colman, Solomons and Miller on the one side and Grant on the other - who were negotiating as before, right up till the morning of 17th January on which date the primary agreement was ultimately executed. One sees from Mr. Grant's notes that Mr. Bowen (who was Mr. Barton's personal solicitor) rang up about some clause in the agreement. Your Honours, I think, can recall the note "some misunderstanding, understandable" or something of that nature. So it is perfectly clear that the solicitors were acting as if it were an ordinary negotiation between solicitors. If, as Mr. Gruzman suggests, Armstrong was in a position of overwhelming power and Barton was in a state of complete and utter funk, the last thing one would have expected was this sort of discussion between solicitors about some clause or a minor amendment or the like. One would reasonably have expected Barton to have said to either Solomons or Miller "Whatever he wants, we will sign". But that is far from being the case. Indeed, it is as far from being the case as Barton saying "Don't give an inch". Indeed this clause, which has been categorised by Mr. Gruzman as a monstrous thing, was meekly given up and this hardly suggests that Mr. Armstrong considered himself in a position of power or that Mr. Barton had said to Mr. Colman "Sign anything they put in front of you".

The whole position of negotiation suggests - and it is supported by the discussion Barton had with Grant and which Barton had with Smith on 18th and 19th respectively - as your Honours observe, Barton told Grant "Now we have got rid of him, nothing can stop us", and he interjected some comment, I think, about "I am very glad you did not have him here. It would have been unpleasant". It was not a case of "I am glad you did not have him here. I am terrified of the man". But it is "He is a nasty man, it would have been unpleasant. I am glad you

did not have him here". It has to be observed, also, that Mr. Grant was not cross-examined at all on that matter and Mr. Smith was not cross-examined at all on the conversation - "I congratulate you. It is a miracle".

JACOBS, J.A.: Neither Mr. Grant nor Mr. Smith were told anything by Mr. Barton about those threats?

MR. POWELL: Never mentioned. And so far as we know, no other solicitor, except Mr. Miller being told of the Vojinovic incident, was ever told of anything at all.

JACOBS, J.A.: So, undoubtedly, Mr. Barton was keeping things back.

MR. POWELL: Keeping them back, if they mattered. If they did not matter, then he was not keeping anything back.

JACOBS, J.A.: Not altogether, because the police were told. There was a relating of these events to the threats and telling the police but no disclosure of them to Mr. Armstrong afterwards.

MR. POWELL: Yes, and no further discussion with Miller. One might say, without hesitation, that mere muttering over the telephone, the idle ramblings of an erratic man who has been categorised by Mr. Barton as a madman, may have upset him but when a physical manifestation comes on the scene he then takes action and does something. He went to the police. Mr. Gruzman said that you cannot get any mileage out of the fact that he did not go to the police thereafter because they let him down badly. But he did not know, even if the police had let him down badly, by the 13th or 16th they were going to behave in that way. His belief at that stage was that the police were an effective arm and if anything really endangered his life they were the people to go to. So the fact that he did nothing about it, again suggests it did not have any great effect and one cannot forget this assertion by Mr. Barton himself that he just told Armstrong "I am not going to be blackmailed into any agreement". That is a pretty vital piece of evidence, certainly at that date.

Now, in the fact of an open threat he is saying "You can do what you like. I will sign it if it suits me". That is hardly the statement of a man who is being affected by terror. He certainly said so at that stage - "I have got the nerve" - and the substantive events and statements by Barton suggest that he retain his nerve and did not crack, as your Honours suggested earlier during the day, at that stage. "I am not going to be blackmailed", was a defiance and a defiance which is, incidentally in the light of his manifold success in the war to date, something that has to be considered. Mr. Armstrong had not won a round up to that stage and he had every reason to be defiant because he (Barton) had won every round.

JACOBS, J.A.: Is this consistent with what you say, that you accept that the plaintiff was terrified?

MR. POWELL: He was terrified, although not terrified in the sense of losing his capacity to reason. What he said was "This is a terrible thing. We will go to the police. They will look after me. In the meantime, Mr. Armstrong, if it suits me I will enter into that agreement; if it does not, I won't". Because he had access to what he believed to be an effective arm, when he took what one may say were intelligent steps. He got out of his house and certainly at that stage he was reasoning with a pretty clear sort of mind. These and other matters are not just make-weights, they do support the various steps in his reasoning and hardly suggest that he was just whistling in the dark when he said to Smith "It is a miracle".

Be it noted that he denied that he ever said that to Smith. Be it noted that he denied he ever told Grant "I am glad you did not have him here". So on parts of evidence that are very critical to the issue his Honour is just not accepting Mr. Barton and consequently one comes to the critical issue, and the closer one gets to these critical issues the more are the steps on which his Honour does not accept Mr. Barton.

There are other matters which might be put into this. Within a short time, by March of the same year, there was litigation between the company - in the hands of responsible and senior counsel who would have been well and truly alive to a point of this nature, but no mention is made of it.

JACOBS, J.A.: No mention even of these threats?

MR. POWELL: Not in the evidence. There is not the slightest bit. The only basis for the injunction proceedings in March and the money-lending proceedings in the form in which they were taken out was that there was a collateral warrant as to, as it were, periods of grace. That, one might think, is a pretty weak sort of reed to rely on, if there were strong arguments. That suggests certainly at that stage Mr. Barton still was not greatly terrified about Mr. Armstrong and his carryings on.

JACOBS, J.A.: "Still was not"? Did you say "still was not"?

MR. POWELL: I did, your Honour - was not then terrified greatly.

JACOBS, J.A.: Do you mean he had recovered?

MR. POWELL: No. What I am saying is that it could not be suggested that he was worried enough about any power that Armstrong might have over him to the extent that he would refrain from fighting.

MASON, J.A.: But he still retained, you say, an independent mind to enter into the agreement, such as in relation to working it out?

MR. POWELL: As to that, in relation to his interests, yes. There is, we submit, abundant evidence.

Perhaps there are one or two other matters that might be pointed to. There are other matters which support that view and these are some of them: as your Honours will observe from his Honour's findings on a number of occasions Mr. Barton or his family companies put money into Landmark or its various subsidiaries. If in fact Mr. Barton was of the opinion that all was lost and had been lost on 17th January one would find it very difficult to believe that a hard-headed businessman would put his good money in where it could do no good. It might be suggested: "He had to make the best of a bad thing and therefore even though he was hazarding his own money, if money was needed somebody had to put it in". But that comment does not apply to purchase of shares in the company. There is no hope at all of getting it back by capital in the event of liquidation, and, more importantly, it is not going to the defendant's company because it was purely a purchase on the open market and no capital would flow into the company - unless it be suggested that Mr. Barton, by buying on the open market, was indulging in a little bit of "kite-flying" but there is no suggestion of that. This would show that he retained a degree of confidence.

MASON, J.A.: Could I ask you a question which I think I did ask on Friday and I still have some difficulty with it? You accept the finding, do you, that the plaintiff was in a state of terror as a result of the intimidation by Mr. Armstrong?

MR. POWELL: I do not know whether the finding goes that far. That is the result, I think, of the introduction of the Vojinovic incidents. His Honour certainly says he was in a state of fear for his life, but what the effect and the consequence of the Vojinovic incidents were I am not too sure.

MASON, J.A.: Can we deal with it on perhaps different bases? First of all, on the basis that we look at the plaintiff's state of mind, taking all factors into consideration that were productive of that state of mind - that is the Vojinovic incidents.

You accept, do you, the finding that the plaintiff feared for his own safety and that of his family?

MR. POWELL: If it is in the purely general sense, unrelated to a particular transaction, I do not think it is open to us to attack it.

MASON, J.A.: Do you concede that that state of mind subsisted all the way through from the time when the threats were made in connection with the difficulties in the company up to the removal of Mr. Armstrong as a director through the Annual General Meeting, through the succeeding period up to the execution of the agreement in January?

MR. POWELL: No your Honour.

MASON, J.A.: You do not?

MR. POWELL: No.

MASON, J.A.: What periods do you seek to subtract?

MR. POWELL: Certainly the period between the Annual General Meeting and the Vojinovic incident.

MASON, J.A.: You do not point to any particular incident that produced this hiatus?

MR. POWELL: One can point to a variety of things, including at the outset the termination of the services of the Australian Watching Company.

MASON, J.A.: I am thinking of something that operates as a cause to terminate an existing state of fear. After all, the termination of the services of the Watching Company is consequential.

MR. POWELL: It is a reflection, perhaps, rather than a cause.

MASON, J.A.: Yes.

MR. POWELL: A cause, one would think, would be that Barton related the threats and the Watching Company to Armstrong's desire to get control of the company.

MASON, J.A.: So when the Annual General Meeting was over there was not a continuing state of affairs that continued on the state of fear?

MR. POWELL: Which to his mind continued.

MASON, J.A.: Although you accept, of course, the finding of his Honour that after that the plaintiff's state of mind was such as to render him susceptible to intimidation by Mr. Armstrong? You accept that finding?

MR. POWELL: I do not think we can contest that.

MASON, J.A.: What distinction do you draw between the finding that the plaintiff was in a state of fear before that and the finding that his condition of susceptibility continued after that? What is the distinction between those two?

MR. POWELL: It would seem that what his Honour is

saying is that because there is a particular situation Mr. Barton, in his mind, related that to this situation and he was fearful while the situation existed but thereafter, having once been under attack, if a situation arose he might react if he could see that it was directed towards another situation.

MASON, J.A.: What do you understand by the word "intimidation" in that context? Does it mean further threats or does it mean domination pursuant to further threats?

MR. POWELL: I think domination, your Honour, with respect.

MASON, J.A.: There was a further threat that we know of definitely on 12th January and, on another view, a likelihood that in the interregnum some other phone calls were made. Would not that be enough to crystallise in susceptibility, subject to the second finding?

MR. POWELL: It might have been, but it does not follow as the day the night.

MASON, J.A.: Why not?

MR. POWELL: Susceptibility does not produce the consequence necessarily. I may be susceptible to fear but I do not necessarily fear.

MASON, J.A.: Ordinarily one might see great force in that but, of course, remember that this condition of susceptibility was an aftermath of a state of actual fear; it is said to be a condition of susceptibility to domination by further threats. There is a further threat (at least one that we know of specifically). Why is not that enough to restore the previous existing condition of fear?

MR. POWELL: Partly because the plaintiff himself said in effect in evidence: "That is not going to worry me". That was his evidence in chief - proudly boasting that he told Armstrong that that threat was not going to have any effect on him. If this is a question of subjective states that is at least some evidence to be thrown into the pot to suggest that what one would think would normally happen did not happen.

MASON, J.A.: One further question. On the basis of subtracting the impact of the Vojinovic incident from the plaintiff's state of mind, what do you then say was his state of mind as at 17th or 18th January?

MR. POWELL: That is very difficult, in fact, to take out of account, your Honour. But as at 17th and 18th January, if one can take the Vojinovic incident out of account, his state of mind is such that "all of our problems are solved, that dreadful

man won't be around to interfere in our company again and off we go". He regarded it as a miracle, something that he did not think was going to be pulled off.

MASON, J.A.: You still accept, do you, that even if you subtract the impact of the Vojinovic incident the plaintiff was in a state of fear from Armstrong, or do you challenge that?

MR. POWELL: We challenge that.

MASON, J.A.: You challenge that?

MR. POWELL: Yes, certainly challenge that he was in such a state of fear as would have led to the result that is contended for. In fact his Honour finds that neither on the 13th nor the 16th was Barton, in the one case, effectively threatened or in the other case threatened at all.

JACOBS, J.A.: On 13th January?

MR. POWELL: Yes, on 13th January.

TAYLOR, A-J.A.: This is your case all the time; Barton wanted an agreement and he might have thought the terms were a bit harsher but he never queried the 60 cents and in effect, if he wanted to do it, why was he being pressured into doing something that he wanted to do?

MASON, J.A.: My questions were directed rather at the aspect of fear and terror. I was not concerned in the questions I put to you, Mr. Powell, to raise the question for Barton's fears, or what was operating on Mr. Barton's mind at the time, I was only concerned with the findings of fear.

MR. POWELL: As to those, the plaintiff still has to show that it did have operation and that, I would suggest, he has not done. There is abundant evidence which makes it at least an equivalent hypothesis in the way it is approached in Whiteley's case.

JACOBS, J.A.: But you cannot concede - and do not, do you - that Mr. Barton may have felt that the terms were a bit harsh?

MR. POWELL: Your Honour, we do not concede that. the way in which I have put it earlier during the day was that they thought they had to get rid of Armstrong, no matter what the cost. So that, commercially, if one sat down and tried to see whether considerations were such - putting to one side the equivalent of what they got - they may have said "It is a bit high, but the ultimate object is to get rid of Armstrong".

JACOBS, J.A.: Not "to relieve myself of these threats"?

MR. POWELL: Yes.

TAYLOR, A-J.A.: If they wanted to buy Armstrong out, if that was the situation, why would he not make hard terms on a commercial level?

MR. POWELL: That is so. To merely take advantage of a commercial situation is never duress, where it is a pure contest in the market. One gets, perhaps, an over-anxious purchaser and the not too anxious vendor, if one gets into another line of inquiry.

JACOBS, J.A.: But at a price so much above the market price, it could only be justified commercially as a broad statement if they had hidden information of exceptionally good value; is that what you say?

MR. POWELL: No, your Honour, with respect.

JACOBS, J.A.: What else would it be?

MR. POWELL: They could have thought, as apparently they did, that once Armstrong was out of the way everything would go ahead without the slightest hitch. Then looking at it as pure market value, even though the price might have been 30 cents, they could well have thought "Our prospects are such that 60 cents is all right".

JACOBS, J.A.: So they regarded their hidden information as sort of getting rid of Mr. Armstrong?

MR. POWELL: In a sense, but be it noted that there are a variety of things that suggest that perhaps the market was not a true reflection. One knows of the letter to Mr. Dobbie which Mr. Gruzman apparently had some difficulty dealing with would suggest that the taking of a dollar share, or the backing of a dollar to a share, and one knows that Armstrong himself was prepared to pay that or more and get Barton out. It is a question of Armstrong being prepared to pay 70 cents, in order to get Barton out, and if they thought it was worth more - although perhaps it was a bit above the market - it has to be looked at in that light.

TAYLOR, A-J.A.: It is more a matter of looking at what you are prepared to pay to get him out, rather than the market price.

MR. POWELL: In one sense the market price is truly irrelevant to the question of what it was worth to get rid of him. They had said that once Armstrong was gone everything was for the best in these best of worlds, and then it was worth 60 cents to them. If one wants to look at it objectively, Armstrong was prepared to pay that to try and get rid of them.

TAYLOR, A-J.A.: His share interest did not manifest itself in such a way as to control the general meeting.

MR. POWELL: It did not because it was against a statement of fact concerning the shareholders, but we do not know how many - -

JACOBS, J.A.: You would have to equate this with what other shares were held.

MR. POWELL: This could be a kind of rallying point. I do not know whether he would have had a controlling interest at that stage.

MASON, J.A.: Was there a sliding scale of votes?

MR. POWELL: I think not. We believe it was one-for-one.

JACOBS, J.A.: One of the problems which you have to face (it may not be a great problem) is that a quite simple way of neutralising Armstrong was to get a loan elsewhere and then you do not have any receivership over Paradise Waters, and you leave him with a 12½% minority holding. It would have been an answer to that, if that was the controlling interest. Yet the result at the Annual General Meeting, after a closely-fought battle, did not reveal that he had a controlling interest.

MR. POWELL: Certainly he did not control that meeting but that was put in the context of "We do not need Armstrong because we can get the money elsewhere".

JACOBS, J.A.: I am not putting that hypothesis.

MR. POWELL: One could not say if we had then gone to the shareholders - Mr. Armstrong could have gone to the shareholders on a requisitioned meeting to get rid of the whole board - "They do need me" - because "While I remain a shareholder they cannot pay me out".

JACOBS, J.A.: I am assuming their hypothesis that the simple thing for Mr. Barton to do was to clinch the money side of it.

MR. POWELL: It would not have necessarily produced the ultimate result of being free from Armstrong, as Mr. Gruzman rather (one suggests with respect) uncautiously put it. He produced the hypothesis that Armstrong could have been neutralised by not inviting him to the directors' meeting, by forming committees and cutting him out. The immediate thing would have been more litigation, maybe even a petition under s.186 on the ground of oppression. They had ultimately to be free of this man.

JACOBS, J.A.: I am just repeating this, the best way of getting free of him unless he had a shareholding control (and there is nothing to indicate that he did) was to pay, and if they could not do that they could not do anything with the company, could they?

MR. POWELL: They could neutralise him commercially, as they did in a sense, by paying him out some money to get further time and deferring the evil day. That is what they did. They got some money out to him.

TAYLOR, A-J.A.: Did they have the right to pay off the mortgage of Paradise Waters?

MR. POWELL: I would think there was something of that nature - -

TAYLOR, A-J.A.: Did he then have the right, with that mortgage, to get two more directors onto Paradise Waters?

MR. POWELL: We believe it was only in the event of default. We will check that for your Honour overnight.

TAYLOR, A-J.A.: Whilst he held 40% of the shares of Paradise Waters he got 40% of the profit on the sales, even if they had paid his mortgage off.

MR. POWELL: Yes, and assuming that the whole transaction had come good, he stood to make some money.

TAYLOR, A-J.A.: They were going to do all the work, take all the risks, to make 40% for him.

MR. POWELL: This is what we will be suggesting, Heaven only knows what was the best commercial solution.

TAYLOR, A-J.A.: There is no evidence from which we can ever make any decision about what this company was worth or what might have happened. The trial Judge was never asked to rule on it and I do not think he directed his attention to this matter. Nobody ever gave evidence about how far these blocks had got although there is some evidence from Mr. Barton of "up to 70%", and there is evidence that Armstrong exercised his option on 35 lots. That meant that he would have to pay half the list price for 35 lots.

MR. POWELL: I do not know whether it was a condition or not - -

TAYLOR, A-J.A.: At some time.

MR. POWELL: Yes. There was a minimum price of so many thousand dollars a block, so he was up for a substantial sum of money.

TAYLOR, A-J.A.: The list price was stated, and I suppose it is reasonable to suggest that he would have got the best ones.

MR. POWELL: Your Honour is drawing all the inferences against him.

TAYLOR, A-J.A.: He would be entitled to do that.

MR. POWELL: That schedule provides, in our submission, some of the material which suggests there was ample evidence to justify his Honour's conclusion, having regard to the fact that his Honour indicated on one or more than one occasion this - and remembering that your Honours have intimated that you propose to read the evidence again before delivering judgment I think there is little purpose to be served in going in detail through that material.

One turns then to the basis on which the plaintiffs have sought to attack his Honour's findings. Turning to file 19, might we go to par. 4. The first attack is on the finding by his Honour that he has grave doubts about the reliability of Mr. Barton on the evidence given in that part of the case which concerns Detective Sergeant Wild and Detective Constable Follington.

I have related this schedule to the detailed schedule handed in by Mr. Gruzman and I am now dealing with par. 4, turning to the particular findings attacked. I have gone through this evidence in the order in which the findings appear in Mr. Gruzman's document headed "Findings sought by the appellant", and this will be my comment on this document. The comments as to the numbered paragraph 4 follow the findings sought by Mr. Gruzman.

It is sought to attack that finding of his Honour which deals with credibility and reliability of Mr. Barton vis-a-vis Sergeant Wild and Constable Follington and to suggest for that a finding that the two police officers were of little credit, lied and were biassed, etc. As to that we submit that no valid ground of attack has been made out by the appellants. There has been, as Mr. Gruzman said, great analysis of the evidence laid before his Honour but there is nothing, in our submission, which has been pointed out which could be shown that his Honour overlooked. Indeed, in the course of his argument on this appeal Mr. Gruzman said of his Honour's judgment that he brought order and reason to the evidence. If that be so, that is not only in being able to find something overlooked, but rather a concession that his Honour dealt with it in the most elaborate and careful way.

Ultimately that must operate on the respective credibilities of Mr. Barton on the one hand and the police officers on the other.

TAYLOR, A-J.A.: Is that so? I can understand that so far as it turns on the issue of whether or not Barton saw this record of interview of Hume's, which would seem to be the only relevance to which that evidence went but if that is all you are concerned with, it is credit and credit only, and all this long cross-examination goes to it and is dealt with by the trial Judge. As I understand it,

a further use can be made of this to the effect that from this you get an affirmative basis for reaching agreement that it is a conspiracy.

MR. POWELL: Likewise, that argument was advanced before the learned Judge.

TAYLOR, A-J.A.: That is what I wanted to know; that he made no findings on that?

MR. POWELL: He made no findings but the argument was advanced that these were part of an omnibus conspiracy - the primary conspiracy being the conspiracy to kill and the secondary conspiracy being a conspiracy to pervert the course of justice, to destroy evidence - call it what you will. Certainly it was said that these police were the tools of Armstrong, in address (not in cross-examination) be it noted.

The credibility is the ultimate test, and added to that is the fact that young Mr. Barton was never called.

TAYLOR, A-J.A.: You have got a direct finding on the credibility of the witnesses on the issue.

MR. POWELL: On that primary issue, yes, your Honour. As to anything else that is involved that does not lead to any finding on conspiracy, in our submission no use could be made of it.

TAYLOR, A-J.A.: If conspiracy is irrelevant, what is relevant, I suppose, is Vojinovic.

MR. POWELL: As I understand the law, the problem is that you first catch your agreement. There is no evidence of agreement to which one can attach first external acts.

The next finding attacked is the finding that his Honour did not accept Mr. Barton's evidence regarding his state of mind in December and January with reference to the future of Landmark and with reference to the link between Mr. Armstrong's threats and the making of the agreement, and related to that finding is a finding that the belief is self-induced rather than being based on fact.

As to that we say simply that there is evidence pointing both ways. The resolution of the problem, which conclusion to draw, depended at least in a material part on the credibility of the witnesses. These were utterly competing hypotheses and, no other matter having been introduced into it, it is not open to the appellant to challenge.

As to the finding attacked at the bottom of the page "I do not accept that Mr. Armstrong's threats and intimidation were intended to coerce nor that they had the effect of coercing" - we would say again that there is evidence tending both ways and the resolution depends at least in

part on the credibility and more importantly there is the absence of the responsibility for or knowledge of Vojinovic's activities, and these are utterly irrelevant for the solution of the problem before the Court. For that purpose we rely on the finding in Talbot v. Von Boris.

JACOBS, J.A.: Can you tell me how in fact the conversation "Sign the agreement or else" and the finding that it was a threat is consistent with a finding that it was not intending to coerce?

MR. POWELL: There is a problem in the evidence at that stage. Mr. Smith, I think, gave evidence that he had a conversation with Barton on the 11th which in effect said, "This is with our solicitors. They have all had a look at it". The original completion date was the 13th. The next day was the telephone conversation, so your Honour believes, and how one interprets that conversation is a matter that is at least open to some comment.

JACOBS, J.A.: But the Judge did interpret it; he interpreted it as a threat.

MR. POWELL: Yes, as a threat. As we understand what his Honour is saying is that it was not intended to threaten a man who was not otherwise disposed but was rather intended to threaten before the relevant date, because Barton was saying "We are not going to be ready for the 13th".

TAYLOR, A-J.A.: You mean it is allied with this attempt to get him to put up the $4,000?

MR. POWELL: Yes. That seems to be so. One turns to the phrase which has been much attacked, the "reluctant vendor". Perhaps that is not a completely accurate description, it could be peripatetic rather than reluctant remembering, as we do, that on Armstrong's part there is a note in his diary to the effect of giving him his last extension. That is consistent with a man syaing "I gave him until the 13th. I have extended it. I have given him until tomorrow and if he does not sign tomorrow, that is the end of it". It could be viewed in that context, but it is not an easy finding to deal with.

JACOBS, J.A.: I do not quite follow you, Mr. Powell. If you want to consider that further, do so, but at the moment I have difficulty in seeing how one can say that a finding of a threat in the terms "Sign the agreement or else" and a finding that that is a threat - and, in the context of this case - he obviously did not mean a threat to call the negotiations off; that finding seems to me not to be consistent with a finding that the words were not said with any intention of coercing. The words just do not seem to lend themselves to any interpretation other than it was a threat.

MR. POWELL: I am sorry. I had misinterpreted what your Honour had put to me before. I would like to look at it. I do bear in mind that his Honour had formed the view that Mr. Armstrong was not a very nice sort of person but a sort of person who would, out of sheer malice, take a delight in upsetting something.

JACOBS, J.A.: I am sorry, but that does not answer me. Do you mean that his mind did not go with his words?

MR. POWELL: What his Honour may be saying - and I will look it up overnight - is this: "There is no doubt that, taken objectively, that could be considered by Mr. Armstrong as 'If you do not sign this your days are numbered', but I do not think Mr. Armstrong really meant that. I think he took a certain malicious pleasure out of frightening this man". That may be what his Honour was saying, and his Honour has referred to this aspect in the evidence.

TAYLOR, A-J.A.: So if Barton wanted the agreement and Armstrong knew he wanted him, Armstrong was going to play him along and it could be directed to "sign it now"?

MR. POWELL: That puts it in another direction.

JACOBS, J.A.: That is my difficulty. I would not describe that as a threat within the context of this case.

MR. POWELL: I would rather look at it in a little more detail overnight. But I do bear in mind that his Honour did attribute a certain degree of malevolence to Mr. Armstrong and indeed in his own way Mr. Barton seemed to have thought that he was a highly erratic and irrational sort of individual.

TAYLOR, A-J.A.: His Honour had a very good look at him, for more than four days.

MR. POWELL: Nine days, in cross-examination, so his Honour was more than well acquainted with the facial twitches of Mr. Armstrong.

MASON, J.A.: The finding that you are at present discussing had two limbs to it: (1) the intention behind the threats on the part of Mr. Armstrong and (2) the impact on Mr. Barton.

So far as the intention behind the threats are concerned, to what extent does that finding depend on credibility and to what extent, or to the extent that it does - whose credibility?

MR. POWELL: Curiously enough, I think that turns on Mr. Armstrong's.

MASON, J.A.: That is what I thought.

MR. POWELL: But be it noted that although the learned trial Judge thought of Mr. Armstrong that his credit was virtually non-existent he did say "But I have the impression that on many occasions he told the truth" - perhaps he was scared to do otherwise. But to produce that result his Honour must have had a very strong impression, because Mr. Armstrong (in his Honour's eyes) was anything but of a sympathetic character and if that part of the finding could be thought to favour Mr. Armstrong then his Honour must have had a very strong impression to come to that conclusion.

JACOBS, J.A.: It may be that his Honour was referring to a different period at this time, and that he was not directing his mind to 12th January but to an earlier period when he said "Throughout December he found that there were constant telephone calls". I think that is correct.

MR. POWELL: This appears at page 3116: "I have a general impression that the account given by Mr. Barton is founded on fact but he has, in going over and over again in his mind, ... reconstructed an unreal relationship between the events in that time". Then he accepts certain evidence.

MASON, J.A.: His Honour does specifically refer to December and January and to events in January and it may be that his Honour felt by reason of another view that he had formed about some of the issues in this case, namely that the agreement was negotiated in the early part of January and there had been no departure from the head agreement then reached, and all the time one was looking for something around the beginning of January as the material date; therefore in his mind, what occurred on 12th January in that sense was irrelevant to the question of duress or influence over the plaintiff's mind and he put it to one side and was not concerned to pick it up again in forming the view that the threats were not intended to coerce the plaintiff in making this particular agreement.

MR. POWELL: Yes. It may be that what his Honour was saying, so far as the earlier threats are concerned, was that they were utterly unrelated to any particular thing.

JACOBS, J.A.: That is why I think it may be an explanation of this apparent difficulty, because his Honour did find that there were constant threats by telephone through December and that, indeed, round about the middle of December there may well have been a threat to Mr. Barton personally by Mr. Armstrong but that it was not a threat which said "You sign the agreement or you will be killed". At page 3153 his Honour finds that Mr. Armstrong "may well have threatened Mr. Barton on 14th December".

MR. POWELL: I am sorry, but as I read it - "I am not satisfied that Mr. Armstrong did threaten Mr. Barton", it is rather the converse.

JACOBS, J.A.: Line 18 of page 3153.

MR. POWELL: There was a threat.

MASON, J.A.: They may have been a threat. He was not satisfied that it was related to the agreement.

MR. POWELL: I am sorry, I looked some lines lower down to "may have threatened him on the 14th".

JACOBS, J.A.: The combination of the telephone plus that may not have satisfied his Honour that in December Mr. Armstrong's threats had, as it were, "honed in" on the agreement.

MR. POWELL: That, no doubt, would be open although there were discussions round about that day to 12th, 13th or 14th, but I would like to read again that passage because it is not entirely easy to understand it.

TAYLOR, A-J.A.: Does it really come down to this: that what his Honour has found is that the threats were made by Armstrong, unrelated to this agreement or any intimidation, and they were so accepted and received by Barton? Is not that what the findings come down to?

MR. POWELL: That is one interpretation?

TAYLOR, A-J.A.: What is the other one?

MR. POWELL: If your Honours did not so construe his Honour's judgment that the threats were made, they may have been thought to be such that Barton was in fact utterly unaffected by them.

TAYLOR, A-J.A.: That Armstrong did not intend them to affect him? That is another one.

MR. POWELL: Yes.

TAYLOR, A-J.A.: I suppose it is an odd way for people to behave, but we are dealing with odd people.

JACOBS, J.A.: One cannot help but think in the back of one's mind they may not have been related to any particular agreement in the early stages because they were going to be related to whatever situation developed between the parties. They were threats in a business relationship, if they were, and unless it was sheer malevolence (which the Judge thought conceivable) they were not, as it were, related to the achievement of a particular end at this particular stage. All they were wanted to do was to make sure that whatever particular end there is they would play their part in the long run. Otherwise they become inexplicable in the type of realm in which we, as reasonable men, move.

MR. POWELL: Mr. Gruzman has seen fit to categorise Mr. Armstrong as anything but an ordinary person.

JACOBS, J.A.: But that type of person does not get special treatment in the law unless he is in a very special category. He is supposed to intend the natural consequences of his act, and people's reaction to such a person is looked at as being what would be the reasonable man's reaction to them. The law is not over-nice about watching the depths of an individual's mind, either as a passive or active party, to find a place for that odd body.

MR. POWELL: Your Honour is with respect, seeking to apply the test of a reasonable man in a different way in each case.

JACOBS, J.A.: Not only that, but I am applying it more as the test to a factual situation. I am not saying it is the legal test, but the law perhaps is not over-sympathetic towards drawing an odd conclusion because of an oddness in the situation. I do not know, maybe I am wrong.

MR. POWELL: Might I merely quote somebody who no doubt carries far more authority than I could command? I refer to the judgment of Windeyer J. in Da Costa: "I may be forgiven for quoting from Sir Alan Herbert's 'Uncommon Law of England' ... was done". One might also pray in aid Sir Alan Herbert who says there is no such thing as a reasonable woman either.

(Further hearing adjourned until 10.15 a.m. Tuesday, 16th March, 1971).

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES) Term No. 22 of 1969
)
COURT OF APPEAL)

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

BARTON v. ARMSTRONG & ORS.

EIGHTEENTH DAY: TUESDAY, 16TH MARCH, 1971.

MR. POWELL: Yesterday afternoon we had just come to the consideration of the detailed findings that were attacked by the plaintiffs. We had reached page 2 of Mr. Gruzman's large document. On that your Honours will see, about halfway down the page, the finding attacked is the finding on page 3117 of his Honour's judgment: "Mr. Barton's course of conduct both in what he said and what he did between December, 1966 and the time shortly prior to the commencement of the suit contained no inkling of his having been intimidated into making the agreement. The attack mounted on that is an attack which suggests that the complaints and actions of Barton themselves amount to evidence of intimidation.

We would submit that that attack is not made out. At best the material relied upon to justify the alternate findings supports fear, but not necessarily intimidation. Whether or not that material supports intimidation involves, in our respectful submission, the question of credibility and an assessment of that evidence against other evidence. We merely indicate to your Honours that in this, as in other respects, Mr. Barton did a number of things. First of all,he denied certain actions. Opposed to that denial was the oral testimony of Smith, which was accepted. That is clearly a pure credibility finding. Likewise, Mr. Barton sought to deny the construction that the defendants would have had put on certain of the actions which the defendants relied on.

His Honour refused to accept Mr. Barton's denial of that construction, and indeed the explanation of that conduct which he proferred. That likewise, in our submission, is at least in part based on credibility. Certainly where it is a question of construing the value of an act it must be in part based on credibility.

The next finding attacked is the finding that although it is possible that Barton is sincere in his belief, his Honour was not satisfied with the fact said to be believed. The basis of that attack seems to be purely this: the actions being calculated to produce a result, Barton being sincere in his

belief, it follows that he was in fact believed. That, with respect, is a perfect non sequitur. The mere fact that a man has a present belief does not mean either that the belief is well founded or that at the relevant time it was in any way relevant to the transaction. That must be purely a credibility finding.

I am somewhat at a loss as to whether one ought to go completely through this document in extenso in the course of argument. I place myself in your Honours' hands.

JACOBS, J.A.: I do not think it is wise to do that. We are really in counsel's hands.

MR. POWELL: The only thing I am concerned about is that I do not wish to delay this hearing. Some material is there, and perhaps if your Honours feel some advantage may be obtained, I will continue.

JACOBS, J.A.: I think, just in case there are special things you want to put, if you feel it is covered by your summary we would certainly go through the summary. If it is looked at in that way I do not expect it matters a great deal whether we do it by listening to you or from the summary afterwards. Do you want to add anything to what is in your summary?

MR. POWELL: Really what we wish to point up is this, that throughout these findings which are attacked two things recur consistently: a reliance on credibility and the existence of competing hypothesis. The importance of that, in the light of the views expressed in the various authorities, need not be elaborated. If credibility is - as in our submission - material to his Honour's findings, then with respect your Honours ought not to intervene. If hypothesis are truly competing and it cannot be said that one preponderates so that competition is illusory rather than real, then certainly the views expressed by Sir Garfield Barwick in Whiteley Muir and Zwanenberg and by Sir Garfield Barwick and Sir Victor Windeyer in Cockburn Salvage & Trading Pty. Limited would suggest in that case it is a matter for the trial Judge to satisfy himself which of the two competing hypothesis is the one to be adopted.

TAYLOR, A-J.A.: Do you mean by that that if the ultimate finding that Barton was not coerced by these threats involves questions of credibility, that is enough to bring it into those principles which say that if a judgment on credibility is involved you leave it?

MR. POWELL: Yes.

TAYLOR, A-J.A.: The matters you are looking to alone are the basis of that finding.

MR. POWELL: The only reason we proceeded on this

basis was that, as we understood it, the appellant's case was: if you substitute these findings for those findings then different questions arise. What we wished to say was that if those findings are attacked - one might call them the findings in the process were attacked - one could say on either side credibility or a competition between hypothesis is involved. It comes in both at the ultimate level and at stages during the process of reasoning which lead to the ultimate level.

We submit it would be enough for our case merely that the Judge said "I do not believe Barton was coerced having heard him". But if one is to go into the process of reasoning which led to that conclusion, his Honour is saying at various stages "I do not accept Mr. Barton, I do not believe this about Mr. Barton", "I do not believe he was so gloomy", "I do not believe that", "I do not accept his interpretation of that". So that even in the intermediate stage of the process of reasoning, credibility or competition between hypothesis comes into it at almost every level. That is the only reason why I embarked on this analysis of various findings which were sought to be attacked. We do feel that certainly the basis on which we approach this is set out in the document we handed up to your Honours, and a mere comparison of the one with the other as one proceeds through it is sufficient, we think, without delaying the further hearing of the appeal.

JACOBS, J.A.: What concerns me is that on your approach it would seem to me that if a trial Judge sees a plaintiff in the witness box who tells one story and sees a defendant who tells an inconsistent story, and has a body of surrounding evidence, he being bound to reach a conclusion one way or the other, unless he merely depends on the onus of proof would, it seems on your basis, always be making a finding on credibility.

MR. POWELL: At least in part, yes.

JACOBS, J.A.: Because he would have to say, "I do not believe the plaintiff" or "I do not believe the defendant".

MR. POWELL: Yes.

JACOBS, J.A.: I did not know that it went that far. That might be quite unrelated to their demeanour or anything of that kind. He might just be saying "On the probabilities I do not believe the plaintiff".

MR. POWELL: It would be, in our submission, the rarest possible case where one could say that the evidence on one side was totally uncontradicted and uncontradictable. In that case one would merely say "There it is and it is incapable of contradiction and, therefore, I do not believe the other side". Perhaps in that case one could say

how the witness behaved in the witness box did not have much relevance. But this is not the present case, because there were many, many instances where his Honour was forced to decide on pure oral testimoney, unaided by external matters. There were many instances where his Honour had to assess for himself the worth of an explanation given by Mr. Barton and how Mr. Barton hedged or sought to answer, and all these things are clearly matters of demeanour.

May I merely remind your Honours of this attitude taken by Mr. Barton over the U.D.C. letter written by Mr. Bovill to Mr. Cotter late in December. Mr. Barton took his stand: the fact that that was their opinion, that was the company's opinion, it was not his opinion even though he, Barton, was part of the decision-making process, and he did not ever record his dissent in the minutes. That was his attitude: "That was a true letter as representing the company's views but it was not my view and it did not represent my view". How one assesses the man in the light of that depends on how the man behaves when he is faced with the situation in cross-examination. That must be a demeanour or credibility finding. Likewise, the letter to Dobbie, which Mr. Gruzman would have your Honours accept was at the best whistling in the dark, perhaps at the worst a thoroughly dishonest letter in seeking to lead a financier to advance money on a state of facts which, on Mr. Gruzman's present argument, was totally untrue. How one reacts to cross-examination when faced with that sort of document - -

TAYLOR, A-J.A.: But you can form a judgment on that without ever seeing him. You say any judgment of a Judge who did see him would necessarily be influenced?

MR. POWELL: It must be a matter of influence, particularly when the learned trial Judge sets his own guidelines and says, certainly so far as the motivation point is concerned, "Credibility is the test there, aided perhaps by external evidence. But credibility is the test of motivation". There his Honour's own guidelines are stated. One does not have to search about to see whether there is anything sub silentia which might reflect that this was so. This was his Honour's stated view, that credibility was a matter of prime importance on that issue.

JACOBS, J.A.: Take page 3138 on the big sheet and your notes on it: "I accordingly decline to find that Mr. Armstrong threatened Mr. Barton with physical violence". Your note is "Conflicting evidence, Barton and Armstrong", and then you refer to the failure to call relevant witnesses which can lead to an inference being drawn, and then you say it would be a question of credibility. Does that mean that the Judge preferred Mr. Armstrong as a witness to Mr. Barton?

MR. POWELL: On that occasion, yes.

JACOBS, J.A.: That is not a sufficient answer to make it credibility, because credibility in this context is general. It is not whether he is believed on a particular point, because otherwise you have a completely circuitous situation. Credibility is the advantage, credibility in the sense of the present context of it being specially within the province of the trial Judge means the advantage of seeing the witness in the witness box.

MR. POWELL: Who is to say, with respect, that there was not an advantage on that issue.

JACOBS, J.A.: What advantage would there be?

MR. POWELL: In the sense of seeing how a person reacted to that particular instance.

MASON, J.A.: We do know that Mr. Justice Street derived no advantage from seeing Armstrong in the box, except insofar as it led him to the conclusion that he could not accept what Mr. Armstrong said unless there was other evidence to support it. So that in coming to the conclusion that he did on this incident there was nothing in Mr. Armstrong's demeanour as a witness from which he derived support for the conclusion.

MR. POWELL: I question whether the learned trial Judge goes so far. He does say he was an unsatisfactory witness, but he does undoubtedly say of Mr. Armstrong that there may well be many occasions on which he has told the truth.

MASON, J.A.: That may be so with the most incorrigible liar the world has ever seen.

MR. POWELL: It may be that he would be embarrassed being asked his name, because he would have to tell the truth.

JACOBS, J.A.: I do not think one could ever find a stronger finding against a man's credibility than Mr. Justice Street's finding on Mr. Armstrong.

MR. POWELL: Be that as it may, what one asks, with respect, is the ultimate that caused his Honour to make this finding.

JACOBS, J.A.: I merely referred to it as an example of what I find to be a problem, because if this is so then any time when oral evidence is called and there is a conflict in that evidence one would practically have to reach the conclusion that one side's account was inaccurate. That, you say, always involves credibility. If there is nothing else it almost certainly does involve credibility. But hardly ever is there such a rarified situation that there are not surrounding circumstances. In fact I would say there is never a situation where there is nothing else.

MR. POWELL: Perhaps I have not expressed myself clearly. I had said, or believed I had said, that where it is a pure contest between witness and witness, without other material available to aid the trial Judge, that must be clearly credibility. On this it may be, and with respect it is not beyond the point, that although his Honour thought so little of Mr. Armstrong that he undoubtedly said that a mere denial by Armstrong weighed very little, if anything, his Honour also had said certain things about Barton. For example, his Honour says "His hatred and fear has led him to exaggerate and distort". Is that not perhaps a relevant question in determining whether or not this threat was made? Is not his Honour saying "This is perhaps merely an example of that, because he is liable to distort and exaggerate"? I start off with that proposition. And because he has not got anybody else to help him in a straight conflict situation, then I assess that against him. So that it is proper to say that even on such an issue as this one, one cannot discount entirely credibility.

His Honour has said, rightly or wrongly honesty or dishonesty does not matter, he is inclined to distort and exaggerate. Here we have a situation between people where I just do not know. He is no better than Armstrong in this situation.

One cannot even on that issue say demeanour did not come into it. It may be that his Honour has then said "And because neither Bovill nor Cotter came forward to resolve that problem."

TAYLOR, A-J.A.: Do you mean by that that if you give a low rating, so to speak, to Barton's credibility that you look in a situation like this to other things, look around for other things? If you gave him a very high rating and said "I believe him implicitly", you would not bother.

MR. POWELL: You would not bother. If Barton had come through as the white sepulchre that Mr. Gruzman would have us believe he is, his Honour no doubt would have said "In another situation I might have been disposed to take this into discount because these other people were not called. But because of the view I find of Barton and the utter worthlessness of Armstrong, I am content to act on that". But he starts off by saying "I discount it because of demeanour and therefore this particular non-availability of Bovill and Cotter does have meaning". The starting point, therefore, is demeanour. As I say, we have made our comments on the way through and we think they will be of assistance to your Honours and it would merely be a matter of unnecessarily lengthening the appeal if we went through in great detail.

The points we sought to make were the continued recurrence of the problems of credibility and competing hypothesis. We would submit, on the basis of the

authorities which we have put forward and the analysis of the attacks made, that your Honours should not and will not disturb the findings of the learned trial Judge. If that be so, then a critical element having been found against Mr. Barton the suit must fail.

Even if your Honours were to come to the conclusion that motivation ought to be found, we would submit that no decree can yet be made because in the instant case restitutio in integrum was not open at the time the suit fell to be decided.

TAYLOR, A-J.A.: What do you mean by that? At the time judgment was given?

MR. POWELL: At the time of the trial.

TAYLOR, A-J.A.: This is from the time the trial commenced?

MR. POWELL: Yes, and indeed certain things happened during the course which made it less available, but they might not be entirely relevant. I am not greatly concerned about the month odd between the argument and the delivery of judgment. We would submit that since restitutio is a pre-condition to the grant of relief in a suit of this type, the onus of establishing that restitutio is available lies on the plaintiff. It is true that it is not necessary for the plaintiff to show that precise restitutio in integrum is possible before a decree will go. That may perhaps have been a view current at one stage, and is probably still the view at common law. It is sufficient, we would concede, that if it can be demonstrated by a plaintiff that the Court may, by the use of its powers such as inquiries, accounts and the like, produce a situation where substantial restitutio can be achieved, then the onus is sufficiently discharged.

JACOBS, J.A.: Is there any authority on the onus?

MR. POWELL: No your Honour.

JACOBS, J.A.: I would not have imagined that it lay on the plaintiff. I would have thought that the defendant would have had to plead it on the defence.

MR. POWELL: We would submit that as restitutio is a pre-condition to relief - -

JACOBS, J.A.: Yes, you submit it, but I would never have thought it.

MR. POWELL: May one put it this way: one understands the general test of onus, which is if no evidence at all were led who must fail? If restitutio must be available and no evidence at all is led surely the plaintiff must fail.

JACOBS, J.A.: You put it that way, but first you have to decide whether you should rather put it that the Court will not grant relief unless restitutio in integrum is possible. That puts the onus the other way.

MR. POWELL: With respect not. Whether that be so or not, we would submit in the present case there is sufficient material to show that restitutio was not available even in what one might call the more expanded form.

May we ask your Honours merely to turn shortly to point number 21, The earlier authorities are cited there. I think it is sufficient for your Honours' purposes merely to turn to the judgment of the High Court in Alati v. Kruger in 94 C.L.R., 216, the relevant passage being the joint judgment commencing at page 223. If one goes to the paragraph commencing near the foot of page 223, your Honours will see the judgment proceeds "If the case had to be decided according to the principles of the common law ... upon the decision". Then their Honours proceed to see what might be done. This does point up again the approach which we suggest supports the view that there is an onus on the plaintiff. When your Honours see that the Court is saying that restitutio, or the possibility of restitutio is an adjunct to a present right to rescind. So that that does support the view that the onus of showing a possibility lies on the plaintiff. Clearly enough he must show that he rescinds or has a present right. If an essential ingredient of the present right is a possibility he must show that as well.

We would submit that for a variety of reasons restitutio was not possible in the present case. It is to be observed at once that this was not a simple transaction inter-parties, Mr. Barton on the one hand, Mr. Armstrong and his companies on the other. This was a compound transaction, and compound not only in the sense that the primary deed had a vast number of parties to it, but that there were intended to be and there were in fact a number of subsidiary agreements. The primary deed, which is Exhibit "H", is found at page 2092, which is vol. 7 of the record of the appeal. Your Honours will observe that after the recitals the operative parts of the deed commence at page 2096.

The first covenant is, in effect, a covenant by Southern Tablelands to lend $300,000 to Paradise Waters Sales. The terms of that loan are dealt with more fully in Exhibit "T", to which I would ask your Honours to turn shortly. The second operative covenant deals with the securities to be provided to support the loan, and those include the deeds of mortgage; the schedule is on page 2114: "The contract of loan, the bill of mortgage over Paradise Waters ... raising no objection". Then your Honours see that in cl. 3 there was conferred on Southern Tablelands, in effect, the option to substitute another

borrower. There followed a covenant to ensure the speedy completion of Landmark House: covenant 5, in effect, is in aid of covenant 3, if the option to substitute is exercised then those securities must be discharged. Covenant 6 grants the option to take up lots in the island project. Covenant 7 is in aid of that. Covenant 8 is an agreement by the Armstrong companies to sell to persons nominated, and covenant 9 is a covenant by Barton to procure people todo certain things.

We know from the guarantee instruments, which are Exhibit "J", that a number of people were procured as purchasers and in fact entered into independent agreement of purchase with the Armstrong company. Covenant 10 is a covenant providing for end finance on the Vista Court project. Covenant 11 is an agreement to sell Paradise Waters Sales shares. Covenant 12 deals with the sale of the penthouse in Landmark Towers. Covenant 13 deals with the loan and how it is to be applied. Covenant 14 deals with settlement, and the others are what one might call procedural.

One comes to this situation, that we know from the evidence before the Court first of all that $300,000 was loaned and that the companies who were to guarantee and give security did guarantee and give security. One knows as well that at least six nominated purchasers entered into independent agreements, so that at that point of time at least Barton's covenant to procure is exhausted, and in the absence of some special right between the nominated purchaser and the Armstrong company, the Armstrong company would be bound to sell and the nominated purchaser would be bound to purchase. One knows that the penthouse was sold. What happened with Vista Court we know not, except that if what was done was what was provided for the sale was to be completed and subject purchasers were to be provided with end finance. What happened then?

It is clear, in our respectful submission, that at least four of the companies involved have affirmed the transaction, and cannot deeds affirm it and could not deeds have affirmed it at the time when this suit came before his Honour. We refer to the proceedings taken in March and April in Equity and under the Moneylenders' Act in relation to the call-up of the loan.

May I draw your Honours' attention firstly to page 2461, which is the first of the affidavits sworn by Mr. Barton in the moneylending proceedings. Your Honours will see that the applicants were Paradise Waters Sales, Landmark Corporation itself, Goondoo and Paradise Waters. They were applicant parties. If one then turns to page 2498, which is in vol. 8, one sees the first of the affidavits sworn by Mr. Barton in the Equity suit. This is a suit by Landmark Corporation against Southern Tablelands Finance.

The gravamen of the case made both in the moneylending application and in the Equity suit was that it was intended to be a term of the loan arrangements that the borrowers and the guarantors were to have at least 7, if not 14, days in which to rectify any breach. That was the only attempt made to say, in the one case, that the transaction is harsh and unconscienable because it does not reflect that prior agreement, and in the other case to stay, as it were, the enforcement of rights against Landmark. Those proceedings were both settled and the terms of settlement appear on page 2471, which is in vol. 7 of the record before your Honours.

JACOBS, J.A.: Did Mr. Barton guarantee the purchase of the shares? He really entered into a separate covenant.

MR. POWELL: There is a covenant to procure and then there is a series of guarantors, Exhibit "J", in which there are cross guarantees everywhere. Home Holdings and Allabart and all these other companies come into it.

JACOBS, J.A.: I do not see where he agreed to guarantee.

MR. POWELL: I do not think he did agree to guarantee. That is another interesting feature, that that is a further obligation he took on himself.

TAYLOR, A-J.A.: Somewhere in the negotiations he said something about it. I think in the negotiations or the affidavits sworn in the Equity proceedings or the moneylending proceedings he claimed that he told Smith or Armstrong that he would see that the moneys were paid.

MR. POWELL: The terms of settlement are on page 2471 and 2474. Your Honours observe that the terms of settlement proceeded on the basis that Southern Tablelands, the lender, undertook not to enforce any of its rights until 30th June, 1967, nor to take any steps to enforce any of its rights against any of the other plaintiff guarantors until 30th June, 1967, so long as a sum of interest was paid and thereafter further sums of interest were paid. That, of itself, one would have thought without more, would have amounted to a recognition and an affirmation of a present obligation to pay money on a particular account, namely, the instrument of 18th January, 1967. But whether or no one considers it that way, clearly enough on page 2472 the plaintiffs themselves have so undertaken. They undertake to abandon any claims made or which might have been made to have the transactions re-opened and, more importantly, to abandon for evermore their claim that the principal sum is not now here entailed.

One adds into that, for what it is worth,

this having been a suit in which the proceedings were dismissed with no order being sought by his Honour the trial Judge under rule 160, there would be an issue estoppel in any event between the parties. Perhaps one does not need to go so far because of the express agreement that a sum of money was then due and payable, but for what it is worth there was undoubtedly, in our submission, an issue estoppel, that there was a binding deed pursuant to which a sum of money was due and payable. Not only did the plaintiff companies affirm it in that sense, but they affirmed it because they obtained for themselves further time. On the basis of the abandonment of the claim the money was then due and payable. By entering into the negotiations they obtained for themselves further time, albeit not a great deal of time, but they did obtain for themselves an advantage, which they conceded they were not entitled to.

At page 2474 there are the terms of settlement dealing with the moneylending application, and that again rehearses the respective undertakings given in the Equity suit and the dismissal, coupled with the undertaking, one would have thought would amount to an issue estoppel that the transaction, at least qua those four parties, is not harsh and unconscienable.

One then has this situation, that in a situation of a compound nature four at least of the parties to the primary transaction cannot rescind because they have affirmed and, with respect, by virtue of the agreement added into it there is no longer any room for restitutio at least qua them.

TAYLOR, A-J.A.: What would be involved in restitutio in this agreement the subject of the Equity suit or the application under the Moneylenders' Act? What would be involved?

MR. POWELL: As we see it what would be involved would be a payment back by George Armstrong and Sons, actually of the $400,000-odd, because they were paid out on the transaction. They would have paid that back. Paradise Waters Sales, which was the primary mortgagor in each transaction, would then have to repay to Southern Tablelands Finance $300,000-odd; Mr. Barton and his sub-purchasers would have to give back the 300,000 shares and, no doubt, the primary instrument would be delivered up for destruction. To take it to its ultimate, the subsidiary instruments would also need to be delivered up for destruction because unless they were brought back into the pool there would be independent rights; the penthouse would have to go back to Landmark (Queensland), that company would have to repay the sum of $60,000. Carrying it through to its ultimate, I think if one uses the common law approach, the Vista Court project would become the subject of a trust in favour of Goulburn Acceptance, but I do not think the Court would be

troubled about that; they would leave the legal title where the beneficial title was. That, or the effect of that, would have to be achieved.

We would submit that, firstly, because the companies had proceeded on the particular basis, it was not open for them to do anything about setting the transaction aside, even if it could have been said they were affected. More importantly, by the time the suit came to be determined at least three - and I think five - companies were in liquidation with receivers in on their assets. One would then get the problem that because a charge had crystallised over the Paradise Waters project, if George Armstrong and Sons repaid to Paradise Waters Sales the sum of $500,000, that would become immediately subject to the charge and it would not be possible for the Court to say that by a clear demonstration $300,000 would then be paid out to Southern Tablelands Finance. So that one has that problem. The rights of third parties had intervened, the charges had crystallised.

His Honour points to this fact at page 32220, that the receiver was then in possession of the Paradise Waters project. So that even if money went back in from George Armstrong, it could not go back out to Southern Tablelands, so that one could not get restitutio even at that level. As far as the penthouse was concerned, Landmark (Queensland) was in liquidation too, so that one could not say that if the penthouse went back it could pay out $60,000. Indeed one does not know what the position was with the penthouse. There was no evidence at all that Armstrong or anybody associated with him still held it. There is that hiatus in the evidence. One could not point in that respect to the possibility.

So far as the sub-purchasers were concerned, the thing that led them to enter into their ultimate agreements with Armsgrong was the fact that Barton procured them. There was no basis on which those sub-purchasers could, as against A.E. Armstrong and Sons Pty. Limited, avoid. They were as much bound to purchase as Armstrong's company was bound to sell. Indeed, as I have indicated before, Barton's covenant at least to that extent was exhausted. He had procured. The operating feature qua those people was the procurement, and nothing that Armstrong had done. Furthermore, so far as the evidence disclosed, none of those purchasers had taken any action to set aside their respective agreements anyway.

TAYLOR, A-J.A.: They were all parties to this suit?

MR. POWELL: They were submitting defendants. They sought no relief of their own.

JACOBS, J.A.: There is no question of relief to anybody but Mr. Barton arises.

MR. POWELL: With respect it does, because it is a compound transaction. The loan was an integral part of the primary agreement, as were the securities.

JACOBS, J.A.: Assuming duress is applied to one party to a contract to which there are six parties, and the duress induces that party to enter into the contract with one of the other parties upon whom he conferred a benefit by the contract, but duress did not operate on any of the other parties who dealt with them. Do you say that no relief can ever be given to the single party who was the subject of the duress?

MR. POWELL: I would submit in such a compound situation no. If Talbot v. Von Boris be right, that an agreement can only be set aside against a person who either applied duress or knew and took advantage of duress, that must be so.

JACOBS, J.A.: So that it cannot be set aside as against the party who did apply the duress?

MR. POWELL: In a compound situation of this type, yes, because one would be affecting the rights of innocent purchasers for the value of the former; to set it aside partly would mean there just was no restitutio. What would be left would be a truncated agreement, which was not what the innocent parties intended to enter into.

JACOBS, J.A.: How were the innocent parties concerned with the arrangement for purchase of shares between Mr. Barton and Mr. Armstrong or the guarantee that Mr. Barton gave Mr. Armstrong?

MR. POWELL: Mr. Barton's covenant was to procure; in this case that covenant is exhausted to the extent to which he did get sub-purchasers. Those persons were in no way affected. Let us just take Barton as opposed to the other companies. If the primary obligation of Barton was set aside then, with respect, so what? He would have exhausted his obligation to that extent; the other parties could not do anything about getting out of the agreement.

JACOBS, J.A.: They could in certain circumstances.

MR. POWELL: On the hypothesis that the only thing that operated was with Barton and Armstrong.

TAYLOR, A-J.A.: But they are bound by deeds.

MR. POWELL: That is so.

TAYLOR, A-J.A.: Bound by a deed to pay for their shares.

MR. POWELL: And that was what was required in the primary agreement.

TAYLOR, A-J.A.: So long as the deed stands, they must pay.

MR. POWELL: We submit so.

TAYLOR, A-J.A.: Then the only relief Barton could get here was relief from the obligation to buy his own shares, which was $30,000.

JACOBS, J.A.: And to guarantee the others.

MR. POWELL: With respect, no, because there is no specific covenant to guarantee in the primary agreement. That comes in by the subsidiary agreement.

JACOBS, J.A.: The deeds were made the following day?

MR. POWELL: They were.

JACOBS, J.A.: I am trying to find these additional obligations that Mr. Barton undertook beyond what had been agreed on at the 4th January.

MR. POWELL: When I said it was not determined, the agreement, I meant the deed of 17th does not specifically - -

MASON, J.A.: It does not, but on 4th January the plaintiff indicated that he was prepared to accept this obligation to guarantee the payment price by a purchaser. That appears in Mr. Smith's notes.

JACOBS, J.A.: I do not understand what you are adverting to.

MR. POWELL: If one sets aside the deed of the 17th which contains no covenant to guarantee, that is not going to get Mr. Barton out of his guarantees. One cannot set aside the subsidiary agreements because in the case of the six sub-purchasers at least all we know is that Barton procured the sub-purchasers and they were in no way affected which might be sheeted home to Armstrong or his company. That is another part of the compound transaction that cannot be set aside.

JACOBS, J.A.: It seems to me that the obligation undertaken by Mr. Barton was (a) to purchase certain shares; (b) to find purchasers for other shares and (c) to guarantee those purchasers.

MR. POWELL: May we just go back to the agreement. Mr. Gruzman has drawn my attention to the fact that on page 2115 guarantees by Barton are provided for. One might, on that basis, be able to set aside the guarantees, but one could not set aside the sub-purchasers.

JACOBS, J.A.: There is no relevant party seeking to have that done. It has nothing to do with Mr. Barton any longer.

MR. POWELL: This points up what we submit is the problem. This is not an agreement capable of

being taken in isolation. This was a compound agreement, and unless it can be restored in substance all round then it cannot be set aside.

TAYLOR, A-J.A.: Whatever happens with it, the obligation still stands for these seven people to pay for these shares?

MR. POWELL: Yes.

TAYLOR, A-J.A.: It was originally supposed to be ten.

MR. POWELL: It was supposed to be ten at $30,000, that was one plus nine. I think it came down to one plus seven between the first draft and the last draft.

JACOBS, J.A.: They do not seek relief in the suit. They do not seek any relief but they cannot debar a man who, if he is bound subject to duress in respect of the imposition of his obligations from repudiating those obligations, provided in respect of those obligations there can be restitutio in integrum.

MR. POWELL: We submit it goes further than that. There are obligations in the deed of the 17th which go beyond Barton. If that agreement is to be set aside it must be set aside in toto. One cannot have an agreement rescinded on one side but operative as to everybody else who is a party to it.

JACOBS, J.A.: Especially if the considerations are interdependent.

MR. POWELL: In some they undoubtedly are, because one sees that there is a specific covenant for the finance by Southern Tablelands, that it is to be applied at least pro tanto in discharge of the joint Armstrong group. Then it goes out of time.

JACOBS, J.A.: But no relevant party is seeking relief in respect of that transaction.

MR. POWELL: It is not a question of no relevant party. Either, in our submission, there can be restitutio in integrum of the agreement or there cannot.

JACOBS, J.A.: The whole lot?

MR. POWELL: The whole lot. If there cannot, then, quite apart from the third party duress problem, that is the end of it. As I pointed out to your Honours there were receivers in, there were liquidators in, in at least two and I believe four. Two were in liquidation before the suit started, they being Landmark (Queensland) and Landmark Housing Developments, and two subsequently went into liquidation, I believe before the suit came on, in the interregnum between the originating summons and the

date in May when the suit commenced. In addition U.D.C. receivers had gone in on the Paradise Waters project. I am not quite sure whether the evidence discloses that the bank's charge had crystallised or any advantage had been taken. If the evidence does disclose, then one gets another problem, that the moneys which ought to go through and flow out again have been stopped. One also has the other problem that shares had been transferred in companies in liquidation.

JACOBS, J.A.: I think that needs closer study.

MR. POWELL: Without the leave of the Court or the liquidator it would seem that shares cannot be transferred. This arises partly out of the problem of the need to create the A and B list to appropriate the obligation. The authorities seem to demonstrate that even if there had been a sale, uncompleted in the sense that transfer had not been registered, the register could not be rectified without the approval of the liquidator or the Court. That injects another problem as well, although it may be that that is not a problem because the Court can put on its company hat while sitting in Equity.

JACOBS, J.A.: You say there should be leave for the directors of Landmark to rectify?

MR. POWELL: Yes, because Landmark itself was in liquidation. There is this problem, that certainly if it be the plaintiff's onus to show the possibility, the plaintiff did not even attempt to show it. If the onus be on the defendant to show no possibility then there is sufficient there, in our submission, to show that at least in some respects total restitutio could not be applied.

JACOBS, J.A.: You say that the suit is defective for want of plaintiffs seeking relief, quite apart from restitutio.

MR. POWELL: In that sense, yes. People just have not disaverred. As your Honour sees Landmark submitted through Mr. Bennett, the Queensland company submitted and the sub-purchasers submitted. The only disputing defendants were Mr. Armstrong and his companies. Some of the defendants may not have appeared, but the dispute was between Barton on the one hand and the Armstrong group on the other, with people involved in the primary transaction not saying "We have rescinded" and not saying there is any possibility of restitutio. That, in our submission, would be enough to dispose of the suit. That concludes the matter that we would wish to put on the suit as originally propounded.

Mr. Horton has drawn my attention to the fact that I may have misled your Honours when I said U.D.C. receiver was in. That was my impression, but when I check back to the page, page 3220, it does not say U.D.C. It is a mere statement that

the receiver was in. But at page 630 of the transcript Mr. Smith gives the evidence that he had been appointed receiver by Southern Tablelands Finance, and it appears that he was in that capacity.

Before I pass on to the other matters, your Honours will recall that at some stage there was some suggestion about the basis on which Mr. Staff abandoned the duress, aquiescence and delay plea. Mr. Gruzman has extracted from the transcript of the argument a passage which we have been able to check, and at his request may I hand that up.

TAYLOR, A-J.A.: Does this not prevent you now from raising this point about restitutio?

MR. POWELL: With respect not.

TAYLOR, A-J.A.: I thought you opened your remarks about this by saying that the critical time was the time when the suit came on for hearing.

MR. POWELL: Restitutio was raised in argument.

TAYLOR, A-J.A.: You mean it is clear that the parties in any event did not construe this the way I am construing it?

MR. POWELL: There is in material before your Honours a passage in Mr. Staff's argument where he raised and dealt with the point of restitutio.

JACOBS, J.A.: You say he was not directing his mind to restitutio when he made this statement?

MR. POWELL: No.

JACOBS, J.A.: What was the width of this statement?

MR. POWELL: As I understand it what he was saying was "We do not say that because on the cesser of the duress he did nothing, by reason of that fact he has lost his right". That flows from the context of the objection to evidence and the ruling which the learned trial Judge gave.

JACOBS, J.A.: You did give a half indication that you might wish to submit a somewhat narrower approach. Do you abandon that now?

MR. POWELL: I indicated if the matter is to be amended I would certainly wish to raise it, but I felt constrained, in the light of what I understood had been said, not to have it open to me now to say that that was there.

JACOBS, J.A.: Just to be clear, apart from duress, acquiesence and delay being equitable defences, I expect there was a defence or an issue open that the duress had ended. I do not know, but it could be on one view of the law a defence that the duress had come to an end.

MR. POWELL: I do not think it was raised.

JACOBS, J.A.: I do not think you could raise it, in view of the statement that if Mr. Barton can satisfy the Court he had a right in January "Then we do not raise a defence".

MR. POWELL: Yes. I understand Mr. Staff was saying the case for the Armstrong defendants was a denial of the threats, a denial of any operative threats, a mere pointing to the facts along the way as evidentiary material to support one or other of the first two arguments and a final statement that because it was the plaintiff's obligation to prove that he had, at the commencement of the suit, a right to rescind, then restitutio was irrelevant.

MASON, J.A.: To be precise about it, the issue that was thrown up by par. 15 of the statement of claim - -

MR. POWELL: That is the continuation of the threat?

MASON, J.A.: That the plaintiff still was and remains in fear of his life and safety and of the life and safety of his family, which was traversed in the statement was, by Mr. Staff's concession, excised from the issues in the case.

MR. POWELL: It was for that reason that no real evidence went to it, but I do not think it is open. It would not be properly, because it has not been properly canvassed. We just do not believe that on the authorities it is open.

May I turn now to deal briefly with the new issues sought to be introduced into the case. May I turn first of all to the question of undue influence, which is now sought to be introduced. We would say firstly that there is just no situation here demonstrated of undue influence in any one of the varieties of that expression that equity recognises. The judicial statements and the writings of the academics seem to be very wide in their ambit. I think that the passage from Salmond and Williams, which appears in the judgment of Mr. Justice Porter, as he then was, in Mutual Finance Limited v. John Wetton & Sons Limited, the only suggestion is that there be some degree of iniquity between the parties to the transaction. In our submission that is an over-statement or an over-simplification of what is involved. The material to which we would ask your Honours to look briefly is under point 24 and following. In our submission, upon its true analysis, undue influence comes down to two basic situations; first of all, an equitable extension of the common law as to duress.

The second one is an extension of the general equitable doctrine of fraud insofar as the doctrine embrases within it the concept of fiduciary

relationships and obligations to protect the interests of other parties. In either case the ultimate question is whether or no the influence operated to produce the gift or the agreement sought to be impuned.

Where the attack is mounted on an extension of the equitable concept of duress, in our submission the plaintiff must show pressure of such a nature as to make the enforcement of the agreement contrary to public policy and, secondly, must show that the agreement resulted from that pressure.

Williams v. Bayley certainly operates to support that view. I will not take your Honours back to it because it has been read a number of times by Mr. Gruzman. But your Honours recall in the course of the reasons by the learned Lords two threads emerge, one being illegality in the sense that this has in its end the object of agreement to stifle prosecution. The other concept is that this was pressure on a man's near relative to produce an agreement and it was contrary to public policy to use the possibility of proceedings (in a criminal sense) as a means of exerting pressure on the man in question. The two threads of reasoning appear in that judgment.

In Kaufman v. Gerson, by contrast there is no pressure in that sense but the Court says "whatever may be the position ... it would offend against our public policy to recognise such an agreement and therefore that is the end of it". There is also the approach displayed by Mutual Finance v. John Wetton, and also the material handed in from Williston, which I do not think is in that file, but it is in the policy file, or an earlier file and supports that view. The material in Williston under point 12 covers duress in its baldest form and also undue influence which is in the material from Chitty.

In the present case, in our submission, it does not matter what Equity would recognise as undue influence by extending the common law approach. This was duress in its baldest and most simple form. If it does not exist as such then it certainly is not going to succeed by putting another label on it. This, if it be operative duress, is a threat of violence to the man himself and the only question then was: Did it operate? So it is not going to advantage the plaintiff to say "This was undue influence".

In the second class of case, the case involving the general extension of the equitable doctrine of fraud, a rather different approach is required. The authorities support, in our submission, that the plaintiff must show either a traditional relationship of influence - the Pastor and the member of the flock, the teacher and the student, and the like; or the plaintiff must demonstrate that there was a special ad hoc relationship of influence.

TAYLOR, A-J.A.: You take the law as set out by Dixon C.J. at page 132 and you accept that, in Johnson's case?

MR. POWELL: Yes.

TAYLOR, A-J.A.: If that is so, it would avail the plaintiff nothing in this action to get an emendment on undue influence?

MR. POWELL: No, and this is what we say it will come to unless and until he can demonstrate the capacity to exercise influence in the sense that it is a capacity to mould the judgment - it is just not going to assist him in the slightest. Merely to say that this is an undue influence case does not (as Mr. Gruzman seems to suggest) immediately produce a swinging onus. It is only when the traditional relationship is shown to have been established in the first case, or in the second case where the special relationship is shown to have been established, that the Court will then presume anything.

But even though the Court may then interpose with a presumption that, as we all know, is not just the end of it. The Court interposes with its presumption purely because it was said that one or other of these states of fact has been established, and the experience of man would - in the absence of other evidence - lead to the conclusion that advantage was taken of the situation. So it is at best an evidentiary presumption and it is clearly, of course, capable of being discharged. It is, as we will put with respect, an evidentiary presumption.

MASON, J.A.: Not a legal presumption?

MR. POWELL: No. It is a legal presumption when a traditional relationship is established to show "we presume that this is a situation in which influence is capable of being exercised".

JACOBS, J.A.: No, "was exercised".

MR. POWELL: With respect, no.

JACOBS, J.A.: Either the situation is one where it is capable of being exercised - -

MR. POWELL: If it were a legal presumption one question whether it would be rebuttable. It is only because it is an evidentiary presumption that it relieves the plaintiff from the necessity to go further unless and until there is some evidence to the contrary.

JACOBS, J.A.: Just to make sure that we have our terms definite, assume at the end of the day a relationship of influence is proved - doctor and patient or clergyman and parishioner - and at the end of the day the tribunal of fact cannot make

up its mind whether in fact influence was exerted; what do you say? On which side does the decision come down?

MR. POWELL: On the side of the person who has established the existence of the relationship because there is no acceptable evidence to the contrary. Perhaps it is a matter of semantics.

JACOBS, J.A.: It is a matter of words. Certainly I have taken evidentiary presumption to mean the case where you produce evidence and in the ordinary experience it might be that that evidence - uncontradicted - would carry the day, but it is not necessarily so.

MR. POWELL: It may be a question of semantics.

JACOBS, J.A.: I think if you can use the words "legal presumption" to mean shifting of the onus so that the end of the day if the Court is not satisfied it finds that there was onus, and evidentiary presumption being evidence which is more or less compelling, but if at the end of the day the tribunal cannot make up its mind that the person alleging the onus has failed?

MR. POWELL: If that be the trend of the phrase "legal presumption" in the way your Honour is using it, I would say this is a legal presumption because it can only be displaced by acceptable and accepted evidence. But the onus may be discharged by a variety of ways. However, where the transaction is not a pure transaction of gift but is a transaction of an ex facie commercial nature the questions which are involved in an examination of whether or not the onus has been discharged are somewhat different. The gener[illegible] approach where the transaction is purely one of gift seems to be, and I think in the Privy Council case of Inche Noriah they say this is not the only way of doing it, but the general approach seems to be that you can basically discharge the onus if you can show that there was independent legal advice given by a person who had a proper and full knowledge of the circumstances under which the transaction was being entered into and explained the document both in its legal and other aspects to the person concerned, and in the light of a proper and intelligent and full explanation nevertheless the transaction went through. Clearly enough, in this case the legal advice does not mean you necessarily fail to destroy the presumption. Indeed, in Inche Noriah the presence of legal advice was not held to be enough because the advice was given by a man who had but a passing knowledge of the circumstances and such knowledge that he had came from the nephew and not from the old lady herself, whom he in fact believed was responsible for this idea, rather than it being an idea which originated with the nephew.

But where the transaction is in its nature

commercial, then one goes beyond that and one is entitled to, and indeed obliged to, we submit, look at a far more extensive range of facts. The view that supports that is in fact the judgment of Dixon C.J. at page 143 in Johnson v. Buttress where his Honour does say that adequacy of consideration and other matters come in. We are not restricted merely to say either that there was no relationship or that legal advice was involved, or what have you. In the present case we take our stand on two bases: we say that firstly, quite apart from the fact that this is not a case of undue influence of any kind, even this were the case where the Court could be persuaded that there was a possibility that influence might be applied and that by reason of that fact the onus swung to Armstrong's side, there is a specific finding by his Honour that Mr. Barton entered into the transaction for commercial reasons.

MASON, J.A.: Just before you get to that, you say this is not a case of undue influence, anyhow?

MR. POWELL: Yes.

MASON, J.A.: You say that, looking at it on the extended basis, because on the evidence and on the judgment in its findings the plaintiffs have failed to establish a special relationship?

MR. POWELL: Yes.

MASON, J.A.: If we put traditional relationship out that is your reason?

MR. POWELL: Yes, that is our basic reason. If one means to pray in aid evidence one may only need to remember that, if I may be forgiven for using the vernacular, the one who called the fight on in the first place was Mr. Armstrong; a man who demonstrated a fierce independence of mind, at least in the earlier stages was Mr. Armstrong, a man who felt as late as 22nd December in company with Mr. Bovill disposed to say that the price for saving the company, if faced perhaps with the possibility that Mr. Armstrong would get back, was too high for them to pay.

TAYLOR, A-J.A.: He couched it in more extreme language than that. He said "That would give him control, I would not consider it".

MR. POWELL: Yes, I think Mr. Bovill went a little further, but Mr.Barton went higher and said that "Not on your life".

MASON, J.A.: Before you get to the evidence, and looking at it purely as a matter of finding from the Court below, what do you say would have been necessary as a finding on the part of Mr. Justice Street to justify us making it a case of special relationship and influence?

MR. POWELL: What seems to be involved in the non-duress type of undue influence is in reality something in the nature of a fiduciary relationship of one to the other. I think Dixon C.J. used the phrase "The weaker party might be presumed to believe that the other party would only act in his interests because he had taken control of the supervision". That is certainly not this case. If the rationale behind this type of undue influence is fudiciary, then it is a weakness arising from reposed confidence.

MASON, J.A.: Is not there an error in this philosphy which defines as the sub-stratum of the relationship of influence a fudiciary relationship? I have always understood that the fudiciary relationship did not necessarily correspond at all with the relationship and interest. The relationship of influence may well be found outside the fudiciary relationship.

MR. POWELL: It might be, your Honour, and this is why we say it is some sort of extension of that fudiciary relationship problem. But the underlying philosophy nonetheless seems to be somewhat akin to that, that it would be improper for a person in whom had been reposed confidence.

MASON, J.A.: This view is based on the view that underlying influence was the trust and confidence by the weak party?

MR. POWELL: Yes.

MASON, J.A.: If you asserted that as the gravaman of the relationship of influence you immediately ignore any power to influence or dominate that arose as a result of intimidation or threats.

MR. POWELL: That rather falls into the other concept and that is why, with respect, as we see it the undue influence concept in equity proceeds on two lines; the extension of the common law duress on the one side and extension or continuation (I am not quite sure what it is, perhaps it is extension) of the fudiciary relationship. There is no doubt that if one can see something of the nature of the problem that was shown to operate in Williams v. Bayley or these other cases that would be an undue influence situation because of the approach down that line, but if one remembers that the relationship of influence as Mr. Gruzman is putting, it is almost like Mrs. Beaton and her cookery book: first catch your relationship and what is it you are looking for? You are looking for a person who is weak and because he has reposed confidence and trust. He may reasonably be able to believe or he may reasonably be expected to believe that he in whom he has reposed confidence would protect his interest.

MASON, J.A.: You put it on the basis that there has to be missing from this finding something to

the effect that because onus or domination, whatever you like to call that philosophy, has really stemmed from the wrong sort of parentage?

MR. POWELL: It is either common law duress or equitable extension or it is nothing, in undue influence terms.

JACOBS, J.A.: By reason of the facts in this case or by reason of the undue influence?

MR. POWELL: By reason of the facts of the case.

MASON, J.A.: I can understand that, but I had rather thought that you were putting it on the basis of by reason of the nature of the undue influence.

MR. POWELL: No. I am sorry if I have perhaps expressed myself badly. We have sought to say that undue influence must have these two approaches: it may be that in a given case (although we find it hard to envisage) a case might fall within both sides or it might be evenly embraced by either approach.

MASON, J.A.: Do you concede that a case of special relationship of influence can arise as a result of threats and intimidation?

MR. POWELL: We would think not, only because if the approach which we suggest is the proper one is adopted then one can say in that situation he might reasonably have expected the threatener to look after his interest.

MASON, J.A.: Your first point then is that there was an absence of an appropriate finding to ground a special relationship of influence by virtue of the intimidation and threats that are relied on by the plaintiff as founding that situation?

MR. POWELL: Yes.

MASON, J.A.: Secondly I gather you would seek to make the point that even if that be not the correct approach, that intimidation could found such a relationship, nevertheless there is an absence of the appropriate finding in terms of influence or capacity - influence as between the two parties, is that correct?

MR. POWELL: Yes.

MASON, J.A.: When it comes to the second point, you put it, do you, on the basis that there is not a finding that at material times Mr. Armstrong had the capacity to influence the plaintiff? Is that how you put it?

MR. POWELL: In commercial matters, yes.

MASON, J.A.: In commercial matters? But you are

happy with the formulation of "capacity to influence the plaintiff" qualified by "in commercial matters"? I think that is the expression that you used earlier and that is why I put it. I may be under a misapprehension but I think you used that very expression.

MR. POWELL: I think that is so, your Honour. That is quite apart from the problem whether or no in any event this Court can be satisfied that the problem has been fully examined at this stage.

MASON, J.A.: I understand that, Mr. Powell.

MR. POWELL: But quite apart from the question of capacity, in any event on what we say is a discharge that might in any way have been cast upon us, because we point to the fact that his Honour did not say it was for commercial reasons; so even if we bore the onus we suggest that we had discharged it.

I do not know that any virtue would be served in going to the authorities, they have been quoted, and these are collected in the file.

MASON, J.A.: We have been taken to most of them, I think, by Mr. Gruzman at considerable length.

MR. POWELL: I think Mr. Gruzman did refer to Adui v. Fisher, but it is there purely for a convenient collection of all that material.

We would turn then to the question of equitable fraud, although we find it quite difficult to understand how that is put in this case.

JACOBS, J.A.: Separately from undue influence?

MR. POWELL: Yes, your Honour. We have found the use of such phrases as "this is an unrighteous transaction", "this has proven it is a fraud", to be emotive rather than illuminating, particularly when in one case the alleged proven piece of fraud was not the subject of cross-examination at all but was given by a witness who was accepted by his Honour and, as we say, we find the problem a little difficult to grapple with and not unlike the prospect that would face one if one is stuck in a paper bag and had to box with a marshmallow. For that reason we have had to deal with the matter in a rather broad sort of way.

As we see it, although the concept of equitable fraud is very wide and although his Lordship in Earl of Chesterfield v. Jannsen started off with that basic statement, that he was not going to delimit the area of equitable fraud because that would lay down guide lines for nasty people to take advantage of in the future, nevertheless one can discern, we believe, in the authorities some degree of delimitation. The basic philosophy behind the whole approach seems not to be that silly people

are to be protected from the consequences of their folly but rather that if silly people had been victims in the sense that some person has forced them to do something, misled them or tricked them in some way and then taken advantage of their folly, then the Court will intervene.

TAYLOR, A-J.A.: Is not that to protect them from the results of their folly?

MR. POWELL: Not necessarily. To get to that stage one introduces the Moneylenders' Act and other delightful pieces of legislation under which one can be as stupid as one likes and then rely on the Courts to protect himself. But there does seem to be a limiting in the way of a formulation which appears in the judgment of Lindley J. in Allcard v. Skinner, where he says basically "What is behind the intervention of the Court in cases such as these" - and he said it would not be right to protect them just because they are stupid or that somebody has taken advantage of them, but if somebody has taken advantage of their stupidity, "then we can intervene".

JACOBS, J.A.: I must say that I can understand your difficulty in grappling with this point of equitable fraud separately from undue influence, but it seemed to me to be rather designed as a basic argument of principle, to try to comprehend all the various authorities on equitable fraud, and that the conclusion that all of them allow relief when situations exist, even though it is not proved that the situation led to the main transaction - you can say that, for instance, an unconscionable bargain may be released because of the situation, and one can put it on different bases, but once you find a fudiciary relationship, equity relieves. But the great difficulty with this argument is that when you come to the undue influence, equity does nothing of the sort; it only does it when there is a relationship.

MR. POWELL: That is why we suggested, with respect, that there is a general statement - "We will not be circumscribed" - when in fact in its application it has been circumscribed all the way.

JACOBS, J.A.: That is why Mr. Gruzman found difficulty in answering my question. I do not think he ever did answer it. The question was: could he give instances or a case where there was undue influence in the form of duress exerted and where it was necessary to prove positively that it was operative at the time. I think one says that the applicable principle is a very wide one, without the particularisation of undue influence. Can you give an example of that?

MR. POWELL: It seem to be, one might think, a catch-all.

JACOBS, J.A.: It is not a catch-all, undue influence is a catch-all for duress?

MR. POWELL: We think not.

JACOBS, J.A.: Equity would probably follow along on that.

MR. POWELL: The fact that ultimately there has been this moving away from the catch-all situation does suggest that there had been some delimitation and it may well be that really there is nothing which left any equitable fraud that is not already apprehended in some other approach.

JACOBS, J.A.: We cannot know that. But we do know that the law on undue influence has been moderately explored.

MR. POWELL: I know. It is perhaps not to say that equity is beyond the age of child-bearing, although some have been heard to say that she has produced some pretty mis-shapen children of late.

There seems to be very little left of the broad approach, and to merely pick up such phrases as "This is an unrighteous transaction" does not really take us very far.

We have put on page 14 of the notes a statement of what we understand to be the result of the authorities. We would merely say that whatever be the ambit of equitable fraud it has no application whatever to this case. There was no position of weakness, the plaintiff had available and recourse to independent advice, and whatever may be the views, he certainly accepted the fact of the commercial desirability or otherwise of this transaction at the relevant time and it was an open question. Indeed, once one gets the recurring statements by both Barton and Bovill that once Armstrong has gone "the future will be rosy" there seems to be nothing left on which any statement of general equitable fraud could operate.

One turns lastly to this question of illegality and such submissions we would wish to make are summarised there. We merely say that it cannot be demonstrated, nor is it found by his Honour that either expressly or by implication it was part of the consideration for the proposed transaction that no further conduct of this type would occur. That just cannot be demonstrated to be so.

JACOBS, J.A.: That is only one way of putting it, perhaps, Mr. Powell. There may be a principle that if you are actively engaged in a crime at the moment when you are dealing with someone and the crime is in some way related to the dealing, you have not got to express it in terms of illegal consideration.

MR. POWELL: One gets into the area of public policy.

JACOBS, J.A.: Public policy, is that because the Courts simply cannot embark on a nice examination

of whether or not a passenger on the stage coach would or would not have handed over his watch when the gun was pointed at him? It is just that once the gun is pointed that is the end of the matter, the transaction becomes an illegal transaction. This is, I think, the point of this illegality. It may be expressed in terms of the illegal consideration, as some of the cases put.

MR. POWELL: Yes, certainly in Williams v. Bayley and in Whetton's case the matter was whether it was impliedly part of the arrangement.

JACOBS, J.A.: That is perhaps understandable. It is not so far removed from the principle of Smith v. Jenkins in the High Court recently, that the Court cannot be examining the precise relationship between the parties when there is an illegal act in the actual course of performance.

MR. POWELL: While that may be so in general terms, with respect we suggest it is not opposite to this case because if that were so then the principle, both in common law and equity, so far as equity is concerned would always have been that once there was a threat that was the end of it.

JACOBS, J.A.: That brings me to the question: is it illegal at common law to threaten a man's life?

MR. POWELL: This is where I think Mr. Justice Taylor has had the benefit of far greater experience than I have. There are certain circumstances in which it may be. There is, for example, an offence which could be called apprehended violence which as a young junior one always found down in the Petty Sessions. There is undoubtedly the threat to obtain money by menaces and it may be in an appropriate case when one has the physical stage, vis a vis the threat that there could be an assault.

JACOBS, J.A.: It may be an actual assault.

MR. POWELL: Yes. One thinks of the joke that is always told of the case of assault where the man took a swipe at another but missed, but he was still convicted of assault. That points out the problem.

TAYLOR, A-J.A.: That is the test, was he in a physical position to execute the threat?

MR. POWELL: Yes. There is nothing inherently absurd in the law in saying that threat may be illegal, indeed the contrary is the case; that in an appropriate case threats may be legal.

JACOBS, J.A.: This is not unimportant in this context. If I point a pistol at a man and say "Your money or your life" I am assaulting him. There is no doubt about that. So I am therefore

guilty of a criminal act, quite apart from the admission itself of the demand, which may be incidental. If in fact the threat of death is a serious and criminal one, then when one over the telephone says these things, there could be a lot to be said for the argument that it is illegal and it provides a background against which the Court will not recognise the validity of transactions entered into in the circumstances. I think one of the difficulties is that it is, first of all, necessary to be shown that it is illegal and illegal in a context which is relevant to the public policy. That is where you have to go to Smith v. Jenkins, co-partners in crime. But once you get on to statutory offences, then in the same way you have to categorise them.

MR. POWELL: Then you have the problem of "inherently bad".

With respect, there are two problems in this approach - quite apart from whether or not the matter has been fully examined - and they are basically these: does the mere threat amount to an appropriate offence? We would suggest, with respect, that some words do not; I rather gather that your Honour Mr. Justice Taylor has held that they do in appropriate cases.

TAYLOR, A-J.A.: It is a matter of whether they are capable of constituting an assault or whether they were not so capable.

MR. POWELL: Quite apart from that, your Honour Mr. Justice Jacobs has put a finger on it when one says in such a relationship to the transaction - the law itself has already determined what is the necessary relationship so far as threats of this character are concerned. That is that they must induce, and if they do induce then that is contrary to public policy.

TAYLOR, A-J.A.: You have to consider duress, even if they are illegal acts.

MR. POWELL: They may be illegal acts, but they afford no cause to set aside, and this was a case of setting aside.

That, with respect, in our submission must be so because whether at law or in equity, so far as either the common law or the equitable extension is concerned, one must show the overt act or the threat of the act which induced, and in equity one must show pressure of this type which induced. So with the law in relation to contract in any event "this is a relationship that must be shown". While in other situations, for example, the illegal use of a car, it is sufficient purely that they are on an improper exercise - speaking of joy-riders. That is not so here. In the light of his Honour's finding we would submit, with respect, there is just not room for the operation of the principle now sought to be advanced.

Unless your Honours think we can perhaps assist in other respects those are our submissions we wish to advance and for those reasons we submit that the appeal should be dismissed with costs.

(Luncheon adjournment).

MR. GRUZMAN: Firstly, on the question of illegality and specific matters, under the Post and Telegraphs Act, Regulation 63(1)(a) is in these terms (read). That is just incidental.

S.103 of the Crimes Act is in these terms (read). Assuming the contract was bad and therefore fraudulent the attempt would be punishable by 14 years.

There is one authority I will mention on inducement which is also referred to (amongst others) in Alati v. Kruger, and that is Smith's case in 41 Ch.Division 348, where at page 369 Lord Haslbury said: "... fraud is ... appropriate among the different parts of it, the effect produced by the whole ...misrepresentation".

JACOBS, J.A.: Has that ever been judicially noticed?

MR. GRUZMAN: It is referred to in Alati v. Kruger (94 C.L.R. 216) on this point, but in the argument - not in the judgment.

I did intend to refer to Alati v. Kruger very briefly as an example. Your Honours will remember the authority as to the manner in which the Court will deal with the question of in restitutio, and how it will mould its decree to meet whatever circumstances have arisen. To the same effect is the judgment of Else-Mitchell, J. in a case in which I happened to appear some years ago, Waters Motors v. Cratchley, 88 W.N. 1165. That was an extremely complicated case where this man Cratchley, whom his Honour described as an eloquent and plausible rogue, by a most complicated series of transactions of company upon company upon company had created such a mess that one would have thought it was impossib e to undo it. There were third parties which intervened. At page 1177 his Honour said: "There are two other observations which ... in the present case". That appears under the general heading in the judgment of "restitutio" and at page 1179 his Honour sets aside quite a large number of contracts.

Finally on that point might I cite to your Honours Spencer Bowens "Actionable Nondisclosure" at page 206, para. 234. (read). At page 209, para.239, the author says (read). They again set out the procedures which can be employed under that heading. There are authorities quoted there to which I do not propose to take your Honours.

Might I give your Honours a reference to

the case your Honour mentioned just before lunch, Smith v. Jenkins; 119 C.L.R. at 397, dealing with people who had stolen a motor car and had an accident. There is an interesting discussion of the same subject in Godbolt v. Fittok, 63 S.R. (N.S.W.) 617, a decision of the Full Court. Godbolt's case puts it quite clearly on the principle of public authority while I think Smith v. Jenkins ultimately decided on the footing of public authority, takes the view that it is the principle of public policy which prevents the erection of a duty to care.

I think one of your Honours referred at one stage to a discussion by Windeyer J. of these principles. I would give your Honours the reference to the National Insurance Company of New Zealand Case, 105 C.L.R. At 569. The discussion by Windeyer J. appears to start somewhere on page 588 where there is quite an elaborate discussion by his Honour.

Just to short factual matters. One is this matter that my learned friend Mr. Powell mentioned about the list which Barton or his solicitor required of the documents to be handed over on settlement. There is a reference in Mr. Grant's evidence (page 673, line 30) where apparently Solomon said that Barton was concerned that there be some trick or demand at the last moment, and the deed provided that unless settlement took place by 6 p.m. on the next day, for whatever reason, for any default by Barton, the effect would be that Barton would have to buy the shares and all the money would have to be paid and in addition Armstrong would go into control.

The final matter to which I wish to refer is that Mr. Powell made, I think, some considerable point of the fact of the negotiations of 4th January. He said they were unaffected by any threat or, alternatively, were unaffected by any relevant threat. He said it was not suggested to the contrary. The fact is that Mr. Barton's evidence, although not wholly accepted on this point, was that on 14th December he had been threatened to enter into this agreement. His Honour did not accept that and said that he may have been threatened but secondly that it was Mr. Smith on the same day who put the substance of the agreement to him.

MR. POWELL: Might I indicate to your Honour, Mr. Justice Mason, who asked me on Friday whether we would be able to prepare a list of defences we would wish to raise if the amendments were allowed that I undertook to prepare that document and it has only just come off the press. Might I hand that in (produced to Court) and might I also hand a copy to Mr. Gruzman.

MR. GRUZMAN: I wish to comment on just two matters that I should mention to your Honours. Firstly, in dealings with Armstrong, my learned friend

Mr. Powell said, or sought to make something of his credit because of the way in which his Honour put it. That is, because of the documents which might have been in existence he might have spoken the truth, for that fear. I am reminded that when I put to your Honours about these statements, the denials of the relevant conversations were made in evidence in chief, before Mr. Armstrong was aware that any documents of any kind were in existence; so no credit at all can attach to that.

JACOBS, J.A.: The Court, needless to say, will reserve its decision.

(Decision reserved).

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES) Term No. 22 of 1969.
)
COURT OF APPEAL)

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

Wednesday, 30th June, 1971.

BARTON v. ARMSTRONG

JUDGMENT

JACOBS, J.A.: In this matter the Court was constituted as it is at present.

I am of the opinion that the appeal should be allowed, that there should be a declaration that the deed dated 17th January, 1967, and the ancillary deeds executed on 18th January, 1967, were executed by the plaintiff under duress and have been duly avoided by him, and that they are void so far as concerns the plaintiff, that there should be an injunction restraining the first, second, third, fourth, fifth and sixth named defendants from acting upon the said deed so far as concerns the plaintiff; that the plaintiff should have the costs of the hearing at first instance but that there should be no order for either party's costs of the appeal. I publish my reasons.

MASON, J.A.: I am of the opinion that the appeal should be dismissed with costs. I publish my reasons.

TAYLOR, A-J.A.: I am of the opinion that the appeal should be dismissed with costs. I publish my reasons.

JACOBS, J.A.: By majority, the order of the Court is that the appeal be dismissed with costs.

IN THE SUPREME COURT)
OF NEW SOUTH WALES) Term No. 22 of 1969.
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CORAM: JACOBS, J.A.
MASON, J.A.
TAYLOR, A-J.A.

30th June, 1971.

BARTON v. ARMSTRONG

JUDGMENT

JACOBS, J.A.: The appellant is Alexander Barton who was the plaintiff in a suit commenced in Equity on 9th February, 1968. The defendants to the suit, the respondents to this appeal, were firstly Alexander Ewan Armstrong; secondly, a number of companies controlled by Alexander Ewan Armstrong; thirdly, Landmark Corporation Limited and a number of companies either subsidiary to or associated with the lastnamed company; and, fourthly, Clare Barton, Terrence Barton, and five other persons and companies associated with the plaintiff in the transaction which is impugned in the proceedings.

By his statement of claim the plaintiff alleged that the defendant Alexander Ewan Armstrong on his own behalf and on behalf of the companies defined in the Statement of Claim as "the Armstrong companies" for the purpose of compelling the plaintiff to agree as mentioned thereafter in the Statement of Claim and to cause the Landmark companies so to agree continually threatened to have the plaintiff murdered if the plaintiff did not agree with the defendants in the manner which the firstnamed defendant sought on his own behalf and on behalf of the Armstrong companies. It was

further alleged that the firstnamed defendant, Alexander Ewan Armstrong, on his own behalf and on behalf of the Armstrong companies, otherwise exerted unlawful pressure upon the plaintiff so to agree.

It was then alleged that for those purposes the defendant, Alexander Ewan Armstrong, on his own behalf and on behalf of the Armstrong companies engaged certain criminals to kill or otherwise injure the plaintiff.

The Statement of Claim proceeds as follows in paragraphs 11 and 12:-

"11. As a result of the threats and actions of the firstnamed Defendant on his own behalf and on behalf of the Armstrong companies hereinbefore mentioned, the Plaintiff feared for his life and safety and feared for the life and safety of his family.

12. The Plaintiff being in fear, as set out in the preceding paragraph, and against his will and for the purpose of avoiding the threat of death or injury aforesaid told the first-named Defendant on his own behalf and on behalf of the Armstrong companies that he agreed with the firstnamed Defendant on his own behalf and on behalf of the Armstrong companies in the manner sought by him and thereafter the Plaintiff executed a Deed on or about the 17th day of January, 1967, which substantially set forth the matters to which the firstnamed Defendant on his own behalf and on behalf of the Armstrong Companies had sought the Plaintiff's agreement in the manner hereinbefore set out."

The plaintiff then alleged that the execution of the said Deed and certain ancillary Deeds by the plaintiff was not voluntary and was done against his will while he was in fear for his life and safety and feared for the life and safety of his family in the manner previously set out.

He further alleged that following the execution of those Deeds by the plaintiff he remained and at the time of the Statement of Claim still remained in fear for his life and safety and for the life and safety of his family because of both the threats and actions of the firstnamed defendant before the execution of the Deed and further threats and actions of the defendant after the execution of the deed designed to have and having the effect of keeping the plaintiff in fear for his life and for the life and safety of his family.

By the Statement of Claim the relief sought was that it might be declared that the Deed and the ancillary Deeds to which I shall refer later were executed by the plaintiff under duress, or alternatively, had been duly avoided by the plaintiff. Certain consequential relief was sought by way of injunction.

After a very long hearing Street J. concluded that Mr. Barton was subjected to threats and intimidation by Mr. Armstrong and that these threats and intimidation were current during the course of the negotiations. He accepted that Mr. Barton was in fear for the safety of himself and his family. However his Honour was not satisfied that Mr. Armstrong's threats and intimidation had the effect of coercing Mr. Barton into making the agreement. Therefore he dismissed the suit

and from that order dismissing the suit the appellant plaintiff now appeals.

The hearing of the appeal lasted some weeks and by far the greater part of that time was taken up with submissions made on behalf of the plaintiff appellant upon two bases. One of these bases was that the statement of claim should be largely amended in orderto allege not only duress as was alleged at the hearing of the suit, but also facts upon which it was submitted that there was a relationship of influence between Mr. Armstrong and Mr. Barton with the consequent legal presumption that the impugned transaction was brought about by the undue influence presumed to arise from the particular relationship. The other of the two bases upon whichthe appellant's submissions mainly proceeded was that this Court should review the findings of primary fact made by the trial judge even where, and I do not think it would be going too far to say particularly where, those findings depended upon the trial judge's assessment of the credibility of witnesses based upon his observation of these witnesses in the witness box.

With the submissions based upon the latter of these two bases I shall deal later in these reasons, but I propose immediately to deal with the question whether leave should be granted to amend the Statement of Claim in the manner sought.

Leave is sought to amend by adding a

further twenty-five paragraphs and to amend a further nine paragraphs to a greater or lesser extent. Leave is then sought to add three additional prayers alleging that the Deed and ancillary Deeds were executed under the undue influence of Mr. Armstrong and that the transactions effected by the said Deed and ancillary Deeds were illegal and void and of no effect and that the execution of the said Deeds was procured by the plaintiff's consent to the transactions being extorted.

The Statement of Claim in the form in which it stood at the hearing alleged facts which, if established, would show duress at common law. I shall deal later in these reasons with the nature and effect of such duress. In paragraph 9 the Statement of Claim alleged also that the firstnamed defendant on his own behalf and on behalf of the Armstrong companies otherwise exerted unlawful pressure upon the plaintiff to make the impugned agreement.

It seems to me that the very large body of evidence in this case is directed to those issues. The evidence was never directed to any issue whether the firstnamed defendant had established an ascendancy or influence over the plaintiff of the kind dealt with in Johnson v. Buttress 56 C.L.R. 113. Naturally there is much evidence in the case which could be regarded as going to such an issue if it had been raised. That,

however, is not the important point on the application to amend. The question really is whether the issues raised in the Court below were such that the evidence in respect thereof necessarily comprehended the whole of the evidence on the issues now sought to be raised by the amendments. The answer must be in the negative. The question whether a general dominance or influence had been established would depend upon the relationship between the parties not only in respect of the events leading up to the impugned transaction but also in respect of other aspects of their relationship. However full the evidence in the case appears to be on the relationship generally between the parties it cannot be assumed that there is not further evidence which would throw light upon the question whether a general domination or influence was established by Mr. Armstrong over Mr. Barton.

It is true that the proposed amendments make very many assertions of fact from which the conclusion would be sought to be drawn that a general relationship of domination and influence was established. To this extent the proposed amendments are objectionable because they allege largely matters of evidence in support of the ultimate allegations of fact that a general ascendancy and influence was established by Mr. Armstrong over Mr. Barton. Many paragraphs of the proposed amendments are objectionable on that ground alone.

However, quite apart from that, the plaintiff cannot by setting out the matters upon which he would rely in order to establish the alleged ultimate fact, namely a general domination and ascendancy and influence, thereby limit the scope of the issue which would be raised. The defence might not only wish to traverse the particular allegations of fact contained in the amendments (and here it is probable that these issues of fact were all covered in the evidence in the Court below) but might also wish to raise other matters outside these particular facts which would or might induce the Court to find against there being any general ascendancy or influence established.

Furthermore, it appears to me that the matters alleged in the amendments do not disclose anything which is capable of being regarded as a general relationship of influence or a general state of dominance and ascendancy of Mr. Armstrong over Mr. Barton independently of the impugned transaction itself. In effect they all relate to the impugned transaction or the events immediately leading up thereto. They do no more than reinforce by allegations of specific fact the general allegations contained in the Statement of Claim upon which the hearing proceeded. It seems to me that in relation to undue influence the approach of the Equity Court has been that if special relationships of a more or less common nature are established

independently of the impugned transaction then the transaction will be presumed to have been produced by an undue influence arising from that relationship, provided that if the transaction be for value it is shown in some way to be unfair. However, when the circumstances relied upon to prove the relationship are just those circumstances which are relied on to prove dominance in the particular transaction, no question of a general or wider relationship between the parties from which a presumption might arise is involved. In short, if the threats of death and injury by Mr. Armstrong to Mr. Barton in immediate reference to their business relationship did in fact result in an ascendancy and influence of Mr. Armstrong over Mr. Barton then some degree of actual coercion or intimidation is proved. There is then no need to have recourse to any concept of a general relationship of influence, ascendancy or domination.

The second matter sought to be raised by the amendments is that of illegality. The amendment sought in this respect alleges that the transactions are contrary to public policy and utility and to the settled rules of law and are illegal. The reason alleged for the illegality is the threats. Reliance is also placed upon a conspiracy to murder the plaintiff, even though the existence of that conspiracy was on the facts negatived by the trial judge. I do not think that the allegation

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

of illegality adds anything to the case which was in fact presented, namely, a case of duress in the common law sense. If in fact a part of the consideration for the agreement of 17th January or of the consideration for a collateral agreement to enter into the agreement was either relief from the threats to murder or relief from the act itself, then such an agreement would certainly be illegal, contrary to public policy and void. However, a finding that there was such an agreement would most certainly be a finding that the plaintiff had entered into the main agreement under the influence of the threats and the case of duress would be proved. The somewhat tortuous reliance upon illegality, although it may be understandable in such cases as Williams v. Bayley (1866) L.R. 1 H.L. 200 and Mutual Finance Limited v. John Wetton & Sons Limited (1937) 2 K.B. 389, seems to me to add nothing in the present case and I do not think that an amendment to add the allegation of illegality and a prayer for relief on that ground should be allowed.

I turn now to the facts as they were found by Street J. The plaintiff, Alexander Barton, was the Managing Director of Landmark Corporation Limited and Alexander Ewan Armstrong was the Chairman of Directors of that company. They had held these positions since late 1964. By the last part of 1966 they had fallen out and it is against

that background of conflict between them that the facts in this case emerge.

These two men not only held the positions to which I have referred but they were also the largest shareholders in Landmark Corporation Limited when account is taken of shares held by themselves, their families, and their respective family companies. However, their holdings were by no means a majority of the issued share capital. Events between the two men moved towards a crisis during the last quarter of 1966. Mr. Armstrong was away from Australia from the beginning of September until about the middle of October, 1966.

Prior to his departure disputes had arisen between Mr. Barton as Managing Director and Mr. Armstrong as Chairman of Directors. Upon Mr. Armstrong's return in October, 1966, there was a conversation between him and Mr. Barton. The account given by Mr. Barton, which was preferred by the trial judge without necessarily accepting the precise terms thereof, was as follows:-

> "I went to him, and said 'I am not prepared to work with your in any circumstances. I see only one alternative, that you resign and get out of Landmark Corporation Limited. I can't resign myself, as much as I would like to, because of my responsibility to shareholders, United Dominions Corporation Limited and other persons and parties connected with the projects which are under consideration'. Mr. Armstrong replied that he was not prepared to resign, and he said that the city is not as safe as I may think between office and home and I will see what he can do against me and I will regret the day when I decided not to work with him."

On 18th October, 1966, there was a board meeting of Landmark Corporation Limited. The four directors were present, Mr. Armstrong and Mr. Barton and Mr. Bovill and Mr. Cotter. There was a disagreement between Mr. Armstrong and the other three directors. After this the next board meeting was on 24th October. Either immediately before or immediately after the board meeting of the 18th Mr. Barton prepared a draft resolution and an accompanying statement. The preamble to the resolution was as follows:-

> "The Board of Directors of Landmark Corporation Limited having taken note of certain actions and pronouncements and practices by its Chairman (Mr. A.E. Armstrong), and believing that these have been and are detrimental to the smooth and successful running of the company ...."

The accompanying statement included the following passage:-

> "In view of the fact that Mr. Armstrong has broken all his past repeated promises to stop interfering and in view of his latest attempt to run my own reputation down in the eyes of a co-director on this Board (Mr. Bovill), I cannot tolerate the situation any longer."

The meeting of 24th October, 1966, considered the statement and the draft resolution. The statement was tabled and four resolutions were passed. Mr. Armstrong did not vote. The four resolutions were much the same as those in the draft resolution earlier prepared by Mr. Barton. The Board of Directors affirmed its confidence in the Managing Director; his authority in connection

with company affairs was recognised and it was resolved that:-

> "No director other than the managing director shall be entitled to any office or secretarial or clerical assistance and use of car at the expense of the company, and any office being used by any director other than the managing director is to be vacated by that director on or before 15th November, 1966."

There was a further meeting of the board on 28th October, 1966. Mr. Armstrong was not present. On 4th November, 1966, Mr. Armstrong's solicitors wrote to Mr. Barton's solicitors offering to purchase from one of Mr. Barton's family companies 170,000 shares in Landmark Corporation Limited for a price of 70 cents each. There was a condition that Mr. Barton should remain on the board of Landmark for at least three and up to six months if required and should support Mr. Armstrong on the board. Also there was a condition requiring him to support Mr. Armstrong's appointment as joint Managing Director or in such other executive office as might be agreed.

This letter was not answered before the next board meeting on 8th November, 1966. At this board meeting the accounts were considered again and it was decided that the annual general meeting should be summoned for 2nd December, 1966. On the same day there was a board meeting of an associated company, Paradise Waters Limited. This was a subsidiary company of Landmark Corporation Limited which was developing land at Surfers' Paradise to

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

provide residential sites. Forty per cent of the share capital in this company was owned by one of the family companies of Mr. Armstrong. In addition, another of the family companies of Mr. Armstrong had lent $400,000 at interest to Paradise Waters Limited and Paradise Waters (Sales) Pty. Limited which was the wholly owning parent company of Paradise Waters Limited. On the 8th November, there was also a meeting of the board of directors of Paradise Waters (Sales) Pty. Limited. At each board meeting a resolution was passed that Mr. Armstrong be removed from the chair. Mr. Barton was appointed Chairman in his place.

On 9th November, 1966, Mr. Marton's solicitors replied to the offer to purchase the 170,000 shares. The letter rejected the offer upon the ground that the conditions sought to be imposed were improper.

Following upon the removal of Mr. Armstrong from the chairmanship of Paradise Waters Limited and Paradise Waters (Sales) Pty. Limited two suits were instituted in the Equity Court on 15th November. By these suits one of Mr. Armstrong's companies sought to enforce rights which had been given to it as a term of the $400,000 advance by the Armstrong interests for the Paradise Waters project. These terms were designed to ensure that Mr. Armstrong and his companies remained in control of the two Paradise Waters companies whilst

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

the loan was outstanding. Certain interlocutory relief was granted. On the same day as the suits were instituted Mr. Armstrong moved out of the Landmark Corporation offices pursuant to the board decision made on 24th October. Also on the same day Mr. Barton directed the secretary of Landmark Corporation that none of the company's records should be made available to any director other than at a board meeting or upon the express instructions of the board.

On 17th November, 1966, there was a further meeting of the board of Landmark Corporation. Mr. Bovill was appointed Chairman of Directors in place of Mr. Armstrong. The effect of removing Mr. Armstrong from the chairmanship was that under the terms of the $400,000 loan, upon Mr. Armstrong ceasing to be chairman, the principal and interest immediately fell due. Later on the same day Mr. Armstrong's solicitors wrote to the solicitors of Landmark Corporation informing them that the loan was required to be repaid forthwith and stating that an appropriate notice of demand would be given to Paradise Waters Limited as mortgagor. The latter notice was given on 21st November, 1966.

Just after Mr. Armstrong's removal as chairman, Mr. Barton began to receive telephone calls during the night and these calls continued during the rest of November and December and the first part of January until the eventual making

of the agreement under challenge in the present case. On most occasions nobody spoke and Mr. Barton only heard heavy breathing into the telephone. On other occasions a voice said to him, "You will be killed". In most of these calls Mr. Barton found the voice to be distorted and did not recognise the speaker but in one of them in early January, 1967, Mr. Barton recognised the voice of Mr. Armstrong. The calls were usually between 4 and 5 o'clock in the morning. Mr. Barton would receive them for four or five days in a row and then there would be a few days break. The calls were particularly frequent in the week or so prior to 2nd December, 1966, the date of the annual general meeting. Street J. found that the calls in fact came from Mr. Armstrong.

At about the same time Mr. Barton noticed that his house was being watched and that he was being followed. On one occasion he recognised the person watching his house as one Frederick Hume, whom he had met in association with Mr. Armstrong. Mr. Hume was a private detective who had been used by Mr. Armstrong and indeed by Landmark Corporation Limited. On another occasion Mr. Barton saw Mr. Hume standing opposite the Landmark office in Pitt Street, Sydney, watching the office. Mr. Barton was followed both on foot and on occasions by a car or by a red truck. Street J. declined to find positively that Mr. Armstrong was responsible for

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

this watching and following of Mr. Barton. He declined to do so upon the ground that there was insufficient evidence to enable him to make the affirmative finding that Mr. Armstrong was responsible.

Late in November Mr. Armstrong spoke to Mr. Barton in threatening terms advising Mr. Barton to take care and warning him of the risk of being killed. Mr. Barton's version of these words was:-

> "I will show you what I can do against you, and you had better watch out. You can get killed."

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

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

Some days before 30th November Mr. Barton had told Mr. Bovill, "I have hired a bodyguard because he is threatening to kill me". He told Mr. Bovill about the threats over the telephone. He also told Mr. Bovill that Mr. Armstrong had said to him, "Your may not get to the annual meeting. If you keep on this fight you are likely to be killed or likely not to get to the annual meeting."

On 30th November Mr. Bovill heard Mr. Armstrong's voice outside the boardroom of Landmark

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

Corporation and then Mr. Armstrong entered the boardroom and shouted at Mr. Barton, "You stink; you stink. I will fix you." Mr. Armstrong then left the boardroom followed by Mr. Barton. Later on that day after the board meeting Mr. Bovill spoke to Mr. Armstrong. He tried to conciliate. The offer was rejected and Mr. Armstrong, in the words of Street J., "then made a series of wild and extravagant statements. In summary these were to the effect that by virtue of his office as a Member of the Legislative Council and with enough money he could procure a member of the Police Force to do his bidding; he made mention of organised crime moving into Sydney, and said that for $2,000 'you can have someone killed'. He made other references to gang war, the risk of being caught in a hail of bullets at Kings Cross, and to drugs. Mr. Bovill understandably regarded Mr. Armstrong's conduct as extremely irrational."

Mr. Bovill reported this conversation to Mr. Barton who more than once asked Mr. Bovill whether he thought Mr. Armstrong could get gangsters to have him shot for $2,000. I refer elsewhere in my judgment to the findings of the learned trial judge of the effect upon the mind of Mr. Barton of these threats and statements at this stage.

After repayment of the loan had been demanded from Landmark Corporation by the Armstrong companies Landmark Corporation through Mr. Barton

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

obtained from United Dominions Corporation a letter confirming a resolution of the board of United Dominions Corporation agreeing to make available to Landmark Corporation the sum of $450,000 plus interest due to pay off the debts to the Armstrong companies in the event of those companies not withdrawing their demands by 25th November, 1966. This letter was obtained on 23rd November, 1966.

At about the same time a proxy fight commenced between the Barton interests and the Armstrong interests in respect of the approaching annual general meeting of 2nd December. Mr. Barton sent out a circular to shareholders on 22nd November referring to the conflict which had developed between Mr. Armstrong and the remainder of the directors. This circular referred to the arrangement which had been made with United Dominions Corporation to provide $450,000 to pay off the debts owing to theArmstrong companies. Mr. Armstrong also sent out a circular supporting the election to the board of directors of three persons nominated by him and stating that if his nominees were elected as directors he would immediately cancel the demand for the repayment of the $400,000 loan. A suit was commenced by Mr. Armstrong in which he sought as a director to enforce a demand he had made to inspect the proxies lodged with the company for use at the meeting. This suit was determined at short notice on 30th November, 1966.

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

At the annual general meeting of Landmark Corporation Limited on 2nd December, 1966, Mr. Armstrong failed to obtain from the shareholders the support that he needed to have his nominees elected to the board of directors. Mr. Cotter, the director who in the ordinary course was standing for re-election, was duly re-elected so that there was in the result a victory for the Barton interests.

The threatening telephone calls to Mr. Barton continued after the annual general meeting. Although Street J. declined to find that there had been a threat of physical violence by Mr. Armstrong to Mr. Barton on 7th December, after a board meeting of Paradise Waters (Sales) Pty. Limited, he did find that the threats in the form of the telephone calls continued.

I pause in the narrative to relate the conclusions of the learned trial judge in respect of the state of mind of Mr. Barton at this stage. He was satisfied that Mr. Barton was during the period following Mr. Armstrong's removal as chairman up to the annual general meeting in genuine fear for his personal safety. He found that the acts and statements made by Mr. Barton during the period prior to the annual general meeting provided evidence that satisfied him that he was at that stage in genuine fear for his personal safety.

"So serious was the concern lest there be

> physical violence directed against him that three bodyguards were employed to attend the annual general meeting on 2nd December, two of them standing behind a curtain on the stage near where Mr. Barton was sitting."

The learned trial judge found that the events leading up to and associated with the annual general meeting established to his satisfaction that Mr. Armstrong both in person and by telephone calls had induced in Mr. Barton a real fear for his own safety. They established that the frame of mind of Mr. Barton was, by reason of Mr. Armstrong's threats, one susceptible of being intimidated.

At this stage, as did the learned trial judge in his judgment, I interpose some account of the financial position of Landmark Corporation Limited in December, 1966. It had received from United Dominions Corporation, which had previously lent to it or its subsidiaries large sums of money for the development of the Paradise Waters project, the assurance to which I have already referred, namely, that United Dominions Corporation would provide finance to pay off the debt of $450,000 odd owing to the Armstrong companies. Consequent upon that assurance arrangements were being made in December between the solicitors for Landmark Corporation and the solicitors for the Armstrong companies to pay off the indebtedness. Indeed $50,000 for this purpose was advanced by United Dominions Corporation early in the month. Then on 10th December the managing director of United

Dominions Corporation told Mr. Barton that his company had decided not to advance the remaining $400,000 and that this company further would make no other loans in connection with the Paradise Waters project. As the learned trial judge said,

> "That project involved the expenditure of substantial sums of money. The primary source from which this money had been obtained, and from which it was expected to be forthcoming in the future, was United Dominions Corporation. Apparently the arrangement under which advances were made by United Dominions Corporation was that from time to time, on the presentation of engineers' progress certificates concerning the development work, additional moneys would be lent by United Dominions Corporation. The loans being made from that company were all covered by mortgages from the Landmark Companies. As at December 1966, although a great deal of work had already been done, there still remained a great deal of further work to be done. Landmark itself had insufficient liquid assets to proceed with the project. Its successful completion was completely dependent upon Landmark being able to borrow moneys to carry it through, such borrowings to be repaid in due course out of proceeds of sale of the lots of land in a developed state. The project was one which had necessarily to be kept moving forward, as the finance already obtained by Landmark was at substantial interest rates. Hold-up in the work, whether through interruption of finance or otherwise, presented the threat of crippling or even destroying Landmark by reason of the continuing aggregation of these heavy interest charges arising from any delay in the ultimate completion date."

This was in the words of the learned trial Judge a delicate financial position. Landmark Corporation was unable to meet the $400,000 debt due to one of the Armstrong companies unless it could obtain a fresh borrowing. Moreover, it needed not only this amount but it also needed a continuity of lending whilst development work proceeded.

Thus, the statement by United Dominions Corporation on 10th December presented a threat to the very existence of Landmark Corporation. This placed the Barton interests in a very precarious position indeed but it must be borne in mind that it also placed much of the Armstrong finances in jeopardy. If Landmark Corporation failed, it would not only result in a loss to the Barton interests but it would also result in a very substantial loss to the Armstrong interests. I find it necessary to bear both these aspects in mind when I turn to the events from 13th December onwards when Mr. Armstrong decided to place an offer before Mr. Barton to sell the Armstrong interests in Landmark Corporation and its associated projects.

On 13th December, 1966, Mr. Barton wrote to United Dominions Corporation demanding that it honour its undertaking to make the advance of $450,000. When discussing the advisability of this letter with Mr. Bovill Mr. Barton said to him:-

> "The money has not come through. I don't think it will come through. I would like to resign. ... ... I don't think we can get the money any other way. I think that it is finished."

The conclusion of the learned trial judge was that at this stage Mr. Barton was despondent about the future of Landmark Corporation although he did not accept that the despondency was as deep-seated and long-standing as Mr. Barton had said in his evidence.

At this stage an offer came to Mr. Barton from Mr. Armstrong through Mr. Smith who was Mr. Armstrong's financial adviser. Mr. Smith made the following notice of the instructions which he received:-

> "Suggest that Barton makes a firm offer in writing which is subject to acceptance within 48 hours.
>
> (a) pay out 2nd mortgage debt at $400,000 plus interest
>
> (b) purchase 40% equity in Paradise Waters (Sales) Pty. Limited for $175,000
>
> (c) purchase approximately 300,000 shares in Landmark Corporation Ltd. for 60 cents per share $180,000.
>
> Upon completion thereof A.E. Armstrong and his nominees will resign from the various Boards."

At that date the stock market which apparently knew nothing of the withdrawal of finance by United Dominions Corporation valued the shares in Landmark Corporation at about forty cents each.

Either on the same or the following day Mr. Smith telephoned Mr. Barton. Certainly he saw him on 14th December. Mr. Barton agreed that by 10.00 a.m. on Friday, 16th December, he would endeavour to reach a firm agreement on a basis which the learned trial judge summarised as follows:-

(1) Pay out the mortgage debt of $400,000 plus interest.

(2) Purchase the 40% interest of the Armstrong companies in the Paradise Waters project for

(a) cash $100,000

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

(b) an option to purchase 30 blocks in the completed development for list price less 40%; this option could be worth $120,000.

(3) Purchase 300,000 shares in Landmark at 60 cents each payable over a three year term; Mr. Armstrong to be entitled to the current dividend.

(4) Mr. Armstrong to resign as a director of all companies.

(5) Mutual undertakings not to make damaging statements.

Mr Barton saw Mr. Smith on 16th December at about 9.30 a.m. He told Mr. Smith that he was not able to commit himself to a firm arrangement in terms of the discussions held two days previously. Mr. Barton desired extended terms to meet the payments referred to in the proposal discussed on 14th December. Mr. Barton suggested another way of financing part of the repayments, namely, that a penthouse be sold to Mr. Armstrong by one of the Landmark companies at a discount of $20,000. Mr. Barton saw Mr. Smith again on Monday, 19th December. There were further discussions. Mr. Armstrong had rejected figures produced by Mr. Barton on the 16th and Mr. Smith told Mr. Barton that Mr. Armstrong was not satisfied that his proposal of the 16th would be capable of being performed. It was clear that whether or not they were so capable depended upon the attitude of United Dominions Corporation, from whom the money alone could be obtained.

Mr. Smith saw the Managing Director of United Dominions Corporation later on 19th December.

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

He met Mr. Barton on 21st December. There was further discussion on matters of detail. Mr. Barton suggested on this occasion that Landmark should sell its 60% interest in Paradise Waters project to Mr. Armstrong for $150,000. As the learned trial judge found, "This offer on Mr. Barton's part was made in the context of a threat then current by United Dominions Corporation to appoint a receiver of the Paradise Waters assets". It is not without significance that the Paradise Waters Project was the main potentially profitable side of the Landmark Corporation business. Yet Mr. Barton was prepared to offer it for sale to Mr. Armstrong at $150,000. His proposal remained in the air.

About the middle of December Mr. Barton had told Mr. Bovill and Mr. Cotter that in his opinion the Landmark Corporation was in trouble. It was clear that the company's prospects had been placed in jeopardy, as the learned trial judge says. It had no available source out of which to pay back the $400,000 due to one of the Armstrong companies and United Dominions Corporation had indicated that no further finance would be forthcoming from it for the Paradise Waters project. Landmark Corporation had no assured prospect of obtaining that finance from any other source. Mr. Barton commenced strong efforts to obtain other finance. On 16th December, he wrote to United Dominions Corporation informing it that "other arrangements are being made for the

$400,000 which is still outstanding". The letter was in effect a withdrawal of the earlier letter of 13th December. In fact, however, there were no other arrangements.

On 22nd December, there was a board meeting of Landmark Corporation at which all four directors were present. Also present was Mr. Grant on behalf of Mr. Armstrong and his interests together with the solicitors of the company. Mr. Grant reported that he learned from United Dominions Corporation that documents had been executed for the appointment of a receiver of the Paradise Waters Project and that it proposed to proceed accordingly unless an agreement was reached whereby there was an immediate reduction of indebtedness by $60,000 and whereby Mr. Armstrong and his interests made a further advance to Landmark Corporation on the project at Paradise Waters of $300,000. Mr. Armstrong then offered at the meeting to advance the $60,000 provided that he took over control of Landmark Corporation from Mr. Barton and in addition had a nominee appointed to the board. Thereby of course he would achieve all that he had failed to achieve earlier in the month through the votes of the other directors and through the votes of the shareholders themselves. The proposal was rejected by Mr. Barton, Mr. Bovill and Mr. Cotter.

On 23rd December, 1966, Mr. Barton saw representatives of the United Dominions Corporation

and executed further securities in favour of that Corporation. In return it undertook not to appoint a receiver for seven days. Mr. Barton then left for Surfers Paradise where he stayed until his return to Sydney on or about 2nd January, 1967.

Before his return, namely, on 28th December, Mr. Bovill and Mr. Cotter sent to United Dominions Corporation a letter asking that no further steps be taken until there had been a full discussion upon Mr. Barton's return to Sydney and it would seem that United Dominions Corporation acquiesced in this request.

Mr. Barton returned to Sydney on 2nd January, 1967, and on 3rd January in response to a telephone call from Mr. Smith he had an interview with Mr. Smith. The discussion went to alternative proposals which had been put forward by Mr. Barton as to ways of achieving the basic agreement that had been under consideration since 14th December, 1966. This basic agreement was that there should be a repayment of the loan of $400,000, purchase of the 40% interest in the Paradise Waters project and the purchase of the 300,000 shares in Landmark Corporation by Mr. Barton or his nominees at 60 cents each. As the learned trial judge said:-

> "The principal difficulty when under examination was the source from which moneys might be found to make the necessary payments to Mr. Armstrong and his companies and the times to be allowed in any settlement for the making of such payments."

Detailed negotiations followed on a purely business basis, Mr. Barton at no stage informing Mr. Smith of the telephone threats which were being made to him.

Later on 3rd January Mr. Smith had further conversations with Mr. Armstrong in regard to the details of the proposals that had been made, and then on 4th January after again seeing Mr. Armstrong Mr. Smith prepared in the latter's presence some notes entitled "Basis of Agreement". Mr. Armstrong initialled these notes. Mr. Smith then telephoned Mr. Barton, informed him that he had had a further discussion with Mr. Armstrong and had made out the notes in question. Mr. Barton stated that he agreed with the arrangement but wished it to be understood that it was subject to the solicitors. Mr. Smith then sent the document to Mr. Armstrong's solicitors and it formed the basis of the preparation of documents by Mr. Armstrong's solicitor, these documents culminating in the making of the agreement on 17th January and its further implementation on 18th January. This document was in the following terms:-

1. Mortgage over Paradise Waters P/L $400,000 plus interest to date to be discharged and shares in Paradise Waters P/L to be sold for $100,000.

2. Payments to be made as follows:-

Penthouse (furnished as is)	60,000	
Cash promptly (within 7 days)	140,000	+ interest
	$ 200,000	

The balance of $300,000 to be paid in one year at 12 per cent interest. Security to be a second charge over Paradise Waters Pty. Limited or Landmark House plus guarantee from Landmark Corporation Limited.

3. Mr. Armstrong to have an option to buy any 35 blocks of Paradise Waters Estate for 50 per cent of list prices on the basis of ten per cent deposit on exercise of option and the balance on transfer of title, such option to be exercised by 15th March, 1967.

4. "Ratification of end finance Rozelle as per Grant agreement 1965."

5. Sale of 300,00 shares in Landmark for $180,000 being 60 cents each with a mortgage back; purchase price payable over three years at annual rest free of interest. Total price to be guaranteed by Mr. Barton but total to be split with nine other parties each of whom will guarantee the price of his individual parcel; each of such nine persons to be acceptable to Mr. Smith as arbitrator; Mr. Armstrong to be entitled to current dividend but no other dividends.

Thereafter the negotiations took place in the main between the solicitors for Mr. Armstrong on the one hand and the solicitors for Mr. Barton and for Landmark on the other. Street J. states:-

"Matters of detail had to be worked out and a number of documents were necessary in view of the multiplicity of parties and the commercial complexity of the transaction. The basis was, however, clear and it did not change in any respect that I regard as significant from 4th January up to the final signing of the deed on 17th January."

The learned trial judge then refers in detail to the deeds which were executed and I set out his judgment in full on this aspect:-

" The parties to the deed were Mr. Barton, Mr. Armstrong, five Armstrong companies, Landmark, and the seven Landmark companies. The deed recited the relationship between the companies and the connection of Mr. Barton and Mr. Armstrong with the companies;

it recited also the two suits brought by one or other of the Armstrong companies against Landmark in December 1966 and Mr. Armstrong's own suit against Landmark concerning inspection of the proxies; it recorded the negotiations for settlement and the agreement to enter into the deed.

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

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

Clause (7) contains convenants by the two Paradise Waters companies not to alter their memoranda or articles or to sell any of the unsold shares referable to development lots prior to 15th March, 1967.

Clause (8) contains the agreement by one of the Armstrong companies to sell to Mr. Barton and seven other person or companies nominated by Mr. Barton and approved by Mr. Smith not more than 300,000 shares in Landmark at 60 cents per share; the dividend is to remain payable to the Armstrong company and, if not paid on or before 18th January, 1968, the, in lieu thereof, an equivalent amount is to be paid by the purchaser to Mr. Armstrong as part of the purchase price. The purchase price is to be paid by three equal annual instalments on 18th January, 1968, 18th January, 1969 and 18th January, 1970; no interest is expressed to be payable on the instalments of the purchase price. The price is to be secured by a mortgage back over the shares and a personal guarantee by Mr. Barton of each purchase contract.

Clause (9) contains the convenant by Mr. Harton that he will procure seven other

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

persons who, with himself will agree to purchase the shares from the Armstrong company.

Clause (10) deals with the provision of finance by the Landmark companies for a project that has been described as the Vista Court project at Rozelle. This is the subject matter of para. (4) of the document of 4th January.

Clause (11) contains the covenant by one of the Armstrong companies to sell its 40 per cent interest in the Paradise Waters project for $100,000.

Clause (12) contains the agreement by one of the Landmark companies to sell to one of the Armstrong companies the furnished penthouse of $60,000.

Clause (13) contains the covenant by the Landmark companies to apply the $300,000 loan mentioned in clauses (1) to (5) in reduction of the $400,000 debt due by one of the Paradise Waters companies to one of the Armstrong companies.

Clause (14) provides for settlement of certain conveyancing transactions to take place on or before 18th January, 1967.

Clause (15) provides for discharge of the deed in the event of United Dominions Corporation appointing a receiver prior to settlement.

Clause (16) provides that in the event of settlement not being effected by 18th January due to default of Mr. Barton or the Landmark group then Mr. Barton will step down from control of Landmark in favour of Mr. Armstrong.

Clause (17) provides that upon settlement Mr. Smith will become Chairman of Directors of Landmark, whereupon Mr. Armstrong will resign from the Boards of all the Landmark companies; it also provides for the appointment of another nominee of Mr. Armstrong to the Boards of the Landmark companies.

Clause (18) provides for the summoning of the necessary meetings and passing of resolutions to give effect to the transactions.

Clause (19) provides for the withdrawal of the three equity suits.

Clause (20) deals with stamp duty, legal expenses and other similar incidental matters.

Clause (21) provides that the proper law of the agreement is the law of New South Wales.

Clause (22) provides that Mr. Barton and his family companies will support Mr. Smith and Mr. Hawley, the other proposed new Director, at the 1967 annual general meeting of Landmark."

Within three days of the negotiations between Mr. Barton and Mr. Smith of the 3rd and 4th January an incident occurred which was in the words of the learned trial judge of a most extraordinary and alarming character. I refer to what has been called the "Vojinovic incident". The learned trial judge accepted Mr. Barton's evidence concerning the Vojinovic incident. Mr. Vojinovic telephoned Mr. Barton and informed him that he wanted to see him urgently. He rang again and said that the matter was very urgent and that Mr. Barton was "in big trouble". He arranged to meet and did meet Mr. Barton at the Rex Hotel at Kings Cross. He was met outside by a third party who took him in and introduced him to Vojinovic. The following account by Mr. Barton was accepted by the learned trial judge:-

"He took me into a corner of that bar and then he said to me 'Mr. Barton, you are in a big trouble. My team has been hired to kill you. We have been paid, offered to be paid £2,000 and the man Frederick Hume is the middleman who has been hired by a big man Armstrong', and he said that if I

prepared to pay him the £2,000 he rather don't do it, and then I told him that I didn't want to be mixed up in these sort of matters and I going straight to the police. He then said that I should not rush into things because I am in real danager and he has a long criminal record and his team is very anxious to get the money and I have told him, as I did before, that I go straight to the police. He said he has a long criminal record, he has been arrested many times and he spent a lot of time in gaol, and he has a detective who he is prepared to bring to me and put the matter in front of the police through the detective.

Q. Please continue. A. Then I told him that if this will be done through the police and if his principals who hired him will get arrested and dealt with I prepared to pay him the money through the police and he said that is quite all right and if I can give him £500 in advance. I told him I do nothing without the police. Then he said it would be all right, he will get in contact with me tomorrow morning and he will contact the detective in the meantime and I will be able to meet him with the detective together and place the matter in the police hands.

... ...

Your Honour, I missed out one point in the conversation with the man when he said that he has been offered £2,000 to kill me and he have to rob my wife diamond ring and he get paid £5,000 for the ring separate."

On the following morning, which was a Sunday, Mr. Barton first thing rang Mr. Millar, the solicitor for Landmark. Later that morning he with Mr. Millar went to the Criminal Investigation Branch. It is apparent that I respectfully agree with the learned trial judge, that as a result of this whole incident Mr. Barton was in genuine fear for the safety of himself and his family and he thought that Mr. Armstrong had hired criminals to

kill him. He so informed Mr. Millar first thing on Sunday morning.

He and Mr. Millar went to the Criminal Investigation Branch and saw Inspector Lendrum. With them was senior counsel whom Mr. Millar had consulted in the meantime. Inspector Lendrum brought in Det. Sgt. Wild and Det. Const. Follington. It is not without significance that the notes of Inspector Lendrum give a history of Landmark Corporation and the connection of Mr. Barton and Mr. Armstrong with that company. Against this background Inspector Lendrum was told that Mr. Armstrong had had a conversation with Mr. Bovill saying that people could be hired in Sydney to "bump off other people". Inspector Lendrum was then told of the search for a compromise, that Mr. Barton had managed to save the company and that Mr. Barton and a representative of Mr. Armstrong had personally reached what appeared to be an agreement subject to documentation. Inspector Lendrum then goes on in his notes to set out the Vojinovic incident. Mr. Millar told Inspector Lendrum that Barton believed Hume to be "under a retainer from Armstrong since July to keep a tag on him".

It must be borne in mind that immediately before or immediately after the Vojinovic incident Mr. Barton recognised Mr. Armstrong's voice on the phone saying to him, "You will be killed". Steps were taken to deal with the Vojinovic proposal.

He was apprehended by Sgt. Wild and Const. Follington and went with him to the Criminal Investigation Department where he was interviewed and a record of that interview was made. This record was shown to Mr. Barton in the following week. I think that it is best to set out the matter in the language of the learned trial judge:-

> "The record of interview is in the form of questions and answers, and runs into six foolscap pages. Vojinovic says in it that he was approached about two weeks previously by a man later identified as Michael Novak and told that Novak had been offered £2,000 to engage somebody to commit a murder. Part of the conversation he had with Novak was described by Vojinovic in the following terms:
>
> > 'Yes, well, he said 'This fellow must have been in trouble with the other fellow - they are both rich and one wants to kill the other.' And then he said 'One of the fellows is a German in the company and the other fellow did something to him and got him put off and he got the job.' He said 'You must know this fellow because he was in the paper and that he is a big fellow in a good position his name is Armstrong, and the fellow to be killed is Mr. Barton.''
>
> According to the statement, Novak gave Vojinovic a piece of paper with the name Armstrong and a telephone number on it, and on the bottom the name Barton and another telephone number Novak said that a man named "Fred Hume was the man in between and that he is the man paying the £2000 to get Mr. Barton killed"; he also said "that Hume works for Mr. Armstrong private investigating and doing all the things he needed I suppose." Vojinovic said he had never met Frederick Hume, but he had seen Novak go and speak to him on one occasion.
>
> It seems from the statement that nothing happened for some days until Saturday, 7th January. Vojinovic had been fairly

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

constantly in Novak's company, driving around in a car being used by Novak; later evidence shows that this car was being acquired under a hire-purchase agreement by Mr. Hume. On Saturday, 7th, Vojinovic saw again the piece of paper with the names and the telephone numbers on it. He then decided to ring up Mr. Barton, which he later did, and made the appointment to meet him at a Post Office. He said he was unable to find the Post Office, and later rang Mr. Barton again and arranged to meet him at the Rex Hotel. The statement then proceeds to recount the interview with Mr. Barton at the Rex Hotel, in which Vojinovic told Mr. Barton that Mr. Armstrong wanted to kill him and he was paying £2,000 to Frederick Hume to procure somebody to do this. Mr. Barton had said that he would pay Vojinovic an equivalent amount if Vojinovic "could being Armstrong and Hume to the justice". Vojinovic said that he had asked Mr. Barton for £500 as a payment for his help. The statement then deals with Vojinovic's telephone call to Mr. Barton on the Sunday in which he had told Mr. Barton that he needed money straight away and that £200 "would keep me till the thing is finished". Later on Sunday he had rung Mr. Barton and made the appointment to meet him that evening, this being the meeting at which the police had apprehended Vojinovic."

Once this statement had been taken from Vojinovic it would seem that, unless Mr. Barton's account is accepted and the account of the police is rejected, no further step was taken in the matter in effect until after the agreement was signed on 18th January. Like the learned trial judge, I find it extraordinary that the investigating sergeant should in all the circumstances of the matter have been as inactive and dilatory in the conduct of the investigations as Sergeant Wild appears to have been. Nevertheless that does not enable one to make the positive finding that a statement by Mr. Hume had been taken and was suppressed. The

record of interview with Mr. Vojinovic shows that three persons were on his account concerned in the very serious events which had taken place, namely, Mr. Armstrong, Mr. Hume and Mr. Novak. The account given was of a conspiracy to murder. There were circumstantial surrounding circumstances, particularly the dispute between Mr. Armstrong and Mr. Barton which lent at least the possibility to the view that Mr. Vojinovic was telling the truth. However, nothing was done. There was no attempt to interview Mr. Hume until 18th January. No statement or record of interview was, on Sgt. Wild's account, taken from Mr. Hume. There was no attempt at any stage to interview Mr. Armstrong. It is indeed an extraordinary situation. However, the learned trial judge heard the whole of the evidence and he, bearing in mind the onus of proof which lay upon Mr. Barton declined to conclude that there had been a statement taken from Mr. Hume in the period between 8th January and 18th January. Despite a very long argument which would go behind the findings of credibility made by the learned trial judge I do not think that it is possible for this court to interfere with that finding.

When Mr. Barton saw the statement which had been made by Mr. Vojinovic he took action which showed that he was, in the words of Street J., "in extreme and genuine fear for the personal safety of himself and his family". I shall refer to

that shortly. About this time Mr. Barton said to Mr. Bovill, "The threats are getting worse. He has now hired criminals to kill me." On or about 11th January Mr. Barton told Mr. Bovill that he and his family had moved to the Wentworth Hotel and that he had bought a rifle.

Between 10th January, 1967 and 18th January, 1967 negotiations continued on a professional level between the legal advisers of the parties with no apparent awareness on the part of any of them of events which were taking place and which had just taken place. On 10th January Mr. Smith telephoned Mr. Barton and told Mr. Barton that Mr. Armstrong wanted the agreement exchanged by Friday, 13th. Mr. Barton said that this was not possible. Mr. Armstrong then through Mr. Smith suggested a payment on account into Mr. Smith's trust account as a guarantee of good faith by Mr. Barton.

Some diary entries of Mr. Armstrong are meanwhile worthy of note. On 6th January Mr. Armstrong had noted in his diary that he had discussed matters re Barton and Landmark with Bruce Smith. He wrote, "There are some new proposals to finish on Friday, Jan. 13 but I doubt if much will come of them." On the day of 9th January, 1967, Mr. Armstrong noted in his diary "No progress yet with Barton agreement, still lawyer conferences". The following day he noted "Spent most of day at home, still discussing Barton matter."

On 12th January, 1967, a very important

incident occurred. Mr. Armstrong rang Mr. Barton at the Landmark office and said to him, "You had better sign this agreement, or else". Mr. Barton replied, "I told him I didn't let myself be blackmailed into any agreement". Mr. Armstrong denied that conversation but the learned trial judge accepted it. However, he did not accept a claim by Mr. Barton in his evidence that Mr. Smith telephoned him and that in the course of that conversation Mr. Barton told Mr. Smith, "I am not prepared to sign or exchange the document on behalf of myself, and also I am not prepared to advise my co-directors on behalf of Landmark Corporation to do so". Also the learned trial judge did not accept that on the morning of Monday, 16th January Mr. Armstrong rang Mr. Barton and said to him, "Unless you sign that document, you will be dead - you will be killed - you will get killed". A long submission has been made to this Court that this Court should not accept the finding of the learned trial judge in this respect. I do not think that it is possible in the circumstances to interfere with the findings of the trial judge. The finding was based upon credibility and for reasons which I shall express later in this judgment I do not think the Court can interfere.

However, there is one aspect of this evidence to which it is necessary to refer. Mr. Barton deposed that he had told Mr. Bovill on the 13th

January that he was not proceeding with negotiations. Mr. Bovill in his evidence supported this:-

> "Mr. Barton said to me about the first set of agreements that were prepared - he said ... ... 'It is a bad business. It is risky. We should not execute these agreements.' I said to him I thought the price was high but I believed that the settlement with Mr. Armstrong was a prerequisite to financing the company. Mr. Barton said 'I don't believe the finance will necessarily be forthcoming. I don't think these agreements should be signed.' I therefore put them out of mind, and that was the end of them so far as I was concerned."

Now the learned trial judge did not accept the evidence of Mr. Barton to this effect and he did not accept the evidence of Mr. Bovill in so far as he placed this conversation at 13th January. However, he came to the conclusion, not that Mr. Bovill was fabricating or imagining this conversation, but that that conversation happened sometime prior to Christmas, 1966. That finding would mean that at some stage between the opening of negotiations on 14th December, 1966, and the departure of Mr. Barton for Surfers Paradise shortly before Christmas, 1966 Mr. Barton had expressed his intention not to proceed with the agreements that had been proposed. Yet, the very first conversation which Mr. Barton has with Mr. Smith after his return from Surfers Paradise shows no apparent reluctance to enter into agreements at all. There is here a very serious inconsistency which it seems to me might well only be able to be explained by the effect on Mr. Barton's mind of the telephone calls

early in January when he recognised Mr. Armstrong's voice threatening to kill him.

The agreement was signed on 17th January and the documentation pursuant thereto was executed on 18th January. I do not think that it is necessary to go further into the details surrounding this execution, because it is clear beyond any doubt that at the level of legal advisers matters proceeded was though there was no unusual feature at all in the transactions between the parties. It is however significant, I think, to record what was said by Mr. Barton to Sgt. Wild on 11th January. Mr. Barton saw Sgt. Wild at the Criminal Investigation Branch on the morning of 11th January. It was about 9.30 a.m. Mr. Barton was there with his son and for some time Det. Follington was present. Sgt. Wild in his evidence on behalf of the defendand recalled that Mr. Barton had said words to the effect of, "How are things going?" Sgt. Wild replied, "We have interviewed the man Vojinovic or the man Alec and obtained a record of interview with him". Sgt. Wild went and got the record of interview from another room. When he came back Mr. Barton said "Have you seen the man, Hume or Momo?" Momo is Novak. Sgt. Wild said, "No I have not interviewed them as yet." Mr. Barton said, "I am worried about what is going on". Sgt. Wild then said to Mr. Barton, "I don't feel that you should worry because I feel that this man Alec has told you this story with the sole purpose of

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

obtaining money from you." Mr. Barton said, "I am still worried about it". There was then discussion of the obtaining of the rifle or a pistol and there was discussion about payment of money to Vojinovic. Then very significantly in my view Sgt. Wild volunteered the following evidence. He was asked whether Mr. Armstrong was mentioned by anybody and he replied:-

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

It seems to me that Sgt. Wild is here giving the language of Mr. Barton and the effect of it is that on 11th January Mr. Barton was in a state of mind where he was very worried about what was happening in relation to the threats to his life but that he believed that once the agreement was signed on the 18th January it would all be over. I cannot but give weight to this and I shall return to it shortly.

So far I have dealt with the facts up to the signing of the agreement. Immediately after and for some time after the signing of the agreement things were said and done by Mr. Barton which showed that he was still hopeful about the future of the Landmark Corporation. He told Mr. Grant after the execution of the documents on the 18th January, "Now we have got rid of Armstrong nothing will stop us. Very glad you did not have him here. It

would have saved - by not having him here it would have saved unpleasantness." On 19th January Mr. Barton congratulated Mr. Smith, told him he thought the deal was a miracle. In the ensuing weeks and months Mr. Barton's family company lent moneys to Landmark or to a subsidiary of Landmark. Certain correspondence showed an optimism for the future of Landmark when applying for finance. Perhaps no great reliance can be placed upon this but it is not without significance that in the ensuing months some shares of Landmark were bought by Mr. Barton's family company on the Stock Exchange. The price was then 28 cents per share and it may here be noted that the price of 60 cents per share was a very great deal higher than any price at which the shares of Landmark Corporation had been saleable on the Stock Exchange over the relevant period. The price varied between 14th December, 1966 and 17th January, 1967 between a high of 43 cents on 16th December and a low of 32 cents on 3rd January. Yet, at a time when no finance was available, even if Mr. Barton was hopeful of obtaining it, a price of 60 cents per share does appear something of a gamble.

The subsequent history of the Landmark Corporation appears in the judgment of Street J. and I do not think that it is necessary to repeat it. The fact is that finance could never be obtained and by the middle of 1967 the financial position had deteriorated. At that stage Mr. Barton first

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

told Mr. Smith that Mr. Armstrong had employed gangsters to kill him. He said that this had occurred whilst negotiations were going on. I should add that early in 1968 Landmark Corporation was wound up on the ground of insolvency and the shares are now worthless. Of the Landmark companies two were at the time of the hearing before Street J. in the course of being wound up as insolvent companies and a receiver was in possession of the assets comprising the Paradise Waters project.

The primary case sought to be made by the plaintiff was that by 13th January, 1967 he had determined that he would not proceed with the agreement with Mr. Armstrong and his companies, that on that day he told Mr. Bovill that this was so, that on 16th January, 1967 in a telephone call Mr. Armstrong threatened him and thereafter he on the 17th January entered into the agreement.

It is clear that this grossly over-simplified case which the plaintiff sought to present before the trial judge was not accept by him. The plaintiff sought to say that the negotiations leading up to the Deed of 17th January and the ancillary Deeds did not commence until 3rd or 4th January. His case primarily was that from that time until 13th January negotiations continued without any arrangement having been arrived at and that on 13th January the plaintiff, realising that finance could not be obtained and that disaster for Landmark Corporation Limited was inevitable, determined

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

that he would proceed no further with the negotiations. Then he says that on the Monday, 16th January, he received a telephone call from Mr. Armstrong in which the latter told him that unless he signed the agreement he would be killed. Mr. Barton said that then having received this threat he decided that he would sign the agreement.

This account was not accepted by the trial judge and upon this issue which was so tied up with the credibility of the witnesses who were examined before the trial judge I do not think that this Court can or should substitute any different finding.

It is true that this appeal is an appeal by way of rehearing. It has been submitted to us at very great length that we should in the circumstances of the case interfere with the findings of primary fact which have been made by the trial judge and substitute findings of primary fact to the contrary of his findings. I think that such a submission in the circumstances of the present case is quite untenable. I do not think that it is necessary in this case once again to traverse the many statements which have been made in the cases upon the role of an appeal court where there is an appeal by way of rehearing. I am satisfied with the enunciations made upon this subject matter in Powell v. Streatham Manor Nursing Home 1935 A.C. 243 and in Paterson v. Paterson 89 C.L.R. 212. There are many other statements upon the subject matter. It is true to say that in certain special circumstances

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

a court of appeal may find it necessary to interfere with the findings of fact made by a judge at first instance where those findings depend upon conflicting evidence. Such occasions however are rare and they may generally be described, I think, in the language of Lord Sumner in S.S. Hontestroon v. S.S. Sagaporack 1927 A.C. 37 at p. 47 as those where it is shown that the trial judge has failed to use or has palpably misused his advantage. This passage was quoted by Dixon C.J., Webb and Taylor JJ. in Riebe v. Riebe 98 C.L.R. 212 at 226, as well as by Lord Wright in Powell's case (supra) at 265. I do not think that in the present case it can in the least be said that the trial judge has failed to use or has palpably misused his advantage of seeing the witnesses.

However, I do not think that this rule of common sense means that in the ordinary case it is not possible even to review the findings of ultimate fact made by the trial judge. There is not even a presumption that the judgment in the court below is right, see Riekmann v. Thierry 14 Rp C 105 per Halsbury L.C. at 116-117, a view expressly concurred in by Lord MacNaghten. The principle as I understand it is that one does not interfere with a finding of a trial judge upon a fact which he determines upon the basis of seeing the witnesses and the views he takes of their credibility. This in my view is a rule generally limited to the findings of primary fact which are made. As a matter

of common sense, that common sense upon which the rule itself is based, the same strong presumption cannot apply where what is being dealt with is not a primary fact deposed to by a witness but a conclusion reached by reasoning or inference from the primary facts so found.

The findings of primary fact which were made by Street J. make necessary an examination of certain inferences and conclusions of ultimate fact drawn by him and of the legal effect of his findings generally. Upon those findings which I have already recounted the plaintiff, Mr. Barton, was from about the middle of November, 1966, in genuine fear for his personal safety at the hands of Mr. Armstrong. Mr. Armstrong had threatened him with death both in conversations at the Landmark offices and on the telephone. Mr. Armstrong had induced in Mr. Barton a real fear for his own safety as early as the beginning of December, 1966. This was a date earlier than the first proposal made to Mr. Barton and that he should purchase Mr. Armstrong's interests. Threatening telephone calls continued up until and beyond the commencement of negotiations on 14th December. In particular Mr. Barton recognised the voice of Mr. Armstrong in early January saying on the telephone to him, "You will be killed".

The depth of Mr. Barton's fear was greatly increased by the Vojinovic incident but that incident was not the source of his fear and whether or not one is satisfied that Mr. Hume and Mr. Vojinovic

were the agents for Mr. Armstrong, a subject which would be of primary importance if there had been no threats from Mr. Armstrong himself, when one finds that there were threats by telephone from Mr. Armstrong himself, the importance of the Vojinovic incident is that it reasonably and understandably gave great weight to threats of Mr. Armstrong which might otherwise have been passed off.

The Vojinovic incident is very important in this case. As I have stated, I propose to accept the finding of Street J. that there was no sufficient certainty to link Mr. Armstrong with a conspiracy to murder. But that finding hardly lessens the importance of the incident. Even if Mr. Armstrong was not responsible for these events Mr. Barton certainly thought that he was thereby placed in greater fear of Mr. Armstrong than before. If the fear was baseless then Mr. Armstrong could not be prejudiced. But the fear was not baseless - it was real and it was based on the actual words of Mr. Armstrong to Mr. Barton. There had been threats of death by Mr. Armstrong to Mr. Barton. The Vojinovic incident gave extreme force and substance to those threats, whether or not Mr. Armstrong was responsible for it.

Mr. Barton, upon the finding of Street J., believed that Mr. Armstrong had hired criminals to kill him and he believed this from a time very shortly after the resumption of negotiations on

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

4th January, 1967 The effect of the Vojinovic incident in the light of the actual threats which Mr. Armstrong had made was immediately to raise in Mr. Barton, to use the words of Street J., "an understandable and justifiable state of real concern for his personal safety". Street J. reached the conclusion that Mr. Barton was in genuine fear of Mr. Armstrong whom he regarded as an evil man whose threats both to his face and as he believed through the agency of Hume and hence Vojinovic could not safely be brushed aside. He feared retaliation at Mr. Armstrong's hands.

Despite these findings by Street J. he came to the conclusion that the threats and the fear did not intimidate Mr. Barton in relation to the question whether or not he should make an agreement with Mr. Armstrong. Street J., as I read his judgment, came to the conclusion that the threats and the fear had no operative effect because the broad terms of agreement had already been reached between Mr. Barton and Mr. Smith on 4th January, 1967. The conclusions of the learned trial judge are summed up upon this aspect of the case in the following passage:-

> "But, although all of this might well have tended to create in Mr. Barton a frame of mind in which he would be susceptible to Mr. Armstrong coercing him into entering into an agreement regardless of Mr. Barton's own free will, I am not satisfied that Mr. Barton was in truth coerced into the agreement. Whilst Mr. Barton was personally in fear of Mr. Armstrong, he regarded him also with a mixture of hatred and contempt. It is quite apparent from the

evidence that Mr. Barton and Mr. Bovill both regarded Mr. Armstrong's presence on the Board and amongst the shareholders of Landmark as a major handicap to the future well-being of that company. The discord between Mr. Armstrong and the other directors was regarded by Mr. Barton and Mr. Bovill as not only an encumbrance to the internal workings of the company but, more importantly, it presented a grave prejudice to obtaining the finance essential to the further prosecution of the Paradise Waters project. Mr. Barton and Mr. Bovill regarded it as a sheer commercial necessity to rid Landmark of the presence of Mr. Armstrong as a director and of Mr. Armstrong, through his companies, as a shareholder. It was the recognition of what they regarded as sheer commercial necessity that was the real, and quite possibly the sole, motivating factor underlying the agreement recorded in the deed of 17th January, 1968.

I am not satisfied that Mr. Barton's personal fears for his own safety played any significant part in his entering into the agreement with Mr. Armstrong. The course of the negotiations between the parties and the whole of the evidence leaves me with the distinct impression that neither the fact that Mr. Barton entered into this agreement with Mr. Armstrong, nor any of the terms of that agreement, would have been in any way changed if there were a complete absence of any threats or intimidation on Mr. Armstrong's part. Mr. Barton wanted to be rid of Mr. Armstrong in the interests of Landmark, and, indirectly, in his own interests as a substantial shareholder and managing director of Landmark."

A little later in his judgement Street J. after recounting how Mr. Barton had been reduced to a state of extreme and genuine fear for the personal safety of himself and his family, how he had arranged for his mother and his parents-in-law to go to a guest house in the Blue Mountains whilst he himself with his wife and son moved to the Wentworth Hotel taking pains to ensure that he was not followed, and having recounted how Mr. Barton had arranged

to purchase a rifle for his self-protections

continued:-

> "In the light of the Vojinovic incident and Mr. Armstrong's previous conduct towards him, I am satisfied that Mr. Barton's fear for his own life and safety was reasonable and justifiable. I am satisfied, in addition, that he firmly believed what he had read in the Vojinovic statement, namely, that Mr. Armstrong was plotting to have him murdered. In this state of very real mental torment it may, perhaps, at first sight appear unduly legalistic to investigate whether Mr. Barton's belief was that, unless he entered into the agreement Mr. Armstrong wanted, he would be killed. But this is the case that he comes to Court to make out. The evidence touching on his state of mind must be analysed to see whether in truth his willingness to enter into the agreement was brought about by his fear of physical violence or perhaps even death at the hands of Mr. Armstrong. A man of less fortitude than Mr. Barton might well, in the light of the threats made to him by Mr. Armstrong prior to the Vojinovic incident, and in the light of the Vojinovic incident itself, have abandoned altogether any attempt to continue negotiating for commercially acceptable terms and might well have been prepared to surrender absolutely. But Mr. Barton, although he took steps to preserve his personal safety so far as he was able, has not satisfied me that he yielded his independent business judgment by reason of his fear of Mr. Armstrong. He had a hatred for Mr. Armstrong; he held him in contempt; and he feared what he believed to be Mr. Armstrong's capacity to cause him physical harm. But he did not in his own mind relate Mr. Armstrong's threats to a desire by Mr. Armstrong to force through the agreement; nor was it forced through, so far as Mr. Barton was concerned, by reason of his fear of Mr. Armstrong's power to harm him. The agreement went through for the primary and predominent reason that Mr. Barton, along with Mr. Bovill, was firmly convinced that it was indispensable for the future of Landmark to enter into some such arrangement as this with Mr. Armstrong. Their belief was that they had to get rid of Mr. Armstrong if Landmark was to survive."

Street J. then recounts a further threat which he

accepts was made by Mr. Armstrong to Mr. Barton

by telephone on Thursday, 12th January, when Mr. Armstrong said to Mr. Barton, "You had better sign this agreement or else". After recounting this evidence his Honour continued:-

> "Although this finding places Mr. Armstrong in a position of having made a direct threat on 12th January regarding the signing of the agreement, it does not necessarily assist Mr. Barton on the critical issue of whether he was intimidated by Mr. Armstrong's threats into signing the agreement. I accept Mr. Barton's evidence that he told Mr. Armstrong that he would not let himself be blackmailed into any agreement; I believe that in truth Mr. Barton was not coerced into this agreement by reason of any threat of physical violence."

This threat of Thursday, 12th January, was the last threat which the learned trial judge accepted as having been made by Mr. Armstrong prior to the signing of the Deed on 17th January, 1967.

The conclusions of the learned trial judge are expressed towards the end of his reasons for judgment as follows:

> "I am satisfied that Mr. Armstrong did threaten Mr. Barton. But I am not satisfied that Mr. Barton was intimidated by Mr. Armstrong's threats into signing the agreement. The threats themselves were such as might well have intimidated the recipient into signing an agreement such as this, and I am satisfied that Mr. Barton was throughout the relevant period in real and justifiable fear for the safety of himself and his family. This fear was induced to a significant extent by Mr. Armstrong's acts; it was enhanced by the Vojinovic incident, but this was not proved to my satisfaction to be an incident for which Mr. Armstrong was responsible. It was not Mr. Barton's fear that drove him into the agreement. I am satisfied that he now fervently believes that it was, but this is a belief founded upon reconstruction rather than upon recollection. It is perhaps, an understandable reconstruction, but the detailed evidence that has been given of the events leading up to the making of the

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

agreement demonstrates that Mr. Barton was not in fact coerced into making the agreement. It follows that his claim in this suit fails, and that the suit must be dismissed."

Accepting as I do the findings of primary fact which were made by Street J. the question is whether he was correct in his conclusion that there was no duress. This largely depends, in my opinion, on what needs to be proved in order to establish duress. The test laid down by the trial judge was whether it was proved that Mr. Barton's willingness to enter into the agreement was brought about by his fear of physical violence or perhaps even death at the hands of Mr. Armstrong. His Honour took the view that because the primary and predominant reason of Mr. Barton was that he was convinced that it was indispensable for the future of Landmark to enter into some such arrangement as was made with Mr. Armstrong therefor there was left no place for the operation of the threats. The question may well be simply how much Mr. Barton had to prove beyond the findings of primary fact which were in his favour.

However, before dealing with that question I find it necessary to deal with three inferences from the primary facts which the learned trial judge drew but which I find myself unable to draw and in respect of which I draw different inferences. Street J. did not accept that Mr. Armstrong's threats and intimidation were intended to coerce Mr. Barton into making the agreement. For reasons which I shall state I do not draw this inference. I am of the opinion that the evidence establishes two things. First, it establishes that Mr. Armstrong's threats and intimidation were intended by him to influence Mr. Barton in his business dealings with Mr. Armstrong generally. Secondly, I am of opinion that the correct inference to draw from the language of Mr. Armstrong, especially in the telephone conversation of 12th January, is that he intended to put pressure on Mr. Barton to make the agreement.

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

The second matter upon which I draw inferences of fact different from those of Street J. is upon the question whether Mr. Barton did in his own mind relate Mr. Armstrong's threats to a desire by Mr. Armstrong to force through the agreement. I am of the opinion that the evidence establishes this fact. A number of different aspects of the primary facts lead me to this conclusion. First, when the threats were reported to the police, they were so reported in a context relating to the business relationship between the parties. Secondly, the telephone conversation of 12th January, 1967, made it clear that Mr. Armstrong was relating his threats to the making of the agreement. Indeed Street J. so finds when he describes the telephone call as a direct threat regarding the signing of the agreement. Next, there is Mr. Barton's statement to Sergeant Wild that it would all be over on the 18th. I have earlier referred to this important evidence.

A third matter of inference upon which I find myself differing from the trial judge is upon the question whether Mr. Armstrong was in any sense a reluctant vendor. It seems to me that his conversations with Mr. Smith, his entries in his diary and his threat to Mr. Barton of 12th January all show a person who was very concerned to see that the agreement which he had proposed went through. I may say however that I do not regard a concluded finding upon this point to be essential to a determination of the case.

I am therefore of the opinion that Mr. Armstrong intended to threaten Mr. Barton in relation to the signing of the agreement. I am further of the opinion that Mr. Barton must have been aware that Mr. Armstrong so intended. I am also of the opinion that by his conduct Mr. Armstrong showed that he was not a reluctant vendor but wanting

an agreement which suited him was prepared to go to great lengths to obtain it.

I accept the finding of the learned trial judge that Mr. Barton was in fact in great fear for the personal safety of himself and his immediate family. I agree with the learned trial judge in his finding that more probably than not (and certainly the contrary was not proved in Mr. Barton's case) Mr. Barton, in order to get rid of Mr. Armstrong from the companies for reasons sufficiently apart from his threatening conduct, would in the words of Street J. have entered into some such agreement with Mr. Armstrong "for the primary and predominant reason that Mr. Barton, along with Mr. Bovill, was firmly convinced that it was indispensable for the future of Landmark to enter into some such arrangement as this with Mr. Armstrong".

In the light of the facts as they have been found by Street J. and the inferences therefrom the question is what did Mr. Barton have to show in order to succeed. If he had to show that he would not have entered into some such agreement as he did if he had not been intimidated by Mr. Armstrong then I think he fails. Street J. found, and the evidence strongly supported the finding, that commercial necessity itself played a large part in the motivation of Mr. Barton. Still more so does Mr. Barton fail if the test is whether fear as distinct from any other factor induced him to enter into the contract. On the other hand, if the test

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

be whether the evidence establishes that the threats and the consequent fear had any appreciable effect at all on the mind of Mr. Barton then I think that he is in a much stronger position. He would be in an even stronger position if the true test be that duress is established when it is found that there are menaces accompanying the transaction which menaces have succeeded in placing the other party to the transaction in that requisite degree of fear from which it can be assumed that his freedom of agency is impaired.

The special problem of this case can in my view only be solved by an examination of the principles governing the law of duress at common law. There are practically no cases on common law duress other than as a defence in the criminal law for centuries past. The pride in the stability of our society which is truly reflected in the absence of such cases is tarnished by the fact that if falls to this Court in New South Wales now to define the effect in law of threats to murder made by a man whose position of wealth and power required that those threats be taken seriously.

Sire Frederick Pollock in his work on the Indian Contract Act remarked:-

> "In England the topic of duress at common law has been almost rendered obsolete, partly by the general improvement in manners and morals, and partly by the development of equitable jurisdiction under the head of undue influence."

The evidence in the present case provides an

ironical commentary upon the observation that improvement in manners and morals has rendered duress at common law almost obsolete. Moreover, the particular findings of fact which have been made may make it necessary to distinguish the principles applicable to duress as a doctrine of the common law from those applicable in Equity where the case is one of equitable duress or undue influence.

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

The common law concept of duress was a narrow one because it only operated when there was induced thereby a fear which could be assumed to some extent to paralyse the will. Anything less than this was not capable of being duress at common law and it required the development of equitable doctrines to enable the Court to grant relief where the pressure or coercion was undue but nevertheless not of a kind which the law would regard as paralysing the will. However, it may be noted that, although a transaction at common law would not be avoided for anything less than duress at common law, nevertheless

money paid under a compulsion not amounting to duress at common law could be recovered. This is a separate doctrine of the common law which need not be further considered in the present context. Cases illustrative of that different subject are Astley v. Reynolds (1731) 2 Str. 915; Morgan v. Palmer (1824) 2 B.N.C. 729; Atlee v. Backhouse (1836) 3 M. & W. 633; Skeate v. Beale (1840) 11 Ad. & E11. 983. In this last case Denman C.J. clearly distinguished the duress which avoids the transaction and the species of constraint or duress which leaves the transaction standing but nevertheless allows moneys to be recovered on an indebitatus assumpsit. At page 990 he said:-

> "The former is a constraining force which not only takes away the free agency but may leave no room for appeal to the law for a remedy; a man, therefore, is not bound by the agreement which he enters into under such circumstances; but the fear that goods may be taken or injured does not deprive anyone of his free agency who possesses that ordinary degree of firmness which the law requires all to exert."

He later distinguishes the cases dealing with recovery in actions for money had and received.

It is because it is of the nature of duress as it was known to the common law that it takes away the free agency, while less severe inducements, however much they may influence a man, nevertheless do not paralyse the will, that one finds in the early growth of the common law cases illustrating a growing doctrine of duress before it is possible to find a similar growth of the

doctrine of avoidance based on fraud. So Pollock and Maitland 2nd Edition Vol. 2 at 535-6 say:-

> "... while we should have no difficulty in finding cases which illustrate a growing doctrine of 'duress', it would not be easy to come by instances in which a defendant relies upon fraud, except where the fraud consists of an abuse in the machinery of the law."

The reference is to Bracton at Folio 16b. This passage in Bracton deals strictly with the donatio, but it has been relied upon by Coke and writers following in relation to deeds and transactions generally.

Coke deals with menaces at common law at 482-3 of his Second Institutes. He wrote:-

> "A man shall avoid his own act for manuas in four cases, viz
>
> 1. For fear of loss of life
>
> 2. Of loss of member
>
> 3. Of mayhem, and
>
> 4. Of imprisonment;
>
> otherwise it is for fear of battery, which may be very light, or for burning of his houses, or taking away, or destroying of his goods, or the like, for there he may have satisfaction by recovery of damages. This fear by reason of manuas is well described by Bracton ..."

There then follows the passage from Bracton at Folio 16b to which I have already referred. The portion quoted by Coke is as follows:-

> "Metus autem est praesentis vel futuri periculi causa mentis trepidatio; et praesentem debemus accipere metum, non suspicionem inferendi ejus, vel cujuslibet vani vel meticulosi hominis, sed talem qui cadere possit in virum constantem, talis enim debet esse metus, qui in se contineat mortis periculum et corporis cruciatum."

Immediately following this passage quoted by Coke is the following passage:-

> "Refert autem utrum metus praevaniat donationem, vel subsequatur; quia si primo coaetus et per metum compulsus promisero, et postea sponte et gratis dedero, talis metus non excusat. Si autem primo gratis promisero, at postea per metum coaetus tradidero, iste metus excusat, propter violentiam tradendi et compulsionem, cum forte mutata sit prima voluntas transferendi rem ad donatorium."

The latter passage is of considerable significance in the present enquiry and I shall later refer to it. The use of the subjunctive and of the adverb "forte" would appear to show that even if a man has freely made an arrangement but afterwards under the influence of a fear of the kind which Bracton describes takes the legal step, that fear excuses him on account of the violence and compulsion involved since perchance his earlier wish of transferring the property might have changed. It is recognised that once the menaces and their effect are found to exist it is speculation whether or not a man would have adhered to his original purpose if the fear had not been superimposed.

It seems to me that this reasoning is as sound in the law today as it was in Bracton's time. The test applied is not whether it can be proved that the victim of the fear would have acted differently if he had not been menaced but rather whether the kind of menace should be regarded as having an appreciable effect upon his mind so as

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

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

It seems to me that the stress is upon the existence of the threats and the consequent fear rather than upon an enquiry into the effect thereof as a problem in causation. Thus it is of some significance that in respect of duress by imprisonment there had previously been a special writ dum fuit in prisona. Although even by Coke's day this particular writ was regarded as antiquated the significance is that an alienation made while in prison was bad. The stress was upon the temporal not the causative element, an unlawful imprisonment being assumed to affect the free agency of the imprisoned man.

In Rolles Abridgement the subject "menace" is dealt with as follows:-

> "(A) Que ferra dit un menace sufficient d'avoider choses.
>
> (1) Si home fit chose sur un menace pur doubt de mort, il avoidera ceo, etsi nul act or force soit use vers luy. 43 E 3.19.
>
> (2) Menace d'occider un home sil ne voilt faire un fait est sufficient d'avoider ceo. 13 H 4 title dures. 20.39 E 3. 28.b. coment le ne soit ascun act a constrainer luy al ceo.
>
> (3) Si home fit un fait sur menace de battery d'avoider greinder male, ceo avoidera le fait. 4HH 4.2. Contra 13 H 4 dures 20.
>
> (4) Si home menace un auter que sil ne voilt enter en un obligation de 100 l. a luy, il voilt ejecter luy del meason en que il enhabit, sur que d'avoider l'ejectment hors

> de son meason il enter en l'obligation, cest menace nest sufficient d'avoider cest obligation, pur ceo que nest fait al son vie un member mes solment a son estate. Mich 15 Ja. en Camera stellate enter Goodrick & le Seigneur Clifton resolve per les Judges, le Seigneur Coke, le Seigneur Keeper & Curia;

This passage lays stress upon the nature of the menacing and the nature of the fear produced. If the causative effect of fear were the primary test, there would be no reason for the limited categories of menace. The common law could well have done what Equity later did and look to the effect, whatever the nature of the undue coercion might be.

In Viner's Abridgement at 316 under the title of "Duress" Pl. 10 and 11 are as follows:-

> "10. If a party menace me, except I will make unto him a bond of 401. and I tell him that I will not do it, but I will make unto him a bond of 201. the law shall not expound this bond to be voluntary, but shall rather make construction that my mind and courage is not to enter into the greater bond for any menace, and yet that I enter by compulsion notwithstanding in the lesser. Bacon's Elements, 81.
>
> 11. If I will draw any consideration to myself, as if I had said I will enter into your bond of 401. if you will deliver me that piece of plate. Now the duress is discharged, and yet if it had moved from the duressor, who had said at the first you shall take this piece of plate and make me a bond of 401. now the gift of the plate had been good, and yet the bond shall be avoided by duress. Bacon's Elements, 81."

It seems to me that the principle of common law is correctly expressed in the work which is quoted by the learned judge at first instance, namely, Encyclopaedia of the Laws of England 2nd Edition Vol 7 page 421. The passage appears under

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

the heading "Intimidation" and I would quote it in full:-

> "Intimidation is putting a man in fear with a view of inducing him to enter into a contract or to pay money, or to do or abstain from doing some other act. It is a general term under which falls much that is usually spoken of as COERCION, EXTORTION, MENACES, THREATS. It is distinct from UNDUE INFLUENCE and CATCHING BARGAINS.
>
> Civil matters - Where any contract (even a contract of marriage) has been entered into under the influence of coercion, duress, menaces, or intimidation it may be repudiated and avoided, and any money paid or property parted with under it may be recovered. But the contract is voidable only, and not void, and the right to avoid it may be waived.
>
> The duress or intimidation must consist in threats of voilence calculated to cause fear of loss of life or of bodily harm or actual violence or unlawful imprisonment or threat thereof to one party or his or her husband or wife or child by the other party to the contract, or by someone acting with his knowledge and for his advantage."

I think that this expression of the principle in a modern work is important also because it draws the distinction between intimidation as a common law doctrine and undue influence as a doctrin of equity.

The principle is put differently in Williston on Contracts. In Chapter XLVII under the heading "Duress and Undue Influence" Williston commences with the early development of the law of duress. "Under the name of duress there have long been included what early lawyers classified under the two headings: (1) Duress, that is, imprisonment and (2) Menaces, that is, threats of imprisonment or bodily harm". He then refers to Bracton

and Coke. Then under the subheading "Gradual Enlargement of Duress" he writes:-

> "Under the influence of increased liberality of legal thought aided by the example offered by courts of equity in its treatment of undue influence, the definition of duress in courts of law has been much enlarged. It has been said 'Duress is but the extreme of undue influence'. Commercial National Bank v. Wheelock 52 Oh. St. 534. And while this statement is not strictly accurate since duress implies that fear is the motive which coerces the will, and no such implication is necessarily involved in the words 'undue influence', there is no doubt that the modern tendency of courts of law is to regard any transaction as voidable which the party seeking to avoid was not bound to enter into and which was coerced by fear of a wrongful act by the other party to the transaction. The earlier requirements of common-law duress may be regarded as merged in this broader definition."

Then after further elaboration of the modern doctrine in the United States Williston proceeds:-

> "Whatever definition is adopted, it is clear that in order that a transaction may be avoided on account of duress or undue influence, it must appear that the consent of the party seeking to avoid the transaction was coerced. This is, that he was actually induced by the duress or undue influence to give his consent and would not have done so otherwise."

A little later he states:-

> "The tendency of the modern cases, and undoubtedly the correct rule is that any unlawful threats which do in fact overcome the will of the person threatened, and induce him to do an act which he would not otherwise have done and which he was not bound to do, constitute duress."

A footnote states that thus not only threats of physical injury and of financial injury but also threats inducing fear of social disgrace or injury to one's family pride may be duress.

This is of course a vast extension of the doctrine of duress at common law but at the same time in my opinion such an extension of the common law doctrine of duress takes away an element which existed in that common law doctrine. It may well be correct to say that in respect of coercion in equity, falling short of common law duress, it must be shown as Williston says, that the complainant was actually induced to give his consent and would not have done so otherwise. It is not necessary to determine this in the present case. However, in the case of true common law duress I am of the opinion that a plaintiff is entitled to succeed when he shows that he was under the influence of the menaces and fear consequent upon them. Who can say what a man would or would not have done if he had not been in that particular form of extreme fear which is a necessary condition of the application of the common law doctrine of duress? I am of the opinion that a plaintiff discharge the onus that lies upon him if he shows that at the time of entering into the transaction he was under the influence of menaces directed to the transaction. He may not be a complete stranger to the transaction. He may want some such transaction to take place but the law requires that he be a free agent right up until the time when he enters into the contract. It is no answer for a menacer to say that even if he had not menaced, if he had not put the other party in "extreme fear for his

personal safety and that of his family", still it is not shown that the transaction would not otherwise have gone through. It is not necessary to say that the onus shifts. Rather, it is a case of examining whether the menaces and the fear were one appreciable element in the mind of the party seeking relief at the time when he entered into the transaction.

There is an analogy in the cases on fraud. A plaintiff must show that the false representation induced him to enter into the contract. However, he does not have to prove that he would not have entered into the contract if it had not been for the representation. Williams Case L.R. 9 Eq. 225n.

> "If it be said that I have no evidence that the falsehood was successful, that it is possible, and, from what took place in another case, probable, that if the falsehood had not been told the directors still would have done what they did, I do not think a Court of Equity is in the habit of considering that a falsehood is not to be looked at because if the truth had been told the same thing might have resulted."

In Smith v. Kay 7 H.L.C. 750 at 759 it was said:-

> "But can it be permitted to a party who has practised a deception, with a view to a particular end, which has been attained by it, to speculate upon what might have been the result if there had been a full communication of the truth? How it is possible to say in what manner the disclosure would have operated upon Kay's mind, that he had been the dupe of a scheme of deception, which up to that moment had been successful in inducing him to believe that Adams had befriended him in taking up the bills, and that Smith had kindly co-operated with him. For my part, I think that the Appellant takes too sanguine a view of probabilities when he assumes that the discovery that Johnston was, after all, the holder of the

> greater part of the bills, would still have left Kay in the same mind to ratify the transaction, as he was brought into by the misrepresentations which were designedly made to him."

In Reynell v. Sprye 1 De G.M. & G. 707 at 708 it was said:-

> "... it may well be that he would not have acted as he did; - perhaps he might, perhaps he might not. But this is a matter on which I do not feel called upon or indeed at liberty to speculate. Once make out that there has been anything like deception and no contract resting in any degree on that foundation can stand. It is impossible so to analyse the operations of the human mind as to be able to say how far any particular representation may have led to the formation of any particular resolution, or the adoption of any particular line of conduct. No one can do this with certainty, even as to himself, still less as to another. Where certain statements have been made, all in their nature capable, more or less, of leading the party to whom they are addressed, to adopt a particular line of conduct, it is impossible to say of any one such representation so made that, even if it had not been made, the same resolution would have been taken, or the same conduct followed. Where, therefore, in a negotiation between two parties, one of them induces the other to contract on the faith of the representations made to him, any one of which has been untrue, the whole contract is in this Court considered as having been obtained fraudulently. Who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed?"

As was said by Cotton L.J. in Edgington v. Fitzmaurice 29 Ch. D. 459 at 481:-

> "It is not necessary to show that the misstatement was the sole cause of his acting as he did."

I am of the opinion that these principles which have been applied to the law of fraudulent misrepresentation are equally applicable to the law relating to duress. What must be shown is that

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

the threats operated upon the mind of the threatened party to the extent that he was brought into a state of fear sufficient to subject him to intimidation. If that be proved then an analysis of the principal motivation becomes unnecessary. The question in the present case is not whether Barton would not have entered into some such agreement if had not been in the extreme fear in which he was found to be but whether as a result of that extreme fear he was not a free agent who could decide to enter or not to enter into the particular agreement or any other agreement just as he thought fit. No man, it may be said, is a free agent who is subject to any pressure, economic, commercial, emotional or otherwise by the law makes a distrinction. Duress to the person to that extent which amounts to duress at common law is such a constraining force that it takes away the freedom of will, of agency, in a way which other forms of coercion do not.

If Mr. Barton had not been in the state of fear in which he was found to be, he might have raised many points which were never even discussed. He might have queried the necessity of paying a price for the shares which was fifty per centum above the market price. He might have required a condition that the agreement should be dependent upon him being able to arrange satisfactory finance. He might have demurred to the necessity as distinct from the possibility of payment of such a large sum in cash to Mr. Armstrong when the company was faced

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

with such a liquidity problem. It is true that the principal objective of Mr. Barton and indeed of Mr. Bovill and Mr. Cotter may have been to get Mr. Armstrong and his interests out of the Landmark Corporation Limited. How far though, it may be asked, was that motivation induced by the wicked conduct of Mr. Armstrong in using threats of death to Mr. Barton in order to further his purposes?

I find that the threats by Mr. Armstrong to Mr. Barton must be related to their business dealings. It would appear that substantially their only dealings and relationship were in business. The reason for Mr. Armstrong's threats may indeed have been malevolence or worse but it was a malevolence which must be regarded as associated with the business relationship between him and Mr. Barton. That being so, it is not necessary in my opinion to find that the threats at each stage were directly related to negotiations for the agreement which eventually transpired. They all seem to me, as they appeared I think also to Street J., to have been intended to cause Mr. Barton to weaken in his opposition to Mr. Armstrong in connection with the business affairs of Landmark and they are all of importance in that they establish that Mr. Barton's frame of mind was one susceptible of being intimidated. When I consider the limited area of the relationship between Mr. Barton and Mr. Armstrong I cannot infer that Mr.

Barton believed that Mr. Armstrong's threats and actions against him were dissociated from the negotiations which began on 14th December and culminated in the agreement of 17th January. It seems to me that Mr. Barton must have believed that Mr. Armstrong's threats and actions against him were associated with the whole of their business relationship including the proposed agreement.

Street J. found that Mr. Barton regarded it as a sheer commercial necessity to rid the Landmark Corporation of the presence of Mr. Armstrong as a director and of Mr. Armstrong, through his companies, as a shareholder. He said, "It was the recognition of what they regarded as sheer commercial necessity that was the real, and quite possible the sole, motivating factor underlying the agreement recorded in the deed of 17th January, 1967". The reasons which I have earlier expressed make it clear I think that, unless there be a conclusion that commercial necessity was the sole motivating factor, that is to say, unless the factor of fear and intimidation be wholly excluded, then the duress is established, provided that the further factor of fear or intimidation is an appreciable one. I quote again because they are so important the words of Street J.:-

> "I am not satisfied that Mr. Barton's personal fears for his own safety played any significant part in his entering into the agreement with Mr. Armstrong. The course of the negotiations between the parties and the whole of the evidence leaves me with the distinct impression that neither the

> fact that Mr. Barton entered into this agreement with Mr. Armstrong, nor any of the terms of that agreement, would have been in any way changed if there were a complete absence of any threats or intimidation on Mr. Armstrong's part. Mr. Barton wanted to be rid of Mr. Armstrong in the interests of Landmark, and, indirectly, in his own interests as a substantial shareholder and managing director of Landmark."

It seems to me that the opening words of this passage must be read in the light of the following sentence. It seems to me that the significance of the intimidation by Mr. Armstrong was gauged by the test whether, even without the intimidation, Mr. Barton would have entered into this agreement. I think that in the circumstances this approach threw too heavy a burden upon the plaintiff.

It would seem to me to follow that Mr. Barton did not carry such a high onus that he had to show that his willingness to enter into the agreement was actually brought about by his fear of physical violence or perhaps even death at the hands of Mr. Armstrong. He did not have to show that he wholly yielded his independent business judgment by reason of his fear of Mr. Armstrong. It was not an answer to his claim that the agreement went through for the primary and predominant reason that Mr. Barton was firmly convinced that it was indispensable for the future of Landmark Corporation to enter into some such arrangement as was made with Mr. Armstrong. He only had to show that his fear for his personal safety and the personal safety of his family, firmly based, genuine and extreme as it

was found to be, was a factor which more probably than not was operative on his mind at the relevant time either by way of inducement to do what he did or by way of reduction of the freedom of his will.

A great deal of reliance appears to me to have been placed by Street J. upon the fact that the broad terms of the agreement were worked out between Mr. Smith and Mr. Barton by 4th January, that is to say before the Vojinovic incident, and remained virtually unchanged until the making of the agreement. Within the principles so stated by Bracton the law relating to duress requires that one look at the state of mind at the time of the making of the agreement, 17th January, 1967, because "perchance" Mr. Barton would have changed his mind in the period between 4th January and 17th January. Furthermore upon the facts of the present case the threats, particularly by telephone, had been made well before 4th January.

With great respect to the learned trial judge I am of the opinion that he sought a too clear relationship of the intimidation to the actual negotiations for the agreement. When the relationship between parties is a business relationship, threats which lead to extreme fear in one of the parties in respect of their business relationship generally enable an inference to be drawn that the threats and the extreme fear extended into the particular aspect of the relationship.

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

I am of the opinion that the ordinary course of human experience is that a threat of death intended to coerce and which places the recipient of the threat in extreme fear has some effect in coercing. In such circumstances it does not avail the defendant to say "You must prove that even though that might be so you would not in any event have entered into the agreement".

The bare circumstances must be borne in mind.

(1) Without finance the Company was worthless.

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

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

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

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

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

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

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

Would any ordinary reasonable man be uninfluenced by such threats? Are Mr. Barton's actions consistent with being uninfluenced? Is the agreement an obvious business agreement with no unexpected

terms from which the influence of some external events cannot be inferred? To all these questions I answer "No". How then can, and why should Mr. Barton be regarded as more stalwart than the ordinary man? Is it not better in this situation to conclude that Mr. Barton's response was a normal one rather than an abnormally brave one? How can one satifactorily search back into the springs of action in the mind of a man in order to conclude that the springs of his action were abnormally uninfluenced by the emotion of extreme fear?

It is however an essential element of duress at common law that the act done thereunder is voidable and not void and the law is that the party menaced must avoid the transaction when the duress ends. It is hard to believe that Mr. Barton, as he alleged in his statement of claim and in his evidence, remained in fear for his life and safety and for the life and safety of his family because of the threats of Mr. Armstrong both before and after the execution of the deed up to and at the time of the commencement of the proceedings. There are indications in the evidence that he did not have the requisite degree of fear throughout that whole following period.

However, the defendant expressly disclaimed any reliance upon this submission. This aspect of the matter was summed up by the learned trial judge in the following terms:-

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

It could not be so relied on because of the events in the court at first instance. When the plaintiff attempted to give evidence of events after the making of the agreement of 17th January and the completion thereof on 18th January, objection was taken.

"Q. Following the settlement, what was the next thing that happend so far as it affected your mind? A. I was telephoned Det. Follington and ask him about inquiries - (Objected to: pressed.)

His Honour: Mr. Gruzman now foreshadows tendering evidence to explain the delay between the execution of the documents and the institution of the suit. The present question is said to be relevant to that explanation, and that only.

The defendant objects to the tender of evidence of delay as being irrelevant. It is put by defendants' counsel that explanation of the delay forms no necessary part of the plaintiff's case in chief. There is no defence of delay pleaded, and in such circumstances it does not seem to me to be relevent at this port of time to receive and consider evidence purely related to the question of delay; and accordingly I reject the question.

By way of elaboration of what I have just said, I shall add that Mr. Staff does not contend that delay may not at a later stage of his suit become relevant. His contention merely being that it is not relevant at this stage. Unless and until some significance is sought to be attached to delay on behalf of the defendant, I agree with Mr. Staff's submission that the delay is not presently relevant."

At the end of the case in his submissions counsel for the defendant sought at one stage to

submit that Mr. Barton had by his conduct affirmed the agreement and had lost the right to avoid the obligation. He submitted that it was not a matter of delay but rather of election. However the learned trial judge pointed out that such an argument was hardly open and in the light of the objection which had been taken this must surely be right.

We have also been supplied with an extract from the transcript of the addresses before Street J. Counsel for Mr. Armstrong said.

> "We do not seek to raise any defence of laches, acquiescence or delay arising out of failure to institute proceedings. If Mr. Barton can satisfy the Court that he had a right in January then we do not raise any defence raised upon the fact that it was a year later that he came to assert it. We do, however, submit that the fact that it took him 12 months to make his claim is highly significant, and it is significant upon the probabilities of whether he ever had a claim or whether the event which he says happened ever did happen."

Whether the subject matter be called delay or affirmation and upon whomever the burden of proof and of pleading may lie, the course of the trial made it impossible for the defendant to rely upon the submission that the plaintiff had not established a continuing duress up until the commencement of proceedings. This was recognised by Mr. Powell in the course of his argument before us Mr. Powell felt bound to concede and did concede that the course of events at the trial deprived him of any argument based on an alleged delay

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

between the cesser of the duress and the commencement of the suit.

I am therefore of the opinion that on the findings of fact of Street J. and the proper conclusions from those findings the plaintiff established his claim.

The question then remains as to the relief which may be granted. The plaintiff succeeds only on a claim that he was intimidated. It is not suggested that anybody elese was intimidated. A claim that a deed or an act is voidable for duress at common law can only be relied upon by the party menaced. Every authority is clear upon this point. A man shall not avoid a deed by duress to a stranger. If A and B make an obligation by reason of duress done to A, B shall not avoid this obligation, though A may, because he shall not avoid it by duress to a stranger. Viner's Abridgement 317-318 pl. 6-7.

The only relief which can be given in the present case is relief to Mr. Barton. It is not possible to set the whole transaction aside. Mr. Barton's promises are upon my view invalid and unenforceable. Because the relief is sought in Equity, it would be proper to require as the condition of granting relief that he deliver up such shares as he received upon the purchase from Mr. Armstrong. However, the shares in Landmark Corporation are admittedly worthless and there seems no point in making such a condition or such an

Reasons for Judgment
of his Honour Mr.
Justice Jacobs, J.A.

order. The result therefore is that through the invalidity of the promise, Mr. Barton is excused from payment for the shares and from recourse being had to him under the guarantees given by him. A Declaration should be made that the deed dated 17th January, 1967, and the ancillary deeds executed on 18th January, 1967, were executed by the plaintiff under duress and have been duly avoided by him. It should also be declared that the said deeds are void so far as concerns the plaintiff. The first, second, third, fourth, fifth and sixth named defendants should be restrained from acting upon the said deeds so far as concerns the plaintiff.

There remains then the question of the costs of the hearing of the suit and the hearing of the appeal. I am of the opinion that the first, second, third, fourth, fifth and sixth defendants should be ordered to pay the plaintiff's cost of the suit. So far as the costs of this appeal are concerned I am of the opinion that there should be no order as to its costs. My reason for this conclusion is that such a very large part of the lengthy hearing was taken up with submissions based upon amendments to the Statement of Claim and the Grounds of Appeal which have not been granted, that the success of the appellant upon the issue of duress is quite easily balanced by his failure upon these other aspects. It would not be fair that any of the respondents should be required to meet his costs of the long hearing devoted to those other aspects.

If he were to obtain the costs of the appeal on the issue of duress the respondents should have the costs of the many days of hearing lost on submissions which do not in my opinion succeed. However, a fair order in the circumstances would be that there be no order for either party's costs.

I Certify that this and the 78 preceding pages are a true copy of the reasons for Judgment herein of the Honourable Mr. Justice Jacobs. 10

30. 6. 71 A. COLLINS

Date Associate

IN THE SUPREME COURT)
OF NEW SOUTH WALES) Term No. 22 of 1969
COURT OF APPEAL)

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

Wednesday 30th June, 1971.

BARTON v. ARMSTRONG

JUDGMENT

MASON, J.A.: This is an appeal against a decree made by Street J. sitting in equity dismissing a suit brought by the appellant Alexander Barton in which the appellant sought a declaration that a deed dated 17th January, 1967, and certain ancillary deeds to which he was a party, were invalid on the ground that he had executed them under the duress of Alexander Ewan Armstrong, the principal and firstnamed defendant in the suit.

The suit in which this appeal arises has its origin in the affairs of Landmark Corporation Ltd., hereinafter called "Landmark", a public company with an issued capital of $1,753,000 divided into shares of 50¢ each, those shares being listed on the Sydney Stock Exchange. Landmark was engaged at all material times in the business of developing a parcel of real estate in the City of Brisbane as a multi-storey office building known as Landmark House. It was also engaged through its subsidiary companies in the business of developing a building estate known as Paradise Waters on the Gold Cost in Queensland.

The respondent Armstrong was from 1963 until

November 1966 the chairman of directors of Landmark. He was, in association with his family companies, in particular A.E. Armstrong Pty. Ltd., hereinafter called "A.E. Armstrong", the largest shareholder in Landmark. In all, he and his family companies held 300,000 shares approximately in Landmark.

The appellant Barton was also a substantial shareholder in Landmark although his holding fell short of that controlled by Mr. Armstrong. The appellant became the general manager of Landmark in 1963 at the invitation of Mr. Armstrong and was subsequently appointed its managing director in 1964. In the relevant years 1966 and 1967 the other directors of Landmark were Messrs. Bovill and Cotter.

The real estate development known as Paradise Waters was undertaken through three companies: Paradise Waters Ltd., hereinafter called "Paradise Waters", Paradise Waters (Sales) Pty. Ltd., hereinafter called "Paradise Waters (Sales)", and Goondoo Pty. Ltd., hereinafter called "Goondoo". It seems that the real estate which was partly freehold and partly leasehold had formerly been owned by one or more of the family companies associated with Mr. Armstrong. Subsequently the real estate was acquired from Mr. Armstrong's companies by Goondoo, a wholly owned subsidiary of Landmark, and Paradise Waters which was a wholly owned subsidiary of Paradise Waters (Sales). The share capital of the latter company was held as to 60% thereof by Landmark and as to the balance by Finlayside Pty. Ltd.,

hereinafter called "Finlayside", an Armstrong family company. Of the purchase price payable to the Armstrong companies in respect of the acquisition an amount of $400,000 remained unpaid at the middle of 1966. The payment of that sum and interest thereon was secured by a mortgage by Paradise Waters over the freehold land in favour of George Armstrong & Son Pty. Ltd., hereinafter called "George Armstrong", that mortgage being subject to a first mortgage to United Dominion Corporation (Aust.) Ltd., hereinafter called "U.D.C.", and it was further secured by a mortgage by Goondoo over the leasehold land, that mortgage being subject to a first mortgage to U.D.C. George Armstrong held certain other securities which need not be mentioned specifically.

Grosvenor Developments Pty. Ltd., hereinafter called "Grosvenor", another wholly owned subsidiary of Landmark was indebted to Southern Tablelands Finance Co. Pty. Ltd., hereinafter called "Southern Tablelands", another Armstrong company in the sum of $50,000 repayment of which was secured by an equitable mortgage over a property known as Toff Monks in Elizabeth Bay near Sydney. This transaction was not associated with the Paradise Waters project.

Goondoo had covenanted to develop the Paradise Waters estate under the lease which it held. The development of the estate was a costly business involving reclamation, drainage and the construction of canals. It was estimated that a

Reasons for Judgment
of his Honour Mr.
Justice Mason, J.A.

monthly expenditure of the order of $22,000 to $25,000 was needed in order to comply with the covenant. Substantial borrowings outside the Landmark group and from sources dissociated with Mr. Armstrong were made to enable the development of the project to take place. This borrowing was undertaken with a view to its being repaid out of the proceedings of sale of individual lots as the development was completed. Before November 1966 a sum of $416,000 had been borrowed to meet development costs from U.D.C. The repayment of these moneys was secured by the first mortgage in favour of that company to which reference has already been made. The mortgage held by George Armstrong was expressed to be subject to a first mortgage in favour of U.D.C. to secure a sum of up to $650,000. It was envisaged that a sum considerably in excess of the $416,000 already lent by U.D.C. would be required to bring the development to completion and it seems that the directors of Landmark had hoped that U.D.C. would provide the major part, if not all, of that capital requirement.

Until the middle of 1966 the relationship between the appellant and Mr. Armstrong was not unfriendly. However, from that time onwards their relationship steadily deteriorated. Before Mr. Armstrong's departure overseas in the beginning of September 1966 disagreements had occurred between the two men concerning business matters affecting Landmark. The appellant resented undue interference

Reasons for Judgment
of his Honour Mr.
Justice Mason, J.A.

by Mr. Armstrong as chairman of directors in the day to day business activities of the company and the use of the company's facilities for purposes unconnected with the company's affairs. On Mr. Armstrong's return in the middle of October a heated argument took place between the two men in which, according to the appellant, he asked Mr. Armstrong to resign, the request was refused and was accompanied by threatening language.

On 18th October, 1966, at a Board meeting of Landmark Mr. Armstrong objected in strong terms to the method of presentation of the company's accounts for the year ended 30th June, 1966, which, he claimed, gave a misleading picture of Landmark's financial position. The other directors and the Secretary all joined issue with this objection.

At or about the same time Mr. Armstrong in a conversation with Mr. Bovill was critical of the appellant's conduct in selling to Mr. Hoggett, the new manager of Landmark, a parcel of shares in that company at a price substantially above the market price. The appellant's resentment of Mr. Armstrong was aggravated when he learned of this criticism.

In consequence of these disputes and on the initiative of the appellant, on 24th October, 1966, at a meeting of the directors of Landmark, a vote of confidence was passed in the appellant as its managing director on a motion on which Mr. Armstrong

refrained from voting. At the same meeting a series of resolutions aimed at Mr. Armstrong were passed, including a resolution which denied to directors other than the managing director any executive authority in connexion with the company and the use of a car and office and secretarial assistance at the expense of the company.

On 4th November, 1966, Mr. Armstrong's solicitors wrote to the appellant offering to purchase from one of the appellant's family companies 170,000 shares in Landmark at 70¢ per share, a price above the then market price. This offer was rejected by the appellant because it contained a condition requiring the appellant to remain on the Board for three to six months and to support Mr. Armstrong.

Further disputes concerning the Landmark accounts took place at a Board meeting on 8th November. This dispute was resolved against Mr. Armstrong and it was decided to convene the annual general meeting on 2nd December. Mr. Armstrong protested strongly against the recommendation that a dividend be declared on the ground that the finances of the company were not such as to warrant the payment, an attitude which seems to have been correct and to have been borne out by subsequent events.

On the same day Mr. Armstrong was removed as chairman of directors of Paradise Waters and

Paradise Waters (Sales) and the appellant was appointed as chairman of each of the companies.

On 10th November, 1966, the solicitors for Finlayside demanded that Mr. R.I. Grant, Mr. Armstrong's solicitor, should be appointed to the Boards of Paradise Waters and Paradise Waters (Sales) as a nominee of Finlayside to give effect to the provisions of a deed of covenant dated 11th February, 1966, between Finlayside, Landmark, Paradise Waters and Paradise Waters (Sales) which entitled Finlayside to have equal representation with Landmark on the Boards of the two companies and to have its nominee appointed as chairman of directors with a casting vote. Landmark did not comply with this demand with the result that proceedings by way of originating summons were instituted on 15th November, 1966, in which Street J. on 17th November, 1966, after a contested hearing, made an order on certain terms requiring Landmark to cause Mr. Grant to be appointed as a director of Paradise Waters and Paradise Waters (Sales).

At the same time the solicitors for George Armstrong had demanded the appointment of Mr. O. Guth as its nominee to the Board of Paradise Waters (Sales) pursuant to clause 4(j) of a scrip lien and deed of charge dated 22nd February, 1966, being one of the securities taken by George Armstrong. After non-compliance with this demand, on 15th November, 1966, George Armstrong commenced

proceedings by way of originating summons in equity for appropriate relief. It does not appear that any order was made by the Court in these proceedings. The two suits were brought for the purpose of enforcing provisions in the security documents which were designed to ensure that Mr. Armstrong retained control of the two Paradise Waters companies whilst the loan by George Armstrong was outstanding.

On 17th November, 1966, whilst these proceedings were still pending, the appellant with the support of Messrs. Bovill and Cotter, succeeded in removing Mr. Armstrong from his position as chairman of directors of Landmark at a meeting of directors of that company. Subsequently Mr. Armstrong nominated candidates for election to the Board of Landmark at its annual general meeting on 2nd December, 1966 against Mr. Cotter, the retiring director. This led to a contest between the appellant and Mr. Armstrong to secure proxies from the shareholders. The outcome of this contest resulted in a victory for the appellant who succeeded in having Mr. Cotter re-elected and Mr. Armstrong's candidates rejected.

The contest over the election of directors gave rise to an equity suit by Mr. Armstrong to enforce a demand which he made as a director, to inspect the proxies lodged with the company for use at the meeting. Relief was granted to Mr. Armstrong on 1st December, 1966.

Under a clause in the mortgage from Paradise

Waters to George Armstrong the outstanding principal of $400,000 together with interest became due and payable on the removal of Mr. Armstrong as chairman of directors of Landmark. On 21st November, 1966, Mr. Armstrong's solicitors gave notice to Landmark that the amount was required to be paid and that formal notice of demand would be given to Paradise Waters. On the same day Southern Tablelands demanded immediate payment of an amount of $50,000 from Grosvenor, together with interest, the amount having been overdue since 30th September, 1966.

On 23rd November, 1966, Landmark received from U.D.C. a formal letter confirming a resolution of the Board of that company agreeing to make available to Landmark an amount of $450,000 together with interest outstanding to the Armstrong companies so as to enable the payment of the debts owing to those companies. Thereafter the solicitors for Landmark and for the Armstrong companies gave consideration to the documentation which would be required to enable the securities held by the Armstrong companies to be discharged.

However, on 10th December, 1966, Mr. Honey, managing director of U.D.C., informed the appellant that his company had decided not to advance the moneys necessary to discharge the indebtedness of the Armstrong companies and that his company would make no further loans in connexion with the Paradise Waters project. This intelligence threatened the financial position of Landmark for the Paradise

Waters project was the largest individual project of the company and for its development Landmark was dependent on substantial finance from outside sources.

Although a great deal of work had been done by December of 1966 much still remained to be done. Successful completion of the project was dependent upon Landmark's ability to refinance the debts owing to the Armstrong companies and its ability to borrow the further moneys for development which, it had been anticipated, would be provided by U.D.C. Interest rates payable in connexion with the moneys already borrowed from U.D.C. and on any further borrowings were high and any delay in the completion of the project would severely prejudice Landmark's ability to repay borrowings out of the proceedings of sale of the lots as they were completed.

On 13th December the appellant wrote to U.D.C. on behalf of Landmark demanding that the company honour its undertaking and make the advance of $450,000. On 19th December in a discussion with Mr. B.H. Smith, a well-known accountant who acted for Mr. Armstrong in the negotiations which commenced on 14th December, U.D.C. made it clear that it had not finally decided to withdraw financial support from Landmark. U.D.C. indicated that its attitude towards further finance would be influenced by the settlement of the differences between the directors of Landmark and by Mr. Armstrong refraining from calling up the debt of $400,000. However, on 22nd December Mr. Grant ascertained that U.D.C. proposed

to appoint a receiver of Landmark under its securities unless its existing loan was immediately reduced by $60,000 and Mr. Armstrong made a further advance of $300,000 to Landmark. This led to an offer by Mr. Armstrong to the Board of Landmark to advance $60,000 on condition that he took over control of the company from the appellant and had a nominee appointed to the Board. The offer was rejected by the other directors. U.D.C. was induced to stay its hand in relation to the appointment of a receiver on Landmark making a payment of $60,000. Subsequently the appellant wrote a more conciliatory letter to U.D.C. stating that Landmark had no present requirement for the moneys.

Street, J. found, and it is not now disputed, that meantime on 14th December negotiations commenced between Mr. B.H. Smith who acted on behalf of Mr. Armstrong, and the appellant with a view to concluding an agreement which would settle the outstanding differences between Landmark, Mr. Armstrong and the appellant. Then negotiations continued until 23rd December when they were temporarily discontinued. They were resumed on 4th January, 1967, and they culminated in the execution of certain deeds on 17th January, 1967, in respect of which the appellant sought relief.

The negotiations commenced with a proposal by Mr. Smith that the appellant should make a firm offer in writing to be subject to acceptance within forty-eight hours involving the following matters:

(i) that Landmark would pay out George Armstrong's mortgage debt of $400,000 together with interest;

(ii) that Landmark would purchase the 40% shareholding of Finlayside in Paradise Waters (Sales) for $175,000;

(iii) that he would purchase the 300,000 shares in Landmark held by Mr. Armstrong and his companies for $180,000; and

(iv) that upon completion Mr. Armstrong and his nominees would resign from the Boards of the various companies.

The appellant indicated that he would endeavour to reach a firm agreement on a variation of this proposal. The principal variation was that the purchase price for the 40% shareholding of the Armstrong companies in Paradise Waters (Sales) should be $100,000 in cash and the granting of an option by that company to Mr. Armstrong or his companies to purchase thirty blocks in the completed development at the list price of those lots less 40%. It seems that the appellant did not demur to the suggested purchase price of 60¢ per share for the 300,000 shares in Landmark, notwithstanding that the market price of those shares was little more than half that figure. It is unnecessary at this point to set out in any detail the course of the subsequent discussions between the appellant and Mr. Smith. It is sufficient at this stage to say that the negotiations resulted in the execution of a deed dated 17th January, 1967, and certain ancillary deeds.

The parties to the principal deed were the appellant, Mr. Armstrong, Landmark, the four Armstrong companies to which I have referred, Goulburn Acceptance Pty. Ltd., (another Armstrong company), Paradise Waters, Paradise Waters (Sales), Goondoo and four other Landmark subsidiaries.

By the deed it was provided that a loan of $300,000 should be made by Southern Tablelands to Paradise Waters (Sales) secured at the option of the lender over assets of Paradise Waters (Sales) or over Landmark House; by virtue of the provisions of the security documents mentioned in the deed it was provided that the loan should be repaid at the expiration of one year and bear interest at the rate of 12% per annum (clauses 1-5).

Clause 6 granted to Mr. Armstrong or his nominee an option to purchase not more than 35 groups of shares in Paradise Waters (Sales) at half list price (each group of shares entitled the holder to a lot in the Paradise Waters development); the option was to be exercisable on or before 15th March, 1967, and, if exercised, was to be accompanied by a deposit of 10% of the purchase price, the balance being payable on completion.

By clause 8 A.E. Armstrong agreed to sell to the appellant and seven other persons or companies nominated by the appellant and approved by Mr. Smith not more than 300,000 shares in Landmark at 60¢ per share. It was provided that the dividend already declared by Landmark, but not paid, should

remain payable to the vendor and, if not paid on or before 18th January, 1968, an equivalent amount should be paid by the purchaser as an addition to the purchase price. It was further provided that the purchase price was to be paid by three equal annual instalments commencing on 18th January, 1968. No interest was payable on the purchase price which was to be secured by a mortgage back over the shares and a personal guarantee by the appellant of the performance of the obligations of each purchaser. The appellant covenanted that he would procure seven other persons who, with himself, would agree to purchase the shares from the vendor (clause 9).

By clause 11 Finlayside covenanted that it would sell its 2,000 $2 shares in Paradise Waters (Sales), being its 40% interest in the capital of that company, for $100,000.

By clause 12 Landmark (Q'ld) Pty. Ltd. agreed to sell to Finlayside the furnished penthouse in Paradise Towers for $60,000.

By clause 13 the Landmark companies covenanted to apply the $300,000 loan already mentioned in reduction of the $400,000 debt due to George Armstrong.

It was provided that the settlement of the individual transactions for which the deed made provision was to take place on or before the following day, namely 18th January, 1967 (clause 14). It was further provided that the parties should be released from all their obligations under the deed in

the event of a receiver being appointed prior to settlement by U.D.C. (clause 15). It was also provided that in the event of settlement not being effected by 18th January due to the default of the appellant or of the Landmark group the appellant would relinquish control of Landmark in favour of Mr. Armstrong (clause 16).

Clause 17 provided that upon settlement Mr. Smith would become chairman of directors of Landmark whereupon Mr. Armstrong would resign from the Boards of all the Landmark companies and that a nominee of Mr. Armstrong's would be appointed to the Boards of those companies.

Settlement of the transactions for which the deed made provision took place, as contemplated, on or before 18th January, 1967. In particular, deeds were executed relating to the purchase by the appellant and his seven nominees of the shares held by A.E. Armstrong in Landmark and a guarantee of performance by the purchasers of their obligations under these contracts was contained in deeds executed by the appellant on 13th January, 1967. Meetings of directors of the companies took place at which appropriate steps were taken necessary to give effect to the provisions of the deed.

Thereafter, notwithstanding energetic endeavours by the appellant to obtain further finance, in particular for the Paradise Waters development, additional finance was not forthcoming. By February, 1967 Landmark encountered difficulties in

connexion with its property Landmark House in Brisbane.

On 18th March, 1967, the Landmark companies failed to pay the instalment of interest due under the loan from Southern Tablelands to Paradise Waters (Sales) and, in consequence, Southern Tablelands threatened to exercise its rights under the securities which it held. This led to the commencement of proceedings in the Supreme Court in equity by the Landmark companies. An application was made under s.30 of the Money Lenders and Infant Loans Act, 1941, as amended, and a suit was commenced by the same companies against Southern Tablelands for orders restraining Southern Tablelands from exercising its rights. The basis of the proceedings was an allegation that it was a term of the agreement between the parties to the deed (albeit unexpressed in the deed) that any default by the appellant or a Landmark company should be the subject of a notice by Southern Tablelands and that there would be seven to fourteen days' time within which to rectify the default. The proceedings were settled by the parties on the footing that the proceedings were dismissed upon an undertaking by the defendant not to exercise until after 30th June, 1967, any of its rights to enforce payment of the principal sum of $300,000 so long as the plaintiffs paid the outstanding instalments of interest due on 18th March and 18th April, 1967, and continued to pay interest in accordance with the provisions of the deed and supporting documents.

By the middle of 1967 Landmark's financial position had deteriorated. No further finance had been obtained and discussions took place between the appellant and Mr. Smith concerning the possibility of a scheme of arrangement between the company and its creditors. The financial difficulties of Landmark continued as the time for repayment of the money lent by Southern Tablelands and for payment of the first instalment of the purchase price of the shares in Landmark drew near, that is 18th January, 1968. It was on 10th January, 1968, that the appellant commenced a suit in which he sought relief against the deed of 17th January, 1967, and the ancillary deeds. The filing of the settlement of claim was not preceded by any letter of demand or correspondence in which the claim subsequently made in the suit was asserted.

The financial difficulties of Landmark resulted in a compulsory winding up order being made by the Supreme Court in equity against the company after the suit had commenced and before the defendants filed their statements of defence.

By his amended statement of claim the appellant alleged that prior to the execution of the deed dated 17th January, 1967, Mr. Armstrong on behalf of himself and of the Armstrong companies had coerced the appellant into agreeing upon the matters dealt with by the deed by threatening to have the appellant murdered and otherwise exerting unlawful pressure on the appellant; that for the purposes

mentioned he engaged certain criminals to kill or otherwise injure the appellant; that in consequence the appellant feared for his life and safety and that of his family with the result that he had executed the deed and the ancillary deeds so as to avoid the threat of death or injury; that the execution of the deeds by the appellant was not voluntary. It was alleged that in consequence of the actions of Mr. Armstrong the appellant remained in fear of his life and safety and for that of his family following the execution of the deed up to the filing of the statement of claim.

In his prayer for relief the appellant sought a declaration that the deeds were executed by him under duress, that in the alternative that it might be declared that the deeds were executed by him under duress and had been avoided and further, alternatively, that it might be declared that the deeds are void, or void so far as concerns the appellant.

The material allegations in the statement of claim were denied in the statements of defence. However, during the hearing senior counsel for Mr. Armstrong and his companies made it clear that the defendants did not rely on subsequent inaction after 17th January, 1967, on the part of the appellant in disaffirming the deeds as constituting laches, acquiescence or delay and that the subsequent inaction was relied upon for the purpose only of throwing doubt upon the genuineness of the appellant's claim. We were informed by senior counsel for Mr.

Armstrong that this concession relieved the appellant from proving that his fear consequent upon the threats continued up to the filing of the statement of claim.

In his answers to interrogatories the appellant gave particulars of the occasions on which, and the means by which, Mr. Armstrong and persons acting on the latter's behalf had threatened or brought pressure to bear upon him in connexion with the making of the agreement. There were five distinct and identifiable occasions commencing with an occasion in mid-December 1966 at the offices of Landmark in Sydney when Mr. Armstrong said, "Unless Landmark buys my interest in Paradise Waters for $100,000 and repays the loan of $400,000 and you buy my shares at 60¢ each I will have you fixed".

The second occasion was on 7th January, 1966, when a man named Vojinovic informed the appellant that he Vojinovic had instructions originating from Mr. Armstrong to assist in the killing of the appellant.

Then on 12th January, 1967, in a telephone conversation Mr. Armstrong said to the appellant: "You had better sign these documents or else", to which the appellant replied, "I won't be blackmailed into signing these documents". On 13th January 1967, Mr. Smith spoke to the appellant by telephone and said, "Unless the documents are signed and exchanged today, the whole deal is off. This is an instruction from Mr. Armstrong".

Finally on 16th January, 1967, Mr. Armstrong said to the appellant in a telephone conversation, "Unless you sign this agreement you get killed". It is of some significance that the appellant stated in his answers to interrogatories that he resisted all these threats with the exception of the last, to which, so he claims, he finally succumbed.

In addition, the appellant claimed that on a number of occasions during January 1967 he received telephone calls at his home in the early mornings. The form of these calls varied. On some occasions the caller would say, "You will be killed". At other times the caller did not speak. At no time did the caller identify himself but on at least one occasion the appellant recognised the voice of Mr. Armstrong.

As well, the appellant alleged, first, that he was followed and that his home was watched by persons acting on behalf of Mr. Armstrong. These activities took place during November and December 1966 and January 1967. Secondly, that Mr. Armstrong during December 1966 and January 1967 made statements to various persons derogatory of the appellant intending thereby to bring pressure on the appellant to execute the agreement.

It is evident from the nature of the appellant's case that it depended substantially on the evidence of the appellant himself. No other witness was able to speak as to the telephone calls which the appellant had received, nor as to his private

conversations with Mr. Armstrong. No member of the appellant's family was called as a witness to support his case, although his son might reasonably have been expected to have given evidence in support of the appellant's case, had he been willing to do so. Nor was any legal adviser of the appellant or Landmark called to support the appellant's case, although several solicitors were active in the affairs of the appellant and Landmark and in the negotiations. The principal witness called to support the appellant was Mr. Bovill, a fellow director, who, with one exception, was not able to speak of threats made to the appellant, but who was able to speak of a threat made to him by Mr. Armstrong which was recounted to the appellant and of the appellant's attitude of mind during the struggle for control of Landmark and the subsequent negotiations.

The appellant gave evidence in support of each of the incidents already mentioned, as well as other incidents of which he had not furnished particulars. The appellant said that the threats commenced immediately after Mr. Armstrong's return from overseas in the middle of October 1966 when in a conversation in which the appellant asked Mr. Armstrong to resign and he refused to do so, Mr. Armstrong said: "... the city is not as safe as I may think between office and home and I will see what he can do against me and I will regret the day when I decided not to work with him".

He said that in mid-November 1966 he began to receive telephone calls in the early hours of the morning as already described and that he continued to receive these calls until 7th January, 1967, when they ceased for a period. He also says that at about the same time he was under surveillance at home, at his office and as he travelled about. On one occasion he identified the person watching as Frederick Hume, a private inquiry agent and associate of criminals, who was friendly with Mr. Armstrong and who did work for Mr. Armstrong from time to time. In consequence of these activities he hired, at the expense of Landmark, a bodyguard from the Australian Watching Company from 20th November to 3rd December, 1966. Indeed, following an incident which occurred outside the appellant's home one night an additional bodyguard was employed during this period. Three bodyguards were in attendance at the annual general meeting of Landmark.

At the end of November 1966 the appellant says that Mr. Armstrong warned him that he, Armstrong, was of German origin and that "You had better watch out. You can get killed". Mr. Bovill also speaks of an occasion at about this time when Mr. Armstrong said to the appellant before a Board meeting, "You stink. You stink. I will fix you".

After this meeting Mr. Bovill recounted to him a conversation with Mr. Armstrong in which Mr. Armstrong had asserted that he could hire gunmen from Melbourne for $2,000. Mr. Bovill then told

the appellant that he was concerned for the appellant's safety as Mr. Armstrong might hire a gunman to kill him. This conversation was confirmed by Mr. Bovill who also gave evidence in some detail of his conversation with Mr. Armstrong in which that gentleman claimed to be in a position to have evidence manufactured or destroyed by the Police Force.

According to the appellant the next incident occurred after another Board meeting on 7th December when Mr. Armstrong said to him "You can employ as many bodyguards as you want. I will still fix you". Then on 14th December, so the appellant says, outside a Board meeting Mr. Armstrong said "Unless Landmark buys my interest in Paradise Waters (Sales) for $100,000 and the company repays $400,000 owing to me, and you buy my shares for 60¢ each I will have you fixed". The appellant asserted that he was frightened by this threat and was only dissuaded from resigning by Messrs. Bovill and Cotter.

As I have already observed, Street, J. found that the negotiations between the appellant and Mr. Smith commenced on 14th December, 1967. In so finding, his Honour rejected the evidence of the appellant who swore that the negotiations commenced on 4th January and that there had been no discussions between himself and Mr. Smith in December 1966. The appellant does not now challenge the correctness of his Honour's finding on this issue.

After the resumption of the negotiations on 4th January, 1967, the appellant was telephoned on

7th January by Vojinovic and it was arranged that they should meet at Castlecrag Post Office. After Vojinovic failed to appear at the appointed time, a further meeting was arranged at the Rex Hotel, King's Cross, that night. The appellant made arrangements for a bodyguard and for two of his friends to proceed to the Hotel. The appellant's account of what Vojinovic said to him was accepted by Street, J. and it was as follows:

> "He took me into a corner of that bar and then he said to me 'Mr. Barton, you are in a big trouble. My team has been hired to kill you. We have been paid, offered to be paid £2000 and the man Frederick Hume is the middleman who has been hired by a big man Armstrong', and he said that if I prepared to pay him the £2000 he rather don't do it, and then I told him that I didn't want to be mixed up in these sort of matters and I going straight to the police. He then said that I should not rush into things because I am in real danger and he has a long criminal record and his team is very anxious to get the money and I have told him, as I did before, that I go straight to the police. He said he has a long criminal record, he has been arrested many times and he spent a lot of time in gaol, and he has a detective who he is prepared to bring to me and put the matter in front of the police through the detective.
>
> Q. Please continue. A. Then I told him that if this will be done through the police and if his principals who hired him will get arrested and dealt with I prepared to pay him the money through the police and he said that is quite all right and if I can give him £500 in advance. I told him I do nothing without the police. Then he said it would be all right, he will get in contact with me tomorrow morning and he will contact the detective in the meantime and I will be able to meet him with the detective together and place the matter in the police hands.
>
> ....
>
> Your Honour, I missed out one point in the conversation with the man when he

said that he has been offered £2000 to kill me and he have to rob my wife diamond ring and he get paid £5000 for the ring separate."

On the following morning Sunday 8th January a conference with the Criminal Investigation Branch of the Police Force was appointed. In attendance were the appellant, Mr. Muir Q.C. and Mr. Miller, solicitor, both representing the appellant and Landmark, Inspector Lendrum, Detective Sergeant Wild and Detective Constable Follington. Following the conference Constable Follington went to the appellant's home. There, when Vojinovic subsequently telephoned, the appellant arranged a further meeting with him that night. The meeting took place. Vojinovic was apprehended and interviewed. He signed a written record of interview which was shown to the appellant on 9th January. According to this document and to his evidence Vojinovic had been approached two weeks earlier by a man named Novak who said that he Novak had been offered £2000 to engage someone to murder the appellant. The offer, so Vojinovic said, had been made by Hume, a private investigator, who was acting on behalf of Mr. Armstrong. Vojinovic was in Novak's company in the next two weeks, driving around in a car which Hume had acquired on hire-purchase, but he did not see Hume. Vojinovic said that he had asked the appellant for £500 for his help.

Vojinovic was allowed to leave the Criminal Investigation Branch after he had signed the record of interview. No written statement was obtained

Reasons for Judgment
of his Honour Mr.
Justice Mason, J.A.

from Hume until 1968. According to Detective Sergeant Wild he was interviewed in January 1967 when he denied Vojinovic's allegations, as he later did in his evidence at the hearing, but no written statement was then obtained from him. The appellant disputed this evidence and said that Constable Follington showed him, in the presence of his son, a written statement obtained from Hume in which he admitted to some of the allegations made by Vojinovic.

According to the appellant he was profoundly affected by the Vojinovic episode. He arranged for his mother and his parents-in-law who normally lived with him to go to a guest house in the Blue Mountains; he himself, together with his wife and son, moved to the Wentworth Hotel, taking pains to ensure that he was not followed so that his place or residence should not be known. On the same day that he moved to the Wentworth Hotel, namely Wednesday 11th January, being unable to obtain a pistol licence, he arranged to purchase a rifle for his self-protection. Indeed, Constable Follington gave his son some elementary instruction in the use of the rifle.

The appellant informed Mr. Bovill that Mr. Armstrong's threats were becoming worse and that he had hired criminals to kill him. The appellant informed Mr. Bovill that he had already gone to the police and, later, that he and his family had moved to the Wentworth Hotel and that he had purchased a rifle.

Negotiations continued meantime. In a telephone conversation on 10th January Mr. Smith informed the appellant that Mr. Armstrong wanted the agreement exchanged by Friday 13th January to which the appellant replied that it would not be possible to do so. According to the appellant, on 12th January Mr. Armstrong telephoned him at the Landmark offices and said, "You had better sign this agreement or else". The appellant replied, "I won't let myself be blackmailed into any agreement".

On 13th January, 1967, the appellant said that he received a telephone call from Mr. Smith in which Mr. Smith said that he had received instructions from Mr. Armstrong that the documents which were in the course of being finalised would have to be signed and exchanged that day, otherwise the agreement would be off. According to the appellant he informed Mr. Smith that he would not be prepared to sign or exchange the documents that day and that he would not be prepared to advise his co-directors to sign or exchange them that day.

The appellant's case was that on Friday 13th January he had decided not to proceed any further in the matter of the agreements and that he was only induced to change his mind in favour of proceeding by the threat which he claims was made on 16th January. Mr. Bovill gave evidence of a conversation which he had with the appellant, which was said to have taken place on Friday 13th. According to Mr. Bovill, the appellant then said, "It's a bad

business. It's risky. We should not execute these agreements", to which Mr. Bovill replied that settlement with Mr. Armstrong was a pre-requisite to obtaining finance. Mr. Bovill said that this comment drew from the appellant the remark, "I don't believe the finance will necessarily be forthcoming. I don't think these agreements should be signed".

On the appellant's evidence the significant event which occurred and induced him to execute the deeds and to prevail upon his fellow directors to have them executed by Landmark and its subsidiaries was the threat which was made in a telephone call which he says that he received from Mr. Armstrong at about 8.20 a.m. on the morning of Monday 16th January. Mr. Armstrong then said to him, "Unless you sign this document I will get you killed". The appellant then decided that the agreements should be executed and exchanged. He told Mr. Bovill that he was no longer prepared to refuse Mr. Armstrong's demands and that it was not his duty as a director to run the risk of being killed. Accordingly he persuaded Mr. Bovill to proceed with the agreements and Mr. Bovill agreed. Mr. Bovill for his part said that at this time the appellant communicated with him and urged him that the agreements should be signed quickly before Mr. Armstrong changed his mind. He says that the appellant made reference to the threats and that it was necessary to get rid of Mr. Armstrong in order to run the company

profitably. But he does not say that the appellant made mention of a threat which he had received on 16th January.

Little need be said of the defendants' case for the effect of the evidence called by the defendants was to deny the allegations that any threats or intimidation had been offered to the plaintiff and that he had been subjected to any unlawful pressure. Mr. Armstrong denied all the allegations made against him by the appellant and that he had instructed others to threaten, intimidate or watch the appellant. Mr. Hume also gave evidence by way of denial of the appellant's case. The three Police officers who attended the conference on 8th January gave evidence concerning the Police investigation of the appellant's complaint and in the course of that evidence denied that they had obtained a statement from Hume implicating Mr. Armstrong and that they had destroyed such a statement. Mr. Smith and Mr. Grant, Mr. Armstrong's solicitor, gave evidence concerning events leading up to the execution of the deeds. Other witnesses were called, but no reference need be made to their evidence.

The credit of the witnesses was of critical importance. For this reason I turn first to the views which Street, J. formed with respect to the evidence of the principal witnesses. With respect to Mr. Armstrong his Honour said:

> "I think so little of Mr. Armstrong's credit that I am satisfied that on any point of importance he would not hesitate, if he thought

> it necessary for his own protection or advantage so to do, to give false evidence ... When the whole story was unfolded as his cross-examination proceeded he is exposed as a man having little regard for the need to preserve the integrity of Court proceedings and for the obligation of a party to Court proceedings to present a true as distinct from a manufactured case."

The correctness of this assessment of Mr. Armstrong's credibility as a witness was not questioned in the appeal.

As to the appellant, his Honour said:

> "There are substantial inaccuracies in his firmly expressed account of the negotiations; these may be due to deliberate mis-statement or they may be due to distorted reconstruction. The inaccuracies may, indeed, be due partly to one cause and partly to the other. But whatever their origin, the inaccuracies are such as to indicate that great care must be taken in accepting and acting upon Mr. Barton's uncorroborated testimony. I have grave doubts about the reliability of his evidence on that part of the case which concerns Detective Sergeant Wild and Detective Constable Follington. He is at variance in some details with a witness whom I accept as truthful and honest, namely Detective Inspector Lendrum. And, as will appear later, I do not accept his evidence regarding his state of mind in December 1966 or January 1967 with reference to the future of Landmark and with reference to the causal link between Mr. Armstrong's threats and the making of the agreement of 17th January. There are many other points in the mass of evidence casting doubt upon the reliability of Mr. Barton's testimony."

His Honour said that most of the appellant's inaccuracies were due either to faulty recollection or to some bona fide distorted reconstruction, that his credit was superior to that of Mr. Armstrong that his belief in his case was self-induced, rather than based on fact and that, accordingly, his evidence must be regarded as suspect.

Mr. Smith and Inspector Lendrum impressed Street, J. as honest and reliable witnesses, as did Mr. Bovill, but his Honour did qualify his assessment of Mr. Bovill by saying that in some respect his recollection, particularly as to dates, was faulty and that in recounting conversations the attempt to reconstruct had led in some instances to inaccuracies in the actual terms used.

His Honour regarded Hume and Vojinovic as unreliable witnesses whose evidence could not be accepted unless it was otherwise corroborated. His Honour did not express a concluded opinion on the credit of Detective Sergeant Wild and Constable Follington as witnesses, but it is evident that he had some reservations concerning the reliability of their evidence.

Street, J. found that Mr. Armstrong had threatened and intimidated the appellant, that in consequence the appellant feared for his life and safety and that of his family, but that he was not entitled to relief in respect of the deeds because he had entered into the deeds with a free and voluntary mind for commercial reasons.

The appellant obtained a finding that he had received threatening telephone calls and that Mr. Armstrong was responsible for them. It was found that the appellant had been watched and followed as he alleged, although his Honour was not able to find on the evidence that Mr. Armstrong was responsible for these activities.

The appellant secured a finding that Mr. Armstrong threatened him in the middle of October 1966 on his return from abroad and again about the end of November when Mr. Armstrong warned the appellant of the risk of being killed. Likewise his Honour accepted Mr. Bovill's evidence concerning events before the commencement of the Board meeting on 30th November when Mr. Armstrong said to the appellant "You stink. You stink. I will fix you" and the later conversation in which Mr. Armstrong had made extraordinary claims concerning the hiring of gunmen and his ability to have the Police do his bidding which were reccunted subsequently by Mr. Bovill to the appellant.

The learned Judge did not accept the appellant's evidence that he was threatened after a Board meeting of Paradise Waters (Sales) on 7th December because none of the persons in whose presence the threat was alleged to have been made was called to corroborate the appellant's account.

His Honour did accept the appellant's account of the Vojinovic incident, but declined to hold that either Hume or Mr. Armstrong had requested or instructed Vojinovic to threaten or kill the appellant.

There was a finding that Mr. Smith telephoned the appellant on 10th January and stated that Mr. Armstrong wanted the agreement exchanged by Friday 13th. Indeed, that there was such a conversation on that day was not disputed. Again, there was a

finding that Mr. Armstrong threatened the appellant in a telephone conversation on Thursday 12th January when he said: "You had better sign this agreement or else" and that the appellant replied by saying that he would not allow himself to be blackmailed into any agreement. But his Honour refused to find that the appellant at that time changed his mind and decided not to enter into the agreement. His Honour was of the opinion that the appellant for commercial reasons had decided to enter into the agreement and that he was consistently of this mind from 4th January, 1967, onwards. Accordingly, although his Honour thought that a conversation took place between the appellant and Mr. Bovill in which the appellant expressed the view that finance might not be forthcoming and that the agreements should not be executed, he considered that the conversation had taken place some time in December and certainly before 4th January, 1967. In this respect his Honour took the view that Mr. Bovill was mistaken in his recollection of the date of the conversation and that he was influenced in his answers by counsel suggesting to him that the conversation took place on 13th January.

Finally his Honour was not satisfied that Mr. Armstrong threatened the appellant on 16th January. He accepts that a conversation took place between the appellant and Mr. Bovill in which the appellant proposed that the deed should be executed urgently lest Mr. Armstrong change his mind. In

substance he accepted Mr. Bovill's version of this conversation and regarded it as inconsistent with the appellant's case because there is no mention in it of the threat made that day, nor any mention of the profound and significant effect which, according to the appellant, it had upon his mind. The rejection of the threat on 16th January was fatal to the appellant's case because the appellant had resisted the earlier pressure and, according to him, it was this final threat that overcame his steadfast will to resist and induced him to enter the agreement.

Street, J. considered that the appellant executed the deeds for commercial reasons. The appellant believed that it was essential for the future of Landmark that the conflict between himself and Mr. Armstrong should be resolved by the acquisition of Mr. Armstrong's interests and by the repayment of the loans to his companies. Moreover, the appellant considered that an arrangement of this kind was essential to further borrowing for the purpose of developing Paradise Waters.

The appellant has sought what amounts to a new trial of the case on the footing that an appeal under s. 82 is a rehearing and has submitted that the findings of fact and conclusions of law adverse to him should be reversed. As a preliminary to a consideration of the appellant's arguments, in particular the submission that the learned Judge erred in placing the onus of proof on the appellant, it is

convenient to examine the common law doctrine of duress.

The traditional common law concept related to duress of the person which included duress of imprisonment, involving actual loss of liberty, and duress per minas, where the injury was threatened. Duress by threat of injury was confined to threatened loss of life, mayhem or loss of a limb (Bl. Comm. I. page 130). The severity of the threat and its capacity to instil an immediate reaction of fear so great as to overpower the will was emphasized in the early insistence of the common law that the threats must be such as to put a brave man in fear (Blackstone (supra)).

However, in equity it was held that security given by a father under the influence of a threat of criminal proceedings against his son was unenforceable (Williams v. Bayley (1866) L.R. 1 H.L. 200 at 219) where Lord Westbury said:

> "A contract to give security for the debt of another, which is a contract without consideration, is above all things, a contract that should be based upon the free and voluntary agency of the individual who enters it."

Conscious no doubt that the remedy might be abused if it were too readily available at the suit of a person who claimed to have been overborne by threats, the courts have recognised that, in order to succeed in a defence of duress, the defendant must show that his mind was so overcome by fear in consequence of threats that he did not enter into

Reasons for Judgment
of his Honour Mr.
Justice Mason, J.A.

the transaction with a free and voluntary mind (Holdsworth - History of English Law Vol. 8 page 51; Cumming v. Ince (1847) 11 Q.B. 112; Seear v. Cohen (1885) 45 L.T.N.S. 589; Mutual Finance v. John Wetton & Sons Ltd. (1937) 2 K.B. 389 at 396-397). In Cumming v. Ince (at 120) Lord Denman C.J. stated as the test, "Was the contract made with her free will?" In Seear v. Cohen (at 590-591), then Denman J., he said with reference to the transaction:

> "It is not to be looked at as a voluntary act, but as a case of extortion .. the defendants were not free agents, but were coerced and forced into this bargain by reason of a representation ...; that they believed this and that they would not have signed the promissory note unless they believed this."

It may be that it is necessary that the party alleging duress should prove that, but for the threats, he would not have entered into the agreement (the test in fraud) - Williston on Contracts s. 1604. But this in itself is not a sufficient title to relief, for, as Williston puts it, "The real and ultimate fact to be determined in every case is whether or not the party really had a choice - whether he had freedom of exercising his will". (Williston on Contracts s. 1603-1605; American Restatement of Contracts and s. 492 et seq.) There is nothing in the authorities which would suggest the appellant places strong reliance on it, that the correct test in duress is whether the threats were the predominant cause of entry into the contract.

Where the plaintiff can show that his assent to an agreement has been coerced by duress, the agreement is not void, but voidable at his instance (Whelpdale's Case (1605) 5 Co. Rep. 119a cf. Sheppard's Touchstone page 61). In this respect the concept of duress in its development has more closely followed that of fraud, than mutual mistake. Likewise, as in fraud, it has always been accepted that the onus rests with the party alleging duress of proving that his assent was coerced by duress.

The issues in this case do not call for a precise definition of the relationship between duress and the equitable doctrine of undue influence. However, as the appellant's arguments on the onus of proof have endeavoured in several respects to draw some support from the characteristics of undue influence, it is necessary to make some observations concerning that doctrine. It has been authoritatively stated that the limitation of duress at common law were the occasion for the elaboration by equity of undue influence. Although it may be referred to broadly as an extension of the common law concept and there may be an element of overlapping, the equitable doctrine is in some respects different. In duress the making of threats instils a fear in the wronged party which induces him to act against his will; whereas in those cases in which there is a legal presumption that a transaction has been procured by undue influence there is a relation of ascendancy, domination or trust between the

wrongdoer and the innocent party who enters into the transaction, not against his will, but because he wishes so to do by reason of the unconscientious use by the wrongdoer of his capacity to exercise influence. The characteristics of undue influence and their relationship to the onus of proof have been expressed thus:-

> "The source of power to practise such a domination may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act. But the parties may antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected. When they stand in such a relation the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him by the other as a gift, unless he satisfies the court ... that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee .. A solicitor must thus justify the receipt of such a benefit from his client, a physician from his patient, a parent from his child, a guardian from his ward, and a man from the woman he has engaged to marry ... But while in these ... relationships their very nature imports influence, the doctrine ... is confined to no fixed category ... It applied whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part."

(Johnson v. Buttress 56 C.L.R. 113 at 134-135).

The case presented before Street, J. was one of common law duress only. As I have already said, the legal onus in such a case rests with the party alleging duress and this was conceded before

his Honour by counsel for the appellant. The attempt in this Court to go behind this concession by seeking to extract from the doctrine of undue influence a principle of general application which would place a legal onus on the party alleged to have resorted to duress was misconceived. Even if it be conceded that in some circumstances fear induced by threats of death or injury can ground a case of undue influence, the appellant's argument ignores the substantial differences which do exist between the concept of duress and that of undue influence and that the case here is one of common law duress. There was here no relationship of ascendancy or domination, antecedent or otherwise, no situation of dependence or trust, which would attract the legal presumption which applies in the traditional relationships of influence. The conclusion which I have reached therefore is that the present case is one of duress; that if it is to be regarded as a case of undue influence it does not fall into the category which gives rise to the legal presumption that entry into the transaction has been procured by the exercise of undue influence. Accordingly, I am of opinion that his Honour was correct in regarding the appellant as bearing the legal onus of proof.

I come now to the criticism which was directed at the findings of fact. In considering this aspect of the appellant's case I should make some reference to the function of this Court under s.82

Reasons for Judgment
of his Honour Mr.
Justice Mason, J.A.

of the Equity Act in reviewing findings of fact made by a judge at first instance.

First, it is accepted that this Court must be greatly influenced by, and give special regard to, the opinion of the Court of first instance who has had the advantage of seeing the witnesses in a way not open to an appellate Court. The advantage enjoyed by the trial Judge is not confined to credibility in any narrow sense of that expression; it extends to other matters such as intelligence, personality and character, the reliability of a witness's memory and his powers of observation (Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370 at 375; Clarke v. Edinburgh & District Tramways Co. Ltd. (1919) S.C. (H.L.) 35 at 36-37; Khoo Sit Hoh v. Lim Thean Tong (1912) A.C. 323 at 325; Watt or Thomas v. Thomas (1947) A.C. 484 at 488-489). As Lord Sumner said in S.S. Hontestroom v. S.S. Sagaporack (1927) A.C. 37 at 47, in a passage approved by Lord Wright in Powell v. Streatham Manor Nursing Home (1935) A.C. 243 at 265:-

> "If his estimate of the man forms any substantial part of his reasons for judgment the trial judge's conclusions of fact should ... be let alone."

This is not to say that an appellant Court will never be justified in reversing findings of fact based on an assessment of credibility. But the taking of such a course is exceptional and should be pursued only in circumstances in which it is manifest that the assessment of credibility is erroneous.

Secondly, it has been said that the appellate Court is more at liberty to review findings of fact which are not based on an assessment of the credibility of witnesses and which do not arise out of conflicting evidence. In Rickmann v. Thierry (1897) 14 R.P.C. 105 at 116 Lord Halsbury, in a speech with which Lord Macnaghten agreed, said:-

> "The hearing upon appeal is a re-hearing, and I do not think there is any presumption that the judgment in the Court below is right ... the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced in the Court from which the appeal proceeds, and that it is not within their competence to say that they would have given a different judgment if they had been the Judge of first instance, but that because he has pronounced a different judgment they will adhere to his decision."

To the same effect are the observations of Lord Halsbury L.C. in Montgomerie & Co. Ltd. v. Wallace-James (1904) A.C. 73 at 75; Viscount Cave L.C. in Mersey Docks & Harbour Board v. Proctor (1923) A.C. 253 at 258-259; Dixon C.J. and Kitto, J. In Paterson v. Paterson 89 C.L.R. 212 at 219-224; Lord Wright in Powell v. Streatham Manor Nursing Home (supra) at 267 where his Lordship drew a distinction between cases of facts found on the impression of witnesses and cases which turn on inferences from facts which are not in doubt, or on documents; and Viscount Simonds in Benmax v. Austin Motor Co. Ltd. (supra) at 373 where his Lordship said that any confusion which may have arisen upon the topic arose from a failure to distinguish between the finding of a specific fact and the finding of fact which

is really an inference from facts specifically found or, as it has sometimes been said, between the preception and evaluation of facts. Lord Morton of Henryton and Lord Reid were of a similar opinion.

There are, however, some authoritative statements in which the approach to be taken by an appellate court is somewhat different expressed. According to these statements the appellate court should not reverse a finding of fact based on the trial Judge's view of the probabilities or an inference drawn by the trial Judge unless it can be said that the conclusion was wrong and that it is not enough that the appellate court would have differed from the trial Judge in the conclusion which, had the Court been trying the matter in the first instance, it would have drawn from the material available. In this respect I refer to the observations of Barwick C.J. (with whose reasons for judgment McTiernan J. agreed substantially) in Whiteley Muir & Zwanenberg Ltd. v. Kerr 39 A.L.J.R. 505 at 506; Barwick C.J. and Windeyer, J. in Da Costa v. Cockburn Salvage & Trading Pty. Ltd. 44 A.L.J.R. 455 at 459 and 462-465; Lord Sankey in Powell's Case (supra) at 243 where his Lordship, apparently speaking with reference to findings of fact generally, said that they should not be upset unless the appellate court was satisfied that they were clearly wrong.

It is not important for the purpose of

considering the present case to determine to what extent, if at all, these different expressions give effect to a difference in principle. The degree of satisfaction requisite in an appellate court depends on the nature of the findings which are the subject of challenge and, in particular, where inferences from established facts are attacked, upon the nature of those inferences and the material from which they are sought to be drawn. Here the fundamental issues of fact were determined on a consideration of sharply conflicting oral evidence and the evaluation of the events and the characters to which that evidence related formed an important part of the material on which the inferences of fact were based.

The issues thrown up by the allegations of the appellant were of such a kind as to make the credibility of the witnesses, in particular the appellant and Mr. Armstrong, of vital significance. Yet the appellant has neither shown, nor sought to show, any ground upon which Street, J.'s general assessment of the witnesses should be disturbed. That assessment was primarily based on observation of the witnesses and it led to conclusions respecting their character, personality and motivation. The findings on primary and ultimate questions of fact are all substantially influenced by his Honour's "estimate of the man" to use Lord Shaw's expression in its application to the witnesses in this case, and in particular to the appellant, for

Reasons for Judgment
of his Honour Mr.
Justice Mason, J.A.

on the evaluation of his evidence so much depended.

In my opinion it follows that in this case this Court should not upset his Honour's findings of fact unless it appears that a finding of fact was incorrect. Adopting this approach I have come to the conclusion that, with the exception of four findings, I am in agreement with the findings of fact made by his Honour. I do not propose to deal with all the findings challenged by the appellant; it will be sufficient if I refer to the major findings. (1) That the appellant did not believe that Landmark was worthless after 10th December, 1966.

The foundation for the attack on this finding is largely based on hindsight and takes as its starting point the subsequent failure of the company and its failure to borrow money with which to proceed with the Paradise Waters development. It is said that it was apparent in December 1966 that unless Landmark obtained substantial finance it would fail and that once U.D.C. declined to lend there was no real prospect of borrowing from other sources.

The appellant's difficulty is that Street, J. rejected the appellant's evidence that in December 1966 he believed that Landmark would fail. This rejection was based partly on his Honour's view that the appellant had persuaded himself that he was coerced into the agreement against his will and partly on the strenuous efforts which the appellant made to obtain other finance and the confident

assurances which he gave to U.D.C. and the Bank of New South Wales in connexion with the company's prospects.

That finding is strongly supported by certain statements made at the end of the negotiations. First, Mr. Solomon, the solicitor for Landmark, said to Mr. Grant on the evening of Friday, 13th January, 1967, that the appellant was concerned that, after the agreement was signed, Mr. Armstrong would not go through with the deal, thereby bringing the default provisions of the deeds into operation. After execution of the deed the appellant said to Mr. Grant, "Now we have got rid of Armstrong nothing will stop us". To Mr. Smith he said, "What I would like to do is congratulate you. I think the deal is a miracle". Making due allowance for what might be described as a spirit of exuberance or exhilaration on the final execution of an agreement which provided for a severance of Mr. Armstrong's interests, I find it impossible to regard these statements as being otherwise than inconsistent with a belief on the part of the appellant that Landmark was then worthless.

No doubt the appellant recognised that the company's prospects of success rested on its ability to obtain further finance by way of loan and that there was no certainty that loan moneys would be forthcoming. Street, J. found that on 13th December, 1966, when he had a conversation with Mr. Bovill concerning future prospects of obtaining

Reasons for Judgment
of his Honour Mr.
Justice Mason, J.A.

finance, the appellant was despondent about the future of the company, but his Honour went on to say that this attitude was transient and not as enduring as the appellant suggested in evidence. The evidence to which I have earlier referred indicates that the appellant was generally hopeful that finance would be obtained, although in the middle of December he had misgivings about the future and expressed them to Mr. Bovill.

Mr. Bovill who was conversant with Landmark's position in December and January expressed confidence in the company's ability to secure further finance. Moreover, he entered into a contract to purchase shares in Landmark from Finlayside. This in itself indicates that the financial position of Landmark was not then considered to be as bleak as the appellant would now have it.

I am of opinion that his Honour's finding was correct.

(2) <u>That the evidence did not establish that Mr. Armstrong was responsible for the watching and following of the appellant which occurred in November and December, 1966</u>.

The appellant submits that the learned Judge, having found that the watching and following took place as the appellant asserted, should have inferred that it took place at Mr. Armstrong's instigation, despite his denial of knowledge and complicity, because no reliance was placed upon that denial, there being no reliable evidence to

Reasons for Judgment
of his Honour Mr.
Justice Mason, J.A.

corroborate the denial. The argument is supported by the finding that at the material time Mr. Armstrong was threatening the appellant, in particular by means of telephone calls, and the absence of any alternative hypothesis which would serve to account for the watching. In addition, there is the evidence of the appellant that he recognised Hume watching his house on one occasion and his office on another occasion. Hume, it will be recalled, was a private inquiry agent who had a close social and business relationship with Mr. Armstrong. Although Hume denied that he played any part in these activities, his evidence was not accepted.

The circumstances are such that, with great respect to the view of the learned Judge, I am satisfied that the inference should be drawn that Mr. Armstrong was responsible for these activities.

(3) <u>That Mr. Armstrong did not threaten the appellant with physical violence on 7th December after a Board meeting of Paradise Waters (Sales).</u>

The learned Judge rejected the appellant's evidence as to this incident as it was not supported by corroborative evidence from one or more of the persons present at the meeting. Mr. Bovill was present at the meeting and was called as a witness, but he gave no evidence of a threat on the part of Mr. Armstrong on this occasion.

The appellant makes the point that Mr. Grant was also present at the meeting, was called as a witness but did not deny the making of the threat.

In my opinion this circumstance is of insufficient weight to displace the conclusion of the learned Judge on this issue.

(4) That Mr. Armstrong did not threaten the appellant on 14th December, 1966, in a conversation outside a Board meeting of one of the Paradise Waters companies that unless he agreed to purchase Mr. Armstrong's shares in Landmark and the Paradise Waters companies and to pay off the moneys owing to the Armstrong companies he would be "fixed".

The learned Judge said that he was not satisfied that Mr. Armstrong had threatened the appellant in the terms deposed to by the appellant, although he conceded that Mr. Armstrong may have threatened the appellant on this occasion. His Honour said that, although the appellant claimed to have told his co-directors and his solicitor of the threat, his evidence in this respect was not corroborated by any of these gentlemen and there was nothing to support the claim that a threat, if it was made, was related to a requirement that the appellant should enter into an agreement with Mr. Armstrong.

The appellant attacks this finding on the ground that evidence from co-directors and the solicitor would have been inadmissible as self-serving statements. Having regard to the way in which the appellant's case was presented and to the reception of evidence in the form of statements by and actions of the appellant, as bearing upon his state of mind, I am of opinion that this criticism is not well founded.

The learned Judge expressed the view that the evidence did not satisfy him that a threat was made and that, if made, it was in the terms deposed to. The absence of corroboration from the co-directors and the solicitor is the more significant in relation to the existence of a threat in the terms deposed to for there was a compelling reason for the appellant to acquaint his co-directors and the solicitor with the making of a threat in those terms.

I am not persuaded that his Honour's finding was incorrect.

(5) <u>That the learned Judge was not satisfied that Mr. Armstrong initiated or was implicated in a plot, involving Hume, Novak and Vojinovic, to have the appellant killed or injured</u>.

In my opinion the appellant has failed to show any sufficient ground for disturbing this finding. There is every reason for agreeing with the learned Judge's conclusion that the evidence of Vojinovic and Hume was unreliable. In addition, when weight is given to the serious nature of the charge made against Mr. Armstrong, I consider that his Honour was correct in concluding that the appellant did not discharge the burden of proof on this issue.

The case that there was a plot to murder or injure the appellant and that Mr. Armstrong was a party to it rests on the evidence of Vojinovic with supplementary evidence of a circumstantial kind

showing an association firstly between Novak and Hume, and then between Hume and Mr. Armstrong. The existence of a plot to murder or injure the appellant was denied by Hume and Mr. Armstrong. Having regard to their established lack of veracity, their denial does not count for much, but nor does the assertion of Vojinovic. The case against Mr. Armstrong on this issue is one of surmise and suspicion and it fails because the evidence is not sufficiently cogent to justify the finding that there was a plot to murder or injure and that Mr. Armstrong was party to it.

I should add that in arriving at this conclusion I have considered the criticism offered in relation to the learned Judge's finding that Hume was at the Hawkesbury River on the night of Saturday, 7th January, 1967, with the consequence that he did not telephone Vojinovic at or about 5.30 p.m. that evening. I can see no ground for disturbing that conclusion of fact, arrived at after a consideration of the oral testimony of a number of witnesses directed to establishing that conclusion. Moreover, even if the finding were to be displaced, its disturbance would not warrant a finding that Mr. Armstrong was party to a conspiracy to murder or injure the appellant.

Likewise, I have considered the challenge made to the learned Judge's refusal to find that a written record of interview with Hume was in existence in January 1967, that it was shown to

the appellant and that it was subsequently destroyed by the police. The learned Judge dealt at length with the conflicting evidence given on this point and, after making some observations critical of the conduct of Detective Sergeant Wild and Detective Constable Follington which in my opinion were well merited, found that he could not accept the appellant's account of the incident. An important reason for rejecting the appellant's account of the incident was the failure of the appellant to call his son who was present on the occasion when it was alleged that Constable Follington had handed to the appellant Hume's written record of interview. No explanation was offered for the absence of corroboration on the part of the appellant's son on an allegation which was strenuously denied by the police officers concerned.

In my opinion there is no justification for disturbing his Honour's conclusion on this aspect of the case.

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

(7) That the appellant did not in a conversation with Mr. Bovill on Friday, 13th January, 1967, say

Reasons for Judgment
of his Honour Mr.
Justice Mason, J.A.

to Mr. Bovill, "It is a bad business. It is risky. We should not execute these agreements ... I don't believe the finance will necessarily be forthcoming."

I have already dealt with the challenge to the finding that the appellant did not believe after 10th December, 1966, that Landmark was worthless. The two findings set forth above are related to that finding. The appellant's difficulty is that his Honour rejected the appellant's evidence as to both conversations, at least in relation to the date assigned to the conversation with Mr. Bovill.

The appellant submits that there is some support for his case in the evidence in cross-examination of Mr. Smith where, it is said, that Mr. Smith should be understood as saying that the conversation referred to in (6) took place on Wednesday, 11th January. Mr. Smith said that on the Wednesday he informed the appellant that Mr. Armstrong's instructions were that the contract had to be exchanged on the Friday, but that requirement could not be fulfilled. The following question and answer appear in the transcript:-

> Q. Did Mr. Barton say to you "I am not prepared to sign or exchange the document on behalf of myself and also I am not prepared to advise my co-directors on behalf of Landmark Corporation to do so. Was that on 13th January? A. This is where my recollection differs from Mr. Barton. My recollection is that this conversation was on the Wednesday. I recall him saying that the document had to be studied by the solicitors. He had two sets of solicitors acting for him; one personally and one for the company. It had to be looked at by the

directors. In principle it was OK but the contracts were very complicated.

It is evident, I think, that his Honour regarded this answer as asserting, not that the appellant was refusing to go on with the contract at all, but that in principle he approved of the agreement and that the form of the agreement required examination by the solicitors. I am of opinion that this interpretation of the evidence is correct and that Mr. Smith's evidence, which his Honour accepted, refutes, and does not support, the appellant's case on this issue.

As to the conversation dealt with in finding (7), the appellant submits that the learned Judge gave too much weight to the fact that the date was suggested to Mr. Bovill by examining counsel and that, in ascribing the conversation to a date before Christmas 1966, his Honour failed to take account of the fact that Mr. Bovill in his evidence had spoken of the execution of the agreements, the uncontradicted evidence being that no written document in draft form came into existence before 6th January, 1967.

This issue is by no means easy to resolve and the arguments put on behalf of the appellant are not without strength. The reference to the execution of "these agreements" seems to indicate that the conversation between the appellant and Mr. Bovill took place on or after 6th January, rather than before 4th January as his Honour thought.

Moreover, the internal difficulties of Landmark and the unwillingness of U.D.C. to continue to finance the Paradise Waters development should have alerted the appellant to the possibility that Landmark might not be able to borrow sufficient finance to enable it to carry on its activities as planned. Notwithstanding these considerations, his Honour thought that the appellant was optimistic concerning finance in the first half of January and that the conversation expressing doubts as to the future of Landmark took place earlier.

I am not persuaded that this conclusion is incorrect. The appellant's case on this issue rests on his own evidence, upon which his Honour was not prepared to place much reliance, and on the evidence of Mr. Bovill which was found to be unreliable as to dates and times. The point is made with considerable force in the judgment that on the very occasions when it would be expected that the appellant would call a halt to the negotiations, had he changed his mind as he now alleges, he in fact participated in continuing them. Thus, he took no step to cancel the meeting with Mr. Smith on 13th January; he attended that meeting and entered into a discussion concerning points which were still outstanding, expressing optimism concerning the resale price of the allotments in the Paradise Waters subdivision. He did not instruct his solicitor or the solicitor for the company to suspend the negotiations because Mr. Grant gave evidence of a

Reasons for Judgment
of his Honour Mr.
Justice Mason, J.A.

conversation with the solicitor for Landmark on the evening of 13th January when the latter stated that the appellant was concerned that at the last minute Mr. Armstrong would cause a delay in the completion of the agreement after it had been executed. No evidence was called from the solicitors Mr. Solomon and Mr. Bowen to suggest that the appellant had given instructions to them consequent upon a change of mind with respect to the execution of the agreement.

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

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

(10) Mr. Armstrong was a reluctant vendor whom the appellant had to buy out if Landmark was to be saved.

(11) The dominant theme of the telephone conversation between the appellant and Mr. Bovill on 16th January was the commercial necessity of getting Mr. Armstrong out of the company.

(12) I am not satisfied that Mr. Armstrong threatened the appellant in a telephone call on the morning of 16th January.

Findings (8) and (9) are attacked because it is said that on Friday, 13th January Mr. Smith had informed Mr. Armstrong that neither he Mr. Smith, nor Mr. Hawley, were willing to accept appointment as directors of Landmark on completion of the

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

It should not be thought that his Honour overlooked these circumstances. In my opinion his Honour's language should be understood as indicating that he did not regard the circumstances as throwing significant light on the question whether a threat in the terms alleged was made by Mr. Armstrong on 16th January. I am of the same opinion for the circumstances do not provide a sufficiently firm foundation for estimating the probabilities.

Finding (10) is a more troublesome matter. Mr. Armstrong would have preferred to have remained a substantial shareholder in Landmark in circumstances in which he retained control of that company and of the Paradise Waters development; indeed, he would have preferred to have bought the appellant's interests in the company on terms which he regarded as satisfactory. But by 13th December when he gave instructions to Mr. Smith he had come to recognise reluctantly that the appellant had won control of Landmark from him, that the appellant wished to continue to exercise that control and,

being unwilling to tolerate a continuation of that situation, Mr. Armstrong decided that it was to his advantage that the appellant and Landmark should acquire his interests on suitable terms and that the debts owing to his companies should be repaid. Thenceforth he was not merely willing, but, I should have thought, anxious to sell on the terms which he indicated to Mr. Smith or on terms similar thereto. The learned trial Judge found that on 12th January Mr. Armstrong threatened the appellant and said to him, "You had better sign this agreement or else". The making of this threat and the subsequent emphasis given by Mr. Armstrong and those who represented him to the necessity of having the documents prepared and executed with the utmost despatch are quite inconsistent with the notion that Mr. Armstrong was a reluctant vendor, if that expression be understood as signifying that he was diffident or hesitant about entering into the deed of 16th January, 1967.

This conclusion does not, however, greatly assist the appellant's case. The real point is that, although Mr. Armstrong was not a reluctant vendor, he presented the appearance of a tough and intransigent negotiator and, what is of more importance, the tide of events was running very much his way. The appellant wanted to continue in control of Landmark and to make actual the potential profit in Paradise Waters, a profit which he believed to be extremely large. To achieve this object it

was necessary to secure a large amount of borrowed finance and an essential condition of securing finance was the termination of the dispute with Mr. Armstrong. To remain in control and to terminate that dispute quickly, because U.D.C. was threatening to appoint a receiver which would have spelled disaster, meant that the debt to the Armstrong companies had to be repaid and the Armstrong interests acquired. In such a situation Mr. Armstrong had a position of great negotiating strength; he was virtually able to dictate his terms to the appellant and the appellant, so long as he held to his objective, was forced to accept them. This in one sense, although not so expressed, was the point of his Honour's finding.

There is in my opinion no sufficient ground for disturbing finding (11). As the learned trial Judge has pointed out, the two accounts given by Mr. Bovill of his conversation with the appellant on 16th January emphasised the appellant's desire to sever the company's connexion with Mr. Armstrong as soon as possible, before the latter changed his mind. In Mr. Bovill's accounts of the conversation, no reference was made to the appellant having claimed that he had been threatened by Mr. Armstrong that very morning. Nor in these accounts was there any reference to statements by the appellant that it was not his duty as a director to resist Mr. Armstrong and get killed and that he was no longer prepared to refuse the demands of Mr. Armstrong,

these statements being the principal feature of the appellant's version of his conversation with Mr. Bovill.

In my opinion the learned Judge was amply justified in giving greater weight to Mr. Bovill's evidence on this issue and placing upon the occurrence the interpretation which he did, namely that it revealed that the appellant was anxious to conclude the agreement, not because he had been coerced by Mr. Armstrong and was in fear of him, but because he wished to put an end to Mr. Armstrong's association with the company, an association which he regarded as disastrous to its future success.

It follows that his Honour's refusal to find that Mr. Armstrong threatened the appellant on 16th January cannot be successfully attacked for it rests on the appellant's evidence alone. It receives no confirmation from Mr. Bovill's accounts of his conversation with the appellant. This is significant, for the appellant had to some extent confided in Mr. Bovill and it would be natural that he should inform Mr. Bovill of the most recent and immediate threat which he had received, had such a threat been made. There would, of course, have been stronger reason for accepting the appellant's evidence as to the making of this threat, had the appellant been able to establish that he had decided not to proceed with the agreement in the preceding week.

(13) <u>That Mr. Armstrong's threats and intimidation</u>

were not intended to coerce the appellant into the making of the agreement.

I am unable to agree with his Honour's finding on this issue. There is, I think, no doubt that the threats and intimidation to which Mr. Armstrong resorted up to the annual general meeting on 2nd December, were designed in part at least to influence and coerce the appellant into an acceptance of a situation in which Mr. Armstrong was left in control of Landmark and its affairs, to the extent to which he had exercised control of that company and availed himself of its facilities in the first half of 1966. Indeed, it is clear that the threats and intimidation had their genesis in the struggle for control of Landmark, so that their purpose must be related to that struggle.

But intimidation continued after 2nd December, 1966. The appellant continued to be watched and followed and the learned Judge found that Mr. Armstrong threatened the appellant on 12th January when he said, "You had better sign this agreement or else". In these circumstances I am of opinion that it should be inferred that Mr. Armstrong intended by his threat and by the intimidation which took place after 2nd December to influence and coerce the appellant into entering into the agreement which was proposed by Mr. Smith on 13th December. By his conversation with Mr. Bovill in November, 1966 and by the threats and intimidation to which he resorted before 2nd December Mr. Armstrong had revealed

himself as a man who would employ these means to achieve his objectives. There is every reason for thinking that, when he employed this means subsequently, he did so, not only in a spirit of idle malevolence, but also to assist in the prompt execution of an agreement of the kind contemplated. It was a natural step to carry intimidation from the field of the struggle for control of the company to the negotiations for an agreement on advantageous terms which would salvage Mr. Armstrong's financial interests. And it is of significance that the threat which his Honour found to have been made on 12th January was expressly related to the signing of the agreement.

(14) <u>The appellant did not in his own mind relate Mr. Armstrong's threats to a desire by Mr. Armstrong to force through the agreement</u>.

Having concluded that Mr. Armstrong threatened and intimidated the appellant with a view to influencing him to enter into an agreement of the kind contemplated, I am unable to accept that the appellant did not relate those actions to the agreement. It is not readily to be supposed that the appellant thought that they were entirely dissociated from the negotiations, for no other explanation for them, except sheer malevolence, is offered. Moreover, as I have said, the threat of 12th January was expressly directed to the signing of the agreement. That threat and the insistence by Mr. Armstrong's representatives that the agreement should

be signed with despatch produced in the appellant's mind some association between the threats and the prompt signing of the agreement.

There is no opposition in the intimidation having its origin in the struggle for control of the company and in its subsequently having an association with the making of the agreement. Indeed, it was a natural progression or development involving the application by Mr. Armstrong of the same technique to successive objects.

(15) The appellant's course of conduct both in what he said and what he did, between December 1966 and the time shortly prior to the commencement of the suit is inconsistent with his having been coerced into the making of the agreement.

This finding was attacked on the ground that it ignores such acts on the part of the appellant as the hiring of bodyguards, his removal and that of his family from his home, his secret sojourn at the Qantas Wentworth and his purchase of a rifle. The argument misapprehends the finding. The finding accepts that the appellant was fearful of Mr. Armstrong's willingness and capacity to execute his threats. It is directed to the issue of inducement and makes the powerful point that in the period mentioned the appellant did not conduct himself in the manner expected of a man who had been improperly coerced into making a disadvantageous agreement.

In my view the finding is demonstrably correct. Reference has already been made to the

Reasons for Judgment
of his Honour Mr.
Justice Mason, J.A.

absence of evidence from the solicitors who acted for the appellant and Landmark and who, it might be anticipated, could give evidence of any complaint made to them of coercion. Again, the evidence of the complaint made to the police on 7th January, to which I shall later refer at greater length, does not indicate that the complaint was that the appellant was being coerced into the proposed agreement.

Following the settlement of the agreement several events occurred which are ex facie inconsistent with coercion having taken place. In conversation with Mr. Grant on 18th January and with Mr. Smith on 19th January, following the settlement, to which I have already referred, the appellant made remarks indicating a sense of elation that the agreement was concluded, which were inconsistent with the notion that he had been coerced into acceptance of the agreement.

The next matter is that Landmark made default in respect of the instalment of interest due to Southern Tablelands under the contract of loan dated 18th January, 1967. On the lender threatening to exercise its rights proceedings were commenced for an injunction to restrain Southern Tablelands from exercising its rights and an application was made by Landmark and its relevant subsidiaries under s. 30 of the Money-Lenders and Infants Loans Act, 1941, as amended. In the proceedings two affidavits were sworn by the appellant in which he claimed that in the negotiations with Mr. Smith it had been agreed

Reasons for Judgment
of his Honour Mr.
Justice Mason, J.A.

that a clause would be inserted in the contract of loan that any default by the appellant or by a company in the Landmark group could be remedied in seven or fourteen days, yet no such clause had been included in the contract of loan. The proceedings were settled on terms whereby Southern Tablelands undertook not to enforce its rights to enforce payment of the principal sum until after 30th June, 1967, so long as the plaintiffs paid promptly all instalments of interest then due and thereafter to become due and paid the principal sum on or before 30th June, 1967, (seven months in advance of the date for repayment stipulated in the contract of loan) and the plaintiffs undertook to abandon their claims to have the transactions reopened and their claim that the principal sum was not then due and payable. On these undertakings the proceedings were dismissed.

The importance of this matter is this, anxious as the appellant was to avoid the consequence of default under the agreement, he at no stage alleged that the contract of loan had been procured by coercion, as he now alleges, yet he did put forward a ground for relief which can only be described as spurious in the light of the terms of settlement which were distinctly advantageous to Mr. Armstrong. It can hardly be suggested with conviction that fear of Mr. Armstrong induced him not to raise the matter because it did not dissuade him from causing the proceedings to be instituted on what seems to

have been a spurious ground; nor had that fear dissuaded him from bringing to the notice of the police his allegations concerning Vojinovic, Hume, Novak and Mr. Armstrong in January.

Subsequently, in June 1967 the appellant swore an affidavit in proceedings by Landmark for an injunction to restrain Southern Tablelands from presenting a winding up petition in respect of an amount said to be owing to that company which had by assignment from A.E. Armstrong taken the benefit of a dividend declared but not paid. In the affidavit the appellant swore that Mr. Armstrong had, on behalf of A.E. Armstrong, waived payment of the dividend. Again no suggestion was made of the claim now made, although in the proceedings the appellant was once again asserting that the documents did not record comprehensively the agreement which the parties had made.

Meantime, on a number of occasions which are set out in detail in the judgment of Street, J. the appellant had acted in such a way as to indicate that he was optimistic concerning the future of Landmark. In his endeavours to obtain further finance he painted a rosy picture of Landmark's position and prospects, he assured the Stock Exchange that the dividend declared in 1966 would be paid to shareholders, his family company lent $4,000, $30,000 and $ 2,400 to Landmark on 24th January, 30th January and 3rd April, 1967, respectively. In April, 1967 his family company bought 8,800 shares in Landmark at a price of 28 cents per share.

Indeed, his actions were all consistent with an affirmation of the agreement until such time as it appeared that Landmark was in inextricable financial difficulties. Then, without the sending of a preliminary letter of demand, the suit was commenced immediately before the due date for repayment of principal and interest under the contract of loan.

(16) That the appellant did not establish that he was coerced into signing the documents of 17th and 18th January.

Street, J. found that the appellant was in genuine fear of Mr. Armstrong, a fear that related to his own safety and that of his family, a fear that was the product, not only of the intimidation for which Mr. Armstrong was responsible, but also of other activities, in particular the Vojinovic affair which the appellant was unable to sheet home to Mr. Armstrong. Indeed, the Vojinovic incident involving, as it did, an apparent plot to murder the appellant, was without any doubt the principal cause of his apprehension that Mr. Armstrong might cause him or his family physical harm. It was this incident that induced the appellant to hire a bodyguard in January, seek the assistance of the police, to purchase a gun, to move to the Qantas Wentworth and to send his relatives away from Sydney. In these circumstances it is not to be doubted, as his Honour found, that he was in fear of Mr. Armstrong. It is the existence of this finding, favourable to the appellant's case, that the appellant

relies upon as the principal ground for the conclusion that the appellant was coerced into entering into the agreements. The strength of this challenge is considerable for it goes without saying that a man who is in fear of another is prone to comply with the demands of that other, without bringing a free and independent mind to the matter in hand. The outcome of the issue therefore depends in part on the degree of the apprehension which affected the appellant's mind and his capacity, despite that apprehension, to bring a free mind to bear on the question whether he should assent to the proposed agreement.

If any characteristic of the appellant emerges with clarity from the evidence and from his Honour's judgment it is that he is a man of considerable self-possession and courage. His own evidence reveals that as early as May 1966 he was aware that Mr. Armstrong was a "vicious and ruthless man" and that he would "go far as death" to achieve his ends. At that time in an argument with Mr. Armstrong he revealed that he had some knowledge that Mr. Armstrong had contemplated bribing a judge and had instructed persons to spy on him. Notwithstanding this knowledge, he decided to put an end to certain privileges that Mr. Armstrong had enjoyed in Landmark and to remove him from his position as chairman of directors. Nor was he deflected from this course by Mr. Armstrong's subsequent threats and intimidation. Although believing the latter's willingness and

capacity to carry out his threats, the appellant up to 2nd December, 1966, demonstrated his own capacity to withstand coercion of that kind.

After that date it is the Vojinovic incident which in the main produced a keener degree of apprehension in the appellant. Certainly that incident made the risk appear to be more acute and induced the appellant to take greater precautions, but, and this is the important factor, the appellant was not overwhelmed by this incident. His immediate reaction was not that of submission, but of resistance. He at once took steps with the assistance of Mr. Miller, the company's solicitor, to lodge a complaint with the police with respect to the Vojinovic incident, making it quite clear that he regarded Mr. Armstrong as the guiding hand in a plot to murder him. He hoped that this would lead to an investigation of the affair which might result in the arrest and prosecution of Mr. Armstrong, but likewise he would have realised that by his action he was exposing himself to retaliation by Mr. Armstrong.

It is of great significance that, according to the notes taken by Inspector Lendrum, whose evidence the learned Judge accepted, Mr. Miller stated that on Wednesday, 4th January, 1967, Mr. Armstrong and the appellant "personally reached what appeared to be an agreement subject to documentation". This statement, to which the appellant offered no contradiction or variation, indicates that no complaint was made that the agreement was reached

against the appellant's better judgment or because he had been coerced into it. I entirely agree with his Honour's observations that this incident is inconsistent with the appellant having been coerced into the agreement.

The threat of 12th January, 1967, does not alter this picture for the appellant responded to the threat by saying that he would not be blackmailed into any agreement. Thereafter there was no change of heart on the part of the appellant.

Critical to the appellant's case was the suggestion that he changed his mind on Friday, 13th January and decided that he would not enter the agreement, an attitude of mind said to have been displaced by a further threat made by Mr. Armstrong in a telephone conversation on the morning of 16th January. Adverse findings in relation to these two incidents dispose of the primary case presented by the appellant before Street, J. As I have already indicated, the earlier history of events does not show that the appellant had succumbed to intimidation, even including the Vojinovic incident for which Mr. Armstrong cannot be held responsible. This is confirmed by the subsequent conduct of the appellant prior to the institution of the suit.

I agree with the learned Judge in thinking that at all relevant times the appellant, although apprehensive as to the safety of himself and his family in the light of threats and intimidation to which he had been subjected, nevertheless viewed

and considered the proposed agreement dispassionately with a free and independent mind. He entered into the agreement and committed Landmark to it, not because he was overborne by Mr. Armstrong, but because in the exercise of his free and independent judgment he considered the agreement to be advantageous. First, he thought that Paradise Waters held the promise of very considerable profits. Secondly, he appreciated that to enable completion to take place it was essential to secure finance which could be obtained only in the event that the controversy within the company was brought to an end by a settlement which terminated the Armstrong interest in the company. Thirdly, for the well-being of the company he thought it essential to sever the connexion with Mr. Armstrong and eliminate his capacity to create trouble. For these reasons, which his Honour shortly described as commercial necessity, he decided to enter into the agreement and commit Landmark to it.

The strong point in the appellant's case is the finding that the appellant was fearful for his own safety and that of his family. In general the existence of a condition of fear associated with a particular event is incompatible with the possession of a free and dispassionate mind with reference to a course of action which involves as a possibility the occurrence of that event. But it is not universally so for, as I have said, much depends on the degree of apprehension and the capacity of the mind to act independently of the apprehension.

In this case the appellant's degree of fear and apprehension was not such as to cow him into abject submission or to deprive him of his power to respond rationally. Throughout the period in which he was threatened he resisted the threat and acted with self-possession; on his own account, when the final threat was made on 12th January shortly after the Vojinovic incident, far from giving any indication that he might yield, he stated firmly that he would not be blackmailed into an agreement. At the same time he did not assert that he was unwilling to enter into the agreement; his attitude seems to have been one of acceptance in principle of the agreement accompanied by a refusal to be bullied by threats into a hurried execution of it. This was not the reaction of a man whose mind was overborne by fear or who had been deprived of his independent judgment. Yet nothing subsequently occurred to instil in him a compelling degree of terror.

The problem is complicated by the circumstance that an element in the reasoning which led the appellant to assent to the agreement was his realisation that the company should sever its connexion with a man who caused trouble within the company and who resorted to intimidation and instilled fear in those who opposed him. In this way, it may be said, intimidation and the fear which it caused played a part in producing the appellant's assent to the agreement.

But this element, I think, adds nothing to the appellant's case; if anything, it subtracts from it. For, if it be accepted, as I think it should be accepted, that the appellant entered into the agreement for the reasons already stated, the existence of that process of reasoning exhibited a mind capable of appraising dispassionately the merits of the transaction, not a mind which was overborne or coerced by fear.

It is implicit in what I have said that the variations which I am disposed to make in the findings made by Street, J. do not cause me to differ from the ultimate finding of fact which his Honour made. These variations are of minor significance when compared with the other objective evidence throwing light on the appellant's attitude of mind.

An additional complication is the circumstance that the degree of apprehension to which the appellant was subject after 7th January, 1967, was largely the product of the Vojinovic incident; yet that was not the handiwork of Mr. Armstrong; nor was it the outcome of a threat of murder if the appellant failed to assent to the agreement. It was the appellant's reaction to his discovery of what he believed was a conspiracy to murder him. That this was the major source of the appellant's apprehensions may be no obstacle to the appellant's case for the incident did no more than give to Mr. Armstrong's intimidation an impact in the appellant's mind which the intimidation was intended to have. I do

not find it necessary to explore this question; it is enough for me to say that I do not rely on the circumstance for the conclusion which I have reached.

The appellant submitted that his Honour applied an incorrect standard in deciding whether the appellant was coerced into signing the agreement. It was argued that the "predominant cause" standard was applied. Although there are passages in the judgment which, taken in isolation, lend some colour to that argument, I consider that when read in its entirety the judgment shows that his Honour found either that the appellant had not shown that his assent to the agreement was given otherwise than with a free and voluntary mind or that he would not have entered into the agreement but for the intimidation. His Honour said that he was not satisfied on the evidence "that he (the appellant) was in truth coerced", that he found as a fact that:

> "Mr. Barton was not coerced by fear for his personal safety into the making of the agreement - it was commercial exigency and not personal fear that led him to make it."

His Honour also said:

> "I am not satisfied that Mr. Barton's personal fears for his own safety played any significant part in his entering into the agreement with Mr. Armstrong. The course of the negotiations between the parties and the whole of the evidence leaves me with the distinct impression that neither the fact that Mr. Barton entered into this agreement with Mr. Armstrong, nor any of the terms of that agreement, would have been in any way changed if there were a complete absence of any threats or intimidation on Mr. Armstrong's part."

and

> "But Mr. Barton, although he took steps to preserve his personal safety so far as he was able, has not satisfied me that he yielded his independent business judgment by reason of his fear of Mr. Armstrong."

It was also argued that once it was found that the appellant was in fear for his safety and that of his family in consequence of threats of a kind that would put an ordinary man in such a state of fear, his Honour should have held as a matter of law that the appellant executed the agreement under duress. It follows from what I have already said that I do not consider this submission to be well founded or to be established by the authorities. In my opinion in duress, as well as undue influence, the court is concerned to ascertain whether entry into the transaction was free and voluntary; the area of that inquiry is not circumscribed by a rigid proposition of law that a condition of fear or apprehension is absolutely and in all circumstances incompatible with the possession of a free and voluntary mind.

In conclusion it is necessary to deal with the appellant's application to further amend his statement of claim and notice of appeal so as to raise grounds for relief which were neither pleaded nor argued at the hearing. The amendments are extensive and are designed to plead:

(a) that the appellant's assent to the deeds was procured by the exercise by Mr. Armstrong of undue influence over the appellant;

(b) That the appellant entered into the deeds as a result of equitable fraud on the part of Mr. Armstrong in that the latter had taken advantage of the appellant when he was in a situation of weakness and thereby induced him to execute the deeds; and

(c) that the deeds were contrary to public policy and illegal, in that their execution was procured by the exercise of undue pressure and the real consideration for their execution was that Mr. Armstrong would not carry his threat to murder the appellant.

The Equity Court may under Equity Rule 172 allow all amendments as may be necessary for the purpose of determining the real questions in controversy between the parties, provided that the making of the amendments will not cause injustice. Apart from amendments to the statement of claim there is the question whether this Court should allow the appellant to agitate these matters which were not raised in the court below. In my opinion it should not.

It seems to me that the amendments raise issues of fact which were not fully explored before Street, J. There was no issue before his Honour of undue influence or of unconscionable dealing with a person in a situation of disadvantage. Moreover, it is likely that the defendants would wish to plead laches, acquiescence and delay to the amended grounds of relief. Accordingly, it is not a case

Reasons for Judgment
of his Honour Mr.
Justice Mason, J.A.

in which we can say that we have all the facts as fully before us as would have been the case had these matters been raised at the proper time in the court below. See Connecticut Fire Insurance Co. v. Kavanagh (1892) A.C. 473 at 480: Suttor v. Gundowda Pty. Ltd., 81 C.L.R. 418 at 438. For this reason I would refuse the application for leave to amend the notice of appeal and the application for leave to amend the statement of claim.

For my part I should also say that I have some difficulty in seeing how the appellant could succeed on the new grounds sought to be argued in the light of the evidence and the findings on that evidence. I have already pointed out in connexion with the appellant's argument on the onus of proof that this was not a case in which Mr. Armstrong occupied a position of domination, ascendancy or trust vis-a-vis the appellant giving rise to a legal presumption that any benefit which he gained was as a result of the exercise of undue influence. So the finding that the appellant entered the agreement not through fear, but for commercial reasons, would be as fatal to a case of undue influence as it is the case of duress.

Again, having regard to the findings made, it is difficult to conclude that the appellant was in a position of disadvantage or weakness of which Mr. Armstrong took an unconscionable advantage so as to bring the case within the principle of the Earl of Chesterfield v. Janssen (1751) 2 Ves. Sen. 125.

The same comment may be made of the third way in which the amendments seek to put the appellant's case, unless the case to be presented under the amendment is to be understood as asserting that any agreement made following a threat by one party to murder or injure the other in the event that he refuses to agree is invalid, irrespective of that other's state of mind, in which event there seems to be little to support the proposition. In Mutual Finance Ltd. v. John Wetton & Sons Ltd. (supra) at 395-396 where Porter, J. suggested that any contract procured by the doing or threatening of a wilfully illegal act of any description would in general be held invalid, his Lordship was postulating that the threats or the acts coerce or influence the innocent party into making the contract. This is made apparent by the following passages from the judgment:

> "Not only is no direct threat necessary, but no promise need be given to abstain from a prosecution. It is enough if the undertaking were given owing to a desire to prevent a prosecution and that desire were known to those to whom the undertaking was given. In such a case one may imply (as I do here) a term in the contract that no prosecution should take place."

and

> "It is not necessary to determine the exact bounds beyond which the doctrine would not be applied, but I should myself be inclined to say that it extended to any case where the persons entering into the undertaking were in substance influenced by the desire to prevent the prosecution or possibility of prosecution of the person implicated, and were known and intended to have been so influenced by the person in whose favour the undertaking was given."

In the result I am of opinion that the appeal should be dismissed with costs.

I certify that this and the seventy-seven preceding pages are a true copy of the Reasons for Judgment herein of the Honourable Mr. Justice Mason.

30th June, 1971.
Date

H. Casey
Associate

10

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

No. 22 of 1969

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

30th June, 1971.

BARTON v. ARMSTRONG

JUDGMENT

TAYLOR, A-J.A.: This is an appeal from an order of Street, J. dismissing a suit in equity wherein the present appellant plaintiff sought to have set aside and declared void a deed of 17th January, 1967. The plaintiff, the defendant Armstrong and a number of companies, were parties to this deed.

The appellant claimed that he had entered into this deed as a result of duress imposed upon him by the respondent Armstrong; that he had not entered into it voluntarily but because he was in fear of his life, his safety and that of his family; that the respondent had for the purpose of compelling him to sign the deed, which was against his interest, threatened to have him murdered and had employed criminals to kill or otherwise injure him. The respondent denied all these allegations.

The appellant Barton was the Manager and a director of Landmark Corporation Limited, a public company. Armstrong was the chairman of that company. He and the appellant had held their respective positions on the Board since 1964. Armstrong and companies controlled by him held some 300,000 shares in the company and were the largest shareholders. Barton, his family and his family companies

held in excess of 200,000 shares and were the second largest shareholders. The principal assets of Landmark in the latter half of 1966 were a mortgage investment business, a city building in Brisbane, and land at Surfers Paradise, in the course of being developed and sold as residential sites. This was a very extensive project, known as Paradise Waters. It involved draining swampland, making canals and building up low-lying land, subdividing and selling.

The Armstrong companies, or one of them, had originally owned the land and sold it to a company in which the Armstrong group held forty per cent. of the shares and Landmark sixty per cent. George Armstrong Limited, one of the group, had a second mortgage of $400,000 secured on the land. A first mortgage was held by United Dominion Corporation who were providing the finance to develop the project. Landmark had from its own funds advanced some $600,000 to $700,000 for the development. For this to continue outside finance had to be obtained.

There is no precise evidence as to how far the development had progressed by the end of 1966. A plan in evidence (Exhibit "H") showed that the total number of blocks for sale on completion was four hundred and thirty and the sale price per block as at September, 1965, had been fixed at figures that ranged from $9,600 to $18,000.

The relationship between Barton and Armstrong was at first friendly. It worsened in the first half of 1966 and by the latter half of that year had

reached a stage of open conflict. Armstrong had other interests besides Landmark and Paradise Waters. He was a Member of the Legislative Council, owned a country property near Goulburn, and owned and controlled a number of finance companies. These activities he carried on from the office of Landmark using the staff and facilities of that company. He had an office adjoining the Board Room. Landmark provided him with a car, as it did the plaintiff.

Barton was abroad from early in May until the end of June. After he returned there was some difficulty with the contractors at Paradise Waters and both he and Armstrong were at Surfers Paradise. It was there that Barton met Hume, a private inquiry agent who had worked for Armstrong. Hume in fact was a friend of Armstrong, he played tennis with him and visited his home. Armstrong went abroad in September and returned about the 15th October.

The other two directors of Landmark were Bovill and Cotter, both of whom, when differences occurred between Armstrong and Barton, supported Barton. At a series of directors' meetings after Armstrong returned Barton succeeded in withdrawing the privileges which Armstrong had afforded himself at the Landmark office. He had it recorded that the managing director only was to give instructions to the staff or make arrangements binding on the company and that information was not to be supplied to individual directors. The Board affirmed its

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

confidence in the managing director and its disapproval of the interference of the Chairman in the affairs of the company. Armstrong was forced to vacate the office he used and was denied access to the company's records. His opposition to the company's annual accounts to be presented to the annual general meeting of shareholders was overruled.

On the 17th November, Armstrong was removed from his position as chairman of the company. One result of this was that the principal sum of $400,000 secured by second mortgage to George Armstrong Limited fell due. The annual general meeting took place on 2nd December, 1966. Prior to it, both Armstrong and Barton had circularised shareholders, seeking proxies. The disputation between the two men was to an extent given a public airing. It did not escape the attention of the financial journalists. Barton prevailed at this meeting. Armstrong's candidates were rejected and the directors were as before.

The battle continued in the board room and in the law courts. After the meeting of the 17th November, Armstrong threatened to have Barton physically harmed, if not killed. Barton commenced to receive anonymous telephone calls at his home in the early hours, in some of these he was threatened: "You will be killed", and in others all he heard was heavy breathing. On one occasion he recognised the voice as that of Armstrong. After the meeting of

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

17th November, Barton discovered that he was being followed, his home was being watched. To ensure his personal safety he engaged a bodyguard. He terminated the bodyguard's services after the annual general meeting.

On the 4th November, Armstrong offered to purchase from one of Barton's companies 170,000 shares in Landmark at seventy cents a share. This offer was refused on the 9th November. It contained a condition that Barton should remain on the Board and support Armstrong; this, Barton's solicitors said, was improper.

On 23rd November U.D.C. had in a letter to Landmark agreed to provide the sum of $450,000 to pay the principal and interest due under the mortgage on the land at Paradise Waters. This letter was quoted by Barton in circulars he sent to shareholders before the annual general meeting and its contents were disclosed to that meeting. On the 10th December Barton was advised by U.D.C. that it did not propose to provide this finance. On the 13th December negotiations commenced between Barton and Armstrong's financial adviser, Mr. Smith, an accountant, with a view to buying from Armstrong 300,000 shares at sixty cents, and Landmark paying off the mortgage of $400,000 owing to George Armstrong, and Landmark buying Armstrong's interest in Paradise Waters (Sales) Limited. Ultimately on the 4th January the three main matters were agreed to. The discharge of the mortgage over Paradise

Waters and the purchase of Armstrong's shares in that project. An advance of $300,000 on second mortgage from Southern Tablelands to Paradise Waters at twelve per cent., Armstrong to have an option to purchase thirty-five blocks of the Paradise Waters Estate at fifty per cent. of the list price. The sale of the shares at sixty cents, payment to be spread over three years and guaranteed by Barton. Armstrong was to receive some $200,000 in cash.

Thereafter, the memorandum setting out these basic terms of the agreement was referred to the solicitors for implementation and on the 17th January the Deed, the subject of this suit, was executed. On the 7th January, there had occurred the Vojinovic incident. A person of that name had met with Barton and told him that he and others had been hired by Hume to kill Barton for which they were to be paid the sum of £2,000 at the same time they were to rob his house and steal jewellery belonging to his wife. Barton, with his legal advisors, went to the police. He left his home and with his immediate family went to live at the Wentworth Hotel.

The deed of 17th January, 1967, provided for the sale by Armstrong and his companies to Barton and seven other persons nominated by Barton of 300,000 shares in Landmark at sixty cents. Payment was to be by three instalments spread over three years. Barton guaranteed performance. The $400,000 loan to George Armstrong was to be repaid

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

and a loan of $300,000 was to be advanced by Southern Tablelands Finance at twelve per cent. on second mortgage. Armstrong's forty per cent. interest in Paradise Waters (Sales) was to be bought by Landmark for $100,000. Armstrong was given an option to purchase thirty-five blocks of the development at fifty per cent. of the list price. Armstrong was to resign from all boards.

This suit was commenced in January, 1968, by which time Landmark had failed and was in liquidation. It did not obtain the finance required from U.D.C. or from any other source. At the hearing, the plaintiff's case was that he was pessimistic about the prospect of Landmark surviving the financial crises that had developed as a result of the dispute between himself and Armstrong. His execution of the deed of the 17th January was not voluntary but against his will because he was in fear of his life and his safety and for the safety of his family. The fear, he alleged, resulted from threats and actions by Armstrong. These threats were continued threats to have him murdered if he did not enter into the agreement, and the bringing of other unlawful pressure upon him. The statement of claim specifically alleged that Armstrong engaged certain criminals to kill or otherwise injure him, Barton.

The defendant's case was a complete denial of these threats and of any coercion of the plaintiff, Barton. The agreement of 17th January, 1967, was entered into as a commercial transaction and

for no other reason. Street, J. stated the relevant principle of law thus:

> "Where any contract ... has been entered into "under the influence" of coercion, duress, menaces or intimidation it may be repudiated and avoided and any money paid or property parted with under it may be recovered, but the contract is voidable only and not void and the right to avoid it may be waived. The duress or intimidation must consist of threats of violence calculated to cause fear of loss of life or of bodily harm or actual violence or unlawful imprisonment or threat thereof to one party or his or her husband or wife or child by the other party to the contract or by someone acting with his knowledge and for his advantage."

He said there were two main questions, first, did Armstrong threaten Barton? And second, was Barton intimidated by Armstrong's threats into signing the deed of the 17th January? Barton asserted that both the questions should be answered in the affirmative, and Armstrong for his part denied them both.

The hearing of the suit was protracted. It occupied in all some fifty six days. Many witnesses were called, and from the nature of the issues the inquiry extended over a wide range. Street, J. made detailed and considered findings as to the credibility of both parties and also as to a number of the witnesses.

His view of Armstrong's credit as a witness was that he had none. Armstrong, he said, would not hesitate on any point of importance if he thought it necessary for his own protection or advantage to give false evidence.

He regarded Barton's credit as superior to that of Armstrong. He thought Barton believed in

the truth and justice of his case but the belief was self-induced rather than based on fact. His evidence was to be regarded as suspect.

Street, J. regarded the credit of the parties as of primary importance. The second issue in the case, was Barton intimidated into signing the agreement, depended upon the significance and weight to be given to Barton's evidence in the light of his credibility and the contemporaneous circumstances. Bovill, he thought, was honest and truthful. His recollection, in some respects, particularly as to dates, was unreliable. Grant, Armstrong's solicitor, he accepted as an honest witness. B.H. Smith he accepted without qualification. He was careful and precise and was able, in aid of his recollection, to rely on notes made contemporaneously.

Inspector Lendrum he regarded as completely reliable and truthful. He was critical of Sergeant Wild and Constable Follington but he regarded their evidence as sufficiently reliable to prevent him finding that the record of interview with Hume, which Barton swore he had been shown by Follington, existed. Hume and Vojinovic he thought were not worthy of credit.

Some issues he was able to find in favour of one party or the other. On other issues, however, he was left in the situation where his judgment was that the issue had not been firmly established by the party who carried the onus.

Stated broadly the judgment found that

Barton was subjected to threats and intimidation by Armstrong, that these continued up to the date of signing the agreement and the plaintiff, Barton, was in fear for the safety of himself and his family. These threats and the fears he entertained as a result of the threats were not the cause, nor were they a material factor, in Barton executing the agreement of the 17th January. He did this because he regarded it as a matter of commercial necessity to get Armstrong out of the company. In the result his Honour found that the plaintiff had failed to prove a material part of his case, that is, that he was coerced into signing the deed by the duress of Armstrong, and he dismissed the suit.

The grounds of appeal are in essence:

(1) That on the findings made by his Honour the plaintiff was entitled to succeed.

(2) That on the evidence the plaintiff was entitled to succeed.

(3) That his Honour was in error in failing to find that the plaintiff executed the deed as a result of the defendant's duress, and

(4) That on the way the case was fought, since the Judge found that the plaintiff had made out that he was threatened by Armstrong during the course of negotiations and prior thereto, the Judge should have found a decree in his favour.

Other grounds of appeal were that the Judge failed to make findings that the plaintiff was coerced, and that his Honour should have in fact made specific findings that Armstrong was implicated in a plot to have the plaintiff killed and that a record of interview by a man named Hume did in fact exist and was seen by the plaintiff.

The appeal is by virtue of s. 82 of the Equity Act a re-hearing, but it is not a hearing de novo. The principles upon which a Court of Appeal should act in determining an appeal by way of re-hearing have been the subject of many decisions of final courts of appeal in this country and in England. In Paterson v. Paterson, 89 C.L.R., 212 Dixon, C.J. and Kitto, J. reviewed the authorities dealing with the position of a Court of Appeal in relation to findings of fact by a primary Judge. After examining a large number of authorities Dixon, C.J. and Kitto, J. quoted at page 222 from the speech of Lord Sumner in a case of S.S. Hontestroom v. S.S. Sagaporack, 1927 A.C. 37:

> "Of course there is jurisdiction to re-try the case on the shorthand note. Nonetheless, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial Judge; and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the Judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial Judge's conclusions of fact should, as I understand the decisions, be let alone."

This passage was said by Lord Wright to be the latest and fullest statement of the relevant principles, see Powell v. Streatham Manor Nursing Home, 1935 A.C. 243. Later in his speech Lord Wright said, at page 265:

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

> "Two principles are beyond controversy. First it is clear that in an appeal of this character that is from the decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen the Court of Appeal must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced it is wrong. Secondly, the Court of Appeal has no right to ignore what facts the Judge has found on his impressions of the credibility of the witnesses and proceed to try the case on paper on his own view of the probabilities as if there had been no oral hearing."

The matter has been recently considered in the High Court, see Da Costa v. Cockburn Salvage and Trading Pty. Limited, 44 A.L.J.R. 455; Whitely Muir and Zwanenburg Limited v. Kerr, 39 A.L.J.R. 305. In both these cases the appellant Court was in as good a position to draw inferences from the facts established as the Court of first instance since the conclusion of the trial Judge was not based upon his opinion of the credit of witnesses. These decisions establish that in such a case it is not enough to set aside the Judge's findings that the appellant Court would if trying the matter initially have drawn a different inference, and thus come to a different conclusion. It must be shown that the trial Judge was wrong. If his conclusion was one fairly open to a reasonable mind the trial Judge is not to be over-ruled.

At the conclusion of his argument on the fifteenth day of the hearing of the appeal counsel for the appellant sought to amend the statement of claim and the grounds of appeal. In substance the amendments to the statement of claim allege:

1. That the agreement of 17th January, 1967, was entered into by the plaintiff as the result of undue influence exerted on him by the defendant Armstrong.

2. That the agreement was entered into by the plaintiff when he stood vis-a-vis Armstrong in a position of weakness and that advantage was taken by Armstrong of this situation to procure the agreement. This was said to be a case of equitable fraud.

3. That the plaintiff entered into the agreement because he was in fear and terror as a result of threats by the defendant to his life and to be relieved of the pressure and threats which had induced his fears. Thus it was not a document entered into as a free and voluntary act and it was contrary to public policy and illegal.

No application to amend was made to the trial Judge. The purpose of the amendments it was frankly said was that this Court should try the dispute between the parties on issues and pleadings differing from those in the trial and make findings of fact on matters not raised before the trial Judge. No doubt the reason for the appellant wishing to make a different case on appeal is plain enough. He has a finding that his life was threatened by the defendant, he was in fear for his own life and for the lives of his family when he entered into the agreement of 17th January. He failed to obtain a finding that it was these threats and the fear engendered by them that induced him to enter into the agreement. Indeed, the finding of the trial Judge was to the contrary. The appellant's counsel contended that if he could make out one or other of the new cases sought to be raised by the amendment it would be for the defendant to show that the

plaintiff's state of fear was not a contributing factor to his entering into the agreement.

The amendment to the notice of appeal sought to add fifteen new grounds of appeal. Twelve of them seek findings from this court on matters some of which were not raised at the trial and in respect of all no finding was made by the trial Judge.

"12. That his Honour upon the evidence and upon the findings of fact made by him and the inferences drawn by him should have concluded that the defendant Armstrong

(a) Had antecedently to the execution of the said deeds acquired a dominance and ascendancy over the plaintiff and had acquired an influence over the plaintiff,

(b) alternatively, had deliberately contrived a dominance, ascendancy and influence over the plaintiff and enjoyed the same at the time of the negotiations leading up to the execution of the said deeds and at the time of the execution thereof,

(c) had extorted the plaintiff's agreement by undue pressure.

13. That his Honour should have concluded that part of the consideration for the execution of the said deeds by the plaintiff was the desire of the plaintiff to be relieved from his fear of death and injury instilled in him by the defendant Armstrong and his desire to avoid the risk of death or injury at the hands of the defendant Armstrong and that the said consideration was illegal.

14. That his Honour should have concluded that the threats and menaces conveyed by Vojinovic to the plaintiff constructed unlawful pressure upon the plaintiff and that the said pressure influenced the plaintiff in agreeing to enter into and in entering into the said deeds.

15. That his Honour on the evidence should have concluded that a conspiracy existed between the defendant Armstrong, Hume, Novak and Vojinovic to murder the plaintiff.

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

16. That his Honour should have concluded that a conspiracy existed between the defendant Armstrong, Hume, Novak, and Vojinovic to harm the plaintiff.

17. That his Honour should have concluded alternatively to the matters set forth in the last two preceding paragraphs, that a conspiracy existed between the defendant Armstrong and Hume to use Novak and Vojinovic to put undue pressure upon the plaintiff in relation to the affairs of the Landmark companies and the plaintiff's relationship with the defendant Armstrong and thereby to extort from the plaintiff an advantage in the defendant Armstrong's favour.

18. That his Honour should have concluded that the statements by Vojinovic to the plaintiff made the consent of the plaintiff to the transactions effected by the said deeds defective and that the said deeds were void.

19. That his Honour should have concluded that the threats and menaces made by Armstrong to the plaintiff made the plaintiff's consent to the transactions effected by the said deeds defective and the said deeds void.

20. That his Honour should have held that the onus of establishing the validity of the transactions effected by the said deeds was on the defendants.

21. That his Honour should have concluded that the onus mentioned in the last preceding paragraph had not been discharged.

22. That his Honour should have held that the transactions effected by the said deeds were entered into and procured in such circumstances as to make the transactions contrary to public policy and utility and to the settled rules of law and that the said deeds were illegal and void and of no effect.

23. That his Honour should have concluded that the said deeds were procured in whole or in part, by the fraud and imposition of the defendant Armstrong."

The matter is one for the discretion of the appellant court but it has been decided in many cases that this discretion is to be exercised in accordance with well recognised principles. Where it

is sought to raise in an appellant court a point for the first time, if, had the point been raised in the Court below relevant evidence might have been tendered with respect to the question of fact which must necessarily be decided, the point cannot be taken on appeal, Suttor v. Gundowda Pty. Limited, 81 C.L.R. 418. The Court in that case refused to allow a defence to be raised for the first time on the hearing of the appeal. If the defence had been raised below evidence might have been tendered with respect to the question of fact which necessarily had to be decided. In Suttor's Case, in a joint judgment, Latham, C.J., Williams and Fullagar, JJ. page 438, quoted with approval from the speech of Lord Watson in Connecticut Fire Insurance Company v. Kavanagh (1892) A.C. 473:

> "When a question of law is raised for the first time in a Court of last resort, upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding large questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below."

The judgment of the High Court proceeded:

> "The present is not a case in which we are able to say that we have before us all the facts bearing on this belated defence as completely as would have been the case had it been raised in the Court below. The decision whether or not to refuse specific performance in the exercise of the discretion is one peculiarly for the trial Judge and his Honour should have been given an opportunity of exercising his discretion before being told that the appeal had been allowed before a point he had no opportunity of considering."

The Court quoted with approval a passage from the speech of Lord Hobhouse in Grey v. Manitoba and North-Western Railway Co. of Canada (1897) A.C. 254:

> "The question now raised ought to have been raised on the pleadings and evidence so that they might be properly thrashed out in the courts below. As the matter stands they have not been touched by the Courts below ... they (their Lordships) confined themselves to deciding the issues which the Court below were invited by the plaintiffs to decide."

It is, I think, appropriate to refer in the present case to the opinion of Lord Atkin delivered in the House of Lords in Ley v. Hamilton, 153 L.T.R. 384. The Court of Appeal had ordered a new trial in an action of defamation where the plaintiff had obtained a verdict of $5,000 damages, Lord Atkin having said that the decision of the majority of the Court of Appeal could only be supported if the pleading had been amended, said at page 385:

> "It is obvious that if either point had been raised at the trial the examination of the plaintiff and the cross-examination of the defendant and Wakeling might have taken a very different form. Moreover, even if the question had not involved further evidence as to facts, I am of the opinion that an Appellate Court should be very chary where counsel have had ample opportunity of raising alternative pleas at the trial and have not thought to do so. Nothing could be more unfortunate than to encourage the idea that counsel may present one point to the jury and keep an alternative for the Court of Appeal."

An examination of the grounds of appeal now sought to be argued, the amendments to the statements of claim sought and a comparison of these with the issues decided by the trial Judge in his careful and considered judgment, leads me to the

conclusion that not only would different issues be raised but many new facts would have to be decided if those new issues were to be litigated. The defences to be raised to the proposed amendments would, without doubt, involve the presentation of additional evidence.

I would refuse the application to amend the statement of claim and the grounds of appeal. To permit them would require this Court to decide issues that were not raised at the trial. This would be a hearing de novo, which is impermissible. This Court has not before it all the facts so that it could decide the issues raised by the amendments. To allow the amendments now would cause an injustice since the defendant may well have raised defences different from those he raised at the trial and may have conducted his case differently to meet the new case and may have adduced evidence not in the transcript. Finally, the case for the plaintiff was conducted without any application to amend being made up to the time of the decree being pronounced. Having lost on the issues he was prepared to contest for some fifty-six days at the trial. He ought not now be permitted to make a new case.

I come now to a consideration of the case as it was presented and contested at the trial. In so doing I accept the trial Judge's findings as to the credibility to be afforded to the testimony of the parties and of witnesses.

An appropriate starting point is the

conversation between Barton and Armstrong in May, 1966. Barton objected to Armstrong's instructing people to spy on him, to his committing the company in real estate transactions and interfering with the running of the company by its executives. The reference in this conversation to Armstrong's conspiring to mislead justice, contacting people in high positions including Judges, would indicate that Barton had already in his possession, or at least perused, the notes written by Armstrong as to the Eskell divorce and his own divorce, which were used subsequently to destroy Armstrong's credit in cross-examination. But whatever the reason, it is clear that at this interview Barton felt sufficiently sure of himself and of his position to voide his opinion of Armstrong and his activities in unflattering and contemptuous terms. When Barton confronted Armstrong shortly after his return from abroad, about 15th October, and before the directors meeting of 18th October, he made it plain that he had decided (1) to continue with the company, (2) not to work with Armstrong in any circumstances, and (3) that Armstrong should resign and get out of the Landmark Corporation. This is what Barton thought was necessary and his views were shared by Bovill. It was not a question of Armstrong's ceasing to be a director or ceasing to be chairman but that he should get right out of the company. At page 471 of the Appeal Book Bovill was asked these questions and gave these answers:

"Q. A step to get Mr. Armstrong right out if you could? A. Right out of the management of the company, not out of the chairmanship or off the Board, just right out of the company.

Q. You came to the conclusion at some stage, you came to form the opinion at some stage, that U.D.C. were not going to honour their obligation? A. I believed U.D.C. would honour their obligation once Mr. Armstrong was off the Landmark board. I was alone perhaps in that view.

Q. Right off the board? A. Right off the Board and paid out and got rid of."

When Barton made it known to Armstrong that he, Armstrong, should resign from Landmark he had, I believe, decided that he would bring this about. This was not a decision made on the spur of the moment. It was made after discussion with Bovill and with Cotter. The events that followed were logical steps in an attempt to carry this purpose into effect. The powers and privileges of the chairman of directors were curtailed. He was replaced as chairman. He was defeated at the annual general meeting when he sought to have elected to the Board three nominees which would have given him control, and Barton prior to the annual general meeting refused to sell his shares in the company to Armstrong.

It must have been obvious to Barton and to Bovill that if they were to persuade Armstrong to get right out of Landmark three things had to happen, his shareholding had to be acquired, the second mortgage in default since his removal from the position of chairman had to be paid out or re-negotiated, and his forty per cent. interest in Paradise Waters acquired.

The events of the annual general meeting strengthened Barton's position. He had won a public victory, he had obtained the support of a majority of the shareholders which in the light of Armstrong's own large shareholding was a considerable achievement. Barton had a majority on the Board that supported him. The company had, he believed, the money to pay out the mortgage of $400,000 with interest owing to Armstrong's company and he, Bovill and Cotter, were in control for at least another twelve months. When U.D.C. intimated it would not advance the $450,000 or make any further advances to pay the contractors working at Paradise Waters and subsequently prepared to appoint a receiver, the position of the company was acute.

No doubt United Development Corporation were loath to become further involved in a company where the Board were involved in a power struggle and where Armstrong as second mortgagee was in a position to exercise his powers on default. Although the annual general meeting had renewed Barton's control of the Board with Bovill and Cotter, it had not solved anything so far as the dissension in the company was concerned. Mr. Smith's memo of 19th December, 1966 (Exhibit 44, transcript page 2735) and Grant's statement to the directors' meeting of 22nd February indicate that given a Board with proper control and with Smith as chairman, with Armstrong prepared to put further money into the Paradise Waters project, U.D.C. were prepared to

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

consider further finance. At this Board meeting, which is one of considerable significance, the attitude of U.D.C. was made plain. Armstrong agreed to provide $60,000 to meet the immediate crisis. This was dependent upon his gaining executive control of the company until 21st January and on Barton's resigning as chairman and managing director. The motion was rejected. Barton asked Armstrong to resign, because the company's credit position would not improve until this happened. This Armstrong refused to do. In evidence Barton said that he considered the suggestion put forward by Grant to be an absurd proposition. At this time Barton had been negotiating with B.H. Smith, an accountant and Armstrong's financial adviser, on a proposed agreement which involved Barton buying Armstrong's shares, 300,000 at sixty cents, Landmark paying off the mortgage due to Armstrong's company and buying his forty per cent. share of Paradise Waters.

The proposal put forward at the meeting of 22nd December provided a possible solution. Certainly if the motion put by Armstrong had been carried the negotiations with Smith would not have proceeded any further. The events of this Board meeting of 22nd December show that both Barton and Bovill believed genuinely that to give Armstrong control of the company would be contrary to its best interests and to their own interest and it further demonstrated that they believed, or at least Barton believed, that he could find other ways out of the

difficulties. The results of the meeting demonstrate that Barton was determined to thwart any attempt by Armstrong to gain control of the company and that he intended to control the company himself by getting Armstrong out, contrary to the declared will of Armstrong. It is important to realise that Barton was dependent upon Bovill and to some extent Cotter, sharing his views, because without their support he could not commit the company. Both Bovill and Cotter were influenced, I believe, by Barton. The events of 22nd December further support the view that Bovill and Barton both believed that with Armstrong off the Board and out of the company they could obtain the necessary finance to carry on.

Since Armstrong's plan had been rejected, and since U.D.C. had only given a temporary postponement of their decision to appoint a receiver, it became extremely urgent that Barton should obtain finance and if he was going to do this with Armstrong out of the company an agreement with Armstrong had to be concluded. Armstrong had rejected a counter proposal that he should buy out Landmark's interest in Paradise Waters which would have involved taking over the liability to U.D.C. for moneys already advanced and accepting as a liability the amount that Landmark itself had already spent on the project.

Thereafter the negotiations between Smith and Barton were concerned mainly with the amount to be paid and how the matter was to be financed, and

when the payments were to be made. Landmark's problem was to meet Armstrong's terms and at the same time leave the company in a position to carry on and to obtain further finance. The principal matters and the method of finance were agreed to on the 4th January between Smith and Barton. The rest was a matter for the lawyers to work out. Barton may well have had misgivings about the company's capacity to carry out the agreement. It had to find in cash some $140,000. This would involve further mortgaging of unsold units in Paradise Waters. It gave Armstrong the right to buy thirty-five of the lots at half the selling price. Its interest bill had been increased, although the amount of the mortgage had been reduced by $100,000. Their entering into this agreement demonstrates a firmly held belief by Barton and by Bovill that it was not possible to run the company successfully whilst Armstrong was there, and a determination to get him out of the company.

My conclusion is that there were from the commercial point of view practical and logical reasons for Barton and Landmark entering into the deed of 17th January and for Barton agreeing to buy 300,000 of Armstrong's shares at sixty cents. It was an ultimate and necessary step in getting Armstrong out of the company, something which Barton with the co-operation of Bovill and Cotter had been endeavouring to do since at least 15th October and probably since May of 1966. Barton and Bovill and

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

Cotter believed this to be necessary for the company to function successfully and they believed that with Armstrong out of the way they could arrange the necessary finance. Barton, and to a lesser extent Bovill, may well have had misgivings about the extent to which the company had had to mortgage its assets and deprive itself of liquid funds to meet Armstrong's requirements. The price, though high, was acceptable. Over the period from October 15th onwards, Barton was being watched and followed. He was subjected to threats to his life and safety by Armstrong and by others for whom Armstrong was, in my view, responsible. Street, J. has made a number of findings as to these watchings and threats and I accept them. I would find, however, that Armstrong was responsible for the watching and following of Barton by Hume and Novak. I would infer this from the facts and circumstances which are set out in the judgment together with the payments made by the Armstrong companies to Hume, the untruths of Hume and Armstrong in seeking to explain these, and finally because I do not believe that Hume and Novak would do this watching and following unless they were requested to do it and being paid for it. I cannot see anybody other than Armstrong as the person who would want it done, and pay for it being done. Although I concede the advantages that Street, J. had, denied to me in forming any judgment about this matter, in that he had the whole case developed before him, he saw and heard all these people.

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

Nevertheless, this finding, in my view, was not correct. Street, J. found that the threats and intimidation were not intended to coerce the appellant into signing the agreement. I find myself, to an extent, in disagreement with this. In the initial stages of the struggle for control between these two men, I believe the threats and intimidation were intended to persuade Barton to weaken in his opposition to Armstrong, if not to cease it entirely. I also think that to an extent they proceeded from malevolence on Armstrong's part. When Armstrong required Barton and the company to enter into an agreement with him his threats and intimidation were, in my opinion, intended to make Barton agree to his terms. The threat of 12th January was directed to persuade him that he should hasten to conclude the agreement. However, I concede the advantages of the trial Judge in arriving at his conclusion and I am not prepared to say that it is incorrect.

I accept the ultimate finding of the trial Judge that Armstrong did threaten Barton, that the threats were such as might well have intimidated the recipient into signing an agreement such as this and that Barton was throughout the relevant period in real and justifiable fear for the safety of himself and his family. This fear was induced to a significant extent by Armstrong's acts. These are accepted by the appellant and not challenged by the respondent.

The appellant seeks however findings from

this Court as to the threats and the effects thereof on Barton which Street, J. did not accept. He contended that Street, J. was wrong in not finding (1) that Armstrong threatened Barton with physical violence on 7th December; (2) that Armstrong threatened Barton on 14th December that he would have him fixed unless he agreed to buy his shares and Landmark agreed to buy his interests and pay off his mortgage; (3) that Barton decided on 13th January not to go on with the proposed agreement, and (4) that Armstrong threatened Barton on 16th January.

The incident of the 7th December was alleged by Barton to have taken place after a Board meeting. According to Barton the threat was: "You can employ as many bodyguards as you want. I will still fix you." This was said in the presence of a number of people. His Honour in his judgment gave reasons for not accepting Barton on this. Nobody was called, he said, to substantiate the threat, and there were witnesses to it, some of whose sympathies might be thought to lie with Barton. For this reason, which to me is an eminently sound one, his Honour rejected Barton's claim that the threat was made.

The threat of 14th December again depended on Barton's evidence, when he and Armstrong were alone. The threat was: "Unless Landmark buys my interest in Paradise Waters (Sales) Pty. Limited for $100,000 and the company repays $400,000 owing to me and you buy my shares for sixty cents each, I will have you fixed."

The trial Judge considered this evidence and he weighed the probabilities. Barton claimed that he told his solicitor and Bovill and Cotter of the making of this threat. None of them gave evidence of any such conversation with him, and his Honour was not prepared to accept his evidence. This was entirely his province and his decision is not, I think, open to question.

The plaintiff's case was that on 13th January he had decided not to proceed further with the proposed agreement then being discussed between him and Smith. He said on that day Smith said to him that he had instructions from Armstrong that the documents had to be signed and exchanged today and "unless this is done the deal is off". He told Smith: "I am not prepared to sign or exchange the document on behalf of myself, also I am not prepared to recommend that my co-directors of Landmark sign and exchange it". So far as he was concerned the deal was off. That remained his decision until the 16th when he says he was again threatened by Armstrong. On the telephone Armstrong said to him: "Unless you sign this document I will get you killed". As a result of this threat and believing that his life was in danger, he entered into the agreement of the 17th January. These two claims would call for some careful examination of the testimony proferred to support them and in view of the trial Judge's evaluation of Barton his testimony could be regarded with some suspicion. This suspicion I

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

think would be enhanced by the fact that Barton swore that he had no discussions with Smith before January. Although I accept the trial Judge's findings as to this matter I have had difficulty in appreciating how the moving forward of these events from December to January by Barton could have been other than deliberate.

To begin with, the date of the 13th as the day on which Barton decided not to proceed further with the proposed agreement and communicated this fact to Bovill, got off to a bad start insofar as it depended upon Bovill's evidence. The date was suggested to him by counsel. If on a vital matter such as this counsel chooses to suggest a date when, if credibility is to be given to the evidence, it is important that it proceed from the unprompted recollection of the witness, he cannot complain if from the outset the date is suspect. Bovill gave evidence that on the 13th January Barton had a conversation with him in which he expressed the opinion that would indicate he did not intend to go on. Barton said to him: "It is a bad business, it is risky, we should not execute these agreements". Bovill said to Barton: "I thought the price was too high but I believed that the settlement with Armstrong was a pre-requisite to financing the company". Mr. Barton said: "I don't believe the finance will necessarily be forthcoming. I don't think these agreements should be signed". He said he therefore put them out of his mind, and that is the end of the matter.

Street, J. did not accept that this conversation took place on 13th January but probably on a date earlier in the negotiations, before Christmas 1966. His Honour in his findings on credibility accepted Bovill as an honest and reliable witness, but one whose recollection as to dates was faulty. There is some difficulty in placing the conversation with its reference to agreements in December since there were no agreements in existence, draft or otherwise, at that date. The earliest time Barton could have seen draft agreements would have been in the week of 13th January, and we were much pressed with the argument that this placed the conversation in that week. Street, J. despite the reference in the conversation to the agreements, concluded that Bovill had no clear recollection of having seen a form of agreement or a draft on any occasion prior to 18th January, 1967. If this be so there is no effective tie as to time between Bovill seeing the agreements and the conversation. His Honour's final conclusion was that it was more probable than not that the conversation occurred prior to Christmas 1966, but whether this was so or not, he did not accept that it took place at any time after the 4th January. This finding, in the light of all the other evidence on the matter, was plainly open, it contained no inconsistencies, and it must stand.

The alleged threat of the 16th by Armstrong was a central part of the plaintiff's case. It caused him to reverse the decision not to go on

with the agreement, and was decisive of his signing the agreement of the 17th. Barton claimed that immediately after he received this threat, which was over the telephone, from Armstrong, he communicated with Bovill who gave evidence of the change of attitude and of this being due to threats by Armstrong to kill Barton. Barton told him: "This man is threatening me, he has hired criminals to kill me, I have to get him out of my hair and out of the company's hair. I want you urgently to come in, I want to finalise this deal to get Armstrong before he changes his mind. It is most urgent, will you come in quickly?"

Street, J. gave reasons at length for rejecting Barton's claim that such a telephone conversation took place. As I read his judgment he regarded the events of the 13th January and the 16th January as closely integrated, and I am left with the clear impression that he rejected the plaintiff's version of the events on both these days because he regarded them as part of a reconstructed case, and that in doing this he was considering these events in the light of the whole case. His Honour was rejecting the case sought to be made by Barton that after 4th January, he having decided not to enter into any agreement to buy Armstrong out, was, by Armstrong's threats and fears for his life, coerced into making such an agreement. Indeed, his Honour rejected all the evidence as to threats by Armstrong after 4th January other than the threat

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

of 12th January, which he apparently regarded as non-effective, Barton's reaction to it being that he would not let himself be blackmailed into an agreement.

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

The finding by the trial Judge that Barton had reached agreement with Smith on 4th January, a matter so his Honour said, of major importance in the suit, was attacked, but not in my opinion on any sound basis. It was sought to say that no agreement had been reached because in draft deeds later prepared matters were introduced not the subject of Mr. Smith's memorandum of the 4th January. However, when this memorandum is compared with the actual agreement of the 17th, as is done in the judgment, it sufficiently appears in my view that the basic matters dealt with by these documents are the same.

His Honour's finding that Armstrong was a reluctant vendor was attacked. This was said to be inconsistent with the requirement that Barton indicate his agreement to the initial proposal within 48 hours and also with the evidence that Smith on Armstrong's behalf was anxious to bring the matter to some degree of finality. I am of the opinion that Armstrong did not want to be a vendor until

there was little chance of him being anything else. Prior to 14th December he had no doubt been advised by Smith that if finance for the continued development of Paradise Waters was not forthcoming, the company could fail, and it was with this in mind that he instructed Smith to negotiate with Barton but he was not committed as the proceedings at the meeting of the 22nd December show. He would have preferred, I have no doubt, to have bought Barton's shares than to sell his own, but the events of the directors' meeting of the 22nd December made it quite clear that Barton, Bovill and Cotter would not agree to his resuming any sort of control of the company and endeavouring to arrange further finance. He was then in a position of having to be a vendor and I have little doubt that he sought to get as much in cash or kind in reduction of his debt as he could since he, after the 22nd, thought the company would fail, if he did not think so before.

The specific matters attacked in the tenth ground of appeal are: (1) That his Honour should have held that Armstrong was implicated in the plot to kill or injure the plaintiff, Barton; (2) that the written statement of Hume taken by Sergeant Wild and Constable Follington did exist; (3) that the plaintiff was intimidated by Armstrong's threat into signing the agreement. His Honour refused to make any of these findings and therein it was alleged he was in error, he should have found that Armstrong was party to the Vojinovic incident. This

finding that there was not sufficient evidence to involve Armstrong is, in my opinion, clearly right. There is not any direct evidence that Armstrong had anything to do with the Vojinovic incident, or the plot alleged by Vojinovic to have existed. The matter was of considerable importance to the plaintiff's case since on the Judge's finding whatever fear or terror was inspired in Barton's mind by the Vojinovic incident and by what he was told by Vojinovic could not, since it is intimidation by a third party, be made part of his case against Armstrong (see Talbot v. Von Boris & Anor. (1911) 1 K.B. 854; Chitty on Contract, 23rd edition page 171).

At the trial it was attempted to link Armstrong to the Vojinovic incident through Hume by establishing a telephone call from Vojinovic to Hume on the evening of Saturday, January 7th when the meeting between Barton and Vojinovic took place. However, on the evidence no such telephone call took place. It again was attempted to establish a connection by Barton's evidence of what he claimed was set out in a record of interview between the police and Hume, shown to him by Constable Follington, on the 11th January. This, if accepted, would not of itself have been any evidence implicating Armstrong in the Vojinovic incident, but coupled with other evidence as to Armstrong's relationship with Hume, it may have afforded a link.

Before Street, J. and before this Court it was sought to argue that from all the facts

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

established in the case there should be inferred a conspiracy on the part of Armstrong, Hume, Novak, Vojinovic, Wild and Follington to murder Barton. From the judgment it appears that his Honour was invited to find such a conspiracy, but declined to make any finding. He regarded the matter as two stages removed from any issue he had to decide. If I were to form my own opinion on the matter I would not be persuaded there was any such conspiracy; indeed, I would hold to the contrary. So far as Vojinovic's disclosures to Barton were concerned they are well open to the view that Vojinovic was aware of Novak's watchings and of the disputes between Barton and Armstrong and even of some of the threats, and he decided that this was an opportunity to get money out of Barton for himself. However, it is sufficient to say that the trial Judge's finding on these matters, based as it was on his acceptance or rejection of oral testimony and his view of the credibility of witnesses should be accepted.

As part of this incident, there is the alleged record of interview or written statement of Hume, which according to Barton was taken by Wild and Follington and which he saw at the Criminal Investigation Branch on 11th January. This is the matter that was the subject of a great deal of evidence in the Court below, and there was put in evidence a document (Exhibit 29) which Barton claimed to have dictated to his son some time after the suit commenced, in the form of question and answer, being

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

his recollection of the record of interview of Hume which Follington had shown him at the C.I.B. more than twelve months previously. Street, J. made an evaluation of the witnesses and of their testimony and he considered the conflict between Barton on the one hand and Wild and Follington on the other. No doubt he was well aware of the discrepancies and contradictions in the police testimony on this and other matters. He was critical of the police officers for not making a proper investigation. He was not unmindful of the fact that Barton's son, who was present and saw the document with his father when Follington produced it, was not called. As a result he was not prepared to make a finding in Barton's favour on this issue. The only materiality of the document, if it existed, was that it contained statements by Hume to the effect that he and others had been engaged to harass and frighten Barton and Barton claimed that this had a considerable effect on his mind and confirmed his fears that a plot existed to murder him. The other matters inquired into in this aspect of the trial related to the credit of the witnesses.

I would agree with the findings of Street, J. adding for myself only this, I am quite unable to accept that Barton could perform the feat of memory required to reproduce accurately in question and answer form the contents of a document which he saw on one occasion only, some fifteen months before. It was urged that the document dictated by

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

Barton to his son of itself contained internal evidence that Barton had seen such a record of interview from Hume. This document which came into existence after this litigation commenced I do not regard as reliable for the purpose of determining this issue.

The significant point in this appeal arises from two findings in the judgment of Street, J. These are that at the time the negotiations were proceeding, at the time he signed the document, Barton was justifiably in fear of his life, fearful for the safety of his family, and believed that Armstrong was engaged in a plot to have him killed, and a finding which is really the central point of the appeal that these threats and the fears engendered by them were not the reason for his entering into the agreement but that he did so because he regarded this agreement as a sheer commercial necessity to get Armstrong out of the company.

It was submitted for the appellant that these findings could not stand together, and since the finding that at the time he signed the agreement Barton was in terror for his safety and that of his family as a result of Armstrong's threats and what he believed to be his hiring of criminals to murder him was not questioned he could not have executed the agreement with a free mind. It was, so the argument proceeded, unreal and contrary to human experience that a person in Barton's position was not, in entering into this agreement affected

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

by fear and by a desire to be safe from threats. In this case these threats took place in a commercial conflict. There was no other relationship or situation between these parties that could provide the occasion for Armstrong threatening Barton. There is much force in this. If "A" who was seeking an agreement with "B" by threats induced in the mind of "B" a belief that he is in danger of being murdered unless he agrees and "B" does agree it is difficult to see how it can be said that these threats play no part in "B" entering into the agreement. What other object could "A" have in making the threats? It is a natural reaction if one's life is threatened to seek to remove the cause of the threat, and if this be a failure to agree with another, then to agree. But this is to take a case uncomplicated by other factors which may have induced "B" to enter into the agreement, and it is not this case. If there are good reasons for "B" entering into the agreement apart altogether from the threats then different considerations arise and the appropriate inquiry is, I think, "Would 'B' have consented to the agreement had it not been for the threats to his life?" This is a case of common law duress, rendering the agreement voidable. According to the common law the agreement might be avoided if the consent of the party seeking to avoid it was obtained by coercion. The onus of establishing that the consent was thus obtained lay on the party who sought to avoid the agreement.

> "Whatever definition is adopted it is clear that in order that a transaction may be avoided on the count of duress or undue influence, it must appear that the consent of the party seeking to avoid the transaction was coerced. That is, that he was actually induced by the duress or undue influence to give his consent and would not have done so otherwise."
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> (Williston on Contracts, Chap. XLVII Para. 1604).

In a later passage in Williston this appears:

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

In Halsbury, Vol. 8, para. 146 dealing with duress and undue influence it is said:

> "By duress it meant the compulsion under which a person acts through fear of personal suffering as through injury to the body or through confinement actual or threatened. A threat of a criminal prosecution for which there is sufficient ground is not such duress as will vitiate a contract made in consequence thereof provided that there is adequate valuable consideration for the contract and that there is no agreement to stifle the prosecution.
>
> A contract obtained by means of duress exercised by one party over the other is voidable and not void if voluntarily acted upon by the party entitled to avoid it will become binding on him. The duress must be actually existing at the time of the making of the contract and the personal suffering may be that of the husband or wife or near relative of the contracting party but that of a stranger or a master is not sufficient."

Most authorities dealing with duress are ancient. The cases in modern times that deal with duress in relation to marriage seem to stand in a special category. There is I think some assistance to be obtained from the decision of the High Court in Johnson v. Buttress, 56 C.L.R. 113; at page 134 Dixon, J. (as he then was) said this:

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

> "The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise to affect the alienors will or freedom of judgment in reference to such matter. The source of power to practise such a domination may be found in no antecedent relation but in a particular situation or in the deliberate contrivance of the party. If this be so facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act. But the party may antecedently stand in a relation that gives one an authority or influence proper that he should be protected. When they stand in such a relation the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him by the other as a gift unless he satisfies the Court that he took no advantage of the donor but that the gift was the independent and well understood act of a man in a position to exercise a free judgment based on information as full as that of the donee."

There is an analogy between a case of undue influence not arising out of an antecedent relationship but out of a particular situation and a case of duress that extends beyond the question of onus. In either case it has to be shown that the influence exercised as a result of the particular situation or arising from the threat, brought about the transaction that is sought to be set aside.

A person who enters into an agreement or gives a bond or makes a payment under the threat of duress knows what he is doing and agrees to do it. It is his agreement that is forced and it is in this sense that he is coerced. If he wishes to avoid the agreement on this ground then on principles and on authority it would seem just that he should show that he would not have entered into the

agreement but for the coercion. It would follow that if there are reasons for his having entered into the agreement apart from the coercion the deed would not be set aside unless it be established that but for the coercion he would not have entered into it. It is not sufficient in my opinion for a plaintiff to show that he was under pressure or that his mind was troubled or that he was in fear as a result of threats; he must show that it was the pressure or threats that caused him to enter into the agreement that he seeks to set aside.

In the passage quoted from the Encyclopaedia of the Laws of England relied on by Street, J. there appears the phrase "where any contract ... has been entered into under the influence of coercion duress menaces or intimidation it may be repudiated and avoided". The expression "under the influence of" are words of wide import and would seem to cover both the "but for" test set out in the passage from Williston first quoted and the test whether he had freedom of choice. They do not in my opinion mean that a contract can be set aside merely because a person was subject to duress by "A" and whilst so subjected entered into a contract with him. The question is was his consent the result of a free choice, if it was the contract stands, or did it proceed from the threats offered, in which case the contract may be avoided.

Street, J. examined the various matters that could have been the material inducement. Barton's

fear for his safety and for that of his family if he did not agree, his commercial judgment as the inducing factor in the light of the past history of the struggle between these men, his beliefs in the future of the company without Armstrong, his mental state following the threats, the followings, the surveillance and the Vojinovic incident, all these and Armstrong's behaviour towards him the character and commercial acumen of Barton and his determination to get rid of Armstrong he took into account and made the following findings.

Barton was sincere in his belief and his claim that he was coerced by Armstrong into purchasing the shares but he was not on the evidence in truth coerced (page 3117).

The real and quite possibly the sole motivating factor underlying the agreement recorded in the deed of the 17th January so far as both Barton and Bovill were concerned was the sheer commercial necessity of getting rid of Armstrong (page 3172).

He was not satisfied that Barton's personal fears for his own safety played any significant part in his entering into the agreement with Armstrong. Barton would have entered into it on the same terms had there been a complete absence of any threats or intimidation. Barton wanted to get rid of Armstrong in the interests of Landmark and indirectly in his own interests as a substantial shareholder and managing director of Landmark (page 3172).

He was not satisfied that Barton yielded his independent business judgment by reason of his fear of Armstrong. Barton did not relate Armstrong's threats to a desire by Armstrong to force through the agreement. The agreement was not forced through so far as Barton was concerned by reason of his fear of Armstrong's power to harm him. The agreement went through for the primary and predominant reason that Barton with Bovill was firmly convinced that it was indispensable for the future of Landmark to enter into some such arrangement as this with Armstrong. They believed they had to get rid of Armstrong if Landmark was to survive (page 2183).

In truth Barton was not coerced into this agreement by reason of any threat of physical violence (page 3186).

He was not satisfied that what Barton said to Bovill on the morning of Monday, 16th January indicated a mental state of having been intimidated or coerced through fear of his personal safety into yielding to Armstrong's demands (page 3186).

Barton's willingness to enter into the settlement with Armstrong continued uninterrupted from and after the 4th January (page 3193).

It does not indicate a situation in which Armstrong was driving Barton by threats of personal violence into making an agreement contrary to Barton's free will (page 3198).

He found as a fact that Barton was not coerced by fear for his personal safety into the making

of the agreement; it was commercial exigency and not personal fear that led him to make it (page 3218).

Barton's belief that it was his fears that drove him into the agreement is a reconstruction. Barton was not in fact coerced into making the agreement (page 3219).

These are positive findings that Barton had strong and compelling motives to enter into this agreement apart altogether from any question of coercion. They are also positive findings that he was not coerced. These findings were challenged on two main grounds. What was called the commercial aspect of the case, having regard to the financial situation of the company there was every reason for Barton refusing to enter into the agreement of the 17th January. The company was doomed to failure when U.D.C. withdrew its support of 10th December. Once U.D.C. had withdrawn no other institution would consider financing the project. The company must fail, its shares were worthless, both Barton and Armstrong knew this. There was no reason for Barton, a man of sound commercial judgment, entering into the agreement of 17th January, which he knew was a financial disaster, for himself and the company, other than that he was in fear of his life and fear of the safety of his family. Added to this was the conspiracy that existed between Armstrong, Hume, Vojinovic, Novak, Sergeant Wild and Constable Follington, the object of which was

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

to have Barton murdered if he did not sign the agreement.

Apart from the initial difficulty that the evidence does not support such a case, it is contrary to the facts accepted and findings made by Street, J. Indeed, once he accepted that Barton agreed on 4th January with Smith on the terms for Armstrong severing his connections with the company and that Barton did this because he believed this was a commercial necessity if the company was to continue and once the case that on the 13th January, Barton had determined not to go on with the agreement until he was overborn by the threats of Armstrong to kill him was rejected, then the conclusion that Barton entered into this agreement because he wanted to and from commercial motives only is, I think, undoubtedly correct.

What Street, J. was inquiring into was the state of Barton's mind in relation to the making of this agreement. This is the important inquiry. It is of less significance what Armstrong's purpose was in making these threats.

It has been said of this case that it is an unusual one, and it would not be surprising to find in it unusual people. Street, J. in forming his assessment of these men and judging their motives had the advantage of a trial in which every facet of their characters, their dispositions, their intelligence, their standards of behaviour, their reaction to situations, their background, was gone into.

He saw them both in the witness box for long periods and in the end, after reflection and taking into consideration all aspects of the case, made his evaluation. It is an unusual one. In some respects it provides no convincing reason for Armstrong's continued threats, and it may be there was none. I do not believe that from a transcript, without any of the advantages that Street, J. had, that this is a finding from which I would differ. Ultimately, it is a question of fact and the finding was well open. There cannot be made cases where the personality of the parties and the witnesses and the Judge's assessment of them as individuals are as important as they were in this case.

Putting aside the judgment for the moment and trying the case on the transcript and the other material submitted to us I would come to the same ultimate conclusion as Street, J. did, and my reasons for so doing are largely the reasons that are set out in his Honour's judgment, pages 3200 to 3207. I regard as a compelling fact Barton's failure to make this claim for a year and that he asserted it only after it was apparent that the agreement was a disaster and that the time had come when he had to meet his obligations under it. If in fact he had been coerced into entering into this agreement and this was operating on his mind during the time that he was negotiating I would have expected in the first place that he would raise the matter with Smith, an accountant and a company

director of standing in the community, whom obviously Barton respected and whom he wanted as chairman of the Board, and whose association with Armstrong was that of a professional adviser. And again, why was no solicitor called before Street, J. to say that he had been told by Barton of these matters, and to explain why no action was taken? The only explanation is that Barton had not told them of the threats and it was because of these threats he was being forced into signing the agreement. I am unable to accept that if he had believed that he was being threatened and intimidated for the purpose of compelling him to enter into this agreement that was against his interests, against the company's interests, to the extent alleged here that it was a disaster, Barton would not have disclosed this to solicitors, either his own or the company's. Finally, if Barton had believed he was being coerced, why is it that he did not go to the police earlier? For this no acceptable explanation has ever been offered.

The judgment of Street, J. convinces me that this decision is the right one. It is a judgment of high quality. It, as was said by counsel for the appellant, took chaos and confusion and reduced them to order. And for myself I would only add this, it expressed the result with considerable elegance.

I am of the opinion that the appeal should be dismissed with costs.

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

I certify that this and the preceding forty-seven pages are a true copy of the reasons for Judgment herein of the Honourable Mr. Justice Taylor.

29.6.71.
Date.

Sally Scott
Associate.

Reasons for Judgment
of his Honour Mr.
Justice Taylor, A-J.A.

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES) No. 22 of 1969
)
COURT OF APPEAL)

BETWEEN: ALEXANDER BARTON

Plaintiff (Appellant)

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

Defendants (Respondents)

THE 13th day of December, 1971

UPON MOTION made this day pursuant to the Notice of Motion filed herein on the 2nd December, 1970 WHEREUPON AND UPON READING the said Notice of Motion the affidavit of PETER FREDERICK WILLIAM JAY sworn on the 26th November, 1971 and the Prothonotary's Certificate of Compliance, AND UPON HEARING what is alleged by Mr. L.C. Gruzman of Queen's Counsel with whom appeared Mr. R.N.J. Purvis of Counsel on behalf of the Appellant and Mr. P.E. Powell of Queen's Counsel with whom appeared Mr. J. Goldstein of Counsel on behalf of the first to sixthnamed

Rule of the Court of Appeal granting final leave to appeal to Her Majesty in Council

Rule of the Court of Appeal granting final leave to appeal to Her Majesty in Council

Respondents IT IS ORDERED that final leave to appeal to Her Majesty in Council from the judgment of this Court given and made herein on the 30th day of June, 1971 be and the same is hereby granted to the Appellant AND IT IS FURTHER ORDERED that upon payment by the Appellant of the costs of preparation of the Transcript Record and despatch thereof to England the sum of Fifty dollars ($50.00) deposited in Court by the Appellant as security for and towards the costs thereof be paid out of Court to the Appellant. 10

By the Court,

For the Registrar,

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Chief Clerk

Rule of the Court of Appeal granting final leave to appeal to Her Majesty in Council